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Proposed Regulation Agency Background Document

Agency name	Department of Criminal Justice Services
Virginia Administrative Code (VAC) citation(s)	6VAC20-230
Regulation title(s)	Regulations Relating to Special Conservators of the Peace
Action title	Amend the Initial Registration Application requirements regarding bond or insurance verification.
Date this document prepared	March 24, 2015

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

The Criminal Justice Services Board (CJSB) seeks to amend the minimum amount and type of liability or self insurance for special conservators of the peace as required by Virginia Code § 19.2-13(C). The Criminal Justice Services Board further seeks to remove the language allowing a special conservator of the peace to be covered by a cash or surety bond to conform to the changes in the Code of Virginia during the 2015 General Assembly as a result of SB1195.

The proposed changes will reflect the CJSB's decision in June 2014 to amend the \$10,000 general liability or self insurance policy to a minimum of \$500,000 in professional law enforcement liability insurance. The CJSB further voted to increase the minimum coverage amount for a cash or surety bond from \$10,000 to \$100,000 but will not pursue proposing this increase based on recent legislative action that strikes this requirement from the Code of Virginia § 19.2-13 pursuant to Chapter 772 of the 2015 Acts of Assembly, effective July 1, 2015.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

CJSB – Criminal Justice Services Board
 DCJS – Department of Criminal Justice Services
 DRM – Division of Risk Management, Virginia Department of Treasury
 PSSAB - Private Security Services Advisory Board
 SCOP – Special Conservator of the Peace
 VML – Virginia Municipal League

Surety bond - A contractual arrangement between the surety, the principal and the obligee whereby the surety agrees to protect the obligee if the principal defaults in performing the principal’s contractual obligations. A bond is the instrument that binds the surety.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.

The *Code of Virginia* requires persons appointed as a special conservator of the peace to be covered by a cash or surety bond or evidence of a policy of liability insurance or self-insurance in an amount and with coverage as fixed by the Criminal Justice Services Board. Virginia Code § 19.2-13(C). The Criminal Justice Services Board is statutorily authorized to establish the amount and type of insurance coverage required for special conservators of the peace. It also has the statutory authority to adopt regulations establishing the qualifications of applicants for registration and to administer the regulatory system promulgated by the Board. Virginia Code § 9.1-150.2.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

Special conservators of the peace (SCOPS) are unique actors in that they are typically citizens granted full arrest authority equivalent to law enforcement officers. SCOPS can carry firearms and use lethal force when effecting arrests; they can use the seal of the Commonwealth and the word “police” on their badges and uniforms. SCOPS engage in similar activities as law enforcement, such as enforcing the laws of the Commonwealth, making arrests and dealing with dangerous people and situations while on duty. Because their authority, responsibilities and actions are similar to that of law enforcement officers, SCOPS need to be adequately and similarly protected from potential claims of wrongdoing. Unlike governmental actors, who enjoy a certain degree of protection, coverage and in some cases, immunity, SCOPS employed by private corporations likely enjoy no immunity for their actions and therefore need adequate coverage when claims are made against them. For the same reasons, citizens interacting with

SCOPS must also be afforded some degree of protection or ability to be made whole after suffering wrongdoings or misconduct by SCOPS.

Currently a SCOP applicant is required to maintain either a \$10,000 surety or cash bond or a \$10,000 general liability insurance policy. The \$10,000 bond amount is the minimum amount that the CJSB can fix pursuant to §19.2-13 (C); this requirement will be removed from the Code of Virginia pursuant to Chapter 772 of the 2015 Acts of Assembly. The Code does not specify a minimum amount of insurance and provides the CJSB with the authority to fix the amount and type of insurance coverage. CJSB evaluated the established minimum standards to determine whether it adequately protected individual SCOPS, employers of SCOPS and private citizens interacting with SCOPS.

To this end, the CJSB sought additional information and input from DCJS and the Private Security Services Advisory Board (PSSAB). An expert from the Virginia Municipal League (VML) and an expert from the Virginia Department of Taxation, Division of Risk Management (DRM), both presented information to the CJSB about bonds and insurance as it relates to the coverage of individuals with arrest authority. VML is statutorily authorized to provide insurance whose members include local governments, towns and counties. VML is the insurance company for 150 police departments in Virginia. The Division of Risk Management protects Virginia's state government, other public entities, and certain qualified individuals from financial loss caused by legal liability, loss to property, and other hazards. DRM protects a diverse range of exposures for state government, constitutional officers, local governments, and others throughout Virginia.

The experts indicated that a cash bond is a bond paid in cash and is not secured by property or real estate. They further advised that cash and surety bonds merely protect an employer from dishonest acts of the employee (such as theft) and speculated that the bond requirement for special conservators was an antiquated method that was likely codified in Virginia Code § 19.2-13(C) prior to the emergence of insurance. Both experts advised that bonds do not act like insurance and do nothing to protect the public from misconduct or injury inflicted by special conservators of the peace. Ideally, the SCOP would be covered by both a bond (to protect the employer) and liability insurance (to protect the SCOP and public). The expert from Department of Taxation, Division of Risk Management advised that additional coverage of a \$500,000 faithful performance bond exists for all state employees.

The CJSB was advised of the different types of insurance. General liability insurance covers situations resulting in injury or damage to another person or property. Self insurance of one's property or interests against possible loss is established through a special fund for that specific purpose, instead of seeking coverage with an underwriter. Self insurance is typically used by local and state governments. Law enforcement liability insurance, a type of professional insurance, covers what general liability insurance does not, namely actions and misconduct arising out of arrests or the enforcement of criminal laws. Law enforcement liability insurance covers errors of judgment (what the SCOP should have done), such as excessive use of force, wrongful detention, racial profiling and infliction of mental anguish. Most law enforcement claims are for errors of judgment and excessive use of force and, to a lesser degree, include claims for racial profiling and mental anguish. The main difference between general liability insurance and professional law enforcement liability is that professional law enforcement liability covers specific actions arising out of law enforcement duties and actions.

The experts also advised the CJSB that the industry standard for coverage of individuals with arrest authority is \$1,000,000 in professional law enforcement coverage. VML insures all its member officers and special conservators of the peace for at least \$1,000,000 per occurrence and that many police departments pay for additional coverage. By statute, sheriffs are covered by a \$1,500,000 liability policy and a \$500,000 fidelity bond. The experts informed the CJSB that there is a healthy, commercial market available for the purchase of professional law enforcement liability.

In summary, the experts advised that a \$10,000 bond and a \$10,000 general liability insurance plan was not adequate coverage to: 1) provide recourse for an individual harmed by SCOP actions or misconduct or 2) protect the SCOP from claims arising out of his law enforcement activities.

Prior to making a decision, the CJSB also sought advice from the Private Security Services Advisory Board. The PSSAB recommended the CJSB increase the bond amount to \$100,000 and to change the insurance amount and type to \$500,000 in a general liability insurance plan. DCJS recommended increasing the bond amount to \$100,000 and changing the insurance amount and type to \$500,000 in professional law enforcement liability insurance.

After considering all information and recommendations from experts, DCJS and PSSAB, and mindful of ensuring the health, safety and welfare of citizens and special conservators of the peace arising out of the law enforcement duties of SCOPS, the Criminal Justice Services Board decided in June 2014, pursuant to their direct authority in Virginia Code Section 19.2-13(C), that special conservators of the peace must maintain either a \$100,000 surety or cash bond or \$500,000 professional law enforcement liability in order to become eligible for registration and appointment. On May 7, 2015, the CJSB decided to remove the proposal to increase the surety or cash bond and to strike the requirement from the regulations to conform to statutory language as enacted in Chapter 772 of the 2015 Acts of Assembly (SB1195).

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of changes" section below.

The proposed changes will reflect the CJSB's statutory authority to amend the \$10,000 general liability or self insurance to a minimum of \$500,000 in professional law enforcement liability insurance. Further, the proposed changes will reflect the removal of the cash or surety bond option to conform to the change in the Code of Virginia as enacted in Chapter 772 of the 2015 Acts of Assembly (SB1195).

Issues

Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

The primary advantage to the public is ensuring an increased opportunity for recourse in the event that an individual is harmed as a result of interacting with a SCOP. Individual SCOPS are also provided with increased liability protection for actions arising out of their conduct. The current requirements do nothing to protect the individual SCOP from defending against actions arising out of their errors of judgment.

There are no disadvantages to the agency or the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities that will be particularly affected by the proposed regulation. As mentioned above, many governmentally employed SCOPS already have equal or more insurance coverage than is proposed by the new regulation.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the Criminal Justice Services Board is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Barbara Peterson-Wilson, Law Enforcement Program Coordinator. Address: Department of Criminal Justice Services 1100 Bank Street, 12th Fl Richmond, Virginia 23219, Email: Barbara.Peterson-Wilson@dcjs.virginia.gov, Fax: (804) 786-0410. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <http://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures	None
Projected cost of the new regulations or changes to existing regulations on localities.	None

<p>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>Special Conservators of the Peace registered and appointed pursuant to Virginia Code § 19.2-13.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There are currently 760 individual special conservators of the peace registered with DCJS. It is estimated that less than 1% of the businesses employing registered SCOPS are small businesses, as records reflect that the majority of the special conservators of the peace are employed by cities, counties, or state agencies and large corporations.</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>The projected costs are applicable to any special conservator of the peace who maintains liability insurance coverage less than the proposed amount.</p> <p>Insurance premium costs normally follow a tiered system based on risk and other business factors. Potential costs for private businesses employing SCOPS could range from \$2,500.00 to \$25,000 a year based on annual payroll, revenues, operational risk and history of the business. Risk varies by the type of SCOP activities engaged in.</p> <p>Records reflect that over 60% of SCOPs are provided with the authority to carry a firearm. It is estimated that less than 15% of small businesses employ armed SCOPs and the majority of these SCOPs are bonded.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>Individual SCOPS and their employers will be better protected by claims arising out of errors of judgment, including excessive use of force, wrongful detention, racial profiling and infliction of mental anguish. These types of claims are common for law enforcement activity and not covered by general liability insurance.</p> <p>Citizens will also have a better way to claim and recover judgments against SCOPS and their employers from wrongdoing.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

There are no viable alternatives for the Criminal Justice Services Board or the agency. The CJSB has exclusive control over establishing the amount and type of insurance for SCOPS and has, by virtue of its decision to amend, determined that \$500,000 in professional law enforcement liability insurance is essential to the safety and welfare of SCOPS and the public.

Small businesses may pursue less costly alternatives by evaluating and reducing the risk of activities it engages in SCOPs to engage in.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

DCJS has no other alternative regulatory methods or authority to change or alter the CJSB’s decision. DCJS only requires SCOP applicants to provide evidence of either a bond or insurance upon initial application and renewals. Complying with the requirements is easily accomplished by providing documentation of the appropriate coverage. There are no reporting requirements, performance standards or operational standards proposed or affected by the proposed regulation.

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

No public comment was received since the publication of the NOIRA.

Family impact

Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

There is no anticipated impact on the institution of the family and family stability.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being

*proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please list separately: (1) all differences between the **pre-emergency** regulation and this proposed regulation; and 2) only changes made since the publication of the emergency regulation.*

For changes to existing regulation(s), use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
6VAC20-230-30		Documentation verifying a secured surety bond or cash bond in the amount not to be less than \$10,000 or a policy of comprehensive general liability insurance with a minimum coverage of \$10,000.	<p>The proposed changes will strike the language allowing for a cash or surety bond and amend the \$10,000 general liability or self insurance to a minimum of \$500,000 in professional law enforcement liability insurance.</p> <p>The proposed changes will better protect the individual SCOP, his employer and the public from misconduct and errors in judgment arising out of his law enforcement type duties.</p>