ADMINISTRATIVE RULES SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Wednesday, August 19, 2020
9:00 a.m.
Room A, MAC
Little Rock, Arkansas

A. Call to Order.

B. Reports of the Executive Subcommittee.

C. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309.

1. <u>DEPARTMENT OF AGRICULTURE, STATE PLANT BOARD</u> (Mr. Wade Hodge, Mr. Scott Bray)

a. <u>SUBJECT</u>: Criminal Background Check Rule

<u>DESCRIPTION</u>: The purpose of this newly proposed rule by the State Plant Board is to comply with laws passed during the 2019 legislative session. The Board met on December 3, 2019, to consider a new rule in response to Act 990 of 2019, which mandates that the Board promulgate a rule to establish a process for an individual to petition the Board for a determination about whether their criminal conviction disqualifies them from licensure, and if so, whether they can obtain a waiver from the Board.

The new rule:
- Establishes a petition process for a pre-licensure criminal background check.
- Establishes a waiver process for individuals with criminal convictions.
- Specifies that some criminal convictions are permanently disqualifying from licensure.

The proposed rule is based on model rules drafted by the Attorney General's Office. The rule allows an individual to petition the Board for a determination as to whether their criminal conviction disqualifies them from licensure. If the individual is disqualified from licensure based upon their criminal conviction, the rule allows the individual to request a waiver from the Board, unless the conviction is one that Act 990 identifies as permanently disqualifying. The rule aids in reducing barriers for

individuals with criminal convictions who are trying to re-enter the workforce.

The Board issues multiple occupational licenses. Proposing multiple rules, one for each of the occupational licenses issued by the Board, could be cumbersome, time-consuming, and inefficient. Instead, the Board is proposing a rule that will contain the criminal background check provisions in one document for each occupational license that it issues.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on June 21, 2020. The Board received no comments.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Section I.C. – What is contemplated by the Board as "a reasonable time"? **RESPONSE:** It depends on whether the individual has a conviction that is a permanent disqualification pursuant to 17-3-103(e). If so, staff can respond immediately following receipt of the background check. If the conviction is one for which a waiver may be requested, then it will depend on how long it takes for the individual to provide, or for the staff to gather, the information specified in 17-3-103(b). Once that information is assembled, it is contemplated that a response could follow the Board's next regularly scheduled quarterly meeting.

(2) Section I.D. – Is it the Board's position that a pre-licensure determination is not an adjudication under the Administrative Procedure Act subject to subsequent review? **RESPONSE:** That is correct.

(3) Section II.A. – Should the statutory reference be to Ark. Code Ann. § "17-3-102(a)" as now codified? **RESPONSE:** Yes.

(4) Section II.E. – Should the reference be to "Administrative Procedure Act," per Ark. Code Ann. § 25-15-201? **RESPONSE:** Yes.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the proposed rule has no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 17-3-104(a), a licensing entity shall adopt or amend rules necessary for the implementation of Title 17, Chapter 3, of the Arkansas Code, concerning occupational criminal background checks. The rule implements the provisions of Act 990 of 2019, sponsored by Senator John

Cooper, which amended the laws regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure.

2. DEPARTMENT OF AGRICULTURE, ARKANSAS WATER WELL CONSTRUCTION COMMISSION (Mr. Wade Hodge)

a. SUBJECT: Arkansas Water Well Construction Commission Rules

DESCRIPTION: The purpose of the proposed rule amendments by the Arkansas Water Well Construction Commission is to comply with laws passed during the 2019 legislative session. The Commission met on December 13, 2019, to consider rule changes in response to laws passed during the 2019 session that require rules for reciprocity and temporary licensure, portability of occupational licenses for military members and spouses, and criminal background checks for individuals seeking occupational licenses. Other changes were made as discussed below.

The proposed amendments are to comply with the following acts of 2019:
- Act 990 of 2019 required occupational licensing entities to promulgate a rule regarding criminal background checks.
- Act 315 of 2019 provided for the elimination of the word "regulation" in favor of the word "rule."
- Act 820 of 2019 required occupational licensing entities to promulgate a rule regarding portability of licenses for military members and spouses.
- Act 1011 of 2019 required occupational licensing entities to promulgate rules providing for reciprocity and temporary licensure.

In addition to the changes made to comply with 2019 acts, an amendment is also proposed to change a reference to "direct supervision" to "personal supervision" because personal supervision is the term defined in the rules. Additionally, an amendment is proposed to remove a provision for a late fee from the rule because the Commission does not have statutory authority to assess a late fee.

The reciprocity and temporary licensure provisions allow individuals holding similar licenses in other states to practice in this state while their credentials are being vetted to see if they are substantially similar to Arkansas's requirements. The criminal background rule allows an individual to petition the Commission for a determination as to whether their criminal conviction disqualifies them from licensure. The military licensure rule requires the Commission to grant expedited licensure to active duty military service members, returning military veterans, and their spouses, if they hold a substantially equivalent occupational license in good standing in another state, territory, or district of the United States.

The new rule additions will help to reduce any barriers individuals might face in obtaining a license in this state or when returning to the workforce.

PUBLIC COMMENT: The proposed rules were reviewed pursuant to Act 820 of 2019 by the Administrative Rules Subcommittee at its meeting of May 14, 2020. No public hearing was held. The public comment period expired on June 21, 2020. The Commission received no comments.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) What is the reasoning behind the Commission's decision not to offer automatic licensure to military applicants, but instead seek approval of expedited licensure under Act 820? **RESPONSE:** Expedited licensure might offer a better path for the applicant because automatic licensure depends upon another state providing information to us that will verify that the licensure is "substantially equivalent." "Expedited" allows staff to take whatever actions necessary to speed the process along.

(2) Section 3.12.1 – What sort of terms are contemplated by the Commission in its reciprocity agreement? **RESPONSE:** The Commission will consider a completed, signed, and subsequently approved (by the Commission) application to be the "written agreement."

(3) Section 3.13.1(D) – Is there a reason the Commission chose not to track the statutory language from Ark. Code Ann. § 17-3-102(c) and omitted the language regarding the date probation "ends" and the reference to "whichever date is the latest"? **RESPONSE:** When the statute uses the phrase that a "disqualification shall not be considered for more than" a certain amount of time, it is setting the outside limit on which an agency may consider that matter as disqualifying. The statute does not preclude the agency from shortening the period of disqualification in this instance.

(4) Section 3.13.1(D)(3) – Should this language be set forth separately from the rest of that in subsection (D), as it does not appear to be limited in time and is set forth separately in the statute, Ark. Code Ann. § 17-3-102(d)? **RESPONSE:** The Commission is comfortable with the placement of the language and will always interpret its rules in compliance with applicable law.

(5) Section 3.13.3(F) – Is it the Commission's position that this decision is not an adjudication under the Administrative Procedure Act, Ark. Code Ann. § 25-15-201 et seq.? **RESPONSE:** That is correct.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 17-50-204(a), the Commission on Water Well Construction shall be responsible for the administration of the Arkansas Water Well Construction Act, Ark. Code Ann. §§ 17-50-101 through 17-50-407, and shall adopt, and from time to time amend or repeal, necessary rules governing the installation, construction, repair, and abandonment of water wells and pumping equipment. Further authority for the rulemaking can be found in Ark. Code Ann. § 17-1-106 (permitting an occupational licensing entity to submit proposed rules recommending an expedited process and procedure for occupational licensure of active duty service members, returning military veterans, and spouses, instead of automatic licensure); Ark. Code Ann. § 17-1-107 (providing that an occupational licensing entity shall by rule adopt reduced requirements for the reinstatement of a license, registration, permit, or certification of certain persons); Ark. Code Ann. § 17-1-108 (providing for expedited temporary and provisional licensure and that an occupational licensing entity shall by rule adopt the least restrictive requirements for an occupational license for certain individuals); and § 17-3-104 (providing that a licensing entity shall adopt or amend rules necessary for the implementation of Title 17, Chapter 3, of the Arkansas Code, concerning occupational criminal background checks).

The proposed changes include those made in light of Act 820 of 2019, sponsored by Senator Missy Irvin, which amended the law concerning the occupational licensure of active duty service members, returning military veterans, and their spouses, provided automatic licensure, and required review and approval of rules submitted; Act 990 of 2019, sponsored by Senator John Cooper, which amended the laws regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure; and Act 1011 of 2019, sponsored by Representative Jim Dotson, which amended the law concerning licensing, registration, and certification for certain professions and established a system of endorsement, recognition, and reciprocity for licensing.

3. DEPARTMENT OF COMMERCE, ARKANSAS ECONOMIC DEVELOPMENT COMMISSION (Mr. Steven Porch)

a. SUBJECT: Arkansas Rural Connect Coronavirus Rule

DESCRIPTION: The Arkansas Economic Development Commission (AEDC) is proposing a new rule entitled, "Arkansas Rural Connect Coronavirus Rule."

Legislative Authority for Rule
This rule is issued by the Director of the Arkansas Economic Development Commission ("Director"). Ark. Code Ann. § 15-4-209(b)(5) provides that AEDC may promulgate rules necessary to implement the programs and services offered by AEDC. On or about August 9, 2019, Governor Asa Hutchinson authorized a transfer of funding for the implementation and administration of the ARC Program to AEDC. Pursuant to Ark. Code Ann. § 15-4-209(a)(1), AEDC is authorized to administer grants to assist with the economic development in the State. The ARC Program is therefore authorized to administer the ARC grant and authorized to issue administrative rules under Ark. Code Ann. § 15-4-209(b)(5) as a service offered by AEDC.

Background & Purpose of Rule
The funding round of Arkansas Rural Connect (ARC) is occurring under circumstances that were not anticipated when the Arkansas Rural Connect program was developed. The COVID-19 pandemic has severely impacted the citizens of Arkansas and the world. COVID-19 has necessitated the imposition of new public health guidelines that encourage, and in some cases require, citizens to practice "social distancing," staying at least 6 feet away from other people as much as possible. COVID-19 has brought about an urgent and immediate need for broadband internet access. Normal day to day activities can no longer be done safely. Broadband enables workers to telework, patients to use telemedicine services, K-12 and college students and unemployed workers in need of reskilling to participate in distance education, religious people to participate in online worship services, and all citizens to shop on line, interact with friends through Skype and other video chat tools, and keep up with the latest news and public health guidelines.

While the COVID-19 pandemic has negatively impacted the state's economy, the federal government has instituted a major relief effort entitled the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act provides substantial allocations of funding to states for coronavirus response, broadly defined. Guidance provided by the US Treasury describes allowable uses of CARES Act funding. In general, CARES Act money cannot be used for regular budget support, and must

be used for coronavirus response, but this includes both public health related measures and economic relief to address the "second-order effects" of the crisis. All CARES Act funds must be spent before the end of December 30, 2020.

The Arkansas Rural Connect program promotes broadband deployment in rural areas of Arkansas that lacks meaningful and efficient broadband services. The ARC program and its purposes align with allowable uses of CARES Act funds. However, Arkansas Rural Connect is designed as a medium- to longer-term investment program, requiring deployment only by late in 2022, which lies well outside the CARES Act spending window.

Due to the urgent need for broadband, necessitated by the COVID-19 pandemic, this rule is needed to disperse funds immediately and to accelerate deployment to the extent possible.

Explanation of the Proposed Rule

Accelerated Application Review

This Rule accelerates review, approval and funding for the following ARC Rural Connect applicants: completed application submissions will receive an expedited review while the funding window is still open. Special attention will be given to qualified projects that are able to deploy in less than a year, preferably 6 to 8 months, if not sooner, to at least 90% of the locations targeted by the project. This 90% deployment rate is flexible, but preferred, and must be clearly stated in your application. The same is true with the ARC rules $3,000 cap per unserved location connection. This $3,000 cap is flexible, but preferred. All approved applications must meet eligibility criteria under the ARC rules. Due to the urgency of deploying broadband to underserved areas during the COVID-19 pandemic, some of the deadlines in the Arkansas Rural Connect program timeline may be moved forward to facilitate faster decision-making. Due to the need for expediency, the scoring rubric described in the ARC rules may or may not be used in making award decisions. The Broadband Office and technical review team will evaluate applications until funding ends.

Distribution of Funds

Due to COVID-19, approved projects will immediately receive disbursement of funds up to the maximum amount of funding allowable under the ARC program. Depending on the project, the Broadband Manager with the approval of the Secretary of the Arkansas Department of Commerce, can increase the maximum amount of funding per project under the ARC program. This funding mechanism contrasts with the usual fiscal rules of the Arkansas Rural Connect program and helps to ensure that projects will not be delayed by cash flow constraints on the part of awardees. In other respects, including submittal of receipts and payment of

penalties for non-performance or early termination of service, awardee ISPs shall be subject to the same obligations as other ARC participants.

PUBLIC COMMENT: A public hearing was held on July 6, 2020. The public comment period expired on July 6, 2020. AEDC provided the following summary of the comments received and its responses thereto:

One comment was received, via e-mail, during the thirty-day comment period. A second comment was asked at the public hearing, via Zoom. The comments were more of a question and the AEDC responses are summarized below:

1. Mark McCaslin's submitted the following question: Can I get clarification around a comment in the Rural Connect broadband rule? It reads, "Qualified projects that are able to deploy six months to a year". Do the funds have to be spent (deployed) by 12/31/20 or within a year of receipt? **RESPONSE:** Steven Porch, AEDC Broadband Office, responded as follows: Grants issued with CARES Act funds must be expended by or before December 30, 2020. Likewise, we are expecting complete deployment and broadband availability to take place by or before December 30, 2020.

2. Howard Gorter's question, during the July 6, 2020 public hearing, is as follows: Is there a scoring or weighting benefit to projects with a greater percentage of completion before year end? **RESPONSE:** Steven Porch, AEDC Broadband Office, responded as follows: Yes, we grant more weight to projects with a greater percentage of completion before December 30, 2020. The goal is to cover as many Arkansans as possible during this pandemic.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: AEDC indicated that the proposed rules do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas Economic Development Commission has authority to administer grants, loans, cooperative agreements, tax credits, guaranties and other incentives, memoranda of understanding, and conveyances to assist with economic development in the state. *See* Ark. Code Ann. § 15-4-209(a)(1). Additionally, AEDC has authority to promulgate rules necessary to implement the programs and services offered by the commission. *See* Ark. Code Ann. § 15-4-209(b)(5).

4. DEPARTMENT OF COMMERCE, STATE INSURANCE DEPARTMENT (Mr. Booth Rand)

a. SUBJECT: Rule 116: Arkansas Firefighter Cancer Relief Trust Fund

DESCRIPTION: The State Insurance Department is proposing a new rule implementing Act 823 of 2019 pertaining to the Arkansas Firefighter Cancer Relief Trust Fund program.

Legislative Authority for Rule
The proposed Rule implements Ark. Code Ann. § 21-5-110(d) and Section Three (3) of Act 823 of 2019, "An Act to Create the Arkansas Firefighter Cancer Relief Network Trust Fund." Section Three (3) of the Act is not codified; however, this Section requires the Insurance Department to issue a rule to implement the program on or before January 1, 2020.

Background & Purpose of Rule
The purpose of this Rule is to simply set up a mechanism to implement the Arkansas Firefighter Cancer Relief Fund Program ("Program") in Act 823. The program envisions that charitable contributions are to be made to this Program by individuals or businesses. The donated funds are proposed to be awarded to firefighters diagnosed with cancer after such funds are transmitted to AID and to State Treasury. The exact mechanism or process of this Program is not explained in the legislation but is deferred to rule-making by AID. AID was not directly involved in creating this legislation or program. It has no insurance regulatory component and is not tied to any insurance product, activity, or insurance premium tax credits. The legislation however vests responsibility with the Department to establish rules pertaining to this Program. The legislation requires the Department to issue a rule implementing this Program on or before January 1, 2020. The Program however has no appropriation Act at this time to distribute funds, and therefore, in our opinion, no funds can be distributed by AID or State Treasury until such appropriation is made. The purpose of this Rule is to set up a mechanism to receive and distribute the funds when the appropriation is made next legislative or fiscal session.

Explanation of the Proposed Rule
The proposed Rule implements the Program by creating a seven (7) member advisory board from the three (3) firefighter associations which are to establish eligibility and award requirements. Because these associations are more informed about this program and issue or the needs of the affected firefighters than AID, we believe the best approach to this is to establish a board of firefighter members to create these eligibility and award requirements. Following promulgation of this Rule, the proposed Rule will require this Board to meet and establish eligibility requirements,

contribution procedures, award standards, and deposit of fund. It is proposed that this Board will meet biannually.

Post-Hearing Summary
The following changes were made to the rules after the conclusion of the public hearing:
1. The "EFFECTIVE DATE" has been changed from August 3, 2020 to September 3, 2020.
2. Two (2) references to "advisory" board in the proposed rule were removed.

PUBLIC COMMENT: A public hearing was held on June 30, 2020. The public comment period expired on June 30, 2020. The State Insurance Department received no public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following question and received the following response thereto:

QUESTION: Ark. Code Ann. § 21-5-110(b) provides that the 3 firefighter associations "shall determine eligibility and award amounts *under the rules promulgated by the department***.**" The proposed rules appear to create an advisory board to make these determinations, rather than establish these standards via the department's rules.
(a) What was the Department's reasoning/rationale for taking this approach? **RESPONSE:** The board is not advisory. [A revised version of the rule removing advisory language was submitted.] The board needs to consult with us about deposits and distributions because we manage the trust account to and from State Treasury. The trust account "is to be managed by AID." We aren't giving them a checkbook, basically. They approve the awards and we will authorize any distributions. Currently, the board can't spend any money because it does not have a statutory appropriation, anyway. They have to run a bill next session.
(b) Will the Department promulgate the eligibility and awards amounts developed by the Board in the future? **RESPONSE:** The Board would adopt the eligibility requirements, and AID would have to publish those out as a rule, as a department rule, to comply with that language.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that the proposed rule does not have a financial impact.

LEGAL AUTHORIZATION: Act 823 of 2019, sponsored by Senator Jonathan Dismang, created the Arkansas Firefighter Cancer Relief Network Trust Fund. Pursuant to the Act, the State Insurance Department shall maintain the trust fund, deposit any donated funds into the fund, and

promulgate rules necessary to implement this section. *See* Ark. Code Ann. §§ 21-5-110(a) and 21-5-110(d). The Arkansas Association of Fire Chiefs, the Arkansas Professional Fire Fighters Association, and the Arkansas State Firefighters Association, Inc., shall determine eligibility and award amounts under the rules promulgated by the department. *See* Ark. Code Ann. § 21-5-110(b).

5. DEPARTMENT OF COMMERCE, ARKANSAS WATERWAYS COMMISSION (Ms. Cassandra Caldwell)

a. SUBJECT: Arkansas Port, Intermodal, and Waterway Development Grant Program Rules

DESCRIPTION: The Arkansas Waterways Commission proposes changes to its Arkansas Port, Intermodal, and Waterway Development Grant Program Rules. The Arkansas Port, Intermodal, and Waterway Development Grant Program provides financial assistance to port authorities and intermodal authorities for the purpose of funding port development projects. The goals of the program are to provide public funds to build land-side infrastructure and to dredge ports and waterways. Funding this infrastructure will provide jobs and competitive transportation costs for moving cargo, thereby minimizing highway congestion, improving safety, and reducing maintenance costs related to Arkansas's highways. This program will also allow Arkansas products to reach additional markets.

The proposed changes to the rules include the following:

- Requires cost estimates to come from a certified engineer, construction company, or manufacturer with vendor's logo included on documentation.
- Requires the grant award recipient deposit the exact amount applicant stated in the grant application if awarded the full amount. If the full amount requested is not awarded, the applicant will deposit 10% of the awarded amount, unless it is a dredge project, in which case 50% must be deposited.
- Requires verification of deposit made by grant recipient within 60 days of notification to the recipient of grant award, or forfeiture of grant award will occur.
- Clarifies that the project must be completed within one year of the date the project was awarded, or the Arkansas Waterways Commission must grant an extension upon proof that all reasonable efforts had been made to complete the project within one year.
- Excludes any port, intermodal authority, or any other public entity along the McClellan-Kerr Arkansas River Navigation System (MKARNS) from participating in the Arkansas Port, Intermodal, and Waterway

Development Grant Program due to the Arkansas River Navigation Fund established by Act 561, § 19-5-1264.

- Grantees shall submit the required quarterly expenditure reports to the Arkansas Waterways Commission within 30 days of report being due to remain in compliance and be eligible for the next year's program.
- Requires that the application will have a component that benefits the movement of waterborne commerce within the State of Arkansas.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on July 13, 2020. The Commission received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 15-23-205(f), the Arkansas Waterways Commission shall promulgate rules to implement the statute, concerning the Arkansas Port, Intermodal, and Waterway Development Grant Program.

6. DEPARTMENT OF EDUCATION, DIVISION OF EARLY AND SECONDARY EDUCATION (DESE) (Ms. Jennifer Dedman, items a-c; Ms. Mary Claire Hyatt, item d; and Ms. Courtney Salas-Ford, items e-g)

a. SUBJECT: Repeal of ADE Rules Governing the Calculation of Arkansas Smart Core Incentive Funding

DESCRIPTION: The Division of Elementary and Secondary Education proposes the repeal of the Rules Governing the Calculation of Arkansas Smart Core Incentive Funding. The rules were formerly necessary to provide a method for the calculation of Smart Core Incentive funding. This program is now funded using College and Career Readiness Planning Program funding, rendering these rules unnecessary.

PUBLIC COMMENT: A public hearing was held on March 11, 2020. The public comment period expired on March 27, 2020. The Division received no comments.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Who or what agency administers the College and Career Readiness Planning Program funding? **RESPONSE:** The Division of Elementary

and Secondary Education administers the College and Career Readiness Planning Program funding if additional funding is available. However, the DESE now provides the ACT to all 11th graders in the state. High schools are required to offer transitional courses for students who do not demonstrate readiness.

(2) Will the distribution of funds from that funding require similar rules?
RESPONSE: The DESE Rules Governing the College and Career Readiness Planning Program address that program.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the repealed rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-11-105(a)(1), (a)(7)(B), the State Board of Education shall have general supervision of the public schools of the state and shall take such other action as it may deem necessary to promote the organization and efficiency of the public schools of the state.

b. SUBJECT: DESE Rules Governing the Enrollment of Children of Military Families and Repeal

DESCRIPTION: The Division of Elementary and Secondary Education proposes its Rules Governing the Enrollment of Children of Military Families and its repeal of the Rules Governing the Enrollment of Military Dependents. The purpose of these new rules is to extend laws related to children of active duty members of the uniformed forces under the Interstate Compact on Educational Opportunity for Military Children to children of all components of the uniformed services in order to remove barriers to educational success that may be experienced by children of military families due to frequent moves and deployment of their parents by:

- Facilitating the timely enrollment of children of military families and ensuring the children are not placed at a disadvantage due to difficulty in the transfer of education records from a previous public school, including a public school in another state;
- Facilitating the student placement process so children of military families are not disadvantaged by variations in attendance requirements, scheduling, lesson sequencing, grading, course content, and assessment;
- Facilitating the qualification and eligibility for enrollment, educational programs, and participation in extracurricular activities;
- Facilitating the on-time graduation of children of military families;
- Providing for the uniform collection and sharing of information between and among public school districts; and

• Promoting flexibility and cooperation between the educational system, parents and legal guardians, and students in order to achieve educational success for the student.

PUBLIC COMMENT: A public hearing was held on April 13, 2020. The public comment period expired on April 20, 2020. The Division provided the following summary of the comments that it received and its responses thereto:

Lucas Harder, Arkansas School Boards Association
Comment: While the table of contents includes the chapter number followed by a hyphen followed by the subchapter number (1-1.01, 2-1.01, 3-1.01, etc.), the actual section numbers in the Rules are missing the chapter number and the hyphen, which would make it much easier to cite to a specific section in the Rules.
Agency Response: The change was made.

Comment: 3-2.01: Act 910 changed this to "Commissioner of Elementary and Secondary Education."
Agency Response: The change was made.

Comment: 3-2.01.1: There appears to be an extra "state" here.
Agency Response: The change was made.

Comment: 3-2.01.2: There appears to be a "the" missing from between "in" and "government."
Agency Response: The change was made.

Comment: 3-3.02: There is a "6" instead of a "b" in "by."
Agency Response: The change was made.

Col. Don Berry, Arkansas Veterans Coalition
Comment: Add to section 1-2.01.5 as follows:
2.01.5 Providing for the adoption and enforcement of administrative rules to implement the provisions of §§ 6-18-107 which replicate or exceed provisions of the Compact model statute codified by §§ 6-4-302 and thereby these rules meet the public school district level responsibilities set by the Compact statute and its rules.
Agency Response: Comment considered. No change was made because the existing language was taken directly from Ark. Code Ann. § 6-4-302.

Comment: Strike the word "minor" in sections 3.15 and 4.02.
Agency Response: Comment considered. No change was made because the word "minor" is part of the definition of student in the statute. *See* Ark. Code Ann. § 6-18-107.

Comment: Strike section 2-1.02.
Agency Response: Comment considered. No change was made. Arkansas law is not binding on other states. This language was included to prevent the conflict of laws issues that have arisen in other states due to the inability to enforce the provisions of the Compact against non-Compact states.

Comment: Change section 3-1.01 as follows:
[3-]1.01 The purpose of the Compact Council is to promote, administer and communicate the provisions of Arkansas statutes and develop programs in coordination with the division, Arkansas public school districts, and our military commands is in order to remove barriers to educational success imposed on children of military families because of frequent moves and deployment of their parents by:
Agency Response: Comment considered. No change was made. The existing language was taken from Ark. Code Ann. § 6-4-302.

Comment: Add to sections 3-1.01.1 through 3-1.01.4 following the word "facilitating" the phrase "promoting and supporting division and school district programs for."
Agency Response: Comment considered. No change was made. The existing language was taken from Ark. Code Ann. § 6-4-302.

Comment: Add "In collaboration with the division" to the beginning of sections 3-1.01.5 and 1.01.6 and add "and Arkansas statutes and rules" to the end of 3-1.01.6.
Agency Response: Comment considered. No change was made. The existing language was taken from Ark. Code Ann. § 6-4-302.

Comment: Strike section 3-1.01.7.
Agency Response: Comment considered. No change was made. The existing language was taken from Ark. Code Ann. § 6-4-302.

Comment: Add to the beginning of section 3-1.01.8 "Principle mission of the Council is in."
Agency Response: Comment considered. No change was made. The existing language was taken from Ark. Code Ann. § 6-4-302.

Comment: Replace "this subchapter" with the statutory citation Ark. Code Ann. § 6-4-301 et seq. and add a reference to Ark. Code Ann. § 6-18-107 to the end of the section.
Agency Response: The change was partially made. "This subchapter" was replaced with the appropriate statutory citation to Ark. Code Ann. § 6-4-301 et seq., but § 6-18-107 was not added to the section. The Compact Commissioner's authority is only under the Compact. Adding the attendance statute at § 6-18-107 would be inaccurate.

Comment: In section 3-2.01.2, replace "this compact" with the statutory citation Ark. Code Ann. § 6-4-301 et seq. and Ark. Code Ann. § 6-18-107.
Agency Response: Comment considered. No change was made. This language is as it appears in the statute.

Comment: Strike section 3-2.02.1 and replace it with the following language: "The Arkansas congressional district of each public school district is as reported in the Arkansas Public School Computer Network accessible through the MySchoolInfo application."
Agency Response: Comment considered. No change was made. The address that appears in MySchoolInfo is the address of the district's administrative office, as indicated in the current language.

Comment: Add to section 3-2.02.2 and 3-2.06.1 as follows:
2.02.2 The number of children of military families shall be determined by the number of children of military families by component and service as reported by the district in the Arkansas Public School Computer Network under chapter 2, section 2.02 of these rules accessible through My School Info application.

2.06.1 The number of children of military families shall be determined by the number of children of military families by component and service as reported by the district in the Arkansas Public School Computer Network under chapter 2, section 2.02 of these rules accessible through the My School Info application.
Agency Response: Comment considered. No change was made. Ark. Code Ann. § 6-18-107 does not require the reporting of this additional information, nor does APSCN track this information.

Comment: Add to section 3-2.07 as follows:
2.07 A representative from each federal and state military installation in Arkansas that employs uniformed service members to be designated by each the military installation commander in the case of federal installations and the Secretary, Arkansas Military Department in the case of state installations as follows:
Agency Response: Comment considered. No change was made. This language was taken directly from Ark. Code Ann. § 6-4-304(a)(7).

Comment: Alter section 3-2.07.1 as follows:
2.07.1 Federal installations: Little Rock Air Force Base, Pine Bluff Arsenal, and Camp Pike Armed Forces Reserve Complex, serving as the active federal installations;
Agency Response: Comment considered. No change was made. Camp Pike is properly listed in the following section 3-2.07.2 as the reserve federal installation.

Comment: Reorganize sections 3-2.07.2 through 3-2.07.3.3 as follows:
2.07.2 State installations: Camp Robinson, Ebbing Air National Guard Base, Fort Chaffee Camp Pike Armed Forces Reserve Complex, serving as the reserve federal installation; and
2.07.3 One representative from each of the following state installations:
2.07.3.1 Camp Robinson,
2.07.3.2 Fort Chaffee, and
2.07.3.3 Ebbing Air National Guard Base.
Agency Response: Comment considered. No change was made. Camp Pike was not listed in this section along with the state installations, but is properly listed as the reserve federal installation in section 3-2.07.2.

Comment: Strike section 3-2.07.4. Rationale: "Installation" is clearly defined in Chapter 1, Sec 3.11. If it is found that the caveat information is needed, then it is more appropriate to amend the definition. Section could cause confusion since Camp Pike is an armed forces reserve center. ROTC and JROTC programs are held on college campuses and in public school classrooms. There can be no consideration that there is a military installation to which assigned personnel are stationed. This rule stipulation is not needed.
Agency Response: Comment considered. No change was made. This language is included for additional clarity.

Comment: Delete use of 'ex officio' throughout all rules. The Council of State Governments legal staff that drafted the original compact language misuse the term. Eliminating use of the term altogether eliminates potential misuse from the established direction in Roberts Rules, 11th Edition, page 483, line 30.
Agency Response: Comment considered. No change made. The term "ex officio" is used in the statute and has been included in the rules for that reason.

Comment: Correct the typo in section 3-3.02 by replacing the 6 with a "b."
Agency Response: The change was made.

Comment: Strike section 3.04. Rationale: Legislative language behind this rule is incorrect and establishes an authority presumption that cases not resolved at the local district level may be resolved at the council level. Council and its DESE employee members may advise districts on issues but in all cases the final determination is at the school district or perhaps with DESE leadership or the Board of Education. Council is not chartered to be an audit authority on decisions made by district superintendents.
Agency Response: Comment considered. No change was made. The existing language is taken directly from Ark. Code Ann. § 6-4-305(e).

Comment: Strike the word "minor" in sections 4.01 and 4.02. Rationale: Same as 3.15 above.
Agency Response: Comment considered. No change was made. See previous response.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) There are several references to "subchapter" throughout the rules. Was this intentional? **RESPONSE:** The changes were made.

(2) Chapter 2, Sections 3.01 and 3.01.1 – In both sections, the public school "district" is referenced whereas the statute on which the rules appear premised, Ark. Code Ann. § 6-4-309(a), (a)(1), as amended by Act 939 of 2019, § 7, refers simply to "public school." Is there a reason for the difference? **RESPONSE:** The change was made.

(3) Chapter 2, Section 3.01.2.2 – Should "department" be "Division" as provided in Ark. Code Ann. § 6-4-309(b), as now codified? **RESPONSE:** The change was made.

(4) Chapter 3, Section 2.01.2 – Should "Department of Education" be "Division" as now codified at Ark. Code Ann. § 6-4-303(c)?
RESPONSE: The change was made.

(5) Chapter 3, Section 3.04 – Should "Department of Education" be "Division" as now codified at Ark. Code Ann. § 6-4-305(e)?
RESPONSE: The change was made.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the proposed rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-18-107(u), the State Board of Education shall promulgate rules to implement the statute, concerning the enrollment of children of military families. The proposed rules implement changes made by Act 939 of 2019, sponsored by Senator Jane English, which concerned the Interstate Compact on Educational Opportunity for Children of Military Families and amended aspects of the Arkansas Code with respect to children of military families who are enrolled in a public school.

c. SUBJECT: DESE Rules Governing Consolidation and Annexation of School Districts

DESCRIPTION: The Division of Elementary and Secondary Education proposes changes to its Rules Governing Consolidation and Annexation of School Districts. The purpose of the rules is to establish the requirements and procedures for consolidating and annexing school districts, administratively consolidating and annexing school districts, and distributing consolidation and annexation incentive funding.

The revisions to the rules were necessary because Sections 4 and 5 of Act 757 of 2019 amended the law to assign the duty of amending school district maps to show boundary lines to the Arkansas Geographic Information Systems Office. *See* Sections 5.04.2 and 6.04.2. The law formerly assigned that duty to the Department of Education.

Other changes to the rules include adding a table of contents, clarifying that "Act 60" schools are administratively reorganized schools in Section 20.02, and replacing references to the Department of Education with the Division of Elementary and Secondary Education.

Following the public comment period, the language in Section 20.02 was returned to its original form due to the familiarity of the term "Act 60."

PUBLIC COMMENT: A public hearing was held on April 13, 2020. The public comment period expired on April 20, 2020. The Division provided the following summary of the comments that it received and its responses thereto:

Lucas Harder, Arkansas School Boards Association
Comment: 1.01: The "c" in the first occurrence of "school" is unnecessarily indicated as being stricken.
Agency Response: The change was made.

Comment: Sections 5.05.4, 6.05.4, 12.12, and 13.11: Due to the Geographic Informations Systems Office being in charge of developing the district boundaries map under 6.04.2 and the consolidation order to county clerks being required to include a copy of the map under 12.11, I would recommend changing this to read "A consolidation or annexation order filed with a county clerk or the Secretary of State shall include a digital copy of the map showing the boundaries of the resulting district or receiving district created by the Arkansas Geographic Information Systems Office under these Rules."
Agency Response: Comment considered. No change was made. Ark. Code Ann. § 6-13-1415(f)(3) requires that it be filed with the Arkansas Geographic Information Systems Office.

Comment: 12.11: With my recommendations to 5.05.4, 6.05.4, 12.12, and 13.11, this section is unnecessary as the Geographic Informations Systems Office would have a copy of the map due to having created the map and the county clerks and Secretary of State would be provided a copy under the other sections.
Agency Response: See previous response.

Comment: 20.00: The intent in this section to move away from references to "Act 60" is a good one, but the phrase of "administratively reorganized school district" could be taken to refer to the district that resulted from the consolidation rather than from the district that was closed. If you want to use this phrase, I would recommend adding it as a new definition to replace "Act 60".
Agency Response: Comment considered. The change was removed. Due to the familiarity of the term Act 60 and its significance as part of the *Lake View* case, the term has been returned to Act 60.

Comment: 22.01.3: I would recommend changing "Arkansas curriculum frameworks" to "Arkansas Academic Standards."
Agency Response: Comment considered. The change was made.

Comment: 24.02.3: There is an "is" missing from between the final "applicable" and "three."
Agency Response: The change was made.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) For Sections 5.04.2 and 6.04.2, Act 757 changed the "shall be" to "is." Was there a reason the previous language was retained? **RESPONSE:** The change was made.

(2) Sections 20.02 and 20.03.2 – Is there a reason that the term "administratively reorganized" was used when Ark. Code Ann. § 6-13-1610(a)(2) and Section 20.01.2 of the rules seem to use "involuntarily consolidated"? **RESPONSE:** The change was made. "Administratively reorganized" was intended to replace "Act 60." For clarity and consistency, the term has been returned to "Act 60." See previous response.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-13-1409(a)(3), the State Board of Education shall have the duty to enact rules regarding the consolidation and annexation of school districts under Title 6 of the Arkansas Code. *See also* Ark. Code Ann. § 6-13-1415(g) (providing that the State Board may promulgate rules necessary to administer Title 6, Chapter 13, Subchapter 14, of the Arkansas Code, concerning consolidation, annexation, and formation of school districts). Further authority for the rulemaking can be found in Ark. Code Ann. § 6-13-1603(j), which provides that the State Board shall promulgate rules to facilitate the administration of Title 6, Chapter 13, Subchapter 16, of the Arkansas Code, concerning the Public Education Reorganization Act. The proposed changes include those made in light of Act 757 of 2019, sponsored by Representative Bruce Cozart, which amended and updated various provisions of the Arkansas Code concerning public education.

d. SUBJECT: DESE Rules Governing Nutrition and Physical Activity Standards and Body Mass Index for Age Assessment Protocols in Arkansas Public Schools

DESCRIPTION: The Division of Elementary and Secondary Education proposes changes to its Rules Governing Nutrition and Physical Activity Standards and Body Mass Index for Age Assessment Protocols in Arkansas Public Schools. Amendments to the rules are necessary as a result of Acts 641 and 428 of 2019. Changes to the rules include the following:

- Regulatory authority in Section 2.02 is changed to reflect updates in law.
- Section 3.04 is deleted as a result of Act 930 of 2017.
- Section 6.06.1 is changed to incorporate changes in the federal modules.
- Sections 7.11–7.13 are added to incorporate provisions of Act 641 of 2019.
- Section 11.01 is changed to reflect changes in federal guidance.
- Section 11.03 is changed to incorporate provisions of Act 428 of 2019.
- Grammatical changes have been made throughout, as well as changes for clarity.

The proposed changes have been reviewed by the Child Health Advisory Committee and the State Board of Health.

PUBLIC COMMENT: A public hearing was held on May 26, 2020. The public comment period expired on June 8, 2020. The Division provided the following summary of the sole comment received and its response thereto:

Delite Fife RN, BSN, NCSN (Concord School District)
Comment: I find this statement to have unclear wording: 11.03.1.1 Provide a student requesting a meal or snack that is different from the

meal or snack being provided to other students in the school. Possible revision: Provide a meal or snack per student request that is different from the meal or snack that is provided to other students.
Agency Response: Comment considered. Non-substantive change made to clarify language.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Section 3.40 – Is the citation to Ark. Code Ann. § 6-15-2006, which concerns annual reports, accurate? **RESPONSE:** No. That citation was accidentally included and has been removed.

(2) Section 6.01.1 – What is meant by a "health and wellness district priority"? **RESPONSE:** This references the district portion of the health and wellness school improvement plan, which requires districts to identify the wellness committee members.

(3) Section 6.06.3 – What is meant by a "health and wellness school improvement priority"? Is this the same as the "health and wellness district priority" as used in Section 6.01.1? **RESPONSE:** The "health and wellness school improvement priority" references the school portion of the health and wellness school improvement plan, which requires school level goals and objectives to be set. The "health and wellness district priority" references the district portion of the health and wellness school improvement plan, which requires districts to identify the wellness committee members.

(4) Section 7.07 – What is the rationale for the striking of this section? **RESPONSE:** This section is in direct conflict with sections 7.9.1 and 7.10, which require a licensed physical education teacher. K-12 Physical Education and Health is a license and is required to teach PE.

(5) Section 7.11.2.1.1 – Should the second statutory citation be to Title 6, rather than Title 66? **RESPONSE:** Yes. This is a typo and should reference Title 6.

(6) Section 11.03.2 – What is meant by a "local charge policy"? **RESPONSE:** All districts participating in the National School Lunch and/or School Breakfast Program must have a written policy or "local charge policy" to address situations where children participating at the reduced price or paid rate do not have money to cover the cost of a meal at the time of meal service. This is a USDA requirement and "local charge policy" is a USDA term.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the amended rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-7-135(a), the State Board of Education, after having consulted the Child Health Advisory Committee and the State Board of Health, shall promulgate appropriate rules to ensure that nutrition and physical activity standards and body mass index for age assessment protocols are implemented to provide students with the skills, opportunities, and encouragement to adopt healthy lifestyles. The proposed changes include those made in light of Act 428 of 2019, sponsored by Representative Andy Davis, which created the Hunger-Free Students' Bill of Rights, required a school to provide a meal or snack, allowed a school to collect money owed, and prohibited a school from stigmatizing a student unable to pay for a meal; and Act 641 of 2019, sponsored by Representative Jana Della Rosa, which allowed for extended learning opportunities through unstructured social time, required a certain amount of time for recess, and considered supervision during unstructured social time as instructional.

e. SUBJECT: Repeal of ADE Rules Governing Minimum Qualifications for General Business Managers

DESCRIPTION: The Division of Elementary and Secondary Education proposes the repeal of the Rules Governing Minimum Qualifications for General Business Managers. Necessary provisions of the rules have been incorporated into the DESE Rules Governing the Fiscal Assessment and Accountability Program to avoid having a separate rule. It is for this reason that the Division proposes this repeal.

PUBLIC COMMENT: A public hearing was held on May 26, 2020. The public comment period expired on June 8, 2020. The Division received no comments.

The proposed effective date is September 1, 2020.

FINANCIAL IMPACT: The agency states that the repealed rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-15-2302(b), the Division of Elementary and Secondary Education is authorized to establish by rule the minimum qualifications that a general business manager for a public school district shall meet.

f. **SUBJECT: Repeal of DESE Rules Governing Special Education and Related Services Sec. 22.00 Home Schooling; Sec. 23.00 ACTAAP; Sec. 27.00 Charter Schools; Sec. 28.00 Uniform Grading Scales**

DESCRIPTION: The Division of Elementary and Secondary Education proposes the repeal of several sections of its Rules Governing Special Education and Related Services, specifically, Section 22.00 Home Schooling; Section 23.00 Arkansas Comprehensive Testing, Assessment, and Accountability Program and the Academic Distress Program; Section 27.00 Charter Schools; and Section 28.00 Uniform Grading Scales. The repeal of these sections is proposed because they are stand-alone rules applicable to all students, not just special education, and are maintained separately.

PUBLIC COMMENT: A public hearing was held on May 26, 2020. The public comment period expired on June 8, 2020. The Division received no comments.

The proposed effective date is September 1, 2020.

FINANCIAL IMPACT: The agency states that the repealed rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-41-207(c), the State Board of Education shall make the necessary rules in keeping with the provisions of the Children with Disabilities Act of 1973, Ark. Code Ann. §§ 6-41-201 through 6-41-223.

g. **SUBJECT: DESE Rules Governing the Arkansas Fiscal Assessment and Accountability Program**

DESCRIPTION: The Division of Elementary and Secondary Education proposes changes to its Rules Governing the Arkansas Fiscal Assessment and Accountability Program. The proposed amendments to these rules include:

- Incorporating necessary changes from Act 929 of 2019.
- Adding early indicators of fiscal distress (Sections 4.01.2.13 and 4.01.2.14).
- Clarifying the process for notifying and identifying districts who experience early indicators of fiscal distress.
- Aligning the authority of the State Board regarding districts in fiscal distress with the Arkansas Educational Support and Accountability Act.
- Adding provisions concerning the State Board's authority over districts that are returned to local control or removed from fiscal distress status, including monitoring for up to three (3) years.

- Incorporating provisions of the ADE Rules Governing Minimum Qualifications for General Business Managers to avoid having a separate rule.
- Replacing Arkansas Department of Education with the Division of Elementary and Secondary Education.

PUBLIC COMMENT: A public hearing was held on May 26, 2020. The public comment period expired on June 8, 2020. The Division provided the following summary of the comments that it received and its response thereto:

Lucas Harder, ASBA
Comment:
~~3.09~~: I would recommend either retaining this number and changing "Department" to "Division" or reducing all following subsection numbers in Section 3 by one as they do not currently indicate a reduction from the deletion of this subsection.

4.01.2.5: "Division of Legislative Audit" should be changed to "Arkansas Legislative Audit."

4.05.1: The "and" at the end of the subsection is on the wrong side of the semicolon.

6.02: "Commissioner of Education" should be changed to "Commissioner of Elementary and Secondary Education."

7.01.5: "Commissioner of Education" should be changed to "Commissioner of Elementary and Secondary Education."

9.01: "Commissioner of Education" should be changed to "Commissioner of Elementary and Secondary Education."

9.01.~~3~~4: "Commissioner of Education" should be changed to "Commissioner of Elementary and Secondary Education."

10.02.2: There is a comma missing from between "annexed" and "or."

10.02.3: There is a comma missing from between "annexed" and "or."

10.02.5: There is a comma missing from between "annexed" and "or."

10.02.9: While A.C.A. § 6-20-1910(b) grants the State Board the sole authority to set the boundary lines following the annexation or consolidation of a district due to fiscal distress, Act 757 of 2019

transferred the duty to create a map of the revised boundaries from the Division to the Arkansas Geographic Informations Systems Office.

10.05.3: The numbering of this subsection through 10.05.4 does not account for the deletion of subsections 10.05 through 10.05.2.7.3.

12.01.1: For standardization, the "ten" and "five" here are missing parenthetical Arabic numerals.

12.02: For standardization, the "ten," "five," and "three" here are missing parenthetical Arabic numerals.

12.02.1: For standardization, the "15" here is missing the longhand.

12.04: For standardization, the "two" here is missing parenthetical Arabic numerals.

12.04.1: For standardization, the "two" here is missing parenthetical Arabic numerals.

12.06: For clarity, I would recommend changing this to read "If the general business manager for a school district or education service cooperative fails to obtain certification within the designated time or fails to renew his or her certification, the school district or education service cooperative must appoint another person to the position who meets the general business manager qualifications listed above."
Agency Response: Corrections made to all sections.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Section 9.01.7 – Is there a reason that the phrase "day-to-day governance of the public school district," as used in Ark. Code Ann. § 6-20-1909(a)(7), as amended by Act 929 of 2019, § 6, was omitted and "operation of all school district systems" was used instead? **RESPONSE:** The phrase "operation of all school district systems" was used to more accurately reflect the role of the Commissioner when a school district is under the authority of the state. The phrase "day-to-day governance" aligns better with the duties of a superintendent or other group of individuals who may act in an advisory capacity to the Commissioner.

(2) Section 9.01.10.1 – Was there a reason that the language "and the public school district has not experienced any additional indicators of fiscal distress," as that language was added by Act 929, § 6, to Ark. Code Ann. § 6-20-1909(a)(10)(A)(i), was omitted? **RESPONSE:** Correction made.

(3) Section 11.02.2 – Should "department" be "division" in accord with Ark. Code Ann. § 6-20-1912(b)(2), as now codified? **RESPONSE:** Correction made.

The proposed effective date is September 1, 2020.

FINANCIAL IMPACT: The agency states that the amended rules have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-20-1911(a), the Division of Elementary and Secondary Education shall promulgate rules as necessary to identify, evaluate, assist, and address school districts in fiscal distress. Further, the Division may promulgate rules as necessary to administer the Arkansas Fiscal Assessment and Accountability Program, Ark. Code Ann. §§ 6-20-1901 through 6-20-1914. *See* Ark. Code Ann. § 6-20-1911(b). The proposed rules include changes made in light of Act 929 of 2019, sponsored by Senator Jane English, which amended provisions of the Arkansas Code concerning public school fiscal accountability and reporting.

7. DEPARTMENT OF FINANCE AND ADMINISTRATION, REVENUE DIVISION (Mr. Paul Gehring, Ms. Lauren Ballard)

a. SUBJECT: Automatic Car Wash, Car Wash Tunnel, and Self-Service Bay Rules

DESCRIPTION: These rules are promulgated to implement changes made by Act 822 of 2019. The rules clarify the newly created sales and use tax exemptions for car wash operators and the imposition of the Water Usage Fee.

PUBLIC COMMENT: A public hearing was held on this rule on July 7, 2020. The public comment period expired July 7, 2020. The agency indicated that it received no public comments.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following answers:

1. Where does the definition of "self-service bay" come from? **RESPONSE:** The definition of "self-service bay" comes from a prior version of SB576 that was filed by Sen. Hester on March 15, 2019. Act 822 refers readers to § 26-57-1601, but it appears this definition was stripped from that section in a subsequent amendment of the bill that was filed by Representative Douglas on March 26, 2019. The Department used

Sen. Hester's definition for "self-service bay" that was provided in earlier versions of the bill, and therefore, DFA used Sen. Hester's original intended definition for rulemaking purposes.

2. Is Section D.2, which recommends use of dedicated water meters, based in statute, or does it come from somewhere else? **RESPONSE:** The recommendation for water meters comes from the agency's best determination of practical application of the statute. The agency made this determination by reviewing similar metered utility tax provisions and in response to public and legislative feedback that was presented to the Department in a City, County Local Affairs meeting on December 10, 2019. In addition, the Department responded to a Revenue Legal Opinion request (Opinion No. 20160614), where the Department provided guidance to a taxpayer that the best possible method of measuring water usage was for the taxpayer to install a separate water meter. In this Legal Opinion, however, DFA made it clear that installation of a separate meter was not required by DFA and the rule likewise states that separate metering is not required.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that this rule will have a financial impact. The agency did not indicate a dollar amount for that financial impact. Per the agency, this rule does not impose any additional cost outside of the original impacts of Act 822 of 2019.

LEGAL AUTHORIZATION: The Arkansas Department of Finance and Administration has the authority to promulgate rules related to car wash registration and water usage fees for car wash operators. Ark. Code Ann. § 26-57-1605(b). These proposed rules implement Act 822 of 2019.

Act 822, sponsored by Senator Bart Hester, amended the sales tax exemption for certain car washes, exempted certain products and services related to car washes from sales and use tax, and levied a fee on certain car wash operators in lieu of the sales and use tax.

8. DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS AND COMMISSIONS, ARKANSAS BOARD OF DISPENSING OPTICIANS (Mr. Lonnie Burrow, Mr. Matt Gilmore)

a. SUBJECT: Arkansas Board of Dispensing Opticians Rules

DESCRIPTION: The Arkansas Board of Dispensing Opticians is proposing changes to its rules. The changes update rules to provide for the criminal background check process mandated by Ark. Code Ann. § 17-3-

101 *et seq.*; update rules to provide for automatic licensure of active duty service members, returning military veterans, and spouses pursuant to Ark. Code Ann. § 17-1-106; and update rules to remove the term "regulation" per Act 315 of 2019.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on July 5, 2020. The board received no public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses thereto:

QUESTION 1: It appears that Section 16(A) of the rule concerning waiver requests refers to Ark. Code Ann. § 17-2-102(a). Should it be referring to Ark. Code Ann. § 17-3-102 instead? If so, could you please submit a revised markup? **RESPONSE:** Thank you, the cite has been corrected. [A revised markup was submitted.]

QUESTION 2: Concerning Section 16(D), what would the board consider a reasonable time to respond with a decision? **RESPONSE:** 30 days. The Board only meets quarterly so we envision it might take time to guarantee the availability of a quorum to vote on a waiver request.

QUESTION 3: Concerning Section 16, will the applicant need to provide a background check as part of the waiver request? **RESPONSE:** An applicant is not required to provide a background check, but would be encouraged to do so to make sure the applicant is aware of all offenses on their record.

The proposed effective date is September 1, 2020.

FINANCIAL IMPACT: The board indicated that the proposed rules do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas Board of Dispensing Opticians has authority to adopt rules commensurate with policies of Title 17, Chapter 89 of the Arkansas Code (concerning ophthalmic dispensers) and for the purpose of carrying the chapter into effect, including but not limited to, rules which establish ethical standards of ophthalmic dispensing practices, application procedures, and procedures for investigating complaints. *See* Ark. Code Ann. § 17-89-203(a)(9). The proposed rules implement the following Acts of the 2019 Regular Session:

Act 315 of 2019, sponsored by Representative Jim Dotson, provides for the uniform use of the term "rule" for an agency statement of general applicability and future effect that implements, interprets, or prescribes

law or policy, or describes the organization, procedure, or practice of an agency and includes, but is not limited to, the amendment or repeal of a prior rule throughout the Arkansas Code as envisioned by defining the term in the Arkansas Administrative Procedure Act. *See* Act 315 of 2019, § 1(a)(4).

Act 820 of 2019, sponsored by Senator Missy Irvin, amended the law concerning the occupational licensure of active duty service members, returning military veterans, and their spouses to provide for automatic licensure. The Act required occupational licensing agencies to grant automatic occupational licensure to these individuals if they hold a substantially equivalent occupational license in good standing issued by another state, territory or district of the United States. *See* Act 820 of 2019, § 2(b).

Act 990 of 2019, sponsored by Senator John Cooper, amended the law regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure. An individual with a criminal record may petition a licensing entity at any time for a determination of whether the criminal record of the individual will disqualify the individual from licensure and whether or not he or she could obtain a waiver under Ark. Code Ann. § 17-3-102(b). *See* Ark. Code Ann. § 17-3-103(a)(1). A licensing entity shall adopt or amend rules necessary for the implementation of Title 17, Chapter 3, of the Arkansas Code, concerning occupational criminal background checks. *See* Ark. Code Ann. § 17-3-104(a).

9. <u>DEPARTMENT OF HUMAN SERVICES, DIVISION OF AGING, ADULT, AND BEHAVIORAL HEALTH SERVICES</u> (Mr. Mark White, Ms. Patricia Gann)

a. <u>SUBJECT</u>: Arkansas Long Term Care Ombudsman Program Policies

<u>DESCRIPTION</u>:

<u>Statement of Necessity</u>

The federal Department of Health and Human Services, Administration on Aging (AoA), issued a final rule for State Long-Term Care Ombudsman programs, effective July 1, 2016, to implement provisions of the Older American Act of 1965 regarding states' Long-Term Care Ombudsman programs. The final rule filing provides that the federal regulation was necessary because the federal agency had not promulgated regulations

regarding state implementation of the Long-Term Care Ombudsman program. This federal regulation was intended to eliminate variation in interpretation of the Act's provisions among the states. Arkansas's ombudsman has complied with the requirements of the Act even though the federal regulation regarding states' implementation was not yet in effect.

In order to comply with this new federal regulation, the Office of the State Ombudsman, Division of Aging, Adult, and Behavioral Health Services (DAABHS), has worked with the AoA to establish ombudsman policies. The AoA has approved these policies, and DAABHS is now bringing this promulgation.

Rule Summary

This rule, entitled, "Ombudsman Policies," is being promulgated for the first time. These policies address:
- An introduction to the office;
- Definitions of important terms;
- Program administration, including the State Ombudsman's role within the Department of Human Services;
- Responsibilities of the Area Agency on Aging, providers, regional ombudsmen, and representatives;
- Grievance processes;
- Criteria for designations within the ombudsman process as well as removal or suspension of awarded designation;
- Service components, delivery, monitoring, and evaluation;
- An outline of organizational and individual conflicts of interest;
- Information on legal counsel;
- Prohibition of willful interference and retaliation along with reporting procedures;
- Authority of the Long Term Care Office to access residents, facilities, and records;
- Policy on confidentiality, monitoring, disclosure, and maintenance;
- Procedure to initiate complaints and how they will be investigated and resolved.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on April 20, 2020. The agency provided the following summary of the public comments it received and its responses to those comments.

Commenter's Name: Luke Mattingly, CEO/President, CareLink

COMMENT 1: Page 1 – typo in line for Chapter 300 "Designation and Certification nd Grievance Processes" **RESPONSE:** We will edit this accordingly. Please see the revised rule.

COMMENT 2: Page 4 – Home and Community Based Services – is it possible to add older adults as a targeted population in this definition? **RESPONSE:** Medicaid has defined "Home and Community Based Services" as opportunities for Medicaid beneficiaries to receive services in their own home or community rather than institutions or other isolated settings. These programs serve a variety of targeted populations.

COMMENT 3: Page 11 – Section 204 (C)(3) Is the OSLTCO-approved monitoring tool one that that SLTCO provides to AAAs? Or Does the AAA have to develop a monitoring tool and submit to the SLTCO for approval? **RESPONSE:** The monitoring tool has been created by the SLTCO and approved by the ACL.

COMMENT 4: Page 12 – Section 204 (D) (1) – Please clarify which AAA staff are to attend OSLTCO-sponsored trainings and meetings. Is this the regional ombudsman, their supervisor, or someone from upper management? **RESPONSE:** The AAA staff that attends the OSLTCO-sponsored trainings and meetings is the regional Ombudsman representative. Section 204(D)(1) is revised to state: "Promote the attendance of the AAA regional ombudsman representative to attend OSLTCO-sponsored trainings and meetings pertaining to the Program."

COMMENT 5: Page 19 – Section 305 (E)(2) What is considered a reasonable time to fill a vacant Ombudsman Representative staff position? Who determines the reasonable time frame? **RESPONSE:** We will revise the wording to state: "Failure to fill a vacant Ombudsman Representative staff position within 45 days of vacancy" based on the DHS Administrative Procedures Manual Chapter 801. This is the same policy as the state unit on aging when fulfilling the State Ombudsman position.

COMMENT 6: Page 20 – Section 307 (A) Typo – "An provider agency" **RESPONSE:** We will make this correction. Please see the revised rule.

Commenter's Name: Holly Johnson, Senior Assistant Attorney General, Medicaid Fraud Control Unit, Office of Arkansas Attorney General Leslie Rutledge

COMMENT 1: Pursuant to the directions outlined for public comments in the March 22, 2020, Arkansas Long Term Care Ombudsman Program Policies Memorandum, the Medicaid Fraud Control Unit offers the following response to the proposed rule revisions:

Under Section 203, State Long-Term Care Ombudsman (SLTCO) Responsibilities, Part E.9., I just wanted to note that the State Attorney General's Office is such an entity based on its statutory authority to ensure the well-being of long-term care facility residents.

RESPONSE: The rule has been revised to add the State Attorney General's Office to the list in Section 203(E)(9).

COMMENT 2: Under Section 305, Withdrawal of Designation of Ombudsman Programs, what constitutes a "reasonable time" (days, e.g.) under part E.2. pertaining to the failure to fill a vacant ombudsman representative staff position? **RESPONSE:** We will revise this to say: "Failure to fill a vacant Ombudsman Representative staff position within 45 days of vacancy" based on the DHS Administrative Procedures Manual Chapter 801. This is the same policy as the state unit on aging when fulfilling the State Ombudsman position.

COMMENT 3: Under Section 306, Process for Withdrawal of Designation of an Ombudsman Program Provider Agency, what are the "reconsideration procedures" referenced in A.1.?

RESPONSE: In response to your question, we will add to Section 306(A)(1) the following:

"a) Designation is not withdrawn until reasonable notice and opportunity for a hearing is provided;
b) Notification of the right to appeal and the appeal procedures are included in the letter notifying the provider agency of a decision to withdraw designation; and,
c) Hearings are conducted by the Appeals and Hearing Units of Arkansas Department of Human Services."

COMMENT 4: Under Section 602, Legal Counsel for the OSLTCO, Part B.1., there is no time-frame for when the SLTCO or designee shall advise the Department of Human Services Secretary and the Office of Chief Counsel of the legal action or threatened legal action. Under Part B.2., there is no time-frame for when the SLTCO will submit a written request.

RESPONSE: We will add "as soon as possible" to Part B.1 and Part B.2, as follows:

Part B.1: "The SLTCO or designee shall as soon as possible…"
Part B.2: "When appropriate, the SLTCO will as soon as possible…"

COMMENT 5: Under Section 603 B., for an Ombudsman Representative to obtain legal representation, there is no time-frame under No. 1. for

when the representative shall advise the SLTCO of a legal action or threatened legal action. Under B.2.a., there is no time-frame for when the SLTCO will submit a written request.

RESPONSE: We will revise the wording to include "as soon as possible," as follows:

No. 1: "The Ombudsman Representative shall as soon as possible advise…"
B.2.a: "The SLTCO will as soon as possible submit…"

COMMENT 6: Under Section 702, Procedures for Reporting Interference or Retaliation, will the OSLTCO have a certain time-period to conduct an investigation under Part B? Will there be a time-frame for SLTCO's written report under Part C.1.a.?

RESPONSE: In response to this input, we will make the following revisions:

Add the verbiage "within 10 days" to Part b, as follows: "The OSLTCO shall review the information provided and within 10 days conduct …"

Add the verbiage "within 14 days" to Part C.1.a., as follows: "The SLTCO shall submit within 14 days a written report."

COMMENT 7: Under Section 903, Disclosure of Information, Part F.1., is there a time-frame for the OSLTCO's response once a written request is made? Under No. 4, will there be a time-frame for the release of requested information? **RESPONSE:** There is no time frame for the OSLTCO's response once a written request is made. There is no timeframe for the release of requested information.

COMMENT 8: Under 1006 Complaint Referral, No. 2, I would recommend adding the Arkansas Attorney General's Office to Part b given its statutory authority to ensure the well-being of residents. For example, (i.e., Arkansas Department of Health, the Office of Long-Term Care, and the Arkansas Attorney General's Office).

RESPONSE: The rule has been revised to add **"**the Arkansas Attorney General's Office" to Section 1006(A)(2)(b).

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:

1. The definition of "abuse" in the proposed rules includes deprivation of goods/services that are necessary to "avoid physical harm, mental anguish,

or mental illness." The definition of "abuse" in the Older Americans Act (42 U.S.C. § 3002(1)) includes "knowing" deprivation of goods/services that are necessary to "meet essential needs or to avoid physical or psychological harm." Is there a reason DAABHS has altered this language for the proposed rule? **RESPONSE:** The definitions contained in the federal Older Americans Act and the Arkansas Adult and Long-Term Care Facility Resident Maltreatment Act differ in a number of ways. The definitions contained in the proposed rule are an attempt to balance the federal definitions, the state definitions, and current practice and policies. The definitions contained in the proposed rule have been approved by the Administration for Community Living of the U.S. Department of Health and Human Services.

2. The proposed definition of "exploitation" omits portions of the definition found at 42 U.S.C. § 3002(18)(A). Is this because the proposed definition of "exploitation" does not expressly include "financial exploitation," as the statutory definition does, or is there some other reason for this change? **RESPONSE:** The definitions contained in the federal Older Americans Act and the Arkansas Adult and Long-Term Care Facility Resident Maltreatment Act differ in a number of ways. The definitions contained in the proposed rule are an attempt to balance the federal definitions, the state definitions, and current practice and policies. The definitions contained in the proposed rule have been approved by the Administration for Community Living of the U.S. Department of Health and Human Services.

3. The statutory definition of "neglect" uses the phrase "goods or services that are necessary to maintain the health or safety of an older individual." 42 U.S.C. § 3002(38)(A). The proposed rules replace this phrase with "goods or services that are necessary to avoid physical harm, mental anguish, or mental illness." Why did the agency choose to make this change? **RESPONSE:** The definitions contained in the federal Older Americans Act and the Arkansas Adult and Long-Term Care Facility Resident Maltreatment Act differ in a number of ways. The definitions contained in the proposed rule are an attempt to balance the federal definitions, the state definitions, and current practice and policies. The definitions contained in the proposed rule have been approved by the Administration for Community Living of the U.S. Department of Health and Human Services.

4. The proposed definition of "neglect" reads, "The failure to provide the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness, or the failure of a caregiver to provide the goods and services." Does the agency anticipate that someone other than a caregiver could fail to provide goods/services, or is there another reason for the two separate clauses? **RESPONSE:** Yes. The definitions

contained in the federal Older Americans Act and the Arkansas Adult and Long-Term Care Facility Resident Maltreatment Act differ in a number of ways. The definitions contained in the proposed rule are an attempt to balance the federal definitions, the state definitions, and current practice and policies. The definitions contained in the proposed rule have been approved by the Administration for Community Living of the U.S. Department of Health and Human Services.

5. Section 204 deals with Area Agency on Aging responsibilities. Is there specific statutory authority for these responsibilities, or are they adapted from something else? **RESPONSE:** The general statutory authority for the proposed rules is Ark. Code Ann. § 20-10-602, which gives broad authority to DHS to "establish and administer an ombudsman program" and to adopt rules necessary to administer the program. 42 U.S.C. 3058g(a)(5)(D) and 45 C.F.R. § 1324.11(e) require the state to establish policies and procedures for area agencies on aging functioning as local Ombudsman entities under the Older Americans Act.

6. Section 205(F)(2) requires that provider agencies provide Ombudsman staff/volunteers in addition to the Ombudsman Program Representative as necessary to maintain or exceed the level of services provided in the service area during the previous fiscal year. Is there specific statutory authority for this provision? **RESPONSE:** The general statutory authority for the proposed rules is Ark. Code Ann. § 20-10-602, which gives broad authority to DHS to "establish and administer an ombudsman program" and to adopt rules necessary to administer the program. This specific requirement is drawn from the federal maintenance of effort requirement, found at 42 U.S.C. §3026(a)(9), regarding expenditures by each area agency on aging operating under the State Long-Term Care Ombudsman Program.

7. What is the source for Section 205(J)'s requirement that provider agencies provide professional development opportunities for Ombudsman Representatives? **RESPONSE:** 42 U.S.C. § 3058g(h)(4) requires the State to establish minimum training requirements for all ombudsman representatives, and 45 C.F.R. § 1324.17(a) makes the local ombudsman entity responsible for personnel management for employee and volunteer representatives.

8. Section 205(O) requires provider agencies to retain personnel records for 5 years. Where does this timeframe come from? **RESPONSE:** The timeframe is taken from current practice and polices, as well as the Arkansas General Records Retention Schedule, Section GS 04007, as promulgated by the Department of Finance and Administration.

9. Where does the 30-day timeframe for review and closure of complaints

in Section 206(B)(7) come from? **RESPONSE:** The timeframe is taken from current practice and policies and non-regulatory guidance issued by the Administration for Community Living of the U.S. Department of Health and Human Services.

10. Is the annual review of regional ombudsman programs in Section 206(B)(10) required by statute? **RESPONSE:** No, but the annual review is necessitated by the annual report required by 42 U.S.C. § 3058g(h)(1) and by the monitoring requirements of 42 U.S.C. § 3058g(a)(5)(D)(i) and 45 C.F.R. § 1324.15(e).

11. Are the designation processes laid out in Sections 303 and 304 adapted from somewhere else? **RESPONSE:** The processes are taken from current practice and policies and a review of state long-term care ombudsman policies of other states that have already received federal approval.

12. Are the withdrawal of designation processes in Sections 305 and 306 adapted from somewhere else? **RESPONSE:** The processes are taken from current practice and policies and a review of state long-term care ombudsman policies of other states that have already received federal approval.

13. Where do the requirements of Section 307, regarding voluntary withdrawal of provider agencies, come from? **RESPONSE:** The requirements are taken from a review of state long-term care ombudsman policies of other states that have already received federal approval.

14. Where do the staff qualification requirements laid out in Sections 310, 311, and 312 come from? **RESPONSE:** Local ombudsman entities are required to cooperate with the State Ombudsman in the selection of these individuals, by 45 C.F.R. § 1324.11(e)(1), and representatives and volunteers are ultimately designated by the State Long-Term Care Ombudsman per 42 U.S.C. § 3058g(a)(5)(A). Criminal background checks are required by Ark. Code Ann. § 20-38-103. The remaining requirement are taken from current practice and policies.

15. Is the provider agency hiring process detailed in Section 313 adapted from somewhere else or original to the agency? **RESPONSE:** The process is taken from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

16. What is the source for the certification requirements for formerly certified ombudsman representatives (Section 314)? **RESPONSE:** The

requirements are taken from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

17. Is the grievance process in Section 318 adapted from somewhere else? If not, where do the investigation timeframes come from? Is there any specific statutory source for these requirements? **RESPONSE:** The grievance process is required by 45 C.F.R. § 1324.11(e)(7). The timeframes are adapted from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

18. Chapter 400, subsection A lists several service components that the Program shall provide to residents. Is this list taken from somewhere, or was it drafted specifically for these proposed rules? **RESPONSE:** This list is taken from current practice and policies.

19. Section 401(A) provides that the Program shall "identify, investigate, and resolve complaints made by or on behalf of residents." Is this meant to apply to all complaints, or merely those specific types of complaints listed in 45 C.F.R. § 1324.13(a)(1)? **RESPONSE:** This language applies only to complaints authorized under 45 C.F.R. § 1324.13(a)(1). The limiting language of 1324.13(a)(1) is reflected in the remainder of the proposed rule, including the definition of "complaint" in Section 102.

20. Is there specific statutory authority for Section 404, which deals with routine visits to long-term care facilities? **RESPONSE:** Access to facilities by ombudsmen is guaranteed by Ark. Code Ann. § 20-10-603. The general statutory authority for the proposed rules is Ark. Code Ann. § 20-10-602, which gives broad authority to DHS to "establish and administer an ombudsman program" and to adopt rules necessary to administer the program. Additional requirements are contained in 45 C.F.R. § 1324.11(e)(2).

21. Is there specific statutory authority for Section 405(D)-(E), dealing with issue advocacy? **RESPONSE:** These provisions are authorized by 45 C.F.R. §§ 1324.11(e)(5) and 1324.13(a)(7)(iv). This function of the Ombudsman is required by 42 U.S.C. § 3058g(a)(3)(G).

22. Where do the annual plan requirements listed in Section 408(C) come from? **RESPONSE:** These requirements are taken from current practice and policies. 45 C.F.R. §§ 1324.13(c)(1)(i) & (ii) requires the submission, review, approval, and regular monitoring of a plan.

23. Section 502(B)(3) identifies "current or former employment of an individual by, or current or former involvement in the management of a long-term care facility or by the owner or operator of any long-term care facility or long-term care services or support services, or managed care organization," as a potential conflict of interest. Is this intended to apply to any prior employment/involvement, or just employment/involvement within the past year as specified by 42 U.S.C. § 3058g(f)(1)(C)(iii)? **RESPONSE:** This language is intended to follow and not exceed the requirements of 42 U.S.C. § 3058g(f)(1)(C)(iii).

24. Section 502(B)(9)(e) identifies providing "legal services outside the scope of ombudsman duties" as a potential conflict of interest. Is there specific statutory/regulatory authority for this provision? **RESPONSE:** An attorney-client relationship is a fiduciary relationship, and such a relationship explicitly qualifies as a conflict of interest under 42 U.S.C. § 3058g(f)(1)(C)(vi).

25. What is the source for the recurrent 5-calendar-day timeframe in Sections 503 and 504? **RESPONSE:** The timeframe is adapted from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

26. Where does Section 602, addressing legal counsel for the State Long Term Care Office, come from? **RESPONSE:** The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(g) and 45 C.F.R. § 1324.15(j) and current practices.

27. Where do the procedures detailed in Section 603, regarding legal counsel for representatives of the Long Term Care Office, come from? **RESPONSE:** The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(g) and 45 C.F.R. § 1324.15(j) and current practices.

28. Are the reporting procedures in Section 702 adapted from somewhere else? **RESPONSE:** The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(j) and 45 C.F.R. § 1324.15(i), and were adapted from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

29. Are the confidentiality procedures in Section 901 adapted from somewhere else? **RESPONSE:** The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(a)(5)(D)(iii) and current practices.

30. Where do the review requirements in Section 902(C)-(F) come from? **RESPONSE:** The provisions of this section reflect the requirements of 42

U.S.C. § 3058g(a)(5)(D)(i) and 45 C.F.R. § 1324.15(e), and were adapted from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

31. Where do the disclosure determination procedures in Section 903(F) come from? **RESPONSE:** The provisions of this section reflect the requirements of 45 C.F.R. § 1324.13(e)(3) and current practices.

32. Where do the record maintenance procedures in Section 904 come from? **RESPONSE:** The provisions of this section reflect the requirements of 45 C.F.R. § 1324.13(d) and were adapted from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

33. Are the complaint processing procedures in Section 1001 adapted from somewhere else? **RESPONSE:** The provisions of this section reflect the requirements of 45 C.F.R. § 1324.19(b).

34. Section 1002(C) states, "Investigation by the ombudsman representative shall proceed only with the express consent of the resident or resident representative except in systemic cases." What is the statutory authority for this provision? **RESPONSE:** 42 U.S.C. § 3058g(a)(3)(A)(i) and 45 C.F.R. § 1324.19(b)(2)(ii)(B). The general statutory authority for the proposed rules is Ark. Code Ann. § 20-10-602, which gives broad authority to DHS to "establish and administer an ombudsman program" and to adopt rules necessary to administer the program.

35. Section 1002(F)(1) states that the State Ombudsman or designee shall refer the matter and disclose resident-identifying information to the appropriate agency/agencies if, among other things, "the ombudsman representative has reasonable cause to believe that the resident representative has taken an action, inaction, or decision that may adversely affect the health, safety, welfare, or rights of the resident." What is the statutory authority for this provision? **RESPONSE:** 42 U.S.C. § 3058g(a)(3)(A)(ii) and 45 C.F.R. § 1324.19(b)(7)(i). The general statutory authority for the proposed rules is Ark. Code Ann. § 20-10-602, which gives broad authority to DHS to "establish and administer an ombudsman program" and to adopt rules necessary to administer the program.

36. Where do the complaint investigation procedures in Section 1002(G) come from? **RESPONSE:** The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(a)(3)(A)(i) and 45 C.F.R. § 1324.19(b)(2)(ii)(B).

37. Section 1002(I) addresses case closure when residents die. Where do these procedures come from? **RESPONSE:** The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(a)(3)(A)(i) and 45 C.F.R. § 1324.19(b)(2)(ii)(B).

38. Are the complaint investigation procedures in Section 1002(J)-(O) adapted from somewhere else? **RESPONSE:** The provisions of these sections reflect the requirements of 45 C.F.R. § 1324.19(b) and were adapted from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

39. Where do the complaint verification provisions of Section 1003 come from? **RESPONSE:** The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(a)(3)(A)(i) and 45 C.F.R. § 1324.19(b)(2)(F).

40. Section 1004(C) lists classifications for case resolution status. Where do these classifications come from? **RESPONSE:** These classifications are taken from the National Ombudsman Reporting System (NORS), an ombudsman data collection tool provided by the Administration for Community Living of the U.S. Department of Health and Human Services.

41. What is the source for the case closure criteria in Section 1004(D)? **RESPONSE:** These criteria are taken from the National Ombudsman Reporting System (NORS), an ombudsman data collection tool provided by the Administration for Community Living of the U.S. Department of Health and Human Services.

42. Section 1005(F) addresses procedures when a resident refuses to consent to report suspected abuse or neglect. Where do these procedures come from? **RESPONSE:** These procedures are taken from current practice and reflect the requirement of 45 C.F.R. § 1324.17(a) that the State Long-Term Care Ombudsman retains programmatic oversight over local ombudsman entities.

43. What is the source for the procedures in Section 1005(I)-(J) dealing with suspected financial exploitation of a resident? **RESPONSE:** The procedures are taken from current practice and policies and a review of state long-term care ombudsman policies of other states that have already received federal approval.

44. Section 1006(D)(2) sets out procedures for referring a resident to

private attorneys. Where do these procedures come from? **RESPONSE:** These procedures are implicitly required by 42 U.S.C. § 3058g(a)(3)(C). They are taken from current practice and policies and a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

45. Are the training requirements in Appendix B based on specific statutory authority? If not, are they adapted from somewhere else? **RESPONSE:** The training requirements are published by the Administration for Community Living of the U.S. Department of Health and Human Services.

46. 45 C.F.R. § 1324.13(c)(2)(iii) requires that a state agency's training procedures "specify an annual number of hours of in-service training for all representatives of the Office." Does Appendix B address in-service training, or has the agency addressed this somewhere else? **RESPONSE:** This requirement is addressed in the proposed rules, in Appendix B, "CERTIFICATION-CONTINUATION REQUIREMENTS," section C.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that this rule does not have a financial impact.

LEGAL AUTHORIZATION: "The Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services shall establish and administer an ombudsman program in accordance with the Older Americans Act . . . and all applicable federal and state laws . . . ." Ark. Code Ann. § 20-10-602. Federal regulations require state agencies on aging to "develop policies governing all aspects of . . . the ombudsman program whether operated directly by the State agency or under contract." 45 C.F.R. § 1321.11(a). The Department has the authority to promulgate rules as necessary or desirable to administer assigned forms of welfare activities and services, *see* Ark. Code Ann. § 20-76-201, and it may also promulgate rules as needed to conform its programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129.

10. DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES (Mr. Mark White, Ms. Janet Mann)

a. SUBJECT: Medication Assisted Treatment Including the Following Provider Manuals: Federally Qualified Health Center 1-19, Hospital-5-19, Nurse Practitioner-3-19, Outpatient Behavioral Health Services-1-19, Physician-4-19 and Rural Health Clinic-1-19; Pharmacy-2-19; Section I-4-19; State Plan Amendment #2020-0013

DESCRIPTION:

Statement of Necessity

The Division of Medical Services (DMS) provider manuals and Arkansas Medicaid state plan are revised to comply with Act 964 of 2019. The purpose of the Act is to increase services and medications available to Arkansas Medicaid eligible beneficiaries diagnosed with Opioid Use Disorders. Act 964 mandates that Arkansas Medicaid may not require prior authorization (PA) nor impose other requirements other than a valid prescription and compliance with Medication-Assisted Treatment (MAT) guidelines by the Substance Abuse and Mental Health Services Administration (SAMHSA). The intent of the Act is to remove barriers to patients obtaining coverage for buprenorphine, naloxone, naltrexone, methadone, and their various formulations and combinations approved by the U.S. Food and Drug Administration (FDA) for the treatment of opioid addiction. This mandate to remove PA requirements pertains to prescription drugs for the treatment of opioid addiction designated as preferred on the evidence-based preferred drug list (PDL) provided there is at least one (1) of each of the drugs which has the preferred designation on the PDL, or available without PA. In addition, under Act 964, prescriptions for these drugs for this purpose may not count against any prescription limits imposed. An additional change was made to clarify that tobacco cessation products do not count toward the three-prescription limit.

SAMHSA defines MAT as the use of medications in combination with counseling and behavioral therapies for the treatment of substance use disorders. A combination of medication and behavioral therapies is effective in the treatment of substance use disorders and can help some people to sustain recovery. This definition and other MAT guidelines can be found at https://www.integration.samhsa.gov/clinical-practice/mat/matoverview. Only providers who have an X-DEA identification number on file with Arkansas Medicaid may prescribe medication required for the treatment of Opioid Use Disorder as part of a MAT program for Arkansas Medicaid beneficiaries. These MAT providers are responsible for coordinating all follow-up and referrals for

counseling and other services in conjunction with prescribing medications. In support of building capacity for SAMHSA-compliant practices, Arkansas Medicaid is promulgating additional policy to recognize the importance of physician visits, counseling, and behavioral therapies in conjunction with prescribed medication by removing barriers to access. Visits to enrolled MAT practitioners will be excluded from the programmatic visit limits when the claim is coded with a specific Opioid Use Disorder (OUD) diagnosis. These services will also be excluded from the $500 lab and x-ray limit.

Rule Summary

The proposed effective date for the rule revisions is September 1. The rule revisions are as follows:

- Physician: **Sections 201.500 through 201.520** are revised to reflect Arkansas Medicaid participation requirements for providers of MAT for Opioid Use Disorder; **Section 203.270** is revised to replace the word "Mental" with "Behavioral"; **Section 203.271** is added to explain the MAT Provider role in administering Opioid Use Disorder services; **Section 225.000** is revised to automatically extend the outpatient hospital visit benefit limit when services are rendered for Opioid Use Disorder once monthly by MAT providers; **Section 225.100** is revised to automatically override benefit limitations when one (1) Opioid Use Disorder test per month is ordered by a MAT provider; **Section 226.000** is revised to automatically extend the physician visit benefit limit when services are rendered for Opioid Use Disorder once monthly by MAT providers; **Sections 230.000 through 230.100** are added to explain coverage rules for MAT and minimum requirement compliance standards; **Section 263.000** is revised to clarify where to locate information regarding procedures for physician-administered drugs; **Section 263.100** is added to explain coverage for MAT prescription products; **Section 272.600** is added to explain special reimbursement rules for MAT may be available; **Section 292.920** is added to outline special billing procedures for MAT.

- Outpatient Behavioral Health Services: **Section 211.200** has a grammatical change; **Section 214.200** is added to explain coverage rules for MAT and minimum requirement compliance standards.

- Pharmacy: **Section 211.105** is added to explain coverage and limitations for MAT products in the pharmacy program; **Section 213.100** is revised to add prescriptions for Opioid Use Disorder and tobacco cessation products to the list of monthly prescription limits.

- Federally Qualified Health Center: **Section 212.220** is revised to add MAT for Opioid Use Disorders when furnished in collaboration with a physician; **Section 220.000** is revised to exempt MAT for Opioid Use Disorder from the twelve (12) FQHC core service encounters per state fiscal year limit; **Section 220.200** is revised to add Opioid Use Disorder when treated with MAT to the list of diagnoses for extension of benefits; **Section 262.430** is added to provide guidelines for MAT billing.

- Hospital: **Section 272.501** is revised to incorporate coverage of MAT and Opioid Use Disorder treatment drugs when provided according to rules promulgated into the Arkansas Medicaid Physician's provider manual.

- Nurse Practitioner: **Section 252.448** is revised to incorporate coverage of MAT and Opioid Use Disorder treatment drugs when provided according to rules promulgated into the Arkansas Medicaid Physician's provider manual.

- Rural Health Clinic: **Section 211.100** is revised to include MAT for Opioid Use Disorders as a core service; **Section 218.100** is revised to explain that the established benefit limit does not apply to individuals receiving MAT for Opioid Use Disorders when it is the primary diagnosis; **Section 252.400** has been added as a place holder for Special Billing Procedures; **Section 252.401** has been added to provide guidance for claims submitted for the Upper Respiratory Infection Acute Pharyngitis episode; **Section 252.402** has been added to provide guidance for MAT billing procedures.

- The Arkansas Medicaid State Plan: has been updated throughout to add MAT program guidelines.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired June 13, 2020. The agency indicated that it received the following public comment and it provided the following response to that comment.

Commenter's Name: Steven C. Anderson, President and Chief Executive Officer, National Association of Chain Drug Stores

COMMENT: On behalf our members operating chain pharmacies in the state of Arkansas, the National Association of Chain Drug Stores (NACDS) appreciates the opportunity to comment on the proposed rule regarding Medication Assisted Treatment (MAT). We want to express our support for the new regulations associated with Arkansas Act 964 of 2019, which expands the availability of Opioid Use Disorder (OUD) medications and services for Medicaid eligible members.

NACDS and our member companies are committed to supporting policies and other initiatives to aggressively combat the opioid epidemic. We believe holistic approaches are needed not only to prevent misuse, abuse, diversion, and addiction from taking root, but also to provide treatment options for individuals who are currently suffering from opioid use disorders.

Section 211.105 of the new regulation is specific to pharmacies. The removal of prior authorization for preferred oral drugs for OUD helps alleviate administrative burdens on our pharmacists and enables patients to receive their prescriptions in a timelier manner. Additionally, allowing MAT drugs to be exempt from the monthly prescription benefit limit and copay requirement are important provisions which will improve access to these important OUD therapies.

NACDS is an active partner in helping states to address the opioid epidemic. We urge all states to utilize pharmacists to provide OUD medications and services to Medicaid beneficiaries and we thank the Division of Medical Services for taking action to address this important public health issue. If you have any questions, please do not hesitate to contact Mary Staples at mstaples@nacds.org or 817-442-1155.

RESPONSE: Thank you for your support.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:

1. What is the status on CMS approval for the SPA? **RESPONSE:** The SPA was submitted on 5/14/20 and is currently pending. The 90th day is 8/12/20.

2. The hyperlink provided in Section 203.271 points to the Center of Excellence for Integrated Health Solutions' home page. Is this the correct link? **RESPONSE:** The link has changed. DMS is changing the language to include a hyperlink instead (see attached updated packet), which can be easily updated should this happen again. The correct link that will be attached to the hyperlink is: https://store.samhsa.gov/product/TIP-63Medications-for-Opioid-Use-Disorder-Full-Document/PEP20-02-01-006. The hyperlink in the policy will be activated when the rule becomes effective.

3. Where do the requirements in Section 230.000(D)(c) regarding maintenance treatment after the first year of treatment come from? **RESPONSE:** The guidelines were derived from TIP 63 in the SAMHSA guidelines and the state's objective for at least quarterly quality assurance

to ensure that all persons on MAT are achieving objectives through treatment.

The proposed effective date is September 1, 2020.

FINANCIAL IMPACT: The agency indicated that this rule has a financial impact.

Per the agency, the additional cost of this rule is estimated at $924,784 for the current fiscal year ($265,017 in general revenue and $659,767 in federal funds) and $1,109,629 for the next fiscal year ($316,355 in general revenue and $793, 274 in federal funds). The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is $265,017 for the current fiscal year and $316,355 for the next fiscal year.

The agency indicated that there is a new or increased cost or obligation of at least $100,000 per year to a private individual, private entity, private business, state government, county government, municipal government, or to two or more of those entities combined. Accordingly, the agency provided the following written findings:

(1) a statement of the rule's basis and purpose;
To combat opioid use disorders.

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;
To comply with Act 964, which mandates that Arkansas Medicaid not require prior authorization other than a valid prescription and compliance with MAT guidelines by the Substance Abuse and Mental Health Services Administration.

(3) a description of the factual evidence that:
(a) justifies the agency's need for the proposed rule; and
(b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;
To combat opioid use disorders. To comply with Act 964, which mandates that Arkansas Medicaid not require prior authorization other than a valid prescription and compliance with Medication Assisted Treatment guidelines by the Substance Abuse and Mental Health Services Administration.

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
No alternatives are proposed at this time.

(5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;
No comments have been received.

(6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and
Not applicable.

(7) an agency plan for review of the rule no less than every ten years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
(a) the rule is achieving the statutory objectives;
(b) the benefits of the rule continue to justify its costs; and
(c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives
The agency monitors state and federal rules and policies for opportunities to reduce and control costs.

LEGAL AUTHORIZATION: The Department of Human Services has the responsibility to administer assigned forms of public assistance and is specifically authorized to maintain an indigent medical care program (Arkansas Medicaid). *See* Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has the authority to make rules that are necessary or desirable to carry out its public assistance duties. Ark. Code Ann. § 20-76-201(12). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

This proposed rule implements Act 964 of 2019, sponsored by Representative Deborah Ferguson, which amended the Prior Authorization Transparency Act and prohibited prior authorization for medication-assisted treatment.

11. <u>DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, STATE BOARD OF PUBLIC ACCOUNTANCY</u> (Mr. Jimmy Corley)

a. <u>SUBJECT</u>: Rule 19 Licensure for Military Members/Veterans/Spouses

<u>DESCRIPTION</u>: In 2015, the legislature passed Act 848, entitled "An act to amend Arkansas Law concerning the licensure, certification, or permitting of active duty service members, returning military veterans, and spouses." This Act required all state boards or commissions that issue licenses to:

• Expedite the process/procedure for full licensure for military service members, veterans, or their spouses;
• Provide for a temporary license while the full license application process is ongoing;
• Consider the applicant's military training and experience and accept it in lieu of experience or education requirements required for licensure if deemed satisfactory by the Board;
• Grant partial or full exemptions of continuing education requirements in certain circumstances; and
• Extend the expiration date of the license of a military service member deployed outside the state of Arkansas or spouse to 180 days following the individual's return from active deployment.

Act 848 also authorized Boards and commissions to promulgate rules necessary to carry out the required provisions. The Arkansas State Board of Public Accountancy did promulgate rules as required by Act 848. Board Rule 19 "Licensure for active duty service members, returning military veterans, and spouses" was created during this promulgation process. Also, Board Rule 13 "Continuing Education" was modified to allow for continuing education exemptions in certain circumstances.

In 2017 Act 248 was passed which amended the law to "require that all state boards and commissions promulgate rules to expedite the process and procedures for full licensure…for active duty service members, returning military veterans, and their spouses." Because our Board had already promulgated such rules that became effective in February 2016, the Board of Accountancy did not take any additional action based on Act 248.

In 2019 the Legislature passed Act 820 entitled "An Act to amend the Law concerning the occupational licensure of active duty service members, returning military veterans, and their spouses; to provide automatic

licensure; to require review and approval of rules submitted by occupational entities; and for other purposes."

This Act provided for automatic licensure for military service members, returning military veterans, or spouses unless rules were approved by the Administrative Rules and Regulations Subcommittee of the Legislative Council. The Act was silent on Boards and Commissions who had already promulgated (and obtained approval for) rules regarding licensure for military service members, returning military veterans, and spouses. Out of an abundance of caution our Board decided to make changes to Rule 19 and seek approval from the Administrative Rules and Regulations Subcommittee of the Legislative Council.

While the changes we are proposing to Rule 19 are not substantive from the practical point of view of a qualified applicant seeking the benefits Rule 19 provides, the changes might be considered substantive from a legal point of view. The prior version of Rule 19 offered temporary licensure during the expedited application review process under Rule 19.1. This temporary licensure was based on the specific requirement of Act 848 of 2015 to offer such temporary licensure. The changes made to Ark. Code Ann. § 17-1-106 by Act 820 of 2019 eliminated the statutory temporary licensure provisions. However, the board determined that temporary licensure could still be granted as part of the expedited review process mandated under 2019 revision to Ark. Code Ann. § 17-1-106. In amending Rule 19, the board decided to reverse the order of prior Rules 19.1 and 19.2 and make clear that temporary licensure is now considered part of the expedited review process and not an independent benefit, as it might have been considered under the 2015 statutory authorization.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on June 30, 2020. The State Board of Accountancy received no public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses thereto:

QUESTION 1: Concerning Section 19.2(2) of the rule, is appeal of denial of an application for licensure governed by provisions of the Administrative Procedure Act? **RESPONSE:** Yes – under Ark. Code Ann. § 17-12-603(j), "[a]nyone adversely affected by any order of the board shall be entitled to pursue all rights and remedies available under the Arkansas Administrative Procedure Act, § 25-15-201 et seq.

QUESTION 2: If the Administrative Procedure Act applies to this decision, would it also govern the determination of "the expiration of any period of time permitted to seek judicial review of the denial of an

application…and any remand following judicial review," as anticipated by the rule? **RESPONSE:** Yes, it would.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The State Board of Accountancy indicated that the proposed rules do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas State Board of Accountancy has authority to adopt, and amend from time to time, rules for the orderly conduct of its affairs and for the administration of Title 17, Chapter 12 of the Arkansas Code concerning Accountants. *See* Ark. Code Ann. § 17-12-203(a). In addition, the board may also adopt rules as necessary and proper to carry out the purposes of subchapter 2 concerning the board's powers and duties. *See* Ark. Code Ann. § 17-12-203(e)(1).

The proposed rules implement Act 820 of 2019, sponsored by Senator Missy Irvin, which provides for automatic licensure of active duty service members, returning military veterans and their spouses, in circumstances where the individual is a holder in good standing of a substantially equivalent occupational license issued by another state, territory, or district of the United States. *See* Ark. Code Ann. § 17-1-106(b)(1). An occupational licensing entity may, however, submit proposed rules recommending an expedited process and procedure for licensure, to the Administrative Rules Subcommittee of the Legislative Council. *See* Ark. Code Ann. § 17-1-106(c). An occupational licensing entity shall be required to provide automatic licensure if the proposed rules are not approved as required under subsection (d)(2) of this section. *See* Ark. Code Ann. § 17-1-106(b)(2).

12. DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, AUCTIONEER'S LICENSING BOARD (Ms. Kristy Arnold, Mr. Brad Wooley)

a. SUBJECT: Rules of the Arkansas Auctioneer's Licensing Board

DESCRIPTION: The Arkansas Auctioneer's Licensing Board is proposing amendments to its rules pursuant to its authority under Ark. Code Ann. § 17-17-207. The proposed amendments update existing rules to:

- provide for the criminal background check process mandated by Ark. Code Ann. § 17-3-101 *et seq.*;

- provide for automatic licensure of active duty service members, returning service members, and their spouses pursuant to Ark. Code Ann. § 17-1-106;
- clarify the reciprocity process pursuant to Acts 426 and 1011 of 2019; and
- remove the term "regulation" pursuant to Act 315 of 2019.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on May 19, 2020. The Arkansas Auctioneer's Licensing Board did not receive any public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following question and receive the following response thereto:

QUESTION: Concerning Rule 9.3.2, what does the board consider to be a "reasonable time?" **RESPONSE:** The board considers 30 days to be a "reasonable time."

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The board indicated that the proposed rules do not have a financial impact.

LEGAL AUTHORIZATION: The Auctioneer's Licensing Board has authority to promulgate such rules as may be necessary to implement Title 17, Chapter 17 of the Arkansas Code concerning auctioneers, and may establish by rule such forms as may be necessary to administer this chapter. *See* Ark. Code Ann. § 17-17-207. The proposed rules implement the following Acts of the 2019 Regular Session:

Act 315 of 2019, sponsored by Representative Jim Dotson, provides for the uniform use of the term "rule" for an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency and includes, but is not limited to, the amendment or repeal of a prior rule throughout the Arkansas Code as envisioned by defining the term in the Arkansas Administrative Procedure Act. *See* Act 315 of 2019, § 1(a)(4).

Act 426 of 2019, sponsored by Representative Bruce Cozart, authorizes occupational licensing entities to grant expedited temporary and provisional licensing for certain individuals. *See* Act 426 of 2019.

Act 820 of 2019, sponsored by Senator Missy Irvin, amended the law concerning the occupational licensure of active duty service members, returning military veterans, and their spouses to provide for automatic

licensure. The Act required occupational licensing agencies to grant automatic occupational licensure to these individuals if they hold a substantially equivalent occupational license in good standing issued by another state, territory or district of the United States. *See* Act 820 of 2019, § 2(b).

Act 990 of 2019, sponsored by Senator John Cooper, amended the law regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure. An individual with a criminal record may petition a licensing entity at any time for a determination of whether the criminal record of the individual will disqualify the individual from licensure and whether or not he or she could obtain a waiver under Ark. Code Ann. § 17-3-102(b). *See* Ark. Code Ann. § 17-3-103(a)(1). A licensing entity shall adopt or amend rules necessary for the implementation of Title 17, Chapter 3, of the Arkansas Code, concerning occupational criminal background checks. *See* Ark. Code Ann. § 17-3-104(a).

13. <u>DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, STATE BOARD OF LICENSURE FOR PROFESSIONAL ENGINEERS AND PROFESSIONAL SURVEYORS</u> (Ms. Denise Oxley, Ms. Heather Richardson)

a. <u>SUBJECT</u>: Rules of the Board of Licensure for Professional Engineers and Professional Surveyors

<u>DESCRIPTION</u>: The proposed amendments to the existing Rules of the Board of Licensure for Professional Engineers and Professional Surveyors will delete board duties that will be performed by the Secretary of Labor and Licensing, pursuant to the Transformation Act 910 and delete character requirements such as "good moral character" and "moral turpitude" in compliance with Act 990 of 2019. The Board seeks to amend reciprocity (which is referred to in the industry as comity) for all applicants who hold substantially similar licenses in other states, pursuant to Act 1011 and amend temporary license, in compliance with Act 426 and Act 1011. The amendment seeks to clarify and expedite the licensure process by allowing the Board's Director to conditionally approve, subject to Board ratification, all qualified reciprocity (comity) and intern licensure applications. The current rule requires the Board to approve original applications and admit the applicants to exams prior to licensure. The amendment would enable the Board to issue a licenses to qualified original applicants if the applicants previously passed exams. The amendment seeks to remove specific college course and hour curriculum

requirements for original Surveyor Intern and Professional Surveyor applicants. The amendment clarifies that all licenses are renewed biennially. The Continuing Professional Competency (CPC) requirements for Professional Surveyors are amended to include at least 2 hours of Standards of Practice No. 1 for Property Boundary Surveys and Plats for each biennial renewal period. The amendment specifies when and where the seal of an individual and/or firm must be used. The amendments also include moving all licensure-related provisions under Article 8; deleting obsolete fees; deleting duplicative and unnecessary provisions; and updating and clarifying terminology.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on June 20, 2020. The board provided the following summary of comments received and its responses thereto:

1. Comments of Randy Johnson, E.I.; Kiron Browning, P.E.; John Campbell, P.E.; Dwayne Calhoun, P.E.; Sam Paulus, P.S.; John Harty, P.E.; and Rick Nichols, P.E. were regarding the deleting of character requirements such as "good moral character" and "moral turpitude."

Board Response: On July 14, 2020, the Board discussed and voted that the character requirements such as "good moral character" and "moral turpitude" will be deleted from the Board's Rules pursuant to Act 990 of 2019. Rules of the Board, Article 20. Ethics and
Rules of Professional Conduct did not contain such character requirements; therefore, no requirements were deleted from this article.

2. Comment of John Campbell, P.E. was to add "webinars" to the PDH credits.

Board Response: On July 14, 2020, the Board discussed and voted that Article 19
Continuing Professional Competency (CPC) D.1.d, D.2.d, lists seminars as a qualifying unit for PDHs.; therefore, there was no change to the rule.

3. Comment of Kiron Browning, P.E. was wanting clarification of amending reciprocity/comity requirements for all applicants who hold substantially similar licenses.

Board Response: On July 14, 2020, the Board discussed and voted that the amendments to the current rule regarding reciprocity/comity licensure was pursuant to Act 1011 of 2019.

4. Comment of Kiron Browning, P.E. was wanting clarification of amending the temporary license.

Board Response: On July 14, 2020, the Board discussed and voted that the amendments to the current rule regarding temporary licensure was pursuant to Act 1011 of 2019 and Act 426 of 2019.

5. Comment of Kiron Browning, P.E. was wanting clarification of amending the rule regarding members of the military and their spouses to include expedited licensure for Professional Surveyor applicants and automatic licensure for Professional Engineers, Engineer Intern, and Surveyor Intern applicants.

Board Response: On July 14, 2020, the Board discussed and voted that the amendments to the current rule regarding the members of the military and their spouses was pursuant to Act 820 of 2019. Article 8.I Military Licensure rule received initial approval by the Legislative Administrative Rules Subcommittee on May 14, 2020.

6. Comment of "Trey" Roy Lee Lewis, S.I. was seeking clarification whether the original applicants would still be required to get board permission to take the NCEES Professional and Practice Exams.

Board Response: On July 14, 2020 the Board discussed and voted that amendments to the current rule Articles 8.C.1.e and 8.E.1.d would give the Professional Engineer-Original license applicant and Professional Surveyor-Original license applicant the option to either request approval and/or permission to take the NCEES Professional and Practice Exam or the applicant may take and pass the NCEES Professional and Practice Exam without approval and/or permission and apply for licensure once they pass the exam and meet all qualifications for licensure.

7. Comment of Sam Paulus, P.S. was seeking clarification regarding the "removal of college requirements for original applicants."

Board Response: On July 14, 2020 the Board discussed and voted that amendments to the current rule in Article 8.D.1.c and Article 8.E.1.a.iii would clarify the education qualifications for Surveyor Intern applicant and Professional Surveyor-Original applicant seeking licensure with a non-surveying degree by eliminating the outdated, specified 30 hours of course requirements and requiring proof of completing 30 hours of survey courses to be combined with a bachelor's degree.

8. Comment of Joe McGartland, P.E. was removing the social security number (SSN) from the applications.

Board Response: On July 14, 2020 the Board discussed and voted that there would not be an amendment to the rule due to the SSN is required

pursuant to Federal Law (the Social Security Act section 466(a)(13)), and State Law (A.C.A. §17-1-1 04(a)) disclosure of the Social Security Number (SSN) is mandatory and will be used under the child support enforcement program.

9. Comment of John Harty, P.E. was the Director should not "approve licensure at his discretion" and he gives "no credence to the qualifying statements regarding Board ratification and "qualified applicants." To allow one person to wield that kind of power is to invite corruption and public endangerment."

Board Response: On July 14, 2020, the Board discussed and voted that amendments to the current rule were necessary to make a long-standing Board Policy from 1998 a board rule. Article 8.A.4 will allow the Director the authority to Conditionally Approve qualified applicants who meet all the licensure qualifications subject to later Board ratification. Original licensure applicants are not Conditionally Approved.

10. Comment of Leland Dyson, P.E. Arkansas State Engineer was to clarify the proposed rule regarding the sealing and signing of the cover sheet of drawings.

Board Response: On July 14, 2020, the Board discussed, agreed with the comment, and voted to remove proposed amendments to Article 12.B.1. The proposed corrected language is as follows: *"Each page of each final engineering document to include drawings, and the cover sheet of ~~each volume of~~ specifications and the signature page of written reports prepared by a licensee shall, when issued, be dated, signed and stamped with the said seal or facsimile thereof by the responsible licensee(s)."*

11. Comment of Jason Waldemer, P.S. was verifying that the rule change "would require
PDH's in Minimum Technical standards or standards of practice."

Board Response: On July 14, 2020, the Board discussed and voted that amendments to Article 19.C.2 would require 2 PDH of Arkansas Standards of Practice No. 1 for Professional Surveyor licensees during the biennial renewal period.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses thereto:

QUESTION 1: For both professional engineers and professional surveyors, there is language in the rule indicating that "As evidence that the applicant is sufficiently competent, the applicant shall pass an examination in the fundamentals of engineering/surveying." Is this an

examination given by the board, or a National examination? Would passing the final examination of a class be sufficient? Could you please clarify and make changes to the rule if necessary? **RESPONSE:** The Fundamentals of Engineering exam (FE) is an exam administered by NCEES, a national organization. The exam is a competency exam not associated with a particular class. Taking and/or passing the FE exam may be a requirement for graduation from some university programs. The NCEES FE exam has been a requirement for Engineer Intern (EI) licensure in Arkansas since May 1965. More information about the exam can be found at https://ncees.org/engineering/fe/)

QUESTION 2: Section A of Article 14 appears to incorrectly cite Ark. Code Ann. § 17-2-102, rather than § 17-3-102. Could you please explain or correct this? **RESPONSE:** This has been corrected in the attached revised markup and clean versions

QUESTION 3: Could you please provide statutory authority for the fine listed in Article 14 (C)? **RESPONSE:** Ark. Code Ann. § 17-30-305(b)

QUESTION 4: Article 21(A)(3) references a "reasonable time" for the board's response. What does the board consider to be a reasonable time? **RESPONSE:** Assuming the applicant/petitioner supplies the sufficient documentation, 30 days would be a reasonable time. This language is part of the AG's model language for Act 990 and has been approved by ADH and the Governor's Office.

QUESTION 5: Section B(1) of Article 21 appears to incorrectly cite Ark. Code Ann. § 17-2-102, rather than § 17-3-102 twice. Could you please explain or correct these?
RESPONSE: This has been corrected in the attached revised markup and clean versions.

QUESTION 6: What is the anticipated timeframe for the board to respond to a waiver request under Article 21(B)? **RESPONSE:** Since the waiver request will be a board agenda item, the board response will be submitted to the requestor days after the board's decision. This language is part of the AG's model language for Act 990 and has been approved by ADH and the Governor's Office.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The board indicated that the proposed rules have a financial impact. The total estimated cost for the next fiscal year to private individuals, entities and businesses subjected to the proposed rules is $150.00. The agency explained that professional surveyors will have the option of applying for a temporary license for a fee of $150.00.

Additionally, the only potential cost to the agency for the amended rules is to implement the new temporary license for surveyors with computer programming in the PELS database. The agency states that the cost is unknown at this time.

LEGAL AUTHORIZATION: Concerning professional engineers, the State Board of Licensure for Professional Engineers and Professional Surveyors has authority to adopt rules not inconsistent with Title 17, Chapter 30 of the Arkansas Code. *See* Ark. Code Ann. § 17-30-203(b)(4). The board also has authority to have a seal affixed to each certificate of licensure, determine the persons entitled to be licensed and those whose licenses shall be suspended or revoked, fix fees and renewal fees, and to hold examinations for applicants for licensure. *See* Ark. Code Ann. §§ 17-30-203(a) and 17-30-203(b). Persons violating this chapter or a rule of the board shall pay the board a civil penalty in an amount determined by the board of not more than five thousand dollars for each offense. *See* Ark. Code Ann. § 17-30-305(b).

Concerning professional surveyors, the board has authority to adopt and amend all bylaws and rules of procedure not inconsistent with the Arkansas Constitution and laws of this state that may be reasonably necessary for the proper performance of its duties and the regulation of its proceedings, meetings, records, examinations and conduct thereof. *See* Ark. Code Ann. § 17-48-104(a). The board may also establish application fees, certificate fees, renewal fees, license reinstatement fees, examination fees, penalties for late renewals or cancellations, and any other fee it deems necessary within the guidelines of the State of Arkansas. *See* Ark. Code Ann. § 17-48-104(e). The proposed rules implement the following Acts of the 2019 Regular Session:

Act 426 of 2019, sponsored by Representative Bruce Cozart, authorizes occupational licensing entities to grant expedited temporary and provisional licensing for certain individuals. *See* Act 426 of 2019.

Act 820 of 2019, sponsored by Senator Missy Irvin, amended the law concerning the occupational licensure of active duty service members, returning military veterans, and their spouses to provide for automatic licensure. The Act required occupational licensing agencies to grant automatic occupational licensure to these individuals if they hold a substantially equivalent occupational license in good standing issued by another state, territory or district of the United States. *See* Act 820 of 2019, § 2(b).

Act 990 of 2019, sponsored by Senator John Cooper, amended the law regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and

disqualifying offenses for licensure. An individual with a criminal record may petition a licensing entity at any time for a determination of whether the criminal record of the individual will disqualify the individual from licensure and whether or not he or she could obtain a waiver under Ark. Code Ann. § 17-3-102(b). *See* Ark. Code Ann. § 17-3-103(a)(1). A licensing entity shall adopt or amend rules necessary for the implementation of Title 17, Chapter 3, of the Arkansas Code, concerning occupational criminal background checks. *See* Ark. Code Ann. § 17-3-104(a).

Act 1011 of 2019, sponsored by Representative Jim Dotson, amended the law concerning licensing, registration, and certification for certain professions and established a system of endorsement, recognition, and reciprocity for licensing, registration, and certification for certain professions. *See* Act 1011 of 2019.

14. DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, HVAC LICENSING BOARD (Ms. Denise Oxley)

a. SUBJECT: Administrative Rules Pertaining to the Licensing of Heating, Ventilation, Air Conditioning and Refrigeration Contractors

DESCRIPTION: The proposed amendments to the rules of the HVAC/R Board would accomplish the following:

1. Revises organizational names as needed. 2019 Ark. Acts 910;
2. Replaces the term "regulations" with "rules." 2019 Ark. Acts 315;
3. Revises definitions to include a definition of "substantially similar license." See 2019 Ark. Acts 426;
4. Revises the general licensing requirements to clarify that criminal background checks are not required, and that apprenticeship, education, or training is not a condition of licensure;
5. Revises the provisions regarding proof of experience to be least restrictive;
6. Adds a provision on temporary or provisional licensing to comply with Ark. Code Ann. § 17-1-108. 2019 Ark. Acts 426 and 1011;
7. Adds a provision regarding disqualification for criminal offenses to comply with 2019 Ark. Acts 990. This provision provides that the board may grant a waiver in certain circumstances, although criminal background checks are not authorized. Further, the board may inquire about criminal convictions at the time of application or renewal. Providing false information to the board may result in license denial, suspension or revocation;

8. Revises the provision on reciprocity to comply with Ark. Code Ann. § 17-1-107. 2019 Ark. Acts 426 and 1011; and
9. Adds a provision to provide for automatic licensure of active duty service members, returning military veterans and their spouses. 2019 Ark. Acts 820.

PUBLIC COMMENT: A public hearing was held on July 8, 2020. The public comment period expired on July 8, 2020. The board received no public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following question and received the following response thereto:

QUESTION: In Section V(D) of the rule, there appear to be two references to Ark. Code Ann. § 17-2-102 et seq. Should these be Ark. Code Ann. § 17-3-102 instead? If so, could you please send me a revised markup? **RESPONSE:** A revised mark-up and clean copy were submitted.

The proposed effective date is September 1, 2020.

FINANCIAL IMPACT: The board indicated that the proposed rules do not have a financial impact.

LEGAL AUTHORIZATION: The HVACR Licensing Board is authorized to adopt certain rules to ensure the proper administration and enforcement of Title 17, Chapter 33 of the Arkansas Code concerning heating, ventilation, air conditioning, and refrigeration workers. *See* Ark. Code Ann. § 17-33-202(1). In addition, the board may also: (1) adopt a mechanical code and standards for the conduct of HVACR work, (2) establish HVACR code inspection programs, (3) review applications for examination for a Class A, Class B, Class C, Class D, Class E, and Class L license, and (4) establish fees for the proper administration of the requirements of this chapter. *See* Ark. Code Ann. §§ 17-33-202(2), (5), (7), and (10). The proposed rules implement the following Acts of the 2019 Regular Session:

Act 315 of 2019, sponsored by Representative Jim Dotson, provides for the uniform use of the term "rule" for an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency and includes, but is not limited to, the amendment or repeal of a prior rule throughout the Arkansas Code as envisioned by defining the term in the Arkansas Administrative Procedure Act. *See* Act 315 of 2019, § 1(a)(4).

Act 426 of 2019, sponsored by Representative Bruce Cozart, authorizes occupational licensing entities to grant expedited temporary and provisional licensing for certain individuals. *See* Act 426 of 2019.

Act 820 of 2019, sponsored by Senator Missy Irvin, amended the law concerning the occupational licensure of active duty service members, returning military veterans, and their spouses to provide for automatic licensure. The Act required occupational licensing agencies to grant automatic occupational licensure to these individuals if they hold a substantially equivalent occupational license in good standing issued by another state, territory or district of the United States. *See* Act 820 of 2019, § 2(b).

Act 990 of 2019, sponsored by Senator John Cooper, amended the law regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure. An individual with a criminal record may petition a licensing entity at any time for a determination of whether the criminal record of the individual will disqualify the individual from licensure and whether or not he or she could obtain a waiver under Ark. Code Ann. § 17-3-102(b). *See* Ark. Code Ann. § 17-3-103(a)(1). A licensing entity shall adopt or amend rules necessary for the implementation of Title 17, Chapter 3, of the Arkansas Code, concerning occupational criminal background checks. *See* Ark. Code Ann. § 17-3-104(a).

Act 1011 of 2019, sponsored by Representative Jim Dotson, amended the law concerning licensing, registration, and certification for certain professions and established a system of endorsement, recognition, and reciprocity for licensing, registration, and certification for certain professions. *See* Act 1011 of 2019.

15. <u>DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES, DIVISION OF BUILDING AUTHORITY</u> (Ms. Ann Purvis)

a. <u>SUBJECT</u>: Building Authority Minimum Standards and Criteria, Section Three: Construction; 3-324

<u>DESCRIPTION</u>: The changes in this proposed rule provide for a method of determining contractors' eligibility to bid on future state agency capital improvement projects when a material issue exists on a state agency contract. The proposed rule determines what is a "material issue," the process of notifying the Contractor of the issue, and the appeal process to the State Procurement Director.

- A state agency determines a material issue exists and provides the Contractor written notification.
- Material issues are related to a contractor taking too long to begin a contract, taking too long to complete a project, committing fraud, providing inferior work, failing to provide warranty work, and failing to provide payments to subcontractors.
- Appeals of state agency determinations are made to the Office of Procurement.
- If a timely appeal is not provided or if the appeal is denied, the names of the ineligible contractors are placed on the Division of Building Authority and the Department of Higher Education websites.
- The prohibition shall not last for more than 3 years and shall remain until the state agency provides notification that the material issue is no longer of concern or the contract has been terminated or closed out, whichever is sooner. At this point the contractor's name is removed from the website.

PUBLIC COMMENT: A public hearing was held on this rule on June 24, 2020. The public comment period expired July 7, 2020. The agency indicated that it received no public comments other than questions submitted by BLR staff.

Lacey Johnson, an attorney with the Bureau of Legislative Research, asked the following questions and received the following answers:

1. Are the "material issues" listed in section (A)(1)(c)-(f) and (i) of the proposed rules taken from a specific statutory source, or are they based on something else? **RESPONSE:** They do not come from a rule or code reference. The law stated that the rule would provide guidance on what is considered a "material issue". The issues listed are the main problems that state agencies/higher education have on construction projects. These material issues were developed in discussions DBA had with the Associated General Contractors (contractors' group) and University of Arkansas staff.

2. Ark. Code Ann. § 22-9-105(a)(2)(C) states that the State Procurement Director shall adopt rules to establish the process and procedure for appeals. Are these rules being promulgated by OSP in any capacity? **RESPONSE:** No, OSP provided the language contained in the rule regarding the appeal processes. Since DBA and OSP are all under TSS and the subject matter involved capital improvements (of which OSP does not have authority over), I believe DBA was the one chosen as a practical matter to push the promulgation under the TSS umbrella since the topic of the rule is capital improvements.

3. Per Act 422 and Ark. Code Ann. § 22-9-105(c), "the Secretary of the Department of Finance and Administration shall adopt rules to provide guidance on what is considered to be a material issue . . . ." Is DFA involved in the promulgation of these rules? **RESPONSE:** Both DBA and OSP were under DFA when the legislation was signed, but they have since been moved under TSS which is why these are being promulgated and adopted by the Secretary of TSS, not DFA.

4. Is there specific authority for the fourteen calendar day timeframe within which appeals must be submitted (section (A)(2)(a)(iii))? **RESPONSE:** While this Act does not specify a specific timeline, Ark. Code Ann. 19-11-244 outlines a 14-day timeline for protesting solicitations and awards so the same was used for this section.

5. Where does the three-year timeframe on bid prohibitions come from (section (A)(2)(b))? **RESPONSE:** The 3-year language was requested by higher education to give the prohibition more meaning to the "carrot/stick" approach of having the contractor perform better on existing contracts.

The proposed effective date is September 1, 2020.

FINANCIAL IMPACT: The agency indicated that this rule will not have a financial impact.

Contractors who have a material issue on an existing capital improvement contract will be prohibited from bidding on projects. While there is no guarantee a bid will turn into an award of contract, prohibited bidders will nonetheless be unable to seek any award of state capital improvement contracts which exceed $35,000.

The agency indicated that there is a new or increased cost or obligation of at least $100,000 per year to a private individual, private entity, private business, state government, county government, municipal government, or to two or more of those entities combined. Accordingly, the agency provided the following written findings:

There is a possibility of lost profits reaching the amount of $100,000 if the contractor is prohibited in bidding and being determined as the "lowest responsible bidder." Per the agency, colleges and universities have more bid projects than DBA. The majority of DBA bid projects are in the mid ranges of $300,000-$750,000. While a contractor profit margin on DBA bid projects may not reach $100,000 on one project, it is conceivable that a combination of project awards could reach that amount.

(1) a statement of the rule's basis and purpose;

The changes in this proposed rule provide for a method of determining contractors' eligibility to bid on future state agency capital improvement projects when a material issue exists on a state agency contract. The proposed rule determines what is a "material issue," the process of notifying the Contractor of the issue, and the appeal process to the State Procurement Director.

- A state agency determines a material issue exists and provides the Contractor written notification.
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(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;

The proposed rule is required by Ark. Code Ann. § 22-9-205. The rule addresses the issue of poor performing contractors on existing state contracts from seeking other state capital improvements until the performance is corrected or the contract is terminated, but the prohibition cannot last for more than 3 years.

(3) a description of the factual evidence that:
(a) justifies the agency's need for the proposed rule; and
(b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;

The proposed rule is being implemented due to concerns raised in 2018 by the Ikaso Consulting LLC report to the ALC – Review Subcommittee regarding the State's procurement issues. Act 422 of 2019 was enacted as a result of the report. The benefit of the bidder's prohibitions contained in the proposed rule (pursuant to Ark. Code Ann. § 22-9-105) is to encourage contractors to provide quality work on state projects.

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do no adequately address the problem to be solved by the proposed rule;

The rule is mandated by law and specifically tailored to impact poor performing contractors. There is not a list of less costly alternatives to the proposed rule.

(5) a list of alternatives to the proposed rule that were suggested as a result of public comment and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

Public comments will be furnished at the close of the public comment period.

(6) a statement of whether existing rules have created or contributed to the problem the agency seeks to address with the proposed rule and, if existing rules have created or contributed to the problem, an explanation of why amendment or repeal of the rule creating or contributing to the problem is not a sufficient response; and

Existing rules have not contributed to the problem.

(7) an agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:
(a) the rule is achieving the statutory objectives;
(b) the benefits of the rule continue to justify its costs; and
(c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

TSS will implement an agency-wide review of the Department's rules on a regular basis regarding (a) – (c) above.

LEGAL AUTHORIZATION: The Department of Transformation and Shared Services, Building Authority Division has the authority to "execute contracts necessary to accomplish the purposes of [the Arkansas Building Authority Division Act], including without limitation a statewide contract for design services to expedite the procurement of design services by a state agency in an emergency." Ark. Code Ann. § 22-2-108(7)(a). The Division may promulgate rules as necessary to accomplish its duties under the Building Authority Division Act. Ark. Code Ann. § 22-2-108(16). These proposed rules implement Act 422 of 2019.

Act 422, sponsored by Representative Jeff Wardlaw, amended the law concerning the procurement of design services contracts. The Act

required the Department of Finance and Administration to "adopt rules to provide guidance on what is considered to be a material issue" under Ark. Code Ann. § 22-9-105(a), which addresses poor contractual performance by a firm with an existing state contract.

Per the agency, these rules are being promulgated by the Department of Transformation and Shared Services, rather than the Department of Finance and Administration, because "[b]oth DBA and [the Office of State Procurement] were under DFA when the legislation was signed, but they have since been moved under TSS[.]"

D. Agency Updates on Delinquent Rulemaking under Act 517 of 2019.

1. Department of Agriculture, Arkansas Bureau of Standards (Act 501) (REPORT BY LETTER PURSUANT TO MOTION ADOPTED AT JULY 22, 2020 MEETING)

2. Department of Commerce, State Insurance Department (Acts 698, 823)

3. Department of Finance and Administration, Director (Act 822)

4. Department of Health (Act 216)

5. Highway Commission (Act 468)

6. Department of Transformation and Shared Services, Office of State Procurement (Act 422)

E. Adjournment.