ADMINISTRATIVE RULES SUBCOMMITTEE
OF THE
ARKANSAS LEGISLATIVE COUNCIL

Monday, November 16, 2020
10:00 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 September 30, 2020.

1. Department of Corrections (Ms. Lindsay Wallace)

2. Parole Board (Ms. Lindsay Wallace)

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

1. <u>DEPARTMENT OF COMMERCE, ARKANSAS ECONOMIC DEVELOPMENT COMMISSION</u> (Ms. Renee Doty, Mr. Jim Hudson)

a. <u>SUBJECT</u>: Developmental Disabilities Provider Emergency Loan Program

<u>DESCRIPTION</u>: This is a permanent rule that will replace the emergency rule that went into effect on July 24, 2020. The proposed rule outlines the administration of a loan program to assist developmental disabilities providers with over 500 employees that are experiencing significant hardship due to COVID-19. The proposed rule outlines eligibility criteria, application process, loan terms, AEDC responsibilities, and the terms of loan forgiveness. The Arkansas Economic Development Commission (AEDC) will administer the program compliant with the federal CARES Act. The proposed rule:

- Provides an overview of the need that has been created due to COVID-19.
- Outlines the eligibility criteria for ELP.
- Describes the application process and notification process for ELP.
- Lists AEDC's responsibilities under the loan program.

- Provides that the principal amount of an ELP loan may not exceed an amount equal to 2.5 times a provider's average monthly payroll for 2019, excluding any amount paid to an employee over $100,000 a year. The aggregate limit for all loans equals the requested appropriation of $7,844,021.
- Provides that ELP loans shall be for a term of up to two years.
- Provides that ELP loans shall be completely forgivable under the same terms as loans are forgiven under the federal PPP loan program (i.e., amounts paid during the 24-week period following loan closing for payroll, rent, mortgage interest, and utilities would count towards loan forgiveness.

PUBLIC COMMENT: A public hearing was held on August 11, 2020. The public comment period expired on August 25, 2020. The Arkansas Economic Development Commission received no public comments.

This rule was promulgated on an emergency basis, with an effective date of July 24, 2020. The proposed date for permanent promulgation is pending legislative review and approval.

FINANCIAL IMPACT: AEDC indicated that the proposed rules have a financial impact. Specifically, AEDC estimated $300 in legal advertising and copying costs during the promulgation process of the emergency and permanent proposed rules.

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

2. DEPARTMENT OF COMMERCE, STATE INSURANCE DEPARTMENT (Mr. Gray Turner)

a. SUBJECT: Rule 112: Travel Insurance

DESCRIPTION: The Arkansas Insurance Department is responsible for regulating the sale of travel insurance. Act 698 of 2019 and Ark. Code Ann. § 23-64-234 create a new legal framework for the marketing and sale of travel insurance. This rule promulgates Act 698 of 2019, which gives clear definitions as to who is considered a travel insurance provider. It also prevents travel insurance providers from using an "opt out"

requirement when bundling travel insurance with, for example, plane tickets or rental car.

PUBLIC COMMENT: A public hearing was held on July 15, 2020. The public comment period expired on August 18, 2020. The State Insurance Department provided the following summary of comments received and its responses thereto:

After the July 15, 2020, public hearing, the Arkansas Insurance Department received one public comment concerning the proposed rule from the U.S. Travel Association. The Travel Association requested that the federal laws cited in the rule be interpreted as they existed January 1, 2019. **AGENCY RESPONSE:** In response to this comment, the following changes were made:
1. In section 4(B)(2), the language was changed from "18 USC § 1033" to "18 USC § 1033 and 1034 as they existed on January 1, 2019."
2. In section 2(C), the language was changed from "this rule" to "Act 698 of 2019."

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Act 698 of 2019, sponsored by Senator Jason Rapert, established a comprehensive framework for the sale of travel insurance. Pursuant to Act 698, the Insurance Commissioner has authority to promulgate rules necessary to implement this section. *See* Act 698 of 2019, codified as Ark. Code Ann. § 23-64-234(i)(1).

3. DEPARTMENT OF ENERGY AND ENVIRONMENT, OIL AND GAS COMMISSION (Mr. Lawrence Bengal)

a. SUBJECT: Rule B-26: General Lease Operating Requirements

DESCRIPTION: The Arkansas Oil and Gas Commission ("AOGC") proposes amendments to its Rule B-26: General Lease Operating Requirements. The proposed amendments will allow private industry to develop more efficient and cost-effective methods of draining storm water from containment structures. Rule B-26(e)(5)(A) currently requires that a representative of the permit holder be physically present when storm water is drained from a containment structure. Industry has requested that the AOGC allow the process of draining the containment structures to be electronically monitored, rather than requiring an employee physically present during the process. The AOGC responded by approving a pilot

program to ensure that the process is both safe and viable, and now by amending Rule B-26(e)(5)(A)(iv) to allow the Director the authority to approve acceptable proposals and plans that allow for the electronic monitoring of the draining of storm water from containment structures. The authority of the AOGC to initiate this rulemaking is found in Ark. Code Ann. § 15-71-110. The rulemaking is further initiated in order to change the terminology in Rule B-26 to reflect changes in the structure of the Division of Environmental Quality that are mandated by the Transformation and Efficiencies Act of 2019, Act 910 of 2019.

PUBLIC COMMENT: A public hearing was held on July 22, 2020. The public comment period expired on August 3, 2020. No public comments were received.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Oil and Gas Commission shall have jurisdiction of and authority over all persons and property necessary to administer and enforce effectively the provisions of the act under which it was created and all other statutory authority of the Commission relating to the exploration, production, and conservation of oil and gas. *See* Ark. Code Ann. § 15-71-110(a)(1). Pursuant to Ark. Code Ann. § 15-71-110(d)(1)(A), the Commission may make such reasonable rules and orders as are necessary from time to time in the proper administration and enforcement of the act under which it was created, after hearing and notice as provided in the act, including rules to require the drilling, casing, operation, and plugging of wells to be done in such a manner as to prevent the escape of oil or gas from one (1) stratum to another; prevent the intrusion of water into an oil or gas stratum from a separate stratum; and prevent the pollution of fresh water supplies and unnecessary damage to property, soil, animals, fish, or aquatic life by oil, gas, or salt water.

b. SUBJECT: Rule D-23: General Rule for the Regulation of Underground Natural Gas Storage Projects

DESCRIPTION: The Arkansas Oil and Gas Commission ("AOGC") proposes a new rule, Rule D-23: General Rule for the Regulation of Underground Natural Gas Storage Projects. The AOGC has historically inspected and regulated underground storage facilities established to maintain an available reserve of natural gas pursuant to its general powers in Ark. Code Ann. § 15-71-110(d). In response to serious gas leaks, the United States Congress enacted the Protecting Our Infrastructure of Pipelines and Enhancing Safety Act of 2016. This Act delegated to the

Department of Transportation, Pipeline, and Hazardous Materials Safety Administration ("PHMSA") the authority to regulate and enforce new federal standards regarding the underground storage of natural gas. Under 49 U.S.C. § 60105, the AOGC is now required to be certified by PHMSA in order to continue to have the authority to inspect and enforce regulations that apply to underground storage facilities within the State of Arkansas. The AOGC has obtained certification by PHMSA to inspect these facilities and enforce federal and state regulations. Under 49 U.S.C. § 60105(b)(2), the AOGC must necessarily promulgate D-23 in order to maintain this certification, and the corresponding authority to enforce its regulations applicable to underground storage facilities. Rule D-23 is therefore required in order for the AOGC to have the ongoing ability to enforce the regulations applicable to underground storage facilities located in Arkansas.

The AOGC, therefore, has initiated rulemaking to promulgate this new rule – Rule D-23: General Rule for the Regulation of Underground Natural Gas Storage Projects. Ark. Code Ann. § 15-72-603 provides that the AOGC may find that underground natural gas storage facilities are in the public interest. Ark. Code Ann. § 15-72-604 provides that natural gas public utilities may construct and maintain underground facilities for the storage of natural gas. The AOGC is also empowered by the legislature, in Ark. Code Ann. § 15-72-608, to promulgate necessary rules to regulate the establishment, maintenance, and closing of facilities used for the underground storage of natural gas. The proposed Rule D-23 regulates public utilities engaged in the process of the storage of natural gas in underground reservoirs within the State of Arkansas. The proposed rule specifies the process that natural gas public utilities must follow for obtaining the necessary property rights for the establishment of an underground storage facility, for opening and maintaining such a facility, and for closing the storage facility after the removal of the stored gas at the end of the use of the facility.

The proposed Rule D-23 specifically contains the following provisions:

- Subsection (c) sets forth the procedure for eminent domain should it be necessary to obtain interests in real property to establish an underground facility for the storage of natural gas;
- Subsections (d) and (e) provide a procedure for obtaining a certificate of storage from the AOGC to establish an underground storage facility;
- Subsection (f) provides the procedure for obtaining a permit for a storage well used to inject natural gas into the storage facility;
- Subsections (i) and (j) provide the standards for construction and maintenance of storage wells;

- Subsection (k) provides the standards for monitoring storage wells after they are constructed;
- Subsection (l) provides the procedure for abandoning storage wells; and
- Subsection (m) provides the procedure for decommissioning the storage facility.

In addition to the foregoing provisions, subsection (n) incorporates necessary and applicable federal requirements that specifically apply to underground storage facilities used for the storage of natural gas. Specifically, subsection (n)(2) of Rule D-23 incorporates operation and maintenance requirements in Federal Regulation 49 C.F.R., Part 192, as amended; applicable enforcement provisions of Federal Regulation 49 C.F.R., Part 190, as amended; applicable incident and other reporting requirements contained in Federal Regulation 49 C.F.R., Part 191, as amended; and the applicable drug and alcohol testing requirements contained in Federal Regulation 49 C.F.R., Part 199, as amended. These federal standards are required to be incorporated into state rules regulating underground storage facilities for natural gas by PHMSA, in order for the AOGC to maintain certification to enforce federal regulations under 49 U.S.C. § 60105.

PUBLIC COMMENT: A public hearing was held on July 22, 2020. The public comment period expired on August 3, 2020. No public comments were received.

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

(1) Section (b)(6) – Is there a reason that the Commission did not use the definition set forth in Ark. Code Ann. § 15-72-602(3) for "natural gas"?
RESPONSE: We utilized the definition from OGC General Rule A-4 for natural gas. We don't believe this causes any conflict, and provides a more explicit and commonly used definition of natural gas.

(2) Section (b)(7) – Was there a reason that the language "authorized to do business in this state and" as used in Ark. Code Ann. § 15-72-602(4) was not included in the definition of "natural gas public utility"?
RESPONSE: This was an omission. We will make the suggested revision in the final version of the rule.

(3) Section (f)(4)(B) – As I'm sure you are aware, Ark. Code Ann. § 25-15-105(b)(1) requires specific statutory authority for any fees. On what such authority does the Commission rely for this permit fee?
RESPONSE: This is a fee for a permit to drill a well, and we believe is included in Ark Code Ann. 15-72-205.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 15-72-608(a), the Oil and Gas Commission shall have authority to make reasonable rules and exercise such powers as are granted to it by §§ 15-71-101 – 15-71-112, 15-72-101 – 15-72-110, 15-72-205, 15-72-212, 15-72-216, 15-72-301 – 15-72-324, and 15-72-401 – 15-72-407 as may be necessary in the administration of the Underground Storage of Gas Law, Ark. Code Ann. §§ 15-72-601 through 15-72-608.

Additionally, the agency states that the rule is required to comply with federal law, specifically, 49 U.S.C. § 60105.

4. DEPARTMENT OF FINANCE AND ADMINISTRATION, ALCOHOLIC BEVERAGE CONTROL DIVISION (Ms. Doralee Chandler, Mr. Michael Lewis)

a. SUBJECT: Distiller or Liquor Manufacturer Operations (Title K, Rule 2.85)

DESCRIPTION: Subtitle K is a new addition resulting from Act 740 of 2019. The Act amends the Distiller or Liquor Manufacturer permit and defines operations, and it specifically authorizes off-premises and on-premises sale of vinous liquor and authorizes vinous liquor tasting events. This subtitle reflects those legislative changes.

PUBLIC COMMENT: A public hearing was held on this rule on August 19, 2020. The public comment period expired August 19, 2020. 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:

1. Section (1) of the proposed rules states, "A distiller or manufacturer may sell, deliver, and transport any liquor product to a wholesaler or rectifier[.]" Does this exclude small farm wines, as provided in Act 740, § 1(a) and (e)? **RESPONSE:** This rule does exclude small farm wines. Under A.C.A. 3-4-602 (Act 740, Sec 1 (a) and (e), small farm wines are excepted from the statute, thus they are exempted from the rule. Small farm wine permits are governed by A.C.A. 3-5-1602, et seq. This statute allows small farm wine permit holders to sell and

transport to wholesalers. Small farm wineries can do what this rule allowed; however, they must be operate under a different permit and set or rules/laws.

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 Alcoholic Beverage Control Division is the permitting agency for distillers and liquor manufacturers. Ark. Code Ann. § 3-4-602(a). The Division has authority to promulgate rules regarding sale, delivery, and transportation of alcoholic beverages produced by distillers and liquor manufacturers. These rules implement Act 740 of 2019, sponsored by Senator David Wallace, which amended the law regarding a distiller or manufacturer permit and authorized off-premises sales of vinous liquor for consumption, on-premises sales of vinous liquor by the drink, and vinous liquor tasting events.

b. SUBJECT: Title 2 Rules Applicable to Permits to Manufacture and Wholesale

DESCRIPTION: Amendment 100 to the Arkansas Constitution (the Arkansas Casino Gambling Amendment of 2018) established four potential casino licensees. Under the Amendment, controlled beverages may be sold or provided under a casino license governed by the Racing Commission. Due to the fact that wholesalers are only entitled to sell to Alcoholic Beverage Control permit locations, and casinos are not governed by Alcoholic Beverage Control, these Rules reflect the necessary changes to allow delivery of alcoholic beverages to casinos.

PUBLIC COMMENT: A public hearing was held on this rule on August 19, 2020. The public comment period expired August 19, 2020. 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 has no financial impact.

LEGAL AUTHORIZATION: The Director of the Alcoholic Beverage Control Division "has broad discretionary power to govern the traffic in alcoholic liquor and to enforce strictly all the provisions of the alcohol control laws of this state." Ark. Code Ann. § 3-2-206(d). The Division has authority to promulgate rules "for the supervision and control of the manufacture and sale of vinous (except wines), spirituous, or malt liquors

throughout the state not inconsistent with law." Ark. Code Ann. § 3-2-205.

These rules implement the Arkansas Casino Gaming Amendment of 2018 (Amendment 100). Amendment 100 provided that "[c]asino licensees shall be permitted to sell intoxicating liquor or provide complimentary servings of intoxicating liquor, only for on-premises consumption at the casinos, during all hours in which the casino licensees conduct casino gaming." Ark. Const. amend. 100 § 7.

c. SUBJECT: Oversight of Medical Marijuana Transporters/Distributors

DESCRIPTION: These rules govern the oversight of medical marijuana transporters/distributors in Arkansas by governing the requirements for record keeping, security, personnel, storage, and delivery of medical marijuana to a facility licensed by the Department of Health or the Alcoholic Beverage Control Division to possess such products. The rules are drafted in a consistent manner with the existing rules governing cultivation, dispensary, and processing facilities.

PUBLIC COMMENT: A public hearing was held on this rule on August 19, 2020. The public comment period expired on August 19, 2020. 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:

1. Is there a specific statutory source for the prohibition on a transporter/distributor commencing operations until the Division has issued an authorization letter (Section 6.2(B))? **RESPONSE:** There is no specific statutory source but the requirement has been pulled from Amendment 98 Sec 24(g).

The proposed effective date is pending legislative review and approval.

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

Per the agency, licensed transporters/distributors will incur costs to comply with the requirements, but the amount of these costs is unknown.

The agency indicated that there will not be a new or increased cost of at least $100,000 per year to any private individual, private entity, private business, state government, county government, municipal government, or to two or more of those entities combined.

LEGAL AUTHORIZATION: The Alcoholic Beverage Control Division has authority to license medical marijuana transporter agents, distributor agents, and processor agents. Ark. Const. amend. 98, § 25(a)(1). The Division also has authority to administer the provisions of Sections 24 and 25 of the Arkansas Medical Marijuana Amendment of 2018 concerning transporters, distributors, processors, and their agents. Ark. Const. amend. 98, §§ 24(a)(2), 25(a)(2). The Division shall adopt rules governing "matters necessary to the fair, impartial, stringent, and comprehensive administration" of its duties, including agent licensure and registration; oversight, recordkeeping, security, personnel, and inspection requirements for transporters, distributers, and processors; manufacture, processing, packaging, and dispensing of medical marijuana; and advertising restrictions for transporters, distributors, and processors. Ark. Const. amend. 98, §§ 24(h)(2), 25(h).

5. DEPARTMENT OF FINANCE AND ADMINISTRATION, ALCOHOLIC BEVERAGE CONTROL DIVISION, MEDICAL MARIJUANA COMMISSION (Ms. Doralee Chandler, Mr. Chip Leibovich)

a. SUBJECT: Licensure of Medical Marijuana Transporters

DESCRIPTION: The Arkansas Medical Marijuana Commission is adopting rules that prescribe the licensure, application, and renewal of licenses for medical marijuana transporters (also called "distributors") in Arkansas. The rules were adapted from the existing licensing rules for cultivation facilities and dispensaries. The rules describe the license application and license renewal procedures; impose limitations on licensed transporters; establish an initial license fee and renewal fee, in addition to a performance bond requirement for the first year of licensure; describe notification procedures for a licensee with information changes; and prescribe appeal procedures for denials of initial applications or license renewals.

PUBLIC COMMENT: A public hearing was held on this rule on August 25, 2020. The public comment period expired August 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 answers:

1. Is the $100,000 performance bond instituted by the proposed rules required by statute? **RESPONSE:** It is not required by statute, but the general authority found in Amendment 98 at Sec 24(h)(2)(J). The

Commission was seeking consistency with what they required of the Cultivation and Dispensary licensees.

2. Is there statutory authority for the requirements in Section IV.2.C.7 regarding proof of financial stability and access to financial resources? **RESPONSE:** There is not any specific authority, but there is general authority which provides for "any other matters necessary to the fair, impartial, stringent, and comprehensive administration of the duties of the division under this section." Amendment 98 Sec 24(h)(2)(J). The Commission sought consistency between licensing requirements for cultivation facilities and dispensaries with the new licenses.

3. Where does the requirement that owners, board members, and officers of license applicants must "have a reputable and responsible character" come from? **RESPONSE:** There is not any specific authority, but there is general authority which provides for "any other matters necessary to the fair, impartial, stringent, and comprehensive administration of the duties of the division under this section." Amendment 98 Sec 24(h)(2)(J). The Commission sought consistency between licensing requirements for cultivation facilities and dispensaries with the new licenses.

The proposed effective date is pending legislative review and approval.

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

Per the agency, the total estimated cost by fiscal year to any private individual, entity, and business subject to the proposed rule is $105,000 for the current fiscal year and $5,000 for the next fiscal year. In the first year of licensure, a transporter is required to maintain a performance bond of $100,000 and pay a licensure fee of $5,000. In the second year, the licensee can discontinue the bond but must pay a license renewal fee of $5,000.

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

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

The rule establishes the process for licensing medical marijuana transporters (also called "distributors"), which transport medical marijuana between licensed facilities and an approved lab.

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

Section 24 of Ark. Const. Amend. 98 requires the Medical Marijuana Commission to license transporters and distributors.

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

Section 24 of Ark. Const. Amend. 98 requires the Medical Marijuana Commission to adopt rules to license transporters and distributors, which the Commission has done through this proposed rule that combines both transporters and distributors into one "transporter" license. The rule establishes an initial license fee and renewal fee, as specifically allowed by Amend. 98, both in the amount of $5,000. Any applicant that meets the requirements will be granted a transporter license. In the initial year of licensure only, a transporter licensee must maintain a performance bond of $100,000.

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

While the Commission could certainly impose lesser fees and performance bond amount, the amounts set forth in the rule are the most reasonable. The fees are comparable to those required of transporters in other states. The performance bond amount is the same as that required for licensed dispensaries in Arkansas and is only required in the first year of licensure.

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

This finding will be supplemented after the public comment period closes. [The agency later clarified that no public comments were received.]

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

N/A

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

The medical marijuana industry is brand new in Arkansas. The Commission intends to continually update and improve the rules as the industry evolves and updates and improvements become apparent and necessary.

LEGAL AUTHORIZATION: These rules implement the Arkansas Medical Marijuana Amendment of 2016. The Amendment requires the Medical Marijuana Commission to adopt rules governing license applications. Ark. Const. amend. 98, § 24(h)(1). The Commission is also empowered to charge a "reasonable" licensure and license renewal fee. Ark. Const. amend. 98, § 24(e). The Alcoholic Beverage Control Division has the authority to promulgate rules governing procedures for suspending or terminating a license. Ark. Const. amend. 98, § 24(h)(2)(F).

b. SUBJECT: Licensure of Medical Marijuana Cultivation Facilities, Processors, and Dispensaries

DESCRIPTION: The Arkansas Medical Marijuana Commission is adopting rules that prescribe the licensure, application, and renewal of licenses for medical marijuana processors in Arkansas. The rules were adapted from the existing licensing rules for cultivation facilities and dispensaries. The rules describe the license application and license renewal procedures; impose limitations on licensed processors; establish an initial license fee and renewal fee, in addition to a performance bond requirement for the first year of licensure; describe notification procedures for a licensee with information changes; and prescribe appeal procedures for denials of initial applications or license renewals. Additionally, they incorporate the distance requirements for a developmental disability home as contained in Act 1004 of 2019.

PUBLIC COMMENT: A public hearing was held on this rule on August 25, 2020. The public comment period expired August 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 answers:

1. The proposed rules state that dispensaries must be located at least 1,500 feet from any facility for individuals with developmental disabilities, in accordance with Act 1004 of 2019. However, Act 1004 excludes "existing locations of dispensaries issued a license before the effective date of" the Act from the distance requirement. As the rules state that the Commission may deny license renewal for failure to meet any requirement set forth in the rules, and the proposed rules do not explicitly include Act 1004's existing facility distance requirement exclusion, is it the Commission's position that the new distance requirements apply to existing facilities seeking license renewal?

RESPONSE: It is not the Commission's position that the new distance requirements apply to existing facilities seeking license renewal. The rule states the Commission may deny a renewal for "failure to provide the information or meet the requirements described in the Amendment, the MMC rules, rules of the Arkansas Department of Health or Arkansas Alcoholic Beverage Control Division", but because Act 1004 amended Sec. 8 of the amendment, which excludes facilities licensed before the effective date, renewals for those licenses will not be impacted by the developmental disability prohibition.

2. Is the $100,000 performance bond instituted by the proposed rules required by statute? **RESPONSE:** It is not required by statute, but the general authority found in Amendment 98 at Sec 24(h)(2)(J).

3. Is there statutory authority for the requirements in Section VI.2.c.vii regarding proof of financial stability and access to financial resources? **RESPONSE:** There is not any specific authority, but there is general authority which provides for "any other matters necessary to the fair, impartial, stringent, and comprehensive administration of the duties of the division under this section." Amendment 98 Sec 24(h)(2)(J). The Commission sought consistency between licensing requirements for cultivation facilities and dispensaries with the new licenses.

4. Where does the requirement that owners, board members, and officers of license applicants must "have a reputable and responsible character" come from? **RESPONSE:** There is not any specific authority, but there is general authority which provides for "any other matters necessary to the fair, impartial, stringent, and comprehensive administration of the duties of the division under this section." Amendment 98 Sec 24(h)(2)(J). The Commission sought consistency between licensing requirements for cultivation facilities and dispensaries with the new licenses.

5. The proposed rules remove the following language from Section IV.12.c (cultivation facilities) and Section V.12.c (dispensaries): "A person aggrieved by a decision made pursuant to this section may appeal

in accordance with this chapter." However, the proposed processor rule retains this language (see Section VI.4.c). Was this language intentionally retained in the new processor rule? If so, why was it removed from the cultivation facility and dispensary rules?

RESPONSE: This language was intentionally retained in the new processor rules. The appeal procedure for cultivation facilities and dispensaries was provided in Rule 19. Rule 19 provides a direct appeal to circuit court from a non-adjudicative administrative decision and that language was found unfavorable by the Arkansas Supreme Court in *Ark. Dep't of Finance & Admin v. Carpenter Fars Med. Gro, LLC.*, 2020 Ark. 213. As a result we are working on new rules for the cultivation facilities and dispensaries. The number of licenses to be granted to processors are not limited in number and the applicants for these licenses will only be denied for failure to meet certain requirements; therefore, the MMC can reasonably hold hearing on denials of processor and transporter applications. It would be unnecessary to allow them to have a direct appeal to circuit court as set out in the cultivation rules and dispensary rules.

The proposed effective date is pending legislative review and approval.

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

Per the agency, the total estimated cost by fiscal year to any private individual, entity, and business subject to the proposed rule is $105,000 for the current fiscal year and $5,000 for the next fiscal year. The agency indicated that, in the first year of licensure, a processor is required to maintain a performance bond of $100,000 and pay a licensure fee of $5,000. In the second year, the licensee can discontinue the performance bond but must pay a license renewal fee of $5,000.

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

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

The rule establishes the process for licensing medical marijuana processors to allow for creation of third party to transform raw product into usable medical marijuana products to be distributed to authorized patients by a licensed dispensary.

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

Section 24 of Ark. Const. Amend. 98 requires the Medical Marijuana Commission to license processors.

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

Section 24 of Ark. Const. Amend. 98 requires the Medical Marijuana Commission to adopt rules to license processors. The rule establishes an initial license fee and renewal fee, as specifically allowed by Amend. 98, both in the amount of $5,000. Any applicant that meets the requirements will be granted a transporter license. In the initial year of licensure only, a transporter licensee must maintain a performance bond of $100,000.

(4) A list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

While the Commission could certainly impose lesser fees and performance bond amount, the amounts set forth in the rule are the most reasonable. The fees are comparable to those required of processors in other states. The performance bond amount is the same as that required for licensed dispensaries in Arkansas and is only required in the first year of licensure.

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

This finding will be supplemented after the public comment period closes. [The agency later clarified that it received no public comments.]

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

N/A

(7) An agency plan for review of the rule no less than every ten (10) years to determine whether, based upon the evidence, there remains a need for the rule including, without limitation, whether:

(a) the rule is achieving the statutory objectives;
(b) the benefits of the rule continue to justify its costs; and
(c) the rule can be amended or repealed to reduce costs while continuing to achieve the statutory objectives.

The medical marijuana industry is brand-new in Arkansas. The Commission intends to continually update and improve the rules as the industry evolves and updates and improvements become apparent and necessary.

LEGAL AUTHORIZATION: The Medical Marijuana Commission has authority to license medical marijuana cultivation facilities, processors, and dispensaries. Ark. Const. amend. 98, §§ 8(a)(1), 24(a)(1). The Commission is empowered to promulgate rules relating to its licensure responsibilities. Ark. Const. amend. 98, §§ 8(d), 24(h). The Commission is also empowered to charge licensure and license renewal fees. Ark. Const. amend. 98, §§ 8(f)(1), 24(e). The Alcoholic Beverage Control Division has the authority to promulgate rules relating to procedures for suspending or terminating a license. Ark. Const. amend. 98, §§ 8(e)(6), 24(h)(2)(F).

In addition to provisions of the Arkansas Medical Marijuana Amendment of 2016, these rules implement Act 1004 of 2019. The Act, sponsored by Senator Trent Garner, added a facility for individuals with developmental disabilities to the distance requirements for a dispensary.

6. DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE BOARD OF FINANCE (Mr. David Rector)

a. SUBJECT: Arkansas State Treasury Investment Policy

DESCRIPTION: The proposed amendment to the Investment Policy is in direct response to the enactment of Act 882 of 2019. That statute requires the State Board of Finance to set criteria for purchase and sale of securities which: (a) utilizes a competitive procedure, (b) seeks optimum price, and (c) does not permit preferential treatment toward certain brokers. The proposed rule change is intended to meet those newly enacted statutory requirements.

PUBLIC COMMENT: A public hearing was held on this rule on September 15, 2020. The public comment period expired September 15, 2020. 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: This proposed rule implements Act 882 of 2019, sponsored by Senator Jason Rapert, which amended the law concerning the investment of funds in the State Treasury and amended the powers and duties of the State Board of Finance in relation to the Chief Investment Officer of the Treasurer of State's Office. Per the Act, "[a]ll purchases and sales of securities by the Treasurer of State shall be made using a competitive procedure that: (i) [i]s approved by the State Board of Finance . . . ." Ark. Code Ann. § 19-3-518(b)(3)(B), *as amended by* Act 882.

7. DEPARTMENT OF HEALTH, CENTER FOR HEALTH ADVANCEMENT (Ms. Laura Shue)

a. SUBJECT: Rules Governing the Practice of Licensed Lay Midwifery in Arkansas

DESCRIPTION: The agency provided the following summary of changes to the Licensed Lay Midwifery Rules:

- Changed "Rules and Regulations" to read only "Rules" throughout document (Act 315).
- Added Section 208: Automatic Licensure of Active Duty Service Members, Returning Military Veterans, and Their Spouses (Act 820).
- Added Section 209: Reciprocal Licensure guidelines (Acts 426 and 1011).
    - Applicants licensed in another U.S. state or district
    - Applicants from states that do not license lay midwives
- Form for compliance with Act 977 requirement for hospitals to report to ADH transfers from midwife-attended births.
- Add reference to statutory prohibiting offenses and pre-licensure background petition (Act 990).
- Clean-up:
    - Added line for "Informed Refusal" to the Incident Report (p. 74). This was missing in error from original promulgation.
    - Added "Complete application form" under the instructions for renewing an LLM license without a CPM (p. 68). This was missing and has been added to be consistent with all other areas where the renewal process is discussed.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on July 29, 2020. The agency provided

the following summary of the public comment it received and its response to that comment:

Commenter's Name: Ralph M. Shenefelt, Health and Safety Institute

COMMENT SUMMARY: Request to add The Health and Safety Institute to the approved adult and infant cardiopulmonary resuscitation (CPR) courses.

Proposed Rule Language: 202. RENEWAL 2. b. "A copy of both sides of current certification in adult and infant cardiopulmonary resuscitation (CPR). Approved CPR courses include the American Heart Association and the American Red Cross."

Requested Amendment: 202. RENEWAL 2. b. "A copy of both sides of current certification in adult and infant cardiopulmonary resuscitation (CPR). Approved CPR courses include the American Heart Association, the American Red Cross, and the Health & Safety Institute."

RESPONSE: Thank you for your comment. As reflected in the draft, ADH proposed LLM Rule Amendments are focused on compliance with certain Acts of the last regular session of the AR General Assembly. However, we have considered your comment related to current Rule 202.2.b and will not be making a change at this time. We will revisit and reconsider your comment with any rule changes in the future.

After further review, the Arkansas Department of Health will amend section 202.2.b Changes made are as follows:

Renewal 2.b. "A copy of both sides of current certification in adult and infant cardiopulmonary resuscitation (CPR). Approved CPR courses include courses that are approved by NARM."

Appendix B. Transitional Apprentices. 7.b "A copy of both sides of current certification in adult and infant cardiopulmonary resuscitation (CPR). Approved CPR courses include courses that are approved by NARM."

Appendix B. Transitional Apprentices. 8.c "A copy of both sides of current certification in adult and infant cardiopulmonary resuscitation (CPR). Approved CPR courses include courses that are approved by NARM."

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

1. Is there statutory authority for the provision in Section 209.2.i that temporary licenses "cannot be reissued or extended," or is this a policy decision by the agency? **RESPONSE:** Policy decision. Act 1011 only requires that a licensing entity issue a temporary/provisional license for a minimum of 90 days. It does not require a reissue or extension.

2. The proposed rules replace "felony" with "crime" on the initial license and reactivation of license application form. Is there a reason this language was not also changed on the license renewal application form? **RESPONSE:** This was an oversight.

3. The new patient transfer hospital reporting form includes space for the patient's full name, address, and date of birth. Is the Department required to collect this information by statute? **RESPONSE:** Act 977 of 2019 requires a "hospital or licensed healthcare facility" to "report to ADH when a known transfer occurs of a patient." The Act does not prescribe the manner, form, or media of the reporting. ADH is a covered entity and the public health licensing agency for both hospitals, licensed healthcare facilities, and Licensed Lay Midwives, which allows us to receive information under HIPAA. Because Act 977 is silent on detail, we modeled this form for audit and other regulatory purposes, including investigations. LLM's are currently required under LLM Rules to report to ADH instances where LLM clients had to be transferred to a hospital. The information contained in the reporting from Act 977 would allow us to reconcile the two for audit and investigations.

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 license lay midwives in Arkansas. Ark. Code Ann. § 17-85-107(a). The Board also has the power to promulgate rules related to licensure. Ark. Code Ann. § 17-85-107(a)(1). These proposed rules implement Acts 426, 820, 977, 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 977, sponsored by Representative Deborah Ferguson, required reporting to the Department of Health of patient transfers from a lay midwife.

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 Governing the Licensure of Interpreters

<u>DESCRIPTION</u>: The Rules Governing the Licensure of Interpreters are being amended as follows:

- Amended for numerical inclusion of new sections of the Advisory Board Rules and amended numbering of all sections.
- Addition of definitions of "automatic licensure" and "returning military veteran."
- Changed wording for form in Section VII.
- Added Section VIII, Application for Temporary Provisional Licensure in compliance with Act 426.
- Added Section IX, Application for Automatic Licensure in compliance with Act 820.
- Added Section X, Reciprocity in compliance with Act 1011.
- Added Section XI, License for Individuals From a State That Does Not License Profession in compliance with Act 1011.
- Reduced fee for initial application and licensure from $120.00 to $90.00. Reduced annual fee from $90.00 to $75.00.

<u>PUBLIC COMMENT</u>: No public hearing was held on this proposed rule. The public comment period expired on September 15, 2020. The agency indicated that it received no public comments.

The proposed effective date is December 1, 2020.

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

LEGAL AUTHORIZATION: The Department of Health has the authority to issue, deny, and renew licenses for interpreters "between a hearing individual and an individual who is deaf, deafblind, hard of hearing, or oral deaf[.]" Ark. Code Ann. § 20-14-806. The Department may also "[e]stablish reasonable fees for licensure and renewal of licensure." Ark. Code Ann. § 20-14-806(a)(5). The State Board of Health may promulgate rules regarding these duties. Ark. Code Ann. § 20-14-809. This proposed rule implements Acts 426, 820, 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 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.

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

a. SUBJECT: Rules Pertaining to Onsite Wastewater Systems

DESCRIPTION: The following changes have been made to the Onsite Wastewater rules:

- Added Section 16 to reflect changes due to Act 426, Act 820, and Act 1011 of the 2019 Arkansas General Assembly.
- Updated entire rule to reflect requirements of Act 315 of the 2019 General Assembly.

PUBLIC COMMENT: A public hearing was held on this proposed 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: Section 16.5.1 states that an applicant must take the Designated Representative, Installer, or Certified Maintenance Person test if the applicant is licensed in another state that does not offer reciprocity to Arkansas residents. Is this different than the requirement under Section 16.2.3 that an applicant licensed in a state with reciprocity must pass the Designated Representative, Installer, or Certified Monitoring test to prove sufficient competency?

RESPONSE: ADH will strike the highlighted portion as shown below because it is confusing and redundant. Everyone takes the test. However, ADH would waive any state apprenticeship requirements if the other state does the same for AR licensees. The language is directly from the statute and the agreed upon model language and complies with Act 1011.

16.5. Reciprocity and state-specific education. Act 1011, A.C.A § 17-1-08(d)(3)

16.5.1. The Department shall require an applicant to take the Designated Representative, Installer, or Certified Maintenance Person test if the applicant is licensed in another state that does not offer reciprocity to Arkansas residents that is similar to reciprocity provided to out-of-state applicants in A.C.A. § 17-1-108.

16.5.2. Reciprocity in another state will be considered similar to reciprocity under A.C.A. § 17-1-108 if the reciprocity provisions in the other state:

16.5.2.1. Provide the least restrictive path to licensure for Arkansas applicants;

16.5.2.2. Do not require Arkansas applicants to participate in the apprenticeship, education, or training required as a prerequisite to licensure of a new professional in that state, except that the state may require Arkansas applicants to participate in continuing education or training that is required for all professionals in that state to maintain the licensure.

16.5.2.3. Do not require Arkansas applicants to take a state-specific education ~~unless required to do so under the same conditions described in A.C.A. § 17-1-108.~~

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 certify wastewater system installers, designated representatives, and certified maintenance personnel. Ark. Code Ann. §§ 14-236-115(a), -116(b)-(d), -119(a). The State Board of Health has authority to amend rules promulgated under the Arkansas Sewage Disposal Systems Act. Ark. Code Ann. § 14-236-102(b)(5). These proposed rules implement Acts 426, 820, 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 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.

9. DEPARTMENT OF HEALTH, CENTER FOR PUBLIC HEALTH PROTECTION, EPIDEMIOLOGY (Mr. Laura Shue)

a. SUBJECT: Rules Pertaining to Lead-Based Paint Activities

DESCRIPTION: The Rules Pertaining to Lead-Based Paint Activities are amended as follows:

In compliance with Act 820, added Section VI(a)(5): Licensure of Active-Duty Service Members, Returning Military Veterans, and Their Spouses.

In compliance with Acts 426 and 1011, added Section VI(a)(1)(B): Reciprocal Licensure.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on August 19, 2020. 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 the proposed rule does not have a financial impact.

LEGAL AUTHORIZATION: The Arkansas Department of Health has the authority to "[r]equire and regulate training and examinations for individuals engaged in performing lead-based paint activities under" the Arkansas Lead-Based Paint Hazard Act of 2011. Ark. Code Ann. § 20-27-2505(1). The Department also has licensing authority over "firms and individuals engaged in lead-based paint activities[.]" Ark. Code Ann. § 20-27-2505(2). These proposed rules implement Acts 426, 820, 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 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.

10. DEPARTMENT OF HEALTH, HEALTH FACILITY SERVICES (Ms. Laura Shue, Ms. Rebecca Bennett)

a. SUBJECT: Rules for Critical Access Hospitals (CAH)

DESCRIPTION: The Rules for Critical Access Hospitals are being amended as follows:

Updated throughout to remove the term "regulation" in accordance with Act 315 of 2019.

Rule 3(A): Add definition of "abortion complication" to comply with Act 620 of 2019.

Rule 8(D)(2): Update TB language to standardize across all types of health care facilities. The same language was previously promulgated in Rule 18(A)(5)(h).

Rule 9(D): Add abortion complication reporting requirement to comply with Act 620 of 2019.

Rule 9(E): Add reporting requirement for transfers from lay midwives to comply with Act 977 of 2019.

Rule 43(G)(2)(a)(8), (G)(3)(a)(5): Add option for compliance certification by licensed architect or professional engineer in compliance with Act 889 of 2019.

PUBLIC COMMENT: A public hearing was held on this rule on September 3, 2020. The public comment period expired September 3, 2020. The agency provided the following summary of the public comments it received and its responses to those comments.

Commenter's Name: Josephine M. Colacci, Director of Government Affairs, International Association of Healthcare Central Service Material Management

SUMMARY OF COMMENT: Section 34(B), Specialized Services: Central Sterilization and Supply

The central sterilization and supply service shall be under the direct supervision of a Registered Nurse or a person who has successfully passed a nationally accredited central service exam for central service technicians and holds and maintains at least one of the following credentials (1) the certified registered central service technician credential; or (2) the certified sterile processing and distribution technician credential.

RESPONSE: The current proposal did not contain any changes to §34 "Central Sterilization and Supply." A more comprehensive revision is expected to begin once the current proposal is complete. The comment will carry forward as a suggested language for the next revision. The commenter was so notified by the Agency on 08/27/20.

Commenter's Name: Paul Acre

SUMMARY OF COMMENT: Suggestions regarding language for physical facilities and fire walls.

RESPONSE: The current proposal did not contain any changes to the physical facility portions. A more comprehensive revision is expected to begin once the current proposal is complete. The comments will carry forward as a suggested language for the next revision. The commenter was so notified by the Agency on 09/08/20.

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

QUESTION: I see the abortion complications reporting requirement in Section 9(D), but the rule summary says a definition of "abortion complication" was added to Section 3(A). The proposed rules don't have that definition. Is the rule summary or the proposed rules redline correct regarding the added definition? **RESPONSE:** [The agency provided an updated copy of the rules containing the referenced definition.]

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, Division of Health Facility Services has the authority to inspect, regulate, and license hospitals and institutions. Ark. Code Ann. § 20-9-204(b)(3). The Department may promulgate rules as necessary to accomplish the purposes of Ark. Code Ann. §§ 20-9-201 to -223, which relate to health facilities services. Ark. Code Ann. § 20-9-205(b). These rules implement Acts 620, 889, and 977 of 2019.

Act 620, sponsored by Senator Trent Garner, required additional reporting requirements by certain physicians and healthcare facilities for abortion complications. The Act required such reports to "[b]e submitted in the form and manner prescribed by rule of the department[.]" Ark. Code Ann. § 20-16-605(c)(2)(A), *as created by* Act 620.

Act 889, sponsored by Senator Bart Hester, modernized plumbing plan review submissions and responses and clarified that local jurisdiction review of certain plumbing plans and specifications does not require review by the Department of Health.

Act 977, sponsored by Representative Deborah Ferguson, required reporting to the Department of Health of patient transfers from a lay midwife.

b. SUBJECT: Rules for Hospitals and Related Institutions in Arkansas

DESCRIPTION: The Rules for Hospitals and Related Institutions in Arkansas are being amended as follows:

- Removed term "regulation" throughout document
- Added abortion complication definition
- Updated TB prevention language
- Added reporting requirements for abortion complications
- Added reporting requirements for transfers of patients from the care of lay midwives during labor and delivery
- Added option for compliance certification by licensed architect or professional engineer

PUBLIC COMMENT: A public hearing was held on this rule on September 3, 2020. The public comment period expired September 3, 2020. The agency provided the following summary of the public comments it received and its responses to those comments.

Commenter's Name: Josephine M. Colacci, Director of Government Affairs, International Association of Healthcare Central Service Material Management

SUMMARY OF COMMENT: Section 34(B), Specialized Services: Central Sterilization and Supply

The central sterilization and supply service shall be under the direct supervision of a Registered Nurse or a person who has successfully passed a nationally accredited central service exam for central service technicians and holds and maintains at least one of the following credentials (1) the certified registered central service technician credential; or (2) the certified sterile processing and distribution technician credential.

RESPONSE: The current proposal did not contain any changes to §34 "Central Sterilization and Supply." A more comprehensive revision is expected to begin once the current proposal is complete. The comment will carry forward as a suggested language for the next revision. The commenter was so notified by the Agency on 08/27/20.

Commenter's Name: Paul Acre

SUMMARY OF COMMENT: Suggestions regarding language for physical facilities and fire walls.

RESPONSE: The current proposal did not contain any changes to the physical facility portions. A more comprehensive revision is expected to begin once the current proposal is complete. The comments will carry forward as a suggested language for the next revision. The commenter was so notified by the Agency on 09/08/20.

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, Division of Health Facility Services has the authority to inspect, regulate, and license hospitals and institutions. Ark. Code Ann. § 20-9-204(b)(3). The Department may promulgate rules as necessary to accomplish the purposes of Ark. Code Ann. §§ 20-9-201 to -223, which relate to health facilities services. Ark. Code Ann. § 20-9-205(b). These rules implement Acts 620, 889, and 977 of 2019.

Act 620, sponsored by Senator Trent Garner, required additional reporting requirements by certain physicians and healthcare facilities for abortion complications. The Act required such reports to "[b]e submitted in the form and manner prescribed by rule of the department[.]" Ark. Code Ann. § 20-16-605(c)(2)(A), *as created by* Act 620.

Act 889, sponsored by Senator Bart Hester, modernized plumbing plan review submissions and responses and clarified that local jurisdiction review of certain plumbing plans and specifications does not require review by the Department of Health.

Act 977, sponsored by Representative Deborah Ferguson, required reporting to the Department of Health of patient transfers from a lay midwife.

c. SUBJECT: Rules for Freestanding Birthing Centers in Arkansas

DESCRIPTION: The Rules for Freestanding Birthing Centers in Arkansas are being amended as follows:

- Strike "regulations" throughout document in accordance with Act 315 of 2019

- Add reporting requirements for patients transferred to a hospital or other licensed healthcare facility in accordance with Act 977 of 2019
- Change TB screening requirements to latest CDC guidelines
- Add severability clause

PUBLIC COMMENT: A public hearing was held on this rule on September 3, 2020. The public comment period expired on September 3, 2020. 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: The redline of the new TB language reads, "There shall be a plan for ensuring that each health care worker has measures for prevention of communicable disease outbreaks . . ." It seems as if something is missing between "has" and "measures." Could you clarify this?

RESPONSE: The licensed facility is responsible for measures that meet CDC guidelines to insure that its health care workers are disease free. The sentence will be revised to the following for clarification:

There shall be a plan for ensuring that the health facility each health care worker has taken ~~an annual TB skin test or is evaluated in accordance with guidelines approved by the Arkansas Department of Health (Rules and Regulations Pertaining to Communicable Disease; Section 1, Section 13 - Arkansas Department of Health Tuberculosis Program Amendment 22394Adopted in February, 1994).~~measures for prevention of communicable disease outbreaks, especially Mycobacterium tuberculosis (TB). All plans for the prevention of transmission of TB shall conform to the most current CDC Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health Care Facilities.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Department of Health has the authority to promulgate rules "[s]etting minimum standards for the construction, maintenance, and operation of a freestanding birthing center[.]" Ark. Code Ann. § 20-9-403(a)(1). This rule implements Act 977 of 2019, sponsored by Representative Deborah Ferguson. Act 977 required reporting to the Department of patient transfers from a lay midwife.

d. **SUBJECT: Rules for Orthotic, Prosthetic, and Pedorthic Providers in Arkansas**

DESCRIPTION: The rules for Orthotic, Prosthetic, and Pedorthic Providers in Arkansas are being amended as follows:

- Eliminate the word "regulation" throughout the document
- Add definition of "returning military veteran" (Section 3(28))
- Add requirements for reciprocal licensure (Section 6 (5)(a)-(f))
- Add military licensing provisions (Section 6(6))
- Add criminal history background provisions (Section 6(7)-(8))
- Add language to clarify criminal conviction disclosures on applications (Section 7(3))
- Add language from criminal background check disqualifications (Section 7(3)(a))
- Add severability clause (Section 15)

PUBLIC COMMENT: A public hearing was held on this rule on September 3, 2020. The public comment period expired on September 3, 2020. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter's Name: Jeremy Crawl

COMMENT SUMMARY: Arkansan has full license from another state (Oklahoma) but is not certified by BOC so practice is limited in Arkansas. Suggests that reciprocity for other certification bodies be accepted.
R**ESPONSE:** OPP Advisory Board recommends against licensure without BOC certification.

Commenter's Name: Brock Berta, Transcend OP, Indiana

COMMENT SUMMARY: Out of state practitioner requests reciprocity for other national certification bodies be accepted by Arkansas.
RESPONSE: OPP Advisory Board recommends against licensure without BOC certification.

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

QUESTION: Section 6(7)(C) states that the Board will respond to a pre-licensure criminal background check petition "within a reasonable time." What does the Board consider to be a reasonable time? **RESPONSE:** Should be within 2 weeks following receipt of the criminal history report.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The State Board of Health has the authority to promulgate rules prescribing "[p]rocedures for the issuance, renewal, inactivation, restoration, suspension, and revocation of a license or certification" for an orthotist, pedorthist, or prosthetist. Ark. Code Ann. § 17-107-204(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.

e. SUBJECT: Rules for Hospice in Arkansas

DESCRIPTION: The Rules for Hospice in Arkansas have been amended as follows:

- Update document throughout to remove term "regulations"
- Add definition of "attending APRN" as requested by the Arkansas Hospice and Palliative Care Association
- Strike unnecessary authority citations

- Update language regarding TB prevention for consistency across all healthcare facilities
- Expand dietary counseling to include RNs and nutritionists
- Add severability clause

PUBLIC COMMENT: A public hearing was held on this rule on September 3, 2020. The public comment period expired September 3, 2020. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter's Name: Hospice and Palliative Care Association

SUMMARY OF COMMENT: Add APRN definition. **RESPONSE:** Added.

Commenter's Name: Sam Sellers, Hospice and Palliative Care Association

SUMMARY OF COMMENT: Asks that rules specify what an Attending APRN is allowed to do; suggests adding to definition that attending physician also includes attending APRN with exception of certify/recertify for hospice care eligibility.

RESPONSE: Request after Board of Health approved draft. Planning for future revisions to add general qualifications rather than practitioner types.

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

QUESTION: The proposed rules add a severability clause in Section 35. However, there is already a severability clause in Section 33. Could you explain why the second severability clause is necessary? (Also, page 35-1 labels the new severability clause "Section 21" instead of "Section 35.")
RESPONSE: We missed the existing severability clause in section 33. We'll eliminate section 33 and renumber the two remaining sections.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The Arkansas Department of Health has the authority to regulate hospice care in Arkansas through the State Hospice Office, "to be administered in a division of the department to be designated by the Secretary of the Department of Health." Ark. Code Ann. § 20-7-117(a), (b)(1)(B). Through the State Hospice Office, the Department may "[i]mplement rules, regulations, and standards for

hospice care" that agree with national standards and federal law. Ark. Code Ann. § 20-7-117(b)(1)(B). The Department has designated the Division of Health Facility Services as the division to administer hospice regulation. See https://www.healthy.arkansas.gov/programs-services/topics/health-facility-services.

11. DEPARTMENT OF HEALTH, HEALTH SYSTEMS LICENSING AND REGULATION/COSMETOLOGY AND MASSAGE THERAPY SECTION (Ms. Laura Shue, Ms. Kelli Kersey)

a. SUBJECT: Rules for Cosmetology in Arkansas

DESCRIPTION: The Rules for Cosmetology in Arkansas have been amended as follows:

Section 1, Cosmetology Section
- Added and corrected language to meet requirements of Act 1081 of 2017
- Corrected the Department's website
- Edited language to meet requirements of Acts 972 and 973 of 2017
- Lowered renewal fees, transfer fees, and first-time licensure fees

Section 2, Definitions
- Added definitions of "certified hours"; "mobile salon"; and "revocation"
- Added language addressing domestic violence and sexual assault awareness training
- Reorganized rule sections for better flow

Section 3, Requirements for Cosmetology and Related Occupations
- Added requirements for school licensing based on language utilized by the Department of Education
- Added references to mobile salons in accordance with Act 1081 of 2017

Section 4, Examinations
- Edited language to meet requirements of Acts 972 and 973 of 2017

Section 5, Reciprocity
- Created new rule sections for better flow and ease for reciprocity candidates
- Clarified language for better understanding
- Added language regarding temporary licenses, military automatic licensure, and licensure for a person from a state that does not license profession under Act 1011 of 2019.

Section 6, Requirements for Schools of Cosmetology, Postsecondary Schools of Cosmetology, and Establishments

- Added language regarding mobile salons
- Clarified rule for better understanding
- Addressed industry concerns raised by subcommittee to mirror textbook (§ 6.1(C))

Section 7, Cosmetology Establishment Certificate of Registration and Licensure
- Added language regarding mobile salons
- Replaced "letter of authorization" with "license" in response to industry concerns raised by subcommittee
- Corrected language to meet requirements of Act 1081 of 2019

Section 8, School of Cosmetology and Postsecondary School of Cosmetology Requirements
- Corrected the Department's website
- Mirrored secondary school policy to postsecondary school policy
- Clarified rule language for better understanding
- Added language regarding domestic violence and sexual assault training
- Removed language from § 8.21(A)(1) and added language to § 8.21(A)(5) and (B)(1) due to industry concerns raised by subcommittee
- Reorganized rule sections for better flow and ease of understanding
- Clarified practical examination fee to meet requirements of Act 973 of 2017

Section 9, Instructor Training
- Added renewal requirements to comply with Acts 972 and 973 of 2017
- Removed § 9.1(A) as duplicative
- Added language regarding domestic violence and sexual assault training

Section 11, Complaint Policy
- Added language referencing mobile salons
- Added language concerning prelicensure criminal background checks, as required by Act 990 of 2019

Section 12, Equipment and Chemical Use in Cosmetology and its Related Branches
- Edited language relating to piercing to address industry concerns raised by subcommittee
- Added language referencing mobile salons

PUBLIC COMMENT: A public hearing was held on these rules on August 27, 2020. The public comment period expired on August 27, 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. Rule 4.1(A)(2) allows a school to submit an Early Testing examination form to the Department for potential examinees who have completed partial training and are currently enrolled in training. Does this rule require the examinee to have completed all the required training before the examination? **RESPONSE:** No, this is updating a Statute amendment from 2019.

2. Rules 5(B), 5(C)(3), 8.14(A) require an applicant for cosmetology licensure to complete at least 1500 hours of training, while Rules 8.15 and 8.16 require 600 hours of training for manicurists and aestheticians. However, Ark. Code Ann. § 17-26-304 was amended in 2015 to lower the training requirements to "at least" 1200 hours for cosmetologists and 480 hours for manicurists and aestheticians. Is there a reason the Department has retained the old hourly requirements for training? **RESPONSE:** This is a requirement for examination not training. **17-26-304. Prerequisites to examination for a cosmetologist, manicurist, aesthetician or instructor.**

3. Rule 9.4(A) states that "For biennial renewal instructors shall not be required to renew the specialty license in which they were originally licensed" but "shall only be allowed to instruct in the specialty area of original licensure." Are such instructors required to be in good standing, as required by Act 973 of 2017? **RESPONSE:** Yes. Previously the Statute required licensees to renew both licenses, this eliminates the renewal of original license.

4. Rule 11(A)(5)(c) states that the Department will respond to a pre-licensure criminal background check petition "within a reasonable time." What does the Department consider to be a reasonable time? **RESPONSE:** The answer depends on volume received. The "reasonable" time period was selected as ADH was unsure about how many would result from Act 990 of 2019. The maximum time is two weeks depending on volume (just as medical marijuana background checks are performed within two weeks per law).

5. Rule 12(A)(3) states, "Piercing activity of cosmetologists and aestheticians shall be limited to piercing the lobe of the ear using an ear piercing gun." Is there statutory basis for this language, or is it solely derived from industry concerns as indicated in the rule summary? **RESPONSE:** Piercing an earlobe with a gun does not require a body art license under A.C.A. § 20-27-1501 (b). Piercing via any other method would require a body art license and hence outside scope of practice for cosmo licensee.

The proposed effective date is pending legislative review and approval.

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

Per the agency, the total estimated cost by fiscal year to any private individual, entity, and business subject to the proposed rule is as follows:

Category	Current Fee	Proposed Fee
Reciprocity applicants	$150	$50
New establishment or mobile salon applicants	$150	$100 (one-time fee)
Establishment or mobile salon renewal	$100	$50 (annually)
Establishment relocation	$150	$50 (one-time fee)
Name and/or ownership change of establishment or mobile salon	$75	$25 (one-time fee)
New School of Cosmetology or postsecondary school of cosmetology	$1,500	$1,000 (one-time fee)
Name and/or ownership change of School of Cosmetology or postsecondary school of cosmetology	$500	$100 (one-time fee)
Duplicate license	$25	$10 (one-time fee)
Certificate of Department records	$50	$10 (one-time fee)

The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is $1,280,023.00 for the current fiscal year and $1,138,522.00 for the next fiscal year. Per the agency, the revenue reduction for fiscal year 2021 is $282,260 with fee reduction. The agency clarified that the rule amendments do not increase any cost to run the program.

The agency indicated that there is not a new or increased cost or obligation of at least $100,000 per year to a private individual, private entity, private business, state government, county government, municipal government, or to two or more of those entities combined.

LEGAL AUTHORIZATION: The State Board of Health has the authority to promulgate rules to carry out the provisions of the Cosmetology Act, conduct examinations of applicants for cosmetology licensure, and govern health and safety in cosmetological establishments, schools of cosmetology, the practice of cosmetology, and any branch of cosmetology. Ark. Code Ann. § 17-26-205(a)(5). The Board may also

promulgate a fee schedule and collect fees. Ark. Code Ann. § 17-26-209(a).

The Arkansas Department of Health has the authority to issue cosmetologist permits and licenses, register cosmetological establishments and schools, and implement the State Board of Health's rules regarding cosmetology. Ark. Code Ann. § 17-26-205(a). The Department also has the authority to promulgate rules to implement domestic violence and sexual assault awareness training and to set a standard curriculum for cosmetology schools. Ark. Code Ann. § 17-26-205(d)(1). These proposed rules implement Acts 488, 972, 973, and 1081 of 2017 and Acts 426, 820, 990, and 1011 of 2019.

Act 488 of 2017, sponsored by Representative Charlene Fite, required cosmetology students to have training in domestic violence and sexual assault awareness.

Act 972 of 2017, sponsored by Senator Bill Sample, amended the laws regarding cosmetology instructor training. Act 973 of 2017, also sponsored by Senator Sample, amended the law concerning the profession of cosmetology, schools of cosmetology, and the requirements for cosmetology licensure.

Act 1081 of 2017, sponsored by Representative Rebecca Petty, permitted the operation of mobile salons and created a licensing procedure concerning mobile salons. The Act required the Department of Health to promulgate rules implementing its provisions by September 1, 2017. Act 1081, § 5(b)(1).

Act 426 of 2019, 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 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 and provided automatic licensure.

Act 990 of 2019, 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 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.

b. SUBJECT: Rules for Massage Therapy in Arkansas

DESCRIPTION: The Rules for Massage Therapy in Arkansas are revised as follows:

Section 1, Massage Therapy Section
- Remove term "regulation" in accordance with Act 315 of 2019
- Add language indicating the rules' purpose

Section 2, Principles, Methods, and Definitions
- Remove term "regulation" in accordance with Act 315 of 2019
- Clarify multiple definitions
- Add definition of "postsecondary massage therapy school"
- Remove language to address industry concerns raised by subcommittee

Section 3, Policies and Procedures
- Remove restrictive language
- Remove term "regulation" in accordance with Act 315 of 2019
- Add language regarding denial, suspension, probation, or revocation of licenses
- Add prelicensure criminal background check provisions in accordance with Act 990 of 2019
- Add subsection addressing waiver requests
- Remove language to address industry concerns raised by subcommittee

Section 4, Enforcement
- Remove repetitive language
- Add language regarding consumer information for transparency
- Clarify rule language for better understanding

Section 5, Licensing and Renewals
- Remove language for better flow and ease for reciprocity candidates
- Clarify rule for better understanding
- Move language for better understanding and flow

Section 6, Reciprocity, Temporary Licensure, and Military Licensure
- Correct rule to meet requirements of Act 1011 of 2019

- Add language to meet requirements of Act 820 of 2019

Section 7, Continuing Education
- Clarify rule for better understanding
- Add, remove, and replace language to address industry concerns raised by subcommittee

Section 8, Massage Clinics
- Add language to protect health and safety of consumers
- Clarify rule for better understanding

Section 9, Massage Therapy Schools and Postsecondary Massage Therapy Schools
- Rearrange section for clarification and better flow

Section 10, Conduct and Ethics
- Rearrange and rewrite language for better clarification and flow of the rule
- Remove term "regulation" in accordance with Act 315 of 2019
- Remove repetitive language
- Remove language regarding attire due to lack of health and safety risk to the public

Section 11, Miscellaneous Guidelines
- Remove repetitive language
- Add, remove, or replace language for clarification and better flow of the rule

PUBLIC COMMENT: A public hearing was held on this rule on August 27, 2020. The public comment period expired August 27, 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. The proposed rules state that inspectors may enter licensed establishments and conduct inspections "at any time during business hours." A.C.A. § 17-86-203(b)(2) specifies that inspectors may not enter rooms where clients are receiving treatment. Is the Department comfortable that this requirement is reflected in the proposed rules? **RESPONSE:** Yes. That statement is reflective of the requirements of the law found in A.C.A. § 17-86-203(b)(1)(B) and helps put licensees on notice of when they might anticipate an inspection.

2. Is there a specific source for the requirement that an instructor must have 5 hours of specialized related training for every one hour of CE to be

taught (Section 7.4.d), or was this based in Departmental discretion? **RESPONSE:** This was an industry request; it is amended language to the current Rule 6.10 –

10. Instructors may only teach courses that reflect a percentage level of their training consistent with hours of credit being offered by the instructor.

a. No more than twenty (20) percent of the hourly credit can be offered in relation to the training received by the instructor.

For example, if a trainer takes an approved thirty (30) hour continuing education program, he or she would qualify to teach a six (6) hour course in that particular subject.

3. What is the source for the thirty-day timeframe within which a licensee who receives an audit form must submit all appropriate documentation (Section 7.9.a)? **RESPONSE:** Request from the industry for better clarification of the existing Rule.

4. The rule summary indicates that the new language in Section 8.1 was added as a result of industry concerns. Is there, in addition, any statutory basis for the new language? **RESPONSE:** The language is consistent with National Continuing education applications and the broad powers under A.C.A. § 17-86-203(a) for the "State Board of Health may promulgate and enforce reasonable rules for the purpose of carrying out this chapter."

5. The proposed rules require postsecondary schools' handbooks to include a disciplinary policy. Is this a statutory requirement? **RESPONSE:** This is to comply with 34 CFR 600.9 for federal student aid programs.

6. What is the source for the requirement that a school desiring to move locations "notify the Department in writing at least thirty (30) days prior to any location change"? **RESPONSE:** This is to ensure timeliness and appropriate notice for efficient and orderly program administration. It helps to plan any necessary inspections and to update ADH records.

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 massage therapists, master massage therapists,

massage therapy instructors, massage therapy schools, and massage therapy clinics and spas. Ark. Code Ann. §§ 17-86-303 to -307. The State Board of Health may promulgate reasonable rules to carry out the provisions of the Massage Therapy Act. Ark. Code Ann. § 17-86-203(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.

12. <u>DEPARTMENT OF HEALTH, PUBLIC HEALTH LAB AND CENTER FOR HEALTH ADVANCEMENT</u> (Ms. Laura Shue)

a. <u>SUBJECT</u>: Rules Pertaining to Milk Bank Standards

<u>DESCRIPTION</u>: Pursuant to Act 216 of 2019, the Department of Health is establishing standards for transporting, processing, and distributing human breast milk on a for-profit or nonprofit basis.

<u>PUBLIC COMMENT</u>: A public hearing was held on this rule on October 7, 2019. The initial public comment period expired on October 14, 2019. After receiving public comments, the agency made substantive changes to the rule and submitted it for another round of public comment.

This second public comment period ended September 3, 2020. A second public hearing was not held.

The agency provided the following summary of the public comments it received and its responses to those comments:

Public Comment Period Ending October 14, 2019

Commenter's Name: Victoria Niklas, Prolacta Bioscience

SUMMARY OF COMMENT 1: Classification and Labeling: That though the Health Department's proposed milk banking regulations mirror existing federal guidelines, the proposed regulations fall short specifically around safety and labeling requirements as established by FDA, in 21 CFR 100-169.

RESPONSE: ADH disagrees with commentator's legal analysis. Human Breast milk is not defined in the Code of Law in the United States and is not regulated by the FDA, including promulgation of any standards. The FDA defines both cow's milk and infant formula in Title 21: "Food and Drugs". Does not define human breast milk as food. Accordingly, 21 CFR 100-169 is inapplicable to human breast milk and specifically the subchapter for Food for Human Consumption. See 21 C.F.R. § 133.3. Also see: Mathilde Cohen, Should Human Milk Be Regulated? Vol. 9 Issue 3, UC Irvine Law Review 557 (2019). Were any changes made to the Proposed Rule as a result of this Comment? If so, please describe. No changes were made.

SUMMARY OF COMMENT 2: Testing: ADH guidelines in their present form, do not address the risk of transmission of infectious diseases. **RESPONSE:** ADH Guidelines are based upon Standards adopted by the Human Milk Banking Association of North America (HMBANA). HMBANA has been referred to as the "gold standard in the profession." See: Mathilde Cohen, Should Human Milk Be Regulated? Vol. 9 Issue 3, UC Irvine Law Review 557 (2019). However, ADH's initial draft did not "wholesale" incorporate those Standards. Based on consideration of stakeholder concerns, ADH will further and thoroughly explore the Public Health issues raised with 2 the potential for changes to the current draft completed prior to the quarterly Board of Health meeting in April 2020.

SUMMARY OF COMMENT 3: Traceability: Prolacta encourages the Department to consider an absolute traceability requirement for all donor milk and donor-milk derived products. **RESPONSE:** ADH Guidelines are based upon Standards adopted by the Human Milk Banking Association of North America (HMBANA). HMBANA has been referred

to as the "gold standard in the profession." See: Mathilde Cohen, Should Human Milk Be Regulated? Vol. 9 Issue 3, UC Irvine Law Review 557 (2019). However, ADH's initial draft did not "wholesale" incorporate those Standards. Based on consideration of stakeholder concerns, ADH will further and thoroughly explore the Public Health issues raised with the potential for changes to the current draft completed prior to the quarterly Board of Health meeting in April of 2020.

Public Comment Period Ending September 3, 2020

Commenter's Name: American Association for Laboratory Accreditation (A2LA).
A2LA is a non-profit, accreditation body with over 3750 actively accredited certificates representing all 50 states and international, including 27 organizations accredited in Arkansas.

SUMMARY OF COMMENT 1: Specific to the use of the ISO/IEC 17025 standard for medical testing and calibration, the recommended language is inserted in **bold**. In section 4.4.3, the requirements specify "A CLIA certified high complexity clinical laboratory or an ISO 17025 accredited clinical laboratory does the tests…" Please note that an ISO standard exists that is based on ISO/IEC 17025 and ISO 9001 but specifies requirements for quality and competence that are particular to medical laboratories. We recommend that 4.4.3 be revised to **"A CLIA certified high complexity clinical laboratory or an ISO 15189 accredited clinical laboratory, that achieved accreditation from an International Laboratory Accreditation Cooperation recognized accreditation body, does the tests…"**

RESPONSE: After consultation with the Director of the Public Health Laboratory, the recommended change is made as suggested.

SUMMARY OF COMMENT 2: In section 15.3.2, the requirements specify, "Thermometers may be certified calibrated by National Institute of Standards and Technology (NIST) (or similar agency), or calibrated quarterly by the milk bank using an NIST certified reference thermometer. The milk bank must keep records of calibration." It is industry practice to rely on NIST calibration or rely on an ISO/IEC 17025 accredited calibration laboratory that is accredited by an ILAC recognized accreditation body for calibration of the reference thermometers. Then the milk bank may verify working thermometers against the reference thermometers.

We recommend the following revision to section 15.3.2: "Thermometers may be calibrated by a national metrology institute (NMI) such as the National Institute of Standards and Technology (NIST) or an ISO/IEC

17025 accredited calibration laboratory that is accredited by an ILAC recognized accreditation body, for the calibration of the reference thermometers. The milk bank shall verify working thermometers against the calibrated reference thermometers at least quarterly. The milk bank must keep records of the calibration and verification records."

RESPONSE: After consultation with the Director of the Public Health Laboratory, the recommended change is made as suggested.

Commenter's Name: Scott Eaker, Chief Operations Officer, Prolacta Bioscience

SUMMARY OF COMMENT 1: Section 2. Definitions, 2.11 – Milk Donor – This definition refers to, "a lactating woman who voluntarily contributes milk to a human milk bank." Some milk banks remunerate donors for their milk, and some do not. Act 216 of 2019 makes no mention of remuneration received by donors.

We request that the definition is amended to read as follows, "A lactating woman who voluntarily contributes milk to a human milk bank." A donor may or may not be remunerated.

RESPONSE: After consideration of the proposed language to this definition, the recommended change is made.

SUMMARY OF COMMENT 2: Section 2. Definitions, 2.6 – Donor Human Milk. This section refers to donor human milk as milk pasteurized using the Holder Pasteurization Method. We request this is amended to read, "donated by lactating women, pasteurized using the Holder Pasteurization Method subjected to a validated pathogen inactivation method, and dispensed…"

2.6.3 –"Bioburden Reduced Milk",

and that the specifics of the Holder Pasteurization are replaced to read as follows, "fresh-raw and/or fresh-frozen milk that has been heated to 62.5 degrees Celsius, for 30 minutes subjected to a validated method of pathogen reduction."

2.12 – Milk Processing Centers –this subsection should be omitted.

RESPONSE: After consideration and consultation with a Senior Medical Advisor, the recommended changes to these definitions will not be made at this time, but will be considered at the next regular review of these rules.

SUMMARY OF COMMENT 3: Section 3. Administrative Structure, 3.1 –add Medical Director within the Administrative Structure

Section 4. Donor Qualifications/Screening
4.2 – and 4.4.1—revise Electronic communication
4.4.3 –revise Requalifying donor and 4.4.3.1 –Donor communication
4.4.4 –provide for Medical Director review
4.4.4.5 –revise Prospective donors medications

Section 6. Exclusion Criteria
6.10 – remove Redundant language
6.12 – amend Vegans and supplemental nutrition

Section 7. amend Tattoo temporary disqualification

RESPONSE: After consideration and consultation with an ADH Senior Medical Advisor, the recommended changes to the administrative structure, qualifications, and exclusion will not be made at this time, but will be considered at the next regular review of these rules in 2021.

SUMMARY OF COMMENT 4: Section 8. Serological Tests, 8.1 – Screening consistency throughout the guidelines, proposed "within 6 months prior to a woman's becoming a donor."

Section 26 – Milk Bank Records
26.1.2 – In line with the comments made re. subsection 8.1, we would like for the serology testing to be consistent throughout the guidelines.

RESPONSE: After consideration of the proposed language, the recommended changes for serology testing are made for consistency.

SUMMARY OF COMMENT 5: Section 9 – revise Donor Approval

Section 11 – clarify Donor Education and Procedures in 11.2 – Instructions

Section 12 – review Procedure Manual every two years

Section 14 – clarify Equipment

Section 15 – suggested language change for Thermometers

Section 17 – remove Thermometer Calibration Procedure

Section 23 – revise Aliquoting and Heat Processing and 23.2– Heat Processing.

23.4.1 – revise Labeling of Milk expiration.

RESPONSE: After consideration and consultation with an ADH Senior Medical Advisor, the recommended changes to the donor approval and education, procedure manual, equipment, thermometers, aliquoting and heat processing, and labeling will not be made at this time, but will be considered at the next regular review of these rules in 2021.

SUMMARY OF COMMENT 6: 23.6.1 –Revise requirement of "the microbiology Standards of Practice (SOP) available in their banks, distributed by Human Milk Bank Association of North America (HMBANA)," which would require all milk banks to comply with the SOPs put forth by another milk bank.

Instead, we suggest the rules require compliance with the FDA's Bacteriological Analytical Manual (BAM).

RESPONSE: After consideration of the proposed language, the recommended changes are added to allow for following either HMBANA SOP or FDA's BAM.

SUMMARY OF COMMENT 7: 26.1.4 –revise Birth date

Section 27 – Tracking and Recall of Donor Milk and 27.1 and 27.2– suggested language for adverse event reporting

Additional requested language for the Human Milk Bank Rules included Definitions for Donation Date, Expression Date, and Medical Director. Also, requested language on Section 4. Donor Qualifications/Screening, and Requested language on Physician Attestations, Testing of Milk Donations for infectious disease and adulterants, involvement of a Medical Advisory Board, and whether a donor will be accepted or deferred based on the screening test.

RESPONSE: After consideration and consultation with an ADH Senior Medical Advisor, the recommended changes to the birth date, tracking and recall, and additional definitions and other suggested additions will not be made at this time, but will be considered at the next regular review of these rules in 2021.

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

QUESTION: Did the Department reference any particular outside source when drafting these rules, such as model language, codified industry standards, or existing regulations in another jurisdiction? I noticed that the

authorizing Act gives the Department fairly broad rulemaking authority with minimal guidance and that this is a new, fairly lengthy set of rules, so I'm just wondering where the language/standards came from.

RESPONSE: After the legislative session, Center Directors from the Department of Health, Center for Health Advancement and the Public Health Lab, developed proposed Milk Bank Standards utilizing the Human Milk Bank of North America guidelines. The Rules establishing the Standards were proposed to the Board of Health on August 1, 2019. The Board of Health approved the proposed standards linked below.

ADH filed the initial proposed rules to establish standards with the Secretary of State on September 19, 2019. See http://170.94.37.152/REGS/007.32.19-001P-19185.pdf. ADH published notice of a public comment period and held a public hearing on October 7, 2019. The public comment period ended on October 14, 2019. Please see the initial proposed new rules, public comment report and agency responses, and public hearing minutes posted on the ADH website in compliance with the Administrative Procedure Act. See also https://www.healthy.arkansas.gov/proposed-new-rules.

Upon consideration of the public comments received in writing and at the public hearing, ADH determined that additional revisions to the proposed new rule for Human Breast Milk Standards were necessary. Due to the subsequent proposed material changes, ADH presented the revised rule at the April 23, 2020, Board of Health meeting, and the Board approved.

Our staff purchased and used the full paper copy [of the HMBANA standards] for the drafts in 2019 and 2020. Please see https://www.hmbana.org/file_download/inline/95a0362a-c9f4-4f15-b9ab-cf8cf7b7b866 for a brief overview summary of the guidelines.

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: This proposed rule implements Act 216 of 2019, sponsored by Representative Aaron Pilkington, which established Arkansas standards for human breast milk and encouraged the development of human breast milk depositories and banks in Arkansas. The Act required the Department of Health to promulgate rules establishing standards "for transporting, processing, and distributing commercial human breast milk on a for-profit or nonprofit basis in this state." Act 216, § 1(a), *codified at* Ark. Code Ann. § 20-7-140(a).

Per the agency, the substance of the rule is based on standards adopted by the Human Milk Banking Association of North America (HMBANA).

13. <u>DEPARTMENT OF HEALTH, RADIATION CONTROL SECTION</u> (Ms. Laura Shue, Mr. Bernard Bevill)

a. <u>SUBJECT</u>: Rules Pertaining to Radiologic Technology Licensure

<u>DESCRIPTION</u>: The Rules Pertaining to Radiologic Technology Licensure have been revised to comply with Acts 315, 426, 820, 990, and 1011 of 2019.

Act 315: Changed "Rules and Regulations" to read only "Rules" throughout the document.

Act 820: Added Section VII: Licensure of Active Duty Service Members, Returning Military Veterans, and Their Spouses.
- Grant licensure if holding substantially equivalent license;
- Substantially equivalent means (i) graduation from an accredited Radiologic Technology School; and (ii) passage of the American Registry of Radiologic Technologists (ARRT) exam.

Act 426/1011:

Added Section VIII: Reciprocal Licensure.
- Applicants licensed in another U.S. state or district: A license from another state is substantially similar to an Arkansas Radiologic Technology license if the other state's licensure qualifications require (i) graduation from an accredited Radiologic Technology School; and (ii) passing the ARRT exam.

Added Section IX: Temporary or Provisional License, good for six months.

Added Section X for states that do not license Radiologic Technologists.
- Provide evidence of competency
- Pass the ARRT exam

Added Section XI: Reciprocity and State-Specific Education
- Requires an applicant to take the Limited Scope Radiologic Technologist exam if the applicant is licensed in another state that does not offer reciprocity to Arkansas residents that is similar.

Act 990: Added Section XII: Pre-Licensure Petition, and amended Section XIII to reference the Act.

PUBLIC COMMENT: No public hearing was held on this proposed rule. The public comment period expired on August 19, 2020. 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 State Board of Health has authority to "[a]dopt standards for applicants wishing to take the licensing examination" necessary to obtain a radiologic technologist license. Ark. Code Ann. §§ 17-106-105, -107. The Board has authority to promulgate rules "as may be necessary" to carry out its duties under the Arkansas Consumer-Patient Radiation Health and Safety Act. Ark. Code Ann. § 17-106-105(a)(1)(D). 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.

14. DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS AND COMMISSIONS, STATE MEDICAL BOARD (Ms. Amy Embry, Mr. Kevin O'Dwyer)

a. SUBJECT: Rule 45 – Reciprocity

DESCRIPTION: The State Medical Board is proposing a new rule, Rule 45 concerning Reciprocity. Rule 45 sets out the required qualifications and required documentation for reciprocal licensure.

PUBLIC COMMENT: A public hearing was held on October 1, 2020. The public comment period expired on October 1, 2020. The State Medical Board received no public comments.

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: Pursuant to the Arkansas Medical Practices Act, the Arkansas State Medical Board has authority to make and adopt all rules not inconsistent with the laws of this state or the United States and necessary or convenient to perform the duties and to transact business required by law. *See* Ark. Code Ann. § 17-95-303(1). In addition, the board may promulgate and put into effect such rules as are necessary to carry out the purposes of the Arkansas Medical Practices Act. *See* Ark. Code Ann. § 17-95-303(2). The proposed rules implement Act 1011 of 2019, sponsored by Representative Jim Dotson, which amended the law concerning licensing, registration, and certification for certain professions, and established a system of endorsement, recognition, and reciprocity for licensing, registration, and certification for certain professions. *See* Act 1011 of 2019. The Act required that occupational licensing entities adopt the least restrictive rule that allows for reciprocity or licensure by endorsement. *See* Act 1011 of 2019.

15. DEPARTMENT OF HEALTH, DIVISION OF HEALTH RELATED BOARDS AND COMMISSIONS, STATE BOARD OF PHYSICAL THERAPY (Ms. Nancy Worthen, Mr. Matt Gilmore)

a. SUBJECT: Arkansas State Board of Physical Therapy Telehealth Rule

DESCRIPTION: The Arkansas State Board of Physical Therapy Telehealth Rule allows for physical therapists and physical therapist assistants to practice telehealth under the Arkansas Telemedicine Act as

health professionals. It is necessary for the public to have access to a physical therapist and/or physical therapist assistant when they are unable to see the therapist in person. Pursuant to the Arkansas Telemedicine Act, Ark. Code Ann. §§ 17-80-401 et seq., the new rule applies to the provision of services via telehealth by physical therapists and physical therapist assistants when acting within their respective scopes of practice. Ark. Code Ann. § 17-80-406 states "State licensing and certification boards for a healthcare professional shall amend their rules where necessary to comply with this subchapter."

PUBLIC COMMENT: A public hearing was not held in this matter. The public comment period expired on September 10, 2020. The State Board of Physical Therapy received no public comments.

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

1. The Telemedicine Act does not utilize the word "telehealth" or define the term. The proposed rules use the term "telehealth" but do not define it. Could you please explain/clarify this discrepancy? **RESPONSE:** The Board disagrees that the use of the word "telehealth" constitutes a discrepancy. "Telehealth" is a commonly used and understood term. For example, the Governor used the word "telehealth" in his Executive Orders 20-05 and 20-37 when he suspended certain provision of The Telemedicine Act due to COVID-19.

2. In Section II (1) of the proposed rule, the word "regulation" is used. Is the board comfortable using this term in light of Act 315 of 2019? **RESPONSE:** No, this was an oversight and will be corrected. [A revised markup was submitted.]

3. The Telemedicine Act defined "professional relationship" to include "relationships in other circumstances as defined by rule of a licensing or certification board for other healthcare professionals under the jurisdiction of the appropriate board and their patients, if the rules are no less restrictive than the rules of the Arkansas State Medical Board." Section II (1)(A) and (1)(B) of the proposed rule appears to mirror the definition of "professional relationship" in some aspects, but there are some deviations from the statutory language. **RESPONSE:** All of the differences are due to the Board's adoption of provisions of the State Medical Board's rules.

(a) Section II(1)(A) requires that licensees perform a history, whereas the requirement of history does not appear in Ark. Code Ann. § 17-80-402(4). Could you please explain this discrepancy? **RESPONSE:** The Board disagrees with use of the word "discrepancy." The language in

II(1)(A) mirrors the language in the State Medical Board's Rule 2.8.A.1.A.

(b) Section II(1)(A) of the proposed rule requires that the in-person physical examination to be "adequate to establish a diagnosis and identify underlying conditions and/or contraindications to the treatment recommended/provided." This additional qualification on the in-person physical examination does not appear in the Telemedicine Act. Could you please provide statutory authority for the additional requirement, or explain the board's rationale for including this language? **RESPONSE:** Please see response to question 3(a).

(c) In Section II(1)(B) & (C), the definition appears to mirror Ark. Code Ann. § 17-80-402(b), except for the use of the work 'general' instead of 'relevant.' Can you please explain this discrepancy? **RESPONSE:** The Board disagrees with use of the word "discrepancy." The language in II(1)(A) mirrors the language in the State Medical Board's Rule 2.8.A.1.C.

(d) In Section II(1), it is unclear whether the "professional relationship" requirement will be met with A alone, or B and C. Or is C required even when A is satisfied? Could you please clarify the applicability of "OR" and "and" used at the end of Section II (A) and (B)? **RESPONSE:** This language is taken directly from the Medical Board's telemedicine rule. The requirement of either A or B, plus C, must be met.

(e) Are the portions of the rule concerning the professional relationship "no less restrictive than the rules of the Arkansas State Medical Board?" **RESPONSE:** Yes.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Act 203 of 2017, sponsored by Senator Cecile Bledsoe, created the Telemedicine Act, which amended the definition of telemedicine, addressed the requirements of a professional relationship when utilizing telemedicine, and added standards for appropriate use of telemedicine. *See* Act 203 of 2017. In addition, the Act provided that "state licensing and certification boards for a healthcare professional shall amend their rules where necessary to comply" with the Telemedicine Act. *See* Ark. Code Ann. § 17-80-406. The Arkansas State Board of Physical Therapy has authority to license applicants who meet qualifications under Title 17, Chapter 93 of the Arkansas Code concerning physical therapists, as well as to adopt reasonable rules to carry out the

purposes of the chapter. *See* Ark. Code Ann. §§ 17-93-202(a)(4) and (b)(1).

16. HIGHWAY COMMISSION, ARKANSAS DEPARTMENT OF TRANSPORTATION (Mr. Gill Rogers)

a. SUBJECT: Autonomous Vehicle Pilot Program

DESCRIPTION: Pursuant to Ark. Code Ann. § 27-51-2002(d), the Arkansas Highway Commission proposes its Autonomous Vehicle Pilot Program Rules. These rules set out the process to apply for and obtain approval to operate up to three autonomous vehicles pursuant to the requirements of Arkansas law.

The rules define terms used in the law, such as "automated driving system," or "dynamic driving task," and set out the information required to be submitted or acknowledged as part of the application process. The latter requires notably proof of insurance under the Motor Vehicle Safety Responsibility Act, Ark. Code Ann. §§ 27-19-101 et seq., and 27-22 101 et seq., as well as affirmation that the vehicle is capable of complying with all Arkansas laws in its operation. In addition, the method of application review, approval, denial, or withdrawal of approval is set out, providing for both internal and external (i.e. judicial) review of any such action.

The proposed rules then provide requirements to be met in order to operate an autonomous vehicle without a human operator present in the vehicle, and requirements in the event of a serious injury or fatal accident.

The final section provides for annual reporting, by January 31st, of information concerning the operation of vehicles under the Pilot Program. The reporting information includes total number of trips, total miles traveled, the total number of disengagements that occurred during operation, and submission of all law enforcement reports.

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

Act 468 of 2019 established that the Arkansas Highway Commission (AHC) is responsible to adopt rules for the implementation of Autonomous Vehicle Pilot Programs. In June of 2020, the AHC adopted Minute Order 2020-048, which authorized the Director to promulgate the rules. Following adoption of the Minute Order, the rules were published for public comment. During the public comment period, comments were

received from two entities. The comments, along with the recommended response, are noted below.

1. This comment was received on July 10, 2020 from Michael Lindsey, Director of Public Affairs and Governmental Relations with Walmart/Gatik AI:

"(b) During the first six months of an approved autonomous vehicle pilot program, a human operator will be required to be physically present in the vehicle while it is operating on the streets and highways of this State;"

- We recommend inserting the following clause: "This requirement does not apply to any organization operating under an AV Pilot Program in the state, if an application has already been approved to remove the safety driver from another vehicle operating under an AV Pilot Program in the state by the same organization."
- Rationale - since we have already operated in AR for more than 6 months with a safety driver, it would be great to have the option to be able to expand our unmanned service (with multiple vehicles assuming the request to remove the 3 vehicle restriction is approved) to any new route(s)/site(s) within AR without having to wait the 6-month period (assuming our pending request for unmanned operations is approved)."

ArDOT RESPONSE: Walmart/Gatik AI is wanting to remove the onboard safety driver from the three (3) vehicles they are currently operating under the Autonomous Vehicle (AV) Pilot Program. This would be allowed under the rules as currently written since they have been satisfactorily operating for more than six (6) months with a safety driver.

Walmart/Gatik AI's other comments pertain to their desire to expand to other locations and to operate more than three (3) vehicles, all without onboard safety drivers. These changes would take their activity beyond the scope of the Pilot Program and would require legislative changes.

ARDOT believes no changes to the proposed rules are needed based on the comments received from Walmart/Gatik AI.

2. The following comments were received on July 17, 2020 from Stephanie Malone, Chief Executive Officer with the Arkansas Trial Lawyers Association.

On behalf of the Arkansas Trial Lawyers Association, I write today with some brief comments on the Arkansas Vehicle Pilot Program Rules. As representatives of those hurt and killed in traffic collisions, we recognize the deep need for sustained investment in vehicle safety technologies. However, we worry that unreasonable profiteering and gamesmanship by automated vehicle manufacturers could wipe out the safety potential that automated vehicles present. To ensure that automated vehicle developments in Arkansas are truly in the public interest, we encourage

the Department of Transportation to adopt the following suggestions when promulgating final rules for the deployment of automated vehicles in Arkansas:

Mandatory Registration in State

Companies seeking to test automated vehicles on Arkansas Highways should be required to be Arkansas businesses, or to register to do business in Arkansas, appoint an agent for service, and consent to the jurisdiction of Arkansas state courts. Without such a requirement, foreign corporations—potentially even companies based in China or outside the territorial United States—could utilize Arkansas highways to test their experimental technologies without having to submit to the state's authority. Unaccountable foreign companies should not be allowed to experiment on Arkansas citizens without consequence.

Requiring companies to submit to Arkansas authority will expediate DOT's ability to obtain information or enforce these rules while putting in-state companies on the same footing as foreign companies. It will also ensure that those Arkansas citizens whose property has been destroyed or who have been injured or killed by a dangerous AV operated by foreign company can hold the company accountable in state court for the harm they cause. This is a commonsense addition that should be uncontroversial for those seeking to use Arkansas highways in good faith. Therefore, to ensure Arkansas DOT and Arkansas citizens can use Arkansas courts to enforce Arkansas laws, the department should require companies testing automated vehicles in Arkansas to submit to Arkansas jurisdiction.

Mandatory Insurance Requirements of $2 Million Dollars

One notable limitation in the proposed Arkansas rules is the lack of a comprehensive insurance requirement for companies to meet. Companies seeking to utilize Arkansas highways to experiment with their technology should be capable of paying for the harm their experiments cause. Acknowledging this, many other states have required heightened insurance minimum requirements for automated vehicle operators to carry. For example, both Louisiana and Alabama required $2 million dollars in insurance coverage while Tennessee requires $5 million dollars per incident in coverage to be carried prior to operations.

Multiple reasons justify a heightened insurance requirement as applied to automated vehicles. First, automated vehicles are being operated pursuant to an algorithm designed by individuals who are not placed at personal risk if the vehicle is operated unsafely. Unlike a human driver, the people telling the car to drive unsafely do not have their literal skin (and blood) in the game. While we share the hope that these automated decisions will be made reasonably, the National Transportation Safety Board's investigation into the Uber automated vehicle collision in Arizona suggests that at least

some operators will forego even the most rudimentary of safety precautions. Without the threat to personal security, the imperative to ensure the company is financially capable of paying for the harm it causes becomes all the more imperative.

Second, automated vehicle operators are either experimenting using the state's highways as their personal laboratories or, one day, operating a for-profit transportation service utilizing their automated driving technology. As this regulation specifically covers the experimentation phase of the automated vehicle development process, heightened insurance requirements would ensure that the citizens of the state are not unwittingly subsidizing the company choosing to utilize Arkansas roads for practice. If someone is hurt by a dangerous automated vehicle, he or she shouldn't be forced to pay out-of-pocket for the medical bills or suffer lost wages due to an underinsured automated vehicle operator. Companies using Arkansas roads should be prepared to compensate Arkansas citizens fully for the harms that they cause.

Finally, the Arkansas statutes suggest that companies need to be prepared to take responsibility should they fail to live up to those requirements. Arkansas Act 468 of 2019 and these proposed rules require that companies certify that they will follow the rules of the road—implying that if they do not, they should pay for the harm that their negligent operations cause. Requiring that the company to be financially capable of fulfilling that requirement would be a necessary and proper final rule to achieve these goals set out in the legislation.

Therefore, to ensure that Arkansas citizens are adequately protected, the department should require companies testing automated vehicles in Arkansas to carry at least $2 million in insurance covering a crash.

ArDOT RESPONSE: The Arkansas Trial Lawyers Association (ATLA) requested that language be added to the rules to require AV Pilot Program applicants to register with the Secretary of State in order to do business in Arkansas. We do not believe it is necessary to add this provision to the rules since such registration with the Secretary of State is already required by state law and is being required of applicants.

The ATLA also requested that higher mandatory insurance requirements be placed on AV operators. The enabling legislation for the AV Pilot Program, Act 468 of 2019, did not mandate any additional insurance requirement other than what is required under the Motor Vehicle Safety Responsibility Act. ATLA noted higher mandatory insurance limits for AV operators in Louisiana, Alabama, and Tennessee, but those higher limits were imposed by legislation, not by rule.

ArDOT believes no changes to the proposed rules are needed based on the comments received from the ATLA.

With your concurrence, the proposed rules, as established by Minute Order 2020-048, will be submitted to the Administrative Rules Subcommittee of the Arkansas Legislative Council for their consideration.

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: The proposed rules implement Acts 468 and 1052 of 2019. Act 468 of 2019, which was sponsored by Representative Austin McCollum, authorized the operation of autonomous vehicles or fully autonomous vehicles on the streets and highways of this state under an autonomous vehicle pilot program. *See* Act 468 of 2019. Pursuant to the Act, an autonomous vehicle or fully autonomous vehicle may be operated in this state under an autonomous vehicle pilot program approved by the State Highway Commission. *See* Act 468 of 2019, codified as Ark. Code Ann. § 27-51-2002(a)(1). The Arkansas State Highway Commission is authorized to adopt rules necessary for the implementation of Title 27, Chapter 51, subchapter 20 of the Arkansas Code concerning autonomous vehicles. *See* Act 468 of 2019, codified as Ark. Code Ann. § 27-51-2002(d).

Act 1052 of 2019, which was sponsored by Representative Craig Christiansen, provided that the Arkansas Department of Transportation shall consult with railroad companies operating in this state when considering an exemption that affects the operation of autonomous vehicles or fully autonomous vehicles at railroad crossings. *See* Act 1052 of 2019, § 1, codified as Ark. Code Ann. § 27-51-2002(b)(3)(A)(ii).

17. DEPARTMENT OF HUMAN SERVICES, DIVISION OF CHILD CARE AND EARLY CHILDHOOD EDUCATION (Mr. Mark White, Ms. Ashelyn Abney, Ms. Ebony Russ)

a. SUBJECT: Minimum Licensing Requirements (Child Care Centers, Licensed Child Care Family Homes, Out-of-School Time Facilities, & Registered Child Care Family Homes)

DESCRIPTION:

Statement of Necessity

The Division of Child Care and Early Childhood Education (DCCECE) updates the minimum licensing requirements for Child Care Centers (CCC), Child Care Family Homes (CCFH), Out-of-School Time Facilities (OST), and Registered Child Care Family Homes (RCCFH). The changes are needed to comply with DHS Exclusion Policy 1088 that prevents excluded individuals and related parties from applying for a license. Also, language needed to be removed regarding prior licensed facility and employee compliance exemptions, or delayed time periods allowed to meet all updated compliance standards.

Rule Summary

DCCECE updated all four manuals to clarify the requirement regarding excluding parties. Also, the minimum licensing requirements for OSTs were updated to require immunization records or documentation of an exemption.

The following specific changes apply to all four facility types:

- Removed language in several places regarding the amount of time allowed facilities licensed prior to the implementation of the rule or their employees to comply with the standards.

- Clarified the following requirement regarding excluded parties:

- "Falsification of any document and submission of false information to the Division of Child Care and Early Childhood Education (DCCECE) may constitute grounds for revocation of the license. (Falsification means the submission of untrue information, whether by statement or omission.)"

- "Any individual and related parties on the Department of Human Services (DHS) Exclusion List pursuant to DHS Exclusion Policy 1088 shall not be eligible to be an owner, member of the Board of Directors, Director, Assistant Director, or Person in Charge of any licensed facility."

The following change applies to Out-of-School Time Facilities only:

604.1 l. "An authorized record of up-to-date immunizations or documentation of a religious, medical, or philosophical exemption from the Arkansas Department of Health (ADH)."

PUBLIC COMMENT: No public hearing was held on this proposed rule. The public comment period expired on October 11, 2020. The agency indicated that it did not receive any public comments.

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

Q. Is there specific authority for adding "theft of public benefits" to the excluding offenses list? **RESPONSE:** The rule was revised by removing "theft of public benefits" from all manuals.

The proposed effective date is December 1, 2020.

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

LEGAL AUTHORIZATION: The Division of Child Care and Early Childhood Education has authority to promulgate rules governing childcare facility licensing and operation. *See* Ark. Code Ann. § 20-78-206(a)(1)(A). It is required to promulgate rules that promote children's "health, safety, and welfare" and that ensure childcare workers are "capable, qualified, and healthy[.]" *See* Ark. Code Ann. § 20-78-206(b)(1), (3). The Division is expressly prohibited from permitting "a child who has not been age-appropriately immunized" from diseases designated by the State Board of Health to attend a child care center without a documented medical, religious, or philosophical exemption. Ark. Code Ann. § 20-78-206(a)(2)(A)(i), (B)(i)-(ii).

b. SUBJECT: Minimum Licensing Standards for Child Welfare Agencies (Placement and Residential)

DESCRIPTION:

Statement of Necessity

The Minimum Licensing Standards for Child Welfare Agencies (Placement and Residential) are being revised to meet the requirements of the Families First Prevention Services Act (Public Law 115-123) established for Arkansas. The standards will impact the foster families of Arkansas and residential facilities that have direct involvement with Transitional Living.

Rule Summary

Several changes will be made to the Minimum Licensing Standards. The changes to the Placement Standards involve the content of the home study, physical requirements of the home, approval of foster homes, foster parent responsibilities, medications, continued training of foster parents, and sleeping arrangements. The changes for the Residential Standards affect the Transitional Living Section.

Summary of Changes for Placement

- Section 207 Content of the Home Study: Inserted provisions for one (1) scheduled home interview and the right to request further documentation.

- Section 208 Physical Requirements of the Home: Added requirements that the home shall be maintained in a clean, safe, and sanitary condition and in a reasonable state of repair. Added requirements for smoke detectors, the physical structure of the home, indoor appliances, and utilities, including functioning water, lighting, ventilation, sewage, and electricity. Inserted requirements for in-ground, above-ground, and portable pools, including gates, access to the pool, and maintenance. Added requirements that the home exterior and interior must be free from dangerous objects and conditions, and from hazardous materials. Added a requirement for maintenance of emergency supplies and a list of emergency phone numbers.

- Section 209 Sleeping Arrangements: Revised the requirements for a child's bedroom, specifying bedding in a condition similar to the other household members. Added a clause against parents co-sleeping or sharing a bed with a child.

- Section 210 Approval of Foster Homes: Added conditions for personal references. Added topics for pre-service training. Added clauses regarding proper communication and functional literacy among parents and children.

- Section 212 Continued Training of Foster Parents: Added clauses for ongoing foster parent training and topics for annual training.

- Section 213 Foster Parents Responsibilities: Added language regarding foster parents compliance with agency rules and responsibilities, including the drug and alcohol policy.

- Section 214 Medications: Deleted language regarding over-the-counter medications. Added new language specifying limited access to over-the-counter and prescription medications.

- Section 307 Content of the Home Study: Inserted provisions for one (1) scheduled home interview and the right to request further documentation.

- Section 308 Physical Requirements of the Home: Added requirements that the home shall be maintained in a clean, safe, and sanitary condition

and in a reasonable state of repair. Added requirements for smoke detectors, the physical structure of the home, indoor appliances, and utilities, including functioning water, lighting, ventilation, sewage, and electricity. Inserted requirements for in-ground, above-ground, and portable pools, including gates, access to the pool, and maintenance. Added requirements that the home exterior and interior must be free from dangerous objects and conditions, and from hazardous materials. Added a requirement for maintenance of emergency supplies and a list of emergency phone numbers.

- Section 309 Sleeping Arrangements: Revised the requirements for a child's bedroom, specifying bedding in a condition similar to the other household members. Added a clause against parents co-sleeping or sharing a bed with a child.

- Section 310 Approval of Foster Homes: Added conditions for personal references. Added topics for pre-service training. Added clauses regarding proper communication and functional literacy among parents and children.

- Section 312 Continued Training of Foster Parents: Added clauses for ongoing foster parent training and topics for annual training.

- Section 314 Medications: Deleted language regarding over-the-counter medications. Added new language specifying limited access to over-the-counter and prescription medications.

- Section 408 Content of the Home Study: Inserted provisions for one (1) scheduled home interview and the right to request further documentation.

- Section 409 Physical Requirements of the Home: Added requirements that the home shall be maintained in a clean, safe, and sanitary condition and in a reasonable state of repair. Added requirements for smoke detectors, the physical structure of the home, indoor appliances, and utilities, including functioning water, lighting, ventilation, sewage, and electricity. Inserted requirements for in-ground, above-ground, and portable pools, including gates, access to the pool, and maintenance. Added requirements that the home exterior and interior must be free from dangerous objects and conditions, and from hazardous materials. Added a requirement for maintenance of emergency supplies and a list of emergency phone numbers.

- Section 410 Sleeping Arrangements: Revised the requirements for a child's bedroom, specifying bedding in a condition similar to the other household members. Added a clause against parents co-sleeping or sharing a bed with a child.

- Section 411 Approval of Foster Homes: Added conditions for personal references. Added topics for pre-service training. Added clauses regarding proper communication and functional literacy among parents and children.

- Section 413 Continued Training of Foster Parents: Added clauses for ongoing foster parent training and topics for annual training.

- Section 415 Medications: Deleted language regarding over-the-counter medications. Added new language specifying limited access to over-the-counter and prescription medications.

- Appendix B: Updated to correct the misspelling of "Offenses."

Summary of Changes for Residential

- Section 800 Transitional Living: Updated the requirement for agencies holding a Transitional Living License to provide a continuum of care for youths that have turned eighteen (18) while in the agency's residential program to a licensed or exempt program.

- Section 801 Agency Responsibilities: Removed the requirement of the residential license. This will allow providers who do not want to operate as a residential facility to have the ability to offer the transitional living services to youth that have turned age eighteen (18) while in a licensed or exempt program. Updated to clarify the caseworker's responsibilities toward the youth regarding budgeting and monthly home visits.

- Section 802 Eligibility Requirement: Language was deleted to remove conditions of time and program type from requirements for transfer.

- Appendix B: Updated to correct the misspelling of "Offenses."

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired on October 11, 2020. The agency provided the following summary of the public comments it received and its responses to those comments.

Commenter's Name: Tressa Hamilton, Arkansas Chapter of FFTA

COMMENT: The Therapeutic Foster Care Providers met and reviewed the proposed minimum licensing standards and have concern regarding the above-proposed standard. While we fully agree that, the children in our care absolutely need to remain safe around swimming pools and while

engaging in water activities there is major concerns around the cost of what is being proposed as the new licensing standards.

One of my therapeutic foster parents looked in to the approved pool cover meeting the American Society for testing materials (ASTM) that requires the cover to hold a minimum of 485 pounds per five (S) square feet. They found out that to purchase the cover and have it installed, it will cost them $3,000.00.

The alternative listed to the pool covering is also be VERY expensive, as it is very specific in the requirements (S feet tall, no more than 4 inches in diameter, no openings, handholds, footholds to be climbed over) and the again very specific requirements on the gate and the gate lock. Any foster parent that has a pool already with a fence will likely have to have it totally replaced, as it will not meet these very specific standards.

Again, we absolutely agree that the children in our care need to be safe around swimming pools, however, these requirements are going to be an excessive expense that foster parents do not have, especially since they become effective December 1, 2020.

We feel that this standard will cause us to lose current and future foster homes, both regular and therapeutic if this standard remain. We are in a placement crisis right now with foster children and do not need to lose homes, surely there is a more affordable way to protect our children.

RESPONSE: The Child Welfare Agency Review Board did consider the cost to foster parents when they approved the standards that have been put forth regarding swimming pool safety. The standards are to mitigate the potential for any serious injury or death to children in the custody of the State of Arkansas. The Child Welfare Agency Review Board does acknowledge that the cost could be potentially prohibitive to some current and future foster parents.

Commenter's Name: Consevella James LCSW, Executive Director, Treatment Homes, Inc.

COMMENT: There appears to be an error in Section 310.4 in the Approval of Foster Homes in the proposed changes in the Minimum Licensing Standards for Child Welfare Agencies (Placement & Residential).

Section 310.4 was removed: Foster parents shall be trained in crisis prevention and intervention before a child is placed in the home.

However, Section 305.5 states: Physical restraint shall be initiated only by a trained person and only to prevent injury to the child, other people or property, and shall not be initiated solely as a form of discipline.

I suspect this must have been an error. This training requirement remains in Section 411.4 for Therapeutic Foster Care - Sexual Rehabilitative Programs.

RESPONSE: Section 310.4 was removed in error. Public comment was correct.

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

1. I see that the proposed rules follow the National Model Foster Family Home Licensing Standards in requiring at least one applicant reference to come from a relative and one from a non-relative. Are you aware of any additional statutory/regulatory authority for this provision?

RESPONSE: Aside from the National Model Foster Family Home Licensing Standards ("NMFHLS") released by the U.S. Children's Bureau, as required by the Family First Prevention Services Act, I was unable to locate the specific reference requirement under any other authority. The NMFHLS does require under the Foster Family Home Eligibility Home Study section that there be: Multiple applicant references that attest to the capability of the applicant to care for the child, including at least one from a relative and one from a non-relative.

The Information Memorandum from the USDHHS regarding the NMFHLS explains that there is no federal requirement for title IV-E agencies to adhere to the final model standards. However, it also explains that title IV-E agencies may design licensing standards to meet the unique geographical, cultural, community, legal and other needs of the state or tribe.

2. The National Model Standards require pre-licensing training on first aid, including CPR, and medication administration. While the pre-service training requirements in the proposed rules include medication administration, they do not include first aid/CPR. Why did DHS choose to omit this training requirement?

RESPONSE: Although first aid and CPR are not listed in the pre-service training section, they are discussed in section 210.5 and 212.3 . They are included in promulgation. Please see below.

4.5. Foster parent(s) shall have a current certificate of completion of First Aid and CPR before a child is placed in the home. The training shall require hands- on skilled based instruction as well as practical testing. Training and certification that is provided solely on-line will not be accepted.

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3. Each foster parent shall maintain a current certificate of successful completion of hands-on, skill-based CPR and First Aid. Training and certification that is provided solely on-line will not be accepted.

The proposed effective date is December 1, 2020.

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

Per the agency, the proposed rule formalizes certain safety standards related to foster home approval, including standards related to swimming pools and utilities. These standards are currently implemented on an informal basis as part of the home study already required by current rules. While it is possible that some existing foster homes may not comply with these standards, DHS believes these instances would be limited, and DHS has no information by which it can estimate a specific number of foster homes that are not already in compliance.

LEGAL AUTHORIZATION: The Child Welfare Agency Review Board has authority to promulgate rules regarding child welfare agency licensure and operation. Ark. Code Ann. § 9-28-405(a)(1). The Board has specific authority to adopt rules that "[p]romote the health, safety, and welfare of children in the care of a child welfare agency; [p]romote safe and healthy physical facilities; [and e]nsure adequate supervision of the children by capable, qualified, and healthy individuals[.]" Ark. Code Ann. § 9-28-405(c)(1)(A)-(C).

These proposed rules implement model standards prescribed by the federal Department of Health and Human Services. *See* Children's Bureau, U.S. Dep't of Health & Human Servs., *National Model Foster Family Home Licensing Standards* (Feb. 4, 2019), https://www.acf.hhs.gov/sites/default/files/cb/im1901.pdf.

Under the Bipartisan Budget Act of 2018, in order to be eligible for Title IV-E funding, a state must indicate to the Department of Health and Human Services whether its licensing standards comply with the model standards. 42 U.S.C. § 671(a)(36)(A). If the state's standards are noncompliant, the state must indicate "the reason for the specific deviation

and a description as to why having a standard that is reasonably in accord with the corresponding national model standards is not appropriate for the State[.]" 42 U.S.C. § 671(a)(36)(A).

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

a. SUBJECT: Medical Services Policy Manual Sections B-700 through B-730 Transitional Medicaid

DESCRIPTION:

Statement of Necessity

Federal law requires Medicaid programs to provide coverage for Transitional Medicaid (TM). This rule must be promulgated by DHS to ensure coverage for TM, which is required by 42 U.S.C. § 1396r-6. The TM program is for families who were previously receiving Parent/Caretaker Relative Medicaid coverage and lost it due to increased wages or increased hours of employment. The federal statute requires states to grant an initial 6-month period of eligibility under the TM program. An additional 6 months of eligibility may be granted after undergoing a review determination. This proposed rule outlines the program, the services available, eligibility, and reporting requirements.

The federal statute requiring the TM program, 42 U.S.C. § 1396r-6, previously contained a sunset provision, and as a result DHS allowed its TM program policy to lapse in 2014. After the implementation of the Affordable Care Act, it was unclear whether Congress would reauthorize the program as they had done in the past. In addition, the Centers for Medicare and Medicaid Services (CMS) expressed doubt in their communication with the states that the TM program would continue. However, CMS has now confirmed to DHS that the TM program is and will remain a federal requirement.

Rule Summary

Effective December 1, 2020, the Transitional Medicaid (TM) program will provide a temporary extension of Medicaid eligibility when a family was previously receiving Parent/Caretaker Relative Medicaid coverage and lost it due to increased wages or increased hours of employment. Medical Services Policy Section B-700 has been created to update the TM program procedure to follow Modified Adjusted Gross Income rules. The section includes extent of services and eligibility, as well as residence,

employment, income, and reporting requirements for the initial 6-month period and the extension of the 6-month period.

PUBLIC COMMENT: No public hearing was held on these rules. The public comment period expired on September 12, 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. Is CMS approval required for this rule? If so, what is the status on that approval? **RESPONSE:** CMS approval is not required for this rule.

2. The financial impact statement indicates that DHS intends to use a 12 month initial Transitional Medicaid eligibility period rather than an initial 6 month eligibility period with an additional 6 months granted upon redetermination. However, the proposed rules appear to split eligibility into two 6-month periods. Could you explain this apparent discrepancy? **RESPONSE:** This was an error and corrected in the updated packet attached.

3. What is the source for the requirement that TM recipients have been residents of Arkansas in the last month of PCR Medicaid eligibility and continue to reside in Arkansas throughout the TM period (Sections B-710(3), B-725)? **RESPONSE:** 42 U.S. Code § 602 (B) Special Provisions (i) The document shall indicate whether the State intends to treat families moving into the State from another State differently than other families under the program, and if so, how the State intends to treat such families under the program.

4. Sections B-710(8) and B-755 indicate that the parent or caretaker relative must continue to be employed and receive earnings unless "good cause" exists. What does "good cause" mean in this context? **RESPONSE:** 42 U.S.C. § 1396r-6 (B) Reporting Requirements "State may permit such additional extended assistance under this subsection notwithstanding a failure to report under this clause if the family has established, to the satisfaction of the State, good cause for the failure to report on a timely basis." The state has defined good cause for other Medicaid requirements and those requirements will be the same for good cause in this context.

5. Section B-730 indicates that, if the only dependent child leaves home, TM eligibility will terminate at the end of the month and, once closed, the TM case cannot be reopened even if the child returns home. Is there a specific source for this provision? **RESPONSE:** This is a current

business process that follows other MAGI categories where when ineligibility is determined coverage will end at the end of the month.

6. 42 U.S.C. § 1396r-6 requires reporting to occur by the twenty-first day of the fourth month. However, Sections B-735 and B-750 require notice and report forms to be returned by the fifth day of the fourth month. Is there a separate source for the fifth-day requirement? **RESPONSE:** Per 42 U.S.C. § 1396r-6 requires reporting to occur by the twenty-first day of the fourth month not on the twenty-first day. The fifth day follows our current business processes defined for reporting capabilities.

7. Sections B-735 and B-750 require TM recipients to report the household composition on the notice and report forms. What is the source for this requirement? **RESPONSE:**
Per 42 U.S.C. § 1396r-6 under reporting requirements (page 3) and termination of extension (page 1) both list a dependent child therefore it is imperative we have house hold comp changes to ensure the dependent child still lives in the home.

8. Section B-735 indicates that a client must establish good cause to meet the reporting requirements if a report is received untimely. What constitutes good cause in this context? **RESPONSE:** 42 U.S.C. § 1396r-6 states good cause satisfactory to the state. Good cause requirements have already been defined for other reporting requirements with Medicaid. Good cause in this context will follow the same business process defined for other Medicaid requirements that have good cause.

9. Section B-765 states that minor children entering the household who were not part of the household when the determination for TM was made will not be added to the case and that eligibility for this child will be determined in another category. What is the source for this provision? **RESPONSE:** Our agency has always interpreted 42 U.S.C. § 1396r-6 to mean that each family member had to be part of the household at the time of ineligibility to qualify for the TM extension.

The proposed effective date is December 1, 2020.

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

Per the agency, this rule implements a federal rule or regulation. The cost to implement the federal rule or regulation is estimated at $2,686,230 for the current fiscal year ($769,605 in general revenue and $1,916,625 in federal funds) and $4,604,966 for the next fiscal year ($1,312,876 in general revenue and $3,292,090 in federal funds). The total estimated cost by fiscal year to state, county, and municipal government as a result of this

rule is $769,605 for the current fiscal year and $1,312,876 for the next fiscal year.

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

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

Some low-income families are eligible for Medicaid under Section 1931 of the Social Security Act. When these families become ineligible for Medicaid due to earnings, extended Medicaid coverage is required by 42 U.S.C. § 1396r-6.

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

The agency seeks to resolve the problem that our current rules do not include the Transitional Medicaid Program. This rule is required by 42 U.S.C. § 1396r-6.

(3) a description of the factual evidence that:
(a) justifies the agency's need for the proposed rule; and

Extended Medicaid services are mandatory under 42 U.S.C. § 1396r-6. The agency is required by federal regulations to offer this program.

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

42 U.S.C. § 1396r-6 allows states the option of using a 12 month initial Transitional Medicaid eligibility period rather than an initial 6 month eligibility period with an additional 6 months granted upon redetermination. Our current eligibility system is designed to provide 12 month eligibility periods for our MAGI categories. Using the two 6 month eligibility periods would require costly updates and system development. The 12 month eligibility period will allow us to automate the program using our current system rules.

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

There are no less costly alternatives.

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

The proposed rule will be posted for public comment with the initial filing of this document. [The agency later clarified that it received no public comments.]

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

Existing rules have had no impact on the proposed rule change.

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

Our agency is in constant contact with CMS to ensure that mandated changes are implemented as required. If a change is made to the federal statute governing the proposed rule, we will act immediately to make sure that we are achieving the statutory objectives and meeting the costs objectives.

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).

These proposed rule changes implement 42 U.S.C. § 1396r-6, which addresses extensions of eligibility for medical assistance. Under certain conditions, this statute requires an initial six-month extension of eligibility followed by an additional six-month extension.

19. DEPARTMENT OF HUMAN SERVICES, DIVISION OF DEVELOPMENTAL DISABILITIES SERVICES (Mr. Mark White, Ms. Melissa Stone)

a. SUBJECT: Community and Employment Supports (CES) Home and Community-Based Waiver

DESCRIPTION:

Statement of Necessity

There are approximately 3,400 individuals waiting for a Community and Employment Supports (CES) Waiver slot (formerly called the Alternative Community Services Waiver Program). Act 775 of 2017 outlines the Provider-led Arkansas Shared Savings Entity (PASSE) program. In accordance with that Act, premium tax collected from PASSE must be:

"Transferred in amounts not less than fifty percent (50%) of the taxes based on premiums collected under the Arkansas Medicaid Program as administered by a risk-based provider organization to the designated account created by § 20-48-1004 within the Arkansas Medicaid Program Trust Fund to solely provide funding for home and community-based services to individuals with intellectual and developmental disabilities until the Department of Human Services certifies to the Department of Finance and Administration that the waiting list for the Alternative Community Services Waiver Program, also known as the 'Developmental Disabilities Waiver,' is eliminated."

Rule Summary

Effective 12/01/2020, the Community and Employment Supports (CES) Waiver is amended as follows:

- Six hundred (600) regular slots are being added to the CES Waiver and one hundred (100) priority slots for children in DCFS custody

- Cost neutrality analysis is being updated to reflect these new slots

PUBLIC COMMENT: A public hearing was held on this rule on September 14, 2020. The public comment period expired on September 26, 2020. The agency provided the following summary of the public comments it received and its responses to those comments:

Commenter's Name: Stephanie Smith

COMMENT: How will families be notified when this happens? Are they going to go ahead and start being notified or is that notification will not start [sic] until December 1st?

RESPONSE: This was noted during the hearing as a question and not a comment. It was not relevant to this public hearing.

Commenter's Name: Cindy Alberding

COMMENT 1: But I don't believe the past legislation specified that the amount of additional money that was going to be saved was going to be used for the DDS waiting list and to cover DCFS children. I believe the legislation says that the money was going to be used for the DDS waiting list. So while I appreciate you need 100 more slots for DCFS children, I believe there are 600 slots due the ACS waiver. The last point I would make on that is, there is other funding that can be used to support the DCFS children that need care. We don't want them to not have care because of this, but I do think the 600 slots funded from the past money should be allocated, and then the additional 100 can be determined by DHS with other funding. My opinion. My comment.

RESPONSE: Thank you. The total number of slots being requested (regular and DCFS reserved) are 700.

COMMENT 2: So that language says "and"? So you're actually adding 700 slots? As long as that's what we end up with, then my comment is already satisfied. Thank you.

RESPONSE: Thank you.

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

1. The numbers on page 35, when compared to the old waiver application, appear to show that 600 total slots are being added to the waiver. Do the 600 new slots added to the waiver include the 100 slots for children in DCFS custody, or are 700 slots being added to the waiver?

RESPONSE: Table: B.3.A year 5 should be 5483 (this has been corrected in the attached documented). This number reflects 600 additional regular waiver slots. DCFS reserved slots went from 200 to 300 for year 5 and are shown correctly on the tables. Point In Time numbers are correct. The total number of slots being requested (regular and DCFS reserved) are 700.

2. Will the added slots eliminate the waiting list? **RESPONSE:** No.

The agency received CMS approval for these proposed changes on November 3, 2020. The proposed effective date is December 1, 2020.

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

Per the agency, the total cost to implement this rule is $10,422,028.99 for the current fiscal year ($7,450,708.53 in federal funds and $2,971,320.47 in other funds) and $45,502,524 for the next fiscal year ($32,529,754.41 in federal funds and $12,972,769.59 in other funds). The agency indicated that all costs of Medicaid services for the additional waiver slots will be borne by Arkansas Medicaid.

The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is $2,971,320.47 for the current fiscal year and $12,972,769.59 for the next fiscal year. The agency indicated that this represents the required state share of Medicaid expenditures for the additional waiver slots.

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

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

To add additional slots to the existing CES Waiver

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

There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.

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

There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

There is currently a waiting list for participation in the CES Waiver. Act 775 of 2017 requires that certain premium tax revenues be used to reduce the size of the waiting list.

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

No alternatives have been suggested as a result of public comment.

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

No existing rules have created or contributed to the problem the agency seeks to address.

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

The agency is required by federal law to review and renew the CES Waiver at least every five years. In the course of this review, the agency will review these criteria.

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). These proposed rules implement Act 1033 of 2019.

Act 1033, sponsored by Representative Josh Miller, eliminated the waiting list for the Alternative Community Services Waiver Program, also known as the "Developmental Disabilities Waiver." Per the Act, within three years of the Act's effective date "[t]he Department of Human Services shall eliminate the waiting list as existing on March 1, 2019, for the" Program or its successor, "using available funding streams, unless the department determines that an adequate number of providers for individuals with developmental disabilities does not exist within the state." Act 1033, § 1(b), *codified at* Ark. Code Ann. § 20-77-135(b).

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

a. SUBJECT: Hyperalimentation 1-19, Prosthetics 3-19, and State Plan Amendment 2020-0017

DESCRIPTION:

Statement of Necessity

Providers are required to use HCPCS (Healthcare Common Procedure Coding System) procedure codes for billing nutritional formulas. The Arkansas Medicaid program mirrors coverage of approved WIC (Women, Infants, and Children) nutritional formulas. Because WIC approved formulas are updated periodically, resulting in the need to subsequently update provider manuals, DMS is deleting specific brand names for nutritional formulas in the Hyperalimentation and Prosthetics Provider Manuals. This change will reduce the need for frequent rule revisions pertaining to nutritional formulae.

As part of an ongoing project, DMS is removing all references to vendors. The MIC-Key brand name for low-profile button feeding tubes is being removed from the provider manuals and the Arkansas Medicaid State Plan as well.

Rule Summary

Effective December 1, 2020, the following Medicaid provider manuals and the Arkansas State Medicaid Plan are revised as follows:

Hyperalimentation Manual, Section 242.120 Enteral (Sole Source) Formulae:

- Deleted the paragraph that reads, "For a non-covered prescribed formula, a review for medical necessity will be performed upon request. The product information, with assigned HCPCS code and physician documentation of the medical necessity of the formula for a specific beneficiary, must be submitted to Utilization Review. If approved, the formula will be added to the list of covered formulae and the Provider will be notified. If denied, the Provider and beneficiary will be notified."

- Deleted the sentence that reads, "** - These covered formulae are substitutions for PediaSure."

- Deleted brand names listed under the covered formulae column except for MCT Oil, Procel Protein Supplement, Provimin, Polycose Powder, Scandical, and Microlipid.

- Made other technical changes to the language in the manuals.

Prosthetics Manual, Section 212.209 – (DME) MIC-KEY Skin Level Gastrostomy Tube (MIC-Key Button) and Supplies for Beneficiaries of All Ages:

- Changed "MIC-Key" to "Low-Profile."

- Deleted references to AFMC.

Prosthetics Manual, Section 212.210 – DME MIC-KEY Percutaneous Cecostomy Tube (MIC-Key Button) for Beneficiaries of All Ages:

- Changed "MIC-Key" to "Low-Profile."

- Deleted references to AFMC.

Prosthetics Manual, Section 242.150 – Nutritional Formulae for Child Health Services (EPSDT) Beneficiaries Under Twenty-One Years of Age:

- Deleted the sentence that reads, "** - These covered formulae are substitutions for PediaSure."

- Deleted brand names listed under the covered formulae column except for MCT Oil, Procel Protein Supplement, Provimin, SolCarb, Scandical, and Microlipid.

- Deleted the paragraph that reads, "NOTE: If a specific formula is not listed but is prescribed as the result of the EPSDT screening of an Arkansas Medicaid beneficiary, the provider may forward a copy of the screening and prescription, along with product information, to Utilization Review for consideration."

- Made other technical changes to the language in the manual.

Prosthetics Manual, Section 242.153 – MIC-KEY Skin Level Gastronomy Tube (MIC-Key Button) and MIC-KEY Percutaneous Cecostomy Tube and Supplies for Beneficiaries of All Ages:

- Changed "MIC-Key" to "Low-Profile."

Arkansas State Medicaid Plan:

- Changed "MIC-Key" to "Low-Profile."

- Changed "Arkansas Department of Human Services, Division of Health" to "the Arkansas Department of Health."

- Made other technical changes to the language in the state plan.

PUBLIC COMMENT: No public hearing was held on this rule. The public comment period expired September 7, 2020. 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 response:

QUESTION: What is the status on CMS approval for the SPA?
RESPONSE: We are still working with CMS on requests for additional information. The SPA was submitted on August 6, 2020, and the 90th day is November 4, 2020. So, we will hopefully have approval before review in November. [The agency received CMS approval on October 1, 2020.]

The proposed effective date is December 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).

b. SUBJECT: Electronic Visit Verification (EVV) Implementation

DESCRIPTION:

Statement of Necessity

Section 12006 of the 21st Century Cures Act (42 U.S.C. § 1396b(*l*)) requires states to implement Electronic Visit Verification (EVV) for in-home personal care services, attendant care, and respite services paid by Medicaid no later than December 1, 2020.

An EVV system is a telephone-, computer-, or other technology-based system under which visits conducted as part of personal care services or home health services are electronically verified with respect to:

1. The type of service(s) performed;
2. The individual receiving the service(s);
3. The date of the service(s);
4. The location of service delivery;
5. The individual providing the service(s); and
6. The time the service(s) begins and ends.

This proposed rule establishes utilization standards for provider agencies to electronically verify home visits and verify that clients receive the services authorized for their support and for which Medicaid is being billed. The Department of Human Services (DHS) has contracted with a vendor to implement an EVV system that uses a smartphone app for an in-home caregiver to check in and out when they go to a client's home to provide services. The smartphone app records the caregiver's GPS coordinates to verify that the caregiver is actually at the client's home.

Rule Summary

The proposed rule is an addition to an amendment of Section I of the Arkansas Medicaid Provider Manual.

- Section 131.000 is amended to clarify that a provider cannot bill a beneficiary for a claim or portion of a claim that was denied or rejected because the provider failed to meet the EVV requirements.
- Section 145.100 outlines the legal basis and scope of the EVV requirements.

- Section 145.200 establishes the steps that a Medicaid provider must take to become eligible to use EVV, which will be a requirement for submitting any claims for reimbursement to Medicaid for in-home personal care services. Providers will be required to obtain a unique identification number for each caregiver employed or contracted by the provider to serve Medicaid beneficiaries and then ensure that each caregiver uses the EVV app.
- Section 145.300 establishes that any claim for reimbursement filed with Medicaid for in-home personal care services must be verified by EVV and outlines the specific procedure codes that are subject to the EVV requirements.
- Providers will have the ability to use their own EVV system instead of the state system, so long as that system is certified by the DHS EVV Vendor. The certification process is set out in Section 145.400.

PUBLIC COMMENT: No public hearing was held on this proposed rule. The public comment period expired on October 4, 2020. The agency provided the following summary of the public comments it received and its responses to those comments.

Commenter's Name: Luke Mattingly, Care Link CEO/President

COMMENT 1: The hyperlink in section I-2, 145.100, View or print the DHS EVV Vendor contact information, is not functioning. **RESPONSE:** We will contact our Vendor who manages the website to ensure the link is working before the document is posted permanently. The contact information for our vendor, Fiserv, can be found on their website at https://www.firstdata.com/en_us/products/government-solutions/health-care/electronic-visit-verification/authenticare.html

COMMENT 2: The federal statute states "to ensure that such system is minimally burdensome." However, the Arkansas implementation is overly burdensome. For example, requiring personal care aides and service recipients to physically sign after every shift, even if the geofence captured the precise location and the Aide clocked in and out correctly, is not minimally burdensome. One of the benefits of an electronic capture system is to minimize or eliminate such steps. Signatures should only be required for exceptions such as missed clock-in or clock-out or when the system cannot verify data. This just adds another layer of administrative burden and expense that is not necessary, an "electronic signature" is not defined as the actual capture of a physical signature but rather an electronic verification that the service was delivered, i.e. GPS coordinates at a location and from a device registered in the electronic system.

RESPONSE: At this time, the requirement for electronic signatures is considered informational only and will not cause a claim to deny. This

change was implemented due to the Public Health Emergency and was communicated to providers.

COMMENT 3: CareLink has no issue with Aides being required to be assigned a Practitioner Identification Number (PIN). However, the state needs to improve the process for attaining the number, for providers to be able electronically search to verify that a number has already been assigned and to check the status of a submitted application. Currently the position of the state is that it can take up to 30-days after an application is received before a number is issued. If the process is not improved, this will ultimately delay services to older people and adults with physical disabilities. Additionally, numerous submissions are past the 30-day time frame and we are simply instructed to resubmit causing more and more administrative burden.

RESPONSE: Currently, DXC's Provider Enrollment office, along with DMS staff, have processed over 9,000 direct care worker enrollment applications. While some applications may take longer because the application must be returned to the provider due it being incomplete, most applications are able to be worked well within the 30-day timeframe. If you need assistance with the Provider Enrollment Process, please contact Arkansas Medicaid Provider Enrollment at (501) 376-2211 or (800) 457-4544. When prompted select "0" for other inquiries, then "3" for Provider Enrollment.

COMMENT 4: Medicaid reimbursement rate are not sufficient to cover the increased administrative burden of EVV implementation. Although the state is providing a no payment option for the software, the cost of implementing, administering, and maintaining an EVV software system is not covered. The Medicaid reimbursement rate for this service is already loathsome, the EVV implementation is adding significant additional administrative burden without an offsetting rate adjustment further jeopardizing home and community-based services because of rate structure.

RESPONSE: DHS continues to work with Providers to get complete information on revenue versus expense to complete a rate study. We also continue to evaluate the impact of minimum wage increases on this rate, as well as the impact of purchasing additional equipment for EVV implementation.

COMMENT 5: Also, Aides are minimum wage or close to minimum wage employees and the state expects them to possess a smart phone with a data plan in order to successfully utilize the app for the EVV system, the method to obtain geofencing (GPS coordinates). The current reimbursement rate does not provide for any wage offset to recognize this

cost to Aides. **RESPONSE:** While some providers may choose to provide smartphones to their employees, Arkansas has implemented an IVR methodology that allows EVV claims to be submitted using a landline telephone. However, as noted above, DMS is considering the financial impact of EVV implementation on providers.

The agency indicated that CMS approval is not required for this rule change.

The proposed effective date is December 1, 2020.

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

Per the agency, the purpose of this rule is to implement a federal rule or regulation. The cost to implement the federal rule or regulation is $2,206,487 for the current fiscal year ($365,729 in general revenue and $1,840,758 in federal funds) and $967,200 for the next fiscal year ($241,800 in general revenue and $725,400 in federal funds).

The total estimated cost by fiscal year to state, county, and municipal government to implement this rule is $365,729 for the current fiscal year and $241,800 for the next fiscal year. Per the agency, this represents the state share of expenditures for EVV implementation and ongoing maintenance and operations.

The total estimated cost by fiscal year to any private individual, entity, and business subject to the proposed rule is $62,158 for the current fiscal year and $31,579 for the next fiscal year. The agency indicated that some providers may purchase smartphones or tablets for direct care workers to easily access the EVV system in clients' homes.

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

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

The basis and purpose of this rule is to implement an electronic visit verification (EVV) system for in-home personal care services, attendant care, and respite services paid by Medicaid, as required by section 12006 of the 21st Century Cures Act (42 U.S.C. § 1396b(*l*).

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

Section 12006 of the 21st Century Cures Act (42 U.S.C. § 1396b(*l*)) compels the Arkansas Medicaid program to require all personal care providers to use EVV for in-home services on and after December 1, 2020. DHS has no way to implement this requirement except through promulgation of a rule.

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

Section 12006 of the 21st Century Cures Act (42 U.S.C. § 1396b(*l*)) compels the Arkansas Medicaid program to require all personal care providers to use EVV for in-home services on and after December 1, 2020. The proposed rule reflects the implementation costs as determined through a competitive procurement process, and an estimate of the cost to providers. The costs estimated above are the minimum cost of the state coming into compliance with the EVV mandate.

(4) a list of less costly alternatives to the proposed rule and the reasons why the alternatives do not adequately address the problem to be solved by the proposed rule;

The agency is unaware of any less costly alternatives.

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

No alternatives have been identified or suggested through public comment to date.

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

No existing state rules have created or contributed to the problem the agency seeks to address. The need for this rule is entirely a creation of federal statute.

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

The agency monitors State and Federal rules and policies for opportunities to reduce and control cost.

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).

Per federal law, states must implement electronic visit verification in order to receive the full amount of available federal funding "for personal care services or home health care services requiring an in-home visit by a provider . . . furnished in a calendar quarter beginning on or after January 1, 2020 (or, in the case of home health care services, on or after January 1, 2023)[.]" 42 U.S.C. § 1396b(*l*)(1).

21. DEPARTMENT OF LABOR AND LICENSING, DIVISION OF OCCUPATIONAL & PROF. LICENSING BOARDS AND COMMISSIONS, BOARD OF ELECTRICAL EXAMINERS (Mr. Marcus Devine)

a. SUBJECT: Administrative Rules of the Board of Electrical Examiners

DESCRIPTION: The proposed amendments to the rules of the Board of Electrical Examiners would accomplish the following:

1. Revises organizational names as needed. 2019 Ark. Act 910;
2. Replaces the term "regulations" with "rules." 2019 Ark. Act 315;
3. Revises definitions to include a definition of a "substantially similar license" and "substantially equivalent license." 2019 Ark. Acts 820;

4. Revises the rule to eliminate the requirement for new examination for licenses expired more than 1 year. 2017 Ark. Act 381;
5. Adds a licensure-connected expectation of candor before the Board;
6. Adds a provision for criminal disqualification with the Board's limited ability to do background checks. 2019 Ark. Act 990;
7. Amends the provisions for active duty service members, returning military veterans and their spouses for reciprocal licensure. 2019 Ark. Act 820;
8. Revises the rules to conform to statutory increase in late fees. 2017 Ark. Act 381;
9. Provides for parking lot light endorsement for specialist sign electrician. 2017 Ark. Act 766; and
10. Expands the period of time for which a temporary license can be issued for large industrial projects. 2017 Ark. Acts 476.

PUBLIC COMMENT: A public hearing was held on September 15, 2020. The public comment period expired on September 15, 2020. The Board of Electrical Examiners received no public comments.

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

1. Could you please provide any authority that the agency is relying upon in adding Section T concerning *Expectation of Candor before the Board* to Rule 010.13-007? **RESPONSE:** The authority for the expectation of candor is in the notion of questioning itself. Where questions are posed, the questioner has the right to expect that the answers posited by the respondent are true. What would be the point of any questioning if the respondent did not proffer true responses? The rule seeks to memorialize this understanding and provide a delineated ability to address deceptive or less than candid responses.

2. Concerning Section 010.13-011(C) of the rule, will any examination fees to be paid to the testing service exceed the examination fees set out in Ark. Code Ann. § 17-28-203? **RESPONSE:** We will also change the language of the rule to reflect that the maximum that can be charged for the testing regime is that in Ark. Code Ann. § 17-28-203. The department also has a call in to the private testing company, PROV, to have them reduce their charge for Industrial maintenance to the statutory maximum. [A revised markup was submitted including this change.]

3. Should the references (2) to Ark. Code Ann. § 17-2-102 in Rule 010.13-012(B) be referring to Ark. Code Ann. § 17-3-102? **RESPONSE:** Yes. [A revised markup was submitted including this change.]

The proposed effective date is pending legislative review and approval.

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

LEGAL AUTHORIZATION: Pursuant to Ark. Code Ann. § 17-28-202(a), the Arkansas Board of Electrical Examiners has authority to adopt rules necessary for the implementation of Title 17, Chapter 28 concerning electricians, and also for the implementation of Ark. Code Ann. § 17-55-101 *et seq.* concerning electrical inspectors. The proposed rule 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 381 of 2017, sponsored by Representative Roger Lynch, eliminated required re-testing on an electrician who failed to timely renew his or her license, and provided monetary penalties for failure to timely renew a license. *See* Act 381 of 2019.

Act 476 of 2017, sponsored by Representative Jack Ladyman, expanded the authorization for the use of temporary electrical licenses on large industrial projects. *See* Act 476 of 2019.

Act 766 of 2017, sponsored by Representative Andy Mayberry, amended the definition of a specialist sign electrician. *See* Act 766 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 910 of 2019, sponsored by Representative Andy Davis, created the Transformation and Efficiencies Act of 2019. Act 910 created the Department of Labor and Licensing, and the Board of Electrical Examiners was transferred to the Department. *See* Act 910 of 2019, § 5625.

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).

22. <u>DEPARTMENT OF PARKS, HERITAGE, AND TOURISM</u> (Ms. Stacy Hurst, Mr. Jim Andrews, Mr. Grady Spann)

a. <u>SUBJECT</u>: Policy Statement, Criteria and Procedures for Naming ADPHT Amenities

<u>DESCRIPTION</u>: The purpose of the rule is to establish a written set of guidelines and procedures for the naming of amenities (e.g., structures, buildings, trails, natural areas, etc.) within the Arkansas Department of Parks, Heritage and Tourism. Such amenities are variously located within the department's divisions of State Parks, Heritage, and Tourism. No statutes or other written guidance exist on point. Many times in the past, these amenities have been named after a person - often a benefactor or political figure. Occasionally, there have been disputes in regard to an amenity name.

The proposed rule is intended to provide a uniform naming policy within the Arkansas Department of Parks, Heritage and Tourism. It is intended to provide a fair and consistent process in the naming of amenities and provide the public with an opportunity to comment on a proposed name before it is adopted. The proposed rule gives the public an opportunity to propose a name or change a name and an opportunity for vetting of proposed names or name changes through the various appointed boards and commissions that serve the Arkansas Department of Parks, Heritage and Tourism as well as vetting through the Office of the Secretary of the Arkansas Department of Parks, Heritage and Tourism and the Arkansas Governor's Office.

<u>PUBLIC COMMENT</u>: A public hearing was not held in this matter. The public comment period expired on September 30, 2020. The agency received no public comments.

Suba Desikan, an attorney with the Bureau of Legislative Research, asked the following questions and received the following responses:
1. This rule appears to be jointly promulgated by three divisions of ADPHT and lists multiple statutes as rulemaking authority. As such, it is unclear what rulemaking authority the agency is relying upon in promulgating these rules. Could you please provide an explanation clarifying the rulemaking authority that the agency is relying upon in promulgating these rules? (If you are relying upon different statutory provisions for each division, please identify each division and its respective rulemaking authority.) **RESPONSE:** Sure, and I apologize for not being more specific in my prior submission. As a preface, and as stated in our submission, there are no statutes directly on point that address naming authority and policies. Instead, we have broadly defined authorities scattered in various statutes. Accordingly, there is not a single source for the authority that is expressly on point. However, I have provided the best general authority citations below.

Please note that the transformation of Arkansas government resulted in the merger of the Arkansas Department of Parks and Tourism with the Department of Arkansas Heritage to form the Arkansas Department of Parks, Heritage, and Tourism in July 2019. With that merger, we naturally saw some culture and policy differences. Parks and Tourism had an active history of naming park amenities with no formal rules or policies or policies in place – with the limited exception of some vague provisions in PD 2510 (see below). The Heritage division also did not have written rules or policies in place, but was not as active in naming amenities as was Parks and Tourism. The issues related to the naming of amenities surfaced soon after transformation. Accordingly, the Department with its three current divisions (1) Parks, (2) Heritage and (3) Tourism seeks to create a uniform set of rules on point. I would prefer to file these rules as a Department filing, but the Secretary of State's office was adamant that I must file the rule three times – once for each of our three divisions.

Two of our divisions – Parks and Tourism have a common appointed board – the State Parks, Recreation and Travel Commission (SPRTC). The Department Secretary and the SPRTC, working together, promulgated the rules that have been submitted to BLR.

The authority of the SPRTC to promulgate rules is found at Ark. Code Ann. § 15-11-206(a), which reads as follows:
(a) The State Parks, Recreation, and Travel Commission shall:
(1) Have and be subject to all functions, powers, and duties as by law are conferred and imposed upon it; and
(2) For the purpose of regulating its own procedure and carrying out its functions, have the authority from time to time to make, amend, and

enforce all reasonable rules not inconsistent with law which will aid in the performance of any of the functions, powers, or duties conferred or imposed upon it by law.

From the Transformation Act, Ark. Code Ann. § 25-43-1302 reads as follows:

(a) The administrative functions of the following state entities are transferred to the Department of Parks, Heritage, and Tourism by a cabinet-level transfer:

(1) The Advisory Council of the Arkansas Arts Council, created under § 13-8-103;

(2) The Arkansas Arts Council, created under § 13-8-103;

(3) The Arkansas Historic Preservation Program, created under § 13-7-106;

(4) The Arkansas History Commission, created under § 13-3-102;

(5) The Arkansas Natural and Cultural Heritage Advisory Committee, created under § 25-3-104;

(6) The Arkansas Natural and Cultural Resources Council, created under § 15-12-101;

(7) The Arkansas Natural Heritage Commission, created under § 15-20-304;

(8) The Arkansas Post Museum, created under § 13-5-601;

(9) The Arkansas State Archives, created under § 13-3-101;

(10) The Black History Commission of Arkansas, created under § 13-3-201;

(11) The Capitol Zoning District Commission, created under § 22-3-303;

(12) The Delta Cultural Center Policy Advisory Board, created under § 13-5-704;

(13) The Department of Arkansas Heritage, created under § 25-3-102, now to be known as the "Division of Arkansas Heritage";

(14) The Department of Parks and Tourism, created under § 25-13-101 [repealed], now to be known as the "Department of Parks, Heritage, and Tourism", created under § 25-43-1301, the State Parks Division, created under § 25-43-1304, and the Tourism Division, created under § 25-43-1305, as provided under the Transformation and Efficiencies Act of 2019;[1]

(15) The Great River Road Division, created under § 25-13-102;

(16) The Historic Arkansas Museum Commission, created under § 13-7-302;

(17) The Keep Arkansas Beautiful Commission, created under § 15-11-601;

(18) The Mosaic Templars of America Center for African-American Culture and Business Enterprise Advisory Board, created under § 13-5-903;

(19) The Mosaic Templars of America Center for African-American Culture and Business Enterprise, created under § 13-5-902;

(20) The Old State House Commission, created under § 13-7-201; and

(21) The State Parks, Recreation, and Travel Commission, created under § 15-11-201.
(b) Unless otherwise provided by law, a cabinet-level department transfer under subsection (a) of this section includes all state entities under a state entity transferred to the Department of Parks, Heritage, and Tourism under subsection (a) of this section, including without limitation a division, office, program, or other unit of a state entity transferred to the Department of Parks, Heritage, and Tourism under subsection (a) of this section.
(c) Unless otherwise provided by law, a state entity whose administrative functions have been transferred to the Department of Parks, Heritage, and Tourism under subsection (a) of this section shall otherwise continue to exercise the duties of the state entity under the administration of the cabinet-level Department of Parks, Heritage, and Tourism in the same manner as before the creation of the cabinet-level department.

Aside from the Parks and Tourism divisions, most the above-listed entities fall under the Heritage division. Those that do not fall under the Heritage division are otherwise under the administrative function of the Secretary of Parks, Heritage and Tourism. The appointed boards, commissions, committees and councils (also listed above) that serve the agencies of the Heritage Division are primarily advisory in nature and their enabling statutes give them certain powers and duties to administer programs related to their specific purposes. Rulemaking authority of this type (naming authority) is not explicitly stated in those enabling statutes.

2. I noticed that a specific individual's email is used as contact information to obtain forms in Section C(a)(1) of the rule. In response to Question 8 on the questionnaire, the agency provided a link where the proposed rule is accessible in electronic format. The draft of the rules published online includes a different individual's email address as the contact information.
(a) Could you please clarify this discrepancy? **RESPONSE:** Sure, the cognizant contact at the Department's Public Information Office is provided as the public's point of contact in Section C(a)(1) of the proposed rule. If the proposed rule is approved, this will the person the public may contact to propose or petition for a naming suggestion under the rules. The draft rules published online for 30-day public comments gave a different contact for public questions about the proposed rule itself.

(b) Given that state agencies sometimes have employment changes, did the agency consider putting the forms online or using a general email address instead? **RESPONSE:** We anticipate employment changes, but the contact given is a long-time employee. If there is a personnel change,

we anticipate "rolling over" messages to that contact to the successor or changing the contact information at a later date.

The proposed effective date is pending legislative review and approval.

FINANCIAL IMPACT: The Department of Parks, Heritage and Tourism indicated that the proposed rule does not have a financial impact.

LEGAL AUTHORIZATION: The State Parks, Recreation and Travel Commission (SPRTC) has authority to make, amend, and enforce all reasonable rules not inconsistent with law which will aid in the performance of any of the function, powers, or duties conferred or imposed upon it by law. *See* Ark. Code Ann. § 15-11-206(a). The administrative functions of the State Parks, Recreation and Travel Commission and the Department of Arkansas Heritage [now Division of Arkansas Heritage] were transferred to the Department of Parks, Heritage, and Tourism, pursuant to Act 910 of 2019 (the Transformation and Efficiencies Act of 2019).

23. PUBLIC SERVICE COMMISSION (Mr. Ted Thomas)

a. SUBJECT: Net Metering Rules

DESCRIPTION: The Arkansas Public Service Commission began consideration of revisions to its Net Metering Rules in Docket No. 16-027-R after passage of Act 827 of 2015. The Commission bifurcated the revisions into two phases: (1) issues other than rate design and (2) rate design. Issues other than rate design were addressed in Phase 1, with that portion of the rules effective on 9/15/2017. The Commission then began consideration of proposed rules dealing with rate design issues in Phase 2. Before the rate design issues could be finalized in Phase 2, Act 464 of 2019 revised the net metering statutes, and the Commission began Phase 3 to also incorporate other rule changes necessitated by Act 464 of 2019. The substantive proposed changes include:

- A continuation of the 1:1 full retail rate credit for net metering customers with a demand component, as explicitly required by Act 464 of 2019
- Set the default rate to 1:1 full retail rate credit for net metering customers without a demand component (no change in existing rule)
- The size limit of facilities that do not require Commission approval is increased from 300 kW to 1,000 kW, as explicitly required by Act 464 of 2019

- Allow utilities to propose alternative rate designs upon a showing of unreasonable allocation of costs that are actual, or known and measurable
- Allow automatic grandfathering for facilities under 1MW
- Prevent and prohibit "gaming" of the net-metering law
- Require expanded net metering reporting
- Require a signed affidavit to establish common ownership and qualifications for safe harbor, subject to reasonable and justifiable challenges

After the public hearing, the following changes were made:

- The Commission revised the section on billing for net metering to add language regarding net-metering customers with a generating capacity over 1,000kW and up to 20 MW. The largest of these changes is the requirement that an electric utility shall bill a grid charge to this category of net-metering customers. The initial grid charge shall be set at zero, effective June 1, 2020, but after these rules become effective, an electric utility may file an application to revise the grid charge.
- The Commission reorganized much of the proposed language for an application to exceed generating capacity limit.
- The Commission made edits and additions to streamline the section on grandfathering net-metering rate structures. All net-metering customers with use that does not exceed 1,000kW who submit a standard interconnection agreement to the electric utility prior to December 31, 2022, shall remain under the net-metering rate structure (1:1) in effect when the net-metering agreement was signed, for a period of 20 years. The changes also address net-metering facilities that wish to exceed their generating capacity of 1,000kW and state that the initial capacity of the net-metering facility shall retain grandfathered status, but the additional capacity shall be subject to whatever the current rate structure is at the time the new agreement is signed. Grandfathering shall apply to a net-metering facility itself and not the net-metering customer.
- The Commission made changes to the section on leases and safe harbor for service agreements, and the rules now require that a net-metering customer entering into a lease for a net-metering facility shall provide a Commission approved Notice and Affidavit that the lease is in compliance with A.C.A. 23-18-603(7)(B). The Commission removed the language that a net-metering customer must certify the customer meets safe harbor requirements as provided by the Internal Revenue Service and the Office of Management and Budget Moratorium.
- The Commission added to the section on requirements for preliminary interconnection site review request that a net-metering

customer may request parallel processing of multiple reviews, and that the electric utility shall respond and process the request within a reasonable time, not to exceed 90 days.

- In Appendix B, the Commission made edits, corresponding to the above listed edits, in its model utility tariff.

PUBLIC COMMENT: A public hearing was held on February 19, 2020. The public comment period expired that same day. The Commission provided a summary of the public comments received and its responses thereto. Due to its length, that summary is attached separately.

Upon receipt of the revisions made following the public hearing, Rebecca Miller-Rice, an attorney with the Bureau of Legislative Research, asked the following questions:

(1) Rule 1.01(g) – What is the reasoning behind the Commission's use of the term "an Electric Utility" here, as opposed to the language previously proposed at Rule 2.04(F) and used in statute, Ark. Code Ann. § 23-18-604(d), of "a public utility as defined in § 23-1-101(9)"? **RESPONSE:** The only thing the Commission did was to move Staff's proposed Rule 2.04(F) into the definition of Electric Utility because it was definitional and important to the understanding of the definition. This action involved no change of content, and only changes where it appears. Given that only electric utilities may net meter electricity, this definition is clarifying and also makes clear that a person who acts as a lessor or service provider as described in Ark. Code Ann. § 23-18-603(7)(B) or (C) shall not be considered an Electric Utility.

(2) Rule 2.04(A)(3)(b) – What was the reasoning behind the Commission's addition of a grid charge for certain net metering customers? **RESPONSE:** In its discussion and findings adopting grid charge in Order No. 28, the Commission stated:

> Based upon review and careful consideration of the positions of the Parties in Phases 2 and 3 of this Docket, the Commission declines to adopt a 2-channel billing approach at this time and as described in the next section, will afford the utilities the opportunity on a voluntary, utility-by-utility basis to demonstrate how a phased-in grid charge would address any demonstrated unreasonable allocations of costs to non-Net-Metering Customers on the utility's distribution system. Two-channel billing does not provide the same ability to phase-in adoption as does a grid charge. As shown in the previous discussion section of this Order and in the summaries of comments and testimony in the full record of Phases 2 and 3, the Commission notes that most of the investor-owned utilities have expressed support for a grid charge approach as an alternative to 2-channel and none have opposed it. As

> noted in A, above, the Commission finds that the 2-channel billing approach is not an optional billing structure for non-residential Net-Metering Customers taking service under a demand component and with generation capacity of 1 MW or below, as they are required to continue under the 1:1 full retail rate structure. The same is true with regard to those same demand-component customers with respect to a grid charge under Act 464 – it is not available as an option, but other options may exist in addition to the 1:1 full retail credit, such as those under Ark. Code Ann. § 23-18-604(b)(4).

Order No. 28 at 532-533 (footnote omitted). The Commission further found:

> Based on the evidence presented by the Parties, and in consideration of the provisions of Act 464, the Commission finds that the institution of a grid charge mechanism for Net-Metering Customers over 1 MW is the preferred alternative at this time to address utility allegations of unreasonable cost shifting or cost allocations having a negative impact on non-Net-Metering Customers. As previously noted, in the absence of utility-specific data and evidence, the Commission cannot establish a utility-specific rate for the grid charge; therefore, the initial grid charge rate will be set at zero. Under this approach, a utility, at its discretion, may propose a revised grid charge rate. The Commission will not require that the application be made in a general rate case, but if the utility has opted to utilize a formula rate plan, the utility shall ensure that its relief sought in the application is consistent with the formula rate plan.
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> * * *
>
> A utility desiring to implement a revised grid charge rate should file a separate application to establish the revised grid charge rate. In its filing, the utility should quantify, on a dollar-per-kWh basis, the distinct functionalized as well as classified cost components that are currently recovered via the volumetric rates applicable to its rate schedules. In spreadsheet format with formulas linked to supporting sources, the utility shall present, by month, each rate schedule's volumetric rate decomposed into constituent costs. In its application for its revised grid charge rate, the utility shall identify all energy and capacity benefits that offset any avoided or unrecovered distribution-related demand costs. To evaluate energy benefits, the utility shall quantify the benefit associated with avoided incremental fuel costs, as represented by the hourly locational marginal prices from MISO, SPP, or both, as applicable.

Id. at 545-546 (citations omitted).

On the subject of cost shifting, the Commission found that:

> [A] 'cost shift' may be defined as the cumulative amount of fixed costs avoided by Net-Metering Customers because of Net-Metering, as expressed by monthly bill impacts. The cost shift should be offset by direct benefits which impact customer bills. "Direct benefits" should consider benefits to all customers of market-driven innovation, including forward looking projections of avoidable generation, transmission, and distribution costs associated with customer-owned and financed Net-Metering Facilities and other distributed energy resources. The Commission may determine that a cost shift is unreasonable if the monthly bill impact to non-Net-Metering Customers exceeds the direct benefits. The Commission intends for the utility to demonstrate that cost shifting has occurred or is occurring on a cumulative basis, rather than on the basis of an individual Net-Metering Customer's proposed facility.

Id. at 584.

(3) Rule 2.04(A)(3)(d) – I see that following the effective date of these rules, an electric utility may file an application to revise the grid charge from zero. The rule provides that "[o]nce approved, the Electric Utility shall bill these Net-Metering Customers in accordance with the Electric Utility's approved grid charge." Will the electric utility be permitted to bill retroactively to the effective date of these rules, or will any approved grid charge be permitted to be billed prospectively only from the date of approval? **RESPONSE:** Consistent with long-standing regulatory law and policy, there will be no retroactive billing. The charges will only apply going forward from approval of the new rate. A customer who signs a SIA after the date of Order 28 and who is not grandfathered under the 1:1 credit approach and who is subject to the grid charge currently set at zero, will have their rate change from zero to the approved grid charge.

(4) Rule 2.07(A)(1) – What was the reasoning behind the Commission's inclusion of the date "beginning June 1, 2020" where that limiting date was not included in the language of the statute, Ark. Code Ann. § 23-18-604(b)(10)(A), on which the rule appears to be premised? **RESPONSE:** Prior to Act 464, AREDA did not address or define a starting date for grandfathering, so the Commission established one in 2017, per Order 10, so as to provide certainty to net-metering customers and to be consistent with AREDA's purpose of promoting the development of renewable energy net metering. In Order No. 10, the Commission discussed different options for fixing the grandfathering date, including setting a different date for each customer (such as when the facility went online) or a single date certain for all eligible net-metering facilities. For administrative

efficiency (per the Order 10 language), the Commission determined that a single date for the starting date of grandfathering would be better. And per that language from Order 10, which stated that the grandfathering term would start on the date of the order, if any, changing the rate structure, Order Nos. 28 and 33 ratified and adopted that date certain.

See Order No. 10 at 142-150.

The General Assembly is presumed to know what the Commission did by Order No. 10 in adopting grandfathering and establishing the start date as of the date of an order changing the rate structure, and did not change it when they enacted Act 464. Since that Act did not address when the grandfathering term started, the Commission had to decide that consistent with the language of the statute, including its purpose of promoting the development of net metering.

The Commission further indicated that four parties have filed notices of appeal from the Commission's Orders Nos. 28 and 33.

The proposed effective date is pending legislative review and approval.

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

The agency offers the following with respect to the total estimated cost by fiscal year to any private individual, entity, and business subject to the amended rules: The rule adopting a rate structure may affect the rate credited by the utility to its customer for net-metered energy but the effect will depend on the rate adopted and the customer's usage. Based upon the manner in which utility rates are established, no appreciable increase in costs to any private individual, entity, or business is expected. Regulated utilities subject to the rules are permitted to recover their costs of service through just and reasonable rates established by the Commission and paid by their customers.

With respect to the total estimated cost by fiscal year to state, county, and municipal government to implement the rule, the agency states: The implementation of the rule should have a negligible cost on state, county, and municipal government. The APSC will be required to process utility tariff revisions to implement the rule. While the rule has a minimal effect, Act 464 of 2019 has had the intended effect of further stimulating the development of solar energy and increased the costs of the APSC to administer the Net Metering Rules while continuing to perform its other assigned duties, which have also increased due to additional duties required by the Formula Rate Review Act and other utility renewable project requests. Additional staff and overheard expenses may be required

if a significant number of applications or proceedings requiring adjudication by the APSC are initiated. The Commission is aware of no other state, county, or municipal government which will incur additional costs due to implementation of the Net Metering Rules.

LEGAL AUTHORIZATION: Pursuant to Arkansas Code Annotated § 23-18-604(b)(1), the Arkansas Public Service Commission, following notice and opportunity for public comment, shall establish appropriate rates, terms, and conditions for net metering. The proposed changes include those made in light of Act 464 of 2019, sponsored by Senator David Wallace, which amended certain definitions under the Arkansas Renewable Energy Development Act of 2001 and amended the law concerning the authority of the Arkansas Public Service Commission.

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 (Act 698)

3. Department of Health (Act 216)

4. Highway Commission (Act 468)

F. Adjournment.