

JOINT COMMITTEE ON GOVERNMENT AND FINANCE
WEST VIRGINIA OFFICE OF THE LEGISLATIVE AUDITOR

POST AUDIT DIVISION

LEGISLATIVE AUDIT REPORT

State Agencies' Compliance with W.Va. Code §5A-1-12

Legislative Auditor: Aaron Allred
Post Audit Division Director: Justin Robinson



GENERALLY ACCEPTED GOVERNMENT
AUDITING STANDARDS STATEMENT

We conducted this performance audit in accordance with Generally Accepted Government Auditing Standards (**GAGAS**). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

POST AUDIT DIVISION
Justin Robinson, Director

POST AUDIT DIVISION

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STATE AGENCIES' COMPLIANCE WITH W.VA. CODE §5A-1-12

January 28, 2021

LEGISLATIVE AUDITOR'S STAFF CONTRIBUTORS

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Most State Agencies Responsible For A Purchasing Exemption Did Not Comply With A New State Law Requiring Them To Establish Purchasing Procedures Via A Procedural Rule, By September 1, 2020. While Most Agencies Are Now In Compliance With The Law, Agencies Responsible For 13 Exemptions Have Not Filed The Required Rule.

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Objective, Scope, & Methodology

EXECUTIVE SUMMARY

The Legislative Auditor conducted this compliance audit on agency compliance with the provisions of H.B. 4042 in accordance with W. Va. Code §4-2-5. The objective of this review was to determine to determine the extent to which state agencies that are exempt from all or part of the West Virginia Purchasing Division’s requirements have complied with W.Va. Code §5A-1-12, effective September 1, 2020, by adopting procedural rules establishing their own purchasing procedures.

Frequently Used Acronyms in This Report

DEP: Department of Environmental Protection

DHHR: Department of Health & Human Resources

DHS: Department of Homeland Security

DOA: Department of Administration

DOT: Department of Transportation

OIC: Office of the Insurance Commissioner

WVDE: West Virginia Department of Education

WVSTO: West Virginia State Treasurer’s Office

Report Highlights

Issue 1: Most State Agencies Responsible For A Purchasing Exemption Did Not Comply With A New State Law Requiring Them to Establish Purchasing Procedures Via A Procedural Rule, By September 1, 2020. While Most Agencies Are Now In Compliance With The Law, Agencies Responsible For 13 Exemptions Have Not Filed The Required Rule.

- Agencies responsible for filing procedural rules for 14 active exemptions on or before September 1, 2020, in compliance with W.Va. Code §5A-1-12.
- Twenty-five (25) agencies responsible for a purchasing exemption had not filed rules as of September 1, 2020.
 - Of those 25 agencies, 13 have filed rules with the West Virginia Secretary of State’s Office since September 1, 2020 and are now in compliance.
 - Agencies responsible for the remaining 12 exemptions had not filed a rule, as required by Code, as of the date of their response to the Legislative Auditor.
- The provisions of W.Va. Code §5A-1-12 may inhibit the ability of the Governor to respond to declared states of emergency with respect to exercising his or her statutory authorities to relax purchasing requirements.

Recommendations

1. The Legislative Auditor recommends that any agency, spending unit, or other governmental entity responsible for one or more purchasing exemptions file the appropriate procedural rule without delay, and strictly adhere to the requirements of the West Virginia Purchasing Division until compliance is achieved.
2. The Legislative Auditor recommends the Legislature consider modifying the provisions of W.Va. Code §5A-1-12 to clarify the scope of its applicability to non-purchasing-exempt agencies.
3. The Legislative Auditor recommends that the Governor's Office seek an opinion as to the applicability and effects of W.Va. Code §5A-1-12 on its special purchasing exemption powers.
4. The Legislative Auditor recommends that the Legislature consider clarifying W.Va. Code §5A-1-12's applicability to the Governor's special exemption powers.

Post Audit's Response to the Agency's Written Response

On January 20, 2021, the Legislative Auditor transmitted draft copies of the report to the Governor's Office and the State Auditor's Office for comment. Neither elected to provide a formal written response. However, the State Auditor's Office indicates that its review of purchasing exemptions has corroborated the findings identified in this report.

ISSUE 1: Most State Agencies Responsible For A Purchasing Exemption Did Not Comply With A New State Law Requiring Them to Establish Purchasing Procedures Via A Procedural Rule, By September 1, 2020. While Most Agencies Are Now In Compliance With The Law, Agencies Responsible For 13 Exemptions Have Not Filed The Required Rule.

Introduction

During the 2020 Regular Session the Legislature passed House Bill 4042¹ creating W.Va. Code §5A-1-12. This statute requires that agencies exempted in part, or in full, from the requirements of the Department of Administration's Purchasing Division² shall adopt procedural rules establishing purchasing policies and procedures. These rules were to be filed with the West Virginia Secretary of State no later than September 1, 2020. According to the statute, any agency responsible for a purchasing exemption that did not file a rule by September 1, 2020 is required to follow the requirements of the Purchasing Division, effectively pausing its purchasing exemption.

Purchasing Exemption Overview

Exemptions from the Purchasing Division requirements are set by statute. Currently, the Purchasing Division lists over 40 exemptions³ (full or partial) on its website. These exemptions fall into one of two broad categories:

1. Full exemptions from the Purchasing Division requirements granted to an entire agency or governmental entity; or
2. Select exemptions from specific Purchasing Division requirements for certain types of contracts or the procurement of certain goods or services.

On December 9, 2020, the Legislative Auditor sent a letter to the agencies responsible for one or more purchasing exemptions to determine if rules had been filed, as required, by September 1, 2020. The results of this compliance review found:

- Agencies responsible for filing procedural rules for 14 active exemptions on or before September 1, 2020, in compliance with W.Va. Code §5A-1-12.
- Twenty-five (25) agencies responsible for a purchasing exemption had not filed rules as of September 1, 2020.
 - Of those 25 agencies, 13 have filed rules with the West Virginia Secretary of State's Office since September 1, 2020 and are now in compliance.
 - Agencies responsible for the remaining 12 exemptions had not filed a rule, as required by Code, as of the date of their response to the Legislative Auditor.

¹ House Bill 4042 was subsequently signed by the Governor on February 17, 2020 and became effective ninety days after passage by the Legislature (May 7, 2020).

² The Purchasing Division is authorized under W.Va. Code §5A-3-1 and sets forth its requirements via the *West Virginia Purchasing Procedures Handbook*.

³ Not all exemptions listed by the Purchasing Division are in-use or subject to W.Va. Code §5A-1-12.

The Legislative Auditor recommends that any agency, spending unit, or other governmental entity responsible for one or more purchasing exemptions file the appropriate procedural rule without delay, and strictly adhere to the requirements of the West Virginia Purchasing Division until compliance is achieved.

In addition, W.Va. Code §5A-1-12, as drafted, raises questions about the Governor’s statutory authority to respond to declared states of emergency by relaxing purchasing rules for agencies responding to those emergencies. **The Legislative Auditor recommends that the Governor’s Office seek an opinion as to the applicability and effects of W.Va. Code §5A-1-12 on its special purchasing exemption powers. Further, the Legislative Auditor recommends that the Legislature consider clarifying W.Va. Code §5A-1-12’s applicability to the Governor’s special exemption powers.**

Agencies Responsible for 14 Purchasing Exemptions Filed Procedural Rules in Compliance with W.Va. Code §5A-1-12 by September 1, 2020.

The Legislative auditor conducted a review of exemptions granted to state agencies to determine compliance with the provisions of W.Va. Code §5A-1-12. On December 9, 2020, the Legislative Auditor transmitted a letter to each responsible agency to inquire as to whether it had filed a rule, and if not, why it had not complied with the statutory mandate.

From the responses provided to this request, the Legislative Auditor determined agencies responsible for 14 of the exemptions had complied with all aspects of W.Va. Code §5A-1-12 and filed procurement rules on or before September 1, 2020. Figure 1 below outlines the details of compliant agencies and their associated exemptions (if applicable, Cabinet Level Administration is noted in brackets).

Figure 1 Compliant with W.Va. Code §5A-1-12		
Agency/Exemption	File Date	Rule Citation
Higher Education Policy Commission	8/23/2016	CSR 133-30
Council for Community & Technical College Education	8/24/2016	CSR 135-30
Water Development Authority	6/11/2020	CSR 44-4
[DOA] Public Employees Insurance Agency	6/25/2020	CSR 151-01
[DOA] Board of Risk and Insurance Management	7/9/2020	CSR 115-9
[DHS] Regional Jails	9/1/2020	CSR 90-10
[DHS] West Virginia State Police	8/31/2020	CSR 81-18
[DHS] Division of Corrections and Rehabilitation	9/1/2020	CSR 90-10
[DHS] Juvenile Services	9/1/2020	CSR 90-10
[Commerce] Division of Natural Resources	7/29/2020	CSR 58-10
[Commerce] Tourism Office	8/31/2020	CSR 144-3
[Revenue] Alcohol Beverage Control Administration	6/23/2008	CSR 175-6
[DOT] Division of Highways	8/30/2018	CSR 157-1
[DOT] State Rail Authority	4/6/2011	CSR 172-2

Source: Responses received by the Legislative Auditor from respondent-agencies.

Agencies Responsible for the Majority of Purchasing Exemptions Were Not In Compliance With W.Va. Code §5A-1-12.

The Legislative Auditor determined that agencies responsible for 25 exemptions included on the Purchasing Division’s website did not comply with W.Va. Code §5A-1-12. Noncompliant agencies fell into two primary categories:

1. Agencies with procedural rules establishing purchasing procedures filed **after** September 1, 2020 (i.e., compliant as of today).
2. Agencies with **no** procedural rules establishing purchasing procedures and thus, currently noncompliant.

Procedural Rules filed after September 1, 2020.

The 13 exemptions for which exemptions were filed after September 1, 2020 fall mainly under the purview of two agencies – the Department of Health and Human Services, and the State Treasurer. Figure 2 below outlines the details of these agencies and their associated exemptions (if applicable, Cabinet Level Administration is noted in brackets).

Figure 2 Exemptions For Which No Rule Was Filed By September 1, 2020 But Currently In Compliance		
Agency/Exemption	File Date	Rule Citation
[DHS] Division of Protective Services	9/2/2020	CSR 99-6
Treasurer Bond Counsel	10/16/2020	CSR 112-17
Treasurer Bank Investment	10/16/2020	CSR 112-17
Treasurer Board of Treasury Investments	10/16/2020	CSR 112-17
Treasurer Deferred Compensation	10/16/2020	CSR 112-17
Treasurer Banking Depositors	10/16/2020	CSR 112-17
Treasurer College Prepaid/Savings	10/16/2020	CSR 112-17
[DHHR] Children's Health Insurance	12/1/2020	CSR 69-16
[DHHR] Pharma Manufactures	12/1/2020	CSR 69-16
[DHHR] Gambling Treatment	12/1/2020	CSR 69-16
[DHHR] Office of Lab Services	12/1/2020	CSR 69-16
[DHHR] Contracts WVU, MU, OSM	12/1/2020	CSR 69-16
[DHHR] Direct Patient Care (State-Owned Hospitals)	12/1/2020	CSR 69-16

Source: Responses received by the Legislative Auditor from respondent-agencies.

The reason cited by these agencies for delayed compliance with W.Va. Code §5A-1-12 largely relate to the COVID-19 pandemic as a contributing factor. DHHR, for instance, indicates that while it was aware of the statutory requirement, the pandemic response resulted in the Department’s response to the mandate falling through the cracks.

The West Virginia State Treasurer’s Office (WVSTO) also cites the COVID-19 pandemic but attributes its delay to communications and clarification issues caused by the pandemic. WVSTO indicated, in part:

When the WVSTO began work on 112 CSR 17 in May, I was told there was no need to issue a rule because all "Rules [were] suspended by the State of Emergency Proclamation due to the COVID-19 virus." That language is the same as is on the West Virginia Secretary of State's website with the exception of the added word.

...

With the pandemic, it was difficult to find people to talk with about a lot of things. I could not find anyone with various agencies for various issues and leaving voice mail did not help. My expectation was that someone would be able to give me a definitive answer on the issue of whether or not we needed to issue the rule, but that did not happen.

Thus, while WVSTO does not cite its specific actions responding to the pandemic, it clearly indicates that communication issues caused by the pandemic contributed to it missing the September 1, 2020 filing deadline in Code.

Finally, the Department of Homeland Security indicates to the Legislative Auditor that the procedural rule for the Division of Protective Services was filed by the Department on a timely basis but was initially rejected on technical grounds. This resulted in the rule for the Division of Protective Services being filed one day after the statutory deadline.

Agencies Responsible for the 12 Purchasing Exemptions For Which a Rule Has Not Been Filed Cite a Number of Reasons For Non-Compliance, Including the COVID-19 Pandemic, Breakdowns in Communication, and Others. Most of These Agencies Indicate They Have Taken Immediate Steps to File a Rule.

The Legislative Auditor's review found that agencies responsible for 12 purchasing exemptions had not, as of the date of their response to the December 9, 2020 request letter, filed procedural rules establishing purchasing policies for their respective exemptions. The December 9, 2020 letter sought to determine reasons and explanations for noncompliance with W.Va. Code §5A-1-12 and included specific questions regarding instances where no procurement rules were filed for exemptions governed by this statute. The following sections summarize each noncompliant agency's response(s) to these questions.

Department of Education – Responsible for one (1) non-compliant exemption [W.Va. Code §5A-3-1(d)]

The Department of Education's response indicates that development of procedural rules is being carried out, but efforts at finalizing such rules have been hampered by the COVID-19 pandemic. Their response, in part, states:

...the WVDE has not codified our formal procedures due to the emergency brought upon by the COVID19 pandemic and emergency staffing shortages. However, we continue to follow our normal internal purchasing procedures for both exempt and non-exempt purchases. WVDE is in the process of completing our formal procedures for exempt purchases. We are working with our Legal Department to have the policy before the State Board of Education, which is our rule making body. A draft of the procedures was

*submitted prior to the deadline and due to the pandemic, was unable to be acted upon by the board before the deadline. **We anticipate that the policy will be before the WV Board of Education by their February meeting(emphasis added).***”

Department of Environmental Protection - Responsible for one (1) non-compliant exemption [W.Va. Code §5A-3-3(9) Construction and Reclamation]

The Department of Environmental Protection’s response indicates that efforts are being made to finalize procedural rules, but the COVID 19 pandemic and staffing shortages have slowed progress towards this goal. Their response, in part, states:

...the DEP did not have a purchasing-exempt rule in place on September 1, 2020. Procurement was/is in the process of finalizing a Rule based on our Standard Specifications, published on the DEP website... Due to staffing shortages and adjustments necessary due to the COVID pandemic, DEP was unable to complete the rule-making process for the September 2020 deadline... The procurement rule for purchasing-exempt contracts, based on DEP Standard Specifications, is currently being prepared by the procurement staff for review by the Legal Services and submission to the Environmental Protection Advisory Council for approval. The process is expected to be completed about March 15, 2021.

Department of Agriculture – Responsible for two (2) non-compliant exemptions [W.Va. Code §5A-3-47 Contracts with the federal government for distributing food, food stamps, surplus commodities, and agricultural products; W.Va. Code §5A-3 State Conservation Committee or Agency- Contracts related to flood recovery]

The Department of Agriculture’s response indicates that it believes neither exemption has been used. Their response, in part, states:

*WV Code §5A-3-47 - Contracts with the federal government for distributing food, food stamps, surplus commodities, and agricultural products - This is a long-standing exemption in WV Code that appears to be related to the agency's Food Distribution Program for the various USDA commodity food products handled by the program; **however, this exemption has never been utilized** as WVDA does not enter into contracts with USDA for the products.*

WV Code §5A-3-3(9) - ...No flood or disaster recovery contracts have been required since the creation of this statutory exemption. To qualify for federal FEMA funding to reimburse state disaster response costs, federal requirements dictate that contracts for services of this nature be bid and finalized in a manner that mirrors Purchasing Division guidelines for maximum transparency and accountability. Per Brian Farkas, Executive Director, WV Conservation Agency, official procedures will be developed via Rule and filed in 2021(Emphasis added).

Department of Homeland Security – Responsible for two (2) non-compliant exemptions [W.Va. Code §5A-3-3a Statewide Interoperable Radio Network-Emergency construction or repair contracts; W.Va. Code §5A-3c Division of Homeland Security-Certain contracts during declared state of emergency.]

The Department of Homeland Security, which oversees seven total purchasing exemptions did not have rules filed for two of those exemptions as of December 18, 2020; both of the non-compliant exemptions are the responsibility of the State’s Division of Emergency Management. The Department’s response indicates, in part:

With regard to the Division of Emergency Management. . . the lack of filing of a procurement rule was an oversight which has been exacerbated by the COVID-19 pandemic response duties of the Division of Emergency Management.

*. . .
The Division of Emergency Management asserts that it is in the process of developing a procurement rule, although the development of a rule continues to be hampered by the COVID-19 pandemic response and the agency’s involvement with distribution of items supporting the State’s response to the pandemic. It is estimated that such rule will be filed on or before January 31, 2021.*

Department of Revenue – Responsible for five (5) non-compliant exemptions; two under the authority of the Division of Financial Institutions and three under the authority of the Insurance Commissioner.

[W. Va. Code §31A-8D-7(d) Division of Financial Institutions- Contracts for Supervisory Agency; W. Va. Code §31A-8A-8(4) Division of Financial Institutions- Contracts for Examiners; W. Va. Code §23-1-1f (2) Insurance Commissioner- Professional Services; W. Va. Code §33-2-9(i)1 Insurance Commissioner- Examinations; W. Va. Code §33-2-21a Workers’ Compensation Program]

The Department of Revenue’s response comprises separate responses from each unit under the Department’s purview that is responsible for purchasing exemptions. Responses from the Division of Financial Institutions and the Office of the Insurance Commissioner (OIC), both of which are responsible for exemptions but have not filed a rule, are detailed below.

The response from the Division of Financial Institutions indicates that the Division has, to the best of its knowledge, never made use of the statutory purchasing exemptions granted to it. In its response, the Division cites staff with tenure dating back to the 1980s being unaware of any instance in which a purchase was made by the Division using the exemption. In addition, the Division indicated, “*The Division is in the early drafting stage of procedural rules.*”

The Office of the Insurance Commissioner indicated to the Legislative Auditor that a communications error contributed to its current noncompliance with W.Va. Code §5A-1-12. A memo from the State’s Purchasing Division providing notification of and guidance for complying with the statute was sent to the OIC in late-March but was not forwarded to the agency’s

management. In addition, OIC indicates that of its five listed purchasing exemptions, three are used by the OIC and two are not.⁴ With respect to the exemptions that are used by it, the response from the Insurance Commissioner states, in part:

Upon receipt of the Legislative Auditor’s letter, we immediately commenced the process of developing the required rule. We anticipate the rule being finalized within weeks, if not days, and that public notice of the rule will be filed with the Secretary of State by the end of 2020.

The Department of Transportation, Parkways Authority – Responsible for one (1) non-compliant exemption [W.Va. Code §17-16A-13(b)]

The Department of Transportation’s response indicates that the Parkways Authority has not filed procurement rules establishing purchasing procedures. However, the agency provided no further detail as to either the cause for non-compliance, or the intention to address the issue and file the required rule. Their response, in part, states:

*The [Parkways Authority] adheres strictly to the Legislative procurement policies of the State of West Virginia and mirrors State policy **when possible**. The Authority’s goal is to acquire quality maintenance, goods and services that allow efficient performance at the lowest price. This compliance with State Purchasing is accomplished even though the Department of Administration determined that the Parkways Authority is not required to utilize the State Division of Purchasing for its procurements (emphasis added).*

The Legislative Auditor notes that while Parkways has indicated that it follows “State policy (presumably meaning the requirements of the Purchasing Division) when possible,” non-compliance with W.Va. Code §5A-1-12 requires that Parkways follow the requirements of the Purchasing Division **without exception** at least until such time as the appropriate procedural rule has been filed as required.

While most of the agencies that are currently out of compliance with the provisions of W.Va. Code §5A-1-12 indicate that they are working to get the appropriate rule filed, the Legislative Auditor notes that some agencies were not definitive in their plans to do so, citing limited or no known uses of their exemptions, or indicated that their rule filings could be delayed several months into the future. **The Legislative Auditor recommends that each agency responsible for a purchasing exemption file the required procedural rule without delay, and strictly adhere to the requirements of the West Virginia Purchasing Division until compliance is achieved.**

⁴ The purchasing exemption for the Workers’ Compensation Commission “expired” when the Commission was terminated in 2006. Moreover, the Medical Malpractice Liability Insurance Joint Underwriting Association, which is the entity granted an exemption under W.Va. Code §33-20E-7, was never established, per the OIC.

W.Va. Code §5A-1-12 is Constructed So Broadly That It Includes a Mandate For More Than Just Purchasing-Exempt Agencies. However, The Statute is Without Practical Effect For Non-Exempt Agencies.

W.Va. Code §5A-1-12 states that agencies exempted from Chapter 5A, in part or in whole, are required to file a procedural rule. However, Legislative Services notes that Chapter 5A includes much more than just the Purchasing Division. Chapter 5A also comprises: Fleet Management, General Services, Office of Technology, and Real Estate Leasing among others. Thus, the effect of the statute's use of "Chapter," instead of limiting the applicability of the statute to the purchasing article, is that any agency that is exempted, in part or in whole, from any of the services/provisions under Chapter 5A was similarly required to submit a procedural rule documenting its purchasing policies and procedures by September 1, 2020.

However, it is the opinion of Legislative Services that, as a practical matter, this does not have any real effect since the consequence of non-compliance with W.Va. Code §5A-1-12 is that agencies must follow the requirements of the Purchasing Division. Thus, for any agency that is not exempted from the requirements of the Purchasing Division but is exempted from some other provision of Chapter 5A, it is required to follow the Purchasing Division's requirements anyway. **The Legislative Auditor recommends the Legislature consider modifying the provisions of W.Va. Code §5A-1-12 to clarify the scope of its applicability to non-purchasing-exempt agencies.**

The Provisions of W.Va. Code §5A-1-12 May Inhibit the Ability of the Governor to Respond to Declared States of Emergency With Respect to Exercising His or Her Statutory Authorities to Relax Purchasing Requirements.

Under current state law, the Governor is authorized under several provisions of W.Va. Code to issue special purchasing exemptions under certain circumstances:

- W.Va. Code §5A-1-8 allows spending units to make an appeal to the Governor that the provisions of Chapter 5A (which includes the requirements of the Purchasing Division) may "*interfere with the successful functioning*" of the government.
- W.Va. Code §15-5-6 allows the Governor to suspend the provisions of "*any regulatory statute prescribing the procedures for conduct of state business or the orders, rules of any state agency, if strict compliance therewith would in any way prevent, hinder or delay necessary action in coping with the emergency.*"
- W.Va. Code §5A-3-3c abrogates Purchasing Act requirements for contracts entered into during a state of emergency and exempts Purchasing Act requirements when a purchasing unit purchases "*goods or services from the federal government, or an agency thereof,*" and certain other conditions are similarly met.

The Legislative Auditor has questions as to the applicability **and effect** of the provisions of W.Va. Code §5A-1-12 on these special exemption powers of the Governor. W.Va. Code §5A-1-12(c) states that, "*For agencies that are exempted after the effective date of this section, the written procedures shall be filed before the exemption may take effect.*" According to Legislative

Services, a strict reading of the statute could require agencies that receive a special exemption from the Governor in the future to adopt rules before said exemption takes effect, even if the exemption is only temporary.

The Legislative Auditor notes that the statutes establishing the Governor’s special exemption powers, particularly those related to declared states of emergency, are intended to facilitate greater flexibility and speed in the procurement of goods and services necessary to appropriately respond to emergencies. As such, the provisions of W.Va. Code §5A-1-12 could negatively impact the Governor’s ability to provide that flexibility if specially exempted agencies are required to file procurement rules before the exemptions take effect. **Therefore, the Legislative Auditor recommends that the Governor’s Office seek an opinion as to the applicability and effects of W.Va. Code §5A-1-12 on its special purchasing exemption powers. Further, the Legislative Auditor recommends that the Legislature consider clarifying W.Va. Code §5A-1-12’s applicability to the Governor’s special exemption powers.**

As Currently Drafted, The Provisions of W.Va. Code §5A-1-12 Do Not and Cannot Apply To The Legislative or Judicial Branches of Government.

Under the provisions of W.Va. Code §5A-1-12, **agencies** are required to file procedural rules under the provisions of the West Virginia Administrative Procedures Act. To determine the applicability of this law on the legislative and judicial branches, the Legislative Auditor sought a legal opinion from the Legislative Services Division.

Legislative Services determined that the requirements of W.Va. Code §5A-1-12 do not apply to the Legislature or Judiciary. The West Virginia Administrative Procedures Act, according to Legislative Services, clearly defines the term “agency” as comprising any state board, commission, department, office or officer authorized by law to make rules or adjudicate contested cases “*except those in the legislative or judicial branches.*” Therefore, because the new law specifically requires “agencies” to file “procedural rules” citing the provisions of the West Virginia Administrative Procedures Act, neither the Legislature nor the Judiciary are required to comply with the law, **nor do they have the statutory authority to do so** because the West Virginia Administrative Procedures Act only authorizes executive branch agencies to create or adopt procedural rules.

Conclusion

As of September 1, 2020, agencies responsible for approximately one-third (14) of all purchasing exemptions had complied with W.Va. Code §5A-1-12 by filing a procedural rule establishing its purchasing policies and procedures. Non-compliant agencies cited a number of reasons for not filing procedural rules; however, most of the given reasons included the COVID-19 pandemic. While compliance by September 1st was low, most agencies are now in compliance with the law and have appropriately filed rules with the West Virginia Secretary of State. The agencies responsible for the remaining 12 purchasing exemptions should take immediate steps to file their purchasing rules, as required, and should adhere strictly to the requirements of the Purchasing Division until compliance is achieved.

Recommendations

1. The Legislative Auditor recommends that any agency, spending unit, or other governmental entity responsible for one or more purchasing exemptions file the appropriate

procedural rule without delay, and strictly adhere to the requirements of the West Virginia Purchasing Division until compliance is achieved.

2. The Legislative Auditor recommends the Legislature consider modifying the provisions of W.Va. Code §5A-1-12 to clarify the scope of its applicability to non-purchasing-exempt agencies.
3. The Legislative Auditor recommends that the Governor's Office seek an opinion as to the applicability and effects of W.Va. Code §5A-1-12 on its special purchasing exemption powers.
4. The Legislative Auditor recommends that the Legislature consider clarifying W.Va. Code §5A-1-12's applicability to the Governor's special exemption powers.

WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE

Post Audit Division

Appendix A

1900 Kanawha Blvd. East, Room W-329
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(304) 347-4880



Justin Robinson
Director

January 20, 2021

Hon. James C. Justice, II
Governor of the State of West Virginia
State Capitol Complex, Building 1
Charleston, WV 25305

Governor Justice:

The Post Audit Division of the Legislative Auditor's Office has completed an audit on the compliance of purchasing-exempt state agencies with the provisions of W.Va. Code §5A-1-12. This audit was conducted as a follow up to compliance issues identified in an ongoing audit conducted by the Post Audit Division that raised questions about compliance statewide.

This report concerns issues of non-compliance for several Executive Branch agencies and other potential issues concerning W.Va. Code §5A-1-12 which may affect the Governor's emergency powers. Therefore, our office wanted to provide a draft copy of this report prior to its release to inform you of these issues and offer you the opportunity to provide comment on the issues if you should desire.

Along with this correspondence, please find the attached draft audit report. A meeting to discuss this report is not required as it is not a direct audit of the Governor's Office. However, should you have any questions or concerns or wish to discuss the report, please contact me at 304-347-4880 or justin.robinson@wvlegislature.gov.

It is our intent to release this report on **Thursday, January 28, 2021**. If your office desires to provide any written comment to be included with the report, please provide your written response no later than **Wednesday, January 27, 2021**. Please submit written comments to Adam Fridley, Audit Manager, at adam.fridley@wvlegislature.gov. Thank you.

Sincerely,

A handwritten signature in blue ink that reads "Justin Robinson".

Justin Robinson

C: Brian Abraham, Chief of Staff
Enclosure

WEST VIRGINIA LEGISLATIVE AUDITOR'S OFFICE

Post Audit Division

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Justin Robinson
Director



January 20, 2021

John B. McCuskey, State Auditor
West Virginia State Auditor's Office
State Capitol Complex, Building 1
Charleston, WV 25305

Auditor McCuskey:

This letter is to transmit a draft copy of the Post Audit Division's report on state agencies' compliance with the provisions of W.Va. Code §5A-1-12. While the enclosed report draft is not an audit of the State Auditor's Office, due to the nature of the issues addressed, we wanted to inform you of this report and provide a draft copy for your review and comment prior to its release. The Legislative Auditor is planning to release this report on **Thursday, January 28, 2021**.

If you would like to provide written comments in response to the report, please provide those comments to Adam R. Fridley, CGAP, Audit Manager, at adam.fridley@wvlegislature.gov by **Noon, Wednesday, January 27, 2021**, to allow time for us to incorporate it into the final draft. Should you have any questions, please don't hesitate to contact me at 304-347-4880 or justin.robinson@wvlegislature.gov.

Sincerely,

A handwritten signature in blue ink that reads "Justin Robinson".

Justin Robinson

Enclosure

Appendix B

Objective, Scope, and Methodology

The Post Audit Division within the Office of the Legislative Auditor conducted this review as pursuant to Chapter 5, Article 2, Section 5 of the *West Virginia Code*, as amended.

Objectives

The objective of this review was “*To determine the extent to which state agencies that are exempt from all or part of the West Virginia Purchasing Division’s requirements have complied with W.Va. Code §5A-1-12, effective September 1, 2020, by adopting procedural rules establishing their own purchasing procedures.*”

Scope

The scope of this review consists of all purchasing rules filed by purchasing-exempt agencies to comply with W.Va. Code §5A-1-12. The scope will comprise all rules filed since the effective date of H.B. 4042 and any rules that were filed prior to that date which satisfy the statutory requirement. The scope is limited to determining whether agencies have filed a purchasing procedural rule and will not seek to make any determination on the sufficiency of any rule filed by agencies, nor does the scope include any determinations of the design or implementation of any agency’s internal controls over purchasing.

Methodology

Post Audit staff gathered and analyzed several sources of information and assessed the sufficiency and appropriateness of the information used as evidence. Testimonial evidence was gathered through interviews or email correspondence with various employees at state agencies responsible for one or more purchasing exemptions. The purpose for testimonial evidence was to gain a better understanding or clarification of certain issues, to confirm the existence or non-existence of a condition, or to understand the respective agency’s position on an issue. Such testimonial evidence was confirmed by either written statements or the receipt of corroborating or physical evidence.

Audit staff analyzed various source documents that were primarily provided to us by the respondent agencies. In addition, the audit team accessed procedural rules filed by agencies using the Secretary of State’s Administrative Law search function to obtain copies of rules, as well as to corroborate filing dates. The audit team also worked with attorneys in Legislative Services to resolve legal questions that arose during the audit field work.

We conducted this performance audit in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.



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