

RULES AND REGULATIONS

Title 4—ADMINISTRATION

STATE CIVIL SERVICE COMMISSION

[4 PA. CODE CH. 95]

Promotion Procedure

The State Civil Service Commission (Commission) adopts an amendment to Chapter 95 (relating to selection of employees for entrance to, or promotion in, the classified service). The Commission is publishing this amendment as a notice of final-form rulemaking under the authority of section 208 of the Civil Service Act (act) (71 P. S. § 741.208).

Regulatory Review

The notice of proposed rulemaking was published at 31 Pa.B. 6454 (November 24, 2001). Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), the Commission submitted a copy of the notice of proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Labor Relations Committee and the Senate State Government Committee for review and comment.

In compliance with section 5(c) of the Regulatory Review Act, the Commission also provided IRRC and the committees with copies of the comments received as well as other documentation.

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on February 26, 2002, this final-form rulemaking was deemed approved by the House Labor Relations Committee and the Senate State Government Committee. The amendment was deemed approved by IRRC effective February 26, 2002, under section 5(g) of the Regulatory Review Act. The Office of Attorney General approved this final-form rulemaking for form and legality on March 5, 2002.

A. *Comments*

In preparing this final-form rulemaking, the Commission has considered the comments received from the public. The Commission held four public hearings to which the public was invited to comment on this proposed amendment. These hearings were held: in Harrisburg on December 12, 2001, and January 15, 2002; in Pittsburgh on November 29, 2001; and in Philadelphia on December 3, 2001. The comments received at these hearings either sought clarification of the purpose of the amendment or were favorable. The Commission received nine letters commenting on the proposed amendment. These comments were favorable. The Commission's only response to these written comments was to acknowledge receipt and thank the sender. No comment was received from either the House Labor Relations Committee or the Senate State Government Committee to the proposed amendment. The response of IRRC was that they have "no objections, comments or suggestions to offer on this regulation."

Changes have not been made to the published proposed rulemaking for this amendment.

B. *Statutory Authority*

The statutory authority for this final-form rulemaking is provided by section 203(1) of the act (71 P. S. § 741.203(1)).

C. *Purpose and Background*

A change in the procedures for promotions was requested by Commonwealth agencies of the Commission. Currently, the Commonwealth's personnel system has civil service and noncivil service employees. Many are initially hired into noncivil service positions. These employees often work for the Commonwealth for years and sometimes are promoted from one noncivil service position to another. In many instances, however, they reach a point when their logical and natural career progression would call for a promotion to a particular position but that position is one that is covered by the act. Currently, the Commission's regulations require that noncivil service employees compete with and be treated in the same fashion as non-Commonwealth employees being newly hired into the civil service system. The result is that some career Commonwealth employees who started their employment as noncivil service reach a career ceiling prematurely. If not for the barrier presented by the Commission's current regulations, their skills, knowledge and abilities would allow for further promotion.

This final-form rulemaking gives the employing agency of State government an option to consider both civil service and noncivil service employees for promotion on an equal basis. This would amend the current section that precludes an agency from considering noncivil service Commonwealth employees for promotion into civil service positions. To be promoted, noncivil service employees would be required to take and pass an examination for the title and compete against other similarly situated Commonwealth employees both civil service and noncivil service. This amendment will enhance the employment opportunities for all Commonwealth employees.

D. *Summary of Final-Form Rulemaking*

The final-form rulemaking is designed to permit additional promotion methods by which noncivil service Commonwealth employees may compete with civil service Commonwealth employees for civil service covered positions. Noncivil service Commonwealth employees would be required to take and pass civil service examinations, and be appointable in accordance with the "rule of three" described by the act.

E. *Effective Date*

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

F. *Paperwork and Cost Requirements*

This final-form regulation will not add to existing paperwork requirements. No measurable savings or costs will occur as a result of this final-form rulemaking.

G. *Fiscal Impact*

This final-form rulemaking will have no adverse fiscal impact on the Commonwealth or its appointing authorities.

H. *Contact Person*

For further information on this amendment, contact Randall C. Breon, Deputy for Operations, State Civil Service Commission, (717) 787-5343 or (717) 772-2685 (TT), P. O. Box 569, 320 Market Street, 4th Floor, Strawberry Square Complex, Harrisburg, PA 17108-0569; rbreon@state.pa.us.

The text of this amendment is available electronically through the Commission's website (<http://www.scsc.state.pa.us>).

Findings

The Commission finds that:

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

(2) The adoption of the amendment of the Commission in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statute.

Order

(a) The regulations of the Commission, 4 Pa. Code Chapter 95, are amended by amending § 95.7 to read as set forth at 31 Pa.B. 6454.

(b) The Executive Director of the Commission shall submit this order and 31 Pa.B. 6454 and deposit them with the Legislative Reference Bureau as require by law.

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

RONALD K. ROWE,
Executive Director

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 1590 (March 23, 2002).)

Fiscal Note: Fiscal Note 61-104 remains valid for the final adoption of the subject regulation.

[Pa.B. Doc. No. 02-493. Filed for public inspection March 29, 2002, 9:00 a.m.]

Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS

STATE REAL ESTATE COMMISSION

[49 PA. CODE CH. 35]

Agency

The State Real Estate Commission (Commission) hereby amends Chapter 35 to read as set forth in Annex A. These regulations incorporate the changes necessitated by the act of November 24, 1998 (P. L. 908, No. 112) and the act of June 22, 2000 (P. L. 371, No. 47) (Act 47).

Statutory Authority

The final-form amendments are authorized under sections 404, 606—606.6 and 608—608.3 of the Real Estate Licensing and Registration Act (RELRA) (63 P. S. §§ 455.404, 455.606—455.606f and 455.608—455.608c).

Response to Public Comments and Regulatory Review

Notice of the proposed rulemaking was published at 30 Pa.B. 641 (February 5, 2000). Publication was followed by a 30-day public comment period during which the Commission received comments from three public commentators, including the Pennsylvania Association of Realtors (PAR). Following the close of the public comment period, the Commission received comments from the House Professional Licensure Committee (HPLC) and the Independent Regulatory Review Commission (IRRC). The Senate

Consumer Protection and Professional Licensure Committee (SCP/PLC) did not comment.

The final-form rulemaking contains changes to the proposed rulemaking.¹ Part A will address the comments to the proposed rulemaking. Part B will address amendments to the proposed rulemaking necessitated by Act 47.

*A. Response to comments to proposed rulemaking.**Section 35.201. Definitions.*

The HPLC and IRRC questioned why the definitions of "agency relationship," "buyer agent," "designated agent," "dual agent," "listing broker," "principal," "salesperson," "seller agent" and "transaction licensee" differ from the definitions in section 201 of the RELRA (63 P. S. § 455.201). In formulating this rulemaking, the Commission shortens the definitions of the RELRA without changing their meaning.

An "agency relationship," as defined under section 201 of the RELRA requires brokers and licensees in their employ to "act as fiduciaries for a consumer of real estate services by the express authority of the consumer of real estate services." Thus, for the licensee to have a fiduciary relationship with a consumer, the consumer shall enter into a written agreement thereby becoming a principal under the definition.

The definition for "buyer agent" in the regulation includes "tenant," "seller agent" includes "landlord" and "dual agent" includes "landlord and tenant." Although "landlord" and "landlord and tenant" are not used in sections 201, 606.2, 606.3 or 606.4 of the RELRA, these definitions incorporate the language in section 606 of the RELRA which characterizes the "buyer agent" relationship as "buyer/tenant" and the "seller agent" relationship as "seller/landlord." To provide meaning to each section of the RELRA and read the provisions in *pari materia*, the definitions in the regulation includes "landlords" and "tenants" along with "sellers" and "buyers." Similarly, although sections 201 and 606 of the RELRA do not use the terms "buyer's agent" and "seller's agent," these terms are used in sections 606.2 and 606.3 of the RELRA.

As proposed, the definition of "designated agent" referred to the "licensees employed by the broker of record." The Commission concurs with IRRC and a public commentator that the proposed definition should be modified. Accordingly, the Commission has replaced "broker of record" with "broker" and "employed by the broker" with "within the broker's employ" throughout the final-form rulemaking.

IRRC suggested that the definition of "principal" be amended since the RELRA defines it as "a consumer who enters into an agency relationship with a broker." The definition of "agency relationship" in the RELRA includes both brokers and licensees. Reading these definitions in *pari materia*, the Commission has defined "principal" to include agency relationships with brokers and licensees in the brokers' employ.

IRRC opined that subparagraph (vii) in the definition of "salesperson" is inconsistent with section 201 of the RELRA because it does not include the phrase "managing of property." The proposed amendments to this subparagraph were included in the Commission's general revisions final-form rulemaking at 30 Pa.B. 5954 (November 18, 2000) and are therefore not reflected in Annex A. The Commission has retained the phrase "managing of property" since the definition of "salesperson" in section 201 of

¹ A cross-reference of the statutory provisions, subject matter and amendments are charted in the preamble to the proposed rulemaking at 30 Pa.B. 641.

the RELRA contains authorization for a salesperson to negotiate, lease, rent and collect rent, all of which relate to property management.

The proposed definition of "subagent" stated that the subagent acts or cooperates in selling the property as the seller's/landlord's agent. Upon further review, the Commission agrees with IRRC that the definition should be amended to specify that in addition to acting or cooperating as a seller's agent, by law, the subagent is deemed to have an agency relationship with the seller. Therefore, the definition was amended accordingly.

IRRC recommended that "licensee" be changed to "broker" in the definitions of "buyer agent," "seller agent," "dual agent," "subagent" and "transaction licensee." While the Commission understands that a salesperson may work only through a broker, salespersons have repeatedly informed the Commission that they do not understand when they are obligated under the RELRA and regulations when the reference is made solely to a broker. Therefore, the Commission has not replaced "licensee" with "broker" when the provision applies to both brokers and salespersons as in § 35.281 (relating to putting contracts, commitments and agreements in writing).

The definition of "transaction licensee" in the proposed rulemaking includes the clause "without entering into an agency relationship with the consumer" rather than "without being an agent or advocate of the consumer" as described in the RELRA. The Commission believes that these definitions are synonymous. To have an agency relationship with a consumer, applying the definition of "agency relationship," the broker shall be an agent or advocate for that consumer.

On final-form rulemaking, the Commission has also added the definition of "comparative market analysis" from section 201 of the RELRA since it is used in § 35.340 (relating to comparative market analysis).

Section 35.281. Putting contracts, commitments and agreements in writing.

IRRC suggested that the Commission should define "valuable consideration" and "open listing agreement." The term "valuable consideration" is commonly used in regulations in this Commonwealth. Black's Law Dictionary defines the term as "consideration that is valid under law; consideration that either confers a pecuniary measurable benefit on one party or imposes a pecuniary measurable detriment on the other." The term is commonly employed and used in real estate transactions. Therefore, the Commission has not included a definition in this section. Conversely, "open listing agreement" is a term of art in the real estate industry. The definition taught to real estate students in the Fundamentals of Practice course has been added to § 35.201.

IRRC also suggested that subsection (b)(3) should be amended to cross-reference the materials required in § 35.331 (relating to written agreements generally). Subsection (b)(3) conforms to section 606.1(b)(4) of the RELRA, which requires that the written disclosure statement contain a description of the services to be performed by the subagent or transaction licensee and the information required by section 608 of the RELRA. Since section 608.1 of the RELRA, and not section 608 of the RELRA, conforms to § 35.331, the Commission has not cross-referenced these sections, but has added a cross-reference to section 608 of the RELRA.

Section 35.283. Disclosure of interest.

In the proposed rulemaking, this section was titled "conflict of interest." One commentator recommended that

since this provision includes more than just conflicts, it should be renamed "disclosure of interest." The Commission agrees with this suggestion and has renamed the provision accordingly.

Proposed subsections (d) and (e) required licensees to provide a written disclosure of financial interests to consumers for deed or document preparation services. PAR suggested that this requirement was too broad. Owing to this concern, the Commission amended subsection (d) to better conform with section 606.1(a)(13) of the RELRA.

The Commission has also corrected the typographical error in subsection (d) by changing the term "service" to "services," as recommended by PAR.

Section 35.284. Disclosures of business relationships.

PAR sought clarification of the requirement in current subsection (a) that the Consumer Notice be provided to "all" consumers. It questioned whether the Consumer Notice must be provided to consumers of commercial property, both spouses and numerous representatives of a corporation. With regard to commercial transactions, section 608 of the RELRA, like all other provisions in the RELRA, does not differentiate between commercial and residential transactions. The Consumer Notice requirement applies equally to both. To insure that licensees are aware of its applicability, the Commission has expressly included residential and commercial property in the titles of §§ 35.336 and 35.337 (relating to disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate where the licensee is working on behalf of the tenant; and disclosure summary for the lease of residential or commercial real estate when the licensee is working on behalf of the owner).

With regard to groups of individuals, the Commission notes that the purpose of the Consumer Notice is to inform parties seeking to purchase, lease or sell property of the various business relationships they may have with a licensee. While the Commission believes that it is advisable for each spouse to understand the Consumer Notice, it does not believe that it is practicable to require both spouses to participate in the initial interview or sign the Consumer Notice. Similarly, the Commission believes that it is not practicable to require each member of the Board of Directors of a corporation to attend the initial interview and sign the Consumer Notice. Rather, the Commission believes that it is sufficient for one spouse or one representative of a company to sign the Consumer Notice.

PAR also questioned whether a designated buyer's agent who takes a buyer to a property to meet the seller must provide a Consumer Notice to the seller. The Commission does not believe that this is required under the regulation since the seller, by listing the property, has received the Consumer Notice and entered into a business relationship with a licensee. However, in light of PAR's questions, the Commission has deleted "all" from subsection (a).

Additionally, the HPLC pointed out that in proposed form, subsection (a) contained a typographical error and incorrectly cross-referenced the Disclosure Summary to § 33.336. The reference has been corrected to § 35.336.

Section 35.287. Supervised property management assistance by salespersons.

Current § 35.287² permits a salesperson to assist in real estate management provided that the salesperson's work is directly supervised and controlled by the employing broker. PAR recommended that the terms "employing broker" be replaced with "controlled by the broker or associate broker charged with the responsibility of directing and supervising the office," to better reflect the realities of a real estate office. The Commission agrees with PAR that an associate broker may be responsible for a particular office, however, the broker retains the ultimate responsibility under the RELRA for supervising the licensees in the broker's employ. The Commission has removed the term "directly" from the provision.

Section 35.292. Duties of licensees generally.

The HPLC questioned why "in a timely manner" was used in § 35.292(a)(7), but "in a reasonably practicable period of time" was used in § 35.283. IRRC recommended that the Commission provide a "definitive standard" for what would be considered timely. To satisfy both concerns, the Commission has used the phrase "in a reasonably practicable period of time," which is commonly used throughout the regulations, including §§ 35.283, 35.292(a)(7) and 35.336.

Another commentator suggested that § 35.292(a) should be amended to advise licensees how to satisfy the duties of licensees generally when the consumer or principal hires an attorney or another licensee to perform some of the duties in a transaction. The commentator provides the example of an attorney who is hired by the consumer or principal to prepare the documents and represent the consumer or principal at settlement. The RELRA does not impose any responsibility on a licensee for the actions of an attorney hired by the consumer or principal to perform document or deed preparation services. Subsection (a)(11) merely requires the licensee to provide assistance with document preparation when requested.

Section 35.311. Generally.

IRRC recommended that the Commission amend subsection (d) to state that a licensee may not reveal or use confidential information during or following "the termination of the agency relationship." The Commission finds this recommendation reasonable and has amended the provision accordingly.

Section 35.312. Duties of seller's agent.

Section 35.313. Duties of buyer's agent.

IRRC recommended that the title for the various agency relationships track the statutory language. To be consistent with the statutory definitions, the Commission has changed the titles of §§ 35.312—35.316.

Additionally, PAR recommended that §§ 35.312(e) and 35.313(d) be amended to replace "become" with "will act as." The Commission finds this suggestion reasonable and has replaced "become" in both subsections.

Section 35.314. Duties of dual agent.

Proposed subsection (b)(2) required that of the duties owed by a dual agent, the licensee make a continuous and good faith effort to find a buyer/tenant for the property and a property for the buyer/tenant unless otherwise agreed. IRRC recommended that the Commission incorporate the exception in section 606.4(b)(2) of the RELRA

that a dual agent is not obligated to seek additional offers to purchase the property while it is subject to an existing contract of sale. The Commission has amended the regulation accordingly.

Section 35.315. Duties of designated agent.

Subsection (b) embodies the Commission's understanding that section 606 of the RELRA would permit designation to take place at any time in the transaction—at the time of initial designation or after the parties have entered into a written agreement. In the proposed rulemaking, subsection (b)(1) stated the Commission's preference that designation would take place at the time the parties enter into a written agreement, as well as the Commission's acknowledgement that designation may take place after the agreement is executed. IRRC expressed concern that the proposed regulation used the "nonregulatory" term "should." It recommended that the Commission replace "should" with "shall" or delete the paragraph. Owing to IRRC's concern, the Commission replaced the term "should" with "may." Because the statute allows designation at any time, the Commission believes that, despite its preference for up-front designation, it cannot use the term "shall" or delete the provision as recommended.

Subsection (b)(1) specifies that if the designation takes place after the initial designation or after a written agreement has been entered into, the principal must consent in writing to the newly designated licensee. The HPLC, IRRC and a public commentator suggested that the Commission amend the paragraph to require specific consent to the broker's designation of the agent, the identity of the agent and the date on which the designation occurs.

The Commission believes that further modification is not necessary. When designation takes place at the time the parties enter into the original contract, the designated licensee is named. The designation date is the date of the contract signed by the licensee and the consumer/principal. When designation occurs after the contract has been executed, subsection (b)(1) requires that consent be given to the newly designated licensee. The principal is informed of, and must give written consent to, the designation and the licensees being designated.

In the proposed rulemaking, subsection (b)(2) required the principal to renounce any previous agency relationship with the other licensees employed by the broker "to the exclusion of the other designated agents." The Commission agrees with the HPLC and IRRC that this last clause is unnecessary because the renunciation would cover all licensees. Accordingly, it has been removed in final-form rulemaking.

Subsection (d) provides that all licensees employed by the broker who have not been designated have no agency relationship with either party in the transaction. Both the HPLC and IRRC questioned whether the proposed subsection conflicts with section 606 of the RELRA. The HPLC reasoned that while section 606 of the RELRA permits the broker to designate agents to act exclusively for either party, it "does not expressly negate any duties on the part of the other employees of the broker to consumers who have entered into an agency relationship with the employing broker."

The Commission relies upon the express language in the definition of "designated agent" in section 201 of the RELRA which specifies that the real estate services are to be provided by the designated licensees "to the exclusion of all other licensees within the broker's employ." In the

² In the proposed rulemaking, this provision included two subsections. Subsection (a) was deleted in the final-form rulemaking at 30 Pa.B. 5954 and is therefore not reflected in Annex A.

Commission's view, unlike dual agency where all of the licensees employed by the broker represent both parties to the transaction, in designated agency only those licensees who have been designated have an agency relationship with a principal and are parties to the transaction. The Commission's construction is consistent with the purpose of designated agency—to insulate the transaction from the licensees in the real estate company who are not involved in the transaction. It ensures that the confidential information that the designated licensees have with the respective principals remains confidential with those licensees. Because of the broker's supervisory role over the designated licensees, only the broker becomes a dual agent in the transaction.

Also, in the Commission's view, characterizing members of the real estate company who have had no involvement in the real estate transaction as dual agents, simply because the broker is bound into a dual agency relationship, would reduce the benefit of designated agency to the consumer. In a typical transaction, one or more licensees in a real estate company are designated to act as the buyer's agent. Others are designated to act as seller's agents. At that point, the broker is a dual agent. If for some reason, one principal would withdraw from the transaction, and, as suggested, all of the remaining members of the real estate company would be considered dual agents, the consumer would not be able to receive real estate services from the company except in a dual agency relationship. Under that scenario, the licensee representing the new party would not have a duty to be loyal and act on behalf of that party, but rather, would only have the duty to take no action that is adverse or detrimental to either party's interest in the transaction. Conversely, if the remaining licensees in the real estate company did not assume any agency status until they became involved in the transaction by becoming designated, they would be available to find another buyer for the seller and can, once designated, act as a buyer agent since the licensee would not possess any confidential information about the seller.

PAR questioned whether subsection (d) permanently bars a licensee who was not designated from representing a party in the transaction. The Commission does not believe that this subsection acts as a permanent bar to nondesignated licensees. Rather, the Commission agrees with the PAR that nondesignated licensees may play a role in the transaction after the initial designation, once the licensee is designated by the broker and receives written approval from the principal.

One commentator also questioned whether a licensee who is not designated may serve in the capacity of a transaction licensee in an in-house transaction. Since the licensee has not been designated in the transaction, and as previously indicated, does not possess any confidential information about the transaction, the licensee is available to represent or provide services to other parties in other capacities.

In the proposed rulemaking, subsection (e) permitted employees of the broker to designate themselves or affiliated licensees who are employed by the broker as designated agents. The HPLC maintained that the RELRA does not authorize licensees, other than brokers, to designate themselves, regardless of written company policy. The Commission agrees with the HPLC that only the broker may designate licensees and has removed the provision.

In the final-form rulemaking, the Commission also renumbered the paragraphs in subsection (e) and replaced the word "renunciate" with "renounce" in subsection (b)(2).

One commentator questioned the status of the employing broker where the real estate company does not represent both parties in the transaction. Designated agency permits one real estate company to represent both parties in a transaction without being in a dual relationship so long as the employing broker designates one or more licensees to act as an agent on behalf of the seller and one or more licensees to act as an agent on behalf of the buyer.

At the time the seller enters into a listing agreement with the broker, the broker does not know whether the broker's company will also represent the buyer. However, to ensure that the seller's information remains confidential, the broker, with the seller's consent, designates one or more licensees in the office to act as seller's agent. The same is true where the broker enters into an agency relationship with the buyer. Again, the broker, with the buyer's consent, designates one or more licensees to work on the buyer's behalf. Only when the broker represents both parties (having given their consent previously) is the broker a dual agent. Other licensees who have not been designated in the transaction continue, as provided in subsection (d), to have no agency relationship in the transaction.

Section 35.316. Duties of transaction licensee.

The definition of "transaction licensee" in §§ 35.201 and 35.316(a) emphasizes that a consumer should not provide a licensee working as a transaction licensee with any confidential information because that licensee is not acting as an agent or advocate of the consumer and is not duty bound to keep the information confidential. Section 35.316(b) tracks the few areas in the statute when the transaction licensee has a limited duty of confidentiality.

One commentator suggested that the duty of limited confidentiality for transaction licensees should continue, like the confidentiality provisions in § 35.311(d), beyond the termination of the transaction licensee relationship. This suggestion is counter to the express language of section 606.1(g) of the RELRA, which continues the confidentiality provisions only when there is an agency relationship. Since a licensee serving in the capacity of a transaction licensee does not have an agency relationship with the consumer, the RELRA does not authorize an extension of the confidentiality provision.

Section 35.331. Written agreements generally.

IRRC recommended that the term "may" be replaced with "shall" in subsection (a). The Commission concurs with IRRC's suggestion and has amended the provision accordingly.

Subsection (a) lists the provisions which must be included in a written agreement. IRRC and PAR suggested that this subsection be amended to track the notification requirement in section 608.1 of the RELRA rather than merely requiring that the agreement contain statements about each required provision. Owing to this concern, the Commission has modified subsection (a) throughout.

IRRC requested that the Commission renumber the paragraphs in subsection (a). In the proposed rulemaking, paragraph (4) was inadvertently omitted. In that it tracks the requirement in section 608.1(2) of the RELRA, it has been reinserted in final-form rulemaking.

Section 35.332. Exclusive listing agreements.

In the preamble to the proposed rulemaking, the Commission stated that the sample exclusive listing agreement in subsection (d) would be deleted. However, that deletion was omitted from proposed Annex A. The Commission has corrected the typographical error in the final-form Annex A and deleted the agreement as indicated.

Section 35.333. Agreements of sale.

Section 35.333 addresses agreements of sale. IRRC requested the Commission explain "conspicuously." Owing to IRRC's concerns, the Commission has removed "conspicuously" from §§ 35.331(a) and 35.333(a).

IRRC asked the Commission to explain the difference between subsections (a) and (d). Subsection (a) contains the required provisions for all types of agreements of sale other than cemetery lots, mausoleum, cremation space or opening. Conversely, subsection (d) contains the required provisions for agreements of sale involving cemetery lots, mausoleum, cremation space or opening.

Section 35.336. Disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate when the licensee is working on behalf of the tenant.

One commentator questioned whether "implied agency" exists when the consumer does not enter into a business relationship with the licensee, but provides the licensee with confidential information. Section 608(a)(2) of the RELRA specifically rejects the application of the common law rule of "implied agency." It states "an agency relationship is not to be presumed and that it will exist only as set forth in a written agreement between the broker and the consumer of real estate services acknowledged by the consumer." To insure that consumers are aware that an agency relationship will not be presumed, the last sentence in the second paragraph of the Disclosure Summary advises that:

"A business relationship of any kind will not be presumed but must be established between the consumer and the licensee."

Section 35.340. Comparative market analysis.

Section 35.340 addresses comparative market analyses. In the proposed rulemaking, subsection (a) tracked the disclosure in section 608.3 of the RELRA and subsection (b) contained an exception for licensees who also hold a license under the Real Estate Appraisers Certification Act (63 P. S. §§ 457.1—457.199)

IRRC disagreed with the Commission's interpretation in subsection (b). According to IRRC, a comparative market analysis is not an appraisal, and therefore, regardless of who prepared it, a consumer must be notified that this is not an appraisal. The Commission agrees with IRRC that the comparative market analysis which the RELRA describes is not an appraisal because it is not performed in accordance with the Uniform Standards of Professional Appraisal Practice and is being performed for a limited purpose. The Commission has deleted this provision to avoid any possible confusion.

B. Act 47 amendments.

Five months after the proposed rulemaking was published, the RELRA was further amended by Act 47. In the final-form rulemaking, the Commission has amended sections in accordance with the changes in Act 47. The modifications to the proposed text do not enlarge the

original purpose of the rulemaking. In each instance, the Commission has simply tracked the statutory language.

Section 35.201. Definitions.

Section 606.1(b) of the RELRA was amended to include nonexclusive buyer agency agreements in the type of agreements that are not required to be in writing. IRRC recommended that the Commission define "open listing agreements," found in the same section, and the Commission has added a parallel definition for "nonexclusive buyer agency agreement."

Section 35.281. Putting contracts, commitments and agreements in writing.

Subsection (b)(1) tracks the language in section 606.1(b)(2) of the RELRA, which added nonexclusive agreements for a licensee to act as a buyer/tenant agent to the written agreement exceptions.

Subsection (c) tracks the language in section 606.1(b)(1) of the RELRA regarding the performance of services before an agreement is signed. It permits a licensee to perform real estate services before a written agreement is signed but not collect a fee in the absence of an agreement.

Section 35.284. Disclosures of business relationships.

In the proposed rulemaking, § 35.284 addressed the requirement of providing the Consumer Notice in § 35.336, obtaining a signature on the acknowledgement and retaining a copy of the acknowledgement as a record. Act 47 created additional disclosure summaries and different retention requirements depending upon the type of transaction. In the final-form rulemaking, this section has been amended to create a separate subsection for each type of disclosure. Subsection (a) addresses the Disclosure Summary requirements when the consumer is seeking to sell or purchase real estate; subsection (b) addresses the Disclosure Summary requirements where the consumer is seeking to lease and subsection (c) addresses the Disclosure Summary when the consumer is seeking to sell time-shares.

Tracking the language in section 608(a) of the RELRA, subsection (a)(1) requires that the Disclosure Summary in § 35.336 be provided to a consumer who is seeking to sell or purchase real estate at the initial interview if the interview occurs in person. If the initial interview does not occur in person, subsection (a)(2), tracking the language of section 608(c) of the RELRA, requires that the licensee provide the oral disclosure in § 35.339 (relating to oral disclosure) at the initial interview and the written disclosure in § 35.336 no later than the earlier of the first meeting after the initial interview or at the time the property is first shown to the consumer.

Subsection (b)(1) requires licensees who are working on behalf of the tenant to provide the Disclosure Summary in § 35.336, as required in subsection (a). Subsection (b)(2), tracking the language of section 608(b) of the RELRA, requires that a licensee provide the Disclosure Summary in § 35.337 to all tenants seeking to lease residential or commercial property where the licensee is working on behalf of the owner.

Subsection (c), tracking the language of section 608(e) of the RELRA, requires that a licensee provide the Disclosure Summary in § 35.338 (relating to disclosure summary for time-share estates) to all consumers seeking to sell timeshares.

Subsection (d) was also amended to track the additional requirements in sections 608(b)(3), (d) and (e)(3) of the RELRA.

Section 35.286. Retention and production of records.

This section was not amended in the proposed rule-making, but was cross-referenced in proposed § 35.284(b). Act 47 subsequently amended the retention requirement mentioned in proposed § 35.284(b) in the final-form rule-making, this section has been amended to track the requirements of section 608 of the RELRA. Subsection (a) delineates which records shall be retained for 3 years and which records shall be retained for 6 months.

Subsection (a)(1) tracks the requirement in existing § 35.336(c) that the acknowledgement portion of the Disclosure Summary in § 35.336 be retained for 6 months when the consumer and the broker have not entered into a business relationship. Subsection (a)(2) tracks the requirement in section 608(b) of the RELRA that the acknowledgement portion of the Disclosure Summary in § 35.337 be retained for 6 months when the consumer is seeking to lease residential or commercial real estate. Subsection (a)(3) tracks the requirement in section 608(e) of the RELRA that the acknowledgement portion of the Disclosure Summary in § 35.338 be retained for 6 months where the consumer is seeking to sell time-shares. Subsection (a)(4) tracks the requirement in section 606.1(b)(4) of the RELRA, that the written disclosure statement establishing a subagent or transaction licensee relationship be retained for 6 months.

New subsection (b) contains the current requirements for the production of documents.

Section 35.336. Disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate when the licensee is working on behalf of the tenant.

Current § 35.336 is divided into four parts: the Consumer Notice is in subsection (a); the requirement to provide the Consumer Notice is in subsection (b); the retention requirement is in subsection (c); and the refusal note is in subsection (d). Given that Act 47 created additional Disclosure Summaries, the information in current subsection (b) has been moved to § 35.284(a)(1), the retention requirement in current subsection (c) has been moved to §§ 35.284(d) and 35.286(a) and the refusal note in current subsection (d) has been moved to § 35.284(d).

In the final-form rulemaking, current subsection (a) has been made into a stand-alone provision similar to §§ 35.337—35.339. This section has also been amended to track the language and requirements in section 608(b)(1) and (d) of the RELRA.

Sections 35.337—35.339.

Sections 35.337—35.339 contain the verbatim language of the three additional disclosure summaries added by Act 47 in section 608(b), (c) and (e) of the RELRA.

Compliance with Executive Order 1996-1

The Commission reviewed this final-form rulemaking and considered its purpose and likely impact on the public and the regulated population under the directives of Executive Order 1996-1, "Regulatory Review and Promulgation."

Fiscal Impact and Paperwork Requirements

The final-form rulemaking will have no adverse fiscal impact or paperwork requirements on the Commonwealth, its political subdivisions or the public sector. In that, changes to the RELRA require licensees to provide up to three Consumer Notices depending upon the status of property, licensees will be subject to a modest fiscal

impact and additional paperwork requirements in producing, distributing and retaining the Consumer Notices.

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 5, 2000, the Commission submitted a copy of the notice of proposed rulemaking, published at 30 Pa.B. 641, to IRRC and to the Chairpersons of the SCP/PLC and the HPLC for review and comment.

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

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on February 11, 2002, this final-form rulemaking was deemed approved by the SCP/PLC and the HPLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on February 21, 2002, and approved the final-form rulemaking.

Contact Person

Further information may be obtained by contacting Deborah Sopko, Administrative Assistant, State Real Estate Commission, P. O. Box 2649, Harrisburg, PA 17105-2649, www.state.pa.us/bpoa/recomm/mainpage.htm.

Findings

The Commission finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) This final-form rulemaking does not enlarge the purpose of proposed rulemaking published at 30 Pa.B. 641.
- (4) This final-form rulemaking is necessary and appropriate for administering and enforcing the authorizing acts identified in this preamble.

Order

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

- (a) The regulations of the Commission, 49 Pa. Code Chapter 35, are amended by amending §§ 35.201, 35.281, 35.283, 35.284, 34.286, 34.287, 35.331—35.333 and 35.336 and by adding §§ 35.292, 35.311—35.316 and 35.337—35.340 to read as set forth in Annex A.
- (b) The Commission shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General as required by law.
- (c) The Commission shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.
- (d) This order shall take effect on final-form publication in the *Pennsylvania Bulletin*.

(*Editor's Note:* The amendment of § 35.286 and the addition of §§ 35.337—35.340 were not included in the proposed rulemaking at 30 Pa.B. 641.)

COLEEN CHRISTY,
Chairperson

(*Editor's Note:* For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 1362 (March 9, 2002).)

Fiscal Note: Fiscal Note 16A-568 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS

PART I. DEPARTMENT OF STATE

Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS

CHAPTER 35. STATE REAL ESTATE COMMISSION

Subchapter B. GENERAL PROVISIONS

§ 35.201. Definitions.

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

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

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

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

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

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

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

(iii) Manages real estate.

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

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

(vi) Undertakes to perform a comparative market analysis.

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

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

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

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

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

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

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

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

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

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

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

Cemetery—A place for the disposal or burial of deceased human beings, by cremation or in a grave, mausoleum, vault, columbarium or other receptacle. The term does not include a private family cemetery.

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

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

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

Cemetery salesperson—An individual employed by a broker or cemetery broker exclusively to perform the duties of a cemetery broker.

Commission—The State Real Estate Commission.

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

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

Credit—A period of 15 hours of instruction.

Department—The Department of State of the Commonwealth.

Designated agent—One or more licensees designated by the employing broker, with the consent of the principal, to

act exclusively as the agent or agents for the principal to the exclusion of all other licensees within the broker's employ.

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

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

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

Licensee—An individual or entity licensed under the act. For purposes of the consumer notice in § 35.336(a) (relating to disclosure summary), the term means a broker or salesperson.

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

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

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

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

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

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

Real estate school—An individual or entity that conducts classes in real estate subjects. The term does not include a college, university or institute of higher learning accredited by the Middle States Association of Colleges and Secondary Schools or equivalent accreditation.

Rental listing referral agent—An individual or entity that owns or manages a business which collects rental information for the purpose of referring prospective tenants to rental units or locations of rental units. The term does not include an official or employee of a public housing authority that is created under State or Federal law.

Salesperson—An individual who is employed by a broker to do one or more of the following:

- (i) Sell or offer to sell real estate, or list real estate for sale.
- (ii) Buy or offer to buy real estate.
- (iii) Negotiate the purchase, sale or exchange of real estate.
- (iv) Negotiate a loan on real estate.
- (v) Lease or rent real estate, or offer to lease or rent real estate or to place real estate for rent.

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

(vii) Assist a broker in managing property.

(viii) Perform a comparative market analysis.

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

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

Time share—The right, however evidenced or documented, to use or occupy one or more units on a periodic basis according to an arrangement allocating use and occupancy rights of that unit or those units between other similar users. As used in this definition, the term "unit" is a building or portion thereof permanently affixed to real property and designed for separate occupancy or a campground membership or portion thereof designed for separate occupancy. The term does not include a campground membership.

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

Transaction licensee—A licensee who, without entering into an agency relationship with the consumer, provides communication or document preparation services or performs other acts listed in the definition of "broker" or "salesperson."

Subchapter E. STANDARDS OF CONDUCT AND PRACTICE

GENERAL ETHICAL RESPONSIBILITIES

§ 35.281. Putting contracts, commitments and agreements in writing.

(a) All contracts, commitments and agreements between a broker, or a licensee employed by the broker, and a principal or a consumer who is required to pay a fee, commission or other valuable consideration shall be in writing and contain the information specified in § 35.331 (relating to written agreements generally).

(b) The following are exceptions to subsection (a):

(1) Open listing agreements or nonexclusive buyer agency agreements may be oral if the seller/buyer or landlord/tenant is provided with a written memorandum stating the terms of the agreement.

(2) Transaction licensees or subagents cooperating with listing brokers are not required to obtain a written agreement from the seller/landlord.

(3) Transaction licensees or subagents who provide services to the buyer/tenant but are paid by the seller/landlord or listing broker shall provide, and have signed, a written disclosure statement describing the nature of the services to be performed and containing the information required by section 608 of the act (63 P. S. § 455.608).

(c) A licensee may perform services before an agreement is signed, but the licensee is not entitled to recover a fee, commission or other valuable consideration in the absence of a signed agreement.

§ 35.283. Disclosure of interest.

(a) A licensee may not participate in a real estate transaction involving property in which he has an owner-

ship interest unless he first discloses his interest in writing to all parties concerned.

(b) A licensee may not represent, or purport to represent, more than one party to a real estate transaction without the written consent of all parties concerned.

(c) A broker who manages rental property may not accept a commission, rebate or profit on expenditures made for the lessor without the lessor's written consent.

(d) A licensee who provides financial services, title transfer and preparation, insurance, construction, repair or inspection services, may not require a consumer to use any of these services.

(e) If the consumer chooses to use any of the services in subsection (d), the licensee shall provide the consumer with a written disclosure of any financial interest, including, a referral fee or commission, that the licensee has in the service. This disclosure shall be made at the time the licensee first advises the consumer that an ancillary service is available or when the licensee first learns that the consumer will be using the service.

(f) A licensee has a continuing obligation to disclose to a principal any conflict of interest in a reasonably practicable period of time after the licensee learns or should have learned of the conflict of interest.

§ 35.284. Disclosures of business relationships.

(a) *Disclosure to consumers seeking to sell or purchase residential or commercial real estate.*

(1) A licensee shall provide the disclosure summary in § 35.336 (relating to disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate when the licensee is working on behalf of the tenant) to consumers seeking to purchase or sell real estate at the initial interview if the interview occurs in person.

(2) If the initial interview does not occur in person, the licensee shall provide the oral disclosure in § 35.339 (relating to the oral disclosure) at the initial interview and the written disclosure statement in § 35.336 no later than the earlier of:

(i) The first meeting that the licensee has in person with the consumer after the initial interview.

(ii) The time the licensee or any person working with the licensee first shows a property to the consumer.

(b) *Disclosure to tenants seeking to lease residential or commercial real estate.*

(1) A licensee who is working on behalf of the tenant shall provide the disclosure summary in § 35.336 as required in subsection (a).

(2) A licensee who is working on behalf of the owner shall provide the disclosure summary in § 35.337 (relating to disclosure summary for the lease of residential or commercial real estate when the licensee is working on behalf of the owner) to tenants seeking to lease residential or commercial property at the initial interview.

(c) *Disclosure to consumers seeking to sell time shares.* A licensee shall provide the disclosure summary in § 35.338 (relating to disclosure summary for time-share estates) to consumers seeking to purchase time-share estates at the initial interview.

(d) *Signed disclosure.* A licensee shall provide a copy of the signed disclosure to the consumers referenced in subsections (a)—(c) and shall retain the signed acknowledgment under § 35.286 (relating to retention and pro-

duction of records). If a consumer refuses to sign the acknowledgment, the refusal shall be noted on the acknowledgment.

§ 35.286. Retention and production of records.

(a) *Retention.* A broker or cemetery broker shall retain records pertaining to a real estate transaction for at least 3 years following consummation except for the following which shall be retained for 6 months:

(1) The acknowledgement portion of the consumer notice applicable to the sale or purchase of real estate in § 35.336 (relating to disclosure summary for the purchase or sale of residential or commercial real estate or the lease of residential or commercial real estate or lease of residential or commercial real estate when the licensee is working on behalf of the tenant) when there is not a real estate transaction.

(2) The acknowledgement portion of the consumer notice applicable to time shares in § 35.338 (relating to disclosure summary for time-share estates).

(3) The acknowledgement portion of the consumer notice applicable to leases in § 35.336 and § 35.337 (relating to disclosure summary for the lease of residential or commercial real estate when the licensee is working on behalf of the owner).

(4) The written disclosure statement establishing a subagent or transaction licensee relationship required by § 35.281(b)(3) (relating to putting contracts, commitments and agreements in writing).

(b) *Production of documents.*

(1) A broker or cemetery broker shall produce the records required in subsection (a) for examination by the Commission or its authorized representatives upon written request or pursuant to an office inspection under § 35.246 (relating to inspection of office).

(2) A corporation, partnership or association that holds a broker's or cemetery broker's license shall produce its corporate, partnership or association records for examination by the Commission or its authorized representatives upon written request or pursuant to an office inspection under § 35.246.

§ 35.287. Supervised property management assistance by salespersons.

A salesperson may assist in property management if the salesperson's work is supervised and controlled by the employing broker. The salesperson may not independently negotiate the terms of a lease nor execute a lease on behalf of the lessor.

§ 35.292. Duties of licensees generally.

(a) The following duties are owed to all consumers of real estate services and may not be waived:

(1) Exercise reasonable professional skill and care.

(2) Deal honestly and in good faith.

(3) Present, in a reasonably practicable period of time, all offers, counteroffers, notices and communications to and from the parties in writing, unless the property is subject to an existing contract and the seller/landlord has agreed in a written waiver.

(4) Comply with the Real Estate Seller Disclosure Act (68 P. S. §§ 1021—1036).

(5) Account for escrow and deposits funds as required by section 604(a)(5) of the act (63 P. S. § 455.604(a)(5)) and §§ 35.321—35.328 (relating to escrow requirements).

(6) Provide consumers with the information in section 608 of the act (63 P. S. § 455.608) at the initial interview.

(7) Disclose, in a reasonably practicable period of time, all conflicts of interest and financial interests as required in § 35.283 (relating to disclosure of interest).

(8) Advise the consumer to seek expert advice on matters about the transaction that are beyond the licensee's expertise.

(9) Ensure that all services are provided in a reasonable, professional and competent manner.

(10) Keep the consumer informed about the transaction and the tasks to be completed.

(11) Provide assistance with document preparation.

(12) Advise the consumer about compliance with laws pertaining to real estate transactions without rendering legal advice.

(b) A licensee is not required to conduct an independent inspection of the property.

(c) A licensee is not required to independently verify the accuracy or completeness of any representation made by the consumer to a transaction which the licensee reasonably believes to be accurate and reliable.

(d) A licensee is not liable for the acts of a consumer unless the consumer is acting at the express direction of the licensee or as a result of a representation by a licensee reasonably relied on by the consumer.

PERMITTED RELATIONSHIPS

§ 35.311. Generally.

(a) A licensee and a consumer may enter into the relationship specified in sections 606.2—606.4 and 606.6 of the act (63 P.S. §§ 455.606—455.606d and 455.606f).

(b) A broker may not extend or delegate the broker's agency relationship without the written consent of the principal.

(c) Compensation paid by a broker to another broker who assists in the marketing and sale/lease of a consumer's property does not create an agency relationship between the consumer and that other broker.

(d) A licensee in an agency relationship may not knowingly, during or following the termination of an agency relationship, reveal or use confidential information of the principal, except when one or more of the following apply:

- (1) The principal consented to the disclosure.
- (2) The information is disclosed to another licensee or third party acting solely on behalf of the principal.
- (3) The information is required to be disclosed under subpoena or court order.
- (4) The disclosure is necessary to prevent the principal from committing a crime.
- (5) The information is used by the licensee to defend in a legal proceeding against an accusation of wrongdoing.

§ 35.312. Duties of seller's agent.

(a) In addition to the duties required in § 35.292 (relating to duties of licensees generally), a seller's agent owes the additional duties of:

- (1) Loyalty to the seller/landlord by acting in the seller's/landlord's best interest.
- (2) Confidentiality, except that a licensee has a duty to reveal known material defects about the property.

(3) Making a continuous and good faith effort to find a buyer/tenant for the property except when the property is subject to an existing agreement of sale/lease.

(4) Disclosure to other parties in the transaction that the licensee has been engaged as a seller's agent.

(b) A licensee does not breach a duty to a seller/landlord by showing alternative properties to a prospective buyer/tenant or listing competing properties.

(c) A seller's agent may compensate other brokers as subagents if the seller/landlord agrees in writing. Subagents have the same duties and obligations to the seller/landlord as the seller's agent.

(d) A seller's agent may also compensate a buyer's agent and a transaction licensee who do not have the same duties and obligations to the seller/landlord as the seller's agent.

(e) Upon entering into a written agreement with the seller/landlord, each licensee employed by the broker will act as a seller's agent unless a licensee has been named, or is thereafter named, a designated agent under § 35.315 (relating to designated agency).

§ 35.313. Duties of buyer's agent.

(a) In addition to the duties required in § 35.292 (relating to duties of licensees generally), a buyer's agent owes the additional duties of:

- (1) Loyalty to the buyer/tenant by acting in the buyer's/tenant's best interest.
- (2) Confidentiality.
- (3) Making a continuous and good faith effort to find a property for the buyer/tenant except when the buyer/tenant is subject to an existing contract for sale/lease.

(4) Disclosure to other parties in the transaction that the licensee has been engaged as a buyer's agent.

(b) A licensee does not breach a duty to a buyer/tenant by showing a property the buyer/tenant is interested in to other buyer/tenants.

(c) A buyer's agent represents the interests of the buyer/tenant even if paid by the seller/landlord.

(d) Upon entering into a written agreement with the buyer/tenant, each licensee employed by the broker will act as a buyer's agent unless a licensee has been named, or is thereafter named, a designated agent under § 35.315 (relating to duties of designated agency).

§ 35.314. Duties of dual agent.

(a) A licensee may act as a dual agent if both parties consent in writing.

(b) In addition to the duties required in § 35.292 (relating to duties of licensees generally), a dual agent owes the additional duties of:

- (1) Taking no action that is adverse or detrimental to either party's interest in the transaction.
- (2) Unless otherwise agreed in writing, making a continuous and good faith effort to find a buyer/tenant for the property and a property for the buyer/tenant except when the buyer/tenant or seller/landlord is subject to an existing contract.
- (3) Confidentiality, except that a licensee is required to disclose known material defects about the property.

(c) A dual agent does not breach a duty to the seller/landlord by showing properties not owned by the seller/landlord to a prospective buyer/tenant or listing competing properties for sale/lease.

(d) A dual agent does not breach a duty to a buyer/tenant by showing a property the buyer/tenant is interested in to other prospective buyer/tenants.

§ 35.315. Duties of designated agent.

(a) A broker, with the written consent of the principal, may designate one or more licensees to act exclusively as the agent of the seller/landlord, and designate one or more licensees to act exclusively as the agent of the buyer/tenant in the same transaction.

(b) Designation may take place at any time. If designation takes place after the initial designation or after a written agreement has been entered into, the broker shall:

(1) Obtain the principal's consent, in writing, to the newly designated licensee.

(2) Obtain, when applicable, the principal's agreement to renounce any previous agency relationship with the other licensees employed by the broker.

(c) Regardless of when the designation takes place, the broker and the designated agents shall use reasonable care to ensure that confidential information is not disclosed or used.

(d) The licensees employed by the broker who are not designated have no agency relationship with either party in the transaction.

(e) Each licensee employed by the same broker who is a designated agent in the same transaction, owes the following additional duties, in addition to those required in § 35.292 (relating to duties of licensees generally):

(1) Loyalty to the principal with whom the designated agent is acting by working in that principal's best interest.

(2) Make a continuous and good faith effort to find a buyer/tenant for a principal who is a seller/landlord or to find a property for a principal who is the buyer/tenant except where the seller/landlord is subject to an existing contract for sale or lease or the buyer/tenant is subject to an existing contract to purchase or lease.

(3) Disclose to the principal prior to writing or presenting an offer to purchase that the other party to the transaction is represented by a designated agent also employed by the broker.

(4) Confirm that the broker is a dual agent in the transaction.

(f) In the transaction specified in subsection (e), the employing broker, as a dual agent, has the additional duties, in addition to those specified in § 35.292 and § 35.314 (relating to duties of dual agents), of:

(1) Taking reasonable care to protect any confidential information that has been disclosed to the designated licensees.

(2) Taking responsibility to direct and supervise the business activities of the designated licensees while taking no action that is adverse or detrimental to either party's interest in the transaction.

§ 35.316. Duties of transaction licensee.

In addition to the duties required in § 35.292 (relating to duties of licensees generally), a transaction licensee shall advise the consumer that the licensee:

(1) Is not acting as an agent or advocate for the consumer and should not be provided with confidential information.

(2) Owes the additional duty of limited confidentiality in that the following information may not be disclosed:

(i) The seller/landlord will accept a price less than the asking/listing price.

(ii) The buyer/tenant will pay a price greater than the price submitted in a written offer.

(iii) The seller/landlord or buyer/tenant will agree to financing terms other than those offered.

REAL ESTATE DOCUMENTS

§ 35.331. Written agreements generally.

(a) A written agreement between a broker and a principal or between a broker and a consumer whereby the consumer is or may be committed to pay a fee, commission or other valuable consideration shall contain the following:

(1) Notification that a Real Estate Recovery Fund exists to reimburse a person who has obtained a final civil judgment against a Commonwealth real estate licensee owing to fraud, misrepresentation or deceit in a real estate transaction and who has been unable to collect the judgment after exhausting legal and equitable remedies. Details about the Fund may be obtained by calling the Commission at (717) 783-3658.

(2) Notification that payments of money received by the broker on account of a sale—regardless of the form of payment and the person designated as payee (if payment is made by an instrument)—shall be held by the broker in an escrow account pending consummation of the sale or a prior termination thereof.

(3) Notification that the broker's commission and the duration of the agreement have been determined as a result of negotiations between the broker, or a licensee employed by the broker, and the seller/landlord or buyer/tenant.

(4) A description of the services to be provided and the fees to be charged.

(5) Notification about the possibility that the broker or any licensee employed by the broker may provide services to more than one party in a single transaction, and an explanation of the duties owed to the other party and the fees which the broker may receive for those services.

(6) Notification of the licensee's continuing duty to disclose in a reasonably practicable period of time any conflict of interest.

(7) In an agreement between a broker and a seller/landlord, a statement regarding cooperation with sub-agents and buyers agents, a disclosure that a buyer agent, even if compensated by the listing broker or seller/landlord will represent the interests of the buyer/tenant and a disclosure of any potential for the broker to act as a dual agent.

(8) In an agreement between a broker and a buyer/tenant, an explanation that the broker may be compensated based upon a percentage of the purchase price, the broker's policies regarding cooperation with listing brokers willing to pay buyer's brokers, a disclosure that the broker, even if compensated by the listing broker or seller/landlord will represent the interests of the buyer/tenant and a disclosure of any potential for the broker to act as a dual agent.

(b) To the extent that any of the information required in subsection (a) is set forth in the disclosure summaries in §§ 35.336—35.338 (relating to disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate when the licensee is working on behalf of the tenant; disclosure summary for the lease of residential or commercial real estate when the licensee is working on behalf of the owner; and disclosure summary for time-share estates), those provisions need not be repeated, but may be incorporated by reference.

§ 35.332. Exclusive listing agreements.

(a) An exclusive listing agreement may comprise one of the following:

- (1) The exclusive agency of the broker.
- (2) The exclusive right-to-sell or exclusive right-to-lease.

(b) An exclusive listing agreement shall contain, in addition to the requirements in § 35.331 (relating to written agreements generally), the following:

- (1) The sale or lease price.
- (2) The commission, fees or other compensation expected on the sale or lease price.
- (3) The duration of the agreement.
- (4) In the case of an exclusive right-to-sell agreement, a statement in bold face type that the broker earns a commission on the sale of the property during the listing period by whomever made, including the owner.

(5) In the case of an exclusive right-to-lease agreement, a statement in bold print that the broker earns a commission on the lease of the property during the listing period by whomever made, including the lessor.

(c) An exclusive listing agreement may not contain:

- (1) A listing period exceeding 1 year.
- (2) An automatic renewal clause.
- (3) A cancellation notice to terminate the agreement at the end of the listing period set forth in the agreement.
- (4) Authority of the broker to execute a signed agreement of sale or lease for the owner or lessor.
- (5) An option by the broker to purchase the listed property.

(6) Authority of the broker to confess judgment against the owner or lessor for the Commission in the event of a sale or lease.

§ 35.333. Agreements of sale.

(a) An agreement of sale, other than for a cemetery lot, mausoleum or cremation space or opening, shall contain:

- (1) The date of the agreement.
- (2) The names of the buyer and seller.
- (3) A description of the property and the interest to be conveyed.
- (4) The sale price.
- (5) The dates for payment and conveyance.

(6) The zoning classification of the property, except if the property (or each parcel thereof, if subdividable) is zoned solely or primarily to permit single-family dwellings, together with a statement that the failure of the agreement of sale to contain the zoning classification of the property shall render the agreement voidable at the

option of the buyer and, if voided, deposits tendered by the buyer shall be returned to the buyer without a requirement of court action.

(7) A statement identifying the capacity in which the broker, or a licensee employed by the broker is involved in the transaction and whether services have been provided to another party in the transaction.

(8) A provision that payments of money received by the broker on account of the sale—regardless of the form of payment and the person designated as payee (if payment is made by an instrument)—shall be held by the broker in an escrow account pending consummation of the sale or a prior termination thereof.

(9) The following statement:

“A Real Estate Recovery Fund exists to reimburse any person who has obtained a final civil judgment against a Pennsylvania real estate licensee owing to fraud, misrepresentation, or deceit in a real estate transaction and who has been unable to collect the judgment after exhausting all legal and equitable remedies. For complete details about the Fund, call (717) 783-3658.”

(10) A statement that access to a public road may require issuance of a highway occupancy permit from the Department of Transportation.

(11) In the case of an agreement of sale for the purchase of a time share or campground membership, a statement regarding the purchaser's right of cancellation that is set forth conspicuously in bold face type of at least 10 point size immediately above the signature line for the purchaser and that is in substantially the following form:

“You, the purchaser, may cancel this purchase at any time prior to midnight of the fifth day following the date of this transaction. If you desire to cancel, you are required to notify the seller, in writing, at (insert address). Such notice shall be given by certified return receipt mail or by any other bona fide means of delivery which provides you with a receipt. Such notice shall be effective upon being postmarked by the United States Postal Service or upon deposit of the notice with any bona fide means of delivery which provides you with a receipt.”

(b) An agreement of sale that is conditioned upon the ability of the buyer to obtain a mortgage shall contain:

- (1) The type of mortgage.
- (2) The mortgage principal.
- (3) The maximum interest rate of the mortgage.
- (4) The minimum term of the mortgage.
- (5) The deadline for the buyer to obtain the mortgage.

(6) The nature and extent of assistance that the broker will render to the buyer in obtaining the mortgage.

(c) The following terms shall be printed in bold face if made part of an agreement of sale:

(1) A provision relieving the seller from responsibility for defects involving the sale property, or a provision requiring the buyer to execute a release to that effect at the time of settlement, or a provision of similar import.

(2) A provision reserving to the builder-seller the right to change, or depart from, the building specifications for the sale property.

(d) An agreement of sale for a cemetery lot or plot or a mausoleum space or opening shall contain the requirements in subsection (a)(1)—(5) and (9).

§ 35.336. Disclosure summary for the purchase or sale of residential or commercial real estate or for the lease of residential or commercial real estate when the licensee is working on behalf of the tenant.

The Disclosure Summary shall be entitled "Consumer Notice" and shall be in the following format available from the Commission office upon request by phone, fax or internet:

**CONSUMER NOTICE
THIS IS NOT A CONTRACT**

Pennsylvania law requires real estate brokers and salespersons (licensees) to advise consumers who are seeking to sell or purchase residential or commercial real estate or tenants who are seeking to lease residential or commercial real estate where the licensee is working on behalf of the tenant of the business relationships permitted by the Real Estate Licensing and Registration Act. This notice must be provided to the consumer at the first contact where a substantive discussion about real estate occurs unless an oral disclosure has been previously provided. If the oral disclosure was provided, this notice must be provided at the first meeting or the first time a property is shown to the consumer by the broker or salesperson.

Before you disclose any information to a licensee, be advised that unless you select an agency relationship the licensee is not representing you. A business relationship of any kind will not be presumed but must be established between the consumer and the licensee.

Any licensee who provides you with real estate services owes you the following duties:

- Exercise reasonable professional skill and care which meets the practice standards required by the act.
 - Deal honestly and in good faith.
 - Present, in a reasonably practicable period of time, all offers, counteroffers, notices, and communications to and from the parties in writing. The duty to present written offers and counteroffers may be waived if the waiver is in writing.
 - Comply with Real Estate Seller Disclosure Act.
 - Account for escrow and deposit funds.
 - Disclose all conflicts of interest in a reasonably practicable period of time.
 - Provide assistance with document preparation and advise the consumer regarding compliance with laws pertaining to real estate transactions.
 - Advise the consumer to seek expert advice on matters about the transaction that are beyond the licensee's expertise.
 - Keep the consumer informed about the transaction and the tasks to be completed.
 - Disclose financial interest in a service, such as financial, title transfer and preparation services, insurance, construction, repair or inspection, at the time service is recommended or the first time the licensee learns that the service will be used.
- A licensee may have the following business relationships with the consumer:

Seller Agency:

Seller agency is a relationship where the licensee, upon entering into a written agreement, works only for a seller/landlord. Seller's agents owe the additional duties of:

- Loyalty to the seller/landlord by acting in the seller's/landlord's best interest.
- Confidentiality, except that a licensee has a duty to reveal known material defects about the property.
- Making a continuous and good faith effort to find a buyer for the property, except while the property is subject to an existing agreement.
- Disclosure to other parties in the transaction that the licensee has been engaged as a seller's agent.

A seller's agent may compensate other brokers as subagents if the seller/landlord agrees in writing. Subagents have the same duties and obligations as the seller's agent. Seller's agents may also compensate buyer's agents and transaction licensees who do not have the same duties and obligations as seller's agents.

If you enter into a written agreement, the licensees in the real estate company owe you the additional duties identified above under seller agency. The exception is designated agency. See the designated agency section in this notice for more information.

Buyer Agency:

Buyer agency is a relationship where the licensee, upon entering into a written agreement, works only for the buyer/tenant. Buyer's agents owe the additional duties of:

- Loyalty to the buyer/tenant by acting in the buyer's/tenant's best interest.
- Confidentiality, except that a licensee is required to disclose known material defects about the property.
- Making a continuous and good faith effort to find a property for the buyer/tenant, except while the buyer is subject to an existing contract.
- Disclosure to other parties in the transaction that the licensee has been engaged as a buyer's agent.

A buyer's agent may be paid fees, which may include a percentage of the purchase price, and, even if paid by the seller/landlord, will represent the interests of the buyer/tenant.

If you enter into a written agreement, the licensees in the real estate company owe you the additional duties identified above under buyer agency. The exception is designated agency. See the designated agency section in this notice for more information.

Dual Agency:

Dual agency is a relationship where the licensee acts as the agent for both the seller/landlord and the buyer/tenant in the same transaction with the written consent of all parties. dual agents owe the additional duties of:

- Taking no action that is adverse or detrimental to either party's interest in the transaction.
- Unless otherwise agreed to in writing, making a continuous and good faith effort to find a buyer for the property and a property for the buyer, unless either are subject to an existing contract.
- Confidentiality, except that a licensee is required to disclose known material defects about the property.

Designated Agency:

In designated agency, the employing broker may, with your consent, designate one or more licensees from the real estate company to represent you. Other licensees in the company may represent another party and shall not be provided with any confidential information. The designated agent(s) shall have the duties as listed above under seller agency and buyer agency.

In designated agency, the employing broker will be a dual agent and have the additional duties of:

- Taking reasonable care to protect any confidential information disclosed to the licensee.
- Taking responsibility to direct and supervise the business activities of the licensees who represent the seller and buyer while taking no action that is adverse or detrimental to either party's interest in the transaction.

The designation may take place at the time that the parties enter into a written agreement, but may occur at a later time. Regardless of when the designation takes place, the employing broker is responsible for ensuring that confidential information is not disclosed.

Transaction Licensee:

A transaction licensee is a broker or salesperson who provides communication or document preparation services or performs other acts for which a license is required without being the agent or advocate for either the seller/landlord or the buyer/tenant. Upon signing a written agreement or disclosure statement, a transaction licensee has the additional duty of limited confidentiality in that the following information may not be disclosed:

- The seller/landlord will accept a price less than the asking/listing price.
- The buyer/tenant will pay a price greater than the price submitted in a written offer.
- The seller/landlord or buyer/tenant will agree to financing terms other than those offered.

Other information deemed confidential by the consumer shall not be provided to the transaction licensee.

OTHER INFORMATION ABOUT REAL ESTATE TRANSACTIONS

The following are negotiable and shall be addressed in an agreement/disclosure statement with the licensee:

- The duration of the employment, listing agreement or contract.
- The fees or commissions.
- The scope of the activities or practices.
- The broker's cooperation with other brokers, including the sharing of fees.

Any sales agreement must contain the zoning classification of a property except in cases where the property is zoned solely or primarily to permit single family dwellings.

The Real Estate Recovery Fund exists to reimburse any person who has obtained a final civil judgment against a Pennsylvania real estate licensee owing to fraud, misrepresentation, or deceit in a real estate transaction and who has been unable to collect the judgment after exhausting all legal and equitable remedies. For complete details about the Fund, call (717) 783-3658.

ACKNOWLEDGMENT

I ACKNOWLEDGE THAT I HAVE RECEIVED THIS DISCLOSURE.

DATE: _____
PRINT (CONSUMER) PRINT (CONSUMER)

SIGNED (CONSUMER) SIGNED (CONSUMER)

ADDRESS (OPTIONAL): ADDRESS (OPTIONAL):

PHONE NUMBER PHONE NUMBER
(OPTIONAL): (OPTIONAL):

I CERTIFY THAT I HAVE PROVIDED THIS DOCUMENT TO THE ABOVE CONSUMER.

DATE: _____
PRINT LICENSEE

SIGNED LICENSEE

ADOPTED BY THE STATE REAL ESTATE COMMISSION AT 49 PA. CODE § 35.336.

§ 35.337. Disclosure summary for the lease of residential or commercial real estate when the licensee is working on behalf of the owner.

The disclosure summary for the lease of residential or commercial property shall be in the following format:

**CONSUMER NOTICE
THIS IS NOT A CONTRACT**

(LICENSEE) HEREBY STATES THAT WITH RESPECT TO THIS PROPERTY, (DESCRIBE PROPERTY) I AM ACTING IN THE FOLLOWING CAPACITY: (CHECK ONE)

- (I) OWNER/LANDLORD OF THE PROPERTY;
- (II) A DIRECT EMPLOYEE OF THE OWNER/LANDLORD; OR
- (III) AN AGENT OF THE OWNER/LANDLORD PURSUANT TO A PROPERTY MANAGEMENT OR EXCLUSIVE LEASING AGREEMENT.

I ACKNOWLEDGE THAT I HAVE RECEIVED THIS NOTICE:

DATE: _____
PRINT (CONSUMER) PRINT (CONSUMER)

SIGNED (CONSUMER) SIGNED (CONSUMER)

ADDRESS (OPTIONAL): ADDRESS (OPTIONAL):

PHONE NUMBER PHONE NUMBER
(OPTIONAL): (OPTIONAL):

I CERTIFY THAT I HAVE PROVIDED THIS NOTICE:

(LICENSEE) (DATE)

§ 35.338. Disclosure summary for time-share estates.

The disclosure summary for time-share estates shall be in the following format:

**CONSUMER NOTICE
THIS IS NOT A CONTRACT**

(LICENSEE) HEREBY STATES THAT WITH RESPECT TO THIS PROPERTY, (DESCRIBE PROPERTY) I AM ACTING IN THE FOLLOWING CAPACITY: (CHECK ONE)

- (I) OWNER OF THE PROPERTY;
 (II) A DIRECT EMPLOYEE OF THE OWNER; OR
 (III) AN AGENT OF THE OWNER PURSUANT TO A PROPERTY MANAGEMENT OR EXCLUSIVE LEASING OR SELLING AGREEMENT.

I ACKNOWLEDGE THAT I HAVE RECEIVED THIS NOTICE:

 (CONSUMER) (DATE)

I CERTIFY THAT I HAVE PROVIDED THIS NOTICE:

 (LICENSEE) (DATE)

§ 35.339. Oral disclosure.

The disclosure shall be read verbatim:

“THE REAL ESTATE LAW REQUIRES THAT I PROVIDE YOU WITH A WRITTEN CONSUMER NOTICE THAT DESCRIBES THE VARIOUS BUSINESS RELATIONSHIP CHOICES THAT YOU MAY HAVE WITH A REAL ESTATE LICENSEE. SINCE WE ARE DISCUSSING REAL ESTATE WITHOUT YOU HAVING THE BENEFIT OF THE CONSUMER NOTICE, I HAVE THE DUTY TO ADVISE YOU THAT ANY INFORMATION YOU GIVE ME AT THIS TIME IS NOT CONSIDERED TO BE CONFIDENTIAL, AND ANY INFORMATION YOU GIVE ME WILL NOT BE CONSIDERED CONFIDENTIAL UNLESS AND UNTIL YOU AND I ENTER INTO A BUSINESS RELATIONSHIP. AT OUR FIRST MEETING I WILL PROVIDE YOU WITH A WRITTEN CONSUMER NOTICE WHICH EXPLAINS THOSE BUSINESS RELATIONSHIPS AND MY CORRESPONDING DUTIES TO YOU.”

§ 35.340. Comparative market analysis.

A comparative market analysis shall contain the following statement printed conspicuously and without change on the first page:

This analysis has not been performed in accordance with the Uniform Standards of Professional Appraisal Practice which requires valuers to act as unbiased, disinterested third parties with impartiality, objectivity and independence and without accommodation of personal interest. It is not to be construed as an appraisal and may not be used as such for any purpose.

[Pa.B. Doc. No. 02-494. Filed for public inspection March 29, 2002, 9:00 a.m.]

**STATE BOARD OF PHYSICAL THERAPY
 [49 PA. CODE CH. 40]
 Examination Fees**

The State Board of Physical Therapy (Board) amends §§ 40.5 and 40.13—40.16 to read as set forth in Annex A.

Effective Date

The amendments take effect upon publication of the final-form rulemaking in the *Pennsylvania Bulletin*.

Statutory Authority

This final-form rulemaking authorized under section 812.1 of The Administrative Code of 1929 (71 P. S. § 279.3a) and section 8 of the Physical Therapy Practice Act (63 P. S. § 1308).

Background and Purpose

This final-form rulemaking deletes references to examination fees for the physical therapist, athletic trainer and physical therapist assistant examinations. A third-party testing organization develops and administers the examinations. The fees are established by the test provider and are paid by the examinee. The examiner communicates directly with the applicants, who pay the examination fees directly to the examiner. Thus, to avoid the necessity of amending its regulations whenever the examination administrator might change the fees, the Board has deleted all references to examination fees.

Response to Comments

Notice of proposed rulemaking was published at 31 Pa.B. 2379 (May 5, 2001). Publication was followed by a 30-day public comment period during which the Board received no public comments. Following the close of the public comment period, the Board received comments from the Independent Regulatory Review Commission (IRRC). The Board did not receive any comments from the House Professional Licensure Committee (HPLC) or the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC). This final-form rulemaking responds to the comments and suggestions made by IRRC.

As proposed, the Board would have deleted only the examination fees in § 40.5 (relating to fees). IRRC recommended that the Board delete all references to examination fees and examinations in §§ 40.13—40.16.

The Board concurs with the recommendation as it applies to § 40.15 (relating to examinations) and has amended this provision accordingly. The Board has not deleted references to the examination in §§ 40.13 and 40.16 (relating to areas of examination; and licensure by endorsement) since the elimination of the examination fees does not change the Board's review process. The Board still determines eligibility to sit for the examinations and still must notify applicants for licensure that an examination is required. The Board does believe, however, that amendments are necessary to clarify that the examinations are administered by the Board-approved vendor, rather than the Board. The Board, therefore, clarified this language in §§ 40.13 and 40.16.

With respect to § 40.14 (relating to failure; reexamination), an applicant who fails the first examination and wishes to take a second examination shall pay an additional examination fee charged by the vendor. The Board clarifies in § 40.14 that the additional fee is for the examination and that it is charged by the vendor, not by the Board.

The application procedure is as follows. Upon request, the applicant receives from the Board an application consisting of four parts. The first part requires the candidate to provide personal data and an application fee to the Board. The second part requests verification of education which is sent directly to the school by the applicant and the school returns it to the Board. The third part is an application for computerized testing which the applicant sends to the Board. The Board forwards this to the National provider after the Board determines the applicant is eligible for the examination. The fourth part is a payment information form which is directly sent by the applicant along with the examination fee to the National provider. The National provider sends the applicant scheduling information to schedule the examination with Prometric Testing Service.

Compliance with Executive Order 1996-1

The Board reviewed this final-form rulemaking and considered its purpose and likely impact on the public and the regulated population under the directives of Executive Order 1996-1, "Regulatory Review and Promulgation," and determined that the final-form rulemaking comply with the order.

Fiscal Impact and Paperwork Requirements

The final-form amendments will have no adverse fiscal impact nor will they impose significant paperwork requirements on the Board, licensees, the Commonwealth, its political subdivisions or the public sector.

Sunset Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 5, 2001, the Board submitted a copy of the notice of proposed rulemaking published at 31 Pa.B. 2379, to IRRC and to the Chairpersons of SCP/PLC and HPLC for review and comment.

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

Under section 5.1(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), on March 4, 2002, this final-form rulemaking was deemed approved by the SCP/PLC and HPLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on March 7, 2002, and approved the final-form rulemaking.

Contact Person

Further information may be obtained by contacting Robert Kline, Administrative Assistant, State Board of Physical Therapy, P. O. Box 2649, Harrisburg, PA 17105-2649, (717) 783-7134.

Findings

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) This final-form rulemaking does not enlarge the purpose of proposed rulemaking published at 31 Pa.B. 2379.
- (4) This final-form rulemaking is necessary and appropriate for administering and enforcing the authorizing acts identified in Part B of this Preamble.

Order

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

(a) The regulations of the Board, 49 Pa. Code Chapter 40, are amended by amending § 40.5 to read as set forth at 31 Pa.B. 2379; and by amending §§ 40.13—40.16 to read as set forth in Annex A.

(b) The Board shall submit this order, 31 Pa.B. 2379 and Annex A to the Office of General Counsel and the Office of Attorney General as required by law.

(c) The Board shall certify this order, 31 Pa.B. 2379 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

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

(Editor's Note: The amendments to §§ 40.13—40.16 were not included in the proposal at 31 Pa.B. 2379.)

JAMES J. IRRGANG,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 32 Pa.B. 1590 (March 23, 2002).)

Fiscal Note: Fiscal Note 16A-658 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 40. STATE BOARD OF PHYSICAL THERAPY

Subchapter A. PHYSICAL THERAPISTS LICENSURE

§ 40.13. Areas of examination.

(a) An applicant for licensure shall pass the approved licensing examination described in section 6(b) of the act (63 P. S. § 1306(b)). The Board's approved vendor conducts at least two written examinations each year. The examinations will be conducted in the English language in the following areas:

- (1) Basic science.
- (2) Clinical science.
- (3) Physical therapy theory and procedures.

(b) Oral or practical examinations, or both, for licensure may be administered by the Board-approved vendor under section 6(b) of the act, in addition to the requirement of passing a written examination for licensure.

§ 40.14. Failure; reexamination.

(a) Applicants shall successfully pass, to the satisfaction of the Board, the examination approved by the Board. In cases of failure at the first examination, the applicant shall have, after the expiration of 6 months and within 2 years from the date of the first failure, the privilege of a second examination, with the payment of an additional examination fee charged by the vendor.

(b) After a second or successive failure to pass the examination, an applicant desiring to take a third or successive examination shall make a new application within the meaning of section 5 of the act (63 P. S. § 1305) within 6 months from the date of the last failure; provided, however, that prior to filing a new application for examination, the Board may require evidence of additional training. If the Board determines that the applicant will be permitted to take a third or successive examination, the Board may, authorize in connection with

a written examination an oral or practical examination, or both, to test the knowledge and competence of the applicant.

(c) The granting of permission by the Board to take a third or successive examination is at all times subject to the applicant otherwise qualifying under the requirements in force at the time permission to take the examination is sought.

§ 40.15. Examinations.

(a) An application for licensure by examination may be obtained from the State Board of Physical Therapy, Post Office Box 2649, Harrisburg, Pennsylvania, 17105-2649.

(b) No applicant may be admitted to examination who is unable to present, at the time of application, the required credentials of professional education from an approved institution.

(c) Examinations are conducted by numbers, exclusive of names, and the candidate may in no part of his paper give indication as to his name or school of graduation.

(d) As a means of identifying applicants, two unmounted finished photographs, not proofs, of each applicant shall be furnished, one of which shall be certified by the appropriate officer of the physical therapy school attended and the other of which shall be marked with the number assigned to the candidate and shall be returned to him with a card of admission to the examinations. Each candidate shall bring the admission card and returned photograph to the Board; otherwise, the candidate may not be admitted to the examination.

§ 40.16. Licensure by endorsement.

An applicant for licensure by endorsement is required to submit the professional credentials in § 40.11 (relating

to license by examination; requirements for examination), and comply with the following:

(1) Submit a written application on forms provided by the Board, together with evidence satisfactory to the Board that he is licensed or otherwise registered as a physical therapist in another state or territory of the United States, or in the District of Columbia, if the requirements for licensure or registration in the state, territory or district were, at the date of his licensure or registration, substantially equal to the requirements for licensure or registration in this Commonwealth under the act.

(2) In the event that an applicant for licensure by endorsement has taken and failed the Commonwealth's approved examination one or more times but has subsequently taken and passed an examination given in another state or territory of the United States or in the District of Columbia, proof shall be given to the Board by the applicant that the other examination taken and passed by the applicant was in fact equivalent to the examination this Commonwealth has approved, before the Board will exercise its discretion in considering endorsing the applicant for licensure.

(3) A fee prescribed in § 40.5 (relating to fees) shall accompany each application for licensure by endorsement. Reference should be made to section 6(d)(2) of the act (63 P. S. § 1306(d)(2)).

[Pa.B. Doc. No. 02-495. Filed for public inspection March 29, 2002, 9:00 a.m.]