ADMINISTRATIVE RULES SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Wednesday, January 15, 2020
9:00 a.m.
Room A, MAC
Little Rock, Arkansas

A. Call to Order.

B. Reports of the Executive Subcommittee.

C. Letters Submitted Pursuant to Act 893 of 2019.

D. Rules Deferred from the December 18, 2019 Meeting of the Administrative Rules Subcommittee.

1. <u>DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES, OFFICE OF STATE PROCUREMENT</u> (Mr. Edward Armstrong)

a. <u>SUBJECT</u>: Changes to Rules Under the AR Procurement Law

<u>DESCRIPTION</u>: Due to legislation passed during the 92nd General Assembly, as well as other rule changes deemed necessary, the following rules are being amended:

- R1:19-11-203 is being amended to provide guidance on the definitions of "commodities" and "services." Additionally, R2:19-11-203 through R7:19-11-203 have been renumbered.
- R2:19-11-203(g) is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R3:19-11-203 is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R6:19-11-217 is being added to provide guidance on how agencies should manage the roster of expiring contracts.
- R1:19-11-218 is being amended to provide guidance for written delegation orders pursuant to changes introduced in Act 420 of 2019, and R1:19-11-218(A) and (C) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-219 is being added to provide guidance on attorney reviews of contracts.

- R1:19-11-220(b) and (c) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-221(2) to (4) are being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-223 is being amended concerning approvals and denials of requests for exemption from mandatory state contracts. R2:19-11-223 has been added to provide guidance for mandatory state contracts. Both rules are being promulgated due to changes introduced in Act 421 of 2019.
- R1:19-11-224(1)(B) is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R6:19-11-229 is being added to provide guidance on solicitation conferences. Consequently, R7:19-11-229 through R14:19-11-229 have been renumbered. Pursuant to statutory changes introduced in Act 419 of 2019, R8:19-11-229 is being amended to provide guidance on time discounts, R11:19-11-229 is being amended to provide guidance on training certification for negotiations, and R8:19-11-229 is being amended to provide greater clarity on grounds for rejecting bids.
- R2:19-11-230 is being amended to provide guidance for weighting cost in competitive sealed proposals. R5:19-11-230 is being amended to provide guidance for use of past performance in evaluations, and use of private evaluators. R7:19-11-230 is being amended to provide guidance on seeking clarifications from offerors.
- R1:19-11-233 is being amended to align with changes introduced in Act 419 of 2019 concerning non-critical emergencies, and to remove language related to reporting requirements that were modified by Act 417 of 2019.
- R1:19-11-238 is being added to provide guidance on contract term lengths pursuant to the statutory changes of Act 418 of 2019.
- R1:19-11-244 is being amended to provide definitions and otherwise align with changes introduced in Act 420 of 2019.
- R1:19-11-249 is being amended to align with changes introduced in Act 421 of 2019.
- R2:19-11-249 is being amended for certain housekeeping changes made pursuant to Act 315 of 2019 and Act 910 of 2019.
- R1:19-11-251 is being amended to remove references to review thresholds and contract designations that have been removed by reporting requirement modifications of Act 417 of 2019.
- Due to reporting requirement modifications of Act 417 of 2019, R1:19-11-265 and R2:19-11-265 are being amended to provide guidance and definitions. R4:19-11-265 and R5:19-11-265 are being repealed. The rules are consequently being renumbered.
- R1:19-11-267 is being amended to reflect the changes and contract amounts introduced in Act 418 of 2019.

- R1:19-11-268 is being repealed due to the changes introduced in Act 418 of 2019.
- R1:19-11-[273] through R3:19-11-[273] have been added to provide guidance on the use of solicitation conferences.
- R1:19-11-[275] through R3:19-11-[275] have been added to provide guidance on the use of requests for information.
- R1:19-11-1006 is being repealed due to the repeal of its statutory counterpart in Act 417 of 2019.
- R1:19-11-1010 and R1:19-11-1013 are being repealed due to the repeal of their statutory counterparts in Act 418 of 2019.
- R2:19-11-1012 is being amended due to reporting requirement modifications of Act 417 of 2019.

PUBLIC COMMENT: A public hearing was held on November 15, 2019. The public comment period expired on November 15, 2019. The Office of State Procurement provided the following summary of the public comments it received:

OSP has received one comment, on November 8, 2019, that was in support of the adoption of the rule changes being promulgated and has received no comments against the adoption of the rule changes being promulgated. OSP held a public comment hearing November 15, 2019 at 9:00 AM. One question was received during the public comment hearing: Should R2:19-11-1012 reference the Department of Finance and Administration or the Department of Transformation and Shared Services, regarding the filing of contracts which are critical emergency procurements or exempted?

OSP revised the proposed rules based on the comment it received at the public hearing.

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

QUESTION #1: Is there statutory authority for the definitions of "consulting services," "employment agreement," "personal services," and "professional services" in R1:19-11-203? **RESPONSE:** Yes. Thank you for the opportunity to explain. The State Procurement Director is statutorily required to procure or supervise the procurement of all commodities and services within the limits of the Arkansas Procurement Law *subchapter* and rules promulgated under the authority of that *subchapter*. *See* Ark. Code Ann. § 19-11-217(c)(1). The Arkansas Procurement Law subchapter specifically defines "services" as including: (i) consulting services; (ii) personal services; and (iii) professional services (*see* Ark. Code Ann. § 19-11-203(27)(C)) but does not define

those component terms. In furtherance of his statutory duties, the State Procurement Director needs to establish a uniform understanding among procurement officials regarding the meaning of these terms so they can consistently apply Arkansas Procurement Law. Because statutory definitions of these important terms are not provided in the Arkansas Procurement Law subchapter, they are being promulgated under that subchapter to provide a uniform standard clarifying which contracts fall within these different subsets of contracts for "services" as defined in the Arkansas Procurement Law subchapter. Without a rule or a statutory provision in Arkansas Procurement Law providing a uniform definition of these terms, there is bound to be varying agency interpretations of the meaning of those terms and discrepant application of the law in deciding which contracts are contracts for "services" as defined in the Arkansas Procurement Law subchapter.

QUESTION #2: Where do the definitions of "included in" and "incident to" in R1:19-11-203(f) come from? **RESPONSE:** Act 417 of 2019 changed the statutory definition of "services" by adding new verbiage regarding the labor, time, or effort of a contractor for the development of "software and other intangible property other than technical support *incidental to* the procurement of proprietary software," Ark. Code Ann. § 19-11-203(27)(B)(v) (emphasis added), and regarding labor, time, or effort by a contractor "that does not produce tangible commodities." Ark. Code Ann. § 19-11-203(27)(A).

The definitions of "included in" and "incident to" in R1:19-11-203(f) come from the need to: (i) align with the Arkansas Uniform Commercial Code (as explained below); and (ii) clearly distinguish between: (a) contracts to pay contractors for furnishing "labor, time, or effort" that may result in the production of tangible commodities, but where payment is predominantly for furnishing "labor, time, or effort" and not actually conditioned on delivering commodities (in which case the contracts should be categorized as contracts for services); and (b) contracts to pay contractors for tangible commodities where the compensation is predominantly for delivery of tangible commodities and any "labor, time, or effort" furnished by the contractor in the production or sale of the commodities is merely incidental thereto or included therein (in which case the contracts should be categorized as contracts for commodities).

Under the Arkansas UCC, in circumstances where a contract calls for a combination of services and goods, the majority test for determining whether a contract is a contract for the sale of goods (and therefore subject to UCC Article 2) or a contract for services "is whether their predominant factor, their thrust, their purpose, reasonably stated, is the rendition of service, with goods incidentally involved (e.g., contract with artist for painting) or is a transaction of sale, with labor incidentally involved (e.g.,

installation of a water heater in a bathroom). *See Bonebrake v. Cox*, 499 F.2d 951, 960 (8th Cir. 1974). *See also Heating & Air Specialists, Inc. v. Jones,* 180 F.3d 923, 932 (8th Cir. 1999) ("Although the parties' franchise agreement is a mixed contract for the sale of goods and services, the transaction at issue is fundamentally an exchange of goods. The Uniform Commercial Code ... governs such transactions [under Arkansas law]."); *B & B Hardware, Inc. v. Fastenal Co.*, 688 F.3d 917, 921 (8th Cir. 2012) (holding that even where there is a "mixed" contract for the sale of goods and services, the UCC governs where the agreement is fundamentally one for the sale of goods). This is a widely accepted distinction at law that is often referred to as the "primary purpose law." Since both Arkansas Procurement Law and the Arkansas UCC apply to contracts for the sale of commodities (*see* Ark. Code Ann. § 19-11-203(4)(A)(i)), it is advisable that they be defined harmoniously and to reach the same result in order to avoid confusion as to the applicable law or result.

The proposed definitions of "included in" and "incident to" are consistent with both the Arkansas UCC and Arkansas Procurement Law. *See* Ark. Code Ann. § 19-11-203(27)(B)(v) ("The furnishing of labor, time, or effort by a contractor for the generation, customization, configuration, or development of software and other intangible property other than technical support incidental to the procurement of proprietary software.") They will help procurement professionals by providing a rule for distinguishing between: (1) contracts to pay for services that may result in the production of tangible commodities (service contracts); and (2) contracts to pay for the production of tangible commodities that may require a contractor to furnish some labor, time, or effort that are merely incidental to or included in the production or sale of those tangible commodities (contracts for commodities).

QUESTION #3: Is the attorney certification provision in R1:19-11-219 required by statute? **RESPONSE:** Ark. Code Ann. § 19-11-219(c) states "The director shall adopt rules to implement this section, including without limitation rules to" before going into designated contracts and requirements for attorneys who may review contracts. The rule requiring attorneys certify they have reviewed the contract comes from the need to clarify what the attorneys who may review are reviewing in the designated contracts. As further explained below, the four items listed in the rule seek to ensure the contract remains in compliance with state law. An earlier draft of the rule provided, in relevant part, as follows:

Where the standard terms and conditions that have already been approved by OSP are not used, or they have been used but substantively amended, the reviewing attorney shall confirm, in a writing…"

OSP is seeking confirmation in writing that contracts which modify the standard terms and conditions complies with state law as discussed below.

QUESTION #4: Where does the list of certification requirements in R1:19-11-219(a)-(d) come from? **RESPONSE:** R1:19-11-219(a) comes from the doctrine of sovereign immunity. *See* Ark. Const. art. 5, § 20; *Bd. of Trustees of Univ. of Ark. v. Andrews*, 2018 Ark. 12, 535 S.W.3d 616 (2018). R1:19-11-219(b) comes from the doctrine of sovereign immunity. R1:19-11-219(c) comes from the Arkansas Freedom of Information Act of 1967 (*see* Ark. Code Ann. § 25-19-101 et al.). R1:19-11-219(d) comes from Ark. Code Ann. § 19-4-1206(b)(3)(B) ("It shall be the responsibility and duty of each disbursing officer or agent to certify that the services have been performed or the goods received.").

QUESTION #5: Is there statutory authority for the definition of "substantial savings" in R2:19-11-223? **RESPONSE:** Ark. Code Ann. § 19-11-223(d)(5)(B) states "The director shall adopt rules to include any necessary conditions, reporting, or document retention standards related to the director's duty to promote mandatory state contract use under this subsection." Ark. Code Ann. § 19-11-223(b)(2)(A) states, "Except as provided in § 19-11-233, the director may approve an exemption from a mandatory state contract awarded under this section only if the state agency demonstrates that substantial savings will likely be effected by purchasing outside of the mandatory state contract." The authority to define "substantial savings" comes from the authority to adopt rules to include any necessary conditions related to the director's duty to promote mandatory state contract use. With "substantial savings" being what agencies are required to demonstrate in order to seek an exemption from a mandatory state contract, a standard definition is vital to a non-arbitrary system of administering mandatory state contract usage. R2:19-11-223 seeks to strike a reasonable balance between an individual agency's need to find savings, and the State's need to maintain favorable pricing through volume purchasing. In any event, clarity is needed on what "substantial savings" an agency must demonstrate to seek exemption from a mandatory state contract.

QUESTION #6: Act 419's training requirements (as codified at Ark. Code Ann. § 19-11-229) go into effect on July 1, 2021. Considering this fact, is proposed rule R11:19-11-229 intended to take effect on January 1, 2020, as indicated on the completed questionnaire? **RESPONSE:** Yes, because the section of the rule that pertains to training (R11:19-11-229(c)) is merely clarifying the administrative interpretation and has no practical impact until the statutory mandate it corresponds to becomes effective on July 1, 2021. OSP would rather have the rule's guidance in place before the law becomes effective than wait until or after the effective date.

QUESTION #7: Is there statutory authority for the points allocation provision of R5:19-11-230(b)(1)? **RESPONSE:** Act 419 of 2019 added new statutory language to Ark. Code Ann. § 19-11-230. In part, it added:

(3) The state's prior experience with an offeror may be considered and *scored* as part of the offeror's proposal only:
(A) To the extent that the request for proposals requests that all offerors provide references; and
(B) If the offeror's past performance with the state occurred no more than three (3) years before the offeror submitted the proposal.
(4) A state agency shall not include prior experience with the state as a mandatory requirement for submitting a proposal under this section.

Act 419 (emphasis added). Because this is new statutory language, it did not have a rule promulgated to correspond with its novel requirements. Under this new language, Ark. Code Ann. § 19-11-230(d)(3) limits the ways in which an offeror's past performance may be considered and "scored," and Ark. Code Ann. § 19-11-230(d)(4) provides that an offeror's past performance with the state cannot be made a mandatory prerequisite for submitting a proposal. As a practical matter, proposals have been and are "scored" by means of a point allocation system. The rule seeks to clarify for procurement officials in a practical fashion the new statutory limits on the way in which points can be used to "score" prior experience consistent with the new language in Ark. Code Ann. § 19-11-230(d)(3) and (4).

QUESTION #8: Does R1:19-11-238's seven-year term-length limit for contracts apply if a longer term is permitted by statute as implied in Ark. Code Ann. § 19-11-238(a)? **RESPONSE:** No. The rule, as the statute, is only intended to apply to contracts that are not otherwise exempt from Arkansas Procurement Law. An earlier draft of the rule provided, in relevant part, as follows:

A non-exempt contract may be entered into for up to a maximum period of a total of seven (7) years.

It was abandoned, but it or a similar articulation can be adopted if you think it would more clearly convey OSP's intent not to reach contracts that are exempt from Arkansas Procurement Law or are governed by a particular law that puts them outside of the law of general application.

QUESTION #9: Is there statutory authority for the definitions in R2:19-11-265(b)? **RESPONSE:** The definitions "initial contract amount" and "total projected contract amount" mirror Ark. Code Ann. § 19-11-267(b)(1), Ark. Code Ann. § 19-11-273(a). "Essential terms of a contract" is defined in conformity with Arkansas common law as to the fundamental

terms that must exist to create an enforceable contract. Accordingly, this definition would seem to align with the intent of Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(c) while clarifying for agencies the definition of the term.

Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked additional questions in follow-up:

(1) Section R1:19-11-203(a) – The rule provides that "real property" is expressly excluded by Ark. Code Ann. § 19-11-203(4)(B); however, Act 417 of 2019, § 1, appears to have stricken the term "real property" from the section addressing what "commodities" does not include. Can you explain the reason for the difference? **RESPONSE:** OSP wants its rules to offer clear guidance. It is trying to make something that is implicit in the law explicit in the rule. Act 417 of 2019, as codified in Ark. Code Ann. § 19-11-203(4)(B), expressly provides that the defined term "Commodities" "does not include: . . . Capital improvements." The term "Capital improvements" means "all lands," among other things. *See* Ark. Code Ann. § 19-11-203(3)(A). At law, the term "land" is understood to mean "[a]n estate or interest in real property." *See Black's Law Dictionary* 881 (7th ed. 1999). Similarly, it is understood at law that "real property" means "[l]and and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land." *See id.* at 1234. Although this may be clear to lawyers familiar with property law, it may not be to all agency staff charged with carrying out procurement. Because the term "Commodities," as defined in Act 417 of 2019, does not include "Capital improvements," which term is defined to include land and structures built on it, it logically follows that the term "Commodities" cannot include "real property." In other words, the exclusion of real property from the definition of "Commodities" is implicit in the statutory framework. The rule just makes this explicit for those people who may not be familiar with the term "Capital improvements," but who may be familiar with the more common term "real property." OSP regularly gets calls from people who mistakenly assume that its rules apply to contracts for the sale or purchase of real property, and OSP would like its rules to make it clear that they do not.

(2) Section R1:19-11-203(a) – Is there a reason that OSP is using the term "excluded commodities and services" when the term used in Ark. Code Ann. § 19-11-203(4)(B)(ii), as amended by Act 417, § 1, is "exempt commodities and services"? **RESPONSE:** No. If the distinction between "exempt" and "excluded" is deemed material by the Committee, there isn't any reason why the phrase "excluded commodities and services" cannot be replaced with "exempt commodities and services."

(3) Section R1:19-11-203(b-e) – Can you provide the origin for the definitions of these terms used by OSP in these rules? **RESPONSE:** The

terms in R1:19-11-203(b)-(e), "Consulting services," "Employment agreement," "Personal services," [and] "Professional services," are all terms used in the subchapter known as Arkansas Procurement Law but which are not defined in the subchapter.

The OSP definition of *"Consulting services"* originates in the ordinary meaning of the word "consulting" in the English language. *See* https://www.merriam-webster.com/dictionary/consulting?utm_campaign=sd&utm_medium=serp&utm_source=jsonld ("providing professional or expert advice").

The OSP definition of *"Employment agreement"* is a blended definition that draws on the legal definition of the term "employment contract," as defined in *Black's Law Dictionary* 321 ("A contract between an employer and employee in which the terms and conditions of employment are stated."), but which also draws on the definitions that mark the legal distinction between an employee and an independent contractor. *See* AMI 701 Agent—Employee—Definition ("An *[agent][employee]* is a person who, by agreement with another called the *[principal][employer]*, acts for the *[principal][employer]* and is subject to *[his][her][its]* control. The agreement may be oral or written or implied from the conduct of the parties and may be with or without compensation. If one person has the right to control the actions of another at a given time, the relationship of *[principal and agent][employer and employee]* may exist at that time, even though the right to control may not actually have been exercised."); AMI 707 Agent or Independent Contractor (". . . An independent contractor is one who, in the course of *[his][her]* independent occupation, is responsible for the performance of certain work, uses *[his][her]* own methods to accomplish it, and is subject to the control of the employer only as to the result of *[his][her]* work."). OSP drafted the definition comprehensively because some procurement staff might not be aware of the legal distinction between an employee and an independent contractor.

The OSP definition of *"Personal services"* originates in well-established contract law recognizing that a personal service contract is one where the identity of the person performing the service is material. *See, e.g.*, *Redman v. Mena Gen. Hosp.*, 152 S.W.2d 542, 544 (Ark. 1941) (adopting the definition articulated in 17 C.J.S. *Contracts*, § 10, wherein "personal contract" is defined as "a contract for personal services; a contract in which the personality of one of the parties is material"). *See also* http://www.duhaime.org/LegalDictionary/P/PersonalServicesContract.aspx (explaining that "[t]he distinctive feature of a personal service contract is that it must follow the person with the skills at the root of the contract.").

The OSP definition of *"Professional services"* is a blended definition that includes a generally accepted definition of the term "professional," *see*

Black's Law Dictionary 1226 ("A person who belongs to a learned professional or whose occupation requires a high level of training and proficiency."), and pulls in the professional services specifically identified in Ark. Code Ann. § 19-11-801. This is done because the statutory definition for "Technical and general services" specifically provides that "Technical and general services" shall not be construed to include the procurement of *professional services under § 19-11-801 et seq*." Ark. Code Ann. § 19-11-203(34)(B) (emphasis added).

(4) Section R1:19-11-203(f) – Is there a reason that OSP's definition of "services" does not track that used in Ark. Code Ann. § 19-11-203(27), as amended by Act 417, § 3? **RESPONSE:** Yes. An earlier version started off tracking the statute and then provided the additional clarification, but during an internal review it was decided that the language that tracked the statute verbatim was merely redundant and that only the language that further clarified and elaborated the statutory definition needed to be kept. OSP has no objection to explicitly incorporating the statutory definition to the front portion of the rule since OSP understands it to be the base on which the rule rests. However, additional clarification is needed because the root definition in the statute does not, by itself, provide enough guidance for procurement officials to reliably draw a clear distinction between labor that is incidental to a contract for the purchase of future goods and labor that is paid for under a contract requiring the production of a commodity or commodities. Although they both require some degree of labor, the contract in the first case is for the procurement of commodities and the contract in the second case is a contract for services. The rule seeks to make this distinction clear because it is an essential distinction with significant legal consequences.

(5) Section R1:19-11-203(g) –
(a) Can you provide the origin for the definition of the term used by OSP in these rules?

(b) Is there a reason OSP chose to reference Ark. Code Ann. § 19-11-203(27)(C) under "technical and general services" when that subsection of the statute falls under the definition of "services," which is defined in Section R1:19-11-203(f)?
RESPONSE: The definition of "technical and general services" in R1:19-11-203(g) expressly adopts the statutory definition in the statute.

In an earlier draft, the language referring to Ark. Code Ann. § 19-11-203(27)(C) was originally connected to the general definition of "services" that preceded definitions of specific types of services contracts, such as "professional services" and "technical and general services," etc. OSP proposes restoring it to the end of the comprehensive definition of "services" as follows:

(f) "**Services**" is defined at Ark. Code Ann. § 19-11-203(27)(A). It refers to the labor, time, or effort that a contractor furnishes under a contract as performance for separate consideration and not labor, time, or effort included in or incident to the production or sale of a commodity or commodities.

Labor, time, or effort are "included in" the production or sale of a commodity if expended within either the production or sale of the commodity and are not set apart for separate consideration outside of the purchase price of the commodity.

Labor, time, or effort are "incident to" the production or sale of a commodity if they accompany the production or sale of the commodity as a minor consideration, even if a separate but relatively small fee is paid to the contractor for it. For example, where the purchase of a computer includes delivery and installation for a relatively small fee, the labor, time, and effort involved in the delivery and installation of the computer are incident to the sale of the commodity.

After the State's procurement and acceptance of a commodity as conforming to the contract, subsequent labor, time, or effort furnished by a contractor with respect to the commodity are considered "**services**" for purposes of Arkansas Procurement Law if they are not incident to the original procurement of the commodity and there is a separate consideration paid for those services. Labor, time, or effort that a contractor furnishes for the customization, configuration, or development of software, beyond that which is incident to the procurement, installation, maintenance, and routine technical support of the software, are considered "**services**" for purposes of Ark. Code Ann. § 19-11-265.

Based on the exclusionary definition in Ark. Code Ann. § 19-11-203(27)(C), the following types of contracts are excluded from being considered a contract requiring "**services**" within the meaning of Ark. Code Ann. § 19-11-265: (1) employment agreements; (2) collective bargaining agreements; (3) architectural or engineering contracts requiring approval of the Division of Building Authority Division of the Department of Transformation and Shared Services or higher education; and (4) other commodities and services exempted by law.

(6) Section R3:19-11-203 – The rule references "capital improvements valued at less than the bid requirement threshold stated in Ark. Code Ann. § 22-9-202(b)(2)(C)"; however, it appears that Act 658 of 2019, § 3, amended that language to read "[c]apital improvements valued at less than the amount stated in § 22-9-203." Can you explain the reason for the

difference? **RESPONSE:** The rule should be revised to correctly reflect the amendment required by Act 658 of 2019, § 3. The definitional section of the Arkansas Procurement Law was amended by four different Acts in 2019 and the amendment changing the citation from Ark. Code Ann. § 22-9-202(b)(2)(C) to Ark. Code Ann. § 22-9-203 got missed.

(7) Section R1:19-11-218(A) – The rule references that the delegation may be for a specific time not exceeding two years and that the delegation shall be made by a written order "or by rules." However, Act 420 of 2019, § 1, appears to require that (a) the delegation order shall be in writing, *i.e.*, no reference to rules, and (b) shall include an expiration date. Can you explain the reason for the differences? **RESPONSE:** The current rule provides that delegation may be made by a written order "or by regulations." OSP Rule R1:19-11-218. The word "rules" was merely substituted for the word "regulations" consistent with the global change that was recently made throughout the Arkansas Code Annotated.

Whatever the original reason may have been for the reference to "regulations" in the rule, it squares with the statutory authority granted in Ark. Code Ann. § 19-11-220(a), which expressly provides that a state agency may be authorized "by rule" to have an agency procurement official. *See* Ark. Code Ann. § 19-11-220(a) ("In addition to any state agency authorized by rule to have an agency procurement official . . ."). An agency procurement official is, by definition, a person authorized to exercise procurement authority. *See* Ark. Code Ann. § 19-11-203(1)(A). Consequently, authorizing a state agency "by rule" to have an agency procurement official necessarily entails delegating some procurement authority to the agency "by rule." The words "or by rules" merely acknowledges that state agencies may also be authorized, by rule, to exercise some procurement authority. *See* Ark. Code Ann. § 19-11-220(a).

(8) Section R1:19-11-218(B) – This section provides that the delegations shall remain in force according to the original terms unless modified or rescinded or until the expiration date *provided by law*; however, Act 420, § 1, appears to provide that (a) the delegation *itself* must contain an expiration date and (b) that the delegation shall remain in effect under the original terms unless those terms are modified or rescinded *in writing*. Can you explain the reason for the differences? **RESPONSE:** The rule does not replace the statute; it supplements it, so the statute is not reiterated verbatim. Before the enactment of Act 420 of 2019, delegation orders did not have an expiration date imposed by law. The existing rule, which already provides that delegation orders remain in force according to their terms or until rescinded, was simply amended to reflect the fact that now there is also an outer limit on the duration of a delegation order that is

imposed by law. The existing rule would be amended by the proposed rule by adding the underlined text:

> All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director, or until the expiration date provided by law, whichever comes first. The term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.

To mitigate any concern about the words "in writing" not appearing in the proposed rule, they can be inserted at the beginning of the proposed amendment to read:

> All delegations of procurement authority shall remain in force according to the original terms thereof unless modified or until rescinded by the State Procurement Director in writing, or until the expiration date provided by law, whichever comes first. The term of delegation authority is counted from, and includes the date of, the effective date stated in the written delegation order.

(9) Section R1:19-11-218(D) – The proposed rule provides that training shall be completed as *may* be required; however, Act 420, § 1, states that a person given authority "shall complete training . . ., as provided for in the subchapter and in the rules adopted by the director, before the written delegation order is issued."

(a) Can you explain the difference between the rule and the Act as it pertains to the required training? **RESPONSE:** The rule and the Act both use the word "shall" to mandate training for a designee. Although the statute mandates training on state procurement laws, it allows for the training to be determined according to rules yet to be adopted by the Director. The rule, like the Act, also uses "shall" to reflect that completing required training is mandatory. It only uses "may" to signal that the mandate applies to whatever type of training "may" be required. The director expects different types of training will be required depending on the different types of procurement activities and authority that the director may delegate. For example, someone receiving a delegation order to perform an invitation for bids will not need the same training as someone receiving a delegation order to make a cooperative purchasing determination.

(b) The Act requires that the Director adopt rules to outline the procurement training required. Will these rules be promulgated separately? **RESPONSE:** Yes.

(10) Section R1:19-11-218(E) – The rule provides that delegation orders may be suspended by the Director. On what authority does the OSP rely for taking such an action? **RESPONSE:** The Act explicitly provides that

written delegation orders, "Remain in effect under the original terms *unless* the terms of the written delegation order are modified or rescinded in writing by the director." Ark. Code Ann. § 19-11-218(a)(3)(B)(iii) (emphasis added). The word "unless," if allowed its usual meaning, signals that the authority delegated under a delegation order does not last unconditionally, but instead only persists subject to the condition that it is not modified or rescinded. Since the Act explicitly allows the terms of a written delegation order to be modified in some fashion short of being completely rescinded, then implicitly the Director retains a degree of discretion to affect the effectiveness of a delegation order short of completely rescinding it. Suspending authority granted under a delegation order seems to be a reasonably intermediate alternative to completely rescinding an order. This also seems consistent with the State Procurement Director's statutory mandate to supervise designees and ensure compliance by designees. *See* Ark. Code Ann. § 19-11-217(c)(1) ("[The Director s]hall procure or supervise the procurement of all commodities and services for each state agency not having an agency procurement official and, when requested to do so by such an official, procure commodities and services not otherwise under state contract"); and Ark. Code Ann. § 19-11-217(c)(8) ("[The State Procurement Director s]hall ensure compliance with this subchapter and implementing rules by reviewing and monitoring procurements conducted by any designee, department, agency, or official delegated authority under this subchapter.").

(11) Section R1:19-11-219 – On what authority is OSP relying in establishing the findings to be certified by a reviewing attorney?
RESPONSE: Act 418 of 2019 gives the State Procurement Director a broad mandate to adopt rules implementing attorney review and designating contracts to be reviewed. In pertinent part, it provides:

> (c) The director shall adopt rules to implement this section, including without limitation rules to:
>
> (1) Designate contracts that require review under this section, which may include without limitation contracts that:
>
> (A) Exceed a certain dollar amount;
>
> (B) Modify the standard state terms and conditions; and
>
> (C) Are based on other stated criteria; and
>
> (2) Identify the requirements for the attorneys who may review contracts under this section, including without limitation:
>
> (A) An attorney employed with the Office of State Procurement, an institution of higher education, or the Office of the Attorney General; and
>
> (B) Any other attorney employed by the state and licensed to practice law in Arkansas.

Ark. Code Ann. § 19-11-219(c). The basic list of specific items to be reviewed were developed in consultation with attorneys at the Arkansas Attorney General's offices. They address sovereign immunity, indemnification, FOIA compliance, and compliance with Arkansas constitutional provisions and public law prohibiting the State from paying for commodities and services before receipt.

(12) Section R1:19-11-223(b) – Is there a reason that the language used in the rule does not track that used in Ark. Code Ann. § 19-11-223(b)(2)(B)(ii), as amended by Act 421 of 2019, § 2? **RESPONSE:** Yes. The statutory language used in Ark. Code Ann. § 19-11-223(b)(2)(B)(ii) provides that denial of a request for an exemption is not required to be in writing, but it does not provide a clear standard for the way or ways in which denials may be communicated. The OSP rule seeks to provide supplemental guidance as to what is permissible since the statute only clarifies what is not required.

(13) Section R2:19-11-223(a) – Is there a reason that the OSP did not enumerate the services as they are enumerated in Ark. Code Ann. § 19-11-223(b)(1), as amended by Act 421, § 2, *i.e.*, "technical and general services, and professional and consultant services"? **RESPONSE:** Yes. Thanks to Act 417 of 2019, Section 3, the definition of "Services" at Ark. Code Ann. § 19-11-203(27) was amended to include technical and general services, consulting services, and professional services, thus rendering the word "Services" into an effective shorthand that encompasses all of these types of contracts without the need for enumerating each separate subcategory of services contract. As a result of this amendment, one word (services) now can take the place of nine (technical and general services, and professional and consultant services).

(14) Section R2:19-11-223(b) – Can you provide the origin for the definition of "substantial savings"? **RESPONSE:** Arkansas Procurement Law only allows the State Procurement Director to approve an exemption from a mandatory contract when an agency demonstrates "substantial savings will likely be effected by purchasing outside of the mandatory state contract." Ark. Code Ann. § 19-11-223(b)(2)(A). However, the term "substantial savings" is not defined in Arkansas Procurement Law.

In order to have a uniform rule for administration of this statutory provision rather than arbitrary standard, OSP is proposing a rule through the promulgation process that will provide a standard essential to the orderly administration of the law. This is within the statutory mandate given to the Director to "adopt rules to include any necessary conditions, reporting, or document retention standards related to the director's duty to promote mandatory state contract use under this subsection." Ark. Code Ann. § 19-11-223(5)(B).

(15) Section R6:19-11-229 –

(a) On what authority does the OSP rely for its provision that a solicitation conference may be held by the State Procurement Director, as Ark. Code Ann. § 19-11-273, as amended by Act 419 of 2019, § 12, appears to permit a state agency to hold such a conference? **RESPONSE:** The State Procurement Director is the principal procurement officer of the State (Ark. Code Ann. § 19-11-217(a)) and is mandated to procure or supervise the procurement of all commodities for each state agency without an agency procurement official. Ark. Code Ann. § 19-11-217(c)(1). Although Ark. Code Ann. § 19-11-273 clearly permits an agency to hold a solicitation conference in connection with a procurement, it would be bizarre to read the statute as silently prohibiting the State Procurement Director from holding a solicitation conference, especially when the Director's approval (or that of another head of a procurement agency) is required when a solicitation seeks to make vendor participation in a solicitation conference mandatory. *See* Ark. Code Ann. § 19-11-273(b)(2). Furthermore, solicitation conferences may be required as part of an invitation for bids/competitive sealed bidding (*see* Ark. Code Ann. § 19-11-229(5)), and there has never been any question about the authority of the State Procurement Director to perform or supervise such a procurement.

(b) What is the authority on which OSP relies for the second sentence of the section that concerns discussions during a solicitation conference? The statute appears to speak to statements not changing the invitation for bids, request for proposals, or request for statements of qualifications and performance data, but does not appear to reference changes to competitive sealed bids? **RESPONSE:** An invitation for bids is the same thing as a competitive sealed bidding. *See* Ark. Code Ann. § 19-11-229(a).

(16) Section R8:19-11-229(2)(A) – It appears this section is premised upon the change made by Act 419, § 4, to Ark. Code Ann. § 19-11-229(f). Is there a reason that the second prong for when a time discount may be considered was omitted, *i.e.*, "[u]nder the structured terms of the invitation for bids"? **RESPONSE:** OSP reads each procurement rule alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it

depends on and corresponds to since that language is already present in the statute alongside the rule.

(17) Section R2-19-11-230.2 – Is there a stray "if" in the introductory language? **RESPONSE:** Yes.

(18) Section R2-19-11-230.2(3) – Is there a reason that the rule omitted the language from Ark. Code Ann. § 19-11-230(d)(2)(C), as amended by Act 419, § 8, that the written determination must be submitted for legislative review "before the request for proposals is issued"? **RESPONSE:** There is no substantive reason why the entirety of the statute is not repeated in the rule, but as a practical matter it does not need to be repeated by OSP in order to be effective. In this case OSP believes the matter of timing to be clearly and comprehensively addressed by the statute. OSP reads each procurement rule alongside of its corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Consequently, unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute that is to be read alongside the rule.

(19) Section R5:19-11-230(b)(1) – It appears that Act 419, § 8, amending Ark. Code Ann. § 19-11-230(d)(3), addresses the only instances in which a state's prior experience with an offeror may be considered and scored. Is there a reason that the rule does not track the language in the Act? **RESPONSE:** OSP reads each procurement rule alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute alongside the rule.

(20) Section R5:19-11-230(d) – In the same vein, is there a reason that the language used in the rule regarding private evaluators does not track each of the requirements set forth in Ark. Code Ann. § 19-11-230(h)(2), as amended by Act 419, § 10? **RESPONSE:** OSP reads each procurement

rule alongside of a corresponding statute, which is why each OSP rule is enumerated to specifically reference a procurement statute and why OSP publishes a compilation of the procurement statutes with each statute followed by any corresponding rules. OSP rules do not stand in isolation from the procurement statutes they are tied to; they accompany and compliment them. Unless OSP sees a need to clarify, amplify, or supplement a statute for purposes of the orderly administration of the law, it sometimes forgoes verbatim repetition in a rule of the statute that it depends on and corresponds to since that language is already present in the statute alongside the rule.

(21) Section R1:19-11-233(a) – What is the rationale behind the striking of this subsection, when similar language was added to Ark. Code Ann. § 19-11-233, as amended by Act 419, § 11? **RESPONSE:** OSP felt the statute required no clarification, rendering R1:19-11-233(a) redundant.

(22) Section R1:19-11-233(c) – In referencing "all services contracts" must be presented for legislative review, does that mean "all" or those meeting the criteria of Ark. Code Ann. § 19-11-265, as amended by Act 417, § 7? **RESPONSE:** The sentence in question states "all services contracts must be presented for legislative review as required under Ark. Code Ann. § 19-11-265." OSP is of the opinion that "all services contracts" is qualified by and limited to "as required under Ark. Code Ann. § 19-11-265." Therefore, the direct answer to your question is "yes," "all" is limited and qualified to mean all of those meeting the criteria of Ark. Code Ann. § 19-11-265.

(23) Section R1:19-11-238 – Is there a reason that the phrase "if funds for the first fiscal year of the contemplated contract are available at the time of contracting" as found in Ark. Code Ann. § 19-11-238(a) was omitted from the rule? **RESPONSE:** Since R1:19-11-238 doesn't speak to or provide guidance on the funding condition found in the statute, OSP deemed it redundant to repeat the statutory funding condition in the rule.

(24) Section R2:19-11-242(4)(B)(i) – The summary of changes provided references this section, but I do not see it between Section R1:19-11-238 and R1-19-11-244 in the markup provided? **RESPONSE:** Thank you for spotting this error. R2:19-11-242 is not intended to be included in this rules promulgation, and was thus errantly included in the summary of changes.

(25) Sections R1-19-11-244.9 – It appears that there are two sections with this number. **RESPONSE:** Thank you for spotting this error. The second R1:19-11-244.9 should have been renumbered to R1:19-11-244.10.

(26) Section R1:19-11-249(a) – It appears that Ark. Code Ann. § 19-11-249(a)(2)(B)(ii), as amended by Act 421, § 3, requires the State Procurement Director to adopt rules to create a review policy outlining how the economic justification for using a cooperative purchasing agreement may be demonstrated. Is this review policy included in the instant rules or will separate rules be promulgated? **RESPONSE:** R1:19-11-249 requires agencies subject to the Procurement Code to seek a determination from the OSP Director that the cooperative purchasing agreement substantially meets the requirements of the Procurement Code. Part of that determination by the OSP Director includes the economic justification required by Ark. Code Ann. § 19-11-249(a)(2)(B)(ii). The form for requesting a cooperative review request requires that the requestor include a verifiable economic justification as to why using the cooperative purchasing agreement is more cost effective or is likely to realize savings when compared to conducting a solicitation.

Accordingly, OSP is of the opinion that in adopting the revised R1:19-11-249(a), a rule is being adopted that creates the policy of agencies seeking a determination from the OSP Director that includes the economic justification requirement. To that end, OSP has already implemented this approach, and is now requiring the economic justification in the determinations of whether cooperative purchasing agreements substantially meet the requirements of the Procurement Code.

(27) Section R2:19-11-249 – I see where the provision for the reporting of cooperative contract purchases of state agencies *without* an agency procurement official has been included, but what about Ark. Code Ann. § 19-11-249(b)(1)(B), as amended by Act 421, § 3, which pertains to a state agency *that has* an agency procurement official and requires an annual report to ALC or JBC. Is there a reason that this language was omitted from the rule? **RESPONSE:** R2:19-11-249 is only seeking to provide guidance for agencies required to submit the data to OSP, per Ark. Code Ann. § 19-11-249(b)(1)(A). BLR is in a better position to determine how ALC or JBC wants agencies to deliver their reports to the legislature. OSP does not want to overstep and is not seeking to provide a rule for a reporting process that, per Ark. Code Ann. § 19-11-249(b)(1)(B), happens between the agencies and the legislature. OSP limited the application of this rule to align with the statutory respective Requirements for agencies and OSP.

(28) Section R1:19-11-265(a) – Is there a reason that the rule omits the language "of one (1) or more persons" when it is included in Ark. Code Ann. § 19-11-265(a)(1), as amended by Act 417, § 7, and includes the language "before the execution of the contract" when that language is stricken? **RESPONSE:** "Services" is defined in R1:19-11-265(a) says "Contracts requiring "services" as defined in Arkansas Procurement Law

and these rules," thereby including "of one (1) or more persons" in the definition. "Before the execution of the contract" is in the rule to provide agencies with guidance, and reduce confusion, as to what point in the procurement process the contract should be submitted to ALC or JBC.

(29) Section R1:19-11-265(b-d) – On what authority does the OSP rely for these sections? **RESPONSE:** Ark. Code Ann. § 19-11-225 gives the State Procurement Director broad discretion in adopting rules in accordance with the applicable provisions of the Procurement Code. Accordingly, the sections in R1:19-11-265(b-d) are based on caselaw and OSP policy as a result of these issues having led to confusion amongst agencies in the past, and thus necessitating a rule in OSP's opinion.

(30) Section R2:19-11-265(a)(1)(A) – Is there a reason that the Office included the term "initial" prior to contract amount when that term is not included in Ark. Code Ann. § 19-11-365(a)(4)(A)(ii)(a), as amended by Act 417, § 7? Can you have an increase "in" the initial amount on a renewal or extension, or would it be an increase "from" the initial amount? **RESPONSE:** With an increase in total projected contract amount already expressly included in the statutory definition of "material change" at Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(b), and with total projected contract amount meaning the total possible number of years of a contract, OSP deduces Ark. Code Ann. § 19-11-265(a)(4)(A)(ii)(a) to be referring to increases in the contract amount during the initial term of a contract. The term "initial contract amount" is defined in R2:19-11-265(b)(1) as "the amount agreed to for the initial term of a contract."

(31) Section R1:19-11-267(c) – Is there a reason that the language included in Ark. Code Ann. § 19-11-267(b)(1), as amended by Act 418, § 4, that the state agency, board, commission, or institution of higher education shall use performance-based standards "that are specifically tailored to the services being provided in the contract" was omitted from the rule? **RESPONSE:** OSP understands the statute to be the base on which the rule rests. Accordingly, OSP does not believe statutory language can be effaced by omission from a rule. The requirement that the performance standards at issue be "specifically tailored to the services being provided in the contract" remains intact and was not in need of comment in a rule. R1:19-11-267(c) is repeating the mandatory performance standards contract thresholds as the launching point for the rest of the rule, and was not intended to also dive into other content already covered by the statute. With all of that being said, OSP certainly does not oppose adding that statutory language if the Committee deems it desirable.

(32) Section R1:19-11-267(h) – On what authority does the OSP rely for exempting such contracts from using performance-based standards?

RESPONSE: Ark. Code Ann. § 19-11-267(d)(1) gives broad discretion to the OSP Director to promulgate rules to implement and administer this section of the Procurement Code, subject to ALC or JBC approval. The substantive language of R1:19-11-267(h) was previously promulgated, and this author is surmising the original intent of the rule drafters and the ALC reviewers.

Sole source – R1:19-11-267(h)(1) states that if the contract has been awarded to a contractor with whom the state was compelled to contract with due to legal mandates, the primary purpose behind performance standards is moot due to the inability of the State to find a different contractor.

Emergency – The intent of Ark. Code Ann. § 19-11-233 is to provide expedited processes in emergency circumstances, as defined by the statute, where time is of the essence. Given the urgency of an emergency and what is at stake in the event of delay, the time it takes to develop performance standards seems to run contrary to the statutory intent of Ark. Code Ann. § 19-11-233, leading to the R1:19-11-267(h)(2) potential exemption.

(33) Section R1:19-11-268 – The summary states that this section is being repealed due to changes introduced in Act 418; however, while Ark. Code Ann. § 19-11-1013 was repealed as duplicative in § 7 of the Act, it appears that vendor performance reports are still required in certain circumstances pursuant to Ark. Code Ann. § 19-11-268, as amended by Act 418, § 4. Is there a reason this section is being removed in its entirety? **RESPONSE:** The intent of R1:19-11-268 was to reiterate the thresholds and frequency of vendor performance reports. With those specific requirements having been removed by Act 418, that iteration of the rule was incorrect. OSP is of the opinion that the statute is sufficiently clear as to its meaning and reach and does not require a new rule that would merely repeat the statute.

(34) Section R1:19-11-[273] *Solicitation Conferences* – On what authority does the OSP rely for this section? **RESPONSE:** In addition to the general rulemaking authority given to the OSP Director under 19-11-225, OSP has attempted to craft a rule that dovetails with the other forms of communications authorized in law between the state and potential contractors. In that effort, OSP listed in R1:19-11-273 the type of information that could be exchanged in a solicitation conference that remains within those confines.

(35) Section R3:19-11-[273] –
(a) As with question 15(b) above, on what authority does OSP rely for the language concerning discussions?

(b) Is this section duplicative of Section R6:19-11-229?

(c) Does this section conflict with Section R6:19-11-229 in that this section appears to include a caveat to the rule that discussions will not be binding "unless it is subsequently reduced to writing and included in the solicitation" that is not included in Section R6:19-11-229?
RESPONSE: R3:19-11-273 mirrors Ark. Code Ann. § 19-11-273(d) in expressing that statements made during solicitation conferences does not alter solicitations unless made in writing.

R6:19-11-229 is applicable only to IFBs, while R3:19-11-273 is intended to be applicable to solicitation conferences generally, and the language has been modified to better capture this general applicability.

OSP does not believe R6:19-11-229 conflicts because Ark. Code Ann. § 19-11-273(d) states changes must be written. R6:19-11-229 is simply of narrower application because that rule is particular to competitive sealed bidding, which is authorized under Ark. Code Ann. § 19-11-229 and is one of the primary procurement methods. However, OSP would not object to R6:19-11-229 being removed since there is another rule that covers the same subject matter more broadly.

(36) Section R3:19-11-[275] – Is there a reason that the OSP did not simply track the language set forth in Ark. Code Ann. § 19-11-275(e), as amended by Act 419, § 12, concerning information provided in response to a request for information being exempt from the FOIA until one of three events occurs? **RESPONSE:** R3:19-11-275 substantially mirrors Ark. Code Ann. § 19-11-275(e). As it relates to R3:19-11-275(3), an earlier iteration of this proposed rule stated "In the event a final determination is made to not proceed with a solicitation following a request for information, the issuer of the request for information should insert a note or other documentation in the solicitation file of the request for information documenting the date of the determination." Internal concerns were raised this allowed for an open-ended ability to prolong the FOIA exemption indefinitely, and so the 24 month expiration was added to balance the exemption against the FOIA intent to provide transparency.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: These rules implement Acts 417 through 421 of 2019, which made changes to the Arkansas Procurement Law, as well as incorporate changes brought about by Act 658 of 2019. The State Procurement Director has the general authority to promulgate rules

implementing the Arkansas Procurement Law. *See* Ark. Code Ann. § 19-11-225(a), as amended by Act 419, § 2. *See also* Ark. Code Ann. § 19-11-217(b)(1). The Director also has the authority to "adopt rules governing the internal procedures of the Office of State Procurement." *See* Ark. Code Ann. § 19-11-217(b)(2). The Director has specific authority to promulgate rules related to emergency procurements (Ark. Code Ann. § 19-11-233), performance-based contracts (Ark. Code Ann. § 19-11-267(d)(1)), and contract review (Ark. Code Ann. § 19-11-219(c), as amended by Act 418, § 2).

Act 417, sponsored by Representative Jim Dotson, amended the review and reporting requirements for service contracts and provided for the tracking and reporting of contracts procured by state agencies. As codified at Ark. Code Ann. § 19-11-217(c)(9), it required the Director to maintain "a roster of expiring contracts entered into by a state agency for which there is no new requisition." Act 418, also sponsored by Representative Dotson, amended the law concerning the content, term, and review of contracts procured by the state. It also required the use of performance-based contracts and amended vendor performance report requirements.

Act 419, sponsored by Representative Jeff Wardlaw, amended the law concerning various procurement methods and provided for the training and certification of procurement officials. It also required additional legislative review of procurement rules. The Act, as codified at Ark. Code Ann. § 19-11-276(d)(2), specifically allows the Director to promulgate rules specifying procurement certification revocation procedures.

Act 420, sponsored by Representative Wardlaw, amended the law concerning the Director's delegation authority. It also amended the law concerning protests of solicitations and awards under the Arkansas Procurement Law. The Act, as codified at Ark. Code Ann. § 19-11-218(b), specifically requires the Director to adopt rules regarding written delegation orders and procurement training.

Act 421, also sponsored by Representative Wardlaw, amended the law concerning state contracts and cooperative purchasing agreements. As codified at Ark. Code Ann. § 19-11-223(d)(5), it requires the Director to promulgate rules "related to the [D]irector's duty to promote mandatory state contract use" as detailed.

Act 658, sponsored by Representative Jack Ladyman, amended the law concerning state agency capital improvement contracts for purposes of uniformity.

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

1. DEPARTMENT OF AGRICULTURE, ARKANSAS LIVESTOCK & POULTRY COMMISSION (Mr. Patrick Fisk, Mr. Wade Hodge)

a. SUBJECT: Brucellosis in Cattle and Repeals

DESCRIPTION: The proposed rule combines four separate brucellosis rules into one rule, allowing for the repeal of four rules. The rule is promulgated by the Arkansas Livestock & Poultry Commission ("Commission"), as are the rules to be repealed.

Brucellosis is a contagious disease found in cattle that can also affect humans. It can cause spontaneous abortions, infertility, decreased milk production, weight loss, and lameness. The Commission currently has four separate rules dealing with the disease, dating from the 1970s and 80s. Arkansas Department of Agriculture ("Department") staff held multiple meetings with industry representatives and was able to combine all four rules into one rule. The Commission voted to repeal the four existing rules and go forward with promulgation of this combined rule on July 18, 2019, and voted on the final rule after close of public comment on December 12, 2019.

The proposed rule:
- Combines four separate rules
- Adds a "Definitions" section
- Removes or clarifies confusing or contradictory language
- Allows interested parties to find needed information in one document
- Will allow for the repeal of four rules

The Commission currently has four separate brucellosis rules that will be repealed:
(1) Management of Brucellosis and Adjacent Herds and On-Farm Calf-hood Vaccination (1969)
(2) Exposed Brucellosis Cattle (1972)
(3) Depopulation of Brucella Abortus Infected Cattle Herds (1988)
(4) Vaccination of Brucellosis Infected Cattle Herds (1988)

The information in these rules deals with how to manage and control the spread of brucellosis. There is no need for separate rules, and in fact, having separate rules can lead to confusion. If someone reads one of the rules and complies with it, it may be reasonable for that individual to believe they have complied with everything they are supposed to do. Therefore, combining the rules is helpful to those subject to the rules, and helpful in assisting Department staff in carrying out their responsibilities.

The existing rules are short, so combining them into one rule does not result in a rule that is cumbersome.

No substantive changes were made relative to the requirements of the current rules.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on November 2, 2019. The Commission provided the following summary of the sole comment that it received and its response thereto:

One comment was received from the Livestock Marketing Association. The comment suggested that Section IV.E.4 was old language and no longer needed. The Commission noted that while Arkansas is currently Brucellosis free, the language should be left in the rule as a precaution against potential future brucellosis outbreaks.

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

(1) *Definitions* I.F. – Is the definition for "Quarantine Feedlot" missing? **RESPONSE:** Definition was added.

(2) Section IV.B.6.b. – The prior rule referred to "Reactors and B-branded exposed cattle" and required that they be "B-branded and tagged." The proposed rule refers to "Reactors and S-branded exposed cattle" and requires that they be "B-branded and tagged." Should the branded following "Reactors" be "S" or "B" in the new rule? **RESPONSE:** Language was corrected.

(3) Section V.F. – The prior rule required all known exposed cattle in interstate movement consigned to slaughter or a quarantined feedlot shall be branded "S" or "B" prior to entry to Arkansas. The proposed rule allows for only a branding of "S." Is this correct? **RESPONSE:** Yes.

(4) Section V – There is a statement of "More discussion on S brand VS B brand" at the conclusion of the section. Is that part of the rule? **RESPONSE:** Language deleted.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the proposed rule and repeals have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 2-40-103(a)(2), it is the duty of the Arkansas Livestock and Poultry

Commission to establish and promulgate rules in regard to isolation or quarantine of infected animals, disinfection of animals and premises, destruction of incurably diseased animals, and disposal of carcasses as it may deem necessary to prevent the spread of disease.

b. <u>SUBJECT</u>: Trichomoniasis Testing and Movement Requirements for Cattle

<u>DESCRIPTION</u>: The Arkansas Livestock and Poultry Commission ("Commission") is proposing amendments to the Trichomoniasis Testing and Movement Requirements for Cattle rule.

Pursuant to A.C.A. § 2-33-107(a), the Commission has authority for the control, suppression, and eradication of livestock and poultry diseases in this state and is required by A.C.A. § 2-40-103(a)(2) to adopt rules regarding isolation or quarantine of infected animals. The Trichomoniasis rule was promulgated in 2009 to provide for suppression and control of the disease and isolation of diseased animals. Department of Agriculture staff held multiple meetings with industry representatives to review this rule, and it was decided to clarify and update certain provisions of the rule. The Commission voted to go forward with the proposed amendments to this rule on July 18, 2019, and voted on the final rule after close of public comment on December 12, 2019.

The proposed rule:

- Adds certain definitions and removes unneeded definitions
- Re-numbers paragraphs for uniformity with other Commission rules
- Provides additional time for cattle to be moved from the Livestock Market to the buyer's facility

Trichomoniasis is a highly contagious disease of the reproductive tract of cattle. It can cause a reduced calf crop or lower weaning weights. Because infected bulls typically show no outward signs of the disease, testing of cattle entering and leaving the state is imperative. It is also important to separate bulls testing positive or bulls that have not been tested from other cattle.

The rule requires that any bull sold in Arkansas must show a negative Trichomoniasis test prior to change of ownership. Bulls brought to market for sale that are untested or found positive with Trichomoniasis must be isolated from other animals, sent to slaughter, and must be removed from the livestock market within seven (7) days. Because additional time is sometimes needed to remove the animals from the premises, the Commission is proposing an amendment that would extend the time the buyer has to pick the animal up from the market from seven (7) to fourteen (14) days. This change was requested by the industry and is a change that

the Commission and Department staff believe can be made without compromising animal health.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on November 2, 2019. The Commission provided the following summary of the comments that it received and its response thereto:

Comments were received from the Livestock Marketing Association. The comments expressed support for proposed changes that allow for more out-of-state bulls and bulls needing Trichomoniasis testing to be sold at Arkansas markets. The comments requested changes be made to the proposed rule allowing bulls that have not been tested for Trichomoniasis to be transferred to an approved feedyard using a particular federal form, VS-127. They also requested that the rule be amended to allow cattle to be transferred with a temporary paper backtag instead of a permanent official USDA eartag. The Commission considered the comments and voted to not make changes to the proposed rule, as it was felt that the proposed rule provided greater safeguards against the spread of contagious diseases.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 2-40-103(a)(2), it is the duty of the Arkansas Livestock and Poultry Commission to establish and promulgate rules in regard to isolation or quarantine of infected animals, disinfection of animals and premises, destruction of incurably diseased animals, and disposal of carcasses as it may deem necessary to prevent the spread of disease.

c. SUBJECT: Airborne Eradication of Feral Hogs

DESCRIPTION: The Arkansas Livestock and Poultry Commission ("Commission") proposes this rule to allow the airborne eradication of feral hogs in Arkansas.

In 2017, the Arkansas General Assembly passed Act 1010, which created the Feral Hog Eradication Task Force. One of the recommendations of the Task Force was to propose legislation addressing feral hogs. As a result, in 2019, the General Assembly passed Act 991. Among other things, Act 991 authorized the airborne hunting of feral hogs by individuals holding a permit issued by the Commission pursuant to federal law. Act 991 became effective July 24, 2019.

The proposed rule:
- Establishes issuance of a permit as outlined in this summary
- Establishes what information will be necessary for applicants to submit
- Establishes prohibited acts that could lead to suspension or revocation of a permit
- Informs applicants that the Department of Agriculture is required by federal law to share with both the FBI and the Department of the Interior certain personal information assembled in connection with the issuance of a permit

Current federal law, 16 U.S.C. § 742j-1, makes it illegal to hunt from aircraft unless done pursuant to a permit issued by the United States or any State to protect "land, water, wildlife, domesticated animals, human life, or crops." The issuance of a permit necessitates informing applicants and permit holders of the requirements for both obtaining and maintaining such a permit. The rule clearly informs applicants of acts that are not authorized by the issuance of a permit and outlines information that must be provided to the Commission in order to obtain a permit.

The federal law and regulations, 50 C.F.R. 19, require states issuing permits to submit certain information on the applicant in an annual report to the Department of the Interior, and to immediately notify the FBI regarding the issuance of such a permit. The rule provides clear notice to applicants that the information collected by the Commission will be shared with federal authorities. Both the information required to be submitted by applicants as well as the prohibitions contained in the rule come directly from the federal law and federal regulations.

The rule does not impose a fee, because Act 991 of 2019 did not give the Commission authority to assess a fee for these permits.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on November 2, 2019. The Commission received no comments.

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

In Sections I.A. and I.C.1., there is mention of the necessity for the protection of timber; however, I am not seeing timber referenced in Act 991 of 2019, 16 U.S.C. § 742j-1, or 50 C.F.R. § 19. From where does this basis for a permit come? **RESPONSE:** We were just trying to make it clear in the rule that timber is a crop because many people do not think of timber production when they think of crops. Governor Hutchinson specifically mentioned that in his weekly radio address earlier this week.

(https://www.kark.com/news/local-news/governor-hutchinsons-weekly-address-arkansas-timber-is-a-crop-too/)

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The proposed rule implements Act 991 of 2019, sponsored by Senator Kim Hammer, which amended the definition of "feral hog"; amended the law regarding the release of feral hogs into the wild; and amended the law regarding the capturing and killing of feral hogs. Pursuant to Arkansas Code Annotated § 2-33-107(c), the Arkansas Livestock and Poultry Commission shall have the authority to make, modify, and enforce such rules and orders, not inconsistent with law, as it shall from time to time deem necessary to effectively carry out the functions performable by it.

2. DEPARTMENT OF COMMERCE, OFFICE OF SKILLS DEVELOPMENT (Mr. Cody Waits)

a. SUBJECT: Revised Rules and Regulations for Arkansas's Registered Apprenticeship Programs

DESCRIPTION: Registered apprenticeship programs must follow these rules to be in compliance with state law. Changes to the rules include updates in language to reflect government transformation that has impacted the State Apprenticeship Office, Office of Skills Development, the former Arkansas Department of Career Education, and the newly created Arkansas Department of Commerce. Additional revisions have been updated to reflect changes made under Act 369 of 2019. Further, in Section XIII, *Funding and other information*, A.7., language was updated by striking "must" and inserting "may" to provide flexibility for program sponsors to no longer be required to utilize an LEA as significant cost savings may occur by eliminating the method by which sponsors must have funds sent through an LEA.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on September 23, 2019. The Office received no public comments.

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

Within the title and Section I of the rules, the term "regulation" has remained. I just wanted to make mention of Act 315 of 2019, § 3204(b)(3), which concerns the uniform use of the term "rule" and requires governmental entities to ensure the use of the term "rule" upon promulgation of any rule after the effective date of the Act, which was July 24, 2019. **RESPONSE:** Changes were made to the rules to comply with Act 315.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-52-203, as amended by Act 910 of 2019, § 147, the Office of Skills Development and the State Apprenticeship Coordination Steering Committee shall promulgate rules necessary to implement the provisions of Title 6, Chapter 52, Subchapter 2 of the Arkansas Code, concerning apprenticeship training programs. The proposed changes include those made in light of Act 369 of 2019, sponsored by Senator Jane English, which amended certain laws regarding apprenticeship and training programs, school approval, and membership on boards with respect to the Career Education and Workforce Development Board.

3. DEPARTMENT OF CORRECTIONS, OFFICE OF THE SECRETARY
(Mr. Solomon Graves, Ms. Takelia McDaniel)

a. SUBJECT: AR 005 Reporting of Incidents

DESCRIPTION: The Department of Corrections is amending rules on the reporting of incidents. Consistent with direction from the Board of Corrections, this rule is being condensed to reflect a general statement of policy. Proposed amendments also reflect the current electronic logging and reporting of incidents. This rule ensures that all significant incidents occurring within the Division of Correction are completely documented by the employees involved, and all appropriate personnel are informed of the incident in a timely manner.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on November 26, 2019. The Department of Corrections received no public comments.

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

In Section 1 of the rule, you reference "Arkansas Department of Correction." Under transformation, we have a "Division of Correction" and a "Department of Corrections." Could you please clarify?
RESPONSE: [A revised mark-up was submitted changing "Arkansas Department of Correction" to "Arkansas Division of Correction."]

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Act 910 of 2019, the Department of Corrections was created as a cabinet-level Department, and the Board of Corrections was designated as the governing authority of the department. *See* Ark. Code Ann. § 25-43-401, as amended by Act 910 of 2019. Concurrently, the existing Department of Correction was newly designated as the Division of Correction and transferred to the Department of Corrections. *See* Ark. Code Ann. § 25-43-402, as amended by Act 910 of 2019. The Division of Correction has exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. *See* Ark. Code Ann. § 12-27-103(b), as amended by Acts 910 and 315 of 2019. The division's functions, powers, and duties are administered in accordance with the policies and rules promulgated by the Board of Corrections. *See* § 12-27-103(b), as amended by Acts 910 and 315 of 2019. The Board of Corrections has general supervisory power and control over the Division of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. *See* Ark. Code Ann. § 12-27-105(b)(1).

b. SUBJECT: AR 217 Staff Assignments, Housing, and Emoluments

DESCRIPTION: Per the agency, the purpose of this amendment is to ensure that state supplied housing, or space for employee provided housing (mobile homes), are available to only those individuals in approved positions, and that they be administered and documented in such a way that fiscal responsibility is guaranteed. The proposed amendment provides for the reporting of the use of state supplied housing or space for employee provided housing, to the Board of Corrections Compliance Division. Additionally, the Secretary of the Department is given the authority to manage the use of state supplied housing, or space for employee provided housing. This amendment also clarifies the Department's ability to recoup the cost of repairs to state supplied housing beyond normal wear and tear. Finally, this amendment eliminates the

authority to provide emoluments to staff. Emoluments were eliminated as a practice several years ago.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on November 26, 2019. The Department of Corrections received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Act 910 of 2019, the Department of Corrections was created as a cabinet-level Department, and the Board of Corrections was designated as the governing authority of the department. *See* Ark. Code Ann. § 25-43-401, as amended by Act 910 of 2019. Concurrently, the existing Department of Correction was newly designated as the Division of Correction and transferred to the Department of Corrections. *See* Ark. Code Ann. § 25-43-402, as amended by Act 910 of 2019. The Division of Correction has exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. *See* Ark. Code Ann. § 12-27-103(b), as amended by Acts 910 and 315 of 2019. The division's functions, powers, and duties are administered in accordance with the policies and rules promulgated by the Board of Corrections. *See* § 12-27-103(b), as amended by Acts 910 and 315 of 2019. The Board of Corrections has general supervisory power and control over the Division of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. *See* Ark. Code Ann. § 12-27-105(b)(1).

c. SUBJECT: AR 405 State Police Assistance During Escapes and Other Disturbances

DESCRIPTION: The Department of Corrections is repealing AR 405 concerning State Police Assistance During Escapes and Other Disturbances. The Division of Correction cannot direct the activity of State Police. Additionally, these activities are separately addressed in memorandums of understanding and the Department's Emergency Preparedness manual.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on November 26, 2019. The Department of Corrections received no comments.

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

QUESTION: In your summary you said that "these activities are separately addressed in Memorandums of Understanding and the Division's Emergency Preparedness Manual." Could you please send me copies of these documents with the relevant portions identified?
RESPONSE: The Division of Correction's Emergency Preparedness Manual is confidential by law and its contents are not subject to disclosure except in limited situations to ALC Charitable and Penal. We can look at providing a general summary of ASPs support if that would be helpful. The following summary was provided, with copies of the ASP Memorandum of Understanding and Executive Order 2015-13:

Summary of the Division of Correction Emergency Procedures

The Division's Mission Statement guides the Division's emergency response. The elements of the Mission Statement are as follows:

- Provide public safety by carrying out the mandates of the courts;
- Provide a safe, humane environment for staff and inmates;
- Provide programs to strengthen the work ethic; and
- Provide opportunities for spiritual, mental, and physical growth.

During emergency events this mission will be followed. In order to accomplish this goal, the Division has many plans, policies and procedures in place. We will continue providing services to the citizens of Arkansas by observing the following priorities in our day to day operation as well as during an emergency:

Priority Number One: The safe care and custody of all persons incarcerated in the Division of Correction. This includes prevention of escapes, hostage situations, or any other event deemed an emergency, which affects the good order and safety of the institutions. In order to accomplish this priority, the Division will:

- Provide high quality training to correctional staff
- Design, construct and maintain Institutions which provide an appropriate custody level of the offenders (Minimum to Maximum Security)
- Provide appropriate perimeter systems to prevent escapes and protect the public (Single fences with Razor Wire to Electrified Lethal Fences)

Priority Number Two: During an emergency, Division of Correction must maintain all critical administrative services. These services provide the efficient and effective care and custody to the inmate population. These include but are not limited to:

- **Food Service -** Central Warehouse operations which support the institutions
- **Medical -** Private Contractor Administrator who ensures medical needs at impacted institution; in addition to coordinating any outside hospitalization
- **Fiscal -** Staff ensures procurement and accounting procedures continue
- **Human Resources -** Staff ensures that payroll, hiring and benefits continue during an emergency.
- **Information Systems -** Staff ensures that multiple servers and support are in place to continue all operations
- **Maintenance -** Staff ensures that Physical Plant Operations (boilers plants, utilities and repairs) will continue
- **Legal -** Staff ensured that all Federal and State laws are followed
- **Communications –** Staff ensures that the public is aware of the agency's response to the emergency
- **Mental Health –** Staff provides counseling and support to both staff and inmates

The Division of Correction, through its Emergency Preparedness Program, has identified multiple avenues to address shortages of these key operations during an emergency. Utilizing the "Sister Unit" method, the management of the Division may assign staff from other institutions to the affected institution. Additionally, all locations throughout the state have established alternative sites for their operations.

In addition to the priorities of our daily operation, the Division of Correction has specific plans with checklists for events that affect inmates. These checklists allow staff to document when each portion of an emergency response is implemented. The following areas are defined as potential emergency situations:

- Employee Job Actions (Strikes, Blue Flu, etc.)
- Epidemics
- Bomb Threats & Terrorist Threats
- Natural and Man-Made Disasters (Tornados, Floods, Earthquake, Chemical Spills, etc.)
- Escapes
- Fire
- Hostage Situations
- Inmate Disturbances/Riots
- Utility Failures
- Mass Evacuations

We have one or more persons at each location assigned to emergency preparedness. The emergency preparedness coordinators prepare manuals

with all contact telephone numbers and checklists such as the one attached to deal with these emergencies. The emergency preparedness coordinators regularly scheduled tabletop exercises, fire drills, and evacuation drills to ensure that staff will be ready and able to handle these disasters or emergencies.

External stakeholders during an emergency response include the Division of Information Systems, the Division of Emergency Management, the Arkansas State Police, local law enforcement, the Department of Transportation, the Division of Emergency Management, and local utility providers.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Act 910 of 2019, the Department of Corrections was created as a cabinet-level Department, and the Board of Corrections was designated as the governing authority of the department. *See* Ark. Code Ann. § 25-43-401, as amended by Act 910 of 2019. Concurrently, the existing Department of Correction was newly designated as the Division of Correction and transferred to the Department of Corrections. *See* Ark. Code Ann. § 25-43-402, as amended by Act 910 of 2019. The Division of Correction has exclusive jurisdiction over the care, charge, custody, control, management, administration, and supervision of all persons and offenders committed to, or in the custody of, the state penitentiary. *See* Ark. Code Ann. § 12-27-103(b), as amended by Acts 910 and 315 of 2019. The division's functions, powers, and duties are administered in accordance with the policies and rules promulgated by the Board of Corrections. *See* § 12-27-103(b), as amended by Acts 910 and 315 of 2019. The Board of Corrections has general supervisory power and control over the Division of Correction and shall perform all functions with respect to the management and control of the adult correctional institutions of this state contemplated by Arkansas Constitution, Amendment 33. *See* Ark. Code Ann. § 12-27-105(b)(1).

4. DEPARTMENT OF EDUCATION, DIVISION OF ELEMENTARY AND SECONDARY EDUCATION (Ms. Mary Claire Hyatt)

a. SUBJECT: Data Reporting, Public School Computer Network, and Information Systems and Repeals

DESCRIPTION: This proposed new rule consolidates the following current rules, which will be repealed with the approval of this consolidated rule:

- Arkansas Department of Education Rules Governing the Processes to Ensure the Quality, Security, Validation and Timeliness of Public School Data in the Arkansas Public School Computer Network
- Arkansas Department of Education Rules Governing the Arkansas Educational Financial Accounting and Reporting System and Annual Training Requirements
- Arkansas Department of Education Rules Governing the Issuance of Local Education Agency Numbers
- Arkansas Department of Education Rules Governing the Final Close of Public School Financial Records

Combining these rules streamlines the processes, submission dates, and procedures, and removes inconsistencies. By combining these rules into one, the requirements are easier to follow.

The combined rules largely mirror the individual rules with the following changes:

- Final submission date for the previous year's final cycle report changed from September 15 to September 10, per Act 741 of 2017
- Removal of APSCN certification requirements
- Inclusion of Act 930 of 2017
- Inclusion of reporting requirements with the Student Management System
- Requests for LEA number assignment or changes moved to June 1
- Inclusion of the Electronic Transcripts law
- Definition of "cycle reports" added for clarity
- Inclusion of Acts 832 and 1083 of 2019, as well as Act 745 of 2017

Changes made after the public comment period include:

Section 3.04: Changed the legal authority from § 6-20-2202 to § 6-20-2203 to correct an error.

Section 11.03: Changed to clarify that a *minimum* of two persons per LEA are required to attend Tier I trainings, rather than just two persons, and to clarify who the required persons are.

Sections 11.03.5.4.1 and 11.03.5.4.2 are changed to clarify that the Division must notify the superintendent or director of the employing LEA by certified mail, return receipt requested, and that the superintendent or director must also notify the person failing to obtain training by certified mail.

PUBLIC COMMENT: A public hearing was held on October 28, 2019. The public comment period expired on November 19, 2019. The Division provided the following summary of the comments that it received and its responses thereto:

Commenter Name: Lucas Harder, Arkansas School Boards Association (10/3/19)
Comment (1): 5.01: APSCN is previously abbreviated at 2.01 and 4.01.3 so it does not need to be written longhand here.
Division Response: Comment considered. No change made.

Comment (2): 6.00: Local Education Agency was previously defined and abbreviated so it doesn't need to be written longhand here.
Division Response: Comment considered. No change made.

Comment (3): 8.04: AFR and AFB were both previously defined and abbreviated so they do not need to be written longhand here.
Division Response: Comment considered. No change made.

Comment (4): 8.05: For consistency, I would recommend replacing "State Board" with "SBE" as it is abbreviated in the majority of the document.
Division Response: Comment considered. Non-substantive change made.

Comment (5): 8.08: There is a comma missing after analyze.
Division Response: Comment considered. Non-substantive change made.

Comment (6): 10.01: APSCN is already abbreviated earlier so it does not need to be written longhand here.
Division Response: Comment considered. Non-substantive change made.

Comment (7): 11.03.5.4.4: For consistency, I would recommend replacing "State Board" with "SBE" as it is abbreviated in the majority of the document.
Division Response: Comment considered. Non-substantive change made.

Commenter Name: Jacob Smith, Jacksonville North Pulaski School District (11/19/19)
Comment (1): For Arkansas to attain equitable discipline, it is essential that all infractions are entered into eSchool and that all districts enter infractions the same way. Without this requirement and sufficient monitoring, Arkansas will continue to have inequitable discipline patterns. Without standardized and monitored discipline entry procedures, it is not possible to hold any school accountable for discipline data attained from eSchool.

Recommendations: (1) No discipline infraction in eSchool may have more than one offender; (2) Discipline entries must be entered into eSchool within five business days of the administration of the consequence; (3) The Division will utilize eSchool and Cognos discipline audits to prevent the removal or manipulation of discipline infraction information and ensure the entry of discipline information; (4) Schools will use eSchool to record all affirmative findings of student policy violations; (5) The Division will monitor the use of eSchool for discipline data entry; and (6) Each discipline infraction in only one offender.
Division Response: DESE provides the statewide portal for data entry for schools in an effort to meet state and federal law and rules. In eSchool, part of the APSCN, there are designated discipline categories that are based on general common disciplinary areas and categories that are required by federal law. DESE monitors discipline data in an effort to review trends, assist with discrepancies, and to monitor for adherence to state and federal law. There are standardized procedures and training for input of discipline data by districts into eSchool provided by DESE and APSCN, however districts remain in control of their local policies for input of discipline data, subject to state and federal law. Schools have local control with regard to discipline, provided their policies meet the state and federal requirements. Comment considered. No change made.

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

(1) Section 3.04 – Should the statutory reference be to Ark. Code Ann. § 6-20-2203, which requires the establishment and implementation of the Handbook in subsection (a)(3)(A)? (Also, missing close quotes after Handbook?) **RESPONSE:** Close quotes added after Handbook. Yes, change made.

(2) Section 10.00 – This section seems fairly broad in its terms. Is the Department comfortable with its statutory authority to impose each of the sanctions listed as it pertains specifically to failing to submit cycle data or submitting inaccurate or incomplete data? **RESPONSE:** Yes, Ark. Code Ann. §§ 6-20-2202(e)(1)—authority to withhold state funds, 6-20-

1805(c)—referral to the SBE, 6-20-1904—consideration of fiscal distress, 6-20-2207(c)—consideration of fiscal distress, 6-20-2205—consideration of fiscal distress, 6-17-410—referral to the Professional Licensure Standards Board, 6-15-2901 et seq.—increased risk factor in determining whether increased level of support is needed, 6-20-2202(b)-(c)—require submission to address deficiencies, 6-18-213(d)(1)—withholding state funds, 6-20-2202(d)(1)(B).

(3) Section 11.03 – Both the prior rule, Financial Accounting 10.01.2, and Ark. Code Ann. § 6-20-2204(a)(1)(C)(i), (1) provide that a minimum of two persons must attend the initial and Tier I training and then (2) list out the two persons that shall be included. Is there a reason the Department removed the "minimum" language and the specified persons that the minimum shall include? **RESPONSE:** The required language was accidentally omitted and has been added.

(4) Section 11.03.5.4.3 – Both the prior rule, Financial Accounting 10.03.3 and Ark. Code Ann. § 6-20-2204(a)(4)(B)(i), provide that a person failing to obtain the required Tier I training shall be notified by the person's superintendent or director by certified mail, return receipt requested. Is there a reason this language was not included in the new rules?
RESPONSE: I believe that language is included in Section 11.03.5.4.1 and 11.03.5.4.2, and 11.03.5.4.3.
FOLLOW-UP QUESTION: As I read Sections 11.03.5.4.1 and 11.03.5.4.2 of the rules cited in your response, they reference the notification from the Division to the superintendent or director of the employing LEA and the board president and require that it be by certified mail, return receipt requested. My reading of the statute is that it requires (1) notification from the Division to the superintendent or director with a copy to the Board president by certified mail, return receipt requested (Ark. Code Ann. § 6-20-2204(a)(4)(A)), but also (2) that the superintendent or director shall notify the person who failed to obtain the training by certified mail, return receipt requested (Ark. Code Ann. § 6-20-2204(a)(4)(B)(i)). While Section 11.03.5.4.3 does reference the person's date of receipt of notification, I'm not seeing the actual requirement that s/he be notified and that it be by certified mail, return receipt requested. It is the first portion of subsection (a)(4)(B)(i) that seems to me to be missing from the rules? **RESPONSE:** The language was included in Section 11.03.5.4.2, but was not clear as originally written. Sections 11.03.5.4.1 and 11.03.5.4.2 have been changed for clarity.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the proposed rule and repeals have no financial impact.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-11-128(b), the Division of Elementary and Secondary Education ("Division") shall implement the use of policies, procedures, and personnel to provide for data quality and security with the Arkansas Public School Computer Network. The State Board of Education ("State Board") shall promulgate rules and procedures as may be required to implement the intent of Ark. Code Ann. § 6-18-213, concerning attendance records and reports generally. *See* Ark. Code Ann. § 6-18-213(g). The State Board shall further establish by rules appropriate training and continuing education requirements for individuals whose job responsibilities include preparing a budget or classifying, recording, or reporting receipts or expenditures of a school or school district and shall establish rules to assure the proficiency of school employees or other individuals to properly classify, record, and report the fiscal transactions of schools or school districts. *See* Ark. Code Ann. § 6-20-1805(a), (b). Likewise, the State Board shall promulgate the necessary rules to fully implement Ark. Code Ann. § 6-20-2202, concerning budget and expenditure reports. *See* Ark. Code Ann. § 6-20-2202(f).

The proposed rules incorporate provisions of Act 832 of 2019, sponsored by Representative Nelda Speaks, which amended the law concerning the Arkansas Public School Computer Network; and Act 1083 of 2019, sponsored by Senator Alan Clark, which amended the name of national school lunch state categorical funding. The proposed rules also include revisions based upon Act 741 of 2017, sponsored by Representative Bruce Cozart, which amended provisions of the Arkansas Code, including amending the date by which a final close must be performed by educational entities in the state; Act 745 of 2017, also sponsored by Representative Bruce Cozart, which amended various provisions of the Arkansas Code concerning public education, including repealing certain provisions of Ark. Code Ann. § 6-11-128, concerning the Arkansas Public School Computer Network; and Act 930 of 2017, sponsored by Senator Jane English, which amended provisions of the Arkansas Code concerning the Public School State Accountability System.

b. SUBJECT: Rules Governing Schools of Innovation

DESCRIPTION: The Division of Elementary and Secondary Education proposes changes to its Rules Governing Schools of Innovation. The proposed revisions include:

- Title changed to reflect the change in name of the Division of Elementary and Secondary Education from the Arkansas Department of Education. Throughout, changes are made to reflect the change in name of the Division of Elementary and Secondary Education from the

Arkansas Department of Education. Stylistic changes are also made throughout.

- Changes made throughout to incorporate provisions and changes made by Act 815 of 2019.
- Sections 5.01.2 and 5.02 added to clarify the process for designation as a School of Innovation.
- Section 6.01 added to reflect current practice for submission of proposed amendments to the school of innovation application.
- Section 6.03.1 allows until May 1 for final revisions to applications, from June 30.
- Section 9.01.1 changed to clarify the vote must be 60% of all eligible employees, not 60% of those voting.

Changes made after the public comment period were non-substantive and included changing the title to remove the strikethrough of "Rules Governing" and, in Section 5.01.1, changing "year" to "years."

PUBLIC COMMENT: A public hearing was held on October 28, 2019. The public comment period expired on November 19, 2019. The Division provided the following summary of the comments that it received and its responses thereto:

Commenter: Lucas Harder, Arkansas School Boards Association (10/3/19)
Comment (1): Title "Rules Governing" appears to have been placed on the wrong side of DESE.
Division Response: Comment considered. Non-substantive change made.

Comment (2): 5.0~~1~~2.1 "Year" should be "years."
Division Response: Comment considered. Non-substantive change made.

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

(1) Section 4.03 – It appears that this section is premised on Ark. Code Ann. § 6-15-2801(5)(B). This section, as originally written, seemed to track the statute. With "the exceptions approved" removed, it will not. What is the reason behind the deletion of that phrase? **RESPONSE:** In Section 4.00, the Rules are only discussing the purposes of the Council of Innovation. The Rules clarify that although the CoI can develop a school of innovation application, but it is subject to approval by the Commissioner, meaning the application is not approved until the Commissioner approves it. Later, in Section 10.00, the Rules discuss exemptions (now referred to as waivers). Ark. Code Ann. § 6-15-

2801(5)(B) is the definition of "school of innovation," and Section 4.03 is not a definition, but a discussion of the Council of Innovation, and is changed to clarify the approval process.

(2) In the summary for the rule, it states that Section 6.02 changes the deadline for submitting applications to March 1 and final revisions by May 1; however, it looks like the deadline for the original application is currently March 1 (see stricken language in 6.03.1). Can you reconcile this for me? **RESPONSE:** The summary is unclear. The change was to make the deadline to submit final revisions from June 30 to May 1.

(3) Section 7.03.4 – This section appears to currently mirror Ark. Code Ann. § 6-15-2803(c)(4). Is there a reason that "Progress toward" is being stricken? **RESPONSE:** The application must include goals, but until the application is approved and the school begins to implement the approved plan, the school cannot have progress towards a goal. "Progress toward" was removed because applicants cannot make progress toward goals prior to the approval. The application must contain goals, but it would be unreasonable to require applicants to have already made progress towards those goals when they have not been approved to begin operating as a school of innovation.

(4) Section 9.01.1 – I see in your summary that the Division is proposing the change in Section 9.01.1 to clarify the vote needed; however, is the Division comfortable that the rule as proposed is not in conflict with how Ark. Code Ann. § 6-15-2804(b)(2) reads? **RESPONSE:** The meaning is still the same as the law; however, the rules clarify due to several instances of misunderstanding by Districts.

(5) Section 10.00 – What is the reasoning behind the Division's change of the term "exemption" to "waiver" when the latter does not appear to be used in Title 6, Chapter 15, Subchapter 28? **RESPONSE:** This change is to bring this language in line with how we treat "exemptions" for charters, 1240 waivers, and Standards waivers. The content has not changed, only the terminology. These "exemptions" are treated the same as waivers and are entered into the Standards for Accreditation monitoring tool the same as waivers, therefore the language was changed to make it clear.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Changes to the rules include revisions made in light of Act 815 of 2019, sponsored by Senator James Sturch, which amended provisions of the Arkansas Code with respect to open-

enrollment public charter school and traditional public school waivers and amended provisions concerning schools of innovation. Pursuant to Arkansas Code Annotated § 6-15-2802(c), as amended by Act 815, § 5, the State Board of Education shall adopt rules to administer Title 6, Chapter 15, Subchapter 28 of the Arkansas Code, concerning the District of Innovation Program, including without limitation rules that address the: (1) rules subject to exemption or modification for a school of innovation application if approved by the Commissioner of Elementary and Secondary Education; (2) application, school of innovation plan review, approval, and amendment process for a public school district to establish a school of innovation; (3) timeline for initial approval of a school of innovation and subsequent renewal, including any ongoing evaluations of a school of innovation; (4) documentation required to show meaningful parental, educator, and community engagement and capacity for the changes identified in the school of innovation plan; (5) approval by the eligible employees of a school of innovation; (6) evidence of teacher collaboration and shared leadership responsibility within each school seeking to become a school of innovation; (7) documentation of the understanding and implementation of research-based practices of professional learning communities; (8) process for revocation of a designation as a district of innovation or school of innovation; (9) reporting and oversight responsibility of the school of innovation and the Division of Elementary and Secondary Education; (10) budget and financial details of the school of innovation; and (11) other information necessary as determined by the State Board.

5. DEPARTMENT OF EDUCATION, DIVISION OF HIGHER EDUCATION (Dr. Maria Markham)

a. SUBJECT: Arkansas Advanced Placement (AP) Credit Policy

DESCRIPTION: The proposed rule will bring clarity to the existing variances of policies regarding the awarding of college credits following a successful Advanced Placement Exam score of three (3). It will standardize the awarding of credits by colleges and universities for earning a three (3) on an Advanced Placement Exam, with some limitations.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on October 12, 2019. The Division received no comments.

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

(1) Could you please specify the subsection of Ark. Code Ann. § 6-53-203, or any other statute, on which the Division is relying for the Arkansas Higher Education Coordinating Board's authority to promulgate rules regarding course credit for Advanced Placement scores? **RESPONSE:** It probably more falls under 6-61-218 setting a standard for transferability among all institutions. It would also be in line with (a)(1) of 6-53-203 in that we are coordinating a policy between the institutions and the public schools on the acceptance of AP courses.

(2) Should the reference in the first line be to the "Arkansas Higher Education Coordinating Board" rather than the "Arkansas *Department of* Higher Education Coordinating Board"? **RESPONSE:** Yes. It will be changed.

(3) Should the reference in Section I, *Course Credit*, be to the "Division of Higher Education" rather than the "*Department* of Higher Education" in accord with Act 910 of 2019, § 1030? **RESPONSE:** All references to Department will be fixed so that they now say Division. These were all drafted, and approved by our board actually, before the transformation act was passed. So I didn't update from that approval.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The authority relied upon by the agency for the promulgation of the instant rules can be found in Arkansas Code Annotated § 6-16-218, which authorizes the Arkansas Higher Education Coordinating Board to establish a minimum core of courses that shall apply toward the general education core curriculum requirements for associate and baccalaureate degrees at state-supported institutions of higher education and that shall be fully transferable among all state-supported institutions of higher education. The agency further points to Ark. Code Ann. § 6-53-203(a)(1), which provides that in order to promote a coordinated system of two-year postsecondary education in Arkansas, to provide an effective delivery system for adult education programs, and to assure an orderly and effective development of a system of publicly and locally supported institutions, the Board shall have the power and duty to function as a coordinating body between the technical and community colleges in the system and the public schools, universities, state colleges, and other educational institutions in Arkansas.

b. **SUBJECT: Nontraditional Documented Immigrant Tuition and Fee Policy**

DESCRIPTION: This proposed rule by the Division of Higher Education gives a state-supported institution of higher education the discretion to classify students with nontraditional documented immigration status as in-state for purposes of tuition and fees under limited circumstances.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on October 12, 2019. The Division received no comments.

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

Is the resolution contained in the latter part of the rule submitted a part of the actual rule? If yes, should "Department" as used twice be "Division" in accord with Act 910 of 2019, § 1030? **RESPONSE:** The resolution was removed, and a reference was included that each institution must submit its policy to ADHE.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: This rule implements Act 844 of 2019, sponsored by Representative Dan Douglas, which concerned in-state tuition at a state-supported institution of higher education and allowed a state-supported institution of higher education to classify certain students as in-state for purposes of tuition and fees at a state-supported institution of higher education. Pursuant to Arkansas Code Annotated § 6-60-215(b)(1), as amended by Act 844, § 1, the Division of Higher Education shall promulgate rules necessary to implement the statute, concerning nontraditional documented immigration status.

c. **SUBJECT: Productivity Funding Model Policy – Universities**

DESCRIPTION: This is an amendment to the current rule that establishes the framework for the productivity funding formula to address an instance of unintended consequence within the current model to better address productivity within the four-year university model. The unintended consequence being addressed is in the change to the research metric. In our yearly review of the formula, it was determined by the workgroup that by comparing the research percentage between the

baseline and comparative totals, that it was possible for a school to be negatively impacted by a reduction in research expenses. It was not the intent of the adjustment to negatively impact an institution. So, the change was proposed to only apply the research adjustment to the comparative year, thus ensuring that the adjustment will always be a positive adjustment for an institution and continue to incentivize the research missions of our universities.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on October 12, 2019. The Division received no comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-61-234(a)(1)(A), the Arkansas Higher Education Coordinating Board shall adopt policies developed by the Division 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).

d. SUBJECT: Productivity Funding Model Policy – Colleges

DESCRIPTION: This amendment to the current rule removes the requirement to include a non-credit workforce training metric in the productivity funding model for the second-year recommendations. This change was recommended by the Workforce Task Group and accepted by the ACC Board of Directors. This amendment also addresses three instances of unintended consequences within the current model to better address productivity within the two-year college model.

One unintended consequence was in the Diseconomies of Scale adjustment metric where an institution was actually negatively impacted due to the fact that it did not decrease in enrollment size as much as the average enrollment decreased; thus, it was penalized for doing better than average, and the Division does not want that to happen again.

The second change is an adjustment to the weightings of each metric. The current weighting in the model did not take into consideration that certain metrics measure a much smaller cohort than other metrics. As a result, small numbers of students can unduly impact the overall model. The adjustment of the weighting also applies a greater impact to the

Credentials metric which supports the state's goal of increasing the percentage of adults with a college credential.

The third change is an adjustment to the additional weighting applied to High Demand Credentials. In the current model STEM credentials are given a 3x multiplier, and high demand credentials are given a 1.5x multiplier. The change increases the multiplier to 3x for the two-year colleges. This adjustment was requested to reflect the mission of the community colleges and support the goals of the state to supply a well-prepared workforce for high demand jobs. While two-year institutions do provide many STEM credentials, it was felt that the High Demand credential focus was even greater which had the ability to cause disproportionate scoring.

PUBLIC COMMENT: No public hearing was held. The public comment period expired on October 12, 2019. The Division received no comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 6-61-234(a)(1)(A), the Arkansas Higher Education Coordinating Board shall adopt policies developed by the Division 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).

6. ETHICS COMMISSION (Mr. Graham Sloan)

a. SUBJECT: Rules of Practice and Procedure

DESCRIPTION: The Ethics Commission is revising the Rules of Practice and Procedure to bring those rules and certain forms in conformity with Acts 341, 545, 547, and 845 of 2019.

Act 341 increased the fine range from $50 - $2,000 per violation to $50 - $3,500 per violation.

Act 545 provided that, for years in which the office of President of the United States will appear on the ballot at the general election, the filing period for running for public office shall be in the November preceding

the election year ("beginning at 12:00 noon on the first Monday in November preceding the general primary election and ending at 12:00 noon on the seventh day thereafter") and moves the primary election to March ("the first Tuesday after the first Monday in March"). This affects when the SFI for candidates would be due and also affects the reporting schedule for C&E reports.

Act 547 provides that, if the AEC requires additional time to complete its investigation under subdivision (b)(5)(A)(i) of Ark. Code Ann. § 7-6-218 or to complete its hearing or action under subdivision (b)(5)(A)(ii) of Ark. Code Ann. § 7-6-218, and gives written notice to the person who is under investigation or the subject of the hearing or action, the AEC may extend the time to complete the investigation, hearing, or action by no more than sixty (60) days.

Act 845 added the following provisions regarding carryover funds: (E) The use of carryover funds to pay an elected candidate's own personal expenses for food, lodging, conference fees, or travel to attend a conference related to the performance of his or her responsibilities as an elected official: (i) Shall not be considered a taking of campaign funds as personal income; (ii) The reimbursement of expenses shall be a result of travel and the source of the reimbursement shall be authorized under the rules of the Arkansas House of Representatives or the Arkansas Senate and used to reimburse the carryover account; and (iii) The reimbursement amount shall be reported in the elected candidate's carryover fund report.

PUBLIC COMMENT: A public hearing was held on November 22, 2019. The public comment period expired on November 22, 2019. The Arkansas Ethics Commission received no public comments.

The effective date is pending legislative review and approval.

FINANCIAL IMPACT: The Commission states that the proposed revisions do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas Ethics Commission has authority to promulgate reasonable rules to implement and administer the requirements of the campaign financing subchapter of Title 7, Chapter 6 of the Arkansas Code. *See* Ark. Code Ann. § 7-6-217(g)(1). The Arkansas Ethics Commission is amending its Rules of Practice and Procedure, including forms and instructions, to be consistent with the following Acts of the 2019 Regular Session:

Act 341 of 2019, sponsored by Senator Jim Hendren, which increased the fine range from $50 - $2,000 per violation to $50 - $3,500 per violation.

See Ark. Code Ann. § 7-6-218(b)(4)(B)(i), as amended by Act 341 of 2019.

Act 545 of 2019, sponsored by Senator Trent Garner, which provides that, for years in which the office of President of the United States will appear on the ballot at the general election, the filing period for running for public office shall be in the November preceding the election year ("beginning at 12:00 noon on the first Monday in November preceding the general primary election and ending at 12:00 noon on the seventh day thereafter") and moves the primary election to March ("the first Tuesday after the first Monday in March"). This affects when the Statement of Financial Interest for candidates would be due and also affects the reporting schedule for Contributions & Expenses reports. *See* Ark. Code Ann. § 7-7-203(b)(2), Ark. Code. Ann. § 7-7-203(c)(1)(B), as amended by Act 545 of 2019.

Act 547 of 2019, sponsored by Representative Jana Della Rosa, which provides that, if the Arkansas Ethics Commission requires additional time to complete its investigation under Ark. Code Ann. § 7-6-218(b)(5)(A)(i) or to complete its hearing or action under Ark. Code Ann. § 7-6-218(b)(5)(A)(ii), and gives written notice to the person who is under investigation or the subject of the hearing or action, the Commission may extend the time to complete the investigation, hearing, or action by no more than sixty (60) days. *See* Ark. Code Ann. § 7-6-218(b)(5)(A)(iii), as amended by Act 547 of 2019.

Act 845 of 2019, sponsored by Representative Stephen Meeks, which provides that the use of carryover funds to pay an elected candidate's own personal expenses for food, lodging, conference fees, or travel to attend a conference related to the performance of his or her responsibilities as an elected official: (i) Shall not be considered a taking of campaign funds as personal income; (ii) The reimbursement of expenses shall be a result of travel and the source of the reimbursement shall be authorized under the rules of the Arkansas House of Representatives or the Arkansas Senate and used to reimburse the carryover account; and (iii) The reimbursement amount shall be reported in the elected candidate's carryover fund report. See Ark. Code Ann. § 7-6-203(g)(4)(E), as amended by Act 845 of 2019.

b. <u>SUBJECT</u>: Rules of Political Committees

<u>DESCRIPTION</u>: The Ethics Commission is revising the Rules on Political Committees to bring them in conformity with Acts 240, 341, 1039, and 1058 of 2019. Those changes are summarized below.

Act 240, concerning quarterly reports filed by county political party committees, replaced the word "filing" period with "reporting" period, to provide clarity.

Act 341 increased the fine range from $50-$2,000 per violation to $50-3,500 per violation.

Act 1039 allows political action committees (PAC) to register via paper with the requirement that PACs who seek to become paper filers instead of electronic filers must submit an affidavit that they do not have access to technology and that it would constitute a substantial hardship to file electronically. (The affidavit was already required of candidates to paper file.)

Act 1039 added the requirement that PACs which seeks to become paper filers instead of electronic filers must submit an affidavit that they do not have access to the necessary technology and that it would constitute a substantial hardship to file electronically. (The affidavit was already required of candidates to paper file.)

Act 1039 addressed paper registration and reporting by Political Action Committees and Independent Expenditure Committees and requires the affidavit. It likewise requires the Secretary of State to notify the filers in writing if their filing was rejected within five (5) days, telling them the reason it was rejected.

Act 1039 also provided that the AEC shall approve the forms and instructions used by the Secretary of State under this section to ensure that all required information is requested. Reports shall be filed on the forms furnished by the Secretary of State, except that computer-generated contribution and expenditure reports shall be accepted by the Secretary of State and the Arkansas Ethics Commission provided that all of the requisite elements are included. It also adds the traditional timely filing elements of ten (10) days follow-up to fax, and that a pre-election report must be received by the due date. Furthermore, it makes it clear that the Secretary of State shall post the filings on its website.

Act 1058 extended the types of persons who must include disclaimer language on printed campaign materials, so that printed campaign materials produced by PACs and IECs must also contain the phrase "paid for by" followed by who paid for it.

PUBLIC COMMENT: A public hearing was held on November 22, 2019. The public comment period expired on November 22, 2019. The Arkansas Ethics Commission receive no public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following question:

Ark. Code Ann. § 7-6-226(c)(1)(A), as amended by Act 240, requires that within 15 days after the end of each quarter, county political party committees file a quarterly report with the Secretary of State including the total amount of contributions received and the total amount of contributions made during the **reporting period** and the cumulative amount of those totals. In § 502(a)(1) of the proposed rule, the Commission retained the word "filing," but chose to add "(i.e., reporting)" next to it. Why did the Commission choose not to mirror the language in the statute? **RESPONSE:** I'm not sure there was a specific reason. The intent of the language added to the rule was to clarify that the period of time in question is the reporting period. There was nothing else going on there.

The effective date is pending legislative review and approval.

FINANCIAL IMPACT: The Commission states that the proposed revisions do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas Ethics Commission has authority to promulgate reasonable rules to implement and administer the requirements of the campaign financing subchapter of Title 7, Chapter 6 of the Arkansas Code. *See* Ark. Code Ann. § 7-6-217(g)(1). Additionally, the Commission may issue guidelines on the requirements of Ark. Code Ann. § 7-1-103(7). *See* Ark. Code Ann. § 7-6-217(g)(2).

The Arkansas Ethics Commission is amending its Rules on Political Committees to be consistent with the following Acts of the 2019 Regular Session:

(1) Act 240 of 2019, sponsored by Senator Bart Hester, which mandated that political party committees to file a quarterly report with Secretary of State including the total number of contributions received and total number of contributions made during the *reporting* period. (Emphasis Added) *See* Ark. Code Ann. § 7-6-226(c)(1)(A), as amended by Act 240 of 2019.

(2) Act 341 of 2019, sponsored by Senator Jim Hendren, which increased the Arkansas Ethics Commission allowable fine range from $50-$2,000 per violation to $50-3,500 per violation. *See* Ark. Code Ann. § 7-6-218(b)(4)(B)(i), as amended by Act 341 of 2019.

(3) Act 1039 of 2019, sponsored by Representative Jana Della Rosa, which:
(a) Provided for paper registration and reporting by political action committees (PAC) and independent expenditure committees, in circumstances where they do not have access to the technology necessary

to make required submissions in electronic format, where submission in an electronic format would constitute a substantial hardship and where they submits a notarized affidavit that complies with Ark. Code Ann. § 7-6-231. *See* Ark. Code Ann. § 7-6-215(a)(1)(E), as amended by Act 1039 of 2019 (PAC registration); *See* Ark. Code Ann. § 7-6-215(a)(1)(E), as amended by Act 1039 of 2019 (PAC reporting); *See* Ark. Code Ann. 7-6-220(e)(3), as amended by Act 1039 of 2019 (independent expenditure committee reporting); *See* Ark. Code Ann. § 7-6-231, as amended by Act 1039 of 2019 (affidavit requirements).
(b) Required the Secretary of State to provide written notice to candidates if a report in paper form is not accepted, providing the reason the report was not filed or accepted, within five (5) business days. *See* Ark. Code Ann. § 7-6-230(2)(B), as amended by Act 1039 of 2019, and
(c) Provided an alternative to electronic filing. *See* Ark Code Ann. §§ 7-6-230 and 7-6-231, as amended by Act 1039 of 2019.

(4) Act 1058 of 2019, sponsored by Representative Jana Della Rosa, which required political action committees and independent expenditure committees to include disclaimer language on printed campaign materials. *See* Ark. Code Ann. § 7-6-228(c)(2), as amended by Act 1058 of 2019.

c. SUBJECT: Rules on Lobbyist Registration and Reporting

DESCRIPTION: The Ethics Commission is revising the Rules on Lobbyist Registration and Reporting to bring them in conformity with Acts 315, 341, 342 and 661 of 2019. Those changes are summarized below:

With regard to implementing Act 315, the rule revisions would remove the word "regulation" from the Arkansas Code as follows:

- Ark. Code Ann. § 21-8-402(1)(A). "Administrative action" means any decision on, or proposal, consideration, or making of any rule, ratemaking proceeding, or policy action by a governmental body.
- Ark. Code Ann. § 21-8-601(a)(3)(F). Assisting an executive agency, at the written request of the agency, in drafting administrative rules or in publicizing or assisting in the implementation of final administrative actions.

Act 341 increased the fine range from $50 - 2,000 to $50 - $3,500.

Act 342 amended Arkansas Code Title 21, Chapter 8, Subchapter 1, to add an additional section as provided below. The Ethics Commission is revising the Rules on Lobbyist Registration and Reporting to include this new definition on who is permitted to register as a lobbyist while serving as an elected state official:

- Ark. Code Ann. § 21-8-103. Elected state officials prohibited from registering as lobbyists
  (a) A person serving as an elected state official in any jurisdiction is prohibited from registering as a lobbyist in Arkansas under Ark. Code Ann. § 21-8-601 *et seq*. or similarly in any other jurisdiction while the person is serving as an elected state official.
  (b) As used in this section, "elected state official" means a person holding an elective office of state government as a constitutional officer or as a member of the General Assembly and includes persons during the time period between the date that he or she is elected and the date he or she takes office.

Act 661 amended the wording of the ban on lobbying for two years after leaving the General Assembly, and similarly bans two (2) more types of jobs during that two (2) year period of time, and sets time frames for which legislators these rules apply to:

- A former member of the General Assembly shall not take the following actions until two (2) years after the expiration of the term of office for which he or she was elected: (A) Register as a lobbyist under Ark. Code Ann. § 21-8-601 *et seq*.; or (B) Enter into employment as the director of an: (i) Educational cooperative or (ii) Area agency on aging.
- Portions of this section apply to persons elected or reelected to the General Assembly on or after November 6, 2018 and the newer portions of this section apply to a person elected or reelected to the General Assembly on or after November 4, 2014. (Approved: 4/2/19 with Emergency Clause)

PUBLIC COMMENT: A public hearing was held on November 22, 2019. The public comment period expired on November 22, 2019. The Arkansas Ethics Commission received no public comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency states that the proposed rule amendments do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas Ethics Commission has authority to promulgate reasonable rules to implement and administer the requirements of the campaign financing subchapter of Title 7, Chapter 6 of the Arkansas Code. *See* Ark. Code Ann. § 7-6-217(g)(1). The Arkansas Ethics Commission is amending its Rules on Lobbyist Registration and Reporting to be consistent with the following Acts of the 2019 Regular Session:

(1) Act 315 of 2019, which was sponsored by Representative Jim Dotson, provided for the uniform use of the term "rule" for an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency. *See* Act 315 of 2019.

(2) Act 341 of 2019, sponsored by Senator Jim Hendren, which increased the Arkansas Ethics Commission allowable fine range from $50-$2,000 per violation to $50-3,500 per violation. *See* Ark. Code Ann. § 7-6-218(b)(4)(B)(i), as amended by Act 341 of 2019.

(3) Pursuant to Act 342 of 2019, sponsored by Senator Keith Ingram, a person serving as an elected state official in any jurisdiction is prohibited from registering as a lobbyist in Arkansas under Ark. Code Ann. § 21-8-601 *et seq.* or similarly in any other jurisdiction while the person is serving as an elected state official. As used in this section, "elected state official" means a person holding an elective office of state government as a constitutional officer or as a member of the General Assembly and includes persons during the time period between the date that he or she is elected and the date he or she takes office. *See* Ark. Code Ann. § 21-8-103, as amended by Act 342 of 2019.

(4) Act 661 of 2019, sponsored by Representative Frances Cavenaugh, prohibited former members of the General Assembly from certain actions until two (2) years after the expiration of their term of office. Specifically, these members may not register as a lobbyist under Ark. Code Ann. § 21-8-601 *et seq.*, enter into employment as the director of an educational cooperative under The Public School Educational Cooperative Act of 1981, § 6-13-901 *et seq*. or enter into employment as director of an area agency on aging. *See* Arkansas Constitution, Article 19, § 29(a) and (b) and Ark. Code Ann. § 21-2-402(f), as amended by Act 661 of 2019.

d. <u>SUBJECT</u>: Rules on Independent Expenditures

<u>DESCRIPTION</u>: The Ethics Commission is revising the Rules on Independent Expenditures to bring them in conformity with Acts 341, 1039, and 1058 of 2019. The changes are summarized as follows:

Act 341 increased the fine range from $50 - $2,000 to $50 - $3,500.

Act 1039 amended the law to require that when the Secretary of State has not accepted a report in paper form because a notarized affidavit was not submitted with the first paper report in the election cycle, then it must provide written notice to the candidate within five (5) business days if the report in paper form was not filed or accepted; and provide the reason the report in paper form was not filed or accepted.

Act 1039 addressed paper registration and reporting by Political Action Committees and Independent Expenditure Committees and requires the affidavit declaring an inability to file electronically, as was already required by candidates. It likewise required the Secretary of State to notify the filers in writing if their filing was rejected within five (5) days and telling them the reason it was rejected.

Act 1039 provided that the AEC shall approve the forms and instructions used by the Secretary of State under this section to ensure that all required information is requested. Reports shall be filed on the forms furnished by the Secretary of State, except that computer-generated contribution and expenditure reports shall be accepted by the Secretary of State and the Arkansas Ethics Commission provided that all of the requisite elements are included. It also adds the traditional timely filing elements of ten (10) days follow-up to fax, and that a pre-election report must be received by the due date. Furthermore, it makes it clear that the Secretary of State shall post the filings on its website.

Act 1058 amended Ark. Code Ann. § 7-6-228(c)(2) to expand the types of persons who must include disclaimer language on printed campaign materials, so that printed campaign materials produced by Political Action Committees and Independent Expenditure Committees must also contain the phrase "paid for by" followed by who paid for it.

PUBLIC COMMENT: A public hearing was held on November 22, 2019. The public comment period expired on November 22, 2019. The Arkansas Ethics Commission received no public comments.

The effective date is pending legislative review and approval.

FINANCIAL IMPACT: The Commission states that there is no financial impact.

LEGAL AUTHORIZATION: The Arkansas Ethics Commission has authority to promulgate reasonable rules to implement and administer the requirements of the campaign financing subchapter of Title 7, Chapter 6 of the Arkansas Code. *See* Ark. Code Ann. § 7-6-217(g)(1). The Arkansas Ethics Commission is amending its Rules on Independent Expenditures to be consistent with the following Acts of the 2019 Regular Session:

(1) Act 341 of 2019, sponsored by Senator Jim Hendren, which increased the Arkansas Ethics Commission allowable fine range from $50-$2,000 per violation to $50-3,500 per violation. *See* Ark. Code Ann. § 7-6-218(b)(4)(B)(i), as amended by Act 341 of 2019.

(2) Act 1039 of 2019, sponsored by Representative Jana Della Rosa, which:
(a) Provided for paper registration and reporting by political action committees (PAC) and independent expenditure committees, in circumstances where: (1) they do not have access to the technology necessary to make required submissions in electronic format, (2) where submission in an electronic format would constitute a substantial hardship and (3) where a notarized affidavit that complies with Ark. Code Ann. § 7-6-231 is submitted. *See* Ark. Code Ann. § 7-6-215(a)(1)(E), as amended by Act 1039 of 2019 (PAC registration); *See* Ark. Code Ann. § 7-6-215(a)(1)(E), as amended by Act 1039 of 2019 (PAC reporting); *See* Ark. Code Ann. 7-6-220(e)(3), as amended by Act 1039 of 2019 (independent expenditure committee reporting); *See* Ark. Code Ann. § 7-6-231, as amended by Act 1039 of 2019 (affidavit requirements).
(b) Required the Secretary of State to provide written notice to candidates if a report in paper form is not accepted, providing the reason the report was not filed or accepted, within five (5) business days. *See* Ark. Code Ann. § 7-6-230(2)(B), as amended by Act 1039 of 2019.
(c) Provided an alternative to electronic filing. *See* Ark Code Ann. §§ 7-6-230 and 7-6-231, as amended by Act 1039 of 2019.

(3) Act 1058 of 2019, sponsored by Representative Jana Della Rosa, which required political action committees and independent expenditure committees to include disclaimer language on printed campaign materials. *See* Ark. Code Ann. § 7-6-228(c)(2), as amended by Act 1058 of 2019.

e. SUBJECT: Rules on Campaign Contribution Limit

DESCRIPTION: Pursuant to Act 1280 of 2015, Ark. Code Ann. § 7-6-203(i) provides as follows:
(1) The contribution limits under subdivision (a)(1)(A) and subdivision (b)(1) of this section shall be adjusted at the beginning of each odd-numbered year in an amount equal to the percentage certified to the Federal Election Commission by the Bureau of Labor Statistics of the Department of Labor under 52 U.S.C. § 30116(c) as existing on January 1, 2015.

(2) If the amount after adjustment under subdivision (i)(1) of this section is not a multiple of one hundred dollars ($100), the Arkansas Ethics Commission shall round the amount to the nearest multiple of one hundred dollars ($100).

(3) The Arkansas Ethics Commission shall promulgate rules identifying the adjusted contribution limit under subdivision (i)(1) of this section.

On or about February 7, 2019, the Federal Election Commission announced updated contribution limits that have been indexed for inflation and are effective for the 2019-2020 federal elections.

This proposed amendment is necessary to adjust the campaign contribution limit from $2,700 to $2,800 for candidates for public office in Arkansas. The purpose of this Rule is to establish a campaign contribution limit and give the public clear guidance on that limit. The presumed intent of the mandated adjustment is to keep the contribution limit in line with the rising cost of running a campaign.

PUBLIC COMMENT: A public hearing was held on November 22, 2019. The public comment expired on November 22, 2019. The Arkansas Ethics Commission received no public comments.

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

Did the Commission obtain the $2,800 directly from FEC or did the commission calculate the increase and round as anticipated in Ark. Code Ann. 7-6-203(i)? **RESPONSE:** When Act 1280 passed, the campaign contribution limit was $2,700. For 2016, the price index certified to the FEC was 1.3555%. Application of that percentage to the $2,700 amount yields an adjusted amount of $2,736.59 which did not necessitate an adjustment. For 2018, the price index number certified to the FEC was 1.41818%. Application of that percentage to the previously adjusted amount of $2,736.59 yields $2,775.40 which, rounded to the nearest hundred, is $2,800. This amount tracks the $2,800 contribution limit set forth in the FEC announcement released February 7, 2019.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Arkansas Ethics Commission has authority to promulgate reasonable rules to implement and administer the requirements of the campaign financing subchapter of Title 7, Chapter 6 of the Arkansas Code. *See* Ark. Code Ann. § 7-6-217(g)(1).

The contribution limits under Ark. Code Ann. § 7-6-203(a)(1)(A) (addressing acceptance of campaign contributions and Ark. Code Ann. § 7-6-203(b)(1) (making campaign contributions) shall be adjusted at the beginning of each odd-numbered year in an amount equal to the percentage certified to the Federal Election Commission by the Bureau of Labor Statistics of the Department of Labor under 52 U.S.C. § 30116(c),

as existing on January 1, 2015. If the amount after adjustment is not a multiple of one hundred dollars ($100), the Arkansas Ethics Commission shall round the amount to the nearest multiple of one hundred dollars ($100). The Arkansas Ethics Commission shall promulgate rules identifying the adjusted contribution limit. *See* Ark. Code Ann. § 7-6-203(i).

f. SUBJECT: Rules on Conflicts

DESCRIPTION: The Ethics Commission is revising this set of Rules on Conflicts to bring it in conformity with Act 315 of 2019, specifically, by removing the word "regulation" and/or replacing the word "regulation" with the word "rule."

PUBLIC COMMENT: A public hearing was held on November 22, 2019. The public comment expired on November 22, 2019. The Arkansas Ethics Commission received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Arkansas Ethics Commission has authority to promulgate reasonable rules to implement and administer the requirements of the campaign financing subchapter of Title 7, Chapter 6 of the Arkansas Code. *See* Ark. Code Ann. § 7-6-217(g)(1).

Act 315 of 2019, sponsored by Representative Jim Dotson, provided for the uniform use of the term "rule" for an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency. *See* Act 315 of 2019.

g. SUBJECT: Rules on Campaign Finance & Disclosure

DESCRIPTION: The Ethics Commission is revising the Rules on Campaign Finance & Disclosure to bring them in conformity with Acts 240, 341, 545, 845, 879, and 894 of 2019. Those changes are summarized below.

Act 240 clarified that it is unlawful for *any* person to make a contribution to a candidate for any public office or to any person acting on the candidate's behalf, which in the aggregate exceeds two thousand seven hundred dollars ($2,700) per election, *regardless* of whether or not they are a permissible contributor. (Emphasis added)

Act 240 clarified that, for candidates for state and district office, monthly reporting will begin in January of the year of the election.

Act 240 clarified that all candidates for state or district office, including unopposed candidates whose names will not appear on the ballot (i.e., "when only one (1) candidate qualifies for a particular office or position and no position or name of an unopposed candidate shall appear on a ballot,"), must file a Final Campaign Contribution & Expenditure ("C& E") report. A final report is required regardless of whether a candidate has received contributions or made expenditures in excess of five hundred dollars ($500).

Act 240 clarified that all candidates for school district, township, or municipal office, including unopposed candidates whose names will not appear on the ballot (i.e., "when only one (1) candidate qualifies for a particular office or position and no position or name of an unopposed candidate shall appear on a ballot,"), must file a Final C&E report. A final report is required regardless of whether a candidate has received contributions or made expenditures in excess of five hundred dollars ($500).

Act 240 clarified that all candidates for county office, including unopposed candidates whose names will not appear on the ballot ("when only one (1) candidate qualifies for a particular office or position and no position or name of an unopposed candidate shall appear on a ballot,"), must file a Final C&E report. A final report is required regardless of whether a candidate has received contributions or made expenditures in excess of five hundred dollars ($500)"). (Approved: 2/28/19)

Act 240 amended the law regarding the authority of local jurisdictions, municipalities, counties, and townships providing they *may* (removing "shall have the authority to") establish reasonable limitations on certain aspects of campaign finance law in their community. Likewise, it adds a new provision clearly stating, "Enforcement of any limitation established under subsection (a) of this section is the responsibility of the municipality, county, or township establishing the limitation." This removes any misunderstanding that the Ethics Commission would be responsible for enforcement or education regarding various local limitations.

Act 240, concerning quarterly reports filed by county political party committees, replaced the word "filing" period with "reporting" period, to provide clarity.

Act 341 increased the fine range from $50 - $2,000 per violation to $50 - $3,500 per violation.

Act 545 provided that, for years in which the office of President of the United States will appear on the ballot at the general election, the filing period for running for public office shall be in the November preceding the election year ("beginning at 12:00 noon on the first Monday in November preceding the general primary election and ending at 12:00 noon on the seventh day thereafter") and moves the primary election to March ("the first Tuesday after the first Monday in March"). This affects when the SFI for candidates would be due and also effects the reporting schedule for the C&E reports.

Act 845 added the following provisions regarding carryover funds. (Somewhat similar provisions have been in the RCF &D for many years): (E) The use of carryover funds to pay an elected candidate's own personal expenses or food, lodging, conference fees, or travel to attend a conference related to the performance of his or her responsibilities as an elected official: (i) Shall not be considered a taking of campaign funds as personal income; (ii) The reimbursement of expenses shall be a result of travel and the source of the reimbursement shall be authorized under the rules of the Arkansas House of Representatives or the Arkansas Senate and used to reimburse the carryover account; and (iii) The reimbursement amount shall be reported in the elected candidate's carryover fund report. (Approved: 4/10/19)

Act 879 clarified that carryover funds (as is the case with campaign funds) should not be taken as personal income. Likewise, it specifically states that candidates or officeholders may use campaign funds or carryover funds to fulfill any commitment, obligation, or expense authorized by law, or permitted by an Arkansas Ethics Commission rule or opinion at the time of the expenditure, or reasonably and legitimately related to a campaign or officeholder activity.

Act 879 specified that taking campaign/carryover funds as personal income is still prohibited even after the former candidate lost the election or has left office.

Act 879 made knowingly taking campaign funds as personal income a felony if the value taken exceeds $2,500, as follows:

- Class B felony if the value of the benefit is twenty-five thousand dollars ($25,000) or more;
- Class C felony if five thousand dollars ($5,000) or more, but less than twenty five thousand dollars ($25,000);
- Class D felony if two thousand five hundred dollars ($2,500) or more, but less than five thousand dollars ($5,000); or

- Class A misdemeanor if less than two thousand five hundred dollars ($2,500).

Act 879 created an affirmative defense to a prosecution for taking campaign funds as personal income if the candidate or officeholder shows by a preponderance of the evidence that: (A) If the personal property was retained as carryover funds, that the candidate or officeholder: (i) Reported the personal property as carryover funds; and (ii) Retained or disposed of the personal property in the manner that is required by law for carryover funds; or (B) If the personal property was retained as surplus funds, that the candidate or officeholder: (i) Reported the personal property as surplus funds; and (ii) Retained or disposed of the personal property in the manner that is required by law for surplus funds.

Act 894 created two new defined terms as follows: "Constitutional office" means the offices of Governor, Lieutenant Governor, Auditor of State, Treasurer of State, Secretary of State, Commissioner of State Lands, the Attorney General, the General Assembly, Justice of the Supreme Court, Judge of the Court of Appeals, circuit judge, and district judge; and "Public trust crime" means a crime prohibited under Arkansas Constitution, Article 5, § 9.

Act 894 added a new area of jurisdiction for the AEC, providing that a person who has been found guilty of a crime of public trust shall not file, run or hold a constitutional office.

PUBLIC COMMENT: A public hearing was held on November 22, 2019. The public comment period expired on November 22, 2019. The Arkansas Ethics Commission received no public comments.

The effective date is pending legislative review and approval.

FINANCIAL IMPACT: The Commission states that the proposed revisions do not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas Ethics Commission has authority to promulgate reasonable rules to implement and administer the requirements of the campaign financing subchapter of Title 7, Chapter 6 of the Arkansas Code. *See* Ark. Code Ann. § 7-6-217(g)(1). The Commission is revising the Rules on Campaign Finance & Disclosure to bring them in conformity with the following Acts of the 2019 legislative session:

(1) Act 240 of 2019, sponsored by Senator Bart Hester, which made a number of changes to the law concerning ethics and campaign finance. Specifically:

(a) It shall be unlawful for any person to make a contribution to a candidate for any public office or any person acting on the candidate's behalf, which in aggregate exceeds $2,700 per election. *See* Ark. Code Ann. § 7-6-203(b)(1), as amended by Act 240 of 2019.
(b) Monthly reporting for candidates for state and district office will begin in January of the year of the election. *See* Ark. Code Ann. § 7-6-207(a)(1)(B), as amended by Act 240 of 2019.
(c) A final report of all contributions received and expenditures made which have not been disclosed on reports previously required, must be made no later than thirty (30) days after the end of the month in which the candidate's names has appeared on the ballot or in situations where only one (1) candidate qualifies for a particular office or position and no position or name of an unopposed candidate shall appear on a ballot. *See* Ark. Code Ann. § 7-6-207(a)(1)(D), as amended by Act 240 of 2019 (final reports for candidates for state or district office); Ark. Code Ann. § 7-6-208(a)(2), as amended by Act 240 of 2019 (final reports for candidates for school district, township, or municipal office); Ark. Code Ann. § 7-6-209(a)(2), as amended by Act 240 of 2019 (final reports for candidates for county office).
(d) Municipalities, counties and townships may establish reasonable limitations on time periods that candidates for local office shall be allowed to solicit contributions, limits on contributions to local candidates at amounts lower than those set by state law, and voluntary campaign expenditure limits for candidates seeking election to their respective governing bodies. Enforcement of any limitation established is the responsibility of the municipality, county, or township which established the limitation. *See* Ark. Code Ann. § 7-6-244, as amended by Act 240 of 2019.
(e)Within fifteen (15) calendar days after the end of each calendar quarter, county political party committees shall file a quarterly report with the Secretary of State containing certain information, including the total amount of contributions received and the total amount of contributions made during the reporting period and the cumulative amounts of those totals. *See* Ark. Code Ann. § 7-6-226(c)(1)(A), as amended by Act 240 of 2019.

(2) Act 341 of 2019, sponsored by Senator Jim Hendren, which increased the Arkansas Ethics Commission allowable fine range from $50-$2,000 per violation to $50-3,500 per violation. *See* Ark. Code Ann. § 7-6-218(b)(4)(B)(i), as amended by Act 341 of 2019.

(3) Act 545 of 2019, sponsored by Senator Trent Garner, which provides that, for years in which the offices of President of the United States will appear on the ballot at the general election, the filing period for running for public office shall be in the November preceding the election year ("beginning at 12:00 noon on the first Monday in November preceding the

general primary election and ending at 12:00 noon on the seventh day thereafter") and moves the primary election to March ("the first Tuesday after the first Monday in March"). This affects when the Statement of Financial Interest for candidates would be due and also affects the reporting schedule for Contributions & Expenses reports. *See* Ark. Code Ann. § 7-7-203(b)(2), Ark. Code. Ann. § 7-7-203(c)(1)(B), as amended by Act 545 of 2019.

(4) Act 845 of 2019, sponsored by Representative Stephen Meeks, which provides that the use of carryover funds to pay an elected candidate's own personal expenses for food, lodging, conference fees, or travel to attend a conference related to the performance of his or her responsibilities as an elected official: (i) Shall not be considered a taking of campaign funds as personal income; (ii) The reimbursement of expenses shall be a result of travel and the source of the reimbursement shall be authorized under the rules of the Arkansas House of Representatives or the Arkansas Senate and used to reimburse the carryover account; and (iii) The reimbursement amount shall be reported in the elected candidate's carryover fund report. See Ark. Code Ann. § 7-6-203(g)(4)(E), as amended by Act 845 of 2019.

(5) Act 879 of 2019, sponsored by Senator Will Bond, which increased the penalties for taking campaign and carryover funds as personal income. Candidates or officeholders may use campaign funds or carryover funds to fulfill any commitment, obligation, or expense authorized by law, or permitted by an Arkansas Ethics Commission rule or opinion at the time of the expenditure, or reasonably and legitimately related to a campaign or officeholder activity. *See* Ark. Code Ann. § 7-6-203(f)(4)(A), as amended by Act 879 of 2019. Taking campaign/carryover funds as personal income is still prohibited even after the former candidate lost the election or has left office. Knowingly taking campaign funds as personal income is a:

- Class B felony if the value of the benefit is twenty-five thousand dollars ($25,000) or more;
- Class C felony if five thousand dollars ($5,000) or more, but less than twenty five thousand dollars ($25,000);
- Class D felony if two thousand five hundred dollars ($2,500) or more, but less than five thousand dollars ($5,000); or
- Class A misdemeanor if less than two thousand five hundred dollars ($2,500).

It is an affirmative defense to a prosecution for taking campaign funds as personal income if the candidate or officeholder shows by a preponderance of the evidence that:
(A) If the personal property was retained as carryover funds, that the candidate or officeholder: (i) Reported the personal property as carryover funds; and (ii) Retained or disposed of the personal property in the manner that is required by law for carryover funds; or

(B) If the personal property was retained as surplus funds, that the candidate or officeholder: (i) Reported the personal property as surplus funds; and (ii) Retained or disposed of the personal property in the manner that is required by law for surplus funds. *See* Ark. Code Ann. §§ 7-6-203(f)(5), 7-6-203(f)(6), and 7-6-203(f)(7), as amended by Act 879 of 2019.

(6) Act 894 of 2019, sponsored by Senator Bart Hester, which prohibited a person convicted of a public trust crime from filing as a candidate for a constitutional office or from running as a candidate for a public office. "Constitutional office" means the offices of Governor, Lieutenant Governor, Auditor of State, Treasurer of State, Secretary of State, Commissioner of State Lands, the Attorney General, the General Assembly, Justice of the Supreme Court, Judge of the Court of Appeals, circuit judge, and district judge. *See* Ark. Code Ann. § 21-8-301(6), as amended by Act 894 of 2019. "Public trust crime" means a crime prohibited under Arkansas Constitution, Article 5, § 9. *See* Ark. Code Ann. § 21-8-301(7), as amended by Act 894 of 2019.

7. DEPARTMENT OF HEALTH, CENTER FOR HEALTH PROTECTION, INFECTIOUS DISEASE BRANCH (Ms. Laura Shue)

a. SUBJECT: Rules Pertaining to Communicable Disease – Tuberculosis

DESCRIPTION: The proposed revisions reflect the new Centers for Disease Control (CDC) guidelines for screening and testing health care workers for tuberculosis (TB), including removing annual testing. The proposed revisions also remove annual testing as a requirement for other low-risk groups, such as employees of correctional facilities, inmates within correctional facilities, employees of homeless shelters, and employees of child and adult day care centers. Revisions include:

- Adding language allowing persons without documented prior TB exposure or latent TB infection (LTBI) to undergo an interferon-gamma release assay (IGRA) blood test as an alternative to a tuberculin skin test (TST);
- Removing the requirement for yearly TB testing after baseline and adding language indicating no routine follow-up testing is required in the absence of a known exposure or ongoing transmission;
- Requiring compliance with CDC guidelines on annual symptom screening for health care personnel with untreated LTBI and annual TB education of all health care personnel.

PUBLIC COMMENT: The public comment period expired on September 30, 2019. A public hearing was held on October 8, 2019. The agency indicated that it received no public comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that this amended rule does not have a financial impact and will, in fact, decrease costs to healthcare institutions, state government, and county government by reducing the materials and time expended on TB testing.

LEGAL AUTHORIZATION: The State Board of Health has authority to promulgate "all reasonable and necessary rules" to suppress, prevent, quarantine, and control communicable diseases within the state. *See* Ark. Code Ann. § 20-7-109(a)(1)(C). The Board also has the authority to promulgate rules necessary to protect public health and safety. *See* Ark. Code Ann. § 20-7-109(a)(1)(A). Finally, the Board has authority to promulgate rules that are necessary to enforce "quarantine, isolation, and control of such diseases[.]" *See* Ark. Code Ann. § 20-7-109(D). Tuberculosis is a communicable disease within the meaning of the statute. *See* Ark. Code Ann. § 20-15-701.

8. DEPARTMENT OF HEALTH, CENTER FOR LOCAL PUBLIC HEALTH (Ms. Laura Shue)

a. SUBJECT: Rules Pertaining to Body Art Establishments

DESCRIPTION: The Department has amended the rules as follows:

- Updated rules to reflect requirements of Act 315 of 2019;
- Added Section 4.7, pertaining to artist training requirements, to implement Act 910 of 2019;
- Added Section 5.3.4, Veterans Licensure, to implement Act 820 of 2019;
- Added sections pertaining to reciprocity and temporary and provisional licenses, implementing Act 426 of 2019;

PUBLIC COMMENT: The public comment period on this rule expired on October 4, 2019. A public hearing was also held on October 4, 2019. The agency provided the following summary of the public comments it received:

Commenter's Name: Simon Garcia

COMMENT #1: Mr. Garcia asked if with the addition of criminal background checks, felons would still be allowed to tattoo. **RESPONSE:** The language concerning prohibiting offenses are in direct response to the requirements of Act 990 of 2019. An individual will not be eligible to receive or hold a license issued by the Department if that individual has pleaded guilty or nolo contendere or been found guilty of any of the offenses detailed in Ark. Code Ann. § 17-1-108. However, the Department may grant a waiver as authorized by Ark. Code Ann. § 17-2-102 in certain circumstances. Act 990 allows an individual to have the Department render a pre-application opinion regarding criminal convictions. No changes will be made to sections 5.3.8 or 5.3.9.

[Per the agency, sections 5.3.8 and 5.3.9 were subsequently removed after executive branch attorneys reached a consensus about Act 990's applicability and concluded that the Act does not apply to Title 20 occupations.]

COMMENT #2: Mr. Garcia asked for clarification on the changes affecting Military personal and their spouses in regard to licensure. **RESPONSE:** The Rule is being changed in response to Act 820 of 2019, which requires automatic or expedited licensure for Military service members and/or their spouses. Military members and their spouses will receive a license upon the Department's receipt of (1) payment of the initial licensure fee, (2) Evidence that the individual holds a substantially equivalent license in another state, and (3) Evidence that the applicant is a qualified applicant under 5.3.4. of this rule. No changes will be made to section 5.3.4.

Commenter's Name: Jay Little

COMMENT #1: Mr. Little asked if the Department of Health decides how to regulate the Body Art profession, and if this Public Hearing was the time or place for general concerns regarding the Body Art Rules.

RESPONSE: The October 4th Public Hearing was only for receiving comments that related to the changes being made to the Rules Pertaining to Body Art Establishments. General comments concerning the Body Art rules were not appropriate at that time. Attendees were informed at the Public Hearing that the Department intended to organize an additional meeting to interact with those who wished to discuss concerns regarding the Body Art profession outside the scope of the Public Hearing.

On December 9th, 2019, ADH held a meeting to clarify the questions and concerns of the Body Art Schools and Body Artists who attended the public hearing of October 4th, 2019. All Body Art Trainers/School

Operators in the State were invited, as well as the Artists who attended the public hearing.

The stated goals of the meeting were to accept any information and questions the regulated community expressed or requested, provide additional explanation of the rule updates required by the Acts of the 2019 General Assembly, and to ask for assistance and input with developing curriculum for Body Art Training Schools as required by Act 910 of 2019.

Twenty-one Artists attend the meeting along with Department Environmental and Legal Staff. The attendee's concerns that are within the parameters of ADH authority were addressed. Several artists/school trainers were identified to assist with ongoing development of the curriculum for body art schools.

COMMENT #2: Mr. Little asked if the Rules Pertaining to Body Art Establishments have already changed. **RESPONSE:** The Rules Pertaining to Body Art Establishments have not been changed. The 2016 Rules Pertaining to Body Art Establishments are still currently what the Department is enforcing. The Proposed Amendments to the Rule have not completed the promulgation process.

COMMENT #3: Mr. Little asked if wordage in section 4.7.1 meant that the Department intended to start its own [body art] school. **RESPONSE:** The wording in section 4.7.1 comes directly from Ark. Code Ann. § 20-27-1507. It requires that the school an artist in training attends is licensed by the Department – not run by the Department.

Commenter's Name: Micaela Stephens

Comment: Ms. Stephens stated that she has an issue with the requirement of an "apprentice sponsor" having to be licensed in Arkansas for 5 years. **RESPONSE:** ADH took Ms. Stephens comment on October 4th and on December 9th, 2019, further discussed Ms. Stephens' objections. ADH stated that they would continue to review this requirement among others, but no change would be made to 4.3.7 at this time.

Commenter's Name: Sherry Atkins

COMMENT: Ms. Atkins commented that she has information and copies of the Rules and Regulations from when Body Art was regulated by the Department of Higher Education, and wished to share it with the Department. **RESPONSE:** The Department accepted and copied the information Ms. Atkins offered during the December 9th meeting mentioned in Response #3. The Rules given to us by Ms. Atkins are not applicable to ADH as a result of Act 910 of 2019.

Commenter's Name: Derek Canessa

COMMENT: Mr. Canessa commented that he believed the requirements for a school to be licensed, and the requirements for an artist in training were too vague. **RESPONSE:** The Department believes the language meets the text and intent of Ark. Code Ann. § 20-27-1507 and no changes will be made at this time.

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

1. The completed questionnaire lists a proposed effective date of April 2020. Is that meant to be April 1, 2020? **RESPONSE:** Yes.

2. Section 4.7.1.8 has a citation to the Arkansas Code that should read "§ 20-27-1508" rather than "§ 20-27-32 1508.". Section 4.7.1.9 duplicates the word "department." **RESPONSE:** Agreed. Both are typos. Corrected.

3. Section 5.3.4.2 states that the Department shall grant automatic licensure "upon receipt of all of the below." It then lists categories of people who may apply for automatic licensure. What is the Department supposed to receive under this section? **RESPONSE:** This was the result of a cut and paste typo. Corrected version attached.

4. Is an applicant under § 5.3.4.3 who holds a substantially equivalent license in another state required to show that he or she is in good standing with the licensing board of that other state?

RESPONSE: No. The person is not required to provide documentation such as a certificate of good standing or the like. Such a requirement is not a part of the agreed upon model language being utilized by the executive agencies.

It may be that good standing is presumed under 5.3.4.3.2. It may be to reduce paperwork burden since the military licensees are few in number and good standing could usually be ascertained by a phone call to appropriate licensing authorities in other states. This would be consistent with the General Assembly's clear intent is to ease burden red tape burden's on otherwise qualified military personnel. This is all speculation on my part.

5. There seems to be a word missing in § 5.3.4.2.2. Additionally, § 5.3.4.3 should read "upon receipt" instead of "upton recipt."
RESPONSE: The missing word was her – fixed. Typo/Omissions fixed.

6. Are the provisions of § 5.3.5 intended to apply solely to current and former military personnel and their spouses, as implied by the reference to § 5.3.4.1? **RESPONSE:** It was meant to apply to any person holding a substantially similar or equivalent license in compliance with Act 1011. I have added clarification language to reference Act 1011

7. Section 5.3.5.1 references § 5.2.4.2. However, § 5.2.4.2 does not exist. What is the correct cross-reference here? What is "the documentation required" under that section and § 5.3.4.1? **RESPONSE:** I believe this a cut and paste error from another rule set that slipped through into the final draft. I have corrected it.

8. What is meant by "the rest of the documentation required above" in § 5.3.5.3? **RESPONSE:** That was meant to reference 4.4. I have corrected for clarity.

9. Where does the procedure detailed in § 5.3.9.2 through 5.3.9.7 come from? **RESPONSE:** This was based on Act 990 which does not apply to Title 20 Occupations. This was an error that was caught on two other ADH programs in late September/Early October, but obviously slipped through on this program. Originally there was some confusion among executive branch attorneys concerning Red Tape Reduction Act interpretation as it relates to occupations in Title 20. Once a consensus was reached that all Red tape Reduction Acts in addition to Title 17, apply to Title 20 Occupations **except for Act 990,** ADH amended its drafts. This one slipped through since it was one of the earliest to go through our internal rules procedures. I have amended corrected it and deleted the language. I also have deleted the prohibiting offenses language in 5.3.8 which was also based on Act 990 Model Language.

10. Is there specific statutory authority for the proposition that the Department's decision on a pre-licensure criminal background check petition is not subject to appeal? **RESPONSE:** See item 9 response.

The proposed effective date is April 1, 2020.

FINANCIAL IMPACT: Per the agency, the proposed rule has no financial impact.

LEGAL AUTHORIZATION: The Department of Health has the authority to license, regulate, and promulgate rules related to body art establishments. *See* Ark. Code Ann. § 20-27-1503(a)(1), (b)(1). Act 910 of 2019 gave the Department the authority to license and regulate body art trainers and training facilities. Act 426 of 2019, sponsored by Representative Bruce Cozart, authorized licensing entities, including the

Department, to grant temporary or provisional occupational licenses. The Act also required those entities to adopt "the least restrictive" rules allowing reciprocity and temporary or provisional licenses for certain individuals. *See* Ark. Code Ann. § 17-1-108(b), (c)(3). Act 820 of 2019, sponsored by Senator Missy Irvin, required occupational licensing entities to automatically grant licenses to certain veterans.

9. DEPARTMENT OF HEALTH, ENGINEERING SECTION (Ms. Laura Shue)

a. SUBJECT: Rules Pertaining to Public Water Systems

DESCRIPTION: The Engineering Section of the Arkansas Department of Health is proposing the following changes to its Rules Pertaining to Public Water Systems:

- Section VII.G Approved Chemicals, Materials, Equipment, and Processes: Modify language so that, for very small water systems, product standards equal to ANSI/NSF 60 or 61 can be used for selecting equipment if those equivalent standards are issued by the Food and Drug Administration or ANSI/NSF. In plain language, this means that certifications intended for residential use and sized products can be referenced when the very small water systems need to select equipment of a similar small size.
- Section XI.H Cleaning and Disinfection: Update the referenced American Water Works Association (AWWA) Standard C652-92 to refer to the most recent version of the standard, which is C652-11. This AWWA standard governs the disinfection of drinking water storage tanks prior to placing such a tank into service.
- Section XIV.E Disinfection of Pipe:
  - Update the referenced AWWA Standard C651-92 to refer to the most recent version of the standard, which is C651-14.
  - Strike the language concerning collection of bacteriological samples "that are not collected on the same day" and add the language "and bacteriological sampling" so that the requirements of this section are not in conflict with the requirements of AWWA Standard C651-14. In plain language, the latest revision of this standard allows for two options concerning bacteriological sampling, one of which allows for collection of bacteriological samples on the same day. The proposed changes would allow for use of either option.
- Section XXV Annual Fees: In accordance with Act 788 of 2019, update the indicated public water system service fee from $0.30/month per service connection to $0.40/month per service connection.
- Adjust page numbers as needed.

- In accordance with Act 315 of 2019, replace the word "regulations" with the word "rules" and, in Section IV.A, replace "Arkansas Department of Health and Human Services" with "Arkansas Department of Health."

PUBLIC COMMENT: A public hearing was held on this rule on September 26, 2019. The public comment period expired on October 14, 2019. The agency indicated that it received no comments.

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

QUESTION #1: Are these rules being promulgated by the Board of Health in any capacity? **RESPONSE:** On August 1, 2019, the Board of Health approved the department's request to begin this process for revising these rules with regards to these changes.

QUESTION #2: Is there a state or federal statute requiring or suggesting reliance on ANSI/NSF and AWWA standards? If not, could you explain why the Department uses these standards? **RESPONSE:** I am not aware of federal law requiring a state to rely upon NSF (National Sanitation Foundation) standards or AWWA (American Water Works Standards). However, almost all states do rely upon these national standards to ensure that safe chemicals, materials, and procedures are utilized. These standards are comparable to any number of other national standards that are utilized to ensure the public safety. These standards are developed with the input from scientific experts and various stakeholders to ensure that sensible standards are developed that protect the public.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: Per the agency, every entity, residence, or business with a water service meter will be charged an additional $0.10 per month. The Department of Health does not anticipate any additional financial burden on state, county, and municipal government as a result of the changes. It intends to use the additional income to provide laboratory services to approximately 1000 public water systems to ensure all water systems are monitored for compliance with the federal Safe Drinking Water Act. The agency believes that utilizing the single public health laboratory will promote efficiency so that the benefits of the increased fees outweigh the costs.

LEGAL AUTHORIZATION: Some of the proposed changes implement Act 788 of 2019, sponsored by Representative Dan Douglas, which allowed the Department of Health and the State Board of Health to establish and collect fees of up to $0.40 per service connection per month

from community public water systems and nontransient nonpublic water systems. The State Board of Health has the authority "to make all necessary and reasonable rules of a general nature" to promote public health and safety, sanitation, and disease suppression. *See* Ark. Code Ann. § 20-7-109.

10. <u>DEPARTMENT OF HUMAN SERVICES, DIVISION OF MEDICAL SERVICES (DMS)</u> (Mr. Mark White, Ms. Janet Mann, item a; Mr. David Sterling, Mr. Jim Brader, Mr. Mark White, Ms. Tammera Harrelson, item b)

a. <u>SUBJECT</u>: ARKids First-B-2-19, Certified Nurse Midwife-1-18, Early and Periodic Screening, Diagnosis, and Treatment (EPSDT)-1-19, Dental-1-18, Nurse Practitioner-3-18, Pharmacy 1-19, and Physician-3-18

<u>DESCRIPTION</u>: The rule revisions are being made to comply with Acts 651, 652, and 959 of 2019 and to add informational language concerning the availability of tobacco cessation counseling as follows:

- ARKids First-B: Section 222.750 is revised to include a new section containing health education.
- Certified Nurse-Midwife: Pursuant to Act 959, section 272.452 is revised to reflect that coverage of tobacco cessation products either prescribed or initiated through statewide pharmacist protocol does not require prior authorization. Revisions also include new billing information for Tobacco Cessation counseling services.
- Child Health Services/Early and Periodic Screening, Diagnosis, and Treatment: Sections 215.290 and 252.100 are revised to include counseling visits concerning tobacco cessation.
- Dental: Pursuant to Act 959, section 214.100 is revised to reflect that coverage of tobacco cessation products either prescribed or initiated through statewide pharmacist protocol does not require prior authorization. Pursuant to Acts 651 and 959, revisions also reflect increased product coverage and the full scope of available coverage and new billing information for Tobacco Cessation counseling services.
- Nurse Practitioner: Pursuant to Act 959, section 252.454 is revised to reflect that coverage of tobacco cessation products either prescribed or initiated through statewide pharmacist protocol does not require prior authorization. Revisions also include new billing information for Tobacco Cessation counseling services.
- Pharmacy:
  - Pursuant to Act 652, sections 201.100 and 211.000 are revised to reflect the new protocol for reimbursement and coverage of vaccines and

immunizations for beneficiaries age seven (7) years of age to age eighteen (18) years of age.

- Pursuant to Act 959, section 241.000 is revised to reflect that coverage of tobacco cessation products either prescribed or initiated through statewide pharmacist protocol does not require prior authorization. Pursuant to Acts 651 and 959, revisions also reflect increased product coverage and the full scope of available coverage.

- Physician/Independent Lab/CRNA/Radiation Therapy Center:
  - Pursuant to Act 959, section 257.000 is revised to reflect that coverage of tobacco cessation products either prescribed or initiated through statewide pharmacist protocol does not require prior authorization. Pursuant to Acts 651 and 959, revisions also reflect increased product coverage and the full scope of available coverage and new billing information for Tobacco Cessation counseling services.
  - Pursuant to Act 959, section 292.900 is revised to reflect that coverage of tobacco cessation products either prescribed or initiated through statewide pharmacist protocol does not require prior authorization. Revisions also include the exempt procedure codes from PCP referral for Tobacco Cessation.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on November 25, 2019. The agency indicated that it received no public comments.

Per the agency, this rule does not require CMS approval.

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

QUESTION #1: The proposed revisions allow children under 18 to receive tobacco cessation counseling if a parent or guardian smokes. Is this required by statute or was it a policy decision? **RESPONSE:** This was a policy decision.

[At the Public Health, Welfare, and Labor Committee meeting on January 6, 2020, the agency clarified that the referenced section of the proposed rules allows the *parents* of children under 18 to receive tobacco cessation counseling, which may then be billed under the minor's beneficiary number. The agency indicated that children under 18 can receive such counseling regardless of whether their parents smoke. The agency also clarified that it understands "smoking," as it is used in the proposed rules, to include vaping.]

QUESTION #2: In light of Ark. Code Ann. § 17-92-101(17)(A)(i)(c) and (e), why do the proposed rules require prescription orders for vaccines and immunizations given to adults 19 years of age and older? I am specifically

referring to the Pharmacy provider manual, section 211.000 (the last sentence in the paragraph directly following the discussion of over-the-counter items). **RESPONSE:** Thank you for catching that. DHS is removing the referenced phrase from the manual.

The proposed effective date is February 1, 2020.

FINANCIAL IMPACT: The agency stated that this rule will have no financial impact.

LEGAL AUTHORIZATION: The Department of Human Services has the authority to administer and maintain Arkansas Medicaid. *See* Ark. Code Ann. § 20-77-107. These rules implement Acts 651, 652, and 959 of 2019. Act 651, sponsored by Representative Les Eaves, authorizes physicians and pharmacists to initiate therapy and administer or dispense nicotine replacement therapy products. Act 652, sponsored by Representative Jimmy Gazaway, allows children between the ages of seven and eighteen, with parental consent, to be vaccinated or immunized pursuant to a general written protocol rather than patient-specific orders. Act 959, sponsored by Representative Andrew Collins, requires Arkansas Medicaid to cover FDA-approved tobacco cessation medications and allows physicians and pharmacists to provide these products to eligible Medicaid beneficiaries without prior authorization.

b. SUBJECT: DHS Policy 1088 – Participant Exclusion Rule

DESCRIPTION: DHS Policy 1088, Participant Exclusion Rule, is being revised to:

- Clarify that the Office of Medicaid Inspector General (OMIG) is an entity that may exclude Medicaid providers pursuant to Ark. Code Ann. § 20-77-2506;
- Clarify the procedure for adding an individual or organization to the excluded participant list and the duration of the exclusion;
- Clarify the circumstances that may result in mandatory and discretionary exclusions;
- Add language to implement Acts 2019, No. 951, which provides that an individual working as a peer support specialist may not be excluded from participation in the Arkansas Medicaid Program if the exclusion was based on a criminal background check under certain circumstances, including that the individual obtains certification in peer recovery and the criminal offense does not involve violence or a sexual act;
- Rearrange and renumber sections so that the rule is set out in a more logical order;
- Make general revisions to the language for clarity.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired November 29, 2019. The agency reported that it received no public comments.

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

QUESTION 1: Is there specific statutory authority for the new or altered definitions of the following words? If there is not statutory authority, where did the definitions come from?

- Exclusion
- Expungement
- Participant
- Related party

RESPONSE: DHS agency discretion and authority requires it to only conduct business with responsible participants to protect public funds, the integrity of publicly funded programs, and public confidence in those programs, including updates to comply with Act 951 of 2019. Also, DHS clarified that OMIG is an entity that may exclude Medicaid providers under Ark. Code Ann. § 20-77-2506.

In updating and clarifying the rule, DHS in its agency discretion has chosen to define the terms above. 42 C.F.R. 1002.210 (referencing 42 C.F.R. 1001 and 1003) is applicable to define administrative procedures to exclude individuals or entities for period of exclusion as determined by the State agency. Also, expungement has statutory authority in Ark. Code Ann. § 16-93-301 although that code section substituted the word "sealing" for expungement in 2013. DHS has chosen to retain use of the term expungement but has referenced the 2013 Act in the definition.

QUESTION 2: Is there statutory authority for the child pornography conviction exclusions in §§ 1088.4(a)(1)(H) and 1088.5(21), or are these just based on a policy decision? **RESPONSE:** Yes. Ark. Code Ann. § 12-12-927.

QUESTION 3: What is the authority for the new discretionary exclusion based on a true or substantiated finding that the provider violated the Arkansas Child Maltreatment Act or the Adult and Long-Term Care Facility Resident Maltreatment Act (in § 1088.5)? **RESPONSE:** 42 C.F.R. 1002.210 (referencing 42 C.F.R. 1001 and 1003), along with agency discretion as described above.

Per the agency, this rule does not require CMS approval.

The proposed effective date is February 1, 2020.

FINANCIAL IMPACT: The agency stated that this rule has no financial impact.

LEGAL AUTHORIZATION: The proposed rules implement Act 951 of 2019, sponsored by Representative Laurie Rushing, which prohibited the Department of Human Services from excluding individuals from participation in the Arkansas Medicaid Program based on a criminal background check under certain circumstances. The Department has specific authority to establish and maintain Arkansas Medicaid, as well as general authority to administer public assistance programs and promulgate rules as "necessary or desirable" to administer these programs. *See* Ark. Code Ann. §§ 20-76-201(1), (12), 20-77-107.

In addition, the Department may promulgate rules as necessary for Arkansas Medicaid to comply with federal law and receive federal funding. *See* Ark. Code Ann. §§ 20-10-129(b). Federal law requires states to implement administrative procedures for state-initiated Medicaid exclusions. *See* 42 C.F.R. § 1002.210. OMIG is responsible for pursuing exclusion of medical providers from the Arkansas Medicaid Program and for implementing rules within the Program to prevent fraud. *See* Ark. Code Ann. § 20-77-2506(6)(A)(iv), (21).

11. DEPARTMENT OF HUMAN SERVICES, DIVISION OF COUNTY OPERATIONS (Mr. Mark White, Ms. Mary Franklin)

a. SUBJECT: Supplemental Nutrition Assistance Program Eligibility (SNAP) Child Support Cooperation

DESCRIPTION:

Statement of Necessity
Acts 2019, No. 1043 requires custodial and non-custodial parents to cooperate with the Office of Child Support Enforcement (OCSE) as a condition of eligibility for the Supplemental Nutrition Assistance Program (SNAP). It is necessary for the Department of Human Services (DHS) to amend the SNAP Certification Manual to implement this Act.

Summary
Effective February 1, 2020, SNAP Eligibility will be amended as follows:

- To implement Acts 2019, No. 1043, as a condition of eligibility, custodial parents that apply for SNAP must cooperate with child support enforcement to gain support for custodial children. If a client does not

cooperate they may not participate but their children can continue to receive benefits.

- To implement Acts 2019, No. 1043, non-custodial parents must also comply with child support enforcement. If they refuse to comply or become non-compliant according to Office of Child Support Enforcement policy, then they will be ineligible to receive benefits. Any remaining household member would continue to be eligible.
- The rule has been revised by removing business processes to clarify program requirements.
- Alternate Service County policy has been deleted to align with Transitional Employment Assistance and Medicaid policy.
- General language and grammar corrections have been made to simplify policy, making the manual more user-friendly.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on November 30, 2019. The agency provided the following public comment summary:

Commenter's Names: Lee Richardson, Kevin De Liban, and Blane Swain for Legal Aid of Arkansas

COMMENT: Legal Aid of Arkansas writes to offer comment on the set of proposed rules issued on 11/1/19 pertaining to new provisions of SNAP policy that would penalize recipients based on the status of child support. *See* Proposed SNAP Policy Manual 1623.3 *et seq.*

Legal Aid serves thousands of low-income Arkansans every year and is intimately familiar with the pressures that poverty places on our clients' lives. In light of this and all available data, the proposed rules would likely harm our client communities by depriving low-income Arkansans of financial support needed to avoid hunger and promote economic well-being.

RESPONSE: Comment considered.

SNAP is a supplemental program; our clients are aware that their benefits are meant to supplement their income. SNAP does not require recoupment of benefits from child support, therefore, the eventual receipt of child support payments will aid families in meeting the needs of their children. This additional income will have a positive impact on the local economy. The proposed rule may have a small negative impact on the household if the adult fails to cooperate with the requirement. However, the remaining household members included in the SNAP case will continue to receive benefits based on the eligibility of the remaining members. We expect that our clients will cooperate with the requirement.

As long as the custodial or non-custodial parent meet OCSE criteria for cooperation, they will retain eligibility and benefits. Cooperation with OCSE is not strictly defined as paying child support, therefore the non-custodial parent's income may not be an immediate factor. The SNAP Works program is available to aid those parents (custodial and non-custodial) who are in need of job skills and employment. OCSE will ensure both parents are aware and understand what the definition of cooperation means for their case. It is vital that both parents maintain contact with OCSE to ensure the standards for cooperation are being met. This contact is critical for parents who maintain an informal agreement for the care and maintenance of their children. SNAP rules have always taken the informal agreements between parents into account when calculating benefits for these households. OCSE's role will be the formalization of those agreements, this will protect the children. Our clients have always understood that we must follow federal regulations have always been willing to meet the requirements once the rules are explained. We understand there will be an adjustment period for all involved but once that has passed, just as with the work requirement, custodial and non-custodial parents will do what needs to be done in order to maintain the health and security of their children.

COMMENT: The proposed rule is likely to harm low-income Arkansans.

As a starting point, it is important to note that **all SNAP funds come from the federal government and do not draw from state budget sources**. As such, SNAP provides an opportunity for the state to leverage federal dollars to benefit local economies, particularly in struggling areas. The USDA's Economic Research Service recently estimated that every $1.00 of additional SNAP spending boosts the economy by $1.54.1 SNAP funds are spent in a variety of locations, including supermarkets, convenience stores, and smaller specialty stores. Over 2,800 Arkansas retailers accept SNAP benefits.2 Thus, any threat to SNAP eligibility harms not only the recipient, but also the ecosystem of retailers and food suppliers that benefit from SNAP spending.

Indeed, the proposed rule threatens to strip SNAP benefits from individuals currently eligible upon determining that they are not cooperating with the Office of Child Support Enforcement. **Such cooperation is not required by federal law. Requiring cooperation threatens to harm low-income Arkansans without any substantial justification.** First, anyone eligible for SNAP already has severely limited income. For custodial parents, cutting off SNAP eligibility will allow the terminated parents even fewer resources to support their children. At the same time, cooperation is not likely to increase financial resources. Non-custodial parents may be unable to pay any child support. Or, if the non-custodial parent is able to pay, the child support is not likely to directly

benefit the children or custodial parent, as Arkansas seizes child support payments as reimbursement for certain public benefits paid on the recipient's behalf (Arkansas does not allow child support to "pass through" to the recipient). In the case of non-custodial parents, terminating SNAP in the case of non-payment or arrearages means that it is less likely that child support will be paid, as the non-custodial parent will have even fewer resources available to support themselves, meaning that fewer resources will be available to support others.

Second, the requirement fails to recognize—and threatens to upset—informal arrangements between custodial and non-custodial parents. Certainly, all custodial parents should have the option to pursue child support from the non-custodial parent. However, some custodial parents recognize that the formal child support system does not provide the flexibility needed by non-custodial parents in low-wage work. The parents may have worked out a child support arrangement that flexibly responds to the various pressures facing the individuals implicated, such as seasonal employment, family emergencies, or unexpected expenses. Now, the state would interfere with that essential relationship and force the parties into arrangements that neither party wants.

Third, the requirement threatens domestic violence survivors. Seeking child support from domestic violence abusers will often provoke more abuse, either through direct contact (with associated risks of more physical violence), emotionally abusive or manipulative responses, campaigns to smear the survivor's reputation, or initiation of retaliatory court actions seeking custody of the child. For reasons discussed below, the good cause exemption will not protect domestic violence survivors.

Fourth, the requirement fails to account for the realities of kinship caregiving relationships. The proposed rule states that "cooperation with the OCSE by a *parent or guardian* is required…" Proposed SNAP Policy Manual 1623.3.1 (emphasis included). As written, this language could be used by local workers to deny SNAP benefits to non-parent family members who take care of a child. As a starting point, the extension of the cooperation requirement to guardians or kinship caregivers is not contemplated by the authorizing legislation. *See* Ark. Code Ann. § 20-76-117 ("The Department of Human Services shall require a custodial parent or noncustodial parent to cooperate."). Apart from being illegal, extension of cooperation requirements to kinship does not make sense. The non-parent family member has less access to information than a parent would have. Additionally, the non-parent family member who seeks child support could provoke the non-custodial parent to initiate retaliatory court actions or otherwise disrupt the stability of the children. Given these considerations, any obligation to cooperate on kinship caregivers seems inappropriate. Indeed, the requirement to seek child support or forego

SNAP could dissuade non-parent family members from taking care of children, potentially increasing the strain on the state's foster care system, or force these kinship caregivers with limited financial resources into deeper economic strain, resulting in adverse impacts to themselves, their families, and the children in their care.

RESPONSE: Comments considered and accepted in part.

Speaking generally, the comment points out that the cooperation rule is not a requirement of federal law. It is, however, *authorized* under federal law and, as codified at Ark. Code Ann. § 20-76-117, does become a requirement DHS must follow.

More specifically, the comment regarding domestic violence survivors has been taken into account and is addressed more fully below under the response to the good cause exception specific comment.

In regard to the kinship caregivers comment, this comment is considered and accepted.

Although the federal regulation allows, at the State agency's election, application of the cooperation rule to kinship caregivers, the Arkansas statute does not, by its explicit terms, expand the cooperation rule beyond the "custodial parent or noncustodial parent," Ark. Code Ann. § 20-76-117.

DHS will revise its proposed rule to limit the application of the cooperation rule only to the biological or adoptive parent and will not apply a cooperation requirement to kinship caregivers or legal guardians.

COMMENT: In addition to the harm to recipients, the proposed rule will be difficult and expensive for state agencies to administer.

Although no state dollars are used to fund SNAP benefits, state dollars will be used to pay for the time of staff from the Office of Child Support Enforcement and DHS involved in making the required determinations. In addition, every determination carries due process rights, meaning that personnel from both OCSE and DHS will be required to process additional paperwork and to participate in fair hearings. Systems to exchange data between the agencies will have to be built or expanded, leading to increased immediate costs and the possibility of further complications due to technical system issues.

For these reasons, only eight states other than Arkansas have implemented any sort of requirement for child support cooperation. DHS should reconsider implementation of such a rule.

RESPONSE: Comment considered.

DHS does not anticipate that implementation and administration of the proposed rule will prove overly burdensome. This position is consistent with the financial impact statement DHS submitted during the legislative session in response to the then proposed legislation, House Bill 1731.

COMMENT: The good cause exception is not sufficient as written. The concerns raised above are serious enough to warrant DHS abandoning the proposed rule. However, if DHS does implement the proposed rule, it should consider revisions to the good cause provisions.

First, DHS should make explicit provision for domestic violence, as the relevant federal regulation requires. 7 C.F.R. § 273.11(o)(2)(i)(B) states:

> The individual's failure to cooperate is deemed to be for "good cause" if . . . cooperating with the State Child Support Agency would make it more difficult for the individual to escape domestic violence or unfairly penalize the individual who is or has been victimized by such violence, or the individual who is at risk of further domestic violence. For purposes of this provision, the term "domestic violence" means the individual or child would be subject to physical acts that result in, or are threatened to result in, physical injury to the individual; sexual abuse; sexual activity involving a dependent child; being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities; threats of, or attempts at physical or sexual abuse; mental abuse; or neglect or deprivation of medical care.

In addition to incorporating this language, DHS should consider the dynamics of domestic violence and acknowledge that not all violence is reported. To this end, DHS should consider adding a specific provision that states "police reports, court papers, medical records, other written documentation, or photos are NOT required to establish good cause on the basis of domestic violence." DHS should consider a provision clarifying that attestation by the recipient is sufficient.

Second, DHS should consider adding a non-exhaustive list of additional example situations illustrating good cause for not cooperating, including (but not limited to) the following: being unemployed, being homeless, changing residence within the last three months, being in substance use treatment, having serious medical conditions, lacking transportation, lacking childcare, incarceration of the non-custodial parent, or having knowledge that the non-custodial parent is unlikely to pay child support (due to unemployment or disability). Establishing good cause in such

situations would free custodial parents from the cooperation requirement in situations where the parent is likely unable to cooperate or where cooperation would bring no benefit to the parent or child.

Third, the rule should make it clear that a non-custodial parent cannot be disqualified from SNAP for not paying arrearages unless DHS and/or OCSE determine that the parent has the ability to pay and does not have good cause for not paying.

RESPONSE: Comment considered and accepted in part.

As Legal Aid notes regarding exceptions for good cause, 7 C.F.R. § 273.11(o)(2)(i)(B**)** reads:

> Cooperating with the State Child Support Agency would make it more difficult for the individual to escape domestic violence or unfairly penalize the individual who is or has been victimized by such violence, or the individual who is at risk of further domestic violence. For purposes of this provision, the term "domestic violence" means the individual or child would be subject to physical acts that result in, or are threatened to result in, physical injury to the individual; sexual abuse; sexual activity involving a dependent child; being forced as the caretaker relative of a dependent child to engage in nonconsensual sexual acts or activities; threats of, or attempts at physical or sexual abuse; mental abuse; or neglect or deprivation of medical care.

Upon consideration of this provision, DHS has determined that the proposed rule shall be revised.

As to proof for good cause exception claims, the proposed rule follows the language of federal regulation. That provision of 7 C.F.R. § 273.11(o)(2)(ii) reads:

> (A)The State agency will accept as corroborative evidence the same evidence required by Part A of Title IV or Part D of Title IV of the Social Security Act *(42 U.S.C. 601*, et seq. or *42 U.S.C. 651*, et seq.) to corroborate a claim of good cause.
>
> (B)The State agency will make a good cause determination based on the corroborative evidence supplied by the individual only after it has examined the evidence and found that it actually verifies the good cause claim.

DHS will continue to require corroborative evidence consistent with the federal regulation, as opposed to attestation by the claimant.

COMMENT: Legal Aid appreciates the opportunity to offer these comments and would be happy to offer suggestions for any revisions to the proposed rule that DHS may make.

RESPONSE: Likewise, DHS appreciates the comments made by Legal Aid and the opportunity for consideration of these comments made during this rule promulgation process.

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

QUESTION 1: Could you briefly explain the change or changes in Transitional Employment Assistance and Medicaid policies that led to deletion of the Alternate Service County policy from the manual? **RESPONSE:** Transitional Employment Assistance and Medicaid policies do not have a rule stating that an individual has to receive services in the county in which they live. Currently an individual applying for TEA and Medicaid can receive benefits in any county not just the county of residence. The county office that is used can be the one most convenient for them. SNAP was the only policy that had the rule of having to receive SNAP in the county of residence. This is process is being updated for all 3 policies to be consistent. This is also a step in moving forward in getting ready for the new eligibility system as it is an integrated system and a universal caseload will be used in the future and county of residency will no longer be a factor. Medicaid is already currently working in a universal caseload status with the MAGI Medicaid Programs.

QUESTION 2: What is the practical effect of removing business processes from the manual? Does DHS still follow these processes and, if so, are they now informal processes or are they duplicated in another rule somewhere? **RESPONSE:** The business processes are informal processes that DHS follows and are not duplicated in any other manual. The policy manuals for the different eligibility policies will have only the rules that are developed from federal and state regulations. The business process manual will be for all of the business processes to make it more readily available for DHS staff.

QUESTION 3: Section 1620(6) requires caretakers to cooperate with OCSE, and § 1623.3.1 requires OCSE cooperation from guardians. Act 1043 only mentions parents. What is the authority for extending the cooperation requirements to guardians and caretakers? **RESPONSE:** 7 CFR 273.11(o) defines custodial parent as a natural or adoptive parent who lives with his or her child, or other individual who is living with and exercises parental control over a child under the age of 18.

QUESTION 4: Is the first sentence of § 1621.2 new or just underlined? It's hard to tell on the grayscale markup copy. **RESPONSE:** The first sentence is underlined for emphasis.

QUESTION 5: Where does the "good cause" exception repeated throughout § 1623.3 come from? Why does it only apply to custodial parents? **RESPONSE:** The federal regulations provide provisions for the custodian to claim "good cause" for non-cooperation but does not make the same provision for non-custodial parents. As to custodial parents, the "good cause" provision appears at 7 CFR 273.11 (o)(2). In regard to the non-custodial parent, 7 CFR 273.11 (q)(2)(iii) provides "good cause" for non-support, not non-cooperation.

QUESTION 6: Act 1043 appears to make OSCE cooperation mandatory for SNAP eligibility. Why does § 1623.3 say parents "may" be denied SNAP benefits if they fail to cooperate with OCSE? **RESPONSE:** In 1623.3, the word "may" was changed to "will" in three instances to make the cooperation mandatory.

QUESTION 7: What is the statutory basis for DHS's authority to define cooperation with OCSE, as seen in § 1623.3.1? **RESPONSE:** 7 CFR 273.11.

QUESTION 8: Which agency is meant by "The State Agency" in § 1623.3.2? **RESPONSE:** The Department of Human Services.

QUESTION 9: Where does the "best interests of the child" exception in § 1623.3.2 come from? **RESPONSE:** 7 CFR 273.11(o)(2)(i).

QUESTION 10: If DHS is removing business processes from the manual, why was § 1623.3.5 added? **RESPONSE:** These are not business processes, these are guidelines that are necessary when a disqualified parent or caretaker regains eligibility through cooperation or by some other means.

The proposed effective date is February 1, 2020.

FINANCIAL IMPACT: The agency estimates that the proposed rules will result in a financial impact of $69,000 in state funds and $69,000 in federal funds for this fiscal year, for a total of $138,000. Per the agency, this estimate is based on a level of effort provided by Deloitte for IT enhancements that will be required as a result of complying with Act 1043. The agency estimates no financial impact in the following fiscal year.

LEGAL AUTHORIZATION: Act 1043, sponsored by Representative Grant Hodges, requires cooperation between certain state agencies regarding SNAP eligibility. The Act dictates that "[t]he Department of Human Services shall require a custodial parent or non-custodial parent to cooperate with the Office of Child Support Enforcement . . . as a condition of eligibility for the Supplemental Nutrition Assistance Program as authorized under 7 C.F.R. § 273.11[.]" *See* Act 1043, § 1. 7 C.F.R. § 273.11 gives states the option to disqualify parents who fail to cooperate with the state's child support enforcement agency from receiving SNAP benefits. This disqualification is subject to a good-cause exception for custodial parents. *See* 7 C.F.R. § 273.11(0)(2).

The Department of Human Services has the authority to promulgate rules as "necessary or desirable" to carry out its duties, which include administering assigned forms of public assistance. *See* Ark. Code Ann. § 20-76-201(1), (12). It also has the authority to promulgate rules as needed to ensure that the program it administers comply with federal law in order to receive federal funding. *See* Ark. Code Ann. § 25-10-129.

12. DEPARTMENT OF PUBLIC SAFETY, DIVISION OF ARKANSAS STATE POLICE (Ms. Mary Claire McLaurin)

a. SUBJECT: Used Motor Vehicle Dealers Service & Handling Fees Rules Amendments

DESCRIPTION: The Division of Arkansas State Police is amending its Used Motor Vehicle Dealers Service & Handling Fees Rules to reflect changes made by Act 910 of 2019. Specifically, the word "Department" is being replaced by "Division" throughout the rule.

PUBLIC COMMENT: A public hearing was held in this matter on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Department of Arkansas State Police may promulgate rules to implement, enforce and administer the provisions of Ark. Code Ann. § 23-112-617 concerning Used Motor Vehicle Dealer Service and Handling Fees. *See* Ark. Code Ann. § 23-112-617(e).

Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety by a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019. This rule is being updated to reflect that change.

b. SUBJECT: Used Motor Vehicle Dealer Licensing Rules Amendments

DESCRIPTION: The Division of Arkansas State Police is amending its Used Motor Vehicle Dealer Licensing Rules to reflect changes made by Acts 910, 315, and 426 of 2019. The term "Department" is replaced with the word "Division" throughout the rules in accordance with Act 910. References to "regulation(s)" are omitted in accordance with Act 315 of 2019. Rules 5.1 – 5.3 are added to permit reciprocal and temporary licensure in accordance with Act 426 of 2019.

PUBLIC COMMENT: A public hearing was held in this matter on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Department of Arkansas State Police may promulgate rules that are necessary to implement, enforce, and administer the Used Motor Vehicle Buyers Protection subchapter of the Arkansas Motor Vehicle Commission Act. *See* Ark. Code Ann. § 23-112-604(a). Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety through a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019.

Act 315 of 2019, which was sponsored by Representative Jim Dotson, provided for the uniform use of the term "rule" for an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency. *See* Act 315 of 2019.

Act 426 of 2019, sponsored by Representative Bruce Cozart, created the Red Tape Reduction Expedited Temporary and Provisional Licensure Act.

See Act 426 of 2019. The Act requires occupational licensure entities to adopt rules which represent the least restrictive requirements for occupational licensure of an individual of sufficient competency in his or her field, who holds an occupational licensure that is substantially similar to practice in the field of his or her occupation or profession in another state, territory or district of the United States. Furthermore, individuals must be in good standing, must not have had their license revoked for acts of bad faith or violations of law, rule or ethics, and must not hold suspended or probationary occupational licensure in any state, territory or district in the United States. *See* Ark. Code Ann. § 17-1-108(b), as amended by Act 426 of 2019. Additionally, the rule adopted shall provide a procedure by which an occupational licensing entity shall grant a temporary and provisional occupational licensure for ninety (90) days or longer, if presented with evidence of a current and active occupational licensure that is substantially similar to practice in the field of his or her occupation or profession in another state, territory or district of the United States. *See* Ark. Code Ann. § 17-1-108(c)(1)(B), as amended by Act 426 of 2019. If a state, territory, or district of the United States does not require occupational licensure for a profession that requires occupational licensure in this state, an occupational licensing entity shall adopt a rule that is least restrictive to permit an individual who is sufficiently competent in his or her field to obtain occupational licensure for that occupation or profession in this State. *See* Ark. Code Ann. § 17-1-108(c)(1)(2), as amended by Act 426 of 2019. Finally, the applicant must also pay any occupational licensure fee required by law or rule. *See* Ark. Code Ann. § 17-1-108(b)(2), as amended by Act 426 of 2019.

c. <u>SUBJECT</u>: Private Investigators & Private Security Agency Rules Amendments

<u>DESCRIPTION</u>: The Division of Arkansas State Police is revising its Rules for Licensing and Regulation of Private Investigators, Private Security Agencies, Alarm Systems Companies, Polygraph Examiners, and Voice Stress Analysis Examiners. Specifically, the changes include: (1) replacement of the term "Department" with the term "Division," (2) omission of references to "regulation(s)," (3) revision of Rule 2.4 to permit reciprocal and temporary licensure, (4) addition of one (1) disqualifying offense to Rule 2.10(e), (5) addition of Rule 2.16 to establish a process for prelicensure criminal background review, and (6) addition of an organization authorized to provide alarm systems training in Rule 9.0 and 9.1.

<u>PUBLIC COMMENT</u>: A public hearing was held in this matter on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Director of the Division of Arkansas State Police has the authority to promulgate rules relating to the granting, denial, suspension or revocation of any license, credential or commission issued under Chapter 40 of the Arkansas Code, concerning private investigators and private security agencies. *See* Ark. Code Ann. § 17-40-207(a)(5), as amended by Act 910 of 2019. The Division is amending its Rules for Licensing and Regulation of Private Investigators, Private Security Agencies, Alarm Systems Companies, Polygraph Examiners, and Voice Stress Analysis Examiners to comply with the following Acts of the 2019 Regular Session:

Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety through a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019.

Act 315 of 2019, which was sponsored by Representative Jim Dotson, provides for the uniform use of the term "rule" for an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency. *See* Act 315 of 2019.

Act 426 of 2019, sponsored by Representative Bruce Cozart, created the Red Tape Reduction Expedited Temporary and Provisional Licensure Act. *See* Act 426 of 2019. The Act requires occupational licensure entities to adopt rules which represent the least restrictive requirements for occupational licensure of an individual of sufficient competency in his or her field, who holds an occupational licensure that is substantially similar to practice in the field of his or her occupation or profession in another state, territory or district of the United States. Furthermore, individuals must be in good standing, must not have had their license revoked for acts of bad faith or violations of law, rule or ethics, and must not hold suspended or probationary occupational licensure in any state, territory or district in the United States. *See* Ark. Code Ann. § 17-1-108(b), as amended by Act 426 of 2019. Additionally, the rule adopted shall provide a procedure by which an occupational licensing entity shall grant a temporary and provisional occupational licensure for ninety (90) days or longer, if presented with evidence of a current and active occupational

licensure that is substantially similar to practice in the field of his or her occupation or profession in another state, territory or district of the United States. *See* Ark. Code Ann. § 17-1-108(c)(1)(B), as amended by Act 426 of 2019. If a state, territory, or district of the United States does not require occupational licensure for a profession that requires occupational licensure in this state, an occupational licensing entity shall adopt a rule that is least restrictive to permit an individual who is sufficiently competent in his or her field to obtain occupational licensure for that occupation or profession in this State. *See* Ark. Code Ann. § 17-1-108(c)(1)(2), as amended by Act 426 of 2019. Finally, the applicant must also pay any occupational licensure fee required by law or rule. *See* Ark. Code Ann. § 17-1-108(b)(2), as amended by Act 426 of 2019.

Pursuant to Ark. Code Ann. § 17-40-306(e), the Department or Division of Arkansas State Police shall promulgate rules that designate disqualifying Class A misdemeanors which involve theft, sexual offenses, violence, an element of dishonesty, or a crime against a person. Interference with emergency communication in the first degree, which is codified as Ark. Code Ann. § 5-60-124, was added as a disqualifying Class A offense involving a crime against a person.

Act 990 of 2019, sponsored by Senator John Cooper, provides for prelicensure criminal background checks. An individual with a criminal record may petition a licensing entity at any time for a determination of whether the criminal record of the individual will disqualify the individual from licensure and whether or not he or she could obtain a waiver. *See* Ark. Code Ann. § 17-2-103(a)(1), as amended by Act 990 of 2019. The licensing entity may require that the applicant undergo and pay for a state and federal criminal background check. The licensing entity shall adopt rules or amend rules necessary for implementation of this chapter. *See* Ark. Code Ann. § 17-2-104(a), as amended by Act 990 of 2019.

Pursuant to Ark. Code Ann. § 17-40-318, the Director of the Division of Arkansas State Police shall promulgate rules regarding the training requirements for alarm systems companies, alarm systems apprentices, alarm systems monitors, alarm systems technicians, and alarm systems agents. In this proposed rule, Elite Continuing Education University is added as an organization authorized to provide alarm systems training.

d. **SUBJECT: Driver's License Testing Fraud Rules Amendments**

DESCRIPTION: The Division of Arkansas State Police is amending its Driver's License Testing Fraud Rules to reflect changes made by Act 910 of 2019. Specifically, the word "Department" is being replaced by "Division" throughout the rule.

PUBLIC COMMENT: A public hearing was held in this matter on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Department of Arkansas State Police may promulgate rules to implement, enforce and administer the provisions of 27-16-701 *et seq.* concerning driver's license examinations. *See* Ark. Code Ann. § 27-16-705(c).

Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety through a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019. This rule is being updated to reflect that change.

e. SUBJECT: Commercial Driver's License Rules Amendments

DESCRIPTION: The Division of Arkansas State Police is amending its Commercial Driver's License Rules to reflect changes made by Act 910 of 2019. Specifically, the word "Department" is being replaced by "Division" throughout the rule.

PUBLIC COMMENT: A public hearing was held in this matter on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Division of Arkansas State Police may, by rules, authorize a person, including an agency of this state, an employer, a private driver training facility, another private institution, or a department, agency, or instrumentality of local government, to administer the skills test pursuant to the requirements of 49 C.F.R. § 383.75, as in effect on January 1, 2013. *See* Ark. Code Ann. § 27-23-108(a)(2).

Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety through a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019. This rule is being updated to reflect that change.

f. **SUBJECT: Third Party Testing Requirements Rules Amendments**

DESCRIPTION: The Division of Arkansas State Police is amending its Third Party Testing Requirements Rule to reflect changes made by Act 910 of 2019. Specifically, the term "Department" is replaced with the word "Division" throughout the rule. In addition, the term(s) "Federal Highway Administration" and "FHWA" are replaced with the term(s) "Federal Motor Carrier Safety Administration" and "FMCSA" throughout the rules.

PUBLIC COMMENT: A public hearing was held in this matter on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police received no public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research asked the following question:

It appears that 49 C.F.R. § 383.75 requires that states have an agreement with third parties containing a provision that allows FMCSA to conduct random inspection without prior notice. One of the changes proposed in your promulgation is to change FHWA to FMCSA. Could you please explain why the agency is making that change? Specifically, is the change due to a change in federal law or regulation? If so, could you point me to that statute or regulation? **RESPONSE:** Highway Patrol is unsure why FHWA was ever mentioned in the rules and stated that it should have always referred to FMCSA. These rules were originally promulgated in 1996, but the FMCSA was not founded until 2000. I imagine that duties once performed by the FHWA are now carried out by the FMCSA, but we have no record of when that change occurred. Both are subdivisions of the federal Department of Transportation.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Division of Arkansas State Police shall, by rules, authorize a person, including an agency of this state, an

employer, a private driver training facility, another private institution, or a department, agency, or instrumentality of local government, to administer the skills test specified by this section pursuant to requirements of 49 C.F.R. § 383.75, as in effect on January 1, 2013. *See* Ark. Code Ann. § 27-23-108(a)(2).

Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety through a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019.

g. SUBJECT: Municipal Police Patrols of Controlled-Access Facilities Rules

DESCRIPTION: The Division of Arkansas State Police is amending its Municipal Police Patrols of Controlled-Access Facilities Rules to reflect changes made by Act 910 of 2019. Specifically, the word "Department" is being replaced by "Division" throughout the rule.

PUBLIC COMMENT: A public hearing was held in this matter on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Ark. Code Ann. § 12-8-106 concerns the duties, powers and restrictions of the Division of Arkansas State Police. *See* Ark. Code Ann. § 12-8-106. Pursuant to this section, the director shall promulgate rules in accordance with Arkansas Administrative Procedure Act, § 25-15-201 et seq., to establish criteria for granting or withdrawing authorization to patrol controlled-access facilities. *See* Ark. Code Ann. § 12-8-106(h)(1)(C).

Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety through a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019. This rule is being updated to reflect that change.

h. **SUBJECT: Arkansas Concealed Handgun Carry License Rules Amendments**

DESCRIPTION: The Division of Arkansas State Police is revising the existing version of the Arkansas Concealed Handgun Carry License Rules. Specifically, the changes include: (1) replacement of the term "Department" with the term "Division" in accordance with Act 910 of 2019, and (2) revision of Rule 7.2 and Rule 7.4 in accordance with Act 431 of 2019, which clarifies that firearms may not be carried in Division of Youth Services facilities.

PUBLIC COMMENT: A public hearing was held on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police receive no public comments.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency reports that the proposed revisions have no financial impact.

LEGAL AUTHORIZATION: The Director of the Division of Arkansas State Police may promulgate rules to permit the efficient administration of Subchapter 23 of Ark. Code Ann. Title 5, Chapter 73 concerning concealed handguns.

Act 431 of 2019, sponsored by Representative Aaron Pilkington, prohibits a concealed handgun licensee from possessing a concealed handgun in any part of a detention facility, prison, jail, or residential treatment facility owned or operated by the Division of Youth Services of the Department of Human Services, including without limitation a parking lot owned, maintained, or otherwise controlled by the Department of Correction, the Department of Community Correction or a residential treatment facility owned or operated by the Division of Youth Services of the Department of Human Services. *See* Ark. Code Ann. § 5-7-306(4), as amended by Act 431 of 2019.

Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety through a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019. This rule is being updated to reflect that change.

i. SUBJECT: Blue Light/Lens Sale Rules Amendments

DESCRIPTION: The Division of Arkansas State Police is amending its Purchase of Blue Light/Lens Sale & Purchase of Official Law Enforcement Insignia Rule to reflect changes made by Acts 910 and 315 of 2019. Specifically, the term "Department" is replaced with the word "Division" throughout the rule, and references to "regulation(s)" are omitted in accordance with Act 315 of 2019.

PUBLIC COMMENT: A public hearing was held in this matter on November 20, 2019. The public comment period expired on November 25, 2019. The Division of Arkansas State Police received no public comments.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Division of Arkansas State Police may promulgate rules to implement the provisions of Ark. Code Ann. 5-77-201 *et seq.*, concerning Emergency Lights and Law Enforcement Insignia Sales. *See* Ark. Code Ann. § 5-77-203, as amended by Act 910 of 2019.

Pursuant to Act 910 of 2019, which was sponsored by Representative Andy Davis, the Department of Arkansas State Police was designated as the Division of Arkansas State Police and transferred to the newly created Department of Public Safety through a cabinet-level transfer. *See* Ark. Code Ann. §§ 12-9-101, 25-43-1401 and 25-43-1402(a)(10), as amended by Act 910 of 2019.

Act 315 of 2019, which was sponsored by Representative Jim Dotson, provided for the uniform use of the term "rule" for an agency statement of general applicability and future effect that implements, interprets, or prescribes law or policy, or describes the organization, procedure, or practice of an agency. *See* Act 315 of 2019. This rule is being amended to change references to "regulation" to "rule."

13. DEPARTMENT OF PUBLIC SAFETY, ARKANSAS STATE POLICE COMMISSION (Ms. Sara Farris)

a. SUBJECT: Rules for the Arkansas State Police Commission

DESCRIPTION: Act 910 changes "Department of Arkansas State Police" to "Division of Arkansas State Police," and this amendment makes the same change in the Commission's Rules.

Currently, the rule requires that applicants for employment as ASP officers meet the standards set by CLEST "as of September 1, 2002." This amendment deletes the date-specific reference.

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on November 30, 2109. The Arkansas State Police Commission of the Department of Public Safety received no public comments.

The proposed effective date is February 1, 2020.

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

LEGAL AUTHORIZATION: Act 910 of 2019, which was sponsored by Representative Andy Davis, transferred the Arkansas State Police Commission to the newly created Department of Public Safety. *See* Ark. Code Ann. § 25-43-1402(a)(5), as amended by Act 910 of 2019. Among other duties, the commission is charged with approving or disapproving promotions and demotions of officers, and hearing appeals of disciplinary actions against commissioned officers by a director. See Ark. Code Ann. § 12-8-103. For the purpose of performing the duties prescribed in Ark. Code Ann. § 12-8-103, the Arkansas State Police Commission may promulgate and enforce reasonable and necessary rules. *See* Ark. Code Ann. § 12-8-103(e)(2).

14. PULASKI COUNTY REGIONAL SOLID WASTE MANAGEMENT DISTRICT (Mr. Craig Douglass)

a. SUBJECT: Regulation 1 and Regulation 3: Tipping Fee Updates

DESCRIPTION: These amendments raise the tipping fees for solid waste disposal within the District's boundaries from $0.30/ton to $0.60/ton. They also correct technical and grammatical issues.

PUBLIC COMMENT: The public comment period expired on November 18, 2019. A public hearing was held on November 19, 2019. The agency indicated that it received no public comments.

Lacey Johnson, an attorney for the Bureau of Legislative Research, asked the following question and received the following answer:

QUESTION: It appears that the term "regulation" remains within the proposed changes. I just wanted to make mention of Act 315 of 2019, § 3204(b)(3), which concerns the uniform use of the term "rule" upon promulgation of any rule after the effective date of the Act. Act 315 went into effect on July 24, 2019. Is there a reason the District has retained the term "regulations" for the present? **RESPONSE:** [The District revised the rules to remove the term "regulations."]

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The agency indicated that these rules have a financial impact. The agency states there will be no cost to state, county, and municipal government as a result of this rule because, while municipalities will be charged the $0.30 increase in the tipping fee, the agency believes these increased charges will be passed on to the customers of the municipality such that the net impact on the municipality itself should be $0.

The agency estimates the total cost by fiscal year to any private individual, entity, and business subject to the amended rule at $36,226.50 for the current fiscal year and $144,906 for the next fiscal year.

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

(1) a statement of the rule's basis and purpose
The Arkansas General Assembly passed Act 752 of 1991 (the "Act"), renaming solid waste planning districts as regional solid waste management districts and establishing solid waste management and planning for the state. The District is comprised of Pulaski County and is one of 18 regional solid waste planning districts established in Arkansas. The Act empowered the districts and created regional solid waste management boards. In addition to collecting data, continuously studying and evaluating the solid waste needs of their respective districts, and issuing certificates of need for landfills, the Act requires that boards establish programs to encourage recycling.

Beginning in July 1992, regional solid waste management districts were required to "ensure" that residents have the opportunity to recycle. To carry out this mandate, the Pulaski County Regional Solid Waste Management District Board (the "Board") adopted a funding mechanism assessing landfills permitted in the county $0.30 for each ton of solid waste disposed of at the respective landfills. This "tipping fee" (as it is known in the industry) helps fund the District's recycling programs. The initial rate of $0.30 per ton has been in effect since 1992 without increase. Ark. Code Ann. § 8-6-714 states that "A regional solid waste management board may fix, charge, and collect rents, fees, and charges of no more than two dollars ($2.00) per ton of solid waste related to the movement or disposal of solid waste within the district, including without limitation fees and charges." The District's request to increase its tipping fee to $0.60 per ton remains well below the amount allowed under state law—$2.00 per ton.

The contiguous districts to Pulaski County charge an average of $1.31 per ton as landfill tipping fees. The District proposed, and the Board agreed, that the District tipping fee in 2020 would be increased to $0.60 per ton, which remains $0.71 per ton below the average tipping fee assessed by contiguous districts.

The District has not increased its tipping fees for waste generated within and disposed of within the District since the inception of the $0.30 per ton fee in 1992. However, the costs associated with the District performing its requirements, duties, and responsibilities, as established by law, have steadily increased. The recycling and solid waste management marketplace is ever-changing, and if the District does its job well, it will continue to have pressure to increase its programs and, correspondingly, raise more revenue to fund the expanding programs. The Board was very conscientious in its decision to raise the tipping fee to $0.60 per ton, even though the General Assembly authorized a fee of up to $2.00 per ton.

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

Act 752 of 1991 requires that regional solid waste management districts ensure that residents within their boundaries have the opportunity to recycle goods and, in fact, the districts are required to establish programs to encourage recycling. The Act provided the districts with the authority to charge a tipping fee to the landfills of up to $2.00 per ton as a source of revenue to fund recycling programs.

The change in Regulation 3 of the District changing the tipping fee from $0.30 per ton to $0.60 per ton is to address the problem of the District not

having sufficient revenue to fund necessary and effective recycling programs. Due to loss of grant revenues and a reduction in revenue from the Waste Tire Management Program, the District expects a year-to-year loss in revenue of $222,425 for fiscal year 2019 (ending June 30, 2020). The $0.30 per ton increase in the tipping fee is expected to generate $144,906 per year. While the increase will not remedy the entire revenue loss for 2019-20, it will serve to replace a large portion of the lost revenue in years to come.

(3) a description of the factual evidence that:

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

The public's interest in a desire to recycle goods has steadily increased since the General Assembly charged the District with offering programs that both encourage and allow for residents to recycle in 1992. Yet the District has never increased the tipping fee it initially set. The District has lost or will be losing certain funding it has relied upon in the past, which includes the loss of $66,255 in annual recycling grants from the Arkansas Department of Energy and Environment, Department of Environmental Quality (DEQ); the loss of the entire DEQ grant of $250,000 for electronic waste recycling; losses of tipping fees of approximately $90,000 due to decreased tonnage from the Southwest Central landfill; loss of a DEQ Illegal Dump Control Officer grant in the amount of $25,000; and loss of approximately $25,000 in administrative fees from the Inter-District Waste Tire Management Program.

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

The General Assembly requires the District to provide recycling programs for residents within the District (Pulaski County, in this instance). Further, the General Assembly authorized the District to charge a tipping fee of up to $2.00 per ton to fund such recycling programs. The Board of the District has now unanimously voted to raise the District's tipping fee from $0.30 per ton to $0.60 per ton. This increase is estimated to raise $144,906 annually, with such funds being necessary to (1) offset the losses of the District set forth above, and (2) fund the ever-expanding demand for effective recycling programs within the District.

(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 resolved by the proposed rule

Upon unanimously deciding that additional revenues are needed so that the District may carry out its mandate of providing recycling programs for the residents of Pulaski County, the Board of the District examined the proper amount for the increase to the tipping fee. The Board considered amounts within its statutory authority up to $2.00 per ton. The Board resolved to limit the increase to $0.30 per ton in order to increase the

revenue of the District by the anticipated amount of $144,906. While not enough to completely offset the lost revenue in the current fiscal year, the Board determined this amount to be a prudent and responsible increase at this time after due consideration of the comments and concerns voiced by stakeholders.

(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
The Board considered comments provided by stakeholders leading up to and during its September 19, 2019 meeting at which the tipping fee increase passed unanimously. The stakeholder comments ranged from not raising the tipping fee to considering an increase up to the statutory limit. The Board ultimately decided that a $0.30 per ton increase to the tipping fee was needed at this time to ensure adequate revenue to fund existing and anticipated recycling programs. Further, the Board will receive all public comments provided in response to the publication of the Notice of the change to Regulation 3 on November 19, 2019, and consider such comments at its December 12, 2019 meeting.

(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 existing rules and regulations of the District did not create or contribute to the problem the District seeks to address with its change to Regulation 3.

(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 District plans to evaluate the tipping fee it charges to landfills within the District on an annual basis. The Arkansas General Assembly has authorized the District to charge a tipping fee of up to $2.00 per ton. The District strives to operate effective and efficient recycling programs. As evidenced by the fact that this is the District's first increase in the tipping fee since the inception of its authority to charge such a fee in 1992, the District will continue to seek other funding sources in order to keep the tipping fee as low as possible while still carrying out its legislative mandate to provide recycling programs to the residents of the District.

LEGAL AUTHORIZATION: Regional solid waste management boards, which govern the regional solid waste management districts, may adopt rules as needed to administer their duties and ensure public participation in their findings and rulings. Ark. Code Ann. § 8-6-704(a)(6). The Boards explicitly have the power to fix and collect fees for solid waste disposal up to $2.00 per ton of waste. Ark. Code Ann. § 8-6-714.

15. SALINE COUNTY REGIONAL SOLID WASTE MANAGEMENT DISTRICT (Mr. Sam Gibson, Ms. Tiffany Dunn)

a. SUBJECT: Rule 22.202 Regarding Requirements for Solid Waste Hauler Licenses and Vehicle Permits

DESCRIPTION: Per the agency, Ark. Code Ann. § 8-6-721 requires Solid Waste Management Boards to license and regulate the transport and disposal of solid waste within their respective Districts. The proposed amendment adds a provision to allow a licensed solid waste hauler to transfer a vehicle permit from a vehicle being taken out of service to a replacement vehicle and removes a requirement for applicants to provide copies of city privilege tax payments with their application for licensing. The text of the rule is re-organized and numbered to make reference to it easier for affected entities. The rule is necessary to make the licensing of solid waste haulers in the Saline County Regional Solid Waste Management District more compatible with such licensing in adjoining Solid Waste Management Districts and more "user friendly" for solid waste haulers operating within the District.

PUBLIC COMMENT: A public hearing was held on this rule on December 11, 2019. The public comment period expired on December 11, 2019. The agency indicated that it received no public comments.

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

QUESTION 1: What is the difference between a vehicle permit and a solid waste hauler license? **RESPONSE:** A Solid Waste Hauler License is issued to each business entity which applies successfully for such license and a Vehicle Permit is issued (under the Solid Waste Hauler License) to each vehicle the Licensee identifies as a vehicle the Licensee will use in conducting solid waste hauling within the District pursuant to the Solid Waste Hauler License. We issue the license to the business and then list all permitted vehicles on the license, and issue a window sticker permit for each vehicle.

QUESTION 2: Is there statutory authority for the permit transfer provision in § 22.202.201? **RESPONSE:** ACA 8-6-721 requires Solid Waste Management Districts to regulate and license solid waste haulers who operate within the District. Subdivision (f) of that statute says the board may set a reasonable licensing fee for each class of haulers, and that is our statutory authority for all the fees set out in the current and proposed revised SCRSWMD rule.

QUESTION 3: What is the statutory authority for the $15 transfer fee in § 22.202.206? **RESPONSE:** See response 2 above.

The proposed effective date is pending review and approval.

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

Per the agency, a total estimated cost to governmental entities or to private entities is not available. The agency stated that nominal fees will be charged for issuance of solid waste hauler licenses and vehicle permits, while license issuance and vehicle inspections are part of the duties of the District's Executive Director and Environmental Enforcement Officer.

LEGAL AUTHORIZATION: Regional solid waste management boards have the authority to issue licenses for solid waste haulers. Ark. Code Ann. § 8-6-721. While the Arkansas Pollution Control and Ecology Commission is responsible for establishing minimum licensing standards, regional solid waste management boards may impose stricter standards. Ark. Code Ann. § 8-6-721(e). The boards may also "set a reasonable licensing fee for each class of haulers." Ark. Code Ann. § 8-6-721(f).

Regional solid waste management boards may adopt rules as needed to administer their duties and ensure public participation in their findings and rulings. Ark. Code Ann. § 8-6-704(a)(6).

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

1. Department of Agriculture, Arkansas Bureau of Standards (Act 501)

2. Department of Agriculture, Veterinary Medical Examining Board (Act 169)

3. Department of Commerce, State Insurance Department (Acts 500, 698, 823)

4. Department of Commerce, Division of Workforce Services (Act 373)

5. Department of Corrections, Arkansas Correctional School (Act 1088)

6. **Department of Education, Career and Technical Education (Act 179)**

7. **Department of Education, Division of Elementary and Secondary Education (Acts 536, 640, 843)**

8. **Department of Education, Division of Higher Education (Act 456, 549, 844)**

9. **Department of Energy and Environment, Pollution Control and Ecology Commission (Act 1067)**

10. **Department of Finance and Administration, Alcoholic Beverage Control Division (Acts 691, 989)**

11. **Department of Finance and Administration, Director (Acts 422, 822)**

12. **Graduate Medical Education Residency Expansion Board (Act 854)**

13. **Department of Health (Acts 216, 556, 708, 811)**

14. **Department of Health, Division of Health Related Boards and Commissions, State Board of Chiropractic Examiners (Act 645)**

15. **Department of Health, Division of Health Related Boards and Commissions, State Board of Nursing (Act 837)**

16. **Department of Health, Division of Health Related Boards and Commissions, Arkansas Board of Podiatric Medicine (112)**

17. **Highway Commission (Act 468)**

18. **AR Military Department (Act 148)**

19. **Osteopathic Rural Medical Practice Student Loan and Scholarship Board (Act 857)**

20. **Commission for Parent Counsel (Act 333)**

21. **Department of Parks, Heritage, and Tourism, Division of Heritage (Act 818)**

22. **Department of Transformation and Shared Services, Office of State Procurement (Acts 417, 418, 419, 420, 421, 422)**

G. Adjournment.