

Commonwealth of Virginia		
Christopher Nolen, Chair <hr/> Elizabeth Palen, Executive Director		General Assembly Building 910 Capitol Street, Second Floor Richmond, Virginia 23219 (Phone) 804-786-3591 (Fax) 804-692-0625 EPalen@leg.state.va.us http://legis.state.va.us/codecomm/alach/alach.htm
Administrative Law Advisory Committee		

I. Welcome and Call to Order - Chris Nolen (Chair) (12:02 p.m.)

- Second annual meeting for 2009
- Hear presentations and then break out into work groups, which will be announced today
- Make some progress with the two groups:
 - Incorporation by Reference/Exemptions
 - Hearing Officer Handbook Update

II. Electronic Submissions - Lisa Wallmeyer, DLS, Joint Commission on Technology and Science

- Touch on some of the legal issues surrounding (or not) the notion of electronic filing.
- Registrar act – requires that all regulations be accompanied by a signed statement that the regulation is full, correct, and accurate, but:
 - Uniform Electronic Transactions Act (UETA) has been adopted by Virginia, which means that unless there is a statutory prohibition against it, business can be conducted electronically.
 - Broad applicability, applies to submitting regulations.
 - Broad definition of electronic signature – “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record (§ 59.1-480(8)).
 - Can be a typed name on an email
 - Click of a mouse – “click here to certify”
 - PIN or password system.
 - So long as there is some sort of symbol or action that both sender and receiver have agreed upon for transacting the business.
- For online submission for regulations:
 - Could give those with authority a password, or a check box, ex: “By checking this, I am authorized to submit these regulations.”

Christopher Nolen (chair)
 Angela P. Bowser
 Cindy Berndt
 Roger L. Chaffe

Jane Chaffin
 Michael Quinan
 Katya Herndon
 John Paul Jones

Phyllis A. Errico
 Martin Kent
 Eric M. Page
 Alexander F. Skirpan, Jr.

- Conclusion – Current law will not prohibit you from submitting the regulations electronically.
 - § 59.1-496- acceptance and distribution of electronic records by public bodies; electronic filing of information permitted.
 - This section would cover the submission of regulations.

Questions:

- *Jane Chaffin* – We currently have a system in place to submit regulations electronically and this is password protected, so this would qualify under UNETA as electronic signature?
 - *Lisa Wallmeyer*- Yes, so long as both parties understand that only the people who have passwords are those who can submit the regulations.
- *Chris Nolen* - When a member of the public wants to petition for a rulemaking, can someone do that electronically?
 - *Jane Chaffin* – The member of the public files the petition with the particular agency, and then the agency files it with the Townhall and with the Register.
- *Elizabeth Palen*– What percentage of the agencies right now submits electronically?
 - *Jane Chaffin* – We are still requiring paper submissions as the official copy right now, but they also file electronically. There is still some information that we need to receive in a different way before we can discontinue the paper submissions, i.e. incorporation by reference.
- *Lisa Wallmeyer* – Under the existing law, you cannot require anyone to submit electronically; if an agency cannot or will not, absent a statutory change, you cannot make them.
- *Martin Kent* – Issues with incorporation by reference and the stimulus money will most likely arise; we are still trying to figure out what the requirements are, but this is something that the group should keep in mind.
- *Chris Nolen* – The Attorney General’s office will see this firsthand; this is something for ALAC to consider as it moves forward the next few months.

III. JLARC Survey of Other States’ APA - Questions and Comments for JLARC

Aris W. Bearse

- Directed by the APA to review exemptions in the Act.
- Research is survey based, as well as some interviews; three surveys:
 - Survey of state agencies who have exemptions asking them to justify the exemptions;
 - Survey of the regulated community;
 - Online survey of other states’ APA- Jenny Breidenbaugh is the point person for this survey.

Jenny Breidenbaugh -Any comments, questions, or suggestions for the survey?

Christopher Nolen (chair)
 Angela P. Bowser
 Cindy Berndt
 Roger L. Chaffe

Jane Chaffin
 Michael Quinan
 Katya Herndon
 John Paul Jones

Phyllis A. Errico
 Martin Kent
 Eric M. Page
 Alexander F. Skirpan, Jr.

- *Chris Nolen* – What is the timing?
 - *Jenny Breidenbaugh* – Later this week, we are going to pretest the survey in a few states; give the pretesters one to two weeks, and then send the survey out. We are reporting the results in September.
- *Alexander Skirpan* - Question 14 – Perhaps should state: “For each action or agency, whether or not your state has a similar exemption.”
- *Eric Page* -What is the track record for responses?
 - *Jenny Breidenbaugh* - Hoping to get as many as possible; hope to get 50 percent; can boost this response rate through phone calls. Jane Chaffin has volunteered to help with this.
- *Chris Nolen* - How long does the survey take?
 - *Jenny Breidenbaugh* - Not sure, Jane Chaffin is going to pretest this and let us know how long it takes her.
- *Chris Nolen* - Can they save their responses and go back to them?
 - *Jenny Breidenbaugh* -Yes, and this is in the instructions.
- *Chris Nolen* - What happens when you get the numbers back?
 - *Jenny Breidenbaugh* – We use the results from other states to put Virginia in a context on the national level; sometimes we have findings and it is possible that we could make recommendations.
- *Roger Chaffe* –Question 17 – curious if other states have an exemption preventing the loss of federal revenue or federal funds; are other states doing anything like that, because Virginia does not have it right now, but wondering if should. Also might want to see if any states have a separate regulatory process for certain kinds of regulations that take them out from under the APA; agencies in Virginia have this, one is the Game Department.
 - Do have a question that asks if they have agencies that are totally exempt from the APA.
 - Martin Kent – The Board of Elections might have something like this coming up this year.

IV. Update on Supreme Court Rules

Chris Nolen -Forwarded to the Supreme Court advisory committee and they have asked for some additional information. Roger will work with Elizabeth Palen on a summary of the rationale behind the changes; definitely want to follow up on that.

V. Work Group Break Out:

Incorporation by Reference/Exemptions

Members:

- Mike Quinan (Chair)
- Phyllis Errico
- Angela Bowser
- Martin Kent

Christopher Nolen (chair)
 Angela P. Bowser
 Cindy Berndt
 Roger L. Chaffe

Jane Chaffin
 Michael Quinan
 Katya Herndon
 John Paul Jones

Phyllis A. Errico
 Martin Kent
 Eric M. Page
 Alexander F. Skirpan, Jr.

- Cindy Berndt
- Jane Chaffin

Summary:

Exemptions:

- Last year's goals:
 - Code Commission Mandate – surveys;
 - Search code for occurrences; consult with other states (do not need to do this now because of the JLARC study);
 - Get law professors involved – not successful last year;
 - Emergency regulations; and
 - Survey of the number of time exemptions used in past.
- *Jane Chaffin* – For the JLARC study, conducted a review of the regulations that were filed, over 60 percent were exempt regulations; we do not track specific exemptions, so not sure why they are exempt; JLARC might be doing this.
- *Cindy Berndt* – Could do the research and figure out data as to what the exemptions were for the Department of Environmental Quality.
- *Jane Chaffin* – John Paul Jones looked at the emergency regulations last year; most were mandated by the way that the legislation is drafted; the agency does not have a choice.
- *Elizabeth Palen* – More of an issue on educating the legislators on the process. In most cases, not necessarily an emergency; they just want expediency.
- *Jane Chaffin* – If the legislator wants the regulation a certain way, there is not much more that the drafter can do once they have suggested or explained the process.
- *Elizabeth Palen* - Lobbyists often push for emergency regulations to the legislators.
- *Cindy Berndt* – A full process regulation can take two years; this is why they push for the emergency regulations; now it is a standard.
- *Martin Kent* – What is the proper venue to train the legislators through?
- *Elizabeth Palen* – It is mentioned during orientation of new members, and Jane talked about putting in a handbook for the members, but this is still just more paper that they may or may not read. There is often an information gap between legislation and regulations.
- Possible solution:
 - Use of a CLE program for the lawyer legislators; maybe a program before session on the regulation process; non lawyers might come also in order to mingle with the legislators.
- Other issue- The APA provides that an emergency is anything that is required to be promulgated within 280 days; maybe ALAC needs to make a recommendation to change the language? No criteria for an “emergency.”
 - Angela Bowser and Cindy Berndt will look into this and bring answers to next ALAC meeting.

Christopher Nolen (chair)
 Angela P. Bowser
 Cindy Berndt
 Roger L. Chaffe

Jane Chaffin
 Michael Quinan
 Katya Herndon
 John Paul Jones

Phyllis A. Errico
 Martin Kent
 Eric M. Page
 Alexander F. Skirpan, Jr.

Incorporation by Reference:

- Issues:
 - Should be hot links to be able to click on the documents, but Jane only has them if the agency submits them.
 - Hoping to have an electronic repository; filed electronically and then link administrative code.
 - Problems with copyrighted materials.
 - Example: DHCD tried a few years ago to incorporate the national building code into the new regulations; were threatened with a law suit by the National Building Code group.
- Possible Solutions:
 - Somehow coming up with an online repository for those things we can link to, and then clearly document those things that have to be purchased because they are copyrighted.
- Questions to other states:
 - Have not been approved by the Committee yet.
 - Before meeting again, have everyone send ideas of what they want to see in a work plan; will be implemented through the use of the interactive web site.
 - See Oct. 24, 2007 Strategy Session agenda and attach the list of questions that have already been developed.
- *Martin Kent* – Stimulus Package Issues:
 - Not replacing state with federal regulations, but rather bits and pieces, hard to figure out where they belong, what is referenced and how; also referencing federal regulations that are subject to change; multiple agencies:
 - Education, transportation, natural resources, commerce and trade, etc.

Hearing Officer Handbook Update Group:

Chris Nolen – The Supreme Court of Virginia wants ALAC to go through the Hearing Officer handbook and update it.

Members:

- Eric Page (Chair)
- Katya Herndon
- Alexander Skirpan
- Roger Chaffe

Summary:

- Initial task is to develop a survey to determine what changes existing hearing officers believe should be made to the handbook.
- Katya to obtain this list (along with contact information and email addresses) from the Court and provide it to Eric Page. Due date is **May 5**.

Christopher Nolen (chair)
Angela P. Bowser
Cindy Berndt
Roger L. Chaffe

Jane Chaffin
Michael Quinan
Katya Herndon
John Paul Jones

Phyllis A. Errico
Martin Kent
Eric M. Page
Alexander F. Skirpan, Jr.

- Alex to provide a list of hearing officers who work for agencies so group can send surveys to these people as well; can obtain this through VAALJHO. Due date is **May 5**.
- Everyone in the work group to provide Eric Page with possible questions for this questionnaire by **May 12**. Eric will put together the document and circulate it before the June meeting.
- Goal is to finalize the questionnaire at the June meeting and move forward with a discussion of other tasks.
- Elizabeth to determine whether there is a state vendor that could administer the survey.
 - Suggestion: Zoomerang or similar arrangement.
- The work group discussed the possible confidentiality of responses to the questionnaire. We agreed that FOIA probably will not allow us to keep the responses confidential, so our idea is to ask each responder to identify themselves at the end of the survey so we can contact them if we have any questions or follow up.
- Another identified task is to update the citations and see if there are any gaps in the handbook.
 - Many of these will probably be identified in responses to the questionnaire, but perhaps some of us can begin looking at this now.
 - Citations to the VAPA have changed, so perhaps someone can start looking at this.
 - If anyone begins to do this before our next meeting, let Eric know when they have made some changes to the document.

VI. Adjourn -Chris Nolen

- Replacement for John Paul Jones –should be filled at next code commission meeting in May.
- Would like to have one more meeting in early June. Wednesdays seem to be workable for the group.

Christopher Nolen (chair)
 Angela P. Bowser
 Cindy Berndt
 Roger L. Chaffe

Jane Chaffin
 Michael Quinan
 Katya Herndon
 John Paul Jones

Phyllis A. Errico
 Martin Kent
 Eric M. Page
 Alexander F. Skirpan, Jr.