

**E-1**

**ARIZONA STATE RETIREMENT SYSTEM (R-16-1101)**  
Title 2, Chapter 8, Article 6, Public Participation in Rulemaking

**Amend:** R2-8-602; R2-8-603; R2-8-604; R2-8-605; R2-8-606; R2-8-607



**GOVERNOR'S REGULATORY REVIEW COUNCIL  
M E M O R A N D U M**

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**MEETING DATE:** November 1, 2016

**AGENDA ITEM:** E-1

**TO:** Members of the Governor's Regulatory Review Council ("Council")

**FROM:** Marcus McGillivray, Intern

**DATE:** October 14, 2016

**SUBJECT:** **ARIZONA STATE RETIREMENT SYSTEM (R-16-1101)**  
Title 2, Chapter 8, Article 6, Public Participation in Rulemaking

Amend: R2-8-602; R2-8-603; R2-8-604; R2-8-605; R2-8-606; R2-8-607.

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The Arizona State Retirement System (ASRS) was established by A.R.S. Title 38, Public Officers and Employees, Chapter 5, Social Security and Retirement, Article 2, Arizona State Retirement System (Article 2). The ASRS Board (Board) "is responsible for supervising the administration of [Article 2] by the director [Director] of ASRS." A.R.S. §§ 38-714(B) and 38-715(C)(1). The purpose of the ASRS and the Director is "to manage and invest employee and employer contributions and assets and distribute retirement and long-term disability benefits to retired members of the system and plan." Laws 2006, Ch. 125 § 5(A).

This rulemaking amends six rules in A.A.C. Title 2, Chapter 8, Article 6. This article informs the public of how to become involved with the rulemaking process of the ASRS. The ASRS is amending these rules to assure that the statutory language is uniform with A.R.S. § 41-1001, allow more time for rule petitions to be answered, and allow objections to a rule based upon evidence that it is not the least burdensome and costly. Overall, the ASRS is amending these rules to establish a more precise and efficient rulemaking process.

**The following is a non-exhaustive summary of the ASRS's proposed actions:**

1. In each of the six rules, the term "an individual" is changed to "a person" to be more consistent with A.R.S. § 41-1001. Furthermore, some rules also include syntax changes that do not alter the meaning or scope of the rules.
2. R2-8-603 and R2-8-604: The ASRS lengthens the time to send written notice of its decision regarding a rule petition from 30 days to 60 days from the receipt of the petition.

3. R2-8-605: This rule outlines a person’s right to object to an economic, small business, and consumer impact. This amendment adds subsection (A)(3)(c), which allows evidence that “[r]eflects that the ASRS did not select the alternative that imposes the least burden and costs to person regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.”
4. R2-8-606: This rule contains the requirements and procedures to request an oral proceeding under A.R.S. § 41-1023(C). The significant amendments to this rule are found in subsection (C), which pertains to the duties of the ASRS officer while conducting an oral proceeding. In subsection (C)(2), “speaker slip” is changed to “Request to Present Oral Comment form.” One of the duties of the presiding officer is to provide the attendees with a Request to Present Oral Comment form. Subsection (C)(2)(d) is taken out of the rule; the approximate time in which the person intends to speak is no longer required on the aforementioned form. In Subsection (C)(2)(a), the line “An individual’s name” is changed to “The name of the person submitting the Request to Present Oral Comment form.”
5. R2-8-607: This rule lists the requirements of a petition to delay the effective date of a rule under A.R.S. § 41-1023(C). Subsection (A) requires the petition to be filed with the ASRS prior to the proposed rule’s close of record date. The amendment makes the rule more precise by simply stating “close of record date,” as opposed to “close of record date identified in the Notice of Proposed Rulemaking.”

### **Exemption or Request and Approval for Exception from the Moratorium**

The ASRS received an exception from the moratorium on June 24, 2016.

### **Substantive or Procedural Concerns**

None.

#### **1. Are the rules legal, consistent with legislative intent, and within the agency’s statutory authority?**

Yes.

**General statutory authority:** The ASRS cites to A.R.S. § 38-714(E)(4), which grants authority to “[a]dopt, amend, or repeal rules for the administration of the plan.”

**Specific statutory authority:** The ASRS cites to A.R.S. § 41-1021 and 41-1051. Section 41-1021 requires agencies to “create and maintain a public rulemaking docket for each pending rulemaking proceeding.” Section 41-1051 is sets forth GRRC’s regulations and procedures.

**2. Are the rules written in a manner that is clear, concise, and understandable to the general public?**

Yes. The rules are generally clear, concise, and understandable.

**3. Does the agency adequately address the comments on the proposed rules and any supplemental proposals?**

Yes. ASRS received no written comments regarding the rulemaking. No one attended the oral proceeding on August 25, 2016.

**4. Are the final rules a substantial change, considered as a whole, from the proposed rules and any supplemental proposals?**

No. There are no substantial changes in the final rules.

**5. Does the preamble disclose a reference to any study relevant to the rules that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rules?**

No. The ASRS indicates that it did not review or rely on a study in its evaluation of, or justification for, any of the rules.

**6. Are the rules more stringent than corresponding federal law and, if so, is there statutory authority that allows the agency to exceed the requirements of federal law?**

No. The rules are not more stringent than federal law. Although federal law applies to retirement programs, no federal law specifically applies to the rules that are being amended.

**7. Do the rules require a permit or license and if so, does the agency use a general permit or is any exception applicable under A.R.S. § 41-1037?**

No. The rules do not require a permit or license.

**8. Do the rules establish a new fee or contain a fee increase?**

No. The amended rules neither establish a new fee nor contain a fee increase.

**9. Conclusion**

The ASRS requests that the rules take effect 60 days after the rule package is filed with the Secretary of State. This analyst recommends approval of the rules.



**GOVERNOR'S REGULATORY REVIEW COUNCIL  
M E M O R A N D U M**

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**MEETING DATE:** November 1, 2016

**AGENDA ITEM:** E-1

**TO:** Members of the Governor's Regulatory Review Council ("Council")

**FROM:** GRRC Economic Team

**DATE:** October 14, 2016

**SUBJECT: ARIZONA STATE RETIREMENT SYSTEM (R-16-1101)**  
Title 2, Chapter 8, Article 6, Public Participation in Rulemaking

Amend: R2-8-602; R2-8-603; R2-8-604; R2-8-605; R2-8-606; R2-8-607.

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I reviewed the economic, small business, and consumer impact comparison for compliance with A.R.S. § 41-1056 and make the following comments. These comments are made to assist the Council in its review and may be used as the Council determines.

**GRRC Economist Comments**

In this rulemaking, the Arizona State Retirement System (ASRS) is proposing to amend several rules to clarify the language used to explain the options outlining public participation in rulemaking. These amendments will ensure the public has notice of how they may participate in the ASRS rulemaking process, including what a person's options may be if the person disputes a rule.

ASRS has certified that the Joint Legislative Budget Committee has not been notified because the number of new full-time employees necessary to implement and enforce the rule is zero. Notice of new FTEs is required by A.R.S. § 41-1055(B)(3)(a).

1. **Costs and Benefits for:**

**a. The implementing agency:**

ASRS incurred the cost of completing this rulemaking and will incur minimal costs to implement the proposed rule. The cost is anticipated to have minimal impact because the rulemaking simply clarifies statutory requirements that already exist.

**b. Political subdivisions:**

This rulemaking does not provide any benefits or impose any costs on political subdivisions.

**c. Businesses:**

No businesses are directly affected by the rulemaking.

**d. Small businesses:**

No businesses are directly affected by the rulemaking.

**e. Consumers directly affected by the rulemaking:**

There are no private persons or consumers directly affected by the rulemaking.

**2. Do the probable benefits outweigh the probable costs?**

Based on the information provided, ASRS indicates that the benefit from the proposed amendments outweigh the costs. The amendments will have minimal economic impact, if any, because they merely clarify language regarding the number of individuals who may submit particular petitions and further participate in the agency's rulemaking process. These amendments will clarify the rulemaking process for the public and such clarification will increase the understandability of the rules.

**3. Analysis of methods to reduce the small business impact:**

An analysis was not submitted because ASRS estimated that there will be no economic impact to small businesses.

**4. The probable effect on state revenues:**

The proposed rulemaking will have no effect on state revenues.

**5. Analysis of any less intrusive or less costly alternative methods:**

The ASRS believes this is the least costly and least intrusive method.

**6. Whether an analysis was submitted to the agency regarding the rule's impact on the competitiveness of businesses in this state as compared to the competitiveness of businesses in other states:**

No analysis was submitted that compares the rule's impact of the competitiveness of businesses in this state to the impact on businesses in other states.

7. **A description of any data on which a rule is based with an explanation of how the data was obtained and why the data is acceptable data, and the methods used by the agency to evaluate the costs and benefits in the EIS.**

The ASRS indicates that no outside data or studies were used in the development of the proposed rule amendment.

8. **Conclusion:**

The submitted economic, small business and consumer impact statement is generally accurate, and contains the information required for compliance with A.R.S. §§ 41-1035, 41-1052(D)(1-3), and 41-1055. This analyst recommends that the proposed rule amendments be approved.



# ARIZONA STATE RETIREMENT SYSTEM

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*Paul Matson*  
Director

August 25, 2016

Ms. Nicole A. Ong, Chair  
The Governor's Regulatory Review Council  
100 North 15th Avenue, Ste. 402  
Phoenix, AZ 85007

**Re: A.A.C. Title 2. Administration**  
**Chapter 8. State Retirement System Board**

Dear Ms. Ong:

The attached final rule package is submitted for review and approval by the Council. The following information is provided for Council's use in reviewing the rule package:

1. Close of record date: The rulemaking record was closed on August 25, 2016 following a period for public comment and an oral proceeding.
2. Relation of the rulemaking to a five-year-review report: This rulemaking relates to a Five-year Review Report approved by the Council on May 5, 2016.
3. New fee or fee increase: This rulemaking does not establish a new fee or increase an existing fee.
4. Immediate effective date: An immediate effective date is not requested.
5. Certification regarding studies: I certify that the Board did not rely on any studies for this rulemaking.
8. Certification that the preparer of the EIS notified the JLBC of the number of new full-time employees necessary to implement and enforce the rule: I certify that the rule in this rulemaking will not require a state agency to employ a new full-time employee. No notification was provided to JLBC.
9. List of documents enclosed:
  - a. Cover letter signed by the Board's Deputy Director;
  - b. Notice of Final Rulemaking including the preamble, table of contents for the rulemaking, and rule text; and
  - c. Economic, Small Business, and Consumer Impact Statement.

Sincerely,

Anthony Guarino  
Deputy Director

**NOTICE OF FINAL RULEMAKING**  
**TITLE 2. ADMINISTRATION**  
**CHAPTER 8. STATE RETIREMENT SYSTEM BOARD**

**PREAMBLE**

<b><u>1. Articles, Parts, and Sections Affected</u></b>	<b><u>Rulemaking Action</u></b>
R2-8-602	Amend
R2-8-603	Amend
R2-8-604	Amend
R2-8-605	Amend
R2-8-606	Amend
R2-8-607	Amend

**2. Citations to the agency's statutory rulemaking authority to include both the authorizing statute (general) and the implementing statute (specific):**

Authorizing statute: A.R.S. § 38-714(E)(4)

Implementing statutes: A.R.S. §§ 41-1021 et seq.; 41-1051 et seq.

**3. The effective date for the rules:**

As specified under A.R.S. § 41-1032(A), the rule will be effective 60 days after the rule package is filed with the Office of the Secretary of State.

**a. If the agency selected a date earlier than the 60 day effective date as specified in A.R.S. § 41-1032(A), include the earlier date and state the reason or reasons the agency selected the earlier effective date as provided in A.R.S. § 41-1032(A)(1) through (5):**

Not applicable.

**b. If the agency selected a date later than the 60 day effective date as specified in A.R.S. § 41-1032(A), include the later date and state the reason or reasons the agency selected the later effective date as provided in A.R.S. § 41-1032(B):**

Not applicable.

**4. Citations to all related notices published in the *Register* as specified in R1-1-409(A) that pertain to the record of the final rulemaking package:**

Notice of Rulemaking Docket Opening: 22 A.A.R. 1918, July 22, 2016

Notice of Proposed Rulemaking: 22 A.A.R. 1879, July 22, 2016

**5. The agency's contact person who can answer questions about the rulemaking:**

Name: Jessica A.R. Thomas, Rules Writer

Address: Arizona State Retirement System  
3300 N. Central Ave., Ste. 1400  
Phoenix, AZ 85012-0250  
Telephone: (602) 240-2039  
E-Mail: [JessicaT@azasrs.gov](mailto:JessicaT@azasrs.gov)

**6. An agency's justification and reason why a rule should be made, amended, repealed, or renumbered, to include an explanation about the rulemaking:**

The ASRS needs to amend six rules in Article 6. The rules need to reflect statutory language and time frames. For example, the term “individual” should be changed to “person” to be more consistent with A.R.S. § 1001 et seq; R2-8-605 needs to reflect that a person may object to a rule if they believe it is not the least burdensome and costly method. These amendments will ensure the public has notice of how they may participate in the ASRS rulemaking process, including what a person’s options may be if the person disputes a rule. Ultimately, this will establish a more certain and robust rulemaking process for the ASRS, lending itself to the equitable promulgation of more effective rules, which, in turn, will result in the more effective administration of the ASRS.

**7. A reference to any study relevant to the rule that the agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

No study was reviewed.

**8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.

**9. A summary of the economic, small business, and consumer impact:**

There is little to no economic, small business, or consumer impact, other than the minimal cost to the ASRS to prepare the rule package. The rules will have minimal economic impact, if any, because the rulemaking simply clarifies statutory requirements that already exist. The Arizona Administrative Procedures Act allows people to petition the agency regarding the agency’s rules. The rules in Article 6, simply clarify how people may submit particular petitions and further participate in the agency’s rulemaking process. These amendments will clarify the rulemaking process for the public and such clarification will increase the understandability of the rules. Thus, the economic impact is minimized.

**10. A description of any changes between the proposed rulemaking, including supplemental notices, and the final rulemaking:**

With the exception of minor grammatical corrections, there were no changes between the proposed rulemaking and the final rulemaking.

**11. An agency's summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments:**

The ASRS received no written comments regarding the rulemaking. No one attended the oral proceeding on August 25, 2016.

**12. All agencies shall list any other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:**

None.

**a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:**

The rules do not require a permit.

**b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:**

Federal law applies to retirement programs, but no federal law specifically applies to this rulemaking.

**c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:**

No analysis was submitted.

**13. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rule:**

No materials are incorporated by reference.

**14. Whether the rule was previously made, amended, or repealed as an emergency rule. If so, cite the notice published in the Register as specified in R1-1-409(A). Also, the agency shall state where the text was changed between the emergency and the final rulemaking packages:**

Not applicable.

**15. The full text of the rules follows:**

**TITLE 2. ADMINISTRATION**  
**CHAPTER 8. STATE RETIREMENT SYSTEM BOARD**  
**ARTICLE 6. PUBLIC PARTICIPATION IN RULEMAKING**

Section

- R2-8-602. Reviewing Agency Rulemaking Record and Directory of Substantive Policy Statements
- R2-8-603. Petition for Rulemaking
- R2-8-604. Review of a Rule, Agency Practice, or Substantive Policy Statement
- R2-8-605. Objection to Rule Based Upon Economic, Small Business, and Consumer Impact
- R2-8-606. Oral Proceedings
- R2-8-607. Petition for Delayed Effective Date

## ARTICLE 6. PUBLIC PARTICIPATION IN RULEMAKING

### **R2-8-602. Reviewing Agency Rulemaking Record and Directory of Substantive Policy Statements**

Except on a state holiday, ~~an individual~~ a person may review a rulemaking record or the directory of substantive policy statements at the Phoenix office of the ASRS, Monday through Friday, from 8:00 a.m. until 5:00 p.m.

### **R2-8-603. Petition for Rulemaking**

- A. ~~An individual~~ A person submitting a petition to the ASRS to make or amend a rule under A.R.S. § 41-1033 shall include the following in the petition:
1. The name and current address of the ~~an individual~~ person submitting the petition;
  2. An identification of the rule to be made or amended;
  3. The suggested language of the rule;
  4. The reason why a new rule should be made or a current rule should be amended with supporting information, including:
    - a. An identification of the persons who would be affected by the rule and how the persons would be affected; and
    - b. If applicable, statistical data with references to attached exhibits;
  5. The signature of the ~~individual~~ person submitting the petition; and
  6. The date the ~~individual~~ person signs the petition.
- B. The ASRS shall send a written notice of the ASRS's decision regarding the Petition for Rulemaking to the ~~individual~~ person within ~~30~~ 60 days of receipt of the petition.

**R2-8-604. Review of a Rule, Agency Practice, or Substantive Policy Statement**

- A. ~~An individual~~ A person submitting a petition to the ASRS under A.R.S. § 41-1033 requesting that the ASRS review an agency practice or substantive policy statement that the ~~individual-person~~ alleges constitutes a rule shall include the following in the petition:
1. The name and current address of the ~~individual-person~~ submitting the petition,
  2. The reason the ~~individual-person~~ alleges that the agency practice or substantive policy statement constitutes a rule,
  3. The signature of the ~~individual-person~~ submitting the petition, and
  4. The date the ~~individual-person~~ signs the petition.
- B. The ~~individual-person~~ who submits a petition under subsection (A) shall attach a copy of the substantive policy statement or a description of the agency practice to the petition.
- C. The ASRS shall send a written notice of the ASRS's decision regarding the petition to the ~~individual person~~ within ~~30-60~~ days of receipt of the petition.

**R2-8-605. Objection to Rule Based Upon Economic, Small Business and Consumer Impact**

- A. ~~An individual~~ A person submitting an objection to a rule based upon the economic, small business and consumer impact under A.R.S. § 41-1056.01 shall include the following in the objection:
1. The name and current address of the ~~individual-person~~ submitting the objection;
  2. Identification of the rule;
  3. Either evidence that the actual economic, small business and consumer impact:
    - a. Significantly exceeded the impact estimated in the economic, small business and consumer impact statement submitted during the making of the rule with supporting information attached as exhibits; or
    - b. Was not estimated in the economic, small business and consumer impact statement submitted during the making of the rule and that actual impact imposes a

significant burden on persons subject to the rule with supporting information attached as exhibits;or

c. Reflects that the ASRS did not select the alternative that imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.

4. The signature of the ~~individual~~person submitting the objection; and

5. The date the ~~individual~~person signs the objection.

B. The ASRS shall respond to the objection as specified in A.R.S. § 41-1056.01(C).

### **R2-8-606. Oral Proceedings**

A. ~~An individual~~ A person requesting an oral proceeding under A.R.S. § 41-1023(C) shall submit a written request to the ASRS that includes:

1. The name and current address of the ~~individual~~person making the request;

2. If applicable, the name of the public or private organization, partnership, corporation or association, or the name of the governmental entity the ~~individual~~person represents; and

3. Reference to the proposed rule including, if known, the date and issue of the Arizona Administrative Register in which the Notice of Proposed Rulemaking was published.

B. The ASRS shall record an oral proceeding by either electronic or stenographic means and any CDs, cassette tapes, transcripts, lists, speaker slips, and written comments received shall become part of the official record.

C. A presiding officer shall perform the following acts on behalf of the ASRS when conducting an oral proceeding as prescribed under A.R.S. § 41-1023:

1. Provide a method for ~~individuals~~ a person who ~~attend~~attends the oral proceeding to voluntarily note ~~their~~the person's attendance;

2. Provide a ~~speaker slip~~ Request to Present Oral Comment form that includes space for:

- a. ~~An individual's~~ The name of the person submitting the Request to Present Oral Comment form,
  - b. ~~The person entity the individual person~~ represents, if applicable, and
  - c. ~~The rule on which the individual person~~ wishes to comment ~~on or~~ about which the person has a question ~~about, and;~~
  - d. ~~The approximate length of time the individual wishes to speak;~~
3. Open the proceeding by identifying the rules to be considered, the location, date, time, purpose of the proceeding, and the agenda;
  4. Explain the background and general content of the proposed rulemaking;
  5. Provide for public comment as specified in A.R.S. § 41-1023(D); and
  6. Close the oral proceeding by announcing the location where written public comments are to be sent and specifying the close of record date and time.
- D. A presiding officer may limit comments to a reasonable time period, as determined by the presiding officer. Oral comments may be limited to prevent undue repetition.

**R2-8-607. Petition for Delayed Effective Date**

- A. ~~An individual~~ A person who wishes to delay the effective date of a rule under A.R.S. § 41-1032 shall file a petition with the ASRS prior to the proposed rule's close of record date ~~identified in the Notice of Proposed Rulemaking.~~ The petition shall contain the:
1. Name and current address of the ~~individual person~~ submitting the petition;
  2. Identification of the proposed rule;
  3. Need for the delay, specifying the undue hardship or other adverse impact that may result if the request for a delayed effective date is not granted;
  4. Reason why the public interest will not be harmed by the delayed effective date;
  5. Signature of the ~~individual person~~ submitting the petition; and

6. Date the ~~individual~~person signs the petition.
- B. The ASRS shall send a written notice of the ASRS's decision to the ~~individual~~person within 30 days of receipt of the Petition for Delayed Effective Date.

# ECONOMIC, SMALL BUSINESS, AND CONSUMER IMPACT STATEMENT<sup>1</sup>

## TITLE 2. ADMINISTRATION

### CHAPTER 8. STATE RETIREMENT SYSTEM BOARD

#### 1. Identification of the rulemaking:

The ASRS needs to amend six rules in Article 6. The rules need to reflect statutory language and time frames. For example, the term “individual” should be changed to “person” to be more consistent with A.R.S. § 1001 et seq; R2-8-605 needs to reflect that a person may object to a rule if they believe it is not the least burdensome and costly method. These amendments will ensure the public has notice of how they may participate in the ASRS rulemaking process, including what a person’s options may be if the person disputes a rule. Ultimately, this will establish a more certain and robust rulemaking process for the ASRS, lending itself to the equitable promulgation of more effective rules, which, in turn, will result in the more effective administration of the ASRS.

#### a. The conduct and its frequency of occurrence that the rule is designed to change:

The rules contained in 2 A.A.C. 8, Article 6 inform the public of how they become involved with the rulemaking process at ASRS. However, the rules need to be updated to:

1. be more consistent with statutory language,
2. provide a longer timeframe for the ASRS to make a decision on a rulemaking petition, and
3. to clarify the requirements for a person to petition the ASRS based on an objection to the economic impact.

These changes will ensure the public has notice of who may become involved in the rulemaking process, and how to become involved at certain stages of the rulemaking process.

#### b. The harm resulting from the conduct the rule is designed to change and the likelihood it will continue to occur if the rule is not changed:

The rulemaking process is designed to allow and protect public participation. The rules in 2 A.A.C. 8, Article 6 describe how a person can become involved in the

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<sup>1</sup> If adequate data are not reasonably available, the agency shall explain the limitations of the data, the methods used in an attempt to obtain the data, and characterize the probable impacts in qualitative terms. (A.R.S. § 41-1055(C)).

rulemaking process. However, if these rules are not amended, the public may not be aware of how to petition the ASRS for specific rulemaking endeavors which would compromise the ability of people to become involved in the rulemaking process.

c. The estimated change in frequency of the targeted conduct expected from the rule change:

This rulemaking will clarify how people may become involved with the rulemaking process and what information is required from a person in order to make certain rulemaking petitions. Such clarification will ensure the rules are more readable and consistent with statute, which ultimately reduces the regulatory burden imposed on the public and encourages participation in the rulemaking process.

2. A brief summary of the information included in the economic, small business, and consumer impact statement:

There is little to no economic, small business, or consumer impact, other than the minimal cost to the ASRS to prepare the rule package. The rules will have minimal economic impact, if any, because the rulemaking simply clarifies statutory requirements that already exist. The Arizona Administrative Procedures Act allows people to petition the agency regarding the agency's rules. The rules in Article 6, simply clarify how people may submit particular petitions and further participate in the agency's rulemaking process. These amendments will clarify the rulemaking process for the public and such clarification will increase the understandability of the rules. Thus, the economic impact is minimized.

3. The person to contact to submit or request additional data on the information included in the economic, small business, and consumer impact statement:

Name: Jessica A.R. Thomas, Rules Writer  
Address: Arizona State Retirement System  
3300 N. Central Ave., Suite 1400  
Phoenix, AZ 85012-0250  
Telephone: (602) 240-2039  
E-mail: [JessicaT@azasrs.gov](mailto:JessicaT@azasrs.gov)

4. Persons who will be directly affected by, bear the costs of, or directly benefit from the rulemaking:

In general, all members of the public will be directly affected by, bear the costs of, and directly benefit from this rulemaking. The ASRS incurred the cost of the rulemaking. The ASRS currently has a total membership of approximately 558,136.

Specifically, members of the public who want to become involved in the rulemaking process at the ASRS will be directly affected by this rulemaking. This rule will clarify how a person can provide comments on rule language throughout the rulemaking process and petition the ASRS for certain rulemaking actions. Such clarification will benefit the public and the ASRS by increasing the readability of certain requirements for public participation in the rulemaking process. This readability, in turn, will increase the public's ability to become involved in the rulemaking process and ultimately lend itself to a more robust and cohesive rulemaking process at the ASRS. A clearer, more robust and cohesive rulemaking process will produce more effective rules, which will lead to more effective administration of the ASRS.

5. Cost-benefit analysis:

- a. Costs and benefits to state agencies directly affected by the rulemaking including the number of new full-time employees at the implementing agency required to implement and enforce the proposed rule:

All members of the public are directly affected by this rulemaking because it clarifies how the public may become involved in the rulemaking process. However, the ASRS has determined that no new full-time employees will be required to implement and enforce the rule.

- b. Costs and benefits to political subdivisions directly affected by the rulemaking:

Although political subdivisions may be directly affected by the rulemaking to the extent they are ASRS employers, this rulemaking does not provide any benefits or impose any costs on political subdivisions.

- c. Costs and benefits to businesses directly affected by the rulemaking:

No businesses are directly affected by the rulemaking.

6. Impact on private and public employment:

The rulemaking will have no impact on private or public employment, except to the extent that all members of the public will be better able to become involved in the rulemaking process.

7. Impact on small businesses<sup>2</sup>:

a. Identification of the small business subject to the rulemaking:

No businesses, regardless of size, are subject to the rulemaking.

b. Administrative and other costs required for compliance with the rulemaking:

Not applicable.

c. Description of methods that may be used to reduce the impact on small businesses:

Not applicable.

8. Cost and benefit to private persons and consumers who are directly affected by the rulemaking:

All members of the public are directly affected by the rulemaking. The effect has been previously described above.

9. Probable effects on state revenues:

There will be no effect on state revenues.

10. Less intrusive or less costly alternative methods considered:

The ASRS believes this is the least costly and least intrusive method because it will clarify the statutory requirements for becoming involved in the rulemaking process without imposing any additional requirements on the public.

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<sup>2</sup> Small business has the meaning specified in A.R.S. § 41-1001(20).

## ARTICLE 6. PUBLIC PARTICIPATION IN RULEMAKING

### R2-8-601. Definitions

The following definitions apply to this Article unless otherwise specified:

1. "Rulemaking record" means a file the ASRS maintains as specified in A.R.S. § 41-1029.
2. "Oral proceeding" means a public gathering the ASRS holds for the purpose of receiving comment and answering questions about a proposed rule as specified in A.R.S. § 41-1023.
3. "Presiding officer" means an individual selected by the ASRS Director to oversee oral proceedings.
4. "Substantive policy statement" means the same as in A.R.S. § 41-1001(22).

#### Historical Note

New Section made by final rulemaking at 12 A.A.R. 964, effective March 7, 2006 (Supp. 06-1). Amended by final rulemaking at 21 A.A.R. 2515, effective December 5, 2015 (Supp. XX)

### R2-8-602. Reviewing Agency Rulemaking Record and Directory of Substantive Policy Statements

Except on a state holiday, an individual may review a rulemaking record or the directory of substantive policy statements at the Phoenix office of the ASRS, Monday through Friday, from 8:00 a.m. until 5:00 p.m.

#### Historical Note

New Section made by final rulemaking at 12 A.A.R. 964, effective March 7, 2006 (Supp. 06-1).

### R2-8-603. Petition for Rulemaking

- A. An individual submitting a petition to the ASRS to make or amend a rule under A.R.S. § 41-1033 shall include the following in the petition:
1. The name and current address of the individual submitting the petition;
  2. An identification of the rule to be made or amended;
  3. The suggested language of the rule;
  4. The reason why a new rule should be made or a current rule should be amended with supporting information, including:
    - a. An identification of the persons who would be affected by the rule and how the persons would be affected; and
    - b. If applicable, statistical data with references to attached exhibits;
  5. The signature of the individual submitting the petition; and
  6. The date the individual signs the petition.
- B. The ASRS shall send a written notice of the ASRS's decision regarding the Petition for Rulemaking to the individual within 30 days of receipt of the petition.

#### Historical Note

New Section made by final rulemaking at 12 A.A.R. 964, effective March 7, 2006 (Supp. 06-1).

### R2-8-604. Review of a Rule, Agency Practice, or Substantive Policy Statement

- A. An individual submitting a petition to the ASRS under A.R.S. § 41-1033 requesting that the ASRS review an agency practice or substantive policy statement that the individual alleges constitutes a rule shall include the following in the petition:
1. The name and current address of the individual submitting the petition,
  2. The reason the individual alleges that the agency practice or substantive policy statement constitutes a rule,
  3. The signature of the individual submitting the petition, and
  4. The date the individual signs the petition.
- B. The individual who submits a petition under subsection (A) shall attach a copy of the substantive policy statement or a description of the agency practice to the petition.
- C. The ASRS shall send a written notice of the ASRS's decision regarding the petition to the individual within 30 days of receipt of the petition.

#### Historical Note

New Section made by final rulemaking at 12 A.A.R. 964, effective March 7, 2006 (Supp. 06-1).

### R2-8-605. Objection to Rule Based Upon Economic, Small Business and Consumer Impact

- A. An individual submitting an objection to a rule based upon the economic, small business and consumer impact under A.R.S. § 41-1056.01 shall include the following in the objection:
1. The name and current address of the individual submitting the objection;
  2. Identification of the rule;
  3. Either evidence that the actual economic, small business and consumer impact:
    - a. Significantly exceeded the impact estimated in the economic, small business and consumer impact statement submitted during the making of the rule with supporting information attached as exhibits; or
    - b. Was not estimated in the economic, small business and consumer impact statement submitted during the making of the rule and that actual impact imposes a significant burden on persons subject to the rule with supporting information attached as exhibits;
  4. The signature of the individual submitting the objection; and
  5. The date the individual signs the objection.

B. The ASRS shall respond to the objection as specified in A.R.S. § 41-1056.01(C).

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 964, effective March 7, 2006 (Supp. 06-1).

**R2-8-606. Oral Proceedings**

- A. An individual requesting an oral proceeding under A.R.S. § 41-1023(C) shall submit a written request to the ASRS that includes:
1. The name and current address of the individual making the request;
  2. If applicable, the name of the public or private organization, partnership, corporation or association, or the name of the governmental entity the individual represents; and
  3. Reference to the proposed rule including, if known, the date and issue of the Arizona Administrative Register in which the Notice of Proposed Rulemaking was published.
- B. The ASRS shall record an oral proceeding by either electronic or stenographic means and any CDs, cassette tapes, transcripts, lists, speaker slips, and written comments received shall become part of the official record.
- C. A presiding officer shall perform the following acts on behalf of the ASRS when conducting an oral proceeding as prescribed under A.R.S. § 41-1023:
1. Provide a method for individuals who attend the oral proceeding to voluntarily note their attendance;
  2. Provide a speaker slip that includes space for:
    - a. An individual's name,
    - b. The person the individual represents, if applicable,
    - c. The rule the individual wishes to comment on or has a question about, and
    - d. The approximate length of time the individual wishes to speak;
  3. Open the proceeding by identifying the rules to be considered, the location, date, time, purpose of the proceeding, and the agenda;
  4. Explain the background and general content of the proposed rulemaking;
  5. Provide for public comment as specified in A.R.S. § 41-1023(D); and
  6. Close the oral proceeding by announcing the location where written public comments are to be sent and specifying the close of record date and time.
- D. A presiding officer may limit comments to a reasonable time period, as determined by the presiding officer. Oral comments may be limited to prevent undue repetition.

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 964, effective March 7, 2006 (Supp. 06-1).

**R2-8-607. Petition for Delayed Effective Date**

- A. An individual who wishes to delay the effective date of a rule under A.R.S. § 41-1032 shall file a petition with the ASRS prior to the proposed rule's close of record date identified in the Notice of Proposed Rulemaking. The petition shall contain the:
1. Name and current address of the individual submitting the petition;
  2. Identification of the proposed rule;
  3. Need for the delay, specifying the undue hardship or other adverse impact that may result if the request for a delayed effective date is not granted;
  4. Reason why the public interest will not be harmed by the delayed effective date;
  5. Signature of the individual submitting the petition; and
  6. Date the individual signs the petition.
- B. The ASRS shall send a written notice of the ASRS's decision to the individual within 30 days of receipt of the Petition for Delayed Effective Date.

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 964, effective March 7, 2006 (Supp. 06-1).

#### 41-1021. Public rule making docket; notice

A. Each agency shall establish and maintain a current, public rule making docket for each pending rule making proceeding. A rule making proceeding is pending from the time the agency begins to consider proposing the rule under section 41-1022 until any one of the following occurs:

1. The time the rule making proceeding is terminated by the agency indicating in the rule making docket that the agency is no longer actively considering proposing the rule.
2. One year after the notice of rule making docket opening is published in the register if the agency has not filed a notice of the proposed rule making with the secretary of state pursuant to section 41-1022.
3. The rule becomes effective.
4. One year after the notice of the proposed rule making is published in the register if the agency has not submitted the rule to the council for review and approval.
5. Publication of a notice of termination.

B. For each rule making proceeding, the docket shall indicate all of the following:

1. The subject matter of the proposed rule.
2. A citation to all published notices relating to the proceeding.
3. The name and address of agency personnel with whom persons may communicate regarding the rule.
4. Where written submissions on the proposed rule may be inspected.
5. The time during which written submissions may be made and the time and place where oral comments may be made.
6. Where a copy of the economic, small business and consumer impact statement and the minutes of the pertinent council meeting may be inspected.
7. The current status of the proposed rule.
8. Any known timetable for agency decisions or other action in the proceeding.
9. The date the rule was sent to the council.
10. The date of the rule's filing and publication.
11. The date the rule was approved by the council.
12. When the rule will become effective.

C. The agency shall provide public notice of the establishment of a rule making docket by causing a notice of docket opening to be published in the register, including the information set forth in subsection B, paragraphs 1, 2, 3, 5 and 8 of this section.

D. An agency may appoint formal advisory committees to comment, before publication of a notice of proposed rule making under section 41-1022, on the subject matter of a possible rule making under active consideration within the agency. The membership of these committees shall be published at the time of formation and annually thereafter in the register. Members of these committees are not eligible to receive compensation except as otherwise provided by law.

#### 41-1021.01. Permissive examples

An agency may include a diagram, example, table, chart or formula in a rule, preamble, economic impact, small business and consumer impact statement or concise explanatory statement to the extent that it assists in making the document understandable by the persons affected by the rule.

#### 41-1021.02. State agencies; annual regulatory agenda

A. On or before December 1 of each year, each agency, except for a self-supporting regulatory board as defined in section 41-1092, shall prepare and make available to the public the regulatory agenda that the agency expects to follow during the next calendar year.

B. The regulatory agenda shall include all of the following:

1. A notice of docket openings.
2. A notice of any proposed rule making, including potential sources of federal funding for each proposed rule making.
3. A review of existing rules.
4. A notice of a final rule making.

C. The regulatory agenda shall also provide for the following information:

1. Any rule making terminated during the current calendar year.
2. Any privatization option and nontraditional regulatory approach being considered by the agency.

D. This section does not prohibit an agency from undertaking any rule making action even if that action has not been included in the agency's annual regulatory agenda.

#### 41-1022. Notice of proposed rule making, amendment or repeal; contents of notice

A. Before rule making, amendment or repeal, the agency shall file a notice of the proposed action with the secretary of state. The notice shall include:

1. The preamble.
2. The exact wording of the rule.

B. The secretary of state shall include in the next edition of the register the information in the notice under subsection A of this section.

C. At the same time the agency files a notice of the proposed rule making with the secretary of state, the agency shall notify by regular mail, telefacsimile or electronic mail each person who has made a timely request to the agency for notification of the proposed rule making and to each person who has requested notification of all proposed rule makings. An agency may provide the notification prescribed in this subsection in a periodic agency newsletter. An agency may purge its list of persons requesting notification of proposed rule makings once each year.

D. Before commencing any proceedings for rule making, amendment or repeal, an agency shall allow at least thirty days to elapse after the publication date of the register in which the notice of the proposed rule making, amendment or repeal is contained.

E. If, as a result of public comments or internal review, an agency determines that a proposed rule requires substantial change pursuant to section 41-1025, the agency shall issue a supplemental notice containing the changes in the proposed rule. The agency shall provide for additional public comment pursuant to section 41-1023.

#### 41-1023. Public participation; written statements; oral proceedings

A. After providing notice of docket openings, an agency may meet informally with any interested party for the purpose of discussing the proposed rule making action.

The agency may solicit comments, suggested language or other input on the proposed rule. The agency may publish notice of these meetings in the register.

B. For at least thirty days after publication of the notice of the proposed rule making, an agency shall afford persons the opportunity to submit in writing statements, arguments, data and views on the proposed rule, with or without the opportunity to present them orally.

C. An agency shall schedule an oral proceeding on a proposed rule if, within thirty days after the published notice of proposed rule making, a written request for an oral proceeding is submitted to the agency personnel listed pursuant to section 41-1021, subsection B.

D. An oral proceeding on a proposed rule may not be held earlier than thirty days after notice of its location and time is published in the register. The agency shall determine a location and time for the oral proceeding which affords a reasonable opportunity to persons to participate. The oral proceeding shall be conducted in a manner that allows for adequate discussion of the substance and the form of the proposed rule, and persons may ask questions regarding the proposed rule and present oral argument, data and views on the proposed rule.

E. The agency, a member of the agency or another presiding officer designated by the agency shall preside at an oral proceeding on a proposed rule. If the agency does not preside, the presiding official shall prepare a memorandum for consideration by the agency summarizing the contents of the presentations made at the oral proceeding. Oral proceedings must be open to the public and recorded by stenographic or other means.

F. Each agency may make rules for the conduct of oral rule making proceedings. Those rules may include provisions calculated to prevent undue repetition in the oral proceedings.

#### 41-1024. Time and manner of rule making

A. An agency may not submit a rule to the council until the rule making record is closed.

B. Within one hundred twenty days after the close of the record on the proposed rule making, an agency shall take one of the following actions:

1. Submit the rule to the council or, if the rule is exempt pursuant to section 41-1057, to the attorney general.

2. Terminate the proceeding by publication of a notice to that effect in the register.

C. Before submitting a rule to the council or the attorney general, an agency shall consider the written submissions, the oral submissions or any memorandum summarizing oral submissions and the economic, small business and consumer impact statement regarding the rule or information in the preamble.

D. Within the scope of its delegated authority, an agency may use its own experience, technical competence, specialized knowledge and judgment in the making of a rule.

E. Unless exempted by section 41-1005 or 41-1057 or unless the rule is an emergency rule made pursuant to section 41-1026, if the agency chooses to make the rule, the agency shall submit a rule package to the council and to the committee. The rule package shall include:

1. The preamble.

2. The exact words of the rule, including existing language and any deletions.
  3. The economic, small business and consumer impact statement.
- F. If the rule is exempt pursuant to section 41-1005, the agency shall file it as a final rule with the secretary of state.
- G. If the rule is exempt from council approval, pursuant to section 41-1057, the agency shall submit the rule package set forth in subsection E of this section to the attorney general for approval pursuant to section 41-1044.
- H. An agency shall not file a final rule with the secretary of state without prior approval from the council, unless the final rule is exempted pursuant to section 41-1005 or 41-1057 or the rule is an emergency rule made pursuant to section 41-1026 or an expedited rule made pursuant to section 41-1027.

#### 41-1025. Variance between rule and published notice of proposed rule

- A. An agency may not submit a rule to the council that is substantially different from the proposed rule contained in the notice of proposed rule making or a supplemental notice filed with the secretary of state pursuant to section 41-1022. However, an agency may terminate a rule making proceeding and commence a new rule making proceeding for the purpose of making a substantially different rule.
- B. In determining whether a rule is substantially different from the published proposed rule on which it is required to be based, all of the following must be considered:
1. The extent to which all persons affected by the rule should have understood that the published proposed rule would affect their interests.
  2. The extent to which the subject matter of the rule or the issues determined by that rule are different from the subject matter or issues involved in the published proposed rule.
  3. The extent to which the effects of the rule differ from the effects of the published proposed rule if it had been made instead.

#### 41-1026. Emergency rule making, amendment or repeal

- A. If an agency makes a finding that a rule is necessary as an emergency measure, the rule may be made, amended or repealed as an emergency measure, without the notice prescribed by sections 41-1021 and 41-1022 and prior review by the council, if the rule is first approved by the attorney general and filed with the secretary of state. The attorney general may not approve the making, amendment or repeal of a rule as an emergency measure if the emergency situation is created due to the agency's delay or inaction and the emergency situation could have been averted by timely compliance with the notice and public participation provisions of this chapter, unless the agency submits substantial evidence that the rule is necessary as an emergency measure to do any of the following:
1. Protect the public health, safety or welfare.
  2. Comply with deadlines in amendments to an agency's governing law or federal programs.
  3. Avoid violation of federal law or regulation or other state law.
  4. Avoid an imminent budget reduction.

5. Avoid serious prejudice to the public interest or the interest of the parties concerned.

B. Within sixty days of receipt, the attorney general shall review the demonstration of emergency and the rule in accordance with the standards prescribed in section 41-1044.

C. After the rule is filed with the secretary of state, the secretary of state shall publish the rule in the register as provided in section 41-1013.

D. A rule made, amended or repealed pursuant to this section is valid for one hundred eighty days after the filing of the rule with the secretary of state and may be renewed for one more one hundred eighty day period if all of the following occur:

1. The agency determines that the emergency situation still exists.

2. The agency follows the procedures prescribed in this section.

3. The rule is approved by the attorney general pursuant to this section.

4. The agency has issued the rule as a proposed rule or has issued an alternative proposed rule pursuant to section 41-1022.

5. The agency seeks approval of the renewal from the attorney general before the expiration of the preceding one hundred eighty day period.

6. The agency files notice of the renewal and any required attorney general approval with the secretary of state and notice is published in the register.

E. A rule that is made pursuant to this chapter and that replaces a rule made, amended or repealed pursuant to this section shall expressly repeal the rule replaced if it has not expired.

#### 41-1026.01. Emergency adoption, amendment or termination of delegation agreements; definition

A. If a delegating agency makes a written finding that a delegation agreement is necessary as an emergency measure, the delegation agreement may be adopted, amended or terminated as an emergency measure, without complying with the public notice and participation provisions of this article. An agency may not adopt, amend or terminate a delegation agreement as an emergency measure if the emergency situation is created due to the agency's delay or inaction and the emergency situation could have been averted by timely compliance with the public notice and participation provisions of this article, unless the agency can present substantial evidence that failure to adopt, amend or terminate the delegation agreement as an emergency measure will result in imminent substantial peril to the public health, safety or welfare.

B. The agency shall file with the secretary of state a summary of the emergency delegation agreement. The summary shall provide the name of the person to contact in the agency with questions or comments. The secretary of state shall publish the summary in the next register.

C. The delegation agreement adopted, amended or terminated pursuant to this section is valid for one hundred eighty days after the filing of the agreement with the secretary of state and may be renewed for one or two more one hundred eighty day periods if all of the following occur:

1. The agency determines that the emergency situation still exists for each renewal.

2. The agency follows the procedures prescribed by this section for each renewal.

3. The agency has begun the public comment and participation process required by this section.

4. The agency makes a finding for an extension of time before the expiration of the preceding one hundred and eighty day period.

5. The agency files notice of the renewal with the secretary of state and notice is published in the register.

D. For purposes of this section, "emergency" means a situation which warrants the adoption of a delegation agreement without compliance with the public notice and participation provisions prescribed in this article because the adoption, amendment or termination of the delegation agreement is necessary for immediate preservation of the public health, safety or welfare, and the public notice and participation requirements of this article are impracticable.

#### 41-1027. Expedited rulemaking

A. An agency may conduct expedited rulemaking pursuant to this section if the rulemaking does not increase the cost of regulatory compliance, increase a fee or reduce procedural rights of persons regulated and does one or more of the following:

1. Amends or repeals rules made obsolete by repeal or supersession of an agency's statutory authority.

2. Amends or repeals rules for which the statute on which the rule is authorized has been declared unconstitutional by a court with jurisdiction, there is a final judgment and no statute has been enacted to replace the unconstitutional statute.

3. Makes, amends or repeals rules that repeat verbatim existing statutory authority granted to the agency.

4. Makes, amends or repeals rules relating only to internal governmental operations that are not subject to violation by a person.

5. Corrects typographical errors, makes address or name changes or clarifies language of a rule without changing its effect.

6. Adopts or incorporates by reference without material change federal statutes or regulations pursuant to section 41-1028, statutes of this state or rules of other agencies of this state.

7. Reduces or consolidates steps, procedures or processes in the rules.

8. Amends or repeals rules that are outdated, redundant or otherwise no longer necessary for the operation of state government.

B. If the proposed expedited rulemaking is solely for a purpose prescribed in subsection A, paragraph 1, 3, 5 or 8 of this section, an agency shall notify the governor, the president of the senate, the speaker of the house of representatives and the council of the proposed expedited rulemaking. The notice shall contain the name, address and telephone number of the agency contact person and the exact wording of the proposed expedited rulemaking and indicate how the proposed expedited rulemaking achieves the purpose prescribed in subsection A, paragraph 1, 3, 5 or 8 of this section.

C. If the proposed expedited rulemaking is for a purpose prescribed in subsection A, paragraph 2, 4, 6 or 7 of this section, an agency shall file a request for proposed expedited rulemaking with the governor and notify the president of the senate, the speaker of the house of representatives and the council of the request. The request

shall contain the name, address and telephone number of the agency contact person and the exact wording of the proposed expedited rulemaking and an explanation of how the proposed expedited rulemaking meets the criteria in subsection A of this section.

D. The governor may approve the request for expedited rulemaking if the request complies with subsection A of this section.

E. On delivery of the notice required in subsection B of this section or on approval by the governor of a request for proposed expedited rulemaking the agency shall file a notice of the proposed expedited rulemaking with the secretary of state for publication in the next state administrative register containing the information and provisions of the proposed rulemaking filed with the governor pursuant to subsection B or C of this section and allow any person to provide written comment to the agency for at least thirty days after publication in the register, including objections to the rulemaking because it does not meet the criteria pursuant to subsection A of this section. The agency shall adequately respond in writing to the comments on the proposed expedited rulemaking.

F. An agency may not submit an expedited rule to the council that is substantially different from the proposed rule contained in the notice of proposed expedited rulemaking. However, an agency may terminate an expedited rulemaking proceeding pursuant to subsection K of this section and commence a new rulemaking proceeding for the purpose of making a substantially different rule. An agency shall use the criteria prescribed in section 41-1025, subsection B for determining whether an expedited rule is substantially different from the published proposed expedited rule.

G. After adequately addressing, in writing, any written objections, an agency shall file a request for approval with the council. The request shall contain the notice of proposed expedited rulemaking filed with the secretary of state pursuant to this section and the agency's responses to any written comments. The council may require a representative of an agency whose proposed expedited rulemaking is under examination to attend a council meeting and answer questions. The council may communicate to the agency its comments on the proposed expedited rule making within the scope of subsection A of this section and require the agency to respond to its comments or testimony in writing. A person may submit written comments to the council that are within the scope of subsection A of this section.

H. Before an agency files a notice of final expedited rulemaking with the secretary of state, the council shall approve any proposed expedited rulemaking. The council shall not approve the rule unless:

1. The rule satisfies the criteria for expedited rulemaking pursuant to subsection A of this section.
2. The rule is clear, concise and understandable.
3. The rule is not illegal, inconsistent with legislative intent or beyond the agency's statutory authority.
4. The agency, in writing, adequately addressed the comments on the proposed rule and any supplementary proposal.
5. If applicable, the permitting requirements comply with section 41-1037.
6. The rule is not a substantial change, considered as a whole, from the proposed rule and any supplementary proposal.
7. The rule imposes the least burden and costs to persons regulated by the rule.

I. On receipt of council approval, the agency shall file a notice of final expedited rulemaking with the secretary of state that contains the information and provisions required in subsection B or C of this section and that the agency did receive approval from the council pursuant to this section.

J. The expedited rulemaking becomes effective thirty days following publication of the notice of final expedited rulemaking.

K. An agency may terminate an expedited rulemaking proceeding on approval of the governor and written notice to the president of the senate, the speaker of the house of representatives and the council.

#### 41-1028. Incorporation by reference

A. An agency may incorporate by reference in its rules, and without publishing the incorporated matter in full, all or any part of a code, standard, rule or regulation of an agency of the United States or of this state or a nationally recognized organization or association, if incorporation of its text in agency rules would be unduly cumbersome, expensive or otherwise inexpedient.

B. The reference in the agency rules shall fully identify the incorporated matter by location, date and otherwise and shall state that the rule does not include any later amendments or editions of the incorporated matter.

C. An agency may incorporate by reference such matter in its rules only if the agency, organization or association originally issuing that matter makes copies of it readily available to the public for inspection and reproduction.

D. The rules shall state where copies of the incorporated matter are available from the agency issuing the rule and from the agency of the United States or this state or the organization or association originally issuing the matter.

E. An agency may incorporate later amendments or editions of the incorporated matter only after compliance with the rule making requirements of this chapter.

#### 41-1029. Agency rule making record

A. An agency shall maintain an official rule making record for each rule it proposes by publication in the register of a notice of proposed rule making and each final rule filed in the office of the secretary of state. The record and matter incorporated by reference must be available for public inspection.

B. The agency rule making record shall contain all of the following:

1. A copy of the notice initially filed in the office of the secretary of state.
2. Copies of all publications in the register with respect to the rule or the proceeding on which the rule is based.
3. Copies of any portions of the agency's rule making docket containing entries relating to the rule or the proceeding on which the rule is based.
4. All written petitions, requests, submissions and comments received by the agency and all other written materials considered or prepared by the agency in connection with the rule or the proceeding on which the rule is based.
5. Any official transcript of oral presentations made in the proceeding on which the rule is based, or if not transcribed, any tape recording or stenographic record of those presentations, and any memorandum prepared by a presiding official summarizing the contents of those presentations.

6. A copy of all materials submitted to the council, including the economic, small business and consumer impact statement and the minutes of the council meeting at which the rule was reviewed.
  7. A copy of the final rule and preamble.
  8. Information requested regarding the experience, technical competence, specialized knowledge and judgment of an agency if the agency relies on section 41-1024, subsection D in the making of a rule and a request is made.
- C. On judicial review, the record required by this section constitutes the official agency rule making record with respect to a rule. Except as provided in section 41-1036 or otherwise required by a provision of law, the agency rule making record need not constitute the exclusive basis for agency action on that rule or for judicial review of that rule.

**41-1030. Invalidity of rules not made according to this chapter; prohibited agency action; prohibited acts by state employees; enforcement; notice**

- A. A rule is invalid unless it is made and approved in substantial compliance with sections 41-1021 through 41-1029 and articles 4, 4.1 and 5 of this chapter, unless otherwise provided by law.
- B. An agency shall not base a licensing decision in whole or in part on a licensing requirement or condition that is not specifically authorized by statute, rule or state tribal gaming compact. A general grant of authority in statute does not constitute a basis for imposing a licensing requirement or condition unless a rule is made pursuant to that general grant of authority that specifically authorizes the requirement or condition.
- C. An agency shall not:
1. Make a rule under a specific grant of rulemaking authority that exceeds the subject matter areas listed in the specific statute authorizing the rule.
  2. Make a rule under a general grant of rulemaking authority to supplement a more specific grant of rulemaking authority.
- D. This section may be enforced in a private civil action and relief may be awarded against the state. The court may award reasonable attorney fees, damages and all fees associated with the license application to a party that prevails in an action against the state for a violation of this section.
- E. A state employee may not intentionally or knowingly violate this section. A violation of this section is cause for disciplinary action or dismissal pursuant to the agency's adopted personnel policy.
- F. This section does not abrogate the immunity provided by section 12-820.01 or 12-820.02.
- G. An agency shall prominently print the provisions of subsections B, D, E and F of this section on all license applications, except license applications processed by the corporation commission.
- H. The licensing application may be in either print or electronic format.

**41-1031. Filing rules and preamble with secretary of state; permanent record**

- A. Following the filing of a rule made pursuant to an exemption to this chapter or following approval and filing of a rule and preamble and an economic, small

business and consumer impact statement by the council as provided in article 5 of this chapter or by the attorney general as provided in article 4 of this chapter, the secretary of state shall affix to each rule document, preamble and economic, small business and consumer impact statement the time and date of filing. A rule is not final until the secretary of state affixes the time and date of filing to the rule document as provided in this section.

B. The secretary of state shall keep a permanent record of rules, preambles and economic, small business and consumer impact statements filed with the office.

#### 41-1032. Effective date of rules

A. A rule filed pursuant to section 41-1031 becomes effective sixty days after a certified original and two copies of the rule and preamble are filed in the office of the secretary of state and the time and date are affixed as provided in section 41-1031, unless the rule making agency includes in the preamble information that demonstrates that the rule needs to be effective immediately on filing in the office of the secretary of state and the time and date are affixed as provided in section 41-1031. A rule may only be effective immediately for any of the following reasons:

1. To preserve the public peace, health or safety.
2. To avoid a violation of federal law or regulation or state law, if the need for an immediate effective date is not created due to the agency's delay or inaction.
3. To comply with deadlines in amendments to an agency's governing statute or federal programs, if the need for an immediate effective date is not created due to the agency's delay or inaction.
4. To provide a benefit to the public and a penalty is not associated with a violation of the rule.
5. To adopt a rule that is less stringent than the rule that is currently in effect and that does not have an impact on the public health, safety, welfare or environment, or that does not affect the public involvement and public participation process.

B. Notwithstanding subsection A of this section, a rule making agency may specify an effective date more than sixty days after the filing of the rule in the office of the secretary of state if the agency determines that good cause exists for and the public interest will not be harmed by the later date.

C. This section does not affect the validity of an existing rule until the new or amended rule that is filed with the secretary of state is effective pursuant to this section.

#### 41-1033. Petition for a rule or review of a practice or policy

A. Any person, in a manner and form prescribed by the agency, may petition an agency requesting the making of a final rule or a review of an existing agency practice or substantive policy statement that the petitioner alleges to constitute a rule. The petition shall clearly state the rule, agency practice or substantive policy statement which the person wishes the agency to make or review. Within sixty days after submission of a petition, the agency shall either deny the petition in writing, stating its reasons for denial, initiate rule making proceedings in accordance with this chapter or, if otherwise lawful, make a rule.

B. A person may appeal to the council the agency's final decision within thirty days after the agency gives written notice pursuant to subsection A of this section. The appeal shall be limited to whether an existing agency practice or substantive policy statement constitutes a rule. The council chairperson shall place this appeal on the agenda of the council's next meeting if at least three council members make such a request of the council chairperson within two weeks after the filing of the appeal.

C. If the council receives information indicating that an existing agency practice or substantive policy statement may constitute a rule and at least four council members request the chairperson that the matter be heard in a public meeting:

1. Within ninety days of receipt of the fourth council member request, the council shall determine if the agency practice or substantive policy statement constitutes a rule.

2. Within ten days of receipt of the fourth council member request, the council shall notify the agency that the matter has been or will be placed on an agenda.

3. Within thirty days of receiving notice from the council, the agency shall submit a statement that addresses whether the existing agency practice or substantive policy statement constitutes a rule.

D. For the purposes of subsection C of this section, the council meeting shall not be held until the expiration of the agency response period prescribed in subsection C, paragraph 3 of this subsection.

E. An agency practice or substantive policy statement considered by the council pursuant to this section shall remain in effect while under consideration of the council. If the council ultimately decides the agency practice or statement constitutes a rule, the practice or statement shall be considered void.

F. A decision by the agency pursuant to this section is not subject to judicial review, except that, in addition to the procedure prescribed in this section or in lieu of the procedure prescribed in this section, a person may seek declaratory relief pursuant to section 41-1034.

#### 41-1034. Declaratory judgment

A. Any person who is or may be affected by a rule may obtain a judicial declaration of the validity of the rule by filing an action for declaratory relief in the superior court in Maricopa county in accordance with title 12, chapter 10, article 2.

B. Any person who is or may be affected by an existing agency practice or substantive policy statement that the person alleges to constitute a rule may obtain a judicial declaration on whether the practice or substantive policy statement constitutes a rule by filing an action for declaratory relief in the superior court in Maricopa county in accordance with title 12, chapter 10, article 2.

#### 41-1035. Rules affecting small businesses; reduction of rule impact

If an agency proposes a new rule or an amendment to an existing rule which may have an impact on small businesses, the agency shall consider each of the methods described in this section for reducing the impact of the rule making on small businesses. The agency shall reduce the impact by using one or more of the following methods, if it finds that the methods are legal and feasible in meeting the statutory objectives which are the basis of the proposed rule making:

1. Establish less stringent compliance or reporting requirements in the rule for small businesses.
2. Establish less stringent schedules or deadlines in the rule for compliance or reporting requirements for small businesses.
3. Consolidate or simplify the rule's compliance or reporting requirements for small businesses.
4. Establish performance standards for small businesses to replace design or operational standards in the rule.
5. Exempt small businesses from any or all requirements of the rule.

#### 41-1036. Preamble; justifications for rule making

Only the reasons contained in the preamble may be used by any party as justifications for the making of the rule in any proceeding in which its validity is at issue.

#### 41-1037. General permits; issuance of traditional permit

A. If an agency proposes a new rule or an amendment to an existing rule that requires the issuance of a regulatory permit, license or agency authorization, the agency shall use a general permit if the facilities, activities or practices in the class are substantially similar in nature unless any of the following applies:

1. A general permit is prohibited by federal law.
2. The issuance of an alternative type of permit, license or authorization is specifically authorized by state statute.
3. The issuance of a general permit is not technically feasible or would not meet the applicable statutory requirements.
4. The issuance of a general permit would result in additional regulatory requirements or costs being placed on the permit applicant.
5. The permit, license or authorization is issued pursuant to section 8-126, 8-503, 8-505, 23-504, 36-592, 36-594.01, 36-595, 36-596, 36-596.54, 41-1967.01 or 46-807.
6. The permit, license or authorization is issued pursuant to title V of the clean air act.

B. The agency retains the authority to revoke an applicant's ability to operate under a general permit and to require the applicant to obtain a traditional permit if the applicant is in substantial noncompliance with the applicable requirements for the general permit.

#### 41-1038. Rules; restrictions; affirmative defense; exceptions; definition

A. Notwithstanding any other law, an agency may not adopt any new rule that would increase existing regulatory restraints or burdens on the free exercise of property rights or the freedom to engage in an otherwise lawful business or occupation unless the rule is either of the following:

1. A component of a comprehensive effort to reduce regulatory restraints or burdens.
2. Necessary to implement statutes or required by a final court order or decision.

B. Any person who is subject to a civil or criminal proceeding arising from the enforcement of a rule in violation of subsection A of this section has an affirmative defense to the enforcement action. Any court or administrative body considering or reviewing the defense shall rule on its merits without deference to any legislative, administrative or executive finding concerning the rule. The court or administrative body may award the prevailing party, other than the agency, attorney fees and costs.

C. This section does not apply to rules that either:

1. Govern public employees.
2. Are necessary to protect public health and safety.
3. Are necessary to avoid sanctions that would result from a failure to take rulemaking action pursuant to a court order or federal law.

D. For the purposes of this section, agency does not include any board, commission, department, officer or other administrative unit of this state established under the authority of the constitution of Arizona.

E. For the purposes of this section, "to protect public health and safety" means the immediate need to address or prevent an outbreak of an infectious disease, a disaster or any other catastrophic event.

41-1051. Governor's regulatory review council; membership; terms; compensation; powers

A. The governor's regulatory review council is established consisting of six members who are appointed by the governor pursuant to section 38-211 and who are subject to sections 38-291 and 38-295 and the director of the department of administration or the assistant director of the department of administration who is responsible for administering the council. The director or assistant director is an ex officio member and chairperson of the council. The council shall elect a vice-chairperson to serve as chairperson in the chairperson's absence. The governor shall appoint at least one member who represents the public interest, at least one member who represents the business community, at least one member who is a small business owner, one member from a list of three persons who are not legislators submitted by the president of the senate and one member from a list of three persons who are not legislators submitted by the speaker of the house of representatives. At least one member of the council shall be an attorney licensed to practice law in this state. The governor shall appoint the members of the council for staggered terms of three years. A vacancy occurring during the term of office of any member shall be filled by appointment by the governor for the unexpired portion of the term in the same manner as provided in this section.

B. The council shall meet at least once a month at a time and place set by the chairperson and at other times and places as the chairperson deems necessary.

C. Members of the council are eligible to receive compensation in an amount of two hundred dollars for each day on which the council meets and reimbursement of expenses pursuant to title 38, chapter 4, article 2.

D. The chairperson, subject to chapter 4, article 4 and, as applicable, articles 5 and 6 of this title, shall employ, determine the conditions of employment of and specify the duties of administrative, secretarial and clerical employees as the chairperson deems necessary.

E. The council may make rules pursuant to this chapter to carry out the purposes of this chapter.

F. The council shall make a list of agency rules approved or returned pursuant to sections 41-1027 and 41-1052 and section 41-1056, subsection C for the previous twelve-month period available to the public on request and on the council's website.

#### 41-1052. Council review and approval

A. Before filing a final rule subject to this section with the secretary of state, an agency shall prepare, transmit to the council and the committee and obtain the council's approval of the rule and its preamble and economic, small business and consumer impact statement that meets the requirements of section 41-1055. The office of economic opportunity shall prepare the economic, small business and consumer impact statement.

B. The council shall accept an early review petition of a proposed rule, in whole or in part, if the proposed rule is alleged to violate any of the criteria prescribed in subsection D of this section and if the early petition is filed by a person who would be adversely impacted by the proposed rule. The council may determine whether the proposed rule, in whole or in part, violates any of the criteria prescribed in subsection D of this section.

C. Within one hundred twenty days after receipt of the rule, preamble and economic, small business and consumer impact statement, the council shall review and approve or return, in whole or in part, the rule, preamble or economic, small business and consumer impact statement. An agency may resubmit a rule, preamble or economic, small business and consumer impact statement if the council returns the rule, economic, small business and consumer impact statement or preamble, in whole or in part, to the agency.

D. The council shall not approve the rule unless:

1. The economic, small business and consumer impact statement contains information from the state, data and analysis prescribed by this article.
2. The economic, small business and consumer impact statement is generally accurate.
3. The probable benefits of the rule outweigh within this state the probable costs of the rule and the agency has demonstrated that it has selected the alternative that imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.
4. The rule is written in a manner that is clear, concise and understandable to the general public.
5. The rule is not illegal, inconsistent with legislative intent or beyond the agency's statutory authority.
6. The agency adequately addressed, in writing, the comments on the proposed rule and any supplemental proposals.
7. The rule is not a substantial change, considered as a whole, from the proposed rule and any supplemental notices.
8. The preamble discloses a reference to any study relevant to the rule that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rule.

9. The rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of that federal law.

10. If a rule requires a permit, the permitting requirement complies with section 41-1037.

E. The council shall verify that a rule with new fees does not violate section 41-1008. The council shall not approve a rule that contains a fee increase unless two-thirds of the voting quorum present vote to approve the rule.

F. The council shall verify that a rule with an immediate effective date complies with section 41-1032. The council shall not approve a rule with an immediate effective date unless two-thirds of the voting quorum present vote to approve the rule.

G. If the rule relies on scientific principles or methods, including a study disclosed pursuant to subsection D, paragraph 8 of this section, and a person submits an analysis to the council questioning whether the rule is based on valid scientific or reliable principles or methods, the council shall not approve the rule unless the council determines that the rule is based on valid scientific or reliable principles or methods that are specific and not of a general nature. In making a determination of reliability or validity, the council shall consider the following factors as applicable to the rule:

1. The authors of the study, principle or method have subject matter knowledge, skill, experience, training and expertise.

2. The study, principle or method is based on sufficient facts or data.

3. The study is the product of reliable principles and methods.

4. The study and its conclusions, principles or methods have been tested or subjected to peer reviewed publications.

5. The known or potential error rate of the study, principle or method has been identified along with its basis.

6. The methodology and approach of the study, principle or method are generally accepted in the scientific community.

H. The council may require a representative of an agency whose rule is under examination to attend a council meeting and answer questions. The council may also communicate to the agency its comments on any rule, preamble or economic, small business and consumer impact statement and require the agency to respond to its comments in writing.

I. At any time during the thirty days immediately following receipt of the rule, a person may submit written comments to the council that are within the scope of subsection D, E, F or G of this section. The council may permit testimony at a council meeting within the scope of subsection D, E, F or G of this section.

J. If the agency makes a good faith effort to comply with the requirements prescribed in this article and has explained in writing the methodology used to produce the economic, small business and consumer impact statement, the rule may not be invalidated after it is finalized on the ground that the contents of the economic, small business and consumer impact statement are insufficient or inaccurate or on the ground that the council erroneously approved the rule, except as provided by section 41-1056.01.

K. The absence of comments pursuant to subsection D, E, F or G of this section or article 4.1 of this chapter does not prevent the council from acting pursuant to this section.

L. The council shall review and approve or reject a notice of proposed expedited rule making pursuant to section 41-1027.

**41-1053. Council review of expedited rules**

A. After receipt of the expedited rule package from the agency, the council shall place the expedited rule on its consent agenda for approval unless a member of the council or the committee requests a hearing.

B. If a hearing is requested, the council shall act on the expedited rule pursuant to section 41-1052 or shall remand the expedited rule to the agency for initiation of a rule making pursuant to sections 41-1022, 41-1023 and 41-1024.

C. The council, at any time a proposed expedited rule is pending, may disapprove the expedited rule making and order initiation of a regular rule making pursuant to sections 41-1022, 41-1023 and 41-1024.

**41-1055. Economic, small business and consumer impact statement**

A. The economic, small business and consumer impact summary in the preamble shall include:

1. An identification of the proposed rule making, including all of the following:  
(a) The conduct and its frequency of occurrence that the rule is designed to change.  
(b) The harm resulting from the conduct the rule is designed to change and the likelihood it will continue to occur if the rule is not changed.

(c) The estimated change in frequency of the targeted conduct expected from the rule change.

2. A brief summary of the information included in the economic, small business and consumer impact statement.

3. If the economic, small business and consumer impact summary accompanies a proposed rule or a proposed expedited rule, the name and address of agency employees who may be contacted to submit or request additional data on the information included in the economic, small business and consumer impact statement.

B. The economic, small business and consumer impact statement shall include:

1. An identification of the proposed rule making.

2. An identification of the persons who will be directly affected by, bear the costs of or directly benefit from the proposed rule making.

3. A cost benefit analysis of the following:

(a) The probable costs and benefits to the implementing agency and other agencies directly affected by the implementation and enforcement of the proposed rule making. The probable costs to the implementing agency shall include the number of new full-time employees necessary to implement and enforce the proposed rule.

The preparer of the economic, small business and consumer impact statement shall notify the joint legislative budget committee of the number of new full-time employees necessary to implement and enforce the rule before the rule is approved by the council.

(b) The probable costs and benefits to a political subdivision of this state directly affected by the implementation and enforcement of the proposed rule making.

(c) The probable costs and benefits to businesses directly affected by the proposed rule making, including any anticipated effect on the revenues or payroll expenditures of employers who are subject to the proposed rule making.

4. A general description of the probable impact on private and public employment in businesses, agencies and political subdivisions of this state directly affected by the proposed rule making.

5. A statement of the probable impact of the proposed rule making on small businesses. The statement shall include:

(a) An identification of the small businesses subject to the proposed rule making.

(b) The administrative and other costs required for compliance with the proposed rule making.

(c) A description of the methods prescribed in section 41-1035 that the agency may use to reduce the impact on small businesses, with reasons for the agency's decision to use or not to use each method.

(d) The probable cost and benefit to private persons and consumers who are directly affected by the proposed rule making.

6. A statement of the probable effect on state revenues.

7. A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rule making, including the monetizing of the costs and benefits for each option and providing the rationale for not using nonselected alternatives.

8. A description of any data on which a rule is based with a detailed explanation of how the data was obtained and why the data is acceptable data. An agency advocating that any data is acceptable data has the burden of proving that the data is acceptable. For the purposes of this paragraph, "acceptable data" means empirical, replicable and testable data as evidenced in supporting documentation, statistics, reports, studies or research.

C. If for any reason adequate data are not reasonably available to comply with the requirements of subsection B of this section, the agency shall explain the limitations of the data and the methods that were employed in the attempt to obtain the data and shall characterize the probable impacts in qualitative terms. The absence of adequate data, if explained in accordance with this subsection, shall not be grounds for a legal challenge to the sufficiency of the economic, small business and consumer impact statement.

D. An agency is not required to prepare an economic, small business and consumer impact statement pursuant to this chapter and is not required to file a petition pursuant to subsection E of this section for the following rule makings:

1. Initial making, but not renewal, of an emergency rule pursuant to section 41-1026.

2. Proposed expedited rule making or final expedited rule making.

E. Before filing a proposed rule with the secretary of state, an agency may petition the council for a determination that the agency is not required to file an economic, small business and consumer impact statement. The petition shall demonstrate both of the following:

1. The rule making decreases monitoring, record keeping, costs or reporting burdens on agencies, political subdivisions, businesses or persons.

2. The rule making does not increase monitoring, record keeping, costs or reporting burdens on persons subject to the proposed rule making.

F. The council shall place a petition under subsection E of this section on the agenda of its next meeting if at least four council members make such a request of the council chairperson within two weeks after the filing of the petition.

G. The preamble for a rule making that is exempt pursuant to subsection D or E of this section shall state that the rule making is exempt from the requirements to prepare and file an economic, small business and consumer impact statement.

H. The cost-benefit analysis required by subsection B of this section shall calculate only the costs and benefits that occur in this state.

I. If a person submits an analysis to the agency regarding the rule's impact on the competitiveness of businesses in this state as compared to the competitiveness of businesses in other states, the agency shall consider the analysis.

#### 41-1056. [Review by agency](#)

A. At least once every five years, each agency shall review all of its rules, including rules made pursuant to an exemption from this chapter or any part of this chapter, to determine whether any rule should be amended or repealed. The agency shall prepare and obtain council approval of a written report summarizing its findings, its supporting reasons and any proposed course of action. The report shall contain a certification that the agency is in compliance with section 41-1091. For each rule, the report shall include a concise analysis of all of the following:

1. The rule's effectiveness in achieving its objectives, including a summary of any available data supporting the conclusions reached.

2. Written criticisms of the rule received during the previous five years, including any written analyses submitted to the agency questioning whether the rule is based on valid scientific or reliable principles or methods.

3. Authorization of the rule by existing statutes.

4. Whether the rule is consistent with statutes or other rules made by the agency and current agency enforcement policy.

5. The clarity, conciseness and understandability of the rule.

6. The estimated economic, small business and consumer impact of the rules as compared to the economic, small business and consumer impact statement prepared on the last making of the rules.

7. Any analysis submitted to the agency by another person regarding the rule's impact on this state's business competitiveness as compared to the competitiveness of businesses in other states.

8. If applicable, that the agency completed the previous five-year review process.

9. A determination that the probable benefits of the rule outweigh within this state the probable costs of the rule, and the rule imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.

10. A determination that the rule is not more stringent than a corresponding federal law unless there is statutory authority to exceed the requirements of that federal law.

11. For rules adopted after July 29, 2010 that require the issuance of a regulatory permit, license or agency authorization, whether the rule complies with section 41-1037.

B. An agency may also include as part of the report the text of a proposed expedited rule pursuant to section 41-1027.

C. The council shall schedule the periodic review of each agency's rules and shall approve or return, in whole or in part, the agency's report on its review. The council may grant an agency an extension from filing an agency's report. If the council returns an agency's report, in whole or in part, the council shall inform the agency of the manner in which its report is inadequate and, in consultation with the agency, shall schedule submission of a revised report. The council shall not approve a report unless the report complies with subsection A of this section.

D. The council may review rules outside of the five-year review process if requested by at least four council members.

E. The council may require the agency to propose an amendment or repeal of the rule by a date no earlier than six months after the date of the meeting at which the council considers the agency's report on its rule if the council determines the agency's analysis under subsection A of this section demonstrates that the rule is materially flawed, including that the rule:

1. Is not authorized by statute.
2. Is inconsistent with other statutes, rules or agency enforcement policies and the inconsistency results in a significant burden on the regulated public.
3. Imposes probable costs, including costs to the regulated person, that significantly exceed the probable benefits of the rule within this state.
4. Is more stringent than a corresponding federal law and there is no statutory authority to exceed the requirements of federal law.
5. Is not clear, concise and understandable.
6. Does not use general permits if required under section 41-1037.
7. Does not impose the least burden to persons regulated by the rule as necessary to achieve the underlying regulatory objective of the rule.
8. Does not rely on valid scientific or reliable principles and methods, including a study, if the rule relies on scientific principles or methods, and a person has submitted an analysis under subsection A of this section questioning whether the rule is based on valid scientific or reliable principles or methods. In making a determination of validity or reliability, the council shall consider the factors listed in section 41-1052, subsection G.

F. An agency may request an extension of no longer than one year from the date specified by the council pursuant to subsection E of this section by sending a written request to the council that:

1. Identifies the reason for the extension request.
2. Demonstrates good cause for the extension.

G. The agency shall notify the council of an amendment or repeal of a rule for which the council has set an expiration date under subsection E of this section. If the agency does not amend or repeal the rule by the date specified by the council under subsection E of this section or the extended date under subsection F of this section, the rule automatically expires. The council shall file a notice of rule expiration with the secretary of state and notify the agency of the expiration of the rule.

H. The council may reschedule a report or portion of a report for any rule that is scheduled for review and that was initially made or substantially revised within two years before the due date of the report as scheduled by the council.

- I. If an agency finds that it cannot provide the written report to the council by the date it is due, the agency may file an extension with the council before the due date indicating the reason for the extension. The timely filing for an extension permits the agency to submit its report on or before the date prescribed by the council.
- J. If an agency fails to submit its report, including a revised report, pursuant to subsection A or C of this section, or file an extension before the due date of the report or if it files an extension and does not submit its report within the extension period, the rules scheduled for review expire and the council shall:
1. Cause a notice to be published in the next register that states the rules have expired and are no longer enforceable.
  2. Notify the secretary of state that the rules have expired and that the rules are to be removed from the code.
  3. Notify the agency that the rules have expired and are no longer enforceable.
- K. If a rule expires as provided in subsection J of this section and the agency wishes to reestablish the rule, the agency shall comply with the requirements of this chapter.
- L. Not less than ninety days before the due date of a report, the council shall send a written notice to the head of the agency whose report is due. The notice shall list the rules to be reviewed and the date the report is due.
- M. A person who is regulated or could be regulated by an obsolete rule may petition the council to require an agency that has the obsolete rule to consider including the rule in the five-year report with a recommendation for repeal of the rule.
- N. A person who is required to obtain or could be required to obtain a license may petition the council to require an agency to consider including a recommendation for reducing a licensing time frame in the five-year report.

#### 41-1056.01. Impact statements: appeals

- A. Within two years after a rule is finalized, a person who is or may be affected by the rule may file a written petition with an agency objecting to all or part of a rule on any of the following grounds:
1. The actual economic, small business or consumer impact significantly exceeded the impact estimated in the economic, small business and consumer impact statement submitted during the making of the rule.
  2. The actual economic, small business or consumer impact was not estimated in the economic, small business and consumer impact statement submitted during the making of the rule and that actual impact imposes a significant burden on persons subject to the rule.
  3. The agency did not select the alternative that imposes the least burden and costs to persons regulated by the rule, including paperwork and other compliance costs, necessary to achieve the underlying regulatory objective.
- B. The burden of proof is on the petitioner to show that any of the provisions set forth in subsection A of this section are met.
- C. Within thirty days after receiving the copy of the petition, the agency shall reevaluate the rule and its economic impacts and publish notice of the petition in the register. For at least thirty days after publication of the notice the agency shall afford persons the opportunity to submit in writing statements, arguments, data and views on the rule and its impacts. Within thirty days after the close of

comment, the agency shall publish a written summary of comments received, the agency's response to those comments, and the final decision of the agency on whether to initiate a rule making or to amend or repeal the rule. The agency shall initiate any such rule making within forty-five days after publication of its final decision.

D. Any person who is or may be affected by the agency's final decision on whether to initiate a rule making pursuant to subsection C of this section may appeal that decision to the council within thirty days after publication of the agency's final decision.

E. The council shall place on its agenda the appeal if at least three council members make such a request of the council chairman within two weeks after the filing of the appeal with the council.

F. If the appeal is placed on the council's agenda, the council chairman shall provide a copy of the appeal and written notice to the agency that the council will consider the appeal. The agency shall provide the council with a copy of the written summary described in subsection C of this section.

G. The council shall require an agency to promptly initiate a rule making or to amend or repeal the rule or the rule package, as prescribed by section 41-1024, subsection E, objected to in the petition if the council finds that any of the provisions set forth in subsection A of this section are met.

H. This section shall not apply to a rule for which there is a final judgment of a court of competent jurisdiction based on the grounds of whether the contents of the economic, small business and consumer impact statement were insufficient or inaccurate.

#### 41-1057. Exemptions

A. In addition to the exemptions stated in section 41-1005, this article does not apply to:

1. An agency which is a unit of state government headed by a single elected official.
2. The corporation commission, which shall adopt substantially similar rule review procedures, including the preparation of an economic impact statement and a statement of the effect of the rule on small business.
3. The industrial commission of Arizona when incorporating by reference the federal occupational safety and health standards as published in 29 Code of Federal Regulations parts 1904, 1910, 1926 and 1928.
4. The Arizona state lottery if making rules that relate only to the design, operation or prize structure of a lottery game.

B. An agency exempt under subsection A of this section may elect to follow the requirements of this article instead of section 41-1044 for a particular rule making. The agency shall include with a final rule making filed with council a statement that the agency has elected to follow the requirements of this article.

**ARIZONA STATE BOARD OF COSMETOLOGY (R-16-1102)**

Title 4, Chapter 10, Article 1, General Provisions

**Amend:** R4-10-108



**GOVERNOR'S REGULATORY REVIEW COUNCIL  
M E M O R A N D U M**

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**MEETING DATE:** November 1, 2016

**AGENDA ITEM:** E-2

**TO:** Members of the Governor's Regulatory Review Council ("Council")

**FROM:** Chris Kleminich, Staff Attorney

**DATE:** October 14, 2016

**SUBJECT: ARIZONA STATE BOARD OF COSMETOLOGY (R-16-1102)**  
Title 4, Chapter 10, Article 1, General Provisions

Amend: R4-10-108

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The purpose of the Arizona State Board of Cosmetology (Board) is to "ensure that the public is protected from the incompetent practice of cosmetology by establishing minimum qualifications for entry into the profession and swift and effective discipline for those practitioners who violate cosmetology statutes or rules adopted pursuant to those statutes." Laws 2014, Ch. 247, § 12. This rulemaking seeks to amend one rule related to licensing examinations.

**Proposed Action**

The Board is making a number of technical and clarifying changes to its rules in accordance with a five-year-review report approved by the Council in August 2016. For example, the heading for the rule is being amended to be more complete, as much of the rule deals with pre-screening review of examination qualifications. Also, Section 108(A) incorrectly references Board approval to take an examination, as the taking and passing of an examination is part of the substantive review of an application for licensure, not a separate approval. In addition, Section 108(E) indicates that the Board shall notify applicants of the time and place for examination, but this is actually done by Professional Credential Services (PCS), the Board's contacted provider for written examinations.

The Board is making one substantive change to the rules by allowing for written licensing examinations to be offered in languages other than English. Currently, both the written and practical sections of the Board's licensing examinations require answers to be submitted in English. While the practical section of the licensing examinations will continue to be conducted in English only, the written section will be conducted in any language made available by PCS. The Board indicates that PCS currently offers written examinations in English, Spanish, Korean, and Vietnamese.

## **Exemption or Request and Approval for Exception from the Moratorium**

The Board received an exception from the moratorium on May 16, 2016.

### **Substantive or Procedural Concerns**

None.

**1. Are the rules legal, consistent with legislative intent, and within the agency's statutory authority?**

Yes. The Board cites to A.R.S. § 32-504(A)(1) as general authority for the rule, under which the Board must “[a]dopt rules that are necessary and proper for the administration of this chapter [Title 32, Chapter 5, Cosmetology], including sanitary and safety requirements for salons and schools and sanitary and safety standards for the practice of cosmetology, aesthetics and nail technology.” In addition, A.R.S. § 32-504(A)(3) requires the Board to “[e]ither prepare, administer and grade practical and written examinations or contract with a national professional organization for cosmetology selected by the board to prepare, administer and grade practical and written examinations.”

**2. Are the rules written in a manner that is clear, concise, and understandable to the general public?**

Yes. The rule is generally clear, concise, and understandable.

**3. Does the agency adequately address the comments on the proposed rules and any supplemental proposals?**

Yes. The Board indicates that it received no written comments about the rulemaking, and no one attended the oral proceeding held on September 12, 2016.

**4. Are the final rules a substantial change, considered as a whole, from the proposed rules and any supplemental proposals?**

No. The Board indicates that only non-substantive changes were made between the proposed and final rule.

**5. Does the preamble disclose a reference to any study relevant to the rules that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rules?**

No. The Board indicates that it did not review or rely on a study in its evaluation of or justification for this rulemaking.

**6. Are the rules more stringent than corresponding federal law and, if so, is there statutory authority that allows the agency to exceed the requirements of federal law?**

No. The Board indicates that no federal laws are directly applicable to the rule.

**7. Do the rules require a permit or license and if so, does the agency use a general permit or is any exception applicable under A.R.S. § 41-1037?**

No. While the rule relates to the Board's issuance of licenses, the rule does not require a license. The Board does indicate in its August 2016 five-year-review report that it complies with A.R.S. § 41-1037 because its licenses are issued to qualified individuals or entities to conduct activities that are substantially similar in nature.

**8. Do the rules establish a new fee or contain a fee increase?**

No. The rule does not establish a new fee or contain a fee increase.

**9. Conclusion**

The Board requests an immediate effective date for the rule under A.R.S. § 41-1032(A)(4), as the Board believes that the rule provides a benefit to the public and a penalty is not associated with a violation of the rule. This analyst recommends approval of the rule.



**GOVERNOR'S REGULATORY REVIEW COUNCIL  
M E M O R A N D U M**

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**MEETING DATE:** November 1, 2016

**AGENDA ITEM:** E-2

**TO:** Members of the Governor's Regulatory Review Council ("Council")

**FROM:** GRCC Economic Team

**DATE:** October 14, 2016

**SUBJECT: ARIZONA STATE BOARD OF COSMETOLOGY (R-16-1102)**  
Title 4, Chapter 10, Article 1, General Provisions

Amend: R4-10-108

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I have reviewed the economic, small business, and consumer impact statement (EIS) and make the following comments.

**GRRC Economist comments:**

The Board currently licenses 1,329 instructors, 42,101 cosmetologists, 13,794 nail technicians, and 10,758 aestheticians. In the last fiscal year, 2,910 applicants took the required written licensing exam; the exam had a 94% pass rate.

**1. Costs and Benefits for:**

**a. The implementing Board:**

The Board does not report any additional costs due to this rulemaking. The rulemaking allows for greater flexibility for allowing the licensing exams to be given in more languages, as available by the testing company.

**b. Political subdivisions:**

The Board does not report any impact on political subdivisions.

**c. Businesses:**

The Board reports no costs to businesses due to this rulemaking.

**d. Small businesses:**

The Board does not report any costs for small businesses, which it defines as including cosmetologists, aestheticians, nail technicians, and instructors. There is potential benefit in allowing more people to test for licenses and start businesses by removing an occupational barrier to entry.

**e. Consumers directly affected by the rulemaking:**

Reported Cost: No costs to consumers directly affected by the rulemaking were reported.

Reported Benefit: The Board indicates that the rulemaking will remove an unnecessary barrier to entry into a profession, which will have an impact on private employment.

**2. Do the probable benefits outweigh the probable costs?**

Based on the information provided, the EIS indicates that the probable benefits outweigh the probable costs.

**3. Analysis of methods to reduce the small business impact:**

No analysis of methods to reduce the small business impact was reported.

**4. The probable effect on state revenues:**

The Board does not report any probable effect on state revenue.

**5. Analysis of any less intrusive or less costly alternative methods:**

No less intrusive or less costly alternative methods were considered by the Board.

**6. Whether an analysis was submitted to the Board regarding the rule's impact on the competitiveness of businesses in this state as compared to the competitiveness of businesses in other states:**

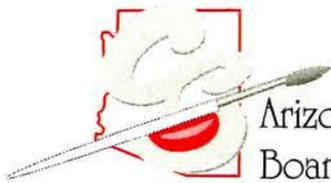
No analysis regarding the rule's impact on competitiveness was submitted.

**7. A description of any data on which a rule is based with an explanation of how the data was obtained and why the data is acceptable data, and the methods used by the Board to evaluate the costs and benefits in the EIS.**

No significant data was used to evaluate the costs and benefits in the EIS. The rule was based on general understanding that removing language barriers for employment could result in more people being able to gain employment in the field.

**8. Conclusion:**

The submitted economic, small business and consumer impact statement contains the information required for compliance with A.R.S. §§ 41-1035, 41-1052(D)(1-3), and 41-1055. The EIS indicates that probable benefits will outweigh the probable costs, and reduce potential barriers to employment in the state.



Arizona State  
Board of Cosmetology

Donna Aune, Executive Director

1721 East Broadway • Tempe, AZ 85282  
Phone 480.784.4539 • Fax 480.784.4962  
www.azboc.gov

September 13, 2016

Ms. Nicole A. Ong, Chair  
The Governor's Regulatory Review Council  
100 North 15th Avenue, Ste. 402  
Phoenix, AZ 85007

**Re: A.A.C. Title 4. Professions and Occupations  
Chapter 10. Board of Cosmetology**



Dear Ms. Ong:

The attached final rule package is submitted for review and approval by the Council. The following information is provided for Council's use in reviewing the rule package:

- A. Close of record date: The rulemaking record was closed on September 12, 2016, following a period for public comment and an oral proceeding. This rule package is being submitted within the 120 days provided by A.R.S. § 41-1024(B).
- B. Relation of the rulemaking to a five-year-review report: The rulemaking relates, in part, to a five-year-review report approved by the Council on August 2, 2016.
- C. New fee: The rulemaking does not establish a new fee.
- D. Fee increase: The rulemaking does not increase an existing fee.
- E. Immediate effective date: The Board respectfully requests an immediate effective date under A.R.S. § 41-1032(A)(4) because the rule in this rulemaking provides a benefit to the public by removing an unnecessarily burdensome regulatory requirement that restrains entry into an occupation and a penalty is not associated with violation of the rule.
- F. Certification regarding studies: I certify that the preamble accurately discloses that the Board did not review or rely on a study in its evaluation of or justification for the rule in this rulemaking.
- G. Certification that the preparer of the EIS notified the JLBC of the number of new full-time employees necessary to implement and enforce the rule: I certify that the rule in this rulemaking will not require a state agency to employ a new full-time employee. No notification was provided to JLBC.

H. List of documents enclosed:

1. Cover letter signed by the Executive Director;
2. Notice of Final Rulemaking including the preamble, table of contents, and rule text;
3. Economic, Small Business, and Consumer Impact Statement

Sincerely,

A handwritten signature in blue ink that reads "Donna Aune". The signature is written in a cursive style with a large, looped initial "D".

Donna Aune  
Executive Director

NOTICE OF FINAL RULEMAKING  
TITLE 4. PROFESSIONS AND OCCUPATIONS  
CHAPTER 10. BOARD OF COSMETOLOGY  
PREAMBLE

**1. Articles, Parts, and Sections Affected**

R4-10-108

**Rulemaking Action**

Amend

**2. Citations to the agency's statutory rulemaking authority to include both the authorizing statute (general) and the implementing statute (specific):**

Authorizing statute: A.R.S. § 32-504(A)(1)

Implementing statute: A.R.S. §§ 32-504(A)(3) and 32-514

**3. The effective date for the rules:**

The Board respectfully requests an immediate effective date under A.R.S. § 41-1032(A)(4).

**a. If the agency selected a date earlier than the 60-day effective date as specified in A.R.S. § 41-1032(A), include the earlier date and state the reason or reasons the agency selected the earlier effective date as provided in A.R.S. § 41-1032(A)(1) through (5):**

An immediate effective date under A.R.S. § 41-1032(A)(4) is appropriate because the rule in this rulemaking provides a benefit to the public by removing an unnecessarily burdensome regulatory requirement that restrains entry into an occupation and a penalty is not associated with violation of the rule.

**b. If the agency selected a date later than the 60-day effective date as specified in A.R.S. § 41-1032(A), include the later date and state the reason or reasons the agency selected the later effective date as provided in A.R.S. § 41-1032(B):**

Not applicable

**4. Citation to all related notices published in the Register to include the Register as specified in R1-1-409(A) that pertain to the record of the final rulemaking package:**

Notice of Rulemaking Docket Opening: 22A.A.R. 1611, June 17, 2016

Notice of Proposed Rulemaking: 22A.A.R. 1941, July 29, 2016

**5. The agency's contact person who can answer questions about the rulemaking:**

Name: Donna Aune

Address: 1721 E. Broadway

Tempe, AZ 85282-1611

Telephone: (480) 784-4539

Fax: (480) 784-4962

E-mail: daune@azboc.gov

Web site: www.azboc.gov

**6. An agency's justification and reason why a rule should be made, amended, repealed , or renumbered, to include an explanation about the rulemaking:**

The Board currently contracts with Professional Credential Services, Inc. (PCS) to administer and grade the Board's licensing examinations. PCS offers written cosmetology licensing examinations in English, Spanish, Korean, and Vietnamese. This rulemaking allows the written licensing examination to be offered in Arizona in all available languages. The rulemaking also relates, in part, to a 5YRR approved by the Council on August 2, 2016.

An exemption from EO2016-03 was provided for this rulemaking by Christina Corieri, Policy Advisor for Health and Human Services in the Governor's office, in an email dated May 16, 2016.

**7. A reference to any study relevant to the rule that the agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

The Board did not review or rely on a study in its evaluation of or justification for the rule in this rulemaking.

**8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable

**9. A summary of the economic, small business, and consumer impact:**

This rulemaking may make it easier for individuals who are more fluent in Spanish, Korean, or Vietnamese than English to pass the written licensing examination and obtain a license. This will have a positive economic benefit for these individuals. The Board incurred the cost of doing this rulemaking.

**10. A description of any changes between the proposed rulemaking, including supplemental notices, and the final rulemaking:**

Only minor, non-substantive changes were made between the proposed and final rules.

**11. An agency's summary of the public or stakeholder comments made about the rulemaking and the agency response to comments:**

The Board received no written comments about the rulemaking. No one attended the oral proceeding on September 12, 2016.

**12. All agencies shall list any other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:**

None

**a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:**

The rule does not require a permit.

**b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:**

There is no federal law directly applicable to examination of cosmetology applicants.

**c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:**

No analysis was submitted.

**13. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rule:**

None

**14. Whether the rule was previously made, amended, or repealed as an emergency rule. If so, cite the notice published in the Register as specified in R1-1-409(A). Also, the agency shall state where the text was changed between the emergency and the final rulemaking packages:**

The rule was not previously made, amended, or repealed as an emergency rule.

**15. The full text of the rules follows:**

**TITLE 4. PROFESSIONS AND OCCUPATIONS**  
**CHAPTER 10. BOARD OF COSMETOLOGY**  
**ARTICLE 1. GENERAL PROVISIONS**

Section

R4-10-108. Pre-screening Review; Licensing Examinations Examination

## ARTICLE 1. GENERAL PROVISIONS

### **R4-10-108. Pre-screening Review; Licensing Examinations Examination**

- A.** ~~The~~ A student planning to apply to the Board for licensure may, but is not required to, request that the Board may complete a pre-screening review of examination qualifications, if requested, whether the student is qualified to take the licensing examination. before the student graduates from a school, but the Board shall not approve the examination application until the The student may request the pre-screening review before the student graduates from a school licensed by the Board but the student shall not be issued an examination date until the student has completed a minimum of:
1. 1450 hours of cosmetology training,
  2. 500 hours of aesthetics or nail technician training,
  3. 550 hours of cosmetology instructor training,
  4. 400 hours for aesthetics instructor training, or
  5. 250 hours of nail technician instructor training.
- B.** After the Board completes the pre-screening review and determines the student has completed the number of hours specified in subsection (A), an applicant may receive the Board or national professional organization with which the Board contracts to administer the licensing examination shall issue an examination date, to the student. but the applicant is However, the Board shall not allowed in allow the student to take the examination site until the applicant student applies for licensure and provides a certification of graduation to the Board.
- C.** ~~If the applicant~~ a student who has been issued an examination date fails to apply for licensure and provide a certification of graduation by the date set for the examination date or the applicant does not fails to appear at the examination site at the scheduled examination time, the applicant forfeits the examination fee is forfeited.
- D.** A request for a pre-screening review is not a substitute for an official agency acceptance or issuance of a license an application for licensure and does not guarantee the Board will issue a license.
- C.** ~~If the applicant does not request an examination pre-screening review, the Board shall not consider an examination application until the applicant has received the hours required for graduation and has graduated from a school licensed by the Board.~~
- D.E.** ~~All examinations shall be held in the Board's examination center at the Board's office unless another location is designated by the Board in its written notice to the applicant. The Board or national professional organization with which the Board contracts to administer the licensing examination shall provide written notice to an applicant of the date, time, and location for the examination.~~
- E.** ~~The Board shall notify applicants in writing of the time and place assigned for the examination.~~

- F.** An applicant shall provide photographic identification upon entering the examination ~~center~~ site. ~~Acceptable forms of identification include United States issued~~ The following U.S.-issued forms of identification are acceptable: passport, driver license, bank identification card, military identification, or other government-issued identification card. Identification shall contain a photograph of the applicant.
- G.** ~~An~~ The licensing examination shall consist ~~consist~~ consists of both a written and practical ~~sections~~ section, and ~~the practical sections~~ An applicant shall include perform a live demonstration ~~demonstrations~~ demonstration on a model as follows: during the practical section of the licensing examination. During the live demonstration, the applicant shall:
1. ~~An applicant shall perform a cosmetology or nail technology demonstration on a mannequin,~~ Provide the model required for the demonstration. If the applicant provides a live model for the demonstration, the live model shall not be a current or former student of aesthetics, cosmetology, or nail technology or a current or former licensee;
  2. ~~An applicant shall perform a demonstration for an aesthetics examination on a person, and~~ Provide all equipment, supplies, tools, or instruments required for the demonstration; and
  3. ~~An applicant shall perform demonstrations for an instructor examination on a person for an aesthetics class or a mannequin for a cosmetology or nail technology class.~~ Comply with all infection control and safety standards specified in R4-10-112, including those regarding blood spills. If an applicant fails to follow proper blood-spill procedures during the demonstration, the examination administrator shall dismiss the applicant from the examination and cause the examination fee to be forfeited.
- H.** ~~An applicant shall comply with all infection control and safety standards required by R4 10 112 during the examination.~~
- ~~I.H.~~** ~~An~~ If an applicant who cannot ~~fails to~~ appear for an a licensing examination as scheduled, ~~shall forfeit the applicant forfeits~~ the examination fee. An ~~If an applicant who~~ arrives at an examination site after a the scheduled examination begins, ~~the examination administrator shall not be allowed to test at the scheduled time~~ allow the applicant to take the examination. If an An applicant arrives after the examination begins or fails to appear for a scheduled examination, the Board shall may reschedule the a missed examination upon payment of by paying another examination fee.
- I.** ~~The~~ An ~~applicant is allowed a one time cancellation of the~~ may cancel a scheduled examination test date if the applicant cancels once by providing notice of cancellation at least 48 hours before the examination start time. The Board does not require another examination fee ~~for rescheduling to reschedule~~ a canceled examination.
- J.** ~~An applicant shall supply equipment, supplies, tools or instruments, and a model as required.~~

~~K.~~ An applicant shall not use a current or former student in an aesthetics, cosmetology, or nail technology school as a model in the live demonstration of aesthetics or instructor examinations.

~~L.J.~~ Examination Neither the Board nor the examination administrator shall make examination materials ~~are not~~ available for inspection or copying by any person, ~~nor shall any~~ A person shall not attempt to obtain or provide examination materials.

~~M.K.~~ The ~~An~~ applicant shall not bring and the examination administrator shall not allow written material or recording media ~~in to~~ either the written or practical ~~sections~~ section of the licensing examination ~~for aestheticians, cosmetologists, or nail technicians~~. The examination administrator may exclude ~~other items~~ from the written or practical ~~sections~~ section of the licensing examination any items the examination administrator believes that may impede the fair administration or security of the examination. ~~An~~ The examination administrator shall dismiss from the examination an applicant who seeks to impede the fair administration of ~~an exam~~ the examination, or copies or asks for information from another applicant ~~shall be dismissed from the examination and shall forfeit~~ and cause the examination fee to be forfeited. ~~An applicant who has a blood spill that is not treated following proper blood spill procedures in R4 10 112 shall be dismissed from the examination and shall forfeit the examination fee.~~

~~N.L.~~ If an applicant passes the examination but ~~does not apply for an original license~~ fails to complete the licensure process within one year after the date of the examination, the Board shall void the examination scores.

~~O.M.~~ If application is made for licensure by reciprocity, the Board ~~may~~ shall accept a score on a written or practical examination from another jurisdiction if the examination:

1. Is the same national examination ~~as that~~ administered in Arizona,
2. The score obtained by the applicant is at least the same as the passing score ~~that was~~ required by the Board at the time the applicant took the examination in the other jurisdiction, and
3. The applicant provides the Board with documentation from the other jurisdiction verifying the passing score and that the score was received within one year ~~of~~ before the application for licensure by reciprocity.

~~P.N.~~ The Board or national professional organization with which the Board contracts to administer the licensing examination shall conduct:

1. ~~all examinations~~ The practical section of the licensing examination in English and ~~applicants~~ an applicant shall submit answers in English;
2. The written section of the licensing examination in English and other languages specified by the national professional organization. An applicant may choose to take the written section of the licensing examination in any of the offered languages.

# ECONOMIC, SMALL BUSINESS, AND CONSUMER IMPACT STATEMENT<sup>1</sup>

## TITLE 4. PROFESSIONS AND OCCUPATIONS

### CHAPTER 10. BOARD OF COSMETOLOGY

#### 1. Identification of the rulemaking:

The Board currently contracts with Professional Credential Services, Inc. (PCS) to administer and grade the Board's licensing examinations. PCS offers written cosmetology examinations in English, Spanish, Korean, and Vietnamese. This rulemaking allows the written licensing examination to be offered in Arizona in all available languages.

##### a. The conduct and its frequency of occurrence that the rule is designed to change:

Until the rulemaking is completed, an applicant for a license offered by the Board will be required to take a written licensing examination in English, which may not be the first language of the applicant. This requirement is burdensome for an applicant for whom English is not a first language and is unnecessary because PCS, with which the Board contracts to administer and grade licensing examinations, offers written cosmetology licensing examinations in English, Spanish, Korean, and Vietnamese.

##### b. The harm resulting from the conduct the rule is designed to change and the likelihood it will continue to occur if the rule is not changed:

The current rule, which requires all applicants for a license offered by the Board to take a written licensing examination in English, is unnecessarily burdensome for applicants for whom English is not a first language and imposes a barrier to entry into an occupation.

##### c. The estimated change in frequency of the targeted conduct expected from the rule change:

When the rulemaking is completed, applicants for a license offered by the Board will have a choice regarding the language in which to take the written licensing examination.

#### 2. A brief summary of the information included in the economic, small business, and consumer impact statement:

This rulemaking may make it easier for individuals who are more fluent in Spanish, Korean, or Vietnamese than English to pass the written licensing examination and obtain a license.

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<sup>1</sup> If adequate data are not reasonably available, the agency shall explain the limitations of the data, the methods used in an attempt to obtain the data, and characterize the probable impacts in qualitative terms. (A.R.S. § 41-1055(C)).

This will have a positive economic benefit for these individuals. The Board incurred the cost of doing this rulemaking.

3. The person to contact to submit or request additional data on the information included in the economic, small business, and consumer impact statement:

Name: Donna Aune

Address: 1721 E. Broadway  
Tempe, AZ 85282-1611

Telephone: (480) 784-4539

Fax: (480) 784-4962

E-mail: daune@azboc.gov

Web site: www.azboc.gov

4. Persons who will be directly affected by, bear the costs of, or directly benefit from the rulemaking:

Applicants for licensure as a cosmetologist, aesthetician, nail technician, or instructor will be directly affected by and directly benefit from the rulemaking. The Board will be directly affected by, bear the costs of, and directly benefit from the rulemaking.

The Board currently licenses 1,329 instructors, 42,101 cosmetologists, 13,794 nail technicians, and 10,758 aestheticians. During the last fiscal year, 2,910 applicants took the required written licensing examination. Ninety-four percent of those who took the written licensing examination passed on first taking. The Board does not know how many of those who failed might have benefitted from being able to take the examination in Spanish, Korean, or Vietnamese rather than English but the lowest pass rate (88 percent) was obtained by applicants for a nail technician license. Nationally, 42 percent of nail technicians are Asian and 39 percent of these are Vietnamese.<sup>2</sup> This suggests the lower pass rate may be the result of the language barrier this rulemaking is designed to remove. Because the cost to take the written licensing examination is the same regardless of the language in which the examination is taken, the rulemaking will have no cost for applicants.

The Board does not keep records regarding the number of students who request pre-screening. However, it is estimated that only about 60 to 80 take advantage of this service annually.

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<sup>2</sup> Danger at Their Fingertips by Archana Pyati and Jhee Yoon, Asian Fortune News, March 25, 2015, [www.asianfortunenews.com/article\\_0113.php?article\\_id=46](http://www.asianfortunenews.com/article_0113.php?article_id=46)

The Board incurred the cost of completing the rulemaking and will incur minimal cost in working with PCS to ensure the written licensing examination is available in not only English but also Spanish, Korean, and Vietnamese.

5. Cost-benefit analysis:

- a. Costs and benefits to state agencies directly affected by the rulemaking including the number of new full-time employees at the implementing agency required to implement and enforce the proposed rule:

The Board is the only state agency directly affected by the rulemaking.

- b. Costs and benefits to political subdivisions directly affected by the rulemaking:

No political subdivision is directly affected by the rulemaking.

- c. Costs and benefits to businesses directly affected by the rulemaking:

Applicants for licensure as a cosmetologist, aesthetician, nail technologist, or instructor are potential businesses directly affected by the rulemaking. The rulemaking will have no cost for them other than the current cost of taking a written licensing examination.

6. Impact on private and public employment:

The Board believes the rulemaking will remove an unnecessary barrier to entry into a profession. This will have an impact on private employment for those for whom the barrier is removed.

7. Impact on small businesses<sup>3</sup>:

- a. Identification of the small business subject to the rulemaking:

Cosmetologists, aestheticians, nail technologists, and instructors are businesses directly affected by the rulemaking.

- b. Administrative and other costs required for compliance with the rulemaking:

As required by statute (See A.R.S. § 32-514), applicants for licensure currently are required to take a licensing examination. Because the rulemaking simply makes the written licensing examination available in multiple languages, there is no cost for compliance with this rulemaking.

- c. Description of methods that may be used to reduce the impact on small businesses:

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<sup>3</sup> Small business has the meaning specified in A.R.S. § 41-1001(21).

The entire rulemaking is designed to reduce a language barrier for entry into a profession by small businesses.

8. Cost and benefit to private persons and consumers who are directly affected by the rulemaking:

Private persons and consumers are not directly affected by the rulemaking.

9. Probable effects on state revenues:

There will be no effect on state revenues unless removing the language barrier increases the number of individuals able to obtain a license from the Board.

10. Less intrusive or less costly alternative methods considered:

No less intrusive or less costly alternative method was considered. If PCS offers the written licensing examination in additional languages in the future, the rule is written to allow those languages in Arizona.

The alternative, continuing to require the written licensing examination in English, is unnecessarily burdensome and restrains entry into an occupation.

Board of Cosmetology

**R4-10-108. Licensing Examinations**

- A. The Board may complete a pre-screening review of examination qualifications, if requested, before the student graduates from a school, but the Board shall not approve the examination application until the student has completed a minimum of:
  - 1. 1450 hours of cosmetology training,
  - 2. 500 hours of aesthetics or nail technician training,
  - 3. 550 hours of cosmetology instructor training,
  - 4. 400 hours for aesthetics instructor training, or
  - 5. 250 hours of nail technician instructor training.
- B. After the Board completes the pre-screening, an applicant may receive an examination date, but the applicant is not allowed in the examination site until the applicant provides a certification of graduation. If the applicant fails to provide a certification of graduation by the date set for the examination or the applicant does not appear at the examination site at the scheduled examination time, the applicant forfeits the examination fee. A pre-screening review is not a substitute for an official agency acceptance or issuance of a license.
- C. If the applicant does not request an examination pre-screening review, the Board shall not consider an examination application until the applicant has received the hours required for graduation and has graduated from a school licensed by the Board.
- D. All examinations shall be held in the Board's examination center at the Board's office unless another location is designated by the Board in its written notice to the applicant.
- E. The Board shall notify applicants in writing of the time and place assigned for the examination.
- F. An applicant shall provide identification upon entering the examination center. Acceptable forms of identification include United States issued: passport, driver license, bank identification card, military identification, or government-issued identification card. Identification shall contain a photograph of the applicant.
- G. An examination shall consist of both written and practical sections and the practical sections shall include live demonstrations on a model as follows:
  - 1. An applicant shall perform a cosmetology or nail technology demonstration on a mannequin,
  - 2. An applicant shall perform a demonstration for an aesthetics examination on a person, and
  - 3. An applicant shall perform demonstrations for an instructor examination on a person for an aesthetics class or a mannequin for a cosmetology or nail technology class.
- H. An applicant shall comply with all infection control and safety standards required by R4-10-112 during the examination.
- I. An applicant who cannot appear for an examination as scheduled shall forfeit the examination fee. An applicant who arrives at an examination site after a scheduled examination begins shall not be allowed to test at the scheduled time. If an applicant arrives after the examination begins or fails to appear for a scheduled examination, the Board shall reschedule the examination upon payment of another examination fee. The applicant is allowed a one time cancellation of the examination test date if the applicant cancels at least 48 hours before the examination start time. The Board does not require another examination fee for rescheduling a canceled examination.
- J. An applicant shall supply equipment, supplies, tools or instruments, and a model as required.
- K. An applicant shall not use a current or former student in an aesthetics, cosmetology, or nail technology school as a model in the live demonstration of aesthetics or instructor examinations.
- L. Examination materials are not available for inspection or copying by any person nor shall any person attempt to obtain or provide examination materials.
- M. The applicant shall not bring and the examination administrator shall not allow written material or recording media in either the written or practical sections of the examination for aestheticians, cosmetologists, or nail technicians. The examination administrator may exclude other items from the written or practical sections of the examination that may impede the fair administration or security of the examination. An applicant who seeks to impede the fair administration of an exam, or copies or asks for information from another applicant shall be dismissed from the examination and shall forfeit the examination fee. An applicant who has a blood spill that is not treated following proper blood spill procedures in R4-10-112 shall be dismissed from the examination and shall forfeit the examination fee.
- N. If an applicant passes the examination but does not apply for an original license within one year after the date of the examination, the Board shall void the examination scores.
- O. If application is made by reciprocity, the Board may accept a score on a written or practical examination from another jurisdiction if the examination:
  - 1. Is the same national examination as that administered in Arizona,
  - 2. The score is at least the same as the passing score that was required by the Board at the time the applicant took the examination in the other jurisdiction, and
  - 3. The applicant provides the Board with documentation from the other jurisdiction verifying the passing score and that the score was received within one year of the application for reciprocity.
- P. The Board shall conduct all examinations in English and applicants shall submit answers in English.

**Historical Note**

Adopted effective April 9, 1996 (Supp. 96-2). Former Section R4-10-108 renumbered to R4-10-111; new Section R4-10-108 renumbered from Section R4-10-104 by final rulemaking at 5 A.A.R. 1791, effective May 18, 1999 (Supp. 99-2). Amended by final rulemaking at 12 A.A.R. 807, effective April 8, 2006 (Supp. 06-1).

### 32-501. Definitions

In this chapter, unless the context otherwise requires:

1. "Aesthetician" means a person who is licensed to practice skin care pursuant to this chapter.
2. "Aesthetics" means any one or a combination of the following practices if they are performed for cosmetic purposes:
  - (a) Massaging, cleansing, stimulating, manipulating, exercising, beautifying or applying oils, creams, antiseptics, clays, lotions or other preparations, either by hand or by mechanical or electrical appliances.
  - (b) Arching eyebrows or tinting eyebrows and eyelashes.
  - (c) Removing superfluous hair by means other than electrolysis or threading.
3. "Board" means the board of cosmetology.
4. "Cosmetic purposes" means for the purpose of beautifying, preserving or conferring comeliness, excluding therapeutic massage and manipulations.
5. "Cosmetologist" means a person who is licensed to practice cosmetology pursuant to this chapter.
6. "Cosmetology" means any one or a combination of the following practices if they are performed for cosmetic purposes:
  - (a) Cutting, clipping or trimming hair.
  - (b) Massaging, cleansing, stimulating, manipulating, exercising, beautifying or applying oils, creams, antiseptics, clays, lotions or other preparations, either by hand or by mechanical or electrical appliances.
  - (c) Styling, arranging, dressing, curling, waving, permanent waving, straightening, cleansing, singeing, bleaching, dyeing, tinting, coloring or similarly treating hair.
  - (d) Arching eyebrows or tinting eyebrows and eyelashes.
  - (e) Removing superfluous hair by means other than electrolysis or threading.
  - (f) Nail technology.
7. "Electrical appliances" means devices that use electrical current and includes lasers and IPL devices as defined in section 32-516.
8. "Instructor" means a person who is licensed to teach cosmetology, aesthetics or nail technology, or any combination thereof, pursuant to this chapter.
9. "Nail technician" means a person who is licensed to practice nail technology pursuant to this chapter.
10. "Nail technology" means:
  - (a) Cutting, trimming, polishing, coloring, tinting, cleansing or otherwise treating a person's nails.
  - (b) Applying artificial nails.
  - (c) Massaging and cleaning a person's hands, arms, legs and feet.
11. "Salon" means any of the following:
  - (a) An establishment that is operated for the purpose of engaging in the practice of cosmetology, aesthetics or nail technology, or any combination of the listed practices.
  - (b) An establishment together with a retrofitted motor vehicle for exclusive use as a mobile facility for the purpose of engaging in the practice of cosmetology, aesthetics or nail technology, or any combination of the listed practices, that is operated and dispatched through the establishment.

(c) A retrofitted motor vehicle exclusively used as a mobile facility for the purpose of engaging in the practice of cosmetology, aesthetics or nail technology, or any combination of the listed practices that is operated and dispatched from a business that has a physical street address that is on file with the board.

12. "School" means an establishment that is operated for the purpose of teaching cosmetology, aesthetics or nail technology, or any combination of the listed practices.

13. "Threading" means a service that results in the removal of hair from its follicle from around the eyebrows and from other parts of the face with the use of a single strand of cotton thread and an over-the-counter astringent, if the service does not use chemicals of any kind, wax or any implements, instruments or tools to remove hair.

### 32-502. Board of cosmetology; appointment; qualifications; terms

A. A board of cosmetology is established consisting of the following seven members who are appointed by the governor:

1. Two cosmetologists who have been actively practicing in this state for at least three years immediately preceding appointment.

2. One nail technician who has been actively practicing in this state for at least three years immediately preceding appointment.

3. One instructor who has been actively practicing in this state for at least three years immediately preceding appointment.

4. One school owner.

5. One educator who does not represent the cosmetology or nail technology industry and is not involved in the manufacture of cosmetology or nail technology products.

6. One public member who is not and has never been associated with the cosmetology or nail technology industry, licensed as a cosmetologist or nail technician or involved in the manufacture of cosmetology or nail technology products.

B. The term of office for members is three years beginning and ending June 22.

C. The governor may remove board members for neglect of duty, malfeasance or misfeasance.

### 32-503. Organization; meetings; personnel; compensation [CHANGE]

A. The board shall annually elect a chairman, vice-chairman and secretary-treasurer from among its membership.

B. The board shall hold at least one regular meeting monthly and may hold other meetings at times and places it designates.

C. Subject to title 41, chapter 4, article 4, the board may employ the following personnel as it deems necessary to carry out the purposes of this chapter and designate their duties:

1. An executive director who shall have been a licensed cosmetologist for at least one of the five years immediately preceding employment.

2. A supervisor of examinations who is an instructor licensed pursuant to this chapter and has worked at least two of the five years immediately preceding employment as an instructor in a school licensed pursuant to this chapter.
  3. Examiners who shall not be employed as instructors in any school licensed pursuant to this chapter.
  4. Persons to provide investigative, professional and clerical assistance as the board deems necessary and may hire consultants to assist the board in the performance of its duties.
  5. Other personnel.
- D. Members of the board are eligible to receive compensation as determined pursuant to section 38-611 for each day of actual service in the business of the board. The board shall compensate its executive director and other personnel as determined pursuant to section 38-611.

#### 32-504. Powers and duties

A. The board shall:

1. Adopt rules that are necessary and proper for the administration of this chapter, including sanitary and safety requirements for salons and schools and sanitary and safety standards for the practice of cosmetology, aesthetics and nail technology.
2. Administer and enforce this chapter and rules adopted pursuant to this chapter.
3. Either prepare, administer and grade practical and written examinations or contract with a national professional organization for cosmetology selected by the board to prepare, administer and grade practical and written examinations.
4. Make and maintain a record of its acts and proceedings, including the issuance, denial, renewal, suspension or revocation of licenses and public reproofs of licensees.
5. Evidence its official acts by the signature of the chairman or vice-chairman of the board or a representative designated by the board.
6. Keep records of the board open to public inspection at all reasonable times.
7. Make an annual report to the governor on or before October 1 of each year covering its official acts and financial transactions during the preceding fiscal year and making recommendations it deems necessary.
8. Prescribe minimum school curriculum requirements for cosmetologists, aestheticians, nail technicians and instructors.
9. Prescribe standards and requirements for the provision of salon services through mobile units and in customer locations.

B. The board may:

1. Inspect the premises of any salon or school during business hours.
2. Delegate authority to its executive director to issue licenses to applicants who meet the requirements of this chapter.

#### 32-505. Board of cosmetology fund

A. The board of cosmetology fund is established. Except as provided in subsection C of this section, before the end of each calendar month, pursuant to sections 35-146 and 35-147, the board shall deposit ten per cent of all monies from whatever source which come into the possession of the board in the state general fund and deposit the remaining ninety per cent in the board of cosmetology fund.

B. Except as provided in section 32-573, subsection G, monies deposited in the board of cosmetology fund are subject to section 35-143.01.

C. Monies from civil penalties received pursuant to section 32-571 shall be deposited, pursuant to sections 35-146 and 35-147, in the state general fund.

### 32-506. Nonapplicability of chapter

This chapter does not apply to the following persons while in the proper discharge of their professional duties:

1. Practices done for the treatment of physical or mental ailments or disease by medical practitioners licensed pursuant to this title.
2. Commissioned physicians and surgeons serving in the armed forces of the United States or other federal agencies.
3. Persons licensed pursuant to chapter 3 or 12 of this title.
4. Students attending schools licensed pursuant to this chapter while they are on school premises during school hours.
5. Persons employed by theatrical groups who apply makeup, oils and cosmetics.
6. Persons who sell makeup, oils and cosmetics and who apply such products during the process of selling such products.
7. Shampoo assistants who shampoo hair under the direction of a cosmetologist licensed pursuant to this chapter.
8. Services performed by and for persons in the custody of the state department of corrections.
9. Persons who apply makeup, oils and cosmetics to patients in a hospital, nursing home or residential care institution with the consent of the patient and the hospital, nursing home or residential care institution.
10. Persons who provide a service that results in tension on hair strands or roots by twisting, wrapping, weaving, extending, locking or braiding, if the service does not include the application of dyes, reactive chemicals or other preparations to alter the color of the hair or to straighten, curl or alter the structure of the hair.
11. Persons who provide threading.
12. Persons who provide tanning services by means of airbrushing, tanning beds or spray tanning.

### 32-507. Fees [CHANGE]

A. The board shall establish and collect fees not to exceed the following:

1. Written examination, one hundred dollars.
2. Practical examination, one hundred dollars.
3. Application for initial personal license, forty-five dollars.
4. Application for personal reciprocity license, one hundred twelve dollars.
5. Application for salon license, one hundred twelve dollars.
6. Application for school license, six hundred dollars.
7. Application for certification of licensure or hours, thirty dollars.
8. Personal license renewal, thirty-eight dollars.
9. Personal license delinquent renewal, sixty dollars.
10. Salon license renewal, fifty dollars.
11. Salon license delinquent renewal, eighty dollars.
12. School license renewal, five hundred dollars.
13. School license delinquent renewal, six hundred dollars.

14. Delinquent penalties for each year or portion of a year for which the license was inactive.
  15. Computer printouts of names of licenses, twenty-five cents per name.
  16. Duplicate license, thirty dollars.
  17. Dishonored checks, twenty dollars.
  18. Copying charges, one dollar per page. For audiotapes, videotapes, computer discs or other mediums used for recording sounds, images or information, fifteen dollars per tape, disc or other medium.
  19. Board administered educational classes, one hundred dollars.
  20. Review of examination, fifty dollars.
  21. Regrading of examinations, twenty-five dollars.
  22. Service charges for persons who pay with alternative payment methods including credit cards, charge cards, debit cards and electronic transfers, not to exceed the cost of the alternative payment method.
- B. The board may charge additional fees for:
1. Documents and publications provided by the board.
  2. Services which the board deems appropriate to carry out its intent and purpose. These additional fees shall not exceed the costs of rendering the services.
- C. The board shall only issue a duplicate license on receipt of a written request which states the reason for the request for a duplicate license.

#### 32-510. Aestheticians; applications; qualifications

A person is entitled to receive an aestheticians license if the person:

1. Submits to the board an application for an aestheticians license on a form supplied by the board.
2. Completes and receives appropriate credits for at least two years of high school education or its equivalent as prescribed by the board in its rules and submits to the board satisfactory evidence that the person is at least sixteen years of age.
3. Submits to the board satisfactory evidence of either of the following:
  - (a) That the person is a graduate of an aestheticians school in another state or country that has substantially the same requirements as this state for schools licensed pursuant to this chapter.
  - (b) That the person is a graduate of an aestheticians course consisting of at least six hundred hours of training in a school licensed pursuant to this chapter.
4. Passes the examination for an aestheticians license.
5. Pays the prescribed fees for an aestheticians license.

#### 32-511. Cosmetologist; applications; qualifications

A person is entitled to receive a cosmetologist license if the person:

1. Submits to the board an application for a cosmetologist license on a form supplied by the board.
2. Completes and receives appropriate credits for at least two years of high school education or its equivalent as prescribed by the board in its rules and submits satisfactory evidence that the person is at least sixteen years of age.
3. Submits to the board satisfactory evidence of either of the following:
  - (a) That the person is a graduate of a cosmetology course consisting of at least sixteen hundred hours of training in a school licensed pursuant to this chapter.

(b) That the person is a graduate of a cosmetology school in another state or country that had at the time of the person's graduation substantially the same requirements as this state for schools licensed pursuant to this chapter.

4. Passes the examination for a cosmetologist license.
5. Pays the prescribed fees.

### 32-512. Nail technician; applications; qualifications

A person is entitled to receive a license to practice nail technology if the person does all of the following:

1. Submits to the board an application for a nail technician license on a form supplied by the board.
2. Completes and receives appropriate credits for at least two years of high school education or its equivalent as prescribed by the board in its rules and submits satisfactory evidence that the person is at least sixteen years of age.
3. Submits to the board satisfactory evidence of either of the following:
  - (a) That the person graduated from a nail technology school in another state or country that had at the time of the person's graduation substantially the same requirements as this state for schools licensed pursuant to this chapter.
  - (b) That the person completed a nail technician course consisting of at least six hundred hours of training in a school licensed pursuant to this chapter.
4. Pays the prescribed fees for a nail technician license.
5. Passes the examination for a nail technician license.

### 32-513. Reciprocity

Notwithstanding sections 32-510, 32-511 and 32-512, a person is entitled to receive a cosmetologist, aesthetician or nail technician license if the person:

1. Submits to the board an application for a cosmetologist, aesthetician or nail technician license on a form supplied by the board.
2. Submits to the board satisfactory evidence that the person is licensed in another state or country.
3. Takes and completes a class relating to infection protection and law review that is provided by the board or its designee. The board shall determine the amount of the fees for the class. The applicant shall pay the fees directly to the board or its designee.
4. Pays the prescribed reciprocity license fees.

### 32-514. Examinations

- A. The board or a national professional organization for cosmetology selected by the board shall administer written and practical examinations for a cosmetologist, aesthetician, nail technician or instructor license. The examinations shall test for requisite knowledge and skills in the technical application of cosmetology services.
- B. The board or a national professional organization for cosmetology selected by the board shall inform each applicant of the examination results.
- C. The board shall make an accurate record of each examination.

### 32-515. Reexaminations

- A. An applicant who fails an examination for a license pursuant to this article is entitled to a reexamination.

B. If an applicant fails either part of the examination, the applicant shall only retake the part of the examination that the applicant failed.

C. If one year or more elapses between an applicant's initial examination and reexamination, the applicant shall take both the written and practical parts of the examination.

D. An applicant desiring to be reexamined shall:

1. Apply to the board, if the board is administering the examination, on forms it prescribes and furnishes or to a national professional organization selected by the board to administer the examination.

2. Pay the prescribed examination fee.

32-516. Aestheticians; cosmetologists; cosmetic laser and IPL device use; certification; fees; definitions

A. An aesthetician or a cosmetologist who wishes to perform cosmetic laser procedures and procedures using IPL devices must:

1. Apply for and receive a certificate from the agency.

2. Comply with the requirements of this section and agency rules.

3. Successfully complete forty hours of didactic training as required by agency rules at an agency-certified training program. The program shall provide a provisional certificate to the applicant verifying the successful completion of the didactic training.

4. For hair removal, complete hands-on training that is supervised by a health professional who is acting within the health professional's scope of practice or by a laser technician who has a minimum of one hundred hours of hands-on experience per procedure. The health professional or laser technician must be present in the room during twenty-four hours of hands-on use of lasers or IPL devices. The supervising health professional or laser technician shall verify that the aesthetician or cosmetologist has completed the training and supervision as prescribed by this section.

5. For other cosmetic laser and IPL device procedures, complete a minimum of an additional twenty-four hours of hands-on training of at least ten cosmetic procedures for each type of specific procedure that is supervised by a health professional who is acting within the health professional's scope of practice or by a laser technician who has a minimum of one hundred hours of hands-on experience per procedure. The health professional or laser technician must be present in the room during twenty-four hours of hands-on use of lasers or IPL devices. The supervising health professional or laser technician shall verify that the aesthetician or cosmetologist has completed the training and supervision as prescribed by this section.

6. Submit to the agency the provisional certificate from the training program and certification by the health professional or laser technician who directly supervised the applicant in the room during the hands-on training.

B. The agency shall issue a laser technician certificate authorizing the aesthetician or cosmetologist to use lasers and IPL devices if the applicant has completed the training for hair removal or lasers and IPL devices for other cosmetic procedures, as applicable, and shall maintain a current register of those laser technicians in good standing and whether certification is for hair removal only or other cosmetic procedures as well. The agency may establish a fee for the registration of

aestheticians or cosmetologists as laser technicians and the issuance of certificates pursuant to this subsection. The agency shall deposit monies collected pursuant to this subsection in the laser safety fund established by section 32-3234.

C. An aesthetician or a cosmetologist who has been certified as a laser technician by the agency may use a laser or IPL device:

1. For hair removal under the indirect supervision of a health professional whose scope of practice permits the supervision.
2. For cosmetic purposes other than hair removal if the aesthetician or cosmetologist is directly supervised by a health professional whose scope of practice permits the supervision and the aesthetician or cosmetologist has been certified in those procedures.

D. The board shall investigate any complaint from the public or from another board or agency regarding a licensed aesthetician or cosmetologist who performs cosmetic laser procedures or procedures using IPL devices pursuant to this section. The board shall report to the agency any complaint it receives about the training or performance of an aesthetician or a cosmetologist who is certified as a laser technician.

E. An aesthetician or a cosmetologist who used laser and IPL devices before November 24, 2009 may continue to do so if the aesthetician or cosmetologist received a certificate pursuant to this section before October 1, 2010.

F. For the purposes of this section:

1. "Agency" means the radiation regulatory agency.
2. "Directly supervised" means a health professional who is licensed in this state and whose scope of practice allows the supervision supervises the use of a laser or IPL device for cosmetic purposes while the health professional is present at the facility where and when the device is being used.
3. "Health professional" means a person who is licensed pursuant to either:
  - (a) Chapter 11, article 2 of this title and who specializes in oral and maxillofacial surgery.
  - (b) Chapter 13, 14, 15, 17 or 25 of this title.
4. "Indirect supervision" means supervision by a health professional who is licensed in this state, whose scope of practice allows the supervision and who is readily accessible by telecommunication.
5. "IPL device" means an intense pulse light class II surgical device certified in accordance with the standards of the agency for cosmetic procedures.
6. "Laser" means any device that can produce or amplify electromagnetic radiation with wavelengths in the range of one hundred eighty nanometers to one millimeter primarily by the process of controlled stimulated emission and certified in accordance with the standards for the agency for cosmetic procedures.
7. "Laser technician" means a person who is or has been certified by the agency pursuant to its rules and chapter 32, article 2 of this title.

### **32-517. [License renewal](#)**

A. Except as provided in section 32-4301, a cosmetologist, aesthetician or nail technician shall renew his license on or before his birth date every year.

B. A cosmetologist, aesthetician or nail technician shall submit an application for renewal accompanied by the prescribed renewal fee in order to renew his license.

C. A cosmetologist, aesthetician or nail technician who fails to renew his license on or before his birth date shall also pay the prescribed delinquent renewal penalty in order to renew his license.

### 32-518. Inactive licenses; reactivation; suspension

A. A license that is not renewed pursuant to section 32-517 automatically reverts to inactive status.

B. A licensee may reactivate an inactive license:

1. If a license has been inactive for less than one year, by paying the prescribed delinquent renewal penalty.
2. If a license has been inactive for one year or more but less than ten years, by paying the prescribed delinquent renewal penalty and submitting proof of satisfying educational requirements prescribed by the board in its rules.

C. A license that has been inactive for ten years is automatically suspended.

D. A licensee shall not practice under an inactive license.

### 32-531. Instructor; applications; qualifications

A person is entitled to receive a license to teach cosmetology, aesthetics or nail technology in a school if the person does all of the following:

1. Submits to the board an application for an instructor license on a form prescribed by the board.
2. Holds a diploma from a high school or its equivalent as prescribed by the board in its rules and submits to the board satisfactory evidence that the person is at least sixteen years of age.
3. Is a licensed cosmetologist, aesthetician or nail technician and complies with either of the following:
  - (a) Has practiced for at least one year, has passed the school examination and has received the following hours of instructor training:
    - (i) For a cosmetologist instructor, six hundred fifty hours.
    - (ii) For an aesthetics instructor, five hundred hours.
    - (iii) For a nail technician instructor, three hundred fifty hours.
  - (b) Has five years of licensed industry experience within the ten years preceding the application and meets requirements as prescribed by the board in its rules.
4. Passes the examination for an instructor license.
5. Pays the prescribed fees.

### 32-532. Instructor reciprocity

Notwithstanding section 32-531, a person is entitled to receive a license to teach cosmetology, aesthetics or nail technology in a school if the person submits to the board an application for an instructor license on a form prescribed by the board, pays the prescribed fees and complies with one of the following:

1. Is a current licensed cosmetologist, aesthetician or nail technician instructor in another state or country.
2. Does all of the following:
  - (a) Holds a diploma from a high school or its equivalent as prescribed by the board in its rules and submits to the board satisfactory evidence that the person is at least sixteen years of age.

(b) Is a licensed cosmetologist, aesthetician or nail technician in another state or country.

(c) Completes instructor training in another state or country that has instructor education requirements that are at least substantially equivalent to those of this state.

(d) Passes the examination for an instructor license.

3. Does all of the following:

(a) Has five years of licensed industry experience within the ten years preceding application.

(b) Holds a high school diploma or its equivalent as prescribed by the board in its rules and submits to the board satisfactory evidence that the person is at least sixteen years of age.

(c) Meets requirements as prescribed by the board in its rules.

(d) Passes the examination for an instructor license.

### 32-533. Instructor examinations; reexaminations

A. An examination for an instructor license shall be written and practical.

B. The board shall inform each applicant of the applicant's examination results in writing.

C. The board shall make an accurate record of each examination.

D. An applicant who fails any part of the examination twice shall attend a school licensed pursuant to this chapter for two hundred fifty hours of instructor training.

E. An applicant desiring to be reexamined shall apply to the board on forms it prescribes and furnishes and pay the prescribed examination fee.

### 32-535. Instructor license renewal

A. Except as provided in section 32-4301, an instructor shall renew his license on or before his birth date every year.

B. An instructor shall submit an application for renewal accompanied by the prescribed renewal fee in order to renew his license.

C. An instructor who fails to renew his license on or before his birth date shall also pay the prescribed delinquent renewal penalty in order to renew his license.

### 32-536. Instructor practice; instruction

A. An instructor may practice in the category of practice he is licensed to practice in a salon licensed pursuant to this chapter.

B. An instructor shall teach only in the area he is licensed by the board to teach.

### 32-537. Instructor; inactive licenses; reactivation; suspension

A. An instructor license that is not renewed pursuant to section 32-535 automatically reverts to inactive status.

B. A licensee may reactivate an inactive license:

1. If a license has been inactive for less than one year, by paying the prescribed delinquent renewal penalty.

2. If a license has been inactive for one year or more but less than ten years, by paying the prescribed delinquent renewal penalty and submitting proof of satisfying educational requirements prescribed by the board in its rules.

C. A license that has been inactive for ten years is automatically suspended.

D. A licensee shall not practice under an inactive license.

#### 32-541. Salon requirements

- A. A person is entitled to receive a license to operate a salon if the person:
1. Submits to the board an application for a salon license on a form supplied by the board.
  2. Pays the prescribed fee.
- B. The safety and sanitary requirements specified by the board in its rules shall be requirements while a salon is operating.
- C. Each salon shall have an individual designated as the manager of the salon.

#### 32-542. Salon inspections

- A. The board shall inspect all proposed salons to determine if all of the requirements are met. The board may issue a license to a salon pending inspection of the salon as it deems appropriate.
- B. The board shall inspect salons on a regular basis as it deems necessary.

#### 32-543. Required display

Salons shall display the following in a conspicuous location which is readily observable by any patron:

1. The current salon license.
2. The current licenses for cosmetologists, aestheticians or nail technicians practicing in the salon.
3. The latest inspection sheet.

#### 32-544. Salon license renewal

- A. Except as provided in section 32-4301, a salon license is renewable each year on or before the anniversary date of the first license by meeting all the requirements for a salon license and paying the prescribed renewal fee.
- B. A salon owner who fails to renew the owner's salon license each year by the anniversary date of the license shall apply pursuant to section 32-541 and pay the prescribed fee and delinquent renewal penalty.

#### 32-545. Change of ownership or location; change of trade name

- A. A salon shall not change from the name of one licensee to another or from one location to another or change its trade name without filing a new application and paying the prescribed fee.
- B. A salon owner shall notify the board in writing within ten days after any change of ownership of the salon or change in the salon's location or trade name and pay the prescribed fee.

#### 32-551. School licenses; applications; requirements

- A. A person is entitled to a license to operate a school if:
1. He pays the prescribed fee.
  2. He furnishes a surety bond in the amount of ten thousand dollars approved by the board and executed by a corporate bonding company authorized to do business in this state. The bond shall be for the benefit of and subject to the claims of the

state for failure to comply with the requirements of this chapter and any student who fails to receive the full course of instruction required under this chapter.

3. He submits to the board under oath an application for a school license on a form supplied by the board and other documentation required by the board in its rules.

4. The proposed school passes an inspection by the board before it opens.

B. An incomplete application shall be returned to an applicant within thirty days after the board receives it with the causes for the return.

#### 32-552. Change of ownership or location; change of trade name

A. A school shall not change from the name of one licensee to another or from one location to another or change its trade name without filing a new application and paying the prescribed fee.

B. A school owner shall notify the board in writing within ten days after any change of ownership of the school or change in the school's location or trade name, submit a new license application for the school and pay the prescribed fee.

#### 32-553. Instruction staff

A. Instructors shall not apply their time to private practice with or without compensation in a school.

B. Students shall be under the constant supervision of an instructor.

#### 32-554. Required display

Schools shall display the following in a conspicuous location:

1. The current school license.

2. The current licenses of instructors teaching in the school.

3. The latest inspection sheet.

#### 32-555. Equipment

A school shall contain sufficient equipment as prescribed by the board in its rules.

#### 32-556. Separation of schools from other businesses

A school of any type, including a cosmetology school or otherwise, shall not be conducted with any other business, including a salon. A school of any type, including a cosmetology school or otherwise, and another business shall be separated by walls of permanent construction and not have doors or openings between them. A cosmetology school may offer for sale cosmetology products and related articles.

#### 32-557. Services for the public; restrictions

A. Students may render services to the public only under the direct supervision of an instructor.

B. The following notice shall be posted in a conspicuous place within the school in letters large enough to be read across the length of the room, "school of cosmetology - work done exclusively by students."

C. A student in a school shall not receive a salary or commission from the school for any cosmetology, aesthetics or nail technology services while he is enrolled in the school as a student.

D. A school shall post a price list for services rendered to the public which is large enough to be easily read from a distance of ten feet.

#### 32-558. [Student-school contracts](#)

A private school is required to execute a contract between itself and a student in duplicate. The form of the contract shall be approved by the board. A contract between a school and a student shall bear the signature of a school official and the student or parent or guardian if the student is under eighteen years of age. A fully executed copy of the contract shall be given to the student and the school shall keep the original copy.

#### 32-559. [School catalogs](#)

A. A private school shall submit a copy of its official catalog to the board for board approval.

B. A private school catalog shall contain the following:

1. Name and address of the school.
2. Date of publication.
3. Admission requirements and procedures used by the school.
4. Number of hours of training required for licensure.
5. A brief outline of the curriculum offered by the school.
6. A description of the school's general physical facilities and equipment.
7. Policies relating to tardiness, absences, make-up work, conduct, termination and other rules of the school.
8. The grading system, including a definition of credit units if any.
9. The type of document awarded on graduation from the school.

#### 32-560. [Transfer procedures](#)

A student who desires to transfer from one school to another shall execute an application for transfer form prescribed by the board. The transferring school shall complete the application for transfer in triplicate and forward the requested information to the board within three days after the student executes the application for transfer.

#### 32-561. [Student records](#)

A school shall keep records as prescribed by the board in its rules on file for each student enrolled or reenrolled in a school for a regular course, postgraduate course or additional hours.

#### 32-562. [School inspections](#)

The board shall inspect schools on a regular basis as it deems necessary.

#### 32-563. [School closings](#)

A. Within five days after a school closes it shall notify the board by certified mail of the closure.

B. Within ten days after a school closes it shall forward all student records to the board.

#### 32-564. [School license renewal](#)

A. Except as provided in section 32-4301, school licenses are renewable on or before June 30 of every year by meeting all the requirements for a school license and paying the prescribed renewal fee.

B. A school owner who fails to renew his school license by June 30 of every year shall apply pursuant to section 32-551 and pay the prescribed fee and delinquent renewal penalty.

### 32-565. Schools; postsecondary education institutions

A school must be recognized as a postsecondary educational institution if both of the following apply:

1. The school admits as regular students only individuals who have earned a recognized high school diploma or the equivalent of a recognized high school diploma or who are beyond the age of compulsory education as provided by section 15-802.
2. The school is licensed by name by the board under this chapter to offer one or more training programs beyond the secondary school level.

### 32-571. Disciplinary action

The board may take any one or a combination of the following disciplinary actions:

1. Revoke a license.
2. Suspend a license.
3. Impose a civil penalty in an amount not to exceed two thousand dollars.
4. Impose probation requirements best adapted to protect the public safety, health and welfare including requirements for restitution payments to patrons.
5. Publicly reprove a licensee.
6. Issue a letter of concern.

### 32-572. Grounds for disciplinary action or refusal to issue or renew license; definition

A. The board may take disciplinary action or refuse to issue or renew a license for any of the following causes:

1. Continued performance of cosmetology, aesthetics or nail technology services by a person knowingly having an infectious or communicable disease.
2. Conviction of a crime.
3. Commission of an act involving dishonesty, fraud or deceit with the intent to substantially benefit oneself or another or substantially injure another.
4. Malpractice or incompetency.
5. Knowingly advertising by means of false, misleading, deceptive or fraudulent statements through communication media.
6. Violating any provision of this chapter or any rule adopted pursuant to this chapter.
7. Making oral or written false statements to the board.
8. Repeated failure to correct infractions of safety and sanitary requirements prescribed by the board in its rules.
9. Failing to comply with an order of the board.

B. A conviction of a crime or act shall not be a cause of refusal to issue or renew a license unless the crime or act is substantially related to the qualifications, functions or duties of the license for which application is made.

C. The expiration, cancellation, suspension or revocation of a license or a licensee's voluntary surrender of a license does not deprive the board of jurisdiction to do any of the following:

1. Proceed with an investigation of a licensee.
2. Proceed with an action or disciplinary proceeding against a licensee.
3. Suspend or revoke a license.
4. Deny the renewal or right of renewal of a license.

D. For the purposes of this section, "conviction" means a plea or verdict of guilty or a conviction following a plea of no contest.

### 32-573. Procedure for disciplinary action; appeal

A. The board on its own motion may investigate any information that appears to show the existence of any of the causes set forth in section 32-572. The board shall investigate the report of any person that appears to show the existence of any of the causes set forth in section 32-572. A person who reports pursuant to this section and who provides the information in good faith is not subject to liability for civil damages as a result.

B. If, after completing its investigation, the board finds that the evidence is not of sufficient seriousness to merit direct action against a license, it may take either of the following actions:

1. Dismiss if, in the opinion of the board, the evidence is without merit.
2. File a letter of concern if, in the opinion of the board, while there is insufficient evidence to support direct action against the license there is sufficient evidence for the board to notify the licensee that continuation of the activities that led to the information or report being made to the board may result in action against the licensee's license.

C. If, in the opinion of the board, it appears the information or report is or may be true, the board shall request an informal interview with the licensee concerned. The interview shall be requested by the board in writing, stating the reasons for the interview and setting a date not less than ten days from the date of the notice for conducting the interview.

D. If, after an informal interview, the board finds that the evidence warrants suspension or revocation of a license issued pursuant to this chapter, imposition of a civil penalty or public reproof or if the licensee under investigation refuses to attend the informal interview, a complaint shall be issued and formal proceedings shall be initiated. All proceedings pursuant to this subsection shall be conducted in accordance with title 41, chapter 6, article 10.

E. A licensee who has been notified pursuant to subsection D of this section of charges pending against the licensee shall file with the board an answer in writing to the charges not more than thirty days after the licensee receives the complaint. If the licensee fails to answer in writing within this time, it is deemed an admission by the licensee of the acts charged in the complaint and the board may take disciplinary action allowed by this chapter without a hearing.

F. If the board finds that the evidence is not of sufficient seriousness to merit suspension or revocation of a license issued pursuant to this chapter, imposition of a civil penalty or public reproof it may take the following actions:

1. Dismiss if, in the opinion of the board, the evidence is without merit.

2. File a letter of concern if, in the opinion of the board, while there is insufficient evidence to support direct action against the license there is sufficient evidence for the board to notify the licensee that continuation of the activities which led to the information or report being made to the board may result in action against the licensee's license.

3. Impose probation requirements.

G. If a licensee violates this chapter or a rule adopted pursuant to this chapter, the board may assess the licensee with the board's reasonable costs and expenses, including attorney fees, incurred in conducting the investigation and administrative hearing. All monies collected pursuant to this subsection shall be deposited, pursuant to sections 35-146 and 35-147, in a separate account in the board of cosmetology fund established by section 32-505. The board may only use these monies to defray its expenses in connection with investigation related training and education, disciplinary investigations and all costs related to administrative hearings. Notwithstanding section 35-143.01 the separate account monies may be spent without legislative appropriation.

H. Except as provided in section 41-1092.08, subsection H, final decisions of the board are subject to judicial review pursuant to title 12, chapter 7, article 6.

#### 32-574. Unlawful acts; violation; classification

A. A person shall not:

1. Perform or attempt to perform cosmetology, aesthetics or nail technology without a license in that category issued pursuant to this chapter, or practice in a category in which the person does not hold a license.

2. Display a sign or in any way advertise or hold oneself out as a cosmetologist, aesthetician or nail technician or as being engaged in the practice or business of cosmetology, aesthetics or nail technology without being licensed pursuant to this chapter.

3. Knowingly make a false statement on an application for a license pursuant to this chapter.

4. Permit an employee or another person under the person's supervision or control to perform cosmetology, aesthetics or nail technology without a license issued pursuant to this chapter.

5. Practice or attempt to practice cosmetology, aesthetics or nail technology in any place other than in a salon licensed pursuant to this chapter unless the person is requested by a customer to go to a place other than a salon licensed pursuant to this chapter and is sent to the customer from the salon, except that a person who is licensed pursuant to this chapter may practice, without the salon's request, cosmetology, aesthetics or nail technology in a health care facility, hospital, residential care institution, nursing home or residence of a person requiring home care because of an illness, infirmity or disability.

6. Obtain or attempt to obtain a license by the use of money other than the prescribed fees or any other thing of value or by fraudulent misrepresentation.

7. Provide any service to a person having a visible disease, pediculosis or open sores suggesting a communicable disease until the person furnishes a statement signed by a physician licensed pursuant to chapter 13 or 17 of this title stating that the disease or condition is not in an infectious, contagious or communicable stage.

8. Operate a salon or school without being licensed pursuant to this chapter.

9. Violate any provision of this chapter or any rule adopted pursuant to this chapter.

10. Ignore or fail to comply with a board subpoena.

11. Use the title of "aesthetician", "cosmetologist" or "nail technician" or any other title or term likely to be confused with "aesthetician", "cosmetologist" or "nail technician" in any advertisement, statement or publication unless that person is licensed pursuant to this chapter.

B. An instructor shall not render cosmetology, aesthetics or nail technology services in a school unless the services are directly incidental to the instruction of students.

C. A person who violates this section is guilty of a class 1 misdemeanor.

### 32-575. Injunctions

The board, the attorney general, a county attorney or any other person may apply to the superior court in the county in which acts or practices of any person which constitute a violation of this chapter or the rules adopted pursuant to this chapter are alleged to have occurred for an order enjoining those acts or practices.

### 32-576. Confidentiality

A. Examination materials, records of examination grading and performance and transcripts of educational institutions are confidential and are not subject to inspection pursuant to title 39, chapter 1, article 2.

B. All investigation files are confidential and are not subject to inspection pursuant to title 39, chapter 1, article 2 until the matter is final. The licensee shall be informed of the investigation. The public may obtain information that discloses that an investigation is being conducted and the general nature of the investigation.

**ARIZONA STATE RETIREMENT SYSTEM (R-16-1103)**

Title 2, Chapter 8, Article 7, Contributions Not Withheld

**Amend:** R2-8-704; R2-8-706



**GOVERNOR'S REGULATORY REVIEW COUNCIL  
M E M O R A N D U M**

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**MEETING DATE:** November 1, 2016

**AGENDA ITEM:** E-3

**TO:** Members of the Governor's Regulatory Review Council ("Council")

**FROM:** Marcus McGillivray, Legal Intern

**DATE:** October 14, 2016

**SUBJECT: ARIZONA STATE RETIREMENT SYSTEM (R-16-1103)**  
Title 2, Chapter 8, Article 7, Contributions Not Withheld

Amend: R2-8-704, R2-8-706

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The Arizona State Retirement System (ASRS) was established by A.R.S. Title 38, Public Officers and Employees, Chapter 5, Social Security and Retirement, Article 2, Arizona State Retirement System (Article 2). The ASRS Board (Board) "is responsible for supervising the administration of [Article 2] by the director [Director] of ASRS." A.R.S. §§ 38-714(B) and 38-715(C)(1). The purpose of the ASRS and the Director is "to manage and invest employee and employer contributions and assets and distribute retirement and long-term disability benefits to retired members of the system and plan." Laws 2006, Ch. 125 § 5(A).

This rulemaking amends two rules in A.A.C. Title 2, Chapter 8, Article 7. The amendments in this section are regarding Contributions Not Withheld (CNW) payments. A CNW occurs when an employer fails to contribute to an eligible employee's ASRS benefit plan. These rules clarify that CNW payments are not due when the employer remits an Alternate Contribution Rate (ACR) payment pursuant to A.R.S. § 38-766, or when contributions are made to another Arizona Retirement system such as those found in in A.R.S. § 15-1451 and § 15-1628.

The amendments in R2-8-704 provide the methods by which a member of the ASRS can report a discovered error. The amendments in R2-8-706 set forth the procedures under which the ASRS uses to determine an actual CNW. This rulemaking is intended to clarify when employers are not obligated to make CNW payments, which will, overall, thwart exorbitant employer contributions.

## **Proposed Action**

The ASRS is engaging in this rulemaking to reflect that CNW payments are not due to the ASRS when the employer remits an ACR payment pursuant to A.R.S. § 38-766, or when contributions are made to another Arizona retirement system. Essentially, this change will prevent the employer from over contributing during the same time period, and clarify that members are not entitled to receive service credit for the same hours worked in more than one state retirement system.

The following is a non-exhaustive summary of the ASRS's proposed actions:

- Section 704: This section lists the requirements for a member's report of a CNW error. The changes require the member to provide whether their position was covered under the Employer's 218 agreement prior to July 24, 2014. Furthermore, instead of initials, the Employer representative must provide a signature on the required statements of understanding and agreements. The employer representative is also required to certify that they understand they may receive an invoice for member contributions that they owe. For reporting time worked, the measurement is changed from months to pay periods.
- Section 706: This section establishes when ASRS shall determine that contributions should not have been withheld. Contributions have not been withheld when an Employer remits an accurate ACR amount pursuant to R2-8-116, or if the employee participates in another Arizona retirement plan listed in A.R.S. § 38-801-823, 841-862, and 881-913, or if the employee opts into an optional retirement plan listed in A.R.S. § 15-1451 or § 15-1628

## **Exemption or Request and Approval for Exception from the Moratorium**

The ASRS received an exception from the moratorium on April 7, 2016.

## **Substantive or Procedural Concerns**

None.

### **1. Are the rules legal, consistent with legislative intent, and within the agency's statutory authority?**

Yes. The ASRS cites to A.R.S. § 38-714(E)(4) and A.R.S. §§ 38-711, 38-738, 38-783. A.R.S. §38-714(E)(4) gives ASRS the authority to adopt, amend, or repeal rules for the administration of the plan. A.R.S. § 38-738 gives the ASRS authority to adjust and refund incorrect contribution amounts.

### **2. Are the rules written in a manner that is clear, concise, and understandable to the general public?**

Yes. The rules are generally clear, concise, and understandable.

**3. Does the agency adequately address the comments on the proposed rules and any supplemental proposals?**

The ASRS received no written comments regarding the rulemaking. No one attended the oral proceeding on September 14, 2016.

**4. Are the final rules a substantial change, considered as a whole, from the proposed rules and any supplemental proposals?**

No. The final rules are not a substantial change from the proposed rules.

**5. Does the preamble disclose a reference to any study relevant to the rules that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rules?**

No. The ASRS indicates that it did not review or rely on a study in its evaluation of, or justification for, any of the rules.

**6. Are the rules more stringent than corresponding federal law and, if so, is there statutory authority that allows the agency to exceed the requirements of federal law?**

No. Federal law does apply to retirement systems, but not to this particular rulemaking.

**7. Do the rules require a permit or license and if so, does the agency use a general permit or is any exception applicable under A.R.S. § 41-1037?**

No. The rules require neither a permit nor license.

**8. Do the rules establish a new fee or contain a fee increase?**

No. The rules do not establish a new fee or a fee increase.

**9. Conclusion**

The ASRS requests that the rules take effect 60 days after the rule package is filed with the Secretary of State. This analyst recommends approval of the rules.



**GOVERNOR'S REGULATORY REVIEW COUNCIL  
M E M O R A N D U M**

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**MEETING DATE:** November 1, 2016

**AGENDA ITEM:** E-3

**TO:** Members of the Governor's Regulatory Review Council ("Council")

**FROM:** GRRC Economic Team

**DATE:** October 14, 2016

**SUBJECT:** **ARIZONA STATE RETIREMENT SYSTEM (R-16-1103)**

Title 2, Chapter 8, Article 7, Contributions Not Withheld

Amend: R2-8-704, R2-8-706

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I reviewed the economic, small business, and consumer impact comparison for compliance with A.R.S. § 41-1056 and make the following comments. These comments are made to assist the Council in its review and may be used as the Council determines.

**GRRC Economist Comments**

In this rulemaking, the Arizona State Retirement System (ASRS) is proposing to amend two rules to clarify the language used to outline various payment options. The amendments will clarify the rule language without substantively changing the rules' requirements. The rule amendments are necessary to clarify that Contributions Not Withheld (CNW) payments are not due to ASRS when the employer remits an Alternate Contribution Rate (ACR) payment pursuant to A.R.S. § 38-766 or when contributions are made to another Arizona retirement system. A.R.S. § 38-766 indicates that an ACR is due to ASRS for every retired member who returns to work with an ASRS employer. However, these rules are necessary to clarify that if the employer is remitting an ACR on behalf of a member, the employer should not be remitting contributions.

ASRS has certified that the Joint Legislative Budget Committee has not been notified because the number of new full-time employees necessary to implement and enforce the rule is zero. Notice of new FTEs is required by A.R.S. § 41-1055(B)(3)(a).

1. **Costs and Benefits for:**

**a. The implementing agency:**

The ASRS incurred the cost of completing this rulemaking and will incur the minimal cost of implementing it.

**b. Political subdivisions:**

This rulemaking does not provide any benefits or impose any costs on political subdivisions.

**c. Businesses:**

No businesses are directly affected by the rulemaking.

**d. Small businesses:**

No small businesses are directly affected by the rulemaking.

**e. Consumers directly affected by the rulemaking:**

There are no private persons or consumers directly affected by the rulemaking.

**2. Do the probable benefits outweigh the probable costs?**

Based on the information provided, ASRS indicates that the benefit from the proposed amendments outweigh the costs. The proposed rule will have minimal economic impact, if any, because it merely clarifies payment options without imposing any additional requirements on the public. If rule language is not updated, some employers may remit both an ACR and a contribution on behalf of a member resulting in an overpayment and requiring administrative action to adjust retirement accounts and correct the error.

**3. Analysis of methods to reduce the small business impact:**

The ASRS estimates that there will be no economic impact to small businesses.

**4. The probable effect on state revenues:**

The proposed rulemaking will have no effect on state revenues.

**5. Analysis of any less intrusive or less costly alternative methods:**

The ASRS believes this is the least costly and least intrusive method because it will clarify the statutory requirements for remitting contributions without imposing any additional requirements on the public.

**6. Whether an analysis was submitted to the agency regarding the rule's impact on the competitiveness of businesses in this state as compared to the competitiveness of businesses in other states:**

No analysis was submitted that compares the rule's impact of the competitiveness of businesses in this state to the impact on businesses in other states.

7. **A description of any data on which a rule is based with an explanation of how the data was obtained and why the data is acceptable data, and the methods used by the agency to evaluate the costs and benefits in the EIS.**

The ASRS indicates that no outside data or studies were used in the development of the proposed rule amendment.

8. **Conclusion:**

The submitted economic, small business and consumer impact statement is generally accurate, and contains the information required for compliance with A.R.S. §§ 41-1035, 41-1052(D)(1-3), and 41-1055. This analyst recommends that the proposed rule amendments be approved.



# ARIZONA STATE RETIREMENT SYSTEM

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*Paul Matson*  
Director

October 14, 2016

Ms. Nicole A. Ong, Chair  
The Governor's Regulatory Review Council  
100 North 15th Avenue, Ste. 402  
Phoenix, AZ 85007

**Re: A.A.C. Title 2. Administration**  
**Chapter 8. State Retirement System Board**

Dear Ms. Ong:

The attached final rule package is submitted for review and approval by the Council. The following information is provided for Council's use in reviewing the rule package:

1. Close of record date: The rulemaking record was closed on September 14, 2016 following a period for public comment and an oral proceeding.
2. Relation of the rulemaking to a five-year-review report: This rulemaking relates to a Five-year Review Report approved by the Council in February 2012.
3. New fee or fee increase: This rulemaking does not establish a new fee or increase an existing fee.
4. Immediate effective date: An immediate effective date is not requested.
5. Certification regarding studies: I certify that the Board did not rely on any studies for this rulemaking.
8. Certification that the preparer of the EIS notified the JLBC of the number of new full-time employees necessary to implement and enforce the rule: I certify that the rules in this rulemaking will not require a state agency to employ a new full-time employee. No notification was provided to JLBC.
9. List of documents enclosed:
  - a. Cover letter signed by the Board's Deputy Director;
  - b. Notice of Final Rulemaking including the preamble, table of contents for the rulemaking, and rule text; and
  - c. Economic, Small Business, and Consumer Impact Statement.

Sincerely,

Pat Klein  
Assistant Director

**NOTICE OF FINAL RULEMAKING**  
**TITLE 2. ADMINISTRATION**  
**CHAPTER 8. STATE RETIREMENT SYSTEM BOARD**  
**PREAMBLE**

**1. Articles, Parts, and Sections Affected**

**Rulemaking Action**

R2-8-704

Amend

R2-8-706

Amend

**2. Citations to the agency's statutory rulemaking authority to include both the authorizing statute (general) and the implementing statute (specific):**

Authorizing statute: A.R.S. § 38-714(E)(4)

Implementing statutes: A.R.S. §§ 38-711, 38-738, 38-783

**3. The effective date for the rules:**

As specified under A.R.S. § 41-1032(A), the rule will be effective 60 days after the rule package is filed with the Office of the Secretary of State.

**a. If the agency selected a date earlier than the 60 day effective date as specified in A.R.S. § 41-1032(A), include the earlier date and state the reason or reasons the agency selected the earlier effective date as provided in A.R.S. § 41-1032(A)(1) through (5):**

Not applicable.

**b. If the agency selected a date later than the 60 day effective date as specified in A.R.S. § 41-1032(A), include the later date and state the reason or reasons the agency selected the later effective date as provided in A.R.S. § 41-1032(B):**

Not applicable.

**4. Citations to all related notices published in the *Register* as specified in R1-1-409(A) that pertain to the record of the final rulemaking package:**

Notice of Rulemaking Docket Opening: 22 A.A.R. 1064

Notice of Proposed Rulemaking: 22 A.A.R. 2079

**5. The agency's contact person who can answer questions about the rulemaking:**

Name: Jessica A.R. Thomas, Rules Writer  
Address: Arizona State Retirement System  
3300 N. Central Ave., Ste. 1400  
Phoenix, AZ 85012-0250

Telephone: (602) 240-2039  
E-Mail: [JessicaT@azasrs.gov](mailto:JessicaT@azasrs.gov)

**6. An agency's justification and reason why a rule should be made, amended, repealed, or renumbered, to include an explanation about the rulemaking:**

The ASRS needs to amend approximately two rules in Article 7. The rules need to reflect that Contributions Not Withheld (CNW) payments are not due to the ASRS when the employer remits an Alternate Contribution Rate (ACR) payment pursuant to A.R.S. § 38-766 or when contributions are made to another Arizona retirement system. This amendment will prevent the employer from overpaying contributions during the same time period and will clarify that members are not entitled to receive service credit for the same hours worked in more than one state retirement system. The rules also need to reflect that the employer representative is not required to initial each statement of understanding on the Verification of Contributions Not Withheld form; and that gross salary and hours worked are reported by pay period within each fiscal year.

**7. A reference to any study relevant to the rule that the agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

No study was reviewed.

**8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.

**9. A summary of the economic, small business, and consumer impact:**

The ASRS promulgates rules that allow the agency to provide for the proper administration of the state retirement trust fund. ASRS rules affect ASRS members and ASRS employers regarding how they contribute to, and receive benefits from, the ASRS. The ASRS effectively administrates how public-sector employers and employees participate in the ASRS. As such, the ASRS does not issue permits or licenses, or charge fees, and its rules have little to no economic impact on private-sector businesses, with the exception of some employer partner charter schools, which have voluntarily contracted to join the ASRS. Thus, there is little to no economic, small business, or consumer impact, other than the minimal

cost to the ASRS to prepare the rule package. The rules will have minimal economic impact, if any, because they merely clarify contributing requirements that are already contained in statute, thereby reducing the regulatory burden and the economic impact.

**10. A description of any changes between the proposed rulemaking, including supplemental notices, and the final rulemaking:**

There were no changes between the proposed rulemaking and the final rulemaking.

**11. An agency's summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments:**

The ASRS received no written comments regarding the rulemaking. No one attended the oral proceeding on September 14, 2016.

**12. All agencies shall list any other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:**

None.

**a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:**

The rules do not require a permit.

**b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:**

Federal law applies to retirement programs, but no federal law specifically applies to this rulemaking.

**c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:**

No analysis was submitted.

**13. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rule:**

No materials are incorporated by reference.

**14. Whether the rule was previously made, amended, or repealed as an emergency rule. If so, cite the notice published in the *Register* as specified in R1-1-409(A). Also, the agency shall state where the text was changed between the emergency and the final rulemaking packages:**

Not applicable.

**15. The full text of the rules follows:**

**TITLE 2. ADMINISTRATION**  
**CHAPTER 8. STATE RETIREMENT SYSTEM BOARD**  
**ARTICLE 7. CONTRIBUTIONS NOT WITHHELD**

Section

R2-8-704. Member's Discovery of Error

R2-8-706. Determination of Contributions Not Withheld

## ARTICLE 7. CONTRIBUTIONS NOT WITHHELD

### R2-8-704. Member's Discovery of Error

~~A.~~—If a member believes that an ~~ASRS employer~~Employer has not withheld contributions for the member for a period of eligible service, the member shall:

~~1.A.~~ Provide the ~~ASRS employer~~Employer with documentation of the member's claim and request that the ~~ASRS employer~~Employer provide a letter that includes the information in the Verification of Contributions Not Withheld form or complete a Verification of Contributions Not Withheld form that includes:

- ~~a.1.~~ The member's full name;
- ~~b.2.~~ Other names used by the member;
- ~~c.3.~~ The member's Social Security number;
- ~~d.4.~~ Whether the position was covered under the ~~ASRS employer's~~Employer's 218 agreement prior to July 24, 2014;
- ~~e.5.~~ The position title the member held at the time the contributions should have been withheld;
- ~~f.6.~~ The eligibility of the member at the time the contributions should have been withheld;
- ~~g.7.~~ The following statements of understanding and agreements ~~to be initialed certified~~ by the authorized ~~employer representative filling out the form~~Employer representative's signature indicating:
  - ~~i.a.~~ I understand it is my responsibility to verify the accuracy of the information I am providing on this form. I understand any individual who knowingly makes a false statement, or who falsifies or permits to be falsified any record of the ASRS with an intent to

defraud the ASRS, is guilty of a Class 6 felony pursuant to A.R.S. § 38-793; and

~~ii.b.~~ I understand that, based on the information provided on this form, the ASRS may determine that contributions are owed on behalf of the member listed on this form, and the ~~ASRS employer~~Employer may incur a substantial financial obligation; I understand that I may receive an invoice for the member contributions I owe.

~~h.8.~~ The following information ~~months worked, the hours per week worked, and the compensation earned by the member,~~ by fiscal year;

a. All pay period end dates;

b. The hours per week worked within each pay period; and

c. The compensation earned by the member within each pay period.

~~i.9.~~ The name of the ~~ASRS employer~~Employer;

~~j.10.~~ The printed name and signature of the authorized ~~employer~~Employer representative;

~~k.11.~~ The daytime telephone number of the authorized ~~employer~~Employer representative;

~~l.12.~~ The title of the authorized ~~employer~~Employer representative; and

~~m.13.~~ The date the authorized ~~employer~~Employer representative signed the form;

~~2.B.~~ Provide the ASRS with the completed Verification of Contributions Not Withheld form; and

~~3.C.~~ If the ~~ASRS employer~~Employer refuses to fill out the Verification of Contributions Not Withheld form, or if the member disputes the information the ~~ASRS employer~~Employer completes on the form, the member shall provide the ASRS with the documentation the member believes supports the allegation that contributions should have been withheld, that includes proof:

- ~~a.~~1. That the employee was covered under the ~~ASRS employer's~~Employer's 218 agreement prior to July 24, 2014,
- ~~b.~~2. Of the number of hours worked,
- ~~c.~~3. Of the length of time the member was employed by the ~~ASRS employer~~Employer, and
- ~~d.~~4. Of the compensation paid to the member by the ~~ASRS employer~~Employer.

#### **R2-8-706. Determination of Contributions Not Withheld**

A. Upon receipt of the information listed in R2-8-703, R2-8-704, or R2-8-705, the ASRS shall review the information to determine whether or not member contributions should have been withheld by the ~~ASRS employer~~Employer, the length of time those contributions should have been withheld, and the amount of contributions that should have been withheld.

B. Except for a member who met active membership requirements while simultaneously contributing to another retirement plan listed in subsection (B)(2), for purposes of this Article, the ASRS shall determine that contributions should not have been withheld for the period of service in question if:

1. An Employer remits an accurate ACR amount pursuant to R2-8-116; or
  2. The employee participates in:
    - a. Another Arizona retirement plan listed in A.R.S. Title 38, Chapter 5, Articles 3, 4, or 6; or
    - b. In an optional retirement plan listed in A.R.S. Title 15, Chapter 12, Article 3 or A.R.S. Title 15, Chapter 13, Article 2.
- ~~B.C.~~ Except for returning to work under A.R.S. § 38-766.01(D), the presence of a contract between a member and the ~~ASRS employer~~Employer does not alter the contribution requirements of A.R.S. §§ 38-736 and 38-737.
- ~~C.D.~~ If there is any discrepancy between the documentation provided by the ~~ASRS employer~~Employer and the documentation provided by the member, a document used in the usual course of business prepared at the time in question is controlling.
- ~~D.E.~~ The ASRS shall provide to the ~~ASRS employer~~Employer and the member a written statement that includes:
1. The dates of eligible service for which contributions were not withheld,
  2. The dollar amount of contributions that should have been made,
  3. The dollar amount of the contributions to be paid by the ~~ASRS employer~~Employer,
  4. The interest on the ~~ASRS employer~~Employer contributions and member contributions to be paid by the ~~ASRS employer~~Employer,
  5. The dollar amount of contributions to be paid by the member, and
  6. ~~To the member, the~~The various payment options that may apply to the member, as specified in R2-8-512 through R2-8-519.

# ECONOMIC, SMALL BUSINESS, AND CONSUMER IMPACT STATEMENT<sup>1</sup>

## TITLE 2. ADMINISTRATION

### CHAPTER 8. STATE RETIREMENT SYSTEM BOARD

#### 1. Identification of the rulemaking:

The ASRS needs to amend approximately two rules in Article 7. The rules need to reflect that Contributions Not Withheld (CNW) payments are not due to the ASRS when the employer remits an Alternate Contribution Rate (ACR) payment pursuant to A.R.S. § 38-766 or when contributions are made to another Arizona retirement system. This amendment will prevent the employer from overpaying contributions during the same time period and will clarify that members are not entitled to receive service credit for the same hours worked in more than one state retirement system. The rules also need to reflect that the employer representative is not required to initial each statement of understanding on the Verification of Contributions Not Withheld form; and that gross salary and hours worked are reported by pay period within each fiscal year.

#### a. The conduct and its frequency of occurrence that the rule is designed to change:

A.R.S. § 38-766 indicates that an ACR is due to the ASRS for every retired member who returns to work with an ASRS employer. However, these rules are necessary to clarify that if the employer is remitting an ACR on behalf of a member, the employer should not be remitting contributions. Without these rules, some employers will remit both an ACR and a contribution on behalf of a member resulting in an overpayment and requiring administrative action to adjust retirement accounts and correct the error. These rules will also prevent errors caused by members receiving service credit in more than one state plan for the same hours worked.

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<sup>1</sup> If adequate data are not reasonably available, the agency shall explain the limitations of the data, the methods used in an attempt to obtain the data, and characterize the probable impacts in qualitative terms. (A.R.S. § 41-1055(C)).

- b. The harm resulting from the conduct the rule is designed to change and the likelihood it will continue to occur if the rule is not changed:

As indicated above, a misunderstanding of the statutes regarding ACR payments and contributions can lead to errors that may result in significant overpayments. Such overpayments then require administrative action to correct the error and adjust retirement accounts. Moreover, such misunderstanding may lead to incorrect retirement amounts being paid by the ASRS. This potential inaccuracy may decrease the funded status of the ASRS, which could result in increased rates for retirement and health benefit supplement contributions. More importantly, such inaccuracies must be corrected when they are discovered which can lead to further administrative delay and expenses in order to ensure the retirement account is accurate. The conduct is likely to continue without this rulemaking because, as discussed in subsection (a) above, many employers have difficulty in understanding when contributions should be remitted.

- c. The estimated change in frequency of the targeted conduct expected from the rule change:

This rulemaking will clarify the an employer should not remit a contribution on behalf of a member if the employer is already remitting an ACR on behalf of that member. This will reduce the number and amount of overpayments made by the employer and the amount of adjustments the ASRS must make when such errors are discovered. As discussed above and below, these amendments will increase the clarity and consistency of the rules, which should result in reducing the employer and member's confusion, as well as any potential errors and subsequent adjustment.

2. A brief summary of the information included in the economic, small business, and consumer impact statement:

The ASRS promulgates rules that allow the agency to provide for the proper administration of the state retirement trust fund. ASRS rules affect ASRS members

and ASRS employers regarding how they contribute to, and receive benefits from, the ASRS. The ASRS effectively administrates how public-sector employers and employees participate in the ASRS. As such, the ASRS does not issue permits or licenses, or charge fees, and its rules have little to no economic impact on private-sector businesses, with the exception of some employer partner charter schools, which have voluntarily contracted to join the ASRS. Thus, there is little to no economic, small business, or consumer impact, other than the minimal cost to the ASRS to prepare the rule package. The rules will have minimal economic impact, if any, because they merely clarify contributing requirements that are already contained in statute, thereby reducing the regulatory burden and the economic impact.

3. The person to contact to submit or request additional data on the information included in the economic, small business, and consumer impact statement:

Name: Jessica A.R. Thomas, Rules Writer  
Address: Arizona State Retirement System  
3300 N. Central Ave., Suite 1400  
Phoenix, AZ 85012-0250  
Telephone: (602) 240-2039  
E-mail: [JessicaT@zasrs.gov](mailto:JessicaT@zasrs.gov)

4. Persons who will be directly affected by, bear the costs of, or directly benefit from the rulemaking:

In general, all members of the ASRS and employers will be directly affected by, bear the costs of, and directly benefit from this rulemaking. The ASRS incurred the cost of the rulemaking. The ASRS currently has a total membership of approximately 558,136.

Specifically, employers will be affected and benefited by this rulemaking because they will have a better understanding of when to remit contributions when an Alternate Rate Contribution (ACR) or other state retirement plan is involved. These rules will help prevent employers from overpaying a contribution on behalf of a specific member when they are currently remitting an ACR for that member. Such clarification will benefit employers and members by ensuring they understand how

contributions shall be remitted, and how service credits are allocated when more than one state retirement plan is involved.

5. Cost-benefit analysis:

- a. Costs and benefits to state agencies directly affected by the rulemaking including the number of new full-time employees at the implementing agency required to implement and enforce the proposed rule:

All ASRS members and employers are directly affected by this rulemaking because it will better clarify when contributions should be remitted to the ASRS. However, the ASRS has determined that no new full-time employees will be required to implement and enforce the rules.

- b. Costs and benefits to political subdivisions directly affected by the rulemaking:

This rulemaking does not provide any benefits or impose any costs on political subdivisions.

- c. Costs and benefits to businesses directly affected by the rulemaking:

No businesses are directly affected by the rulemaking.

6. Impact on private and public employment:

The rulemaking will have no impact on private or public employment, except to the extent that members may adjust employment schedules based on their inability to accrue service credits in more than one retirement plan for the same period of time.

7. Impact on small businesses<sup>2</sup>:

- a. Identification of the small business subject to the rulemaking:

No businesses, regardless of size, are subject to the rulemaking.

- b. Administrative and other costs required for compliance with the rulemaking:

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<sup>2</sup> Small business has the meaning specified in A.R.S. § 41-1001(20).

Not applicable.

c. Description of methods that may be used to reduce the impact on small businesses:

Not applicable.

8. Cost and benefit to private persons and consumers who are directly affected by the rulemaking:

All ASRS members are directly affected by the rulemaking. The effect has been previously described above.

9. Probable effects on state revenues:

There will be no effect on state revenues.

10. Less intrusive or less costly alternative methods considered:

The ASRS believes this is the least costly and least intrusive method because it will clarify the statutory requirements for remitting contributions without imposing any additional requirements on the public.

## ARTICLE 7. CONTRIBUTIONS NOT WITHHELD

### R2-8-701. Definitions

The following definitions apply to this Article unless otherwise specified:

1. "218 agreement" means a written agreement between the state, political subdivision, or political subdivision entity and the Social Security Administration, under the provisions of § 418 of the Social Security Act, to provide Social Security and Medicare or Medicare-only coverage to employees of the state, political subdivision, or political subdivision entity.
2. "Documentation" means a pay stub, completed W-2 form, completed Verification of Contributions Not Withheld form, employer letter or spreadsheet, completed State Personnel Action Form, Social Security Earnings Report, employment contract, payroll record, timesheet, or other ASRS employer-provided form that includes:
  - a. Whether the employee was covered under the ASRS employer's 218 agreement prior to July 24, 2014,
  - b. The number of hours worked or length of time the member was employed by the ASRS employer, or
  - c. The compensation paid to the member by the ASRS employer.
3. "Eligible service" means employment with an ASRS employer:
  - a. That is no more than 15 years before the date the ASRS receives written credible evidence that less than the correct amount of contributions were paid into the ASRS or the ASRS otherwise determines that less than the correct amount of contributions were made as specified in A.R.S. § 38-738(C); and
  - b. In which the member worked a minimum of 20 hours per week for at least 20 weeks in a service year for at least one ASRS employer from 7/1/1999 to the present.

#### Historical Note

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4). Amended by final rulemaking at 21 A.A.R. 2515, effective December 5, 2015 (Supp. XX)

### R2-8-702. General Information

- A. Verified eligible service that occurred more than 15 years before the date ASRS receives the information identified in R2-8-704(A)(1) is considered public service credit as provided in A.R.S. § 38-738(D), and is not applied under this Article.
- B. The ASRS employer shall pay the ASRS employer's portion of the contributions the ASRS determines is owed under R2-8-706 whether or not:
  1. The member has withdrawn contributions as specified in R2-8-115; or
  2. The member pays the member's portion of the contributions.
- C. The person who initiates the claim that contributions were not withheld for eligible service has the burden to prove a contribution error was made.
- D. ASRS shall not waive payment of contributions or interest owed under this Article.
- E. If a member is not able to establish eligibility for service credit for which contributions were not withheld, but is able to establish a period of employment by an ASRS employer the member may request to purchase service credit for that period under A.R.S. § 38-743 and Article 5 of this Chapter.

#### Historical Note

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4).

### R2-8-703. ASRS Employer's Discovery of Error

If an ASRS employer determines that contributions have not been withheld for a member for a period of eligible service, the ASRS employer shall notify ASRS in writing, and shall provide ASRS with the member's full name, Social Security number, months, years, and hours per week worked, the compensation each fiscal year for the time periods worked, and the member's position title and status at the time contributions should have been withheld.

#### Historical Note

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4).

### R2-8-704. Member's Discovery of Error

- A. If a member believes that an ASRS employer has not withheld contributions for the member for a period of eligible service, the member shall:
  1. Provide the ASRS employer with documentation of the member's claim and request that the ASRS employer provide a letter that includes the information in the Verification of Contributions Not Withheld form or complete a Verification of Contributions Not Withheld form that includes:
    - a. The member's full name;
    - b. Other names used by the member;
    - c. The member's Social Security number;
    - d. Whether the position was covered under the ASRS employer's 218 agreement;
    - e. The position title the member held at the time the contributions should have been withheld;
    - f. The eligibility of the member at the time the contributions should have been withheld;
    - g. The following statements of understanding and agreements to be initialed by the authorized employer representative filling out the form:

- i. I understand it is my responsibility to verify the accuracy of the information I am providing on this form. I understand any individual who knowingly makes a false statement, or who falsifies or permits to be falsified any record of the ASRS with an intent to defraud the ASRS, is guilty of a Class 6 felony pursuant to A.R.S. § 38-793; and
  - ii. I understand that, based on the information provided on this form, the ASRS may determine that contributions are owed on behalf of the member listed on this form, and the ASRS employer may incur a substantial financial obligation;
  - h. The months worked, the hours per week worked, and the compensation earned by the member, by fiscal year;
  - i. The name of the ASRS employer;
  - j. The printed name and signature of the authorized employer representative;
  - k. The daytime telephone number of the authorized employer representative;
  - l. The title of the authorized employer representative; and
  - m. The date the authorized employer representative signed the form;
2. Provide the ASRS with the completed Verification of Contributions Not Withheld form; and
3. If the ASRS employer refuses to fill out the Verification of Contributions Not Withheld form, or if the member disputes the information the ASRS employer completes on the form, provide the ASRS with the documentation the member believes supports the allegation that contributions should have been withheld, that includes proof:
- a. That the employee was covered under the ASRS employer's 218 agreement,
  - b. Of the number of hours worked,
  - c. Of the length of time the member was employed by the ASRS employer, and
  - d. Of the compensation paid to the member by the ASRS employer.

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4).

**R2-8-705. ASRS' Discovery of Error**

If the ASRS determines, as specified in A.R.S. § 38-738(B)(7), that contributions have not been withheld for a member for a period of eligible service, the ASRS shall notify the member and the ASRS employer in writing and shall request the following information:

- 1. The months, years and hours per week worked;
- 2. The compensation earned by the member each fiscal year for the time periods worked; and
- 3. The member's position title at the time contributions should have been withheld.

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4).

**R2-8-706. Determination of Contributions Not Withheld**

- A. Upon receipt of the information listed in R2-8-703, R2-8-704, or R2-8-705, the ASRS shall review the information to determine whether or not member contributions should have been withheld by the ASRS employer, the length of time those contributions should have been withheld, and the amount of contributions that should have been withheld.
- B. Except for returning to work under A.R.S. § 38-766.01, the presence of a contract between a member and the ASRS employer does not alter the contribution requirements of A.R.S. §§ 38-736 and 38-737.
- C. If there is any discrepancy between the documentation provided by the ASRS employer and the documentation provided by the member, a document used in the usual course of business prepared at the time in question is controlling.
- D. The ASRS shall provide to the ASRS employer and the member a written statement that includes:
  - 1. The dates of eligible service for which contributions were not withheld,
  - 2. The dollar amount of contributions that should have been made,
  - 3. The dollar amount of the contributions to be paid by the ASRS employer,
  - 4. The interest on the ASRS employer contributions and member contributions to be paid by the ASRS employer,
  - 5. The dollar amount of contributions to be paid by the member, and
  - 6. To the member, the various payment options that may apply, as specified in R2-8-512 through R2-8-519.

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4).

**R2-8-707. Submission of Payment**

- A. Within 90 calendar days after the ASRS notifies the ASRS employer in writing of the amount due, the ASRS employer shall pay all ASRS employer contributions, including accrued interest on both the ASRS employer and member contributions, from the date the contributions were due to the date the ASRS notifies the ASRS employer of the amount due. An ASRS employer who makes payment under A.R.S. § 38-738(B)(3) is not liable for additional interest that may accrue as a result of a member's failure to remit payment required by A.R.S. § 38-738(B)(1). If the ASRS does not receive full payment of the ASRS employer's amount due within 90 calendar days after the ASRS notifies the ASRS employer of the amount due, interest on the amount not paid, as provided in A.R.S. § 38-738(B)(3), will accrue from the 91st day until the ASRS employer pays the full amount.

- B. An ASRS employer may pay the amount the ASRS employer believes may be due at any time before ASRS's notification of the amount due in order to prevent the accrual of interest after the date of the payment. Any amount the ASRS employer pays that the ASRS determines is not owed shall be refunded to the ASRS employer.
- C. A member may purchase eligible service for which contributions were not withheld in accordance with the requirements of Article 5 of this Chapter for purchase of service credit. If the ASRS does not receive full payment of the ASRS employee's amount due within 90 calendar days after the ASRS notifies the member that the ASRS received the ASRS employer's full payment, interest on the amount not paid, as provided in A.R.S. § 38-738(B)(1), will accrue from the 91st day until the member pays the full amount.

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4).

**R2-8-708. Dispute of an ASRS Determination Regarding Contributions Not Withheld**

- A. If a member or the ASRS employer disputes an ASRS determination regarding contributions not withheld, that party may request in writing that the Director review the ASRS determination. Within 30 calendar days of receiving the request for the review of the ASRS determination, the Director shall review and either approve or amend the ASRS determination, and send to the member and the ASRS employer written notice of the Director's decision.
- B. If the member or the ASRS employer disputes the Director's decision, that party may obtain a hearing by filing a Request for a Hearing with the Board, in accordance with Article 4 of this Chapter, within 30 calendar days after receiving notice of the Director's determination. The party filing the request shall provide the name of the other party.
- C. The burden of producing evidence is on the party challenging the determination.
- D. If the ASRS Board determines that the service is eligible, the ASRS shall send both the ASRS employer and the member a written statement, as specified in R2-8-706(D), and the:
  - 1. Decision of the Board;
  - 2. Correct amount due as determined by the Board, if applicable;
  - 3. Additional amount of interest due from the losing party, from the 91st day after the initial notification of the amount due to the date of the decision; and
  - 4. Notification that interest shall continue to accrue on the total amount due at the rate specified in A.R.S. § 38-738(B) until the date payment is received by the ASRS.
- E. If the ASRS Board determines that the service is not eligible, ASRS shall send both the ASRS employer and the member the decision of the Board.

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4).

**R2-8-709. Nonpayment of Contributions**

- A. A member receives service credit only for the portion of service the ASRS has determined is eligible and that the member has paid for.
- B. A member does not receive service credit until both the ASRS employer and member portions of the contributions have been paid.
- C. If the ASRS employer does not pay, the ASRS shall take any steps legally authorized to collect payment. Any steps the ASRS may take to collect payment are separate from any action a member may elect to take against the ASRS employer.

**Historical Note**

New Section made by final rulemaking at 12 A.A.R. 4793, effective December 5, 2006 (Supp. 06-4).

### 38-711. Definitions

In this article, unless the context otherwise requires:

1. "Active member" means a member as defined in paragraph 23, subdivision (b) of this section who satisfies the eligibility criteria prescribed in section 38-727 and who is currently making member contributions as prescribed in section 38-736.
2. "Actuarial equivalent" means equality in value of the aggregate amounts expected to be received under two different forms of payment, based on mortality and interest rate assumptions approved from time to time by the board.
3. "ASRS" means the Arizona state retirement system established by this article.
4. "Assets" means the resources of ASRS including all cash, investments or securities.
5. "Average monthly compensation" means:
  - (a) For a member whose membership in ASRS commenced before January 1, 1984 and who left the member's contributions on deposit or reinstated forfeited credited service pursuant to section 38-742 for a period of employment that commenced before January 1, 1984, the higher of either:
    - (i) The monthly average of compensation that is calculated pursuant to subdivision (b) of this paragraph.
    - (ii) The monthly average of compensation on which contributions were remitted during a period of sixty consecutive months during which the member receives the highest compensation within the last one hundred twenty months of credited service. Any month for which no contributions are reported to ASRS or that falls within a period of nonpaid or partially paid leave of absence or sabbatical leave shall be excluded from the computation. The sixty consecutive months may entirely precede, may be both before and after or may be completely after any excluded months. If the member was employed for less than sixty consecutive months, the average monthly compensation is based on the total consecutive months worked. Payments for accumulated vacation or annual leave, sick leave, compensatory time or other forms of termination pay that, before August 12, 2005, constitute compensation for members whose membership in ASRS commenced before January 1, 1984, do not cease to be included as compensation if paid in the form of nonelective employer contributions under a 26 United States Code section 403(b) plan if all payments of employer and employee contributions are made at the time of termination. Contributions shall be made to ASRS on these amounts pursuant to sections 38-735, 38-736 and 38-737.
  - (b) For a member whose membership in ASRS commenced on or after January 1, 1984 but before July 1, 2011, the monthly average of compensation on which contributions were remitted during a period of thirty-six consecutive months during which a member receives the highest compensation within the last one hundred twenty months of credited service. Any month for which no contributions are reported to ASRS or that falls within a period of nonpaid or partially paid leave of absence or sabbatical leave shall be excluded from the computation. The thirty-six consecutive months may entirely precede, may be both before and after or may be completely after any excluded months. If the member was employed for less than thirty-six consecutive months, the average monthly compensation shall be based on the total consecutive months worked.
  - (c) For a member whose membership in ASRS commenced on or after July 1, 2011, the monthly average of compensation on which contributions were remitted during

a period of sixty consecutive months during which a member receives the highest compensation within the last one hundred twenty months of credited service. Any month for which no contributions are reported to ASRS or that falls within a period of nonpaid or partially paid leave of absence or sabbatical leave shall be excluded from the computation. The sixty consecutive months may entirely precede, may be both before and after or may be completely after any excluded months. If the member was employed for less than sixty consecutive months, the average monthly compensation shall be based on the total consecutive months worked.

6. "Board" means the ASRS board established in section 38-713.

7. "Compensation" means the gross amount paid to a member by an employer as salary or wages, including amounts that are subject to deferred compensation or tax shelter agreements, for services rendered to or for an employer, or that would have been paid to the member except for the member's election or a legal requirement that all or part of the gross amount be used for other purposes, but does not include amounts paid in excess of compensation limits established in section 38-746. Compensation includes amounts paid as salary or wages to a member by a second employer if the member meets the requirements prescribed in paragraph 23, subdivision (b) of this section with that second employer.

Compensation, as provided in paragraph 5, subdivision (b) or (c) of this section, does not include:

(a) Lump sum payments, on termination of employment, for accumulated vacation or annual leave, sick leave, compensatory time or any other form of termination pay whether the payments are made in one payment or by installments over a period of time.

(b) Damages, costs, attorney fees, interest or other penalties paid pursuant to a court order or a compromise settlement or agreement to satisfy a grievance or claim even though the amount of the payment is based in whole or in part on previous salary or wage levels, except that, if the court order or compromise settlement or agreement directs salary or wages to be paid for a specific period of time, the payment is compensation for that specific period of time. If the amount directed to be paid is less than the actual salary or wages that would have been paid for the period if service had been performed, the contributions for the period shall be based on the amount of compensation that would have been paid if the service had been performed.

(c) Payment, at the member's option, in lieu of fringe benefits that are normally paid for or provided by the employer.

(d) Merit awards pursuant to section 38-613 and performance bonuses paid to assistant attorneys general pursuant to section 41-192.

(e) Amounts that are paid as salary or wages to a member for which employer contributions have not been paid.

8. "Contingent annuitant" means the person named by a member to receive retirement income payable following a member's death after retirement as provided in section 38-760.

9. "Credited service" means, subject to section 38-739, the number of years standing to the member's credit on the books of ASRS during which the member made the required contributions.

10. "Current annual compensation" means the greater of:

(a) Annualized compensation of the typical pay period amount immediately before the date of a request to ASRS to purchase credited service pursuant to section 38-743, 38-744 or 38-745. The typical pay period amount shall be determined by taking the five pay periods immediately before the date of a request, disregarding the highest and lowest compensation amount pay periods and averaging the three remaining pay periods.

(b) Annualized compensation of the partial year, disregarding the first compensation amount pay period, if the member has less than twelve months total compensation on the date of a request to purchase credited service pursuant to section 38-743, 38-744 or 38-745.

(c) The sum of the twelve months of compensation immediately before the date of a request to ASRS to purchase credited service pursuant to section 38-743, 38-744 or 38-745.

(d) The sum of the thirty-six months of compensation immediately before the date of a request to ASRS to purchase credited service pursuant to section 38-743, 38-744 or 38-745 divided by three.

(e) If the member has retired one or more times from ASRS, the average monthly compensation that was used for calculating the member's last pension benefit times twelve.

11. "Early retirement" means retirement before a member's normal retirement date after five years of total credited service and attainment of age fifty.

12. "Effective date" means July 1, 1970, except with respect to employers and members whose contributions to ASRS commence thereafter, the effective date of their membership in ASRS is as specified in the applicable joinder agreement.

13. "Employer" means:

(a) This state.

(b) Participating political subdivisions.

(c) Participating political subdivision entities.

14. "Employer contributions" means all amounts paid into ASRS by an employer on behalf of a member.

15. "Fiscal year" means the period from July 1 of any year to June 30 of the following year.

16. "Inactive member" means a member who previously made contributions to ASRS and who satisfies each of the following:

(a) Has not retired.

(b) Is not eligible for active membership in ASRS.

(c) Is not currently making contributions to ASRS.

(d) Has not withdrawn contributions from ASRS.

17. "Interest" means the assumed actuarial investment earnings rate approved by the board.

18. "Internal revenue code" means the United States internal revenue code of 1986, as amended.

19. "Investment manager" means the persons, companies, banks, insurance company investment funds, mutual fund companies, management or any combinations of those entities that are appointed by ASRS and that have responsibility and authority for investment of the monies of ASRS.

20. "Late retirement" means retirement after normal retirement.

21. "Leave of absence" means any unpaid leave authorized by the employer, including leaves authorized for sickness or disability or to pursue education or training.
22. "Life annuity" means equal monthly installments payable during the member's lifetime after retirement.
23. "Member":
- (a) Means any employee of an employer on the effective date.
  - (b) Means all employees of an employer who are eligible for membership pursuant to section 38-727 and who are engaged to work at least twenty weeks in each fiscal year and at least twenty hours each week.
  - (c) Means any person receiving a benefit under ASRS.
  - (d) Means any person who is a former active member of ASRS and who has not withdrawn contributions from ASRS pursuant to section 38-740.
  - (e) Does not include any employee of an employer who is otherwise eligible pursuant to this article and who begins service in a limited appointment for not more than eighteen months on or after July 1, 1979. If the employment exceeds eighteen months, the employee shall be covered by ASRS as of the beginning of the nineteenth month of employment. In order to be excluded under this subdivision, classifications of employees designated by employers as limited appointments must be approved by the director.
  - (f) Does not include any leased employee. For the purposes of section 414(n) of the internal revenue code, "leased employee" means an individual who:
    - (i) Is not otherwise an employee of an employer.
    - (ii) Pursuant to a leasing agreement between the employer and another person, performs services for the employer on a substantially full-time basis for at least one year.
    - (iii) Performs services under the primary direction or control of the employer.
24. "Member contributions" means all amounts paid to ASRS by a member.
25. "Normal costs" means the sum of the individual normal costs for all active members for each fiscal year. The normal cost for an individual active member is the cost that is assigned to the fiscal year, through June 29, 2016, using the projected unit credit method and, beginning June 30, 2016, using the actuarial cost method determined by the board pursuant to section 38-714.
26. "Normal retirement age" means the age at which a member reaches the member's normal retirement date.
27. "Normal retirement date" means the earliest of the following:
- (a) For a member whose membership commenced before July 1, 2011:
    - (i) A member's sixty-fifth birthday.
    - (ii) A member's sixty-second birthday and completion of at least ten years of credited service.
    - (iii) The first day that the sum of a member's age and years of total credited service equals eighty.
  - (b) For a member whose membership commenced on or after July 1, 2011:
    - (i) A member's sixty-fifth birthday.
    - (ii) A member's sixty-second birthday and completion of at least ten years of credited service.
    - (iii) A member's sixtieth birthday and completion of at least twenty-five years of credited service.

(iv) A member's fifty-fifth birthday and completion of at least thirty years of credited service.

28. "Political subdivision" means any political subdivision of this state and includes a political subdivision entity.

29. "Political subdivision entity" means an entity:

(a) That is located in this state.

(b) That is created in whole or in part by political subdivisions, including instrumentalities of political subdivisions.

(c) Where a majority of the membership of the entity is composed of political subdivisions.

(d) Whose primary purpose is the performance of a government related service.

30. "Retired member" means a member who is receiving retirement benefits pursuant to this article.

31. "Service year" means fiscal year, except that:

(a) If the normal work year required of a member is less than the full fiscal year but is for a period of at least nine months, the service year is the normal work year.

(b) For a salaried member employed on a contract basis under one contract, or two or more consecutive contracts, for a total period of at least nine months, the service year is the total period of the contract or consecutive contracts.

(c) In determining average monthly compensation pursuant to paragraph 5 of this section, the service year is considered to be twelve months of compensation.

32. "State" means this state, including any department, office, board, commission, agency, institution or other instrumentality of this state.

33. "Vested" means that a member is eligible to receive a future retirement benefit.

#### 38-714. [Powers and duties of ASRS and board](#)

A. ASRS shall have the powers and privileges of a corporation, shall have an official seal and shall transact all business in the name "Arizona state retirement system", and in that name may sue and be sued.

B. The board is responsible for supervising the administration of this article by the director of ASRS.

C. The board is responsible for the performance of fiduciary duties and other responsibilities required to preserve and protect the retirement trust fund established by section 38-712.

D. The board shall not advocate for or against legislation providing for benefit modifications, except that the board shall provide technical and administrative information regarding the impact of benefit modification legislation.

E. The board may:

1. Determine the rights, benefits or obligations of any person under this article and afford any person dissatisfied with a determination a hearing on the determination. The board may delegate the duty and authority to act on the board's behalf to a committee of the board for the purposes of this paragraph and title 41, chapter 6, article 10 relating to any decision made under this paragraph by that committee of the board.

2. Determine the amount, manner and time of payment of any benefits under this article.

3. Recommend amendments to this article and articles 2.1 and 7 of this chapter that are required for efficient and effective administration.
4. Adopt, amend or repeal rules for the administration of the plan, this article and articles 2.1 and 7 of this chapter.
- F. Beginning June 30, 2016, the board shall determine which of the generally accepted actuarial cost methods shall be used in the annual actuarial valuation of the plan.
- G. The board and ASRS are not subject to title 41, chapter 6, except title 41, chapter 6, article 10, for actuarial assumptions and calculations, investment strategy and decisions and accounting methodology.
- H. The board shall submit to the governor and legislature for each fiscal year no later than eight months after the close of the fiscal year a report of its operations and the operations of ASRS. The report shall follow generally accepted accounting principles and generally accepted financial reporting standards and shall include:
  1. A report on an actuarial valuation of ASRS assets and liabilities.
  2. Any other statistical and financial data that may be necessary for the proper understanding of the financial condition of ASRS and the results of board operations.
  3. On request of the governor or the legislature, a list of investments owned. This list shall be provided in an electronic format.
  4. An estimate of the aggregate fees paid for private equity investments, including management fees and performance fees.
- I. The board shall:
  1. Prepare and publish a synopsis of the annual report for the information of ASRS members.
  2. Contract for a study of the mortality, disability, service and other experiences of the members and employers participating in ASRS. The study shall be conducted for fiscal year 1990-1991 and for at least every fifth fiscal year thereafter. A report of the study shall be completed within eight months after the close of the applicable fiscal year and shall be submitted to the governor and the legislature.
  3. Conduct an annual actuarial valuation of ASRS assets and liabilities.
- J. The auditor general may make an annual audit of ASRS and transmit the results to the governor and the legislature.

### 38-738. [Adjustment and refund](#)

- A. If more than the correct amount of employer or member contributions is paid into ASRS by an employer through a mistake of fact, ASRS shall return those contributions to the employer if the employer requests return of the contributions within one year after the date of overpayment. ASRS shall not pay an employer earnings attributable to excess contributions but shall reduce the amount returned to an employer pursuant to this section by the amount of losses attributable to the excess contributions.
- B. If less than the correct amount of employer or member contributions is paid into ASRS by an employer, the following apply:
  1. The member shall pay an amount that is equal to the amount that would have been paid in member contributions for the period in question. The member's payments shall be made as provided in section 38-747. If the member does not

make the payment within ninety days of being notified by ASRS that the employer has paid all amounts due from the employer, the unpaid amount accrues interest until the amount is paid in full. The member is responsible for payment of the unpaid amount and interest. The interest rate is the interest rate assumption that is approved by the board for actuarial equivalency for the period in question to the date payment is received.

2. If the member contributions to ASRS made pursuant to this subsection exceed the limits prescribed in section 38-747, subsection E when taking into account other annual additions of the member for the limitation year, the amount to be paid by the member shall be adjusted as provided in section 38-747. For the purposes of this subsection, "limitation year" has the same meaning prescribed in section 38-769.

3. The employer shall pay to ASRS an amount equal to the amount that would have been paid in employer contributions for the period in question together with accumulated interest that would have accrued on both the employer and member contributions due. If the employer does not remit full payment of all employer contributions and all interest due within ninety days of being notified by ASRS of the amount due, the unpaid amount accrues interest until the amount is paid in full. The interest rate is the interest rate assumption that is approved by the board for actuarial equivalency for the period in question to the date payment is received.

4. On satisfaction of the requirements of this subsection, the member's salary history on the records of ASRS shall be adjusted and any additional service credits acquired by the member shall be reinstated.

5. If the member retires before all contributions are made pursuant to this subsection, the member's benefits shall be calculated only based on the contributions actually made.

6. Annual additions shall be determined as provided in section 38-747, subsection O.

7. The initiator of the request for correction of salary history and service credits on records of ASRS is responsible for providing credible evidence of past employment and compensation to ASRS in a form or forms that would lead a reasonable person to conclude that a period of employment occurred under circumstances that made the employee eligible for membership in ASRS during that period. A determination of eligibility by ASRS may be appealed to the ASRS board in a manner prescribed by the board.

C. Subsection B of this section applies to eligible verified service that occurred less than or equal to fifteen years before the date the initiator of the request for correction of salary history and service credits on the records of ASRS provides ASRS with credible evidence in writing that less than the correct amount of contributions were paid into ASRS or ASRS otherwise determines that less than the correct amount of contributions were made.

D. Eligible verified service that is more than fifteen years before the date the initiator of the request for correction of salary history and service credits on the records of ASRS provides ASRS with credible evidence in writing that less than the correct amount of contributions were paid into ASRS or ASRS otherwise determines that less than the correct amount of contributions were made is considered public service credit. The member may purchase this service pursuant to section 38-743.

38-783. Retired members; dependents; health insurance; premium payment; separate account; definitions

A. Subject to subsections G, H and I of this section, the board shall pay from ASRS assets part of the single coverage premium of any health and accident insurance for each retired member, contingent annuitant or member with a disability of ASRS if the member elects to participate in the coverage provided by ASRS or section 38-651.01 or elects to participate in a health and accident insurance program provided or administered by an employer or paid for, in whole or in part, by an employer to an insurer. A contingent annuitant must be receiving a monthly retirement benefit from ASRS in order to obtain any premium payment provided by this section. The board shall pay:

1. Up to one hundred fifty dollars per month for a member of ASRS who is not eligible for medicare if the retired member or member with a disability has ten or more years of credited service.
2. Up to one hundred dollars per month for each member of ASRS who is eligible for medicare if the retired member or member with a disability has ten or more years of credited service.

B. Subject to subsections G, H and I of this section, the board shall pay from ASRS assets part of the family coverage premium of any health and accident insurance for a retired member, contingent annuitant or member with a disability of ASRS who elects family coverage and who otherwise qualifies for payment pursuant to subsection A of this section. If a member of ASRS and the member's spouse are both either retired or have disabilities under ASRS and apply for family coverage, the member who elects family coverage is entitled to receive the payments under this section as if they were both applying under a single coverage premium unless the payment under this section for family coverage is greater. Payment under this subsection is in the following amounts:

1. Up to two hundred sixty dollars per month if the member of ASRS and one or more dependents are not eligible for medicare.
2. Up to one hundred seventy dollars per month if the member of ASRS and one or more dependents are eligible for medicare.
3. Up to two hundred fifteen dollars per month if either:
  - (a) The member of ASRS is not eligible for medicare and one or more dependents are eligible for medicare.
  - (b) The member of ASRS is eligible for medicare and one or more dependents are not eligible for medicare.

C. In addition each retired member, contingent annuitant or member with a disability of ASRS with less than ten years of credited service and a dependent of such a retired member, contingent annuitant or member with a disability who elects to participate in the coverage provided by ASRS or section 38-651.01 or who elects to participate in a health and accident insurance program provided or administered by an employer or paid for, in whole or in part, by an employer to an insurer is entitled to receive a proportion of the full benefit prescribed by subsection A or B of this section according to the following schedule:

1. 9.0 to 9.9 years of credited service, ninety percent.
2. 8.0 to 8.9 years of credited service, eighty percent.
3. 7.0 to 7.9 years of credited service, seventy percent.
4. 6.0 to 6.9 years of credited service, sixty percent.

5. 5.0 to 5.9 years of credited service, fifty percent.

6. Those with less than five years of credited service do not qualify for the benefit.

D. The board shall not pay more than the amount prescribed in this section for a member of ASRS.

E. Notwithstanding subsections A, B and C of this section, for a member who retires on or after August 2, 2012, the board shall not make a payment under this section to a retired member, contingent annuitant or member with a disability who is enrolled in an employer's active employee group health and accident insurance program either as the insured or as a dependent, except that if the retired member, contingent annuitant or member with a disability is enrolled as a dependent and the premium paid to the employer's active employee group health and accident insurance program is not subsidized by the employer, the retired member, contingent annuitant or member with a disability is entitled to receive the amount provided in subsection A of this section.

F. The board shall establish a separate account that consists of the benefits provided by this section. The board shall not use or divert any part of the corpus or income of the account for any purpose other than the provision of benefits under this section unless the liabilities of ASRS to provide the benefits are satisfied. If the liabilities of ASRS to provide the benefits described in this section are satisfied, the board shall return any amount remaining in the account to the employer.

G. Payment of the benefits provided by this section is subject to the following conditions:

1. The payment of the benefits is subordinate to the payment of retirement benefits payable by ASRS.

2. The total of contributions for the benefits and actual contributions for life insurance protection, if any, shall not exceed twenty-five percent of the total actual employer and employee contributions to ASRS, less contributions to fund past service credits, after the day the account is established.

3. The board shall deposit the benefits provided by this section in the account.

4. The contributions by the employer to the account shall be reasonable and ascertainable.

H. A member who elects to receive a retirement benefit pursuant to section 38-760, subsection B, paragraph 1 may elect at the time of retirement an optional form of health and accident insurance premium benefit payment pursuant to this subsection as follows:

1. The optional premium benefit payment shall be an amount prescribed by subsection A, B or C of this section that is actuarially reduced to the retiring member for life. The amount of the optional premium benefit payment shall be the actuarial equivalent of the premium benefit payment to which the retired member would otherwise be entitled. The election in a manner prescribed by the board shall name the contingent annuitant and may be revoked at any time before the retiring member's effective date of retirement. At any time after benefits have commenced, the member may name a different contingent annuitant or rescind the election by written notice to the board as follows:

(a) If the retired member names a different contingent annuitant, the optional premium benefit payment shall be adjusted to the actuarial equivalent of the original premium benefit payment based on the age of the new contingent annuitant. The adjustment shall include all postretirement increases or decreases in

amounts prescribed by subsection A, B or C of this section that are authorized by law after the retired member's date of retirement. Payment of this adjusted premium benefit payment shall continue under the provisions of the optional premium benefit payment previously elected by the retired member. A retired member cannot name a different contingent annuitant if the retired member has at any time rescinded the optional form of health and accident insurance premium benefit payment.

(b) If the retired member rescinds the election, the retired member shall thereafter receive the premium benefit payment that the retired member would otherwise be entitled to receive if the retired member had not elected the optional premium benefit payment, including all postretirement increases or decreases in amounts prescribed by subsection A, B or C of this section that are authorized by law after the member's date of retirement. The increased benefit payment shall continue during the remainder of the retired member's lifetime. The decision to rescind shall be irrevocable.

2. If, at the time of the retired member's death:

(a) The retired member was receiving a reduced premium benefit payment based on an amount prescribed in subsection B or C of this section and the contingent annuitant is eligible for family health and accident insurance coverage, the contingent annuitant is entitled to receive a premium benefit payment based on an amount prescribed in subsection B or C of this section times the reduction factor applied to the retired member's premium benefit payment times the joint and survivor option reduction factor elected by the retired member at the time of retirement pursuant to section 38-760, subsection B, paragraph 1.

(b) The retired member was receiving a reduced premium benefit payment based on an amount prescribed in subsection A or C of this section and the contingent annuitant is eligible for single health and accident insurance coverage, the contingent annuitant is entitled to receive a premium benefit payment based on an amount prescribed in subsection A or C of this section times the reduction factor applied to the retired member's premium benefit payment times the joint and survivor option reduction factor elected by the retired member at the time of retirement pursuant to section 38-760, subsection B, paragraph 1.

(c) The retired member was receiving a reduced premium benefit payment based on an amount prescribed in subsection B or C of this section and the contingent annuitant is not eligible for family health and accident insurance coverage, the contingent annuitant is entitled to receive a premium benefit payment based on an amount prescribed in subsection A or C of this section times the reduction factor applied to the retired member's premium benefit payment times the joint and survivor option reduction factor elected by the retired member at the time of retirement pursuant to section 38-760, subsection B, paragraph 1.

I. A member who elects to receive a retirement benefit pursuant to section 38-760, subsection B, paragraph 2 may elect at the time of retirement an optional form of health and accident insurance premium benefit payment pursuant to this subsection as follows:

1. The optional premium benefit payment shall be an amount prescribed by subsection A, B or C of this section that is actuarially reduced with payments for five, ten or fifteen years that are not dependent on the continued lifetime of the retired member but whose payments continue for the retired member's lifetime

beyond the five, ten or fifteen year period. The election in a manner prescribed by the board shall name the contingent annuitant and may be revoked at any time before the retiring member's effective date of retirement. At any time after benefits have commenced, the member may name a different contingent annuitant or rescind the election by written notice to the board. If the retired member rescinds the election, the retired member shall thereafter receive the premium benefit payment that the retired member would otherwise be entitled to receive if the retired member had not elected the optional premium benefit payment, including all postretirement increases or decreases in amounts prescribed by subsection A, B or C of this section that are authorized by law after the member's date of retirement. The increased benefit payment shall continue during the remainder of the retired member's lifetime. The decision to rescind shall be irrevocable.

2. If, at the time of the retired member's death:

(a) The retired member was receiving a reduced premium benefit payment based on an amount prescribed in subsection B or C of this section and the contingent annuitant is eligible for family health and accident insurance coverage, the contingent annuitant is entitled to receive a premium benefit payment based on an amount prescribed in subsection B or C of this section times the period certain and life option reduction factor elected by the retired member at the time of retirement pursuant to section 38-760, subsection B, paragraph 2.

(b) The retired member was receiving a reduced premium benefit payment based on an amount prescribed in subsection A or C of this section and the contingent annuitant is eligible for single health and accident insurance coverage, the contingent annuitant is entitled to receive a premium benefit payment based on an amount prescribed in subsection A or C of this section times the period certain and life option reduction factor elected by the retired member at the time of retirement pursuant to section 38-760, subsection B, paragraph 2.

(c) The retired member was receiving a reduced premium benefit payment based on an amount prescribed in subsection B or C of this section and the contingent annuitant is not eligible for family health and accident insurance coverage, the contingent annuitant is entitled to receive a premium benefit payment based on an amount prescribed in subsection A or C of this section times the period certain and life option reduction factor elected by the retired member at the time of retirement pursuant to section 38-760, subsection B, paragraph 2.

J. If, at the time of retirement, a retiring member does not elect to receive a reduced premium benefit payment pursuant to subsection H or I of this section, the retired member's contingent annuitant is not eligible at any time for the optional premium benefit payment.

K. If a member who is eligible for benefits pursuant to this section forfeits the member's interest in the account before the termination of ASRS, an amount equal to the amount of the forfeiture shall be applied as soon as possible to reduce employer contributions to fund the benefits provided by this section.

L. A contingent annuitant is not eligible for any premium benefit payment if the contingent annuitant was not enrolled in an eligible health and accident insurance plan at the time of the retired member's death or if the contingent annuitant is not the dependent beneficiary or insured surviving dependent as provided in section 38-782.

M. For the purposes of this section:

1. "Account" means the separate account established pursuant to subsection F of this section.
2. "Credited service" includes prior service.
3. "Prior service" means service for this state or a political subdivision of this state before membership in the defined contribution program administered by ASRS.
4. "Subsidized" means a portion of the total premium is paid by the employer, but does not necessarily mean a plan in which the employer uses blended rates to determine the total premium.

**ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM (R-16-1104)**

Title 9, Chapter 28, Article 7, Standards for Payments

**Amend:** R9-28-702



**GOVERNOR'S REGULATORY REVIEW COUNCIL  
M E M O R A N D U M**

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**MEETING DATE:** November 1, 2016

**AGENDA ITEM:** E-4

**TO:** Members of the Governor's Regulatory Review Council ("Council")

**FROM:** Shama Thathi, Staff Attorney

**DATE:** October 14, 2016

**SUBJECT:** **ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM (R-16-1104)**  
Title 9, Chapter 28, Article 7, Standards for Payments

Amend: R9-28-702

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**General Comments**

**Purpose of the Agency and Summary of What the Rulemaking Does**

The Arizona Health Care Cost Containment System ("AHCCCS") is established "to promote a comprehensive health care system to eligible citizens of this state." Laws 2013, 1<sup>st</sup> S.S., Ch. 10, § 53. This system is managed by the Director of the AHCCCS Administration ("Administration"), which is established under A.R.S. § 36-2902(A). The Director has the powers and duties as outlined in A.R.S. §§ 36-2903 and 2903.01.

This rulemaking seeks to amend one rule in A.A.C. Title 9, Chapter 28, Article 7, which contains rules related to standards for payments.

In this rulemaking, the Administration proposes to increase the amount of the nursing facility quality assessment charged for health care items and services provided by nursing facilities. Federal financial participation will be available for nursing facility assessment which conform with federal requirements, resulting in increased supplemental payments to nursing facilities for covered Medicaid expenditures. The quality assessment is computed by taking a nursing facility's total annual patient days, deducting the nursing facility's total annual Medicare patient days, and multiplying the result by the quality assessment dollar amount.

**Article Contents, Including the Subject Matter of Each Rule Affected**

Article 7 contains thirty rules, one of which is affected by this rulemaking, and one exhibit. The rule addresses nursing facility assessment.

## **Year that Each Rule was Last Amended or Newly Made**

The rule was last amended by final rulemaking on September 6, 2014.

## **Proposed Action**

The Administration proposes to increase the quality assessment paid by nursing facilities from \$10.50 to \$15.63 per annual patient day less Medicare patient days. For nursing facilities qualifying under the uniformity tax waiver test described in 42 CFR 433.68(e)(2), the quality assessment would increase from \$1.40 to \$1.80 per annual patient day less Medicare patient days.

The Administration indicates that while the quality assessment rate is increasing for nursing facilities, it is still a net gain for nursing facilities treating patients covered under the Arizona Long-Term Care System. Since Medicaid is a matching grant program, state funds (including the quality assessment) generate additional federal matching funds. Additionally, the proposed rulemaking will support accessibility of critical health care services to vulnerable populations and enhance the ability of nursing facilities to provide higher quality yet cost effective care to frail Arizona residents.

## **Exemption or Request and Approval for Exception from the Moratorium**

The Governor's Office granted an exception from Executive Order 2016-03 for this rulemaking on July 12, 2016.

## **Substantive or Procedural Concerns**

None.

### **1. Are the rules legal, consistent with legislative intent, and within the agency's statutory authority?**

Yes. The Administration cites to A.R.S. § 36-2903.01(F) as general authority for the rules. Under A.R.S. § 36-2903.01(F), the director of the Administration "may adopt necessary rules pursuant to [T]itle 41, [C]hapter 6 to carry out this article." In addition, A.R.S. § 36-2999.52 grants the Administration specific authority to administer a quality assessment on health care items and services provided by nursing facilities in order to obtain federal financial participation.

### **2. Are the rules written in a manner that is clear, concise, and understandable to the general public?**

Yes. The rule is clear, concise, and understandable.

**3. Does the agency adequately address the comments on the proposed rules and any supplemental proposals?**

Yes. The Administration indicates that it received one written comment in support of the rulemaking. The commenter, Executive Director of the Arizona Health Care Association, stated that the rulemaking will contribute to the financial well-being of the long term care community throughout Arizona.

**4. Are the final rules a substantial change, considered as a whole, from the proposed rules and any supplemental proposals?**

No. No substantive changes were made between the proposed rulemaking and the final rulemaking. Only minor grammatical and style corrections were made at the request of Council's staff.

**5. Does the preamble disclose a reference to any study relevant to the rules that the agency reviewed and either did or did not rely on in the agency's evaluation of or justification for the rules?**

No. The Administration indicates that no study was reviewed or relied upon for the rule.

**6. Are the rules more stringent than corresponding federal law and, if so, is there statutory authority that allows the agency to exceed the requirements of federal law?**

No. According to 42 CFR 433.68(e), if a state desires waiver of only the broad-based tax requirement, it must be in compliance with subsection (e)(1), and if the state desires waiver of the uniform tax requirement, it must be in compliance with subsection (e)(2). The Administration indicates that the rule is not more stringent than the corresponding federal law.

**7. Do the rules require a permit or license and if so, does the agency use a general permit or is any exception applicable under A.R.S. § 41-1037?**

No. The rule does not require a permit or license.

**8. Do the rules establish a new fee or contain a fee increase?**

No. The rule does not establish a new fee or contain a fee increase.

**9. Conclusion**

The Administration requests the usual 60-day delayed effective date for the rule. This analyst recommends approval of the rule.



## GOVERNOR'S REGULATORY REVIEW COUNCIL M E M O R A N D U M

MEETING DATE: NOVEMBER 1, 2016

AGENDA ITEM: E-4

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**TO:** Members of the Governor's Regulatory Review Council ("Council")

**FROM:** GRRC Economic Team

**DATE :** October 14, 2016

**SUBJECT:** **ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM (R-16-1104)**  
Title 9, Chapter 28, Article 7, Standards for Payments

Amend: R9-28-702

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I have reviewed the economic, small business, and consumer impact statement (EIS) and make the following comments. These comments are made to assist the Council in its review and may be used as the Council determines.

### **GRRC Economist comments:**

In this rulemaking, the Arizona Health Care Cost Containment System Administration (AHCCCS) is proposing to amend the quality assessment amount in R9-28-702. This rule establishes the quality assessment rules for nursing facilities licensed in Arizona.

AHCCCS estimates that roughly 17% of reported nursing facility days subject to the assessment in FY 2016 were from payors other than Medicare or Medicaid. The vast majority of patient days subject to the assessment receive health care coverage from a Medicaid program.

Even though the quality assessment rate is increasing for nursing facilities, it is still a net gain for nursing facilities treating patients covered by ALTCS. Since Medicaid is a matching grant program, state funds (including the quality assessment) generate additional federal matching funds. AHCCCS estimates that this increase in the quality assessment will generate an additional \$8.1 million from nursing facilities in the fiscal year ending September 30, 2017. Once these funds are matched by federal funds, the total funding increase would be \$16.1 million.

1. **Costs and Benefits for:**
  - a. **The implementing agency:**

The Administration does not anticipate any additional costs to administer the higher quality assessment rate.

**b. Political subdivisions:**

The proposed rulemaking does not directly impact political subdivisions.

**c. Businesses:**

Nursing facilities are the businesses that will be directly impacted by this rule change. The quality assessment costs will increase for nursing facilities, but this increase will provide additional funding for patients covered under ALTCS. The additional \$8.1 million paid by nursing facilities in the fiscal year ending in September 30, 2017 would become \$16.1 million after federal matching funds. This additional \$8 million would increase the supplemental payments made to the nursing facilities that pay the quality assessment.

**d. Small businesses:**

Small nursing facilities would be impacted in the same manner as larger nursing facilities. Nursing facilities with 58 or fewer beds are exempt from the quality assessment.

**e. Consumers directly affected by the rulemaking:**

Residents of nursing facilities covered by ALTCS will directly benefit from the rulemaking because additional funds will improve health care outcomes in these facilities.

**2. Do the probable benefits outweigh the probable costs?**

The Administration notes that while nursing facilities will have some increased costs, they will receive significantly more benefits due to federal matching funds. Additionally, nursing facilities will receive larger supplemental payments from AHCCCS that will offset any increases in the quality assessment.

**3. Analysis of methods to reduce the small business impact:**

This rulemaking does not alter the criteria used to exempt nursing facilities from the quality assessment. Any small businesses that were already exempt will continue to be exempt.

**4. The probable effect on state revenues:**

Neither the quality assessment nor the federal matching funds will be deposited into the general fund. This rulemaking only impacts the funds in the AHCCCS program.

5. **Analysis of any less intrusive or less costly alternative methods:**

The Administration did not consider any alternatives because the current quality assessment mechanism is highly cost effective.

6. **Whether an analysis was submitted to the agency regarding the rule's impact on the competitiveness of businesses in this state as compared to the competitiveness of businesses in other states:**

No analysis was submitted that compares the rule's impact of the competitiveness of businesses in this state to the impact on businesses in other states.

7. **A description of any data on which a rule is based with an explanation of how the data was obtained and why the data is acceptable data, and the methods used by the agency to evaluate the costs and benefits in the EIS.**

The Administration utilized data from the Uniform Accounting Reports that each nursing facility submits to the Arizona Department of Health Services.

8. **Conclusion:**

The submitted economic, small business and consumer impact statement is generally accurate, and contains the information required for compliance with A.R.S. §§ 41-1035, 41-1052(D)(1-3), and 41-1055. This analyst recommends that the proposed rule amendments be approved.

September 16, 2016

Ms. Nicole Ong, Chair  
Governor's Regulatory Review Council  
100 N. 15<sup>th</sup> Ave, Suite 402  
Phoenix, AZ 85007

Dear Ms. Ong:

The Arizona Health Care Cost Containment System (AHCCCS) Administration is submitting the attached regular rule package for your consideration:

- 9 A.A.C. 28, Article 7, Standards for payments.

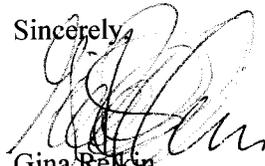
AHCCCS is providing the following information as required in A.A.C. R1-6-201:

- a. The close of record date was 5 p.m., September 6, 2016.
- b. Definitions of terms contained in statute or other rules and used in the rule are either cross-referenced or attached.
- c. The rulemaking does not relate to a 5-year-review.
- d. The rulemaking contains no new fees.
- e. The rulemaking contains no fee increase.
- f. Documents enclosed:
  - Notice of Final Rulemaking, including the preamble, table of contents for the rule, and text of the rule;
  - Economic, small business, and consumer impact statement;
  - If applicable, copy of definitions of terms, contained in statutes or other rules, used in the rule.
- g. All written comments submitted by the public concerning the proposed rule,
- h. The adopted rules contain no materials incorporated by reference,
- i. The adopted rules do not require a permit,
- j. The rule is not more stringent than federal law and the citation to the statutory authority does not exceed the requirements of federal law.
- k. A person has not submitted an analysis to the agency that compares the rule's impact of the competitiveness of businesses in this state to the impact on businesses in other states, and

- l. The AHCCCS Administration has not notified the Joint Legislative Budget Committee (JLBC) of a number of new full-time employees (FTE's) since none were required as a result of this rulemaking as required by A.R.S. § 41-1055.
- m. The AHCCCS Administration has requested and received approval to proceed with this rulemaking from the Governor's Office in reference to the rulemaking moratorium described under Executive Order 2016-03.

I certify that the information provided in number 7 of the Preamble is accurate. An effective date 60 days from the filing with the Secretary of State is requested. I respectfully request that the Council consider and approve the adopted rules.

Sincerely,



Gina Rekin

Deputy General Counsel - Office of Administrative Legal Services  
Attachments

**NOTICE OF FINAL RULEMAKING**

**TITLE 9. HEALTH SERVICES**

**CHAPTER 28. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM**

**ARIZONA LONG-TERM CARE SYSTEM**

**PREAMBLE**

**1. Article, Part, or Section Affected (as applicable)** **Rulemaking Action:**

R9-28-702

Amend

**2. Citations to the agency's statutory rulemaking authority to include both the authorizing statute (general) and the implementing statute (specific):**

Authorizing statute: A.R.S. §§ 36-2903.01, 36-2903, 36-2932

Implementing statute: A.R.S. §§ 36-2999.52, 36-2999.54

**3. The effective date of the rule:**

The agency selected an effective date of 60 days from the date of filing with the Secretary of State as specified in A.R.S. § 41-1032(A).

**4. Citations to all related notices published in the Register to include the Register as specified in R1-1-409(A) that pertain to the record of the final rulemaking package:**

Notice of Rulemaking Docket Opening: 22 A.A.R. 2057, August 5, 2016

Notice of Proposed Rulemaking: 22 A.A.R. 2015, August 5, 2016

**5. The agency's contact person who can answer questions about the rulemaking:**

Name: Gina Relkin

Address: 701 E. Jefferson St.

Telephone: (602) 417-4232  
Fax: (602) 253-9115  
E-mail: AHCCCSrules@azahcccs.gov  
Web site: [www.azahcccs.gov](http://www.azahcccs.gov)

**6. An agency's justification and reason why a rule should be made, amended, repealed or renumbered, to include an explanation about the rulemaking:**

This final rulemaking will amend the current rule to increase the amount of the nursing facility provider assessment charged for health care items and services provided by nursing facilities authorized by State Law ARS§36-2999.51 et seq. The statutory scheme requires the AHCCCS Administration to administer a provider assessment (also referred to as a quality assessment) on health care items and services provided by nursing facilities and to make supplemental payments to nursing facilities for covered Medicaid expenditures. As a result of the final rulemaking which will increase the dollar amount of the nursing facility assessment in R9-28-702, additional supplemental funding will be available to nursing facilities for covered Medicaid expenditures, thus supporting accessibility of critical health care services to vulnerable populations and enhancing the ability of nursing facilities to provide higher quality yet cost effective care to frail Arizona residents.

**7. A reference to any study relevant to the rule that the agency reviewed and either relied on or did not rely on in its evaluation of or justification for the rule, where the public may obtain or review each study, all data underlying each study, and any analysis of each study and other supporting material:**

A study was not referenced or relied upon when revising the regulations.

**8. A showing of good cause why the rulemaking is necessary to promote a statewide interest if the rulemaking will diminish a previous grant of authority of a political subdivision of this state:**

Not applicable.

**9. A summary of the economic, small business, and consumer impact:**

The Administration anticipates a minimal to moderate economic impact to individual qualifying nursing facilities. Under the statute, the amount of the assessment cannot exceed three and one-half percent of the net patient service revenue. The estimated increase in the total assessment for the fiscal year ending September 30, 2017 is \$8.1M. Ninety nine percent of the funds will be used as the non-federal share of supplemental payments to qualifying nursing facilities through the Medicaid program administered by AHCCCS. Because those funds will be matched with federal funds, the estimated increase in the total supplemental payments funded by this assessment for the fiscal year ending September 30, 2017 is \$16.1M.

**10. A description of any changes between the proposed rulemaking, to include supplemental notices, and the final rulemaking:**

No changes were made between the proposed rulemaking and the final rulemaking.

**11. An agency's summary of the public or stakeholder comments made about the rulemaking and the agency response to the comments:**

<b>Item #</b>	<b>Rule Cite Line #</b>	<b>Comment From and Date rec'd.</b>	<b>Comment</b>	<b>Analysis/ Recommendation</b>
1.		Kathleen Collins-Pagels 09/06/16 Executive Director of the AZHCA	I just wanted to take this opportunity to thank the AHCCCS administration for this rule revision.  The Arizona Health Care Association would like to offer its unqualified support for this change, we believe that it will contribute to the financial wellbeing of the Long Term Care Community throughout the state of Arizona and we believe it will contribute to quality outcomes.  We appreciate the leadership of Shelli Silver and Victoria Burns and	AHCCCS thanks Ms. Collins-Pagels for the support.

			all of the AHCCCS administrative team in making this possible.	
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**12. All agencies shall list other matters prescribed by statute applicable to the specific agency or to any specific rule or class of rules. Additionally, an agency subject to Council review under A.R.S. §§ 41-1052 and 41-1055 shall respond to the following questions:**

**a. Whether the rule requires a permit, whether a general permit is used and if not, the reasons why a general permit is not used:**

Not applicable.

**b. Whether a federal law is applicable to the subject of the rule, whether the rule is more stringent than federal law and if so, citation to the statutory authority to exceed the requirements of federal law:**

42 Code of Federal Regulations section 433.68(e)(1) and (2) is applicable to the subject of this rulemaking. The rule is not more stringent than federal law.

**c. Whether a person submitted an analysis to the agency that compares the rule's impact of the competitiveness of business in this state to the impact on business in other states:**

No analysis was submitted.

**13. A list of any incorporated by reference material as specified in A.R.S. § 41-1028 and its location in the rules:**

Not applicable.

**14. Whether the rule was previously made, amended or repealed as an emergency rule. If so, cite the notice published in the Register as specified in R1-1-409(A). Also, the agency shall state where the text was changed between the emergency and the final rulemaking packages:**

Not applicable.

**15. The full text of the rules follows:**

## **TITLE 9. HEALTH SERVICES**

### **CHAPTER 28. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM**

#### **ARIZONA LONG-TERM CARE SYSTEM**

#### **ARTICLE 7. STANDARDS FOR PAYMENTS**

Section

R9-28-702 Nursing Facility Assessment

#### **ARTICLE 7. STANDARDS FOR PAYMENTS**

#### **R9-28-702. Nursing Facility Assessment**

A. For purposes of R9-28-702 and R9-28-703, in addition to the definitions under A.R.S. 36-2999.51, the following terms have the following meaning unless the context specifically requires another meaning:

“820 transaction” means the standard health care premium payments transaction required by 45 CFR 162.1702.

“Assessment year” means the 12 month period beginning October 1<sup>st</sup> each year.

“Medicaid patient days” means patient days reported on the Nursing Care Institution Uniform Accounting Report (UAR) as attributable to AHCCCS and its contractors as the primary payor.

“Medicare days” means resident days where the Medicare program, a Medicare advantage or special needs plan, or the Medicare hospice program is the primary payor.

“Medicare patient days” means patient days reported on the Nursing Care Institution UAR as Skilled Medicare Patient Days or Part C/Advantage/Medicare Replacement Days.

"Nursing Care Institution UAR" means the Nursing Care Institution Uniform Accounting Report described by R9-11-204.

**B.** Subject to Centers for Medicare and Medicaid Services (CMS) approval, effective October 1, 2012, nursing facilities shall be subject to a provider assessment payable on a quarterly basis.

**C.** All nursing facilities licensed in the state of Arizona shall be subject to the provider assessment except for:

1. A continuing care retirement community,
2. A facility with 58 or fewer beds, according to the Arizona Department of Health Services, Division of Licensing Services, Provider & Facility Database,
3. A facility designated by the Arizona Department of Health Services as an Intermediate Care Facility for the Intellectually Disabled,
4. A tribally owned or operated facility located on a reservation, or
5. Arizona Veteran’s Homes.

**D.** The Administration shall calculate the prospective nursing facility provider assessment for qualifying nursing facilities as follows:

1. In September of each year, the Administration shall obtain from the Arizona Department of Health Services the most recently published Nursing Care Institution UAR and the information required in subsection (C)(2). At the request of the Administration, a nursing facility shall provide the Administration with any additional information necessary to determine the assessment.

2. The Administration shall use the information obtained under subsection (D)(1) to determine:
  - a. Each nursing facility's total annual Medicaid patient days,
  - b. Each nursing facility's total annual Medicare patient days,
  - c. Each nursing facility's total annual patient days,
  - d. The aggregate net patient service revenue of all assessed providers, and
  - e. The slope described under 42 CFR 433.68(e)(2).
3. For each nursing facility, other than a nursing facility exempted in subsection (C) or described in subsection (D)(4), the provider assessment is calculated by multiplying the nursing facility's total annual patient days, other than Medicare patient days, by ~~\$10.50~~15.63.
4. For a nursing facility, other than a nursing facility exempted in subsection (C), ~~with the a~~ number of total annual Medicaid patient days greater than or equal to the number required to achieve a slope of at least 1 applying the uniformity tax waiver test described in 42 CFR 433.68(e)(2), the provider assessment is calculated by multiplying the nursing facility's total annual patient days, other than Medicare patient days, by ~~\$1.40~~1.80.
5. For each assessment year the slope described under 42 CFR 433.68(e)(2) shall be recalculated.
6. The total annual assessment calculated under subsections (D)(3), (D)(4) and (D)(5), shall not exceed 3.5 percent of the aggregate net patient service revenue of all assessed providers as reported on the Nursing Care Institution UAR obtained under subsection (D)(1).
7. All calculations and determinations necessary for the provider assessment shall be based on information possessed by the Administration on or before November 1 of the assessment year.
8. The Administration shall forward the provider assessments for all assessed facilities to the Arizona Department of Revenue on or before December 1 of the assessment year.
9. In the event a nursing facility closes during the assessment year, the nursing facility shall cease to be responsible for the portion of the assessment applied to the dates the nursing facility is not operating.

10. In the event a nursing facility begins operation during the assessment year, that facility will have no responsibility for the assessment until such time as the facility has submitted to the Arizona Department of Health Services the report required by R9-11-204(A) covering a full year of operation.

11. In the event a nursing facility has a change of ownership such that the facility remains open and the ownership of the facility changes, the assessment liability transfers with the change in ownership.

**ECONOMIC, SMALL BUSINESS, AND CONSUMER IMPACT STATEMENT**

**TITLE 9. HEALTH SERVICES**

**CHAPTER 28. ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM**

**ADMINISTRATION**

**ARTICLE 7. STANDARDS FOR PAYMENTS**

**NURSING FACILITY ASSESSMENT**

**1. Identification of rulemaking.**

This final rulemaking by the AHCCCS Administration amends the current rule to increase the amount of the nursing facility provider assessment charged for health care items and services provided by nursing facilities authorized by State Law ARS §36-2999.51 et seq. The statutory scheme requires the AHCCCS Administration to administer a provider assessment (also referred to as a quality assessment) on health care items and services provided by nursing facilities and to make supplemental payments to nursing facilities for covered Medicaid expenditures. Federal financial participation will be available for nursing facility assessments which conform with federal requirements, resulting in increased supplemental payments to nursing facilities for covered Medicaid expenditures. This rulemaking will increase the dollar amount of the nursing facility assessment specified in A.A.C. R9-28-702 which will result in additional supplemental funding that will be available to nursing facilities for covered Medicaid expenditures. This additional funding will support accessibility of critical health care services to vulnerable populations and enhance the ability of nursing facilities to provide higher quality yet cost effective care to frail Arizona residents.

**a. The conduct and its frequency of occurrence that the rule is designed to change:**

The proposed changes to A.A.C. R9-28-702 are limited to two specific dollar amounts which will be used in the calculation of the annual nursing facility assessments.

**b. The harm resulting from the conduct the rule is designed to change and the likelihood it will continue to occur if the rule is not changed:**

The rulemaking provides additional supplemental funding to nursing facilities across the State which will support delivery of quality, cost effective nursing home care to vulnerable, low income Medicaid members who have significant health care needs.

c. **The estimated change in frequency of the targeted conduct expected from the rule change:**

The Administration does not anticipate a change in frequency of conduct as the nursing facility assessment is calculated annually. The rulemaking amends the dollar figures for computing the nursing facility assessment.

2. **Identification of the persons who will be directly affected by, bear the costs of, or directly benefit from the rule making.**

Nursing facilities will be directly affected by the rulemaking as the assessment for these entities will increase. Not only will nursing facilities directly benefit because they will receive greater supplemental payments to fund a greater portion of health care costs, but nursing facility residents in the State will also directly benefit as supplemental payments will foster health care innovation delivery and delivery of quality health care services.

3. **Cost benefit analysis.**

a. **Probable costs and benefits to the implementing agency and other agencies directly affected by the implementation and enforcement of the proposed rulemaking including the the number of new full-time employees necessary to implement and enforce the proposed rule:**

i. **Cost:**

The Administration anticipates no cost impact to result from the increase in the nursing facility assessment.

ii. **Benefit:**

The Administration anticipates improved fiscal health of nursing facilities and improved health care delivery to nursing facility residents as a result of the rulemaking.

iii. **Need for additional Full-time Employees:**

The Administration does not anticipate the need to hire full-time employees as a result of this rulemaking.

b. **Probable costs and benefits to political subdivision of this state directly affected by the implementation and enforcement of the proposed rulemaking.**

This proposed rule revision does not directly affect political subdivisions.

c. **Probable costs and benefits to businesses directly affected by the proposed rulemaking, including any anticipated effect on the revenues or payroll expenditures of employers who are subject to the proposed rulemaking.**

The increased supplemental payments to nursing facilities will encourage economic growth within the State, and it will promote fiscal health of nursing facility providers by funding a larger portion of the costs related to care delivery. The estimated increase in the total assessment for the fiscal year ending September 30, 2017 is \$8.1M. Ninety nine percent of the funds will be used as the non-federal share of supplemental payments to qualifying nursing facilities through the Medicaid program administered by AHCCCS. Because those funds will be matched with federal funds, the estimated increase in the total supplemental payments funded by this assessment for the fiscal year ending September 30, 2017 is \$16.1M.

4. **General description of the probable impact on private and public employment in businesses, agencies, and political subdivisions of this state directly affected by the rulemaking.**

The Administration anticipates a minimal to moderate economic impact to individual qualifying nursing facilities. Under the statute, the amount of the assessment cannot exceed three and one-half percent of the net patient service revenue.

5. **Statement of probable impact of the proposed rule on small businesses. The statement shall include:**

a. **Identification of the small businesses subject to the proposed rulemaking.**

Nursing facilities are the small businesses subject to the proposed rulemaking.

b. **Administrative and other costs required for compliance with the proposed rulemaking.**

The Administration does not anticipate an impact upon the administrative expenses of the small business community because the proposed rule language does not change practices of the small business. The proposed rulemaking is limited to increasing the dollar amount of the assessment.

c. **Description of methods prescribed in section A.R.S. § 41-1035 that the agency may use to reduce the impact on small businesses, with reasons for the agency's decision to use or not use each method:**

i. **Establishing less stringent compliance or reporting requirements in the rule for small businesses;**

This rulemaking does not impose compliance or reporting requirements on any small businesses.

ii. **Establishing less stringent schedules deadlines in the rule for compliance or reporting requirements for small businesses;**

This rulemaking does not impose compliance or reporting requirements on any small businesses. As such, it does not establish any deadlines for compliance or reporting.

iii. **Consolidate or simplify the rule's compliance or reporting requirements for small businesses;**

This rulemaking does not impose compliance or reporting requirements on any small businesses. As such, consolidation or simplification of compliance or reporting requirements is not applicable.

iv. **Establish performance standards for small businesses to replace design or operational standards in the rule; and**

This rulemaking does not establish performance standards for any small businesses.

v. **Exempting small businesses from any or all requirements of the rule.**

The criteria specifying nursing facilities which are exempted from the assessment are not affected by this rulemaking.

d. **The probable cost and benefit to private persons and consumers who are directly affected by the proposed rulemaking.**

Nursing facility residents will directly benefit as supplemental payments will foster health care innovation delivery and delivery of quality health care services.

6. **Statement of the probable effect on state revenues.**

The rulemaking will not affect State revenues. No additional general fund expenditures will be necessary as a result of this rulemaking.

7. **Description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed rulemaking, including the monetizing of the costs and benefits for each option and providing the rationale for not using nonselected alternatives.**

The Administration did not consider other alternatives because the changes are the most cost effective and efficient method of complying with state statutes.

8. **A description of any data on which a rule is based with a detailed explanation of how the data was obtained and why the data is acceptable data.**

The Administration used data from the Uniform Accounting Reports submitted by nursing facilities to the Arizona Department of Health Services in accordance with A.A.C. Title 9, Chapter 11. This data is considered acceptable because it is the same data on which the annual assessments are based.

## Arizona Health Care Cost Containment System – Arizona Long-term Care System

repealed by final rulemaking at 8 A.A.R. 444, effective January 10, 2002 (Supp. 02-1).

**R9-28-609. Repealed****Historical Note**

Adopted effective October 1, 1988, filed September 1, 1988 (Supp. 88-3). Section repealed by final rulemaking at 6 A.A.R. 896, effective February 8, 2000 (Supp. 00-1).

**R9-28-610. Repealed****Historical Note**

Adopted effective October 1, 1988, filed September 1, 1988 (Supp. 88-3). Amended under an exemption from the provisions of the Administrative Procedure Act effective March 1, 1993 (Supp. 93-1). Section repealed by final rulemaking at 6 A.A.R. 896, effective February 8, 2000 (Supp. 00-1).

**ARTICLE 7. STANDARDS FOR PAYMENTS****R9-28-701. Standards for Payment Related Definitions**

Definitions. In this Article, in addition to definitions contained in A.R.S. §§ 36-2901 and 36-2931, and 9 A.A.C. 22, Article 1, the following phrase has the following meaning unless the context of the Article explicitly requires another meaning:

"County of fiscal responsibility" means the county that is financially responsible for the state's share of ALTCS funding.

**Historical Note**

Adopted effective October 1, 1988, filed September 1, 1988 (Supp. 88-3). Amended by final rulemaking at 8 A.A.R. 444, effective January 10, 2002 (Supp. 02-1). Section repealed; new Section made by final rulemaking at 11 A.A.R. 3165, effective October 1, 2005 (Supp. 05-3).

**R9-28-701.10. General Requirements**

The following Sections of A.A.C. Chapter 22, Articles 2 and 7, are applicable to reimbursement for services provided under the ALTCS program, except that the term "program contractor" shall be substituted for "contractor."

1. Scope of the Administration's and Contractor's Liability, R9-22-701.10;
2. Charges to Members, R9-22-702;
3. Payments by the Administration or by a program contractor, R9-22-703 and R9-22-705;
4. Contractor's Liability to Hospitals for the Provision of Emergency and Post-stabilization Care, R9-22-709;
5. Payment for Non-hospital services, R9-22-710;
6. Specialty Contracts, R9-22-712(G)(3), R9-22-712.01 (10) and Article 2;
7. Payments by the Administration for Hospital Services Provided to an Eligible Person, R9-22-712; R9-22-712.01 and R9-22-712.10;
8. Overpayment and Recovery of Indebtedness, R9-22-713;
9. Payments to Providers, R9-22-714;
10. Hospital Rate Negotiations, R9-22-715; and
11. Reinsurance, R9-22-720.

**Historical Note**

New Section made by final rulemaking at 13 A.A.R. 458, effective April 7, 2007 (Supp. 07-1).

**R9-28-702. Nursing Facility Assessment**

A. For purposes of R9-28-702 and R9-28-703, in addition to the definitions under A.R.S. 3 6-2999.51, the following terms have the following meaning unless the context specifically requires another meaning:

"820 transaction" means the standard health care premium payments transaction required by 45 CFR 162.1702.

"Assessment year" means the 12 month period beginning October 1<sup>st</sup> each year

"Medicaid patient days" means patient days reported on the Nursing Care Institution Uniform Accounting Report (UAR) as attributable to AHCCCS and its contractors as the primary payor.

"Medicare patient days" means patient days reported on the Nursing Care Institution UAR as Skilled Medicare Patient Days or Part C/Advantage/Medicare Replacement Days.

"Nursing Care Institution UAR" means the Nursing Care Institution Uniform Accounting Report described by R9-11-204.

- B. Subject to Centers for Medicare and Medicaid Services (CMS) approval, effective October 1, 2012, nursing facilities shall be subject to a provider assessment payable on a quarterly basis.
- C. All nursing facilities licensed in the state of Arizona shall be subject to the provider assessment except for:
  1. A continuing care retirement community,
  2. A facility with 58 or fewer beds, according to the Arizona Department of Health Services, Division of Licensing Services, Provider & Facility Database,
  3. A facility designated by the Arizona Department of Health Services as an Intermediate Care Facility for the Intellectually Disabled,
  4. A tribally owned or operated facility located on a reservation, or
  5. Arizona Veteran's Homes.
- D. The Administration shall calculate the prospective nursing facility provider assessment for qualifying nursing facilities as follows:
  1. In September of each year, the Administration shall obtain from the Arizona Department of Health Services the most recently published Nursing Care Institution UAR and the information required in subsection (C)(2). At the request of the Administration, a nursing facility shall provide the Administration with any additional information necessary to determine the assessment.
  2. The Administration shall use the information obtained under subsection (D)(1) to determine:
    - a. Each nursing facility's total annual Medicaid patient days,
    - b. Each nursing facility's total annual Medicare patient days,
    - c. Each nursing facility's total annual patient days,
    - d. The aggregate net patient service revenue of all assessed providers, and
    - e. The slope described under 42 CFR 433.68(e)(2).
  3. For each nursing facility, other than a nursing facility exempted in subsection (C) or described in subsection (D)(4), the provider assessment is calculated by multiplying the nursing facility's total annual patient days other than Medicare patient days by \$10.50.
  4. For a nursing facility, other than a nursing facility exempted in subsection (C), with a number of total annual Medicaid patient days greater than or equal to the number required to achieve a slope of at least 1 applying the uniformity tax waiver test described in 42 CFR 433.68(e)(2), the provider assessment is calculated by multiplying the nursing facility's total annual patient days, other than Medicare patient days, by \$1.40.

## Arizona Health Care Cost Containment System – Arizona Long-term Care System

5. For each assessment year the slope described under 42 CFR 433.68(e)(2) shall be recalculated.
6. The total annual assessment calculated under subsections (D)(3), (D)(4) and (D)(5), shall not exceed 3.5 percent of the aggregate net patient service revenue of all assessed providers as reported on the Nursing Care Institution UAR obtained under subsection (D)(1).
7. All calculations and determinations necessary for the provider assessment shall be based on information possessed by the Administration on or before November 1 of the assessment year.
8. The Administration shall forward the provider assessments for all assessed facilities to the Arizona Department of Revenue by no later than December 1 of the assessment year.
9. In the event a nursing facility closes during the assessment year, the nursing facility shall cease to be responsible for the portion of the assessment applied to the dates the nursing facility is not operating.
10. In the event a nursing facility begins operation during the assessment year, that facility will have no responsibility for the assessment until such time as the facility has submitted to the Arizona Department of Health Services the report required by R9-11-204(A) covering a full year of operation.
11. In the event a nursing facility has a change of ownership such that the facility remains open and the ownership of the facility changes, the assessment liability transfers with the change in ownership.

**Historical Note**

Adopted effective October 1, 1988, filed September 1, 1988 (Supp. 88-3). Amended effective September 22, 1997 (Supp. 97-3). Amended by final rulemaking at 8 A.A.R. 3340, effective July 15, 2002 (Supp. 02-3). Amended by final rulemaking at 11 A.A.R. 3244, effective October 1, 2005 (Supp. 05-3). Section repealed by final rulemaking at 13 A.A.R. 458, effective April 7, 2007 (Supp. 07-1). New Section made by final rulemaking at 19 A.A.R. 137, effective January 8, 2013 (Supp. 13-1). Amended by final rulemaking at 19 A.A.R. 4168, effective February 1, 2014 (Supp. 13-4). Amended by final rulemaking at 20 A.A.R. 1989, effective September 6, 2014 (Supp. 14-3).

**R9-28-703. Nursing Facility Supplemental Payments****A. Nursing Facility Supplemental Payments**

1. Using Medicaid resident bed day information from the most recent and complete twelve months of adjudicated claims and encounter data, for every combination of contractor and every facility eligible for a supplemental payment, the Administration shall determine annually a ratio equal to the number of bed days for the facility paid by each contractor divided by the total number of bed days paid to all facilities by all contractors and the Administration.
2. Using the same information as used in (A)(1), for every facility eligible for a supplemental payment, the Administration shall determine annually a ratio equal to the number of bed days for the facility paid by the Administration divided by the total number of bed days paid to all facilities by all contractors and the Administration.
3. Quarterly, each contractor shall make payments to each facility in an amount equal to 98% of the amounts identified as Nursing Facility Enhanced Payments in the 820 transaction sent from AHCCCS to the contractor for the quarter multiplied by the percentage determined in sub-

section (A)(1) applicable to the contractor and to each facility.

4. Quarterly, the Administration shall make payments to each facility in an amount equal to 99% of the amounts collected during the preceding quarter under R9-28-702, less amounts collected and used to fund the Nursing Facility Enhanced Payments included in the capitation paid to contractors and the corresponding federal financial participation, multiplied by the percentage determined in subsection (A)(2) applicable to the Administration and to each facility. The Administration shall make the supplemental payments to the nursing facilities within 20 calendar days of the determination of the quarterly supplemental payment.
  5. Neither the Administration nor its contractors shall be required to make quarterly payments to facilities otherwise required by subsections (A)(3) or (A)(4) until the amount available in the nursing facility assessment fund established by A.R.S. § 36-2999.53, plus the corresponding federal financial participation, is equal to or greater than 101% of the amount necessary to make such payments in full.
  6. Contractors shall not be required to make quarterly payments to a facility otherwise required by subsection (A)(3) until the Administration has made a retroactive adjustment to the capitation rates paid to contractors to correct the Nursing Facility Enhanced Payments based on actual member months for the specified quarter.
- B.** Each contractor must pay each facility the amount computed within 20 calendar days of receiving the Nursing Facility Enhanced Payment from the Administration. The contractors must confirm each payment and payment date to the Administration within 20 calendar days from receipt of the funds.
- C.** After each assessment year, the Administration shall reconcile the payments made by contractors under subsections (A)(3) and (B) to the portion of the annual collections under R9-28-702 attributable to Medicaid resident bed days paid for by contractors for the same year, less one percent, plus available federal financial participation. The proportion of each nursing facility's Medicaid resident bed days as described in subsection (A)(1) shall be used to calculate the reconciliation amounts. Contractors shall make additional payments to or recoup payments from nursing facilities based on the reconciliation in compliance with the requirements of subsection (B).
- D.** General requirements for all payments.
1. A facility must be open on the date the supplemental payment is made in order to receive a payment. In the event a nursing facility closes during the assessment year, the nursing facility shall cease to be eligible for supplemental payments.
  2. In the event a nursing facility begins operation during the assessment year, that facility shall not receive a supplemental payment until such time as the facility has claims and encounter data that falls within the collection period for the payment calculation.
  3. In the event a nursing facility has a change of ownership, payments shall be made to the owner of the facility as of the date of the supplemental payment.
  4. Subsection (E)(3) shall not be interpreted to prohibit the current and prior owner from agreeing to a transfer of the payment from the current owner to the prior owner.
- E.** The Arizona Veterans' Homes are not eligible for supplemental payments.

**Historical Note**

Adopted effective October 1, 1988, filed September 1, 1988 (Supp. 88-3). Amended effective November 5, 1993

36-2903. Arizona health care cost containment system; administrator; powers and duties of director and administrator; exemption from attorney general representation; definition

A. The Arizona health care cost containment system is established consisting of contracts with contractors for the provision of hospitalization and medical care coverage to members. Except as specifically required by federal law and by section 36-2909, the system is only responsible for providing care on or after the date that the person has been determined eligible for the system, and is only responsible for reimbursing the cost of care rendered on or after the date that the person was determined eligible for the system.

B. An agreement may be entered into with an independent contractor, subject to title 41, chapter 23, to serve as the statewide administrator of the system. The administrator has full operational responsibility, subject to supervision by the director, for the system, which may include any or all of the following:

1. Development of county-by-county implementation and operation plans for the system that include reasonable access to hospitalization and medical care services for members.
2. Contract administration and oversight of contractors, including certification instead of licensure for title XVIII and title XIX purposes.
3. Provision of technical assistance services to contractors and potential contractors.
4. Development of a complete system of accounts and controls for the system including provisions designed to ensure that covered health and medical services provided through the system are not used unnecessarily or unreasonably including but not limited to inpatient behavioral health services provided in a hospital. Periodically the administrator shall compare the scope, utilization rates, utilization control methods and unit prices of major health and medical services provided in this state in comparison with other states' health care services to identify any unnecessary or unreasonable utilization within the system. The administrator shall periodically assess the cost effectiveness and health implications of alternate approaches to the provision of covered health and medical services through the system in order to reduce unnecessary or unreasonable utilization.
5. Establishment of peer review and utilization review functions for all contractors.
6. Assistance in the formation of medical care consortiums to provide covered health and medical services under the system for a county.
7. Development and management of a contractor payment system.
8. Establishment and management of a comprehensive system for assuring the quality of care delivered by the system.
9. Establishment and management of a system to prevent fraud by members, subcontracted providers of care, contractors and noncontracting providers.
10. Coordination of benefits provided under this article to any member. The administrator may require that contractors and noncontracting providers are responsible for the coordination of benefits for services provided under this article. Requirements for coordination of benefits by noncontracting providers under this section are limited to coordination with standard health insurance and disability insurance policies and similar programs for health coverage.

11. Development of a health education and information program.

12. Development and management of an enrollment system.

13. Establishment and maintenance of a claims resolution procedure to ensure that ninety per cent of the clean claims shall be paid within thirty days of receipt and ninety-nine per cent of the remaining clean claims shall be paid within ninety days of receipt. For the purposes of this paragraph, "clean claims" has the same meaning prescribed in section 36-2904, subsection G.

14. Establishment of standards for the coordination of medical care and patient transfers pursuant to section 36-2909, subsection B.

15. Establishment of a system to implement medical child support requirements, as required by federal law. The administration may enter into an intergovernmental agreement with the department of economic security to implement this paragraph.

16. Establishment of an employee recognition fund.

17. Establishment of an eligibility process to determine whether a medicare low income subsidy is available to persons who want to apply for a subsidy as authorized by title XVIII.

C. If an agreement is not entered into with an independent contractor to serve as statewide administrator of the system pursuant to subsection B of this section, the director shall ensure that the operational responsibilities set forth in subsection B of this section are fulfilled by the administration and other contractors as necessary.

D. If the director determines that the administrator will fulfill some but not all of the responsibilities set forth in subsection B of this section, the director shall ensure that the remaining responsibilities are fulfilled by the administration and other contractors as necessary.

E. The administrator or any direct or indirect subsidiary of the administrator is not eligible to serve as a contractor.

F. Except for reinsurance obtained by contractors, the administrator shall coordinate benefits provided under this article to any eligible person who is covered by workers' compensation, disability insurance, a hospital and medical service corporation, a health care services organization, an accountable health plan or any other health or medical or disability insurance plan including coverage made available to persons defined as eligible by section 36-2901, paragraph 6, subdivisions (b), (c), (d) and (e), or who receives payments for accident-related injuries, so that any costs for hospitalization and medical care paid by the system are recovered from any other available third party payors. The administrator may require that contractors and noncontracting providers are responsible for the coordination of benefits for services provided under this article. Requirements for coordination of benefits by noncontracting providers under this section are limited to coordination with standard health insurance and disability insurance policies and similar programs for health coverage. The system shall act as payor of last resort for persons eligible pursuant to section 36-2901, paragraph 6, subdivision (a), section 36-2974 or section 36-2981, paragraph 6 unless specifically prohibited by federal law. By operation of law, eligible persons assign to the system and a county rights to all types of medical benefits to which the person is entitled, including first party medical benefits under automobile insurance policies based on the order of priorities established pursuant to section 36-2915. The state has a right to subrogation against any other person or firm to enforce the assignment of medical benefits. The provisions of this subsection are controlling over the provisions of

any insurance policy that provides benefits to an eligible person if the policy is inconsistent with the provisions of this subsection.

G. Notwithstanding subsection E of this section, the administrator may subcontract distinct administrative functions to one or more persons who may be contractors within the system.

H. The director shall require as a condition of a contract with any contractor that all records relating to contract compliance are available for inspection by the administrator and the director subject to subsection I of this section and that such records be maintained by the contractor for five years. The director shall also require that these records be made available by a contractor on request of the secretary of the United States department of health and human services, or its successor agency.

I. Subject to existing law relating to privilege and protection, the director shall prescribe by rule the types of information that are confidential and circumstances under which such information may be used or released, including requirements for physician-patient confidentiality. Notwithstanding any other provision of law, such rules shall be designed to provide for the exchange of necessary information among the counties, the administration and the department of economic security for the purposes of eligibility determination under this article. Notwithstanding any law to the contrary, a member's medical record shall be released without the member's consent in situations or suspected cases of fraud or abuse relating to the system to an officer of the state's certified Arizona health care cost containment system fraud control unit who has submitted a written request for the medical record.

J. The director shall prescribe rules that specify methods for:

1. The transition of members between system contractors and noncontracting providers.
2. The transfer of members and persons who have been determined eligible from hospitals that do not have contracts to care for such persons.

K. The director shall adopt rules that set forth procedures and standards for use by the system in requesting county long-term care for members or persons determined eligible.

L. To the extent that services are furnished pursuant to this article, and unless otherwise required pursuant to this chapter, a contractor is not subject to title 20.

M. As a condition of the contract with any contractor, the director shall require contract terms as necessary in the judgment of the director to ensure adequate performance and compliance with all applicable federal laws by the contractor of the provisions of each contract executed pursuant to this chapter. Contract provisions required by the director shall include at a minimum the maintenance of deposits, performance bonds, financial reserves or other financial security. The director may waive requirements for the posting of bonds or security for contractors that have posted other security, equal to or greater than that required by the system, with a state agency for the performance of health service contracts if funds would be available from such security for the system on default by the contractor. The director may also adopt rules for the withholding or forfeiture of payments to be made to a contractor by the system for the failure of the contractor to comply with a provision of the contractor's contract with the system or with the adopted rules. The director may also require contract terms allowing the administration to operate a contractor directly under circumstances specified in the contract. The administration shall operate the contractor only as long as it is necessary to assure delivery of uninterrupted care to members enrolled with the contractor and accomplish the orderly transition of those members to other system contractors, or until the contractor reorganizes or otherwise corrects the contract performance failure. The

administration shall not operate a contractor unless, before that action, the administration delivers notice to the contractor and provides an opportunity for a hearing in accordance with procedures established by the director. Notwithstanding the provisions of a contract, if the administration finds that the public health, safety or welfare requires emergency action, it may operate as the contractor on notice to the contractor and pending an administrative hearing, which it shall promptly institute.

N. The administration for the sole purpose of matters concerning and directly related to the Arizona health care cost containment system and the Arizona long-term care system is exempt from section 41-192.

O. Notwithstanding subsection F of this section, if the administration determines that according to federal guidelines it is more cost-effective for a person defined as eligible under section 36-2901, paragraph 6, subdivision (a) to be enrolled in a group health insurance plan in which the person is entitled to be enrolled, the administration may pay all of that person's premiums, deductibles, coinsurance and other cost sharing obligations for services covered under section 36-2907. The person shall apply for enrollment in the group health insurance plan as a condition of eligibility under section 36-2901, paragraph 6, subdivision (a).

P. The total amount of state monies that may be spent in any fiscal year by the administration for health care shall not exceed the amount appropriated or authorized by section 35-173 for all health care purposes. This article does not impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation for that specific purpose.

Q. Notwithstanding section 36-470, a contractor or program contractor may receive laboratory tests from a laboratory or hospital-based laboratory for a system member enrolled with the contractor or program contractor subject to all of the following requirements:

1. The contractor or program contractor shall provide a written request to the laboratory in a format mutually agreed to by the laboratory and the requesting health plan or program contractor. The request shall include the member's name, the member's plan identification number, the specific test results that are being requested and the time periods and the quality improvement activity that prompted the request.
2. The laboratory data may be provided in written or electronic format based on the agreement between the laboratory and the contractor or program contractor. If there is no contract between the laboratory and the contractor or program contractor, the laboratory shall provide the requested data in a format agreed to by the noncontracted laboratory.
3. The laboratory test results provided to the member's contractor or program contractor shall only be used for quality improvement activities authorized by the administration and health care outcome studies required by the administration. The contractors and program contractors shall maintain strict confidentiality about the test results and identity of the member as specified in contractual arrangements with the administration and pursuant to state and federal law.
4. The administration, after collaboration with the department of health services regarding quality improvement activities, may prohibit the contractors and program contractors from receiving certain test results if the administration determines that a serious potential exists that the results may be used for purposes other than those intended for the quality improvement activities. The department of health services shall consult with the clinical laboratory licensure advisory committee established by section 36-

465 before providing recommendations to the administration on certain test results and quality improvement activities.

5. The administration shall provide contracted laboratories and the department of health services with an annual report listing the quality improvement activities that will require laboratory data. The report shall be updated and distributed to the contracting laboratories and the department of health services when laboratory data is needed for new quality improvement activities.

6. A laboratory that complies with a request from the contractor or program contractor for laboratory results pursuant to this section is not subject to civil liability for providing the data to the contractor or program contractor. The administration, the contractor or a program contractor that uses data for reasons other than quality improvement activities is subject to civil liability for this improper use.

R. For the purposes of this section, "quality improvement activities" means those requirements, including health care outcome studies specified in federal law or required by the centers for medicare and medicaid services or the administration, to improve health care outcomes.

#### 36-2903.01. Additional powers and duties; report; definition

A. The director of the Arizona health care cost containment system administration may adopt rules that provide that the system may withhold or forfeit payments to be made to a noncontracting provider by the system if the noncontracting provider fails to comply with this article, the provider agreement or rules that are adopted pursuant to this article and that relate to the specific services rendered for which a claim for payment is made.

B. The director shall:

1. Prescribe uniform forms to be used by all contractors. The rules shall require a written and signed application by the applicant or an applicant's authorized representative, or, if the person is incompetent or incapacitated, a family member or a person acting responsibly for the applicant may obtain a signature or a reasonable facsimile and file the application as prescribed by the administration.

2. Enter into an interagency agreement with the department to establish a streamlined eligibility process to determine the eligibility of all persons defined pursuant to section 36-2901, paragraph 6, subdivision (a). At the administration's option, the interagency agreement may allow the administration to determine the eligibility of certain persons, including those defined pursuant to section 36-2901, paragraph 6, subdivision (a).

3. Enter into an intergovernmental agreement with the department to:

(a) Establish an expedited eligibility and enrollment process for all persons who are hospitalized at the time of application.

(b) Establish performance measures and incentives for the department.

(c) Establish the process for management evaluation reviews that the administration shall perform to evaluate the eligibility determination functions performed by the department.

(d) Establish eligibility quality control reviews by the administration.

(e) Require the department to adopt rules, consistent with the rules adopted by the administration for a hearing process, that applicants or members may use for appeals of eligibility determinations or redeterminations.

(f) Establish the department's responsibility to place sufficient eligibility workers at federally qualified health centers to screen for eligibility and at hospital sites and level one trauma centers to ensure that persons seeking hospital services are screened on a timely basis for eligibility for the system, including a process to ensure that applications for the system can be accepted on a twenty-four hour basis, seven days a week.

(g) Withhold payments based on the allowable sanctions for errors in eligibility determinations or redeterminations or failure to meet performance measures required by the intergovernmental agreement.

(h) Recoup from the department all federal fiscal sanctions that result from the department's inaccurate eligibility determinations. The director may offset all or part of a sanction if the department submits a corrective action plan and a strategy to remedy the error.

4. By rule establish a procedure and time frames for the intake of grievances and requests for hearings, for the continuation of benefits and services during the appeal process and for a grievance process at the contractor level. Notwithstanding sections 41-1092.02, 41-1092.03 and 41-1092.05, the administration shall develop rules to establish the procedure and time frame for the informal resolution of grievances and appeals. A grievance that is not related to a claim for payment of system covered services shall be filed in writing with and received by the administration or the prepaid capitated provider or program contractor not later than sixty days after the date of the adverse action, decision or policy implementation being grieved. A grievance that is related to a claim for payment of system covered services must be filed in writing and received by the administration or the prepaid capitated provider or program contractor within twelve months after the date of service, within twelve months after the date that eligibility is posted or within sixty days after the date of the denial of a timely claim submission, whichever is later. A grievance for the denial of a claim for reimbursement of services may contest the validity of any adverse action, decision, policy implementation or rule that related to or resulted in the full or partial denial of the claim. A policy implementation may be subject to a grievance procedure, but it may not be appealed for a hearing. The administration is not required to participate in a mandatory settlement conference if it is not a real party in interest. In any proceeding before the administration, including a grievance or hearing, persons may represent themselves or be represented by a duly authorized agent who is not charging a fee. A legal entity may be represented by an officer, partner or employee who is specifically authorized by the legal entity to represent it in the particular proceeding.

5. Apply for and accept federal funds available under title XIX of the social security act (P.L. 89-97; 79 Stat. 344; 42 United States Code section 1396 (1980)) in support of the system. The application made by the director pursuant to this paragraph shall be designed to qualify for federal funding primarily on a prepaid capitated basis. Such funds may be used only for the support of persons defined as eligible pursuant to title XIX of the social security act or the approved section 1115 waiver.

6. At least thirty days before the implementation of a policy or a change to an existing policy relating to reimbursement, provide notice to interested parties. Parties interested in receiving notification of policy changes shall submit a written request for notification to the administration.

7. In addition to the cost sharing requirements specified in subsection D, paragraph 4 of this section:

(a) Charge monthly premiums up to the maximum amount allowed by federal law to all populations of eligible persons who may be charged.

(b) Implement this paragraph to the extent permitted under the federal deficit reduction act of 2005 and other federal laws, subject to the approval of federal waiver authority and to the extent that any changes in the cost sharing requirements under this paragraph would permit this state to receive any enhanced federal matching rate.

C. The director is authorized to apply for any federal funds available for the support of programs to investigate and prosecute violations arising from the administration and operation of the system. Available state funds appropriated for the administration and operation of the system may be used as matching funds to secure federal funds pursuant to this subsection.

D. The director may adopt rules or procedures to do the following:

1. Authorize advance payments based on estimated liability to a contractor or a noncontracting provider after the contractor or noncontracting provider has submitted a claim for services and before the claim is ultimately resolved. The rules shall specify that any advance payment shall be conditioned on the execution before payment of a contract with the contractor or noncontracting provider that requires the administration to retain a specified percentage, which shall be at least twenty percent, of the claimed amount as security and that requires repayment to the administration if the administration makes any overpayment.

2. Defer liability, in whole or in part, of contractors for care provided to members who are hospitalized on the date of enrollment or under other circumstances. Payment shall be on a capped fee-for-service basis for services other than hospital services and at the rate established pursuant to subsection G of this section for hospital services or at the rate paid by the health plan, whichever is less.

3. Deputize, in writing, any qualified officer or employee in the administration to perform any act that the director by law is empowered to do or charged with the responsibility of doing, including the authority to issue final administrative decisions pursuant to section 41-1092.08.

4. Notwithstanding any other law, require persons eligible pursuant to section 36-2901, paragraph 6, subdivision (a), section 36-2931 and section 36-2981, paragraph 6 to be financially responsible for any cost sharing requirements established in a state plan or a section 1115 waiver and approved by the centers for medicare and medicaid services. Cost sharing requirements may include copayments, coinsurance, deductibles, enrollment fees and monthly premiums for enrolled members, including households with children enrolled in the Arizona long-term care system.

E. The director shall adopt rules that further specify the medical care and hospital services that are covered by the system pursuant to section 36-2907.

F. In addition to the rules otherwise specified in this article, the director may adopt necessary rules pursuant to title 41, chapter 6 to carry out this article. Rules adopted by the director pursuant to this subsection shall consider the differences between rural and urban conditions on the delivery of hospitalization and medical care.

G. For inpatient hospital admissions and outpatient hospital services on and after March 1, 1993, the administration shall adopt rules for the reimbursement of hospitals according to the following procedures:

1. For inpatient hospital stays from March 1, 1993 through September 30, 2014, the administration shall use a prospective tiered per diem methodology, using hospital peer groups if analysis shows that cost differences can be attributed to independently definable features that hospitals within a peer group share. In peer grouping the administration may consider such factors as length of stay differences and labor market variations. If there are no cost differences, the administration shall implement a stop loss-stop gain or similar mechanism. Any stop loss-stop gain or similar mechanism shall ensure that the tiered per diem rates assigned to a hospital do not represent less than ninety percent of its 1990 base year costs or more than one hundred ten percent of its 1990 base year costs, adjusted by an audit factor, during the period of March 1, 1993 through September 30, 1994. The tiered per diem rates set for hospitals shall represent no less than eighty-seven and one-half percent or more than one hundred twelve and one-half percent of its 1990 base year costs, adjusted by an audit factor, from October 1, 1994 through September 30, 1995 and no less than eighty-five percent or more than one hundred fifteen percent of its 1990 base year costs, adjusted by an audit factor, from October 1, 1995 through September 30, 1996. For the periods after September 30, 1996 no stop loss-stop gain or similar mechanisms shall be in effect. An adjustment in the stop loss-stop gain percentage may be made to ensure that total payments do not increase as a result of this provision. If peer groups are used, the administration shall establish initial peer group designations for each hospital before implementation of the per diem system. The administration may also use a negotiated rate methodology. The tiered per diem methodology may include separate consideration for specialty hospitals that limit their provision of services to specific patient populations, such as rehabilitative patients or children. The initial per diem rates shall be based on hospital claims and encounter data for dates of service November 1, 1990 through October 31, 1991 and processed through May of 1992. The administration may also establish a separate reimbursement methodology for claims with extraordinarily high costs per day that exceed thresholds established by the administration.

2. For rates effective on October 1, 1994, and annually through September 30, 2011, the administration shall adjust tiered per diem payments for inpatient hospital care by the data resources incorporated market basket index for prospective payment system hospitals. For rates effective beginning on October 1, 1999, the administration shall adjust payments to reflect changes in length of stay for the maternity and nursery tiers.

3. Through June 30, 2004, for outpatient hospital services, the administration shall reimburse a hospital by applying a hospital specific outpatient cost-to-charge ratio to the covered charges. Beginning on July 1, 2004 through June 30, 2005, the administration shall reimburse a hospital by applying a hospital specific outpatient cost-to-charge ratio to covered charges. If the hospital increases its charges for outpatient services filed with the Arizona department of health services pursuant to chapter 4, article 3 of this title, by more than 4.7 percent for dates of service effective on or after July 1, 2004, the hospital specific cost-to-charge ratio will be reduced by the amount that it exceeds 4.7 percent. If charges exceed 4.7 percent, the effective date of the increased charges will be the effective date of the adjusted Arizona health care cost containment system cost-to-charge ratio. The administration shall develop the methodology for a capped fee-for-service schedule and a statewide cost-to-charge ratio. Any covered outpatient service not included in the capped fee-for-service schedule shall be reimbursed by applying the statewide cost-to-charge ratio that is based on the services not included in the capped fee-for-service schedule. Beginning on July 1, 2005, the administration shall reimburse clean claims with dates of service on or after July 1, 2005, based on the capped fee-for-service schedule or the statewide cost-to-charge ratio established pursuant to this paragraph. The administration may make additional adjustments to the outpatient hospital rates established pursuant to this section based on other factors, including the number of beds in the hospital, specialty services available to patients and the geographic location of the hospital.

4. Except if submitted under an electronic claims submission system, a hospital bill is considered received for purposes of this paragraph on initial receipt of the legible, error-free claim form by the administration if the claim includes the following error-free documentation in legible form:

- (a) An admission face sheet.
- (b) An itemized statement.
- (c) An admission history and physical.
- (d) A discharge summary or an interim summary if the claim is split.
- (e) An emergency record, if admission was through the emergency room.
- (f) Operative reports, if applicable.
- (g) A labor and delivery room report, if applicable.

Payment received by a hospital from the administration pursuant to this subsection or from a contractor either by contract or pursuant to section 36-2904, subsection I is considered payment by the administration or the contractor of the administration's or contractor's liability for the hospital bill. A hospital may collect any unpaid portion of its bill from other third-party payors or in situations covered by title 33, chapter 7, article 3.

5. For services rendered on and after October 1, 1997, the administration shall pay a hospital's rate established according to this section subject to the following:

- (a) If the hospital's bill is paid within thirty days of the date the bill was received, the administration shall pay ninety-nine percent of the rate.
- (b) If the hospital's bill is paid after thirty days but within sixty days of the date the bill was received, the administration shall pay one hundred percent of the rate.
- (c) If the hospital's bill is paid any time after sixty days of the date the bill was received, the administration shall pay one hundred percent of the rate plus a fee of one percent per month for each month or portion of a month following the sixtieth day of receipt of the bill until the date of payment.

6. In developing the reimbursement methodology, if a review of the reports filed by a hospital pursuant to section 36-125.04 indicates that further investigation is considered necessary to verify the accuracy of the information in the reports, the administration may examine the hospital's records and accounts related to the reporting requirements of section 36-125.04. The administration shall bear the cost incurred in connection with this examination unless the administration finds that the records examined are significantly deficient or incorrect, in which case the administration may charge the cost of the investigation to the hospital examined.

7. Except for privileged medical information, the administration shall make available for public inspection the cost and charge data and the calculations used by the administration to determine payments under the tiered per diem system, provided that individual hospitals are not identified by name. The administration shall make the data and calculations available for public inspection during regular business

hours and shall provide copies of the data and calculations to individuals requesting such copies within thirty days of receipt of a written request. The administration may charge a reasonable fee for the provision of the data or information.

8. The prospective tiered per diem payment methodology for inpatient hospital services shall include a mechanism for the prospective payment of inpatient hospital capital related costs. The capital payment shall include hospital specific and statewide average amounts. For tiered per diem rates beginning on October 1, 1999, the capital related cost component is frozen at the blended rate of forty percent of the hospital specific capital cost and sixty percent of the statewide average capital cost in effect as of January 1, 1999 and as further adjusted by the calculation of tier rates for maternity and nursery as prescribed by law. Through September 30, 2011, the administration shall adjust the capital related cost component by the data resources incorporated market basket index for prospective payment system hospitals.

9. For graduate medical education programs:

(a) Beginning September 30, 1997, the administration shall establish a separate graduate medical education program to reimburse hospitals that had graduate medical education programs that were approved by the administration as of October 1, 1999. The administration shall separately account for monies for the graduate medical education program based on the total reimbursement for graduate medical education reimbursed to hospitals by the system in federal fiscal year 1995-1996 pursuant to the tiered per diem methodology specified in this section. The graduate medical education program reimbursement shall be adjusted annually by the increase or decrease in the index published by the global insight hospital market basket index for prospective hospital reimbursement. Subject to legislative appropriation, on an annual basis, each qualified hospital shall receive a single payment from the graduate medical education program that is equal to the same percentage of graduate medical education reimbursement that was paid by the system in federal fiscal year 1995-1996. Any reimbursement for graduate medical education made by the administration shall not be subject to future settlements or appeals by the hospitals to the administration. The monies available under this subdivision shall not exceed the fiscal year 2005-2006 appropriation adjusted annually by the increase or decrease in the index published by the global insight hospital market basket index for prospective hospital reimbursement, except for monies distributed for expansions pursuant to subdivision (b) of this paragraph.

(b) The monies available for graduate medical education programs pursuant to this subdivision shall not exceed the fiscal year 2006-2007 appropriation adjusted annually by the increase or decrease in the index published by the global insight hospital market basket index for prospective hospital reimbursement. Graduate medical education programs eligible for such reimbursement are not precluded from receiving reimbursement for funding under subdivision (c) of this paragraph. Beginning July 1, 2006, the administration shall distribute any monies appropriated for graduate medical education above the amount prescribed in subdivision (a) of this paragraph in the following order or priority:

(i) For the direct costs to support the expansion of graduate medical education programs established before July 1, 2006 at hospitals that do not receive payments pursuant to subdivision (a) of this paragraph. These programs must be approved by the administration.

(ii) For the direct costs to support the expansion of graduate medical education programs established on or before October 1, 1999. These programs must be approved by the administration.

(c) The administration shall distribute to hospitals any monies appropriated for graduate medical education above the amount prescribed in subdivisions (a) and (b) of this paragraph for the following purposes:

(i) For the direct costs of graduate medical education programs established or expanded on or after July 1, 2006. These programs must be approved by the administration.

(ii) For a portion of additional indirect graduate medical education costs for programs that are located in a county with a population of less than five hundred thousand persons at the time the residency position was created or for a residency position that includes a rotation in a county with a population of less than five hundred thousand persons at the time the residency position was established. These programs must be approved by the administration.

(d) The administration shall develop, by rule, the formula by which the monies are distributed.

(e) Each graduate medical education program that receives funding pursuant to subdivision (b) or (c) of this paragraph shall identify and report to the administration the number of new residency positions created by the funding provided in this paragraph, including positions in rural areas. The program shall also report information related to the number of funded residency positions that resulted in physicians locating their practices in this state. The administration shall report to the joint legislative budget committee by February 1 of each year on the number of new residency positions as reported by the graduate medical education programs.

(f) Local, county and tribal governments and any university under the jurisdiction of the Arizona board of regents may provide monies in addition to any state general fund monies appropriated for graduate medical education in order to qualify for additional matching federal monies for providers, programs or positions in a specific locality and costs incurred pursuant to a specific contract between the administration and providers or other entities to provide graduate medical education services as an administrative activity. Payments by the administration pursuant to this subdivision may be limited to those providers designated by the funding entity and may be based on any methodology deemed appropriate by the administration, including replacing any payments that might otherwise have been paid pursuant to subdivision (a), (b) or (c) of this paragraph had sufficient state general fund monies or other monies been appropriated to fully fund those payments. These programs, positions, payment methodologies and administrative graduate medical education services must be approved by the administration and the centers for medicare and medicaid services. The administration shall report to the president of the senate, the speaker of the house of representatives and the director of the joint legislative budget committee on or before July 1 of each year on the amount of money contributed and number of residency positions funded by local, county and tribal governments, including the amount of federal matching monies used.

(g) Any funds appropriated but not allocated by the administration for subdivision (b) or (c) of this paragraph may be reallocated if funding for either subdivision is insufficient to cover appropriate graduate medical education costs.

10. Notwithstanding section 41-1005, subsection A, paragraph 9, the administration shall adopt rules pursuant to title 41, chapter 6 establishing the methodology for determining the prospective tiered per diem payments that are in effect through September 30, 2014.

11. For inpatient hospital services rendered on or after October 1, 2011, the prospective tiered per diem payment rates are permanently reset to the amounts payable for those services as of October 1, 2011 pursuant to this subsection.

12. The administration shall adopt a diagnosis-related group based hospital reimbursement methodology consistent with title XIX of the social security act for inpatient dates of service on and after October 1,

2014. The administration may make additional adjustments to the inpatient hospital rates established pursuant to this section for hospitals that are publicly operated or based on other factors, including the number of beds in the hospital, the specialty services available to patients, the geographic location and diagnosis-related group codes that are made publicly available by the hospital pursuant to section 36-437. The administration may also provide additional reimbursement for extraordinarily high cost cases that exceed a threshold above the standard payment. The administration may also establish a separate payment methodology for specific services or hospitals serving unique populations.

H. The director may adopt rules that specify enrollment procedures, including notice to contractors of enrollment. The rules may provide for varying time limits for enrollment in different situations. The administration shall specify in contract when a person who has been determined eligible will be enrolled with that contractor and the date on which the contractor will be financially responsible for health and medical services to the person.

I. The administration may make direct payments to hospitals for hospitalization and medical care provided to a member in accordance with this article and rules. The director may adopt rules to establish the procedures by which the administration shall pay hospitals pursuant to this subsection if a contractor fails to make timely payment to a hospital. Such payment shall be at a level determined pursuant to section 36-2904, subsection H or I. The director may withhold payment due to a contractor in the amount of any payment made directly to a hospital by the administration on behalf of a contractor pursuant to this subsection.

J. The director shall establish a special unit within the administration for the purpose of monitoring the third-party payment collections required by contractors and noncontracting providers pursuant to section 36-2903, subsection B, paragraph 10 and subsection F and section 36-2915, subsection E. The director shall determine by rule:

1. The type of third-party payments to be monitored pursuant to this subsection.
2. The percentage of third-party payments that is collected by a contractor or noncontracting provider and that the contractor or noncontracting provider may keep and the percentage of such payments that the contractor or noncontracting provider may be required to pay to the administration. Contractors and noncontracting providers must pay to the administration one hundred percent of all third-party payments that are collected and that duplicate administration fee-for-service payments. A contractor that contracts with the administration pursuant to section 36-2904, subsection A may be entitled to retain a percentage of third-party payments if the payments collected and retained by a contractor are reflected in reduced capitation rates. A contractor may be required to pay the administration a percentage of third-party payments that are collected by a contractor and that are not reflected in reduced capitation rates.

K. The administration shall establish procedures to apply to the following if a provider that has a contract with a contractor or noncontracting provider seeks to collect from an individual or financially responsible relative or representative a claim that exceeds the amount that is reimbursed or should be reimbursed by the system:

1. On written notice from the administration or oral or written notice from a member that a claim for covered services may be in violation of this section, the provider that has a contract with a contractor or noncontracting provider shall investigate the inquiry and verify whether the person was eligible for services at the time that covered services were provided. If the claim was paid or should have been paid by the system, the provider that has a contract with a contractor or noncontracting provider shall not continue billing the member.

2. If the claim was paid or should have been paid by the system and the disputed claim has been referred for collection to a collection agency or referred to a credit reporting bureau, the provider that has a contract with a contractor or noncontracting provider shall:

(a) Notify the collection agency and request that all attempts to collect this specific charge be terminated immediately.

(b) Advise all credit reporting bureaus that the reported delinquency was in error and request that the affected credit report be corrected to remove any notation about this specific delinquency.

(c) Notify the administration and the member that the request for payment was in error and that the collection agency and credit reporting bureaus have been notified.

3. If the administration determines that a provider that has a contract with a contractor or noncontracting provider has billed a member for charges that were paid or should have been paid by the administration, the administration shall send written notification by certified mail or other service with proof of delivery to the provider that has a contract with a contractor or noncontracting provider stating that this billing is in violation of federal and state law. If, twenty-one days or more after receiving the notification, a provider that has a contract with a contractor or noncontracting provider knowingly continues billing a member for charges that were paid or should have been paid by the system, the administration may assess a civil penalty in an amount equal to three times the amount of the billing and reduce payment to the provider that has a contract with a contractor or noncontracting provider accordingly. Receipt of delivery signed by the addressee or the addressee's employee is prima facie evidence of knowledge. Civil penalties collected pursuant to this subsection shall be deposited in the state general fund. Section 36-2918, subsections C, D and F, relating to the imposition, collection and enforcement of civil penalties, apply to civil penalties imposed pursuant to this paragraph.

L. The administration may conduct postpayment review of all claims paid by the administration and may recoup any monies erroneously paid. The director may adopt rules that specify procedures for conducting postpayment review. A contractor may conduct a postpayment review of all claims paid by the contractor and may recoup monies that are erroneously paid.

M. Subject to title 41, chapter 4, article 4, the director or the director's designee may employ and supervise personnel necessary to assist the director in performing the functions of the administration.

N. The administration may contract with contractors for obstetrical care who are eligible to provide services under title XIX of the social security act.

O. Notwithstanding any other law, on federal approval the administration may make disproportionate share payments to private hospitals, county operated hospitals, including hospitals owned or leased by a special health care district, and state operated institutions for mental disease beginning October 1, 1991 in accordance with federal law and subject to legislative appropriation. If at any time the administration receives written notification from federal authorities of any change or difference in the actual or estimated amount of federal funds available for disproportionate share payments from the amount reflected in the legislative appropriation for such purposes, the administration shall provide written notification of such change or difference to the president and the minority leader of the senate, the speaker and the minority leader of the house of representatives, the director of the joint legislative budget committee, the legislative committee of reference and any hospital trade association within this state, within three working days not including weekends after receipt of the notice of the change or difference. In calculating disproportionate share payments as prescribed in this section, the administration may use either a methodology based on

claims and encounter data that is submitted to the administration from contractors or a methodology based on data that is reported to the administration by private hospitals and state operated institutions for mental disease. The selected methodology applies to all private hospitals and state operated institutions for mental disease qualifying for disproportionate share payments.

P. Disproportionate share payments made pursuant to subsection O of this section include amounts for disproportionate share hospitals designated by political subdivisions of this state, tribal governments and universities under the jurisdiction of the Arizona board of regents. Subject to the approval of the centers for medicare and medicaid services, any amount of federal funding allotted to this state pursuant to section 1923(f) of the social security act and not otherwise spent under subsection O of this section shall be made available for distribution pursuant to this subsection. Political subdivisions of this state, tribal governments and universities under the jurisdiction of the Arizona board of regents may designate hospitals eligible to receive disproportionate share payments in an amount up to the limit prescribed in section 1923(g) of the social security act if those political subdivisions, tribal governments or universities provide sufficient monies to qualify for the matching federal monies for the disproportionate share payments.

Q. Notwithstanding any law to the contrary, the administration may receive confidential adoption information to determine whether an adopted child should be terminated from the system.

R. The adoption agency or the adoption attorney shall notify the administration within thirty days after an eligible person receiving services has placed that person's child for adoption.

S. If the administration implements an electronic claims submission system, it may adopt procedures pursuant to subsection G of this section requiring documentation different than prescribed under subsection G, paragraph 4 of this section.

T. In addition to any requirements adopted pursuant to subsection D, paragraph 4 of this section, notwithstanding any other law, subject to approval by the centers for medicare and medicaid services, beginning July 1, 2011, members eligible pursuant to section 36-2901, paragraph 6, subdivision (a), section 36-2931 and section 36-2981, paragraph 6 shall pay the following:

1. A monthly premium of fifteen dollars, except that the total monthly premium for an entire household shall not exceed sixty dollars.
2. A copayment of five dollars for each physician office visit.
3. A copayment of ten dollars for each urgent care visit.
4. A copayment of thirty dollars for each emergency department visit.

U. Subject to the approval of the centers for medicare and medicaid services, political subdivisions of this state, tribal governments and any university under the jurisdiction of the Arizona board of regents may provide to the Arizona health care cost containment system administration monies in addition to any state general fund monies appropriated for critical access hospitals in order to qualify for additional federal monies. Any amount of federal monies received by this state pursuant to this subsection shall be distributed as supplemental payments to critical access hospitals.

V. For the purposes of this section, "disproportionate share payment" means a payment to a hospital that serves a disproportionate share of low-income patients as described by 42 United States Code section 1396r-4.

**36-2932. Arizona long-term care system; powers and duties of the director; expenditure limitation**

A. The Arizona long-term care system is established. The system includes the management and delivery of hospitalization, medical care, institutional services and home and community based services to members through the administration, the program contractors and providers pursuant to this article together with federal participation under title XIX of the social security act. The director in the performance of all duties shall consider the use of existing programs, rules and procedures in the counties and department where appropriate in meeting federal requirements.

B. The administration has full operational responsibility for the system, which shall include the following:

1. Contracting with and certification of program contractors in compliance with all applicable federal laws.
  2. Approving the program contractors' comprehensive service delivery plans pursuant to section 36-2940.
  3. Providing by rule for the ability of the director to review and approve or disapprove program contractors' requests for proposals for providers and provider subcontracts.
  4. Providing technical assistance to the program contractors.
  5. Developing a uniform accounting system to be implemented by program contractors and providers of institutional services and home and community based services.
  6. Conducting quality control on eligibility determinations and preadmission screenings.
  7. Establishing and managing a comprehensive system for assuring the quality of care delivered by the system as required by federal law.
  8. Establishing an enrollment system.
  9. Establishing a member case management tracking system.
  10. Establishing and managing a method to prevent fraud by applicants, members, eligible persons, program contractors, providers and noncontracting providers as required by federal law.
  11. Coordinating benefits as provided in section 36-2946.
  12. Establishing standards for the coordination of services.
  13. Establishing financial and performance audit requirements for program contractors, providers and noncontracting providers.
  14. Prescribing remedies as required pursuant to 42 United States Code section 1396r. These remedies may include the appointment of temporary management by the director, acting in collaboration with the director of the department of health services, in order to continue operation of a nursing care institution providing services pursuant to this article.
  15. Establishing a system to implement medical child support requirements, as required by federal law. The administration may enter into an intergovernmental agreement with the department of economic security to implement this paragraph.
  16. Establishing requirements and guidelines for the review of trusts for the purposes of establishing eligibility for the system pursuant to section 36-2934.01 and posteligibility treatment of income pursuant to subsection L of this section.
  17. Accepting the delegation of authority from the department of health services to enforce rules that prescribe minimum certification standards for adult foster care providers pursuant to section 36-410, subsection B. The administration may contract with another entity to perform the certification functions.
  18. Assessing civil penalties for improper billing as prescribed in section 36-2903.01, subsection K.
- C. For nursing care institutions and hospices that provide services pursuant to this article, the director shall contract periodically as deemed necessary and as required by federal law for a financial audit of the institutions and hospices that is certified by a certified public accountant in accordance with generally accepted auditing standards or conduct or contract for a financial audit or review of the institutions and hospices. The director shall notify the nursing care institution and hospice at least sixty days before beginning a periodic audit. The administration shall reimburse a nursing care institution or hospice for

any additional expenses incurred for professional accounting services obtained in response to a specific request by the administration. On request, the director of the administration shall provide a copy of an audit performed pursuant to this subsection to the director of the department of health services or that person's designee.

D. Notwithstanding any other provision of this article, the administration may contract by an intergovernmental agreement with an Indian tribe, a tribal council or a tribal organization for the provision of long-term care services pursuant to section 36-2939, subsection A, paragraphs 1, 2, 3 and 4 and the home and community based services pursuant to section 36-2939, subsection B, paragraph 2 and subsection C, subject to the restrictions in section 36-2939, subsections D and E for eligible members.

E. The director shall require as a condition of a contract that all records relating to contract compliance are available for inspection by the administration subject to subsection F of this section and that these records are maintained for five years. The director shall also require that these records are available on request of the secretary of the United States department of health and human services or its successor agency.

F. Subject to applicable law relating to privilege and protection, the director shall adopt rules prescribing the types of information that are confidential and circumstances under which that information may be used or released, including requirements for physician-patient confidentiality. Notwithstanding any other law, these rules shall provide for the exchange of necessary information among the program contractors, the administration and the department for the purposes of eligibility determination under this article.

G. The director shall adopt rules to specify methods for the transition of members into, within and out of the system. The rules shall include provisions for the transfer of members, the transfer of medical records and the initiation and termination of services.

H. The director shall adopt rules that provide for withholding or forfeiting payments made to a program contractor if it fails to comply with a provision of its contract or with the director's rules.

I. The director shall:

1. Establish by rule the time frames and procedures for all grievances and requests for hearings consistent with section 36-2903.01, subsection B, paragraph 4.

2. Apply for and accept federal monies available under title XIX of the social security act in support of the system. In addition, the director may apply for and accept grants, contracts and private donations in support of the system.

3. Not less than thirty days before the administration implements a policy or a change to an existing policy relating to reimbursement, provide notice to interested parties. Parties interested in receiving notification of policy changes shall submit a written request for notification to the administration.

J. The director may apply for federal monies available for the support of programs to investigate and prosecute violations arising from the administration and operation of the system. Available state monies appropriated for the administration of the system may be used as matching monies to secure federal monies pursuant to this subsection.

K. The director shall adopt rules that establish requirements of state residency and qualified alien status as prescribed in section 36-2903.03. The administration shall enforce these requirements as part of the eligibility determination process. The rules shall also provide for the determination of the applicant's county of residence for the purpose of assignment of the appropriate program contractor.

L. The director shall adopt rules in accordance with the state plan regarding posteligibility treatment of income and resources that determine the portion of a member's income that shall be available for payment for services under this article. The rules shall provide that a portion of income may be retained for:

1. A personal needs allowance for members receiving institutional services of at least fifteen per cent of the maximum monthly supplemental security income payment for an individual or a personal needs allowance for members receiving home and community based services based on a reasonable assessment of need.

2. The maintenance needs of a spouse or family at home in accordance with federal law. The minimum resource allowance for the spouse or family at home is twelve thousand dollars adjusted annually by the same percentage as the percentage change in the consumer price index for all urban consumers (all items;

United States city average) between September 1988 and the September before the calendar year involved.

3. Expenses incurred for noncovered medical or remedial care that are not subject to payment by a third party payor.

M. In addition to the rules otherwise specified in this article, the director may adopt necessary rules pursuant to title 41, chapter 6 to carry out this article. Rules adopted by the director pursuant to this subsection may consider the differences between rural and urban conditions on the delivery of services.

N. The director shall not adopt any rule or enter into or approve any contract or subcontract that does not conform to federal requirements or that may cause the system to lose any federal monies to which it is otherwise entitled.

O. The administration, program contractors and providers may establish and maintain review committees dealing with the delivery of care. Review committees and their staff are subject to the same requirements, protections, privileges and immunities prescribed pursuant to section 36-2917.

P. If the director determines that the financial viability of a nursing care institution or hospice is in question, the director may require a nursing care institution and a hospice providing services pursuant to this article to submit quarterly financial statements within thirty days after the end of its financial quarter unless the director grants an extension in writing before that date. Quarterly financial statements submitted to the department shall include the following:

1. A balance sheet detailing the institution's assets, liabilities and net worth.
2. A statement of income and expenses, including current personnel costs and full-time equivalent statistics.

Q. The director may require monthly financial statements if the director determines that the financial viability of a nursing care institution or hospice is in question. The director shall prescribe the requirements of these statements.

R. The total amount of state monies that may be spent in any fiscal year by the administration for long-term care shall not exceed the amount appropriated or authorized by section 35-173 for that purpose. This article shall not be construed to impose a duty on an officer, agent or employee of this state to discharge a responsibility or to create any right in a person or group if the discharge or right would require an expenditure of state monies in excess of the expenditure authorized by legislative appropriation for that specific purpose.

36-2999.52. Nursing facility quality assessments; calculation; limitation; exceptions  
(Rpld. 10/1/23)

A. Beginning October 1, 2012, the administration shall charge a quality assessment on health care items and services provided by nursing facilities in order to obtain federal financial participation in the services provided pursuant to this chapter. The administration shall use these monies for supplemental payments to nursing facilities for covered medicaid expenditures, not to exceed the medicare upper payment limit program requirements.

B. Each nursing facility shall pay the assessment prescribed pursuant to this section to the department of revenue for deposit on a quarterly basis in the nursing facility assessment fund established by section 36-2999.53.

C. Unless otherwise required by law, title 42, chapter 5, article 1 governs the administration of the assessment prescribed pursuant to this section except that:

1. A separate license is not required for the assessment.
2. If a nursing facility does not have a transaction privilege tax license, it shall obtain one pursuant to section 42-5005.
3. Each facility shall report and pay the assessment on forms prescribed by the department of revenue.
4. A separate bond is not required of employees of the department of revenue who administer the assessment.
5. The assessment may be included without segregation in any notice and lien filed for unpaid transaction privilege taxes.

D. The administration shall calculate the quality assessment on the net patient service revenue of all nursing facilities that are subject to the quality assessment. The quality assessment may not exceed three and one-half per cent of net patient service revenue and shall be calculated and paid on a per resident day basis exclusive of medicare resident days. Except as prescribed in this section, the per resident day assessment is the same amount for each affected facility.

E. Pursuant to 42 Code of Federal Regulations section 433.68(e)(1) and (2), the administration shall request a waiver of the broad-based and uniform provider assessment requirements of federal law to exclude certain nursing facilities from the quality assessment and to permit certain high volume medicaid nursing facilities or facilities with a high number of total annual patient days to pay the quality assessment at a lesser amount per nonmedicare resident day.

F. Subject to federal approval pursuant to 42 Code of Federal Regulations section 433.68(e)(2), the following nursing facility providers are exempt from the quality assessment:

1. Continuing care retirement communities.
2. Nursing facilities with fifty-eight or fewer beds.

G. The administration shall lower the quality assessment for either certain high volume medicaid nursing facilities or certain facilities with high patient volumes to meet the redistributive test of 42 Code of Federal Regulations section 433.68(e)(2).

#### 36-2999.54. Assessments; failure to pay; suspension or revocation

(Rpld. 10/1/23)

A. Each nursing facility shall pay a quality assessment as prescribed pursuant to this article. The administration shall determine the assessment rate prospectively for the applicable fiscal year on a per resident day basis, exclusive of medicare resident days. The administration shall adopt rules for facility reporting of nonmedicare resident days and for payment of the assessment.

B. A nursing facility may increase its charges to other payors to incorporate the assessment but may not establish a separate line-item charge on the bill reflecting the assessment.

C. If an entity conducts, operates or maintains more than one nursing facility, the entity must pay a quality assessment for each nursing facility separately.

D. If a nursing facility does not pay the full amount of the assessment when due, the director of the Arizona health care cost containment system administration may suspend or revoke the nursing facility's Arizona health care cost containment system provider agreement registration. If the nursing facility does not comply within one hundred eighty days after the director of the Arizona health care cost containment system administration suspends or revokes the nursing facility's provider agreement, the director of the Arizona health care cost containment system administration shall notify the director of the department of health services, who shall suspend or revoke the nursing facility's license pursuant to section 36-427.