

7/3/01

Regulatory Analysis Form

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(1) Agency

Revenue

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REGULATORY
REVIEW COMMISSION

(2) I.D. Number (Governor's Office Use)

15-418

IRRC Number: 2209

(3) Short Title

Employer Withholding Provisions

(4) PA Code Cite

61 Pa. Code §§ 113.2, 113.3, 113.3a, 113.3b, 113.4 and 121.16

(5) Agency Contacts & Telephone Numbers

Primary Contact: Anita M. Doucette (717) 787-1382

Secondary Contact: Douglas A. Berguson (717) 787-1382

(6) Type of Rulemaking (check one)

- ☒ Proposed Rulemaking
☐ Final Order Adopting Regulation
☐ Final Order, Proposed Rulemaking Omitted

(7) Is a 120-Day Emergency Certification Attached?

- ☒ No
☐ Yes: By the Attorney General
☐ Yes: By the Governor

(8) Briefly explain the regulation in clear and non-technical language.

The regulation is intended to serve the following purposes: (1) New rules (§ 113.3(c) and (f)) are being added in order to implement the provisions of Act 1997-7 relating to cafeteria plans and other employee compensation arrangements (72 P.S. § 7301(d)). (2) The regulation establishes new employer identification number requirements in order to facilitate the Department's Keystone Integrated Tax System. (3) The regulation establishes new employer registration requirements in order to facilitate the common employer registration form of the Department of Revenue and the Department of Labor and Industry. (4) The regulation changes W-2 filing requirements in order to facilitate the Department's new Infoimage System and make more use of electronic and magnetic media. (5) The Federal employee reporting and withholding requirements for tip income are being adopted so that businesses will not have to deal with conflicting requirements at the Federal and State level. (6) New rules (§ 113.3(d) and (e)) relating to the statutory trust fund provisions are proposed in order to enhance the Department's enforcement powers.

(9) State the statutory authority for the regulation and any relevant state or federal court decisions.

Statutory authority for the regulation is contained in section 354 of the TRC (72 P.S. § 7354).

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(10) Is the regulation mandated by any federal or state law or court order, or federal regulation? If yes, cite the specific law, case or regulation, and any deadlines for action.

The regulation is not mandated by federal or state law, court order or federal regulation.

(11) Explain the compelling public interest that justifies the regulation. What is the problem it addresses?

Reference should be made to the response to question (8).

(12) State the public health, safety, environmental or general welfare risks associated with nonregulation.

There are no public health, safety, environmental or general welfare risks associated with nonregulation.

(13) Describe who will benefit from the regulation. (Quantify the benefits as completely as possible and approximate the number of people who will benefit.)

Taxpayers and tax practitioners will benefit from having the Department's personal income tax regulations updated to address issues regarding employer withholding provisions.

Regulatory Analysis Form

(14) Describe who will be adversely affected by the regulation. (Quantify the adverse effects as completely as possible and approximate the number of people who will be adversely affected.)

No parties should be adversely affected by the regulation.

(15) List the persons, groups or entities that will be required to comply with the regulation. (Approximate the number of people who will be required to comply.)

All employees, employers and tax practitioners will be required to comply with the regulation.

(16) Describe the communications with and input from the public in the development and drafting of the regulation. List the persons and/or groups who were involved, if applicable.

A copy of the regulation was forwarded to the Pennsylvania Bar Association; the Pennsylvania Institute of Certified Public Accountants, the Pennsylvania Chamber of Business and Industry and the Department of Labor and Industry. The regulation was listed in the Department's Agenda of Regulations published at 31 Pa.B. 711 (February 3, 2001) and was forwarded to interested parties upon request.

(17) Provide a specific estimate of the costs and/or savings to the regulated community associated with compliance, including any legal, accounting or consulting procedures which may be required.

Compliance with the regulation could result in a savings to the regulated community by reducing the possibility of assessment of penalty and interest. No legal, accounting or consulting procedures are required by the regulation. There are no additional costs associated with the electronic filing requirement (§ 113.4(c)) in that businesses falling into that category are currently required to file electronically for Federal purposes.

Regulatory Analysis Form

(18) Provide a specific estimate of the costs and/or savings to local governments associated with compliance, including any legal, accounting or consulting procedures which may be required.

This regulation does not increase costs or savings to local governments. No legal, accounting or consultant procedures are required by the regulation.

(19) Provide a specific estimate of the costs and/or savings to state government associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required.

This regulation does not increase costs or savings to state government. No legal, accounting or consultant procedures are required by the regulation.

Regulatory Analysis Form

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings	N/A					
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs	N/A					
REVENUE GAIN:						
Regulated Community						
Local Government						
State Government	Nominal					
Total Revenue Gains	Nominal					

(20a) Explain how the cost estimates listed above were derived.

The proposed regulation establishes specific requirements for the reporting and withholding of tip income. As a result, an increased number of employers may withhold tax on tips. Collections will be accelerated to the extent that more tax is withheld by the employer, instead of being remitted with the taxpayer's estimated or annual payments. This acceleration of payments may create a nominal increase in revenues.

Regulatory Analysis Form

(20b) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
N/A	N/A	N/A	N/A	N/A

(21) Using the cost-benefit information provided above, explain how the benefits of the regulation outweigh the adverse effects and costs.

N/A

(22) Describe the nonregulatory alternatives considered and the costs associated with those alternatives. Provide the reasons for their dismissal.

There are no nonregulatory alternatives associated with the regulation.

(23) Describe alternative regulatory schemes considered and the costs associated with those schemes. Provide the reasons for their dismissal.

There are no alternative regulatory schemes associated with the regulation.

Regulatory Analysis Form

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulation.

The employer identification number requirements set forth in § 113.3a (relating to employer identification number) are more stringent than federal requirements; however, they are necessary to facilitate the Department's Keystone Integrated Tax System.

(25) How does this regulation compare with those of other states? Will the regulation put Pennsylvania at a competitive disadvantage with other states?

The regulation is either similar or less burdensome than those of other states except for the employer identification requirements outlined in § 113.3a. The regulation will not put Pennsylvania at a competitive disadvantage with other states.

(26) Will the regulation affect existing or proposed regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

This regulation does not affect any other existing or proposed regulations of the Department. The 10-day registration requirement proposed in § 113.3b differs with the registration requirement set forth in the Department of Labor and Industry's regulation 34 Pa. Code § 63.51 (relating to form UC-1) which requires immediate registration. The Department has met and discussed the issue with representatives of the Department of Labor and Industry.

(27) Will any public hearings or informational meetings be scheduled? Please provide the dates, times, and locations, if available.

The Department has not scheduled any public hearings or informational meeting to discuss the regulation.

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(28) Will the regulation change existing reporting, record keeping, or other paperwork requirements? Describe the changes and attach copies of forms or reports which will be required as a result of implementation, if available.

The regulation does not change existing reporting or record keeping requirements. The regulation will reduce paperwork requirements in that form W-2 will no longer be required to be filed with each individual return.

(29) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

No special groups are affected by the regulation; however, the needs of the food service industry were addressed by the Department adopting the Federal rules regarding tips thereby creating uniformity in reporting requirements.

(30) What is the anticipated effective date of the regulation; the date by which compliance with the regulation will be required; and the date by which any required permits, licenses or other approvals must be obtained?

The regulation will be effective upon final publication in the Pennsylvania Bulletin. Compliance with the regulation is required upon publication. There are no permits, licenses or other approvals required by the regulation.

(31) Provide the schedule for continual review of the regulation.

The regulation is scheduled for review within five years of final publication. No sunset date has been assigned.

CDL-1

**FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU**
(Pursuant to Commonwealth Documents Law)

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LEGISLATIVE REFERENCE BUREAU FOR
REVIEW COMMISSION

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<p>7/3/01</p> <p>Copy below is hereby approved as to form and legality. Attorney General</p> <p>By: <u>[Signature]</u> (DEPUTY ATTORNEY GENERAL)</p> <p>JUL 25 2001 DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p># 2209</p> <p>Copy below is hereby certified to be true and correct copy of a document issued, prescribed or promulgated by:</p> <p>PA Department of Revenue (Agency)</p> <p>Document/Fiscal Note No. <u>15-418</u></p> <p>Date of Adoption <u>[Signature]</u></p> <p>By: <u>[Signature]</u> Larry P. Williams Secretary of Revenue</p> <p>Title: _____ (Executive Officer, Chairman or Secretary)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies.</p> <p>By: <u>[Signature]</u></p> <p>7/10/01 Date of Approval</p> <p>(Deputy General Counsel) (Chief Counsel, Independent Agency) (Strike inapplicable title)</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission</p>
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DEPARTMENT OF REVENUE

NOTICE OF PROPOSED RULEMAKING

Personal Income Tax

61 Pa. Code §§ 113.2, 113.3, 113.3a,
113.3b, 113.4 and 121.16

Employer Withholding Provisions

PREAMBLE

The Department of Revenue (Department), under authority contained in section 354 of the Tax Reform Code of 1971 (TRC) (72 P.S. § 7354), proposes amendments to 61 Pa. Code Chapter 113. Withholding of Tax, sections 113.2, 113.3, 113.3a, 113.3b and 113.4 and Chapter 121. Final Returns, section 121.16, to read as set forth in Annex A.

Purpose of Regulation

The regulation is intended to serve the following purposes:

- New rules (§ 113.3(c) and (f)) are being added in order to implement the provisions of Act 1997-7 relating to cafeteria plans and other employee compensation arrangements (72 P.S. § 7301(d)).
- The regulation establishes new employer identification number requirements in order to facilitate the Department's Keystone Integrated Tax System.
- The regulation establishes new employer registration requirements in order to facilitate the common employer registration form of the Department of Revenue and the Department of Labor and Industry.
- The regulation changes W-2 filing requirements in order to facilitate the Department's new Infoimage System and make more use of electronic and magnetic media.
- The Federal employee reporting and withholding requirements for tip income are being adopted so that businesses will not have to deal with conflicting requirements at the Federal and State level.
- New rules (§ 113.3(d) and (e)) relating to the statutory trust fund provisions are proposed in order to enhance the Department's enforcement powers.

Explanation of Regulatory Requirements

Section 113.2 (relating to compensation subject to withholding) is amended by adding a new paragraph (3) relating to tips. Employers are required to deduct and withhold tax on tips of which the employer has the control, receipt, custody or payment; or that are reported by the employee and only to the extent that the employer can collect the tax by deducting it from the employee's compensation exclusive of tips.

Section 113.3 (relating to computing withholding of Pennsylvania Personal Income Tax) is amended by adding a new subsection (c) that addresses special situations relating to the deduction or payment of amounts by an employer for or on behalf of an employee. A new subsection (d) in § 113.3 provides that tax deducted from the state wages of an employee shall be considered to have been withheld at the time of payment of the state wages against which the deduction was charged.

A new subsection (e) in § 113.3 addresses the situation where an employer fails or refuses to pay over any withheld tax or to deposit it in a separate account in trust for and payable to the Department or otherwise identify and segregate it from other funds.

A new § 113.3(f) provides that amounts specified in a cafeteria plan as being available to the employee for purposes of selecting or purchasing benefits under a plan or as additional cash remuneration received in lieu of coverage are excludible from tax and withholding if certain enumerated conditions are met.

A new § 113.3a (relating to employer identification number) is added to explain the various rules relating to Federal and Pennsylvania employer identification numbers.

A new § 113.3b (relating to registration) details when an employer must register with the Department.

Section 113.4 (relating to time and place for filing reconciliation and withholding statements) has been amended by deleting unnecessary language relating to the completion of W-2's for tax year 1971. Subsection (b) is updated to provide for the filing of quarterly withholding returns. Subsection (c) is amended by providing that reconciliation statements with accompanying withholding statements for each employee can be forwarded to the Department via first class mail or electronic or magnetic media. The subsection is further amended to provide that if an employer is required to file 250 or more withholding statements, the reconciliation statement with accompanying withholding statements shall be forwarded via electronic or magnetic media as specified in the instructions of the Department.

Finally, § 121.16 (relating to Form W-2) is deleted in its entirety, consistent with the changes regarding W-2 filing requirements previously referenced.

Affected Parties

Affected parties are employers, employees and tax professionals.

Fiscal Impact

The Department has determined that the proposed amendments will have no significant fiscal impact on the Commonwealth.

Paperwork

The proposed amendments will not require additional paperwork for the public or the Commonwealth. The regulation will reduce paperwork requirements in that form W-2 will no longer be required to be filed with each individual return.

Effectiveness/Sunset Date

The regulation will become effective upon final publication in the Pennsylvania Bulletin. The regulation is scheduled for review within five years of final publication. No sunset date has been assigned.

Contact Person

Interested persons are invited to submit in writing any comments, suggestions, or objections regarding the proposed amendment to Anita M. Doucette, Office of Chief Counsel, PA Department of Revenue, Dept. 281061, Harrisburg, Pennsylvania 17128-1061, within thirty (30) days after the date of the publication of this notice in the Pennsylvania Bulletin.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on August 17, 2001, the Department submitted a copy of this proposed amendment to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Finance and the Senate Committee on Finance. In addition to submitting the amendment, the Department has provided IRRC and the Committees with a copy of a detailed Regulatory Analysis Form prepared by the Department in compliance with Executive Order 1996-1, "Regulatory Review and Promulgation." A copy of this material is available to the public upon request.

If IRRC has objections to any portion of the proposed rulemaking, it will notify the Department within 10 days of the close of the Committees' review period. The notification shall specify the regulatory review criteria which have not been met by that portion. The Regulatory Review Act specifies detailed procedures for review of objections raised, prior to final publication of the amendments, by the Department, the General Assembly and the Governor.

LARRY P. WILLIAMS
SECRETARY OF REVENUE

06/01/01

CONTINUATION SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)

ANNEX A

Title 61. Revenue, Part I. Department of Revenue, Subpart B.
General Fund Revenues, Article V. Personal Income Tax, Chapter
113. Withholding of Tax.

§ 113.2. Compensation subject to withholding.

All compensation shall be subject to withholding of tax by
an employer. Regulations for residents and nonresidents shall be
as follows:

* * *

(3) Tips.

(i) Every employe who, in the course of his
employment, receives in any calendar month cash tips which are
wages as defined in section 3401(a) of the IRC (26 U.S.C.A.
§ 3401(a)) shall report all such tips in one or more written
statements furnished to his employer on or before the tenth day
following such month.

(ii) Employers are required to deduct and withhold
tax only on tips of which the employer has the control, receipt,
custody or payment or tips that are reported by the employe and
only to the extent that the employer can collect the tax by
deducting it from the employe's compensation exclusive of tips.

§ 113.3. Computing withholding of Pennsylvania Personal Income
Tax.

* * *

(c) Except as provided in subsection (f):

(1) Any amount lawfully deducted by an employer from the remuneration of an employee shall be deemed to be a part of the employee's remuneration and to have been paid to the employee as compensation at the time the deduction is made.

(2) Any amount paid by an employer on behalf of an employee without deduction from the remuneration of, or other reimbursement from, the employee on account of any liability or obligation of, or payment required from, an employee shall be deemed to be paid to the employee as compensation at the time the payment is made.

(3) Any payment made to an employee, third party or fund pursuant to a cash or deferred arrangement under which an employee may unilaterally elect to have the employer make payments to such third party or fund for the benefit of the employee or to the employee directly in cash shall be deemed to be paid to the employee as compensation at the time the payment is made.

(4) Any payment made to an employee, third party or fund pursuant to an arrangement under which an employee may unilaterally choose between two or more benefits consisting either of cash and coverage under a plan or coverage under two or more plans shall be deemed to be paid to the employee as compensation at the time the payment is made.

(d) Tax deducted from the state wages of an employe shall be considered to have been withheld at the time of payment of the state wages against which the deduction was charged.

(e) If an employer fails or refuses to pay over any withheld tax or to deposit it in a separate account in trust for and payable to the Department or otherwise identify and segregate it from other funds, it shall be deemed that:

(1) Withheld tax would be on deposit in the general operating account of the employer at the time of payment of the state wages from which deduction was made.

(2) The employer would disburse withheld tax last.

(3) Once withheld tax is disbursed, however, subsequent deposits would not replenish it.

(4) The lowest intermediate balance of cash on deposit in the general operating account is withheld tax that constitutes a trust fund for the Commonwealth that is enforceable against the employer or any person receiving any part of such fund.

(5) Any excess of the tax deducted over the lowest intermediate balance is withheld tax that has been received by the employer and disbursed.

(f) Amounts specified in a cafeteria plan document as being available to the employe for the purpose of selecting or purchasing benefits under a plan or as additional cash remuneration received in lieu of coverage under a plan are excludible from tax and withholding if the following apply:

(1) They were not actually or constructively received, after taking section 125 of the IRC (26 U.S.C.A. § 125) into account.

(2) The benefits selected or purchased are nontaxable under the IRC when offered under a cafeteria plan described in section 125 of the IRC.

(3) The payments made for the plan would be nontaxable under the Pennsylvania Personal Income Tax if made by the employer outside a cafeteria plan described in section 125 of the IRC.

§ 113.3a. Employer identification number.

An employer must use both his Federal and Pennsylvania employer identification numbers to report all Pennsylvania withholding. Employers who have not yet received a Federal employer identification number will be assigned a temporary Pennsylvania number until the Federal employer identification number is obtained, at which time the Department must be notified. If an employer has multiple divisions using the same Pennsylvania employer identification number but remitting and reconciling withholding tax separately, the employer must request a separate Pennsylvania number for each division.

§ 113.3b. Registration.

Every employer having an office or transacting business within this Commonwealth and making payment of wages for the first time to one or more nonresident individuals performing

services on behalf of such employer within this Commonwealth or to one or more resident individuals shall, within ten business days of such payment, register with the Department by completing and filing the form prescribed by instructions of the Department.

§ 113.4. Time and place for filing reconciliation and withholding statements.

(a) An employer shall submit a wage and tax withholding statement to each of his employes on or before January 31 following the year of payment of compensation, or within 30 days from the date of the last payment of compensation if employment or the business is terminated.

(1) An employer shall use the combined Federal-State Wage and Tip Withholding Statement (Form W-2) issued by the Internal Revenue Service or one that conforms thereto with the [name] word "Commonwealth" printed, stamped, or typed thereon.

[(i)] The statement shall show name of employer, address and identification number of employer; name, address and Social Security number of employee; total compensation paid during the taxable year; and total amount of Pennsylvania tax withheld during the taxable year.

[(ii) For the year 1971, the employer shall also show on Form W-2 the actual compensation paid, for example, on and after June 1, 1971, through December 31, 1971, or, in the alternative, actual compensation paid for the period July 1, 1971, through December 31, 1971, plus, 1/3 of the calendar quarter July 1, 1971, to September 30, 1971.]

* * *

[(3) With prior approval of the director of the Commonwealth Personal Income Tax Bureau, an employer or his agent may be permitted to submit a magnetic tape or computer printed listing in lieu of copies of Form W-2.]

(b) A completed Reconciliation Statement (Return Form [RIT-W-3] PA-W3), reconciling Personal Income Tax withheld with related quarterly withholding returns and deposit and employee withholding statements shall be submitted by the following:

* * *

(c) Reconciliation Statements (Form [RIT-W-3] PA-W3), with accompanying withholding statements (Form W-2) for each employee shall be forwarded via first class mail with sufficient postage or electronic or magnetic media as specified in instructions of the Department to [Department of Revenue, Personal Income Tax Bureau, Harrisburg, Pennsylvania 17129] the Department. [If an employer has a large number of Form W-2's to be forwarded, he may use as many packages as are conveniently necessary which shall be numbered consecutively and contain the name of the employer and identification number thereon. If more than one package is forwarded, Form [RIT-W-3] PA-W3 shall be placed in the package numbered one.] If an employer is required to file 250 or more withholding statements, the reconciliation statement, with accompanying withholding statements shall be forwarded via

electronic or magnetic media as specified in the instructions of the Department.

Chapter 121. Final Returns.

[§ 121.16. Form W-2.

This form is a receipt for the taxes withheld from the salary of an employe. It shall accompany his return Form PA-40 as evidence of taxes withheld. If an employe works for more than one employer during the year, he shall usually have more than one Form W-2. A copy of each Form W-2 shall accompany his return. If a person is unable to furnish his Form W-2, a statement shall be attached to the return explaining the reason.] Reserved.

06/01/01

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE
REGULATORY REVIEW ACT**

I.D. NUMBER: 15-418
SUBJECT: Employer Withholding Provisions
AGENCY: DEPARTMENT OF REVENUE

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INDEPENDENT REGULATORY
REVIEW COMMISSION

TYPE OF REGULATION

- X Proposed Regulation
Final Regulation
Final Regulation with Notice of Proposed Rulemaking Omitted
120-day Emergency Certification of the Attorney General
120-day Emergency Certification of the Governor
Delivery of Tolled Regulation
a. With Revisions b. Without Revisions

FILING OF REGULATION

DATE	SIGNATURE	DESIGNATION
8/17	P. Macint	HOUSE COMMITTEE ON FINANCE
8/17	Cheryl Sayla	SENATE COMMITTEE ON FINANCE
8/17/01	St. Helms	INDEPENDENT REGULATORY REVIEW COMMISSION
		ATTORNEY GENERAL
8/17/01	Sharon L. Brown	LEGISLATIVE REFERENCE BUREAU

August 1, 2001