ADMINISTRATIVE RULES SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Wednesday, September 16, 2020
9:00 a.m.
Room A, MAC
Little Rock, Arkansas

A. Call to Order.

B. Reports of the Executive Subcommittee.

C. Reports on Administrative Directives Pursuant to Act 1258 of 2015, for the quarter ending June 30, 2020.

1. Department of Corrections (Mr. Solomon Graves)

2. Parole Board (Ms. Brooke Cummings)

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

1. <u>DEPARTMENT OF COMMERCE, STATE SECURITIES DEPARTMENT</u> (Mr. David Smith)

a. <u>SUBJECT</u>: Rules of the Arkansas Securities Commissioner

<u>DESCRIPTION</u>: The State Securities Department is proposing changes to the Rules of the Arkansas Securities Commissioner to provide additional registration exemption relief, updated physical and cybersecurity procedures, additional clarity to the rules, and to make changes necessary to comply with Act 110 of 2019. The department provided the following summary of changes made to the rule:

- **Rule 102.01 Definitions.** Rule 102.01(6), (18), and (29) are clean-up changes to reflect changes made in the Administrative Procedures Act and the Arkansas Securities Act.
- **Rule 204.01 General.** These changes reflect the new mailing address for the Arkansas Securities Department and update the list of forms used under the Act or Rules.
- **Rule 302.0l(f) Registration Exemption for Merger and Acquisition Brokers.** This is a new addition to the Rules to exempt certain Merger and Acquisition Brokers.

- **Rule 302.02(i). Registration Procedure, Investment Adviser.** This is a new addition to the Rules to require an investment adviser to maintain policies and procedures for physical and cybersecurity.
- **Rule 306.02 Business Records.** New provisions were added to incorporate model physical security and cybersecurity policies and procedures into the business records. Also added to business records are provisions to require preservation of books and records of a registrant that ceases business operations.
- **308.0l (d) Unfair, Misleading, And Unethical Practices of Broker-Dealer or Agent.** Rule 308.01(d) is updated to clarify suitable investments for direct participation plans offered and sold by broker-dealers and agents.
- **Rule 308.02 Fraudulent, Deceptive, Dishonest, or Unethical Practices of lnvestment Advisers.** Amendments made to add additional prohibited activities for investment advisers and representatives that concern suitability requirements, advertising, accessing client accounts, and compliance with policy or procedures.
- **Rule 404.01. Registration Statements General Requirements.** New provisions to allow an issuer or an agent of an issuer to deliver documents over the internet and the use of electronic signatures.
- **Rules 503.01 and 504.01 Securities and Transactions Exemptions.** Exemptions for non-profit organization securities and provisions for manual transaction exemptions are updated to conform with current nationally recognized guidelines.
- **Rule 509.01. Notice Filings.** These Rules amendments contain provisions for certain notice filings that rely on Federal Securities Exemptions to conform with the statutory requirements and to provide better clarity.

PUBLIC COMMENT: A public hearing was held on August 11, 2020. The public comment period expired on August 11, 2020. The State Securities Department received no public comments.

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

1. Concerning 102.01(18), why was the language regarding business brokers removed from the rule? **RESPONSE:** The addition of the North American Securities Administrators Association ("NASAA") model rule concerning merger and acquisition brokers eliminated the need for the language regarding business brokers in 102.01(18). (See #2.)

2. Concerning 302.01(f),
(a) What is the Department's reasoning for creating registration exemptions for certain merger and acquisition brokers? **RESPONSE:** This is a Model Rule adopted by the NASAA, an organization of

Securities Regulators of which Arkansas is a voting member, on September 29, 2015. Local attorneys had requested the Department consider adopting the rule.
(b) Could you please cite authority which allows the commission to create this exemption? **RESPONSE:** The Commissioner is authorized to adopt rules under Ark. Code Ann. § 23-42-204.
(c) Is this change based upon changes to federal law or regulation?
RESPONSE: No.

3. Concerning 302.02(i) and 306.02,
(a) Please provide background on where this language comes from.
RESPONSE: This is from a model law adopted by NASAA on May 19, 2019. Cybersecurity has become an increasing concern for all registrants.
(b) Are the physical security and cybersecurity policies and procedures of the proposed rules based upon/taken from a specific statutory or regulatory source, or taken from guidelines? **RESPONSE:** As stated above, the Department modeled the rules after a Model Rule adopted by NASAA on May 19, 2019.

4. Concerning, 308.01(d) and 308.02(a),
(a) Please provide background on where the presumption language come from. **RESPONSE:** Multiple states have similar provisions regarding non-traded direct participation programs.
(b) Why did the Department choose to include the presumption?
RESPONSE: To address an issue the Department has repeatedly seen in cases, unsuitable practices by registrants marketing concentrations of illiquid securities (non-traded REITS) more directly.
(c) Where does the language come from (federal/state statute, rule, guidelines, etc.)? **RESPONSE:** States such as Tennessee, Kansas, Indiana, Alabama, Illinois have similar presumption language.

5. The Department has made several changes to its rules. Could you please identify the changes that were made to comply with Act 110 of 2019? **RESPONSE:** The Department included that provision for any clean up language needs from Act 110 of 2019, such as clean-up of definitions and changing the Department's address.

The proposed effective date is October 1, 2020.

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

LEGAL AUTHORIZATION: The Securities Commissioner has authority to make, amend, and rescind any rules which are necessary to carry out the provisions of Title 23, Chapter 42 of the Arkansas Code, concerning the Arkansas Securities Act. *See* Ark. Code Ann. § 23-42-

204(a). This includes rules governing registration statements, applications, notice filings, reports, and defining any terms, whether or not used in this chapter, insofar as the definitions are not inconsistent with the provisions of Chapter 42. *See* Ark. Code Ann. § 23-42-204(a). For the purpose of rules and forms, the Commissioner may classify securities, persons, and matters within his or her jurisdiction and prescribe different requirements for different classes. *See* Ark. Code Ann. § 23-42-204(a). No rule may be made, amended or rescinded unless the commissioner finds that the action is necessary or appropriate in the public interest, or for the protection of investors, and consistent with the purposes fairly intended by the policy and provisions of this Chapter 42. *See* Ark. Code Ann. § 23-42-204(b).

The proposed rules implement Act 110 of 2019, sponsored by Senator Jason Rapert, which amended several definitions under the Arkansas Securities Act, regulated exempt transactions, and clarified filing requirements of certain securities. *See* Act 110 of 2019.

2. DEPARTMENT OF EDUCATION, DIVISION OF ELEMENTARY AND SECONDARY EDUCATION (DESE) (Mr. Taylor Dugan)

a. SUBJECT: DESE and ASBN Rules Governing the Administration of Insulin and Glucagon to Arkansas Public School Students Diagnosed with Diabetes

DESCRIPTION: The Division of Elementary and Secondary Education proposes changes to the Division of Elementary and Secondary Education and Arkansas State Board of Nursing Rules Governing the Administration of Insulin and Glucagon to Arkansas Public School Students Diagnosed with Diabetes, pursuant to Act 757 of 2019, § 37, which added language to Arkansas Code Annotated § 6-18-711, concerning the administration of medication to a public school student with diabetes. The language allows that a public school employee may be trained and may administer glucagon to a student with Type I diabetes. This language has been added to Section 4.03 of the rules. All other changes were to change "Department" to "Division."

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

Lucas Harder, Arkansas School Boards Association
3.02: I would recommend changing "altered mental status" to "altered mental state."

There is a comma missing from between "seizure" and "or."

3.04: As "licensed health care practitioner" is defined at 3.05, there is no need to include the same list here as contained in the definition.

3.08.7: It appears that the semicolon here was accidentally struck.

4.~~09~~10: The "has" at "Once other qualified staff has" should be "have."

6.03: Based on the language in 4.~~05~~6, I believe that the "8" at "3.08" is being unnecessarily struck.

7.02: There appears to be a comma missing here and so I would recommend changing this for clarity to read: "district shall maintain a copy of the student's health plan, a list."
Response: All comments considered, and non-substantive changes made.

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

It appears that these rules are jointly promulgated by both the Division of Elementary and Secondary Education and the State Board of Nursing, in accord with Ark. Code Ann. § 17-87-103(11)(E). Has the State Board of Nursing been consulted concerning the proposed changes? **RESPONSE:** Yes, the Division has been communicating and working with the State Board of Nursing on the proposed rules.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 17-87-103(11)(E), the State Board of Education and the Arkansas State Board of Nursing shall promulgate rules necessary to administer Ark. Code Ann. § 17-87-103(11), which exempts from the requirement of a nursing license certain trained volunteer school personnel who may administer glucagon or insulin, or both, to a student diagnosed with diabetes, as outlined in the statute. *See also* Ark. Code Ann. § 6-18-711(c) (providing that "[a] public school employee may volunteer to be trained to administer and may administer glucagon to a student with Type 1 diabetes in an emergency situation as permitted under § 17-87-103(11)"). Changes

to the rules include those made in light of Act 757 of 2019, sponsored by Representative Bruce Cozart, which amended and updated various provisions of the Arkansas Code concerning public education.

3. <u>DEPARTMENT OF ENERGY AND ENVIRONMENT, DIVISION OF ENVIRONMENTAL QUALITY</u> (Mr. Micheal Grappe)

a. <u>SUBJECT</u>: APC&EC Rule No. 23 Hazardous Waste Management

<u>DESCRIPTION</u>: The proposed changes to APC&EC Rule No. 23 incorporate federal rules to maintain Arkansas's equivalency and to maintain our authorization for the Hazardous Waste Program. Changes also incorporate state government transformation, as well as Act 315 of 2019, which eliminated unnecessary references to regulations and provided for consistent references to rules throughout the Arkansas Code.

The timely adoption of these proposed changes is supported by the Arkansas regulated community.

The Federal Rules being adopted with this rulemaking and a brief description of each include:

Revised Definition of Solid Waste

- Revised the rules to encourage recycling hazardous waste and improve accountability and oversight of recycling while allowing flexibilities.
  - Three (3) conditional exclusions:
    - Generator Controlled Exclusion
      - Recycling can occur on-site or off-site as long as it is by the same "person"
    - Transfer-Based Exclusion
      - Hazardous waste may be transferred to an off-site third-party reclamation facility
    - Remanufacturing Exclusion
      - Allows the transfer of certain spent solvents from one manufacturer to another for "remanufacturing"
      - Only available to the pharmaceutical, organic chemical, plastics and resins, and/or paints and coatings industries
  - Codified the definition of legitimate recycling (distinguishes between real recycling and sham recycling)
    - Reclamation must be legitimate: 3 Factors are mandatory and 1 Factor must be considered
      - Must provide a useful contribution (mandatory)
      - Must produce a valuable product or intermediate (mandatory)
      - Must be managed as a valuable product (mandatory)

- The final product should not contain significant concentrations of hazardous constituents that aren't found in analogous products (must be considered)

Generator Improvements Rule

- Revises the hazardous waste generator regulations by making them easier to understand and provides greater flexibility in how hazardous waste is managed
  - Primary objective of the rule is to consolidate most of the generator requirements into Section 262 and to reduce cross-references
  - The rule directly responds to feedback EPA received from the regulated community, states, communities, and other stakeholders
  - Reorganizes, consolidates, and explains requirements in greater detail
  - Clarifies and incorporates guidance, notices, and policies

e-Manifest User Fee Rule

- Establishes the method EPA will use to determine user fees to the electronic and paper manifests submitted to the national e-Manifest system
- ADEQ must adopt the User Fee Rule to maintain equivalency, but will not be authorized; EPA will retain enforcement authority

Import/Export Rule

- EPA published the regulations governing imports and exports of hazardous waste and certain other materials in order to strengthen public accessibility and transparency of import and export related documentation
  - Provides that no Confidential Business Information (CBI) claims may be asserted by any person with respect to documents related to the export, import, and transit of hazardous waste and export of excluded cathode ray tubes (CRTs)
  - EPA does not authorize States to administer the Federal import/export provisions of the hazardous waste regulations
- ADEQ must adopt this rule to maintain equivalency with the Federal program, but will not be authorized

Coal Combustion Residuals (CCR) for exclusion from hazardous waste

- Expands the current exclusion in APC&EC Rule No. 23, Section 261.4(b)(4) to include specific waste streams associated with combustion of coal or other fossil fuels

PUBLIC COMMENT: A public hearing was held on July 20, 2020. The public comment period expired on August 3, 2020. No comments were received.

The proposed effective date is November 10, 2020.

FINANCIAL IMPACT: The agency states that the amended rule has no financial impact. However, the agency estimates that the cost to implement the federal regulation is $811,874.00 in federal funds for the current fiscal year and $776,794.00 in federal funds for the next fiscal year.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 8-7-209(b)(1), the Arkansas Pollution Control and Ecology Commission has the power and duty to adopt, after notice and public hearing, and to promulgate, modify, repeal, and enforce rules regarding hazardous waste management as may be necessary or appropriate to implement or effectuate the purposes and intent of the Arkansas Hazardous Waste Management Act of 1979 ("Act"), Ark. Code Ann. §§ 8-7-201 through 8-7-227, and the powers and duties of the Division of Environmental Quality under the Act, including, but not limited to, rules for: the containerization and labeling of hazardous waste, which rules, to the extent practicable, shall be consistent with those issued by the United States Department of Transportation, the United States Environmental Protection Agency, the State Highway Commission, and the Arkansas Department of Transportation; establishing standards and procedures for the safe operation and maintenance of facilities; identifying those wastes or combination of wastes which are incompatible and which may not be stored or disposed of together and procedures for preventing the storage, disposal, recovery, or treatment of incompatible wastes together; the reporting of hazardous waste management activities; establishing standards and procedures for the certification of supervisory personnel at hazardous waste treatment or disposal facilities or sites as required under § 8-7-219(3); and establishing a manifest system for the transport of hazardous waste and prohibiting the receipt of hazardous waste at storage, processing, recovery, disposal, or transport facilities or sites without a properly completed manifest.

The agency states that the rule is required to comply with federal regulations, specifically, 40 C.F.R. Parts 260-279.

4. DEPARTMENT OF HEALTH, CENTER FOR LOCAL PUBLIC HEALTH (Ms. Laura Shue, Mr. Terry Paul)

a. SUBJECT: Rules Pertaining to Septic Tank Cleaners

DESCRIPTION: The following changes have been made to the Rules Pertaining to Septic Tank Cleaners:

- Updated entire rule to reflect requirements of Act 315 of the 2019 General Assembly.

- Added Section VII to reflect changes due to Act 426, Act 990, and Act 1011 of the 2019 Arkansas General Assembly.

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

Commenter's Name: Nuckles and Son Septic Services

COMMENT SUMMARY: Mr. and Mrs. Nuckles commented on grease traps. Their concern is the fact that it is against the law to haul it out of the waste district, but the waste district won't take it.

RESPONSE: ADH has reviewed your comment and would refer you to the Department of Environmental Quality. Waste districts and grease trap waste disposal are regulated through their rules. Mr. Bryan Leamons with their Office of Water Quality Permits Branch at 501-683-5406 should be able to answer any questions.

Commenter's Name: Rodney Walker, Alrite Septic Tank Services

COMMENT SUMMARY: Mr. Walker commented on Section V, Subsection H. "Each pumper vehicle shall maintain and have on board a bound service record listing the operator's name, the date and location of each septic tank, treatment plant, holding tank, marine sanitation device, portable toilet, or other sewage handling facility pumped, the vector and pathogen reduction method used, the date and location of disposal."

Mr. Walker commented that this section was burdensome due to the handwriting of receipts and manifests. He also noted that there is no time frame for how long records must be kept, and it does not allow for any electronic means of record keeping, from the vehicle itself or another location.

RESPONSE: ADH has reviewed your comment and we have allowed alternate methods including electronic means for accounting for waste removal and disposal. Mr. Sam Dunn, Senior Environmental Specialist, may be able to offer suggestions on electronic methods of compliance acceptable to the Department. We will retain your concern on record retention for the next update of this rule.

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

QUESTION: A portion of Section VII.B deals with automatic licensure for active duty service members, returning military veterans, and their spouses who hold substantially equivalent licenses in other United States jurisdictions. Are such individuals required to hold their licenses in good standing? **RESPONSE:** Yes. That is the intent and our belief is that substantially equivalent implies the license is in good standing.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Arkansas Department of Health has authority to license septic tank cleaners and to promulgate rules necessary for the administration of its duties. Ark. Code Ann. §§ 17-45-102, -103. The proposed rules implement Acts 426, 820, 990, and 1011 of 2019.

Act 426, sponsored by Representative Bruce Cozart, created the Red Tape Reduction Expedited Temporary and Provisional Licensure Act and authorized occupational licensing entities to grant expedited temporary and provisional licensing for certain individuals. The Act requires occupational licensing entities to "by rule adopt the least restrictive requirements for occupational licensure" for certain individuals. Ark. Code Ann. § 17-1-108(b), *as created by* Act 426.

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

Act 990, sponsored by Senator John Cooper, amended the laws regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure. The Act requires licensing entities to adopt rules necessary for its implementation. Ark. Code Ann. § 17-2-104, *as created by* Act 990.

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

b. **<u>SUBJECT</u>: Rules Pertaining to Plumbers License Fee, Expiration, Renewal, Journeyman Plumber, Master Plumber and Restricted Plumber Qualifications**

<u>DESCRIPTION</u>: This proposed rule removes the word "regulation" and replaces it with "rule," as well as adding or changing wording that addresses licensing reciprocation, licensing reinstatement, criminal background, temporary-provisional licensing, and licensing consideration for military veterans and their spouses.

Definitions
- Added definitions for "apprentice plumber," and "backflow testing & repair technicians."
- Added definition for "substantially similar."

Section VIII – Reinstatement of License
- Added that licensing requirement shall not require apprenticeship, education or training as a prerequisite.
- Added the terms "apprentice" and "restricted plumber" throughout the section.

Section X – Reciprocal
- Added expanded language to allow for reciprocation as well as the requirements.

Section XII – Master, Journeyman and Restricted Plumber Qualifications
- Changed Paragraph B to approve of candidates for examination that have out-of-state licensing similar to Arkansas.
- Added language for licensing candidates that have no licensing backgrounds.
- Added Pre-Licensure Criminal Background Check.

Section XVI – Revocation
- Added clean-up language to cover all plumber licensing.

Section XVII – Temp Permits/Provisional Licensing
- Revised the language to be more specific regarding the criteria for temporary/provisional licensing.

Section XVIII – Licensing of Active Duty Service Members, Veterans, and Spouses
- Added this section to comply with laws regarding the detailed processes for the licensing of active duty service members, veterans, and spouses.

PUBLIC COMMENT: A public hearing was held on this rule on October 4, 2019. The public comment period expired on October 4, 2019. The agency indicated that it received no public comments.

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

QUESTION: Where does the definition of "backflow testing and repair technicians" come from? **RESPONSE:** The definition for "backflow tester and repair technicians" appears to be from the 2006 plumbing code 614.a) "A Testing Technician or Repair Technician is any person meeting all applicable licensing and/or certification requirements of the State Administrative Authority."

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The State Board of Health has the power to adopt "rules as to the qualifications, examination, and licensing of master plumbers and journeyman plumbers and for the registration of apprentice plumbers[.]" Ark. Code Ann. § 17-38-201(a)(3), (d)(1). These proposed rules implement Acts 426, 820, 990, and 1011 of 2019.

Act 426, sponsored by Representative Bruce Cozart, created the Red Tape Reduction Expedited Temporary and Provisional Licensure Act and authorized occupational licensing entities to grant expedited temporary and provisional licensing for certain individuals. The Act requires occupational licensing entities to "by rule adopt the least restrictive requirements for occupational licensure" for certain individuals. Ark. Code Ann. § 17-1-108(b), *as created by* Act 426.

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

Act 990, sponsored by Senator John Cooper, amended the laws regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure. The Act requires licensing entities to adopt rules necessary for its implementation. Ark. Code Ann. § 17-2-104, *as created by* Act 990.

Act 1011, sponsored by Representative Jim Dotson, amended the law concerning licensing, registration, and certification for certain professions

and established a system of endorsement, recognition, and reciprocity for licensing, registration, and certification for certain professions.

c. SUBJECT: Rules Pertaining to Water Operating Licensing

DESCRIPTION: The Rules Pertaining to Water Operator Licensing are the basis of the program for drinking water system operators in the state of Arkansas to become licensed and deemed competent to operate water systems. A state water operator licensing program is also necessary to fully comply with requirements of the federal Safe Drinking Water Act. Modification of this rule is necessary in order to comply with laws that were passed affecting licensure during the 2019 state legislative session. Those laws are indicated as follows.

Act 315 requires that modified rules and regulations uniformly utilize the word "rule" rather than "rule" and "regulation" being used interchangeably and perhaps creating confusion.

Act 426 concerns issuing of temporary or provisional licenses to reduce barriers to entrance of qualified workers to the labor market.

Act 820 concerns the occupational licensing of active duty service members, returning military veterans, and their spouses. The requirements of the law require an expedited process of issuing a license if the active duty service member, returning military veteran, or spouse holds an equivalent occupational license in another state, territory, or district of the United States.

Act 990 addresses criminal background concerns for professions and occupations to obtain consistency regarding criminal background reviews and disqualifying offenses for licensure.

Act 1011 concerns licensing rules when a license is to be reinstated or issued based upon reciprocity. The law places limits upon the requirements that can be placed upon a person petitioning for a reinstatement of their license or issuance of a license based upon reciprocity.

PUBLIC COMMENT: A public hearing was held on this rule on October 4, 2019. The public comment period expired on October 4, 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 rule does not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas Department of Health has the authority to license and certify water system operators for "community and certain noncommunity public water systems from which water is sold, distributed, or otherwise offered for human consumption." Ark. Code Ann. § 17-51-201(a). The State Board of Health may promulgate rules as necessary to administer and enforce water operator licensing law. Ark. Code Ann. § 17-51-103(a)(1). These proposed rules implement Acts 426, 820, 990, and 1011 of 2019.

Act 426, sponsored by Representative Bruce Cozart, created the Red Tape Reduction Expedited Temporary and Provisional Licensure Act and authorized occupational licensing entities to grant expedited temporary and provisional licensing for certain individuals. The Act requires occupational licensing entities to "by rule adopt the least restrictive requirements for occupational licensure" for certain individuals. Ark. Code Ann. § 17-1-108(b), *as created by* Act 426.

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

Act 990, sponsored by Senator John Cooper, amended the laws regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure. The Act requires licensing entities to adopt rules necessary for its implementation. Ark. Code Ann. § 17-2-104, *as created by* Act 990.

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

5. DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS AND COMMISSIONS, ARKANSAS BOARD OF HEARING INSTRUMENT DISPENSERS (Ms. Stephanie Pratt, Mr. Matt Gilmore)

a. SUBJECT: State Board of Hearing Instrument Dispensers Rules

DESCRIPTION: The State Board of Hearing Instrument Dispensers is amending the procedures and enforcement provisions for those licensed by the board. The board provided the following summary of changes to the rule:

Article I, Section 2—removes outdated office address and redirects information request to Board website
Article II, Section 3—updates number of Board members
Article III—deletes current Section 5, which restates statutory language; current Section 6 (now Section 5) eliminates two examination fees, reduces four fees, and creates grace periods for late payments and renewals; current Section 7 becomes Section 6.
Article IV—small language clean-up
Article V—removes reference to out-of-date office address, removes "regulation" to comply with Act 315 of 2019 and redirects prospective applicants to the Board's website in Section 2. In Section 5, a statement has been added clarifying that interns who provide false information to the Board may be expelled from their program. Also includes language and formatting clean-ups throughout.
Article VI—in Section 2, the number of interns a licensee can supervise can be reduced from two (2) to one (1). There are also language and formatting clean-ups throughout.
Article VII—Section 1 replaces current written licensing examination with standardized examination from International Hearing Society; Section 2 and new Section 3 provide standards for the practical portion of the licensing examination; new Section 4 (current Section 3) adds requirements for interns who have taken or are planning to take the examination; current Section 4 is deleted; Section 5's language about interns repeating internships is cleaned-up and clarified; Section 6 lays out re-application process for interns who do not pass the licensing examination
Article VIII—Sections 1 and 2 are language clean-up; Section 3 standardizes continuing education requirements at 12 required hours with 1 ethics hour required; Section 3 also adds 2 additional items to be turned in during license renewals and removes "regulation" to comply with Act 315 of 2019.
Article IX—Sections 1, 2, and 4 have language clean-ups and clarifications; Section 6 sets limits on the copying fees a licensee can charge a patient when complying with a records request.
Article X—language clean-up in Section 4
Article XI—Section 1 clarifies the process by which a person can file a complaint against a licensee and states that unlicensed individuals dispensing hearing instruments are also subject to discipline; Section 2 removes outdated address and states that a licensee has 20 days to respond to any complaint filed against him/her; Section 3 cleans up language regarding Board involvement in complaints; new Section 4 places into rule recusal provisions; new Section 5 (prior Section 4) removes obsolete language.
Current Article XII—deleted because it simply restates statutory language
New Article XII (current Article XIII)—Section 1 now requires an applicant for licensure to state whether the applicant will be engaged in the

practice of dispensing in-office assembled hearing instruments on their application; new Section 2 created with existing language; new Sections 3 and 4 (current Sections 2 and 3) contain language clean-up; new Section 5 states that Board investigator's may enter licensee's place of business without notice.
Current Article XIV is renumbered as Article XIII with no other changes
Current Article XV is renumbered as Article XIV with some language clean-up
New Article XV—standardizes requirements for mobile hearing instrument dispensing units
Article XVI—new article to implement reciprocity and temporary licensure provisions for out-of-state individuals with substantial similar licenses, as mandated by Acts 426 and 1011 and 2019
Article XVII—new article that creates process for reciprocal licensing for active duty military members, returning veterans, and spouses of the same, as mandated by Act 820 of 2019
Article XVIII—new article that creates procedure for applicant for licensure to seek a pre-licensing determination on a criminal background check, as mandated by Act 990 of 2019
Article XIX—new article that creates procedure for an applicant for licensure to request that the Board waive a disqualifying felony conviction, as mandated by Act 990 of 2019

The Board has made the following changes to the rules since the initial submission. None of them are substantive in nature. The changes are noted in blue on the mark-up:

1. The Board removed a reference to a $300 delinquent renewal fee in Article VII Section 2(b). This was a drafting error as the Board had voted to lower the referenced fee as part of amendments to Article II, Section 5.

2. The Board changed a reference to "any licensed hearing instrument dispenser or intern" in Article XI Section 2 to "any person" for clarification purposes.

3. The Board voted to add the definition of automatic licensure to Article XVII, creating a new Section 1(a). The definition comes directly from Act 820 of 2019, and this section has been drafted to comply with that legislation. It does not change any process from the originally submitted rules, but was added at the advice of legal counsel for clarification purposes based on comments ADH had received. The definition of "returning military veteran" is now Section 1(b).

4. A drafting error in Article XVII Section 2(c) has been corrected to change erroneous references to Sections 1(a) and (b) to Sections 2(a) and (b).

5. A reference to the Occupational Criminal Background Check Chapter of the Arkansas Code in Article XIX has been corrected from 17-2-101, et. seq. to 17-3-101, et. seq.

PUBLIC COMMENT: A public hearing was held on August 7, 2020. The public comment period expired on July 14, 2020. The board provided the following summary of the comments received and its responses thereto:

Comment received from Dan DeLong, 6/16/2020
My Two Cents:

Article XV
Section 2
It seems reasonable that if ANY licensed HIS is providing services, testing/fitting or dispensing hearing aids ANYWHERE outside of their brick and mortar location, that they provide the board the same information required of those using mobile units.

30 Days notice as to where they will be and proof that their equipment is calibrated and up to the standards the board has in place for all brick and mortar offices. The HIS will need Proof of a sound proof booth in any area if any testing will be done.

Other locations to include:
Nursing Homes and Care facilities
Factories
Senior Centers
City or State Offices
Or ANY place that is not the brick and mortar location for the HIS.

Board Response: These rules mirror the mobile unit statute found at Ark. Code Ann. 17-84-310. The Board already interprets the definition of mobile unit contained in the statute to include all of the locations mentioned by the commenter.

Article XI
Section 3
In regards to the board being able to launch their own investigation, in our offices no patient files will be available for viewing without written consent from each patient. Our patients' privacy is protected by HIPAA.

Don't really know if my opinion matters but wanted to get my point of view out there...

Board Response: This section is in accordance with the Board's powers to investigate complaints in Ark. Code Ann. 17-84-203(10). This does not violate HIPAA in anyway. No patient files are allowed to be turned over from dispensers to the Board without written consent of the patient. The statute and the rules do not and cannot authorize the Board's members, its agents, or investigators to violate HIPAA or any other law.

Comment received from Tammy Payne 7/8/2020
Article XIII
Section 3.
…..
AR License Board should consider regulations enforced by neighboring states:
*** If CEU is approved by IHS, then the state board does not need to "approve" CEUs.**
***CEUs available via online/webinars. If CEUs are already pre-approved by IHS, they should be approved by AR License Board automatically.**
***Requiring a "special AR Ethics" CEU is not more informative than the IHS or Audiology Online Ethics courses that are offered. I think it'd be more advantageous to open up the ability to take online CEUs or virtual meetings**
***Arkansas Hearing Society should not be responsible for offering make-up classes since CEUs are the responsibility of each licensee. Licensees should be required to petition the License Board to make arrangements to obtain their CEUs in the event that the Licensee doesn't attend the yearly convention.**

Board Response: The CEU section is being amended to mirror Ark. Code Ann. 17-84-306(d)(1)(A). Changes to the Board's duty to approve all CEUs and requirement of the ethics hour cannot be made by rule because it is governed by the aforementioned code section. The approval of IHS CEUs still remains in the purview of the Board due to the aforementioned statute. The Board has no control over Arkansas Hearing Society as that is a separate private entity not affiliated with the Board.

ARTICLE IX
Section 2 – The requirement for MCL & UCL testing be conducted should specify whether the test be done via tonal or speech?"

Board Response: The section referenced by the commenter is pre-existing language. No changes are being made to this section.

ARTICLE IX
Section 4 - . **Since results of verification are stored within the software, how are we going to make this available upon request? It**

should be available automatically within the software and should not need board verification to access.

Board Response: This section refers to a Board request for the verification in the case of a disciplinary investigation with a valid HIPAA waiver from the complainant. In that case, a hard copy can be provided to the Board.

ARTICLE IX
Section 6 -
Section 6 reiterates the HIPAA documentation and is not necessary to include. I am concerned about how these rules/regulations are relevant considering the availability of OTC, which will not pertain to the Licensing Board.

Board Response: The existing HIPAA standard is being placed into rule for clarification sake. The commenter's remark about over-the-counter hearing aids is not germane to this section or any section of the rules since the Board has no authority over those items.

ARTICLE XI.
Section 3 presents several concerns, primarily about privacy for both the business owners and their patients. It seems that an investigation prompted by the Board would violate HIPPA as businesses are not required to provide any patient files without patient consent.

Board Response: This section is in accordance with the Board's powers to investigate complaints in Ark. Code Ann. 17-84-203(10). This does not violate HIPAA in anyway. No patient files are allowed to be turned over from dispensers to the Board without written consent of the patient. The statute and the rules do not and cannot authorize the Board's members, its agents, or investigators to violate HIPAA or any other law.

ARTICLE XII
Section 3. **Certified letters should also be accepted via e-mail, especially since mail delivery has seen significant delays during the recent pandemic. E-mail has become an acceptable form of communication and would be more efficient.**

Board Response: This is merely a language clean-up and not a substantive change. Nevertheless, the language, both the current version and proposed change, mirrors Ark. Code Ann. 17-84-309(c). The notification process cannot be changed by rule because the aforementioned statute governs. Further, the Board finds the certified letter to be a more reliable method than email.

ARTICLE XII

Section 3 - **Again, this seems like a potential HIPAA violation that is not mirrored by any neighboring states. I am concerned that by making our license rules more restrictive than other states we will be creating unnecessary obstacles.**

Board Response: This section is in accordance with the Board's powers to inspect licensee's place of business Ark. Code Ann. 17-84-204(6)(B). This does not violate HIPAA in anyway. No patient files are allowed to be turned over from dispensers to the Board without written consent of the patient. The statute and the rules do not and cannot authorize the Board's members, its agents, or investigators to violate HIPAA or any other law. This is no more restrictive than what is already in the statute.

**** I am wondering why it is necessary for the AR License Board to make more restrictions to our profession, when folks can order hearing aids off the internet or walk into a retail store and buy them off the shelf in the near future.**

Board Response: These changes are in compliance with the sections of the Arkansas Code that govern the Board and are no more restrictive than what is in said statutes. As stated before, OTC hearing aids are beyond the scope of this Board.

Comment Received from Jason Massey, 7/10

I have had the opportunity to review the new proposed rules and regulations form the Arkansas Board of Hearing Instrument Dispensers. There are some great new things in these documents that I think are good and will be more appropriate in a modern era of hearing instrument dispensing. However, I noticed a couple of concerns that I feel I must write you about. 1) (page 8) Section 3. The Board may initiate an investigation, act upon its own motion, or upon written complaint. An investigation may be conducted by one or more of the Board members or agents of the Board. 2) (page 9) Section 5. By accepting or renewing a license, the licensed hearing instrument dispenser grants permission for the investigator, or other designee appointed by the board, to enter the licensee's establishment or place of business without prior notice.

Ladies and Gentlemen, please consider that this is not a good policy with regards to our practices. I understand that there may be some situations that may warrant investigation, however investigations, regardless of warrant or cause, even if there is none, feels like far reaching and possibly over stepping. Please understand, I have the utmost respect and appreciation for our board! I am glad that you are here to protect people from anyone who would try to harm or deceive the public, which protects not only the people of our great state, but also our wonderful hearing

professionals. If there are complaints that warrant investigation that is one thing, but unannounced and random investigators does not seem like a prudent use of your time and efforts. Please consider removing these specifications. I am happy to discuss further if you would like.

Board Response: All investigatory powers referenced in the rules are within the bounds of Ark. Code Ann. 17-84-203(10). Additionally, provisions exist in the rules and in the Arkansas Code to prevent Board members who have a conflict from taking part in consideration of any a disciplinary complaints.

Comment received from Shelley York, 7/10/2020 **(Ms. York's comments were received in a PDF form that also contained a copy of the mark-up. The responses reference the location of each comment. The original PDF is attached.)**

Page 3, Comment 1
Board response: The Board has authority to set the rules for interns Ark Code Ann 17-84-203(4). The Board is making this decision in order to better further the statutorily required direct and physical supervision of interns by their sponsors.

Page 3, Comment 2
Board Response: This is pre-existing language. Further, this is in line with Ark. Code Ann. 17-84-304(d)(5), which requires direct and physical supervision of an intern who has not passed the examination.

Page 4, Comment 1
Board Response: This change is consistent with Ark. Code Ann. 17-84-305(a) requiring the Board give the examination **at least** one time a year (emphasis added). The removal of the named months from the rules gives the Board more flexibility in when they can give the examination if they choose to meet in months other than those currently listed in the rule.

Page 4, Comment 2
Board Response: This language is based on Ark. Code Ann. 17-84-304(d), which clearly states that an intern is still considered an intern until fully licensed.

Page 4, Comment 3
Board Response: This mostly pre-existing language is based on Ark. Code Ann. 17-84-304(d). The additional language comes directly from the aforementioned statute. The delineation between an intern and fully licensed dispenser also comes from that statute and is not set by rule

Page 5, Comments 1 and 2

Board Response: The addition of this language is not a substantive change as it places the language of Ark. Code Ann. 17-84-304 into the rule rather than just give a reference to it. This is already the law.

Page 5, Comment 3
Board Response: The commenter has pointed out some inconsistent language that needed to be deleted. The Board has chosen to reduce the fee as stated in Article III Section 5 of this rule. As a result of this comment, the Board voted to remove a reference to $300 in this section. Thank you to the commenter for pointing out this needed fix.

Page 5, Comment 4
Board Response: This is a language clean-up that is consistent with Ark. Code Ann. 17-84-306(c)(2)(C). The commenter's concern—the re-test following delinquent payment of the renewal fee—is governed by the aforementioned statute. It cannot be changed by rule and is not being changed with this rule amendment.

Page 5, Comment 5
Board Response: The CEU section is consistent with Ark. Code Ann. 17-84-306(d)(1)(A). The Board's duty to approve all CEUs comes from this code section and cannot be changed by rule. The approval of IHS CEUs still remains in the purview of the Board due to the aforementioned statute. The Board has no control over Arkansas Hearing Society as that is a separate private entity not affiliated with the Board.

Page 6, Comment 1
Board Response: The requirement of the ethics hour comes from Ark. Code Ann. 17-84-306(d). The requirement of the ethics hour being taught by an Arkansas licensee is within the purview of the Board's authority to set standards for CEUs. The Board has no control over Arkansas Hearing Society as that is a separate private entity not affiliated with the Board. The Board takes its oversight of the ethics hour and all CEUs very seriously.

Page 6, Comment 2
Board Response: The Board is creating this new class of licensee in order to encourage dispensers who are taking a pause from the business to maintain their licenses rather than let it expire. The CEU paragraph of this section is designed to mirror that of a new licensee who is not required to accumulate CEUs until the end of their second renewal period. It was also designed for a dispenser who re-activates his/her license one month before the renewal period begins so that dispenser would not have to accumulate twelve (12) hours in a single month.

Page 7, Comment 1
Board Response: This restatement of HIPAA standard is for clarification sake. While this commenter is well-aware of the standard, the Board has found it still needs to educate other licensees.

Page 8, Comment 1
Board Response: Based upon this comment, the Board voted to amend this section to include the phrase "any person." This is not a substantive change and is consistent with the due process protections of the Arkansas Administrative Procedures Act.

Page 8, Comment 2
Board Response: All investigatory powers referenced in the rules are within the bounds of Ark. Code Ann. 17-84-203(10). The Board has the authority to authorize the opening an investigation if potential violations are made aware to the full Board. Additionally, provisions exist in the rules and in Ark. Code Ann. 21-8-1001 through 1004 to prevent Board members who have a conflict from taking part in consideration of any a disciplinary complaints.
Page 8, Comments 3 and 4
Board Response: The comments for these sections reference pre-existing language. No changes are being made.

Page 9, Comment 1
Board Response: This section is in accordance with the Board's powers to inspect licensee's place of business Ark. Code Ann. 17-84-204(6)(B).

Page 11, Comment 1
Board Response: The Board respectfully disagrees with the commenter's assertion that it would be difficult to obtain three letters. If a dispenser has been in practice in good standing long enough to establish himself/herself, then he/she should be able to gather three letters from other licensed dispensers. Further, the Board has experienced other states having similar requirements when attempting to achieve licensure by reciprocity or endorsement.

Page 11, Comment 2
Board Response: This special carve-out for automatic licensure for active duty military, returning veterans, and their spouses was mandated by Act 820 of 2019.

Comment received from Mark Shuffield, 7/13/2020
It came to my attention, not by any effort of this board or their agents, that changes were being proposed to the Rules and Regulations governing the practice of dispensing hearing aids in the State of Arkansas. I have noted

my specific concerns below and I urge you to consider them without prejudice.

Board Response: The Board wishes to note that it followed all notice requirements mandated by the Administrative Procedures Act.
Article IX Standards of Practice
Section 4.Verification; I do not believe anyone can view a document that is part of a patient file without the proper HIPAA release. This includes any verification information.

Board Response: The Board cannot and will not seek this without a HIPAA waiver from the patient. That being said, the Board has authority to seek this if it is subject of a complaint investigation and if the patient has provided the Board with a HIPAA waiver.

Section 6.
Regarding setting the fees for records, I do not believe it necessary to mandate and/or fix the prices a business can charge for copying or providing records. Some offices may incur additional expenses outside this mandate in order to provide documents.

Board Response: This is a restatement of HIPAA standard for clarification sake. These fee limits are already mandated by HIPAA.

Article XI
Section 1 The use of the phrase "Any person" is ambiguous and leaves too much room for abuse or those without legal standing, "a dog in the fight", to file unfounded or frivolous complaints. Part of this board's responsibility is not only to protect the consumer, but the licensed dispensers as a whole.

Board Response: Any person" is pre-existing language. As to the concerns about unfounded or frivolous complaints, the Board has the authority to review and dismiss any complaint that does not have evidence of a violation by a licensed dispenser.

Section 3 The board now wants to initiate an investigation and "act upon its own motion" to investigate? That is an overreach. I hope this is not the board attempting to seek personal agendas against duly licensed individuals and businesses. Furthermore, what is "agents of the board'? Will the board have power to appoint anyone as an agent without consideration of credentials, experience or even the ability to be objective?

Board Response: All investigatory powers referenced in the rule are within the bounds of Ark. Code Ann. 17-84-203(10). Additionally, provisions exist in the rules and in Ark. Code Ann. 21-8-1001 through

1004 to prevent Board members who have a conflict from taking part in consideration of any a disciplinary complaints.

Article XV. Mobile Units
Section 2 Again, overreach. These requirements could be burdensome to provide the board the exact information requested. To request exact times, hours of operations and locations fails to consider the normal course of business and life. Unexpected delays and other complications are not allowed for in this language. I do not believe it is within the power or scope of the board to be notified of every single event or operation a business undertakes in the course of business. Will all board members and dispensers be required to provide their calendar of events within the same guidelines? You are delving into business operations and marketing practices that are beyond your scope of governance.

Board Response: This section mirrors Ark. Code Ann. 17-84-310. This is no more restrictive than what is already authorized by law. All licensees, including current and future members of this Board, are required to abide by this and every other applicable statute and rule.

Article XVI Reciprocity
True reciprocity can only be achieved if Arkansas recognizes specific states and those states in turn give the same benefit to Arkansas licensed dispenses. The very definition of reciprocity requires "mutual benefit" and I do not see any mutual benefit for current Arkansas licensees. Someone who is granted reciprocity under this language could merely operate in a border state and do business in Arkansas without me, a licensed dispenser in Arkansas, unable to do the same in their state. That is not only unfair, but misguided in the attempt to provide reciprocity for I can only assume select individuals.

Board Response: This language was written to implement changes mandated by the Legislature in Acts 426 and 1011 of the 2019 session. The Acts affected several other licensing boards so this action is not exclusive to this Board. The concerns expressed about other states not extending the same opportunities for Arkansas licensees is understandable, but what other states do is beyond the Board's control.

Perhaps, the board sought outside counsel in preparation of these changes and has not considered the full weight or overreach of what is being proposed. This is why I have taken the opportunity to voice my concerns.

Thank you for your consideration and attention to my concerns.

Comment Received from Dan Delong, 7/13/2020

As a business owner and a Hearing Instrument Specialist governed by the Arkansas Board of Hearing Instrument Dispensers (HID), I am submitting these comments in response to the "proposed changes" to the Rules and Regulations. My first question is "Why?" And in particular, why now? The Hearing Industry is changing so rapidly. Just last year in the FDA Reauthorization Act Hearing Aids were categorized as OTC (Over the Counter) Again with our patients now being bombarded by OTC Hearing Aid Advertising along with 3rd Party Providers why is the Board now trying to make so many bold changes to the Rules and Regulations when they should be trying to protect the consumers from direct to consumer online OTC companies disguising their cheaply made personal sound amplifiers (PSAPs) as hearing aids? Next question is when was this discussed? When was the Board going to let us know about these "proposed changes?" I just happened to be on the Board's website and noticed all the proposed changes highlighted in red. I then asked around and to my amazement not even the Arkansas Hearing Society President was aware of any of these "proposed changes." I then researched the published minutes from previous Board meetings, and again there was no mention of these "proposed changes." This seems odd, and the timing of how we as licensees had to come by this information is alarming.

Board Response: The Board discussed these changes to the rules at several open Board meetings over the last few years. The final version was voted on at the Board's September 27, 2019, meeting. These rules were then vetted by the Department of Health and the Governor before being submitted for public comment. The Board followed all notice requirements mandated by the Administrative Procedures Act. Additionally, this commenter submitted an earlier comment on June 16 and did not express any of this concern about not being notified. He was, in fact, the first person to comment.

We have been asked if we have any comments or questions with these "proposed changes," that we submit them to the Board to be recognized in the upcoming meetings or hearings. The following are my comments:

Article XI
Section 3

In regard to the board being able to launch their own investigation, I am afraid that this seems to run afoul of HIPAA. Specifically, I am concerned that if our office gives patient files to some sort of investigator without the consent of our patient, that patient would have a privacy rights claim against us under HIPAA. In our offices no patient files will be available for viewing without written consent from each patient. Our patients' privacy rights are protected by HIPAA and must continue to be, and we would have to have some other authority tell us this would not be a HIPAA violation to be comfortable with this section.

Board Response: As stated in the response to Mr. DeLong's first comment, this section is in accordance with the Board's powers to investigate complaints in Ark. Code Ann. 17-84-203(10). This does not violate HIPAA in anyway. No patient files are allowed to be turned over from dispensers to the Board without written consent of the patient. The statute and the rules do not and cannot authorize the Board's members, its agents, or investigators to violate HIPAA or any other law.

Article XV
Section 2

My first comment / question is against "Why?" First of all, it sure seems this "proposed change" is pointed directly toward Natural Hearing Centers. That is clear because we are the only company that uses Mobile Hearing Clinics. Rather than directly targeting mobile units, it would seem to be reasonable and fair to say that if ANY licensed Hearing Instrument Servicer (HIS) is providing services, testing/fitting or dispensing hearing aids ANYWHERE outside of their regular, brick and mortar location, they must provide the Board the same information required of those using mobile units under these proposed changes.

That would include 30 days' notice as to locations of operation and proof that their equipment is calibrated and up to the standards the Board has in place for all brick and mortar offices. The HIS should be required to have proof of a soundproof booth in any area if any testing will be done. The HIS should have to meet any other requirements related to service standards. In short, if the concern that is driving these proposed changes is really the quality of testing and service by HIS's, then the requirements for ANY location should be the same as those proposed for mobile units.

The locations that should be subject to the same rules include:

Nursing Homes and Care facilities
Factories
Senior Centers
City or State Offices
Or ANY other place that is not the regular, brick and mortar location for the HIS.

Board Response: As stated in the response to Mr. Delong's first comment, these rules mirror the mobile unit statute found at Ark. Code Ann. 17-84-310. The Board already interprets the definition of mobile unit contained in the statute to include all of the locations mentioned by the commenter.

ARTICLE XVI
Licensure by Reciprocity

The definition of Reciprocity is the practice of exchanging things with others for mutual benefit, especially privileges granted by one country or organization to another. With that in mind, we need to decide if we are going to offer Reciprocity or not. Looking toward the future and this rapidly changing industry we may not even need licenses to fit and dispense hearing aids now that hearing aids are categorized as "Over the Counter." The current way the Rules and Regulations read is way too confusing, with too many stipulations. Going back to the definition, the practice of exchanging things needs to benefit both parties. Plain and simple, if another state will accept Arkansas HID Licenses and offer reciprocity then we should return that privilege and offer it back. Another example of the current outdated thinking is, if a person moves from another state and has taken the time and effort to sit for the National Boards, that person should be granted full Licensure and not have to sit for another State ILE and Practical Exam.

Board Response: This language was written to implement changes mandated by the Legislature in Acts 426 and 1011 of the 2019 session. The Acts affected several other licensing boards so this action is not exclusive to this Board. The concerns expressed about other states not extending the same opportunities for Arkansas licensees is understandable, but what other states do is beyond the Board's control.
I sincerely hope these comments will be given the proper time and consideration before any future and permanent changes are made to our current Rules and Regulations. With that in mind, I respectfully request that I or a representative of Natural Hearing Centers be permitted to address the Board before any Board consideration of these proposed changes. Thank you.

Comment received from Arthur Caiton, 7/14/2020 **(this was received following the close of the public comment period, but the Board chose to consider it anyway)**

We have been informed of proposed rule changes, I have issues with a couple of them.

Some of these rules are not about the welfare of the consumer they are about the power of the board.

Rule proposed to not have a formal complaint against someone before the board investigates them is ridiculous(Upon their own motion),especially given the fact that the board is made up of competitors and business owners themselves who have been known to be jealous of other

companies that outsell them by millions and millions every year. If our patients are taken care of the way a good Hearing Care company should be than the board has no right to be snooping and have the CAPABILITY to put their nose in anytime they please, simply because they wish to do so.(Article xi, section 3)

Board Response: All investigatory powers referenced in the rules are within the bounds of Ark. Code Ann. 17-84-203(10). Additionally, provisions exist in the rules and in Ark. Code Ann. 21-8-1001 through 1004 to prevent Board members who have a conflict from taking part in consideration of any a disciplinary complaints.

Secondly having a Mobile Unit schedule before the year is the most hypocritical thing I've ever heard...does the rest of Arkansas businesses and workers in this hearing industry get info concerning the marketing schedule from the dispensers on the board?
A mobile unit has an office within an hour or so of its location, are the members of the board giving us info on where they send they're marketing and how far out they are going??
What's the difference between them marketing 1-2hours away and me going an hour away and doing everything by the law? I am also not sure that is even legal given the conflict of interest from some of the more competitive members on the board, why should a competitor have that information?. With it they can adjust their marketing against it, they can also market against it like some have before. (Entire article XV)

The board is not there as a form of power to be able to stick their noses where they please. They are not here to serve as a dictator to go after anyone they may have a vendetta against like they have in the past. They are there to serve the consumer/patient and make sure the aids being put on those patients are being done lawfully. They have legal cases that show nothing in a mobile unit is illegal or they would have shut it down years ago. This is simply an attempt to have more access to when we'll be in there city and as stated above with the conflict of interest they need to find out how ETHICAL that is of themselves to even propose as a rule.(Article XV)

These are my takes on the new laws and regulations being proposed, thank you!!

Board Response: Article XV mirrors Ark. Code Ann. 17-84-310. This is no more restrictive than what is already authorized by law. All licensees, including current and future members of this Board, are required to abide by this and every other applicable statute and rule. In response to the commenter's accusations about the Board using their authority to attack competitors, this is completely without merit. The Board's members take

the authority granted to them by statute and rule very seriously. They have accepted appointments to this Board to serve the State, not to accumulate power or use their position to attack competitors, as baselessly alleged by this commenter.

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

1. Concerning Article VI, Section 2, what was the Board's reasoning for limiting hearing instrument dispensers or audiologists who are qualified to act as a sponsor to an intern to one intern at a time? **RESPONSE:** The Board's enabling statutes require direct, personal, and physical supervision of interns by their sponsors. This change will provide a better framework for the sponsors to abide by these requirements.

2. In Article III, Section 5, the board eliminated the practical and written examination fees. In Article VII, Section 1, the board adopted the IHS examination as the written portion of the licensing exam, with the applicant required to pay IHS directly. How much is the current examination fee charged by IHS? **RESPONSE:** The IHS currently charges $225.00 for the test. The Board worded this in such a way that the rules will not have to be changed every time IHS changes their examination fee.

3. Concerning Article III, Section 5, would the total fee for the practical examination be $75.00? **RESPONSE:** Yes.

4. Concerning Article VIII, Section 2(b), the fee of $300 for reinstatement of a license revoked for non-payment appears to be inconsistent with fees in Article II, Section 5. Could you please clarify? **RESPONSE:** This was a drafting error that was the result of these rules amendments being a few years in the making. This error is corrected in the mark-up submitted.

5. Concerning Article XVII, Section 2(c), it appears to incorrectly reference Section 1(a) and (b). Should these be changed to 2(a)& 2(b) instead? **RESPONSE:** Yes, this was a drafting error that is corrected in the new mark-up submitted.

6. Concerning Article XVIII, Section 3, what period of time does the board consider a "reasonable" time to respond? **RESPONSE:** Because the determination must be made by the full Board at an open meeting, the request from the potential applicant would be taken up at the next regularly-scheduled Board meeting. The Board generally meets on a quarterly basis. In the case of a request with exigent circumstances, the Board would consider holding a special meeting to consider that request.

7. Concerning Article XVIII, Section 6, the board appears to take the position that decisions made by the board in response to pre-licensure criminal background checks are not subject to appeal. Could you please provide the rationale/legal authority for that position? **RESPONSE:** It is not appealable because the determination in Article XVIII is not the final step for someone seeking licensure. If the pre-licensure background check determines the potential applicant has a disqualifying offense, then the potential applicant may seek a waiver for that offense from the Board under Article XIX. That process does include a right to appeal under the Administrative Procedure Act.

8. Concerning Article XIX, Section 1, should it reference Ark. Code Ann. § 17-3-102 instead of Ark. Code Ann. § 17-2-102? **RESPONSE:** Yes, this was a drafting error that is corrected in the new mark-up submitted.

9. In the board's financial impact statement, there is an estimated cost of $22,170 for the current fiscal year and $11,045 for the next fiscal year listed on #5. However, the explanation which follows states that the proposed amendments would have a "positive financial impact."
(a) Could you please provide clarification on whether these amounts represent a cost or savings to private individuals, entities and businesses subject to the proposed rules?
(b) Could you please explain how the agency calculated these estimates?
RESPONSE: [Agency attached a spreadsheet containing the *Positive* financial impact to Dispensers renewing, Dispensers applying, Interns, and Intern applicants.]

The proposed effective date is September 26, 2020.

FINANCIAL IMPACT: The board indicated that the proposed rules have a financial impact. The board estimated a cost savings of $22,170 for the current fiscal year and a cost savings of $11,045 for the next fiscal year to private individuals, entities, and businesses subject to the proposed rules. Specifically, the board stated that the proposed amendments would have a positive financial impact on applicants for the internship program, dispenser applicants, and dispensers renewing their licenses. Interns would save $300 on the application process and program, dispenser applicants would save $250, and dispensers renewing their license would save $125 annually.

LEGAL AUTHORIZATION: The Arkansas Board of Hearing Instrument Dispensers has authority to make rules not inconsistent with the laws of this state that are necessary for the enforcement and orderly administration of Title 17, Chapter 84, concerning hearing instrument dispensers. However, no rule shall be promulgated that in any manner serves to restrict the number of licenses that may be issued in any city,

town, or county of this state. *See* Ark. Code Ann. § 17-84-203(5). The board has fee-making authority to establish the following fees: application fee (Ark. Code Ann. § 17-84-304(a)(2)); an internship fee (Ark. Code Ann. § 17-84-304(c)(2)); permanent registration fee and annual fee (Ark. Code Ann. § 17-84-306(a)); renewal fee (Ark. Code Ann. § 17-84-306(c)(1)); late payment penalty (Ark. Code Ann. § 17-84-306(c)(2)). The proposed rules implement the following Acts of the 2019 Regular Session:

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

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

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

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

Act 1011 of 2019, sponsored by Representative Jim Dotson, amended the law concerning licensing, registration, and certification for certain

professions and established a system of endorsement, recognition, and reciprocity for licensing, registration, and certification for certain professions. *See* Act 1011 of 2019.

6. <u>DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS AND COMMISSIONS, STATE MEDICAL BOARD</u> (Mr. Kevin O'Dwyer, Ms. Amy Embry, Dr. Rhys Branman, Mr. Matt Gilmore)

a. <u>SUBJECT</u>: Rule 46 – Minor Aesthetic/Cosmetic Surgical Procedures

<u>DESCRIPTION</u>: The Arkansas State Medical Board's proposed Rule 46 sets out guidelines for minor aesthetic/cosmetic surgical procedures.

Beginning about five years ago, following numerous complaints received by the Arkansas State Medical Board, the Arkansas State Board of Nursing (ASBN), and the Arkansas State Board of Cosmetology (ASBC), representatives of these Boards began meeting to discuss safety issues regarding the use and complications associated with Botox and "fillers." It was subsequently agreed that the injection of these is the practice of medicine and should be regulated as such. A prescription is required to obtain Botox and fillers and significant complications can occur with their injections. Therefore, appropriate training is important for patient safety.

There has never been such a high level of agreement, cooperation and coordination between ASMB's Board and the ASBN Board. Both Boards are very concerned about the patient safety implications of injecting Botox and fillers, and are in complete agreement that regulation is necessary. So, the Boards decided to work closely in preparing complementary rules, and to support the other Board's Rule. The ASBN rule has already had a public hearing and the ASMB Rule public hearing was held on July 23, 2020.

The detractors point to this rule limiting or prohibiting certain providers from performing procedures or injecting Botox and/or fillers. It does not. The Rule only deals with physicians and physician assistants and either may perform the functions related to Rule 46, so long as they have training. The rule sets up guidelines for the administration of Botox and fillers and the need for training in the application of those products and how to deal with complications. This rule is simply about patient safety. This rule does not limit nurse practitioners at all as the Medical Board does not regulate nurses. The Nursing Board rule, which is supported by the Medical Board, relates to the nursing practitioners.

<u>PUBLIC COMMENT</u>: A public hearing was held on July 23, 2020. The public comment period expired on July 23, 2020. The State Medical

Board provided the following summary of the comments received and its responses thereto:

SUMMARY OF OPPOSITION TO RULE 46 MINOR AESTHETIC COSMETIC SURGICAL PROCEDURES GUIDELINES AND ARKANSAS STATE MEDICAL BOARD RESPONSES

We received a total of 725 letters that includes letters from the Cosmetic Health Coalition (CHC), letters from Newman, MD, Plastic Surgery, Advanced Dermatology & Skin Cancer Center, PLLC, Women's Health Associates, Salman Hashmi, Abeer Hashmi, and Taylor Plastic Surgery in opposition to Rule 46.

At the public hearing, four (4) people spoke. Three (3) were against the Rule and one (1) was for the Rule.

We received 719 letters from CHC and six additional letters from other sources as stated above opposing Rule 46. We received three additional letters approving of Rule 46 as stated above.

The objections are as follows (there is overlap of objections because each letter stated several objections):
Of the total 725 received, the main objections are as follows:

637 -Requires a physician to enter into a collaborative agreement to allow an APRN to provide minor cosmetic procedures, the APRN must have too much training.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

373 -Do not like the documentation requirements.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

373 -This rule is an unreasonable restriction on practice for APRNs in Arkansas.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

637 -The proposed rule requires the physician to personally diagnose wrinkles, yet the diagnosis stage is not the stage which exposes patient to significant risk, which is the delivery stage. The rule permits doctors to delegate duties to a Medical Assistant.

BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

371 - Unfair to collaborating doctors.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

646 - Believe this is just a rerouting of the industry to doctors for profit. This is a scheme to create a monopoly and take money, business and ultimately the livelihood of the individuals currently performing these treatments. This causes a financial burden. This is costly to patients and unnecessary.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

2 - I should be able to choose who I go to. My person has fixed a few mess ups from a dermatologist. Cosmetic decisions should be left to the patient and whom they choose to perform the work.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

2 - This is not considered a medical procedure and should not require a medical approval. Clear case of overreach.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

629 - Advance Practice Nurses are performing much more invasive procedures in the state of Arkansas without this much oversight.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

286 - Limits access to healthcare.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

633 -The rule prohibits an aesthetician from delivering any chemical peels even though chemical peels are part of their education and training.

BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

636 -This rule is intended to make the cosmetic industry more complex and competitive and not about patient safety.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

1 -This is a scope of practice and should be controlled by the Legislature.
BOARD'S RESPONSE: The Board doesn't believe that the Rule states this position. The Rule adequately protects patients and allows physicians who are adequately trained to perform the procedures.

SUMMARY OF APPROVAL OF RULE 46 MINOR AESTHETIC COSMETIC SURGICAL PROCEDURES GUIDELINES

We received the following letters from AmSpa, American Society of Plastic Surgeons and Michael Spann, M.D. approving of Rule 46.

AmSpa
Alex R. Thiersch, CEO of AmSpa states that they are glad that the Arkansas State Medical Board has recognized that practitioners in medical spas need to be properly trained. AmSpa is dedicated to ensuring the non-invasive aesthetic industry is safe and that practitioners are trained, qualified and compliant. They applaud and support the decision to address the issue of unsupervised and unqualified practitioners in med spas. The definition of procedures covered by the rule should be clarified. The section addressing neuromodulators should be expanded. The training requirements for physicians should make clear that while board certification is one way to meet the requirements, competency and skill can be gained from a number of sources. Aesthetic medical practices should be able to employ telemedicine to enhance their services. A physician who has sufficient knowledge and experience should be able to delegate a procedure to an APRN with similar training and experience. Licensed practical nurses could perform cosmetic medical procedures under the supervision of a physician or advanced practice registered nurse trained in procedures. In most states, physician assistants and nurse practitioners are permitted to perform patient examinations and prescribe treatments when working in a supervised or collaborative relationship with a physician. AmSpa believes these standards together with the enforcement of existing prohibitions on the unauthorized practice of medicine will eliminate the bad actors and provide the public with confidence that medical spas are safe.

AMERICAN SOCIETY OF PLASTIC SURGEONS

Lynn Jeffers, M.D., President of American Society of Plastic Surgeons, states that plastic surgeons in the state are concerned with patient safety. Some med spas are operated independently by nurses and nonmedical aestheticians which leads to non-physician providers performing procedures within the practice of medicine without the supervision of a physicians. Medical directors are involved in ownership of med spas and are not trained to perform and handle potential complications. It is appreciated that Rule 46 will provide guidance to physicians about the required experience and training.

MICHAEL SPANN, M.D.

Dr. Spann is a plastic surgeon and has board certifications in both general surgery and plastic and reconstructive surgery. The FDA clearly answers that having fillers injected should be considered a medical procedure and not a cosmetic treatment. Most injectors have surprisingly minimal exposure to dealing with complications and essentially learn by trial and error at the expense of the patient. Arkansas law clearly defines the practice of medicine as one who diagnoses, prescribes drugs and performs procedures. The statute makes it clear that the practice of medicine is for those possessing medial degrees. Nurse owned, physician supervised cosmetic clinics falls within the definition of unlicensed practice of medicine. Cosmetic injectors limited learning methods are being employed by or apprentice for a physician who trains them, enrolling in a course or learning by self-study. All of these are inconsistent and inadequate for independent practice. A patient undergoing a medical procedure deserves a competent injector. He asks that Rule 46 be approved.

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

1. The terms 'surgery' and 'minor aesthetic/cosmetic surgical procedures' are defined in the proposed rule. Are these terms defined only in this rule 46 or are these definitions located in other rules of the board? If they are located in other rules, could you please cite those rules? **RESPONSE:** The terms are defined in this rule specific to this rule.

2. What is the board's rationale for requiring physicians to show sufficient training and experience in the procedures being delegated? **RESPONSE:** To protect patients of Arkansas. The Board has discovered situations in which physicians and those persons to whom the procedure is delegated are not sufficiently trained to ensure safety or even basic knowledge of the procedures and the negative outcomes of the procedures. Complications from these procedures are significant.

3. The rule requires that the "physician must personally diagnose and document the condition of the patient, [and] prescribe the treatment and procedure to be performed." What is the board's reasoning behind this requirement? **RESPONSE:** This is really a restatement of an already existing rule. Rule 2.8 requires physicians to establish a proper patient/physician relationship prior to diagnosis and treatment. The reason is to ensure that properly trained professionals are treating patients prior to injecting a prescribed foreign substance into the human body.

4. Does this rule preclude practitioners other than physicians from performing minor aesthetic/cosmetic surgical procedures? **RESPONSE:** No

5. Could you please explain the board's reasoning concerning the prohibition of delegation of these procedures to a licensed practical nurse or licensed aesthetician? **RESPONSE:** The practice acts governing those two professionals currently prohibits those practitioners form performing these procedures.

6. The rule provides that the physician "must be available at the time the minor surgical procedure is performed." What does the board interpret this to mean (physically present, on site, be able to come on-site if there is a complication, etc.)? **RESPONSE:** It means that the physician must be available by phone and have physician "back-up" should anything go wrong. It does not mean the physician must be "on site".

7. Why does the section concerning collaboration with an APRN use mandatory language concerning board certification of the collaborating physician ("must be board certified…"), whereas the general delegation provision only uses permissive language ("may include but is not limited to board certification..."))? **RESPONSE:** It does not require board certification. The last part of the sentence states "or must show sufficient training and clinical experience in performing the procedures to be performed by the APRN."

8. Concerning the language "the board finds that a physician has; in fact, committed gross negligence if the physician or physicians delegated personnel performs minor surgical procedures on patients without the benefit of appropriate clinical training,"
(a) Wouldn't this determination be made on a case-by-case basis depending on the facts alleged in a particular complaint? **RESPONSE:** Yes. The Board would be required to give notice to the physician of a hearing and serve a "charging document" on the physician. A hearing would have to be conducted and evidence presented in order to determine if the physician violated the rule.

(b) Would this determination be subject to the procedural provisions contained in Ark. Code Ann. § 17-95-410? **RESPONSE:** Yes.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Arkansas State Medical Board has authority to:
(1) make and adopt all rules and bylaws not inconsistent with the laws of this state or of the United States and necessary or convenient to perform the duties and to transact the business required by law. *See* Ark. Code Ann. § 17-95-303(1);
(2) promulgate and put into effect such rules as are necessary to carry out the purposes of the Arkansas Medical Practices Act, § 17-95-201 *et seq.*, § 17-95-301 *et seq.*, and § 17-95-401 *et seq.*, and the intentions expressed therein. *See* Ark. Code Ann. § 17-95-303(2);
(3) promulgate rules limiting the amount of Schedule II narcotics that may be prescribed and dispensed by licensees of the board. *See* Ark. Code Ann. § 17-95-303(8); and
(4) adopt rules that establish standards to be met and procedures to be followed by a physician with respect to the physician's delegation of the performance of medical practices to a qualified and properly trained employee who is not licensed or otherwise specifically authorized by the Arkansas Code to perform the practice. *See* Ark. Code Ann. § 17-95-208(a). Rules adopted pursuant to this section shall provide that the delegating physician remains responsible for the acts of the employee performing the delegated practice, that the employee performing the delegated practice is not represented to the public as a licensed healthcare provider, and that medical practices delegated under this section shall be performed under the physician's supervision. *See* Ark. Code Ann. § 17-95-208(c).

7. DEPARTMENT OF HUMAN SERVICES, DIVISION OF AGING, ADULT, AND BEHAVIORAL HEALTH SERVICES (Mr. Mark White, Ms. Patricia Gann)

a. SUBJECT: Arkansas Long Term Care Ombudsman Program Policies

DESCRIPTION:

Statement of Necessity

The federal Department of Health and Human Services, Administration on Aging (AoA), issued a final rule for State Long-Term Care Ombudsman programs, effective July 1, 2016, to implement provisions of the Older American Act of 1965 regarding States' Long-Term Care Ombudsman programs. The final rule filing provides that the federal regulation was necessary because the federal agency had not promulgated regulations regarding state implementation of the Long-Term Care Ombudsman program. This federal regulation was intended to eliminate variation in interpretation of the Act's provisions among the states. Arkansas's ombudsman has complied with the requirements of the Act even though the federal regulation regarding states' implementation was not yet in effect.

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

Rule Summary

This rule, entitled, "Ombudsman Policies," is being promulgated for the first time. These policies address:
- An introduction to the office;
- Definitions of important terms;
- Program administration, including the State Ombudsman's role within the Department of Human Services;
- Responsibilities of the Area Agency on Aging, providers, regional ombudsmen, and representatives;
- Grievance processes;
- Criteria for designations within the ombudsman process as well as removal or suspension of awarded designation;
- Service components, delivery, monitoring, and evaluation;
- An outline of organizational and individual conflicts of interest;
- Information on legal counsel;

- Prohibition of willful interference and retaliation along with reporting procedures;
- Authority of the Long Term Care Office to access residents, facilities, and records;
- Policy on confidentiality, monitoring, disclosure, and maintenance;
- Procedure to initiate complaints and how they will be investigated and resolved.

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

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

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

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

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

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

COMMENT 5: Page 19 – Section 305 (E)(2) What is considered a reasonable time to fill a vacant Ombudsman Representative staff position? Who determines the reasonable time frame? **RESPONSE:** We will revise the wording to state: "Failure to fill a vacant Ombudsman Representative staff position within 45 days of vacancy" based on the DHS

Administrative Procedures Manual Chapter 801. This is the same policy as the state unit on aging when fulfilling the State Ombudsman position.

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

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

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

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

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

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

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

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

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

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

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

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

COMMENT 5: Under Section 603 B., for an Ombudsman Representative to obtain legal representation, there is no time-frame under No. 1. for when the representative shall advise the SLTCO of a legal action or threatened legal action. Under B.2.a., there is no time-frame for when the SLTCO will submit a written request.

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

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

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

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

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

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

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

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

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

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

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

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

3. The statutory definition of "neglect" uses the phrase "goods or services that are necessary to maintain the health or safety of an older individual." 42 U.S.C. § 3002(38)(A). The proposed rules replace this phrase with "goods or services that are necessary to avoid physical harm, mental anguish, or mental illness." Why did the agency choose to make

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

4. The proposed definition of "neglect" reads, "The failure to provide the goods or services that are necessary to avoid physical harm, mental anguish, or mental illness, or the failure of a caregiver to provide the goods and services." Does the agency anticipate that someone other than a caregiver could fail to provide goods/services, or is there another reason for the two separate clauses? **RESPONSE:** Yes. The definitions contained in the federal Older Americans Act and the Arkansas Adult and Long-Term Care Facility Resident Maltreatment Act differ in a number of ways. The definitions contained in the proposed rule are an attempt to balance the federal definitions, the state definitions, and current practice and policies. The definitions contained in the proposed rule have been approved by the Administration for Community Living of the U.S. Department of Health and Human Services.

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

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

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

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

9. Where does the 30-day timeframe for review and closure of complaints in Section 206(B)(7) come from? **RESPONSE:** The timeframe is taken from current practice and policies and non-regulatory guidance issued by the Administration for Community Living of the U.S. Department of Health and Human Services.

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

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

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

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

14. Where do the staff qualification requirements laid out in Sections 310, 311, and 312 come from? **RESPONSE:** Local ombudsman entities are

required to cooperate with the State Ombudsman in the selection of these individuals, by 45 C.F.R. § 1324.11(e)(1), and representatives and volunteers are ultimately designated by the State Long-Term Care Ombudsman per 42 U.S.C. § 3058g(a)(5)(A). Criminal background checks are required by Ark. Code Ann. § 20-38-103. The remaining requirement are taken from current practice and policies.

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

16. What is the source for the certification requirements for formerly certified ombudsman representatives (Section 314)? **RESPONSE:** The requirements are taken from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

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

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

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

20. Is there specific statutory authority for Section 404, which deals with routine visits to long-term care facilities? **RESPONSE:** Access to facilities by ombudsmen is guaranteed by Ark. Code Ann. § 20-10-603.

The general statutory authority for the proposed rules is Ark. Code Ann. § 20-10-602, which gives broad authority to DHS to "establish and administer an ombudsman program" and to adopt rules necessary to administer the program. Additional requirements are contained in 45 C.F.R. § 1324.11(e)(2).

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

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

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

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

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

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

27. Where do the procedures detailed in Section 603, regarding legal counsel for representatives of the Long Term Care Office, come from?

RESPONSE: The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(g) and 45 C.F.R. § 1324.15(j) and current practices.

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

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

30. Where do the review requirements in Section 902(C)-(F) come from? **RESPONSE:** The provisions of this section reflect the requirements of 42 U.S.C. § 3058g(a)(5)(D)(i) and 45 C.F.R. § 1324.15(e), and were adapted from a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

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

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

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

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

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

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

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

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

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

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

41. What is the source for the case closure criteria in Section 1004(D)? **RESPONSE:** These criteria are taken from the National Ombudsman Reporting System (NORS), an ombudsman data collection tool provided

by the Administration for Community Living of the U.S. Department of Health and Human Services.

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

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

44. Section 1006(D)(2) sets out procedures for referring a resident to private attorneys. Where do these procedures come from? **RESPONSE:** These procedures are implicitly required by 42 U.S.C. § 3058g(a)(3)(C). They are taken from current practice and policies and a review of state long-term care ombudsman policies of other states that have already received federal approval, as well as information from the National Long-Term Care Ombudsman Resource Center.

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

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

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: "The Division of Aging, Adult, and Behavioral Health Services of the Department of Human Services shall establish and administer an ombudsman program in accordance with the Older Americans Act . . . and all applicable federal and state laws . . . ."

Ark. Code Ann. § 20-10-602. Federal regulations require state agencies on aging to "develop policies governing all aspects of . . . the ombudsman program whether operated directly by the State agency or under contract." 45 C.F.R. § 1321.11(a). The Department has the authority to promulgate rules as necessary or desirable to administer assigned forms of welfare activities and services, *see* Ark. Code Ann. § 20-76-201, and it may also promulgate rules as needed to conform its programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129.

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

a. SUBJECT: Transitional Employment Assistance Policy Manual 1,000 & 10,000

DESCRIPTION:

Statement of Necessity

Outdated and non-valid information is being removed in Transitional Employment Assistance (TEA) Policy Manual sections 1030, 1040, 1060, 1070, 1080, and 10,000.

Rule Summary

Changes to the Transitional Employment Assistance (TEA) policy include:

- Removing outdated TEA policy sections 1030, 1040, 1060, 1070, and 1080.
- Removing the requirement that the eligibility worker provide a TEA applicant with an Arkansas Work Pays pamphlet from section 10,000.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on July 30, 2020. The agency indicated that it received no public comments.

The proposed effective date is October 1, 2020.

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

LEGAL AUTHORIZATION: The Department of Human Services has the responsibility to administer assigned forms of public assistance. *See* Ark. Code Ann. §§ 20-76-201(1), 20-77-107(a)(1). The Department has

the authority to make rules that are necessary or desirable to carry out its public assistance duties, *see* Ark. Code Ann. § 20-76-201(12), and it has the specific authority to "promulgate rules to determine resource eligibility and benefit levels for" Transitional Employment Assistance Program eligibility. Ark. Code Ann. § 20-76-401(c). The Department and its divisions also have the authority to promulgate rules as necessary to conform their programs to federal law and receive federal funding. Ark. Code Ann. § 25-10-129(b).

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

a. SUBJECT: Episode 1-19; Section I-3-19; and State Plan #20-0002

DESCRIPTION:

Statement of Necessity

The Episode of Care (EOC) program has been successful as each episode is now reporting stability in cost and quality. Financially, the positive incentives (gain share) now outweigh negative incentives (risk share). The program has exhausted any practical selection of new or additional conditions or procedures for which to study.

Asthma, Chronic Obstructive Pulmonary Disease, and Congestive Heart Failure episodes have all increased follow up visits with physicians which decreased repeat visits to the emergency room. Tonsillectomy episode had a huge decrease in pathology rate from 70% the first year to 22% currently along with a decrease in steroid rate. Average length of inpatient stay has decreased for Total Joint Replacement and Congestive Heart Failure and Perinatal was successful in dramatically increasing Strep, HIV, and Chlamydia screenings while also reducing the number of emergency room visits. Upper Respiratory Episode decreased unnecessary antibiotic prescriptions typing a quality measure for strep tests to a prescription. With quality stabilizing, informational reporting is replacing the financial reporting to allow providers to see trends in quality metrics, comparing practice methodology with peers.

As a result of stabilization and no new avenues of consideration, the Episodes of Care program will gradually conclude over the next two (2) years. State fiscal year 2020 (July 1, 2019 – June 31, 2020) will be the last reporting period for each episode's performance period. In state fiscal year 2021, the final reconciliation episode report will be generated. The reconciliation report period allows Principal Accountable Providers the opportunity to improve their gain share/risk share or incentive position.

The report will reconcile the payment report for a final determination of possible risk share or gain share. The reporting timeframe table below identifies the episode programs and the timeframe for each Episode of Care.

Rule Summary

This proposed rule provides that the Episode of Care (EOC) Program will sunset over a period of two years, state fiscal year 2020 and state fiscal year 2021. The EOC program is a retroactive, financial program of Arkansas fee-for-services Medicaid. The episodes were launched quarterly and, as a result, have different performance periods. Hence, the reason for a gradual sunset of the program.

The Arkansas Medicaid State Plan is being revised throughout to announce the sunset of the Episode of Care Program gradually over SFY 2020 and SFY 2021.

Section I, 180.000, Episodes of Care, of the Medicaid provider manuals is being revised to announce the conclusion of the Episode of Care Program gradually over SFY 2020 and SFY 2021.

Section II, 200.000, Episodes of Care General Information, of the Episodes of Care Provider Manual is being revised to announce the conclusion of the Episode of Care Program gradually over SFY 2020 and SFY 2021. Included in the section is a timeframe of the gradual sunset for each episode of care.

Section II, 210.000 – 223.000, of the Episodes of Care Provider Manual are being revised to reflect the final payment report date and the final reconciliation report date of each episode of care.

Episodes of Care
Reporting Timeframe

	SFY 2020				SFY 2021			
Report Type	7/31/19	10/31/19	1/31/20	4/30/20	7/31/20	10/31/20	1/31/21	4/30/21
Payment	CABG	ASTHMA	URIN URIS URIP CHOLE PERINATAL	COPD HF COLON TONSIL TJR				
Reconciliation					CABG	ASTHMA	URIN URIS URIP CHOLE PERINATAL	COPD HF COLON TONSIL TJR

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on July 25, 2020. The agency indicated that it received no public comments.

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

1. What is the status on CMS approval of the SPA? **RESPONSE:** The SPA is still pending with CMS. It was submitted on June 17, 2020. The 90th day is September 15, 2020. We have not received any requests for additional information at this point in time from CMS.

2. Are the other Episodes of Care listed on the Department's website (ADHD, ODD, Hysterectomy, Pediatric Pneumonia, Appendectomy, and UTI) affected by the EOC program sunset process? **RESPONSE:** No, the ones you listed are not affected by the current sunset process. ADHD and ODD were retired as part of the behavioral health transformation in 2017. DHS has left them on the website for reference only. Hysterectomy, Pediatric Pneumonia, Appendectomy, and UTI are all informational reports based on Episode "technology" (algorithms, etc.). These reports do not have financial incentives and are informational for providers, and therefore are not part of this sunset rule promulgation.

The proposed effective date is October 1, 2020.

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

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

10. DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, APPRAISER LICENSING AND CERTIFICATION BOARD (Ms. Diana Piechocki)

a. SUBJECT: Registered Apprentice Appraiser and Revisions 19-0005

DESCRIPTION: The Appraiser Licensing and Certification Board is proposing revisions to Rule 19-0005 concerning registered apprentice appraisers. The board approved these proposed changes to our Rules at the board meeting held on September 12, 2019. These changes are based on approval of the Rule changes we are currently promulgating. The prior Rule change, as well as these changes, are necessary to comply with Arkansas Statutes, specifically Acts 315, 426, 514, 820, 990, and 1028 of 2019, and Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act as amended by Dodd-Frank. A summary of the changes is provided below:

- Removed the word "regulations" and replaced with "rules" where needed.
- Replaced "Competency Provision" with the correct terminology of "Competency Rule."
- Corrected the definition of "Supervisory Appraiser."
- We removed the definition of "Trainee Appraiser." The Registered Apprentice Appraiser classification replaces Trainee Appraiser.
- Added new definitions for "Registered Apprentice Appraiser," "Returning Military Veteran." and "Expedited Credentialing."
- Added a notice regarding the sound-only recording of open public meetings.
- Added "Standards of Practice." Moved to the beginning of the section, the "Restrictions on Appraisal Practice." And, corrected wording for State Licensed, Certified Residential, Certified General and State Registered appraisers. Added Registered Apprentice appraiser for continuity.
- We have corrected the process for a denial of a credential. The denial is subject to the Arkansas Administrative Procedures Act.
- It is clarified when and where an appraiser's signature is required.
- Added the Registered Apprentice appraiser classification throughout where needed.
- We removed the fee for a replacement credential.
- On pages 14 through 24, we made corrections to the education approval process and requirements. These revisions move all of the education information to the same section. Also, we separated criteria specific to qualifying education from criteria specific to continuing education. This information corresponds to "The Real Property Appraiser Qualification Criteria'' as promulgated by the Appraisal Foundation.
- We removed the terminology "moral turpitude."
- We added a section for military veterans which provides expedited credentialing.
- The Board added a section for the Criteria Applicable to a Registered Apprentice Appraiser credential.
- On pages 42 through 47, the Board separated Reciprocity, Temporary Practice Permits, and a Transfer moving to the State of Arkansas.

Reciprocity applies to a non-resident wishing to obtain an Arkansas appraiser credential. Temporary Practice Permits apply to a non-resident wanting to work in Arkansas temporarily on an assignment specific basis. A Transfer applies to a resident of another State moving to Arkansas and wanting to apply for an Arkansas appraiser credential.

- The Supervisory appraiser requirements and responsibilities are revised and worded to correspond with "The Real Property Appraiser Qualification Criteria.''
- The Board added a section to detail Criminal Background Checks and Pre-Licensure Criminal Background Checks.
- Removed the requirement that the Uniform Standards of Professional Appraisal Practice be taken in a classroom setting.

PUBLIC COMMENT: A public hearing was held on August 10, 2020. The public comment period expired on August 10, 2020. The board provided the following summary of comments it received and its responses thereto:

Name of Commenter: John Bice
Summary of the Comment: Correction of the word "energy" on page 22 of the mark-up copy from "entergy."
Response to the Comment: The Board appreciates your comments. The correction of the spelling of "energy" is considered non-substantive, and is corrected in the mark-up and clean draft copies of the Rules.

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

1. Ark. Code Ann. § 17-14-203(6)(C) requires that the board's promulgated rules shall be equivalent to the minimum appraiser-qualification criteria as promulgated by the Appraiser Qualifications Board of the Appraisal Foundation for state-licensed, registered apprentice, and state-certified appraisers performing federally related transactions. I noticed that you cited to the Uniform Standards of Professional Appraisal Practice (USPAP).
a. Are these qualification criteria promulgated by the Appraiser Qualifications Board of the Appraisal Foundation? **RESPONSE:** The Appraisal Standards Board of the Appraisal Foundation promulgates the Uniform Standards of Professional Appraisal Practice (USPAP).
b. If not, could you please provide authority for requiring compliance with these standards? **RESPONSE:** Ark. Code Ann. § 17-14-305 (a)(1) requires compliance with USPAP. Also, Ark. Code Ann. § 17-14-202 (b)(1)(2) requires equivalence to USPAP.

2. There is a blank statutory citation on page 54 of the markup in # 10. Could you please provide a revised markup with the correct citation included? **RESPONSE:** Agency attached revised mark-up.

3. Concerning pre-licensure criminal background checks, what does the board consider a "reasonable time" to respond under Section (D)(3)? **RESPONSE:** The Board considers a "reasonable time" as 25 to 45 days.

4. The term "pre-registration" is used throughout the pre-licensure criminal background check section of the rule. This term does not appear in Act 990. Could you please explain what the term means? **RESPONSE:** We changed the wording of pre-licensure to pre-registration since an appraiser starts with either a State Registered or Registered Apprentice credential. A license is a type of credential we issue after the applicant meets specific requirements and passes the national exam.

5. Concerning pre-licensure criminal background checks, could you please provide legal authority to support Section D(6), which states that decisions made by the board in response to a pre-registration criminal background check is not subject to appeal? **RESPONSE:** The decision is made at the Board level in response to a query or petition by an individual who is not an official applicant or candidate for a specific credential. The decision is non-binding, and the full application process remains available to the individual, including the provisions of appeal afforded in both our law/rules and the Administrative Procedure Act (APA). In other words, it is a Board-level recommendation advising an individual on whether their criminal history contains disqualifying offenses requiring a waiver or permanently disqualifying offenses for which a waiver is not available.

The proposed effective date is November 1, 2020.

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

LEGAL AUTHORIZATION: The Arkansas Appraiser Licensing and Certification Board has authority to establish by rule the minimum examination, education, experience, and continuing education requirements for state-registered, state-licensed, registered apprentice, and state-certified appraisers. *See* Ark. Code Ann. § 17-14-203(6)(A). Promulgated rules shall be equivalent to the minimum appraiser-qualification criteria as promulgated by the Appraiser Qualifications Board of the Appraisal Foundation for state-licensed, registered apprentice, and state-certified appraisers performing federally related transactions. *See* Ark. Code Ann. § 17-14-203(6)(C). The rules shall at all times require minimum examination contents that are equivalent to the

national uniform examination content as promulgated by the Appraisal Qualifications Board of the Appraisal Foundation and utilize a testing service acceptable to the foundation. *See* Ark. Code Ann. § 17-14-203(6)(D). The board is also authorized to adopt and enforce such administrative rules as may be necessary to comply with state law and federal law with specific reference to Title XI of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, as it exists today and as it may be amended and adopted by the Appraisal Subcommittee. *See* Ark. Code Ann. § 17-14-203(11).

11. DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, PROFESSIONAL BAIL BONDSMAN LICENSING BOARD (Mr. Randy Murray, Mr. Curt Clark)

a. SUBJECT: Rule 1 – Regulation of the Bail Bond Business

DESCRIPTION: The Arkansas Professional Bail Bondsman Licensing Board is proposing changes to Rule 1 of the Board's Rules governing the bail bond industry. The board provided the following summary of rule changes:

1. Act 315 of the 92nd General Assembly (2019):
The Board is amending its rules to eliminate the use of the term "regulation" throughout Rule 1.
2. Act 820 of the 92nd General Assembly (2019):
The Board is adding a new Section 17 to its rules to address the need for automatic licensure for returning military service members, their spouses, and veterans.
3. Acts 426/1011 of the 92nd General Assembly (2019):
The Board is adding a new Section 8 to its rules to provide for reciprocal licensure for professional bail bondsmen seeking to become licensed in this State who hold a substantively similar in their home state. Additionally, the rule changes allow for a temporary permit for immediate licensure pending Board approval.
4. Act 990 of the 92nd General Assembly (2019):
The Board is adding two new Sections (22 & 23) to put into place a pre-licensure criminal background check and a waiver process for those individuals who have a qualifying conviction and are seeking licensure.

In addition to the above changes, the Board underwent Legislative review of its rules pursuant to Act 781 of the 91st General Assembly (2017). The review recommended the following changes and the Board has made the changes requested to address the concerns raised:

1. Section 11: Unsecured Bail Bonds, should be deleted because Ark. Code Ann. § 17-19-304 has been repealed by ACT 343 of 2011. – No statutory authority;
2. Section 16 (C): exceeds the statutory authority by adding limitations not in Ark. Code Ann. § 17-19-201. Specifically the following language: "any professional bail bond company or professional bail bondsman who permits any bail bond to be executed to effect the release of a defendant without being physically present shall be deemed in violation…" – No statutory authority;
3. Section 16 (D): exceeds the statutory authority by adding limitations not in Ark. Code Ann. §17-19-201. Specifically the following language: "Notwithstanding the foregoing, no person whose bail bondsman license has been revoked may be employed by a bail bond company in any capacity. Additionally, no member, officer or director of a bail bond company whose license has been revoked may be employed by a bail bond company in any capacity, unless the Board entered a specific finding of fact in the matter that the member, officer or director was not personally at fault and did not acquiesce in the matter on account of which the company license was revoked as provided by Ark. Code Ann. § 17-19-210(g)." – No statutory authority;
4. Section 21(D, E, F, G, J, and K) – No statutory authority;
5. Section 27 (4) - violates statute, due process, and no statutory authority

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on July 28, 2020. The board indicated that it received no public comments.

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

1. Please review the numbering of all sections in the rule. There are many instances where the rule hasn't been renumbered following removal of a section or has been numbered incorrectly with the addition of a section. Please submit a revised markup correcting these. **RESPONSE: [**These were corrected and a mark-up and clean copy of the proposed rules were attached.]

2. Concerning the new reciprocal licensure section, please provide legal authority to support the reciprocity and state-specific education sub-section. Specifically, please provide legal authority that supports treating applicants from states offering reciprocity to Arkansas different than those from states who don't offer reciprocity to Arkansas residents.
RESPONSE: Ark. Code Ann. § 17-1-108(i) provides "An occupational licensing entity may enter into written agreements with similar occupational licensing entities of another state, territory, or district of the United States as necessary to assure that licensees in this state have

comparable nonresident licensing opportunities as those opportunities available to nonresidents by occupational licensing entities in this state." Further, Ark. Code Ann. § 17-1-108(d)(3) provides "The occupational licensing entity may require additional state-specific education for an individual with an occupational license in another state, territory, or district of the United States that does not offer reciprocity similar to reciprocity under this section to individuals with an occupational license in this state." The board relies on these two provisions in support of the proposition that it can require testing of nonresidents from other states only if Arkansas residents cannot obtain a reciprocal license without testing.

3. Concerning Section 21 pre-licensure criminal background checks, what does the board consider a reasonable time to respond to a petition? **RESPONSE:** This has been changed to:"The Board will respond with a decision in writing to a completed petition within thirty (30) days of receipt of all documentation." The Board considers this a reasonable time.

4. The board appears to take the position that decisions made by the board in response to a pre-licensure criminal background check petition are not subject to appeal. Could you please provide rationale/legal authority for that position? **RESPONSE:** This is a decision made at the staff level in response to a query or petition by an individual who is **not** an official applicant or candidate for licensure. The decision is non-binding and the full application process remains available to the individual, including the provisions of appeal afforded in both our law/rules and the Administrative Procedure Act (APA). In other words, it is a staff-level recommendation advising an individual on whether their criminal history contains disqualifying offenses requiring a waiver or permanently disqualifying offenses for which a waiver is not available.

Please note that pursuant to the APA, Ark. Code Ann. § 25-15-212(a), in cases of "adjudication" a person is entitled to judicial review or appeal. The term "adjudication" is defined as the agency process for the formulation of an order. Ark. Code Ann. § 25-15-202(1)(A). An order is "the **final disposition** of an agency in any matter other than rulemaking, **including licensing** and rate making, in which the agency is required by law to make its determination after notice and hearing." Ark. Code Ann. § 25-15-202(6). The Commission has viewed the pre-licensure criminal background check petitions as a preliminary matter. They are not a final disposition on an application for licensure. Certainly, if the Subcommittee disagrees, the Commission will follow such direction.

5. Section 22 concerning criminal background check waiver requests, appears to incorrectly cite to Ark. Code Ann. § 17-2-102. Should this

citation be to Ark. Code Ann. § 17-3-102? **RESPONSE:** This has been corrected.

The proposed effective date is October 1, 2020.

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

LEGAL AUTHORIZATION: The Professional Bail Bond Company and Professional Bail Bondsman Licensing Board has authority to adopt such reasonable rules as it shall deem necessary to assure the effective and efficient administration of Ark. Code Ann. §§ 17-19-107, 17-19-212, and 17-19-401 *et seq*. *See* Ark. Code Ann. § 17-19-108. The proposed rules implement the following Acts of the 2019 Regular Session:

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

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

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

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

implementation of Title 17, Chapter 3, of the Arkansas Code, concerning occupational criminal background checks. *See* Ark. Code Ann. § 17-3-104(a).

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

12. <u>DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, CONTRACTORS LICENSING BOARD</u> (Mr. Gregory Crow, Mr. Michael Langley)

a. <u>SUBJECT</u>: Prelicensure Criminal Background Checks

<u>DESCRIPTION</u>: The Contractors Licensing Board is proposing changes to its rules concerning prelicensure criminal background checks. The amended rule sets the process and procedures for prelicensure criminal background checks as required by change to state law.

<u>PUBLIC COMMENT</u>: A public hearing was held on July 23, 2020. The public comment period expired on July 22, 2020. The Contractors Licensing Board received no public comments.

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

1. Should the five (5) references to "17-2-102" in the rule be citing "17-3-102"? **RESPONSE:** Yes, that is a typo, it should be 17-3-102 in each instance.

2. Under provision b(3) of the rule, what does the board consider a "reasonable time" to respond? **RESPONSE:** Reasonable time would be the first available Board meeting. The Board generally meets once a month, but it is possible they would not meet or there could be as much as 6 or 7 weeks between meetings as the Board could meet early in a month (December for example, avoiding Christmas) and late in the following month. We were not comfortable putting 30 days, but in the vast majority of cases, it will be determined in much less than 30 days.

3. The board appears to take the position that decisions made by the board in response to a pre-licensure criminal background check petition are not subject to appeal. Could you please provide rationale/legal authority for

that position? **RESPONSE:** [Agency attached a copy of the Act 990 model language from the AG's office.] That is where the "no appeal" language came from. That language was NOT in our initial draft, but we changed it to follow the instructions from the AG's office.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Contractors Licensing Board has authority to make such bylaws and rules for its operation as it shall consider appropriate, provided that they are not in conflict with the laws of the State of Arkansas. *See* Ark. Code Ann. § 17-25-203(a). The proposed rules implement Act 990 of 2019, sponsored by Senator John Cooper, which amended the law regarding criminal background checks for professions and occupations to obtain consistency regarding criminal background checks and disqualifying offenses for licensure. An individual with a criminal record may petition a licensing entity at any time for a determination of whether the criminal record of the individual will disqualify the individual from licensure and whether or not he or she could obtain a waiver under Ark. Code Ann. § 17-3-102(b). *See* Ark. Code Ann. § 17-3-103(a)(1). A licensing entity shall adopt or amend rules necessary for the implementation of Title 17, Chapter 3, of the Arkansas Code, concerning occupational criminal background checks. *See* Ark. Code Ann. § 17-3-104(a).

b. SUBJECT: 224-25-5-1 Issuance of License

DESCRIPTION: The Contractor's Licensing Board is proposing changes to its rules concerning issuance of licenses. The amended rule sets the process and procedures for temporary licensure and out of state applicants as required by change to state law.

PUBLIC COMMENT: A public hearing was held on July 23, 2020. The public comment period expired on July 22, 2020. The Contractor's Licensing Board received no public comments.

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

1. Concerning 224-25-5-1 (d)(2) of the proposed rule, what would constitute "appropriate testing?"

2. Concerning 225-25-5-6 sections (a)(1)(C), (b)(1)(C), and (c)(1)(C) of the proposed rule, what is the "appropriate examination" which is referenced in the rule?

RESPONSES: Both appropriate testing and appropriate examination refer to the OPTION of taking a skills test instead of showing experience for a specific specialty classification (framing, roofing, etc). The Board has a contract with PSI, a nation-wide testing company, to provide optional test for specific classifications. Applicants have the option of showing experience in the type of construction for which they are applying, or, taking an examination that covers the type of construction for which they are applying. If they choose to take an examination, they will take an examination for that type of construction. For example, if they are applying for a Residential Builder, they would take the examination for Residential Builder. If they were applying for Residential Roofing, they would take the Residential Roofing examination. Again, the examinations are optional, most applicants submit proof of experience.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Contractor's Licensing Board has authority to make such bylaws and rules for its operation as it shall consider appropriate, provided that they are not in conflict with the laws of the State of Arkansas. *See* Ark. Code Ann. § 17-25-203(a). The proposed rules implement the following Acts of the 2019 Regular Session:

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

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

13. DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, RESIDENTIAL CONTRACTORS COMMITTEE (Mr. Gregory Crow, Mr. Michael Langley)

a. SUBJECT: Prelicensure Criminal Background Checks

DESCRIPTION: The Residential Contractors Committee is proposing changes to its rules concerning prelicensure criminal background checks. The amended rule sets the process and procedures for prelicensure criminal background checks as required by change to state law.

PUBLIC COMMENT: A public hearing was held on July 23, 2020. The public comment period expired on July 22, 2020. The Residential Contractor's Committee received no public comments.

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

1. Should the five (5) references to "17-2-102" in the rule be citing "17-3-102"? **RESPONSE:** Yes, that is a typo, it should be 17-3-102 in each instance.

2. Under provision b(3) of the rule, what does the board consider a "reasonable time" to respond? **RESPONSE:** Reasonable time would be the first available Board meeting. The Board generally meets once a month, but it is possible they would not meet or there could be as much as 6 or 7 weeks between meetings as the Board could meet early in a month (December for example, avoiding Christmas) and late in the following month. We were not comfortable putting 30 days, but in the vast majority of cases, it will be determined in much less than 30 days.

3. The board appears to take the position that decisions made by the board in response to a pre-licensure criminal background check petition are not subject to appeal. Could you please provide rationale/legal authority for that position? **RESPONSE:** [Agency attached a copy of the Act 990 model language from the AG's office.] That is where the "no appeal" language came from. That language was NOT in our initial draft, but we changed it to follow the instructions from the AG's office.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Residential Contractors Committee has authority to issue rules necessary for the implementation of Title 17, Chapter 25, Subchapter 5, concerning the residential contractors committee. *See* Ark. Code Ann. § 17-25-504(4).

The proposed rules implement Act 990 of 2019, sponsored by Senator John Cooper, which amended the law regarding criminal background

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

b. SUBJECT: 224-25-5-1 Issuance of License

DESCRIPTION: The Residential Contractors Committee is proposing changes to its rules concerning issuance of license. The amended rule sets the process and procedures for temporary licensure and out of state applicants as required by changes to state law.

PUBLIC COMMENT: A public hearing was held on July 23, 2020. The public comment period expired on July 22, 2020. The Residential Contractor's Committee received no public comments.

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

1. Concerning 224-25-5-1 (d)(2) of the proposed rule, what would constitute "appropriate testing?"

2. Concerning 225-25-5-6 sections (a)(1)(C), (b)(1)(C), and (c)(1)(C) of the proposed rule, what is the "appropriate examination" which is referenced in the rule?

RESPONSES: Both appropriate testing and appropriate examination refer to the OPTION of taking a skills test instead of showing experience for a specific specialty classification (framing, roofing, etc). The Board has a contract with PSI, a nation-wide testing company, to provide optional test for specific classifications. Applicants have the option of showing experience in the type of construction for which they are applying, or, taking an examination that covers the type of construction for which they are applying. If they choose to take an examination, they will take an examination for that type of construction. For example, if they are applying for a Residential Builder, they would take the examination for Residential Builder. If they were applying for Residential Roofing, they would take the Residential Roofing examination. Again, the examinations are optional, most applicants submit proof of experience.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Residential Contractors Committee has authority to issue rules necessary for the implementation of Title 17, Chapter 25, Subchapter 5, concerning the residential contractors committee. *See* Ark. Code Ann. § 17-25-504(4). The proposed rules implement the following Acts of the 2019 Regular Session:

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

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

14. DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, REAL ESTATE COMMISSION (Ms. Andrea Alford)

a. SUBJECT: Automatic Licensure for Active Duty Service Members, Veterans, and their Spouses; and Pre-Licensure Criminal Background Checks & Waiver Requests

DESCRIPTION: The Arkansas Real Estate Commission is amending its rules to implement changes required by Acts of the 2019 Regular Session:

Act 820 of 2019 requires occupational licensing agencies to provide for automatic licensure for active duty service members, returning military veterans, and their spouses to engage in their chosen professions. The purpose of this new rule is to grant automatic licensure for a real estate broker or salesperson for active duty service members, returning military veterans and their spouses.

Act 990 of 2019 requires licensing agencies to promulgate rules for applicants for licensure who have criminal background records. The purpose of this rule is to allow individuals with criminal background records to file a petition for a pre-licensure determination of whether the individual's criminal record will disqualify the individual from licensure

as a real estate broker or salesperson and whether a waiver may be obtained.

PUBLIC COMMENT: A public hearing was held in this matter on August 10, 2020. The public comment period expired on August 10, 2020. The Arkansas Real Estate Commission received no public comments.

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

1. Concerning Section 4.5(a) of the rule, how does the board define "substantially equivalent license," as used in this section? **RESPONSE:** We define a substantially equivalent license as a real estate agent/broker license issued by the appropriate real estate licensing agency of another jurisdiction.

2. What evidence must an applicant provide to show that they hold a substantially equivalent license in another state? **RESPONSE:** A certified copy of licensure records from the appropriate real estate licensing agency of another jurisdiction (also known as a certified license history).

3. What evidence must an applicant provide to show that they are a qualified applicant under Section 4.5(a) of the rule? **RESPONSE:** The Commission will allow any acceptable form of documentation that serves to prove military service or the spousal relationship to a service member, to include: PCS or other military orders for active duty members, military ID card, DD Form 214, NGB22, discharge certificate, leave and earning statements, Veterans Identification Card (VIC), marriage certificate + spouse's military documentation listed above, military dependent ID/DD Form 1173, or a copy of PCS orders that show authorization for the spouse to accompany the service member to the duty location.

4. Concerning Section 4.6(a)(3) of the rule, what does the commission consider to be a "reasonable time" under this section? **RESPONSE:** 30 days.

5. Concerning Section4.6 (a)(6), the board appears to take the position that decisions made by the board in response to pre-licensure criminal background check petitions are not subject to appeal. Could you please provide the rationale/legal authority for that position? **RESPONSE:** This is a decision made at the staff level in response to a query or petition by an individual who is **not** an official applicant or candidate for licensure. The decision is non-binding and the full application process remains available to the individual, including the provisions of appeal afforded in both our

law/rules and the Administrative Procedures Act (APA). In other words, it is a staff-level recommendation advising an individual on whether their criminal history contains disqualifying offenses requiring a waiver or permanently disqualifying offenses for which a waiver is not available.

Please note that pursuant to the APA, Ark. Code Ann. § 25-15-212(a), in cases of "adjudication" a person is entitled to judicial review or appeal. The term "adjudication" is defined as the agency process for the formulation of an order. Ark. Code Ann. § 25-15-202(1)(A). An order is "the **final disposition** of an agency in any matter other than rulemaking, **including licensing** and rate making, in which the agency is required by law to make its determination after notice and hearing." Ark. Code Ann. § 25-15-202(6). The Commission has viewed the pre-licensure criminal background check petitions as a preliminary matter. They are not a final disposition on an application for licensure. Certainly, if the Subcommittee disagrees, the Commission will follow such direction.

6. Concerning Section 4.6(a)(7), should the citation to the Arkansas code be to Ark. Code Ann. § 17-3-102(a) rather than Ark. Code Ann. § 17-2-102(a)? **RESPONSE:** Yes. Corrected markup and clean copies are attached.

The proposed effective date November 1, 2020.

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

LEGAL AUTHORIZATION: The Arkansas Real Estate Commission has authority to do all things necessary and convenient for carrying into effect the provisions of Title 17, Chapter 42 of the Arkansas Code concerning real estate license law, and from time to time promulgate necessary or desirable rules. *See* Ark. Code Ann. § 17-42-203(a). The proposed rules implement the following Acts of the 2019 Regular Session:

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

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

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

15. PUBLIC SERVICE COMMISSION (Ms. Donna Gray)

a. SUBJECT: Arkansas Gas Pipeline Code

DESCRIPTION: The Public Service Commission proposes changes to the Arkansas Gas Pipeline Code. Arkansas law, specifically, Arkansas Code Annotated § 23-15-205(d), requires that the Arkansas Gas Pipeline Code be consistent with federal law. The proposed rules incorporate the federal changes made by the U.S. Department of Transportation to certain Pipeline Safety Regulations contained in 49 C.F.R. Parts 191, 192, 193, and 199.

The proposed changes include:

Administrative History of the Code

The description of the current proposed changes to the Code have been added.

Part 192 – Transportation of Natural and Other Gas by Pipeline: Minimum Safety Standards

1. § 192.381, paragraph (a) is revised to incorporate the 2017 CFR amendment by adding "EFVs" after Excess Flow Valves and by striking "single residence."

2. § 192.383, paragraph (a) is revised to incorporate the 2017 CFR amendment by adding "*Branched service line* means a gas service line that begins at the existing service line or is installed concurrently with the primary service line but serves a separate residence" and by adding "(SFR)" after single-family residence in the definition of *Service line serving single-family residence*.

3. § 192.383, paragraph (b) and (c) are revised to incorporate the 2017 CFR amendment by striking the installation and reporting requirements in

their entirety and inserting new paragraphs b, c, d, e, f, and g to read as follows:

(b) *Installation required*. An EFV installation must comply with the performance standards in § 192.381. After April 14, 2017, each operator must install an EFV on any new or replaced service line serving the following types of services before the line is activated:

(1) A single service line to one SFR;

(2) A branched service line to a SFR installed concurrently with the primary SFR service line (i.e., a single EFV may be installed to protect both service lines);

(3) A branched service line to a SFR installed off a previously installed SFR service line that does not contain an EFV;

(4) Multifamily residences with known customer loads not exceeding 1,000 SCFH per service, at time of service installation based on installed meter capacity, and

(5) A single, small commercial customer served by a single service line with a known customer load not exceeding 1,000 SCFH, at the time of meter installation, based on installed meter capacity.

(c) *Exceptions to excess flow valve installation requirement*. An operator need not install an excess flow valve if one or more of the following conditions are present:

(1) The service line does not operate at a pressure of 10 psig or greater throughout the year;

(2) The operator has prior experience with contaminants in the gas stream that could interfere with the EFV's operation or cause loss of service to a customer;

(3) An EFV could interfere with necessary operation or maintenance activities, such as blowing liquids from the line; or

(4) An EFV meeting the performance standards in § 192.381 is not commercially available to the operator.

(d) *Customer's right to request an EFV*. Existing service line customers who desire an EFV on service lines not exceeding 1,000 SCFH and who do not qualify for one of the exceptions in paragraph (c) of this section may request an EFV to be installed on their service lines. If an eligible

service line customer requests an EFV installation, an operator must install the EFV at a mutually agreeable date. The operator's rate-setter determines how and to whom the costs of the requested EFVs are distributed.

(e) *Operator notification of customers concerning EFV installation*. Operators must notify customers of their right to request an EFV in the following manner:

(1) Except as specified in paragraphs (c) and (e)(5) of this section, each operator must provide written or electronic notification to customers of their right to request the installation of an EFV. Electronic notification can include emails, Web site postings, and e-billing notices.

(2) The notification must include an explanation for the service line customer of the potential safety benefits that may be derived from installing an EFV. The explanation must include information that an EFV is designed to shut off the flow of natural gas automatically if the service line breaks.

(3) The notification must include a description of EFV installation and replacement costs. The notice must alert the customer that the costs for maintaining and replacing an EFV may later be incurred, and what those costs will be to the extent known.

(4) The notification must indicate that if a service line customer requests installation of an EFV and the load does not exceed 1,000 SCFH and the conditions of paragraph (c) are not present, the operator must install an EFV at a mutually agreeable date.

(5) Operators of master-meter systems and liquefied petroleum gas (LPG) operators with fewer than 100 customers may continuously post a general notification in a prominent location frequented by customers.

(f) *Operator evidence of customer notification*. An operator must make a copy of the notice or notices currently in use available during PHMSA inspections or State inspections conducted under a pipeline safety program certified or approved by PHMSA under 49 U.S.C. 60105 or 60106.

(g) *Reporting*. Except for operators of master-meter systems and LPG operators with fewer than 100 customers, each operator must report the EFV measures detailed in the annual report required by § 191.11.

4. Section 192.385 is added to subpart H to read as follows:

§ 192.385 Manual service line shut-off valve installation.

(a) *Definitions*. As used in this section:

Manual service line shut-off valve means a curb valve or other manually operated valve located near the service line that is safely accessible to operator personnel or other personnel authorized by the operator to manually shut off gas flow to the service line, if needed.

(b) *Installation requirement*. The operator must install either a manual service line shut-off valve or, if possible, based on sound engineering analysis and availability, an EFV for any new or replaced service line with installed meter capacity exceeding 1,000 SCFH.

(c) *Accessibility and maintenance*. Manual service line shut-off valves for any new or replaced service line must be installed in such a way as to allow accessibility during emergencies. Manual service shut-off valves installed under this section are subject to regular scheduled maintenance, as documented by the operator and consistent with the valve manufacturer's specification.

DEFINITIONS

1. In the Definitions Section, added the definition "Confirmed Discovery" in alphabetical order to read as follows:

Confirmed Discovery means when it can be reasonably determined, based on information available to the operator at the time a reportable event has occurred, even if only based on a preliminary evaluation.

2. In the Definitions Section, added the definition "Incident" in alphabetical order to read as follows:

Incident means any of the following events:

(1) An event that involves a release of gas from a pipeline, gas from an underground natural gas storage facility, liquefied natural gas, or gas from an LNG facility, and that results in one or more of the following consequences:

(i) A death, or personal injury necessitating in-patient hospitalization;
(ii) Estimated property damage of $50,000 or more, including loss to the operator and others, or both, but excluding cost of gas lost; or
(iii) Unintentional estimated gas loss of three million cubic feet or more.

(2) An event that results in an emergency shutdown of an LNG facility or an underground natural gas storage facility. Activation of an emergency

shutdown system for reasons other than an actual emergency does not constitute an incident.

(3) An event that is significant in the judgment of the operator, even though it did not meet the criteria of paragraph (1) or (2) of this definition.

Part 191 – Transportation of Natural Gas and Other Gas by Pipeline; Annual Reports, Incident Reports, and Safety-Related Condition Reports

1. § 191.5, paragraph (a) is revised to read:

(a) At the earliest practicable moment following discovery, but no later than one hour after confirmed discovery, each operator must give notice in accordance with paragraph (b) of this section of each incident as defined in the Definitions Section.

Incidents reportable under this subsection (a) include incidents occurring on all pipelines up to the outlet side of the customer's meter and must be reported at the earliest practicable moment unless there is evidence that the leak probably did not occur on pipelines used by the operator in the transportation of gas, in which case, notice may be delayed until determination is made.

2. § 191.5, a new paragraph (c) is added to read:

(c) Within 48 hours after the confirmed discovery of an incident, to the extent practicable, an operator must revise or confirm its initial telephonic notice required in paragraph (b) of this section with an estimate of the amount of product released, an estimate of the number of fatalities and injuries, and all other significant facts that are known by the operator that are relevant to the cause of the incident or extent of the damages. If there are no changes or revisions to the initial report, the operator must confirm the estimates in its initial report.

3. § 191.5, existing paragraph (c) is revised to become paragraph (d).

4. § 191.5, existing paragraph (d) is revised to become paragraph (e).

5. § 191.22(c)(1)(ii) is revised to read:

(ii) Construction of 10 or more miles of a new or replacement pipeline;

6. § 191.22(c)(1), (iv), (v), and (vi) are added to read:

(iv) Construction of a new underground natural gas storage facility or the abandonment, drilling or well workover (including replacement of

wellhead, tubing, or a new casing) of an injection, withdrawal, monitoring, or observation well for an underground natural gas storage facility.

(v) Reversal of product flow direction when the reversal is expected to last more than 30 days. This notification is not required for pipeline systems already designed for bi-directional flow; or

(vi) A pipeline converted for service under § 192.14 of this chapter, or a change in commodity as reported on the annual report as required by § 191.17.

Part 192 – Transportation of Natural Gas and Other Gas by Pipeline: Minimum Federal Safety Standards

1. § 192.14, paragraph (c) is added to read:

(c) An operator converting a pipeline from service not previously covered by this part must notify PHMSA 60 days before the conversion occurs as required by § 191.22 of this chapter.

2. § 192.175, paragraph (b) is revised to read:

(b) Each pipe-type or bottle-type holder must have minimum clearance from other holders in accordance with the following formula:

C = (3D x P x F)/1000) in inches; (C = (3D x P x F)/6,895) in millimeters

In which:

C = Minimum clearance between pipe containers or bottles in inches (millimeters).

D = Outside diameter of pipe containers or bottles in inches (millimeters).

P = Maximum allowable operating pressure, psi (kPa) gauge.

F = Design factor as set forth in § 192.111 of this part.

3. § 192.225, paragraph (a) is revised to read as follows:

§ 192.225 Welding Procedures

(a) Welding must be performed by a qualified welder or welding operator in accordance with welding procedures qualified under section 5, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, *see* § 192.7), or Section IX of the ASME Boiler and Pressure

Vessel Code (ASME BPVC) (incorporated by reference, *see* § 192.7) to produce welds meeting the requirements of this subpart. The quality of the test welds used to qualify welding procedures must be determined by destructive testing in accordance with the applicable welding standard(s).

4. § 192.227, paragraph (a) is revised to read as follows:

§ 192.227 Qualification of Welders.

(a) Except as provided in paragraph (b) of this section, each welder or welding operator must be qualified in accordance with section 6, section 12, Appendix A or Appendix B of API Std 1104 (incorporated by reference, *see* § 192.7), or section IX of the ASME Boiler and Pressure Vessel Code (ASME BPVC) (incorporated by reference, *see* § 192.7). However, a welder or welding operator qualified under an earlier edition than listed in § 192.7 of this part may weld but may not requalify under that earlier edition.

5. § 192.631 paragraphs (b)(3) and (4) are revised, paragraph (b)(5) is added, paragraphs (h)(4) and (h)(5) are revised, and paragraph (h)(6) is added to read as follows:

§ 192.631 Control Room Management

(b)***
(3) A controller's role during an emergency, even if the controller is not the first to detect the emergency, including the controller's responsibility to take specific actions and to communicate with others; ~~and~~
(4) A method of recording controller shift-changes and any hand-over of responsibility between controllers; and
(5) The roles, responsibilities and qualifications of others with the authority to direct or supersede the specific technical actions of a controller.
(h)***
(4) Training that will provide a controller a working knowledge of the pipeline system, especially during the development of abnormal operating conditions; ~~and~~
(5) For pipeline operating setups that are periodically, but infrequently used, providing an opportunity for controllers to review relevant procedures in advance of their application; and
(6) Control room team training and exercises that include both controllers and other individuals, defined by the operator, who would reasonably be expected to operationally collaborate with controllers (control room personnel) during normal, abnormal or emergency situations. Operators must comply with the team training requirements under this paragraph by no later than January 23, 2018.

6. § 192.740 is added to read:

§ 192.740 Pressure regulating, limiting, and overpressure protection – Individual service lines directly connected to production, gathering, or transmission pipelines.

(a) This section applies, except as provided in paragraph (c) of this section, to any service line directly connected to a production, gathering, or transmission pipeline that is not operated as part of a distribution system.

(b) Each pressure regulating or limiting device, relief device (except rupture discs), automatic shutoff device, and associated equipment must be inspected and tested at least once every 3 calendar years, not exceeding 39 months, to determine that it is:

(1) In good mechanical condition;
(2) Adequate from the standpoint of capacity and reliability of operation for the service in which it is employed;
(3) Set to control or relieve at the correct pressure consistent with the pressure limits of § 192.197; and to limit the pressure on the inlet of the service regulator to 60 psi (414 kPA) gauge or less in case the upstream regulator fails to function properly; and
(4) Properly installed and protected from dirt, liquids, or conditions that might prevent proper operation.

(c) This section does not apply to equipment installed on service lines that only serve engines that power irrigation pumps.

7. § 192.1003, is revised to read:

§ 192.1003 What do the regulations in this subpart cover?

(a) *General*. Unless exempted in paragraph (b) of this section this subpart prescribes minimum requirements for an IM program for any gas distribution pipeline covered under this part, including liquefied petroleum gas systems. A gas distribution operator, other than a master meter operator or a small LPG operator, must follow the requirements in §§ 192.1005 through 192.1013 of this subpart. A master meter operator or small LPG operator of a gas distribution pipeline must follow the requirements in § 192.1015 of this subpart.

(b) *Exceptions*. This subpart does not apply to an individual service line directly connected to a transmission, gathering, or production pipeline.

Part 199 – Drug and Alcohol Testing

1. § 199.105, paragraph (b) is revised to read:

(b) *Post-accident testing*. (1) As soon as possible but no later than 32 hours after an accident, an operator must drug test each surviving covered employee whose performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. An operator may decide not to test under this paragraph but such a decision must be based on specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

(2) If a test required by this section is not administered within the 32 hours following the accident, the operator must prepare and maintain its decision stating the reasons why the test was not promptly administered. If a test required by paragraph (b)(1) of this section is not administered within 32 hours following the accident, the operator must cease attempts to administer a drug test and must state in the record the reasons for not administering the test.

2. § 199.119, paragraphs (a) and (b) are revised to read:

(a) Each large operator (having more than 50 covered employees) must submit an annual Management Information System (MIS) report to PHMSA of its anti-drug testing using the MIS form and instructions as required by 49 CFR part 40 (at § 40.26 and appendix H to part 40), not later than March 15 of each year for the prior calendar year (January 1 through December 31). The Administrator may require by notice in the PHMSA Portal (https://portal.phmsa.dot.gov/phmsaportallanding) that small operators (50 or fewer covered employees), not otherwise required to submit annual MIS reports, to prepare and submit such reports to PHMSA.

(b) Each report required under this section must be submitted electronically at http://damis.dot.gov. An operator may obtain the user name and password needed for electronic reporting from the PHMSA Portal (https://portal.phmsa.dot.gov/phmsaportallanding). If electronic reporting imposes an undue burden and hardship, the operator may submit a written request for an alternative reporting method to the Information Resources Manager, Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. The request must describe the undue burden and hardship. PHMSA will review the request and may authorize, in writing, an alternative reporting method. An authorization will state the period for which it is valid, which may be indefinite. An operator must contact

PHMSA at 202-366-8075, or electronically to informationresourcesmanager@dot.gov to make arrangements for submitting a report that is due after a request for alternative reporting is submitted but before an authorization or denial is received.

3. § 199.225, paragraph (a)(1) is revised to read:

§ 199.225 Alcohol tests required.

Each operator shall conduct the following types of alcohol tests for the presence of alcohol:

(a)***
(1) As soon as practicable following an accident, each operator must test each surviving covered employee for alcohol if that employee's performance of a covered function either contributed to the accident or cannot be completely discounted as a contributing factor to the accident. The decision not to administer a test under this section must be based on specific information that the covered employee's performance had no role in the cause(s) or severity of the accident.

4. § 199.227, paragraph (b)(4) is added to read:

§ 199.227 Retention of Records.

(b)***
(4) *Three years*. Records of decisions not to administer post-accident employee alcohol tests must be kept for a minimum of three years.

5. § 199.229, paragraphs (a) and (c) are revised to read:

§ 199.229 Reporting of alcohol testing results.

(a) Each large operator (having more than 50 covered employees) must submit an annual MIS report to PHMSA of its alcohol testing results using the MIS form and instructions as required by 49 CFR part 40 (at § 40.26 and appendix H to part 40) not later than March 15 of each year for the prior calendar year (January 1 through December 31). The Administrator may require by notice in the PHMSA Portal (https://portal.phmsa.dot.gov/phmsaportallanding) that small operators (50 or fewer covered employees), not otherwise required to submit annual MIS reports, to prepare and submit such reports to PHMSA.

* * * *

(c) Each report required under this section must be submitted electronically at http://damis.dot.gov. An operator may obtain the user name and password needed for electronic reporting from the PHMSA Portal https://portal.phmsa.dot.gov/phmsaportallanding. If electronic reporting imposes an undue burden and hardship, the operator may submit a written request for an alternative reporting method to the Information Resources Manager, Office of Pipeline Safety, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue SE., Washington, DC 20590. The request must describe the undue burden and hardship. PHMSA will review the request and authorize, in writing, an alternative reporting method. An authorization will state the period for which it is valid, which may be indefinite. An operator must contact PHMSA at 202-366-8075, or electronically to informationresourcesmanager@dot.gov to make arrangements for submitting a report that is due after a request for alternative reporting is submitted but before an authorization or denial is received.

PUBLIC COMMENT: A public hearing was held on February 27, 2020. The public comment period expired that same day. The Commission provided the following summary of the comments that it received and its responses thereto:

Chris Willis
Date Received: January 9, 2020
Comment: Mr. Willis wrote that it would be helpful of the Public Service Commission to send out a link to guidelines and/or a synopsis of changes to help smaller operators understand any changes.
Agency Response: The head of the Commission's Pipeline Safety Office sent a letter on February 28, 2020 to Mr. Willis, offering to personally discuss the code changes. During the hearing, Judge Griffin requested that the head of the Pipeline Safety Office contact Mr. Willis by letter, advising him of the link to find the proposed changes to the code on the Commission's website, along with another copy of the summary and description of the proposed changes to the code.

Black Hills Energy Arkansas, Inc.
Date Received: February 19, 2020
Comment: BHEA filed comments in this docket and voiced that its only concern with the proposed rules is how adoption of 192.740 and the modification of 192.1003 would affect the time in which BHEA was required to complete inspection and testing of its farm taps. BHEA requested that the Commission adopt the proposed amendments, but to also clarify in its order adopting the amendments that the Commission intended to follow the same enforcement policy as PHMSA with regard to 192.740 and 192.1003.

Agency Response: Judge Griffin ordered that the Commission's Pipeline Safety Office will follow the exercise of enforcement discretion as implemented by PHMSA regarding farm taps. In doing so, the Pipeline Safety Office will give natural gas pipeline operators the choice of managing farm taps under 192.740 or the operator's current DIMP plan. This enforcement discretion will remain in effect until PHMSA changes its enforcement discretion. At that time, the Pipeline Safety Office will make the appropriate changes to its enforcement policy to be at least as stringent as the PHMSA enforcement policy, and the Pipeline Safety Office will notify all pipelines operating in the state that the enforcement discretion policy has been rescinded and farm taps must be managed under 192.740.

Received During February 27, 2020 Hearing:

Jeff Dangeau, on behalf of Black Hills Energy Arkansas, Inc.
Comment: Mr. Russell (referring to APSC Staff Attorney Jacob Russell) just addressed the only issue we had with the rules. It's basically integrating the federal pipeline safety rules into Arkansas code, which is the one issue we had was with the timing of – we'd have to complete under the farm tap rule, complete or inspect and test requirement. And Black Hills Energy Arkansas has elected to go – to address its farm taps under the DIMP regulations which allows us to stretch it out over a longer period of time to prioritize our DIMP program according to risk ranking and also spread out the impact of the cost of compliance over a longer period of time. And we had suggested in our comments some specific language which the Judge could put in her order that would address that. And we discussed it and allowed AG and Staff to both review our comments ahead of time, so we think we're all on the same page about what should be done.
Agency Response: Judge Griffin ordered that the Commission's Pipeline Safety Office will follow the exercise of enforcement discretion as implemented by PHMSA regarding farm taps. In doing so, the Pipeline Safety Office will give natural gas pipeline operators the choice of managing farm taps under 192.740 or the operator's current DIMP plan. This enforcement discretion will remain in effect until PHMSA changes its enforcement discretion. At that time, the Pipeline Safety Office will make the appropriate changes to its enforcement policy to be at least as stringent as the PHMSA enforcement policy, and the Pipeline Safety Office will notify all pipelines operating in the state that the enforcement discretion policy has been rescinded and farm taps must be managed under 192.740.

Michael Sappington, on behalf of the Arkansas Attorney General's Office

Comment: The Attorney General intervened in this matter in order to make comments if necessary once we reviewed the proposed pipeline revisions. We have reviewed those proposed rules and we have no comment on those proposed rules. We also have no opposition to the comments made by Black Hills. And to the extent that they are – they essentially mirror what Staff has recommended and stated just now in opening.
Agency Response: N/A.

The proposed effective date is pending legislative review and approval.

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

Regarding the total estimated cost by fiscal year to any private individual, entity, or business subject to the amended rules, the agency states that natural gas facility operators subject to the jurisdiction of the Commission are not required to incur any additional expense as a result of the state's adoption of the federal regulations.

With respect to the total estimated cost by fiscal year to state, county, and municipal government to implement the rules, the agency states that the APSC will incur deminimus administrative costs to revise the Arkansas Gas Pipeline Code.

LEGAL AUTHORIZATION: Pursuant to Ark. Code Ann. § 23-15-205(a), the Arkansas Public Service Commission by order may promulgate, amend, enforce, waive, and repeal minimum safety standards for the transportation of gas and pipeline facilities. These standards may apply to the design, installation, inspection, testing, construction, extension, operation, replacement, and maintenance of pipeline facilities and shall be practicable and designed to meet the needs for pipeline safety. *See* Ark. Code Ann. § 23-15-205(b). Safety regulations promulgated for gas pipeline facilities or the transportation of gas shall be consistent with federal law and with rules and regulations promulgated under authority of the Natural Gas Pipeline Safety Act of 1968, Pub. L. No. 90-481, as amended. *See* Ark. Code Ann. § 23-15-205(d).

Per the agency, these rules are required to comply with the federal Natural Gas Pipeline Safety Act of 1968, Pub. L. No. 90-481, as amended.

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

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

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

3. Department of Health (Act 216)

4. Highway Commission (Act 468)

F. Adjournment.