

# Regulatory Analysis Form

(Completed by Promulgating Agency)

INDEPENDENT REGULATORY  
REVIEW COMMISSION

(All Comments submitted on this regulation will appear on IRRC's website)

(1) Agency:

Department of State, Bureau of Professional and  
Occupational Affairs

(2) Agency Number: 16A

Identification Number: 16A-723

IRRC Number: 3069

(3) PA Code Cite: 49 Pa. Code §§ 43b.23 and 43b.23a

(4) Short Title:

Schedule of civil penalties – massage therapists

(5) Agency Contacts (List Telephone Number and Email Address):

Primary Contact: Ariel O'Malley, Board Counsel, State Board of Massage Therapy, P.O. Box 69523, Harrisburg, PA 17106-9523 (phone 717-783-7200) (fax 787-0251) [aomalley@pa.gov](mailto:aomalley@pa.gov).

Secondary Contact: Cynthia Montgomery, Regulatory Counsel, Department of State, P.O. Box 69523, Harrisburg, PA 17106-9523 (phone 717-783-7200) (fax 787-0251) [cymontgome@pa.gov](mailto:cymontgome@pa.gov).

(6) Type of Rulemaking (check applicable box):

- Proposed Regulation  
 FINAL REGULATION  
 Final Omitted Regulation

- Emergency Certification Regulation;  
 Certification by the Governor  
 Certification by the Attorney General

(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

The Commissioner of Professional and Occupational Affairs (Commissioner) hereby amends Chapter 43b to read as set forth in Annex A. The Commissioner, in consultation with the State Board of Massage Therapy (Board), proposes to amend the schedule of civil penalties contained in § 43b.23 (relating to schedule of civil penalties – massage therapists – statement of policy) by promulgating the statement of policy as a regulation. This regulation will increase the deterrent effect of the civil penalties by increasing the amount of several of the penalties, as well as clarifying other civil penalties and adding two new civil penalties to enforce provisions of the Massage Therapy Law (act) (63 P.S. §§ 627.1—627.50) and Chapter 20.

(8) State the statutory authority for the regulation. Include specific statutory citation.

Section 5(a) of the act of July 2, 1993 (P.L. 345, No. 48) (Act 48) (63 P.S. § 2205(a)) authorizes the Commissioner, after consultation with the appropriate licensing boards in the Bureau of Professional and Occupational Affairs (Bureau), to promulgate a schedule of civil penalties for violations of the acts or regulations of these boards.

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(9) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

**The proposed rulemaking is not mandated by any Federal or State law or court order.**

(10) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

**Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements. At the same time, licensees who receive an Act 48 citation retain their due process right to a hearing prior to the imposition of judgment. The use of Act 48 citations has increased steadily since 1996, when the program was first implemented, and they have become an important part of the Bureau's enforcement efforts. This regulation increases the deterrent effect of the civil penalties by increasing the amount of several of the penalties, as well as clarifying other civil penalties and adding two new civil penalties to enforce the act.**

(11) 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 regulations.

**The proposed rulemaking does not overlap or conflict with any Federal requirements.**

(12) How does this regulation compare with those of the other states? How will this affect Pennsylvania's ability to compete with other states?

**The regulation differs with other states in that Pennsylvania breaks down the civil penalty per violation type as described, while most surrounding states do not contain as much detail.**

**In Delaware, the Board may impose a monetary penalty not to exceed \$500 for each violation.**

**In Maryland, the Disciplinary Guidelines are most similar to Pennsylvania's Schedule of Civil Penalties in that they go into great detail for each violation and the subsequent civil penalty that accompanies each violation. The Board may impose a civil penalty up to \$5,000 per violation.**

**In New Jersey, the board may impose a civil penalty of not more than \$10,000 for the first violation and \$20,000 for the second and each subsequent violation.**

**In New York, there are general provisions that discuss unprofessional conduct of massage therapists, but there are no guidelines that list what penalties a licensee could incur if unprofessional conduct is performed by a licensee.**

**In Ohio, the Board may, for a first violation, impose a civil penalty of not more than \$5,000; for each subsequent violation, impose a civil penalty of not more than \$20,000.**

**Based on these laws and regulations, the regulation will not place Pennsylvania at a competitive disadvantage.**

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

**The proposed regulation will have no effect on other regulations of the Board or other state agencies.**

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

**The Board discussed this schedule of civil penalties at its regularly scheduled public meeting on November 12, 2013 and sent a copy of its agenda for that meeting to interested parties prior to the meeting. The agenda indicated that the Board would consider this proposal and other examples of civil penalty schedules. Representatives of the profession generally attend the public sessions of Board meetings. On November 12, 2013, representatives of the regulated community attended the public meeting at which this rulemaking was discussed, including the Debra Persinger, Executive Director of the Federation of State Massage Therapy Boards; Natalie Cook, of the Winter Group, a lobbyist representing the American Massage Therapy Association of Pennsylvania; and several massage therapy educators and continuing education providers, including two from the Baltimore School of Massage.**

**The Commissioner published a notice of proposed rulemaking in the *Pennsylvania Bulletin* at 44 Pa.B. 5487 (August 16, 2014) requesting public comments within 30 days. On August 18, 2014, the Commissioner received a comment from Ed Portley, a licensed massage therapist and continuing education provider, who commended the Board for "considering the increase in civil penalties for violations to the massage therapy law. It is my opinion that the previous fees were not much of a deterrent to individuals who find licensure an inconvenience." As a result of Mr. Portley's comment, the Commissioner and Board reconsidered the proposal and determined that it was necessary to increase the civil penalties for unlicensed practice to further enhance the deterrent effect. First, the Commissioner increased the civil penalty for a violation of section 14(a) of the act from \$500 to \$1,000 for a first offense of holding oneself out as a massage therapist or practicing massage therapy while unlicensed. Likewise, under section 14(c), the Commissioner increased the civil penalty for violation of section 14(c) of the act from \$500 to \$1,000 for a first offense of employing an individual in massage therapy who is not licensed. The Commissioner, in consultation with the Board, reasoned that these two offenses are serious offenses and the civil penalty should be more of a deterrent to individuals who might violate these sections of the act.**

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

**The proposed rulemaking would apply to all licensees of the Board. There are approximately 7,763 massage therapists with current licenses in the Commonwealth.**

According to the Pennsylvania Department of Labor and Industry (L&I) in 2010, most massage therapists (44.2%) are self-employed, 32.6% work in personal care services, 12.0% work in offices of other health practitioners, 3.3% work in other amusement and recreation industries, 0.8% work in civic and social organizations and 0.4 % work in private households. A few massage therapists work in management and technical consulting services, junior colleges, technical and trade schools and offices of physicians.

For the business entities listed above, small businesses are defined in Section 3 of Act 76 of 2012, which provides that a small business is defined by the U.S. Small Business Administration's (SBA) Small Business Size Regulations under 13 CFR Ch. 1 Part 121. Specifically, the SBA has established these size standards at 13 CFR § 121.201 for types of businesses under the North American Industry Classification System (NAICS). In applying the NAICS standards to the types of businesses where massage therapists work, obviously those licensees who are self-employed and those who work in private households are small businesses. Small businesses in the categories of personal care services, all other miscellaneous health practitioners, all other amusement and recreation industries, and civic and social organizations are ones with \$7.0 million or less in average annual receipts. A small business in management consulting services as well as scientific and technical consulting services and technical and trade schools are those with \$14.0 million or less in average annual receipts. For junior colleges, the annual threshold is \$19.0 million or less. The NAICS thresholds for offices of physicians (except mental health specialists) is \$10 million or less annually. In considering all of these small business thresholds set by NAICS for the businesses in which massage therapists work, it is probable that most of the licensed massage therapists work in small businesses.

Only those licensees and businesses that violate the statutory or regulatory provisions listed in the Annex and unlicensed individuals who practice without a license will be affected by this rulemaking. The effect of the rulemaking is only procedural – replacing formal disciplinary proceedings with the Act 48 citation process.

The Commissioner has not identified any group of individuals or entities that will be adversely affected by the rulemaking. Generally, Act 48 citations benefit both licensees and the Department. Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements. At the same time, licensees who receive an Act 48 citation retain their due process right to a hearing prior to the imposition of judgment.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Only those licensees and businesses that violate the statutory or regulatory provisions listed in the Annex and unlicensed individuals who practice without a license will be required to comply with the regulation. There are approximately 7,763 massage therapists with current licenses in the Commonwealth. There is no way to approximate the number of unlicensed individuals who may practice without a license.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

**Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements. At the same time, licensees who receive an Act 48 citation retain their due process right to a hearing prior to the imposition of judgment. The use of Act 48 citations has increased steadily since 1996, when the program was first implemented, and they have become an important part of the Bureau's enforcement efforts. This regulation will increase the deterrent effect of the civil penalties by increasing the amount of several of the penalties, as well as clarifying other civil penalties and adding two new civil penalties to enforce the act.**

(18) Explain how the benefits of the regulation outweigh any cost and adverse effects.

**No adverse effects or increased costs have been associated with compliance with the proposed rulemaking. Therefore, the above-identified benefits would outweigh any costs.**

(19) 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. Explain how the dollar estimates were derived.

**Those members of the regulated community who are charged with violating either of the penalties in this schedule of civil penalties will save legal costs by accepting the Act 48 civil penalty rather than participating in the full formal disciplinary action. At the same time, licensees who receive an Act 48 citation retain their due process right to a hearing prior to the imposition of judgment.**

(20) Provide a specific estimate of the costs and/or savings to the **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

**There are no costs or savings to local governments associated with compliance with the proposed rulemaking.**

(21) Provide a specific estimate of the costs and/or savings to the **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

**The Bureau and the Board will enjoy a savings with this rulemaking because the Act 48 citation process is much less expensive than formal disciplinary action. Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements.**

(22) For each of the groups and entities identified in items (19)-(21) above, submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

**Because the proposed rulemaking would permit the use of Act 48 citations to sanction violators of the statute or regulations at the sections indicated, rather than formal disciplinary action, the Bureau, licensees and the Board will have a reduction in paperwork requirements for the disciplinary process.**

(23) 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.

	<b>Current FY 16-17</b>	<b>FY +1 17-18</b>	<b>FY +2 18-19</b>	<b>FY +3 19-20</b>	<b>FY +4 20-21</b>	<b>FY +5 21-22</b>
<b>SAVINGS:</b>	\$	\$	\$	\$	\$	\$
<b>Regulated Community</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Savings</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>COSTS:</b>						
<b>Regulated Community</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Costs</b>	N/A	N/A	N/A	N/A	N/A	N/A
<b>REVENUE LOSSES:</b>						
<b>Regulated Community</b>						
<b>Local Government</b>						
<b>State Government</b>						
<b>Total Revenue Losses</b>	N/A	N/A	N/A	N/A	N/A	N/A

(23a) Provide the past three year expenditure history for programs affected by the regulation.

<b>Program</b>	<b>FY -3 13-14 Actual</b>	<b>FY -2 14-15 (Actual)</b>	<b>FY -1 15-16 (Projected)</b>	<b>Current FY 16-17 (Budgeted)</b>
<b>State Board of Massage Therapy</b>	<b>\$601,282.08</b>	<b>\$664,644.20</b>	<b>\$625,081.33</b>	<b>\$728,000.00</b>

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

**As discussed above in the answers to questions 17 – 19 and 21 – 22, this regulation will not have an adverse impact on small businesses.**

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

**No affected groups or persons have been identified whose particular needs would necessitate the making of special accommodations.**

(26) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

**No alternative regulatory provisions were considered.**

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

**As discussed above in the answers to questions 17 – 19 and 21 – 22, this regulation will not have an adverse impact on small businesses.**

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

**The proposed rulemaking is not based on any data, studies, or references.**

(29) Include a schedule for review of the regulation including:

- |   |   |
|---|---|
| A. The date by which the agency must receive public comments:                               | <b>Public comments were due by September 15, 2014</b>             |
| B. The date or dates on which public meetings or hearings will be held:                     | <b>At regularly scheduled Board meetings (see item #30 below)</b> |
| C. The expected date of promulgation of the proposed regulation as a final-form regulation: | <b>Fall 2016</b>  |
| D. The expected effective date of the final-form regulation:                                | <b>Upon publication in Pennsylvania Bulletin</b>                  |
| E. The date by which compliance with the final-form regulation will be required:            | <b>Effective date</b>   |
| F. The date by which required permits, licenses or other approvals must be obtained:        | <b>Effective date</b>   |

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

**The Commissioner and the Bureau's licensing boards continually review the efficacy of their regulations, as part of their annual review process pursuant to Executive Order 1996-1. The State Board of Massage Therapy discusses all regulatory proposals at regularly scheduled public board meetings. Upcoming meetings are scheduled as follows: October 11, December 13, 2016; and February 7, April 11, June 13, August 8, October 10, December 12, 2017. More information can be found on the Bureau website ([www.dos.pa.gov/ProfessionalLicensing](http://www.dos.pa.gov/ProfessionalLicensing)).**



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FACE SHEET  
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WITH THE LEGISLATIVE REFERENCE BUREAU

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(Pursuant to Commonwealth Documents Law)

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Copy below is hereby approved as to form and legality. Attorney General

Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:

Copy below is approved as to form and legality. Executive or Independent Agencies.

BY: \_\_\_\_\_  
(DEPUTY ATTORNEY GENERAL)

Bureau of Professional and Occupational Affairs  
(AGENCY)

BY: Marisa H. Z. Lehr

DOCUMENT/FISCAL NOTE NO. 16A-723

**AUG 15 2016**

DATE OF APPROVAL

DATE OF APPROVAL

DATE OF ADOPTION: \_\_\_\_\_

BY: Ian J. Harlow

(Executive Deputy General Counsel  
Strike inapplicable title)

TITLE: Commissioner  
(EXECUTIVE OFFICER, CHAIRMAN OR SECRETARY)

- Check if applicable  
Copy not approved.  
Objections attached.
- Check if applicable. No  
Attorney General approval or  
objection within 30 day after  
submission.

FINAL RULEMAKING

COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

49 PA. CODE §§ 43b.23 and 43b.23a

SCHEDULE OF CIVIL PENALTIES – MASSAGE THERAPISTS

The Commissioner of Professional and Occupational Affairs (Commissioner) hereby deletes § 43b.23 (relating to schedule of civil penalties—massage therapists—statement of policy) and adopts § 43b.23a (relating to schedule of civil penalties—massage therapists) to read as set forth in Annex A.

*Effective date*

The final-form rulemaking will be effective upon publication in the *Pennsylvania Bulletin*. The schedule of civil penalties will apply to violations that occur on or after the effective date.

*Statutory authority*

Section 5(a) of the act of July 2, 1993 (P. L. 345, No. 48) (Act 48) (63 P. S. § 2205(a)) authorizes the Commissioner, after consultation with licensing boards in the Bureau of Professional and Occupational Affairs (Bureau), to promulgate a schedule of civil penalties for violations of the acts or regulations of the licensing boards.

*Background and Need for Regulation*

Act 48 authorizes agents of the Bureau to issue citations and impose civil penalties under schedules adopted by the Commissioner in consultation with the Bureau's boards and commissions. Act 48 citations streamline the disciplinary process by eliminating the need for formal orders to show cause, answers, adjudications and orders, and consent agreements. At the same time, licensees who receive an Act 48 citation retain their due process right to a hearing prior to the imposition of judgment. The use of Act 48 citations has increased steadily since 1996, when the program was first implemented, and they have become an important part of the Bureau's enforcement efforts.

Upon consultation with a representative of the Commissioner, the State Board of Massage Therapy (Board) determined that it should utilize the Act 48 citation process to decrease costs to its licensees and more efficiently conduct its duties. The Board has participated in the Act 48 citation program since 2010, when the Commissioner adopted the statement of policy at § 43b.23 setting forth a schedule of civil penalties for a number of offenses. At this time, the Commissioner and the Board believe it is necessary to promulgate the schedule of civil penalties by regulation and make certain revisions to improve their deterrent effect. To that end, the final-form rulemaking establishes a schedule of civil penalties for four general categories of matters that routinely arise before the Board – cases involving licensure display or improper advertising; cases involving unlicensed individuals holding themselves out as licensed; cases involving individuals practicing while their licenses are lapsed/expired/inactive; and cases involving violations of the continuing education and CPR requirements.

*Summary of Comments and the Board's Response*

The Commissioner published a notice of proposed rulemaking in the *Pennsylvania Bulletin* at 44 Pa.B. 5487 (August 16, 2014) requesting public comments within 30 days. On August 18, 2014, the Commissioner received a comment from Ed Portley, a licensed massage therapist and continuing education provider, who commended the Board for “considering the increase in civil penalties for violations to the massage therapy law. It is my opinion that the previous fees were not much of a deterrent to individuals who find licensure an inconvenience.” As a result of Mr. Portley’s comment, the Commissioner and Board reconsidered the proposal and determined that it was necessary to increase the civil penalties for unlicensed practice to further enhance the deterrent effect. First, the Commissioner increased the civil penalty for a violation of section 14(a) of the act from \$500 to \$1,000 for a first offense of holding oneself out as a massage therapist or practicing massage therapy while unlicensed. Likewise, the Commissioner increased the civil penalty for violation of section 14(c) of the act from \$500 to \$1,000 for a first offense of employing an individual in massage therapy who is not licensed. The Commissioner, in consultation with the Board, reasoned that these two offenses are serious offenses and the civil penalty should be more of a deterrent to individuals who might violate these sections of the act.

Neither the House Professional Licensure Committee (HPLC) nor the Senate Consumer Protection and Public Licensure Committee (SCP/PLC) submitted comments on the proposal. However, on October 15, 2014, the Independent Regulatory Review Commission (IRRC) submitted comments to the Commissioner. The first three comments from IRRC related to citations to the act, and the Commissioner made necessary corrections. In addition to the edits suggested by IRRC, the Commissioner added cross references to section 4(6) of the act and § 20.32(a) (relating to continuing education hours, maintenance of certificates of completion) to support the civil penalty schedule for failure to complete 24 hours of continuing education courses. The Commissioner and Board agreed that reference to section 14 of the act was too broad with regard to the violation of holding oneself out as a massage therapist or practicing massage therapy while unlicensed and has limited the statutory provision to section 14(a). Finally, the Commissioner and Board agree that section 14(b) of the act is not relevant to the offense of holding oneself out as a licensed massage therapist while one’s license is expired. Section 14(b) of the act expressly permits one whose license is maintained in inactive status to use various titles or otherwise hold oneself out as a massage therapist. A person whose license is expired is similarly situated as one whose license is inactive, therefore, the Commissioner, in consultation with the Board, has removed the proposed civil penalty from the schedule.

In its last comment, IRRC noted that section 14(e) of the act describes three conditions in the requirement to practice with “a valid, unexpired, unrevoked and unsuspended license,” while the proposed regulation only sets forth a civil penalty for practicing on an expired license. IRRC suggested that all three license statuses be addressed in the schedule. The Board and Commissioner chose not to establish a schedule of civil penalties for practicing on a revoked or suspended license because these are more egregious offenses than practicing on an expired license, which may have occurred due to an oversight. Under section 5(a) of Act 48, the maximum civil penalty that may be imposed by citation is only \$1,000, while the maximum civil penalty that may be imposed by the Board in a formal disciplinary proceeding is \$10,000 under section 5(b)(4) of Act 48. In addition, the Board may wish to take other disciplinary or corrective actions that are

not possible under the citation process when an individual practices on a revoked or suspended license. An Act 48 civil penalty schedule is only proper for a violation that the Board would typically address through a monetary civil penalty alone. However, the Commissioner has added cross references to § 20.31(b) and (i) (relating to expiration, renewal and reactivation of license) as additional support for this civil penalty because these sections of the regulations expressly prohibit practice when a license has not been renewed and authorize disciplinary action for an individual who practices massage therapy on an inactive or expired license. In addition, upon review the Commissioner realized that the schedule of civil penalties for this violation had omitted certain time periods. As proposed, the penalty for practicing on a lapsed license from 0—12 months would be \$250; and for practicing from 13—18 months would be \$500. However, practice for a period between 12 and 13 months was inadvertently omitted from the schedule. Likewise, there is no place in the schedule for violations of between 18 and 19 months. Therefore, the Commissioner revised the schedule to clearly incorporate all possible time periods.

#### *Description of Amendments to the Final-Form Rulemaking*

The Commissioner has amended the schedule to include the appropriate legal citation to the section of the act under which the offense of “[f]ailure to hold current certification to administer CPR” would occur. The section was previously cited as 63 P.S. § 627.6(b)(i) and has been corrected to § 627.6(b)(1)(i).

The Commissioner also amended the relevant legal citation relating to “[f]ailure to complete 24 hours of continuing education courses” to reflect the correct citation to 63 P.S. §§ 627.6(b)(1)(ii) and 627.4(6) and to include the additional cross-reference to the Board’s regulations at § 20.32(a) (relating to continuing education hours, maintenance of certificates of completion) for further clarity.

The legal citation for the offense of “[h]olding oneself out as a massage therapist or practicing massage therapy while unlicensed,” was revised to provide a more specific citation to 63 P.S. § 627.14(a), rather than § 627.14. The schedule of civil penalties for this violation was also amended to provide for a higher civil penalty of \$1,000 for a first offense, rather than \$500 as originally proposed. This amendment has been made based on the public comment and Board discussion, relating to the need for the civil penalties to be high enough to result in a deterrent effect on those individuals who find licensure to be an inconvenience.

The schedule of civil penalties was amended to remove the violation for “[h]olding oneself out as a licensed massage therapist while license is expired” because section 14(b) of the act expressly permits an individual whose license is inactive to continue to use various titles or otherwise hold out that one is licensed as a massage therapist. Individuals whose licenses are expired are similarly situated as those whose licenses are maintained in inactive status. Therefore, the Commissioner has removed the proposed civil penalty from the schedule.

The Commissioner has amended the civil penalty for a first offense violation of “[e]mploying an individual in massage therapy who is not licensed” from \$500 to \$1,000. This

change was made based on the public comment and Board discussion relating to the need for the civil penalties to be high enough to have a deterrent effect.

Finally, the Commissioner has amended the schedule relating to “[p]racticing massage therapy on an expired license” to also include practicing massage therapy on an inactive license and has added appropriate citation to the Board’s regulations at § 20.31(i) (relating to expiration, renewal and reactivation of license). As proposed, there was no specific statement in the previous language that would have allowed for a citation for practice on an inactive license. Inasmuch as practicing on an inactive license is akin to practicing on an expired license, the final-form rulemaking has been amended to cover both situations. Otherwise, practicing on an expired license would result in a citation, while practicing on an inactive license would result in more costly formal disciplinary proceedings. As noted above, the Commissioner declines to include practicing on a suspended or revoked license in this schedule, because those offenses are more appropriately resolved by the Board through formal disciplinary proceedings. In addition, the schedule related to this offense was revised to close inadvertent loopholes created by omitting timeframes between 12 and 13 months and between 18 and 19 months from the schedule.

#### *Fiscal Impact and Paperwork Requirements*

This rulemaking has no adverse fiscal impact on the Commonwealth or its political subdivisions, and will reduce the paperwork requirements of both the Commonwealth and the regulated community by eliminating the need for orders to show cause, answers, consent agreements and adjudications/orders for those violations subject to the Act 48 citation process. The only fiscal impact of the proposal would be borne by those persons who violate the act or regulations of the Board and are subject to the civil penalties imposed by the new schedule.

#### *Sunset Date*

The Board, the Bureau and the Commissioner continually monitor the effectiveness of regulations affecting their operations. As a result, no sunset date has been assigned.

#### *Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on August 5, 2014, the Commissioner submitted a copy of the notice of proposed rulemaking, published at 44 Pa.B. 5487 (August 16, 2014), to IRRC and the chairpersons of the HPLC and the SCP/PLC for review and comment.

Under section 5(c) of the Regulatory Review Act, IRRC, the HPLC and the SCP/PLC were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing the final-form rulemaking, the Board has considered all comments received from IRRC, the HPLC, the SCP/PLC and the public.

On \_\_\_\_\_, 2016, the Board delivered final-form rulemaking to IRRC, the HPLC and the SCP/PLC. Under section 5.1(g)(3) of the Regulatory Review Act (71 P.S. § 745.5a(g)(3)), on \_\_\_\_\_, 2016, the final-form rulemaking was deemed approved by the HPLC and by the SCP/PLC. Under section 5.1(e) of the Regulatory Review Act, IRRC met on \_\_\_\_\_, 2016, and approved the final-form rulemaking.

*Contact Person*

Further information may be obtained by contacting Carol Niner, Board Administrator for the State Board of Massage Therapy by mail at P.O. Box 2649, Harrisburg, PA 17105-2649 or by email at [RA-MASSAGETHERAPY@PA.GOV](mailto:RA-MASSAGETHERAPY@PA.GOV).

*Findings*

The Commissioner finds that:

(1) Public notice of proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) A public comment period was provided as required by law and only one public comment was received.

(3) The amendments to the final form rulemaking do not enlarge the purpose of the proposed rulemaking published at 44 Pa.B. 5487.

(4) This final-form rulemaking is necessary and appropriate for administering and enforcing the authorizing act identified in this Preamble.

*Order*

The Commissioner, acting under the authority of the act of July 2, 1993 (P.L. 345, No. 48), orders that:

(a) The regulations of the Commissioner at 49 Pa. Code § 43b.23a are added to read as set forth in Annex A.

(b) The Commissioner shall submit this order and Annex A to the Office of General Counsel and the Office of Attorney General as required by law.

(c) The Commissioner shall submit this order and Annex A to IRRC, the HPLC and the SCP/PLC as required by law.

(d) The Commissioner shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(e) This order shall take effect on publication in the *Pennsylvania Bulletin*.

Ian J. Harlow  
Commissioner

**ANNEX A**

**TITLE 49. PROFESSIONAL AND VOCATIONAL STANDARDS**

**PART I. DEPARTMENT OF STATE**

**Subpart A. PROFESSIONAL AND OCCUPATIONAL AFFAIRS**

**CHAPTER 43b. COMMISSIONER OF PROFESSIONAL AND OCCUPATIONAL  
AFFAIRS**

**SCHEDULE OF CIVIL PENALTIES, GUIDELINES FOR IMPOSITION OF CIVIL  
PENALTIES AND PROCEDURES FOR APPEAL**

§ 43b.23. [Schedule of civil penalties—massage therapists—statement of policy] (Reserved).

**[STATE BOARD OF MASSAGE THERAPY**

**Violation**

**Violation** under

**under 63** 49 Pa. Code

**P. S.**

**Chapter 20**

**Title/Description**

**Civil Penalty**

§ 20.42(a)(14)	Failure to display current license or wallet card.	First offense—\$50 Second and subsequent offenses— \$250
§ 20.42(a)(15)	Failure to include massage therapy license number in advertisements.	First offense—\$50 Second and subsequent offenses— \$250
§ 20.42(a)(16)	Failure to display name and title.	First offense—\$50 Second and subsequent offenses— \$250



§ 627.6(b)(i)	Failure to hold current certification to administer CPR.	First offense—\$50 Second offense—\$250 Subsequent offense—formal action
§ 627.6(b)(ii)	Failure to complete 24 hours of continuing education courses approved by the Board during the 24 months preceding license renewal.	First offense—\$100 per credit hour Second offense—formal action
§ 627.14	Holding oneself out as a massage therapist or practicing massage therapy while unlicensed.	First offense—\$500 Second offense—formal action
§ 627.14(b)	Holding oneself out as a licensed massage therapist while license is expired.	0—6 months—warning 7—12 months—\$250 13—18 months—\$500 19—24 months—\$1,000 More than 24 months—formal action
§ 627.14(e)	Practicing massage therapy on an expired license.	0—6 months—warning 7—12 months—\$250 13—18 months—\$500 19—24 months—\$1,000

More than 24 months—formal  
 prosecution]

**§ 43b.23a. Schedule of civil penalties—massage therapists.**

**STATE BOARD OF MASSAGE THERAPY**

**Violation**

**under**

**Violation**

**49 Pa. Code**

**under 63 P. S.**

**Chapter 20**

**Title/Description**

**Civil Penalty**

§ 20.42(a)(14) Failure to display current 1st offense—\$250  
license or wallet card. 2nd and subsequent offenses—\$500

§ 20.42(a)(15) Failure to include massage 1st offense—\$250  
therapy license number in 2nd and subsequent offenses—\$500  
advertisements.

§ 20.42(a)(16) Failure to display name 1st offense—\$250  
and title. 2nd and subsequent offenses—\$500

§ 627.6(b)(1)(i) Failure to hold current 1st offense—\$250  
certification to administer 2nd offense—\$500  
CPR. Subsequent offense—formal action

§ 627.6(b)(1)(ii) § 20.32(a) Failure to complete 24 1st offense—\$100 per credit hour up  
AND § 627.4(6) hours of continuing to 10 credit hours  
education courses More than 10 credit hours—formal

	<u>approved by the Board</u>	<u>action</u>
	<u>during the 24 months</u>	<u>2nd and subsequent offenses—</u>
	<u>preceding license renewal.</u>	<u>formal action</u>
<u>§ 627.14(a)</u>	<u>Holding oneself out as a</u>	<u>1st offense—\$500 \$1,000</u>
	<u>massage therapist or</u>	<u>2nd and subsequent offenses—</u>
	<u>practicing massage</u>	<u>formal action</u>
	<u>therapy while unlicensed.</u>	
<u>§ 627.14(b)</u>	<u>Holding oneself out as a</u>	<u>1st offense—</u>
	<u>licensed massage therapist</u>	<u>0—12 months—\$250</u>
	<u>while license is expired.</u>	<u>13—18 months—\$500</u>
		<u>19—24 months—\$1,000</u>
		<u>More than 24 months—formal</u>
		<u>action.</u>
		<u>2nd offense—</u>
		<u>0—12 months—\$500</u>
		<u>13—18 months—\$1,000</u>
		<u>More than 18 months—formal action</u>
		<u>Subsequent offenses—formal action</u>
<u>§ 627.14(c)</u>	<u>Employing an individual</u>	<u>1st offense—\$500 \$1,000</u>
	<u>in massage therapy who is</u>	<u>2nd and subsequent offenses—</u>
	<u>not licensed.</u>	<u>formal action</u>

§ 627.14(d)

A business utilizing the 1st offense—\$500  
words massage, massage 2nd and subsequent offenses—  
therapist, massage formal action  
practitioner, masseur,  
masseuse, myotherapist or  
any derivative of these  
terms or abbreviations,  
unless the services of the  
business are provided by  
licensees.

§ 627.14(e)

§ 20.31(b)

AND (i)

Practicing massage 1st offense—  
therapy on an expired OR 0—12 months OR LESS—\$250  
INACTIVE license. 13—18 MORE THAN 12 MONTHS  
BUT NO MORE THAN 18  
months—\$500  
19—24 MORE THAN 18 MONTHS  
BUT NO MORE THAN 24  
months—\$1,000  
More than 24 months—formal  
action.  
2nd offense—  
0—12 months OR LESS —\$500

13—18 MORE THAN 12 MONTHS

BUT NO MORE THAN 18

months—\$1,000

More than 18 months—formal action

Subsequent offenses—formal action

## List of Commentators

Ed Portley Jr. LMT, NCTMB  
[Port6715@aol.com](mailto:Port6715@aol.com)



COMMONWEALTH OF PENNSYLVANIA  
DEPARTMENT OF STATE  
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS  
Post Office Box 2649  
Harrisburg, Pennsylvania 17105-2649  
(717) 783-7200

August 29, 2016

The Honorable George D. Bedwick, Chairman  
INDEPENDENT REGULATORY REVIEW COMMISSION  
14<sup>th</sup> Floor, Harrisstown 2, 333 Market Street  
Harrisburg, Pennsylvania 17101

Re: Final Regulation  
Bureau of Professional and Occupational Affairs  
16A-723 SCHEDULE OF CIVIL PENALTIES – MASSAGE THERPISTS

Dear Chairman Bedwick:

Enclosed is a copy of a final rulemaking package of the State Board of Massage Therapy pertaining to Schedule of Civil Penalties - Massage Therapists.

The Board will be pleased to provide whatever information the Commission may require during the course of its review of the rulemaking.

Sincerely,

A handwritten signature in blue ink, appearing to read 'I. Harlow', with a horizontal line underneath.

Ian J. Harlow  
Commissioner of  
Professional and Occupational Affairs

IJH/AEO:js

Enclosure

cc: Ian J. Harlow, Commissioner of  
Professional and Occupational Affairs  
Leigh Chapman, Director of Policy, Department of State  
Timothy Gates, Chief Counsel  
Department of State  
Cynthia Montgomery, Regulatory Counsel  
Department of State  
Ariel O'Malley, Counsel  
State Board of Massage Therapy  
State Board of Massage Therapy

TRANSMITTAL SHEET FOR REGULATIONS SUBJECT TO THE  
REGULATORY REVIEW ACT

**I.D. NUMBER:** 16A-723  
**SUBJECT:** Schedule of Civil Penalties – Massage Therapists  
**AGENCY:** DEPARTMENT OF STATE

**TYPE OF REGULATION**

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 Disapproved Regulation  
a. With Revisions b. Without Revisions

2016 AUG 29 AM 10:51

RECEIVED  
HRG

**FILING OF REGULATION**

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
		<i>HOUSE COMMITTEE ON PROFESSIONAL LICENSURE</i>
8/29/16	A. Kelly	MAJORITY CHAIR <u>Julie Harhart</u>
8/29/16	[Signature]	MINORITY CHAIR <u>Harry A. Readshaw</u>
		<i>SENATE COMMITTEE ON CONSUMER PROTECTION &amp; PROFESSIONAL LICENSURE</i>
8/29/16	Tammy W. Bloesch	MAJORITY CHAIR <u>Robert M. Tomlinson</u>
8/29/16	Stephen J. Small	MINORITY CHAIR <u>Lisa M. Boscola</u>
8/29/16	K Cooper	<i>INDEPENDENT REGULATORY REVIEW COMMISSION</i>
		<i>ATTORNEY GENERAL (for Final Omitted only)</i>
		<i>LEGISLATIVE REFERENCE BUREAU (for Proposed only)</i>