

# RULES AND REGULATIONS

## Title 7—AGRICULTURE

### DEPARTMENT OF AGRICULTURE

#### [7 PA. CODE CH. 76]

#### Food Employee Certification

The Department of Agriculture (Department) amends Chapter 76 (relating to food employee certification) to read as set forth in Annex A.

#### *Statutory Authority*

Chapter 65 of 3 Pa.C.S. (relating to the Food Employee Certification Act) (act) provides the legal authority for this final-form rulemaking. Sections 6503(d) and 6505 of the act (relating to certification advisory board and programs; and rules and regulations), respectively: (1) require the Department to adopt food safety protection and training standards for the certification of supervisory employees who are responsible for the storage, preparation, display or serving of food to the public in establishments regulated by the Department or local health organizations; and (2) delegate to the Department the power to adopt regulations necessary for the proper enforcement and administration of the act.

The act also requires that regulations be promulgated with the approval of the Food Employee Certification Advisory Board (Board). The Board approved the proposed rulemaking at its October 6, 2003, meeting. Although that document was subsequently revised in response to comments received from the public and the Independent Regulatory Review Commission (IRRC), the revisions were nonsubstantive and did not require further review by the Board.

#### *Purpose*

Chapter 76 took effect in October 1999. The act was subsequently amended by the act of December 20, 2000 (P. L. 934, No. 124) (Act 124) and then by the act of December 9, 2002 (P. L. 1495, No. 190) (Act 190). The purpose of the final-form rulemaking is to implement the statutory changes of Act 124 and Act 190.

The act was the product of an industry-driven initiative to establish minimum food safety training requirements to be met by at least one supervisory employee in most food establishments in this Commonwealth.

Act 124 revised the act by: (1) deleting the requirement that food safety training requirements be "industry-specific"; (2) extending the date by which food establishments must come into compliance with the act by 2 years (from July 1, 2001, to July 1, 2003); (3) exempting certain food establishments operated by charitable and nonprofit organizations from the requirements of the act; and (4) requiring the Department to develop a food safety training program for those organizations that, although exempt from the requirements of the act, elect to voluntarily seek certification under the act.

Act 190 revised the act by: (1) extending the date by which food establishments must come into compliance with the act by another year (from July 1, 2003, to July 1, 2004); (2) expanding the membership of the Board; and (3) requiring the Department to promulgate regulations (approved by the Board) by July 1, 2004, establishing training programs consistent with the revised act.

The act requires that the Department consider a number of factors in writing the final-form rulemaking, including: (1) the existence and operation of Department-approved employee training programs on safe food handling; (2) the fact that some food establishments engage in only the limited handling of potentially hazardous food; (3) the number of hours necessary to train food establishment employees to handle food safely, with consideration of the "scope" of the food establishment's business; and (4) the demonstration necessary for the Department to be satisfied that a particular supervisory employee is proficient in the safe handling of food. The Department has given consideration to all of these factors in the drafting of the final-form rulemaking.

#### *Need for the Final-Form Rulemaking*

The final-form rulemaking is needed to implement the changes to the act under Act 124 and Act 190.

#### *Comments*

Notice of proposed rulemaking was published at 34 Pa.B. 831 (February 14, 2004) and provided for a 30-day public comment period.

Comments were received from IRRC, the Director of Outdoor Education and Group Rentals for the South Mountain YMCA—Camp Conrad Weiser Outdoor Center (South Mountain YMCA), Goodtime Amusements (through Irvin L. Good, Jr.), the Chester County Health Department (CCHD), the Allegheny County Health Department (ACHD), the Pennsylvania Food Safety Alliance (PAFSA), with members who represent Commonwealth agencies abstaining from the comment process, and the Pennsylvania Food Merchants Association (PFMA). The Department's response to these comments follows:

*Comment 1:* The South Mountain YMCA acknowledged that the act specifically exempts certain tax-exempt and nonprofit organizations from having to comply with the certification requirements in the act, and questioned whether this serves the overall cause of food safety. Although the act allows otherwise-exempt organizations to voluntarily comply, the commentator believes compliance should be mandatory.

*Response:* The Department understands the commentator's concerns, but is constrained by the clear language of the act in this regard. The final-form rulemaking cannot undo the specific exemptions in the act. Section 6510 of the act (relating to exemptions) exempts certain food establishments from compliance and this exemption cannot be undone by regulation.

*Comment 2:* The CCHD noted that the proposed rulemaking did not prescribe duties and responsibilities for a person who becomes a certified supervisory employee. The commentator described the responsibilities it imposes on a "certified food manager" within its jurisdiction, and suggested the final-form rulemaking should impose similar requirements.

*Response:* The Department looks to the act for guidance as to the duties of a certified supervisory employee. The act does not impose any specific responsibilities upon a certified supervisory employee (other than to maintain certification), and the Department will not impose these duties through this final-form rulemaking. In addition, the basic duties the commentator imposes on its "certified food managers" are consistent with duties imposed under Chapter 46 (relating to food code).

*Comment 3:* IRRC reviewed proposed § 76.2 (relating to definitions), and noted that several defined terms that were proposed for deletion were used elsewhere in the proposed rulemaking, and suggested these definitions be retained unless the Department could explain why they are not needed. The defined terms involved are “food contact surface,” “HACCP,” “retail food store” and “water activity.”

*Response:* The Department has elected to retain the referenced defined terms in the final-form rulemaking.

*Comment 4:* IRRC suggested the defined term “food code” be deleted from § 76.2 in the final-form rulemaking, since it is not used in the body of the regulation.

*Response:* The Department has implemented this suggestion in the final-form rulemaking.

*Comment 5:* The PAFSA and the ACHD considered the definition of the phrase “limited handling of potentially hazardous foods” in proposed § 76.2, and recommended the definition be limited to the handling of a single potentially hazardous food. The commentator also suggested that “limited handling” should only include foods that are heated for immediate consumption (and exclude food that are heated and then held hot).

*Response:* The Department believes the proposed definition is adequate, and does not perceive a need to limit the term to only a single type of food. The Department believes it is the limited handling of the potentially hazardous food handled by a food establishment that determines the relative risk of that activity, rather than the number of different types of potentially hazardous food handled. With respect to the suggestion that the definition exclude foods that are heated and then held hot (as opposed to being immediately consumed), the Department declines to implement this suggestion.

*Comment 6:* IRRC recommended proposed § 76.3(b) (relating to requirements for food establishments) be revised by replacing the phrase “unless one of the following is accurate” with “unless one of the following applies.”

*Response:* The recommendation has been implemented in the final-form rulemaking.

*Comment 7:* The CCHD noted that the proposed rulemaking allows for a certified supervisory employee to be certified in a number of categories, depending upon the type of food establishment and food activity involved. These categories are the general, process-specific, modified and nonprofit certification categories, and are referenced throughout the proposed rulemaking, beginning with proposed § 76.3(b). The CCHD references its longstanding and well-regarded food safety program, and objects to the proposed rulemaking allowing for certification in anything but the “general” certification category. The commentator believes that all of the regulated community should have the same level of food safety training. It also believes that the Department will have difficulty tracking compliance with the requirements of the proposed rulemaking, as food employees change jobs or food establishments change their operations so that another certification category is applicable to that operation.

*Response:* The Department appreciates this well-reasoned comment. The Department believes that the most recent amendments to the act make clear the intention of the General Assembly that nonprofit food establishments and food establishments involving only the limited handling of potentially hazardous food be given special consideration in preparing the final-form rulemaking, and that they be subject to standards that

are somewhat less-strict than those imposed upon other food establishments. The Department agrees that having four different certification categories will present a more formidable paperwork and enforcement task, but believes it can handle this and, moreover, believes it is constrained by the current language of the act to establish and regulate different certification categories.

*Comment 8:* Goodtime Amusements noted that proposed § 76.3(c) would allow a new food establishment to remain open for up to 90 days before it would have to have a certified supervisory employee, and suggested this grace period be deleted.

*Response:* The Department declines to implement this suggestion. The Department maintains that the referenced regulatory provision is justified under the language of the act. Section 6503(d) of the act provides that a supervisory employee has up to 90 days within which to pass the test requisite to becoming a certified supervisory employee. Section 6504(d) of the act (relating to certification of employees) also provides that food establishments that are not in compliance with the act because of employee turnover have a grace period of 3 months from the date of loss of a certified supervisory employee to come back into compliance with the act. Against this backdrop, the Department believes it is reasonable and consistent with the act for the referenced subsection to allow a new food establishment 90 days within which to come into compliance with the requirements of the act.

*Comment 9:* Goodtime Amusements reviewed proposed § 76.3(d) and recommended the subsection be revised to allow a food establishment 45 days, rather than 3 months, within which to replace a certified supervisory employee lost through employee turnover.

*Response:* The Department cannot implement this recommendation, since the referenced 3-month period is prescribed by section 6504(d) of the act.

*Comment 10:* In the context of its review of proposed § 76.4 (relating to eligibility to apply for certification), the PFMA recommended that persons be allowed to take “challenge examinations” to demonstrate their food safety knowledge without having to first complete an approved certification training course.

*Response:* Section 6504(b) of the act provides that “No certificate shall be issued unless the applicant has successfully completed a training course and passed an examination recommended by the advisory board and approved by the department.” Although a training course must precede the examination, an organization would be free to develop a brief training course that that would only be offered to persons with specific credentials or experience in the area of food safety. That course could be comparatively shorter than other certified training courses. For this reason, although the Department is not free to adopt the commentator’s recommendation, the desired objective might be reached through the development and approval of a training course.

*Comment 11:* IRRC requested that the phrase “are accurate” in proposed § 76.5(b)(2)(iii) (relating to certification training programs: obtaining the Department’s approval) be replaced with “apply.”

*Response:* The requested change has been made in the final-form rulemaking.

*Comment 12:* IRRC reviewed proposed § 76.5(b)(2)(iv)(B), which describes the standards under which the Department would approve a certification training program in the nonprofit certification category. The commen-

tator suggested that, with respect to a program developed and administered by an entity other than the Department, the proposed requirement that the program "meet the requirements referenced in clause (A)" was too expansive, given that clause (A) contains a reference to section 6504(g)(2) of the act that is only applicable to the Department. IRRC suggested that the Department might have intended this requirement to be only that the course meet the course requirements in § 76.7(b) (relating to certification training programs: food safety protection and training standards).

*Response:* The commentator is correct, and the Department has revised the referenced provision in the final-form rulemaking to reflect that nonprofit certification category training programs must meet the course content requirements in § 76.7(b).

*Comment 13:* The PAFSA and the ACHD noted that proposed § 76.5(d)(4) would allow for certification training course examinations other than examinations that have been accredited by the Conference for Food Protection (CFP). The commentator recommended that, with respect to the general certification category, the final-form rulemaking only allow CFP-accredited examinations, and offered that this is the only way to "assure that the exams are valid and legally defensible."

*Response:* The Department declines to implement this recommendation for several reasons. Initially, the Department notes that the language with respect to which the comment is offered is part of the current regulation, rather than language in the final-form rulemaking. The Department notes that the act does not prescribe CFP-accredited examinations, but defers to the Department, in consultation with the Board, to develop adequate training programs. The Department intends the final-form rulemaking to afford persons a measure of flexibility in developing and administering examinations. Proposed certification program examination will be carefully reviewed by the Department and the Board. An examination that is approved by the Department and the Board, in accordance with the act, will be valid and legally defensible.

*Comment 14:* The PAFSA and the ACHD reviewed proposed § 76.5(d)(7) and, as in the preceding comment, recommended that only CFP-accredited examinations be allowed in home study courses in the general certification category.

*Response:* The Department references its response to Comment 13.

*Comment 15:* IRRC reviewed proposed § 76.7, and offered its opinion that the act requires the Department to establish, through regulation, the appropriate minimum number of hours of instruction necessary "... to prepare employees for safe food handling due to the food establishment's scope of business." IRRC noted that the proposed rulemaking would delete the specific minimum hour of instruction requirements in the current regulation, and asked how the regulation will be in compliance with the act if this is done.

*Response:* The Department does not read the act as rigidly requiring that the final-form rulemaking specify a minimum number of hours of instruction to be given on various topics as part of an approved certification training program. The General Assembly has given the Department the authority and responsibility to adopt a regulation that provides for the consideration of whether a minimum number of hours is necessary, but does not require that the regulation ultimately adopted under that authority establish a minimum-hour standard. The De-

partment believes that the course syllabus and the written examination requirements are, in combination, entirely adequate to ensure that persons who take a certification training course and pass the written examination at the conclusion of that class possess adequate food safety knowledge with respect to the certification category of the course (whether the certification training category is general, process-specific, modified or non-profit). To the extent that the proposed rulemaking might not have adequately reflected that the Department had considered the minimum number of hours necessary for this training, though, the Department has added a sentence to § 76.5 that more clearly constitutes a provision considering the number of hours necessary for certification.

*Comment 16:* The PAFSA and the ACHD offered comments with respect to proposed § 76.8 (relating to certification examination requirements). The commentators believe that an examination administered in the "modified" certification category should be multiple choice, and that language should be added to specify that the subject matter of the examination questions should relate specifically to the course content.

*Response:* The Department does not perceive a need to limit the referenced examination to a multiple-choice format. The Department will keep these comments in mind, though, as it administers the final-form rulemaking, and will revisit this question if it appears there is some problem that could be remedied by requiring the examination to be in multiple-choice format. As far as the comment regarding the examination subject matter is concerned, the Department believes the introductory paragraph in § 76.8 adequately links the examination content of the particular category of certification training course involved. That section provides that "The examination shall adequately test food protection knowledge with respect to the certification category of the approved certification training course."

*Comment 17:* The ACHD noted that proposed § 76.10(a) (relating to applying for certification) would allow a person who has taken an approved certification training course in the past to apply to the Department for certification as long as the certification examination was administered within 5 years preceding the application date. Given that 3 Pa.C.S. § 6504(f) provides that certification last for 5 years, the commentator offered that a person could go nearly 10 years without having to take another training course.

*Response:* The commentator is correct. The Department offers two considerations in response. First, it should be noted that the referenced 5-year window is offered as new regulatory language, and that the current regulation places no time limit whatsoever on the maximum allowable interval between the date of completion of a certification training course and the date of application for certification. The proposed 5-year limit, therefore, is a move in the direction espoused by the commentator. Second, it is significant to consider that once a person passes an approved certification training course and is certified by the Department, the only continuing education requirement is that the certified supervisory employee attend an approved continuing education course and submit an application for renewal of certification to the Department at intervals of no greater than 5 years. Section 6504(f) of the act states that there is to be no written examination required for this recertification. Given that, once certification is granted, the requirements for continuing education are mere attendance at a con-

tinuing education course without being tested on a mastery of the course material, the Department believes the referenced 5-year application window is justifiable.

*Comment 18:* Goodtime Amusements asked whether the Department will publish a list of the other states with respect to which it enters into the reciprocal agreement described in proposed § 76.14 (relating to reciprocity with other states).

*Response:* The Department will publish a list of states in the *Pennsylvania Bulletin* and provide a link to this list on its website: [www.agriculture.state.pa.us](http://www.agriculture.state.pa.us). In addition, it will disseminate this list among groups representing the various segments of the food and restaurant industries in this Commonwealth.

*Comment 19:* Goodtime Amusements reviewed proposed § 76.19 (relating to civil penalties) and opined that the penalties prescribed by that section are too harsh. The commentator also offered that a “. . . \$300 fine for a hair net missing would be harsh.”

*Response:* Since the referenced civil penalty range is prescribed by section 6508 of the act (relating to civil penalties), the Department cannot change it through regulation. With respect to the comment regarding a \$300 civil penalty for a missing hair net, the Department offers that the referenced civil penalties can only be imposed with respect to violations of the provisions of the act or its attendant regulations. Although the act requires food establishments to have certified supervisory employees under certain circumstances, it does not require that these certified supervisory employees implement specific food safety or food sanitation practices. For this reason, the “missing hair net” referenced by the commentator could never be the basis for a civil penalty under the act or the regulation (although the conduct might constitute a violation of Chapter 46 (relating to food code)).

#### *Fiscal Impact*

*Commonwealth:* The final-form rulemaking will impose some costs upon the Commonwealth. The Department estimates its costs in administering the certification requirements imposed by the act at \$15,000 per year until July 1, 2004 (the date beyond which compliance with the certification requirements becomes mandatory) and \$30,000 per year starting July 1, 2004.

*Political Subdivisions:* The final-form rulemaking will impose no costs and have no fiscal impact upon political subdivisions.

*Private Sector:* The final-form rulemaking will impose no costs and have no fiscal impact upon the private sector. The amendments to the act by Act 124 and Act 190 relieve food establishments operated by certain exempt charitable and nonprofit organizations from the cost of training and certification a supervisory employee. These cost savings cannot be readily quantified, and are the product of the referenced legislation, rather than the proposed rulemaking. The overall cost of compliance with the certification requirements imposed by the act is estimated at \$2 million (approximately 100,000 affected food establishments, multiplied by the minimum \$20 fee prescribed by the act). This figure excludes the costs of obtaining the training required as a prerequisite to certification.

*General Public:* The final-form rulemaking will impose no costs and have no fiscal impact upon the general public. Although food establishments may incur some costs in obtaining certification for a supervisory employee, these costs are expected to be modest. Additionally, since

the act has been amended to exempt more types of food establishments from its requirements, these exempt food establishments shall no longer be required to bear the costs of compliance.

#### *Paperwork Requirements*

The final-form rulemaking is not expected to have an appreciable impact upon the Department's paperwork volume.

#### *Sunset Date*

There is no sunset date for the final-form rulemaking. The Department will review the efficacy of these regulations on an ongoing basis.

#### *Contact Person*

Further information is available by contacting the Department of Agriculture, Bureau of Food Safety and Laboratory Services, 2301 North Cameron Street, Harrisburg, PA 17110-9408, Attention: Martha M. Melton, (717) 787-4315.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on February 4, 2004, the Department submitted a copy of the notice of proposed rulemaking, published at 34 Pa.B. 831, to IRRC and the Chairpersons of the House and Senate Standing Committees on Agriculture and Rural Affairs for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on July 14, 2004, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on July 15, 2004, and approved the final-form rulemaking.

#### *Findings*

The Department finds that:

(1) Public notice of intention to adopt the amendments 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 promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

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

(3) The modifications that were made to this final-form rulemaking in response to comments received do not enlarge the purpose of the proposed rulemaking published at 34 Pa.B. 831.

(4) The adoption of the final-form rulemaking in the manner provided in this order is necessary and appropriate for the administration of the act.

#### *Order*

The Department, acting under authority of the act, orders that:

(a) The regulations of the Department, 7 Pa. Code Chapter 76, are amended by amending §§ 76.1, 76.4, 76.7, 76.8, 76.10—76.13, 76.16, 76.17 and 76.19 and by

deleting § 76.18 to read as set forth at 34 Pa.B. 831 and by amending §§ 76.2, 76.3, 76.5 and 76.9 to read as set forth in Annex A.

(b) The Secretary shall submit this order, 34 Pa.B. 831 and Annex A to the Office of General Counsel and to the Office of Attorney General for approval as required by law.

(c) The Secretary shall certify this order, 34 Pa.B. 831 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

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

DENNIS C WOLFF,  
Secretary

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 34 Pa.B. 4082 (July 31, 2004).)*

**Fiscal Note:** Fiscal Note 2-145 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 7. AGRICULTURE**

**PART III. BUREAU OF FOOD SAFETY AND LABORATORY SERVICES**

**Subpart C. MISCELLANEOUS PROVISIONS**

**CHAPTER 76. FOOD EMPLOYEE CERTIFICATION**

**§ 76.2. Definitions.**

The following words and terms, when used in this chapter, have the following meanings unless otherwise defined in Chapter 46 (relating to food code):

*Act*—3 Pa.C.S. Chapter 65 (relating to the Food Employee Certification Act).

*Advisory Board or Board*—The Food Employee Certification Advisory Board.

*Bacteria*—Single cell microorganisms.

*CFP or Conference for Food Protection*—An independent, National voluntary nonprofit organization to promote food safety and consumer protection.

(i) Objectives of the organization include identifying and addressing food safety problems and promoting uniformity of regulations in food protection.

(ii) Participants include Federal, State and local regulatory agencies, several universities, test providers, certifying organizations, consumer groups, food service and retail store trade associations and operators.

*Certificateholder*—A person holding a valid certificate.

*Certification category*—A designation of one of the four types of Department-approved certification training programs, indicating the depth of food safety training received by a person who successfully completes such a program. The four certification categories are as follows:

- (i) General certification category.
- (ii) Process-specific certification category.
- (iii) Modified certification category.
- (iv) Nonprofit certification category.

*Certified supervisory employee*—A supervisory employee holding a valid certificate.

*Cleaning*—The process by which dirt or other foreign matter is removed from an article.

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

*Food*—

(i) A raw, cooked or processed edible substance, ice, beverage or ingredient used or intended for use or for sale in whole or in part for human consumption, or chewing gum.

(ii) The term does not include medicines and drugs.

*Food Act*—The Food Act (31 P. S. §§ 20.1—20.18).

*Food contact surface*—One of the following:

(i) A surface of equipment or a utensil with which food normally comes into contact.

(ii) A surface of equipment or a utensil from which food may drain, drip or splash into a food or onto a surface normally in contact with food.

*Food establishment*—

(i) A room, building, place or portion thereof or vehicle maintained, used or operated for the purpose of selling to the public, commercially storing, packaging, making, cooking, mixing, processing, bottling, baking, canning, freezing, packing or otherwise preparing, transporting or handling food.

(ii) The term includes retail food stores and public eating and drinking licensees, except those portions of establishments operating exclusively under milk or milk products permits and those portions of establishments operating exclusively under United States Department of Agriculture inspection.

(iii) The term does not include dining cars operated by a railroad company in interstate commerce or a bed and breakfast, homestead or inn as defined in the Public Eating and Drinking Place Law.

*Frozen dessert manufacturer*—A food establishment that is located in this Commonwealth and that is required to be licensed under authority of the Frozen Dessert Law (31 P. S. §§ 417.1—417.14).

*HACCP—Hazard Analysis Critical Control Point*—A system that identifies and monitors specific foodborne hazards (biological, chemical or physical properties) that can adversely affect the safety of the food product.

*Limited handling of potentially hazardous foods*—

(i) Food handling activities that are limited to the placement of a potentially hazardous food on or into a warming, heating or cooking unit.

(ii) The term includes activities such as placing a hot dog on a roller, placing a pizza in a cooking/warming unit or warming a premade sandwich in a microwave oven.

*Person*—A corporation, partnership, limited liability company, business trust, other association, government entity (other than the Commonwealth), estate, trust, foundation or natural person.

*Potentially hazardous food*—

(i) A food which consists in whole or in part of milk or milk products, eggs, meats, poultry, fish, shellfish, edible crustaceans or other ingredients, including synthetic ingredients, and which is in a form capable of supporting rapid and progressive growth of infectious or toxigenic microorganisms.

(ii) The term does not include foods that have a pH level of 4.6 or below or a water activity of 0.85 or less

under standard conditions or food products in hermetically sealed containers processed to maintain commercial sterility.

*Public eating and drinking place—*

(i) A place within this Commonwealth where food or drink is served to or provided for the public, with or without charge, or a place which otherwise conforms to the definition in section 1 of the Public Eating and Drinking Place Law (35 P. S. § 655.1).

(ii) The term does not include dining cars operated by a railroad company in interstate commerce or a bed and breakfast homestead or inn.

*Public Eating and Drinking Place Law—*The act of May 23, 1945 (P. L. 926, No. 369) (35 P. S. § 655.1—655.13).

*Retail food store—*A food establishment or a section of a food establishment where food and food products are offered to the consumer and intended for off-premises consumption.

*Sanitizing—*The application of cumulative heat or chemicals on cleaned food contact surfaces that, when evaluated for efficacy, yield a reduction of 5 logs, which is equal to a 99.999% reduction, of representative disease microorganisms of public health importance.

*Secretary—*The Secretary of the Department.

*Supervisory employee—*An owner or a person employed by or designated by the business owner to fulfill the requirements of the act, and who has supervisory authority and is responsible for the storage, preparation, display or serving of foods to the public in establishments regulated by the Department or local health organizations.

*Time and temperature—*Important factors in controlling the growth of pathogenic organisms in potentially hazardous foods.

*Water activity—*A measure of the free moisture in a food. The term is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature, and is indicated by the symbol *AW<sub>w</sub>*.

**§ 76.3. Requirements for food establishments.**

(a) *General requirement.* A food establishment that is not exempt from compliance under § 76.1(d) (relating to compliance) shall comply with the act and this chapter.

(b) *Certified supervisory employee.* A food establishment shall employ or designate at least one certified supervisory employee who holds a valid certificate issued by the Department under authority of the act and this chapter. The certificate shall be in the general certification category unless one of the following applies:

(1) The food establishment engages only in one or more specific, identified food processing activities (such as making cider or preparing frozen desserts), in which case a certificate in the process-specific certification category, pertinent to the processing conducted at the food establishment, shall suffice.

(2) The food establishment's personnel engage only in the limited handling of potentially hazardous foods (such as persons who handle food products that do not require any preparation by the food establishment other than to place the food on or in a cooking or warming unit), in which case a certificate in the modified certification category, pertinent to the food handling conducted at the food establishment, shall suffice.

(3) The food establishment is a nonprofit entity that, although otherwise exempt from compliance under § 76.1(d) voluntarily seeks certification under section 4(c)(2) of the act, regarding certification of employees, in which case a certificate in the nonprofit certification category shall suffice.

(c) *New food establishment.* A new food establishment shall comply with subsection (b) within 90 days of the date it commences operation.

(d) *Employee turnover.* If a food establishment loses its only certified supervisory employee through employee turnover or for any other reason, the food establishment shall comply with subsection (b) within 3 months of the date it lost its previous certified supervisory employee.

(e) *Certification records.* A food establishment shall maintain, at the food establishment site, a list of certified supervisory employees under its employment during the last 4 months including: name, certificate number, certification category, issuance date, expiration date, date employment began and date employment terminated.

(f) *Availability of records.* Upon request by the Department, a food establishment shall make the records described in subsection (e) available for inspection by the Department during normal business hours of the food establishment.

(g) *Posting of certificate.* A food establishment shall post the original certificate of its certified supervisory employee in public view at its business location.

(h) *Return of certificate.* A certificate is the property of the Department and is issued to the individual person identified on its face. A food establishment shall promptly deliver the certificate to a certified supervisory employee who leaves the employ of the food establishment or who otherwise ceases to be a certified supervisory employee with respect to that establishment.

**§ 76.5. Certification training programs: Obtaining the Department's approval.**

(a) *Approval required.* A person shall obtain the Department's approval of a training program before the certification training program will be considered an approved certification training program for purposes of the act and this chapter. Substantive revisions or changes to a previously-approved certification training program shall also be approved by the Department. Although nonsubstantive revisions to a previously-approved certification training program do not require approval of the Department, notice of these nonsubstantive revisions shall be communicated in writing to the Department, at the address in § 76.16 (relating to contacting the Department), before being implemented. Approval under this section authorizes a person to develop and approve certification examinations, conduct certification examinations and certify the results of certification examinations to the Department in accordance with this chapter.

(b) *General requirements for approval.*

(1) *Approval of program.* The Department will approve a certification training program if it meets the food safety protection and training standards described in § 76.7 (relating to certification training programs: Food safety protection and training standards), fits within one of the certification categories described in paragraph (2) and has been recommended for approval by the Advisory Board. The Department's approval of a certification training program will not be contingent upon any minimum number of hours of instruction, in light of the other requirements for certification training program approval described in this section.

(2) *Certification categories.* The Department may approve a certification training program in one of four certification categories. These categories, and the requisites for inclusion of a certification training program within each, are as follows:

(i) *General certification category.* The Department will approve a certification training program in the general certification category if one of the following applies:

(A) The training program addresses the topics set forth in § 76.7(a).

(B) The training program is a Federally-mandated HACCP training program for juice, seafood, meat or poultry.

(ii) *Process-specific certification category.* The Department will approve a certification training program in the process-specific certification category if both of the following apply:

(A) The subject matter of the training program relates to one or more specific, identified food processing activities (such as making cider or preparing frozen desserts).

(B) The training program addresses the topics in § 76.7(a) in a manner specifically directed to the food processing activities that are the identified subject matter of the training program.

(iii) *Modified certification category.* The Department will approve a certification training program in the modified certification category if both of the following apply:

(A) The subject matter of the training program is addressed to persons who handle potentially hazardous food on only a limited basis (such as persons who handle food products that do not require any preparation by the food establishment other than to place the food on or in a cooking or warming unit).

(B) The training program addresses the topics in § 76.7(a) in a manner specifically directed toward persons who handle potentially hazardous food on only a limited basis, and in a less-comprehensive manner than a certification training program in the general certification category.

(iv) *Nonprofit certification category.* The Department will approve a certification training program in the nonprofit certification category if either of the following apply:

(A) The training program is developed and administered by the Department under authority of section 4(g)(2) of the act regarding relating to certification of employees, and meets the course content requirements in § 76.7(b).

(B) The training program is developed and administered by an entity other than the Department, and meets the course content requirements in § 76.7(b).

(c) *Obtaining an application form.* The Department will provide an application form for certification training program approval, or an application form for approval of revisions or changes to a previously-approved certification training program, upon request. Requests for these forms shall be directed to the Department at the address in § 76.16.

(d) *Contents: application for certification training program approval.* The application form for certification training program approval shall require the following information:

(1) The applicant's name, address and telephone number.

(2) A course syllabus demonstrating that the program would meet the course content requirements in § 76.7.

(3) A designation of the certification category (whether general, process-specific, modified or nonprofit), as described in subsection (b)(2), with respect to which approval of the training program is sought.

(4) One of the following:

(i) A copy of the examination to be administered at the conclusion of the certification training program, together with an answer key for that examination, if these documents are available.

(ii) The name of the CFP-accredited examination to be administered at the conclusion of the certification training program.

(5) A copy of all teacher materials for the certification training program, unless the certification training program is a home-study program.

(6) A copy of all materials to be distributed to persons taking the program.

(7) If the certification program is a home study program, the proposed site and date the approved certification examination is to be administered, if available.

(8) Other information the Department might reasonably require in evaluating the certification training program.

(e) *Contents: application for approval of changes or revisions to a previously-approved certification training program.* The application form for approval of changes or revisions to a previously-approved certification training program shall require the applicant's name, address and telephone number and only the information listed in subsection (d) that is relevant to the change or revision with respect to which approval is sought.

(f) *Deadline for filing the application.* An application for certification training program approval or for approval of changes or revisions to a previously-approved certification training program shall be delivered to the Department, at the address in § 76.16, at least 90 days in advance of the proposed date upon which the program is to be conducted.

(g) *Departmental and Advisory Board action on application.* The Department and the Advisory Board will consider application materials submitted to them under subsection (d)(4)–(6) confidential and the proprietary documents of the applicant, and will make no distribution of these materials. The Advisory Board will consider whether to recommend Departmental approval of a certification training program. If a simple majority of a quorum of the Advisory Board recommends Departmental approval of a certification training program, the Department will grant its approval, if the other criteria in subsection (b) are met. The Department will mail the applicant its written approval of the certification training program, its denial of approval or a request for additional clarification or documentation.

**§ 76.9. Reporting results of a certification examination.**

(a) *Reporting results to the program participant.* A person who proctors a certification examination shall, within 30 calendar days of proctoring the examination, mail or deliver written confirmation of the following to any person who took the examination:

(1) The person's examination score, expressed as the percentage of correct answers.

(2) The date and location of the examination.

(3) The name of the course instructor.

(4) If the approved certification training program preceding the examination required a specific level of food-safety-related education or experience as a prerequisite to participating in the training program, confirmation that this requirement was met.

(b) *Reporting results to the Department.* Within the 30-day time period described in subsection (a), the proctor shall mail the same information to the Department at the address in § 76.16 (relating to contacting the Department), using either a form provided by the Department upon request, or a copy of the written confirmation the proctor provided the person who took the examination.

[Pa.B. Doc. No. 04-1438. Filed for public inspection August 6, 2004, 9:00 a.m.]

## Title 31—INSURANCE

### INSURANCE DEPARTMENT

#### [31 PA. CODE CH. 146c]

#### Standards for Safeguarding Customer Information

The Insurance Department (Department) amends Chapter 146c (relating to standards for safeguarding customer information) to read as set forth in Annex A.

##### *Statutory Authority*

The final-form rulemaking is adopted under the general authority of sections 205, 506, 1501 and 1502 of The Administrative Code of 1929 (71 P. S. §§ 66, 186, 411 and 412) and under the guidance of section 648 of The Insurance Department Act of 1921 (40 P. S. § 288). Likewise, this final-form rulemaking is made under the Department's rulemaking authority under the Unfair Insurance Practices Act (40 P. S. §§ 1171.1—1171.15) (the authority is further explained in *PALU v. Insurance Department*, 371 A.2d 564 (Pa. Cmwlth. 1977)), because the Insurance Commissioner (Commissioner) has determined that the improper disclosure or marketing, or both, of nonpublic personal financial and health information by members of the insurance industry constitutes an unfair method of competition and an unfair or deceptive act or practice.

##### *Comments and Response*

Notice of proposed rulemaking was published at 33 Pa.B. 4917 (October 4, 2003) with a 30-day comment period. During the 30-day comment period, comments were received from the American Council of Life Insurers, the American Insurance Association (AIA), the Alliance of American Insurers (AAI) and the Insurance Federation of Pennsylvania, Inc. (IFP). During its regulatory review, the Independent Regulatory Review Commission (IRRC) submitted comments to the Department. The following is a response to the comments that raised concerns with regard to this final-form rulemaking.

The AIA and the AAI noted the Department's definition of "customer" used in the proposed rulemaking goes well beyond the parameters of the National Association of Insurance Commissioners Model Privacy of Consumer Financial and Health Information Regulation (NAIC

Model) and effectively applies the data security standards to all types of nonpublic personal information, including information on applicants and claimants with whom the insurers have no continuing business relationship. Similarly, the IFP noted that including "consumers," as defined in Chapter 146a (relating to privacy of consumer financial information), would require insurers to apply the required information security system to individuals that do not have an ongoing relationship with the insurer, including rejected applicants and third party claimants. In addition, IRRC, during its review, questioned why the Department expanded the definitions in this regulation beyond those found in the NAIC Model.

The Department's intent was not to expand the definition of "customer" beyond the definition found in the NAIC Model. Therefore, upon review of the comments, the Department agrees that the definition of "customer" in this final-form rulemaking should read as follows:

"Either a 'customer' as defined in § 146a.2 (relating to definitions) or a 'consumer' as defined in § 146b.2 (relating to definitions)."

The IFP, as noted in its comments on an initial exposure draft of this final-form rulemaking, again noted its concern that the Department's health privacy regulation provision regarding insurer responsibility for third party service provider misconduct is not clear. The IFP proposed that the Department amend the regulation to provide that a licensee would be responsible for third party privacy breaches only if it knowingly played a role in the disclosure or failed to report a disclosure of which it became aware. Although the Department has attempted to address the IFP's concerns by including provisions that utilize a "knew or reasonably should have known" standard for the imposition of penalties and insurers will only be liable for patterns or practices of misconduct by service providers, the IFP seeks further amendment and a bright line standard. The AAI opposes any inclusion of a standard regarding third party service providers.

The Department believes that Chapter 146b (relating to privacy of consumer health information) and Chapter 146c, especially when read in conjunction with each other, are sufficiently clear with regard to the liability of insurers for violations by third party service providers. In addition, the Department believes that the bright line rule sought by the IFP will be administratively unworkable in that it lacks flexibility, and will not afford sufficient protections for insurance consumers. In addition, the Department does not believe that it is appropriate to attempt to revise or amend its health privacy regulation though this final-form rulemaking.

##### *Affected Parties*

The final-form rulemaking will affect all licensed insurers doing the business of insurance in this Commonwealth.

##### *Fiscal Impact*

There is no anticipated fiscal impact as a result of the final-form rulemaking. Insurers already need to comply with the Gramm-Leach-Bliley Act (15 U.S.C.A. §§ 6801—6827) and Chapters 146a and 146b. Therefore, most, if not all, of the information security methods required by this final-form rulemaking should be in place.

##### *Paperwork*

There is no anticipated additional paperwork expected as a result of this final-form rulemaking.

*Effectiveness/Sunset Date*

The final-form rulemaking will become effective March 1, 2005. The Department continues to monitor the effectiveness of regulations on a triennial basis. Therefore, no sunset date has been assigned.

*Contact Person*

Questions regarding this final-form rulemaking should be directed to Peter J. Salvatore, Regulatory Coordinator, Office of Special Projects, 1326 Strawberry Square, Harrisburg, PA 17120, (717) 787-4429, fax (717) 705-3873, psalvatore@state.pa.us.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on May 21, 2004, the Department submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 4917, to IRRC and the Chairpersons of the House Insurance Committee and the Senate Banking and Insurance Committee for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on June 23, 2004, the final-form rulemaking was deemed approved by the House and Senate Committees. In accordance with section 5a(d) of the Regulatory Review Act (71 P. S. § 745.5a(d)), IRRC met on June 24, 2004, and approved the final-form rulemaking in accordance with section 5a(e) of the Regulatory Review Act.

*Findings*

The Commissioner finds that:

(1) Public notice of intention to adopt this rulemaking as amended 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 this rulemaking in the manner provided in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

*Order*

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

(a) The regulations of the Department, 31 Pa. Code Chapter 146c, are amended by adding §§ 146c.1 and 146c.3—146c.10 to read as set forth at 33 Pa.B. 4917 and by adding §§ 146c.2 and 146c.11 to read as set forth in Annex A.

(b) The Commissioner shall submit this order, 33 Pa.B. 4917 and Annex A to the Office of General Counsel and Office of Attorney General for approval as to form and legality as required by law.

(c) The Commissioner shall certify this order, 33 Pa.B. 4917 and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect March 1, 2005.

M. DIANE KOKEN,  
*Insurance Commissioner*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 34 Pa.B. 3652 (June 26, 2004).)*

**Fiscal Note:** Fiscal Note 11-215 remains valid for the final adoption of the subject regulations.

**Annex A**

**TITLE 31. INSURANCE**

**PART VIII. MISCELLANEOUS PROVISIONS**

**CHAPTER 146c. STANDARDS FOR SAFEGUARDING CUSTOMER INFORMATION**

**§ 146c.2. Definitions.**

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

*Act*—The Insurance Department Act of 1921 (40 P. S. §§ 1—321)

*Customer*—Either a “customer” as defined in § 146a.2 (relating to definitions) or a “consumer” as defined in § 146b.2 (relating to definitions).

*Customer information*—Either “nonpublic personal financial information” as defined in § 146a.2 or “nonpublic personal health information” as defined in § 146b.2 about a customer, whether in paper, electronic or other form that is maintained by or on behalf of the licensee.

*Customer information systems*—The electronic or physical methods used to access, collect, store, use, transmit, protect or dispose of customer information.

*Department*—The Insurance Department of the Commonwealth.

*Licensee*—As defined in either § 146a.2 or § 146b.2, except that the term shall not include a purchasing group or a nonadmitted insurer in regard to the surplus lines business conducted pursuant to sections 1601—1625 of The Insurance Company Law of 1921 (40 P. S. §§ 991.1601—991.1625).

*Service provider*—A person that maintains, processes or otherwise is permitted access to customer information through its provision of services directly to the licensee.

**§ 146c.11. Effective date.**

Each licensee shall establish and implement an information security program, including appropriate policies and systems under this chapter by March 1, 2005.

[Pa.B. Doc. No. 04-1439. Filed for public inspection August 6, 2004, 9:00 a.m.]

**Title 49—PROFESSIONAL AND VOCATIONAL STANDARDS**

**STATE BOARD OF OPTOMETRY**

**[49 PA. CODE CH. 23]**

**Continuing Education, Fees, Certification to Treat Glaucoma**

The State Board of Optometry (Board) amends §§ 23.82, 23.86 and 23.91 (relating to continuing education requirements; sources of continuing education hours;

and fees) and adds § 23.205 (relating to application procedure) to read as set forth in Annex A.

*Response to Comments*

Proposed rulemaking was published at 33 Pa.B. 4464 (September 6, 2003). Following publication, the Board received a comment from the Pennsylvania Academy of Ophthalmology (PAO). On September 30, 2003, the House Professional Licensure Committee (HPLC) voted to take no formal action until final rulemaking. On November 5, 2003, the Independent Regulatory Review Commission (IRRC) submitted comments to the Board.

The PAO noted that section 4.2(b) of the Optometric Practice and Licensure Act (act) (63 P.S. § 244.4b(b)) requires optometrists certified to treat glaucoma to maintain liability insurance of a minimum of \$1 million per occurrence and \$3 million per annual aggregate. The PAO noted that the Board did not include in the proposed rulemaking the insurance requirements for optometrists certified to treat glaucoma. Section 3(a)(2.5)(i) of the act (63 P.S. § 244.3(a)(2.5)(i)) requires all optometrists to have liability insurance in the minimum amount of \$200,000 per occurrence and \$600,000 per annual aggregate. Section 4.2(b) of the act requires optometrists certified to treat glaucoma to have the higher minimum liability coverage.

IRRC's comment also related to the insurance coverage requirement. IRRC asked the Board why the proposed rulemaking did not establish a procedure for optometrists applying for certification to treat glaucoma to demonstrate that they had obtained the required professional liability insurance. The Board indicated that the proposed rulemaking did not establish a procedure because the Board implementing the act of October 30, 1996 (P.L. 721, No. 130) (Act 130) has required optometrists to verify their compliance with the insurance requirements. In its written comments, IRRC suggested: "To provide sufficient notice to prospective applicants, the final-form regulation should include the greater insurance requirements established by the Act."

If the Board were to place the specific statutory requirements in the regulations, as suggested by IRRC, the Board would have to amend its regulations whenever the statutory requirements change. To repeat the mandatory insurance requirement in regulation would be unnecessary and redundant, and could lead to confusion if the statutory minimum coverage changes.

Since the amendments to the act by Act 130, every applicant for licensure as an optometrist is required to verify, under penalty of prosecution for making unsworn falsification to authorities (18 Pa.C.S. § 4904 (relating to unsworn falsification to authorities)), that the applicant has obtained and will maintain the required liability insurance coverage, through the following statement on the application for licensure:

By my signature below, I verify that I have obtained and will obtain the minimum of \$200,000/occurrence and \$600,000/annual aggregate professional liability insurance. I further certify that I will notify the Board within 30 days of my failure to be covered by the required amount of insurance.

Similarly, consistent with the act of December 16, 2002 (P.L. 1950, No. 225), to be granted certification to treat glaucoma, every applicant must verify that the applicant has obtained and will maintain the required liability insurance coverage through the following statement:

By my signature below, I verify that I have obtained and will obtain the minimum of \$1,000,000/

occurrence and \$3,000,000/annual aggregate professional liability insurance required to treat glaucoma. I further certify that I will notify the Board within 30 days of my failure to be covered by the required amount of insurance.

In addition, every optometrist must reverify, at biennial renewal, that he has maintained and will maintain the required liability coverage. The biennial renewal application for optometrists contains the following statement:

\_\_\_\_\_ I have the following liability insurance policy with the minimum of \$200,000/occurrence and \$600,000/annual aggregate:

Insurance co. name \_\_\_\_\_

Policy number \_\_\_\_\_

Expiration date \_\_\_ / \_\_\_ / \_\_\_

The biennial renewal application for certification to treat glaucoma will contain the following statement:

\_\_\_\_\_ I have the following liability insurance policy with the minimum of \$1,000,000/occurrence and \$3,000,000/annual aggregate:

Insurance co. name \_\_\_\_\_

Policy number \_\_\_\_\_

Expiration date \_\_\_ / \_\_\_ / \_\_\_

The POA suggested that the Board "amend its regulations to establish a more formal process for optometrists to show satisfactory proof of required liability insurance that is at least as stringent as that which is outlined by the State Board of Medicine for its physicians." In addition, the POA recommended that an optometrist should be required to demonstrate compliance with the statutory insurance requirements prior to the Board granting the optometrist therapeutic certification or certification to treat glaucoma. As previously explained, an optometrist is already required to demonstrate compliance with the insurance requirements prior to being granted therapeutic certification or certification to treat glaucoma. The process for verification of insurance coverage required of optometrists is already more stringent than that required of physicians.

The Board notes that its rulemaking is similar to that of the State Board of Medicine's regulations, which did, at one time, include the statutorily mandated amounts of liability insurance. The State Board of Medicine amended its regulations so as not to unnecessarily duplicate provisions of the Medical Practice Act and Health Care Services Malpractice Act (now the Medical Care Availability and Reduction of Error (MCARE) Act (40 P.S. §§ 1303.101—1303.5108)) and to avoid the expense and confusion of periodically updating its regulations. See 30 Pa.B. 2474 (May 20, 2000).

The Board also added to its list of preapproved continuing education providers the College of Optometrists in Vision Development, the Council on Optometric Practitioner Education (COPE), vision and eye-related courses offered by accredited medical colleges and vision and eye-related courses offered by the American Medical Association and its state affiliates. These providers consistently offer high-quality continuing education relevant to the practice of optometry. COPE-approved courses are approved by every state board of optometry.

*Statutory Authority*

Section 3(b)(12) of the act authorizes the Board to approve continuing education. Section 3(b)(14) of the act authorizes the Board to "promulgate all rules and regula-

tions necessary to carry out the purposes of this act.” Section 4.2 of the act authorizes the Board to certify licensees to treat glaucoma.

*Fiscal Impact and Paperwork Requirements*

The final-form rulemaking should have only minimal fiscal impact on licensees who will be required to pay a \$25 application fee to obtain certification to treat glaucoma. There is minimal fiscal impact on the Board associated with amending and printing application forms and biennial renewal forms, notifying licensees of the changes and processing applications. There is no fiscal impact on the private sector, the general public or any political subdivisions. The final-form rulemaking will create only minimal additional paperwork for the Board in processing applications to treat glaucoma and will not create additional paperwork for the private sector.

*Sunset Date*

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

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P. S. § 745.5(a)), on August 26, 2003, the Department submitted a copy of the notice of proposed rulemaking, published at 33 Pa.B. 4464, to IRRC and the Chairpersons of the HPLC and the Senate Consumer Protection and Professional Licensure Committee (SCP/PLC) for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Department has considered all comments from IRRC, the House and Senate Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on June 9, 2004, the final-form rulemaking was approved by the HPLC. On July 14, 2004, the final-form rulemaking was deemed approved by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on July 15, 2004, and approved the final-form rulemaking.

*Additional Information*

Additional information regarding this final-form rulemaking may be obtained from Deborah Smith, Board Administrator, State Board of Optometry, P. O. Box 2649, Harrisburg, PA, 17105.

*Findings*

The Board finds that:

- (1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P. L. 769, No. 240) (45 P. S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law and all comments were considered.
- (3) The regulation of the Board is necessary and appropriate for the administration of the act.
- (4) The amendments to this final-form rulemaking do not enlarge the original purpose of the proposed rulemaking published at 33 Pa.B. 4464.

*Order*

The Board therefore orders that:

(a) The regulations of the Board, 49 Pa. Code Chapter 23, are amended by amending §§ 23.82 and 23.91 to read as set forth at 33 Pa.B. 4464 and by amending § 23.86 and by adding § 23.205 to read as set forth in Annex A.

(b) The Board shall submit this order, 33 Pa.B. 4464 and Annex A to the Office of Attorney General and the Office of General Counsel for approval as required by law.

(c) The Board shall certify this order, 33 Pa.B. 4464 and Annex A and shall deposit them with the Legislative Reference Bureau as required by law.

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

STEVEN J. RETO, O.D.,  
*Chairperson*

*(Editor's Note: For the text of the order of the Independent Regulatory Review Commission, relating to this document, see 34 Pa.B. 4082 (July 31, 2004).)*

**Fiscal Note:** Fiscal Note 16A-5211 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 23. STATE BOARD OF OPTOMETRY CONTINUING EDUCATION**

**§ 23.86. Sources of continuing education hours.**

(a) In addition to another provider which wishes to secure approval from the Board, the Board finds that the following providers have currently met the standards for provider approval for all acceptable courses of continuing education; accordingly, the following providers have program approval in all allowable areas for continuing education: the American Optometric Association, the Pennsylvania Optometric Association, all Board-accredited schools and colleges of optometry, the College of Optometrists in Vision Development (COVD), the Council on Optometric Practitioner Education (COPE), eye and vision-related continuing education courses offered by accredited medical colleges, as defined in section 2 of the Medical Practice Act of 1985 (63 P. S. § 422.2), the Optometric Extension Program, the American Academy of Optometry and its state affiliates, the American Academy of Ophthalmology and its state affiliates, and eye and vision-related courses offered by the American Medical Association and its state affiliates. The approval given to these providers is subject to reevaluation. A rescission of provider or program approval will be made only in accordance with 1 Pa. Code Part II (relating to general rules of administrative practice and procedure).

(b) Courses which are provided by providers not indicated in subsection (a) will count as continuing education hours provided that the provider and subject matter are approved by the Board prior to implementation of the course. In addition, credits may be obtained on an individual basis for attendance at programs which have not had prior approval of the Board so long as the individual submits proper application for program approval and supporting documentation and verification of attendance; however, in this instance, the licensee cannot

guarantee himself proper credit from the Board unless the Board finds such course to be in compliance with the subject matter and the provider to be qualified.

(c) It shall be permissible to attend clinical conferences, clinical rounds, or training under a preceptor through clinical hospitals, medical centers, schools, and colleges which are acceptable at the rate of one continuing education hour for every 50 minutes.

(d) Credit hours will be given for correspondence programs, taped study programs, and other individual study programs at the rate of 1 continuing education hour for every 50 minutes. However, proper credit being given for such program is dependent upon the licensee proving, to the satisfaction of the Board, that the program meets the provisions of § 23.85 (relating to standards for providers).

(e) Credit hours will be credited for service as a teacher, preceptor, lecturer, or speaker and for publications, articles, books, and research relating to the practice of optometry. Application should be made prior to the service to assure that approval will be given by the Board to the program. Otherwise, the licensee will be required to secure retroactive approval as set forth in subsection (b).

(f) Each licensee is required to fulfill the continuing education hours using the following allocations:

(1) Subsections (a) and (b) count for a minimum of 50%. Continuing education hours may be completed from subsections (a) and (b).

(2) Subsections (c), (d) or (e) may be used up to a maximum of 25% of the required biennial credit hours. In

no case may the combined total from these three subsections exceed 50% of the total biennial requirement of 24 hours.

#### **CERTIFICATION TO TREAT GLAUCOMA**

##### **§ 23.205. Application procedure.**

An applicant for certification to treat glaucoma under section 4.2 of the act (63 P. S. § 244.4b) shall submit to the Board a completed application obtained from the Board together with the certification fee required by § 23.91 (relating to fees), and one of the following.

(1) A signed verification attesting that the licensee obtained therapeutic certification by passing the licensure examination to practice optometry. The examination shall have included the prescription and administration of pharmaceutical agents for therapeutic purposes (the examination required for therapeutic certification under section 4.1(a)(1) of the act (63 P. S. § 244.4a(a)(1)). The verification shall state the month and year the licensee passed this examination.

(2) A signed verification attesting that the licensee obtained therapeutic certification by passing an examination on the prescription and administration of pharmaceutical agents for therapeutic purposes (the examination required for therapeutic certification under section 4.1(a)(2) of the act) and certificates of attendance from Board-approved continuing education courses demonstrating at least 18 hours in glaucoma, completed since December 19, 2002.

[Pa.B. Doc. No. 04-1440. Filed for public inspection August 6, 2004, 9:00 a.m.]