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Virginia Register of Regulations

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TABLE OF CONTENTS

THE VIRGINIA REGISTER OF REGULATIONS (USPS-001831) is published biweekly, with quarterly cumulative indices published in January, April, July and October, for $188.00 per year by LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204. Periodical postage is paid at Albany, NY and at additional mailing offices. POSTMASTER: Send address changes to LexisNexis Matthew Bender, 1275 Broadway, Albany, NY 12204.

THE VIRGINIA REGISTER INFORMATION PAGE

THE VIRGINIA REGISTER OF REGULATIONS is an official state publication issued every other week throughout the year. Indexes are published quarterly, and are cumulative for the year. The *Virginia Register* has several functions. The new and amended sections of regulations, both as proposed and as finally adopted, are required by law to be published in the *Virginia Register*. In addition, the *Virginia Register* is a source of other information about state government, including petitions for rulemaking, emergency regulations, executive orders issued by the Governor, the Virginia Tax Bulletin issued periodically by the Department of Taxation, and notices of public hearings and open meetings of state agencies.

ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS

An agency wishing to adopt, amend, or repeal regulations must first publish in the *Virginia Register* a notice of intended regulatory action; a basis, purpose, substance and issues statement; an economic impact analysis prepared by the Department of Planning and Budget; the agency's response to the economic impact analysis; a summary; a notice giving the public an opportunity to comment on the proposal; and the text of the proposed regulation.

Following publication of the proposal in the Virginia Register, the promulgating agency receives public comments for a minimum of 60 days. The Governor reviews the proposed regulation to determine if it is necessary to protect the public health, safety and welfare, and if it is clearly written and easily understandable. If the Governor chooses to comment on the proposed regulation, his comments must be transmitted to the agency and the Registrar no later than 15 days following the completion of the 60-day public comment period. The Governor's comments, if any, will be published in the *Virginia Register*. Not less than 15 days following the completion of the 60-day public comment period, the agency may adopt the proposed regulation.

The Joint Commission on Administrative Rules (JCAR) or the appropriate standing committee of each house of the General Assembly may meet during the promulgation or final adoption process and file an objection with the Registrar and the promulgating agency. The objection will be published in the *Virginia Register*. Within 21 days after receipt by the agency of a legislative objection, the agency shall file a response with the Registrar, the objecting legislative body, and the Governor.

When final action is taken, the agency again publishes the text of the regulation as adopted, highlighting all changes made to the proposed regulation and explaining any substantial changes made since publication of the proposal. A 30-day final adoption period begins upon final publication in the *Virginia Register*.

The Governor may review the final regulation during this time and, if he objects, forward his objection to the Registrar and the agency. In addition to or in lieu of filing a formal objection, the Governor may suspend the effective date of a portion or all of a regulation until the end of the next regular General Assembly session by issuing a directive signed by a majority of the members of the appropriate legislative body and the Governor. The Governor's objection or suspension of the regulation, or both, will be published in the *Virginia Register*. If the Governor finds that changes made to the proposed regulation have substantial impact, he may require the agency to provide an additional 30-day public comment period on the changes. Notice of the additional public comment period required by the Governor will be published in the *Virginia Register*.

The agency shall suspend the regulatory process for 30 days when it receives requests from 25 or more individuals to solicit additional public comment, unless the agency determines that the changes have minor or inconsequential impact.

A regulation becomes effective at the conclusion of the 30-day final adoption period, or at any other later date specified by the promulgating agency, unless (i) a legislative objection has been filed, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 21-day objection period; (ii) the Governor exercises his authority to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the period for which the Governor has provided for additional public comment; (iii) the Governor and the General Assembly exercise their authority to suspend the effective date of a regulation until the end of the next regular legislative session; or (iv) the agency suspends the regulatory process, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 30-day public comment period and no earlier than 15 days from publication of the readopted action.

Proposed regulatory action may be withdrawn by the promulgating agency at any time before the regulation becomes final.

FAST-TRACK RULEMAKING PROCESS

Section 2.2-4012.1 of the Code of Virginia provides an exemption from certain provisions of the Administrative Process Act for agency regulations deemed by the Governor to be noncontroversial. To use this process, Governor's concurrence is required and advance notice must be provided to certain legislative committees. Fast-track regulations will become effective on the date noted in the regulatory action if no objections to using the process are filed in accordance with § 2.2-4012.1.

EMERGENCY REGULATIONS

Pursuant to § 2.2-4011 of the Code of Virginia, an agency, upon consultation with the Attorney General, and at the discretion of the Governor, may adopt emergency regulations that are necessitated by an emergency situation. An agency may also adopt an emergency regulation when Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment. The emergency regulation becomes operative upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. Emergency regulations are limited to no more than 12 months in duration; however, may be extended for six months under certain circumstances as provided for in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Register*.

During the time the emergency status is in effect, the agency may proceed with the adoption of permanent regulations through the usual procedures. To begin promulgating the replacement regulation, the agency must (i) file the Notice of Intended Regulatory Action with the Registrar within 60 days of the effective date of the emergency regulation and (ii) file the proposed regulation with the Registrar within 180 days of the effective date of the emergency regulation. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

STATEMENT

The foregoing constitutes a generalized statement of the procedures to be followed. For specific statutory language, it is suggested that Article 2 (§ 2.2-4006 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia be examined carefully.

CITATION TO THE *VIRGINIA REGISTER*

The *Virginia Register* is cited by volume, issue, page number, and date. **23:7 VA.R. 1023-1140 December 11, 2006,** refers to Volume 23, Issue 7, pages 1023 through 1140 of the *Virginia Register* issued on December 11, 2006.

The Virginia Register of Regulations is published pursuant to Article 6 (§ 2.2-4031 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia.

PUBLICATION SCHEDULE AND DEADLINES

This schedule is available on the *Register*'s Internet home page (http://register.state.va.us).

July 2010 through June 2011

Volume: Issue	Material Submitted By Noon*	Will Be Published On
26:22	June 16, 2010	July 5, 2010
26:23	June 30, 2010	July 19, 2010
26:24	July 14, 2010	August 2, 2010
26:25	July 28, 2010	August 16, 2010
26:26	August 11, 2010	August 30, 2010
27:1	August 25, 2010	September 13, 2010
27:2	September 8, 2010	September 27, 2010
27:3	September 22, 2010	October 11, 2010
27:4	October 6, 2010	October 25, 2010
27:5	October 20, 2010	November 8, 2010
27:6	November 3, 2010	November 22, 2010
27:7	November 16, 2010 **(Tuesday)**	December 6, 2010
27:8	December 1, 2010	December 20, 2010
27:9	December 14, 2010 **(Tuesday)**	January 3, 2011
27:10	December 29, 2010	January 17, 2011
27:11	January 12, 2011	January 31, 2011
27:12	January 26, 2011	February 14, 2011
27:13	February 9, 2011	February 28, 2011
27:14	February 23, 2011	March 14, 2011
27:15	March 9, 2011	March 28, 2011
27:16	March 23, 2011	April 11, 2011
27:17	April 6, 2011	April 25, 2011
27:18	April 20, 2011	May 9, 2011
27:19	May 4, 2011	May 23, 2011
27:20	May 18, 2011	June 6, 2011
27:21	June 1, 2011	June 20, 2011

*Filing deadlines are Wednesdays unless otherwise specified.

PETITIONS FOR RULEMAKING

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF NURSING

Initial Agency Notice

Title of Regulation: **18VAC90-20. Regulations Governing the Practice of Nursing.**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Name of Petitioner: Joseph Porter, Esq., on behalf of Excelsior College.

Nature of Petitioner's Request: To amend regulations to allow RN applicants whose educational programs did not provide the requisite hours of clinical education to be licensed based on other criteria set forth in regulation.

Agency's Plan for Disposition of the Request: The board will publish the petition for rulemaking and request comment for 30 days beginning July 5, 2010, after which the request for amendments will be considered by the Board of Nursing at its meeting on September 14, 2010.

Public Comment Deadline: August 4, 2010.

Agency Contact: Jay P. Douglas, Executive Director, Board of Nursing, 9960 Mayland Drive, Richmond, VA 23233-1463, telephone (804) 367-4515, FAX (804) 527-4455, or email jay.douglas@dhp.virginia.gov.

VA.R. Doc. No. R10-64; Filed June 9, 2010, 10:05 a.m.

BOARD OF PHARMACY

Agency Decision

Title of Regulation: **18VAC110-20. Regulations Governing the Practice of Pharmacy.**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Name of Petitioner: David P. Byrd.

Nature of Petitioner's Request: Promulgate a regulation to add Tramadol and Tramadol/APAP to Schedule IV because of the abuse problems and to have those drugs reportable to the Prescription Monitoring Program.

Agency Decision: Request granted.

Statement of Reasons for Decision: The board decided to seek a legislative action to amend the Drug Control Act in order to add Tramadol and Carisoprodol to Schedule IV. If approved by the Governor, legislation would be introduced in the 2011 Session of the General Assembly.

Agency Contact: Elizabeth Scott Russell, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Henrico, VA 23233, telephone (804) 367-4456, FAX (804) 527-4472, or email scotti.russell@dhp.virginia.gov.

VA.R. Doc. No. R10-42; Filed June 14, 2010, 10:23 a.m.

TITLE 24. TRANSPORTATION AND MOTOR VEHICLES

COMMONWEALTH TRANSPORTATION BOARD

Agency Interim Decision

Title of Regulation: 24VAC30-121. Comprehensive Roadside Management Program Regulations.

Statutory Authority: §§ 33.1-12 and 33.1-223.2:9 of the Code of Virginia.

Name of Petitioner: Proctor S. Harvey.

Nature of Petitioner's Request: Amend provisions of regulations as follows: (i) in 24VAC30-121-30, add new subsection C to allow Virginia Department of Transportation (VDOT) District Administrator or designees to review issues arising from a permit application and make recommendations and decisions for resolution; and (ii) in 24VAC30-121-40 D 4 concerning location of acknowledgement signs, change criteria in subdivisions a, b, c, and d from 45 mph to 60 mph to allow for greater locations for gardens.

Statement of Reasons for Decision: VDOT is deferring a decision on granting this petition at this time for the following reason: a portion of the changes proposed to the regulation involves signage along the main traveled way and interchanges of noncontrolled and controlled access primary and secondary highways, in addition to interstate interchanges. VDOT has sought concurrence from the Federal Highway Administration (FHWA) on implementation of this part of the proposal. VDOT will render a decision on the entire petition as expeditiously as possible once the FHWA has provided its input on the petition.

Agency Contact: Keith M. Martin, Agency Regulatory Coordinator, Department of Transportation, Policy Division, 1401 East Broad Street, Richmond, VA 23219, telephone (804) 786-1830 or email keithm.martin@vdot.virginia.gov.

VA.R. Doc. No. R10-41; Filed June 16, 2010, 8:27 a.m.

TITLE 11. GAMING

CHARITABLE GAMING BOARD

Withdrawal of Notice of Intended Regulatory Action

Notice is hereby given that the Charitable Gaming Board has WITHDRAWN the Notice of Intended Regulatory Action for 11VAC15-22, Charitable Gaming Rules and Regulations. The notice was published in 24:13 VA.R. 1722 March 3, 2008. In lieu of moving forward with this action, the board approved a motion to promulgate a new regulation consisting of three parts. Part I will deal with the conduct of charitable gaming as currently provided in 11VAC15-22; Part II will deal with supplier issues as currently provided in 11VAC15-31; and Part III will deal with electronic pull-tab regulations.

Agency Contact: Betty Bowman, Assistant Director-Administration, Department of Charitable Gaming, James Monroe Building, 101 North 14th Street, Richmond, VA 23219, telephone 804-786-3015, FAX 804-786-1079, or email betty.bowman@dcg.virginia.gov.

VA.R. Doc. No. R08-1183; Filed June 10, 2010, 1:14 p.m.

Withdrawal of Notice of Intended Regulatory Action

Notice is hereby given that the Charitable Gaming Board has WITHDRAWN the Notice of Intended Regulatory Action for 11VAC15-31, Supplier Regulations. The notice was published in 25:26 VA.R. 4466, August 31, 2009. In lieu of moving forward with this action, the board approved a motion to promulgate a new regulation consisting of three parts. Part I will deal with the conduct of charitable gaming as currently provided in 11VAC15-22; Part II will deal with supplier issues as currently provided in 11VAC15-31; and Part III will deal with electronic pull-tab regulations.

Agency Contact: Betty Bowman, Division Director, Department of Agriculture and Consumer Services, James Monroe Building, 101 North 14th Street, 17th Floor, Richmond, VA 23219, telephone (804) 786-3015, FAX (804) 786-1079, or email betty.bowman@dcg.virginia.gov.

VA.R. Doc. No. R09-2014; Filed June 10, 2010, 1:26 p.m.

TITLE 4. CONSERVATION AND NATURAL RESOURCES

MARINE RESOURCES COMMISSION

REGISTRAR'S NOTICE: The following regulations filed by the Marine Resources Commission are exempt from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

Final Regulation

Title of Regulation: **4VAC20-450. Pertaining to the Taking of Bluefish (amending 4VAC20-450-30).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: July 1, 2010.

Agency Contact: Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

Summary:

This amendment establishes the 2010 commercial bluefish quota as 1,213,280 pounds.

4VAC20-450-30. Commercial landings quota.

A. During the period of January 1 through December 31, commercial landings of bluefish shall be limited to ~~1,155,945~~ 1,213,280 pounds.

B. When it is projected that 95% of the commercial landings quota has been realized, a notice will be posted to close commercial harvest and landings from the bluefish fishery within five days of posting.

C. It shall be unlawful for any person to harvest or land bluefish for commercial purposes after the closure date set forth in the notice described in subsection B of this section.

VA.R. Doc. No. R10-2477; Filed June 25, 2010, 8:17 a.m.

Final Regulation

Title of Regulation: **4VAC20-752. Pertaining to Blue Crab Sanctuaries (amending 4VAC20-752-20).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: June 25, 2010.

Agency Contact: Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

Summary:

This amendment removes the latitude-longitude coordinates associated with physical markers, such as lights and buoys, that already define the blue crab sanctuaries.

4VAC20-752-20. Definitions.

"COLREGS Line" means the COLREGS Demarcation lines, as specified in Coastal Pilot, 35th and 36th editions by Lighthouse Press.

"Three Nautical Mile Limit Line" means the outer limit of the area extending three miles out to sea from the coast as depicted on NOAA nautical charts.

"Virginia Blue Crab Sanctuary" means two distinct sanctuary areas, Area 1 and Area 2, with Area 1 consisting of all tidal waters that are bounded by a line beginning at a point, near the western shore of Fisherman's Island, being on a line from the Cape Charles Lighthouse to the Thimble Shoal Light~~, having NAD83 geographic coordinates of 37° 05' 58.00" N, 75° 58' 45.95" W~~; thence southwesterly to Thimble Shoal Light~~, 37° 00' 52.19" N, 76° 14' 24.63" W~~; thence southwesterly to the offshore end of ~~Harrison's Fishing Pier, 36° 57' 44.98" N, 76° 15' 31.76" W~~ Ocean View Fishing Pier (formerly Harrison's Fishing Pier); thence north to Flashing Green Buoy "9" on the York River Entrance Channel~~, 37° 11' 30.99" N, 76° 15' 16.85" W~~; thence northeasterly to Wolf Trap Light~~, 37° 23' 27.15" N, 76° 11' 46.01" W~~; thence northwesterly to a point, northeast of Windmill Point, 37° 38' 23.13" N, 76° 15' 59.54" W; thence northerly to a point due east of Great Wicomico Light at 37° 48' 15.72" N, 76° 14' 33.15" W; thence northeasterly to a point, 37° 49' 18.10" N, 76° 13' 06.00" W; thence northerly to a point on the Virginia-Maryland state line, 37° 54' 04.00" N, 76° 11' 49.15" W; thence northeasterly to a point on the Virginia-Maryland state line, 37° 55' 44.82" N, 76° 07' 13.41" W; thence southeasterly to a point, southwest of Tangier Island, 37° 44' 59.85" N, 76° 01' 34.31" W; thence southeasterly to a point, southeast of Tangier Island, 37° 43' 41.05" N, 75° 57' 51.84" W; thence northeasterly to a point, south of Watts Island, 37° 45' 36.95" N, 75° 52' 53.87" W; thence southeasterly to a point, 37° 44' 56.15" N, 75° 51' 33.18" W; thence southwesterly to a point, west of Parkers Marsh, 37° 42' 41.49" N, 75° 55' 06.31" W;

thence southwesterly to a point, west of Cape Charles Harbor, 37° 15' 37.23" N, 76° 04' 13.79" W; thence southeasterly to a point near the western shore of Fisherman's Island, on the line from Cape Charles Lighthouse to Thimble Shoal Light, said point being the point of beginning, and a continuation of Area 1, consisting of all tidal waters that are bounded by a line beginning at Cape Charles Lighthouse~~, having NAD83 geographic coordinates of 37° 07' 31.63" N, 75° 53' 58.36" W~~; thence southwesterly to Cape Henry Lighthouse~~, 36° 55' 42.02" N, 76° 00' 18.44" W~~; thence southeasterly to a point, 36° 54' 42.39" N, 75° 56' 44.23" W; thence northeasterly to a point, east of Cape Charles Lighthouse 37° 06' 45" N, 75° 52' 05" W; thence westerly to the Cape Charles Lighthouse, said point being the point of beginning and a second area, Area 2, beginning at a point, 37° 06' 45.00" N, 75° 52' 05.00" W; thence southwesterly to a point, 37° 03' 11.49" N, 75° 53' 27.02" W, said point being a point on the Three Nautical Mile Limit Line; thence southerly following the Three Nautical Mile Limit Line to a point on the Virginia – North Carolina state boundary, 36° 33' 02.59" N, 75° 48' 16.21" W; thence westerly to a point, along the Virginia – North Carolina state boundary to its intersection with the mean low water line, 36° 33' 01.34" N, 75° 52' 03.06" W; thence northerly, following the mean low water line to the Rudee Inlet weir; thence easterly along the weir to the stone breakwater; thence following the stone breakwater to its northernmost point; thence northerly to the mean low water line at the easternmost point of the stone jetty; thence northerly following the mean low water line to its intersection with the COLREG Line, 36° 55' 38.50" N, 76° 00' 20.32" W; thence southeasterly to a point, 36° 54' 42.39" N, 75° 56' 44.23" W, thence northeasterly to a point, 37° 06' 45.00" N, 75° 52' 05.00" W, said point being the point of beginning of this second area.

VA.R. Doc. No. R10-2479; Filed June 25, 2010, 8:21 a.m.

Final Regulation

Title of Regulation: **4VAC20-950. Pertaining to Black Sea Bass (amending 4VAC20-950-45).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: July 1, 2010.

Agency Contact: Jane Warren, Agency Regulatory Coordinator, Marine Resources Commission, 2600 Washington Avenue, 3rd Floor, Newport News, VA 23607, telephone (757) 247-2248, FAX (757) 247-2002, or email betty.warren@mrc.virginia.gov.

Summary:

This amendment establishes the black sea bass recreational open season from May 22 through October 11 and from November 1 through December 31.

4VAC20-950-45. Recreational possession limits and seasons.

A. It shall be unlawful for any person fishing with hook and line, rod and reel, spear, gig or other recreational gear to possess more than 25 black sea bass. When fishing is from a boat or vessel where the entire catch is held in a common hold or container, the possession limit shall be for that boat or vessel and shall be equal to the number of persons on board legally eligible to fish, multiplied by 25. The captain or operator of the boat or vessel shall be responsible for that boat or vessel possession limit. Any black sea bass taken after the possession limit has been reached shall be returned to the water immediately.

B. Possession of any quantity of black sea bass that exceeds the possession limit described in subsection A of this section shall be presumed to be for commercial purposes.

C. The open recreational fishing season shall be from May 22 through ~~August 8~~ October 11 and from ~~September 4~~ November 1 through ~~October 4~~ December 31.

VA.R. Doc. No. R10-2478; Filed June 25, 2010, 8:19 a.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

Final Regulation

Title of Regulation: **8VAC20-40. Regulations Governing Educational Services for Gifted Students (amending 8VAC20-40-10, 8VAC20-40-20, 8VAC20-40-40, 8VAC20-40-60, 8VAC20-40-70; adding 8VAC20-40-55; repealing 8VAC20-40-30, 8VAC20-40-50).**

Statutory Authority: § 22.1-16 of the Code of Virginia.

Effective Date: August 4, 2010.

Agency Contact: Dr. Margaret N. Roberts, Office of Policy & Communications, Department of Education, P.O. Box 2120, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 225-2540, FAX (804) 225-2524, or email margaret.roberts@doe.virginia.gov.

Summary:

The amendments (i) require that school divisions with identification in general intellectual aptitude provide service options "continuously and sequentially" from kindergarten through twelfth grade; (ii) stipulate that identification in a specific academic aptitude area may occur as assessment instruments exist to support identification; (iii) require that school divisions that elect to identify students in one or more specific academic aptitude areas shall provide continuous and sequential service options through twelfth grade; (iv) require that

school divisions post their plan for the education of gifted students on their websites and have printed copies of the plan available for citizens who do not have online access; (v) require that the identification and placement committee determine the eligibility status of each student referred for the division's gifted education program and notify the parent or guardian of its decision within 90 instructional days of the receipt of a parent's or legal guardian's consent for assessment; (vi) require that requests filed by parents or legal guardians to appeal any action of the identification and placement committee shall be filed within 10 instructional days of receipt of notification of the action by the division; (vii) reduce the minimum number of criteria used for the identification of gifted students from four to three; (viii) require that school divisions must assure that the selected and administered testing and assessment materials have been evaluated by the developers for cultural, racial, and linguistic biases; (ix) explicitly state that specific academic aptitude areas include English, history and social science, mathematics, or science; (x) require that school divisions provide professional development for instructional personnel who deliver services within the gifted education program based on the competencies specified for the gifted education add-on endorsement; (xi) require that each school board approve a comprehensive plan for the education of gifted students that includes the components identified in the regulations; (xii) require that each school board submit a comprehensive plan for the education of gifted students to the Department of Education for technical review on a schedule determined by the department; and (xiii) clarify that current funding for the education of gifted students is governed by the appropriation act.

Final regulations were published the Virginia Register of Regulations on February 1, 2010 (26:11 VA.R. 1636-1642 February 1, 2010). A notice of suspension of the regulatory process was published on March 29, 2010 (26:15 VA.R 2291-2292 March 29, 2010). The notice included an announcement of an extended 30-day comment period.

The majority of comments from the extended 30-day comment period addressed disproportionate representation of minority and low socioeconomic groups in gifted programs throughout the Commonwealth. The following changes in 8VAC20-40-60 are the result of public comments during the suspension period. School divisions shall (i) provide an operational definition of giftedness that is applicable to their local program for gifted education, (ii) use information from the review of program effectiveness to develop a statement of program goals and objectives intended to support the achievement of equitable representation of students in gifted education programs, and (iii) provide professional development based on the teacher competencies outlined in 8VAC20-542-310 related to gifted education. In addition, the annual review of program effectiveness shall include the review of program procedures toward the achievement of equitable representation of students.

~~Part I~~
~~Applicability and Definitions~~

8VAC20-40-10. Applicability.

This chapter shall apply to all local school divisions in the Commonwealth, regarding their gifted education services for students from kindergarten through twelfth grade.

8VAC20-40-20. Definitions.

The words and terms~~,~~ when used in this chapter~~,~~ shall have the following meanings~~,~~ unless the ~~content~~ context clearly indicates otherwise:

"Appropriately differentiated ~~curricula" for gifted students refer to curricula designed in response to their cognitive and effective needs. Such curricula provide emphasis on both accelerative and enrichment opportunities for~~ curriculum and instruction" means curriculum and instruction adapted or modified to accommodate the accelerated learning aptitudes of ~~eligible or~~ identified students in their areas of strength. Such curriculum and instructional strategies provide accelerated and enrichment opportunities that recognize gifted students' needs for (i) advanced content and pacing of instruction~~,~~; (ii) original research or production~~,~~; (iii) problem finding and solving~~,~~; (iv) higher level thinking that leads to the generation of products~~,~~; and (v) a focus on issues, themes, and ideas within and across areas of study. Such curriculum and instruction are offered continuously and sequentially to support the achievement of student outcomes, and provide support necessary for these students to work at increasing levels of complexity that differ significantly from those of their age-level peers.

"Eligible student" means a student who has been identified as gifted by the identification and placement committee for the school division's gifted education program.

"Gifted students" means those students in public elementary, middle, and secondary schools beginning with kindergarten through ~~graduation~~ twelfth grade ~~whose abilities~~ who demonstrate high levels of accomplishment or who show the potential for higher levels of accomplishment when compared to others of the same age, experience, or environment. Their aptitudes and potential for accomplishment are so outstanding that they require special programs to meet their educational needs. These students will be identified by professionally qualified persons through the use of multiple criteria as having potential or demonstrated ~~abilities and who have evidence of high performance capabilities, which may include leadership,~~ aptitudes in one or more of the following areas:

1. ~~Intellectual~~ General intellectual aptitude ~~or aptitudes. Students with advanced aptitude or conceptualization whose development is accelerated beyond their age peers~~

~~as demonstrated by advanced skills, concepts, and creative expression in multiple general intellectual ability or in specific intellectual abilities.~~ Such students demonstrate or have the potential to demonstrate superior reasoning; persistent intellectual curiosity; advanced use of language; exceptional problem solving; rapid acquisition and mastery of facts, concepts, and principles; and creative and imaginative expression across a broad range of intellectual disciplines beyond their age-level peers.

2. Specific academic aptitude. ~~Students with specific aptitudes in selected academic areas: mathematics; the sciences; or the humanities as demonstrated by advanced skills, concepts, and creative expression in those areas.~~ Such students demonstrate or have the potential to demonstrate superior reasoning; persistent intellectual curiosity; advanced use of language; exceptional problem solving; rapid acquisition and mastery of facts, concepts, and principles; and creative and imaginative expression beyond their age-level peers in selected academic areas that include English, history and social science, mathematics, ~~and~~ or science.

3. ~~Technical and practical arts~~ Career and technical aptitude. ~~Students with specific aptitudes in selected technical or practical arts as demonstrated by advanced skills and creative expression in those areas to the extent they need and can benefit from specifically planned educational services differentiated from those provided by the general program experience.~~ Such students demonstrate or have the potential to demonstrate superior reasoning; persistent technical curiosity; advanced use of technical language; exceptional problem solving; rapid acquisition and mastery of facts, concepts, and principles; and creative and imaginative expression beyond their age-level peers in career and technical fields.

4. Visual or performing arts aptitude. ~~Students with specific aptitudes in selected visual or performing arts as demonstrated by advanced skills and creative expression who excel consistently in the development of a product or performance in any of the visual and performing arts to the extent that they need and can benefit from specifically planned educational services differentiated from those generally provided by the general program experience.~~ Such students demonstrate or have the potential to demonstrate superior creative reasoning and imaginative expression; persistent artistic curiosity; and advanced acquisition and mastery of techniques, perspectives, concepts, and principles beyond their age-level peers in visual or performing arts.

"Identification" ~~is~~ means the multistaged process of ~~reviewing student data collected at the screening level and conducting further evaluation of student potential to determine the most qualified students for the specific gifted program available.~~ finding students who are eligible for service options offered through the division's gifted education program. The identification process begins with a divisionwide screening component that is followed by a referral component, and that concludes with the determination of eligibility by the school division's identification and placement committee or committees. The identification process includes the review of valid and reliable student data based on criteria established and applied consistently by the school division. The process shall include the review of information or data from multiple sources to determine whether a student's aptitudes and learning needs are most appropriately served through the school division's gifted education program.

~~"Identification/Placement Committee"~~ "Identification and placement committee" means ~~a standing committee which is composed of a professional who knows the child, classroom teacher or teachers, others representing assessment specialists, gifted program staff and school administration, and others deemed appropriate. This committee may operate at the school or division level. In either case, consistent criteria must be established for the division.~~ the building-level or division-level committee that shall determine a student's eligibility for the division's gifted education program, based on the student's assessed aptitude and learning needs. The identification and placement committee shall determine which of the school division's service options are appropriate for meeting the learning needs of the eligible student.

"Learning needs of gifted students" means gifted students' needs for advanced and complex content that is paced and sequenced to respond to their persistent intellectual, artistic, or technical curiosity; exceptional problem-solving abilities; rapid acquisition and mastery of information; conceptual thinking processes; and imaginative expression across a broad range of disciplines.

"Placement" means the determination of the appropriate educational ~~option~~ options for each eligible student.

"Referral" means the formal and direct process that parents or legal guardians, teachers, professionals, ~~or~~ students, peers, self, or others use to request that a kindergarten through twelfth-grade student be assessed for gifted education program services.

"Screening" ~~is the process of creating the pool of potential candidates using multiple criteria through the referral process, review of test data, or from other sources. Screening is the active search for students who should be evaluated for identification~~ means the ~~divisionwide search each school division conducts at least once annually across all its students to determine which students should be referred for identification and service in the gifted education program. The annual screening shall, at a minimum, consist of a review of current assessment data for all kindergarten through twelfth-grade students. Students selected through the school division's screening process are then referred for formal~~

~~identification~~ annual process of creating a pool for candidates from kindergarten through twelfth grade using multiple criteria through the referral process, the review of current assessment data, or other information from other sources. Screening is the active search for students who are then referred for the formal identification process.

"Service options" ~~include~~ means the instructional ~~approach or~~ approaches, ~~setting or~~ settings, and staffing selected for the delivery of appropriate ~~service or services that are based on student needs~~ ~~programs~~ service or services provided to eligible students based on their assessed needs in their areas of strength.

"Student outcomes" ~~are specified expectations based on the assessment of student cognitive and affective needs. Such outcomes should articulate expectations for advanced levels of performance for gifted learners~~ means the advanced achievement and performance expectations established for each gifted student, through the review of the student's assessed learning needs and the goals of the program of study, that are reviewed and reported to parents or legal guardians.

~~Part II~~
~~Responsibilities of the Local School Divisions~~

8VAC20-40-30. ~~Applicability.~~ (Repealed.)

~~The requirements set forth in this part are applicable to local school divisions providing educational services for gifted students in elementary and secondary schools from kindergarten through graduation.~~

8VAC20-40-40. ~~Identification~~ Screening, referral, identification, and ~~placement~~ service.

A. Each school division shall establish ~~a~~ uniform ~~procedure with common criteria~~ procedures for screening, ~~referral, and identification of gifted students.~~ referring, identifying, and serving students in kindergarten through twelfth grade who are gifted in general intellectual or specific academic aptitude. If the school division elects to identify students ~~with specific academic aptitudes~~ in general intellectual aptitude, ~~they~~ it shall ~~include procedures for identification and service in, at a minimum, English, history and social science, mathematics, and science, and humanities~~ provide service options from kindergarten through twelfth grade. ~~These procedures will permit referrals from school personnel, parents or legal guardians, other persons of related expertise, peer referral and self-referral of those students believed to be gifted. Pertinent information, records, and other performance evidence of referred students will be examined by a building level or division level identification committee. Further, the committee or committees will determine the eligibility of the referred students for differentiated programs. Students who are found to be eligible by the Identification/Placement Committee shall be offered a differentiated program by the school division.~~ Identification in a specific academic aptitude area may occur as assessment instruments exist to support identification. If the school division elects to identify students in one or more selected academic aptitude areas, it shall provide service options through twelfth grade. School divisions may identify and serve gifted students in career and technical aptitude or visual ~~and~~ or performing arts aptitude, or both, at their discretion.

B. ~~Each school division shall maintain a division review procedure for students whose cases are appealed. This procedure shall involve individuals, the majority of whom did not serve on the Identification/Placement Committee.~~ These uniform procedures shall include a screening process that requires instructional personnel to review, at a minimum, current assessment data on each kindergarten through twelfth-grade student annually. Some data used in the screening process may be incorporated into multiple criteria reviewed by the designated identification and placement committee to determine eligibility, but those data shall not replace norm-referenced aptitude test data.

C. These uniform procedures shall permit referrals from ~~school personnel,~~ parents or legal guardians, ~~or other persons of related expertise, as well as peer or self-referral~~ teachers, professionals, students, peers, self, or others. Such referrals shall be accepted for kindergarten through twelfth-grade students.

D. An identification and placement committee shall review pertinent information, records, and other performance evidence for referred students. The committee shall consider input from a professional who knows the child. The committee shall include ~~a professional who knows the child, as well as~~ classroom teachers, assessment specialists, gifted program staff, school administrators, or others with credentials or experience in gifted education. The committee shall (i) review data from multiple sources selected and used consistently within the division to assess students' aptitudes in the areas of giftedness the school division serves, (ii) determine whether a student is eligible for the division's services, and (iii) determine which of the school division's service options match the learning needs of the eligible student. The committee may review valid and reliable data administered by another division for a transfer student who has been identified previously.

1. Identification of students for the gifted education program shall be based on multiple criteria established by the school division and designed to seek out those students with superior aptitudes, including students for whom accurate identification may be affected because they are economically disadvantaged, have limited English proficiency, or have a disability. Data shall include scores from valid and reliable instruments that assess students' potential for advanced achievement, as well as instruments that assess demonstrated advanced skills, conceptual knowledge, and problem-solving aptitudes.

2. Valid and reliable data for each referred student shall be examined by the building-level or division-level identification and placement committee. The committee shall determine the eligibility of each referred student for the school division's gifted education ~~program~~ services. Students who are found eligible by the identification and placement committee shall be offered ~~programs or courses~~ service options with appropriately differentiated curriculum and instruction by the school division.

3. The identification process used by each school division must ensure that no single criterion is used to determine a student's eligibility. The identification process shall include at least three measures from the following categories:

a. Assessment of appropriate student products, performance, or portfolio;

b. Record of observation of in-classroom behavior;

c. Appropriate rating scales, checklists, or questionnaires;

d. Individual interview;

e. Individually administered or group-administered, nationally norm-referenced aptitude or achievement tests;

f. Record of previous accomplishments (such as awards, honors, grades, etc.); or

g. Additional valid and reliable measures or procedures.

4. If a program is designed to address general intellectual aptitude ~~or specific academic aptitude~~, an individually administered or group-administered, nationally norm-referenced aptitude test shall be included as one of the three measures used in the school division's identification procedure.

5. If a program is designed to address ~~either the visual and performing arts or career and technical~~ specific academic aptitude, ~~a portfolio or other performance assessment measure in the specific aptitude area shall be included as part of the data reviewed by the identification and placement committee~~ an individually administered or group-administered, nationally norm-referenced aptitude or achievement test shall be included as one of the three measures used in the school division's identification procedures.

6. If a program is designed to address either the visual or performing arts or career and technical aptitude, a portfolio or other performance assessment measure in the specific aptitude area shall be included as a part of the data reviewed by the identification and placement committee.

E. Within ~~60 business~~ 90 instructional days ~~of~~, beginning with the receipt of a ~~referral~~ parent's or legal guardian's consent for assessment, the identification and placement committee shall determine the eligibility status of each student referred for the division's gifted education program and notify the parent or guardian of its decision. If a student is identified as gifted and eligible for services, the identification and placement committee shall determine which service options most effectively meet the assessed learning needs of the student. Identified gifted students shall be offered placement in ~~a classroom or program~~ an instructional setting that provides:

1. Appropriately differentiated curriculum and instruction provided by professional instructional personnel trained to work with gifted students; and

2. Monitored and assessed student outcomes that are reported to the parents and legal guardians.

8VAC20-40-50. ~~Criteria for screening and identification.~~ (Repealed.)

~~Eligibility of students for programs for the gifted shall be based on multiple criteria for screening and identification established by the school division, and designed to seek out high aptitude in all populations. Multiple criteria shall include four or more of the following categories:~~

~~1. Assessment of appropriate student products, performance, or portfolio;~~

~~2. Record of observation of in-classroom behavior;~~

~~3. Appropriate rating scales, checklists, or questionnaires;~~

~~4. Individual interview;~~

~~5. Individual or group aptitude tests;~~

~~6. Individual or group achievement tests;~~

~~7. Record of previous accomplishments (such as awards, honors, grades, etc.);~~

~~8. Additional valid and reliable measures or procedures.~~

~~If a program is designed to address general intellectual aptitude, aptitude measures must be included as one of the categories in the division identification plan. If a program is designed to address specific academic aptitude, an achievement or an aptitude measure in the specific academic area must be included as one of the categories in the division identification plan. If a program is designed to address either the visual/performing arts or technical/practical arts aptitude, a performance measure in the specific aptitude area must be used. Inclusion of a test score in a division identification plan does not indicate that an individual student must score at a prescribed level on the test or tests to be admitted to the program. No single criterion shall be used in determining students who qualify for, or are denied access to, programs for the gifted.~~

8VAC20-40-55. Parental rights for notification, consent, and appeal.

A. School divisions shall provide written notification to and seek written consent from parents and legal guardians to:

1. Conduct any required assessment to determine a referred student's eligibility for the school division's gifted education program;

2. Announce the decision of the identification and placement committee regarding a referred student's eligibility for and placement in the school division's gifted education program; and

3. Provide services for an identified gifted student in the school division's gifted education program.

B. Each school division shall adopt a review procedure for students whose cases are appealed. This procedure shall involve a committee, the majority of whose members did not serve on the initial identification and placement committee, and shall inform parents or legal guardians, in writing, of the appeal process. Requests filed by parents or legal guardians to appeal any action of the identification and placement committee shall be filed within 10 ~~business~~ instructional days of receipt of notification of the action by the division. The process shall include an opportunity to meet with an administrator to discuss the decision.

1. A parent or legal guardian of a student who was referred but not identified by the identification and placement committee as eligible for services in the school division's gifted education program shall be informed, in writing, within 10 ~~business~~ instructional days, of the school division's process to appeal the committee's decision.

2. A parent or legal guardian of an identified gifted student may appeal any action taken by the school division to change the student's identification for, placement in, or exit from the school division's gifted education program.

C. Following the notification and consent of a parent or legal guardian, the identification and placement committee shall apprise school administrators of each student's eligibility status.

8VAC20-40-60. Local plan, local advisory committee, and annual report.

A. Each school board shall submit a comprehensive plan for the education of gifted students to the Department of Education (DOE) for technical review on a schedule determined by the department. Each school ~~division~~ board shall ~~submit to the Department of Education for approval a review and~~ approve ~~annually~~ a comprehensive plan for the education of gifted students that includes the components identified in these regulations. ~~Modifications to the plan shall be reported to the Department of Education on dates specified by the department.~~ The development process for the school division's local plan for the education of the gifted shall include opportunities for public review of the school division's plan. The approved local plan shall be accessible through the school division's website and the school division shall ensure that printed copies of the comprehensive plan are available to citizens who do not have online access. The plan shall include the following components ~~as follow~~:

1. A statement of philosophy for the gifted education program [and the local operational definition of giftedness for the school division];

2. A statement of the school division's gifted education program goals and objectives for identification, delivery of services, curriculum and instruction, ~~personnel preparation~~ professional development, [equitable representation of students,] and parent and community involvement;

3. Procedures for the early and on-going screening, referral, identification and placement of gifted students~~;~~, beginning with kindergarten through ~~secondary graduation~~ twelfth-grade in at least ~~one of the four defined areas of giftedness;~~ a general intellectual or a specific academic aptitude program; and, if provided in the school division, procedures for the screening, referral, identification, and placement of gifted students in visual ~~and~~ or performing arts or career and technical aptitude programs;

4. A procedure for ~~notifying~~ written notification of parents or legal guardians when additional testing or additional information is required during the identification process and for obtaining permission of parents or legal guardians prior to placement of ~~students~~ a gifted student in the appropriate ~~program~~ service options;

5. A policy for ~~notifying gifted students' change of placement within, and~~ written notification to parents or legal guardians of identification and placement decisions, including initial changes in placement or exit from the program~~, which includes an opportunity for parents who disagree with the committee or committees decision to meet and discuss their concern or concerns with an appropriate administrator~~. Such notice shall include an opportunity for parents or guardians to meet and discuss their concerns with an appropriate administrator and to file an appeal;

6. Assurances that student records are maintained ~~according to 8VAC20-150-10 et seq., Management of Student's Scholastic Record in the Public Schools of Virginia~~ in compliance with applicable state and federal privacy laws and regulations;

7. Assurances that (i) ~~testing and evaluation assessment materials selected and administered are sensitive to~~ free of the selected and administered testing and assessment materials have been evaluated by the developers for cultural, racial, and linguistic ~~differences,~~ biases; (ii) identification procedures are constructed so that ~~they~~ those procedures may identify ~~high potential/ability in all underserved culturally diverse, low socio-economic, and disabled populations,~~ high potential or aptitude in any student whose accurate identification may be affected by economic disadvantages, by limited English proficiency, or

by disability; (iii) standardized tests and other measures have been validated for the ~~specific purpose for which they are used~~ purpose of identifying gifted students; and (iv) instruments are administered and interpreted by a trained personnel in conformity with the developer's instructions ~~of their producer~~;

~~8. A procedure to identify and evaluate student outcomes based on the initial and ongoing assessment of their cognitive and affective needs;~~

~~9. A procedure to match service options, including instructional approaches, settings, and staffing, to designated student needs;~~

~~10. A framework for appropriately differentiated curricula indicating accelerative and enrichment opportunities in content, process, and product;~~

~~11. Procedures for the selection/evaluation of teachers and for the training of personnel to include administrators/supervisors, teachers, and support staff;~~

~~12. Procedures for the appropriate evaluation of the effectiveness of the school division's program for gifted students; and~~

~~13. Other information as required by the Department of Education.~~

8. Assurances that accommodations or modifications determined by the school division's special education Individualized Education Program (IEP) team, as required for the student to receive a free appropriate public education, shall be incorporated into the student's gifted education services;

9. Assurances that a written copy of the school division's approved local plan for the education of the gifted is available to parents or legal guardians of each referred student, and to others upon request;

10. Evidence that gifted education service options from kindergarten through twelfth grade are offered continuously and sequentially, with instructional time during the school day and week to (i) work with their age-level peers, (ii) work with their intellectual and academic peers, (iii) work independently~~;~~, and (iv) foster intellectual and academic growth of gifted students. Parents and legal guardians shall receive assessment of each gifted student's ~~intellectual and~~ academic growth;

11. A description of the school division's program of differentiated curriculum and instruction demonstrating accelerated and advanced content ~~within programs or courses~~;

12. ~~Polices~~ Policies and procedures that allow access to programs of study and advanced courses at a pace and sequence commensurate with their learning needs;

13. Evidence that school divisions provide professional development based on the [teacher] competencies [~~specified~~ outlined] in 8VAC20-542-310 [~~, Gifted education (add-on endorsement), for instructional personnel who deliver services within the gifted education program~~ related to gifted education]; and

14. Procedures for the annual ~~evaluation~~ review of the effectiveness of the school division's gifted education program, including [the review of screening, referral, identification, and program procedures toward the achievement of equitable representation of students, the] review of student outcomes and the ~~intellectual and~~ academic growth of gifted students. Such ~~evaluations~~ review shall be based on multiple criteria and shall include multiple sources of information ~~for gifted students~~.

B. Each school division shall establish a local advisory committee composed of parents, school personnel, and other community members who are appointed by the school board. This committee shall reflect the ethnic and geographical composition of the school division. ~~The purpose of this committee shall be to advise the school board through the division superintendent of the educational needs of all gifted students in the division. As a part of this goal, the~~ This committee shall have two responsibilities: (i) to review annually the local plan for the education of gifted students, including revisions, and (ii) to determine the extent to which the plan for the previous year was implemented. The findings of the annual program effectiveness and the recommendations of the advisory committee shall be submitted annually in writing ~~through~~ to the division superintendent ~~to~~ and the school board.

C. Each school division shall submit an annual report to the Department of Education in a format prescribed by the department.

8VAC20-40-70. Funding. ~~(Repealed.)~~

~~State funds administered by the Department of Education for the education of gifted students shall be used to support only those activities identified in the school division's plan as approved by the Board of Education.~~ Funds designated by the Virginia General Assembly for the education of gifted students shall be used by school divisions in accordance with the provisions of the appropriation act.

VA.R. Doc. No. R07-94; Filed June 18, 2010, 11:00 a.m.

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TITLE 11. GAMING

CHARITABLE GAMING BOARD

Withdrawal of Proposed Regulation

Title of Regulation: **11VAC15-22. Charitable Gaming Rules and Regulations (amending 11VAC15-22-10, 11VAC15-22-40, 11VAC15-22-50, 11VAC15-22-80).**

Statutory Authority: §§ 2.2-2456, 18.2-340.15, and 18.2-340.19 of the Code of Virginia.

Notice is hereby given that the Charitable Gaming Board has WITHDRAWN the proposed regulation entitled 11VAC15-22, Charitable Gaming Rules and Regulations, which was published in 25:22 VA.R. 4051 July 6, 2009. In lieu of moving forward with this action, the board approved a motion to promulgate a new regulation consisting of three parts. Part I will deal with the conduct of charitable gaming as currently provided in 11VAC15-22; Part II will deal with supplier issues as currently provided in 11VAC15-31; and Part III will deal with electronic pull-tab regulations.

Agency Contact: Betty Bowman, Director, Division of Charitable Gaming, 101 N. 14th Street, 17th Street, James Monroe Bldg, Richmond, VA 23219, telephone (804) 786-3015, FAX (804) 786-1079, or email betty.bowman@dcg.virginia.gov.

VA.R. Doc. No. R08-960; Filed June 10, 2010, 1:11 p.m.

Withdrawal of Proposed Regulation

Title of Regulation: **11VAC15-31. Supplier Regulations (amending 11VAC15-31-10).**

Statutory Authority: §§ 2.2-2456, 18.2-340.15, 18.2-340.19, and 18.2-340.34 of the Code of Virginia.

Notice is hereby given that the Charitable Gaming Board has WITHDRAWN the proposed regulation entitled 11VAC15-31, Supplier Regulations, which was published in 25:22 VA.R. 4059 July 6, 2009. In lieu of moving forward with this action, the board approved a motion to promulgate a new regulation consisting of three parts. Part I will deal with the conduct of charitable gaming as currently provided in 11VAC15-22; Part II will deal with supplier issues as currently provided in 11VAC15-31; and Part III will deal with electronic pull-tab regulations.

Agency Contact: Betty Bowman, Director, Division of Charitable Gaming, 101 N. 14th St., 17th Floor, James Monroe Building, Richmond, VA 23219, telephone (804) 786-3015, FAX (804) 786-1079, or email betty.bowman@dcg.virginia.gov.

VA.R. Doc. No. R08-961; Filed June 10, 2010, 1:14 p.m.

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TITLE 12. HEALTH

STATE BOARD OF HEALTH

Final Regulation

REGISTRAR'S NOTICE: The State Board of Health is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The State Board of Health will receive, consider, and respond to petitions from any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **12VAC5-371. Regulations for the Licensure of Nursing Facilities (amending 12VAC5-371-410).**

Statutory Authority: § 32.1-127 of the Code of Virginia.

Effective Date: August 4, 2010.

Agency Contact: Carrie Eddy, Senior Policy Analyst, Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2157, FAX (804) 367-2149, or email carrie.eddy@vdh.virginia.gov.

Summary:

Chapter 177 of the 2005 Acts of Assembly requires that the physical plant standards for nursing facilities be consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities (Guidelines) of the Facilities Guideline Institute, formerly of the American Institute of Architects. The 2010 edition of the Guideline was released January 2010. Therefore, the Department of Health is amending the Rules and Regulations for the Licensure of Nursing Facilities (12VAC5-371) to adopt the 2010 edition of the Guideline as required by the 2005 legislation. The requirements of the Uniform Statewide Building Code take precedence as authorized by § 36-98 of the Code.

Part V
Physical Environment

12VAC5-371-410. Architectural drawings and specifications.

A. All construction of new buildings and additions, renovations or alterations of existing buildings for occupancy as a nursing facility shall conform to state and local codes, zoning and building ordinances, and the Uniform Statewide Building Code.

In addition, nursing facilities shall be designed and constructed according to Part 1 ~~(1.1 through 1.6 2)~~ and sections 4.1-1 through ~~4.1-10~~ 4.2-8 of Part 4 of the ~~2006~~ 2010 Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute (formerly of the

American Institute of Architects). However, the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence.

B. Architectural drawings and specifications for all new construction or for additions, alterations or renovations to any existing building, shall be dated, stamped with licensure seal and signed by the architect. The architect shall certify that the drawings and specifications were prepared to conform to building code requirements.

C. Additional approval may include a Certificate of Public Need.

D. Upon completion of the construction, the nursing facility shall maintain a complete set of legible "as built" drawings showing all construction, fixed equipment, and mechanical and electrical systems, as installed or built.

DOCUMENTS INCORPORATED BY REFERENCE (12VAC5-371)

Guidelines for Design and Construction of Health Care Facilities, ~~The~~ Facilities Guideline Institute (formerly of the American Institute of Architects Academy of Architecture ~~for Health~~), ~~2006~~ 2010 Edition.

Guidelines for Preventing Health Care-Associated Pneumonia, 2003, MMWR 53 (RR03), Advisory Committee on Immunization Practices, Centers for Disease Control and Prevention.

Prevention and Control of Influenza, MMWR 53 (RR06), Advisory Committee on Immunization Practices, Centers for Disease Control and Prevention.

VA.R. Doc. No. R10-2341; Filed June 16, 2010, 10:44 a.m.

Final Regulation

REGISTRAR'S NOTICE: The State Board of Health is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The State Board of Health will receive, consider, and respond to petitions from any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **12VAC5-410. Regulations for the Licensure of Hospitals in Virginia (amending 12VAC5-410-445, 12VAC5-410-650, 12VAC5-410-1350).**

Statutory Authority: § 32.1-123 of the Code of Virginia.

Effective Date: August 4, 2010.

Agency Contact: Carrie Eddy, Policy Analyst, Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2157, FAX (804) 367-2149, or email carrie.eddy@vdh.virginia.gov.

Summary:

Chapter 177 of the 2005 Acts of Assembly requires that the physical plant standards for hospitals and outpatient surgery centers be consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities (Guidelines) of the Facilities Guideline Institute, formerly of the American Institute of Architects. The 2010 edition of the Guidelines was released January 2010. Therefore, the Department of Health is amending the Rules and Regulations for the Licensure of Hospitals in Virginia (12VAC5-410) to adopt the 2010 edition of the Guidelines as required by the 2005 legislation. The requirements of the Virginia Uniform Statewide Building Code take precedence as authorized by § 36-98 of the Code of Virginia.

12VAC5-410-445. Newborn service design and equipment criteria.

A. Construction and renovation of a hospital's nursery shall be consistent with ~~section 2.1-3.6~~ sections 2.2-2.12.1 through 2.2-2.12.6.6 of Part 2 of the ~~2006~~ 2010 Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute (formerly of the American Institute of Architects). Hospitals with higher-level nurseries shall comply with ~~section 2.1-3.4.6~~ sections 2.2-2.10.1 through 2.2-10.9.3 of Part 2 of the ~~2006~~ 2010 guideline as applicable.

B. The hospital shall provide the following equipment in the general level nursery and all higher level nurseries, unless additional equipment requirements are imposed for the higher level nurseries:

1. Resuscitation equipment as specified for the delivery room in 12VAC5-410-442 G 2 shall be available in the nursery at all times;

2. Equipment for the delivery of 100% oxygen concentration, properly heated, blended, and humidified, with the ability to measure oxygen delivery in fractional inspired concentration (FI02). The oxygen analyzer shall be calibrated every eight hours and serviced according to the manufacturer's recommendations by a member of the hospital's respiratory therapy department or other responsible personnel trained to perform the task;

3. Saturation monitor (pulse oximeter or equivalent);

4. Equipment for monitoring blood glucose;

5. Infant scales;

6. Intravenous therapy equipment;

7. Equipment and supplies for the insertion of umbilical arterial and venous catheters;

8. Open bassinets, self-contained incubators, open radiant heat infant care system or any combination thereof appropriate to the service level;

9. Equipment for stabilization of a sick infant prior to transfer that includes a radiant heat source capable of maintaining an infant's body temperature at 99°F;

10. Equipment for insertion of a thoracotomy tube; and

11. Equipment for proper administration and maintenance of phototherapy.

C. The additional equipment required for the intermediate level newborn service and for any higher service level is:

1. Pediatric infusion pumps accurate to plus or minus 1 milliliter (ml) per hour;

2. On-site supply of PgE1;

3. Equipment for 24-hour cardiorespiratory monitoring for neonatal use available for every incubator or radiant warmer;

4. Saturation monitor (pulse oximeter or equivalent) available for every infant given supplemental oxygen;

5. Portable x-ray machine; and

6. If a mechanical ventilator is selected to provide assisted ventilation prior to transport, it shall be approved for the use of neonates.

D. The additional equipment required for the specialty level newborn service and a higher newborn service is as follows:

1. Equipment for 24-hour cardiorespiratory monitoring with central blood pressure capability for each neonate with an arterial line;

2. Equipment necessary for ongoing assisted ventilation approved for neonatal use with on-line capabilities for monitoring airway pressure and ventilation performance;

3. Equipment and supplies necessary for insertion and maintenance of chest tube for drainage;

4. On-site supply of surfactant;

5. Computed axial tomography equipment (CAT) or magnetic resonance imaging equipment (MRI);

6. Equipment necessary for initiation and maintenance of continuous positive airway pressure (CPAP) with ability to constantly measure delineated pressures and including alarm for abnormal pressure (i.e., vent with PAP mode); and

7. Cardioversion unit with appropriate neonatal paddles and ability to deliver appropriate small watt discharges.

E. The hospital shall document that it has the appropriate equipment necessary for any of the neonatal surgical and special procedures it provides that are specified in its medical protocol and that are required for the specialty level newborn service.

F. The additional equipment requirements for the subspecialty level newborn service are:

1. Equipment for emergency gastrointestinal, genitourinary, central nervous system, and sonographic studies available 24 hours a day;

2. Pediatric cardiac catheterization equipment;

3. Portable echocardiography equipment; and

4. Computed axial tomography equipment (CAT) and magnetic resonance imaging equipment (MRI).

G. The hospital shall document that it has the appropriate equipment necessary for any of the neonatal surgical and special procedures it provides that are specified in the medical protocol and are required for the subspecialty level newborn service.

Part III
Standards and Design Criteria for New Buildings and Additions, Alterations and Conversion of Existing Buildings

12VAC5-410-650. General building and physical plant information.

A. All construction of new buildings and additions, renovations, alterations or repairs of existing buildings for occupancy as a hospital shall conform to state and local codes, zoning and building ordinances, and the Uniform Statewide Building Code.

In addition, hospitals shall be designed and constructed according to Part 1 and sections 2.1-1 through ~~2.1-10~~ 2.2-8 of Part 2 of the ~~2006~~ 2010 Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute (formerly of the American Institute of Architects). However, the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence.

B. All buildings shall be inspected and approved as required by the appropriate building regulatory entity. Approval shall be a Certificate of Use and Occupancy indicating the building is classified for its proposed licensed purpose.

Part V
Design Standards for New Outpatient Surgical Hospitals and Additions and Alterations to Existing Outpatient Surgical Hospitals

Article 1
General Considerations

12VAC5-410-1350. Codes; fire safety; zoning; construction standards.

A. All construction of new buildings and additions alterations or repairs to existing buildings for occupancy as a "free-standing" outpatient hospital shall conform to state and

local codes, zoning and building ordinances, and the Statewide Uniform Building Code.

In addition, hospitals shall be designed and constructed according to Part 1 and sections 3.1-1 through ~~3.2-4~~ 3.1-8 and 3.7 of Part 3 of the ~~2006~~ 2010 Guidelines for Design and Construction of Health Care Facilities of the Facilities Guidelines Institute (formerly of the American Institute of Architects). However, the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence.

B. All buildings shall be inspected and approved as required by the appropriate building regulatory entity. Approval shall be a Certificate of Use and Occupancy indicating the building is classified for its proposed licensed purpose.

C. The use of an incinerator shall require permitting from the nearest regional office of the Department of Environmental Quality.

D. Water shall be obtained from an approved water supply system. Outpatient surgery centers shall be connected to sewage systems approved by the Department of Health or the Department of Environmental Quality.

E. Each outpatient surgery center shall establish a monitoring program for the internal enforcement of all applicable fire and safety laws and regulations.

F. All radiological machines shall be registered with the Office of Radiological Health of the Virginia Department of Health. Installation, calibration and testing of machines and storage facilities shall comply with 12VAC5-480, Radiation Protection Regulations.

G. Pharmacy services shall comply with Chapter 33 (§ 54.1-3300 et seq.) of Title 54.1 of the Code of Virginia and 18VAC110-20, Regulations Governing the Practice of Pharmacy.

DOCUMENTS INCORPORATED BY REFERENCE (12VAC5-410)

Guidelines for Design and Construction of Health Care Facilities, ~~The~~ Facilities Guidelines Institute (formerly of the American Institute of Architects), Washington, D.C., ~~2006~~ 2010 Edition.

VA.R. Doc. No. R10-2340; Filed June 16, 2010, 10:43 a.m.

TITLE 13. HOUSING

DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

Final Regulation

REGISTRAR'S NOTICE: The Department of Housing and Community Development is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The Department of Housing and Community Development will receive, consider, and respond to petitions from any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **13VAC5-112. Enterprise Zone Grant Program Regulation (amending 13VAC5-112-10, 13VAC5-112-270, 13VAC5-112-280, 13VAC5-112-400; adding 13VAC5-112-285).**

Statutory Authority: § 59.1-541 of the Code of Virginia.

Effective Date: August 4, 2010.

Agency Contact: Stephen W. Calhoun, Regulatory Coordinator, Department of Housing and Community Development, Main Street Center, 600 East Main Street, Suite 300, Richmond, VA 23219, telephone (804) 371-7000, FAX (804) 371-7090, TTY (804) 371-7089, or email steve.calhoun@dhcd.virginia.gov.

Summary:

The amendments align regulations with the changes in the Virginia Enterprise Zone statute (§§ 59.1-547 and 59.1-549 of the Code of Virginia) pursuant to the 2010 Acts of the General Assembly. Revisions necessitated by the General Assembly's changes define new terms related to implementation of changes to § 59.1-547 of the Code of Virginia; reduce in high unemployment areas (those with unemployment rates of 1.5 times the state rate or higher) the wage rate threshold needed to receive the $500 level of the Job Creation Grants; create a new section explaining how eligibility for the reduced wage rate threshold is determined; and describe that after fully funding the Job Creation Grants, Real Property Investment Grants will be funded out of the remainder of the Enterprise Zone allocation and will be prorated if the requests exceed the remaining amount.

Part I
Definitions

13VAC5-112-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Agreed-upon procedures engagement" means an engagement between an independent certified public accountant licensed by the Commonwealth and the business or zone investor seeking to qualify for Enterprise Zone incentive grants pursuant to § 59.1-549 of the Code of Virginia whereby the independent certified public accountant, using procedures specified by the department, will test and report on the assertion of the business or zone investor as to their qualification to receive the Enterprise Zone incentive.

"Assumption or acquisition" means, in connection with a trade or business, that the inventory, accounts receivable, liabilities, customer list and good will of an existing Virginia company has been assumed or acquired by another taxpayer, regardless of a change in federal identification number or employees.

"Average number of permanent full-time employees" means the number of permanent full-time employees during each payroll period of a business firm's taxable year divided by the number of payroll periods. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20:

1. In calculating the average number of permanent full-time employees, a business firm may count only those permanent full-time employees who worked at least half of their normal workdays during the payroll period. Paid leave time may be counted as work time.

2. For a business firm that uses different payroll periods for different classes of employees, the average number of permanent full-time employees of the firm shall be defined as the sum of the average number of permanent full-time employees for each class of employee.

"Base taxable year" means either of two taxable years immediately preceding the first year of qualification, at the choice of the business firm. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Base year" means either of the two calendar years immediately preceding a qualified business firm's first year of grant eligibility, at the choice of the business firm.

"Building" means any construction meeting the common ordinarily accepted meaning of the term (building, a usually roofed and walled structure built for permanent use) where (i) areas separated by interior floors or other horizontal assemblies and (ii) areas separated by fire walls or vertical assemblies shall not be construed to constitute separate buildings, irrespective of having separate addresses, ownership or tax assessment configurations, unless there is a property line contiguous with the fire wall or vertical assembly.

"Business firm" means any corporation, partnership, electing small business (subchapter S) corporation, limited liability company, or sole proprietorship authorized to do business in the Commonwealth of Virginia. This shall also include business and professional organizations and associations whose classification falls under sectors 813910 and 813920 of the North American Industry Classification Systems and that generate the majority of their revenue from customers outside the Commonwealth.

"Capital lease" means a lease that meets one or more of the following criteria and as such is classified as a purchase by the lessee: the lease term is greater than 75% of the property's estimated economic life; the lease contains an option to purchase the property for less than fair market value; ownership of the property is transferred to the lessee at the end of the lease term; or the present value of the lease payments exceed 90% of the fair market value of the property.

"Common control" means those firms as defined by Internal Revenue Code § 52(b).

"Department" means the Department of Housing and Community Development.

"Establishment" means a single physical location where business is conducted or where services or industrial operations are performed.

1. A central administrative office is an establishment primarily engaged in management and general administrative functions performed centrally for other establishments of the same firm.

2. An auxiliary unit is an establishment primarily engaged in performing supporting services to other establishments of the same firm. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-110.

"Existing business firm" means one that was actively engaged in the conduct of trade or business in an area prior to such an area being designated as an enterprise zone or that was engaged in the conduct of trade or business in the Commonwealth and relocates to begin operation of a trade or business within an enterprise zone. An existing business firm is also one that was not previously conducted in the Commonwealth by such taxpayer who acquires or assumes a trade or business and continues its operations. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Expansion" means an increase in square footage or the footprint of an existing nonresidential building via a shared wall, or enlargement of an existing room or floor plan. Pursuant to real property investment grants this shall include mixed-use buildings.

"Facility" means a complex of buildings, co-located at a single physical location within an enterprise zone, all of which are necessary to facilitate the conduct of the same trade

or business. This definition applies to new construction, as well as to the rehabilitation and expansion of existing structures.

"Federal minimum wage" means the minimum wage standard as currently defined by the United States Department of Labor in the Fair Labor Standards Act, 29 USC § 201 et seq. Such definition applies to permanent full-time employees paid on an hourly or wage basis.

"Food and beverage service" means a business whose classification falls under subsector 722 Food Services and Drinking Places of North American Industry Classification System.

"Full month" means the number of days that a permanent full-time position must be filled in order to count in the calculation of the grant amount under 13VAC5-112-260. A full month is calculated by dividing the total number of days in calendar year by 12. A full month for the purpose of calculating job creation grants is equivalent to 30.416666 days.

"Grant-eligible position" means a new permanent full-time position created above the threshold number at an eligible business firm. Positions in retail, personal service or food and beverage service shall not be considered grant-eligible positions.

"Health benefits" means that at a minimum medical insurance is offered to employees and the employer shall offer to pay at least 50% of the cost of the premium at the time of employment and annually thereafter.

"High unemployment area" means enterprise zone localities with unemployment rates one and one-half times or more than the state average based on the most recent annualized unemployment data published by the Virginia Employment Commission.

"Household" means all the persons who occupy a single housing unit. Occupants may be a single family, one person living alone, two or more families living together, or any group of related or unrelated persons who share living arrangements. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Household income" means all income actually received by all household members over the age of 16 from the following sources. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20:

1. Gross wages, salaries, tips, commissions, etc. (before deductions);

2. Net self-employment income (gross receipts minus operating expenses);

3. Interest and dividend earnings; and

4. Other money income received from net rents, Old Age and Survivors Insurance, social security benefits, pensions, alimony, child support, and periodic income from insurance policy annuities and other sources.

The following types of income are excluded from household income:

1. Noncash benefits such as food stamps and housing assistance;

2. Public assistance payments;

3. Disability payments;

4. Unemployment and employment training benefits;

5. Capital gains and losses; and

6. One-time unearned income.

When computing household income, income of a household member shall be counted for the portion of the income determination period that the person was actually a part of the household.

"Household size" means the largest number of household members during the income determination period. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Housing unit" means a house, apartment, group of rooms, or single room that is occupied or intended for occupancy as separate living quarters. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Income determination period" means the 12 months immediately preceding the month in which the person was hired. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Independent certified public accountant" means a public accountant certified and licensed by the Commonwealth of Virginia who is not an employee of the business firm seeking to qualify for state tax incentives and grants under this program.

"Job creation grant" means a grant provided under § 59.1-547 of the Code of Virginia.

"Jurisdiction" means the city or county which made the application to have an enterprise zone. In the case of a joint application, it means all parties making the application. Pursuant to enterprise zone designations made prior to July 1, 2005, this shall include towns.

"Large qualified business firm" means a qualified business firm making qualified zone investments in excess of $15 million when such zone investments result in the creation of at least 50 permanent full-time positions. This definition

applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Large qualified zone resident" means a qualified zone resident making qualified zone investments in excess of $100 million when such qualified zone investments result in the creation of at least 200 permanent full-time positions. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-110.

"Local zone administrator" means the chief executive of the city or county, in which an enterprise zone is located, or his designee. Pursuant to enterprise zone designations made prior to July 1, 2005, this shall include towns.

"Low-income" means household income was less than or equal to 80% of area median household income during the income determination period. Persons who meet the definition of both low-income and zone resident may not be counted as both for purposes of meeting employment requirements for the general tax credit. Instead, qualifying business firms must claim these persons as either low-income or zone resident. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Median household income" means the dollar amount, adjusted for household size, as determined annually by the department for the city or county in which the zone is located. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Mixed use" means a building incorporating residential uses in which a minimum of 30% of the useable floor space will be devoted to commercial, office or industrial use. Buildings where less than 30% of the useable floor space is devoted to commercial, office or industrial use shall be considered primarily residential in nature and shall not be eligible for a grant under 13VAC5-112-330. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-330.

"Net loss" applies to firms that relocate or expand operations and means (i) after relocating into a zone, a business firm's gross permanent employment is less than it was before locating into the zone, or (ii) after a business firm locates or expands within a zone, its gross employment at its nonzone location or locations is less than it was before the zone location occurred.

"New business" means a business not previously conducted in the Commonwealth by such taxpayer and that begins operation in an enterprise zone after the zone was designated. A new business is also one created by the establishment of a new facility and new permanent full-time employment by an existing business firm in an enterprise zone and does not result in a net loss of permanent full-time employment outside the zone. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"New construction" means a single, nonresidential facility built on previously undeveloped land of a nonresidential structure built on the site/parcel of a previously razed structure with no remnants of the prior structure or physical connection to existing structures or outbuildings on the property. Pursuant to real property investment grants this shall include mixed-use buildings.

"Number of eligible permanent full-time positions" means the amount by which the number of permanent full-time positions at a business firm in a grant year exceeds the threshold number. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-260.

"Payroll period" means the period of time for which a business firm normally pays its employees.

"Permanent full-time employee" means a person employed by a business firm who is normally scheduled to work either (i) a minimum of 35 hours per week for the entire normal year of the business firm's operations, which normal year must consist of at least 48 weeks, (ii) a minimum of 35 hours per week for a portion of the taxable year in which the employee was initially hired for, or transferred to the business firm, or (iii) a minimum of 1,680 hours per year if the standard fringe benefits are paid by the business firm for the employee. Permanent full-time employee also means two or more individuals who together share the same job position and together work the normal number of hours a week as required by the business firm for that one position. Seasonal, temporary, leased or contract labor employees or employees shifted from an existing location in the Commonwealth to a business firm location within an enterprise zone shall not qualify as permanent full-time employees. This definition only applies to business firms for the purpose of qualifying for enterprise zone incentives pursuant to 13VAC5-112-20.

"Permanent full-time position" (for the purpose of qualifying for grants pursuant to § 59.1-547 of the Code of Virginia) means a job of indefinite duration at a business firm located within an enterprise zone requiring the employee to report to work within the enterprise zone; and requiring (i) a minimum of 35 hours of an employee's time per week for the entire normal year of the business firm's operation, which "normal year" must consist of at least 48 weeks, (ii) a minimum of 35 hours of an employee's time per week for the portion of the calendar year in which the employee was initially hired for or transferred to the business firm, or (iii) a minimum of 1,680 hours per year. Such position shall not include (a) seasonal, temporary or contract positions, (b) a position created when a job function is shifted from an existing location in the Commonwealth to a business firm located with an enterprise zone, (c) any position that previously existed in the Commonwealth, or (d) positions created by a business that is

simultaneously closing facilities in other areas of the Commonwealth.

"Personal service" means such positions classified under NAICS 812.

"Placed in service" means the final certificate of occupancy has been issued or the final building inspection has been approved by the local jurisdiction for real property improvements or real property investments, or in cases where a project does not require permits, the licensed third party inspector's report that the project was complete; or pursuant to 13VAC5-112-110 the first moment that machinery becomes operational and is used in the manufacturing of a product for consumption; or in the case of tools and equipment, the first moment they are used in the performance of duty or service.

"Qualification year" the calendar year for which a qualified business firm or qualified zone investor is applying for a grant pursuant to 13VAC5-112-260.

"Qualified business firm" means a business firm meeting the business firm requirements in 13VAC5-112-20 or 13VAC5-112-260 and designated a qualified business firm by the department.

"Qualified real property investment" (for purposes of qualifying for a real property investment grant) means the amount properly chargeable to a capital account for improvements to rehabilitate, expand or construct depreciable real property placed in service during the calendar year within an enterprise zone provided that the total amount of such improvements equals or exceeds (i) $100,000 with respect to a single building or a facility in the case of rehabilitation or expansion or (ii) $500,000 with respect to a single building or a facility in the case of new construction. Qualified real property investments include expenditures associated with (a) any exterior, interior, structural, mechanical or electrical improvements necessary to construct, expand or rehabilitate a building for commercial, industrial or mixed use; (b) excavations; (c) grading and paving; (d) installing driveways; and (e) landscaping or land improvements. Qualified real property investments shall include, but not be limited to, costs associated with demolition, carpentry, sheetrock, plaster, painting, ceilings, fixtures, doors, windows, fire suppression systems, roofing, flashing, exterior repair, cleaning and cleanup.

Qualified real property investment shall not include:

1. The cost of acquiring any real property or building.

2. Other costs including (i) the cost of furnishings; (ii) any expenditure associated with appraisal, architectural, engineering, surveying, and interior design fees; (iii) loan fees, points, or capitalized interest; (iv) legal, accounting, realtor, sales and marketing, or other professional fees; (v) closing costs, permits, user fees, zoning fees, impact fees, and inspection fees; (vi) bids, insurance, signage, utilities, bonding, copying, rent loss, or temporary facilities incurred during construction; (vii) utility connection or access fees; (viii) outbuildings; (ix) the cost of any well or septic or sewer system; and (x) roads.

3. The basis of any property (i) for which a grant under this section was previously provided; (ii) for which a tax credit under § 59.1-280.1 of the Code of Virginia was previously granted; (iii) that was previously placed in service in Virginia by the qualified zone investor, a related party as defined by Internal Revenue Code § 267(b), or a trade or business under common control as defined by Internal Revenue Code § 52(b); or (iv) that was previously in service in Virginia and has a basis in the hands of the person acquiring it, determined in whole or in part by reference to the basis of such property in the hands of the person from whom it was acquired or Internal Revenue Code § 1014(a).

"Qualified zone improvements" (for purposes of qualifying for an Investment Tax Credit) means the amount properly chargeable to a capital account for improvements to rehabilitate or expand depreciable nonresidential real property placed in service during the taxable year within an enterprise zone, provided that the total amount of such improvements equals or exceeds (i) $50,000 and (ii) the assessed value of the original facility immediately prior to the rehabilitation or expansion. Qualified zone improvements include expenditures associated with any exterior, structural, mechanical, or electrical improvements necessary to construct, expand or rehabilitate a building for commercial or industrial use.

1. Qualified zone improvements include, but are not limited to, the costs associated with excavation, grading, paving, driveways, roads, sidewalks, landscaping or other land improvements, demolition, carpentry, sheetrock, plaster, painting, ceilings, fixtures, doors, windows, fire suppression systems, roofing and flashing, exterior repair, cleaning and clean-up.

2. Qualified zone improvements do not include (i) the cost of furnishings; (ii) any expenditure associated with appraisal, architectural, engineering and interior design fees; (iii) loan fees, points or capitalized interest; (iv) legal, accounting, realtor, sales and marketing or other professional fees; (v) closing costs, permits, user fees, zoning fees, impact fees, inspection fees; (vi) bids insurance, signage, utilities, bonding, copying, rent loss, or temporary facilities incurred during construction; (vii) utility hook-up or access fees; (viii) outbuildings; (ix) the cost of any well, septic, or sewer system; or (x) cost of acquiring land or an existing building.

3. In the case of new nonresidential construction, qualified zone improvements also do not include land, land improvements, paving, grading, driveway, and interest.

This definition applies only for the purposes of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-110.

"Qualified zone investment" means the sum of qualified zone improvements and the cost of machinery, tools and equipment used in manufacturing tangible personal property and placed in service on or after July 1, 1995. Machinery, equipment, tools, and real property that are leased through a capital lease and that are being depreciated by the lessee or that are transferred from out-of-state to a zone location by a business firm may be included as qualified zone investment. Such leased or transferred machinery, equipment, tools, and real property shall be valued using the depreciable basis for federal income tax purposes. Machinery, tools and equipment shall not include the basis of any property: (i) for which a credit was previously granted under § 59.1-280.1 of the Code of Virginia; (ii) that was previously placed in service in Virginia by the taxpayer, a related party, as defined by Internal Revenue Code § 267(b), or a trade or business under common control, as defined by Internal Revenue Code § 52(b); or (iii) that was previously in service in Virginia and has a basis in the hands of the person acquiring it, determined in whole or in part by reference to the basis of such property in the hands of the person whom acquired it, or Internal Revenue Code § 1014(a). This definition applies only for the purposes of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-110.

"Qualified zone investor" means an owner or tenant of real property located within an enterprise zone who expands, rehabilitates or constructs such real property for commercial, industrial or mixed use. In the case of a tenant, the amounts of qualified zone investment specified in this section shall relate to the proportion of the building or facility for which the tenant holds a valid lease. In the case of an owner of an individual unit within a horizontal property regime, the amounts of qualified zone investments specified in this section shall relate to that proportion of the building for which the owner holds title and not to common elements. Units of local, state and federal government or political subdivisions shall not be considered qualified zone investors.

"Qualified zone resident" means an owner or tenant of nonresidential real property located in an enterprise zone who expands or rehabilitates such real property to facilitate the conduct of a trade or business by such owner or tenant within the enterprise zone. In the case of a partnership, limited liability company or S corporation, the term "qualified zone resident" means the partnership, limited liability company or S corporation. This definition applies only for the purposes of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-110.

"Real property investment grant" means a grant made under § 59.1-548 of the Code of Virginia. This definition applies only for the purposes of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-330.

"Reduced wage rate threshold" means 150% of the federal minimum wage pursuant to 13VAC5-112-270, 13VAC5-112-280, and 13VAC5-112-285 and high unemployment areas.

"Rehabilitation" means the alteration or renovation of all or part of an existing nonresidential building without an increase in square footage. Pursuant to real property investment grants this shall include mixed-use buildings.

"Regular basis" means at least once a month. This definition applies only for the purposes of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-260.

"Related party" means those as defined by Internal Revenue Code § 267(b).

"Report to work" means that the employee filling a permanent full-time position reports to the business' zone establishment on a regular basis.

"Retail" means a business whose classification falls under sectors 44-45 Retail Trade of North American Industry Classification System.

"Same trade or business" means the operations of a single company or related companies or companies under common control.

"Seasonal employee" means any employee who normally works on a full-time basis and whose customary annual employment is less than nine months. For example, individuals hired by a CPA firm during the tax return season in order to process returns and who work full-time over a three month period are seasonal employees.

"Small qualified business firm" means any qualified business firm other than a large qualified business firm. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

"Small qualified zone resident" means any qualified zone resident other than a large qualified zone resident. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-350 C.

"Subsequent base year" means the base year for calculating the number of grant-eligible positions in a second or subsequent five consecutive calendar year grant period. If a second or subsequent five-year grant period is requested within two years after the previous five-year grant period, the subsequent base year will be the last grant year. The calculation of this subsequent base year employment will be determined by the number of permanent full-time positions in the preceding base year, plus the number of threshold positions, plus the number of grant-eligible positions in the final year of the previous grant period. If a business firm applies for subsequent five consecutive calendar-year grant periods beyond the two years immediately following the

completion of the previous five-year grant period, the business firm shall use one of the two preceding calendar years as subsequent base year, at the choice of the business firm.

"Tax due" means the amount of tax liability as determined by the Department of Taxation or the State Corporation Commission. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20 and 13VAC5-112-110.

"Tax year" means the year in which the assessment is made. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-110.

"Taxable year" means the year in which the tax due on state taxable income, state taxable gross receipts or state taxable net capital is accrued. This definition applies only for the purpose of qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20 and 13VAC5-112-110.

"Threshold number" means an increase of four permanent full-time positions over the number of permanent full-time positions in the base year or subsequent base year.

"Transferred employee" means an employee of a firm in the Commonwealth that is relocated to an enterprise zone facility owned or operated by that firm.

"Useable floor space" means all space in a building finished as appropriate to the use(s) of the building as represented in measured drawings. Unfinished basements, attics, and parking garages would not constitute useable floor space. Finished common areas such as stairwells and elevator shafts should be apportioned appropriately based on the majority use (51%) of that floor(s).

"Wage rate" means the hourly wage paid to an employee inclusive of shift premiums and commissions. In the case of salaried employees, the hourly wage rate shall be determined by dividing the annual salary, inclusive of shift premiums and commissions, by 1,680 hours. Bonuses, overtime and tips are not to be included in the determination of wage rate.

"Zone" means an enterprise zone declared by the Governor to be eligible for the benefits of this program.

"Zone real property investment tax credit" means a credit provided to a large qualified zone resident pursuant to § 59.1-280.1 J of the Code of Virginia. This definition applies only for qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-110.

"Zone resident" means a person whose principal place of residency is within the boundaries of any enterprise zone. Persons who meet the definition of both low-income and zone resident may not be counted as both for purposes of meeting employment requirements for the general tax credit. Instead, qualifying business firms must claim these persons as either low-income or zone resident. Zone residency must be verified annually. This definition applies only for qualifying for Enterprise Zone incentives pursuant to 13VAC5-112-20.

13VAC5-112-270. Computation of grant amount.

A. For any qualified business the grant amount is calculated as follows:

1. $800 per year for up to five consecutive years for each grant-eligible position that is paid a wage rate during the qualification year that is at least of 200% of the federal minimum wage in place during the qualification year, and that is provided with health benefits, or

2. $500 per year for up to five years for each grant-eligible position that is paid a wage rate during such year that is less than 200% of the federal minimum wage, but at least 175% of the federal minimum wage or the reduced wage rate threshold if in a high unemployment area, and that is provided with health benefits.

B. A business firm may receive grants for up to a maximum of 350 grant-eligible jobs annually.

C. Job creation grants are based on a calendar year. The grant amount for any permanent full-time position that is filled for less than a full calendar year must be prorated based on the number of full months worked.

1. In cases where a position is grant eligible for only a portion of a qualification year the grant amount will be prorated based on the number of full months the position was grant eligible. This shall include cases where changes in wage rate, health benefits, or the federal minimum wage rate change a position's grant eligibility.

2. In cases where a change in a grant-eligible position's wage rate or the federal minimum wage rate during a qualification year changes the per position maximum grant amount available for that position, the grant amount shall be prorated based on the period the position was paid a minimum of 200% of the federal minimum wage rate and the period the position was paid a minimum of 175% of the federal minimum wage or the reduced wage rate threshold if in a high unemployment area, but less than 200%.

D. The amount of the job creation grant for which a qualified business firm is eligible in any year shall not include amounts for grant-eligible positions in any year other than the preceding calendar year. Job creation grants shall not be available for any calendar year prior to 2005.

E. Permanent full-time positions that have been used to qualify for any other enterprise zone incentive pursuant to former §§ 59.1-270 through 59.1-284.01 of the Code of Virginia shall not be eligible for job creation grants and shall not be counted as a part of the minimum threshold of four new positions.

1. Large qualified business firms and large qualified zone residents may qualify for job creation grants pursuant to

this section for permanent full-time positions that have been created above the permanent full-time positions as required by their documented negotiation agreement with the department pursuant to subdivision 2 of 13VAC5-112-20.

2. Small qualified business firms may qualify for job creation grants pursuant to this section for net new permanent full-time positions that have been created above the net new permanent full-time employees in the most recently reported qualification year.

3. Business firms that have previously qualified for department enterprise zone job grants may qualify for job creation grants pursuant to this section for net new permanent full-time positions that have been created above the net new permanent full-time positions in the most recently reported qualification year.

13VAC5-112-280. Eligibility.

A. A business firm shall be eligible to receive job creation grants for five consecutive years beginning with the first year of grant eligibility for permanent full-time positions created above the threshold number. Additional permanent full-time positions created during the remainder of years in the grant period are eligible for additional grant funding over the previous year's level or such positions may be used instead to begin a subsequent grant period pursuant to subsection B of this section.

B. A business firm may be eligible for subsequent five consecutive calendar-year grant periods if it creates new grant-eligible positions above the threshold number for its subsequent base year.

1. If a second or subsequent five-year grant period is requested within two years of the previous grant period, the subsequent base year will be the last grant year. The calculation of this subsequent base year employment will be determined by the number of permanent full-time positions in the preceding base year, plus the number of threshold positions, plus the number of grant-eligible positions in the final year of the previous grant period.

2. If a business firm applies for subsequent five consecutive calendar-year grant periods beyond the two years immediately following the completion of the previous five-year grant period, the business firm shall use one of the two preceding calendar years as the subsequent base year, at the choice of the business firm.

C. A business firm is eligible to receive enterprise zone job creation grants for any and all years in which the business firm qualifies in the five consecutive calendar years period commencing with the first year of grant eligibility.

D. Job creation grants shall be available beginning with calendar year 2005.

E. Any qualified business firm receiving an enterprise job creation grant under this section is not be eligible for a major business facility job tax credit pursuant to § 58.1-439 of the Code of Virginia.

F. The following positions are not grant eligible:

1. Those in retail, personal service or food and beverage service.

2. Those paying less than 175% of the federal minimum wage or that are not provided with health benefits.

3. Notwithstanding subdivision 2 of this subsection, in a high unemployment area those paying less than the reduced wage rate threshold or that are not provided with health benefits.

~~3.~~ 4. Seasonal, temporary or contract positions.

13VAC5-112-285. Eligibility for reduced wage rate threshold.

A. Prior to each qualification year, the department shall prepare the list of enterprise zone localities that are high unemployment areas that shall be used in determining eligibility for reduced wage rate thresholds for that qualification year.

B. Qualified business firms located in an enterprise zone listed as a high unemployment area are eligible to use the reduced wage rate threshold (150% of federal minimum wage) in qualifying for the $500 grant amount.

C. Once a qualified business is eligible for the reduced wage rate threshold it remains so through the end of its current five consecutive calendar-year grant period, regardless of changes to the unemployment rate of the enterprise zone locality.

Part VI
Policies and Procedures for Enterprise Zone Grants

13VAC5-112-400. Allocating enterprise zone grants.

A. Qualified business firms and qualified zone investors shall be eligible to receive enterprise zone grants provided for in 13VAC5-112-260 and 13VAC5-112-330 to the extent that they apply for and are approved for grant allocations through the department.

B. Upon receiving applications for grants provided for under 13VAC5-112-260 and 13VAC5-112-330, the department shall determine the amount of the grant to be allocated to each eligible business firm and zone investor.

C. ~~If the total amount of grants for which qualified business firms are eligible under 13VAC5-112-260 and for which qualified zone investors are eligible under 13VAC5-112-330 exceeds the annual appropriation for such grants, then the amount of grant that each qualified business firm and qualified zone investor will receive for shall be prorated in a proportional manner.~~ The department shall prioritize

allocations to fully fund the grants under 13VAC5-112-260 with any remaining funds to be allocated to grants under 13VAC5-112-330. In such cases, the amount of the grant that each qualified zone investor is eligible for under 13VAC5-112-330 shall be prorated in a proportional manner based on the funds remaining in the annual appropriation after full payment of the grants under 13VAC5-112-260.

VA.R. Doc. No. R10-2382; Filed June 14, 2010, 9:36 a.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF DENTISTRY

Final Regulation

REGISTRAR'S NOTICE: The Board of Dentistry is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The Board of Dentistry will receive, consider, and respond to petitions from any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC60-20. Regulations Governing the Practice of Dentistry and Dental Hygiene (amending 18VAC60-20-170).**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Effective Date: August 4, 2010.

Agency Contact: Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4538, FAX (804) 527-4428, or email sandra.reen@dhp.virginia.gov.

Summary:

This action amends the Regulations Governing the Practice of Dentistry and Dental Hygiene to include unauthorized use or disclosure of confidential information obtained from the Prescription Monitoring Program as grounds for disciplinary action. Such a provision is specified in § 54.1-2525 of the Code of Virginia but not specifically referenced in board regulations describing unprofessional conduct.

Part V
Unprofessional Conduct

18VAC60-20-170. Acts constituting unprofessional conduct.

The following practices shall constitute unprofessional conduct within the meaning of § 54.1-2706 of the Code of Virginia:

1. Fraudulently obtaining, attempting to obtain or cooperating with others in obtaining payment for services;

2. Performing services for a patient under terms or conditions ~~which~~ that are unconscionable. The board shall not consider terms unconscionable where there has been a full and fair disclosure of all terms and where the patient entered the agreement without fraud or duress;

3. Misrepresenting to a patient and the public the materials or methods and techniques the licensee uses or intends to use;

4. Committing any act in violation of the Code of Virginia reasonably related to the practice of dentistry and dental hygiene;

5. Delegating any service or operation ~~which~~ that requires the professional competence of a dentist or dental hygienist to any person who is not a dentist or dental hygienist as authorized by this chapter;

6. Certifying completion of a dental procedure that has not actually been completed;

7. Knowingly or negligently violating any applicable statute or regulation governing ionizing radiation in the Commonwealth of Virginia, including, but not limited to, current regulations promulgated by the Virginia Department of Health; ~~and~~

8. Permitting or condoning the placement or exposure of dental x-ray film by an unlicensed person, except where the unlicensed person has complied with 18VAC60-20-195~~.~~; and

9. Unauthorized use or disclosure of confidential information received from the Prescription Monitoring Program.

VA.R. Doc. No. R10-2450; Filed June 14, 2010, 11:35 a.m.

BOARD OF MEDICINE

Final Regulation

REGISTRAR'S NOTICE: The Board of Medicine is claiming an exclusion from the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved. The Board of Medicine will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Titles of Regulations: **18VAC85-20. Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry, and Chiropractic (amending 18VAC85-20-27).**

18VAC85-50. Regulations Governing the Practice of Physician Assistants (amending 18VAC85-50-175).

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Effective Date: August 4, 2010.

Agency Contact: William L. Harp, M.D., Executive Director, Board of Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4621, FAX (804) 527-4429, or email william.harp@dhp.virginia.gov.

Summary:

This action amends the Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry, and Chiropractic and the Regulations Governing the Practice of Physician Assistants to include unauthorized use or disclosure of confidential information obtained from the Prescription Monitoring Program as grounds for disciplinary action. Such a provision is specified in § 54.1-2525 of the Code of Virginia but not specifically referenced in board regulations describing standards of practice.

18VAC85-20-27. Confidentiality.

A. A practitioner shall not willfully or negligently breach the confidentiality between a practitioner and a patient. A breach of confidentiality that is required or permitted by applicable law or beyond the control of the practitioner shall not be considered negligent or willful.

B. Unauthorized use or disclosure of confidential information received from the Prescription Monitoring Program shall be grounds for disciplinary action.

Part VI
Standards of Professional Conduct

18VAC85-50-175. Confidentiality.

A. A practitioner shall not willfully or negligently breach the confidentiality between a practitioner and a patient. A breach of confidentiality that is required or permitted by applicable law or beyond the control of the practitioner shall not be considered negligent or willful.

B. Unauthorized use or disclosure of confidential information received from the Prescription Monitoring Program shall be grounds for disciplinary action.

VA.R. Doc. No. R10-2448; Filed June 14, 2010, 11:35 a.m.

BOARD OF PHARMACY

Final Regulation

REGISTRAR'S NOTICE: The Board of Pharmacy is claiming an exemption from the Administrative Process Act in accordance with (i) § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved and (ii) § 2.2-4006 A 3 of the Code of Virginia, which excludes regulations that consist only of changes in style or form or corrections of technical errors. The Board of Pharmacy will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-90, 18VAC110-20-106, 18VAC110-20-690).**

Statutory Authority: § 54.1-2400 and Chapters 33 (§ 54.1-3300 et seq.) and 34 (§ 54.1-3400 et seq.) of Title 54.1 of the Code of Virginia.

Effective Date: August 4, 2010.

Agency Contact: Elizabeth Scott Russell, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email scotti.russell@dhp.virginia.gov.

Summary:

This action amends two sections of the Regulations Governing the Practice of Pharmacy relating to the maintenance of continuing education (CE) documentation for conformity to the Code of Virginia. Specifically, § 54.1-3314.1 of the Code of Virginia states that certificates issued by CE providers must be retained by licensees for a period of two years following the renewal of licensure. Since 18VAC110-20-90 and 18VAC110-20-106 require retention for three years, these sections are being amended accordingly.

This action also amends a provision of the regulations relating to controlled substances registration, 18VAC110-20-690 C 4, to correct a technical error noted by inspection staff for the board. The reference to an inspection "consistent with subsection B of this section" is deleted as subsection B does not relate to inspections.

18VAC110-20-90. Requirements for continuing education.

A. A pharmacist shall be required to have completed a minimum of 1.5 CEUs or 15 contact hours of continuing pharmacy education in an approved program for each annual renewal of licensure. CEUs or hours in excess of the number required for renewal may not be transferred or credited to another year.

B. A pharmacy education program approved for continuing pharmacy education is:

1. One that is approved by the Accreditation Council for Pharmacy Education (ACPE);

2. One that is approved as a Category I Continuing Medical Education (CME) course, the primary focus of which is pharmacy, pharmacology, or drug therapy; or

3. One that is approved by the board in accordance with the provisions of 18VAC110-20-100.

C. The board may grant an extension pursuant to § 54.1-3314.1 E of the Code of Virginia. Any subsequent extension shall be granted only for good cause shown.

D. Pharmacists are required to attest to compliance with CE requirements in a manner approved by the board at the time of their annual license renewal. Following each renewal period, the board may conduct an audit of the immediate past two years' CE documents to verify compliance with requirements. Pharmacists are required to maintain, for ~~three~~ two years following renewal, the original certificates documenting successful completion of CE, showing date and title of the CE program or activity, the number of CEUs or contact hours awarded, and a certifying signature or other certification of the approved provider. Pharmacists selected for audit must provide these original documents to the board by the deadline date specified by the board in the audit notice.

18VAC110-20-106. Requirements for continued competency.

A. A pharmacy technician shall be required to have completed a minimum of 0.5 CEUs or five contact hours of approved continuing education for each annual renewal of registration. Hours in excess of the number required for renewal may not be transferred or credited to another year.

B. An approved continuing education program shall meet the requirements as set forth in subsection B of 18VAC110-20-90 or subsection B of 18VAC110-20-100.

C. Upon written request of a pharmacy technician, the board may grant an extension of up to one year in order for the pharmacy technician to fulfill the continuing education requirements for the period of time in question. The granting of an extension shall not relieve the pharmacy technician from complying with current year requirements. Any subsequent extension shall be granted for good cause shown.

D. Original certificates showing successful completion of continuing education programs shall be maintained by the pharmacy technician for a period of ~~three~~ two years following the renewal of his registration. The pharmacy technician shall provide such original certificates to the board upon request in a manner to be determined by the board.

Part XVI
Controlled Substances Registration for Other Persons or Entities

18VAC110-20-690. Persons or entities authorized or required to obtain a controlled substances registration.

A. A person or entity which maintains or intends to maintain a supply of Schedule II through Schedule VI controlled substances, other than manufacturers' samples, in accordance with provisions of the Drug Control Act (§ 54.1-3400 et seq. of the Code of Virginia) may apply for a controlled substances registration on forms approved by the board.

B. Persons or entities which may be registered by the board shall include, but not be limited to, hospitals without in-house pharmacies, nursing homes without in-house pharmacies that use automated drug dispensing systems, ambulatory surgery centers, outpatient clinics, alternate delivery sites, and emergency medical services agencies provided such persons or entities are otherwise authorized by law and hold required licenses or appropriate credentials to administer the drugs for which the registration is being sought.

C. In determining whether to register an applicant, the board shall consider factors listed in subsections A and D of § 54.1-3423 of the Code of Virginia and compliance with applicable requirements of this chapter.

1. The proposed location shall be inspected by an authorized agent of the board prior to issuance of a controlled substances registration.

2. Controlled substances registration applications that indicate a requested inspection date, or requests that are received after the application is filed, shall be honored provided a 14-day notice is allowed prior to the requested inspection date.

3. Requested inspection dates that do not allow a 14-day notice to the board may be adjusted by the board to provide 14 days for the scheduling of the inspection.

4. Any person wishing to change an approved location of the drug stock, make structural changes to an existing approved drug storage location, or make changes to a previously approved security system shall file an application with the board and be inspected ~~consistent with subsection B of this section~~.

5. Drugs shall not be stocked within the proposed drug storage location or moved to a new location until approval is granted by the board.

D. The application shall be signed by a person who will act as a responsible party for the controlled substances. The responsible party may be a prescriber, nurse, pharmacist, or pharmacy technician for alternate delivery sites or other person approved by the board who is authorized to administer or otherwise possess the controlled substances for that type entity.

E. The board may require a person or entity to obtain a controlled substances registration upon a determination that Schedule II through VI controlled substances have been obtained and are being used as common stock by multiple practitioners and that one or more of the following factors exist:

1. A federal, state, or local government agency has reported that the person or entity has made large purchases of controlled substances in comparison with other persons or entities in the same classification or category.

2. The person or entity has experienced a diversion, theft, or other unusual loss of controlled substances which requires reporting pursuant to § 54.1-3404 of the Drug Control Act.

3. The person or entity has failed to comply with recordkeeping requirements for controlled substances.

4. The person or entity or any other person with access to the common stock has violated any provision of federal, state, or local law or regulation relating to controlled substances.

VA.R. Doc. No. R10-2431; Filed June 14, 2010, 11:36 a.m.

Final Regulation

REGISTRAR'S NOTICE: The following regulatory action is exempt from the Administrative Process Act in accordance with § 2.2-4006 A 4 c of the Code of Virginia, which excludes regulations that are necessary to meet the requirements of federal law or regulations, provided such regulations do not differ materially from those required by federal law or regulation. The Board of Pharmacy will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-10, 18VAC110-20-250, 18VAC110-20-285, 18VAC110-20-290).**

Statutory Authority: § 54.1-2400 and Chapters 33 (§ 54.1-3300 et seq.) and 34 (§ 54.1-3400 et seq.) of Title 54.1 of the Code of Virginia.

Effective Date: August 4, 2010.

Agency Contact: Elizabeth Scott Russell, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email scotti.russell@dhp.virginia.gov.

Summary:

This action amends several provisions of the Regulations Governing the Practice of Pharmacy regarding electronic prescriptions and transmission of such prescriptions to eliminate language that is inconsistent with recent changes to the Code of Federal Regulations by the Drug Enforcement Administration.

Part I
General Provisions

18VAC110-20-10. Definitions.

In addition to words and terms defined in §§ 54.1-3300 and 54.1-3401 of the Code of Virginia, the following words and terms when used in this chapter shall have the following meanings, unless the context clearly indicates otherwise:

"ACPE" means the Accreditation Council for Pharmacy Education.

"Acquisition" of an existing entity permitted, registered or licensed by the board means (i) the purchase or transfer of all or substantially all of the assets of the entity or of any corporation that owns or controls the entity; (ii) the creation of a partnership by a sole proprietor or change in partnership composition; (iii) the acquiring of 50% or more of the outstanding shares of voting stock of a corporation owning the entity or of the parent corporation of a wholly owned subsidiary owning the entity, except that this shall not apply to any corporation the voting stock of which is actively traded on any securities exchange or in any over-the-counter market; or (iv) the merger of a corporation owning the entity, or of the parent corporation of a wholly owned subsidiary owning the entity, with another business or corporation.

"Alternate delivery site" means a location authorized in 18VAC110-20-275 to receive dispensed prescriptions on behalf of and for further delivery or administration to a patient.

"Beyond-use date" means the date beyond which the integrity of a compounded, repackaged, or dispensed drug can no longer be assured and as such is deemed to be adulterated or misbranded as defined in §§ 54.1-3461 and 54.1-3462 of the Code of Virginia.

"Board" means the Virginia Board of Pharmacy.

"CE" means continuing education as required for renewal of licensure by the Board of Pharmacy.

"CEU" means a continuing education unit awarded for credit as the equivalent of 10 contact hours.

"Chart order" means a lawful order for a drug or device entered on the chart or in a medical record of a patient by a prescriber or his designated agent.

"Compliance packaging" means packaging for dispensed drugs which is comprised of a series of containers for solid oral dosage forms and which is designed to assist the user in administering or self-administering the drugs in accordance with directions for use.

"Contact hour" means the amount of credit awarded for 60 minutes of participation in and successful completion of a continuing education program.

"Correctional facility" means any prison, penitentiary, penal facility, jail, detention unit, or other facility in which persons are incarcerated by government officials.

"DEA" means the United States Drug Enforcement Administration.

"Electronic ~~transmission~~ prescription" means ~~any prescription, other than an oral or written prescription or a prescription transmitted by facsimile machine, that is~~

~~electronically transmitted from a practitioner authorized to prescribe directly to a pharmacy without interception or intervention from a third party, or from one pharmacy to another pharmacy~~ a written prescription that is generated on an electronic application in accordance with 21 CFR Part 1300 and is transmitted to a pharmacy as an electronic data file.

"Expiration date" means that date placed on a drug package by the manufacturer or repacker beyond which the product may not be dispensed or used.

"Facsimile (FAX) prescription" means a written prescription or order which is transmitted by an electronic device over telephone lines which sends the exact image to the receiver (pharmacy) in a hard copy form.

"FDA" means the United States Food and Drug Administration.

"Floor stock" means a supply of drugs that have been distributed for the purpose of general administration by a prescriber or other authorized person pursuant to a valid order of a prescriber.

"Foreign school of pharmacy" means a school outside the United States and its territories offering a course of study in basic sciences, pharmacology, and pharmacy of at least four years in duration resulting in a degree that qualifies a person to practice pharmacy in that country.

"Forgery" means a prescription that was falsely created, falsely signed, or altered.

"FPGEC certificate" means the certificate given by the Foreign Pharmacy Equivalency Committee of NABP that certifies that the holder of such certificate has passed the Foreign Pharmacy Equivalency Examination and a credential review of foreign training to establish educational equivalency to board approved schools of pharmacy, and has passed approved examinations establishing proficiency in English.

"Generic drug name" means the nonproprietary name listed in the United States Pharmacopeia-National Formulary (USP-NF) or in the USAN and the USP Dictionary of Drug Names.

"Hospital" or "nursing home" means those facilities as defined in Title 32.1 of the Code of Virginia or as defined in regulations by the Virginia Department of Health.

"Inactive license" means a license which is registered with the Commonwealth but does not entitle the licensee to practice, the holder of which is not required to submit documentation of CE necessary to hold an active license.

"Long-term care facility" means a nursing home, retirement care, mental care or other facility or institution which provides extended health care to resident patients.

"NABP" means the National Association of Boards of Pharmacy.

"Nuclear pharmacy" means a pharmacy providing radiopharmaceutical services.

"On duty" means that a pharmacist is on the premises at the address of the permitted pharmacy and is available as needed.

"Permitted physician" means a physician who is licensed pursuant to § 54.1-3304 of the Code of Virginia to dispense drugs to persons to whom or for whom pharmacy services are not reasonably available.

"Perpetual inventory" means an ongoing system for recording quantities of drugs received, dispensed or otherwise distributed by a pharmacy.

"Personal supervision" means the pharmacist must be physically present and render direct, personal control over the entire service being rendered or act being performed. Neither prior nor future instructions shall be sufficient nor, shall supervision rendered by telephone, written instructions, or by any mechanical or electronic methods be sufficient.

"Pharmacy closing" means that the permitted pharmacy ceases pharmacy services or fails to provide for continuity of pharmacy services or lawful access to patient prescription records or other required patient records for the purpose of continued pharmacy services to patients.

"Pharmacy technician trainee" means a person who is currently enrolled in an approved pharmacy technician training program and is performing duties restricted to pharmacy technicians for the purpose of obtaining practical experience in accordance with § 54.1-3321 D of the Code of Virginia.

"PIC" means the pharmacist-in-charge of a permitted pharmacy.

"Practice location" means any location in which a prescriber evaluates or treats a patient.

"Prescription department" means any contiguous or noncontiguous areas used for the compounding, dispensing and storage of all Schedule II through VI drugs and devices and any Schedule I investigational drugs.

"PTCB" means the Pharmacy Technician Certification Board, co-founded by the American Pharmaceutical Association and the American Society of Health System Pharmacists, as the national organization for voluntary examination and certification of pharmacy technicians.

"Quality assurance plan" means a plan approved by the board for ongoing monitoring, measuring, evaluating, and, if necessary, improving the performance of a pharmacy function or system.

"Radiopharmaceutical" means any drug that exhibits spontaneous disintegration of unstable nuclei with the

emission of nuclear particles or photons and includes any nonradioactive reagent kit or radionuclide generator that is intended to be used in the preparation of any such substance, but does not include drugs such as carbon-containing compounds or potassium-containing salts that include trace quantities of naturally occurring radionuclides. The term also includes any biological product that is labeled with a radionuclide or intended solely to be labeled with a radionuclide.

"Repackaged drug" means any drug removed from the manufacturer's original package and placed in different packaging.

"Robotic pharmacy system" means a mechanical system controlled by a computer that performs operations or activities relative to the storage, packaging, labeling, dispensing, or distribution of medications, and collects, controls, and maintains all transaction information.

"Safety closure container" means a container which meets the requirements of the federal Poison Prevention Packaging Act of 1970 (15 USC §§ 1471-1476), i.e., in testing such containers, that 85% of a test group of 200 children of ages 41-52 months are unable to open the container in a five-minute period and that 80% fail in another five minutes after a demonstration of how to open it and that 90% of a test group of 100 adults must be able to open and close the container.

"Satellite pharmacy" means a pharmacy which is noncontiguous to the centrally permitted pharmacy of a hospital but at the location designated on the pharmacy permit.

"Special packaging" means packaging that is designed or constructed to be significantly difficult for children under five years of age to open to obtain a toxic or harmful amount of the drug contained therein within a reasonable time and not difficult for normal adults to use properly, but does not mean packaging which all such children cannot open or obtain a toxic or harmful amount within a reasonable time.

"Special use permit" means a permit issued to conduct a pharmacy of a special scope of service that varies in any way from the provisions of any board regulation.

"Storage temperature" means those specific directions stated in some monographs with respect to the temperatures at which pharmaceutical articles shall be stored, where it is considered that storage at a lower or higher temperature may produce undesirable results. The conditions are defined by the following terms:

1. "Cold" means any temperature not exceeding 8°C (46°F). A refrigerator is a cold place in which temperature is maintained thermostatically between 2° and 8°C (36° and 46°F). A freezer is a cold place in which the temperature is maintained thermostatically between -20° and -10°C (-4° and 14°F).

2. "Room temperature" means the temperature prevailing in a working area.

3. "Controlled room temperature" means a temperature maintained thermostatically that encompasses the usual and customary working environment of 20° to 25°C (68° to 77°F); that results in a mean kinetic temperature calculated to be not more than 25°C; and that allows for excursions between 15° and 30°C (59° and 86°F) that are experienced in pharmacies, hospitals, and warehouses.

4. "Warm" means any temperature between 30° and 40°C (86° and 104°F).

5. "Excessive heat" means any temperature above 40°C (104°F).

6. "Protection from freezing" means where, in addition to the risk of breakage of the container, freezing subjects a product to loss of strength or potency, or to the destructive alteration of its characteristics, the container label bears an appropriate instruction to protect the product from freezing.

7. "Cool" means any temperature between 8° and 15°C (46° and 59°F).

"Terminally ill" means a patient with a terminal condition as defined in § 54.1-2982 of the Code of Virginia.

"Unit dose container" means a container that is a single-unit container, as defined in United States Pharmacopeia-National Formulary, for articles intended for administration by other than the parenteral route as a single dose, direct from the container.

"Unit dose package" means a container that contains a particular dose ordered for a patient.

"Unit dose system" means a system in which multiple drugs in unit dose packaging are dispensed in a single container, such as a medication drawer or bin, labeled only with patient name and location. Directions for administration are not provided by the pharmacy on the drug packaging or container but are obtained by the person administering directly from a prescriber's order or medication administration record.

"USP-NF" means the United States Pharmacopeia-National Formulary.

"Well-closed container" means a container that protects the contents from extraneous solids and from loss of the drug under the ordinary or customary conditions of handling, shipment, storage, and distribution.

18VAC110-20-250. Automated data processing records of prescriptions.

A. An automated data processing system may be used for the storage and retrieval of original and refill dispensing information for prescriptions instead of manual record keeping requirements, subject to the following conditions:

1. A ~~hard copy~~ prescription shall be placed on file as set forth in 18VAC110-20-240 B with the following provisions:

a. In lieu of a hard copy file for Schedule VI prescriptions, an electronic image of a prescription may be maintained in an electronic database provided it preserves and provides an exact image of the prescription that is clearly legible and made available within 48 hours of a request by a person authorized by law to have access to prescription information. Storing electronic images of prescriptions for Schedule II-V controlled substances instead of the hard copy shall only be authorized if such storage is allowed by federal law.

b. If the pharmacy system's automated data processing system fields are automatically populated by an electronic ~~transmission~~ prescription, the automated record shall constitute the prescription and a hard copy or electronic image is not required.

c. ~~Storing electronic images of prescriptions for Schedule II-V controlled substances instead of the hard copy shall only be authorized if such storage is allowed by federal law.~~ For Schedule II-V controlled substances, electronic prescriptions shall be maintained in accordance with federal law and regulation.

2. Any computerized system shall provide retrieval (via computer monitor display or printout) of original prescription information for those prescriptions which are currently authorized for dispensing.

3. Any computerized system shall also provide retrieval via computer monitor display or printout of the dispensing history for prescriptions dispensed during the past two years.

4. Documentation of the fact that the information entered into the computer each time a pharmacist fills a prescription for a drug is correct shall be provided by the individual pharmacist who makes use of such system. If a printout is maintained of each day's prescription dispensing data, the printout shall be verified, dated and signed by the individual pharmacist who dispensed the prescription. The individual pharmacist shall verify that the data indicated is correct and then sign the document in the same manner as his name appears on his pharmacist license (e.g., J. H. Smith or John H. Smith).

If a bound log book or separate file is maintained rather than a printout, each individual pharmacist involved in dispensing shall sign a statement each day in the log, in the manner previously described, attesting to the fact that the dispensing information entered into the computer that day has been reviewed by him and is correct as shown.

B. Printout of dispensing data requirements. Any computerized system shall have the capability of producing a printout of any dispensing data which the user pharmacy is responsible for maintaining under the Drug Control Act (§ 54.1-3400 et seq. of the Code of Virginia) and such printout shall be provided within 48 hours of a request of an authorized agent.

18VAC110-20-285. Electronic transmission of prescriptions from prescriber to pharmacy.

A. Unless otherwise prohibited by law, ~~prescriptions~~ an electronic prescription may be transmitted ~~by electronic means~~ from the prescriber or an authorized agent as defined in § 54.1-3408.01 C of the Code of Virginia ~~for transmission of oral prescriptions~~ directly to the dispensing pharmacy. ~~For electronic transmission~~ Electronic prescriptions of Schedule II-V ~~prescriptions, transmissions~~ controlled substances shall comply with any security or other requirements of federal law. All electronic ~~transmissions~~ prescriptions shall also comply with all security requirements of state law related to privacy of protected health information.

~~B. In addition to all other information required to be included on a prescription, an electronically transmitted prescription shall include the telephone number of the prescriber, the full name of the prescriber's agent if other than the prescriber transmitting, and date of transmission.~~

~~C.~~ B. A pharmacy receiving an electronic ~~transmission~~ prescription shall maintain such prescription record in accordance with 18VAC110-20-250 A.

~~D.~~ C. An ~~electronically transmitted~~ electronic prescription shall be transmitted only to the pharmacy of the patient's choice.

18VAC110-20-290. Dispensing of Schedule II drugs.

A. A prescription for a Schedule II drug shall be dispensed in good faith but in no case shall it be dispensed more than six months after the date on which the prescription was issued.

B. A prescription for a Schedule II drug shall not be refilled except as authorized under the conditions for partial dispensing as set forth in 18VAC110-20-310.

C. In case of an emergency situation, a pharmacist may dispense a drug listed in Schedule II upon receiving oral authorization of a prescribing practitioner, provided that:

1. The quantity prescribed and dispensed is limited to the amount adequate to treat the patient during the emergency period;

2. The prescription shall be immediately reduced to writing by the pharmacist and shall contain all information required in § 54.1-3410 of the Drug Control Act, except for the signature of the prescribing practitioner;

3. If the pharmacist does not know the practitioner, he shall make a reasonable effort to determine that the oral authorization came from a practitioner using his phone number as listed in the telephone directory or other good-faith efforts to ensure his identity; and

4. Within seven days after authorizing an emergency oral prescription, the prescribing practitioner shall cause a written prescription for the emergency quantity prescribed to be delivered to the dispensing pharmacist. In addition to conforming to the requirements of § 54.1-3410 of the Drug Control Act, the prescription shall have written on its face "Authorization for Emergency Dispensing" and the date of the oral order. The written prescription may be delivered to the pharmacist in person or ~~by mail, but if delivered,~~ by mail~~, it must be~~ postmarked within the seven-day period, or transmitted as an electronic prescription in accordance with federal law and regulation to include annotation of the electronic prescription with the original authorization and date of the oral order. Upon receipt, the dispensing pharmacist shall attach ~~this~~ the paper prescription to the oral emergency prescription which had earlier been reduced to writing. The pharmacist shall notify the nearest office of the Drug Enforcement Administration and the board if the prescribing practitioner fails to deliver a written prescription to him. Failure of the pharmacist to do so shall void the authority conferred by this subdivision to dispense without a written prescription of a prescribing practitioner.

VA.R. Doc. No. R10-2466; Filed June 14, 2010, 11:36 a.m.

BOARD FOR PROFESSIONAL SOIL SCIENTISTS AND WETLAND PROFESSIONALS

Final Regulation

REGISTRAR'S NOTICE: The following regulatory action is exempt from the Administrative Process Act in accordance with § 2.2-4006 A 6 of the Code of Virginia, which excludes regulations of the regulatory boards served by the Department of Professional and Occupational Regulation pursuant to Title 54.1 of the Code of Virginia that are limited to reducing fees charged to regulants and applicants. The Board for Professional Soil Scientists and Wetland Professionals will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC145-20. Professional Soil Scientists Regulations (amending 18VAC145-20-151).**

Statutory Authority: § 54.1-2211 of the Code of Virginia.

Effective Date: September 1, 2010.

Agency Contact: Kathleen R. Nosbisch, Executive Director, Board for Professional Soil Scientists and Wetland Professionals, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (804) 527-4294, or email soilscientist@dpor.virginia.gov.

Summary:

The proposed amendments reduce the fees for initial certification, renewal, and reinstatement. The fees are reduced to comply with the provisions of the Callahan Act (§ 54.1-113 of the Code of Virginia).

18VAC145-20-151. Fees.

The fees for certification are listed below. Checks or money orders shall be made payable to the Treasurer of Virginia. All fees required by the board are nonrefundable. In the event that a check, money draft, or similar instrument for payment of a fee required by statute or regulation is not honored by the bank or financial institution named, the applicant or regulant shall be required to remit fees sufficient to cover the original fee, plus ~~the~~ an additional processing charge ~~specified below~~ as authorized by § 2.2-614.1 C of the Code of Virginia.

Fee Type	When due	Amount due
New application	~~with~~ With application	~~$300~~ $90
Examination fee	~~upon~~ Upon approval for exam	$150
Reexamination fee	Upon request to be rescheduled for exam	$75 for each part
Renewal fee	With renewal card	~~$260~~ $70
Late renewal fee	30 days after date of expiration	$25
Reinstatement fee	180 days after date of expiration	~~$300~~ $90
~~Dishonored check fee~~	~~With replacement check~~	~~$25~~

FORMS (18VAC145-20)

Professional Soil Scientist Certification Application (with instructions), ~~34CERT (eff. 7/00)~~ 3401CERT (rev. 9/10).

Professional Soil Scientist Experience Log, ~~34EXP (eff. 7/00)~~ 3401EXP (rev. 9/10).

VA.R. Doc. No. R10-2404; Filed June 14, 2010, 1:38 p.m.

Final Regulation

REGISTRAR'S NOTICE: The following regulatory action is exempt from the Administrative Process Act in accordance with § 2.2-4006 A 6 of the Code of Virginia, which excludes regulations of the regulatory boards served by the Department of Professional and Occupational Regulation pursuant to Title 54.1 of the Code of Virginia that are limited to reducing fees charged to regulants and applicants. The Board for Professional Soil Scientists and Wetland Professionals will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC145-30. Regulations Governing Certified Professional Wetland Delineators (amending 18VAC145-30-90).**

Statutory Authority: § 54.1-2203 of the Code of Virginia.

Effective Date: September 1, 2010.

Agency Contact: Kathleen R. Nosbisch, Executive Director, Board for Professional Soil Scientists and Wetland Professionals, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (804) 527-4294, or email soilscientist@dpor.virginia.gov.

Summary:

The proposed amendments reduce the fees for initial certification, renewal, and reinstatement. The fees are reduced to comply with the provisions of the Callahan Act (§ 54.1-113 of the Code of Virginia).

Part III
Fees, Renewal and Reinstatement Requirements

18VAC145-30-90. Fees.

All fees required by the board are nonrefundable and shall not be prorated.

Fee Type	Amount
Application	~~$300~~ $90
Renewal fee	~~$260~~ $70
Late renewal fee	$25
Reinstatement fee	~~$300~~ $90
Examination fee	$150

FORMS (18VAC145-30)

Professional Wetland Delineator Certification Application, 3402CERT (rev.~~3/07)~~ 9/10).

Professional Wetland Delineator Experience Log, 3402EXP (rev.~~3/07)~~ 9/10).

Professional Wetland Delineator Reference Form, 3402REF (rev.~~3/07)~~ 9/10).

VA.R. Doc. No. R10-2405; Filed June 14, 2010, 1:37 p.m.

TITLE 21. SECURITIES AND RETAIL FRANCHISING

STATE CORPORATION COMMISSION

Final Regulation

REGISTRAR'S NOTICE: The State Corporation Commission is exempt from the Administrative Process Act in accordance with § 2.2-4002 A 2 of the Code of Virginia, which exempts courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

Titles of Regulations: **21VAC5-10. General Administration - Securities Act (amending 21VAC5-10-40).**

21VAC5-20. Broker-Dealers, Broker-Dealer Agents and Agents of the Issuer (amending 21VAC5-20-260, 21VAC5-20-280).

21VAC5-40. Exempt Securities (adding 21VAC5-40-170).

21VAC5-80. Investment Advisors (amending 21VAC5-80-10, 21VAC5-80-145, 21VAC5-80-160, 21VAC5-80-170, 21VAC5-80-200).

Statutory Authority: §§ 12.1-13 and 13.1-523 of the Code of Virginia.

Effective Date: July 1, 2010.

Agency Contact: Al Hughes, Principal Auditor, State Corporation Commission, Tyler Building, 9th Floor, P.O. Box 1197, Richmond, VA 23218, telephone (804) 371-9415, FAX (804) 371-9911, or email al.hughes@scc.virginia.gov.

Summary:

The amendments: (i) define the term "solicitation"; (ii) clarify and create requirements for broker-dealers and investment advisors to designate independent supervisors who will periodically review and physically inspect the activities of agent supervisors and investment advisor representatives; (iii) clarify the written procedures requirements imposed on broker-dealers under the statutory and regulatory requirements of the Virginia Securities Act (Act) and these rules; (iv) reflect the name changes of the Institute for Credentialing Excellence; (v) specify prohibited conduct that can subject a broker-dealer or agent to penalties or revocation of registration to enumerating types of prohibited dishonest and unethical practices by a broker-dealer or agent; (vi) limit solicitations and offers by a broker-dealer on behalf of an issuer in a private offering under § 13.1-514 B 7 a of the Act only to existing customers of the participating registered broker-dealer or its registered agent whose

accounts have been in existence for an amount of time sufficient to evidence the customers' suitability for the investment; (vii) require the filing of a new form with an application to become a registered investment advisor; (viii) clarify the definition of "custody" by an investment advisor to include possession of the user ID and password of a client's retirement or securities accounts in some cases; (ix) modify the requirement of those investment advisors required to send quarterly statements to their clients; (x) replace references to § 13.1-502 of the Act with § 13.1-503 of the Act in deeming certain types of custody by an investment advisor to be violative of § 13.1-503 of the Act; (xi) modify the fee disclosure safeguard requirements of an investment advisor having custody of a client's funds; (xii) clarify the exemption from safeguard requirements of those investment advisors having custody pursuant to appointment as trustees of a beneficial trust; (xiii) modify the requirement of an investment advisor having custody over client funds who is unable to use a qualified custodian as required under the rules to obtain specific written approval from the commission for such a custody arrangement; (xiv) create additional client records requirements for investment advisors; (xv) clarify the written procedures required to be maintained by an investment advisor; (xvi) include disclosure by an investment advisor of the identity, affairs, or investments of any client to any third party without the positive written consent of the client as an unethical business practice; and (xvii) clarify and identify specific types of prohibited advertising by an investment advisor.

AT RICHMOND, JUNE 15, 2010

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. SEC-2010-00022

Ex Parte: In the matter of
Adopting a Revision to the Rules
Governing the Virginia Securities Act

ORDER ADOPTING AMENDED RULES

By order entered on March 23, 2010, all interested persons were ordered to take notice that the State Corporation Commission ("Commission") would consider the adoption of a revision to Chapters 10, 20, 40 and 80 of Title 21 of the Virginia Administrative Code ("Regulations") entitled "Rules and Forms Governing Virginia Securities Act." On March 31, 2010, the Division of Securities and Retail Franchising ("Division") mailed the Order to Take Notice of the proposed Regulations to all registrants and applicants engaged in the business of securities within the Commonwealth of Virginia as of March 24, 2010, and to all interested parties pursuant to the Virginia Securities Act, § 13.1-501 et seq. of the Code of Virginia. The Order to Take Notice described the proposed amendments and afforded interested parties an opportunity to file comments and request a hearing by April 30, 2010 with the Clerk of the Commission.

The Commission received timely filed comments from the investment advisory firm of Huff, Stuart & Carlton ("HSC") concerning the Division's proposed amendments to Rule 21 VAC 5-80-145 A 1 a (1). The HSC comments expressed concern over the language in the Division's proposal to include possession of the user ID and password of a client's retirement or securities accounts within the definition of "custody" under the Rule. Specifically, the comments expressed concern that this Rule would subject stringent and costly custody requirements on every state registered investment advisor if they were found to have custody by merely possessing a client's user ID and password for a retirement or securities account.

As a result of HSC's comments, the Division recommended abandoning the previously suggested amendment to Rule 21 VAC 5-80-145 A 1 a (1) and recommended the following modification instead:

A. For purposes of this section, the following definitions shall apply:

1. Custody means holding directly or indirectly, client funds or securities, or having any authority to obtain possession of them (<u>which may include possession of a user ID and password</u>).

The Virginia Bankers Association ("VBA") and Wells Fargo & Company ("Wells") both filed timely comments with the Commission expressing concern over the Division's proposed amendments to Rule 21 VAC 5-20-280 A 27 and B 6, and also Rule 21 VAC 5-80-200 A 14 and B 14, which would preclude broker-dealers and investment advisors from disclosing private client information to any third party without affirmative written consent. Both VBA and Wells commented that the Division's suggested changes would prohibit necessary disclosures to third-party account administrators and those entities affiliated with broker-dealers. They expressed concern that such disclosure was authorized under the provisions of the Gramm-Leach-Bliley Act and was also in conflict with its provisions and those of other federal laws governing federally registered advisors.

Based on these comments and other similar comments submitted to the Division, the Division recommended withdrawing the current proposed amendments to Rule 21 VAC 5-20-280 A 27 and B 6 as well as the amendments proposed in Rule 21 VAC 5-80-200 A 14 and B 14 so the Division could further study the issues surrounding the disclosure of non-public personal information by broker-dealers and investment advisors to third-parties.

NOW THE COMMISSION, upon consideration of the proposed amendments to the Regulations, as modified, the recommendations of the Division, and the record in this case,

finds that the proposed amendments to the Regulations, as modified, should be adopted.

Accordingly, IT IS ORDERED THAT:

(1) The proposed Regulations, as modified, are attached hereto, made a part hereof, and are hereby ADOPTED effective July 1, 2010.

(2) This matter is dismissed from the Commission's docket, and the papers herein shall be placed in the file for ended causes.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to: Huff, Stuart & Carlton, 1563 Crossings Centre Drive, Suite 100, Forest, Virginia 24551; David J. O'Brien, O'Brien Financial Planning, Inc., 13822 Mount Hill Court, Midlothian, Virginia 23113; Robert G. Topping, Covenant Wealth Advisors, LLC, 351 Mclaws Circle, Suite 1, Williamsburg, Virginia 23185; Tamara K. Salmon, Investment Company Institute, 1401 H Street NW, Washington, DC 20005-2148; Ronald C. Long, Wells Fargo & Company, Regulatory Affairs, 1 North Jefferson Ave, St. Louis, MO 63103; Bruce T. Whitehurst, Virginia Bankers Association, 4490 Cox Road, Glen Allen, Virginia 23060; and a copy shall be delivered to the Commission's Division of Information Resources and Office of General Counsel.

21VAC5-10-40. Definitions.

As used in this chapter, the following regulations and forms pertaining to securities, instructions and orders of the commission, the following meanings shall apply:

"Act" means the Securities Act contained in Chapter 5 (§ 13.1-501 et seq.) of Title 13.1 of the Code of Virginia.

"Applicant" means a person on whose behalf an application for registration or a registration statement is filed.

"Application" means all information required by the forms prescribed by the commission as well as any additional information required by the commission and any required fees.

"Bank Holding Company Act of 1956" (12 USC § 1841 et seq.) means the federal statute of that name as now or hereafter amended.

"Boiler room tactics" mean operations or high pressure tactics utilized in connection with the promotion of speculative offerings by means of an intensive telephone campaign or unsolicited calls to persons not known by or having an account with the salesmen or broker-dealer represented by him, whereby the prospective purchaser is encouraged to make a hasty decision to invest, irrespective of his investment needs and objectives.

"Breakpoint" means the dollar level of investment necessary to qualify a purchaser for a discounted sales charge on a quantity purchase of open-end management company shares.

"Commission" means State Corporation Commission.

"Federal covered advisor" means any person who is registered or required to be registered under § 203 of the Investment Advisers Act of 1940 as an "investment adviser."

"Investment Advisers Act of 1940" (15 USC § 80b-1 et seq.) means the federal statute of that name as now or hereafter amended.

Notwithstanding the definition in § 13.1-501 of the Act, "investment advisor representative" as applied to a federal covered advisor only includes an individual who has a "place of business" (as that term is defined in rules or regulations promulgated by the SEC) in this Commonwealth and who either:

1. Is an "investment advisor representative" as that term is defined in rules or regulations promulgated by the SEC; or

2. a. Is not a "supervised person" as that term is defined in the Investment Advisers Act of 1940; and

b. Solicits, offers or negotiates for the sale of or sells investment advisory services on behalf of a federal covered advisor.

"Investment Company Act of 1940" (15 USC § 80a-1 et seq.) means the federal statute of that name as now or hereafter amended.

"NASAA" means the North American Securities Administrators Association, Inc.

"NASD" means the National Association of Securities Dealers, Inc., or its successor, the Financial Industry Regulatory Authority, Inc. (FINRA).

"Notice" or "notice filing" means, with respect to a federal covered advisor or federal covered security, all information required by the regulations and forms prescribed by the commission and any required fee.

"Registrant" means an applicant for whom a registration or registration statement has been granted or declared effective by the commission.

"SEC" means the United States Securities and Exchange Commission.

"Securities Act of 1933" (15 USC § 77a et seq.) means the federal statute of that name as now or hereafter amended.

"Securities Exchange Act of 1934" (15 USC § 78a et seq.) means the federal statute of that name as now or hereafter amended.

"Solicitation" means an offer to one or more persons by any of the following means or as a result of contact initiated through any of these means:

1. Television, radio, or any broadcast medium;

2. Newspaper, magazine, periodical, or any other publication of general circulation;

3. Poster, billboard, Internet posting, or other communication posted for the general public;

4. Brochure, flier, handbill, or similar communication, unless the offeror has a substantial preexisting business relationship or close family or personal relationship with each of the offerees;

5. Seminar or group meeting, unless the offeror has a substantial preexisting business relationship or close family or personal relationship with each of the offerees; or

6. Telephone, facsimile, mail, delivery service, or electronic communication, unless the offeror has a substantial preexisting business relationship or close family or personal relationship with each of the offerees.

NOTICE: The forms used in administering the above regulation are listed below. Any amended or added forms are reflected in the listing and are published following the listing.

FORMS (21VAC5-10)

Broker-Dealer and Agent Forms

Form BD—Uniform Application for Broker-Dealer Registration (2/98).

Form S.A.11—Broker-Dealer's Surety Bond (rev. 7/99).

Form S.A.2—Application for Renewal of a Broker-Dealer's Registration (rev. 7/99).

Form S.D.4—Application for Renewal of Registration as an Agent of an Issuer (1997).

Form S.D.4.A—Non-NASD Broker-Dealer or Issuer Agents to be Renewed Exhibit (1974).

Form S.D.4.B—Non-NASD Broker-Dealer or Issuer Agents to be Canceled with no disciplinary history (1974).

Form S.D.4.C—Non-NASD Broker-Dealer or Issuer Agents to be Canceled with disciplinary history (1974).

Form BDW—Uniform Notice of Termination or Withdrawal of Registration as a Broker-Dealer (rev. 4/89).

Rev. Form U—Uniform Application for Securities Industry Registration or Transfer (11/97).

Rev. Form U—Uniform Termination Notice for Securities Industry Registration (11/97).

Investment Advisor and Investment Advisor Representative Forms

Form ADV—Uniform Application for Registration of Investment Advisors (rev. 1/01).

Form ADV-W—Notice of Withdrawal from Registration as an Investment Advisor (rev. 1/01).

Surety Bond Form (rev. 7/99).

Rev. Form U—Uniform Application for Securities Industry Registration or Transfer (11/97).

Rev. Form U—Uniform Termination Notice for Securities Industry Registration (11/97).

Form S.A.3—Affidavit for Waiver of Examination (rev. 7/99).

Form S.A.15—Investment Advisor Representative Multiple Employment Agreement (eff. 7/07).

Form S.A.16—Agent Multiple Employment Agreement (eff. 7/07).

Form IA XRF—Cross-Reference Between ADV Part II, ADV Part 1A/1B, Schedule F, Contract and Brochure (eff. 7/10).

Securities Registration and Notice Filing Forms

Form U—Uniform Application to Register Securities (7/81).

Form U—Uniform Consent to Service of Process (7/81).

Form U-a—Uniform Form of Corporate Resolution (rev. 7/99).

Form S.A.4—Registration by Notification—Original Issue (rev. 11/96).

Form S.A.5—Registration by Notification—Non-Issuer Distribution (rev. 11/96).

Form S.A.6—Registration by Notification—Pursuant to 21VAC5-30-50 Non-Issuer Distribution "Secondary Trading" (1989).

Form S.A.8—Registration by Qualification (7/91).

Form S.A.10—Request for Refund Affidavit (Unit Investment Trust) (rev. 7/99).

Form S.A.12—Escrow Agreement (1971).

Form S.A.13—Impounding Agreement (rev. 7/99).

Form VA—Parts 1 and 2—Notice of Limited Offering of Securities (rev. 11/96).

Form NF—Uniform Investment Company Notice Filing (4/97).

CROSS REFERENCE BETWEEN ADV PART II, ADV PART 1A/1B, SCHEDULE F, CONTRACT and BROCHURE

Disclosure Description	PART II Item & section	PART 1A & B Item & section	Sch. F Page & paragraph	Contract* Page & paragraph	Brochure Page & paragraph
Name, Address & Telephone	Part II page 1	Part 1A, Item 1 A, F & F3			
Sole Proprietorship		Part 1A Item 3a and 1B 2 J (1)-(3)			
Advisory Services - General	Part II Item 1A(1)-(9)	Part 1A Item 5G			
Advisory Services – Financial Planning	Part II Item 1B	Part 1A Item 5G(1) & 5H			
Advisory Services – Wrap Fee Program	Part II Item 1, Schedule H & Brochure	Part 1A Item 5 I			
Advisory Services – Financial Planning	Part II Item 1B	Part 1B Item 2(H)			
Advisory Fees	Part II Item 1C	Part 1A Item 5E			
Complete description of all services	Part II Item 1D				
Types of Clients	Part II Item 2	Part 1A Item 5C&D			
Types of Investments	Part II Item 3(A)-(L)				
Types of Securities Analysis, Info, Strategies	Part II Item 4(A)				
Types of Securities Analysis, Info, Strategies	Part II Item 4(B)				
Types of Securities Analysis, Info, Strategies	Part II Item 4(C)				
Education/Business Standards	Part II Item 5				
Education/Business Background	Part II Item 6				
Other Business – Not Investment Advice	Part II Item 7A & B	Part 1A Item 6B(1) & (3)			
Other Business – Primary	Part II Item 7C	Part 1A Item 6B(2)			
Other Financial Industry Activities or Affiliations -	Part II Item 8A	Part 1A Item 6A(1)			

BD					
Other Financial Industry Activities or Affiliations - FCM, CPO, CTA	Part II Item 8B	Part 1A Item 6A(3)			
Other Financial Industry Activities or Affiliations - General	Part II Item 8C(1)-(12)	Part 1A Item 7A(1)-(11)			
Other Financial Industry Activities or Affiliations - Partnerships	Part II Item 8D	Part 1A Item 7B & 8B2			
Participation in Client Transactions - Principal	Part II Item 9A	Part 1A Item 8A(1)			
PART II – Item Header	PART II Item & section	PART 1A & B Item & section	Sch. F Page & paragraph	Contract* Page & paragraph	Brochure Page & paragraph
Participation in Client Transactions – BD/Agent Compensation	Part II Item 9B				
Participation in Client Transactions - Agency Cross Transactions	Part II Item 9C	Part 1A Item 8B(1)			
Participation in Client Transactions – Fin'l Interest	Part II Item 9D	Part 1A Item 8A(3) & B3			
Participation in Client Transactions – For Itself	Part II Item 9E	Part 1A Item 8A(2)			
Participation in Client Transactions – Code of Ethics	Part II Item 9				
Conditions for Managing Money	Part II Item 10				
Review of Accounts	Part II Item 11				
Investment or Brokerage Discretion	Part II Item 12A(1)	Part 1A Item 8C(1)			
Investment or Brokerage Discretion	Part II Item 12A(2)	Part 1A Item 8C(2)			
Investment or Brokerage Discretion	Part II Item 12A(3)	Part 1A Item 8C(3)			
Investment or Brokerage Discretion	Part II Item 12A(4)	Part 1A Item 8C(4)			
Investment or Brokerage Discretion - BD	Part II Item 12B	Part 1A Item 8D			
Additional Compensation	Part II Item 13A	Part 1A Item			

– Soft Dollars		8E			
Additional Compensation – Solicitors	Part II Item 13B	Part 1A Item 8F			
Custody of Funds – Balance Sheet	Part II Item 14	Part 1A Item 9A&B			
Custody of Funds – Balance Sheet	Part II Item 14	Part 1A Item 9 & Part 1B 2 i 3			

21VAC5-20-260. Supervision of agents.

A. A broker-dealer shall be responsible for the acts, practices, and conduct of its agents in connection with the sale of securities until such time as the agents have been properly terminated as provided by 21VAC5-20-60.

B. Every broker-dealer shall exercise diligent supervision over the securities activities of all of its agents.

C. Every agent employed by a broker-dealer shall be subject to the supervision of a supervisor designated by such broker-dealer. The supervisor may be the broker-dealer in the case of a sole proprietor, or a partner, officer, office manager or any qualified agent in the case of entities other than sole proprietorships. All designated supervisors shall exercise reasonable supervision over the securities activities of all of the agents under their responsibility.

D. As part of its responsibility under this section, every broker-dealer shall establish, maintain and enforce written procedures, a copy of which shall be kept in each business office, which shall (i) set forth the procedures adopted by the broker-dealer to comply with the Act and regulations, including but not limited to the following duties imposed by this section, and ~~shall~~ (ii) state at which business office or offices the broker-dealer keeps and maintains the records required by 21VAC5-20-240:

1. The review and written approval by the designated supervisor of the opening of each new customer account;

2. The frequent examination of all customer accounts to detect and prevent irregularities or abuses;

3. The prompt review and written approval by a designated supervisor of all securities transactions by agents and all correspondence pertaining to the solicitation or execution of all securities transactions by agents;

4. The review and written approval by the designated supervisor of the delegation by any customer of discretionary authority with respect to the customer's account to the broker-dealer or to a stated agent or agents of the broker-dealer and the prompt written approval of each discretionary order entered on behalf of that account; and

5. The prompt review and written approval of the handling of all customer complaints.

E. Every broker-dealer who has designated more than one supervisor pursuant to subsection C of this section shall designate from among its partners, officers, or other qualified agents, a person or group of persons, independent from the designated business supervisor or supervisors who shall:

1. Supervise and periodically review the activities of these supervisors designated pursuant to subsection C of this section; and

2. No less often than annually ~~inspect~~ conduct a physical inspection of each business office of the broker-dealer to insure that the written procedures and compliance requirements are enforced.

All supervisors designated pursuant to this subsection E shall exercise reasonable supervision over the supervisors under their responsibility to ensure compliance with this subsection.

21VAC5-20-280. Prohibited business conduct.

A. No broker-dealer shall:

1. Engage in a pattern of unreasonable and unjustifiable delays in the delivery of securities purchased by any of its customers or in the payment upon request of free credit balances reflecting completed transactions of any of its customers, or take any action that directly or indirectly interferes with a customer's ability to transfer his account; provided that the account is not subject to any lien for moneys owed by the customer or other bona fide claim, including, but not limited to, seeking a judicial order or decree that would bar or restrict the submission, delivery or acceptance of a written request from a customer to transfer his account;

2. Induce trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account;

3. Recommend to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the customer based upon reasonable inquiry concerning the customer's investment objectives, financial situation, risk

tolerance and needs, and any other relevant information known by the broker-dealer;

4. Execute a transaction on behalf of a customer without authority to do so or, when securities are held in a customer's account, fail to execute a sell transaction involving those securities as instructed by a customer, without reasonable cause;

5. Exercise any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time or price for the execution of orders;

6. Execute any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account, or fail, prior to or at the opening of a margin account, to disclose to a noninstitutional customer the operation of a margin account and the risks associated with trading on margin at least as comprehensively as required by NASD Rule 2341;

7. Fail to segregate customers' free securities or securities held in safekeeping;

8. Hypothecate a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by Rules of the SEC;

9. Enter into a transaction with or for a customer at a price not reasonably related to the current market price of a security or receiving an unreasonable commission or profit;

10. Fail to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus;

11. Introduce customer transactions on a "fully disclosed" basis to another broker-dealer that is not exempt under § 13.1-514 B 6 of the Act;

12. a. Charge unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of moneys due for principal, dividends or interest, exchange or transfer of securities, appraisals, safekeeping, or custody of securities and other services related to its securities business;

b. Charge a fee based on the activity, value or contents (or lack thereof) of a customer account unless written disclosure pertaining to the fee, which shall include information about the amount of the fee, how imposition of the fee can be avoided and any consequence of late payment or nonpayment of the fee, was provided no later than the date the account was established or, with respect to an existing account, at least 60 days prior to the effective date of the fee;

13. Offer to buy from or sell to any person any security at a stated price unless the broker-dealer is prepared to purchase or sell at the price and under such conditions as are stated at the time of the offer to buy or sell;

14. Represent that a security is being offered to a customer "at a market" or a price relevant to the market price unless the broker-dealer knows or has reasonable grounds to believe that a market for the security exists other than that made, created or controlled by the broker-dealer, or by any person for whom he is acting or with whom he is associated in the distribution, or any person controlled by, controlling or under common control with the broker-dealer;

15. Effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include but not be limited to:

a. Effecting any transaction in a security which involves no change in the beneficial ownership thereof;

b. Entering an order or orders for the purchase or sale of any security with the knowledge that an order or orders of substantially the same size, at substantially the same time and substantially the same price, for the sale of any security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; however, nothing in this subdivision shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers;

c. Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in the security or raising or depressing the price of the security, for the purpose of inducing the purchase or sale of the security by others;

16. Guarantee a customer against loss in any securities account of the customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for the customer;

17. Publish or circulate, or cause to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless the broker-dealer believes that the transaction was a bona fide purchase or sale of the security; or which purports to quote the bid price or asked price for any security, unless the broker-dealer believes

that the quotation represents a bona fide bid for, or offer of, the security;

18. Use any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be a distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose or effect of any prospectus or disclosure;

19. Fail to make reasonably available upon request to any person expressing an interest in a solicited transaction in a security, not listed on a registered securities exchange or quoted on an automated quotation system operated by a national securities association approved by regulation of the commission, a balance sheet of the issuer as of a date within 18 months of the offer or sale of the issuer's securities and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, the names of the issuer's proprietor, partners or officers, the nature of the enterprises of the issuer and any available information reasonably necessary for evaluating the desirability or lack of desirability of investing in the securities of an issuer. All transactions in securities described in this subdivision shall comply with the provisions of § 13.1-507 of the Act;

20. Fail to disclose that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of the security, the existence of control to the customer, and if disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction;

21. Fail to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group member, or from a member participating in the distribution as an underwriter or selling group member;

22. Fail or refuse to furnish a customer, upon reasonable request, information to which the customer is entitled, or to respond to a formal written request or complaint;

23. Fail to clearly and separately disclose to its customer, prior to any security transaction, providing investment advice for compensation or any materially related transaction that the customer's funds or securities will be in the custody of an investment advisor or contracted custodian, in a manner that does not provide Securities Investor Protection Corporation protection, or equivalent third-party coverage over the customer's assets;

24. Market broker-dealer services that are associated with financial institutions in a manner that is misleading or confusing to customers as to the nature of securities products or risks; ~~or~~

25. In transactions subject to breakpoints, fail to:

a. Utilize advantageous breakpoints without reasonable basis for their exclusion;

b. Determine information that should be recorded on the books and records of a member or its clearing firm, which is necessary to determine the availability and appropriateness of breakpoint opportunities; or

c. Inquire whether the customer has positions or transactions away from the member that should be considered in connection with the pending transaction, and apprise the customer of the breakpoint opportunities~~.~~; [or]

26. Use a certification or professional designation in connection with the offer, sale, or purchase of securities, that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees in such a way as to mislead any person.

a. The use of such certification or professional designation includes, but is not limited to, the following:

(1) Use of a certification or designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) Use of a nonexistent or self-conferred certification or professional designation;

(3) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; or

(4) Use of a certification or professional designation that was obtained from a designating or certifying organization that:

(a) Is primarily engaged in the business of instruction in sales and/or marketing;

(b) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(c) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(d) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

b. There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for

purposes of subdivision 26 a (4) of this subsection, when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The ~~National Commission for Certifying Agencies~~ Institute for Credentialing Excellence (formerly the National Commission for Certifying Agencies); or

(3) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales and/or marketing.

c. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

(1) Use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) The manner in which those words are combined.

d. For purposes of this section, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency when that job title:

(1) Indicates seniority within the organization; or

(2) Specifies an individual's area of specialization within the organization.

For purposes of this subdivision d, "financial services regulatory agency" includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under § 3 (a)(1) of the Investment Company Act of 1940 (15 USC § 80a-3(a)(1)).

e. Nothing in this regulation shall limit the commission's authority to enforce existing provisions of law [. ~~; or~~

~~27. Disclose the identity, affairs, investments, or nonpublic personal information as defined under the Securities and Exchange Act of 1934 (17 CFR 248.3 Definitions), of any client to any third party, or making use of as a recipient of such prohibited disclosure, unless positively consented to by the client, in writing.~~]

B. No agent shall:

1. Engage in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer;

2. Effect any securities transaction not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transaction is authorized in writing by the broker-dealer prior to execution of the transaction;

3. Establish or maintain an account containing fictitious information in order to execute a transaction which would otherwise be unlawful or prohibited;

4. Share directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents;

5. Divide or otherwise split the agent's commissions, profits or other compensation from the purchase or sale of securities in this state with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control; or

6. Engage in conduct specified in subdivision A 2, 3, 4, 5, 6, 10, 15, 16, 17, 18, 23, 24, 25 [, or] 26 [~~or 27~~] of this section.

C. It shall be deemed a demonstration of a lack of business knowledge by an agent insofar as business knowledge is required for registration by § 13.1-505 A 3 of the Act, if an agent fails to comply with any of the applicable continuing education requirements set forth in any of the following and such failure has resulted in an agent's denial, suspension, or revocation of a license, registration, or membership with a self-regulatory organization.

1. Schedule C to the National Association of Securities Dealers By-Laws, Part XII of the National Association of Securities Dealers, as such provisions existed on July 1, 1995;

2. Rule 345 A of the New York Stock Exchange, as such provisions existed on July 1, 1995;

3. Rule G-3(h) of the Municipal Securities Rulemaking Board, as such provisions existed on July 1, 1995;

4. Rule 341 A of the American Stock Exchange, as such provisions existed on July 1, 1995;

5. Rule 9.3A of the Chicago Board of Options Exchange, as such provisions existed on July 1, 1995;

6. Article VI, Rule 9 of the Chicago Stock Exchange, as such provisions existed on July 1, 1995;

7. Rule 9.27(C) of the Pacific Stock Exchange, as such provisions existed on July 1, 1995; or

8. Rule 640 of the Philadelphia Stock Exchange, as such provisions existed on July 1, 1995.

Each or all of the education requirements standards listed above may be changed by each respective entity and if so changed will become a requirement if the change does not materially reduce the educational requirements expressed above or reduce the investor protection provided by the requirements.

D. No person shall publish, give publicity to, or circulate any notice, circular, advertisement, newspaper article, letter, investment service or communication which, though not purporting to offer a security for sale, describes the security, for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

E. The purpose of this subsection is to identify practices in the securities business which are generally associated with schemes to manipulate and to identify prohibited business conduct of broker-dealers or sales agents.

1. Entering into a transaction with a customer in any security at an unreasonable price or at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit.

2. Contradicting or negating the importance of any information contained in a prospectus or other offering materials with intent to deceive or mislead or using any advertising or sales presentation in a deceptive or misleading manner.

3. In connection with the offer, sale, or purchase of a security, falsely leading a customer to believe that the broker-dealer or agent is in possession of material, nonpublic information which would affect the value of the security.

4. In connection with the solicitation of a sale or purchase of a security, engaging in a pattern or practice of making contradictory recommendations to different investors of similar investment objective for some to sell and others to purchase the same security, at or about the same time, when not justified by the particular circumstances of each investor.

5. Failing to make a bona fide public offering of all the securities allotted to a broker-dealer for distribution by, among other things, (i) transferring securities to a customer, another broker-dealer or a fictitious account with the understanding that those securities will be returned to the broker-dealer or its nominees or (ii) parking or withholding securities.

6. Although nothing in this subsection precludes application of the general antifraud provisions against anyone for practices similar in nature to the practices discussed below, the following subdivisions a through f specifically apply only in connection with the solicitation of a purchase or sale of OTC (over the counter) unlisted non-NASDAQ equity securities:

a. Failing to advise the customer, both at the time of solicitation and on the confirmation, of any and all compensation related to a specific securities transaction to be paid to the agent including commissions, sales charges, or concessions.

b. In connection with a principal transaction, failing to disclose, both at the time of solicitation and on the confirmation, a short inventory position in the firm's account of more than 3.0% of the issued and outstanding shares of that class of securities of the issuer; however, subdivision 6 of this subsection shall apply only if the firm is a market maker at the time of the solicitation.

c. Conducting sales contests in a particular security.

d. After a solicited purchase by a customer, failing or refusing, in connection with a principal transaction, to promptly execute sell orders.

e. Soliciting a secondary market transaction when there has not been a bona fide distribution in the primary market.

f. Engaging in a pattern of compensating an agent in different amounts for effecting sales and purchases in the same security.

7. Effecting any transaction in, or inducing the purchase or sale of any security by means of any manipulative, deceptive or other fraudulent device or contrivance including but not limited to the use of boiler room tactics or use of fictitious or nominee accounts.

8. Failing to comply with any prospectus delivery requirements promulgated under federal law or the Act.

9. In connection with the solicitation of a sale or purchase of an OTC unlisted non-NASDAQ security, failing to promptly provide the most current prospectus or the most recently filed periodic report filed under § 13 of the Securities Exchange Act when requested to do so by a customer.

10. Marking any order tickets or confirmations as unsolicited when in fact the transaction was solicited.

11. For any month in which activity has occurred in a customer's account, but in no event less than every three months, failing to provide each customer with a statement of account with respect to all OTC non-NASDAQ equity securities in the account, containing a value for each such security based on the closing market bid on a date certain; however, this subdivision shall apply only if the firm has been a market maker in the security at any time during the month in which the monthly or quarterly statement is issued.

12. Failing to comply with any applicable provision of the Rules of Fair Practice of the NASD or any applicable fair practice or ethical standard promulgated by the SEC or by a self-regulatory organization approved by the SEC.

13. In connection with the solicitation of a purchase or sale of a designated security:

a. Failing to disclose to the customer the bid and ask price, at which the broker-dealer effects transactions with individual, retail customers, of the designated security as well as its spread in both percentage and dollar amounts at the time of solicitation and on the trade confirmation documents; or

b. Failing to include with the confirmation, the notice disclosure contained in subsection F of this section, except the following shall be exempt from this requirement:

(1) Transactions in which the price of the designated security is $5.00 or more, exclusive of costs or charges; however, if the designated security is a unit composed of one or more securities, the unit price divided by the number of components of the unit other than warrants, options, rights, or similar securities must be $5.00 or more, and any component of the unit that is a warrant, option, right, or similar securities, or a convertible security must have an exercise price or conversion price of $5.00 or more.

(2) Transactions that are not recommended by the broker-dealer or agent.

(3) Transactions by a broker-dealer: (i) whose commissions, commission equivalents, and mark-ups from transactions in designated securities during each of the preceding three months, and during 11 or more of the preceding 12 months, did not exceed 5.0% of its total commissions, commission-equivalents, and mark-ups from transactions in securities during those months; and (ii) who has not executed principal transactions in connection with the solicitation to purchase the designated security that is the subject of the transaction in the preceding 12 months.

(4) Any transaction or transactions that, upon prior written request or upon its own motion, the commission conditionally or unconditionally exempts as not encompassed within the purposes of this section.

c. For purposes of this section, the term "designated security" means any equity security other than a security:

(1) Registered, or approved for registration upon notice of issuance, on a national securities exchange and makes transaction reports available pursuant to 17 CFR 11Aa3-1 under the Securities Exchange Act of 1934;

(2) Authorized, or approved for authorization upon notice of issuance, for quotation in the NASDAQ system;

(3) Issued by an investment company registered under the Investment Company Act of 1940;

(4) That is a put option or call option issued by The Options Clearing Corporation; or

(5) Whose issuer has net tangible assets in excess of $4,000,000 as demonstrated by financial statements dated within no less than 15 months that the broker or dealer has reviewed and has a reasonable basis to believe are true and complete in relation to the date of the transaction with the person, and

(a) In the event the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with the provisions of ~~17 CFR 210.2.02~~ 17 CFR 210.2-02 under the Securities Exchange Act of 1934; or

(b) In the event the issuer is a foreign private issuer, are the most recent financial statements for the issuer that have been filed with the SEC; furnished to the SEC pursuant to ~~17 CFR 241.12g3-2(b)~~ 17 CFR 240.12g3-2(b) under the Securities Exchange Act of 1934; or prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction.

F. Customer notice requirements follow:

IMPORTANT CUSTOMER NOTICE - READ CAREFULLY

You have just entered into a solicited transaction involving a security which may not trade on an active national market. The following should help you understand this transaction and be better able to follow and protect your investment.

Q. What is meant by the BID and ASK price and the spread?

A. The BID is the price at which you could sell your securities at this time. The ASK is the price at which you bought. Both are noted on your confirmation. The difference between these prices is the "spread," which is also noted on the confirmation, in both a dollar amount and a percentage relative to the ASK price.

Q. How can I follow the price of my security?

A. For the most part, you are dependent on broker-dealers that trade in your security for all price information. You may be able to find a quote in the newspaper, but you

should keep in mind that the quote you see will be for dealer-to-dealer transactions (essentially wholesale prices and will not necessarily be the prices at which you could buy or sell).

Q. How does the spread relate to my investments?

A. The spread represents the profit made by your broker-dealer and is the amount by which your investment must increase (the BID must rise) for you to break even. Generally, a greater spread indicates a higher risk.

Q. How do I compute the spread?

A. If you bought 100 shares at an ASK price of $1.00, you would pay $100 (100 shares X $1.00 = $100). If the BID price at the time you purchased your stock was $.50, you could sell the stock back to the broker-dealer for $50 (100 shares X $.50 = $50). In this example, if you sold at the BID price, you would suffer a loss of 50%.

Q. Can I sell at any time?

A. Maybe. Some securities are not easy to sell because there are few buyers, or because there are no broker-dealers who buy or sell them on a regular basis.

Q. Why did I receive this notice?

A. The laws of some states require your broker-dealer or sales agent to disclose the BID and ASK price on your confirmation and include this notice in some instances. If the BID and ASK were not explained to you at the time you discussed this investment with your broker, you may have further rights and remedies under both state and federal law.

Q. Where do I go if I have a problem?

A. If you cannot work the problem out with your broker-dealer, you may contact the Virginia State Corporation Commission or the securities commissioner in the state in which you reside, the United States Securities and Exchange Commission, or the National Association of Securities Dealers, Inc.

G. ~~Engaging in or having engaged~~ No broker-dealer or agent shall engage in any conduct ~~specified in subsection A, B, C, D, or E of this section, or other conduct such as~~ that constitutes a dishonest or unethical practice, including, but not limited to, forgery, embezzlement, nondisclosure, incomplete disclosure or misstatement of material facts, ~~or~~ manipulative or deceptive practices ~~shall be grounds under the Act for imposition of a penalty, denial of a pending application or refusal to renew or revocation of an effective registration~~, or fraudulent course of business.

H. No broker-dealer or agent shall engage in any conduct specified in subsection A, B, C, D, E, or G of this section which shall be grounds under the Act for imposition of a penalty, denial of a pending application, refusal to renew, revocation of an effective registration, or any other action the Act shall allow.

CHAPTER 40
EXEMPT SECURITIES AND TRANSACTIONS

21VAC5-40-170. Offerings conducted pursuant to § 13.1-514 B 7 a; broker-dealer participation and solicitation.

In accordance with § 13.1-514 B 7 a of the Act, an offer or sale by an issuer through a registered broker-dealer and its registered agents is deemed not to be made to the general public by advertisement or solicitation if the offerees are existing customers of the participating registered broker-dealer or its registered agent whose accounts have been in existence for an amount of time sufficient to evidence the customers' suitability for the investment. For purposes of this section, "solicitation" is defined in 21VAC5-10-40.

Part I
Investment Advisor Registration, Notice Filing for Federal Covered Advisors, Expiration, Renewal, Updates and Amendments, Terminations and Merger or Consolidation

21VAC5-80-10. Application for registration as an investment advisor and notice filing as a federal covered advisor.

A. Application for registration as an investment advisor shall be filed in compliance with all requirements of the Investment Advisor Registration Depository (IARD) system and in full compliance with forms and regulations prescribed by the commission and shall include all information required by such forms.

B. An application shall be deemed incomplete for purposes of applying for registration as an investment advisor unless the following executed forms, fee and information are submitted:

1. Form ADV Parts I and II submitted to the IARD system.

2. The statutory fee in the amount of $200 submitted to the IARD system.

3. A copy of the client agreement.

4. A copy of the firm's supervisory and procedures manual as required by 21VAC5-80-170.

5. Copies of all advertising materials.

6. Copies of all stationery and business cards.

7. A signed affidavit stating that an investment advisor domiciled in Virginia has not conducted investment advisory business prior to registration, and for investment advisors domiciled outside of Virginia an affidavit stating that the advisor has fewer than six clients in any prior 12-month period.

8. The following financial statements:

a. A trial balance of all ledger account;

b. A statement of all client funds or securities that are not segregated;

c. A computation of the aggregate amount of client ledger debit balances;

d. A statement as to the number of client accounts;

e. Financial statements prepared in accordance with generally accepted accounting principles that shall include a balance sheet, income statement, and statement of cash flow.

9. A copy of the firm's disaster recovery plan as required by 21VAC5-80-160 F.

10. At least one qualified individual must have a registration pending on the IARD system on behalf of the investment advisor prior to the grant of registration.

11. ~~Any other information the commission may require~~ Form IA XRF, "Cross-Reference Between ADV Part II, ADV Part 1A/1B, Schedule F, Contract and Brochure."

12. Any other information the commission may require.

For purposes of this section, the term "net worth" means an excess of assets over liabilities, as determined by generally accepted accounting principles, but shall not include as assets: prepaid expenses (except as to items properly classified as assets under generally accepted accounting principles), deferred charges such as deferred income tax charges, goodwill, franchise rights, organizational expenses, patents, copyrights, marketing rights, unamortized debt discount and expense, all other assets of intangible nature, home furnishings, automobiles, and any other personal items not readily marketable in the case of an individual; advances or loans to stockholders and officers in the case of a corporation; and advances or loans to partners in the case of a partnership.

C. The commission shall either grant or deny each application for registration within 30 days after it is filed. However, if additional time is needed to obtain or verify information regarding the application, the commission may extend such period as much as 90 days by giving written notice to the applicant. No more than three such extensions may be made by the commission on any one application. An extension of the initial 30-day period, not to exceed 90 days, shall be granted upon written request of the applicant.

D. Every person who transacts business in this Commonwealth as a federal covered advisor shall file a notice as prescribed in subsection E of this section in compliance with all requirements of the Investment Advisor Registration Depository (IARD) system.

E. A notice filing for a federal covered advisor shall be deemed incomplete unless the following executed forms, fee and information are submitted:

1. Form ADV.

2. The statutory fee in the amount of $200 submitted to the IARD system.

Part III
Investment Advisor, Federal Covered Advisor and Investment Advisor Representative Regulations

21VAC5-80-145. Custody requirements for investment advisors.

A. For purposes of this section, the following definitions shall apply:

1. "Custody" means holding directly or indirectly, client funds or securities, or having any authority to obtain possession of them [(which may include possession of a user ID and password)].

a. Custody includes:

(1) Possession of client funds or securities [~~(which includes possession of the user ID and password of a client's retirement or securities accounts)~~] unless received inadvertently and returned to the sender promptly, but in any case within three business days of receiving them;

(2) Any arrangement (including a general power of attorney) under which the investment advisor is permitted to withdraw client funds or securities maintained with a custodian upon the investment advisor's instruction to the custodian; and

(3) Any capacity (such as general partner of a limited partnership, managing member of a limited liability company, or a comparable position for another type of pooled investment vehicle, or trustee of a trust) that gives the investment advisor or the investment advisor's supervised person legal ownership of or access to client funds or securities.

b. Receipt of client's securities or checks drawn by clients and made payable to unrelated third parties will not meet the definition of custody if forwarded to the third party within 24 hours of receipt and the advisor maintains the following records:

(1) A ledger or other listing of all securities or funds held or obtained, including the following information:

(a) Issuer;

(b) Type of security and series;

(c) Date of issue;

(d) For debt instruments, the denomination, interest rate and maturity date;

(e) Certificate number, including alphabetical prefix or suffix;

(f) Name in which registered;

(g) Date given to the advisor;

(h) Date sent to client or sender;

(i) Form of delivery to client or sender, or copy of the form of delivery to client or sender; and

(j) Mail confirmation number, if applicable, or confirmation by client or sender of the fund's or security's return.

2. "Independent representative" means a person who:

a. Acts as agent for an advisory client, including in the case of a pooled investment vehicle, for limited partners of a limited partnership, members of a limited liability company, or other beneficial owners of another type of pooled investment vehicle and by law or contract is obliged to act in the best interest of the advisory client or the limited partners, members, or other beneficial owners;

b. Does not control, is not controlled by, and is not under common control with the investment advisor; and

c. Does not have, and has not had within the past two years, a material business relationship with the investment advisor.

3. "Qualified custodian" means the following independent institutions or entities that are not affiliated with the advisor by any direct or indirect common control and have not had a material business relationship with the advisor in the previous two years:

a. A bank or savings association that has deposits insured by the Federal Deposit Insurance Corporation under the Federal Deposit Insurance Act, 12 USC § 1813;

b. A registered broker-dealer holding the client assets in customer accounts;

c. A registered futures commission merchant registered under § 4f(a) of the Commodity Exchange Act, 7 USC § 6f(a), holding the client assets in customer accounts, but only with respect to clients' funds and security futures, or other securities incidental to transactions in contracts for the purchase or sale of a commodity for future delivery and options thereon; and

d. A foreign financial institution that customarily holds financial assets for its customers, provided that the foreign financial institution keeps the advisory clients' assets in customer accounts segregated from its proprietary assets.

B. Requirements.

1. If the investment advisor is registered or required to be registered, it is unlawful and deemed to be a fraudulent, deceptive, or manipulative act, practice, or course of business under § ~~13.1-502~~ 13.1-503 of the Virginia Securities Act for the investment advisor to have custody of client funds or securities unless:

a. The investment advisor notifies the commission in writing that the investment advisor has or may have custody. Such notification is required on Form ADV submitted to the IARD system;

b. A qualified custodian maintains those funds and securities in a separate account for each client under that client's name or in accounts that contain only investment advisor's clients' funds and securities, under the investment advisor's name as agent or trustee for the clients;

c. If the investment advisor opens an account with a qualified custodian on his client's behalf, either under the client's name or under the investment advisor's name as agent, the investment advisor must notify the client in writing of the qualified custodian's name, address, and the manner in which the funds or securities are maintained, promptly when the account is opened and following any changes to this information;

d. At least quarterly, the investment advisor sends ~~an~~ a copy of the qualified custodian's account statements or a proprietary account statement to each client for whom the investment advisor has custody of funds or securities, identifying the amount of funds and of each security of which the investment advisor has custody at the end of the period and setting forth all transactions during that period~~,~~ and if proprietary account statements are utilized or the advisor has custody pursuant to subdivision A 1 a (3) of this section and does not comply with subdivision 4 of this subsection;

(1) An independent certified public accountant verifies all client funds and securities by actual examination at least once during each calendar year at a time chosen by the accountant without prior notice or announcement to the advisor and that is irregular from year to year, and files a copy of the auditor's report and financial statements with the commission within 30 days after the completion of the examination, along with a letter stating that it has examined the funds and securities and describing the nature and extent of the examination~~.~~;

(2) The independent certified public accountant, upon finding any material discrepancies during the course of the examination, notifies the commission within one business day of the finding, by means of a facsimile transmission or electronic mail, followed by first class mail, directed to the attention of the Division of Securities and Retail Franchising~~.~~;

(3) If the investment advisor is a general partner of a limited partnership (or managing member of a limited liability company, or holds a comparable position for

another type of pooled investment vehicle), the account statements required under subdivision 1 d of this subsection must be sent to each limited partner (or member or other beneficial owner or their independent representative).; and

(4) A client may designate an independent representative to receive, on his behalf, notices and account statements as required under subdivisions 1 c and d of this subsection.

2. An advisor who has custody as defined in subdivision A 1 a (2) of this section by having fees directly deducted from client accounts shall provide the following safeguards:

a. The investment advisor must have written authorization from the client to deduct advisory fees from the account held with the qualified custodian.

b. Each time a fee is directly deducted from a client account, the investment advisor must concurrently:

(1) Send Unless a qualified custodian is calculating the fee, send the qualified custodian an invoice of the amount of the fee to be deducted from the client's account; and

(2) Send the client an invoice itemizing the fee. Itemization includes the formula used to calculate the fee, the amount of assets under management the fee is based on, and the time period covered by the fee. The invoice will notify the client that the custodian will not be checking the accuracy of the fees and this responsibility is the client's.

c. The investment advisor notifies the commission in writing that the investment advisor intends to use the safeguards provided above. Such notification is required to be given on Schedule F of the Form ADV.

d. An investment advisor having custody solely because it meets the definition of custody as defined in subdivision A 1 a (2) of this section and who complies with the safekeeping requirements in subdivisions 1 and 2 of this subsection will not be required to meet the financial requirements for custodial advisors as set forth in 21VAC5-80-180 and subdivisions 1 d (1) and (2) of this subsection provided the investment advisor sends a copy of the qualified custodian's account statements in accordance with subdivision 1 d of this subsection.

3. An investment advisor who has custody as defined in subdivision A 1 a (3) of this section and who does not meet the exception provided in subdivision C 3 of this section must, in addition to the safeguards set forth in subdivisions 1 a through d of this subsection, also comply with the following:

a. Hire an a qualified independent party to review all fees, expenses, and capital withdrawals from the pooled accounts.

b. Send all invoices or receipts to the qualified independent party, detailing the amount of the fee, expenses, or capital withdrawal and the method of calculation such that the qualified independent party can:

(1) Determine that the payment is in accordance with the pooled investment vehicle standards (generally the partnership agreement or membership agreement); and

(2) Forward, to the qualified custodian, approval for payment of the invoice with a copy to the investment advisor.

c. For purposes of this section, an a qualified independent party means a person who:

(1) Is engaged by an investment advisor to act as a financially qualified gatekeeper for the payment of fees, expenses, and capital withdrawals from the pooled investment (Examples would include an independent CPA or an attorney);

(2) Does not control and is not controlled by and is not under common control with the investment advisor, either directly or indirectly; and

(3) Does not have, and has not had within the past two years, a any other material business relationship with the investment advisor.

d. The investment advisor notifies the commission in writing that the investment advisor intends to use the safeguards provided above. Such notification is required to be given on Schedule F of the Form ADV.

e. An investment advisor having custody solely because it meets the definition of custody as defined in subdivision A 1 a (3) of this section and who complies with the safekeeping requirements in subdivisions 1 and 3 of this subsection will not be required to meet the financial requirements for custodial advisors as set forth in 21VAC5-80-180 and subdivisions 1 d (1) and (2) of this subsection.

4. When a trust retains an investment advisor, investment advisor representative, or employee, director, or owner of an investment advisor as trustee, and the investment advisor acts as the investment advisor to that trust, the investment advisor shall:

a. Notify the commission in writing that the investment advisor intends to use the safeguards provided below. Such notification is required to be given on Form ADV submitted to the IARD system.

b. Send to the grantor of the trust, the attorney for the trust if it is a testamentary trust, the co-trustee (other than

the investment advisor; investment advisor representative; or employee, director, or owner of the investment advisor); or a defined beneficiary of the trust, at the same time that it sends any invoice to the qualified custodian, an invoice showing the amount of the trustees' fee or investment management or advisory fee, the value of the assets on which the fees were based, and the specific manner in which the fees were calculated. The invoice will notify the recipient that the custodian will not be checking the accuracy of the fees and that the responsibility is either the grantor's, trust's attorney's, co-trustee's or beneficiary's.

c. Enter into a written agreement with a qualified custodian that specifies the qualified custodian will not deliver trust securities to the investment advisor, any investment advisor representative or employee, director, or owner of the investment advisor, nor will transmit any funds to the investment advisor; any investment advisor representative or employee; director or owner of the investment advisor, except that the qualified custodian may pay trustees' fees to the trustee and investment management or advisory fees to investment advisor, provided that:

(1) The grantor of the trust or attorneys for the trust, if it is a testamentary trust, the co-trustee (other than the investment advisor; investment advisor representative; or employee, director, or owner of the investment advisor); or a defined beneficiary of the trust has authorized the qualified custodian in writing to pay those fees;

(2) The statements for those fees show the amount of the fees for the trustee and, in the case of statements for investment management or advisory fees, show the value of the trust assets on which the fee is based and the manner in which the fee was calculated; and

(3) The qualified custodian agrees to send to the grantor of the trust, the attorneys for a testamentary trust, the co-trustee (other than the investment advisor; investment advisor representative; or employee, director, or owner of the investment advisor); or a defined beneficiary of the trust, at least quarterly, a statement of all disbursements from the account of the trust, including the amount of investment management fees paid to the investment advisor and the amount of trustees' fees paid to the trustee.

d. Except as otherwise set forth in subdivision 4 d (1) of this subsection, the qualified custodian may transfer funds or securities, or both, of the trust only upon the direction of the trustee (who may be the investment advisor; investment advisor representative; or employee, director, or owner of the investment advisor), who the investment advisor has duly accepted as an authorized signatory. The grantor of the trust or attorneys for the trust, if it is a testamentary trust, the co-trustee (other than the investment advisor; investment advisor representative; or employee, director, or owner of the investment advisor); or a defined beneficiary of the trust, must designate the authorized signatory for management of the trust. The direction to transfer funds or securities, or both, can only be made to the following:

(1) To a trust company, bank trust department, or brokerage firm independent of the investment advisor for the account of the trust to which the assets relate;

(2) To the named grantors or to the named beneficiaries of the trust;

(3) To a third person independent of the investment advisor in payment of the fees or charges of the third person including, but not limited to:

(a) Attorney's, accountant's, or qualified custodian's fees for the trust; and

(b) Taxes, interest, maintenance, or other expenses, if there is property other than securities or cash owned by the trust;

(4) To third persons independent of the investment advisor for any other purpose legitimately associated with the management of the trust; or

(5) To a broker-dealer in the normal course of portfolio purchases and sales, provided that the transfer is made on payment against delivery basis or payment against trust receipt.

e. An investment advisor having custody solely because it meets the definition of custody as defined in subdivision A 1 a (3) of this section and who complies with the safekeeping requirements in subdivisions 1 and 4 of this subsection, will not be required to meet the financial requirements for custodial advisors as set forth in 21VAC5-80-180.

C. Exceptions.

1. With respect to shares of an open-end company as defined in § 5(a)(1) of the Investment Company Act of 1940, 15 USC § 80a-5(a)(1) (mutual fund), the investment advisor may use the mutual fund's transfer agent in lieu of a qualified custodian for purposes of complying with subsection B of this section.

2. Certain privately offered securities.

a. An investment advisor is not required to comply with subsection B of this section with respect to securities that are:

(1) Acquired from the unaffiliated issuer in a transaction or chain of transactions not involving any public offering;

(2) Uncertificated, and ownership thereof is recorded only on books of the issuer or its transfer agent in the name of the client; and

(3) Transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

b. Notwithstanding subdivision 2 a of this subsection, the provisions of subdivision 2 of this subsection are available with respect to securities held for the account of a limited partnership (or limited liability company, or other type of pooled investment vehicle) only if the limited partnership is audited, the audited financial statements are distributed, as described in subdivision 3 of this subsection and the investment advisor notifies the commission in writing that the investment advisor intends to provide audited financial statements, as described above. Such notification is required to be given on Schedule F of the Form ADV.

3. The investment advisor is not required to comply with subdivision B 1 ~~c~~ d (1) through (3) of this section with respect to the account of a limited partnership (or limited liability company, or another type of pooled investment vehicle) that is subject to audit at least annually and distributes its audited financial statements prepared in accordance with generally accepted accounting principles to all limited partners (or members or other beneficial owners) within 120 days of the end of its fiscal year. The investment advisor shall also notify the commission in writing that the investment advisor intends to employ the use of the audit safeguards described above. Such notification is required to be given on Schedule F of the Form ADV.

4. The investment advisor is not required to comply with this section with respect to the account of an investment company registered under the Investment Company Act of 1940, 15 USC §§ 80a-1 to 80a-64.

5. The investment advisor is not required to comply with safekeeping requirements of subsection B of this section or the net worth and bonding requirements of 21VAC5-80-180 if the investment advisor has custody solely because the investment advisor, investment advisor representative or employee, director, or owner of the investment advisor is a trustee for a beneficial trust, if all of the following conditions are met for each trust:

a. The beneficial owner of the trust is a parent, a grandparent, a spouse, a sibling, a child, ~~or~~ a grandchild, or other family relative designated as the legal beneficiary of the trustee. These relationships shall include "step" relationships.

b. For each account under subdivision 5 a of this subsection the investment advisor complies with the following:

(1) Provide a written statement to each beneficial owner of the account setting forth a description of the requirements of subsection B of this section and the reasons why the investment advisor will not be complying with those requirements.

(2) Obtain from each beneficial owner a signed and dated statement acknowledging the receipt of the written statement required under subdivision 5 ~~a~~ b (1) of this subsection.

(3) Maintain a copy of both documents described in subdivisions 5 ~~a~~ b (1) and (2) of this subsection until the account is closed or the investment advisor is no longer trustee.

6. Any investment advisor who intends to have custody of client funds or securities but is not able to utilize a qualified custodian as defined in subdivision A 3 of this section shall first obtain specific approval, in writing, from the commission and comply with all of the applicable safekeeping provisions under subsection B of this section including taking responsibility for those provisions that are designated to be performed by a qualified custodian.

21VAC5-80-160. Recordkeeping requirements for investment advisors.

A. Every investment advisor registered or required to be registered under the Act shall make and keep true, accurate and current the following books, ledgers and records, except an investment advisor having its principal place of business outside this Commonwealth and registered or licensed, and in compliance with the applicable books and records requirements, in the state where its principal place of business is located, shall only be required to make, keep current, maintain and preserve such of the following required books, ledgers and records as are not in addition to those required under the laws of the state in which it maintains its principal place of business:

1. A journal or journals, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger.

2. General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.

3. A memorandum of each order given by the investment advisor for the purchase or sale of any security, of any instruction received by the investment advisor from the client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. The memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment advisor who recommended the transaction to the client and the

person who placed the order; and shall show the account for which entered, the date of entry, and the bank, broker or dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.

4. All check books, bank statements, canceled checks and cash reconciliations of the investment advisor.

5. All bills or statements (or copies of), paid or unpaid, relating to the business as an investment advisor.

6. All trial balances, financial statements prepared in accordance with generally accepted accounting principles which shall include a balance sheet, income statement and such other statements as may be required pursuant to 21VAC5-80-180, and internal audit working papers relating to the investment advisor's business as an investment advisor.

7. Originals of all written communications received and copies of all written communications sent by the investment advisor relating to (i) any recommendation made or proposed to be made and any advice given or proposed to be given; (ii) any receipt, disbursement or delivery of funds or securities; and (iii) the placing or execution of any order to purchase or sell any security; however, (a) the investment advisor shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment advisor, and (b) if the investment advisor sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment advisor shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if the notice, circular or advertisement is distributed to persons named on any list, the investment advisor shall retain with a copy of the notice, circular or advertisement a memorandum describing the list and the source thereof.

8. A list or other record of all accounts which list identifies the accounts in which the investment advisor is vested with any discretionary power with respect to the funds, securities or transactions of any client.

9. All powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment advisor, or copies thereof.

10. All written agreements (or copies thereof) entered into by the investment advisor with any client, and all other written agreements otherwise related to the investment advisor's business as an investment advisor.

11. A file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment advisor circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment advisor), and if the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, a memorandum of the investment adviser indicating the reasons for the recommendation.

12. a. A record of every transaction in a security in which the investment advisor or any investment advisory representative of the investment advisor has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except (i) transactions effected in any account over which neither the investment advisor nor any investment advisory representative of the investment advisor has any direct or indirect influence or control; and (ii) transactions in securities which are direct obligations of the United States. The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment advisor or investment advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

b. For purposes of this subdivision 12, the following definitions will apply. The term "advisory representative" means any partner, officer or director of the investment advisor; any employee who participates in any way in the determination of which recommendations shall be made; any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment advisor prior to the effective dissemination of the recommendations:

(1) Any person in a control relationship to the investment adviser;

(2) Any affiliated person of a controlling person; and

(3) Any affiliated person of an affiliated person.

"Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with the company. Any person who owns

beneficially, either directly or through one or more controlled companies, more than 25% of the ownership interest of a company shall be presumed to control the company.

c. An investment advisor shall not be deemed to have violated the provisions of this subdivision 12 because of his failure to record securities transactions of any investment advisor representative if the investment advisor establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

13. a. Notwithstanding the provisions of subdivision 12 of this subsection, where the investment advisor is primarily engaged in a business or businesses other than advising investment advisory clients, a record must be maintained of every transaction in a security in which the investment advisor or any investment advisory representative of such investment advisor has, or by reason of such transaction acquires, any direct or indirect beneficial ownership, except (i) transactions effected in any account over which neither the investment advisor nor any investment advisory representative of the investment advisor has any direct or indirect influence or control; and (ii) transactions in securities which are direct obligations of the United States. The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment advisor or investment advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

b. An investment advisor is "primarily engaged in a business or businesses other than advising investment advisory clients" when, for each of its most recent three fiscal years or for the period of time since organization, whichever is less, the investment advisor derived, on an unconsolidated basis, more than 50% of (i) its total sales and revenues, and (ii) its income (or loss) before income taxes and extraordinary items, from such other business or businesses.

c. For purposes of this subdivision 13, the following definitions will apply. The term "advisory representative," when used in connection with a company primarily engaged in a business or businesses other than advising investment advisory clients, means any partner, officer, director or employee of the investment advisor who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons, who obtain information concerning securities recommendations being made by the investment advisor prior to the effective dissemination of the recommendations or of the information concerning the recommendations:

(1) Any person in a control relationship to the investment advisor;

(2) Any affiliated person of a controlling person; and

(3) Any affiliated person of an affiliated person.

d. An investment advisor shall not be deemed to have violated the provisions of this subdivision 13 because of his failure to record securities transactions of any investment advisor representative if he establishes that he instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

14. A copy of each written statement and each amendment or revision, given or sent to any client or prospective client of such investment advisor in accordance with the provisions of 21VAC5-80-190 and a record of the dates that each written statement, and each amendment or revision, was given, or offered to be given, to any client or prospective client who subsequently becomes a client.

15. For each client that was obtained by the advisor by means of a solicitor to whom a cash fee was paid by the advisor, the following:

a. Evidence of a written agreement to which the advisor is a party related to the payment of such fee;

b. A signed and dated acknowledgement of receipt from the client evidencing the client's receipt of the investment advisor's disclosure statement and a written disclosure statement of the solicitor; and [,]

c. A copy of the solicitor's written disclosure statement. The written agreement, acknowledgement and solicitor disclosure statement will be considered to be in compliance if such documents are in compliance with Rule 275.206(4)-3 of the Investment Advisers Act of 1940.

For purposes of this regulation, the term "solicitor" means any person or entity who, for compensation, acts as an agent of an investment advisor in referring potential clients.

16. All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of all managed accounts or securities

recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including but not limited to electronic media that the investment advisor circulates or distributes directly or indirectly, to two or more persons (other than persons connected with the investment advisor); however, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this subdivision.

17. A file containing a copy of all written communications received or sent regarding any litigation involving the investment advisor or any investment advisor representative or employee, and regarding any written customer or client complaint.

18. Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to the client.

19. Written procedures to supervise the activities of employees and investment advisor representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations.

20. A file containing a copy of each document (other than any notices of general dissemination) that was filed with or received from any state or federal agency or self regulatory organization and that pertains to the registrant or its investment advisor representatives, which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.

21. Any records documenting dates, locations and findings of the investment advisor's annual review of these policies and procedures conducted pursuant to subdivision E 2 of 21VAC5-80-170.

22. Form IA XRF, "Cross-Reference Between ADV Part II, ADV Part 1A/1B, Schedule F, Contract and Brochure."

B. If an investment advisor subject to subsection A of this section has custody or possession of securities or funds of any client, the records required to be made and kept under subsection A of this section shall also include:

1. A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for such accounts and all other debits and credits to the accounts.

2. A separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits.

3. Copies of confirmations of all transactions effected by or for the account of any client.

4. A record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client, and the location of each security.

5. A copy of any records required to be made and kept under 21VAC5-80-145.

C. Every investment advisor subject to subsection A of this section who renders any investment advisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment advisor, make and keep true, accurate and current:

1. Records showing separately for each client the securities purchased and sold, and the date, amount and price of each purchase and sale.

2. For each security in which any client has a current position, information from which the investment advisor can promptly furnish the name of each client and the current amount or interest of the client.

D. Any books or records required by this section may be maintained by the investment advisor in such manner that the identity of any client to whom the investment advisor renders investment advisory services is indicated by numerical or alphabetical code or some similar designation.

E. Every investment advisor subject to subsection A of this section shall preserve the following records in the manner prescribed:

1. All books and records required to be made under the provisions of subsection A through subdivision C 1, inclusive, of this section, except for books and records required to be made under the provisions of subdivisions A 11 and A 16 of this section, shall be maintained in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on record, the first two years of which shall be maintained in the principal office of the investment advisor.

2. Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment advisor and of any predecessor, shall be maintained in the principal office of the investment advisor and preserved until at least three years after termination of the enterprise.

3. Books and records required to be made under the provisions of subdivisions A 11 and A 16 of this section shall be maintained in an easily accessible place for a period of not less than five years, the first two years of which shall be maintained in the principal office of the

investment advisor, from the end of the fiscal year during which the investment advisor last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media.

4. Books and records required to be made under the provisions of subdivisions A 17 through A ~~20~~ 22, inclusive, of this section shall be maintained and preserved in an easily accessible place for a period of not less than five years, from the end of the fiscal year during which the last entry was made on such record, the first two years in the principal office of the investment advisor, or for the time period during which the investment advisor was registered or required to be registered in the state, if less.

5. Notwithstanding other record preservation requirements of this subsection, the following records or copies shall be required to be maintained at the business location of the investment advisor from which the customer or client is being provided or has been provided with investment advisory services: (i) records required to be preserved under subdivisions A 3, A 7 through A 10, A 14 and A 15, A 17 through A 19, subsections B and C, and (ii) the records or copies required under the provision of subdivisions A 11 and A 16 of this section which records or related records identify the name of the investment advisor representative providing investment advice from that business location, or which identify the business locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in this subsection.

F. Every investment advisor shall establish and maintain a written disaster recovery plan that shall address at a minimum:

1. The identity of individuals that will conduct or wind down business on behalf of the investment advisor in the event of death or incapacity of key persons;

2. Means to provide notification to clients of the investment advisor and to those states in which the advisor is registered of the death or incapacity of key persons;

a. Notification shall be provided to the Division of Securities and Retail Franchising via the IARD/CRD system within 24 hours of the death or incapacity of key persons.

b. Notification shall be given to clients within five business days from the death or incapacity of key persons.

3. Means for clients' accounts to continue to be monitored until an orderly liquidation, distribution or transfer of the clients' portfolio to another advisor can be achieved or until an actual notice to the client of investment advisor death or incapacity and client control of their assets occurs;

4. Means for the credit demands of the investment advisor to be met; and

5. Data backups sufficient to allow rapid resumption of the investment advisor's activities.

G. An investment advisor subject to subsection A of this section, before ceasing to conduct or discontinuing business as an investment advisor, shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section, and shall notify the commission in writing of the exact address where the books and records will be maintained during such period.

H. 1. The records required to be maintained pursuant to this section may be immediately produced or reproduced by photograph on film or, as provided in subdivision 2 of this subsection, on magnetic disk, tape or other computer storage medium, and be maintained for the required time in that form. If records are preserved or reproduced by photographic film or computer storage medium, the investment advisor shall:

a. Arrange the records and index the films or computer storage medium so as to permit the immediate location of any particular record;

b. Be ready at all times to promptly provide any facsimile enlargement of film or computer printout or copy of the computer storage medium which the commission by its examiners or other representatives may request;

c. Store separately from the original one other copy of the film or computer storage medium for the time required;

d. With respect to records stored on computer storage medium, maintain procedures for maintenance of, and access to, records so as to reasonably safeguard records from loss, alteration, or destruction; and

e. With respect to records stored on photographic film, at all times have available, for the commission's examination of its records, facilities for immediate, easily readable projection of the film and for producing easily readable facsimile enlargements.

2. Pursuant to subdivision 1 of this subsection, an advisor may maintain and preserve on computer tape or disk or other computer storage medium records which, in the ordinary course of the advisor's business, are created by the advisor on electronic media or are received by the advisor solely on electronic media or by electronic transmission.

I. Any book or record made, kept, maintained, and preserved in compliance with SEC Rules 17a-3 (17 CFR 240.17a-3) and 17a-4 (17 CFR 240.17a-4) under the Securities Exchange Act of 1934, which is substantially the same as the book, or other

record required to be made, kept, maintained, and preserved under this section shall be deemed to be made, kept, maintained, and preserved in compliance with this section.

J. For purposes of this section, "investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client; and "discretionary power" shall not include discretion as to the price at which or the time when a transaction is or is to be effected if, before the order is given by the investment advisor, the client has directed or approved the purchase or sale of a definite amount of the particular security.

K. For purposes of this section, "principal place of business" and "principal office" mean the executive office of the investment advisor from which the officers, partners, or managers of the investment advisor direct, control, and coordinate the activities of the investment advisor.

L. Every investment advisor registered or required to be registered in this Commonwealth and has its principal place of business in a state other than the Commonwealth shall be exempt from the requirements of this section to the extent provided by the National Securities Markets Improvement Act of 1996 (Pub.L. No. 104-290), provided the investment advisor is licensed in such state and is in compliance with such state's recordkeeping requirements.

21VAC5-80-170. Supervision of investment advisor representatives.

A. An investment advisor shall be responsible for the acts, practices, and conduct of its investment advisor representatives in connection with advisory services until such time as the investment advisor representatives have been properly terminated as provided by 21VAC5-80-110.

B. Every investment advisor shall exercise diligent supervision over the advisory activities of all of its investment advisor representatives.

C. Every investment advisor representative employed by an investment advisor shall be subject to the supervision of a supervisor designated by such investment advisor. The supervisor may be the investment advisor in the case of a sole proprietor, or a partner, officer, office manager or any qualified investment advisor representative in the case of entities other than sole proprietorships. All designated supervisors shall exercise reasonable supervision over the advisory activities of all investment advisor representatives under their responsibility.

D. As part of its responsibility under this section, every investment advisor, except entities employing no more than one investment advisor representative, shall establish, maintain and enforce written procedures, a copy of which shall be kept in each business office, which shall set forth the procedures adopted by the investment advisor to comply with the Act and associated regulations, which shall include but not be limited to the following duties imposed by this section; provided that an investment advisor having its principal place of business outside this Commonwealth and registered or licensed, and in compliance with the applicable books and records requirements, in the state where its principal place of business is located, shall only be required to make, keep current, maintain and preserve such of the following required books, ledgers and records as are not in addition to those required under the laws of the state in which it maintains its principal place of business:

1. The review and written approval by the designated supervisor of the opening of each new client account;

2. The frequent examination of all client accounts to detect and prevent irregularities or abuses;

3. The prompt review and written approval by a designated supervisor of all advisory transactions by investment advisor representatives and of all correspondence pertaining to the solicitation or execution of all advisory transactions by investment advisor representatives;

4. The prompt review and written approval of the handling of all client complaints.

E. Every investment advisor who has designated more than one supervisor pursuant to subsection C of this section shall designate from among its partners, officers, or other qualified investment advisor representatives, a person or group of persons, independent from the designated business supervisor or supervisors who shall:

1. Supervise and periodically review the activities of the supervisors designated pursuant to subsection C of this section; and

2. No less often than annually ~~inspect~~, conduct a physical inspection of each business office under his supervision to ensure that the written procedures and compliance requirements are being enforced.

All supervisors designated pursuant to this subsection E shall exercise reasonable supervision over the supervisors under their responsibility to insure compliance with this subsection.

21VAC5-80-200. Dishonest or unethical practices.

A. An investment advisor or federal covered advisor is a fiduciary and has a duty to act primarily for the benefit of his clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment advisor or federal covered advisor and his clients and the circumstances of each case, an investment advisor or federal covered advisor shall not engage in unethical practices, including the following:

1. Recommending to a client to whom investment supervisory, management or consulting services are

provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation, risk tolerance and needs, and any other information known or acquired by the investment advisor or federal covered advisor after reasonable examination of the client's financial records.

2. Placing an order to purchase or sell a security for the account of a client without written authority to do so.

3. Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party authorization from the client.

4. Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within 10 business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

5. Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account.

6. Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment advisor or federal covered advisor, or a financial institution engaged in the business of loaning funds or securities.

7. Loaning money to a client unless the investment advisor or federal covered advisor is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment advisor or federal covered advisor.

8. Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment advisor or federal covered advisor, or misrepresenting the nature of the advisory services being offered or fees to be charged for the services, or omission to state a material fact necessary to make the statements made regarding qualifications services or fees, in light of the circumstances under which they are made, not misleading.

9. Providing a report or recommendation to any advisory client prepared by someone other than the investment advisor or federal covered advisor without disclosing that fact. This prohibition does not apply to a situation where the advisor uses published research reports or statistical analyses to render advice or where an advisor orders such a report in the normal course of providing service.

10. Charging a client an unreasonable advisory fee in light of the fees charged by other investment advisors or federal covered advisors providing essentially the same services.

11. Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment advisor or federal covered advisor or any of his employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:

a. Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; or

b. Charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the advisor or his employees.

12. Guaranteeing a client that a specific result will be achieved as a result of the advice which will be rendered.

13. Directly or indirectly using any advertisement that does any one of the following:

a. Refers to any testimonial of any kind concerning the investment advisor or investment advisor representative or concerning any advice, analysis, report, or other service rendered by the investment advisor or investment advisor representative;

b. Refers to past specific recommendations of the investment advisor or investment advisor representative that were or would have been profitable to any person; except that an investment advisor or investment advisor representative may furnish or offer to furnish a list of all recommendations made by the investment advisor or investment advisor representative within the immediately preceding period of not less than one year if the advertisement or list also includes both of the following:

(1) The name of each security recommended, the date and nature of each recommendation, the market price at that time, the price at which the recommendation was to be acted upon, and the most recently available market price of each security; ~~or~~ and

(2) A legend on the first page in prominent print or type that states that the reader should not assume that recommendations made in the future will be profitable or will equal the performance of the securities in the list;

c. Represents that any graph, chart, formula, or other device being offered can be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or indirectly, that any graph, chart, formula, or other device being offered will assist any person in making that person's own decisions as to which securities to buy or sell, or when to buy or sell

them, without prominently disclosing in the advertisement the limitations thereof and the risks associated to its use;

d. Represents that any report, analysis, or other service will be furnished for free or without charge, unless the report, analysis, or other service actually is or will be furnished entirely free and without any direct or indirect condition or obligation;

e. Represents that the commission has approved any advertisement; or

f. Contains any untrue statement of a material fact, or that is otherwise false or misleading.

For the purposes of this section, the term "advertisement" includes any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any electronic or paper publication, by radio or television, or by any medium, that offers any one of the following:

(i) Any analysis, report, or publication concerning securities;

(ii) Any analysis, report, or publication that is to be used in making any determination as to when to buy or sell any security or which security to buy or sell;

(iii) Any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell; or

(iv) Any other investment advisory service with regard to securities.

14. Disclosing the identity, affairs, or investments of any client to any third party unless required by law or an order of a court or a regulatory agency to do so, or unless [~~positively~~] consented to by the client [~~, in writing~~].

15. Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment advisor has custody or possession of such securities or funds, when the investment advisor's action is subject to and does not comply with the safekeeping requirements of 21VAC5-80-145.

16. Entering into, extending or renewing any investment advisory contract unless the contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the investment advisor or federal covered advisor and that no assignment of such contract shall be made by the investment advisor or federal covered advisor without the consent of the other party to the contract.

17. Failing to clearly and separately disclose to its customer, prior to any security transaction, providing investment advice for compensation or any materially related transaction that the customer's funds or securities will be in the custody of an investment advisor or contracted custodian in a manner that does not provide Securities Investor Protection Corporation protection, or equivalent third-party coverage over the customer's assets.

18. Using a certification or professional designation in connection with the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees in such a way as to mislead any person.

a. The use of such certification or professional designation includes, but is not limited to, the following:

(1) Use of a certification or designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) Use of a nonexistent or self-conferred certification or professional designation;

(3) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; or

(4) Use of a certification or professional designation that was obtained from a designating or certifying organization that:

(a) Is primarily engaged in the business of instruction in sales and/or marketing;

(b) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(c) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(d) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

b. There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subdivision 18 a (4) of this subsection, when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The ~~National Commission for Certifying Agencies~~ Institute for Credentialing Excellence (formerly the National Commission for Certifying Agencies); or

(3) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales and/or marketing.

c. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

(1) Use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) The manner in which those words are combined.

d. For purposes of this section, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title:

(1) Indicates seniority within the organization; or

(2) Specifies an individual's area of specialization within the organization.

For purposes of this subdivision d, "financial services regulatory agency" includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under § 3 (a)(1) of the Investment Company Act of 1940 (15 USC § 80a-3(a)(1)).

e. Nothing in this regulation shall limit the commission's authority to enforce existing provisions of the law.

B. An investment advisor representative is a fiduciary and has a duty to act primarily for the benefit of his clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment advisor representative and his clients and the circumstances of each case, an investment advisor representative shall not engage in unethical practices, including the following:

1. Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known or acquired by the investment advisor representative after reasonable examination of the client's financial records.

2. Placing an order to purchase or sell a security for the account of a client without written authority to do so.

3. Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party authorization from the client.

4. Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within 10 business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

5. Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account.

6. Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment advisor representative, or a financial institution engaged in the business of loaning funds or securities.

7. Loaning money to a client unless the investment advisor representative is engaged in the business of loaning funds or the client is an affiliate of the investment advisor representative.

8. Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment advisor representative, or misrepresenting the nature of the advisory services being offered or fees to be charged for the services, or omission to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.

9. Providing a report or recommendation to any advisory client prepared by someone other than the investment advisor or federal covered advisor who the investment advisor representative is employed by or associated with without disclosing that fact. This prohibition does not apply to a situation where the investment advisor or federal covered advisor uses published research reports or statistical analyses to render advice or where an investment advisor or federal covered advisor orders such a report in the normal course of providing service.

10. Charging a client an unreasonable advisory fee in light of the fees charged by other investment advisor representatives providing essentially the same services.

11. Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment advisor representative which could reasonably be expected to impair the rendering of unbiased and objective advice including:

a. Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; or

b. Charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the investment advisor representative.

12. Guaranteeing a client that a specific result will be achieved as a result of the advice which will be rendered.

13. ~~Publishing, circulating or distributing any advertisement that would not be permitted under Rule 206(4)-1 under the Investment Advisers Act of 1940.~~ Directly or indirectly using any advertisement that does any one of the following:

a. Refers to any testimonial of any kind concerning the investment advisor or investment advisor representative or concerning any advice, analysis, report, or other service rendered by the investment advisor or investment advisor representative;

b. Refers to past specific recommendations of the investment advisor or investment advisor representative that were or would have been profitable to any person; except that an investment advisor or investment advisor representative may furnish or offer to furnish a list of all recommendations made by the investment advisor or investment advisor representative within the immediately preceding period of not less than one year if the advertisement or list also includes both of the following:

(1) The name of each security recommended, the date and nature of each recommendation, the market price at that time, the price at which the recommendation was to be acted upon, and the most recently available market price of each security; and

(2) A legend on the first page in prominent print or type that states that the reader should not assume that recommendations made in the future will be profitable or will equal the performance of the securities in the list;

c. Represents that any graph, chart, formula, or other device being offered can be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or indirectly, that any graph, chart, formula, or other device being offered will assist any person in making that person's own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in the advertisement the limitations thereof and the risks associated with its use;

d. Represents that any report, analysis, or other service will be furnished for free or without charge, unless the report, analysis, or other service actually is or will be furnished entirely free and without any direct or indirect condition or obligation;

e. Represents that the commission has approved any advertisement; or

f. Contains any untrue statement of a material fact, or that is otherwise false or misleading.

For the purposes of this section, the term "advertisement" includes any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any electronic or paper publication, by radio or television, or by any medium, that offers any one of the following:

(i) Any analysis, report, or publication concerning securities;

(ii) Any analysis, report, or publication that is to be used in making any determination as to when to buy or sell any security or which security to buy or sell;

(iii) Any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell; or

(iv) Any other investment advisory service with regard to securities.

14. Disclosing the identity, affairs, or investments of any client to any third party unless required by law or an order of a court or a regulatory agency to do so, or unless [~~positively~~] consented to by the client [~~, in writing~~].

15. Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment advisor representative other than a person associated with a federal covered advisor has custody or possession of such securities or funds, when the investment advisor representative's action is subject to and does not comply with the safekeeping requirements of 21VAC5-80-145.

16. Entering into, extending or renewing any investment advisory or federal covered advisory contract unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the investment advisor representative and that no assignment of such contract shall be made by the investment advisor

representative without the consent of the other party to the contract.

17. Failing to clearly and separately disclose to its customer, prior to any security transaction, providing investment advice for compensation or any materially related transaction that the customer's funds or securities will be in the custody of an investment advisor or contracted custodian in a manner that does not provide Securities Investor Protection Corporation protection, or equivalent third-party coverage over the customer's assets.

18. Using a certification or professional designation in connection with the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees in such a way as to mislead any person.

a. The use of such certification or professional designation includes, but is not limited to, the following:

(1) Use of a certification or designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) Use of a nonexistent or self-conferred certification or professional designation;

(3) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; or

(4) Use of a certification or professional designation that was obtained from a designating or certifying organization that:

(a) Is primarily engaged in the business of instruction in sales and or marketing;

(b) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(c) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(d) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

b. There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subdivision 18 a (4) of this subsection, when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The ~~National Commission for Certifying Agencies~~ Institute for Credentialing Excellence (formerly the National Commission for Certifying Agencies); or

(3) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales and/or marketing.

c. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

(1) Use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) The manner in which those words are combined.

d. For purposes of this section, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title:

(1) Indicates seniority within the organization; or

(2) Specifies an individual's area of specialization within the organization.

For purposes of this subdivision d, "financial services regulatory agency" includes, but is not limited to, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under § 3(a)(1) of the Investment Company Act of 1940 (15 USC § 80a-3(a)(1).

e. Nothing in this regulation shall limit the commission's authority to enforce existing provisions of law.

C. The conduct set forth in subsections A and B of this section is not all inclusive. Engaging in other conduct such as nondisclosure, incomplete disclosure, or deceptive practices may be deemed an unethical business practice except to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290 (96)).

D. The provisions of this section shall apply to federal covered advisors to the extent that fraud or deceit is involved, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290 (96)).

VA.R. Doc. No. R10-2324; Filed June 17, 2010, 4:31 p.m.

EXECUTIVE ORDER NUMBER 12 (2010)

Reissuance of Executive Order 110 (2010) Regarding Allocation of a Portion of the Commonwealth's Share of the Calendar Year 2009 National Limitation for Qualified School Construction Bonds Under the American Recovery and Reinvestment Act of 2009

Importance of the Initiative

The American Recovery and Reinvestment Act of 2009 (Pub. L. No. 111-5, 123 Stat. 355) was enacted on February 17, 2009 ("ARRA"). Section 1521(a), Title I, Division B of ARRA added Section 54F to the Internal Revenue Code of 1986, as amended ("IRC"), to provide for the issuance of qualified school construction bonds ("QSCBs"). QSCBs are tax credit bonds that are designed to bear no interest and may be issued to finance the construction, rehabilitation, or repair of a public school facility or for qualifying public school facility land acquisitions ("Qualified Projects").

IRC Section 54A(d)(2) requires that 100% of the sale proceeds of a QSCB and the investment earnings thereon (the "Available Project Proceeds") must be spent within three (3) years from the date of issuance of the QSCB (the "Expenditure Period") to pay the costs of Qualified Projects or issuance costs. To the extent less than 100% of the Available Project Proceeds are spent on such costs within the Expenditure Period, a pro rata portion of the QSCB is deemed to be a "nonqualified bond" under IRC Section 54A and the issuer is required to redeem the nonqualified bond within 90 days after the end of the Expenditure Period. The requirements described in this paragraph will be referred to collectively below as the "Expend-or-Redeem Requirement."

One of the conditions for the valid issuance of QSCBs is the receipt of an allocation of the national limitation under IRC Section 54F(c) sufficient to cover the QSCBs to be issued (a "Volume Cap Allocation"). IRC Section 54F(c) creates a national limitation of $11 billion for each of calendar years 2009 and 2010. IRC Section 54F(d)(1) requires the U.S. Secretary of the Treasury to make allocations to the states in proportion to the respective amounts each state is eligible to receive under Section 1124 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 6333) for the most recent federal fiscal year ending before the calendar year. Pursuant to Notice 2009-35 of the Internal Revenue Service (IRB 2009-17, dated April 27, 2009) (the "Notice"), the share of the calendar year 2009 national limitation allocated to the Commonwealth of Virginia (the "Commonwealth" or "Virginia") is $191,077,000 (the "2009 Commonwealth Share").

IRC Section 54F(d)(1) also provides that the national limitation amount allocated to a state for any calendar year shall be allocated by a "state agency" to issuers within the state. The Notice provides that eligible issuers of QSCBs include states, political subdivisions as defined for purposes of IRC Section 103, large local educational agencies that are state or local governmental entities, certain "on-behalf-of" issuers and certain conduit financing issuers. Neither Virginia nor federal law provides any process for making allocations of the 2009 Commonwealth Share to eligible issuers.

From the $191,077,000 2009 Commonwealth Share Executive Order 90 (2009) made a Volume Cap Allocation to the Virginia Public School Authority ("VPSA") in an amount sufficient to cover QSCBs to be issued by VPSA to finance certain qualifying projects in certain localities that were on the Literary Fund First Priority Waiting List approved by the Virginia Board of Education. On November 13, 2009, VPSA issued its $61,120,000 School Tax Credit Bonds (Qualified School Construction Bonds), Series 2009-1 (the "2009 VPSA QSCBs"), pursuant to such Volume Cap Allocation. Since that time, additional net qualifying costs for the Lylburn Downing Middle School project in the City of Lexington have been identified and the Virginia Board of Education has added additional projects to the Literary Fund First Priority Waiting List (such additional projects, together with the Lylburn Downing Middle School project, will be referred to below as the "FPWL Projects"). The City of Lexington, together with the localities in which the other FPWL Projects are located, will be referred to below as the "FPWL Localities."

On October 14, 2009, Governor Kaine announced the availability of a portion of the 2009 Commonwealth Share remaining after the issuance of the 2009 VPSA QSCBs to local school divisions of certain localities through a competitive evaluation process to finance energy efficiency improvements and renovations, as well as renewable energy projects, for public school buildings. Working cooperatively, the Department of Education and Department of Mines, Minerals and Energy supervised an application process that concluded on November 12, 2009. Subsequently, each application and project was evaluated against criteria including annual energy savings, project payback period, shovel readiness, and composite index. The projects that were selected and the localities in which such projects are located will be referred to below respectively as the "Energy Projects" and the "Energy Project Localities" and, together with the FPWL Projects and the FPWL Localities, the "Awarded Projects" and the "Awarded Localities."

On January 13, 2010, Governor Kaine issued Executive Order 110 (2010) to allocate to VPSA pursuant to IRC Section 54F(d)(1) a portion of the 2009 Commonwealth Share sufficient for VPSA to issue a face amount of QSCBs at one time or from time to time to produce for each of the Awarded Projects listed therein an amount of net sale proceeds up to the maximum amount of the qualifying costs specified therein.

Since January 13, 2010, VPSA and this office have received a number of requests and comments from the Awarded Localities, their respective school divisions and other interested parties concerning Executive Order 110 (2010). Many of these requests have been for changes in the Awarded Projects and the allocations between Awarded Projects and many of the comments have pointed out potential problems in satisfying the Expend-or-Redeem Requirement. In response to these requests and comments and by virtue of the powers invested in me by Article V of the Constitution of Virginia and Section 2.2-103 of the Code of Virginia of 1950, as amended, as Governor of the Commonwealth of Virginia, I hereby reissue the previously-issued Executive Order 110 (2010) in the form of this order to amend and restate the Volume Cap Allocation to VPSA of a portion of the 2009 Commonwealth Share sufficient for VPSA to issue a face amount of QSCBs at one time or from time to time to produce for each of the Awarded Localities listed below an amount of net sale proceeds (the "Maximum Net Sale Proceeds") up to the maximum amount of specified for all of the Awarded Projects (in aggregate) of each Awarded Locality, which projects are the first priority use of the Maximum Net Sale Proceeds and the investment earnings thereon (the "Local Available Project Proceeds"). This order further (i) directs the Department of Education and the Department of Mines, Minerals and Energy to establish a procedure to ensure use of the Local Available Project Proceeds of each Awarded Locality on energy efficiency improvements and renovations, as well as renewable energy projects, for public school buildings within the Awarded Locality to the extent such proceeds are in excess of the amounts needed to complete all of the Awarded Projects of such Awarded Locality and (ii) establishes an expiration date for the Volume Cap Allocation made to VPSA pursuant hereto.

The FPWL Localities and FPWL Projects:

Locality	Project	Maximum Net Sale Proceeds
Virginia Beach City	Great Neck Middle School	$7,500,000
Washington County	John Battle High School Abingdon High School Patrick Henry High School Holston High School Meadowview Elementary School Wallace Middle School	$10,110,035
	Glade Spring Middle School William N. Neff Center	
Hopewell City	Hopewell City High School	$7,500,000
Virginia Beach City	College Park Elementary School	$4,879,954
Lexington City	Lylburn Downing Middle School	$1,500,000
Montgomery County	New Price's Fork Elementary School	$7,500,000

The Energy Projects and the Energy Project Localities:

Amelia County	Amelia County Public Schools	$1,205,379
Arlington County	Arlington Career Center	$3,331,022
Greene County	Greene County Technical Education Center Nathanael Greene Elementary School Ruckersville Elementary School William Monroe High School William Monroe Middle School	$2,425,879
Greensville County	Belfield Elementary School Greensville County High School Wyatt Middle School Greensville Elementary School	$746,104
Hampton City	Division Wide Lighting Upgrade Initiative	$2,500,000
King William County	Acquinton Elementary School Hamilton Holmes Middle School King William High School Cool Spring Primary School	$260,950

Lancaster County	Lancaster Middle School Lancaster High School	$391,129
Lunenburg County	Central High School	$1,172,948
Martinsville City	Martinsville Middle School Albert Harris Elementary School Patrick Henry Elementary School	$1,050,749
Montgomery County	MCPS Energy Performance Contract	$9,389,331
Prince William County	Hylton High School Benton Middle School Sudley Elementary School Marumsco Hills Elementary School West Gate Elementary School Vaughan Elementary School Swans Creek Elementary School Sinclair Elementary School Signal Hill Elementary School Potomac View Elementary School Parkside Middle School Occoquan Elementary School Neabsco Elementary School Minnieville Elementary School Kerrydale Elementary School Samuel L. Gravely, Jr. Elementary School Glenkirk Elementary School Gar-Field Senior High School Fannie W. Fitzgerald Elementary School Cedar Point Elementary School Brentsville District High School Bennett Elementary School Belmont Elementary School Bel Air Elementary School Ashland Elementary School Alvey Elementary school Parkside Middle School Tyler Elementary School Yorkshire Elementary School Gainesville Middle School Woodbridge Senior High School Woodbridge Middle School Mary Williams Elementary School Victory Elementary School Sudley Elementary School Stonewall Jackson High School Rosa Parks Elementary School Rockledge Elementary School Osbourn Park High School Marumsco Hills Elementary School	$9,515,904

	Marsteller Middle School Leesylvania Elementary School Godwin Middle School Forest Park High School Ellis Elementary School Coles Elementary School Bull Run Middle School Buckland Mills Elementary School Bristow Run Elementary School Beville Middle School Benton Middle School Battlefield Middle School Potomac Middle School Freedom High School Hylton High School Stonewall Jackson High School Osbourn Park High School Gar-Field High School	
Roanoke City	Preston Park Elementary School Morningside Elementary School Westside Elementary School Monterey Elementary School	$1,110,539
Shenandoah County	North Fork Middle School Peter Muhlenberg Middle School	$7,302,996
	Central High School Signal Knob Middle School Sandy Hook Elementary School Ashby Lee Elementary School W. W. Robinson Elementary School Triplett Business and Technical Institute Strasburg High School Stonewall Jackson High School	
Spotsylvania County	Courtland Elementary School Chancellor Elementary School Lee Hill Elementary School Salem Elementary School Battlefield Middle School Career and Technical Center Courtland High School Spotsylvania High School Massaponax High School Battlefield Elementary School Brock Road Elementary School Courthouse Road Elementary School Robert E. Lee Elementary School Smith Station Elementary School Courtland Elementary School Battlefield Middle School	$2,581,293

	Chancellor Middle and High School Thornburg Middle School	
Stafford County	Stafford County Public Schools Rockhill Elementary School	$1,280,000
Virginia Beach City	College Park Elementary School	$4,879,954
Washington County	Abingdon, Holston, Patrick Henry John S. Battle High Schools	$400,000
Westmoreland County	Washington & Lee High School	$1,975,369
York County	Grafton-Bethel Elementary School HVAC Project	$1,100,000

The Maximum Net Sale Proceeds are listed in the aggregate and the Local Available Project Proceeds attributable thereto must be used to finance one or more of the Awarded Projects listed for such Awarded Locality and at least completing the project work described in the approved project application for each Awarded Project undertaken; provided, however, that an Awarded Locality is not obligated to undertake each of the Awarded Projects listed for such Awarded Locality. Each Awarded Locality may distribute its Local Available Project Proceeds among its Awarded Projects as the Awarded Locality deems to be in the best interest of the Awarded Locality.

The Department of Education and the Department of Mines, Minerals and Energy are to establish a procedure to ensure that the Local Available Project Proceeds are used to finance energy efficiency improvements and renovations, as well as renewable energy projects, for public school buildings within the Awarded Localities ("Additional Projects") to the extent such proceeds are in excess of the amounts needed to complete all of the Awarded Projects. Such Additional Projects (i) must be Qualified Projects, (ii) must be able to utilize the unspent Local Available Project Proceeds within the relevant Expenditure Period and (iii) should be evaluated against the following criteria: annual energy savings, project payback period, shovel readiness, and composite index.

By September 1, 2010, VPSA shall provide to the Chief of Staff the completed Internal Revenue Service reporting form or forms (then in effect for the QSCBs) for those QSCBs issued pursuant to the Volume Cap Allocation made to VPSA pursuant to this order. Any portion of such Volume Cap Allocation not used by September 1, 2010, will be deemed waived by the VPSA and the pertinent Awarded Localities, and upon such waiver, the Commonwealth shall be authorized to re-allocate the waived Volume Cap Allocation in any reasonable manner as it shall determine in good faith and in its discretion.

I hereby authorize the Chief of Staff to provide certificates of compliance with IRC Section 54F(c) as may be requested by the VPSA.

Effective Date of the Executive Order

This Executive Order shall be effective as of June 10, 2010, without any further act or filing and shall remain in force and effect so long as IRC Section 54F shall remain in effect, unless sooner rescinded or amended by further executive order.

Given under my hand and under the Seal of the Commonwealth of Virginia this 10th day of June, 2010.

/s/ Robert F. McDonnell
Governor

STATE CORPORATION COMMISSION

Bureau of Insurance

June 14, 2010

Administrative Letter 2010-06

To: All Insurers and Other Interested Parties

Re: Legislation Enacted by the 2010 Virginia General Assembly

We have attached for your reference summaries of certain statutes enacted or amended and re-enacted during the 2010 Session of the Virginia General Assembly. The effective date of these statutes is July 1, 2010, except as otherwise indicated in this letter. Each organization to which this letter is being sent should review the summaries carefully and see that notice of these laws is directed to the proper persons, including appointed representatives, to ensure that appropriate action is taken to effect compliance with these new legal requirements. Copies of individual bills may be obtained at http://legis.state.va.us/. You may enter the bill number (not the chapter number) on the Virginia General Assembly Home Page, and you will be linked to the Legislative Information System. You may also link from the Legislative Information System to any existing section of the Code of Virginia. All statutory references made in the letter are to Title 38.2 (Insurance) of the Code of Virginia unless otherwise noted. All references to the Commission refer to the State Corporation Commission.

Please note that this document is a summary of legislation. It is neither a legal review and interpretation nor a full description of the legislative amendments affecting insurance-related laws during the 2010 Session. Each organization is responsible for review of the statutes pertinent to its operations.

/s/ Alfred W. Gross
Commissioner of Insurance

Chapter 21 (House Bill 554)

This bill amends § 38.2-3541.1 (Group Accident and Sickness Insurance Policies) relating to the continuation of health coverage after involuntary termination of employment. It revises the time period for continuation of coverage under the American Recovery and Reinvestment Act of 2009 (P. L. 111-5) from nine months to include "any additional period specified by the Act as later amended." The legislation was effective upon its passage.

Chapter 157 (Senate Bill 535) and Chapter 357 (House Bill 116)

The bill amends § 38.2-3407.7 (Pharmacies; Freedom of Choice); 38.2-4209.1 (Health Services Plans); and 38.2-4312.1 (Health Maintenance Organizations) to permit for the selection of a single mail order pharmacy provider as the exclusive provider of pharmacy services delivered to the covered person's address by mail, common carrier, or delivery services.

Chapter 211 (House Bill 77)

This bill revises §§ 38.2-3724 and 38.2-3735 (Credit Life and Credit Accident and Sickness) relating to disclosure requirements for credit life and accident and sickness contracts. The revision specifies the type of contracts for which notice is required to advise a debtor of his right to a refund if the insurance is terminated before its maturity date or if the debt is paid off early.

Chapter 225 (House Bill 258)

This bill amends § 38.2-3430.2 (Individual Health Insurance) to add individuals with previous coverage under "a state plan under Title XIX of the Social Security Act (42 U.S.C. § 1396 et seq.)" (Medicaid) to the definition of "eligible individual."

Chapter 226 (House Bill 260)

This bill amends § 38.2-218 (Penalties and Restitution Payments) to authorize the Commission to require a person to make restitution in the amount of direct actual financial loss for improperly withholding, misappropriating or converting any money or property received in the course of doing business.

Chapter 227 (House Bill 352) and Chapter 374 (Senate Bill 465)

The bill amends § 38.2-3323 (Life Insurance Policies) relating to group life insurance coverage of spouses, dependent children, and other persons. The bill permits coverage under a group life insurance policy to any other person in whom the insured group member has an insurable interest as defined in §§ 38.2-301 and 38.2-302 as may mutually be agreed upon by the insurer and the group policyholder.

Chapter 234 (House Bill 531)

The bill adds an exception to § 38.2-1907 (Regulation of Rates), which makes certain filings and supplementary rate information open to public inspection. Filings and supplementary rate information which contain information that constitutes a trade secret, as defined in § 59.1-336, shall not be open to public inspection.

Chapter 235 (House Bill 532) and Chapter 371 (Senate Bill 439)

The bill amends §§ 38.2-2617, 38.2-2618, and 38.2-2619 (Home Protection Companies) to exempt home service contract providers with a net worth in excess of $100 million from the licensing requirements under Article 2 of Chapter 26 of Title 38.2.

Chapter 272 (House Bill 548)

The bill adds § 38.2-3540.2 (Group Accident and Sickness Policies) and amends § 38.2-4319 (Health Maintenance Organizations) to allow group accident and sickness policies and health care plans to provide a premium discount to employers that maintain an employee wellness program that meets the insurer's criteria. An employer may require an employee to undergo a health assessment to enroll in the wellness program.

Chapter 281 (House Bill 800)

The bill amends §§ 38.2-1815 (License Required of Resident Life & Annuities Agents); 38.2-1825 (Duration and Termination of Licenses and Appointments); and 38.2-1869 (Termination of License) to remove the requirement that a nonresident agent must obtain an underlying life and annuities license from the Bureau of Insurance prior to applying for a variable contract license.

Chapter 335 (House Bill 939)

The bill amends § 38.2-1874 (Continuing Education) to delete language that limits appeals with regard to actions of the Insurance Continuing Education Board (CE Board) to licensees whose licenses are affected by the action.

Chapter 337 (House Bill 1018)

The bill repeals § 38.2-323 (Countersignature Requirements) which states that no insurance policy shall contain any provision that deems the policy to be invalid due to the absence of the signature or countersignature of an agent or company representative.

Chapter 395 (House Bill 11)

The bill amends §§ 32.1-137.13 through 32.1-137.15 (Utilization Review Standards and Appeals) to revise the process for reconsideration or appeal of an adverse decision for utilization review. The bill requires that notification include instructions for the provider on behalf of the covered person to seek either a reconsideration pursuant to § 32.1-137.14 (Reconsideration of An Adverse Decision), or an appeal pursuant to § 32.1-137.15 (Appeal of An Adverse Decision). The treating provider shall be notified verbally at the time of the determination and in writing following the determination of the reconsideration of the adverse decision and of the process for an appeal of the determination, including the contact name, address and telephone number to file and perfect an appeal. If the treating provider requests that the adverse decision be reviewed by a peer of the treating provider at any time during the reconsideration process, the request for reconsideration shall be vacated, and considered an appeal pursuant to § 32.1-37.15. In such cases, the covered person shall be notified of the initiation of the appeal, and all documentation and information provided during the reconsideration shall be converted to the appeal process. No additional actions shall be required of the treating provider to perfect the appeal. For appeals other than expedited appeals, the physician advisor reviewing the appeal must be a peer of the health care provider and board certified in the same or similar specialty as the treating health care provider. The effective date of the legislation is delayed and shall not become effective until October 1, 2010.

Chapter 443 (House Bill 1375)

This bill amends § 38.3-3407.5 (Accident and Sickness Insurance; Prescription Drug Coverage) to revise the lists of standard reference compendia for accident and sickness insurers.

Chapter 492 (House Bill 93)

This bill amends § 38.2-2206 (underinsured motorist coverage) by permitting the liability insurer of the underinsured wrongdoer to make an irrevocable offer to pay the limits of its policy and to give written notice of such offer to any insurer providing underinsured motorist coverage with respect to the loss. The liability insurer is then relieved of the cost of defending its insured, and the underinsured motorist insurer(s) shall assume the cost of defense. However, the liability insurer retains the duty to defend its insured. The bill further provides that the liability insurer remains liable for all legal costs incurred prior to making the irrevocable offer of its limits. The underinsured motorist insurer must have been served (pursuant to § 38.2-2206) prior to the liability insurer making an offer of its limits, and the underinsured motorist insurer has 60 days from the date of the liability insurer's offer before the duty to pay defense costs shifts to the underinsured motorist insurer. The underinsured motorist insurer's duty to pay defense costs ends when it offers its limits.

Chapter 503 (House Bill 315)

The bill amends § 38.2-3541 (Continuation of Accident and Sickness Insurance Coverage) to revise the current requirements for continuation of group health coverage upon termination of eligibility. The bill expands the ability of a person who becomes ineligible for coverage under a group health insurance policy to exercise the option to continue coverage under the group policy. The measure (i) extends the maximum length of continued coverage from 90 days to 12 months; (ii) allows premiums to be paid monthly; and (iii) requires the policyholder to inform the persons insured under the group policy of the option. The notice shall be provided within 14 days of the policyholder's knowledge of the covered person's loss of eligibility under the group policy. The measure also retains the policyholder's option to have the issuer issue an individual policy to the covered person who loses eligibility, and the maximum period for applying for such a policy is extended from 31 to 60 days after loss of eligibility.

Chapter 504 (House Bill 317)

The bill adds § 38.2-3541.2 (Group Accident and Sickness Policies), amends § 38.2-4214 (Health Services Plans) and § 38.2-4319 (Health Maintenance Organizations). The bill requires group health insurance policies, health services plans, and health care plans to offer enrollment opportunities for employees and dependents who are eligible for coverage under, but not enrolled in, such policies or plans upon their (i) losing eligibility for coverage under the Commonwealth's Medicaid or FAMIS program or (ii) becoming eligible for premium assistance under either program. In order to enroll, the employee or dependent must request coverage within 60 days of being terminated from coverage under the state program or 60 days of becoming eligible for premium assistance. Employers providing such policies or group plans are required to notify employees of their potential eligibility for premium assistance under these state programs and to disclose to the Department of Medical Assistance Services, upon request, information to permit the Department to determine the cost-effectiveness of any premium assistance provided. The measure implements certain provisions of the federal Children's Health Insurance Program Reauthorization Act of 2009, and applies to corporations issuing subscription contracts, health maintenance organizations, and insurers.

Chapter 510 (House Bill 448)

The bill amends § 38.2-1442 (Investments) and §§ 38.2-1700 through 38.2-1715 (Virginia Life, Accident and Sickness Insurance Guaranty Association) to update and expand the scope of the Guaranty Association.

Chapter 515 (House Bill 556) and Chapter 687 (Senate Bill 642)

The bill amends § 38.2-3406.1 (Small Employer Groups) and revises § 38.2-4319 (Health Maintenance Organizations) to include HMOs in the definition of "health insurer" outlined in § 38.2-3406.1, thereby allowing HMOs to offer and sell to small employer groups health care plans that do not include all of the mandated health insurance benefits. The bill adds "evidence of coverage" to the policy forms and subscription contracts that must disclose that all state-mandated benefits are not included in the coverage. The disclosure must be included in any application or enrollment form as well as the contract and evidence of coverage.

Chapter 583 (House Bill 1263) and Chapter 734 (Senate Bill 622)

The bill adds § 38.2-3407.17 (Accident and Sickness Insurance General Provisions) and revises §§ 38.2-4214 (Health Services Plans), 38.2-4319 (Health Maintenance Organizations) and 38.2-4509 (Dental Optometric Plan Services). The bill provides that no contract between a dental plan and a dentist or oral surgeon may establish fees or rates that the dentist or oral surgeon must accept or require the dentist or oral surgeon accept reimbursement from the dental plan as full payment unless the services are covered under the applicable plan. The bill applies to any contract between a dental plan and a dentist or oral surgeon for the provision of health care to patients that is entered into, amended, extended or renewed on or after July 1, 2010. The Commission has no jurisdiction to adjudicate individual controversies that arise out of the bill.

Chapter 595 (Senate Bill 163)

The bill adds § 38.2-5604 (Virginia Health Savings Account Plan) to provide that, notwithstanding a provision of law to the contrary, the rights of a participant or beneficiary to the money, assets and income of an HSA are exempt from creditor process and are not liable for attachment, garnishment or other process and cannot be seized, taken, appropriated or applied by any legal or equitable process of law to pay any debt or liability of the participant or beneficiary of the account.

Chapter 642 (House Bill 1095)

The bill amends § 38.2-3430.2 (Individual Health Insurance Coverage) as to the timing of the 63-day period during which an individual enrolling in a health plan must obtain coverage to have previous creditable coverage counted. The time period begins on the first day after the person's coverage ends and continues until an application for coverage is submitted. The postmark date is the submission date when an application is mailed.

Chapter 704 (House Bill 1377)

The bill adds § 38.2-4229.2 (Health Services Plans). If another state enacts a law that requires a health services plan operating in Virginia to provide a program or benefits for the residents of the other state, the Commission is authorized to conduct a hearing and an investigation to determine the impact of the state's law on health services plans in Virginia. The Commissioner of Insurance shall conduct an examination which focuses on the impact on surplus, premiums rates for residents of the Commonwealth, and solvency, and shall report its findings to the Commission. If the Commission determines that there is a harmful impact on the residents of Virginia, the Commission shall issue an order to protect such residents.

DEPARTMENT OF EDUCATION

Notice of Additional Public Comment

Proposed Amendments to Regulations Governing Pupil Transportation

The Board of Education is revising the Regulations Governing Pupil Transportation (8VAC20-70). Proposed amendments to the Regulations Governing Pupil Transportation were published in 25:25 VA.R. 4396-4405 August 17, 2009, and posted for a 60-day comment period

from August 17, 2009, through October 16, 2009. Based on the public comment and field committee recommendations, additional amendments are being considered. The Board of Education is seeking comment on the additional amendments and is announcing an additional 30-day comment period beginning July 5, 2010, and ending August 9, 2010.

The additional amendments for which public comment is sought may be viewed at http://www.doe.virginia.gov/support/transportation/regulations/index.shtml#comment.

Comments may be sent by mail to Virginia Department of Education, Pupil Transportation Service, P.O. Box 2120, Richmond, VA 23218, email june.eanes@doe.virginia.gov, or FAX (804) 786-9417.

Contact Information: Dr. Margaret N. Roberts, Office of Policy and Communications, Department of Education, P.O. Box 2120, 101 N. 14th St., 25th Floor, Richmond, VA 23219, telephone (804) 225-2540, FAX (804) 225-2524, or email margaret.roberts@doe.virginia.gov.

DEPARTMENT OF ENVIRONMENTAL QUALITY

Notice of Availability of Material

Amendment of the Solid Waste Management Permit Action Fees and Annual Fees (9VAC20-90)

On May 14, 2010, an opportunity to comment on amendment of the Solid Waste Management Permit Action Fees and Annual Fees (9VAC20-90) was announced. The comment period has closed and the Department of Environmental Quality (DEQ) has reviewed the comments. In addition, DEQ finalized a summary of comments, a response document, and revisions to the proposed amendments to the regulation. These documents will be presented to the Virginia Waste Management Board for its consideration on June 14, 2010.

These documents are now available on the Town Hall as part of a revised agenda and minibook posting for the Virginia Waste Management Board meeting on June 14, 2010. A link to the details of the meeting and the revised agenda and minibook is: http://www.townhall.virginia.gov/L/ViewMeeting.cfm?MeetingID=14683. Click on the meeting agenda to review the material. The comment summary and response starts on page 8 and the revised regulation follows, beginning on page 18.

Contact Information: Cindy Berndt, Regulatory Coordinator, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4378, FAX (804) 698-4346, or email cindy.berndt@deq.virginia.gov.

Notice of Availability of Material

Amendment of the Fees for Permits and Certificates Regulation (9VAC25-20)

On May 14, 2010, an opportunity to comment on the proposed amendment of the Fees for Permits and Certificates (9VAC25-20) was announced. The comment period has closed and the Department of Environmental Quality (DEQ) has reviewed the comments. In addition, DEQ finalized a summary of comments, a response document, and revisions to the proposed amendments. These documents will be presented to the State Water Control Board for its consideration at the June 21-22, 2010, meeting.

These documents are now available on the Town Hall as part of a revised agenda and minibook posting for the State Water Control Board meeting on June 21-22, 2010. A link to the details of the meeting and the revised agenda and minibook is: http://www.townhall.virginia.gov/L/ViewMeeting.cfm?MeetingID=14193. Click on the meeting agenda to review the material. The comment summary and response starts on page 15 and the revised regulation follows, beginning on page 20.

Contact Information: Cindy Berndt, Regulatory Coordinator, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4378, FAX (804) 698-4346, or email cindy.berndt@deq.virginia.gov.

Total Maximum Daily Load for Accotink Creek

Announcement of a Total Maximum Daily Load (TMDL) study to restore water quality in a portion of Accotink Creek that has an aquatic life use impairment.

Purpose of notice: The U.S. Environmental Protection Agency (EPA) plans to establish a TMDL for the Accotink Creek Watershed located in Fairfax County, the City of Fairfax, and the Town of Vienna, Virginia. Stream segments listed as impaired for not supporting the aquatic life use due to poor health in the benthic biological community will have TMDLs calculated. A TMDL is the total amount of a pollutant a water body can receive and still meet water quality standards. To restore water quality, pollutant levels have to be reduced to the TMDL allocated amount. EPA, the Virginia Department of Environmental Quality (DEQ), and the Virginia Department of Conservation and Recreation (DCR) will hold a public meeting to present the details and answer questions regarding the proposed Accotink Creek Benthic TMDL to members of the community.

Public meeting: Monday, July 26, 2010, 6 p.m. to 8 p.m., Fairfax County Government Center, Conference Rooms 4 and 5, 12000 Government Center Parkway, Fairfax, VA 22035.

Description of study: A portion of Accotink Creek has been identified as impaired on the Clean Water Act § 303(d) list

for not supporting the aquatic life use due to poor health in the benthic biological community. EPA is working together with Virginia agencies to identify the benthic stressors causing the aquatic life use impairment on Accotink Creek. The Accotink Creek watershed covers portions of the City of Fairfax, the Town of Vienna, and Fairfax County. Below is a description of the impaired portions of Accotink Creek that will be addressed in this study:

Stream Name	Watershed Location	Impairment	Area (miles)	Upstream Limit	Down-stream Limit
Accotink Creek	Fairfax County Fairfax City Town of Vienna	Aquatic Life Use Benthic Macroin-vertrbrates	7.35	Confluence of Accotink Creek with Calamo Branch	Start of the tidal waters of Accotink Bay
Accotink Creek	Fairfax County Fairfax City Town of Vienna	Aquatic Life Use Benthic Macroin-vertrbrates	0.85	Confluence of Accotink Creek with an Unnamed Tributary located in the upstream corridor of Ranger Park	Confluence of Accotink Creek with Daniels Run

How to comment: EPA welcomes input from the public on the proposed TMDL during the comment period. Persons wishing to comment on the information contained in the TMDL are invited to do so in writing within 30 days of the date of this public notice. All comments must be postmarked no later than August 4, 2010. All comments should be written and include the name, address, and telephone number of the commenter and a concise statement of the exact basis of any comment and the relevant facts upon which such comment is based. Clearly identify the TMDL being commented on. Electronic submission of comments via email is encouraged. Copies of the materials presented at the public meeting will be posted on EPA's website at: http://www.epa.gov/reg3wapd/tmdl/index.htm and on DEQ's website at: https://www.deq.virginia.gov/TMDLDataSearch/DraftReports.jspx.

As an alternative, copies of meeting materials can be inspected and copied at the Region III office of the Environmental Protection Agency, Office of Standards, Assessment and TMDLs, 1650 Arch Street, Philadelphia, PA 19103, at any time between 9 a.m. and 4 p.m., Monday through Friday, except during federal holidays. Further information may be obtained by writing to EPA Region III at the address below.

Contact for additional information: Gregory Voigt (3WP30), Office of Standards, Assessment and TMDLs, U.S. EPA, Region III, 1650 Arch Street, Philadelphia, PA 19103, telephone (215) 814-5737, or email voigt.gregory@epa.gov.

STATE LOTTERY DEPARTMENT

Director's Orders

The following Director's Orders of the State Lottery Department were filed with the Virginia Registrar of Regulations on June 8, 2010. The orders may be viewed at the State Lottery Department, 900 East Main Street, Richmond, VA, or at the office of the Registrar of Regulations, 910 Capitol Street, 2nd Floor, Richmond, VA.

Director's Order Number Forty-Nine (10)

"Redskins Legacy" Virginia Lottery Retailer Incentive Program Rules (effective June 7, 2010)

Director's Order Number Fifty-Seven (10)

"Rite Aid" Virginia Lottery Retailer Incentive Program Rules (effective June 7, 2010)

STATE BOARD OF SOCIAL SERVICES

Notice of Periodic Review

22VAC40-325, Fraud Reduction/Elimination Effort

Pursuant to Executive Order Number 107 (2009), the Department of Social Services (DSS) is currently reviewing Fraud Reduction/Elimination Effort (22VAC40-325) to determine if it should be terminated, amended, or retained in its current form. The review will be guided by the principles listed in Executive Order Number 107 (2009) and in DSS's Plan for Review of Existing Agency Regulations.

DSS seeks public comment regarding the regulation's interference in private enterprise and life, essential need of the regulation, less burdensome and intrusive alternatives to the regulation, specific and measurable goals that the regulation is intended to achieve, and whether the regulation is clearly written and easily understandable.

Written comments may be submitted until July 26, 2010, to Sandy Smith, Program Manager, Fraud Management Unit, Division of Benefit Programs, Department of Social Services, 801 East Main Street, Richmond, VA 23219, or FAX to (804) 726-7669.

STATE WATER CONTROL BOARD

Proposed Enforcement Action for Mr. Mike Leech

An enforcement action has been proposed for Mr. Mike Leech regarding M&M Grocery in Patrick County, for violations of the State Water Control Law. The proposed enforcement action requires a civil charge and corrective action. A description of the proposed action is available at the

Department of Environmental Quality office named below or online at www.deq.virginia.gov. Robert Steele will accept comments by email at robert.steele@deq.virginia.gov, FAX at (540) 562-6725, or postal mail at Department of Environmental Quality, Blue Ridge Regional Office, 3019 Peters Creek Road, Roanoke, VA 24019, from July 5, 2010, to August 4, 2010.

Proposed Enforcement Action for Lunenburg County

An order by consent has been proposed for Lunenburg County for violations at the Lunenburg County Administrative Complex Wastewater Treatment Facility. The order contains a Schedule of Compliance that details the corrective action required and a timeline for completion. A description of the proposed action is available at the Department of Environmental Quality office named below or online at www.deq.virginia.gov. G. Marvin Booth, III will accept comments by email at marvin.booth@deq.virginia.gov, FAX (434) 582-5125, or postal mail at Department of Environmental Quality, Blue Ridge Regional Office, 7705 Timberlake Road, Lynchburg, VA 24502, from July 5, 2010, to August 5, 2010.

Proposed Enforcement Action for Roanoke Electric Steel Corporation, d.b.a. Steel Dynamics

An enforcement action has been proposed for Roanoke Electric Steel Corporation (RES), d.b.a. Steel Dynamics, Roanoke Bar Division, regarding the RES manufacturing plant in Roanoke, Virginia, for violations of the State Water Control Law. The proposed enforcement action requires a civil charge and corrective action. A description of the proposed action is available at the Department of Environmental Quality office named below or online at www.deq.virginia.gov. Robert Steele will accept comments by email at robert.steele@deq.virginia.gov, FAX at (540) 562-6725, or postal mail at Department of Environmental Quality, Blue Ridge Regional Office, 3019 Peters Creek Road, Roanoke, VA 24019, from July 5, 2010, to August 4, 2010.

VIRGINIA CODE COMMISSION

Notice to State Agencies

Mailing Address: Virginia Code Commission, 910 Capitol Street, General Assembly Building, 2nd Floor, Richmond, VA 23219.

Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed

Beginning with Volume 26, Issue 1 of the Virginia Register of Regulations dated September 14, 2009, the Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed will no longer be published in the Virginia Register of Regulations. The cumulative table may be accessed on the Virginia Register Online webpage at http://register.dls.virginia.gov/cumultab.htm.

Filing Material for Publication in the Virginia Register of Regulations

Agencies are required to use the Regulation Information System (RIS) when filing regulations for publication in the Virginia Register of Regulations. The Office of the Virginia Register of Regulations implemented a web-based application called RIS for filing regulations and related items for publication in the Virginia Register. The Registrar's office has worked closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.

The Office of the Virginia Register is working toward the eventual elimination of the requirement that agencies file print copies of regulatory packages. Until that time, agencies may file petitions for rulemaking, notices of intended regulatory actions and general notices in electronic form only; however, until further notice, agencies must continue to file print copies of proposed, final, fast-track and emergency regulatory packages.