

1 Committee Substitute

2 for

3 **H. B. 4410**

4
5 (By Delegate Hartman)

6 (Originating in the Committee on the Judiciary)

7
8 [February 19, 2014]

9
10 A BILL to amend and reenact §19-2C-1, §19-2C-3, §19-2C-5,
11 §19-2C-5a, §19-2C-6, §19-2C-6b, §19-2C-8 and §19-2C-9 of the
12 Code of West Virginia, 1931, as amended; and to amend said
13 code by adding thereto a new section, designated §19-2C-9a,
14 all relating to auctioneers and apprentice auctioneers,
15 generally; redefining auctioneer exceptions; adding
16 definitions; amending license renewal for expired licenses;
17 allowing certain fees to be set by legislative rule;
18 increasing length of record retention; clarifying qualifying
19 test scores; restricting length of apprenticeship; adding
20 duties of sponsoring auctioneer; increasing criminal
21 penalties; requiring contracts to have certain provisions; and
22 requiring escrow accounts.

23 *Be it enacted by the Legislature of West Virginia:*

1 That §19-2C-1, §19-2C-3, §19-2C-5, §19-2C-5a, §19-2C-6,
2 §19-2C-6b, §19-2C-8 and §19-2C-9 of the Code of West Virginia,
3 1931, as amended, be amended and reenacted; and that said code be
4 amended by adding thereto a new section, designated §19-2C-9a, all
5 to read as follows:

6 **ARTICLE 2C. AUCTIONEERS.**

7 **§19-2C-1. Definitions.**

8 For the purposes of this article:

9 (a) The term "auctioneer" means and includes a person who
10 sells goods or real estate at public auction for another on
11 commission or for other compensation. The term "auctioneer" does
12 not include: (1) Persons conducting sales at auctions conducted by
13 or under the direction of any public authority or pursuant to any
14 judicial order or direction or to any sale required by law to be at
15 auction; (2) the owner of any real or personal property when
16 personally sold at auction by ~~such~~ the owner and ~~such~~ the owner has
17 not personally conducted an auction within the previous
18 twelve-month period; (3) persons conducting sales pursuant to a
19 deed of trust ~~or other security agreement;~~ (4) fiduciaries of
20 estates when selling real or personal property of ~~such~~ the estate;
21 (5) persons conducting sales on behalf of charitable, religious,
22 fraternal or other nonprofit organizations; and (6) persons
23 properly licensed pursuant to the provisions of article twelve,

1 chapter forty-seven of this code when conducting an auction, any
2 portion of which contains any leasehold or any estate in land
3 whether corporeal or incorporeal, freehold or nonfreehold, when
4 ~~such~~ the person is retained to conduct an auction by a receiver or
5 trustee in bankruptcy, a fiduciary acting under the authority of a
6 deed of trust or will, or a fiduciary of a decedent's estate:
7 *Provided*, That nothing contained in this article exempts persons
8 conducting sales at public markets from the provisions of article
9 two-a of this chapter, where the sale is confined solely to
10 livestock, poultry and other agriculture and horticulture products.

11 (b) The term "public auction" means any public sale of real or
12 personal property when offers or bids are made by prospective
13 purchasers and the property sold to the highest bidder.

14 (c) The term "commissioner" means the Commissioner of
15 Agriculture of West Virginia.

16 (d) The term "department" means the West Virginia Department
17 of Agriculture.

18 (e) The term "escrow account" means a separate custodial or
19 trust fund account maintained by the auctioneer.

20 **§19-2C-3. Procedure for license; Department of Agriculture as**
21 **statutory agent for licensees; fee.**

22 Any person who wishes to conduct an auction as an auctioneer
23 may apply for a license on forms prescribed by the commissioner and

1 containing such information as the commissioner may require by a
2 legislative rule promulgated in accordance with article three,
3 chapter twenty-nine-a of this code. A nonreturnable application
4 fee of \$50 shall accompany each application as well as a license
5 fee of \$50. All fees collected under this article shall be paid
6 into a special revenue fund in the State Treasury to be used by the
7 Department of Agriculture for the expressed purpose of
8 administering and enforcing this article and for providing
9 continuing education for auctioneers: ~~Provided, That for the~~
10 ~~fiscal year ending June 30, 1997, fees collected under this article~~
11 ~~shall be paid into the state fund, general revenue.~~

12 In addition to the payment of fees, an applicant shall file
13 with his or her application a bond as required in section four of
14 this article.

15 The commissioner shall, within thirty days after the receipt
16 of an application, notify the applicant of his or her eligibility
17 to be examined at the next regularly scheduled examination, as well
18 as the date of the examination.

19 ~~In the event~~ If the license is denied, the commissioner shall
20 refund the license fee submitted with the application to the
21 applicant.

22 Licenses issued expire on December 31, of each year but are
23 renewable upon the payment of the annual license fee within sixty

1 days of the expiration date. Renewals received more than sixty
2 days after the expiration date are subject to a late renewal fee of
3 \$25 in addition to the annual renewal fee. Renewals received more
4 than one hundred-twenty days after the expiration date are subject
5 to a late renewal fee of \$50 in addition to the annual renewal fee;
6 and renewals received more than one hundred-eighty days after the
7 expiration date are subject to a late renewal fee of \$75 in
8 addition to the annual renewal fee. The commissioner ~~shall~~ may not
9 renew licenses which have been expired for more than two years and
10 the auctioneer or apprentice auctioneer shall take the written and
11 oral examination and pay the examination fee in order to renew his
12 or her license. The commissioner ~~shall~~ may not renew a license
13 unless the applicant complies with the other requirements of this
14 article.

15 Where an auctioneer or apprentice auctioneer requires a
16 duplicate or replacement license or a license reflecting a change
17 in information, the auctioneer or apprentice auctioneer shall
18 submit a fee of \$5 with the request.

19 The fees set forth in this subsection remain in effect until
20 subsequently modified by legislative rule.

21 The state Department of Agriculture is the agent for the
22 purpose of service of process on any licensed auctioneer for any
23 action occasioned by the performance of the duties of the

1 auctioneer. Every licensed auctioneer, by virtue of his or her
2 application for a license, shall be considered to have consented to
3 the statutory agency.

4 **§19-2C-5. Requirements for license; rules and regulations; duties**
5 **of licensee.**

6 (1) Each person seeking a license hereunder after the
7 effective date of this section shall submit satisfactory evidence
8 to the commissioner showing:

9 (a) That he or she has successfully completed the written and
10 oral examinations provided ~~for~~ in this article;

11 (b) That he or she has a good reputation;

12 (c) That he or she is of trustworthy character;

13 (d) That he or she has met the apprenticeship requirements set
14 forth in this article, if applicable;

15 (e) That he or she is a citizen of the United States; and

16 (f) That he or she has a general knowledge of the
17 auctioneering profession and the principles involved in conducting
18 an auction.

19 (2) The commissioner shall ~~promulgate~~ propose such reasonable
20 rules ~~and regulations~~ as he or she considers necessary to carry out
21 the intent and the administration and enforcement of this article,
22 which said rules ~~and regulations~~ shall be ~~promulgated~~ proposed for
23 legislative approval in accordance with the applicable provisions

1 of chapter twenty-nine-a of this code.

2 (3) Each licensee shall promptly produce for inspection ~~such~~
3 the license at all sales conducted by or participated in by ~~such~~
4 the licensee when requested to do so by any person and shall keep
5 complete and accurate records of all transactions engaged in for a
6 period of ~~six months, which~~ three years. For the purpose of this
7 section the term "record" includes, but is not limited to, copies
8 of signed contracts; the names of buyers and their addresses; clerk
9 sheets showing items sold, including buyers numbers or names and
10 the selling prices; and final settlement papers. The records shall
11 be open to inspection by the commissioner or his or her authorized
12 representative.

13 **§19-2C-5a. Examinations of applicants; excuse for illness; fee**
14 **renewal.**

15 Examinations shall be held in April and October of each year,
16 at a time and place to be designated by the commissioner or his or
17 her authorized representative.

18 Any individual auctioneer applicant may take the examination
19 for auctioneer or apprentice auctioneer at the regularly scheduled
20 time and place. The apprentice auctioneer's examination shall
21 consist of a written examination. The auctioneer's examination
22 will consist of both a written and oral examination. The passing
23 grade for any written examination shall be seventy percent out of

1 one hundred percent. The passing grade for any oral examination
2 shall be seventy percent out of one hundred percent. The oral
3 portion will be scored by the commissioner or his or her authorized
4 representative. If the applicant fails either the written or oral
5 portion of the examination, no license will be issued and he or she
6 ~~shall~~ may not be administered the examination again until the next
7 regularly scheduled examination date. A person who is qualified
8 for a auctioneer's license as provided ~~for~~ in this article is
9 considered to be a professional in his or her trade.

10 One notice only of the examination shall be mailed to the
11 applicant at the address given on the application. If the
12 applicant fails to appear for such examination, except as provided
13 herein, a new application and a new fee shall be required. No fee
14 ~~shall~~ may be returned except when the applicant fails to take the
15 examination because of illness evidenced by a doctor's certificate
16 sent to the commissioner. If excused because of illness the
17 applicant shall be admitted to the next scheduled examination
18 without paying an additional fee. No applicant ~~shall~~ may be
19 excused from taking the scheduled examination for any reason other
20 than illness unless in the judgment of the commissioner the
21 applicant would suffer undue hardship by not being excused.

22 An examination fee of \$50, in addition to any other fees
23 required by this article, shall be collected from each person

1 taking such examination. If the applicant has previously paid the
2 examination fee and successfully completed the apprentice
3 auctioneer's examination, no additional examination fee will be
4 required to take the auctioneer's examination as provided ~~for~~ in
5 this article.

6 The fees set forth in this subsection remain in effect until
7 subsequently modified by legislative rule.

8 If the commissioner determines that an applicant does not
9 qualify for a license, he or she shall so notify the applicant by
10 certified mail. The notice shall state the reason for refusal to
11 grant a license and the applicant's right to appeal the
12 commissioner's decision within twenty days of receipt of the
13 notice.

14 An examination ~~shall~~ may not be required for the renewal of
15 any license unless such license has been revoked or suspended, in
16 which case the applicant may be required, by the commissioner, to
17 take and pass any written or oral examination required by the
18 department. In cases where a license has been expired for more
19 than two years and not been revoked or suspended, the applicant is
20 required to take and pass any written and oral examinations
21 required by the department. The commissioner ~~is hereby authorized~~
22 ~~to promulgate~~ may propose rules for legislative approval
23 promulgated in accordance with article three, chapter twenty-nine-a

1 of this code as he or she considers necessary for the renewal of
2 auctioneer licenses, including, but not limited to, requirements
3 for continuing education of auctioneers and apprentice auctioneers.

4 **§19-2C-6. Apprentice licenses; fees.**

5 The Department of Agriculture may grant apprentice
6 auctioneer's licenses to those persons considered qualified by the
7 commissioner. Every applicant for an apprentice auctioneer's
8 license must take and pass a written examination relating to the
9 skills and knowledge and statutes and regulations governing
10 auctioneers. Every applicant shall furnish to the commissioner on
11 forms provided by the department satisfactory proof of the
12 following:

13 (a) That he or she has a good reputation;

14 (b) That he or she is a trustworthy character; and

15 (c) That he or she is a citizen of the United States.

16 Any apprentice auctioneer may take the examination to become
17 an auctioneer after serving a two-year apprenticeship under a
18 licensed auctioneer: *Provided*, That if the apprentice auctioneer
19 has attended a nationally accredited graduate school of
20 auctioneering, approved by the commissioner, he or she shall serve
21 an apprenticeship of only six months. Before an apprentice
22 auctioneer may take the auctioneer's examination, the apprentice
23 auctioneer shall conduct at least six auction sales under the

1 direct supervision of the sponsoring auctioneer. The commissioner
2 may waive the requirements of this section, on an individual basis,
3 upon the presentation of written evidence that the applicant has
4 educational training or exceptional experience in the auctioneering
5 profession and that the applicant has been unable to obtain
6 sponsorship by a licensed auctioneer: *Provided, however,* That the
7 commissioner shall ~~promulgate~~ propose rules ~~and regulations~~
8 promulgated in accordance with article three, chapter twenty-nine-a
9 of this code setting forth educational and experience
10 qualifications which would entitle an individual to a waiver of the
11 provisions of this section: *Provided further,* That the
12 commissioner ~~shall~~ may not waive apprenticeship requirements for
13 any applicant without the concurrence of the board of review.

14 When any apprentice auctioneer is discharged or terminates his
15 or her employment with an auctioneer for any reason, the auctioneer
16 shall immediately provide written notification to the commissioner.
17 No discharged or terminated apprentice auctioneer ~~shall~~ may
18 thereafter perform any acts under the authority of his or her
19 license until ~~such~~ the apprentice auctioneer receives a new license
20 bearing the name and address of his or her new employer. No more
21 than one license ~~shall~~ may be issued to any apprentice auctioneer
22 for the same period of time. The fee for the transfer of the
23 license of an apprentice auctioneer to a new employer auctioneer is

1 \$15.

2 The fee for the annual renewal of the apprentice auctioneer's
3 license is \$50. Bond requirements for an apprentice auctioneer
4 shall be established by reasonable rules ~~and regulations~~
5 ~~promulgated~~ by the commissioner, and both the annual renewal fee
6 and the bond must be filed with the Department of Agriculture:
7 *Provided*, That the bond required by this section ~~shall~~ may not be
8 less than ~~\$5,000~~ \$10,000. The department ~~shall~~ may not issue an
9 apprentice auctioneer's license until bond has been filed in
10 accordance with this article. All apprentice auctioneer licenses
11 expire on December 31, of each year but are renewable upon the
12 payment of the annual fee.

13 The fees set forth in this subsection remain in effect until
14 subsequently modified by legislative rule.

15 An apprentice auctioneer may not serve a term to exceed three
16 years without the apprentice applying for an auctioneer license.
17 Should an apprentice auctioneer allow the three year limit to
18 lapse, that apprentice shall be required to take the apprentice
19 exam and meet all requirements stated in this article. An
20 individual may only serve as an apprentice auctioneer a maximum of
21 six years.

22 **§19-2C-6b. Duties and responsibilities of an apprentice**
23 **auctioneer and a sponsoring auctioneer.**

1 An apprentice auctioneer shall only conduct or assist in
2 auctions under the direct supervision of his or her sponsoring
3 auctioneer. A licensed apprentice auctioneer may not enter into a
4 contract to conduct an auction unless the contract is cosigned by
5 his or her sponsoring auctioneer.

6 The sponsoring auctioneer is responsible for the actions of an
7 apprentice auctioneer. It is his or her responsibility to ~~insure~~
8 ensure adherence to this and all applicable sections of state law.
9 The sponsoring auctioneer is responsible for training the
10 apprentice auctioneer in all aspects of practical business
11 functions and duties related to the auctioneering profession.
12 Should an apprentice auctioneer fail to pass both the written and
13 oral examinations to become a fully licensed auctioneer in two
14 consecutive testing sessions, the sponsorship will be terminated.
15 The apprentice auctioneer will be permitted one additional
16 opportunity to pass the oral and written auctioneer examinations
17 only after serving another six month apprenticeship under a
18 different sponsoring auctioneer. A sponsoring auctioneer relieved
19 of his or her sponsorship will not be considered for another
20 sponsorship unless he or she provides a written affidavit to the
21 commissioner that he or she fully understands the responsibilities
22 of a sponsoring auctioneer and gives the details as to what
23 additional training will be provided to a new apprentice

1 auctioneer. Should the commissioner or his or her representative
2 approve of the presented plan an auctioneer may be permitted to
3 sponsor a new apprentice auctioneer: *Provided,* That if the
4 apprentice auctioneer conducts auctions without the consent of his
5 or her sponsor, only the apprentice auctioneer is subject to the
6 penalties in section eight of this article.

7 **§19-2C-8. Penalties for violation of article or rules and**
8 **regulations.**

9 (a) *Criminal penalties.* -- Any person, firm, association or
10 corporation violating any of the provisions of this article, or of
11 the rules ~~and regulations~~ adopted pursuant to the provisions
12 thereof, ~~shall be~~ is guilty of a misdemeanor and, upon conviction
13 thereof, shall be fined not less than ~~\$50~~ \$250 nor more than ~~\$200~~
14 \$500 for the first offense, and not less than ~~\$400~~ \$500 nor more
15 than \$1,000 for the second and subsequent offenses. Magistrates
16 have concurrent jurisdiction with circuit courts to enforce the
17 provisions of this article.

18 (b) *Civil penalties.* -- (1) Any person violating a provision
19 of this article or any rule ~~or regulation~~ adopted hereunder may be
20 assessed a civil penalty by the commissioner. In determining the
21 amount of any civil penalty, the commissioner shall give due
22 consideration to the history of previous violations of the person,
23 the seriousness of the violation, and the demonstrated good faith

1 of the person charged in attempting to achieve compliance with this
2 article before and after written notification of the violation; (2)
3 the commissioner may assess a penalty of not more than \$200 for
4 each first offense, and not more than \$1,000 for a second and
5 subsequent offense; and (3) the civil penalty is payable to the
6 State of West Virginia and is collectible in any manner now or
7 hereafter provided for collection of debt. If any person liable to
8 pay the civil penalty neglects or refuses to pay the ~~same~~ penalty,
9 the amount of the civil penalty, together with interest at ten
10 percent, is a lien in favor of the State of West Virginia upon the
11 property, both real and personal, of such a person after the same
12 has been entered and docketed to record in the county where such
13 property is situated. The clerk of the county, upon receipt of the
14 certified copy of ~~such~~ the lien, shall enter ~~same~~ it to record
15 without requiring the payment of costs as a condition precedent to
16 recording.

17 (c) Notwithstanding any other provision of law to the
18 contrary, the commissioner may ~~promulgate and adopt~~ propose rules
19 for legislative approval in accordance with the provisions of
20 article three, chapter twenty-nine-a of this code which permit
21 consent agreements or negotiated settlements for the civil
22 penalties assessed as a result of violation of the provisions of
23 this article.

1 (d) No state court may allow for the recovery of damages for
2 any administrative action taken if the court finds that there was
3 probable cause for such action.

4 **§19-2C-9. Written contracts; exception.**

5 No person ~~shall~~ may act as auctioneer on the sale at public
6 auction of any goods, wares, merchandise or of any other property,
7 real or personal, until he or she has entered into a written
8 contract in duplicate with the owner or consignor of the property
9 to be sold, containing the terms and conditions upon which the
10 licensee receives or accepts the property for sale at auction. No
11 apprentice auctioneer ~~shall~~ may be authorized to enter into a
12 contract without the written consent of his or her sponsoring
13 auctioneer. All contracts shall be in the name of and on behalf of
14 the sponsoring auctioneer.

15 The commissioner may require by rule the following:

16 (a) That written contracts between the auctioneer and the
17 seller be made in duplicate;

18 (b) That the original contract is to be retained by the
19 auctioneer for a period of ~~six months~~ three years from date of
20 final settlement;

21 (c) That one copy of the contract is to be furnished to each
22 person that entered into the contract;

23 (d) That an apprentice auctioneer may not contract directly

1 with a client but only through his or her sponsoring auctioneer;

2 (e) That an apprentice auctioneer may not engage in a sale
3 with an auctioneer by whom he or she is not sponsored without first
4 obtaining the written consent of his or her sponsoring auctioneer;
5 and

6 (f) That on all contracts between an auctioneer and a seller
7 there shall be a prominent statement indicating that the auctioneer
8 is licensed by the Department of Agriculture and bonded in favor of
9 the State of West Virginia; and

10 (g) That all contracts shall include the following:

11 (1) The name, address and phone number of owner of the
12 property to be sold or the consignee;

13 (2) The date of the auction or a termination date of the
14 contract;

15 (3) The terms and conditions of the auction;

16 (4) The location of the auction;

17 (5) The date the owner or consignor is to be paid;

18 (6) A statement establishing the responsibility for bad
19 checks, debts and unpaid auction items;

20 (7) A detailed list of all fees to be charged by the
21 auctioneer which shall include commissions, rentals, advertising
22 and labor;

23 (8) A statement of the auctioneer's policy regarding absentee

1 bidding;

2 (9) A statement above the owner's signature line: "I have read
3 and accept the terms of the contract"; and

4 (10) A statement indicating an explanation of settlement of
5 the auction (settlement sheet) will be provided to the owner at the
6 end of each auction.

7 **§19-2C-9a. Escrow Accounts.**

8 Each auctioneer shall maintain an escrow account and deposit
9 all moneys from each sale in said account within twenty-four hours
10 of the completion of the sale or on the first business day
11 following the sale, unless the consignor was paid in cash directly
12 at the end of the sale.