

**ADMINISTRATIVE RULES SUBCOMMITTEE  
OF THE  
ARKANSAS LEGISLATIVE COUNCIL**

**Wednesday, August 21, 2019**

**9:00 a.m.**

**Room A, MAC**

**Little Rock, Arkansas**

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- 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, 2019.**
  - 1. **Department of Community Correction (Ms. Dina Tyler)**
  - 2. **Department of Correction (Mr. Solomon Graves)**
  - 3. **Arkansas Parole Board (Ms. Brooke Cummings)**
- D. **Rules Deferred from the June 19, 2019 meeting of the Administrative Rules Subcommittee.**
  - 1. **DEPARTMENT OF TRANSFORMATION AND SHARED SERVICES, OFFICE OF STATE PROCUREMENT (Mr. Edward Armstrong, Mr. David Withrow)**

- a. **SUBJECT: R8: 19-11-230 Discussions**

**DESCRIPTION:** Due to legislation passed during the 91st General Assembly, the rule is being amended to bring it into compliance with legislative changes made to Ark. Code Ann. § 19-11-230.

**R8: 19-11-230 Discussions**

- R8: 19-11-230 (a) is being added to clarify discussions may be conducted with responsible offerors during a request for proposals in order to clarify a proposal or the terms of a request for

proposals, and for negotiations. Such pre-award discussions should be conducted in a manner that supports public confidence in public procurement and ensures fairness.

- R8: 19-11-230 (b) is being added to elaborate upon pre-award discussions conducted for clarifications. Namely, that clarifications can be sought in areas of ambiguity, miscommunication, or misunderstanding, but that such clarifications should be documented in the procurement file.
  
- R8: 19-11-230 (c) is being added to elaborate upon pre-award discussions conducted for negotiations and provide guidance on how such negotiations should be conducted.
  - Provisions for how negotiations might occur should be in the relevant request for proposals, there are no minimum or maximum number of rounds of negotiations other than what could be set forth in a request for proposals;
  - Negotiations may be conducted with a group of responsible offerors identified based on an identified competitive range or just a highest ranking responsible offeror;
  - During serial negotiation with the highest ranked offeror, the procurement agency may only abandon negotiation with the highest ranked offeror if it determines, in writing and for identified cause, that the offeror is not responsible or is otherwise not reasonably susceptible of being awarded a contract;
  - Negotiation may be limited to cost only and shall be documented in the procurement file.
  
- R8: 19-11-230 (d) is being added to define the criteria for “competitive range” namely that such criteria should be established on a rational basis, and may include price, cost of ownership, responses that provide the best value based on evaluation criteria, responses most likely to provide greater value after negotiations, and evaluation scores.
  
- R8: 19-11-230 (e) is being added to provide guidance on how the state may establish a minimum score requirement for offerors to be in the competitive range, such minimum score not being unreasonably high.
  
- R8: 19-11-230 (f) is being added to provide guidance for how the state may elect to negotiate with a single offeror versus a multi-party negotiation, elaborating on factors the state may use to reach a decision, such being:

- The expected dollar value of the award and length of contract;
  - The complexity of the acquisition and the variety and complexity of offered solutions; and
  - The resources available to conduct discussions versus the expected variable administrative costs of discussions;
  - The impact on lead-time for award versus the need for timely delivery;
  - The extent to which discussions with additional offerors would likely provide diminishing returns;
  - The disparity in pricing between the lowest priced offeror and the other offerors;
  - The disparity in pricing between the highest rated offeror and the other offerors.
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- R8: 19-11-230 (g) is being added to establish the rules by which the state may conduct best and final offer (BAFO) negotiations if deemed advantageous to the state. Specifically:
    - The state shall determine which responsible offerors are within the competitive range according to the terms of the request for proposals
    - The state may only restrict the BAFO negotiations to a single offeror or engage in a multi-party BAFO negotiations as provided in the request for proposals and consistent with Arkansas Procurement Law, including these rules;
    - BAFO negotiation shall only be conducted with responsible offerors;
    - The content of the BAFO request may come from questions proposed by the procurement official or the evaluation committee;
    - The state may request that an offeror readdress important aspects of the proposal;
    - The procurement officer shall dispatch the BAFO request stating the elements to be covered and defining the date and time the BAFO must be returned;
    - All communication to and from offerors regarding the BAFO request shall be coordinated by the procurement officer;
    - All responses to the BAFO request must be submitted timely to the procurement officer in order to be considered;
    - Only the original proposal or one properly clarified, revised through negotiation, or submitted as a best and final offer may be considered for evaluation;
    - A BAFO request to multiple offerors shall not identify either the current rank of any of the offerors or any identifiable information derived from a proposal.

- R8: 19-11-230 (h) is being added to provide guidance for the state on conducting target price BAFO, including determining the proposed pricing, comparing pricing against benchmarks, utilizing market analysis, evaluating the reasonableness of target pricing, sending a request for revised pricing, and determining if improved pricing resulted.

**PUBLIC COMMENT:** The public comment period expired on March 22, 2019, and a public hearing was held on March 25, 2019. The agency received no comments. The proposed effective date is pending legislative review and approval.

Additionally, Kathryn Henry, an attorney with the Bureau of Legislative Research, asked the following questions:

1. In the questionnaire filed with our office on February 21, 2019, you stated that these rule changes were being made to bring the rule into compliance with legislative changes made in 2017 to Ark. Code Ann. § 19-11-230(e), concerning competitive sealed proposals. Is the Office comfortable that the proposed rule changes do not conflict with Act 419 of 2019, which again amended Ark. Code Ann. § 19-11-230, and which went into effect on July 24, 2019? **RESPONSE:** OSP reviewed the proposed rule change in light of Act 419 of 2019 upon its passage, and OSP does not see any conflict in the proposed rule with the language of Act 419 of 2019 that amended Ark. Code Ann. § 19-11-230.

2. Do you anticipate additional changes to this specific rule in light of Act 419's amendments to § 19-11-230? **RESPONSE:** No. OSP reviewed the proposed rule change in light of Act 419 of 2019 upon its passage, and in addition to not seeing any conflict in the proposed rule with the language of Act 419 of 2019 that amended Ark. Code Ann. § 19-11-230, we also do not see any additional language needing to be added to the proposed rule.

**FINANCIAL IMPACT:** There is no financial impact.

**LEGAL AUTHORIZATION:** The State Procurement Director, upon the approval of the Secretary of the Department of Transformation and Shared Services, has the authority and responsibility to promulgate rules consistent with the Arkansas Procurement Law and may also adopt rules governing the internal procedures of the Office of State Procurement. *See Ark. Code*

Ann. § 19-11-217(b)(1), (2). Rules shall be promulgated by the Director in accordance with the applicable provisions of the Arkansas Procurement Law and of the Arkansas Administrative Procedure Act, § 25-15-201 et seq. See Ark. Code Ann. §19-11-225(a).

Per the agency, this rule change was made to bring the rule into compliance with legislative changes made to Arkansas Code Annotated § 19-11-230(e), concerning competitive sealed proposals, which was amended by Act 696 of 2017, sponsored by Senator Bart Hester.

**E. Rules Deferred from the July 19, 2019 meeting of the Administrative Rules Subcommittee.**

**1. DEPARTMENT OF HEALTH, CENTER FOR LOCAL PUBLIC HEALTH/ENVIRONMENTAL HEALTH PROTECTION (Ms. Laura Shue, Mr. Terry Paul)**

**a. SUBJECT: Rules and Regulations Pertaining to Food Service Establishments**

**DESCRIPTION:** The purpose of this rule is to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented. The goal is to provide safe food, prevent illness, and ensure honest presentation of food to the public.

This rule establishes definitions; sets standards for management and personnel, food operations, and equipment and facilities; and provides for food establishment plan review, permit issuance, inspection, and employee restriction.

**PUBLIC COMMENT:** A public hearing was held on November 16, 2018. The public comment period expired on November 16, 2018. The Department did not receive any public comments. The proposed effective date is pending legislative review and approval.

**FINANCIAL IMPACT:** The proposed rule requires a certified manager to be employed by the establishment. The agency reported that the food-certified-manager requirement adds minimal cost to the operation of a food service establishment. Several nationally recognized online and in-person trainings are available

for less than \$200 for each certification. These certifications are renewable on a three-to-five year cycle.

**LEGAL AUTHORIZATION:** The State Board of Health is authorized to make all necessary and reasonable rules and regulations of a general nature for the protection of public health and safety and the general amelioration of the sanitary and hygienic conditions within the state. *See* Ark. Code Ann. § 20-7-109(a)(1). The Board is authorized to promulgate rules for the efficient enforcement of the Food, Drug, and Cosmetic Act. *See* Ark. Code Ann. § 20-56-219. Additionally, the Director of the Department of Health has the power and authority to prevent the proliferation of infections and contagious and communicable diseases resulting from unsanitary food-service operations. *See* Ark. Code Ann. § 20-57-203.

~~F. Rules Referred to the House Committee on Public Transportation and the Senate Committee on Transportation, Technology, and Legislative Affairs.~~

~~1. COMMISSION FOR ARKANSAS PUBLIC SCHOOL ACADEMIC FACILITIES AND TRANSPORTATION (Ms. Jennifer Dedman)~~

~~a. SUBJECT: Specifications Governing School Bus Design~~

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

1. ARKANSAS STATE BANK DEPARTMENT (Mr. John Ahlen)

a. SUBJECT: 47-701.9 Fiduciary Powers and State Banks

**DESCRIPTION:** Arkansas Code Annotated § 28-69-202 permits banks and trust companies to operate collective investment funds. The Collective Investment Funds section of Arkansas State Bank Department (ASBD) Rule 47-701.9 was taken nearly verbatim from an Office of the Comptroller of Currency (OCC) rule. Since the adoption of Rule 47-107.9, the OCC has updated its rule on collective investment funds. ASBD would like to amend Rule 47-701.9 by repealing the existing language for Collective Investment Funds and replacing it by adopting the current OCC rule by reference. This will allow ASBD's rule to mirror any future changes to the OCC rule without requiring additional amendments to Rule 47-701.9.

**PUBLIC COMMENT:** A public hearing was held on May 2, 2019. The public comment period expired on May 2, 2019. The Department received no public comments. The proposed effective date is pending legislative review and approval.

**FINANCIAL IMPACT:** The Department reports that this rule has no financial impact.

**LEGAL AUTHORIZATION:** Pursuant to Arkansas Code Annotated § 23-46-205(a), the Bank Commissioner shall be charged with the general supervision of financial institutions, the execution of all laws passed by the State of Arkansas relating to the organization, operations, inspection, supervision, control, liquidation, and dissolution of banks, bank holding companies, subsidiary trust companies, and the general commercial banking business of Arkansas, and such other duties as prescribed by law. *See Ark. Code Ann. § 23-46-205(a).* Additionally, the Commissioner shall have the power to issue such rules as may be necessary or appropriate to carry out the intent and purposes of all those laws and to issue cease and desist orders against any financial institution, or an officer, director, or employee of any financial institution, found to be violating federal banking laws or regulations, violating the banking laws of this state or State Bank Department regulations, violating any regulatory agreement, or jeopardizing the safety and soundness of any financial institution. *See Ark. Code Ann. § 23-46-205(b)(1).*

2. **DEPARTMENT OF EDUCATION (Ms. Courtney Salas-Ford)**

a. **SUBJECT: Special Education Catastrophic Occurrence Fund**

**DESCRIPTION:** Arkansas Code Annotated § 6-20-2303(21) specifies that “Special Education Catastrophic Occurrence” funding shall be pursuant to rules promulgated by the State Board. Changes to the Catastrophic funding formula are being proposed to promote the equitable distribution of resources for students with the most unduly expensive and extraordinary costs associated with the services they need, regardless of the district they attend. Catastrophic funding is intended to assist districts with the costs of individual students who require special education and related services beyond the routine and normal costs, not to supplement funding for school districts.

- The proposed rule maintains the current \$15,000 threshold, but does not allow reimbursement of costs up to the \$15,000 threshold.
- The proposed rule increases the percentage of reimbursement a district may receive for the amount above the threshold.

| <b>Proposed Rule</b>   | <b>Current Rule</b>  |
|--|--|
| <b>District is responsible for 100% of amount up to \$15,000 after adjusted for offsets.</b> | <b>District is responsible for 0% of amount up to \$15,000 after adjusted for offsets.</b> |
| <b>District is responsible for 0% of adjusted amount from \$15,001 up to \$65,000.</b>       | <b>District is responsible for 20% of adjusted amount from \$15,001 to \$50,000.</b>       |
| <b>District is responsible for 20% of any amount above \$65,000 up to \$100,000.</b>         | <b>District is responsible for 50% of any amount above \$50,000 up to \$100,000.</b>       |

Districts have the following funding sources available to provide special education and related services to students with disabilities:

- IDEA Part B - approximately \$1,760 per student \*
- Medicaid \*
- Special Education Services (Extended School Year) - \$74 per day in FY18 \*
- ADM - \$6,781 per student
- Student Growth and Declining Enrollment
- Early Childhood Special Education State Funding - \$16,897,920 appropriated
- Residential Centers / Juvenile Detention Centers - \$16,345,087 appropriated
- Special Education Services (Special Education Supervisor) - \$1,787,247 in FY18

In addition to the \$15,000 threshold, the 2006 Odden-Picus adequacy report recommended that catastrophic funding be made available when costs exceed state and federal funding received by districts including IDEA Part B and Medicaid. Under the current and proposed calculation methods, only the first three funds, as indicated by asterisks, are set-aside when determining the catastrophic cost of a student.

**PUBLIC COMMENT:** A public hearing was held on March 4, 2019. The public comment period expired on March 26, 2019. The Department provided the following summary of the comments that it received and its responses thereto:

**Name:** Tita De Vore, Rogers Public Schools, and on behalf of the Arkansas Association of Special Education Administrators

**Comment:** Our district has concerns about the proposed changes in catastrophic funding revolving around the committee work, the “winners and losers” that the funding will create and the amount of time the submission process takes for districts.

A catastrophic committee was organized in February 2018. The committee met one time. There has been no summary from that meeting. There were 3 goals for the committee to consider; first, the reduction of paperwork. It takes countless hours to record the required data when in reality the department already has access to this information. The second area was to encourage more districts to seek reimbursement. The department produced a document with proposed reimbursement totals under the new rules. 90 districts will lose money and 74 will gain money. A total of 164 districts requested reimbursement during that year. If more districts lose money how is this encouraging for other and additional districts to request reimbursement? The third goal was to have a better understanding of the definition of catastrophic reimbursement and a profile of a student who would qualify for reimbursement.

According to a slide presentation from the Arkansas Department of Special Education, considerations for proposed changes include the promotion of “equitable distribution of resources for students with the most unduly expensive and extraordinary costs associated with the special education services they need, regardless of the school they attend.” However, in reality a student that meets the Catastrophic Reimbursement profile (ex. weekly speech therapy, physical therapy, occupational therapy, specialized transportation, one-on-one instructional support, and nursing) in a district with higher salaries and more available resources, lower student to staff ratios will yield higher balances therefore making it much easier to achieve the proposed required “more than \$15,000” threshold. In turn, this will result in a higher reimbursement. The same student with the same profile and programming in a district with minimum salaries and limited resources, high cost contracted service providers, and higher student to staff ratios will yield a much lower balance, therefore the requested reimbursement will be much

lower. If these proposed rules were to pass and considering the above scenario this will only discourage districts from the process. If districts had a difficult time meeting the current threshold, it would be impossible for them to meet them under the proposed regulations.

Should the proposed regulations go into effect for the 2019-2020 school year, the districts will also be asked to submit all of the information by April 1st rather than the current deadline of May 1st. With the number of hours it takes districts to justify their requests for reimbursement, it will only further discourage districts in requesting reimbursement. They simply cannot spend the required hours it takes as well as perform or meet the day to day job demands and requirements of a special education supervisor. The changes will negatively impact reimbursement for services for students with disabilities across the state and we fear that the changes will not promote additional submissions from other districts.

**Agency Response:** The intent of the proposed revisions to these rules is to create a more equitable distribution of the funds available to assist school districts with students who meet the definition of “special education catastrophic occurrence” in state statute and restructure the process of determining eligibility for funding to meet its intended purpose. Each student must be considered individually in determining the eligibility and need for funding, and not a total amount of supplemental funding for a district.

A committee of stakeholders was convened on April 4, 2018, to review current catastrophic funding procedures, including the funding formula, current allowable expenses, and required documentation, consider opportunities for streamlining the current process, review other states’ methods for distributing catastrophic funds, compare differing processes, and make recommendations for revisions to the current process resulting in more equitable distribution.

As a result of the committee’s work, the following changes will be implemented to reduce the burden to districts in requesting catastrophic funding:

- prior year student information will automatically be carried over into the current year;

- the application will include basic student information and description of services with estimated costs; the budget accompanies the application; and approval of the application is not based on using correct fund codes;
- after the threshold is met, the district will list the materials, services, support, and personnel that is being submitted for reimbursement;
- all applications will be reviewed by a team of ADE staff to determine allowable and eligible costs; and
- the ADE finance office will review the budgets.

It is believed that these improvements in streamlining the catastrophic process as well as further information being provided to districts will encourage more districts to participate. These changes aim to address the impact that the highest-cost students have on all school districts, regardless of the size of the district, which will benefit all school districts and decrease the amount of time necessary for staff to seek funding.

**Name: Ken Ramey, Superintendent, Siloam Springs School District**

**Comment:** Our district leadership team has identified the following concerns about the impact adoption of these rules will have on school districts across the state:

- All things being equal, the difference between reimbursements under the current rules and those under the proposed rules will result in a loss of approximately \$192,000 to our district.
- The new rules are less likely to encourage districts to apply for catastrophic reimbursements because the amount of time required to document such expenses remains the same as under the current rules, while the amount of eligible reimbursements is likely to be less.
- The average cost of catastrophic occurrences for a majority of students who qualify under the current rules is between the proposed range of \$15,000-\$65,000 to earn 100% reimbursement. This is likely to result in a loss of revenue to cover those costs. For example, assume the total cost for services after offsets of one student is \$25,000. Under the current rules, the district is eligible to apply for the initial \$15,000 cost and 80% of the \$10,000 above the initial threshold or \$23,000. Under the proposed rules, the eligible reimbursement amount for this same student is \$10,000. That's a loss of \$13,000 for one student. The amounts submitted for 33 of our 34 students who qualified last year fit in the proposed range. Assuming this scenario is typical of those 33 students;

under the new rules our district will have over \$429,000 less in eligible reimbursements even though costs remain the same.

- Districts cannot deny or reduce services based on funding amounts. Arkansas Code 6-41-205 guarantees the provision of all regular and special education, corrective, and supporting services required by children with disabilities to the end that they shall receive the benefits of a free and appropriate public education (FAPE). Arkansas Code 6-41-206(2)(b) states it is the responsibility of the local school district and state to provide FAPE based upon the individualized education program developed for children with disabilities. The high costs to districts for ensuring FAPE for students with disabilities make it difficult to ensure ALL students receive the benefits of FAPE.
- Based on Table 11 on page 17 of your report on catastrophic funding dated June 18, 2018, the number of students who qualify for catastrophic occurrences and the number of districts and charters who apply for reimbursements related to these occurrences have steadily increased from 2015 to 2017, while the funding per student and percent of approved funds received has steadily decreased during the same time period. Projections indicate this trend will continue in the near future.
- Districts are paying what we believe is a disproportionate amount of the costs incurred for these “supporting services”; that’s approximately 61% or \$509,000 for our district in the 2017-2018 school year. The state has disregarded the guidance of its consultants Picus & Associates, who in 2003 noted the need to provide supplemental funding for catastrophic occurrences. “The small category of students with severe and multiple disabilities...are not found in equal percentages in all districts and **their excess costs need to be fully funded by the state.**” [Ellipsis and emphasis in original.]
- Adoption of the new rules will result in an increased cost for just one of many already unfunded mandates. Consider a few of these requirements - licensed art and physical education teachers in elementary schools; teacher-to-pupil ratios, counselors spend 90% of their time for direct and indirect counseling services, meeting the needs of students who demonstrate the characteristics of dyslexia, the Right to Read Act, implementation of the PLC process, the “recommendations” of the governor’s safety commission, and maintenance. We believe all these requirements benefit our students and support their success at school; however, the state rarely provides additional funds for implementation and when funds are available they are often miniscule when compared to actual costs.

**Agency Response:** The comparison between reimbursement under the current and proposed rules does not take into account the proration necessary under the current process in which claims were paid at approximately 40%. The comparison also does not calculate claims individually, which is the appropriate process, and would have actually resulted in an increase in funding under this scenario. The proposed changes to these rules are intended to address the high-cost of students impacting school districts, not supplement funding for school districts.

In addition to the \$15,000 threshold, the 2006 Odden-Picus adequacy report recommended that catastrophic funding be made available when costs exceed state and federal funding received by districts including IDEA Part B and Medicaid. Catastrophic funding was not intended to supplement special education programming, but it has become a mechanism for doing so in some districts. We believe by restructuring the formula to better align with the definition of a “catastrophic occurrence” in state statute, we will better be able to project if increased funding is necessary.

**Name: Kelly Hayes, Comptroller, Springdale School District**

**Comment:** The Springdale School District has approximately 22,000 students in grades K-12. Of that amount, approximately 2,375 students are served under the Individuals with Disabilities Education Act (IDEA). In the 2017-18 fiscal year, the Springdale School District had approximately 117 students that met the criteria established for catastrophic reimbursement. The total expenses submitted for catastrophic reimbursement for these students was \$2,644,685. Our reimbursement for that year was \$914,359.53 or 34.5% of the expenses submitted.

Under the proposed rule changes to catastrophic reimbursement, Springdale’s annual reimbursement would drop by almost three hundred thousand dollars. It is important to note that our district’s costs to educate these students will not decrease at all. In fact, the costs will increase due to higher salaries, increased costs of supplies and equipment, etc. This rule change will create a financial hardship on our district.

It is clear that the amount of funds currently eligible to reimburse districts for students with significant needs is insufficient (as evidenced by the 34.5% reimbursement rate previously mentioned). However, simply changing the criteria by which school districts are eligible for reimbursement creates winners and

losers. Springdale would lose approximately one-third of its annual reimbursement, not because of any changes our district has made, but simply because of the proposed rule changes.

We encourage the Special Education Unit of the Arkansas Department of Education to leave the present rules in place or to consider alternative rules that do not negatively impact any one district by hundreds of thousands of dollars in lost reimbursement.

**Agency Response:** The intent of the proposed revisions to these rules is to create a more equitable distribution of the funds available to assist school districts with students who meet the definition of “special education catastrophic occurrence” in state statute and restructure the process of determining eligibility for funding to meet its intended purpose; not to create “winners and losers.” Catastrophic funding was not intended to supplement special education programming, but it has become a mechanism for doing so in some districts. We believe by restructuring the formula to better align with the definition of a “catastrophic occurrence” in state statute, we will better be able to project if increased funding is necessary.

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:** The State Board of Education shall have the authority, acting pursuant to its rulemaking powers, to adopt rules for the implementation of the provisions of the Public School Funding Act of 2003 (“Act”), codified at Arkansas Code Annotated §§ 6-20-2301 through 6-20-2309. *See* Ark. Code Ann. § 6-20-2304(a). “Special education catastrophic occurrences” means individual cases in which special education and related services required by the individualized education program of a particular student with disabilities are unduly expensive, extraordinary, or beyond the routine and normal costs associated with special education and related services provided by a school district and funding is pursuant to rules promulgated by the State Board. *See* Ark. Code Ann. § 6-20-2303(21). Pursuant to Act 757 of 2019, § 48, which became effective July 24, 2019, the term “special education catastrophic occurrences” was amended to “special education high-cost occurrences.”

3. **ARKANSAS COMMISSIONER OF STATE LANDS** (Mr. Michael Harry)

a. **SUBJECT: Commissioner of State Lands Rules**

**DESCRIPTION:** The purpose of these rules is to establish the fees charged for the products and services performed and to provide the framework for the process of carrying out the duties of the office of the Commissioner of State Lands regarding the redemption of tax delinquent properties, the sale of tax delinquent properties, distributing excess proceeds derived from the sale of tax delinquent properties, as well as the sale of state owned lands.

**PUBLIC COMMENT:** These rules were reviewed and approved by the Executive Subcommittee at its meeting on June 20, 2019, for emergency promulgation. With respect to permanent promulgation, a public hearing was held on June 28, 2019. The public comment period expired on July 4, 2019. The Commissioner received no comments.

The proposed effective date is pending legislative review and approval.

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

**LEGAL AUTHORIZATION:** The proposed rules implement Act 673 of 2019, sponsored by Representative John Payton, which amended the law concerning the fees collected by the Commissioner of State Lands (“Commissioner”) and authorized the Commissioner to set adequate rates, fees, and charges to reimburse the costs incurred by the Commissioner. Pursuant to Act 626 of 1983, § 7, as amended by Act 814 of 1987, § 6, the Commissioner shall have the authority to promulgate such rules as may be necessary to effectively carry out the provisions of Act 626 of 1983, as amended, and upon adoption, such rules shall have the full force and effect of law. *See also* Ark. Code Ann. § 26-37-101 A.C.R.C. notes (Repl. 2012); *Carter v. Green*, 67 Ark. App. 367, 371, 1 S.W.3d 449, 451 (1999) (“The fact that this provision [granting the Commissioner the authority to promulgate rules to further the intent of acts governing tax-forfeiture sales] is not codified does not deprive it of the force of law.”).

With respect to the Commissioner's authority to promulgate fees within the rules, the Commissioner may by rule establish a schedule of rates, fees, and charges for the deeds produced and filed or services performed in carrying out the established duties and authority of the office of the Commissioner and revise the rates, fees, and charges to ensure that the revenues from the rates, fees, and charges together with other available funds shall be sufficient to cover the costs of the various deeds produced or filed and services performed in carrying out the established duties and authority of the office. *See* Ark. Code Ann. § 21-6-203(a), as amended by Act 673 of 2019, § 1. *See also* Ark. Code Ann. § 26-37-105(b), as amended by Act 673 of 2019, § 2 (providing that the collection fee under the statute shall be established by rule adopted by the Commissioner); Ark. Code Ann. § 26-37-201(a)(2)(A), as amended by Act 673 of 2019, § 3 (providing that the publication fee for a notice of sale of land shall be adopted by rule of the Commissioner). The fees established shall not exceed the actual costs expended by the Commissioner plus three percent (3%) of the actual costs expended. *See* Ark. Code Ann. § 21-6-203(b), as amended by Act 673, § 1; Ark. Code Ann. § 26-37-105(c), as amended by Act 673, § 2; Ark. Code Ann. § 26-37-201(a)(2)(B), as amended by Act 673, § 3.

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

**1. ARKANSAS DEPARTMENT OF AGRICULTURE (Mr. Wes Ward, Mr. Wade Hodge)**

**a. SUBJECT: Grain Grading**

**DESCRIPTION:** In the fall of 2018, issues arose with grain dealers assessing greater deductions for damaged grain than were anticipated by the producers who had contracted with the grain dealer. Deductions were inconsistent statewide, and the individuals handling the sampling and grading were not required to have any experience in grading and sampling, or even any experience in agriculture at all. As a result, many producers expressed dissatisfaction with the process because there was no mechanism for ensuring deductions were not excessive. The General Assembly passed Act 795 of 2019 to address that issue

and charged the Department of Agriculture with adopting rules to implement the law.

**PUBLIC COMMENT:** No public hearing was held. The public comment period expired on August 19, 2019. Any public comments that might have been received by the agency could not be included in this summary prior to its publication due to the time constraints of the public comment period's expiration date of August 19 and this rule's placement on the Subcommittee's August 21 agenda, pending a suspension of the Subcommittee's rules.

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

(1) In Section II.C., is there a word missing? Maybe "All applicants . . . *must* or *shall*"? **RESPONSE:** "[M]ust" has been added.

(2) In looking on Lexis Advance as well as on CFR online at govinfo, I'm having a hard time finding some of the federal regulations referenced in Section III of the Rules. For instance, in Part 802, I'm only seeing two sections, §§ 802.0 and 802.1, and in Part 810, I see §§ 810.201 to 810.405, but it then skips to 810.603. Can you provide any guidance with the citations referenced as "802.0 to 802.13" and "810.201 to 810.555"? **RESPONSE:** Appropriate CFR citations have been added.

(3) Finally, Ark. Code Ann. § 2-25-103(e), as amended by Act 795, specifically provides that the Department "shall promulgate a rule regarding the level of deduction that is excessive for each type of grain" and that the "rule shall: (A) Include the deductions for grain damage or foreign material; (B) Be based upon the numerical grades determined for each type of grain by the United States Department of Agriculture; and (C) Include a provision allowing for variance in the moisture level of a sample, which shall not subject the sample to re-inspection." I see the definition for "excessive deductions"; however, I see no other reference to that term in the proposed rules. Can you direct me to where each of the provisions required by the statute have been included in the proposed rules? **RESPONSE:** (A) & (B) are covered by the fact that the federal standards for grain grading have been adopted, which include those "numerical grades" mentioned in the Act. See specifically 7 CFR 810.404 for corn, 810.1604 for soybeans, and

810.2204 for wheat. [Charts were attached.] These charts show the numerical grades that are based upon the percentage of damage to the grain. (C) A paragraph has been added to satisfy this requirement. While the phrase “excessive deductions” is not used in the rule, it is defined in the rule because that term is used in the statute. That’s why I included in the definition “as used in A.C.A..”

The proposed effective date is pending legislative review and approval.

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

**LEGAL AUTHORIZATION:** The proposed rule implements Act 795 of 2019, sponsored by Representative Dan Sullivan, which established the Arkansas Grain Grading Act, to be codified at Arkansas Code Annotated §§ 2-25-101 through 2-25-106. Pursuant to Ark. Code Ann. § 2-25-103(a), as amended by Act 795, § 1, the Arkansas Agriculture Department shall adopt rules governing the standards for sampling and grading grain that are consistent with the standards for sampling and grading grain developed by the United States Department of Agriculture. The Department shall further promulgate a rule regarding the level of deduction that is excessive for each type of grain. *See* Ark. Code Ann. § 2-25-103(e)(1), as amended by Act 795, § 1. The rule shall include the deductions for grain damage or foreign material; be based upon the numerical grades determined for each type of grain by the United States Department of Agriculture; and include a provision allowing for variance in the moisture level of a sample, which shall not subject the sample to re-inspection. *See* Ark. Code Ann. § 2-25-103(e)(2), as amended by Act 795, § 1. ;

**I. Adjournment.**