

vboa



**VIRGINIA BOARD
OF ACCOUNTANCY**

ENFORCEMENT PROCESSES

FEBRUARY 25, 2020

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STATEMENT OF INTENT

The Virginia Board of Accountancy (VBOA) is required by statutory mandate to take appropriate action against license holders, individuals, and entities to ensure the protection of the public. The VBOA has the authority to investigate possible violations of its statutes and regulations, and enforce these laws through several different types of penalties including, but not limited to, revoking, suspending or restricting a license.

In addition to the general statutory mandates and the VBOA's basic law, the disciplinary process is governed by the Virginia Administrative Process Act (APA), Virginia Code § 2.2-4000 *et seq.*, by the provisions of law generally applicable to the regulation of professions and occupations, and by court decisions interpreting these laws. The Office of the Attorney General provides significant resources to support the VBOA in the quasi-judicial role of hearing charges of misconduct that have been made against a regulated person or entity.

This manual is designed to provide guidance to meet this important responsibility and to be of assistance to staff in the Enforcement Division and the Board. The guidance in the manual does not carry the force of law; it is intended to provide a framework for ensuring fair and consistent enforcement of Virginia's public accountancy laws. It has been prepared by the VBOA's Enforcement Division and has been approved as a guidance document by the VBOA. This manual should be used in conjunction with the VBOA's statutes, regulations, policies and other guidance documents.

This manual is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter, civil or criminal. The information contained herein does not constitute and shall not be construed as legal advice. Please consult an attorney regarding any legal questions related to state or federal laws and regulations, including the interpretation and application of the laws and regulations governing the profession regulated by the VBOA. Under no circumstances shall the VBOA, its members, officers, agents, or employees be liable for any actions taken or omissions made in reliance on any information contained in this publication.

SECTION ONE:

COMPLAINT PROCESS

Consistent with statutory duties of the Executive Director and investigators of the VBOA, all reports received by the VBOA that may allege misconduct are referred to the Enforcement Division. The VBOA also generates internal referrals from the Licensing Division and CPE Division, as well as Enforcement Division staff monitoring news and social media for information regarding licensees or licensed practice that may suggest a violation has occurred.

The complaint form can be obtained through the VBOA's website at www.boa.virginia.gov or upon request to the Enforcement Division. The completed complaint form can be submitted by fax, email or by mail.

INITIAL RECEIPT AND INTAKE

The Enforcement Director is responsible for reviewing reports and complaints to determine if there is a possible violation and if the agency has jurisdiction over the matter. If the Enforcement Director requires additional information to make a determination, a preliminary inquiry is initiated. Various types of records and documents may be obtained, interviews may be conducted by telephone, or correspondence may be generated to gather information to assist in making the initial determination.

The following are examples of items that will not be considered a complaint:

- Inquiries seeking advice or information
- Courtesy copies of complaints addressed to another agency
- Allegations of matters that the VBOA does not have jurisdiction over
- Courtesy copies of internal grievances
- Allegations submitted with no supporting documentation
- Allegations that a violation has been committed in another state
- Fee disputes

If the Enforcement Director determines that it is clear the VBOA lacks subject matter jurisdiction, the complaint has been untimely filed, or both, the Enforcement Director will refer the file to the Executive Director for review. If the Executive Director concurs with the Enforcement Director's recommendation, the Complainant is notified by the Enforcement Director, in writing, of the disposition of the complaint.

If the Enforcement Director determines that the information supports a reasonable suspicion that a possible violation of law or regulation has occurred, a case is opened for investigation and assigned to an Investigator. Unless the Complainant was anonymous, the Complainant is notified in writing that an investigation will be opened and is provided with the case number for reference purposes. Pursuant to Virginia Code § 54.1-108, the VBOA does not disclose information about open cases, including to Complainants.

Additional allegations from the same Complainant against the same recipient after the investigative process has begun can be reviewed on a case-by-case basis to determine whether the allegations should be added to the open complaint or treated as a new complaint. Retaliation complaints that are received after an investigation has begun will be assigned a new complaint number.

A person may file a complaint that is filed on behalf of another named individual(s). The VBOA will contact that individual (or, where the victim is a minor child or incompetent adult, contact the victim's parent, guardian, or attorney) on whose behalf the complaint is filed to ensure that the named victim wishes to pursue the allegations raised on their behalf. If the person declines to pursue the complaint, and the Enforcement Director believes a violation may have occurred the Enforcement Director will present the complaint to a Board member to determine whether an investigation should be initiated in light of the refusal.

SECTION TWO: INVESTIGATIONS

It is the responsibility of the VBOA's Enforcement Division to conduct an investigation by obtaining copies of relevant documents, interviewing potential witnesses and obtaining any other relevant evidence. Once jurisdiction has been established, and complaints are assigned for investigation, the VBOA may engage outside consultants (Section Six) to assist in the investigation of complaints.

Once the investigation is initiated, the Enforcement Division will notify the Respondent of the complaint via a Notice of Apparent Violation (NOAV). Included in the NOAV will be information on the nature of the violations being investigated and the specific information being requested. This could include producing documents, answering specific questions, or both. The letter will also provide specific information on where to send a response.

Generally, a Respondent is initially given 14 calendar days to submit a written response to any request from the VBOA.¹ Failure to respond without good cause within the time frame set forth in VBOA regulation 18VAC5-22-170 is a violation of the VBOA's regulations and may result in disciplinary action being taken.

The purpose of the investigation is to gather facts and assess whether violations of Virginia's public accountancy laws and the VBOA's regulations have occurred. Enforcement Division staff may make multiple requests during the course of the investigation to obtain all necessary and relevant facts and documentation.

The Enforcement Division will send the NOAV and any information requests by certified and first-class mail to the Respondent's address of record, or if the Respondent does not have an address of record, and then at the Respondent's last known address. The Enforcement Division may also send copies of its correspondence to the Respondent via the Respondent's email address of record. It is the licensee's responsibility to notify the VBOA of any change to their mailing address or email address within 30 days of the change.

¹ Pursuant to VBOA regulation 18VAC5-22-170, Communication with the board, "...each licensee or applicant shall respond within 30 calendar days to any board request for information...."

It is important for Respondents to fully cooperate with the VBOA during the entire investigation process. Below are some tips in assisting in the investigation:

- Respond promptly to any requests from Enforcement Division staff.
- Provide true and accurate responses to questions and documentation requested by the Enforcement Division staff.
- Provide as much documentation as possible to ensure Enforcement Division staff have a clear understanding of the facts and circumstances.
- Ensure that the address of record is current.

Refusing to provide complete documentation to the VBOA may result in the VBOA pursuing a subpoena to secure the relevant evidence. The VBOA can both issue subpoenas under its own authority and can petition a court to issue a subpoena. This includes subpoenas duces tecum and subpoenas for witnesses.

The VBOA is committed to adjudicating complaints and cases in a timely manner, and treating a licensee fairly and objectively during the course of the investigation to ensure it has all necessary and relevant facts and documentation to reach an outcome.

SECTION THREE: ELIGIBILITY DETERMINATIONS

The Licensing Division makes initial eligibility determinations for initial licensure, renewal of licensure, or reinstatement of licensure. Upon receipt of a licensing denial, a license applicant may (i) cure the issue(s) identified by the Licensing Division through submission of a new application or (ii) request an Informal Fact-Finding (IFF) Conference proceeding under Code of Virginia § 2.2-4019.

The Licensing Division will transfer the denied licensing application and its attachments to the Enforcement Division if a licensing applicant requests an IFF Conference. The Enforcement Director will generate a case number for the referral and it will be assigned to an Investigator.

SECTION FOUR: CONTINUING PROFESSIONAL EDUCATION COMPLIANCE REVIEWS

All holders of a Virginia individual CPA license are required to meet the continuing professional education (CPE) requirements prescribed by VBOA regulations 18VAC5-22-90 and 18VAC5-22-140 unless they have applied for and received an exemption from the VBOA. As part of the annual renewal process, CPAs are required to either affirm they are in compliance with the VBOA's CPE regulations or if they cannot make such affirmation, to contact the VBOA to report their CPE deficiencies.

To encourage strict compliance with the VBOA's CPE requirements, the VBOA randomly selects a percentage of licensees on a yearly basis (spread out over 12 months) to complete CPE compliance reviews. Additionally, some licensees may be subject to a CPE compliance review under the terms and conditions of a previously entered Consent Order. If a Respondent is a licensee who is under investigation

for unlicensed activity, due professional care, or peer review issues in their firm, the VBOA will also require the submission of CPE documentation as part of the investigation.

Regardless of whether the basis for a CPE compliance review is a self-report or random selection, the Respondent must respond within 30 days of transmittal of the CPE compliance review notice, as required by 18VAC5-22-170(A). Failure to respond without good cause is a violation of the VBOA's regulations and will result in disciplinary action being taken.

SECTION FIVE: REASONABLE CAUSE DETERMINATION

Following completion of the investigation, the investigative report is reviewed by a Board member or designee to determine whether reasonable cause exists to proceed with an administrative proceeding on charges that one or more of the VBOA's statutes or regulations may have been violated. In order to take disciplinary action against a licensee, the VBOA must have clear and convincing evidence that a violation of law or regulation has occurred. While one may believe that a practitioner's action could be considered improper, unethical or otherwise deserving of corrective action, it may not always be a violation of law or regulation.

The review may conclude with:

- Requesting more information from the Complainant or Respondent
- Offering a Consent Order, which the Respondent may accept. If accepted by the Respondent and ratified by the VBOA, the Consent Order will resolve the matter without the need for further administrative proceedings
- Referring the matter to an IFF Conference as described in Virginia Code §§ 2.2-4019 and 2.2-4021
- Closing the case by issuing a Letter of No Finding or a Letter Declining Action

SECTION SIX: EXPERTS AND CONSULTANTS

The scope of the VBOA's regulatory authority and the range of possible complaints demand that the VBOA receives guidance from consultants for licensing and disciplinary matters involving specialized fields of practice. The VBOA may contract with an expert in a particular specialty to review the investigative file and, if necessary, to testify on behalf of the VBOA in an administrative or court proceeding arising from the matter. An expert assists the VBOA in understanding the standard of practice in the specialty, and in evaluating the evidence to determine whether a practitioner performed in accordance with that standard.

The contract with the expert provides that the expert will:

- Be available to work with the Board to develop and present evidence of the alleged violation
- Review and evaluate a completed investigative report and other supporting material indicating the standard of practice

- Render in writing a well-documented expert opinion regarding the standard of practice provided by the subject
- Assist the staff in preparing for any disciplinary proceedings which are brought against the subject practitioner by the Board
- Provide expert testimony on behalf of the Board on any administrative or court proceeding arising from the matter

SECTION SEVEN: INFORMAL FACT-FINDING CONFERENCES

Informal Fact-Finding (IFF) Conferences, as described in Virginia Code §§ 2.2-4019 and 2.2-4021, provide for case resolution without the formalities of a trial-like procedure. These conferences are public proceedings, held before a Presiding Officer assigned by the VBOA (agency subordinate). The IFF Conference gives the Respondent the opportunity to discuss with the Presiding Officer the allegations stated in the VBOA's notice and the evidence contained in the investigative file. In all disciplinary matters and proceedings, the burden of proof rests with the Commonwealth to establish evidence of a violation of law or regulation that governs the practice of public accounting. An exception is cases involving applicants for initial licensure, lifting of a suspension, or reinstatement, who bear the burden of proof to establish evidence that they meet eligibility requirements and are fit and suited to be licensed as a CPA.

IFF Conferences offer a timely, less costly, less adversarial means of adjudication, and most cases are resolved at this level. Respondents have the following rights with respect to informal conferences:

- To receive reasonable notice of the date, time, and location of the proceeding
- To receive reasonable notice of the allegations of misconduct
- To receive copies of all documentation or information that may be relied on during the decision making process
- To be informed, briefly and in writing, of the action that VBOA is authorized to take

The Respondent may choose to be represented by counsel at the IFF Conference. Enforcement Division staff's function at an IFF Conference in public session is to assist the Presiding Officer to determine whether the allegations are supported by the evidence.

IFF Conferences take place at the main office of the VBOA, in Henrico County, Virginia. Pursuant to Virginia Code § 2.2-4003, venue for administrative proceedings is where the agency has its principal office, unless the parties agree otherwise.

A VBOA selected Presiding Officer hears an IFF Conference. Any Presiding Officer, VBOA members, or staff who participate in an IFF Conference may not participate in any subsequent formal hearing regarding the same matter or consideration of the matter by the full VBOA, unless a Respondent agrees in writing to permit ex parte communications between the full VBOA and those VBOA members, former VBOA members, and staff who participated in the IFF Conference.

Following an IFF Conference, the Presiding Officer may take any of the following actions:

- Offer a Consent Order, which the Respondent may accept. If accepted by the Respondent and ratified by the VBOA, the Consent Order will resolve the matter without the need for further administrative proceedings.

- Submit a Proposed Finding of Facts, Conclusions of Law and Recommendation to the VBOA for its consideration.
- Close the case by issuing a Letter of No Finding or a Letter Declining Action.

SECTION EIGHT: CASE CLOSURE

The VBOA's disposition of a case must be documented, and in the event the VBOA finds that a violation has occurred that warrants discipline, will take the form of an order. An order may result from a disciplinary proceeding or from a negotiated settlement in lieu of further disciplinary proceedings.

OUTCOMES OF INVESTIGATIONS

There are four types of case decisions that the VBOA can choose in closing an investigation:

- Letter of No Finding
- Letter Declining Further Action
- Consent Order
- Final Opinion and Order

A letter of no finding is a determination, either by the Presiding Officer or by the VBOA, that no facts have been discovered during the investigation that indicate a violation has occurred.

A letter declining action is a determination, either by the Presiding Officer or by the VBOA, that while facts have been discovered that indicate a violation has occurred, the violation is so minor or inconsequential that further disciplinary proceedings are not in the public interest.

A Consent Order results from a negotiated settlement, either prior to or in lieu of further disciplinary proceedings, and reflects a decision agreed to by the VBOA and a Respondent. The Presiding Officer typically offers Consent Orders when the Respondent admits to the facts or when the issues are clear. A proposed Consent Order that contains findings of fact, conclusions of law, sanctions and a waiver of rights to further proceedings is prepared and presented to the Respondent. If the Respondent agrees to the settlement offered, the Consent Order will be presented to the VBOA for approval. The VBOA may accept or reject, in whole or in part, the Consent Order. While Consent Orders are generally offered before an informal conference or formal hearing is scheduled, they may be used after an IFF Conference.

A Final Opinion and Order is a unilateral decision by the Board to impose penalties on a Respondent, and typically are the result of either a Respondent failing to cooperate with the investigation or a Respondent and the VBOA being unable to negotiate settlement. Generally, a Final Opinion and Order is not utilized unless an IFF Conference or formal hearing has been held. The Presiding Officer or Hearing Officer will prepare a Proposed Finding of Facts, Conclusions of Law, and Recommendation to the VBOA for its consideration. The Board, in its Final Opinion and Order, may accept or reject, in whole or in part, the proposal and may make its own findings of fact, conclusions of law, and impose penalties beyond what the Presiding Officer or hearing officer proposed.

PENALTIES AVAILABLE TO THE VBOA

In its deliberations, the VBOA may utilize statutes, VBOA regulations and VBOA policies. An enumeration of the penalties the VBOA may utilize can be found at Code of Virginia § 54.1-4413.4.

In licensure eligibility matters, the VBOA can also refuse to grant a person the privilege of using the CPA title in Virginia. See Code of Virginia § 54.1-4409.1(C).

FINAL ORDERS AND APPEALS

An appeal of a VBOA's Final Order must be made within 33 days from the date of service by mail, and is handled in the judicial system at the circuit court level. An appeal at this level must comply with the procedures in Part Two A of the Rules of the Supreme Court of Virginia. The order of the VBOA is **not** automatically vacated when appealed to the circuit court. However, the appealing party may request from the court a stay of the VBOA's order pending the appeal.

Because Consent Orders contain a waiver of any right to appeal, Respondents may not appeal a Consent Order.

Final Orders and Consent Orders are matters of public record, pursuant to Virginia Code §§ 2.2-4023 and 54.1-2400.2. A copy of a Final Order or Consent Order is mailed to the Complainant, except in the case of anonymous Complainants. Final Orders, Consent Orders and all related disciplinary case information obtained and maintained during the course of an investigation or disciplinary proceeding become a matter of public record upon the closure of an investigation and are subject to disclosure under the Virginia Freedom of Information Act (FOIA), Virginia Code § 2.2-3700 *et seq.*, unless otherwise exempted.

APPENDIX:

APPENDIX A

DEFINITIONS

Administrative Process Act (APA) – The procedural requirements for promulgating regulations and for deciding cases, found in Va. Code § 2.2-4000 *et seq.* The APA supplements the basic law of the VBOA.

Advisory Letter – In cases where there is insufficient evidence to support a finding of a violation, but there are concerns about the respondent’s practice. The VBOA can send the respondent an advisory letter, which references only the related statutes/regulations of concern. It is a letter to a licensee who has been the subject of an investigation, informing the licensee that the case is being closed without any disciplinary action, but suggesting the licensee examine certain portions of his or her practice in light of certain, specific statutes and regulations. This action does not constitute disciplinary action. The source does not get a copy of this letter. The advisory letter only applies to the evidence within the case being reviewed.

Agency Subordinate – A person designated by the VBOA to preside over administrative proceedings conducted in accordance with Virginia Code § 2.2-4019, and who renders recommended findings of fact, conclusions of law, and decisions for review by the VBOA or offers revised Consent Orders that, if accepted by the Respondent, will then be submitted to the VBOA for approval. An agency subordinate may also be referred to as a Presiding Officer.

Appellant – The party who appeals a case decision of a VBOA to a circuit court for review.

Appellee – On appeal, the party who argues against the setting aside or the remand of a VBOA case decision.

Basic law – Provisions of Virginia statutes that pertain specifically to the VBOA.

Case decision – Any agency proceeding or determination that, under laws or regulations at the time, a named party as a matter of past or present fact, either is, is not, or may or may not be (i) in violation of such law or regulation or (ii) in compliance with any existing requirement for obtaining or retaining a license or other right or benefit.

Censure – A formal sanction of a person or entity who holds a Virginia license or the license of a substantially equivalent jurisdiction. It is a declaration that a Respondent is guilty of misconduct that does not require suspension or revocation. A stern rebuke that finds the conduct of the Respondent violates the standards of conduct and practice, detrimentally affects the integrity of the profession, and undermines public confidence in the practice of public accountancy. A censure also serves as a public warning to other members of the profession.

Civil remedy – A remedy provided by a civil court (e.g., an award for damages in a malpractice lawsuit).

Complainant – An individual or entity that files a complaint or makes a report of an allegation of misconduct.

Complaint – A report or allegation of misconduct.

Consent Order – An order voluntarily agreed to by both a Respondent and the VBOA. Sometimes called a “pre-hearing Consent Order” when it is offered in lieu of an IFF conference or a formal hearing. Consent Orders have the same effect as any Final Order and Opinion (see below).

Final Order and Opinion – A unilateral decision issued by the VBOA pursuant to its statutory authority, affecting a person or entity engaged in prohibited acts or affecting the license of a regulant licensed by the VBOA.

Hearing officer – A person who is qualified, in accordance with Virginia Code § 2.2-4024, to preside over administrative proceedings conducted under Virginia Code § 2.2-4020 and, if the parties mutually agree, over administrative proceedings conducted under Virginia Code § 2.2-4019, when the VBOA (full VBOA, a quorum, or a panel thereof consisting of at least five members) does not convene to conduct the hearing itself.

Informal Fact-Finding (IFF) Conference – A fact-finding proceeding conducted by a board member or a designee with a Respondent. It may result in one or more of the following actions: exonerate the Respondent; offer the Respondent a Consent Order; or make a recommendation containing findings of fact, conclusions of law, and penalties to the VBOA.

Investigative Questionnaire – A list of questions submitted to a Respondent during the course of an investigation of alleged misconduct.

Notice of Apparent Violation (NOAV) – A statement to the Respondent to notify them that they are the subject of a complaint and the general subject matter of the complaint. Also enclosed with the notice is a copy of the complaint and an Investigative Questionnaire.

Notice of Informal Fact-Finding Conference (IFF Notice) – A statement of specific charges provided to the Respondent who is the subject of a complaint. The notice states the time, place, and nature of the proceeding. Also enclosed with the notice is any information on which the VBOA will rely to make a case decision.

Party or parties – A person or persons having a direct interest in the subject matter or outcome of a case; one(s) who could assert a claim, make a defense, control proceedings, examine witnesses, or appeal a case decision (e.g., a Respondent). Only the Respondent may appeal a case decision of the VBOA.

Presiding Officer – see Agency Subordinate.

Reasonable cause – Having more evidence for than against. A reasonable ground for belief in the existence of facts as reported.

Reprimand - A formal sanction of a person or entity who holds a Virginia license or the license of a substantially equivalent jurisdiction. A rebuke for one or more violations does not require censure. A

reprimand usually involves an isolated incident or behavior that can be easily corrected, or misconduct that is more serious but the Respondent presented substantial mitigating factors.

Respondent – The person or entity being investigated or responding to a complaint.

Service – The delivery of a notice of an administrative proceeding, a Consent Order, or an order of a VBOA to a party that charges the party with receipt of the document and subjects the party to the legal effect of it.

Standing – The legal right of a party to assert or enforce legal rights and duties against another. On appeal of a VBOA decision, the party aggrieved or claiming the unlawfulness of such decision (e.g., the Respondent).

Vacate – To set aside or render void an order of the VBOA.

Venue – The particular city, county, or geographical location in which a case may be heard and determined.