



**INDEPENDENT REGULATORY REVIEW COMMISSION
COMMONWEALTH OF PENNSYLVANIA
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December 10, 1998

Honorable Samuel E. Hayes, Jr., Secretary
Department of Agriculture
211 Agriculture Building
2301 North Cameron Street
Harrisburg, PA 17110

Re: IRRC Regulation #2-111 (#1990)
Department of Agriculture
Weights, Measures and Standards

Dear Secretary Hayes:

Enclosed are our Comments on your proposed regulation #2-111. They are also available on our website at <http://www.irrc.state.pa.us>.

The Comments list our objections and suggestions for your consideration when you prepare the final version of this regulation. We have also specified the regulatory criteria which have not been met. These Comments are not a formal approval or disapproval of the proposed version of this regulation.

If you want to meet with us to discuss these Comments, please contact John Nanorta at 787-8491.

Sincerely,

A handwritten signature in black ink that reads "Robert E. Nyce".

Robert E. Nyce
Executive Director

REN:kcg
Enclosure

cc: Charles Bruckner
Office of General Counsel
Office of Attorney General
Pete Tartline

COMMENTS OF THE INDEPENDENT REGULATORY REVIEW COMMISSION

ON

DEPARTMENT OF AGRICULTURE REGULATION NO. 2-111

WEIGHTS, MEASURES AND STANDARDS

DECEMBER 10, 1998

We have reviewed this proposed regulation from the Department of Agriculture and its Bureau of Weights and Measures (Department) and submit for your consideration the following objections and recommendations. Subsections 5.1(h) and 5.1(i) of the Regulatory Review Act (71 P.S. § 745.5a(h) and (i)) specify the criteria the Commission must employ in determining whether a regulation is in the public interest. In applying these criteria, our Comments address issues that relate to protection of the public health and safety, statutory authority, legislative intent, need, reasonableness, and clarity of the regulation. We recommend that these Comments be carefully considered as you prepare the final-form regulation.

1. Chapter 5. Private Certification Programs. - Legislative Intent, Protection of Public Health and Safety, Economic impact, Reasonableness, and Clarity

Chapter 5 provides for inspections of devices through private certification programs. Senators Wenger and Madigan and Representatives Bunt and Cappabianca note in their respective comment letters that the legislative intent of Act 155-1996 (Consolidated Weights and Measures Act, 3 Pa.C.S. § 4101 – 4194)(Act 155-1996) is to allow in-house or self-inspection of weighing and measuring devices by the private sector. They recommend that the regulation be clarified in that regard.

Three private sector commentators oppose such a grant of authority. They note that allowing businesses to self-inspect is an inherent conflict of interest that is contrary to consumer protection and incompatible with the requirement of Act 155-1996 that inspections be “unannounced.”

The Act allows the Department to accept reports of Certified Examiners of Weights and Measures (CEWM). However, it is silent whether CEWMs may be employees, or whether they must be third party or non-employees. Therefore, the Department has the discretion to allow in-house inspections by CEWMs.

The provisions of this Chapter, especially Sections 5.21 and 5.22, should expressly allow the use of third party certified inspectors. If the Department intends to allow in-house or self-inspection of weighing and measuring devices, the final-form regulation should state that. If that is done, however, the regulation must also specify the criteria or limitations necessary to preserve the unannounced inspection requirement and the integrity of procedures to protect consumers and users.

2. Section 2.1. Definitions. – Reasonableness and Clarity

Commercial weighing device

The terms “Commercial weighing device” and “commercial use,” should be defined. Doing so would more clearly prescribe the scope of application of this regulation.

UPC (Universal Product Code) scanning system

The proposed definition of this term simply repeats the term being defined. The definitions of the terms “scanning system” and “UPC” should be further explained. For example, we question whether the definition of “scanning system” could be expanded to include a reference to UPC technologies (in addition to price look-ups (PLU)). If so, it would be unnecessary to separately define the term “*UPC scanning system.*”

3. Section 4.5. Certification Standards; Section 4.6. Training Courses – Clarity

These sections are designed to implement Sections 4110(a)(4) and 4115 of Act 155-1996. As written, they present several clarity concerns. First, Section 4.5(1) should not indicate that the certification program must be approved by the Department in accordance with Section 4.6. Likewise, Section 4.6(a) should not indicate that the Department will “approve” a National Institute of Standards and Technology (NIST) prescribed training course. Under the above-cited statutory provisions, NIST courses are considered “approved.” No further action of the Department is required.

Second, it is not necessary to list the currently approved training courses in the regulation. Section 4.6(b) could simply provide that the Department will, from time to time, publish a notice in the *Pennsylvania Bulletin*, listing the current NIST training courses and the category or type of weighing or measuring device to which they relate. Another alternative is for Section 4.6(b) to indicate that a current list may be obtained from the Department. Under either option, Section 4.6(c) is not needed. Therefore, it should be deleted.

Third, Section 4110(a)(4) authorizes the Department to institute a certification program for CEWMs. If the Department intends to institute a certification program, the regulation should include the necessary standards and procedures, pursuant to 3 Pa.C.S. Section 4110 (a)(1) and (a)(2) of Act 155-1996.

4. Section 4.10. Expiration of CEWM certificate. – Clarity

This provides: “A CEWM certificate will expire no greater than 3 years from the date it is issued.” This is an unusual way to refer to a 3-year limitation. The Department should reexamine this provision to ensure its clarity in the final-form regulation.

5. Section 4.13. Reporting procedures for CEWM. – Clarity

Subsection (a) requires a CEWM to submit an inspection report form to the Department. For improved clarity, and uniformity of reporting and administration by the Department, this provision should also prescribe what form may be used.

6. Section 4.14. Random inspection and testing. – Protection of Public Health and Safety, and Clarity

As recommended by Representative Cappabianca, the regulation should indicate that the Department will inspect a random sample of each type of device to determine the accuracy of CEWMs' inspections. The sample size should be sufficient to render statistically valid results.

7. Sections 4.15. and 5.15 Suspension or revocation of certification. – Clarity

The clarity of Sections 4.15(b) and 5.15(b) would be improved if they cited the applicable rules of administrative practice and procedure that the Department will use in any due process hearing.

8. Section 5.2. Requirement of annual testing and inspection. – Clarity

Subsection 5.2(c) provides an exemption from the annual testing and inspection requirement for commercial UPC scanning systems and PLU devices if, among other things, "the system or device is inspected at intervals of no greater than one year." The phrase is confusing. The Department should clarify this language in the final-form regulation.

9. Section 6.2. Registration requirement. – Statutory Authority, Protection of Public Health and Safety, and Clarity

We join Representative Cappabianca in questioning why UPC/PLU devices under Subsection (b) are exempt from the Subsection (a) registration requirements applicable to sellers, installers and repairers. We question the statutory basis for such an exemption. Sections 4113 and 4114 of Act 155-1996 do not provide for such an exemption. The only exemption is a specific one for gasoline retailers under Section 4114. The Department should provide a justification for any exemption from registration contained in the final-form regulation. If a justification is provided, any exemption should be limited as much as possible because of public health and safety considerations.

10. Section 6.4. Registration procedure. – Clarity

Section 6.4(c) relates to Department action on a registration form by a seller, installer or a repairer of weighing and measuring devices. The clarity of this subsection would be improved if it also stated that an applicant is not allowed to act under this chapter until notified by the Department that the application has been approved.

11. Section 6.6. Newly-installed or repaired commercial weighing and measuring devices. – Protection of Public Health and Safety, and Clarity

The Department should amend the first sentence of Subsection (b), relating to responsibilities of an installer or repairer, to provide that in addition to notifying the Department, the appropriate county or city sealer (if there is one) should be notified. In addition, the final-form regulation should also provide that the county or city sealer is to be furnished with a copy of the written notification submitted to the Department. Provision for such additional notice is consistent with the language in Subsection (b)(7).

Also, the conditional short-term use authorized under Subsection (d) should be amended by adding a comma after the word "uninspected." Subsection (d) should also include a requirement that the Department is to be provided with written notification that the device has been removed from commercial use within a specified time period after the removal occurred.

12. Section 7.5. Registration process. - Clarity

This section outlines the process to obtain a registration form to register and report the inspection of a commercial weighing and measuring device. A commentator questioned who is responsible for registering equipment under Chapter 7. Section 7.5 should be revised to include a new Subsection (a) which would explain who is required to register the device. For example, the recommended new Subsection (a) could parallel the language in Section 10.6(a). The current Subsections should then be relettered accordingly.

Also, for improved clarity, the current Subsection (a) should be amended to refer to an “approved” weighing or measuring device registration form.

13. Section 8.3. Training with respect to individual types of weighing and measuring devices. – Clarity

This section relates to the training and certification requirements for persons who inspect or test particular types of weighing and measuring devices. The caption, however, only refers to “training.” For improved clarity and consistency, the word “certification” should be added to the caption after the word “training.”

14. Section 8.4. Prior training. – Clarity

For improved clarity, this section should also include a reference to a person being registered with or certified by the Department (in addition to having successfully completed a NIST training course prior to the effective date of this regulation). This will assist the Department in keeping track of all qualified inspectors and sealers.

15. Section 8.5. Supplemental or refresher training. – Clarity

We recommend, for improved clarity, that the Department substitute the phrase: “a reasonable number of...” for the word “adequate” in this section.

16. Section 9.5. Application for public weighmaster’s license. – Reasonableness and Clarity

Subsection (d) relates to submitting the application and fee and Subsection (e) relates to Department action on an application. The clarity of both provisions would be improved if they were amended to require the submission of “a completed” application.

Subsection (e)(2) provides no time limit for the Department to notify an applicant of any deficiency in the application. Similarly, Subsection (e)(3) provides no time limit for the Department to refer the application to any county or city inspector of weights and measures for a report on the accuracy of statements made on the application, etc. Subsection (e)(3) also imposes no time limit for a response from the county or city inspector of weights and measures to which the application has been referred. In fairness to applicants as well as to help expedite processing, a reasonable time limit should be included in each of these subsections in the final-form regulation.

17. Section 9.11. Issuing a public weighmaster’s certificate. - Clarity

It is recommended that the words “made out in” be changed to “completed with a.”

18. Section 9.23. Certificate affecting weighmaster requirements. – Clarity

Subsection (a), relating to authorization to haul without a weighmaster's certificate, consists of one very long sentence. For improved clarity, this subsection should be rewritten and divided into shorter sentences. Subsection (d), relating to registration, should also be revised for the same reason.

19. Section 9.24. Limitations of certificate for anthracite.

Subsection (a) is too long and complicated a sentence. For improved clarity, it should be revised and divided into shorter sentences. It is also recommended that the word "authorized" be inserted before the word "officer" under the signature line of the Certificate of Quality form. Doing so will improve clarity by establishing that the person signing the form has the authority to do so on behalf of the producer organization.

20. Section 9.25. Responsibilities of weighmasters and shippers. - Clarity

Subsection (a) provides that weighmasters will be held responsible and their licenses subject to revocation for negligence, failure to abide by the requirements of Chapter 9, and a failure to reconcile their records. Subsection (b) is captioned "shippers" but it also discusses the strict accountability of weighmasters, using only slightly different language than that used in Subsection (a).

What is the substantive difference between a weighmaster being "held responsible" under Subsection (a) and a weighmaster and a shipper being "held to strict accountability" under Subsection (b)? For improved clarity, it is recommended that revisions be made to more clearly segregate weighmaster responsibilities (Subsection (a)) from shippers responsibilities (Subsection (b)). If there is little difference between the responsibilities of each, combine the two into one subsection.

For improved clarity, insert the word "transporting" before "truck" in Subsection (a)(2) and also before "vehicle" in Subsection (a)(4). Subsection (b) is too long and complicated. For improved clarity, it should be divided into two sentences.

21. Section 9.26. Certificate of special transportation. - Clarity

For improved clarity, Subsection (b), relating to issuance and surrender of a certificate of special transportation, should be rewritten and divided into shorter sentences.

22. Section 9.28. Reweighing and issuance of certificates. - Clarity

Subsection (a) provides in part: "A duplicate copy may be returned to the operator of the vehicle if it is obliterated with a rubber stamp using the following legend:...." We question the use of the words "may" and "it." The clarity and accuracy would be improved if the word "may" was changed to "shall" and "a weighmaster certificate" substituted for "it."

23. Section 9.29. Reciprocity with New York. - Clarity

This section authorizes the reciprocity between inspectors in Pennsylvania and New York in recognizing and accepting each other's weight certificates issued within a zone of five miles from the New York border with Pennsylvania. This section should be rewritten for improved clarity. For example, the second part of this sentence, relating to solid fuel weighing certificates, should be set forth as a separate sentence.

24. Section 10.3. General standard for approval by the Department. - Protection of Public Health and Safety, and Clarity

This section sets forth the standards that the Department will use in considering whether to approve a type of measuring and weighing device. It includes whether the scale “is reasonably permanent in its indication and adjustment....” The Department should revise this section to set forth more precise general standards, such as referencing the current approved list of NIST standards and/or a list of types of NIST-approved devices.

25. Section 10.5. Meeting the general standard for approval. - Protection of Public Health and Safety, and Clarity

A scale company commentator expressed the concern that the last sentence of Section 10.5 contradicts the language of the proposed Section 10.3. The Department should reexamine both provisions to ensure that Section 10.5, including Subsection (c), of the final-form regulation is consistent with Section 10.3.

26. Section 10.6. Application and review. - Clarity

For improved clarity of the first sentence of Subsection (a), we recommend substituting the words “request a” for “obtain an” and inserting the word “approved” before the word “application.” If these changes are made, the second sentence should be deleted because it will be rendered unnecessary.

27. Section 10.7. Certificate of approval. - Clarity

The sentence in Subsection (a)(3) is long and complex. For improved clarity, it should be revised.

28. Miscellaneous - Clarity

“Other information”

Sections 5.8(b)(7), 6.4(b)(9), 6.5(b)(8), 9.7(7), 10.6(b)(7), and 10.7(a)(5) contain a broad provision to require “other information deemed relevant by the Department,” or “other information the Department might reasonably require” or “other information the Department deems reasonable.” In the final-form regulation, these phrases should be revised to make them as precise as possible. Doing so will reduce ambiguity and improve their relevancy to the kind of information needed under each section.

“Gender-neutral language”

Sections 6.5(d), 7.5(a), 9.6(b), 9.8, 9.10(a), 9.11(a), and 9.26(a) make inappropriate use of male gender pronouns. Each provision should be revised to ensure that a gender-neutral term is used instead.

INDEPENDENT REGULATORY REVIEW COMMISSION

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Susann Kaufman
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Commission
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Date: December 10, 1998
of Pages: 8

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Department of Agriculture's regulation #2-111. Upon receipt, please sign below and return to me immediately at our fax number 783-2684. We have sent the original through interdepartmental mail. You should expect delivery in a few days. Thank you.

Accepted by: Melissa Martz Date: 12/10/98