ADMINISTRATIVE RULES AND REGULATIONS SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Room A, MAC
Little Rock, Arkansas

Tuesday, October 17, 2017
1:00 p.m.

A. Call to Order.

B. Reports of the Executive Subcommittee.

C. Rules Deferred from the September 12, 2017 Subcommittee Meeting:

1. <u>STATE MEDICAL BOARD</u> (Kevin Odwyer)

a. <u>SUBJECT</u>: Regulation 40: Surgical Technologists

<u>DESCRIPTION</u>: This establishes the registration of surgical technologists as required by Act 390 of 2017.

<u>PUBLIC COMMENT</u>: A public hearing was held on August 3, 2017, and the public comment period expired on that date. No one spoke against the proposal.

The board is proposing a $25 application fee and an annual renewal fee of $10 for surgical technologists registered with the board. Act 390 directs the board to register surgical technologists, but it does not specifically authorize the board to impose any registration fees. Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the board for its specific fee authority to charge the application fee and annual renewal fee. **RESPONSE:** The act directs the board to register surgical technologists, and the fee is for such registration.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The Arkansas State Medical Board is authorized to adopt rules and regulations necessary or convenient to perform its duties as required by law. Ark. Code Ann. § 17-95-303(1). These rules implement Act 390 of 2017, sponsored by Senator David Sanders, which creates the Arkansas Surgical Technologists Act, establishes the registration of surgical technologists, and authorizes the board to promulgate rules. The act does not specifically authorize the board to impose any registration fees.

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

1. ARKANSAS ECONOMIC DEVELOPMENT COMMISSION (Kurt Naumann and Kenneth Burleson)

a. SUBJECT: Partnership for Public Facilities and Infrastructure Act Program Guidelines

DESCRIPTION: These rules establish guidelines for administering the Partnership for Public Facilities and Infrastructure Act by the Arkansas Economic Development Commission (AEDC), as authorized by authority granted under § 15-4-209(b)(5) enabling legislation, and Act 813 of 2017, which requires AEDC to develop guidelines for program administration. As stipulated by Act 813 of 2017 (anticipated ACA § 22-10-502), these guidelines define:

1. Criteria for selecting qualifying projects to be undertaken by a public entity;
2. Criteria for selecting among competing proposals submitted according to a request for proposals under the chapter;
3. Timelines for selecting a qualified respondent under the process for requests for proposals under the chapter;
4. Guidelines for negotiating a comprehensive agreement; and
5. Guidelines for allowing the accelerated selection of a qualified respondent and the review and approval of a qualifying project that is determined to be a priority by the Governor and is funded in whole or substantial part by dedicated revenues.

The guidelines also define terms germane to the program and delineate an application process by which public entities shall apply for public private partnership projects.

PUBLIC COMMENT: A public hearing was held on September 8, 2017. The public comment period expired that same day. The Commission provided the following summary of the comments received and its responses:

Commenter: Larry Watkins, Attorney At Law, Construction Law Group, Dover Dixon Horne PLLC

(1) (pg. 4) In regard to the Public Private Partnership Infrastructure Act (PPFIA) process, consider adding: "c. To avoid delays and shortlist potential qualified respondents, the RPE may, but is not required to, issue a Request for Qualifications (RFQ) prior to issuing the RFP." **RESPONSE:** The PPFIA does not require public entities to conduct a separate RFQ process prior to issuing the RFP. However, our research and discussion with public-private partnership administrators in other states has disclosed that a separate RFQ process has been helpful to public entities in developing their RFP and shortlisting potential qualified respondents. Therefore, we shall add a section that offers public entities the option to conduct a separate RFQ prior to development of the RFP.

(2) (pg. 4) In regard to submitting an RFP to AEDC for review 15 days prior to publication, "This is a short time for review if the RFP is extensive or if you have multiple RFPs to review – especially if you need to use consultants. I suggest after "publication" adding: ", and AEDC strongly recommends that the RPE submit the RFP to AEDC thirty (30) to forty-five calendar days prior to publication in order to avoid delays." **RESPONSE:** We concur that the timeframe is too short to warrant a comprehensive review. We have changed the timeframe to 60 days to run concurrently with the 60-day period for RPEs to notify affected local jurisdictions.

(3) (pg. 4) I strongly urge you to build in an extension system here. Some P3 projects are large and complex, and the development time may take 6 to 9 months (or longer). The P3 projects that I have worked on all had many, many problems. Licenses for engineering and contracting could take 3-6 months alone. And the initial project finance piece could take even longer. After "120 calendar days" consider adding: ", unless the RPE extends the proposal deadline." **RESPONSE:** We have added provisions for a 120-day extension, with the consent of AEDC.

(4) (pg. 4) I think this would be clearer if it read "proposal" as no RFP will be submitted in response to an RFP. **RESPONSE:** Text has been changed from RFP "submittal" to RFP "proposal" throughout.

(5) (pg. 5) I would use "proposed comprehensive" regarding agreements – "proposed comprehensive agreements." **RESPONSE:** The word "proposed" has been added before comprehensive.

(6) (pg. 5) If subdivisions of state government are excluded from the P3 legislation, who can pass an "ordinance"? **RESPONSE:** We believe that this language was unintendedly included in the statute. We are unsure as to whether or not an RPE can pass ordinances (generally a term reserved for municipalities) however, we do not want to be restrictive, should an RPE have the ability to do so. Therefore, we left the language as written.

(7) (pg. 5) I agree with the comment above. The reason for review fees is so that unsolicited proposals do not flood in, consuming state resources. The fee compensates the state for reviewing unsolicited proposals, but it also acts as a filter to discourage meritless or undeveloped proposals. For an AR solicited proposal, the private developer will spend tens or hundreds of thousands of dollars to develop a proposal. If it must also pay unknown fees, I am very concerned such RPE review fees will discourage proposal submissions. Consider discouraging charging a fee, including an explanation, such as: "To encourage competitive proposals, the RPE is strongly discouraged from charging fees to review proposals." **RESPONSE:** We understand your concern regarding fees for review of RFPs; however, the statute specifically permits fee assessments. We suggest that this concern be addressed to the legislature to amend the statute.

(8) (pg. 7) "Project Finance" is a legal term of art that only refers to non-recourse or limited recourse financing based on the value of future cash flows of the borrower. I recommend "Financing the Qualifying Project." "Project Finance" is a specific type of finance that only applies to the private entity. **RESPONSE:** Language was changed from "project financing" to "financing the qualified project."

(9) (pg. 7) This is generally unclear to me. However, specifically, if any state funds are expended, cannot the funds be spent prior to entrance into the state treasury, which would then exempt such expenditure from the appropriations requirement? **RESPONSE:** Our understanding is that all state expenditures require some type of appropriation.

(10) (pg. 7) I recommend: In regard to the supplemental nature of the PPFIA, suggest adding the language ", except as the PPFIA exempts its provisions from application of such other law." **RESPONSE:** The language in the guidelines was taken directly from the legislation. We suggest that this concern be addressed to the legislature to amend the statute.

(11) (pg. 10) I recommend adding: "The RPE may first issue an RFQ ahead of the RFP in order to limit the number of RFPs for review. The purpose of an RFQ is to select three (3) or more private entities that are qualified to submit an RFQ. **RESPONSE:** Language was added to permit an optional RFQ process prior to the RFP to shortlist candidates.

(12) (pg. 12) I would remove this. Developers are concerned about having to list such a commitment as the MBE or WBE could increase prices without justification, creating a hostage or the MBE or WBE could be the source of potential third-party beneficiary claims. Based on my experience, developers and contractors are very concerned about this. If this is in the statute, consider: "The PPFIA does not require the use of such businesses." **RESPONSE:** The AEDC Division of Minority and Women-Owned Business Enterprise will be closely involved with all P3 projects as they may relate to the Minority Business Enterprise and Women-Owned Business Enterprise Certification Program.

(13) (pg. 13) See earlier fee comment. **RESPONSE:** This comment was similar to comment #7, which we answered as follows: We understand your concern regarding fees for review of RFPs; however, the statute specifically permits fee assessments. We suggest that this concern be addressed to the legislature to amend the statute.

(14) (pg. 13) (Reference Comment A): To resolve any conflicts that may arise during the agreement negotiation process, the following wording change is suggested: At any time during the negotiation process, but before the execution of <u>an interim or</u> a

comprehensive agreement, the RPE may, without liability to any private entity or third party, cancel the RFP or reject all proposals received in response to the RFP. **RESPONSE:** Additionally, upon the RPE's entering into an interim agreement or a comprehensive agreement, the agreement shall govern the parties' obligations and liabilities." We agree and will word as suggested.

(15) (pg. 14) The following comment is in regard to the sentence which states, "This type of clause in the interim agreement would allow for termination of the agreement and provide for payment of agreed-upon compensation to the private entity for the work completed pursuant to the interim agreement." I think this is a good idea, but it conflicts with a provision above. See Reference Comment A above. **RESPONSE:** We reviewed the relevant language and did not understand the nature of the conflict.

(16) (pg. 14) Why is this a requirement for a state agency? What if the financing is small, solely for design: Is the intent to cover bonds? What if the financing is non-bond financing? What if the financing does not involve securities? Consider replacing the first five words with: "If bond or security financing requiring indebtedness of the RPE." **RESPONSE:** We cannot make this change because we cannot infer the intent of the legislature when drafting this language, which has been taken verbatim from the statute. The issue may need to be addressed with the legislature next session.

(17) (pg. 14) In regard to financing, which requires Securities and Exchange Commission and Municipal Securities Rulemaking board written evaluations, wouldn't this also apply to comprehensive agreements? **RESPONSE:** Our interpretation of the statute was that it only applies to interim agreements.

(18) (pg. 14) Larry Watkins: RPE? **RESPONSE:** We will correct.

(19) (pg. 15) There may not be a lease. This should read: "lease, term, or concession period." **RESPONSE:** This language has been added.

(20) (pg. 16) Again, I recommend: "Forty-five (45) to thirty (30) calendar days is strongly encouraged to avoid delays." **RESPONSE:** We concur that the timeframe is too short to warrant a comprehensive review. We have changed the timeframe

to 60 days to run concurrently with the 60-day period for RPEs to notify affected local jurisdictions.

(21) (pg. 16) Should this be "Duration from RFP publication to proposal deadline" as publication and advertisement are the same? **RESPONSE:** We added the word "response" before the word deadline to clarify that the deadline was for the response and not the advertisement. The revised sentence now reads, Duration of RFP publication from advertisement to response deadline. This is the 3rd event on page 17.

(22) (pg. 16) Again, I suggest: ", unless the RPE extends such deadline." Environmentalist groups or other opponents of a project could use this apparent time limit to force the project to begin the RFP process anew. **RESPONSE:** We have added the ability for RPEs to extend the timeframe from 120 to 240 days with AEDC approval.

(23) (pg. 16) Proposal deadline **RESPONSE:** We changed wording to response deadline.

(24) (pg. 16) Proposal **RESPONSE:** We changed wording to response.

(25) (pg. 21) This will likely be pure speculation or very basic information. Until the private entity submits a "creative" proposal, the public entity will only be guessing here. **RESPONSE:** We concur. We understand that more detailed financial data will be developed as the project progresses.

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

(1) The instant proposed rules are the rules regarding the definitions and guidelines required by Ark. Code Ann. § 22-10-502, as amended by Act 813 of 2017, § 1, and required to be promulgated within ninety days of the effective date of the Partnership for Public Facilities and Infrastructure Act ("PPFIA"), Ark. Code Ann. §§ 22-10-101 through 22-10-505, as amended by Act 813, correct? Additional, more detailed rules, as required by Ark. Code Ann. § 22-10-503, as amended by Act 813, § 1, to administer the PPFIA will be promulgated at a later date? **RESPONSE:** Yes, that is accurate.

(2) In footnote 2, should "parentheses" be "quotations"? It appears the defined terms throughout the rules are indicated by quotation marks rather than parentheses. **RESPONSE:** Yes, the correct wording should be "quotation marks." The Guidelines will be revised to reflect this change in footnote 2.

(3) In Section I.B, it appears that the rules require submission of the comprehensive agreement to the Governor immediately after the hearing, but before the RPE authorizes execution by order, ordinance, or resolution at a public meeting. However, Ark. Code Ann. § 22-10-501(b)(1)(B)(ii), which requires the submission of a proposed comprehensive agreement to the Governor for approval and authorization to execute it, requires the submission "[a]fter completing all of the steps in subdivision (b)(2)." Subdivision (b)(2) of the statute seems to require three steps: (1) a public hearing; (2) satisfaction of any requirements established by the rules; and (3) RPE authorization to execute by order, ordinance, or resolution at a public meeting. That said, subdivision (b)(2)(C) requires the RPE to authorize execution by order, ordinance, or resolution after conducting a public hearing and "receiving approval of the proposed comprehensive agreement under subdivision (b)(1)(B)," which would technically include approval by both the Chief Fiscal Officer of the State and the Governor. Because it is at least arguable that the Governor could give approval either before the RPE's authorization to execute by order, ordinance, or resolution, or after, has the Governor indicated to the Commission when he wishes a proposed comprehensive agreement be submitted? **RESPONSE:** We agree that the wording of the statute causes difficulty in determining when, specifically, the Governor should review agreements. We have worked closely with Governor Hutchinson's staff throughout the drafting of the Guidelines (including a meeting with staff on July 11, 2017, to review draft Guidelines). Having received no comments suggesting changes to the language, and having received approval from Governor's staff to promulgate rules on August 7, 2017, we believe that the language, as written, is acceptable to Governor Hutchinson.

(4) In Section I.B.11, is there perhaps an "it" missing from "the RPE shall submit to the Governor"? **RESPONSE:** We will add "it" before "to" on page 5 of the Guidelines.

(5) In Section I.E.1, it appears that the language of the second paragraph is based on Ark. Code Ann. § 22-10-401(b)(1), which

allows a RPE to dedicate any real or personal property to the qualified respondent to facilitate a qualifying project "if so doing will serve the public purpose of [the PPFIA]." This language has not been included in the guideline. Was there a reason for not doing so? **RESPONSE:** The language was not included in an effort to streamline the Guidelines as much as possible. We will revise the sentence to read "An RPE may dedicate any real or personal property interest, including land, improvements, and tangible personal property, through lease, sale, or otherwise, to the qualified respondent to facilitate a qualifying project if doing so will serve the public purpose of the PPFIA.

(6) Section I.E.4.e appears to be based on Ark. Code Ann. § 22-10-304(a)(3)(B), which also permits financing secured by a security interest in, or lien on, real or personal property of the qualified respondent, including any property interests in the qualifying project; this language, however, does not appear to have been included in the guideline. Can you reconcile this for me? **RESPONSE:** We will add language as follows to Section I.E.4:
f. May be secured by a security interest in, or lien on, real or personal property of the qualified respondent, including any property interests in the qualifying project.

(7) In Appendix A, Definitions, the term "chapter" has been used throughout. Was that intended? Or is it referring to the PPFIA? **RESPONSE:** Our intent was to reproduce the definitions in Appendix A verbatim from Act 813 of 2017. It was our intent that the words "chapter" and "PPFIA" be synonymous references to Act 813 of 2017.

Upon receiving the final revisions, Ms. Miller-Rice posed the following additional question:

In looking over the changes proposed in light of Mr. Watkins's suggestions, I was wondering if it might be helpful to include a definition of "Request for Qualifications," as that appeared to be a new term, if I'm not mistaken. **RESPONSE:** We will work on a definition. [The definition was subsequently included.]

The proposed effective date is October 31, 2017.

FINANCIAL IMPACT: The anticipated financial impact for the current fiscal year is $750,000 and $500,000 for the next fiscal year.

The $750,000 costs for the current fiscal year are anticipated expenses of **implementing** the Public-Private Partnership Program. Because the Partnership for Public Facilities and Infrastructure Act did not appropriate any funding to AEDC to develop, implement, and administer the program, funding will be requested from all available sources to procure a professional consultant to help develop the program and requisite rules, provide for professional services contracts to review project applications and assist with interim agreement and comprehensive agreement reviews, and to hire sufficient AEDC staff to administer the program and approved projects. The $750,000 breakdown is as follows: $500,000 professional services contract to develop the program and rules and to launch the initial projects; $125,000 for legal, financial, and engineering professional review services (partial year expense), and $125,000 for additional AEDC staff (partial year expense).

The $500,000 costs for the next fiscal year are anticipated for ongoing annual program administration. The $500,000 breakdown is as follows: $250,000 for legal, financial, and engineering professional review services and $250,000 for AEDC administrative staff.

Since there is a new or increased cost or obligation of at least of $100,000 to state government, the agency submitted the following additional information:

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

The Arkansas Economic Development Commission (AEDC) is required to promulgate Partnership for Public Facilities and Infrastructure Act Program Guidelines as mandated by Act 813 of 2017. The purpose of the Guidelines is to define certain terms germane to Act 813 of 2017 and specify criteria, guidelines, and timeframes for implementing key provisions of the Act. Act 813 also specifies that these Guidelines must be in effect no later than 90 days after the effective date of Act 813. The Guidelines are, in essence, prerequisite to the administration of the program and are a legal requirement of AEDC that must be effectuated by October 31, 2017.

(2) the problem the agency seeks to address with the proposed rule, including a statement of whether a rule is required by statute;

The guidelines are required to be developed by AEDC as per Act 813 of 2017 to implement specific requirements of the Partnership for Public Facilities and Infrastructure Act Program. Specific legislative intent of the Act was as follows:

- There is a public need for the timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, and installation of public infrastructure and government facilities within the state that serve a public purpose;

- The public need for government facilities and public infrastructure may not be satisfied by existing methods of procurement or funding available to the state;

- There are inadequate resources to develop public infrastructure and government facilities for the benefit of citizens of the state, and there is demonstrated evidence that public-private partnerships can:

    - promote the timely and cost-efficient development of public infrastructure and governmental facilities;

    - provide alternative and innovative funding sources to governmental entities; and

    - allow governmental entities to leverage and supplement the developmental cost of public infrastructure and governmental facilities through private funding and participation by the private sector in governmental incentive and tax programs that are not otherwise available to governmental entities; and

- The formation of public-private partnerships may result in the ability to develop private projects for public infrastructure and government facilities in a more cost-efficient and timely manner, resulting in increased benefits to the public safety and welfare of the citizens of the state and substantial cost benefits to the governmental entities and the public.

(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;

(a) The guidelines are required to be developed by AEDC as per Act 813 of 2017 to implement specific requirements of the Partnership for Public Facilities and Infrastructure Act Program.

(b) The cost of the rule, which will actually be the cost of developing the program and hiring qualified staff to administer the program, will ensure that the program is administered according to legal and fiscal requirements, which are beyond the capacity of existing staff, and will ensure that state-funded projects, which could cost the state millions of dollars annually, will be administered efficiently and in accordance with all legal and fiscal requirements.

(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;

One less-cost alternative is to do nothing. This would violate provisions of Act 813 of 2017, which mandates AEDC development of Guidelines and subsequent (more detailed) rules. The alternative was rejected.

A second less-cost alternative is to continue program development and administration with existing resources. A review of internal staff finds that the level of knowledge is insufficient to proceed further without procurement of professional services and hiring of additional staff. A review of other states' public-private partnership guidelines and rules development involved the hiring of professional consultants and the addition of several staff. In some instances, new divisions/agencies were created. Without these additional resources, guidelines and rules would be fraught with potential serious legal and fiscal concerns.

(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;

To date, no public comment has been received regarding any alternatives to the Guidelines. The only other alternative, to not file files, would result in violation of state law. (The Guidelines were made available to certain affected state agencies and private entities who expressed interest in the program prior to start of the formal 30-day comment period. Any comments received during

the 30-day comment period in regard to this question will be summarized and submitted to BLR.

(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;

The Guidelines will not contribute to the problem but will ensure compliance with Act 813 of 2017 and will better define some of the key components of the newly-developing Public-Private Partnership Program, which were not specified in the legislation.

(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.

(a) These Guidelines will be reviewed in accordance with Act 781/HB 1880 (Dotson), Establish a Sunset Date for State Agency Rules; Establish a Process for a State Agency Rule to Exist Beyond the Sunset Date.

(b) Copious records will be kept on the administrative costs of developing and administrating the program and the benefits, which accrue from the development of public-private partnership projects.

(c) AEDC will be open to any suggestions that will amend these Guidelines to make the program more efficient while retaining its effectiveness.

LEGAL AUTHORIZATION: Pursuant to section 1 of **Act 813 of 2017**, sponsored by Senator David Sanders, the Arkansas Economic Development Commission ("Commission") shall promulgate certain rules regarding the definitions and guidelines related to the development of qualifying projects under the Partnership for Public Facilities and Infrastructure Act ("PPFIA"), Ark. Code Ann. §§ 22-10-101 through 22-10-505, as amended by Act 813, within ninety (90) days of the effective date of the PPFIA.

See Ark. Code Ann. § 22-10-502(a), as amended by Act 813. The guidelines promulgated under this section shall include without limitation: (1) criteria for selecting qualifying projects to be undertaken by a public entity; (2) criteria for selecting among competing proposals submitted according to a request for proposals under the PPFIA; (3) timelines for selecting a qualified respondent under the process for requests for proposals under the PPFIA; (4) guidelines for negotiating a comprehensive agreement; and (5) guidelines for allowing the accelerated selection of a qualified respondent and the review and approval of a qualifying project that is determined to be a priority by the Governor and is funded in whole or substantial part by dedicated revenues. *See* Ark. Code Ann. § 22-10-502(b), as amended by Act 813. The Commission is further empowered, under Ark. Code Ann. § 15-4-209(b)(5), to promulgate rules necessary to implement the programs and services offered by the Commission.

2. <u>DEPARTMENT OF EDUCATION</u> (Lori Freno)

a. <u>SUBJECT</u>: Rules Governing Background Checks

<u>DESCRIPTION</u>: These rules apply to background checks required for the licensing of teachers and administrators and the employment of all public school personnel, licensed and nonlicensed. Three background checks are required: state criminal records, federal criminal records (with fingerprinting), and the Arkansas Child Maltreatment Central Registry. The proposed rules reflect changes pursuant to Act 746 of 2017.

Section 2.00 – Definitions

2.02 The definition for Applicant reflects new statutory language.

2.06.1.3 The language is stricken because the ADE does not conduct background checks for volunteers.

2.06.2 Clarification is added to the definition of Employment to provide guidance to school districts

2.16 A Rap Back Program definition is added pursuant to Act 746. *(The definition was revised following public comment to more closely track the statutory language.)*

2.20 A Third Party Vendor definition is added to provide guidance to school districts

Section 3.00 – Licensure, License Renewals, and License Revocation

3.01 Changes concerning sealed records made pursuant to Act 746

4.01 The language requiring a school hiring official to review a teacher's AELS record is added from Ark. Code Ann. § 6-17-428(p)

Section 5.00 – Background Check Procedures

5.01.5 This is an instruction for applicant to complete consent forms, which is a federal requirement

(5.01.5.3) Former 5.01.5.3 is stricken as Act 746 permits fingerprinting by either electronic or ink.

5.01.9 Provisions are added to address the federal requirement for identifying the proper reason for the background check

5.04 This adds provisions for participation in the state and federal rap back programs. These are programs, which provide the Department with updated information on arrests for persons whose fingerprints are maintained (with consent only) by the FBI. Also, the persons in the program do not have to be re-fingerprinted for license renewal or subsequent employment.

Section 6.00 - Reporting Requirements for Superintendents, Directors of Educational Entities, and Third Party Vendors

6.01 Change is made pursuant to Act 746 requiring third party vendors to report to the Department if a person in their employ has committed any of the listed offenses. This has always been required of superintendents. *(As a result of public comment, a change was made to clarify that this only applies to classified employee positions.)*

Section 8.00 – State Board Hearing Procedures

These changes are technical and procedural only.

PUBLIC COMMENT: A public hearing was held on August 18, 2017. The public comment period expired on August 26, 2017. The Department provided the following summary of the public comment received and its response:

Lucas Harder, Arkansas School Boards Association (7/31/17)

(Section 4.01.1) While this appears to be a fairly accurate restatement of the language from A.C.A. § 6-17-428(p)(3)(B), we feel that the statement does not fully address or incorporate all relevant statutory language. A.C.A. § 6-17-301(c)(1) prohibits an individual with a suspended or revoked license from being employed at a school district or charter school in any position; this means that the hiring official should be checking AELS to check the status of an individual's license regardless of what position the person has applied for and not only if the person has applied to be a teacher or administrator.

We also have concerns with the "may be hired for employment" language in this section. While the language is taken directly from the statute, we receive multiple calls and emails from board members and school administrators over the question of when an individual is officially "hired." We believe language requiring the hiring official to check AELS before the hiring official makes a recommendation to the board that an individual be hired for employment would help standardize when the check is performed and remove confusion about when the check has to be performed. In addition, language requiring the check to be performed before the hiring recommendation should prevent the hiring official from having to request the board rescind the employment offer because the hiring official failed to check AELS before making the recommendation. **AGENCY RESPONSE:** Comment considered. The Department supports these statements as best practices. However, the Department prefers to use the statutory language in the rules, and allow school districts to develop their own policies regarding the performance of these duties in a manner that complies with legal requirements. *No changes made.*

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

(1) Rule 2.16: The proposed rule defines "rap back program" as a state or federal program that provides arrest information to the Department for individuals covered by the rules. Is this term to include the usual background checks already required, or is this definition in reference to Act 746's Section 10, amending Ark. Code Ann. § 6-17-417, which allows state participation in

"programs [at the state and federal levels] that provide notification of an arrest *subsequent to an initial background check* that is conducted through available governmental systems"? (Emphasis added.) **RESPONSE:** Comment considered. Definition amended to include the statutory language. *No substantive changes made*.

(2) Rule 3.01.2.1: I see in Act 746 that this excepting language was moved from Ark. Code Ann. § 6-17-410(d)(1)(A)(v)(*b*) to subsection (b)(2)(B), but I do not see the addition of the term "sealed" to the language in that particular provision. Can you reconcile the addition of the term to the rule? **RESPONSE:** Comment considered. It is consistent with other references to expunged and pardoned records. *No changes made*.

(3) Rule 4.06.7.1: What is the reasoning behind adding "pursuant to school district policy," where the statute does not contain the same? Is that simply referring to the method by which the waiver is requested? **RESPONSE:** Comment considered. Yes, school districts should develop policy around how applicants apply for this waiver. *No changes made*.

(4) Section 6.00: In the proposed rules, it appears that third-party vendors have been included to require their reporting on licensed personnel, nonlicensed personnel, and fiscal officers in certain instances. Act 746, though, seems to have only added third party vendors to the required reporters for nonlicensed personnel in Ark. Code Ann. § 6-17-414. Can you reconcile the addition of third party vendors concerning licensed personnel and fiscal officers in the rules? **RESPONSE:** Comment considered. This provision has been removed and will be considered for a future proposed legislative change. *No substantive changes made*.

The proposed effective date is November 1, 2017.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The proposed rule revisions include changes being made to incorporate provisions of **Act 746 of 2017,** sponsored by Representative DeAnn Vaught, which amended provisions of the Arkansas Code concerning background checks for public school educators and employees. The State Board of Education shall promulgate rules for the issuance, licensure, relicensure, and continuance of licensure of teachers in the public schools of this state. *See* Ark. Code Ann. § 6-17-

402(b)(1), as amended by Act 416 of 2017, § 1. The State Board shall further adopt the necessary rules to fully implement the provisions of Arkansas Code Annotated § 6-17-410, concerning the requisite statewide and nationwide criminal records checks and Child Maltreatment Central Registry check to be conducted for an applicant for a license issued by the State Board, an applicant for license renewal, and a preservice teacher. *See* Ark. Code Ann. § 6-17-410(i). *See also* Ark. Code Ann. § 6-17-414 (requiring these checks as a condition for initial employment or noncontinuous reemployment in a nonlicensed staff position); Ark. Code Ann. § 6-17-421(b)(1)(A) (requiring statewide and nationwide criminal records checks as a condition for employment as a fiscal officer of an educational entity).

b. SUBJECT: Professional Learning Communities

DESCRIPTION: The proposed rules govern the development and administration of Professional Learning Communities within selected pilot program schools. The schools will serve as a working laboratory for the professional learning community process, with the goal that research and best practices then will be shared with other schools throughout the state.

PUBLIC COMMENT: The proposed rules became effective under the emergency provisions of the Administrative Procedure Act on August 1, 2017, and expire on November 29, 2017. For purposes of permanent promulgation, a public hearing was held on July 5, 2017. The public comment period expired on July 24, 2017. After discovering that the version released did not include a definition that the State Board of Education had voted to include, the Department revised its initial version and held a second public hearing on August 18, 2017; the second public comment period expired on August 26, 2017. The Department received no comments during either public comment period.

The proposed effective date for the permanent rules is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The instant proposed rules implement **Act 427 of 2017,** sponsored by Representative Bruce Cozart, which served to require that any increases in professional development funding each school year be used for professional

learning communities. The Act amends Arkansas Code Annotated § 6-20-2305 by adding an additional subsection to the statute, providing that additional funding for professional development that is above the amount set forth in subsection (b)(5)(A) of the statute "shall be used by the Department of Education for the development and administration of professional learning communities for the benefit of public school districts." Ark. Code Ann. § 6-20-2305(b)(5)(C)(i), as amended by Act 427, § 1. Pursuant to Ark. Code Ann. § 6-20-2305(b)(5)(C)(ii)(*a*), as amended by Act 427, § 1, the Department shall promulgate rules to administer the additional professional development funding.

3. <u>STATE BOARD OF ELECTION COMMISSIONERS</u> (Daniel Shults)

a. <u>SUBJECT</u>: Verification of Voter Registration

<u>DESCRIPTION</u>: These rules approved by the SBEC are designed to operate together with the rules dealing with provisional voting to implement Act 633 of 2017. The purpose of this rule is to provide a concise statement of the relevant legal provisions set out in Act 633 and to provide additional rules where necessary in order to ensure fair orderly election procedures.

The first section of the rule establishes definitions for words or phrases used in the rule.

The second section states when voters are required to verify their voter registration before voting at the poll.

The third section establishes a procedure for elections officials to use when verifying the registration of a voter. This section is one of the key portions of the rule that ensures uniform application of Act 633 and establishes rules that explain how poll workers are to determine whether a voter has successfully verified his or her voter registration and is therefore permitted to cast a regular ballot.

The fourth section addresses certain first-time voters who registered by mail and did not satisfy the statutory requirements for identification when registering to vote and explains Act 633 requires that these voters follow existing law rather than the new voter verification rules.

The fifth section addresses the result of a voter's failure to satisfy the legal requirement applicable to that voter when casting a ballot in person at the poll.

The sixth section addresses absentee voting. The rule adds to existing law by stating that an absentee voter can satisfy his verification requirement by submitting a photo copy of any qualifying document.

The seventh section addresses how a provisional ballot cast due to the failure to verify a voter's registration can be counted.

The eighth section addresses post-election verification of a voter's registration by the county clerk or county board of election commissioners.

The ninth section directs the county clerks to notify the county board of election commissioners if any voter has verified his or her registration to the clerk after the election.

The tenth section states that the emergency rules are effective upon filling.

PUBLIC COMMENT: A public hearing was held on August 23, 2017, and the public comment period expired on August 21, 2017. No public comments were submitted.

These rules were promulgated on an emergency basis and were approved at a meeting of the Executive Subcommittee on July 20, 2017. The proposed date for permanent promulgation is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Election Commissioners is authorized to "[f]ormulate, adopt, and promulgate all necessary rules to assure even and consistent application of voter registration laws and fair and orderly election procedures." Ark. Code Ann. § 7-4-101(f)(5). These rules implement Act 633 of 2017, sponsored by Representative Mark Lowery, which amends Amendment 51 of the Arkansas Constitution concerning verification of voter registration. Under Act 633, a provisional ballot cast by a voter who did not present a required document or identification card shall be counted if the

voter's ballot is not invalid for any other reason and the voter completes one of the two steps: (1) the voter submits a sworn statement that states that he or she is registered to vote in the State of Arkansas and that he or she is the person who registered to vote or (2) the voter verifies his or her voter registration in person to either the county clerk or the county board of election commissioners by noon on the Monday following the election. *See* Ark. Const. Amend. 51, § 13; *see also* Ark. Code Ann. § 7-5-308 (as amended by Act 633 of 2017). The board is required to promulgate rules necessary to implement the requirements for verification of voter registration in accordance with Act 633.

b. <u>SUBJECT</u>: Poll Watchers, Vote Challenges, and Provisional Voting

<u>DESCRIPTION</u>: These amendments approved by the SBEC are designed to operate together with the rules dealing directly with the verification of voter registration in order to implement and explain Act 633 of 2017. The purpose of this rule is to provide a concise statement of the relevant legal provisions set out in Act 633 and to provide additional rules where necessary in order to ensure fair and orderly election procedures.

The first section that is amended establishes definitions for words or phrases used in the rule. The second section amended, § 901, updates portions of the rule that no longer reflect current law regarding the result of a failure to present a document with the voter's photograph to a poll worker when voting. The third section amended, § 905, updates the procedures for voting a provisional ballot to conform to the requirements of Act 633. The next section amended, § 906, which deals with notice to the voters, inserts a requirement that the notice given to a provisional voter at the poll include an explanation of how that voter can cause their ballot to be counted if the only reason the ballot has been cast as provisional is that the voter failed to verify his or her voter registration and did not sign the affirmation of identity. This same section is also amended to reflect the requirements of Act 1014 of 2017 that states written notice must be given to all voters, including absentee voters, whose votes are not counted. The fifth section amended, § 907, which addressed the review of provisional ballots, is also updated to include the requirements of Act 633. The sixth section, § 908, clarifies that the system of granting a hearing in order to determine whether provisional ballots are to be counted applies only to general provisional ballots and that ballots made

provisional under Act 633 must comply with the requirements of Act 633 in order to be counted. The seventh section amended, § 909, updates the rule governing when provisional ballots are to be counted to include when ballots made provisional because the voter did not verify his or her voter registration. Attachment A, the Provisional Voter Envelope, and Attachment B, the provisional voter list, are updated to comply with Act 633.

PUBLIC COMMENT: A public hearing was held on August 23, 2017, and the public comment period expired on August 21, 2017. No public comments were submitted.

These rules were promulgated on an emergency basis and were approved at a meeting of the Executive Subcommittee on July 20, 2017. The proposed date for permanent promulgation is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Election Commissioners is authorized to "[f]ormulate, adopt, and promulgate all necessary rules to assure even and consistent application of voter registration laws and fair and orderly election procedures." Ark. Code Ann. § 7-4-101(f)(5). These rules implement Act 633 of 2017, sponsored by Representative Mark Lowery, which amends Amendment 51 of the Arkansas Constitution concerning verification of voter registration. Under Act 633, a provisional ballot cast by a voter who did not present a required document or identification card shall be counted if the voter's ballot is not invalid for any other reason and the voter completes one of the two steps: (1) the voter submits a sworn statement that states that he or she is registered to vote in the State of Arkansas and that he or she is the person who registered to vote or (2) the voter verifies his or her voter registration in person to either the county clerk or the county board of election commissioners by noon on the Monday following the election. *See* Ark. Const. Amend. 51, § 13; *see also* Ark. Code Ann. § 7-5-308 (as amended by Act 633 of 2017). The board is required to promulgate rules necessary to implement the requirements for verification of voter registration in accordance with Act 633.

Additionally, the rules reflect the requirements of Act 1014 of 2017, sponsored by Representative Vivian Flowers, which creates the Voting and Elections Transparency Act of 2017 and requires

the county board of election commissioners to promptly notify a person who cast a vote that was not counted. The notification shall be in writing and shall state the reason(s) the vote was not counted. *See* Ark. Code Ann. § 7-5-902 (as amended by Act 1014 of 2017).

c. SUBJECT: Procedure for Citizen Complaints Regarding Violations of State Election and Voter Registration Laws

DESCRIPTION: These amendments approved by the SBEC are designed to update this rule to comply with Act 247 of 2017.

The effect of the changes made by Act 247, which are the same changes made by this amended rule, is to make the State Board of Election Commissioners' authority to impose a fine apply to all violations of law which the State Board has the authority to investigate and enforce. This amendment merely strikes language that limits the State Board's fining authority to a particular subchapter of Title Seven.

Other changes in the table of contents merely reflect a renumbering of the pages due to formatting changes.

PUBLIC COMMENT: A public hearing was held on August 23, 2017, and the public comment period expired on August 21, 2017. No public comments were submitted. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Election Commissioners is authorized to "[f]ormulate, adopt, and promulgate all necessary rules to assure even and consistent application of voter registration laws and fair and orderly election procedures." Ark. Code Ann. § 7-4-101(f)(5). These rules implement Act 247 of 2017, sponsored by Representative Michelle Gray, concerning complaints of election law violations.

4. DEPARTMENT OF HUMAN SERVICES, COUNTY OPERATIONS (Lorie Williams)

a. SUBJECT: Low Income Home Energy Assistance Program (HEAP) State Plan for FFY 2018

DESCRIPTION: This Plan serves as Arkansas's application to receive federal funds for the implementation of the FFY 2018 LIHEAP program.

The following is a summary of the changes to the LIHEAP State Plan:

1. The maximum LIHEAP weatherization benefit/expenditure per household will change from $4,736 to "no maximum benefit" per household.

2. The LIHEAP Model Plan will be submitted electronically to DHHS Electronic Model Plan.

A summary of the 2018 State Plan follows:

ALLOCATION OF FUNDS

Federal policy places certain restrictions on the use of the block grant funds: no more than 10% of the funds can be used for administrative costs; up to 15% of funds may be used for weatherization services and up to 5% may be used for Assurance 16 activities.

The Division proposes to use the Federal Fiscal (FFY) 2018 block grant funds as follows: Regular (Winter) Energy Assistance Program (53%), Crisis Intervention Program (17%), Weatherization Assistance Program (15%), Administration (10%) and Assurance 16 (5%).

ALLOWABLE SERVICES

The purpose of the Low-Income Home Energy Assistance Program (LIHEAP) Block Grant is to provide funds to help eligible low-income households with the costs of home energy by offering assistance benefits, home weatherization services and Assurance 16 activities.

SERVICES AND ELIGIBILITY

The Division proposes to administer the Low-Income Home Energy Assistance Program in a manner similar to the prior year. The primary objective of the HEAP program will be to provide

assistance benefits as a one-time payment to approximately 60,000 households.

The LIHEAP program is implemented by local Community Action Agencies serving different area of the state. Households must apply for assistance at the agency serving their county of residence.

Eligibility for Winter Energy Assistance would be based on the following criteria:

1. Households' countable income cannot be more than 60% of the state medium income poverty guidelines;

2. Households must have no more than $2,000 in countable resources; for elderly households (age 60 and over), the limit is $3,250.

Eligibility for Crisis Intervention Assistance is the same as for Winter Energy Assistance with the following exceptions:

1. Households must have an energy-related emergency situation;

2. The maximum benefit of $500.00 per household, combined with the household's own resources, must be adequate to alleviate the crisis situation.

3. For the Crisis Intervention Program, assistance to resolve the household's crisis situation must be provided within 18/48 hours after a signed application is received by the subgrantee agency. If the crisis situation is life-threatening, assistance must be provided within 18 hours after a signed application is received. For the Winter Energy Assistance Program, assistance must be provided within 30 days.

Assurance 16 activities are services provided which encourage and enable households to reduce their home energy needs and their need for energy assistance. These activities may include but are not limited to: Needs Assessments, Counseling, Energy Education and assistance with energy vendors.

The Division proposes that the **LIHEAP Weatherization Assistance Program** be administered in a manner similar to the

prior year. The Weatherization Assistance Program would make energy-saving improvements to low-income dwelling units (priority is given to households with elderly and/or individuals with disabilities) with the following objectives:

1. To aid those individuals least able to afford high utility costs;

2. To provide for more healthy dwelling environments; and,

3. To help conserve needed energy.

DHS estimates that approximately 486 homes will be weatherized with the LIHEAP funds at a no maximum cost per home. This should result in substantial long-term energy savings.

GEOGRAPHIC DISTRIBUTION

Each of the eligible entity areas will receive funding based on their previous funding and the number of low-income persons in their service area.

APPEALS

Applicants of the Home Energy Assistance Program and Weatherization Assistance Program have the right to request an administrative hearing under these programs to contest any adverse action taken on an application.

PUBLIC COMMENT: Public hearings were held on August 1, 2017, August 2, 2017, and August 3, 2017. The public comment period expired on August 29, 2017.

Public comments were as follows:

Tim Wooldridge, Executive Director, CRDC

(1) Submission of all LIHEAP reports electronically and electronic signature. **RESPONSE:** Your request will be reviewed by the Division and a decision will be sent to the agencies.

(2) The LIHEAP Funding allocation to be increased for CRDC. **RESPONSE:** Arkansas' allocation to the Community

Action Agencies is based on Poverty Level for each Arkansas county and the total award by the Administration for Children and Families. The formula for each agency is in discussion and a decision will be provided upon completion.

(3) Funding Expedited for Advance and Expenditure Invoice Requests. **RESPONSE:** A new requirement was initiated for processing the LIHEAP awards which caused a delay in payment processing. Procedures have been put into place to reduce the timeframe.

(4) The use of Admin/Program Funds. **RESPONSE:** A LIHEAP Policy Directive providing guidance on Admin/Program funds was issued to the agencies as of 9/15/17.

Casey Kidd, Director of Human Services, CRDC

(1) A request to increase LIHEAP funding. **RESPONSE:** Arkansas' allocation to the Community Action Agencies is based on Poverty Level for each Arkansas county and the total award by the Administration for Children and Families. The formula for each agency is in discussion and a decision will be provided upon completion.

(2) The agency would like to have additional time to process LIHEAP mail outs or PE applications. **RESPONSE:** Agencies currently have four (4) weeks prior to the start of the LIHEAP program to mail out PE Applications. The Office of Community Services will review and explore if there are other options allowable.

(3) CRDC has requested to submit LIHEAP payments to LIHEAP Utility Suppliers electronically. **RESPONSE:** Your request will be reviewed by the Division and upon completion of the review, a decision will be sent to the agencies.

The proposed effective date is November 1, 2017.

FINANCIAL IMPACT: The cost for the state plan is $27,000,000 in federal funds for the current fiscal year and $27,000,000 in federal funds for the next fiscal year.

LEGAL AUTHORIZATION: Arkansas Code Annotated § 25-10-129 authorizes the Department of Human Services to

"promulgate rules, as necessary to conform to federal statutes, rules, and regulations as may now or in the future affect programs administered or funded by or through the department or its various divisions, as necessary to receive any federal funds." The proposed rule is being promulgated in accordance with the Low-Income Home Energy Assistance Program for the distribution of block grant funds.

42 U.S.C. 8621 - 8630 creates the Low-Income Home Energy Assistance program and authorizes the federal government to award grants "to States to assist low-income households, particularly those with the lowest incomes, that pay a high proportion of household income for home energy, primarily in meeting their immediate home energy needs." To be eligible for a grant, a state must submit to the federal Secretary of Health and Human Services an annual application.

b. <u>SUBJECT</u>: Community Services Block Grant State Plan for Fiscal Years 2018 and 2019

<u>DESCRIPTION</u>: This is the State Plan for use of Community Services Block Grant funds in Arkansas in Fiscal Years 2018 and 2019. The two-year plan allocates funds primarily to 16 Community Action Agencies in the state, to allow for essential service intended to assist the low-income citizens of Arkansas to become self-sufficient. The changes follow:

1. The entire policy manual has been developed to include current language as found in the Community Services Block Grant Performance Management Framework. This framework includes the Community Services Block Grant Organizational Standards, The ROMA Next Generation (Annual Report), and State and Federal Accountability Measures.

2. The policy manual was updated to include required referrals to Workforce and Child Support to be in compliance with the CSBG Act. Included are sample policy, procedure and referral notice documents for Child Support.

3. The policy manual also was updated in the area of board requirements to include regulations set forth in Information Memorandum 82.

4. The State Plan for FY 2018 and FY 2019 includes updated Lead Agency goals and training and technical assistance needs.

5. The State Plan for FY 2018 and FY 2019 includes updated requirements for monitoring by the State Lead Agency and terms of corrective actions plans that could be issued as a result.

6. The State Plan for FY 2018 and FY 2019 includes a language change as a result of the public comment period in the area of Community Action Agency Bylaws. All agencies must update their bylaws to reflect a democratic selection process for governing board members to include a term of service of up to five years regardless of sector.

PUBLIC COMMENT: A public hearing was held on August 23, 2017. The public comment period expired on September 12, 2017. During the public hearing, there were no comments regarding the Community Services Block Grant State Plan.

Concerns were expressed by the DHS/Division of County Operations Director, Mary Franklin, with regard to the long standing agency policy to allow Community Action Agency Board members serving the public sector to serve an indefinite length of time.

RESPONSE: The below is the change in language in the Community Services Block Grant Policy and Procedure Manual: Section III Policies of Governing Boards (p. 6-11):

> Each individual on an eligible entity governing board, regardless of sector represented, must be elected in accordance with a democratic selection process defined in the eligible entity bylaws.
> The bylaws of each eligible entity shall define the term of office and its board election process.
> The term of service may be up to five years as defined in the eligible entity bylaws.
> The eligible entity may set the term lower than the State Lead Agency requirement, but must hold an election at the end of each term of service.
> Public officials elected to the eligible entity board may select a representative to serve in their stead during the term of board service. Public officials or their representatives, serve only as long as the public official is

currently holding office, and is subject to the eligible entity selection process and term of service.

The State life-term limit of ten years for the Private and Low-Income sectors has been removed. However, each eligible entity must demonstrate than an election has been held at the end of each term of service for all three sectors, Public, Private, and Low-Income.

The proposed effective date is November 1, 2017.

FINANCIAL IMPACT: The financial impact is $9,120,191 for each year of the current fiscal year and the next fiscal year in federal funds.

LEGAL AUTHORIZATION: Arkansas Code Annotated § 25-10-129 authorizes the Department of Human Services to "promulgate rules, as necessary to conform to federal statutes, rules, and regulations as may now or in the future affect programs administered or funded by or through the department or its various divisions, as necessary to receive any federal funds." The proposed rule is being promulgated in accordance with the Community Services Block Grant Act, 42 U.S.C. § 9901 *et seq*.

42 U.S.C. § 9901 et seq. creates the Community Services Block Grant Program to "provide assistance to States and local communities, working through a network of community action agencies and other neighborhood-based organizations, for the reduction of poverty, the revitalization of low-income communities, and the empowerment of low-income families and individuals in rural and urban areas to become fully self-sufficient." 42 U.S.C. § 9908 provides that a state that wishes to receive a block grant must apply for the grant and develop a state plan that meets federal requirements, including how the state will use and distribute the funds.

5. DEPARTMENT OF HUMAN SERVICES, MEDICAL SERVICES AND COUNTY OPERATIONS (Dave Mills and Mary Franklin)

a. SUBJECT: DHS/DMS/DCO Proposed Lawfully Residing Alien Children Under Age 21 and Pregnant Women Coverage Option

DESCRIPTION: These are Medical Services Policy changes and Medicaid and CHIP State Plans and MAGI Eligibility PDF Pages amendments for the State of Arkansas' election of the option, effective 01/01/2018, to provide Medicaid and CHIP coverage to otherwise eligible children under age 21 and pregnant women aliens, lawfully residing in the United States, as provided in section 1903(v)(4) of the Social Security Act and under section 214 of the Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA").

The policies affected are Medical Services Policy Manual Section Appendix C; D-200 through 230; B-250; E-300 and E-445 and Medicaid SPA: AR 17-003; CHIP SPA: AR 17-004; Medicaid PDF page S89 MAGI Eligibility SPA: AR-17-0007; CHIP PDF page CS 18 MAGI Eligibility SPA: AR-17-0006 for Medicaid and CHIP Coverage for Lawfully Residing Alien Children Under Age 21 and Pregnant Women.

The proposed rule changes revise Medical Services policy to provide Medicaid coverage to certain children and pregnant women who are lawfully residing in the United States. In addition, the policy is being revised to comply with federal regulations and law regarding verification of citizenship and immigration status, and the state is electing the option to provide Medicaid and CHIP coverage to otherwise eligible children under age 21 and pregnant women aliens, lawfully residing in the United States, as provided in section 1903(v)(4) of the Social Security Act and under section 214 of the CHIPRA.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on August 27, 2017. The Department provided the following summary of the public comment it received and its response:

Commenter: Cynthia S Parke

I have been hearing reports of proposed changes to adding legal immigrant children to the Medicaid rolls here as soon as they arrive in Arkansas. I am almost at a loss for words in hearing this. There are plenty of citizens here who do not "qualify" for Medicaid, immediately after coming to this state. I DO understand it is kids, believe me, but I think the current 5 year waiting period should stay the way it is, for at least the period of time it takes to figure out the healthcare cost issues that currently face our state

and nation. If they come here, because one of the processing plants has offered them jobs, then those plants should also be providing them and their families with healthcare. Some of these companies are reporting huge profit margins in their operations in this state (and others) but are not required to provide healthcare for these families that they so willingly bring to our state. In the meantime, for instance, the chicken industry here, which employs most of the Marshallese immigrants, are under close scrutiny for river pollution, (AR Dept of Fish and Game [sic] studies on rivers); land pollution, (Concerned departments: ADEQ, with spreading of manure around the state); and this exact issue, of their employees not having healthcare, and housing. If you bring the industries here, I believe you should also, somehow, require the companies making these huge profits, provide healthcare. I believe the regulations with a 5 year waiting period for immigrants, and their children, should stay in place, with the issue looked at again in a few years. Thank you for taking the time to hear the public about this issue.

RESPONSE: Thank you for responding to the Public Comment period for the CHIPRA 214 Medicaid policy changes regarding providing Medicaid coverage to children and pregnant women who are lawfully residing within Arkansas. I will try to address all your concerns with this response.

Arkansas has made great strides through the ARKids First program in reducing the uninsured rate for children in the state from 22 percent in 1997 to less than 5 percent today. This 5 percent of Arkansas' children that are not covered today include children whose families are lawfully residing and working here in Arkansas. The proposed rule change will allow Arkansas to extend coverage to children and pregnant women who are legally residing in Arkansas but otherwise may not have access to health services, especially the preventative care that is essential for children to grow up and reach their full potential. This preventative care is of utmost importance during the first five years of the child's life. These years are the foundation that shapes a child's future health, happiness, growth, development and learning achievement at school, in the family and community, and in life in general. As residents of Arkansas, it is important that every child be given every available opportunity to grow and flourish within the State. This is good for the child and good for Arkansas. Subsequently, it is the goal of the Department of Human Services to ensure all eligible children have access to consistent, comprehensive health care coverage.

In addition to meeting lawfully residing status, children and pregnant women in this group will also be required to meet all other Medicaid eligibility guidelines in order to be determined eligible for Medicaid coverage. These guidelines include income limits, state residency and Social Security Enumeration requirements.

Unfortunately, DHS is unable to address your concerns regarding health care coverage or environmental issues potentially associated with the chicken industry as those issues are outside of the Department's purview.

The agency states that the instant rules will require CMS approval; that approval is pending as of September 25, 2017. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: The cost in the current fiscal year (January through June) is $714,189 in federal funds and for the next fiscal year is $4,474,904 in federal funds. There is no impact on general revenue.

The agency provided the following additional information:

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

The proposed rule changes revise Medical Services policy to provide Medicaid coverage to certain children and pregnant women who are lawfully residing in the United States. In addition, policy is being revised to comply with federal regulations and law regarding verification of citizenship and immigration status.

(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 changes revise Medical Services policy to comply with Children's Health Insurance Program Reauthorization Act of 2009 (CHIPRA) and 8 U.S.C. 1612(b)(2)(B) of the Social Security Act; 435.956(c)(2) of Federal Register; and POMS RM 10210.810.

(3) a description of the factual evidence that:

(a) justifies the agency's need for the proposed rule; and

The proposed rule changes revise Medical Services policy to provide Medicaid coverage to certain children and pregnant women who are lawfully residing in the United States. In addition, policy is being revised to comply with federal regulations and law regarding verification of citizenship and immigration status.

(b) describes how the benefits of the rule meet the relevant statutory objectives and justify the rule's costs;

The proposed rule changes revise Medical Services policy to provide Medicaid coverage to certain children and pregnant women who are lawfully residing in the United States. In addition, policy is being revised to comply with federal regulations and law regarding verification of citizenship and immigration status.

(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 less costly alternatives exist.

(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;

There were no alternatives proposed.

(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

N/A

(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.

The agency, in compliance with ACA 25-15-204, will review the rule every 10 years.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201, the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. *See* Ark. Code Ann. § 20-76-201(1). The Department shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76, Public Assistance Generally, of the Arkansas Code. *See* Ark. Code Ann. § 20-76-201(12). Per the agency, these rules are further being promulgated to comply with federal law, specifically, the Children's Health Insurance Program Reauthorization Act of 2009 ("CHIPRA"), 8 U.S.C. § 1612(b)(2)(B) of the Social Security Act, 435.956(c)(2) of the Federal Register, and POMS RM 10210.810. Further support for the rule change can be found in **House Concurrent Resolution 1012**, sponsored by Representative Jeff Williams, which encouraged the Governor to submit a state plan amendment to the Centers for Medicare and Medicaid Services to provide access to coverage for migrant children and pregnant women from the Compact of Free Association Islands.

6. DEPARTMENT OF HUMAN SERVICES, MEDICAL SERVICES (Tami Harlan)

a. SUBJECT: Section III 2-17 – Provider Billing Manual

DESCRIPTION: Effective November 1, 2017, the provider billing manual is being changed to reflect the efficiencies within the new MMIS billing system. The system will become more user friendly and more automated for the Arkansas Medicaid provider community. This manual update reflects upgrades in electronic claims submission, prior authorizations, remittance advice protocol, claims status inquiry, claims adjustment transactions, financial transactions, and explanation of benefit codes. The implementation of the new Medicaid Management Information System (MMIS) will ensure providers can correctly bill Arkansas Medicaid.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 12, 2017. The Department received one comment:

Lisa Carver, Assistant Director of Billing, Reliance Health Care

After reviewing Section 332.100 Medicare/Medicaid Crossover Claims, I believe providers need more clarification on how to bill Medicare crossover claims if we need to submit a paper claim. Your website states that proprietary crossover claim forms will no longer be used. In section 332.100, it states to mail a red-ink original claim of the appropriate crossover invoice and provides a link, however, the link does not work. It is unclear at this point how providers would bill these claims if we are unable to bill them electronically. Any clarification would be appreciated.
RESPONSE: We appreciate your suggestions and we have added clarification to Section III by providing specific instructions to the provider manual.

The agency states that CMS approval is not required for this rule. The proposed effective date is November 1, 2017.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76 of the Arkansas Code, Public Assistance Generally. *See* Ark. Code Ann. § 20-76-201(12).

b. SUBJECT: Ambulatory Surgical ASC 1-17

DESCRIPTION: Effective November 1, 2017, this rule informs providers of the additional Ambulatory Surgical procedural codes, which will require prior authorization.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 12, 2017. The Department received no comments.

The agency states that CMS approval is not required for this rule. The proposed effective date is November 1, 2017.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76 of the Arkansas Code, Public Assistance Generally. *See* Ark. Code Ann. § 20-76-201(12).

c. SUBJECT: Section I 2-17; Section III 1-17 and Section V 3-17 – Electronic Funds Transfer

DESCRIPTION: Effective November 1, 2017, DXC Technology will no longer accept provider enrollment applications that do not include an active email address. If a provider profile needs to be updated, form DMS – 673 – Provider Address/Email Change Form will need to be completed.

Also, effective November 1, 2017, Provider Enrollment will no longer accept applications without a completed Authorization for Electronic Funds Transfer (Automatic Deposit) form. Providers who currently receive paper checks must complete the Authorization for EFT form by November 1, 2017. After this deadline, Arkansas Medicaid will no longer mail checks for Medicaid payment. The Authorization for EFT form can be found at https://www.medicaid.state.ar.us/Download/provider/provdocs/forms/autodeposit.doc.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 12, 2017. The Department received no comments.

The agency states that CMS approval is not required for this rule. The proposed effective date is November 1, 2017.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76 of the Arkansas Code, Public Assistance Generally. *See* Ark. Code Ann. § 20-76-201(12).

d. SUBJECT: Notice of Rule Making 003-17 – Removal of Processing Hold on Paper Claims

DESCRIPTION: With the implementation of the new Medicaid Management Information System (MMIS), submitted paper claims will no longer be held for processing for all provider types. On or after November 1, 2017, paper claims will be processed as they are received.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 12, 2017. The Department received no comments.

The agency states that CMS approval is not required for this rule. The proposed effective date is November 1, 2017.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 20-76-201(1), the Department of Human Services ("Department") shall administer assigned forms of public assistance, supervise agencies and institutions caring for dependent or aged adults or adults with mental or physical disabilities, and administer other welfare activities or services that may be vested in it. The Department shall also make rules and regulations and take actions as are necessary or desirable to carry out the provisions of Title 20, Chapter 76 of the Arkansas Code, Public Assistance Generally. *See* Ark. Code Ann. § 20-76-201(12).

7. STATE BOARD OF OPTOMETRY (Kevin Odwyer)

a. SUBJECT: Chapter I, Article XIII, Governing Licensure by Endorsement

DESCRIPTION: This sets procedures to permit a person from another state desiring to engage in the practice of optometry in this state to be issued licensure by endorsement at the sole discretion of the State Board of Optometry.

PUBLIC COMMENT: A public hearing was held on August 17, 2017, and the public comment period expired on that date. No one spoke against the proposal. The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Board of Optometry has rulemaking authority under Ark. Code Ann. § 17-90-204(1). These rules implement Act 143 of 2017, sponsored by Representative Michelle Gray, which authorizes licensure by endorsement for optometrists. The applicant shall pay a fee to the Secretary-Treasurer of the State Board of Optometry for registration in a reasonable amount to cover the administrative costs of the application process as determined by the board. Ark. Code Ann. § 17-90-302(b) (as amended by Act 143 of 2017).

8. DEPARTMENT OF PARKS AND TOURISM, STATE PARKS DIVISION (John Beneke)

a. SUBJECT: Outdoor Recreation FUN Park Grants Rule

DESCRIPTION: The Department of Parks and Tourism's FUN Park Grant Program administers grants for the development of outdoor recreation facilities. These grants, which do not require a cash match by the grantee, are available to incorporated municipalities with populations of 2,500 or less and to communities that are often unable to take advantage of the Department's Matching Grant Program due to a required 50% match by the grantee. FUN Park Grants are funded through a portion of the Arkansas Real Estate Transfer Tax.

The proposed rule will replace the existing rule, which is a 1995 application guide, and it will clarify responsibilities of grantor and grantee with respect to conditions of the grant. The previous rule is outdated and in an inappropriate format for establishing conditions of the grant.

PUBLIC COMMENT: A public hearing was held on August 17, 2017, and the public comment period expired on August 11, 2017. The agency received one comment from Mitzi Hargan of the White River Planning and Development District who was supportive of the rule. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The FUN Parks Grants Program was created to provide basic outdoor recreation facilities including baseball and softball fields, basketball courts, picnic tables and pavilions, and playground equipment to residents of small Arkansas communities. Ark. Code Ann. § 14-270-202. The Arkansas Department of Parks and Tourism is authorized to administer the Program and to promulgate procedures, rules, guidelines, or regulations necessary for the administration of the FUN Park Grants Program. *See* Ark. Code Ann. §§ 14-270-202, 14-270-203.

b. SUBJECT: Outdoor Recreation Matching Grants Rule

DESCRIPTION: A summary follows:

LWCF Program

The Outdoor Recreation Grants Program, within the Arkansas Department of Parks and Tourism, administers matching grants funded by the Land and Water Conservation Fund (LWCF). The LWCF is a federal funding mechanism, created by an Act of Congress, the intent of which is to fund projects that provide outdoor recreation for the public. LWCF funds are allotted annually to each state, with the state passing these funds to grantees. All municipal and county governments in the state are eligible to apply for funding, and successful applicants are chosen by a Governor-appointed committee using the Open Project Selection Process. State agencies that provide public out recreation and conservation areas (Arkansas Game and Fish

Commission, Arkansas Natural Heritage Commission, and Arkansas State Parks) are also eligible to receive funding.

Since the advent of the LWCF in 1966, the State of Arkansas has awarded more than 800 LWCF Matching Grants totaling $51.6 million to state agencies and municipalities. These grants have helped to fund outdoor recreational opportunities for the citizens of Arkansas throughout the entire state, and encompass projects ranging from baseball fields and picnic pavilions to fishing docks and archery ranges. All regions of the state have benefited from LWCF funding, and both rural and urban areas are eligible for, and have received, grant funding. All funded projects are developed on publicly-owned land, and any funded site is placed in the public trust in perpetuity. Recreational facilities may be altered, but the site must remain devoted to public outdoor recreation.

Reason for Rule Change

LWCF grants are federally-funded, and are administered by the Department of the Interior through the National Park Service; however, each award is administered locally by the state as a "pass-through" grant. As such, while the state provides guidance to grantees regarding rule compliance, it is ultimately the state that is responsible for the compliance or non-compliance of each grant. The rules for state compliance are laid out in the LWCF State Assistance Program Federal Financial Assistance Manual (FAM).

The proposed matching grant rule is to adopt the current version of the FAM as the official rulebook of the ORGP Matching Grant Program. The version of the rules currently on file with the Arkansas Secretary of State is outdated, and by officially adopting the most recent version of the FAM, ORGP staff will be able to provide clearer, more consistent information to applicants and grantees. This will streamline grant administration, make the state more responsive to grantees, and ultimately, make grantees better able to assert local control over local projects.

PUBLIC COMMENT: A public hearing was held on August 17, 2017, and the public comment period expired on August 11, 2017. The agency received one comment from Mitzi Hargan of the White River Planning and Development District who was supportive of the rule. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The State Parks, Recreation, and Travel Commission is authorized to make, amend, and enforce all reasonable rules or regulations not inconsistent with law which will aid in the performance of any of the functions, powers, or duties conferred or imposed upon it by law. *See* § 15-11-206(a). The Parks and Tourism Outdoor Recreation Grants Fund consists of ten percent (10%) of those special revenues as specified in § 19-6-301(145), there to be used by the Department of Parks and Tourism for making grants for outdoor recreational purposes to cities and counties of this state in accordance with the Statewide Comprehensive Outdoor Recreation Plan as set out in § 15-12-13. *See* Ark. Code Ann. § 19-5-1051(b).

9. PUBLIC EMPLOYEES RETIREMENT SYSTEM (Gail Stone and Jay Wills)

a. SUBJECT: Employer Contribution Rates

DESCRIPTION: In accordance with the provisions of A.C.A. § 24-2-701, the Board of Trustees will establish the employer contribution rate for both the state and local divisions to take effect on July 1st of each year.

PUBLIC COMMENT: A public hearing was held on September 8, 2017. The public comment period expired that same day. The System received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 24-2-701(c)(3)(A), the Board of Trustees of the Arkansas Public Employees' Retirement System shall establish employer contribution rates prospectively each year.

b. SUBJECT: Employer Reporting

DESCRIPTION: Rule 104 Employer Reporting permits employers to remit payment to the Arkansas Employees

Retirement System for benefits and report credit earned by its employees by electronic means.

PUBLIC COMMENT: A public hearing was held on September 8, 2017. The public comment period expired that same day. The System received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Arkansas Code Annotated § 24-2-202(a)(1), as amended by **Act 91 of 2015**, sponsored by Senator Bill Sample, provides that on or after July 1, 2017, the state employer contributions made by a state agency that employs each member provided for in Ark. Code Ann. § 24-2-701 shall be: (a) reported electronically by the state agency through the Arkansas Public Employees' Retirement System ("APERS") portal; and (b) paid by electronic transfer by the state agency. *See* Act 91 of 2015, § 1. The employer's contribution shall be paid to the APERS Fund ("Fund") at the time and with the frequency established by the Board of Trustees ("Board") of the APERS and shall be paid concurrently with the contributions made by its employees to the Fund. *See* Ark. Code Ann. § 24-4-202(a)(2). Pursuant to Ark. Code Ann. § 24-4-105(b)(1), the Board shall make all rules and regulations as it shall deem necessary from time to time in the transaction of its business and in administering the APERS.

c. SUBJECT: Age of Members – How Established

DESCRIPTION: Rule 201 Age of Members – How Established enumerates the documents that may be used to establish a member's age if he or she was born on or after July 1, 2011. This regulation protects Arkansas citizens by allowing them to establish their age with a birth certificate regardless of when the birth certificate was issued.

PUBLIC COMMENT: A public hearing was held on September 8, 2017. The public comment period expired that same day. The System received no comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The administration and control of the Arkansas Public Employees' Retirement System shall be vested in a board called the "Board of Trustees of the Arkansas Public Employees' Retirement System" ("Board"). Ark. Code Ann. § 24-4-104(a). Pursuant to Arkansas Code Annotated § 24-4-105(b)(1), the Board shall make all rules and regulations as it shall deem necessary from time to time in the transaction of its business and in administering the Arkansas Public Employees' Retirement System.

d. SUBJECT: DROP Provisions

DESCRIPTION: Rule 214 DROP provisions govern when a member is eligible for the Deferred Retirement Option Plan (DROP), how DROP payments are made, the interest paid on a DROP Account, and how the death of a participant in DROP or a retiree should be treated by the System.

PUBLIC COMMENT: A public hearing was held on September 8, 2017. The public comment period expired that same day. The System received no comments.

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

Drop Payment Methods – What was the Board's reasoning behind changing the lifetime monthly annuity to one that concludes upon completion of twenty-five (25) years when Ark. Code Ann. § 24-4-804(b)(1)(A) simply references "monthly"? **RESPONSE:** The change to a 25-year-certain annuity means that APERS will not be in danger of paying out MORE than the accrued DROP balance. With a lifetime guarantee, we have, in fact, paid out more than the total accrual. With a 25-year-certain, you get your entire accrual balance over that time. If you die early, the remainder goes to survivors or estate. This change removes the unintended skew toward paying out more than accrued.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The administration and control of the Arkansas Public Employees' Retirement System shall be vested in a board called the "Board of Trustees of the Arkansas Public Employees' Retirement System" ("Board"). Ark. Code Ann. § 24-4-104(a). Pursuant to Arkansas Code Annotated § 24-4-105(b)(1), the Board shall make all rules and regulations as it shall deem necessary from time to time in the transaction of its business and in administering the Arkansas Public Employees' Retirement System. The proposed changes include revisions made in light of section 1 of **Act 552 of 2017**, sponsored by Senator Bill Sample, which amends the law concerning a member's cessation of participation in the Arkansas Public Employees' Retirement System Deferred Retirement Option Plan, effective January 1, 2018.

e. SUBJECT: Spouse's Acknowledgement of Benefit Selection

DESCRIPTION: Rule 215 Spouse's Acknowledgement of Benefit Selection requires that notice must be given to a spouse when a retiree elects a straight life benefit.

PUBLIC COMMENT: A public hearing was held on September 8, 2017. The public comment period expired that same day. The System received no comments.

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

What "proof" will the Board require, *i.e.*, what will constitute this proof that the spouse was notified when the spouse would not sign the form? **RESPONSE:** The spouse signs a form entitled "Spouse Acknowledgement," and it is notarized; it is the only form of proof member services will accept, and the member will not be permitted to make the election without the form.

FOLLOW-UP QUESTION: So, if a spouse refuses to sign the form, the member just has to return the blank form with election, and it will go through? Because the rule says that an application shall not be denied on the basis of the spouse's failure to sign? **RESPONSE:** I verified with our staff that the statement "An application shall not be denied because a spouse refuses to sign the

form" is applicable in circumstances when there has been an affirmative refusal of the spouse to sign. In this circumstance, APERS will let the member elect the straight life option as long as the member submits a letter to APERS documenting his or her spouse's refusal. In contrast, there is a circumstance where the spouse can't be located and there has been no affirmative refusal. In this circumstance, the member will not be permitted to elect the straight life option.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The administration and control of the Arkansas Public Employees' Retirement System shall be vested in a board called the "Board of Trustees of the Arkansas Public Employees' Retirement System" ("Board"). Ark. Code Ann. § 24-4-104(a). Pursuant to Arkansas Code Annotated § 24-4-105(b)(1), the Board shall make all rules and regulations as it shall deem necessary from time to time in the transaction of its business and in administering the Arkansas Public Employees' Retirement System.

f. SUBJECT: Termination of Covered Employment Required for Retirement

DESCRIPTION: Rule 220 Termination of Covered Employment Required for Retirement outlines the procedure for a member to properly terminate employment to obtain retirement benefits.

PUBLIC COMMENT: A public hearing was held on September 8, 2017. The public comment period expired that same day. The System received no comments.

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

Is the change merely one of formatting—moving up language that had been contained in an outdated emergency provision and striking the remainder of that provision? **RESPONSE:** Yes.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The administration and control of the Arkansas Public Employees' Retirement System shall be vested in a board called the "Board of Trustees of the Arkansas Public Employees' Retirement System" ("Board"). Ark. Code Ann. § 24-4-104(a). Pursuant to Arkansas Code Annotated § 24-4-105(b)(1), the Board shall make all rules and regulations as it shall deem necessary from time to time in the transaction of its business and in administering the Arkansas Public Employees' Retirement System.

g. SUBJECT: Recoupment of Overpayments

DESCRIPTION: Rule 222 Recoupment of Overpayments outlines how the Arkansas Public Employees Retirement System may recoup an overpayment of benefits.

PUBLIC COMMENT: A public hearing was held on September 8, 2017. The public comment period expired that same day. The System received no comments.

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

Does Ark. Code Ann. § 24-4-207(c) (providing the Board the right to recover any overpayment that any person may have received from funds of the system) have any application here and why or why not? If so, can you reconcile the differences between the rule as proposed and the statute's provisions, which appear to set forth a specific time limit on the recoupment of overpayments and address the appeal of a decrease in annuity amount? **RESPONSE:** The rule was requested by Legislative Audit and does not conflict with Ark. Code Ann. § 24-4-207(c). The rule outlines the procedure to recoup the overpayment. Further, the one year limitation excludes those errors caused by the member, retirant, or beneficiary. The error is usually caused because the beneficiary fails to notify APERS of a triggering event (such as remarriage) or the member's estate. The appeal to the board is provided in the rule to avoid an allegation of a taking without due process.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: The administration and control of the Arkansas Public Employees' Retirement System shall be vested in a board called the "Board of Trustees of the Arkansas Public Employees' Retirement System" ("Board"). Ark. Code Ann. § 24-4-104(a). The Board shall make all rules and regulations as it shall deem necessary from time to time in the transaction of its business and in administering the Arkansas Public Employees' Retirement System. *See* Ark. Code Ann. § 24-4-105(b)(1). Pursuant to Arkansas Code Annotated § 24-4-207(c)(2)(A), the Board shall have the right to recover any overpayment that any person may have received from funds of the system, providing the overpayment is determined and the person is so notified within one (1) year of the date of the last overpayment. If the overpayment is determined at a date later than one (1) year after the date of the first overpayment, the overpayment shall not be recouped by the Board unless the overpayment is a result of an error on the part of a member, retirant, or beneficiary. *See* Ark. Code Ann. § 24-4-207(c)(2)(B). In all instances where an overpayment is determined, any subsequent payments shall be adjusted to the correct amount. *See* Ark. Code Ann. § 24-4-207(c)(2)(C).

10. ARKANSAS RACING COMMISSION (Byron Freeland and John Campbell)

a. SUBJECT: Rule 1151 - Amendment Removing Exceptions for Graded Stakes Races as Obsolete

DESCRIPTION: This amendment removes the word "graded" as obsolete, and defines the time for payment of purses for the two remaining types of races – stakes and overnight races.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017.

David Longinotti, Director of Racing at Oaklawn Park, speaking on behalf of the rule, commented that the proposed amendments to Rule 1151 merely remove the word "graded" from the rule, which was used in the past to define stakes races, but which is now obsolete. Under this amendment, all races would fall into one of

two categories: stakes or overnights races. All payments for the winners' purse money would be made in the two methods contained in the rule.

The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

b. SUBJECT: Rule 1217(D) - Multiple Medication Violations

DESCRIPTION: This amendment contains penalties for multiple medication violations and amends the current rule to update the rule to conform to the latest ARCI Model Rule.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. Skip Ebel, counsel for Oaklawn Park, pointed out one typographical error in the draft rule, and it was corrected. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

c. SUBJECT: Rule 1260(e) - Clarifies Existing Power of the Commission

DESCRIPTION: This new rule further defines the discretion and authority of the Arkansas Racing Commission concerning decisions of the stewards and appeals to the commission, as follows:

1260. (e) Following the hearing, the Commission may, at its discretion, uphold the decision of the Stewards, overturn the decision of the Stewards, or reduce or increase any penalties assessed by the Stewards in their ruling.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

d. SUBJECT: Rule 2099.1(4)-Horses That Have Not Started a Race in Six Months to One Year and the Requirements for Workouts and Physical Examination

DESCRIPTION: This amendment adds a paragraph with requirements for a horse which has not started a race for periods of six months or one year, as follows:

2099.1(4). A horse which has not started for period of six (6) months or more prior to a race day must have three officially published timed workouts, two of which must be within 30 days of the raced and one which must be a distance of four (4) furlongs or more. A horse which has not started for a period of one (1) year or more must also undergo a physical examination by a regulatory veterinarian and be approved in writing by the regulatory veterinarian prior to being entered in a race. The workouts must have occurred at a pari-mutuel horse racing facility or a recognized horse training facility, approved by the Stewards.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017.

David Longinotti, Director of Racing at Oaklawn Park, commented that the one-year provision requiring a physical examination should be shortened to six months. Mr. Longinotti stated that all

horses that have not raced in six months should be required to have an examination prior to racing again. **RESPONSE:** Mr. Longinotti's comments that any horse that has not raced in six months should be required to have an examination prior to racing again was considered by the Commission. However, the requirement has not been adopted by the Model Rules and is not normally required at other U.S. tracks. As a result, the Commission has chosen not to adopt Mr. Longinotti's view at this time.

The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

e. SUBJECT: Rule 2104 - Applications for Licenses

DESCRIPTION: This amendment allows national licensing organization licensing forms to be used at Oaklawn and changes the time for the application to be on file to 3 p.m. (central time) the day before the race.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017.

Skip Ebel, counsel for Oaklawn Park, commented that the proposed rule should include language giving the Board of Stewards discretion by inserting the following phrase: "unless otherwise approved by the Board of Stewards." **RESPONSE:** Based on Mr. Ebel's comments, the phrase, "unless otherwise approved by the Board of Stewards" will be inserted into the Rule.

The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has

sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

f. SUBJECT: Rule 2105 - Extends Licenses from One Year to Up to Three Years

DESCRIPTION: This amendment will make licenses for up to three years rather than one year. The amendment gives the licensee an option to avoid annual renewal of his/her license.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

g. SUBJECT: Rule 2110(a) - License Fees for Owners, Stable Names, Trainers, Etc., at Oaklawn Park

DESCRIPTION: This amendment will increase license fees for owners, stable names, trainers, assistant trainers, jockeys, apprentice jockeys, and jockey agents per the recent amendment to Arkansas law contained in Ark. Code Ann. § 23-110-204, which authorizes license fees of up to $150. The commission will consider two proposals, one a $30 increase and the second a $45 increase.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked whether the Commission had decided on the $30 increase or the $45 increase. **RESPONSE:** The $30 increase.

The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: Some individuals in some license categories could pay from $30 to $45 more per year for a license.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

The purpose of this rule is to increase current fees for various licenses associated with horse racing. Pursuant to Ark. Code Ann. § 23-110-204(a)(4), the commission has the authority to establish fees for licenses, not to exceed one hundred fifty dollars ($150).

h. SUBJECT: Rule 2154 - Stable Names

DESCRIPTION: This is a repeal of Rule 2154. The repeal of Rule 2154 permits trainers to register stable names in the future. The repeal is as follows:

~~2154. No trainer of racing horses may register under a stable name.~~

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

i. **SUBJECT: Rule 2163(a) - Protective Headgear for Jockeys and Riders**

DESCRIPTION: The amendment sets forth the current standards for jockey and rider headgear.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: One-time cost to purchase conforming safety helmet/headgear. There is a potential one-time costs of under $1,000. Most jockeys already have conforming equipment. The amendment implements the standards used in other states.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

j. **SUBJECT: Rule 2163(b) - Safety Vests for Jockeys**

DESCRIPTION: This amendment sets forth the current standards for jockey safety vests.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is a one-time cost to purchase conforming safety vest. The potential one-time costs is under $1,000. Most jockeys already have conforming equipment. This amendment adopts the same standards used in other states.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

k. **SUBJECT: Rule 2163(c) - Requirements and Conditions for the Use of a Riding Crop**

DESCRIPTION: This amendment is a new subparagraph adding requirements and conditions for the use of a riding crop.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017.

Skip Ebel, counsel for Oaklawn Park, pointed out one typographical error in the proposed rule. There were no further comments from the public. Commissioner Lamberth commented that the application of this proposed rule should be left up to the Stewards.

The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

l. **SUBJECT: Rule 2176 - When the Jockey Must Be Named for Each Race at Oaklawn**

DESCRIPTION: This amendment requires the jockey to be named at the time of entry, as follows:

2176. Jockeys shall be named not later than ~~scratch~~ time of entry.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has

sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

m. SUBJECT: Rule 2212(c) - Disqualification of Horses Owned or Trained by the Same Person and Running in the Same Race

DESCRIPTION: This is a repeal of Rule 2212(c). The content and subject matter of repealed Rule 2212(c) are covered in Rule 2371 and the amendments thereto.

~~2212. (c) If any horses trained by the same trainer and/or owned by the same owner race uncoupled in any race, and one or more of them shall be disqualified for violation of the rules of racing, any other horses entered by that same trainer and/or owner shall be disqualified if in the judgment of the stewards such violation prevented any other horse or horses from finishing ahead of the other part of the uncoupled entry. If said violation is without such effect upon the finish of the race, penalty therefore may be applied against the offender only.~~

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

n. SUBJECT: Rule 2222.1 - Entries in Races at Oaklawn Park

DESCRIPTION: This amendment makes the administrative process of entering a horse easier for horses shipping into Oaklawn Park for big races, and it complies with industry practices, as follows:

2222.1. No horse shall be allowed to start unless the registration papers are on file with the Racing Secretary. For horses running in stakes and allowance races, the Stewards may waive this requirement, provided the horse can be positively identified by the Identifier.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

o. SUBJECT: Rule 2262 - Horses Returning to Competition after Being Excused

DESCRIPTION: This amendment prohibits a horse from racing for a period of ten (10) days after the horse has been excused from starting a race because of illness or disability.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. David Longinotti, Director of Racing at Oaklawn Park, commented that this proposed rule has been a policy of Oaklawn Park for a number of years. Terry Brannan, representing the HBPA, stated that the rule was a generally accepted practice in the industry. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

p. **SUBJECT: Rule 2371 - Disqualification of a Coupled Entry**

DESCRIPTION: This rule deals with the same topic as Rule 2212 (c) proposed to be repealed. Rule 2371 requires the disqualification of a coupled entry when there is a foul in a race if the Stewards determine any part of the entry benefitted from the foul committed by the other part of the coupled entry.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

q. **SUBJECT: Rule 2426(a)(5) - Claiming of Horses at Oaklawn Park**

DESCRIPTION: This amendment of Rule 2426(a)(5) prohibits the use of a claim certificate for the first 24 hours after it is issued and in the first week of the race meet.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017.

David Longinotti, Director of Racing at Oaklawn Park, stated that this rule has been the actual practice of Oaklawn Park for several years.

Skip Ebel, counsel for Oaklawn Park, proposed the insertion of the word "scheduled" in the following sentence, ". . . the first block of consecutive scheduled racing days of each meet," to clarify the meaning of the rule. Terry Brennan, representing the HBPA, agreed with Mr. Longinotti's and Mr. Ebel's comments.
RESPONSE: The word "scheduled" was placed in the final version of the rule.

The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

r. SUBJECT: Rule 2445 - Eligibility of Horses Claimed to Run in Lower Priced Claiming Races

DESCRIPTION: This amendment of Rule 2445 changes the period of time for a claimed horse to start in a race from 20 days to 28 days in races that do not meet the purse requirements set out in the rule.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. David Longinotti, Director of Racing at Oaklawn Park, commented that the horse can be entered on the 29th day after the claim. The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-110-204(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of horse racing in the state of Arkansas. Further, Ark. Code Ann. § 23-110-204(b)(1)(E) gives the Arkansas Racing Commission the full, complete, and sole power and authority to promulgate rules accordingly.

s. SUBJECT: Greyhound Rule 3098 - Increase in License Fees

DESCRIPTION: This amendment of Greyhound Rule 3098 will increase license fees for owners, breeders, trainers, assistant trainers, kennel registration, and partnerships per the recent amendment to Arkansas law. The commission will consider two proposals, one a $30 increase and the second, a $45 increase.

PUBLIC COMMENT: A public hearing was held on August 21, 2017. The public comment period expired on August 18, 2017. No public comments were submitted.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked whether the Commission had decided on the $30 increase or the $45 increase. **RESPONSE:** The $30 increase.

The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: Individuals licensed at Southland could pay $30 to $45 more for a license per year.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-111-203(a), the Arkansas Racing Commission has sole jurisdiction over the business and sport of greyhound racing in the state of Arkansas. Further, Ark. Code Ann. § 23-111-203(c)(5) directs the commission to promulgate rules to regulate greyhound racing in the state of Arkansas.

The purpose of this rule is to increase current fees for various licenses associated with greyhound racing. Pursuant to Ark. Code Ann. § 23-111-203(b)(4), the commission has the authority to establish fees for licenses, not to exceed one hundred fifty dollars ($150).

11. SECRETARY OF STATE, ELECTIONS DIVISION (Peyton Murphy)

a. SUBJECT: Verification of Voter Registration Cards

DESCRIPTION: This rule implements a process for voters to obtain a free card which can be used to verify their voter registration.

PUBLIC COMMENT: A public hearing was held on August 16, 2017. The public comment period expired on September 8, 2017. No public comments were submitted.

Jessica Sutton, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) I noted that a few references to Amendment 51, § 3 need to be changed to Amendment 51, § 13. **RESPONSE:** Correction made.

(2) Page 3 – There is a typographical error under subsection (g). Instead of "issues," it should be "issued." **RESPONSE:** Correction made.

(3) In Sections 7.03 and 7.04, you have a list of items of acceptable documentation. Is this list limited to only these items, or not limited to these items? **RESPONSE:** Clarification made to state that documentation is not limited to those items specifically identified.

This rule was promulgated on an emergency basis and was approved at a meeting of the Executive Subcommittee on August 17, 2017. The proposed date for permanent promulgation is pending legislative review and approval.

FINANCIAL IMPACT: There is no financial impact.

LEGAL AUTHORIZATION: These rules implement Act 633 of 2017, sponsored by Representative Mark Lowery, which amends Amendment 51 of the Arkansas Constitution concerning verification of voter registration. Under Act 633, a provisional ballot cast by a voter who did not present a required document or identification card shall be counted if the voter's ballot is not invalid for any other reason and the voter completes one of the two steps: (1) the voter submits a sworn statement that states that he or she is registered to vote in the State of Arkansas and that he or she is the person who registered to vote or (2) the voter verifies his or her voter registration in person to either the county clerk or the county board of election commissioners by noon on the Monday following the election. *See* Ark. Const. Amend. 51, § 13; *see also* Ark. Code Ann. § 7-5-308 (as amended by Act 633 of 2017).

Act 633 requires the Secretary of State to provide by rule for the issuance of a voter verification card that may be requested by an individual to be used to verify his or her voter registration under Arkansas Constitution, Amendment 51, § 13, when appearing to vote in person or by absentee ballot. The rules shall include without limitation: (1) a requirement that the voter verification card include a photograph of the voter; (2) specification of the information to be included on the voter verification card; (3)

provisions concerning the expiration of a voter verification card; and (4) provisions for the voter verification card to be provided by the county clerk of the county in which the voter is registered to vote. *See* Ark. Code Ann. § 7-5-324 (as amended by Act 633 of 2017).

12. <u>WORKERS COMPENSATION COMMISSION</u> (Barbara Webb and Mark McGuire)

a. <u>SUBJECT</u>: Workers' Compensation Drug Formulary

<u>DESCRIPTION</u>: Proposed Rule 099.41 is a drug formulary to control costs in workers' compensation claims, provide claimants with the most appropriate drugs for their injury, limit opioid prescriptions, and reduce addictions. The rule improves the way opioids are prescribed and ensures safer treatment while reducing the misuse of these drugs. It also allows for timely dispensing and review of FDA approved prescription drugs for workers' compensation claims. It is necessary to reduce misuse of opioids and allow timely dispensing and review of FDA approved prescriptions.

<u>PUBLIC COMMENT</u>: A public hearing was held on May 23, 2017. The public comment period expired on June 14, 2017. The Commission provided the following summary of the public comments received and its responses:

Commenter: Eddie Walker, Attorney At Law

Adopting the drug formulary is a good idea, but he believes that such a rule should be given a trial period so that any needed adjustments can be made prior to the actual adoption of the rule. Therefore he suggests that the proposed rule be specifically identified as in interim rule that is initially being considered on a trial basis and that a permanent rule will not be adopted until the effects of the interim rule are evaluated.

Secondly he has grave concerns about the 10 day appeal time. He does not believe that an injured worker that does not already have an attorney will be able to obtain one quickly enough to comply with such a short time frame. Especially since they will be looking for an attorney willing to represent them for free. Even if the

attorney is to be paid, he does not know many attorneys who would be willing to agree to handle an appeal on such short notice.

He states that the Public Employee's Claims Division stated they have had very few appeals as support that the program is good and he suggests that they may have had few appeals because the injured worker could not find an attorney to represent them or didn't believe they could get a doctor to explain why the recommended treatment/prescription is appropriate. He says his experience has been that most physicians don't like being second guessed by insurance companies, nurses, or pharmacists.

He says it appears the conditions to which the appealing party have to certify are unnecessarily onerous and place additional requirements on the treating physician which is likely to run more doctors out of the ranks of those who are willing to treat workers' compensation injuries.

Also, he says that since the implementation of a drug formulary will save Respondents a considerable amount of money, some provision for an attorney's fee for an attorney who successfully represents an injured worker would be appropriate and suggests a flat fee of $500.00.

He proposes that attorneys are already donating a significant amount of time helping injured workers when respondents refuse to authorize medical treatment and now, they will be expected to donate even more time representing injured workers regarding disputes relative to prescription medications even though those prescriptions are coming from authorized treating physicians. He says this clearly creates an unfair situation for injured workers.
AGENCY RESPONSE - The Commission discussed the possibility of a trial period for this Rule but did not see any benefit, in view of the fact that the Public Employee Claims Division of the Arkansas Insurance Department has been using this drug formulary since November of 2015. The Commission also discussed the process and timeframe for appeals of denied medications and decided not to make any changes to the proposed rule. A short appeal time will allow the injured worker to obtain a resolution of the issue quickly. The Commission believes that any provision for an attorney's fee will have to be addressed by the Legislature.

Commenter: Jason M. Hatfield, P.A., Attorney At Law

He has concerns about the proposed rule. He says from the claimant's perspective delay equals denial and this is one more way to force litigation on injured workers. He says the workers' compensation rules in our state do not provide attorney's fees for disputed medical expenses and injured workers will have a difficult time finding an attorney to represent them in disputes between the carrier and doctor.

Also he says this rule will run more doctors away from handling pain management related issues in workers' compensation claims and result in few, if any, qualified doctors interested in fighting the red tape battles on behalf of their patients.

He says the question of whether medical treatment is appropriate, reasonable and necessary is already an issue in every workers' compensation claim and there is no reason to add additional hurdles over the issue of whether a particular form of medication management is appropriate or not.

He urges the Commission to contact as many pain management professionals as they can in the State of Arkansas to specifically request their opinion and comment on the subject before implementing this rule.
AGENCY RESPONSE – The Commission believes that any provision for an attorney's fee will have to be addressed by the Legislature. The Commission has received and considered public comments from pain management doctors and the Arkansas Medical Society.

Commenter: Steven McNeely, Attorney At Law

His specific concerns with the rule include:

90 MED per day is too low and does not take into account multiple prescriptions, which may be required during the first few days or weeks following an injury or surgery.

This MED bright line does not take into account an individual's body type, body mass or other individual factors.

A 100 mcg/hour Duragesic patch taken once a day would not be allowed under this formula.

He believes a better rule would be whenever an injured worker's MED reaches 120 mg they be sent to a pain management doctor for an evaluation concerning their prescriptions.

The current rule will accomplish its goal of reducing costs for the carrier and it does not have any benefit to the injured worker.

He foresees more doctors not wanting to accept a work comp patient, which will add additional stress to an already stressful worker's life and could delay and even prohibit their recovery.

Also, he says the UAMS Drug Formulary is only 4 pages long and then moves to a prior authorization process.
AGENCY RESPONSE – The Commission understands Attorney McNeely's concerns but has chosen to rely on the CDC guidelines.

Commenter: Greg Giles, Attorney At Law

Mr. Giles addressed his concerns from the claimant's perspective. He said delay equals denial and this is simply one more way to force litigation on an injured worker with very little chance of representation since the workers' compensation rules in Arkansas do not provide attorney's fees for disputed medical expenses. This will result in injured workers being forced to be unrepresented in this dispute between the carrier and doctor.

He suspects this rule will simply run more doctors away from handling pain management related issues in workers' compensation claims and the net result will be few, if any, qualified doctors interested in fighting the red tape battles on behalf of their patients.

Also, he says the question of whether medical treatment is appropriate, reasonable, and necessary is already an issue that comes into play in every workers' compensation claim and there is no reason to add additional red tape to the process over the issue of whether a particular form of medication management is appropriate or not. A "Drug Formulary" should not be necessary to try and establish some boundaries over what is appropriate medical care. He says the Arkansas Democrat Gazette says this issue is already being addressed in other ways. He includes an article in the Gazette originally printed in the Washington Post.

He urges the Commission to contact as many pain management professionals as they can in Arkansas to specifically request their opinion and comment on the subject before adopting this rule, which limits pain management.
AGENCY RESPONSE - The Commission believes that any provision for an attorney's fee will have to be addressed by the Legislature. The Commission has received and considered public comments from pain management doctors and the Arkansas Medical Society.

Commenter: Steven A. Bennett, Associate General Counsel, American Insurance Association

AIA supports adoption of a workers' compensation drug formulary, but recommends that the Commission adopt the Official Disability Guidelines (ODG) drug formulary produced by the Work Loss Data Institute. It is important to adopt a nationally-recognized, evidence-based formulary that has been adopted in other states (Texas, Oklahoma, Tennessee, New Mexico, North Dakota, and Ohio) and has a proven track record.

They recommend ODG based upon the following:

- The ODG Formulary is based upon evidence-based medical treatment guidelines, applying the most complete and thorough medical knowledge;

- The ODG Formulary is updated monthly so it is current and up-to-date;

- The ODG Formulary has a proven track record of success and Texas is given as an example;

- The ODG Formulary covers the broadest range of potential prescriptions and treatments (covers all 10,000 ICD9 codes; 65,000 ICD10 codes; and 11,000 CPT codes);

- The ODG Formulary has already been successfully integrated by most payers and prescription benefit managers, thereby reducing or eliminating implementation delays and costs;

AIA also offers the following recommended changes to the proposed rule:

Legacy Claims: It is critical that the formulary and the proposed rule apply to all workers' compensation injuries including legacy claims. They suggest a delay of six to nine months before applying the formulary to existing claims, which will allow time to wean the workers off dangerous, addictive drugs.

Compound Medications: The proposed rule should include strong restrictions on the use of all compound medications. The proposed rule should require pre-authorization for any compound drug and require medical certification of the patient's inability to tolerate treatment by other non-compound medications.

Opioid Restrictions: The proposed rule allows initial prescriptions beyond five days and prescriptions for continuing opioid medications beyond 90 days if the treating physician certifies a "medical necessity" for the prescription. This exclusion based merely on a treating doctor's certificate of "medical necessity" may destroy the effectiveness of the proposed restrictions. Departure from the opioid restrictions should be allowed only upon prior authorization and medical certification that more conservative, non-opioid medications were attempted with the injured worker but were ineffective.

AGENCY RESPONSE – The Commission desires patient-centered care. Other states have adopted formularies and have seen good results in reducing opiates and costs. We are more comfortable with UAMS than an out-of-state company with no input by the Commission. UAMS is able to address our concerns and to react quickly. We believe that UAMS is a better fit than ODG. The Public Employee Claims Division has chosen to utilize the UAMS drug formulary and has seen a 20-25% overall reduction in opiates.

Compound medications are subject to fee schedule reimbursement according to the pharmacy schedule in Rule 099.30. Language will be added to the proposed rule to require pre-authorization from the payor for compound medications and to require medical certification of the patient's inability to tolerate treatment by other non-compound medications.

The Commission will make the following change to the proposed rule regarding an Opioid medication beyond 90 days:

PART III. Opioid Medications

5. A Payor shall not be required to pay for continuing an Opioid medication beyond 90 days without written certification of medical necessity which shall include the following:

1. Follow-up visits

2. Documentation of improved function under the medication

3. Periodic drug screening

4. A detailed plan for future weaning off the Opioid medication

5. A summary of conservative care rendered to the worker that focused on increased function and return to work

6. Mandatory and documented review of the PDMP prior to issuing every prescription for a Schedule II or III narcotic or benzodiazepine

7. A statement on why prior or alternative conservative measures were ineffective or contraindicated (including non-opioid pain medications)

8. A summary of findings of the data received from an automated Prescription Drug Monitoring Program (PDMP)

The Commission has excluded legacy claims from the proposed rule. At this point there has not been enough feedback and study to include these claims. The Commission may undertake an interim study on legacy claims.

Commenter: Chris Merideth, Manager, Government & Industry Affairs, Farmers Insurance

Farmers supports policies to control opioid abuse and cost abuse (physician dispensing/repackaged/compound drugs), including opioid dosing limitations, strengthening prescription drug monitoring programs, implementing closed formularies, banning or severely limiting physician dispensing, and requiring pre-authorization for dispensing compounds. Farmers also supports policies on medical treatment that are in accordance with sound treatment guidelines embodying principles of evidence-based medicine.

AGENCY RESPONSE – The Commission will add language to the proposed rule to require pre-authorization by the payor for compound medications and to require medical certification of the patient's inability to tolerate treatment by other non-compound medications.

Commenter: Sandy Shtab, AVP Advocacy & Compliance, Healthe Systems

They offered the following comments in support of the drug formulary rulemaking process.

Adopting a lower Med threshold and requiring physicians to demonstrate medical necessity if the prescriber recommends greater than 50 MED for more than 5 days. This would allow patients with acute injuries or post-operative care to access needed opioids while holding prescribing physicians accountable for addressing ongoing medical necessity when prescribing higher doses for more than a short duration.

They recommend additional language, which specifies "All compounded medications are subject to preauthorization and a medical necessity review."

They oppose the reconsideration process to the reviewing pharmacist. They propose the same utilization review as in Rule 30 be applied to reconsiderations of payor decisions and would then be performed by a certified UR agent rather than a pharmacist. They state that a licensed physician is better qualified to examine all the medical records of the patient to arrive at an appropriate, medically supported finding.

They propose the effective date of the Rule be at least six months after the date of the rule adoption, January 1, 2018, instead of September 1, 2017.

AGENCY RESPONSE – The Commission discussed the MED limit and decided to stay with the CDC guideline of a 90 MED per day limit. As noted in response to previous comments, the Commission will add language to the proposed rule regarding compound medications. The Commission discussed the process for disputes. We modeled this process after the Public Employee Claims Division and will leave the dispute process as it is. The Commission will delay the effective date of the proposed rule to all claims with a date of injury on or after January 1, 2018.

Commenter: Kevin C. Tribout, Executive Director, Government Affairs, Optum Workers' Comp and Auto No-Fault

Optum is supportive of the proposed drug formulary but offers comments and suggestions to better aid the Commission during the rule-making process. They believe their suggested language will assist the Commission in developing a sound and effective drug formulary rule. Optum has extensive experience in working with several other states in the development of their drug formularies.

He suggests the following changes to these parts of the proposed Rule.

Part I. General Provisions

A. Scope.

(a) He suggested that language be added that the formulary shall be reviewed at least quarterly or more frequently if needed to allow provision for all appropriate medications and that updates shall not take effect for a minimum of thirty days.

(b) He suggested this part be changed to say that all initial prescriptions for opioids shall be limited to a 5-day supply. All subsequent opioid prescriptions shall be limited to a 90-day maximum supply and shall not exceed a 90 MED dosage limitation per day.

He suggested adding a definition for "initial prescription" and "drug formulary."

Part III. Opioid Medications

A. He proposed language be added that suggests an implementation date change to January 1, 2018, to allow all stakeholders more time to prepare and address the impact of formulary changes.

B. He suggested the language be changed from should to shall regarding checking the Prescription Drug Monitoring Program database and saying "the prescribing of opioid therapies" rather than what medications to prescribe.

C. Changing the rule language from first to initial prescription of an Opioid medication.
5. Add written to the physician certification of medical necessity for continuing an Opioid medication beyond 90 days.

Part IV. Process for Filling Workers' Compensation Prescriptions

He says that physicians are the key to initiation of formulary conformity and the proposed rule places the initiative on prescribers. The *italics* represent the language of the proposed rule and the **bold** is their suggested language.

A. *Prescribers, before writing* **Pharmacists filling** a workers' compensation prescription **must** *shall check to see if* **verify that** the prescribed drug(s) are listed *as covered* on the **approved** drug formulary.

B. If the prescribed drug(s) is not *listed as covered* on the **approved** drug formulary, *the prescriber shall notify the injured worker that the prescribed medication may require prior authorization.*

C. If the prescriber desires to utilize a drug which is not listed as covered on the drug formulary, the prescriber shall attempt to seek authorization for the medication prior to prescribing.

D. *Unless indicated by the physician, before dispensing any medication not listed as covered on the drug formulary, the pharmacy shall attempt to verify* **pharmacist must contact the Payor for** approval of the prescribed drug(s) and must consult with the Prescribing Physician before switching *the prescription to a drug listed as covered on the drug formulary.* **the medication to a formulary medication(s).**

E. The **filling** *dispensing* pharmacist*, in seeking reimbursement for dispensed opioids, shall* **must** abide by the **rule** requirements *for maximum opioid duration and dosage levels.* **for prescribed Opioids for the Payor to be required to pay for the medication(s). (90 MED per day for five (5) days and a 90 day duration)**

F. Approval through a prior authorization process is required for all topical analgesics or compounds.

G. Where an employer or insurer contracts with a pharmacy benefit manager or pharmacy network for the provision of drugs for treatment of injured workers, drugs available to the injured worker must be consistent with the drug formulary and contractual terms of the agreement.

Part V. Process for Resolving Disputes Between Provider and Reviewing Pharmacist or PBM

When the Payor denies the medication and the injured employee, **filling pharmacist,** or prescribing physician insists on the medication that has been denied, reconsideration may be made to the reviewing pharmacist on staff or contracted with the Payor or the Payor's PBM by submitting a Reconsideration Form. The Payor should promptly send a Reconsideration Form to the prescribing physician to complete and submit together with any supporting documentation **to the reviewing Pharmacist.** The reviewing Pharmacist shall have three (3) business days to consult with the Physician or Medical Director, if necessary, and to respond to the reconsideration request. If the reviewing Pharmacist does not respond within three (3) business days, *the prescription may be dispensed as authorized.* **filling pharmacist may fill the prescription.** If the reviewing Pharmacist denies the reconsideration request, an appeal may be made within 10 business days to the Medical Cost Containment Division of the Arkansas Workers' Compensation Commission.

AGENCY RESPONSE – The Commission discussed the comments received from Mr. Tribout and decided to make changes to the proposed rule. Language will be added to state that the formulary will be reviewed and updated as needed. Language will be changed regarding initial and subsequent opioid prescriptions. A definition will be added for "initial prescription." The implementation date will be delayed until January 1, 2018. The language will be changed from "should" to "shall" regarding checking the Prescription Drug Monitoring Program database.

Commenter: Nathan Culp, Director, Public Employee Claims Division of the Arkansas Insurance Department

Public Employee Claims administers about 3,600 claims a year and we implemented the program that is being proposed in November 2015. It would go into effect for new claims and would not affect people who are currently taking opioids for their workers' compensation claim. Our program has a reconsideration process in

place. We have received three reconsideration requests from physicians since implementation. On one of the three reconsideration requests a change of physician was obtained. The Public Employee Claims Division does support the Rule and also the Arkansas Self-Insured Association is in support.
AGENCY RESPONSE – The Commission appreciates the comments made by Mr. Culp during the public hearing.

Commenter: Jill Johnson, Risk Management Resources (TPA)

Risk Management Resources handles claims for self-insured employers and five large groups. She has been doing this 30 years and has seen the effects of opioid addiction and the epidemic, and we try to get people to doctors that will help them get off of opioids and have received thank yous from claimants and their families. Risk Management Resources supports the formulary.

She suggests that the notification requirement to the Commission of the PBM be added to the Form O, which is a form that employers fill out listing their TPA and who's responsible for getting bills and who their contact is and etc.

Under resolving disputes in Part 5, the proposed rule says, "The payor should promptly send a reconsideration form to the prescribing physician to complete and submit together with any supporting documentation to the reviewing pharmacist." She doesn't understand why if they deny it they would be the ones that would pursue that. She doesn't know that the payor is the one that should make that appeal or make that reconsideration request.
AGENCY RESPONSE – The Commission discussed and decided not to modify the Form O. The notification is not burdensome and may be accomplished by sending an e-mail notification to the Medical Cost Containment Administrator, Ms. Pat Hannah.

Commenter: Trey Gillespie, PCI, Property Casualty Insurers

Property Casualty Insurers Association of America (PCI) is a trade association representing over 1000 property and casualty insurance companies and write 34% of the private workers compensation insurance market.

PCI accepts and supports that a request for reconsideration should be reviewed by a Physician or Medical Director and that the payor must have a Physician or Medical Director on staff or has

contracted with another entity that has such a contractual relationship.

PCI accepts and supports that Payors and PBMs should be allowed to have a reviewing pharmacist review the request for approval of the prescribed drugs not on the approved drug formulary.

PCI opposes the mandatory requirement that the Payor have on staff or contract with a reviewing pharmacist to review requests for approval of prescribed drugs not on the approved drug formulary. This may create an unnecessary expense and regulatory burden if the ultimate payor decision rests with the review by the Physician/Medical Director.

The Payor should be allowed to have a reviewing pharmacist be part of the process but should not be required to contract with a reviewing pharmacist or have one on staff.

PCI supports the proposed 5-day limitation on the first prescription of an Opioid and requirements for continuing an Opioid medication beyond the first 5-day prescription. However, it appears there are fewer requirements imposed for continuing an Opioid beyond 90 days than for the 5-90 day period. They recommend: In order for an Opioid medication to be continued beyond 90 days, there should be at least the following minimum requirements: (1) follow-up visits, (2) documentation of improved function under the medication, (3) periodic drug screening, (4) detailed plan for future weaning off the Opioid medication, (5) screening for drug abuse disorder, and (6) mandatory and documented review of the PDMP prior to issuing every prescription for a Schedule II or III narcotic or benzodiazepine. Arkansas should follow the "CDC Guideline for Prescribing Opioids for Chronic Pain-United States, 2016."

The Rule should apply to Legacy claims and compounded drugs. The current Rule only applies to FDA approved drugs. They suggest that the language be changed to say: *This Rule is adopted for all prescriptions for workers' compensation claims with a date of injury on or after September 1, 2017, and applies to all drugs that are prescribed and dispensed for outpatient use. For workers' compensation claims with a date of injury prior to September 1, 2017, this Rule is effective March 1, 2018.*
AGENCY RESPONSE – The Commission discussed and decided not to make any changes to the requirement for the Payor to have a

reviewing pharmacist contracted or on staff. As noted in response to previous comments, the Commission is adding additional requirements to the rule for Opioid medications, which are continued beyond 90 days. The Commission is also adding language to address compounded drugs. The Commission has excluded legacy claims from the proposed rule but may undertake an interim study of this issue.

Commenter: Denny Altes, Arkansas State Drug Director

Thanks the Commission for striving to abide by the CDC guidelines and hopes this will cut down on the opioids hitting the street and save the lives of our kids. He appreciates all that is being done in the fight against illegal use of drugs and their destruction. **AGENCY RESPONSE** – The Commission appreciates the comments submitted by Mr. Altes.

Commenter: David Wroten, Executive Vice-President, Arkansas Medical Society

The Arkansas Medical Society represents over 4,500 physicians from all over Arkansas.

AMS respectfully requests that the Commission review and adopt an approach that follows this year's Act 820 for maximum consistency so physicians do not have one set of rules for their Workers' Compensation patients and another for all their other patients.

Regarding the 90 MED per day. At the very minimum there should be a mechanism, which is not overly burdensome to obtain approval for a larger dosage if warranted by the patient's injury. This mechanism should be managed similarly to how a "prior authorization" is handled by payers/carriers and/or their contracted agents and should not involve the AWCC.

He suggests that we replace the language in Part III. Opioid Medications B. with the following:

Prior to prescribing Schedule II or III opioid medications, prescribers shall check the Prescription Drug Monitoring Program database according to the provisions of Act 820 of 2017(or Arkansas Code 20-7-604 (d)).

In regards to Part III. Opioid Medications C. The AMS has serious concerns with this language and suggests a complete rewrite. What is intended by "five (5) days of medication? Is there an assumption this would be five days of medication up to 90 MED on each of those five days? Does this unwittingly encourage physicians to prescribe five days of 90 MED per day with each prescription?

AMS opposes limiting this to five days. Gives an example of a patient undergoing outpatient surgery on Monday and receives five days of medication (whatever that may be) and they run out on Friday night or over the weekend. Their pain may not be managed for up to 2 or 3 days or they may present to a hospital ER. What about patients who are admitted to the hospital with major trauma and need pain medications for several days? Even IV pain medication is "prescribed." Proposes a change to 7-10 days for the initial prescription.

Also rather than requiring all five conditions be met for a payor to be required to pay for continuing an Opioid medication beyond the first five day prescription they suggest something like this language "the prior authorization request as mentioned in our response to Part II, A. above for any prescription above the recommended 7-10 day threshold."

If the Commission decides to stay with the current proposed five requirements listed under C the following questions need to be answered.

1. What is meant by "authorized" treating physician? AMS suggests removing "authorized."
2. Who determines if the medication is "reasonable, necessary, and related to the workers' compensation injury or illness"? Is this the treating physician, insurer, employer or the AWCC?
3. It is expected that there will be follow-up visits, but how does the physician "certify" the medication is effective and to whom? Suggests it should say the treating physician "determines and notes in the medical record" rather than certifies. Also, states that opioid medications are to treat the pain associated with injury or illness and do not treat the actual injury or illness. AMS suggests this language, "effective in treating the pain associated with the injured employee's injury or illness."
4. Same comment as #3.

5. How does a physician certify medical necessity and to whom. "Authorized" is not clear and if the physician treating the patient under AWCC rules is authorized. AMS suggests deleting "authorized" and leaving it as "treating physician."
AGENCY RESPONSE – The Commission discussed the comments received from Mr. Wroten. As noted in response to previous comments, the language will be changed from "should" to "shall" regarding checking the Prescription Drug Monitoring Program database. The current meaning and application of the terms "authorized treating physician" and "reasonable, necessary, and related to the workers' compensation injury or illness" will not be changed by this rule.

Commenter: M. Carl Covey, M.D.; Medical Director, Pain Treatment Center of America

Commends the AWCC's attempt to address the opioid epidemic, which is a clear public health disaster.

He states it is clear the AWCC is drawing the "90 MED" in the proposed formulary from the 2016 CDC Guidelines for Prescribing Opioids for Chronic Pain. The result will be a tragedy of suffering and injury to many chronic pain patients and he predicts will result in legislative action and litigation as unintended consequences.

He says he has spoken to many physicians, other medical providers, and other stakeholders who have not read the CDC Guidelines but have simply plucked out the unsupported 90 MME/day number.

He says the first sentence of the CDC Guidelines refutes the AWCC proposal: "This guideline provides recommendations for primary care clinicians who are prescribing opioids for chronic pain…. "

He also says the following regarding the CDC Guideline:

It was not intended for all Specialties, especially Pain Management physicians whose patients require medically necessary doses of opiates exceeding the 90 MED per day proposed;

It mentions considering referral to a Pain Management Specialist no less than six times;

Experts agreed that lower dosages of opioids reduce the risk for overdose but that a single dosage threshold for safe opioid use could not be identified;

In the list of Grading Clinical Evidence for the document there were 33 study groupings, 18 had serious limitations, 6 had very serious limitations, 7 had insufficient evidence, and only 2 had no limitation but those 2 were for Myocardial Infarction and Motor Vehicle Crash Injuries; and

The CDC was very humble in its closing statement stating, "Yet, given that chronic pain is recognized as a significant public health problem…a guideline for prescribing is warranted with the evidence that is currently available."

He suggests that the AWCC consider setting the opioid ceiling for Primary Care Physicians/providers as defined in the CDC Guideline for Primary Care of 90 MME/day (if a defined number is necessary) but with the caveat quoted from the same CDC Guideline, "for example, before increasing the long-term opioid therapy dosage to >120 MME/day, clinicians in Washington state must obtain consultation from a pain specialist who agrees that this is indicated and appropriate." To do otherwise according to him will cause unjustified pain and suffering and reduce or eliminate access to medical care for the most desperate and vulnerable patient population.
AGENCY RESPONSE – The Commission discussed and decided not to alter the 90 MED limitation. Other pain management doctors support a limit of 90 MED per day.

Commenter: Carlos Roman, MD

He strongly supports the AWCC's drug formulary Rule 099.41 of limiting prescriptions to CDC recommended 90 MEDs per day and it should be applied to any prescribing physician primary care or pain management specialist. This limitation is appropriate and well founded and is still a tremendous amount of narcotics. These levels of narcotics for chronic non cancer pain are more than generous for proper pain management and will lead to better patient care, lower levels of physical opioid dependency, improved safety, less opioid induced hyperalgesia, better pain control due to lower opioid tolerance, decreased risk of overdose deaths, and help decrease the epidemic of prescription drugs diverted into our communities.

He says the opioid drug epidemic is a direct effect of a well marketed and focused effort by large pharmaceuticals to sell products and they have effectively hijacked the educational process for many physicians. The CDC guidelines represent an undeniable trend in decreasing opioid use for chronic pain.

He says that prior to 2009 the mantra of "pain management" physicians was titrate to effect regardless of dose. In 2009 this argument was addressed by the American Pain Society-American Academy of Pain Management, which recommended a maximum of 200 MeQ and in 2016 the CDC guidelines recommended a max of 90 MeQ. He says this trend will continue and he cites an article by Robert Barth, PhD that says prescription narcotics at a high dose prevents a return to work by injured patients.
AGENCY RESPONSE – The Commission agrees that the current CDC guidelines should be the standard, which is the basis of this rule. The Commission appreciates the comments made by Dr. Roman.

Commenter: John Swicegood, M.D., F.I.P.P., D.A.B.I.P.P.; Advanced Interventional Pain & Diagnostics

Supports Dr. Covey's analysis of the proposed opiate prescribing guidelines and formulary.

He has had 2 workers' compensation patients cut off from their Opana medication (low dose) when medication trials demonstrate efficacy to the patient when nothing else could control their pain and physical function. WC carriers have physicians for hire to opine and question the clinical care of injured workers with no accountability other than to improve financial gain to the WC carrier. The WC expert opinion directed patient to a cheaper opiate that had previously been tried and demonstrated inferior and ineffective in the patient's course of care. Often the drug of choice for WC was methadone with little regard to the risk of this inexpensive opiate.

WC is taking advantage of misinformation and generalization of opiate poisoning and rising death rates at the expense of the injured worker. Raw ER data concerning the opiate death rate is being used rather than data of patients being treated with opiates that are monitored appropriately and followed as part of a comprehensive pain care regimen. WC is manipulating this "raw data" to their financial advantage. He challenges WC to produce data of our

patient population under the care of board certified practitioners that support the need for the proposed opiate guidelines.

WC continues to obstruct, obfuscate, and deny chronic pain care as a campaign to deny the injured worker and pushes the patient and his/her family into poverty and into the legal system.

He recommends certification of pain prescribers who treat chronic pain and for WC to be held accountable for failure of duty to the injured workers.
AGENCY RESPONSE – The Commission discussed the concerns of Dr. Swicegood but decided not to make any changes to the proposed rule as a result of these comments.

Commenter: Cathy Luo, MD, Pain Management & Rehabilitation Consultants

Opposed to the 90 MED limit. This may cause patients more suffering. Some patients have been on chronic opioid treatment for a long time and have a high tolerance to pain meds. It will be difficult to keep all patients under 90 MED per day. Suggests that the Commission contact the Arkansas Pain Boards for recommendations.
AGENCY RESPONSE – The Commission discussed the MED limit and decided to stay with the CDC guideline of a 90 MED per day limit. The Commission has received and considered public comments from pain management doctors and the Arkansas Medical Society.

Commenter: Randy Zook, President & CEO, Arkansas State Chamber of Commerce and Associated Industries of Arkansas

His comments are provided on behalf of over 1,200 member businesses, industries, business associations, local chambers of commerce and local economic developers.

The proposed formulary is a positive step, but ODG would provide the most effective service. It is a superior product because it is objective, more detailed, based upon medical evidence, widely available and more comprehensive than the proposed formulary developed by UAMS. ODG is the only independent commercially published and updated monthly workers' compensation drug formulary and guideline with current guideline contact adopted in multiple states that is tied to evidence based treatment guidelines

that have been adopted and implemented in any US jurisdiction by rule or regulation.

The UAMS Formulary is only updated quarterly and its adoption will require multi-state businesses to maintain separate systems. They are also concerned about the future cost of the UAMS Formulary over that of ODG.

Texas adopted the ODG Drug Formulary in 2011 and is the only state that has collected, analyzed and reported data from their use of the ODG Drug Formulary and the ODG Treatment Guidelines, and their experience with ODG is remarkable. 30% reduction in medical costs, opioid costs decreased from 27% of the total pharmacy costs in 2009 to 18% in 2015, 49% savings in premiums, total drug costs in TX work comp system fell by 15%, etc.

Arkansas employers using ODG in other states support adoption of ODG in Arkansas because: ODG is based on medical evidence, objective and usable, updated monthly, provides a file that can be uploaded to process pharmacy bills, provides 46,000 NDC codes for the various versions of medications, provides continuing education resources for physicians, and benefits injured employees.

UAMS' Formulary has no downloadable file format and no related guidelines. UAMS has no current plans to provide this for their formulary.

Examples of Experience and Successes in Other States

New Mexico-total annual losses or outliers drop 78%, North Dakota-premium reductions of 40%, Ohio-savings of 66% in absence-60% in medical costs-77% in treatment delay-84% provider approval, Oklahoma-44% cumulative drop in loss-cost rates. Other examples of Industry Success were given for ESIS, Shell Oil, Marathon Oil, Adelaide AHTA, and Rand Corporation.

ODG has a proven methodology. It is owned by MCG Health, the worldwide leader in evidence-based medical guidelines for general health care, and is part of the Hearst Health Network. Its methodology has been ranked among the best and most rigorous in the world for technical quality by Rand Corporation and others. ODG is currently adopted in Texas, Tennessee, Oklahoma and Arizona. The current ODG Drug Formulary includes over 331

prescription medications commonly prescribed for workers' compensation injuries with reasonable options for short acting opioids and musculoskeletal on the preferred Y-drug list, most PBMs and Payors have already integrated the ODG Treatment Guidelines and/or Drug Formulary into their systems and procedures and this eliminates and minimizes obstacles and costs of implementation. Over two million workers' compensation prescriptions have been filled under the ODG Formulary compared to zero by other Commercial Work Comp Guidelines Publishers.
AGENCY RESPONSE – In 2015, the Arkansas Workers' Compensation Commission determined that adoption of ODG Medical Guidelines was not in the best interest of the citizens of Arkansas. Due to an increasing amount of opioid and narcotic prescriptions in the workers' compensation arena, the Commission reviewed and studied several drug formularies, including the UAMS Drug Formulary. The Commission has determined that the UAMS formulary is the best formulary for use in Arkansas. The UAMS Drug Formulary was developed by the College of Pharmacy at UAMS and is an evidence-based formulary based on actual claims experience in Arkansas by Arkansas medical personnel. There are no user fees associated with this formulary and it can be readily available on our website. Because it is local, it will be more responsive to any updates or changes needed.

It has demonstrated its effectiveness since the voluntary adoption of the formulary by the Public Employee Claims Division of the State of Arkansas in both reducing the prescription of opioids and in overall costs without compromise of care to the injured workers.

Commenter: Janice Van Allen, Senior Director, Walmart Risk Management

Walmart supports the adoption of an Arkansas Workers' Compensation Drug Formulary. However they support and ask that consideration be given to adopting the ODG Drug Formulary. It has the following benefits that make it easier for physicians and payors to administer: ODG is updated monthly so new drugs are included sooner than other formularies, ODG is usable, ODG is a continuing education resource for physicians, ODG is based on medical evidence, ODG has been proven to work in several states (TX, OK, TN, NM, ND, and OH), Texas' results after adoption demonstrate several successes, Walmart's results show that claims where narcotics were prescribed on 6 month old claims, associates

missed 33 less days from work on average and a 75% reduction in the number of MEDs.

If the Commission adopts Proposed Rule 099.41 and the UAMS Formulary, the following comments are for their consideration:

The formulary should be published and available in a downloadable format.

They say our language in A1 (b)-Establishes that all Opioid prescriptions shall have a 90 MED per day limit for five days for the initial prescription with a 90-day maximum duration period is written inconsistently throughout the proposed rule and needs to be clarified for intent.

The requirement to ensure this rule is followed is ineffective. Allowing treating physicians to simply state that the request for additional days and MEDs is "reasonable and necessary" will be no more effective than the current requirement. Physicians should provide the following to demonstrate why treatment requests are "reasonable and necessary": a summary of conservative care rendered to the worker that focused on increased function and return to work; a statement on why prior or alternative conservative measures were ineffective or contraindicated (including non-opioid pain medications); a statement that the treating physician has considered the results obtained from appropriate industry accepted screening tools to detect factors that may significantly increase the risk of abuse or adverse outcomes including a history of alcohol or other substance abuse; a summary of findings of the data received from an automated Prescription Drug Monitoring Program (PDMP); and a treatment plan, which includes all the following: overall treatment goals and functional progress, periodic urine drug screens, a conscientious effort to reduce pain through the use of non-opioid medications, alternative non-pharmaceutical strategies, or both and consideration of weaning the injured worker from opioid use.

The rule should include existing claims but allow a weaning period. Their proposed language gave a six month weaning period.

They agree clinicians need to be involved in the identification and review of drug misuse but don't necessarily agree it has to involve a PBM. They say the language regarding payors to have on staff a Pharmacist and Physician or Medical Director or shall contract

with a PBM, who has a Pharmacist and a Physician or Medical Director on staff or has contracted with a Pharmacist and a Physician or Medical Director is referenced differently throughout the proposed rule and needs to be clarified for intent.

They ask who will be responsible for administering the provision A1(f) requiring for the certification of all payors determined to be in compliance with the criteria and standards established by this rule.

In regards to A1(g)-Provides for the implementation of Medical Cost Containment Division review and decision making responsibility. They ask how will the additional staff for this division be funded and will the appointed individuals have medical/pharmaceutical knowledge/education?
AGENCY RESPONSE - As noted above in response to other comments received, the Commission has carefully considered the comments in support of ODG but has ultimately decided to adopt the UAMS College of Pharmacy Evidence-Based Prescription Program. The drug formulary has been published to the Commission's website and is readily available. As noted in response to other comments, the Commission has added requirements to the proposed rule regarding Opioid medications beyond 90 days. The proposed rule does not include legacy claims, but the Commission may undertake an interim study of that subject. The Medical Cost Containment Division of the Commission will be responsible for certifying payors, and we do not anticipate a need to add additional staff for this purpose.

The proposed effective date is January 1, 2018.

FINANCIAL IMPACT: The financial impact is unknown. All entities involved in any workers' compensation claim filed after December 31, 2017 would be subject to the proposed rule. This would include pharmacists, dispensing physicians, treating physicians, claimants, carriers, and self-insured employers. It will affect reimbursement and the claims processing for all FDA approved prescription drugs.

While the agency does not know how this will affect county and municipal governments, it does have information regarding state employees. Public Employee Claims implemented a drug formulary similar to this one a year ago, and they have shown a cost savings with few requests for review of claims processed.

LEGAL AUTHORIZATION: The Workers' Compensation Commission is authorized to establish rules and regulations, including schedules of maximum allowable fees for specified medical services rendered with respect to compensable injuries, for the purpose of controlling the cost of medical and hospital services and supplies provided pursuant to Arkansas Code Annotated §§ 11-9-508 through 11-9-516. *See* Ark. Code Ann. § 11-9-517. Further authority for the rulemaking can be found in Ark. Code Ann. § 11-9-205(a)(1), which provides that for the purpose of administering the provisions of the Workers' Compensation Law, Ark. Code Ann. §§ 11-9-101 through 11-9-1001, the Workers' Compensation Commission is authorized to make such rules and regulations as may be found necessary.

13. DEPARTMENT OF HIGHER EDUCATION, FINANCIAL AID (Maria Markham and Tara Smith)

a. SUBJECT: Arkansas Academic Challenge Scholarship

DESCRIPTION: These rules address the student eligibility criteria, method for recipient selection, continuing eligibility requirements, procedures for making payments to an approved institution of higher education, and other administrative procedures necessary for operation of the program.

The rules and regulations are being amended due to changes made by Acts 315, 597, 613, 719, 1008, and 1041 of 2017.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 11, 2017. The Department received no comments.

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

In the definition of "Continuously enrolled," are sections 7(B)(i), (ii) being stricken because they relate to the Achiever program that is no longer viable? Or does the striking of the language stem from one of the Acts? **RESPONSE:** The striking of sections 7(B)(i), (ii) in the "Continuously enrolled" section is continued clean up that relates to the Current Achiever program that is no longer viable.

The proposed effective date is October 27, 2017.

FINANCIAL IMPACT: The estimated cost is $88,000,000 for each of the current and next fiscal year. The projected cost of the Academic Challenge Scholarship program is not expected to significantly change with the amendments to these rules. This amount is the total projected cost of the scholarship program. This scholarship is funded through general revenue and net lottery proceeds. There is no additional cost to general revenue.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-85-205(a), the Department of Higher Education shall develop and promulgate rules for the administration of the Arkansas Academic Challenge Scholarship Program consistent with the purposes and requirements of Title 6, Chapter 85, Subchapter 2 of the Arkansas Code, concerning the Arkansas Academic Challenge Scholarship Program—Part 2. The rules shall pertain to: (1) student eligibility criteria based on the subchapter; (2) the method for selecting scholarship recipients and for determining continuing eligibility; (3) the procedures for making payment to an approved institution of higher education where the recipient is enrolled; and (4) other administrative procedures that may be necessary for the implementation and operation of the program. *See* Ark. Code Ann. § 6-85-205(b). The instant proposed changes include revisions brought about by **Act 315,** sponsored by Senator Jimmy Hickey; **Act 597,** sponsored by Representative Michelle Gray; **Act 613,** sponsored by Senator Jimmy Hickey; **Act 719,** sponsored by Senator Jimmy Hickey; **Act 1008,** sponsored by Representative Andy Davis; and **Act 1041,** sponsored by Senator Jimmy Hickey, **of 2017**.

b. SUBJECT: Arkansas Future Grant Program

DESCRIPTION: The Arkansas Future Grant Program rules and regulations are being proposed due to the creation of the grant program by Act 316 of 2017. The Workforce Improvement Grant (WIG) Program rule is being repealed to create the Arkansas Future Grant Program. The proposed new rule for the Arkansas Future Grant addresses the student eligibility criteria, method for recipient selection, continuing eligibility requirements, and procedures for making payments to an approved institution of higher education, and other administrative procedures necessary for operation of the program.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 11, 2017. The Department received no comments.

The proposed effective date is October 27, 2017.

FINANCIAL IMPACT: The estimated cost is $9,000,000 for each year of the current fiscal year and the next fiscal year. The Higher Education Opportunities (Go!) Grant is being phased out and the Workforce Improvement Grant (WIG) was repealed. The revenue funding allocated to those programs will be redirected to the Arkansas Future Grant. There are no additional costs to general revenue.

LEGAL AUTHORIZATION: These rules implement **Act 316 of 2017**, sponsored by Representative Jana Della Rosa, which created the Arkansas Future Grant Program. Pursuant to Arkansas Code Annotated § 6-82-1805, as amended by Act 316, § 1, the Department of Higher Education shall promulgate rules to implement the Arkansas Future Grant Program. The agency states that these rules will repeal the existing Arkansas Workforce Improvement Grant Program Rules and Regulations.

E. Rules Filed Pursuant to Ark. Code Ann. § 10-3-309 to be Considered Pending Suspension of the Rules:

1. DEPARTMENT OF HIGHER EDUCATION (Maria Markham and Tara Smith)

a. SUBJECT: Productivity Funding Policy – Colleges; Productivity Funding Model Policy – Universities; and Productivity Funding Distribution Policy

DESCRIPTION: Act 148 of 2017 requires the Arkansas Higher Education Coordinating Board (AHECB) to adopt policies developed by the Department of Higher Education necessary to implement a productivity-based funding model for state-supported institutions of higher education. The Productivity Funding Model Policy – Colleges and Productivity Funding Model Policy – Universities describe the guiding principles that were used to design the new funding model and outlines the metrics that will be

used for state-supported institutions of higher education to determine productivity changes from year to year. The AHECB shall use the productivity-based funding model as the mechanism for recommending funding for applicable state-supported institutions of higher education. The AHECB shall recommend funding for the state-supported institutions of higher education as a whole and the allocation of funding to each state-supported institution of higher education. The AHECB shall make separate recommendations for the two-year institutions and four-year institutions. The framework for those recommendations is described in the Productivity Funding Distribution Policy.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 25, 2017. The Department provided the following summary of the comments it received and its responses:

COMMENT 1: Support for inclusion of a non-credit workforce metric for two-year colleges

By: Mark Lobel, David Stickler, Gary Hughes, Kay Brockwell, Mark O'Mell, Chris Heigle, Tim Scott, Faith Paine, Chris Raymer, Angela Barber, Paula Swift, Jeannie Fort, Ericka Massey, Keith Prevost & Mark Digirolamo, Ammi Tucker, Barbara Jones, Randy Esters, John Hogan, Steve Rook, James Shemwell, Rep. Sonia Barker, Evelyn Jorgenson, and Bill Stovall

Response: A workgroup of two-year Presidents and Chancellors convened in response to the public comment relating to lack of a workforce metric and have agreed on the inclusion of a non-credit workforce adjustment beginning in FY2020. The proposed policy has been modified to include this change.

The funding model is only one of a multi-pronged approach to achieving the ADHE Master Plan. Although gaps in Associate and Bachelor's degrees are smaller, they do exist, are more expensive and/or take more time to produce, and are not areas where we can afford to lose ground. Complimentary programs to achieve the Master Plan are already in place.

Arkansas Future and Workforce Challenge are new programs specifically designed to address the attainment gaps at the certificate level. A projected $13 million per year will be expended to recruit and support students in the technical programs

offered at Arkansas community colleges. This shift in funds represents a targeted strategy to close the stated gaps and drive both attainments and resources to community colleges.

It is also important to note that non-credit workforce training is funded in a variety of ways beyond formula funding. Direct funding for training can be accessed through the Office of Skill Development, Regional Workforce Grants, industry contributions, student training fees, and in the Fall of 2018, students will be eligible to receive coverage through the Workforce Challenge program.

COMMENT 2: Support for inclusion of concurrent student success for gateway courses at two-year colleges

By: Faith Paine, Keith Prevost & Mark Digirolamo, Randy Esters, John Hogan, Steve Rook, James Shemwell, Evelyn Jorgenson, Bill Stovall, and Ammi Tucker

Response: The formula currently counts concurrent students in the same manner as post-secondary students. There is no distinction between student types in the two-year college policy.

COMMENT 3: Support for including a post-completion metric

By: Chris Raymer, Barbara Jones, John Hogan, Steve Rook, James Shemwell, Rep. Sonia Barker, Bill Stovall, Ammi Tucker, Angela Barber, Paula Swift, Jeannie Fort, and Ericka Massey

Response: The inclusion of a post-completion metric is planned for phase 2 of the model and currently under development. This metric will likely incorporate an employment aspect, professional licensure, and graduate school participation. The post-completion metric will be complex, data intensive, and will likely come at expense to produce. Arkansas is not unique in grappling with this metric and all other states with outcomes based funding have phased it in as well.

COMMENT 4: Support for adjusting weightings for high-demand programs above what is recommended in the proposed policy

By: John Hogan, Steve Rook, James Shemwell, Rep. Sonia Barker, Liz Smith, and Bill Stovall

Response: High demand degrees are weighted with a multiplier of 1.5. In analyzing the impact of potential weightings, it was determined that anything higher would negate all other factors in the model. The high demand list used to determine which programs receive the weighting is the most inclusive list available. The regional demand lists are much more restrictive. The statewide demand list allows institutions to offer novel programs that meet statewide need without duplicating expensive programs.

COMMENT 5: Support for cost calculations in the model

By: Randy Esters, James Shemwell, Liz Smith, Bill Stovall, Rep. Sonia Barker, Chris Raymer, Ammi Tucker, Keith Prevost & Mark Digirolamo, Angela Barber, Paula Swift, Tim Scott, Jeannie Fort, and Ericka Massey

Response: The Productivity Model is not a cost model. Cost considerations are not incorporated into any part of the model. However, the types of programs mentioned in the comments received are given weightings because they are either in the STEM or High Demand categories because these programs address strategic needs. This was intentional as programs falling outside of either the High Demand or STEM areas do not speak to state needs and the additional costs should not represent a burden to tax payers.

COMMENT 6: Support for more differentiation between university and two-year college missions

By: Keith Prevost & Mark Digirolamo, Ammi Tucker, Randy Esters, Steve Rook, James Shemwell, Chris Heigle, Kay Brockwell, Gary Hughes, Mark Lobel, Rep. Sonia Barker, Liz Smith, Tim Scott, and Mark O'Mell

Response: All student successes are captured in the model from short-term certificates through advanced degrees. This allows institutions to carry out their mission specific programming without the need for the model to articulate every niche program. Community colleges receive credit for transfer to universities, technical credentials, concurrent student gateway, progression, and credentials, etc. Once post-completion and non-credit workforce training metrics are finalized, no aspects of mission will be excluded from consideration. General education programs are

weighted at one-third of STEM and medical programs and one-half of high demand programs. This weighting is one of many examples of the way the model provides for differentiation in mission.

COMMENT 7: Support for funding two-year colleges based on meeting benchmarks rather than increases in productivity

By: Barbara Jones, John Hogan, Steve Rook, Evelyn Jorgenson, Bill Stovall, and Ammi Tucker

Response: The law requires ADHE to develop a policy that funds institutions on productivity, not performance or equity. Productivity requires the production of more credentials both in sum and in underserved populations. Benchmarking would be appropriate and will be considered once we reach the attainment goals set forth in the master plan.

COMMENT 8: Support for a larger distribution of funds to the two-year colleges versus universities than described in the funding distribution policy

By: Bill Stovall, Randy Esters, James Shemwell, and Steve Rook

Response: The distribution method was carefully considered. Currently, the universities are funded at 59% of need and the community colleges are at 80%. If inequities were to be corrected, the split would result in a much less favorable ratio than the proposed 74/26. Additionally, this argument neglects to consider that there are multiple state funding streams to support workforce training initiatives outside of the higher education institutional funding formula. However, the formula is the sole source of providing state funds for academic programs. Shifting the proportion of funds between institution types might result in increases in some areas but would also create deficits in areas where Arkansas cannot afford to lose ground.

COMMENT 9: Support for making affordability allowances for associate programs over 60 credit hours

By: John Hogan, Barbara Jones, and Steve Rook

Response: There is no penalty for programs over 60 hours if those programs require additional hours to meet external accreditation of

licensure requirements. Requests for exceptions have been made and approved for all such programs. The denominator for credits at completions has been adjusted upward to account for necessary variations. The policy has been updated to reflect the allowances made.

COMMENT 10: Support for addressing equity funding prior to implementation of the productivity funding model

By: Faith Paine, Jim Hall, and Evelyn Jorgenson

Response: The concept of equity funding has been widely debated and considered. The reality is, that to bring all colleges to equity, would cost the state over $130 million annually. This request has been made each year and is not realistic in light of available state revenues. The new model will result in closing the equity gap slowly over time while maintaining stability of statewide higher education funding. Although there is a temptation to shift dollars immediately, the result would destabilize the higher education system and would further disenfranchise the underserved populations that we need to elevate. Ultimately, the new law requires that institutions of higher education be funded based on productivity, not equity.

COMMENT 11: Support for eliminating or reducing the "Progression" aspect of the model

By: James Shemwell and Liz Smith

Response: The institutional funding workgroup fundamentally disagrees with this argument. Assigning credit to momentum points is a recognition of reaching research-based predictors of completion. The decision to include points at this level is neither a function of enrollment nor arbitrary. The measure of student retention and success is in itself an outcome.

COMMENT 12: Support for excluded out-of-state student successes from model

By: Ammi Tucker, James Shemwell, and Liz Smith

Response: It is not the intent of Governor Hutchinson nor ADHE to discourage institutions from recruiting students from out of state and certainly not from underserved populations. Some of

Arkansas's institutions depend on out-of-state students to subsidize academic programs. Also, industry in Arkansas recruits heavily from that population of students. Additionally, failure to recognize risk factors in out-of-state students would be directly contrary to the missions of some Arkansas institutions who seek to serve minorities and nontraditional students. Weighting for underserved populations were specifically applied across the board to protect those students from discriminatory practices and close attainment gaps as dictated by the ADHE master plan.

COMMENT 13: Support for rewarding transfer from a university back to a two-year college or between two-year colleges

By: Steve Rook

Response: The workgroup and the agency considered this suggestion but ultimately elected not to revise the policy. The transfer metric is not intended to capture all transfer, but transfers that are intentional and seamless. Capturing reverse transfers and transfers among like-type institutions would promote student swirl and would hold institutions accountable for fluctuations outside of their control.

COMMENT 14: Support for including affordability measures for certificate level credentials

By: James Shemwell and Ammi Tucker

Response: Certificates are not included in this measure because the length of time for those credentials vary widely. To establish a threshold for credits in certificate programs would be arbitrary and would have a negative impact on demand programs not meeting this arbitrary bench mark. For example, only awarding affordability points for certificates under 36 hours would exclude all LPN programs from receiving credit in this metric. The notion that this adjustment would not be complex is simply incorrect.

COMMENT 15: The Act lacks clarity and simplicity as compared to the previous funding Act

By: Larry Lawson

Response: The Act that created the need for the policy reduces the Higher Education funding code from 16 pages to 2. The policies

presented for public comment replace much more complex polices that were in place under the previous model as well; however, the old policies were not subject to the Administrative Procedure Act and never posed for comment.

COMMENT 16: At the moment I have two questions. #1 What was wrong with the present way of funding higher education? #2 Has there been given any thought to the massive expense involved with additional staff and new programs to keep up with the records involved? Someone needs to think.

The first thing I notice is that this document is not "clear and simplistic" as stated in The Formula Structure. If the public was exposed to the clear and simplistic meaning of this act, they would understand that it is a way to lower standards, or a giveaway program to make claim to more degreed people in our state. Higher education will be challenged to graduate more in order to receive more. Result, lower the bar. In reading all nine pages many times, the emphasis seems to be tilted toward helping the underserved, at risk, ethnicity, age, income and academic. Of course these are all PC statements with subdued or subjective intent. The most obvious category is the lack of recognizing the GIFTED. Do we not want or need the gifted or would that throw the whole plan off? The lack of inclusiveness may fringe on being unconstitutional. This document seems more political than educational. It appears we are sacrificing a good education for good intentions. Not everyone needs a college degree. Vocational schools are wonderful. Having served in higher education for 30 years, I know how the wind blows and this Act is not good for education or our state.

By: Marvin Lawson

Response: The previous model for funding higher education was not aligned with the strategic goals of our state. The model failed to produce gains in the attainment levels of Arkansans or to close gaps in underserved populations. Additional staff and new programs will not be required of the institutions. All of the data required to run the new model is already collected, housed, and shared between the institutions and the department.

Higher education will in fact be challenged to graduate more in order to receive more. However, this will not result in a lowered bar but a raised level of student support. No reduction will be made in the course and degree outcomes (which are monitored by

regional accreditors) but improvements will be required in the areas of remediation, advising, transfer partnerships, and administrative spending.

The emphasis is quite transparently tilted toward underserved populations because they are by definition underserved and represent the largest attainment gaps in our state. Without substantial elevation of these groups, Arkansas will be unable to close overarching deficits in attainment. Although these students are given increased weighting throughout the model, all students garner productivity points for their institutions. Gifted students face far fewer barriers, arrive prepared for success, and require less institutional investment to achieve credentials. Colleges and universities do not need external motivation to attract, retain, and graduate this type of student.

Although ADHE agrees that not everyone needs a Baccalaureate degree, the jobs of today and tomorrow require some level of post-secondary preparation. This could mean anything from a non-credit, industry-recognized credential to a post-doctorate degree. The entirety of post-secondary higher education is captured in the new model, including vocational credentials, and institutions are incentivized to place students in career paths that fit their aptitudes and abilities.

COMMENT 17: Reduce the "Progression" hours from 15/30/45 to 12/24/36 credit hours for community colleges because community college students face significantly higher barriers to success.

By: Bill Stovall

Response: Assigning credit to momentum points is a recognition of reaching research-based predictors of completion. Barriers for students have been accounted for in different ways in the model by providing additional weighting for underserved student groups.

COMMENT 18: Reduce the "Progression" hours from 15 to 12 credit hours for concurrent students

By: Evelyn Jorgenson

Response: The formula counts concurrent students in the same manner as post-secondary students. There is no distinction

between student types for this metric in the two-year college policy. ADHE does not intend to reward concurrent success at a higher rate than postsecondary student success.

The proposed effective date is October 27, 2017.

FINANCIAL IMPACT: The estimated cost is $10,000,000 in the next fiscal year in general revenue. This policy provides the details used for determining funding recommendations for institutions of higher education made to the Governor and General Assembly by the Arkansas Higher Education Coordinating Board (AHECB). The Governor and Arkansas General Assembly will determine if the recommended funding is provided.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-61-234(a)(1)(A), as amended by **Act 148 of 2017**, § 1, sponsored by Representative Mark Lowery, the Arkansas Higher Education Coordinating Board shall adopt policies developed by the Department of Higher Education necessary to implement a productivity-based funding model for state-supported institutions of higher education. The Board shall adopt separate policies for two-year institutions of higher education and four-year institutions of higher education. *See* Ark. Code Ann. § 6-61-234(a)(1)(B), as amended by Act 148, § 1. The policies adopted to implement a productivity-based funding model for state-supported institutions of higher education shall contain measures for effectiveness, affordability, and efficiency that acknowledge the following priorities: (a) differences in institutional missions; (b) completion of students' educational goals; (c) progression toward students' completion of programs of study; (d) affordability through: (i) on-time completion of programs of study; (ii) limiting the number of excess credits earned by students; and (iii) efficient allocation of resources; (e) institutional collaboration that encourages the successful transfer of students; (f) success in serving underrepresented students; and (g) production of students graduating with credentials in science, technology, engineering, mathematics, and high-demand fields. *See* Ark. Code Ann. § 6-61-234(a)(2), as amended by Act 148, § 1.

F. Adjournment.