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Proposed Regulation Agency Background Document

Agency name	Office of the State Inspector General
Virginia Administrative Code (VAC) citation(s)	1 VAC42-30
Regulation title(s)	Fraud and Abuse Whistle Blower Reward Fund Regulation
Action title	Initial Promulgation of <i>Fraud and Abuse Whistle Blower Reward Fund Regulation</i>
Date this document prepared	October 6, 2017

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

These proposed regulations define the Fraud and Abuse Whistle Blower Reward Fund (Fund) and its administration by the Office of the State Inspector General (OSIG), including eligibility requirements, amount, distribution, process for leftover moneys at the end of the fiscal year, and the Fund's establishment on the books of the Comptroller.

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.

"Abuse" means an employer's or employee's conduct or omissions that result in substantial misuse, destruction, waste, or loss of funds or resources belonging to or derived from federal, state, or local government sources.

"Commonwealth" means the Commonwealth of Virginia.

"Disclosure" means a voluntary formal or informal communication or transmission of any violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

"Employee" means any individual who is employed in either a salaried or wage basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of and whose compensation is payable, no more often than biweekly, in whole or in part, by a Virginia governmental agency.

"Employer" means a person supervising one or more employees, including the employee filing a good faith report, a superior of that supervisor, or an agent of the governmental agency.

"Executive branch agency" or "agency" means any agency, institution, board, bureau, commission, council, public institution of higher education, or instrumentality of state government in the executive department listed in the appropriation act.

"Fraud" means the intentional deception perpetrated by an individual or individuals or an organization or organizations, either internal or external to state government, which could result in a tangible or intangible benefit to themselves, others, or the Commonwealth, including local government, or could cause detriment to others or the Commonwealth. Fraud includes a false representation of the facts, whether by words or by conduct. Fraud also includes false or misleading statements, or by the concealment of essential information, or information or actions that deceive or are intended to deceive.

"Fraud and Abuse Whistle Blower Protection Act Program" or "WBPA Program" means the policy of the Commonwealth that Commonwealth citizens and employees of state government are freely able to report instances of wrongdoing or abuse committed by their employing agency, other state agencies, or independent contractors of state agencies.

"Fraud and Abuse Whistle Blower Reward Fund" or "Fund" means the fund used solely to provide monetary rewards to Commonwealth citizens who have disclosed information of wrongdoing or abuse under the WBPA Program that results in a recovery of at least \$5,000. The amount of the reward is equal to up to 10% of actual sums recovered by the Commonwealth as a result of the disclosed wrongdoing or abuse. OSIG administers the Fund and defines the regulations for its operation.

"Good faith report" means a reported incident of possible wrongdoing or abuse made without malice, for which the person reporting has reasonable cause to believe wrongdoing or abuse occurred.

"Governmental agency" means (i) any agency, institution, board, bureau, commission, council, or instrumentality of state government in the executive branch listed in the appropriation act and any independent agency; (ii) any county, city or town or local or regional governmental authority; and (iii) any local school division as defined in § 22.1-280.2:2.

"Hotline coordinator" means a qualified employee, designated by a governmental agency director or chief administrator, responsible for conducting State Fraud, Waste and Abuse Hotline investigations referred to the agency by OSIG.

"Internal audit director" means a director of a governmental agency internal audit program.

"Misconduct" means conduct or behavior by an employee that is inconsistent with state, local or agency standards for which specific corrective or disciplinary action is warranted.

"Nonstate agency" means any public or private foundation, authority, institute, museum, corporation, or similar organization that is (i) not a unit of state government or a political subdivision of the Commonwealth as established by general law or special act and (ii) wholly or principally supported by state funds. "Nonstate agency" shall not include any such entity that receives state funds (a) as a subgrantee of a state agency, (b) through a state grant-in-aid program authorized by law, (c) as a result of an award of a competitive grant or a public contract for the procurement of goods, services, or construction, or (d) pursuant to a lease of real property as described in subdivision 5 of § 2.2-1149.

"Office of the State Inspector General" or "OSIG" means the governmental agency that conducts independent investigations, performance audits, and other services designed to provide objective and useful information to the Commonwealth and those charged with its governance and promotes efficiency and effectiveness in state government executive branch agencies in accordance with § 2.2-307 to 313. OSIG administers the Fund.

"Public body" means any legislative body; any authority, board, bureau, commission, district or agency of the Commonwealth or any political subdivision of the Commonwealth, including counties, cities and towns, city councils, boards of supervisors, school boards, planning commissions, boards of visitors of institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds. "Public body" includes any committee, subcommittee, or other entity however designated, of the public body or formed to advise the public body, including those with private sector or citizen members and corporations organized by the Virginia Retirement System. For the purposes of this chapter the term "public body" does not include courts of the Commonwealth.

"Reward" means a monetary benefit payable from the Fund by OSIG to an eligible whistle blower.
 "Screening process" means OSIG's internal review to ensure reports of information or disclosures of wrongdoing fall within the authority of the WBPA Program.

"State Fraud, Waste and Abuse Hotline" or "Hotline" means the program (i) that provides Commonwealth citizens with a confidential and anonymous method to report suspected occurrences of fraud, waste and abuse in state agencies and institutions and (ii) that provides the Commonwealth a way to investigate such occurrences to determine their validity and make appropriate recommendations to address deficiencies.

"Whistle blower" means a Commonwealth employee or citizen who witnesses or has evidence of wrongdoing or abuse and who makes a good faith, open, and public report of the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority.

"Wrongdoing" means a violation, which is not of a merely technical or minimal nature, of a federal or state law or regulation or a formally adopted code of conduct or ethics of a professional organization designed to protect the interests of the public or employee. It includes any violation of any law, rule, or regulation; or gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.

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.

- 1) Subsection E of § 2.2-3014 of the *Code of Virginia*.
- 2) State Inspector General (subsection A.8 of § 2.2-309 of the *Code of Virginia*).

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.

These regulations will:

- Provide direction to state agency employees and citizens for reporting instances of fraud and/or abuse within executive branch agencies.
- Encourage state agency employees and citizens of the Commonwealth to report instances of fraud, abuse, or other wrongdoing committed within executive branch agencies and non-state agencies.
- Encourage state agency employees and citizens of the Commonwealth to report instances of fraud, abuse, or other wrongdoing committed by independent contractors of state agencies.
- Provide resources to pay monetary rewards to state agency employees and citizens who provide relevant information to the OSIG that results in recovery of funds on behalf of the Commonwealth.
- Provide statutory protection for state employees and citizens who report instances of abuse or wrongdoing from discrimination or retaliation by state agencies.

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.

This is the first issue of the Fraud and Abuse Whistleblower Fund regulation. The proposed regulation defines the Fraud and Abuse Whistle Blower Reward Fund (Fund) and its administration by the Office of the State Inspector General, including Fund eligibility requirements, Fund amount, Fund distribution, process for leftover Fund moneys at the end of the fiscal year, and the establishment of the Fund on the books of the Comptroller.

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
10	Proposed policy	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Provide readers with information on the Whistle Blower Protection Act and Whistle Blower Reward Fund.
20	Proposed definition of terms	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Provide readers with definitions for technical terms in regulations and how technical terms apply to Whistle Blower Reward Fund.
30	Proposed OSIG responsibilities	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains OSIG’s role in administering the Whistle Blower Protection Act Program and the Whistle Blower Reward Fund.
40	Proposed WBPA	Subsection E of § 2.2-	Explains how OSIG will

	Program/Fund Notification	3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	communicate information about and advertise the WBPA Program and the Whistle Blower Reward Fund.
50	Proposed guidelines for reporting alleged fraud, abuse, or wrongdoing	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Provides readers with guidelines for reporting instances of alleged fraud, waste, or other wrongdoing in state government executive branch agencies.
60	Proposed guidelines for OSIG receipt of an allegation	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains process OSIG staff perform when receive a whistle blower allegation under the WBPA program.
70	Proposed guidelines for OSIG’s allegation investigative process	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains process OSIG follows when investigating a whistle blower allegation.
80	Proposed guidelines for Whistle Blower Reward Fund as a non-reverting fund	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains structure of Whistle Blower Reward fund and what happens to its moneys.
90	Proposed guidelines for fund payments made out to whistle blowers	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains how payments from the Whistle Blower Reward Fund are made to whistle blowers and defines the regulations surrounding payments.
100	Proposed whistle blower protections under the Whistle Blower Protection Act	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains to readers what legal protections whistle blowers have as a result of the Whistle Blower Protection Act, including antiretaliation regulations.
110	Proposed annual report guidelines	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains the annual report OSIG must provide the General Assembly and the Governor concerning the WBPA Program and the Whistle Blower Reward Fund.

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 proposed regulation will provide direction to all citizens of the Commonwealth of Virginia (including state employees) for reporting instances of fraud and/or abuse within executive branch agencies.

These regulations will:

- Provide direction to state agency employees and citizens for reporting instances of fraud and/or abuse within executive branch agencies.
- Encourage state agency employees and citizens of the Commonwealth to report instances of fraud, abuse, or other wrongdoing committed within executive branch agencies and non-state agencies.
- Encourage state agency employees and citizens of the Commonwealth to report instances of fraud, abuse, or other wrongdoing committed by independent contractors of state agencies.
- Provide resources to pay monetary rewards to state agency employees and citizens who provide relevant information to the OSIG that result in recovery of funds on behalf of the Commonwealth.
- Provide statutory protection for state employees and citizens who report instances of abuse or wrongdoing from discrimination or retaliation by state agencies.

All moneys recovered by the State Inspector General as the result of whistle blower activity and alerts originating with the Office of the State Inspector General shall be deposited in the Fund (85 percent of all sums recovered shall be remitted to the institutions or governmental agencies on whose behalf the recovery was secured by the State Inspector General unless otherwise directed by a court of law). Interest earned on moneys in the Fund shall remain in the Fund and be credited to it. Any moneys remaining in the Fund, including interest thereon, at the end of each fiscal year shall not revert to the general fund but shall remain in the Fund.

Moneys in the Fund shall be used solely to (i) provide monetary rewards to persons who have disclosed information of wrongdoing or abuse under this chapter and the disclosure results in a recovery of at least \$5,000 or (ii) support the administration of the Fund, defray Fund advertising costs, or subsidize the operation of the Fraud, Waste and Abuse Hotline.

There are no anticipated disadvantages to the public 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 is no locality particularly affected by the proposed 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 agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency 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: Mark Courtney, Regulatory Coordinator, Office of the State Inspector General, 101 N. 14th St., 7th Floor, Richmond, VA 23219, Phone (804) 625-3255, Fax (804) 371-0165, E-mail mark.courtney@osig.virginia.gov. 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 not be held following the publication of this stage of this regulatory action.

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	\$0
Projected cost of the new regulations or changes to existing regulations on localities.	\$0
Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.	Citizens of the Commonwealth, contractors, executive branch state government agencies and employees, and local government agencies and employees
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.	Estimated at 10 state and local government agencies per year
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	\$0

of the proposed regulatory changes or new regulations.	
Beneficial impact the regulation is designed to produce.	Recovery of the Commonwealth's funds

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.

Subsection E of § 2.2-3014 of the *Code of Virginia* mandates the promulgation of these regulations; therefore, no alternative exists.

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.

Subsection E of § 2.2-3014 of the *Code of Virginia* mandates the promulgation of these regulations; therefore, no alternative exists.

Periodic review and small business impact review report of findings

If you are using this form to report the result of a periodic review/small business impact review that was announced during the NOIRA stage, please indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

Not applicable.

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.

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.

This regulatory action is not expected to have any 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 follow the instructions in the text following the three chart templates below.

If a new regulation is being promulgated, that is not replacing an existing regulation, please use this chart:

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40	Proposed WBPA Program/Fund Notification	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains how OSIG will communicate information about and advertise the WBPA Program and the Whistle Blower Reward Fund.
50	Proposed guidelines for	Subsection E of § 2.2-	Provides readers with

	reporting alleged fraud, abuse, or wrongdoing	3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	guidelines for reporting instances of alleged fraud, waste, or other wrongdoing in state government executive branch agencies.
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110	Proposed annual report guidelines	Subsection E of § 2.2-3014 and subsection A.8 of § 2.2-309 of the <i>Code Virginia</i>	Explains the annual report OSIG must provide the General Assembly and the Governor concerning the WBPA Program and the Whistle Blower Reward Fund.

This action is to replace an emergency regulation for the initial promulgation of the Fraud and Abuse Whistle Blower Reward Fund regulation (this is a brand new chapter and never existed before the Emergency regulation). The language for the proposed regulation contains some changes in wording from the emergency language (not substantive – wording was changed in almost all sections; however, no new sections were created and no sections were deleted nor did the policy intent of the sections change). The changes were developed from a meeting of a Regulatory Advisory Panel on October 12, 2016 (The following individuals attended the meeting: Senator Frank M. Ruff Jr., Delegate Matthew James, Jennifer Fountain Connolly, Esq., and Stephen M. Kohn, Esq. The following individuals were invited, but did not attend the meeting: Senator R. Creigh Deeds, Delegate James M. LeMunyon, Delegate Alfonso H. Lopez, Louisiana State Inspector General Stephen B. Street Jr., Danielle Brian, Executive Director of the Project on Government Oversight, and Philip Zisman, Executive Director of the Association of Inspectors General.)