

PROPOSED RULEMAKING

PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

[22 PA. CODE CH. 215]

Optional Alternate Retirement Plans

The Public School Employees' Retirement Board (Board) proposes to amend Chapter 215 (relating to general administration) to read as set forth in Annex A. The rulemaking proposes to delete the transitional provisions for electing to participate in an optional alternate retirement plan in § 215.36 (relating to optional alternate retirement programs). The transitional provisions are no longer needed and, read broadly, may conflict with 24 Pa.C.S. Part IV (relating to Public School Employees' Retirement Code) (Retirement Code), because the Retirement Code does not allow current members to opt out of the system.

A. *Effective Date*

This proposed rulemaking will go into effect upon publication in the *Pennsylvania Bulletin* as a final-form rulemaking.

B. *Contact Person*

For further information, contact Frank Ryder, Director of Government Relations, Public School Employees' Retirement System, 5 North Fifth Street, P. O. Box 125, Harrisburg, PA 17108, (717) 720-4733; or Charles K. Serine, Deputy Chief Counsel, Public School Employees' Retirement System, 5 North Fifth Street, P. O. Box 125, Harrisburg, PA 17108, (717) 720-4679.

C. *Statutory Authority*

This proposed rulemaking is being made under the authority of the Retirement Code.

D. *Background and Purpose*

When it was amended in 1975, the Retirement Code, for the first time, permitted certain school employees to choose an alternate retirement plan. The Retirement Code applies to new employees. The Board promulgated § 215.36 to implement this Retirement Code provision. Section 215.36, among other things, contained a transitional provision granting existing employees an opportunity to elect an alternate retirement plan. This transitional provision was added because the existing employees never had the opportunity to select an alternate plan. At the time of enactment of § 215.36, the only alternate plan allowed was the Teachers Insurance and Annuity Association—College Retirement Equities Fund.

The act of June 22, 2001 (P. L. 530, No. 35) allowed the State System of Higher Education (SSHE) to add insurance companies or mutual funds as additional alternate plans for its employees. Section 215.36, as written, could be interpreted to allow existing employees, who already had a choice under the Retirement Code to elect an alternate retirement plan, to make an additional election and to opt out of the Public School Employees' Retirement System (PSERS) each time a new alternate plan is approved by SSHE. The Board, however, has always interpreted § 215.36 as providing a one-time opportunity for these employees, not a continual choice each time a

new alternate plan is approved by the employer. Deleting the language clarifies the intent of the Board and eliminates a potential conflict between § 215.36 and the Retirement Code, because the Retirement Code does not allow current members to opt out of the system.

The State Employees' Retirement System (SERS) is proposing a similar revision of its regulation that parallels § 215.36. This repeal will harmonize the regulations of PSERS and SERS with regard to election of alternate retirement plans. SSHE supports the amendment and repeal of these sections.

E. *Benefits, Costs and Compliance*

Benefits

This proposed rulemaking removes an expired transitional provision, clarifies the Board's intent regarding the election of alternate retirement plans and eliminates a potential conflict between the Retirement Code and § 215.36.

Costs

The proposed rulemaking will formalize the Board's long-standing interpretation that the transitional provisions of § 215.36 have expired. The proposed rulemaking, therefore, maintains the status quo and has no associated cost to the Commonwealth, its citizens, school employers, school employees or PSERS.

Compliance Costs

The proposed rulemaking will not impose any additional compliance costs on school employees or employers.

F. *Sunset Review*

Not applicable.

G. *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on January 31, 2003, the Board submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Education Committee and the Senate Finance Committee. In addition to submitting the proposed rulemaking, the Board has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the PSERS. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed rulemaking, it will notify the Board within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed rulemaking to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of objections raised.

H. *Public Comments*

Written Comments. Interested persons are invited to submit comments, suggestions or objections regarding the proposed rulemaking to the Public School Employees' Retirement System, 5 North Fifth Street, P. O. Box 125, Harrisburg, PA 17108-0125. Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board March 17, 2003 (within 30 days of publication in the *Pennsylvania Bulletin*). Interested persons may also submit a summary of

their comments to the Board. The summary may not exceed one page in length and must be received by March 7, 2003 (within 20 days following publication in the *Pennsylvania Bulletin*). The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final regulation will be considered.

Electronic Comments. Comments may also be submitted electronically to the Board at fryder@state.pa.us and must also be received by the Board by March 7, 2003. A subject heading of the proposal and a return name and address must be included in each transmission. If an acknowledgment of electronic comments is not received by the sender within 2 working days, the comments should be transmitted by mail to ensure receipt.

DALE H. EVERHART,
Secretary

Fiscal Note: 43-9. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 22. EDUCATION

PART XIII. PUBLIC SCHOOL EMPLOYEES' RETIREMENT BOARD

CHAPTER 215. GENERAL ADMINISTRATION

MISCELLANEOUS PROVISIONS

§ 215.36. Optional alternate retirement programs.

(a) Under section 8301(a)(1) of the Retirement Code (relating to mandatory and optional membership), certain school [**employees**] **employees** may elect not to join the System [, or to depart from it] in favor of an optional alternate retirement program approved by the employer [, such as the Secretary of Education or the governing body of certain State institutions, including Pennsylvania State University, as the case may be]. Therefore, the following paragraphs are adopted by the Board to establish guidelines and procedures, insofar as the Board is authorized to so do, with respect to implementing such a program for certain eligible school [**employees**] **employees**:

(1) [**Section 8301(a)(1) of the Retirement Code (relating to eligibility points for retention and reinstatement of source credits) purports to authorize the existence of an optional alternate retirement program under the responsibility of the employer.**

(2) **Employees, including those employed on the effective date of the establishment of an optional alternate retirement program, who are eligible for membership therein, and who are active members of the System, have the option of continuing their active membership or of joining the optional alternate retirement program if they make the election within 9 months of the effective date of the establishment of the optional alternate retirement program.** Every [**employee**] **employee** who [**subsequently becomes**] is eligible for membership in the optional alternate retirement program shall make the election within 30 days of the first date of active employment. [**Employees**] **Employees** not exercising the option to join the optional alternate retirement program shall be deemed to have chosen to commence [**or continue**] active membership in the System, unless they

have elected membership in the State [**Employees**] **Employees**' Retirement System, as otherwise provided by law.

[(3) **When an eligible employee, who is an active member of the System, elects to participate in the optional alternate retirement program in accordance with paragraph (2), the employee may elect to withdraw the accumulated deductions from the fund as of the date of the election; or, if the employee is eligible for vesting in accordance with the Retirement Code, the employee may elect to leave the accumulated deductions credited to account of the employee in the Fund and receive a retirement allowance from the System upon separation from employment; or, at the employee's option, upon attainment of superannuation retirement age, if later. The retirement allowance shall be based upon credited service and final average salary while a contributing member to this System only.**

(4) **Notwithstanding provisions to the contrary, an eligible employee employed on the effective date of the establishment of the optional alternate retirement program, who is eligible for membership therein, who is an active member of the System, and who is not vested in the retirement system, has the option of joining the optional alternate retirement program within 60 days of the date upon which the employee becomes eligible for vesting in accordance with the applicable provisions of the Retirement Code, in which case the employee may vest and join the optional alternate retirement program under the same conditions as provided in paragraph (3).**

(5)] (2) **When an eligible [employee elects] employee elected to participate in the optional alternate retirement program in accordance with paragraph (2) as it existed on _____ (Editor's Note: The blank refers to a date 1 day before the effective date of adoption of this proposal.) or paragraph (4) as it existed on _____ (Editor's Note: The blank refers to a date 1 day before the effective date of adoption of this proposal.) or elects to participate in the optional alternate retirement program in accordance with paragraph (2), the election is final and binding so long as the [employee shall] employee remains eligible to remain in the optional alternate retirement program. When an [employee] employee later is employed in a capacity which does not qualify for membership in the optional alternate retirement program, the [employee] employee shall, upon meeting the qualifications for membership in the System, [resume making] make contributions to the fund or reinstate the former credited service for which contributions had been withdrawn, as the case may be, in accordance with the applicable provisions of the Retirement Code. Service, salary or other compensation paid to an [employee] employee while a member of the optional alternate retirement program will not be credited toward membership in, or retirement benefit from, the System.**

[(6) **For employees who elect to join the optional alternate retirement program, the contribution of the Commonwealth to the optional alternate retirement program on behalf of the employees will be no more than 1/2 of the employer normal contribution rate and accrued liability rate as determined in**

accordance with section 8328(b) and (c) of the Retirement Code (relating to actuarial cost method).]

(b) Retirement Code reference: Section [8301] 8326 of the Retirement Code.

[Pa.B. Doc. No. 03-266. Filed for public inspection February 14, 2003, 9:00 a.m.]

SECURITIES COMMISSION

[64 PA. CODE CHS. 102, 202, 203, 204, 207, 305 AND 606]

Banking and Savings and Loan Institutions

The Securities Commission (Commission), under the authority contained in sections 102(d), (k) and (t), 202(a), (c), (e) and (i), 203(i.1), (p) and (r), 204(a), 207(l), 305(a)(ix), 606(a) and (d) and 609(a) of the Pennsylvania Securities Act of 1972 (act) (70 P. S. §§ 1-102(d), (k) and (t), 1-202(a), (c), (e) and (i), 1-203(i.1), (p) and (r), 1-204(a), 1-207(l), 305(a)(ix), 1-606(a) and (d) and 1-609(a)), proposes to amend regulations concerning the subject matter of the act to read as set forth in Annex A.

Summary and Purpose of Regulations

Section 102.041. This proposed rulemaking will indicate that a "bank," as defined under the act, does not include a person organized as a holding company and codify the Commission's published interpretation of when a "bank-organization" becomes a "bank" for purposes of the act.

Section 102.112. The Commission's published position on when the definition of "institutional investor" would include IRAs, SEPs and KEOGHs will be codified into a separate regulation.

Section 102.202. This section will be amended to: include an affirmative statement of when the offer and sale of real property would be a "security" under the act; delete references to the Unit Property Act; and follow United States Securities and Exchange Commission (SEC) No Action Letters which base the existence of a security on participation in a mandatory rental pool arrangement.

Section 102.241. This section will be amended to make the definition of "exchange" similar to the Federal securities laws.

Section 202.010. The amendment to this section would make it clear that all securities that are exempt securities under section 3(a)(2) of the Securities Act of 1933 (1933 Act) (15 U.S.C.A. § 77c(a)(2)) would be exempt under section 202(a) of the act except when a separate security exists by application of SEC Rule 131.

Section 202.030. The section will be amended to: state that all section 3(a)(3) of the 1933 Act exempt securities, as interpreted by SEC Release 33-4412, are eligible for the section 202(c) of the act exemption; define "prime quality" as being in one of the three highest ratings of a Nationally recognized statistical rating organization; prohibit use of public media advertising and mass mailings; and require that commercial paper issued by bank holding companies contain disclosures that the paper is not issued by a "bank" and, therefore, is not covered by FDIC insurance.

Section 202.051. The section will be amended to correct a miscitation.

Section 202.092. The section will be amended to: define the term guaranty; and include only issuers located in this Commonwealth or an issuer where the guaranty would be deemed a separate security under SEC Rule 131.

Section 203.091. As required by Act 108 of 2002, the section will be amended to delete the filing requirement and Form 203-I.

Section 203.161. The section will be amended to permit issuers relying on this section to comply with the trust indenture and offering circular requirements of section 203(p) of the act by satisfying Parts V—VII of the Statement of Policy of the North American Securities Administrators Association Regarding Church Bonds.

Section 203.189. The Commission proposes to delete the definition of "accredited investor" in § 204.010 as being obsolete as the General Assembly enacted a specific statutory accredited investor exemption in the act of November 24, 1998 (Act 109) (P. L. 829, No. 109). However, a definition of "accredited investor" is necessary for operation of the exemption created by this section and therefore, this section will be amended to include the definition of "accredited investor" as set forth in SEC Rule 501(a).

Section 204.010. Since Act 109 enacted an accredited investor exemption in section 203(t) of the act, the definition of "accredited investor" in § 204.010 (relating to increasing number of purchasers and offerees) is no longer required. Therefore, the section will be amended to delete the definition of "accredited investor."

Section 207.120. The National Securities Markets Improvement Act of 1996 (NSMIA) prohibits states from registering securities issued by registered investment companies. This section relates to registration of investment company securities and, under NSMIA, is no longer applicable. Therefore, the section will be reserved.

Section 305.011. NSMIA prohibits states from maintaining rules governing recordkeeping, or financial or operational reporting requirements for broker-dealers that are inconsistent with rules established by the SEC under the Securities Exchange Act of 1934 (15 U.S.C.A. §§ 78a—78kk). These generally are rules of the National Association of Securities Dealers (NASD) which are subject to SEC approval. The section will be amended to mirror the inspection requirements for broker-dealers of their offices of supervisory jurisdiction, branch offices and nonbranch locations in accordance with criteria set forth in NASD Rule 3010(g) and NASD Notice to Members 98-38.

Section 606.011. Act 108 gave the Commission authority to require, by rule, that persons purchasing securities from a nonprofit issuer under section 203(p) of the act receive annual financial information from the issuer. The section will be amended accordingly.

Section 606.041 It is proposed that this section be amended to permit the Assistant Director of the Division of Corporation Finance to exercise authority delegated to the Director in his absence.

Persons Affected by the Proposed Rulemaking

Commonwealth issuers of municipal securities and issuers of commercial paper will be affected by the proposed rulemaking. Registered broker-dealers will be affected by the proposed amendments to inspection requirements for various offices maintained by the

broker-dealer. Nonprofit organizations issuing debt securities secured by a first lien mortgage shall comply with certain disclosure requirements in the use of an offering circular and in annual financial information to be given to security holders in this Commonwealth.

Fiscal Impact

The proposed rulemaking reduces compliance costs by eliminating the filing of Form 203-I. The only new compliance cost is that nonprofit organizations which sell debt securities to Commonwealth residents that are secured by a first lien mortgage on property owned by the issuer must provide annual financial information to those purchasers. The Commission does not believe the compliance cost to be unreasonable when balanced against an investor's need to know the financial health of the issuer and the security of bonds the investor purchased. No additional compliance cost is envisioned for broker-dealer inspection of their offices as the regulatory requirement mirrors that which already exists in NASD rules.

Paperwork

The Commission proposes to eliminate Form 203-I. The only new paperwork requirement is the provision of annual financial information to Commonwealth residents who have purchased debt securities from a nonprofit organization which are secured by a first lien mortgage on property owned by the organization.

Effective Date

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

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 3, 2003, the Commission submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on Commerce and Economic Development and the Senate Committee on Banking and Insurance. In addition to submitting the proposed rulemaking, the Commission has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Commission. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed rulemaking, it will notify the Commission within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed rulemaking to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Commission, the General Assembly and the Governor of objections raised.

Availability in Alternative Formats

This proposed rulemaking may be made available in alternative formats upon request. The Commission also will receive comments on this proposed rulemaking in alternative formats. TDD users should use the AT&T Relay Center, (800) 854-5984. To make arrangements for alternative formats, contact Cheryl Krchnar, ADA Coordinator, (717) 787-6828.

Contact Person

Interested persons are invited to send comments concerning the proposed rulemaking within 30 days of publication of this notice to G. Philip Rutledge, Chief

Counsel, Securities Commission, Eastgate Building, 1010 N. Seventh Street, 2nd Floor, Harrisburg, PA 17102-1410, (717) 783-5130.

M. JOANNA CUMMINGS,
Secretary

Fiscal Note: 50-118. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 64. SECURITIES

PART I. SECURITIES COMMISSION

Subpart A. DEFINITIONS

CHAPTER 102. DEFINITIONS

§ 102.041. [Banking institution; savings and loan institution] Bank holding companies; banks in organization.

(a) [For the purpose of section 102(d) of the act (70 P. S. § 1-102(d)), the term "banking institution" means an institution organized under the applicable State or Federal law:

(1) The business of which is substantially confined to the business of banking.

(2) Supervised and examined as a bank by the appropriate State or Federal authorities having supervision over the institution. For the purpose of this subsection, the "banking business" is deemed to be borrowing and lending and the receipt of deposits. The term "banking institution" does not include a bank holding company or a bank in organization.] The definition of "bank" in section 102(d) of the act (70 P. S. § 1-102(d)) does not include a holding company for a bank.

(b) [For the purpose of section 102(d) of the act (70 P. S. § 1-102(d)), the term "savings and loan institution" means an institution organized under the applicable State or Federal law:

(1) The business of which is substantially confined to the savings association business.

(2) Examined and supervised as a savings association by the appropriate State or Federal authorities having supervision over an institution. For the purpose of this subsection, the term "savings association business" is deemed to be the receipt of deposits from and the making of loans to members of the association. The term "savings and loan institution" does not include a savings and loan holding company or a savings and loan in organization.] The definition of "bank" in section 102(d) of the act does not include a bank-in-organization. Whether an entity is a "bank" or a "bank-in-organization" should be determined in accordance with the interpretation of the primary regulatory authority responsible for administration of the banking laws under which the entity is being formed or with which it shall otherwise comply.

§ 102.112. SEPs, IRAs and KEOGHs as institutional investors.

Institutional investor, as defined in section 102(k) of the act (70 P. S. § 1-102(k)), includes a Qualified Pension and Profit Sharing and Stock Bonus Plan under section 401 of the Internal Revenue Code of 1986 (KEOGH), an Individual Retirement Account under section 408 of the Internal Revenue Code of

1986 (IRA) and a Simplified Employee Pension under section 408(k) of the Internal Revenue Code of 1986 (SEP) if the KEOGH, IRA or SEP has one of the following:

- (1) Plan assets of \$5 million or more.
- (2) Retained, on an ongoing basis, the services of a person knowledgeable and experienced in financial and business matters to render professional investment management advice and has investments of \$500,000 or more in securities.

§ 102.202. Real property [units].

(a) For purposes of section 102(t) of the act (70 P. S. § 1-102(t)), the term "security" is deemed to include the offer and sale of real property [units ("unit" or "units") where] when one of the following exists:

(1) [The purchaser of a unit is offered a rental pool arrangement in connection with the offer of the unit.

(2)] The purchaser of [a unit] the property is required by the terms of the purchase or by reason of acquiring title [to a unit] either:

(i) To use the seller to perform services in connection with a sale, lease or license of the [purchased unit] property purchased.

(ii) To hold [his unit] the property available to persons other than the purchaser for the other person's lease, license or other use for a specified period of time or for a period of time when the [unit] property is not in use by the owner.

(2) The purchaser is required by the terms of the purchase or by reason of acquiring title to participate in a rental pool arrangement.

[(3) One or more units (other than the purchased unit) or all or part of the common elements are to be used for activities which are intended to generate income for the purchasers as a group, either directly or indirectly by reason of a reduction in the common expenses payable by the unit owners and the seller represents, or otherwise gives the purchaser reason to believe or expect, that the income during a 1-year period will equal or exceed 20% of the actual or anticipated common expenses for the period.

(4) The purchaser of a unit is offered, as part of the offer or in connection therewith, a property interest which would itself be deemed to be a security under section 102(t) of the act or this section.

(b) For purposes of this section, the term "seller" means every beneficial owner of two or more units who offers the units for sale or longterm lease, and affiliates of those persons.

(c) For purposes of this section, the terms "unit," "common elements" and "common expenses" are defined as in the Unit Property Act (68 P. S. §§ 700.101—700.805). Additionally, where one or more parcels of real property have been developed so as to make portions thereof capable of separate, exclusive ownership by different persons and the owners will also own one or more portions thereof in common and will share the expenses relating to the common portions, the portions capable of sepa-

rate, exclusive ownership shall be deemed "units", the common portions shall be deemed "common elements" and the expenses shall be deemed "common expenses" for purposes of this section, notwithstanding that the real estate cannot be or has not been submitted to the Unit Property Act (68 P. S. §§ 700.101—700.805).

(d)] (b) For purposes of this section, the term "rental pool arrangement" constitutes either:

(1) A device whereby a person, whether or not the seller, undertakes to rent [units] the property on behalf of [their owners] the owner during periods of time when [a unit] the property is not in use by its owner, the rents received from all [units] properties participating in the pool and the expenses attributable to the rents being combined with each [unit] property owner receiving a ratable share of the rental proceeds regardless of whether his particular [unit was] property actually was rented.

(2) Other devices having like attributes. [The term "rental pool arrangement" includes voluntary arrangements wherein the unit owner places his unit in a rental pool when and if he chooses to do so.]

§ 102.241. Exchange.

[The term "exchange" means an organization or association, whether incorporated or unincorporated, which constitutes, maintains or provides a market place or facilities for bringing together purchasers and sellers of securities or for otherwise performing with respect to securities the functions commonly performed by a stock exchange, specifically including the maintenance of an auction market for the purchase or sale of securities.] For purposes of the act, the term "exchange" includes a National securities exchange registered with the United States Securities and Exchange Commission (SEC) under section 6 of the Securities Exchange Act of 1934 (15 U.S.C. § 78f) (1934 Act) or a National quotation system operated by a National securities association registered with the SEC under section 15A of the 1934 Act (15 U.S.C. § 78o-3).

Subpart B. REGISTRATION OF SECURITIES

CHAPTER 202. EXEMPT SECURITIES

§ 202.010. [Private activity bonds] Securities issued by a governmental unit.

[(a)] The [availability of the] exemption contained in section 202(a) of the act (70 P. S. § 1-202(a)) is [not limited to an issuer or guarantor of a private activity bond] available for any security described in that section which is an exempt security under section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77c(2)) except for any part of an obligation evidenced by a bond, note, debenture or other evidence of indebtedness issued by any governmental unit specified in section 3(a)(2) that is deemed to be a separate security under United States Securities and Exchange Commission Rule 131 (17 CFR 230.131 (relating to definition of security issued under governmental obligations)).

[(b) A private activity bond, or industrial development bond, as defined in the Internal Revenue Code of 1986 (IRC), shall be deemed to have been

issued or guaranteed by a governmental instrumentality and therefore exempt under section 202(a) if the issuer has obtained one of the following:

(1) A ruling from the Internal Revenue Service or an opinion of counsel, experienced in matters relating to taxation, that the interest paid on the security is excludable from gross income under section 103(a)(1) of the IRC (26 U.S.C.A. § 103(a)(1)), except during a period when it is held by a substantial user of the facilities to be financed by the proceeds of the securities or by a related person of the substantial user, as those terms are defined in section 147(a) of the IRC (26 U.S.C.A. § 147(a)) and regulations adopted thereunder.

(2) A "No action Letter" from the United States Securities and Exchange Commission indicating that the sale of the securities is exempt from the registration provisions of section 5 of the Securities Act of 1933 (15 U.S.C.A. § 77e (1992)) by reason of section 3(a)(2) thereof (15 U.S.C.A. § 77(c)(2) (1992)), concerning industrial development bonds or an opinion of counsel, experienced in matters relating to securities, to the effect that the exemption is available.]

§ 202.030. Commercial paper.

(a) The exemption contained in section 202(c) of the act (70 P. S. § 1-202(c)) [shall be applicable only with respect to prime quality, unsecured short-term promissory notes or a renewal thereof, or a guarantee of the notes or of a renewal which are the following] is available for any security which is a Federally covered security by reason of being an exempt security under section 3(a)(3) of the Securities Act of 1933 (15 U.S.C. § 77c(3)) as interpreted by Release 33-4412 (26 Fed. Reg. 9158 (1961)) issued by the United States Securities and Exchange Commission which provides that:

(1) [Payable on a stated maturity date] The commercial paper shall be prime quality of a type not ordinarily purchased by the general public.

(2) [Issued in units of not less than \$5,000 provided that there may be no sales of fractional interests in units] The commercial paper is of a type eligible for discounting by banks which are members of the Federal Reserve System.

(3) [Issued with a maturity not exceeding nine months exclusive of days of grace from the date of issuance] The commercial paper is not payable on demand and does not contain a provision for an automatic "rollover."

(4) [Issued] The commercial paper is issued to facilitate current operational business [transactions] requirements.

(5) [Marketed without the use of any public media advertisement or any mass mailing.] The proceeds of the commercial paper are not used to:

(i) Discharge existing indebtedness unless the indebtedness is itself exempt under section 3(a)(3) of the Securities Act of 1933.

(ii) Purchase or construct a plant facility.

(iii) Purchase durable machinery or equipment.

(iv) Fund commercial real estate development or financing.

(v) Purchase real estate mortgages or other securities.

(vi) Finance mobile homes or home improvements.

(vii) Purchase or establish a business enterprise.

(b) ["Prime quality" for] For purposes of this section, "prime quality" means [one of the following:

(1) That the issuer of such notes must be rated within the three highest ratings as determined by Standard & Poor's (A-1, A-2 or A-3) or Moody's Investors Service (P-1, P-2 or P-3) or the two highest ratings as determined by Fitch Investors Service (F-1 or F-2) or have an equivalent rating by a national rating service which the Commission may by order specify.

(2) That upon application to the Commission the issuer of the notes has been determined by the Commission to have credit characteristics equivalent to comparable issuers so rated, the determination by the Commission to be made upon a review of the net worth of the issuer, liquidity position, recent financial performance, aggregate indebtedness and access to additional channels of borrowing] that the commercial paper has been rated in one of the top three rating categories by a Nationally recognized statistical rating organization.

(c) [The proceeds of short-term promissory notes shall be deemed used to finance current operational business expenses of the issuer if they are used for short-term business activities of the issuer. They may not be used for permanent or fixed investments such as land, buildings or machinery nor used for speculative transactions or transactions in securities or for loans or capital to subsidiaries or affiliates for those purposes.] When commercial paper is being issued by a holding company for a bank, as that term is defined in section 102(d) of the act (70 P. S. § 1-102(d)), the commercial paper shall bear a prominent legend in bold face type of at least 12 points in size indicating that the commercial paper:

(1) Has not been issued by the bank for which the issuer is the holding company.

(2) Is not a deposit of the bank covered by Federal deposit insurance.

(d) No public media advertisement or mass mailing may be made in connection with soliciting offers or sales of [the notes] commercial paper; provided, that nothing in this section [shall limit] limits mailings to institutional investors or broker-dealers, as those terms are defined in the act and this subpart.

§ 202.032. [Commercial paper issued by bank holding companies] (Reserved).

[(a) Where a bank holding company or any subsidiary of a bank holding company which is not itself a banking institution, proposes to offer or sell securities in this Commonwealth in reliance upon section 202(c) of the act (70 P. S. § 1-202(c)), any note, certificate or other evidence of indebtedness to be issued shall bear a conspicuous legend in

roman type at least as large and as legible as ten-point modern type in writing, stating:

- (1) That the securities are commercial paper.
- (2) That the securities have not been issued or guaranteed by any banking institution.
- (3) that the securities are not guaranteed or insured by any agency or instrumentality of any state or the Federal government; provided that such legend shall be omitted either where the subject securities are guaranteed as to payment of principal and interest by an irrevocable letter of credit issued by a banking institution or where the subject securities are sold in units of not less than \$100,000.

(b) For the purposes of this regulation, the term "bank holding company" shall mean a corporation registered under 12 U.S.C.A. § 1841 et seq. (1969) (relating to Bank Holding Companies).

(c) For the purposes of this regulation, the term "banking institution" shall have the meaning as set forth in this Title.]

§ 202.051. Equity securities of nonprofit organizations.

(a) For the purpose of section [203(e) (70 P. S. § 1-203(e))] 202(e) of the act (70 P. S. § 1-202(e)), the exemption [shall] is not [be] applicable to a proposed offering of nondebt securities by an issuer [where] when:

* * * * *

§ 202.092. Guaranties of certain debt securities exempt.

(a) The exemption established by this section applies to a guaranty of a bond, as those terms are defined in subsection (d)(1) and (2), that is offered or sold in this Commonwealth.

(b) Under the authority contained in section 202(i) of the act (70 P. S. § 1-202(i)), the Commission finds that it is not in the public interest nor necessary for the protection of investors to require the registration under section 201 of the act (70 P. S. § 1-201) of the guaranty [of payment of interest, principal or premium on bonds—guaranty—when] of a bond if all of the following conditions are met:

(1) [The bonds are exempt from the registration requirements of section 201 of the act (70 P. S. § 1-201) by virtue of section 202(a) of the act (70 P. S. § 1-202(a)).

(2) The issuer of the guaranty—the guarantor—or an affiliate of the guarantor is obligated to make payments to the issuer of the bonds under a lease, sublease, loan agreement, installment sale agreement or similar arrangement sufficient to carry the debt service requirements on the bonds.

(3) Under the trust indenture, mortgage, deed of trust or similar agreement, the guaranty is entered into between the guarantor and the trustee for the bonds, and the guarantor unconditionally guarantees payment of interest, principal and premium, on the bonds in the event of default by the issuer of the bonds or on the obligation set forth in paragraph (2).

(4)] The official statement or other disclosure document being utilized in connection with the offer and sale of the bonds contains either of the following:

* * * * *

[(5) The guaranty may not be bought, sold or traded as a security or otherwise realized upon by a securityholder separately from the securityholder's interest in the bonds.

(6)] (2) The proceeds from the sale of the bonds [shall] are to be utilized for the benefit of a facility which is owned or operated—user—by either of the following:

* * * * *

[(7)] (3) Under the guaranty [agreement], the guarantor is required to do the following:

* * * * *

(ii) Be responsible for expenses incurred by the Trustee for the Bondholders in complying with paragraph [(8)] (4)(ii) and (iii) unless there are specific provisions to the contrary in the relevant financing documents.

(iii) Notify the Trustee for the Bondholders within 24 hours after it becomes insolvent as that term is defined in subsection [(c)(1)] (d)(4).

[(8)] (4) Under the trust indenture, mortgage, deed of trust or other similar agreement, the trustee for the bondholders, as that term is defined in subsection [(c)(2)] (d)(5), is required to do the following:

* * * * *

(iii) Notify the bondholders of the occurrence of any of the following events no later than 30 days after an occurrence and inform the bondholders that a copy of the bondholders list described in subparagraph (i) will be provided within 30 days of receipt of a written request for the list:

(A) The date the guarantor failed to comply with subsection [(a)(7)(i)] (b)(3)(i).

* * * * *

(C) The date on which the trustee is informed that the guarantor is insolvent as that term is defined in subsection [(c)(1)] (d)(4). There is no independent duty on the part of the trustee to determine the insolvency of the guarantor.

[(b)] (c) * * *

[(c)] (d) The following terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

(1) Bond—This includes only the following:

(i) A bond, note, debenture or other evidence of indebtedness that is an exempt security under section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77c(2)) when the issuer of the security is located in this Commonwealth.

(ii) A bond, note, debenture or other evidence of indebtedness that is an exempt security under section 3(a)(2) of the Securities Act of 1933 (15 U.S.C. § 77c(2)) but when the guaranty issued in connection with the bond, note, debenture or other evidence of indebtedness is deemed to be a separate security pursuant to United States Securities and Exchange Commission Rule 131 (17 CFR § 230.131 (relating to definition of security issued under governmental obligations)).

(2) **Guaranty**—A duly executed written agreement wherein a person, not the issuer, in connection with offer and sale of bonds in this Commonwealth, guarantees the prompt payment of the principal of, and interest on, the bonds whether at the stated maturity, at redemption prior to maturity or otherwise, and premium, if any, when and as the principal and interest shall become due and the guaranty cannot not be bought, sold or traded as a security or otherwise realized upon by a bondholder separately from the bondholder's interest in the bonds.

(3) **Guarantor**—A person who executes a guaranty.

(4) **Insolvent**—The inability of a guarantor to pay debts as they fall due in the usual course of business, or having liabilities in excess of the fair market value of assets. For purposes of this paragraph, a guarantor may not be considered insolvent if the auditor's report to the guarantor's audited balance sheet and statement of income did not contain a going concern disclosure as that term is defined in § 609.032(b).

[(2)] (5) * * *

CHAPTER 203. EXEMPT TRANSACTIONS

§ 203.091. Equity securities issued by reporting company.

[(a) A person proposing to sell securities under section 203(i.1) of the act (70 P. S. § 1-203(i.1)) shall complete and file with the Commission Form 203-I, which follows this section.

(b) Form 203-I may be accompanied by two copies of a preliminary prospectus or offering circular in order to comply with section 203(h) of the act (70 P. S. § 1-203(h)).

(c)] For purposes of this section and the availability of the exemption contained in section 203(i.1) of the act (70 P. S. § 1-203(i.1)), the term "equity security" includes:

- (1) Common stock, preferred stock and nondebt securities convertible into common or preferred stock.
- (2) Nontransferable warrants to purchase any of the foregoing.
- (3) Transferable warrants exercisable within not more than 90 days of issuance to purchase any of the foregoing.

(Editor's Note: As part of this proposal, the Commission is proposing to delete the text of Form 203-I, which appears at 64 Pa. Code pages 203-12—203-16, serial pages (262388)—(262392).)

§ 203.161. Debt securities of nonprofit organizations.

(a) A person proposing to offer debt securities under section 203(p) of the act (70 P. S. § 1-203(p)) shall complete and file with the Commission two copies of the following notice, designated by the Commission as Form 203-P not later than 5 business days before the issuer receives from any person an executed subscription agreement or other contract to purchase the securities being offered or the issuer receives consideration from any person therefor, whichever is earlier.

* * * * *

(b) Except in cases [where] when the delivery of [a complete offering circular, before or concurrently with any offer of securities,] an offering document

is not required by order of the Commission [as a condition of qualification under section 203(p) of the act (70 P. S. § 1-203(p))], every offering of debt securities pursuant to [this] section 203(p) of the act shall be made by an offering [circular] document containing [complete] all material information about the securities being offered and the issuer [, including the following:]. In preparing an offering document to meet the requirements of this section, the Commission suggests that issuers include information that is elicited by Part VII of the Statement of Policy Regarding Church Bonds adopted April 14, 2002, by the North American Securities Administrators Association, Inc. and any successor policy thereto ("NASAA Guidelines") and in the format suggested therein. A copy of the offering document and any offering literature to be used in connection with the offer or sale of securities under section 203(p) shall be filed with the Commission at the same time the notice required by subsection (a) shall be filed.

[(1) The name, address and date of formation of the issuer.

(2) The date of the offering circular.

(3) The risk factors including by way of illustration and not limitation the following, if applicable, ability of issuer to pay interest and repay indebtedness; fluctuation in issuer's income; limited experience of chief executive officer or operating personnel; limited experience of underwriter or other persons or both assisting in the offering, or of both; amount of commissions, consulting fees and underwriting compensation; lack of marketability of the securities and lack of loan value of the securities.

(4) Activities engaged in by the issuer.

(5) Financial statements, prepared in accordance with section 609(c) (70 P. S. § 1-609(c)) and the regulations adopted thereunder.

(6) Membership figures for the three year period preceding the date of the offering.

(7) Use of proceeds and purpose of the offering; alternative plans if all securities are not sold; escrows of proceeds to be raised in the offering until a stated percentage of estimated project or operational costs are raised.

(8) Education and prior employment background of chief executive officer, or operating personnel, officer, directors, trustees or organizers and all remuneration paid or proposed to be paid; directly or indirectly, to each of such persons in connection with the issuer's activities or in connection with the offering and any relationship or affiliation between any such person and any vendor, contractor, developer, or any other person who proposes to engage in any material transaction with the issuer or who has at any time within the past five years engaged in any material transaction with the issuer.

(9) Detailed information about the security including information with respect to: interest, subordination, call or redemption privileges, lien priorities, amortization, maturity, sinking fund, retirement, and default including the type of event which constitutes a default and whether or not periodic evidence is required to be furnished as to

the absence of any default in compliance with the terms of the indenture or other trust instrument.

(10) Name and address of trustee, if any, and the nature of any material relationship with the issuer or any of its affiliates; the percentage of securities of the class necessary to require the trustee to take action in the event of a default and what indemnification the trustee may require before proceeding to enforce any lien referred to in paragraph (9) of this subsection; if there is no trustee, the issuer should undertake to notify all investors in the event of a default in the issuer's obligations. The issuer must undertake to notify all security holders of the existence of such default and of the steps to be taken to assert their rights under the terms of the securities.

(11) Name and address of any underwriter, the amount being underwritten, any relationship between the underwriter and the issuer or any affiliate of the issuer; all commissions or other consideration to be paid, directly or indirectly, to any underwriter in connection with the offering.

(12) Name and address of any person assisting the issuer by way of preparation of offering literature, instructing representatives on selling techniques, pricing the offering, acting as a finder or otherwise consulting with the issuer with respect to the offering; the amount of any compensation to be paid, directly or indirectly, to such person; whether any such person, or any affiliate, will enter into any consulting, construction or other agreement with the issuer, or any affiliate of the issuer, in furtherance of the issuer's activities; and whether such person is licensed as a broker-dealer, agent or investment adviser (or equivalent) in any jurisdiction.

(13) A breakdown of total expenses of the offering including, without limitation, legal and accounting fees, printing costs, fees referred to in paragraphs (11) and (12) of this subsection, finders' fees and other anticipated expenses.

(14) Any terms on which purchases may be made, such as periodic payments and any arrangements to be made by the issuer or any person described in paragraphs (11) and (12) of this subsection to secure financing for purchasers of the securities.

(15) A notice describing the provisions of section 207(m)(2) (70 P. S. § 1-207(m)(2)) and informing an offeree or purchaser of the method of exercising the rights created by that section and the regulations promulgated thereunder.

(16) A description of any legal proceedings pending against the issuer.

(17) An indication that an annual report containing a balance sheet and income statement of the issuer for the preceding fiscal year, prepared by an independent public accountant or certified public accountant and including an opinion of the accountant as to the financial condition, will be distributed to investors not more than 120 days after the end of the issuer's fiscal year; and

(18) Other information as the issuer may deem material, such as the status of the securities for personal property taxation in the Commonwealth.]

(c) [The issuance of debt securities in an amount exceeding \$100,000 under section 203(p) (70 P. S.

§ 1-203(p)) must be pursuant to an indenture or other trust instrument complying with the provisions of the Trust Indenture Act of 1939, 15 U.S.C. § 77aaa et seq. (1971).] The offering document required by subsection (b) shall meet the following conditions:

(1) Contain a notice of a right to withdraw that complies with § 207.130 (relating to notice to purchasers under section 207(m) of the act (70 P. S. § 1-207(m))).

(2) Contain financial statements of the issuer that comply with § 609.034(b) (relating to financial statements).

(3) Demonstrate compliance with the trust indenture standards and trustee qualification standards and associated disclosure requirements as set forth in Parts V and VI of the NASAA Guidelines if the total amount of securities to be offered exceeds \$250,000.

[(d) Include with the offering circular described in subsection (b) of this section an opinion of counsel with respect to the lien priority granted to purchasers of the securities, the validity and effect of the securities when issued and paid for and the availability of the section 203(p) (70 P. S. § 1-203(p)) exemption with respect to the particular offering. Also, include]

(4) Include whatever data may be necessary to establish that investors will receive a first lien on real estate of the issuer, that the issuer has not defaulted on prior obligations and that the total amount of securities offered does not exceed 75% of the current fair market value of the real property covered by the securities [, less the unpaid amount of any unpaid special assessment taxes].

[(e) Describe supplementally, if applicable, any provisions made for escrowing the proceeds of the offering until the first lien described in subsection (d) of this section is established.]

§ 203.189. Isolated transaction exemption.

* * * * *

(b) *Waivers.*

* * * * *

(2) Subsection (a)(3) does not apply if the following criteria are met:

* * * * *

(ii) The offers made in this Commonwealth in reliance on this section are made only to accredited investors as that term is defined in [§ 204.010] Rule 501(a) of Regulation D promulgated by the United States Securities and Exchange Commission (17 CFR 230.501(a)) (relating to definitions and terms used in Regulation D).

(iii) The sales made in this Commonwealth in reliance on this section are made only to accredited investors as that term is defined in [§ 204.010] Rule 501(a) of Regulation D promulgated by the United States Securities and Exchange Commission (17 CFR 230.501(a)).

* * * * *

CHAPTER 204. EXEMPTION PROCEEDINGS

§ 204.010. Increasing number of purchasers and offerees.

* * * * *

(d) *Definitions.* For purposes of this section, the following terms have the following meanings:

* * * * *

[(4) *Accredited investor.* A person who meets the definition of accredited investor in SEC Rule 501(a) (17 CFR 230.501(a)).]

* * * * *

CHAPTER 207. GENERAL REGISTRATION PROVISIONS

§ 207.120. [Continuous offering] (Reserved).

[The offer of securities, under a registration statement filed with the Commission under section 205 of the act (70 P. S. § 1-205) or section 206 of the act (70 P. S. § 1-206), by an open-end investment company, face amount certificate company or unit investment trust, as such terms are defined in the Investment Company Act of 1940 (15 U.S.C. §§ 80a-1—80a-52), shall constitute a “continuous offering” for the purpose of section 207(1) of the act (70 P. S. § 1-207(1)) and this chapter.]

Subpart C. REGISTRATION OF BROKER-DEALERS, AGENTS, INVESTMENT ADVISERS AND INVESTMENT ADVISER REPRESENTATIVES AND NOTICE FILINGS BY FEDERALLY-COVERED ADVISERS

CHAPTER 305. DENIAL, SUSPENSION, REVOCATION AND CONDITIONING OF REGISTRATION

§ 305.011. Supervision of agents, investment adviser representatives and [employes] employes.

* * * * *

(c) As evidence of compliance with the supervisory obligations imposed by this section, every broker-dealer and investment adviser shall implement written procedures, a copy of which shall be kept in each location at which the broker-dealer or investment adviser conducts business, and shall establish, maintain and enforce those written procedures designed to achieve compliance with the act and this title and to detect and prevent violations described in subsection (a). These written procedures, at a minimum, shall address:

* * * * *

(10) The periodic inspection of each location in this Commonwealth from which business is conducted to ensure that the written procedures and systems are enforced. In establishing an inspection cycle, the broker-dealer and investment adviser shall give consideration to the nature and complexity of the securities activities for which the location is responsible, the volume of business done and the number of agents or investment adviser representatives assigned to the location. **The obligation of diligent supervision required by this section may require that one or more locations of a broker-dealer or investment adviser in this Commonwealth receive more inspections or be on a periodic inspection cycle different than other locations of the broker-dealer or investment adviser in this Commonwealth and that inspections be unannounced.**

(i) [The obligation of diligent supervision required by this section may require that one or more locations in this Commonwealth receive more than one inspection per year and that one or more of these inspections be unannounced.] An office of supervisory jurisdiction of a broker-dealer shall be inspected at least annually. Branch offices and nonbranch locations of a broker-dealer shall be inspected in accordance with an inspection cycle established in the broker-dealer’s written supervisory procedures.

(ii) It is the responsibility of the broker-dealer or investment adviser to [**determine the required number of**] ensure through inspections of each location [**is to receive each year to ensure**] in this Commonwealth that the written procedures and systems are enforced and the supervisory obligations imposed by this section are being honored.

* * * * *

(iv) For purposes of this section, the terms “office of supervisory jurisdiction” and “branch office” shall have the same meaning as those terms are defined in NASD Conduct Rule 3010(g) or any successor thereto. The term “nonbranch location” means any location at which a broker-dealer is conducting a securities business that does not come within the definition of “office of supervisory jurisdiction” or “branch office.”

* * * * *

Subpart F. ADMINISTRATION

CHAPTER 606. MISCELLANEOUS POWERS OF COMMISSION

§ 606.011. Financial reports to security holders.

(a) In the case of securities issued under section 203(d) or (p) of the act (70 P. S. § 1-203(d) or (p)), or registered under sections 205 or 206 of the act (70 P. S. §§ 1-205 and 1-206), the issuer shall, so long as the securities are held of record by a Commonwealth resident, deliver its financial statements to each holder at least annually and within 120 days after the close of the fiscal year of the issuer.

* * * * *

§ 606.041. Delegation and substitution.

* * * * *

(e) The Commission authorizes the [**Chief Counsel or Deputy Chief Counsel to exercise delegations given in this section in the absence of the Director of the Division of Corporation Finance or the Director of the Division of Licensing.**] following:

(1) **The Chief Counsel, Deputy Chief Counsel or the Assistant Director of the Division of Corporation Finance may exercise the delegations given in this section in the absence of the Director of the Division of Corporation Finance.**

(2) **The Chief Counsel and Deputy Chief Counsel may exercise the delegations given in this section in the absence of the Director of the Division of Licensing.**

[Pa.B. Doc. No. 03-267. Filed for public inspection February 14, 2003, 9:00 a.m.]

STATE EMPLOYEES' RETIREMENT BOARD

[4 PA. CODE CHS. 243 AND 249]

Optional Alternate Retirement Plans

The State Employees' Retirement Board (Board) proposes to amend Chapters 243 and 249 (relating to membership, credited service, classes of service and eligibility for benefits; and administration, funds, accounts, general provisions) to read as set forth in Annex A. The rulemaking is being proposed to delete the transitional provisions for electing to participate in an optional alternate retirement program or plan contained in §§ 243.3 and 249.58 (relating to optional alternate retirement program). The transitional provisions are no longer needed and, read broadly, may conflict with current 71 Pa.C.S. (relating to State Employees' Retirement Code) (Retirement Code) provisions, because the Retirement Code does not allow current members to opt out of the system.

A. Effective Date

The proposed rulemaking will go into effect upon publication in the *Pennsylvania Bulletin* as a final-form rulemaking.

B. Contact Person

For further information, contact Sean Sanderson, Director of Communications, State Employees' Retirement System, 30 North Third Street, P. O. Box 1147, Harrisburg, PA 17108, (717) 787-9657; or M. Catherine Nolan, Assistant Counsel, State Employees' Retirement System, 30 North Third Street, P. O. Box 1147, Harrisburg, PA 17108, (717) 783-7317.

C. Statutory Authority

This proposed rulemaking is being made under the authority of 71 Pa.C.S. § 5902(h) (relating to administrative duties of the board).

D. Background and Purpose

When the Retirement Code was amended in 1974, the Retirement Code, for the first time, permitted certain school employees to choose an alternate retirement plan. The Retirement Code applies to new employees. The Board promulgated §§ 243.3 and 249.58 to implement this Retirement Code provision. Sections 243.3 and 249.58, among other things, contained transitional provisions, granting to existing employees an opportunity to elect an alternate retirement plan. Section 249.58 provides that vested members make an election on or before November 1, 1975. Active members who had not vested as of November 1, 1975, had 60 days from becoming eligible to vest to so elect. The transitional provisions of §§ 243.3 and 249.58 were added because the existing employees never had the opportunity to select an alternate plan. At the time of enactment of §§ 243.3 and 249.58, the only alternate plan allowed was Teachers Insurance and Annuity Association-College Retirement Equities Fund.

The act of June 22, 2001 (P. L. 530, No. 35) allowed the State System of Higher Education (SSHE) to add insurance companies or mutual funds as additional alternate plans for its employees. Sections 243.3 and 249.58, as written, could be interpreted to allow existing employees, who already had a choice under the Retirement Code to elect an alternate retirement plan, to make an additional election and to opt out of the State Employees Retirement

System (SERS) each time a new alternate plan is approved by SSHE. The Board, however, has always interpreted §§ 243.3 and 249.58 as providing a one-time opportunity for these employees, not a continual choice each time a new alternate plan is approved by the employer. Deleting the language clarifies the intent of the Board and eliminates a potential conflict between §§ 243.3 and 249.58 and the Retirement Code, because the Retirement Code does not allow current members to opt out of the system.

The Public School Employees' Retirement System (PSERS) is proposing a similar revision of its regulations that parallels § 249.58. This amendment will harmonize the regulations of SERS and PSERS with regard to election of alternate retirement plans. SSHE supports the proposed amendment of these provisions.

E. Benefits, Costs and Compliance

Benefits

The proposed rulemaking removes expired transitional provisions, clarifies the Board's intent regarding the election of alternate retirement plans and eliminates a potential conflict between the Retirement Code and §§ 243.3 and 249.58.

Costs

The proposed rulemaking would formalize the Board's long-standing interpretation that the transitional provisions of §§ 243.3 and 249.58 have expired. The proposed rulemaking, therefore, maintains the status quo and has no associated cost.

Compliance Costs

The proposed rulemaking will not impose any additional compliance costs on State employees or employers.

F. Sunset Review

Not applicable.

G. Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 3, 2003, the Board submitted a copy of this proposed rulemaking to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House State Government Committee and the Senate Finance Committee. In addition to submitting the proposed rulemaking, the Board has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by SERS. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, if IRRC has objections to any portion of the proposed rulemaking, it will notify the Board within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria that have not been met by the portion of the proposed rulemaking to which an objection is made. The Regulatory Review Act specifies detailed procedures for review, prior to final publication of the rulemaking, by the Board, the General Assembly and the Governor of objections raised.

H. Public Comments

Written Comments. Interested persons are invited to submit comments, suggestions or objections regarding the proposed rulemaking to the State Employees' Retirement System, 30 North Third Street, P. O. Box 1147, Harrisburg, PA 17108. Comments submitted by facsimile will not be accepted. Comments, suggestions or objections must be received by the Board by March 17, 2003 (within 30 days of publication in the *Pennsylvania Bulletin*).

Interested persons may also submit a summary of their comments to the Board. The summary may not exceed one page in length and must be received by March 7, 2003 (within 20 days following publication in the *Pennsylvania Bulletin*). The one-page summary will be provided to each member of the Board in the agenda packet distributed prior to the meeting at which the final rulemaking will be considered.

JOHN BROSIUS,
Secretary

Fiscal Note: 31-2. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 4. ADMINISTRATION

PART X. STATE [EMPLOYES'] EMPLOYEES' RETIREMENT BOARD

CHAPTER 243. MEMBERSHIP, CREDITED SERVICE, CLASSES OF SERVICE AND ELIGIBILITY FOR BENEFITS

§ 243.3. Optional alternate retirement program.

School [employees] employees, limited to certain designated [employees] employees and officers of The Pennsylvania State University, Indiana University of Pennsylvania, the State System of Higher Education and the Department of Education, shall be permitted to join an optional alternate retirement program in lieu of membership in the system. The program shall be an independent retirement program approved by the employing agency head, provided that the employer is not contributing at a rate greater than that provided in section 5508(b) of the code (relating to actuarial cost method). [Eligible employees, who are members of this System on the effective date of the code, shall have the right to elect to join an alternate retirement program and irrevocably relinquish membership in this System, under conditions to be contained in an agreement to be later approved by the respective employing agencies and the Board and to be published as an appendix to this part.]

CHAPTER 249. ADMINISTRATION, FUNDS, ACCOUNTS, GENERAL PROVISIONS

Subchapter E. GENERAL PROVISIONS

§ 249.58. Optional Alternate Retirement Program.

Pursuant to section 5301 of the code (relating to mandatory and optional membership), certain school [employees] employees may elect not to join the System [or to depart from it] in favor of an optional alternate retirement program approved by the employer. [Such section also requires that such a program be approved by the Secretary of Education or the governing body of certain State institutions, including Pennsylvania State University, as the case may be.] As a consequence, the following [rules and regulations] paragraphs are adopted by the Board to establish guidelines and procedures, insofar as the Board is authorized to so do, with respect to implementing such a program for certain school [employees] employees:

(1) [Section 5301(a)(12) of the code authorizes the governing body of the institution, or the Secretary of Education, where he has jurisdiction, to designate who shall be eligible to participate in the

optional retirement program. They shall be responsible for the establishment of and the provisions of the program.

(2) **Employees, including those employed on the effective date of the establishment of an optional alternate retirement program, who are eligible for membership therein, and who are active members of this System, shall have the option of continuing their active membership or of joining the optional alternate retirement program provided they shall make such election on or before November 1, 1975.**] Every [employee] employee, who [subsequently becomes] is eligible for membership in the optional alternate retirement program, shall make such election within 30 days of the first date of active employment. All [employees] employees not exercising the option to join the optional alternate retirement program as aforesaid shall be deemed to have chosen to commence [or continue] active membership in the System, unless he shall have elected membership in the Public School [Employees'] Employees' Retirement System, as provided by law.

(3) **Where an eligible employee, who is an active member of this System, elects to participate in the optional alternate retirement program in accordance with the provisions of paragraph (2), he may elect to withdraw his accumulated deductions and accumulated social security integration deductions from the fund as of the date of such election; or, if such employee is eligible for vesting, he may elect to leave his accumulated deductions and accumulated social security integration deductions credited to his account in the fund and receive a retirement allowance upon separation from Commonwealth employment; or, at his option, upon attainment of superannuation retirement age, if later. Such retirement allowance shall be based upon his credited service and final average salary while a contributing member to this System only.**

(4) **Notwithstanding any provisions in this section to the contrary, an eligible employee employed on the effective date of the establishment of the optional alternate retirement program, who is eligible for membership therein, who is an active member of this System, and who is not vested, shall have the option of joining the optional alternate retirement program within 60 days of the date upon which he becomes eligible for vesting in accordance with the applicable provisions of the code, in which case he may vest in this System and join the optional alternate retirement program under the same conditions as provided in paragraph (3).**]

(5) **Where (2) When an eligible [employee elects] employee elected to participate in the optional alternate retirement program in accordance with the provisions of paragraph (2) as it existed on _____ (Editor's Note: The blank refers to a date 1 day before the effective date of adoption of this proposal.) or paragraph (4) as it existed on _____ (Editor's Note: The blank refers to a date 1 day before the effective date of adoption of this proposal.) or elects to participate in the optional alternate retirement program in accordance with paragraph (2), the election shall be final and binding so long as [he shall remain] the employee remains eligible**

to remain in the optional alternate retirement program. If **[such an employe] the employee** later becomes employed by the Commonwealth in a capacity which does not qualify him for membership in the optional alternate retirement program, **[he] the employee** shall, upon meeting the qualifications for membership in this System, **[resume making] make** contributions to the fund or reinstate **[his]** former credited service, for which contributions had been withdrawn, as the case may be, in accordance with the applicable provisions of the code. **[In no case shall service,] Service** salary, or other compensation paid to an **[employe] employee** while a member of the optional alternate retirement program

will not be credited toward membership in **or retirement benefit from** this System.

[(6) In the case of eligible employes who elect to join the optional alternate retirement program, the employer's contribution to the optional alternate retirement program on behalf of such employes shall be at the same rate as the employe normal contribution rate to the fund as determined in accordance with the provisions of section 5508(b) of the code (relating to actuarial cost method).

(7)] (3) * * *

[Pa.B. Doc. No. 03-268. Filed for public inspection February 14, 2003, 9:00 a.m.]