RESOURCE MANUAL

for

ALABAMA REGULATORY
BOARDS and COMMISSIONS

Department of Examiners of Public Accounts

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Introduction

I am pleased to provide this edition of the Resource Manual for Alabama Regulatory Boards and Commissions.

Recognizing the critical role of our state's regulatory agencies, the Sunset Committee of the Alabama Legislature directed that we develop training to help state regulatory agencies conduct their operations appropriately and in accordance with state laws. Our goal is to promote a better understanding of the roles and responsibilities of board members and their staffs, to outline legal requirements, and to share information we think will be beneficial.

This manual is intended as a general reference work providing an overview of the responsibilities and requirements imposed on regulatory boards and commissions. It is not intended to replace the advice of legal counsel.

I hope that the manual will become a valuable reference in conducting your operations.

The manual can also be found in the forms and publications section of our Internet website at www.examiners.alabama.gov

Ronald L. Jones,

Chief Examiner
Department of Examiners of Public Accounts

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Section One: Regulatory Entities Generally

Important Reasons for the Existence of Regulatory Entities

There are many reasons for regulatory entities to exist. The most important is public protection. The unregulated practice of a profession or occupation can pose a danger to the health, safety, and well-being of the public.

Protection of the public is accomplished as follows:

- Requiring persons or entities to be qualified before providing service to the public.
- Monitoring the practice of a profession or business to see that it is done in a competent manner according to accepted standards.
- Taking appropriate action when requirements are not met.

NOTE: These items are discussed in greater detail in *Section Nine*.

Additional reasons for the regulation of professions and occupations include:

- Public Acceptance – If the public is aware of an oversight/regulatory entity for a specific profession or occupation, the public may feel more secure in using the services of that profession or occupation. The public may also gain an authoritative entity to which questions and concerns may be posed and from which to seek redress.
- Professional Integrity – A profession or occupation existing without an oversight entity may be perceived with less respect and trust. Incompetent practice can discredit a profession. An oversight entity may help combat incompetent practice and increase public trust.

Regulatory Entities and State Government

Alabama government is divided into three branches: the judicial branch, the legislative branch, and the executive branch. Each branch plays a role in the regulation of professions and occupations. Regulatory entities are primarily an administrative function of the executive branch of government.

1. *Judicial Branch*

   The actions of regulatory entities can be appealed to the judicial branch, thereby making them accountable for their actions. Alternatively, the judicial branch may be called upon to enforce the orders of regulatory entities.

2. *Legislative Branch*

   The legislative branch adds the weight of state law to the regulation of professions and occupations in Alabama by enacting regulatory legislation and by monitoring its implementation. Some entities of the legislative branch you may have contact with are:

- *Legislative Reference Service* – Prepares legislation and conducts legal research for the various committees and members of the legislature. The Administrative Procedure Division provides public access to regulatory rules and administers the process that creates those rules.

- *Legislative Fiscal Office* – The Legislative Fiscal Office researches and reports to the legislature on fiscal matters, including the budgets of state government entities.

- *Examiners of Public Accounts* – The Examiners of Public Accounts provide legislative oversight of compliance with state laws by state agencies and acceptable practices in the conduct of state business through audits and evaluations.

- *Sunset Committee* – The Sunset Committee consists of legislative members from the Senate and the House of Representatives who are tasked with reviewing the operations of state agencies. The Examiners of Public Accounts act as agents for the Sunset Committee by conducting on-site evaluations of agency operations and reporting the results to the committee.

3. *Executive Branch*

The executive branch is responsible for the day-to-day operation of state government in accordance with the laws established by the legislative branch, subject to review by the judicial branch. The governor is the chief executive officer of the state. Other constitutional offices included in the executive branch that you may have contact with are:

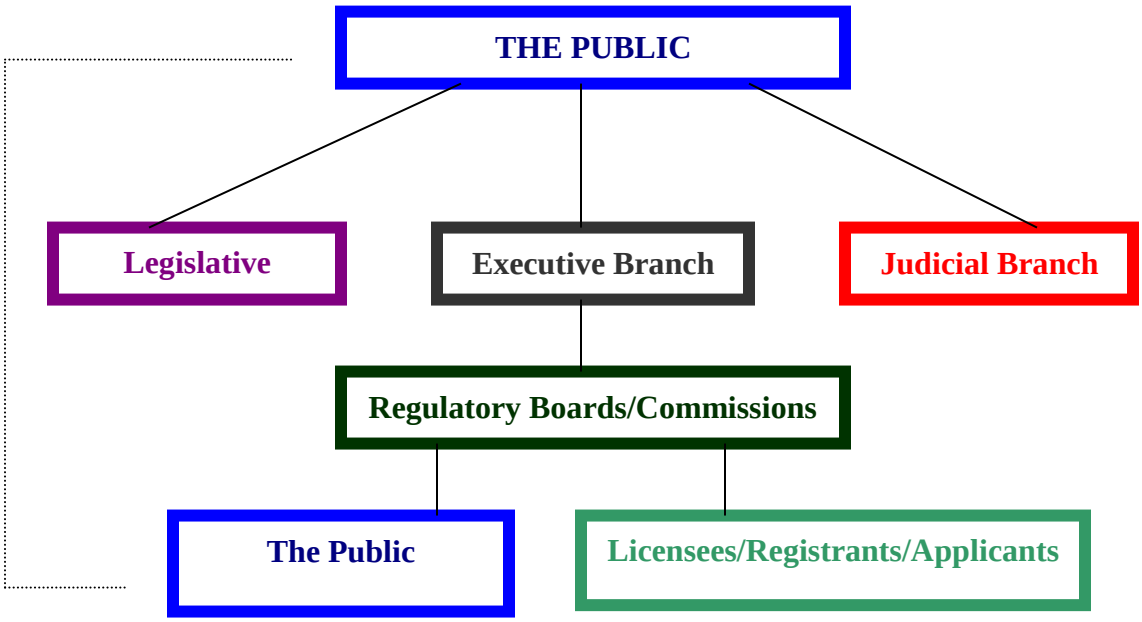
- *State Treasurer* – The state treasurer acts as custodian of state funds.

- *State Auditor* – The state auditor is charged with auditing all receipts and disbursements of the state treasurer, and acts as caretaker of all of the state's nonconsumable personal property (equipment, furnishings, and fixtures).

- *Attorney General* – The attorney general is the legal counsel for state governmental entities and controls the use of attorneys by state agencies.

- *Secretary of State* – The secretary of state has 1,000 plus duties, mostly dealing with the filing of public records, including acts of the legislature; acting as the official notary to the governor; overseeing elections; and performing business duties related to lands and trademarks, corporations, and the Uniform Commercial Code (UCC) filings. The secretary of state also acts as the repository for all filings of public notice of meetings for all governmental entities required to comply with the Open Meetings Act, as presented later in this manual.

Organization Chart



Section Two: Generally Applicable to All

Regulatory practice in the name of the state cannot exist without specific authority granted in state law. Usually, a licensing law is created when persons seeking the establishment of licensing for a profession or occupation convince the legislature that unregulated practice harms or endangers the public health, safety, and welfare.

Licensing and regulatory entities in Alabama are subject to many laws, rules and regulations, policies, and procedures, in addition to the provisions of their own enabling law. Some are detailed as follows:

Federal Laws

- U.S. Constitution
- U.S. Code

State Laws

State laws restate or clarify federal laws or provide original law where federal law defers to the state or does not address the issue.

- *Constitution of Alabama 1901*, as amended
- ***Code of Alabama 1975***, as amended, includes licensing/regulatory enabling laws and other general laws that are applicable, such as laws governing:
  - Travel Expenses
  - Personnel (State Merit System)
  - Administrative Procedures (Rule-Making)
  - Disciplinary Procedures (Due Process)
  - Ethics/Conflict of Interest
  - State Holidays
  - Accounts Against the State to be Itemized
  - Competitive Bid Law/Request for Proposals
  - Review of Contracts by Legislative Contract Review Committee
  - Legal Services Contract Must be Reviewed
  - Requirements for Posting of Meetings
- [Legislative] Acts of Alabama - Some are incorporated permanently into the ***Code of Alabama 1975,*** and some are not. Your agency's enabling laws were incorporated into ***Code of Alabama 1975***. Annual appropriations, which give agencies the authority to spend public funds, are not.

Administrative Rules and Regulations

Rules and regulations are created by state agencies to explain and clarify laws where the laws are not sufficiently specific.

Federal Rules

Code of Federal Regulations

www.gpoaccess.gov/ecfr/

State Rules

- *Legislative Reference Service - Administrative Procedure Division Rules and Regulations* – The division provides instructions on how to propose, adopt, amend, etc. rules and regulations subject to the state's Administrative Procedure Act. The Alabama Administrative Code is a compendium of state agency-specific rules and regulations that affect or have the potential to affect Alabama citizens. The rules may be found at www.alabamaadministrativecode.state.al.us. Contact the Administrative Procedure Division of the Legislative Reference Service as indicated in the contact list accompanying this manual.

- *Personnel Department Rules and Regulations (Employment Of Personnel)* – The *Personnel Department Rules and Regulations* and *Personnel Department Procedures Manual* contain information on personnel laws, rules, and regulations. Personnel Department rules and regulations, by law, have the full force and effect of law, once approved by the governor. *Personnel Department Rules and Regulations* and the *Personnel Procedures Manual* are not available on the Personnel Department's web site, www.personnel.alabama.gov; however, they are available by contacting the State Personnel Department as indicated in the contact list accompanying this manual.

- *Department of Finance Rules and Regulations* – The *Department of Finance Fiscal Policy and Procedures Manual* addresses processing and recording financial transactions (receipts, disbursements, investments, purchasing, contracting, etc.). The manual is a regulation of the Department of Finance that has the full force and effect of law. The *Fiscal Policy and Procedures Manual* is available at the Procedures tab of the State Comptroller's web site, www.comptroller.alabama.gov, or by contacting the State Department of Finance as indicated in the contact list accompanying this manual.

- *State Auditor's Office, Property Inventory Control Division Rules and Regulations* – The Property Inventory Control Division publishes a property manual with instructions for the proper treatment of transactions involving the acquisition and disposition of nonconsumable personal property (equipment, furniture, etc.). The manual is available on the State Auditor's web site, www.auditor.alabama.gov.

Reports to the Secretary of State

Act 2006-630 (codified as Section 36-14-17) requires the chair of an existing board, commission, committee, or task force having statewide or regional jurisdiction or application to provide the secretary of state certain information in electronic format by December 4, 2006. The information required includes the following:

- Name, mailing address, telephone number, and e-mail address of the board
- Name, date of appointment, term of appointment, and expiration date of term of each appointee to the board
- Name and position of the appointing authority

This information will be updated and posted to the secretary of state's website by January 4th of each year. The chair of the board shall notify the secretary of state by electronic

means of vacancies, which will be published weekly by the secretary of state on the website.

Opinions

Opinions interpret laws, rules, and regulations when their meaning is not sufficiently clear.

- *Attorney General's Office* – The Attorney General's Office, when asked in writing, offers opinions on the legality of proposed actions or activities when the laws or rules and regulations addressing the action or activity are unclear or appear to be in conflict. A formal Attorney General's Opinion is not law, but will protect the entity requesting the opinion from prosecution in the event the opinion is later proven incorrect in a court of law. An opinion obtained after completing the act(s) or action(s) in question does not offer this protection. Attorney General Opinions issued since 1979 are available on the Attorney General's Office web site, www.ago.alabama.gov, or by contacting the Attorney General's Office as indicated in the contact list accompanying this manual. Opinions issued prior to 1979 can also be obtained by contacting the Attorney General's Office.

- *Ethics Commission* – The Ethics Commission rules on matters involving questions concerning conflicts of interest and violations of state ethics laws. Individuals can ask for the commission's opinion on the propriety of *proposed* actions. Ethics commission opinions can be researched at the commission's web site, www.ethics.alabama.gov, or by contacting the commission as indicated in the contact list accompanying this manual.

- *Department of Examiners of Public Accounts* – When asked in writing, the Chief Examiner will respond to questions regarding the proper conduct of audit-related matters. Following the opinion offers no legal protection, but will prevent an audit finding. Copies of recent reports issued by the Department of Examiners of Public Accounts are available at the department's web site, www.examiners.alabama.gov, or by contacting the Examiners of Public Accounts as indicated in the contact list accompanying this manual.

- *Courts* – Courts do not make law. However, the courts do offer binding interpretation of laws, rules, and regulations, and rule on matters of law. Courts are also the final place for appeals of regulatory entity actions.

Executive Orders

Executive orders are directives issued by the governor, usually to address a specific problem until adequate legislation can be enacted or until the problem ceases to exist. Executive orders are numbered sequentially beginning at number one for each governor's administration. Executive orders remain in effect until repealed or superseded. State law takes precedence over executive orders. Executive orders for the current administration are filed with and can be obtained from the Secretary of State's Office, Public Information Division, at (334) 242-7224, or by fax at (334) 353-8993, or by visiting the governor's website, www.governor.alabama.gov. There is no charge for copies to state agencies. At the

beginning of each new administration, the executive orders of the prior administration are archived at the Department of Archives and History. ***NOTE***: *Staff at the Secretary of State's Office wishes to receive requests by fax.*

- Executive Order Number 5, dated May 25, 1993, by Governor Jim Folsom, citing the state's excessive cost of legal fees, set the hourly rate for attorneys employed by contract at no more than $85.00 per hour; however, those attorneys who are employed because they possess an expertise in a particular filed of law may negotiate for a higher rate, not to exceed $100.
- Executive Order Number 2, dated January 13, 1995, by Governor Fob James, Jr., removed the $100.00 maximum for attorneys, with payments in excess of $85.00 for attorney services subject to the approval of the governor through his legal office for good cause shown.
- Executive Order 51, dated August 12, 2010, by Governor Bob Riley, sets the legal fees at a maximum of $195 per hour unless it falls within an exception named with the executive order.

Miscellaneous

- *Food*
  Normally, state agencies are not authorized to expend state funds to provide meals or refreshments to employees not in a travel status. In instances where meals or refreshments are allowed to be provided, the employee may not be entitled to also make a claim for travel per diem allowances.

  - Several Attorney General Opinions address the issue of providing meals. Opinion 2001-168, to Robert L. Childree, dated April 26, 2001, states "A state agency may not provide refreshments at a break during a meeting that does not extend through lunch or a mealtime. The opinion to Honorable Tommy Flowers, AGO No. 2001-102, is modified to the extent that it conflicts with this opinion."
  - Opinion 2000-044 and Opinion 2000-045, dated December 14, 1999, to Dr. Melissa M. Galvin, Executive Director of the Commission on Aging, states "The Senior Citizens Hall of Fame Commission may use public funds to pay for a reception and/or banquet where the banquet furthers the public purposes for which the Commission was established." Also, "… [If] the meals are incidental to the meeting, it is appropriate for public funds to be used to finance such a meeting…In order for the meals to be an incidental part of the meeting, the primary purpose of the gathering must be to have an official meeting at which business is conducted, not a social gathering at which food is provided."
  - Opinion 2001-102 to Tommy Flowers, dated February 27, 2001, states "The State Personnel Department may provide meals and/or refreshments at job analysis meetings, day-long examinations, and consent decree compliance meetings where the meals and/or refreshments are merely incidental to the meetings."

- *Recycling*
  Since April 19, 1990, all state agencies are required to have an approved plan for recycling. The ***Code of Alabama 1975***, Section 22-22B-3, addresses specific requirements, as well as the development of an annual recycling plan and of reporting requirements. For assistance with a recycling plan, see the contact list in this manual.

- *Use of Internet*
  Use of computers and the Internet to conduct business requires agencies to review laws and policies pertaining to Internet usage, including e-mail and records retention. Every agency should develop policies for the use of the Internet by employees. The policies should address such issues as appropriate use during office hours, virus prevention, and consequences if policies are ignored.

- *Retention of E-Mail Records*
  E-mail messages are agency records subject to the same retention requirements as the same type of record in another format. The ***Code of Alabama 1975***, Sections 41-13-21 and 41-13-23, prohibits a public official from destroying any public record without the approval of the state or local government records commissions.

  Public records including e-mail messages have one of three different retention classifications, depending on the value of the records to the agency.

- Transitory Records – Transitory records are records of no meaningful value to an agency for documenting its work, and may be destroyed as soon as they are no longer needed. An example is a note sent to a co-worker coordinating lunchtimes.
- Temporary Records – Temporary records have documentary value but do not need to be retained permanently. An example is a public inquiry about the services of an agency.
- Permanent Records – Permanent records are programmatic records of the agency that have historical value because they document the function and duties of the agency. An example of this is complaints to the agency.

  NOTE: For more information on record retention, the Department of Archives and History can be found in the contact list in this manual.

- *Alternative Distribution and Publication of Materials Supplied to the Legislature, Per the **Code of Alabama 1975**, Section 29-1-25*
  After August 1, 2001, reports and other documentation normally provided to members of the legislature on paper must be provided to the membership on the Internet. More specifically, any state agency, state department, or public agency required to supply paper copies of annual reports and other documents and materials to members of the legislature shall develop and implement an alternative method of distribution and publication.

  The alternative method must include each of the following components:

- Notice provided to each member of the legislature after August 1, 2001, and at the beginning of each subsequent legislative term that the state agency, state department, or public agency intends to display or post the report, document, or other material on the Internet. The notice shall include an explanation of how the information may be accessed and copied from the Internet.
- Display of the report, document, or material on the Internet for at least 90 days.
- A written offer to each member of the legislature after August 1, 2001, and at the beginning of each subsequent legislative term, of the opportunity to receive a paper copy of the material. If a member, at the time the notice is received or any other time, requests a paper copy of the material, the material shall be promptly provided.

Each state agency, state department, or public agency may promulgate necessary rules and regulations to implement this section. One example of reporting to the legislature via the Internet is that of the Department of Examiners of Public Accounts publishing all of its audit reports on the Internet.

Section Three: Agency Specific Statutes

Each agency has its own enabling statutes. The statutes for the agency define the legislative intent for the creation of the agency. The statutes establish qualifications and compensation for members of the agency as well as its purpose, powers, and duties. The statutes state fees, qualifications, and continuing education required for licensure. The law will be either explicit when stating qualifications for licensure or may give the agency the privilege of creating rules based upon law. These rules may not exceed or diminish the agency's law. The enabling statutes may also set fines and/or penalties for non-compliance with the licensure law as well as disciplinary proceedings. The law normally states how the monies collected are to be deposited, expended, and the disposition of funds at year end. Some agencies must report annually to designated officials or have annual audits. Below is a definition of the duties, powers, and entitlements of state agencies by law:

- A *duty* is an act or course of action that is required by position, social custom, law, or religion.

- A *power* is the ability or official capacity to exercise control or authority.

- An *entitlement* is a right or claim to something.

Election of Officers

All regulatory agencies have a requirement (duty) to elect officers, usually annually. Having officers allows for leadership at meetings and assists parliamentary procedure. Election of officers is important, in that the chairperson/president and the recording secretary are expected to sign the minutes of meetings.

> "The board shall elect annually a chair and a vice chair." (***Code of Alabama 1975***, Section 34-17A-7(c) [Board of Marriage and Family Therapy])

Annual Report

Many state agencies are required to produce an annual report that details the activities of the agency for the year covered. Such reports should be made in a timely manner; however, unless specified in enabling statutes, there is no date requirement for the submission of the reports. The governor is the person most commonly provided the report, but the legislature and the secretary of state are also frequently-listed recipients. *The* ***Code of Alabama 1975****, Section 29-1-25, requires that any state agency that is to provide an annual report to the legislature must develop an alternative means for providing the report on the Internet***.** Further requirements for displaying and providing paper copies of the report to the legislature are included in the *Code* section. Examples of statutes mandating annual reports include:

- "Keep a record of its proceedings and make an annual report thereon to the Governor and the Legislature." (***Code of Alabama 1975***, Section 35-15B-5(8) [Licensure Board for Interior Designers])
- "The board shall annually submit to the Governor a report of its transactions for the preceding year. The board shall file with the Secretary of State a copy of the report

submitted to the Governor." (***Code of Alabama 1975***, Section 34-14A-10 [Home Builders Licensure Board])

Required Location of Office

Some state agencies are required by enabling statutes to have all or part of their operations located in a specific city. For example:

- "The commission shall establish and maintain its principal office in Jasper, Alabama, and establish and maintain such field offices in other coal producing counties as it may consider necessary for the proper discharge of its duties." (***Code of Alabama 1975***, Section 9-16-73(h) [Surface Mining Commission])
- "The legal office of the board shall be located in the City of Montgomery." (***Code of Alabama 1975***, Section 34-11-34 [Licensing Board for Engineers and Land Surveyors])

Roster of Licensees

Frequently, maintaining a roster of licensees is a duty set by the enabling statutes of a state licensing or permitting agency. If this requirement is included in your agency's statutes, it becomes a record that your agency must maintain. It is also a public record and must be maintained in a form accessible by the public. Some agencies maintain their rosters of licensees on their websites, as well as in a form that can be printed in hard copy for a fee to recover costs.

- "Maintain an official roster showing the name, registration number, and address of all individuals receiving a certificate of registration and/or seal and authorization as a registered interior designer from the board, together with the date, term of the issuance, and the place or places of business where each respective individual is engaged in the practice of interior design, and a record of all renewals, revocations, suspensions, reinstatements, or other actions taken in regard to such persons." (***Code of Alabama 1975***, Section 34-15B-5(11) [Licensing Board for Interior Designers])
- "Publish annually the rules and regulations promulgated by the board, a copy of the Dental Practice Act and to publish at least every two years a list of all persons licensed to practice under this chapter." (***Code of Alabama 1975***, Section 34-9-43(11) [Board of Dental Examiners])

Subpoena of Witnesses and Records

Administering Oaths and Issuing Subpoenas

Subpoena power cannot be acquired through an agency's administrative rules. It must be granted specifically by law. The power to administer oaths and issue subpoenas for the production of witnesses and documents by the state agency is usually found in the agency's enabling statutes. The wording that grants subpoena power needs to be carefully reviewed to ensure that both the compelling of witnesses and the production of documents and other evidentiary matter is included.

- "The board, or any committee thereof, shall be entitled to the services of the attorney general in connection with the affairs of the board, and the board shall have the power to compel attendance of witnesses, to require production of documents, to administer oaths and to take testimony and proof concerning all matters within its jurisdiction." (***Code of Alabama 1975,*** Section 34-2-39(b) [Board for Registration of Architects])
- "In carrying into effect the provisions of this chapter, the board may, under the hand of its chairman and the seal of the board, subpoena witnesses and compel their attendance and may also require them to produce books, papers, maps or documents. Any member of the board may administer oaths of affirmation to witnesses appearing before the board." (***Code of Alabama 1975***, Section 34-12-35 [Board of Registration for Foresters])

The state's Administrative Procedures Act grants limited subpoena authority to the state agencies that are subject to the act, as provided by the ***Code of Alabama 1975***, Section 41-22-12(c). This section grants the officer presiding over a contested case the authority to issue subpoenas, discovery orders related to relevant matters, and protective orders in accordance with the rules of civil procedure.

Fines

Two types of fines exist in the enabling statutes of regulatory agencies: criminal fines and administrative fines. Criminal fines are monetary punishments imposed upon a person convicted of a crime, and can only be imposed by the courts. Administrative fines can be imposed by state agencies on grounds provided in state law. To be able to impose an administrative fine on a licensee, the fine must be authorized by the agency's enabling statutes. If the statutes are silent on administrative fines, they may not be imposed. Like fees and penalties, administrative fines may be imposed only upon conditions specified by law and only in amounts authorized by law. When the law names the grounds for charging an administrative fine, a fine cannot be charged on any other grounds.

- Criminal Fine - "Any person who practices, maintains a school, maintains a salon, or acts in any capacity without a certificate or license when one is required pursuant to this chapter, or who otherwise violates any provision of this chapter, shall be guilty of a misdemeanor and fined no more than five hundred dollars ($500) or imprisoned for no more than 90 days, or both. Any corporation which acts in violation of any provision of this chapter shall be punished by a fine of no more than one thousand dollars ($1,000)." (***Code of Alabama 1975***, Section 34-7A-2 [Board of Cosmetology])
- Administrative Fine - "The board may levy and collect an administrative fine of not less than five hundred dollars ($500) nor more than five thousand dollars ($5,000) for any violation of any provision of this chapter or the rules and regulations of the board." (***Code of Alabama 1975***, Section 34-8-4(a) [General Contractors Licensing Board])

Penalties

A penalty is a sum of money that the law exacts as punishment for doing some act that is prohibited, or for not doing some act that is required. The authority to charge a penalty must be specifically given in the law. Most state agencies are given the power to charge penalties as a part of their licensing and disciplinary authority. Again, only the type or amount of penalty that is allowed by law may be charged. If the law is silent regarding penalty fees, then none may be collected. If a penalty is set in the law, the conditions under which it may be charged cannot deviate from the conditions specified by law. For example, if a late renewal fee is set at $20, the agency, by rule-making authority, may not impose a $20 fee for being up to 30 days late, another $20 fee for being up to 60 days late, and another $20 fee for being up to 90 days late. A penalty may only be imposed as allowed by law.

> "If a licensee fails to renew his or her license within 90 days following expiration of the previous license, a late penalty of fifty dollars ($50) shall be collected, upon renewal, in addition to the renewal fee." (***Code of Alabama 1975***, Section 34-8-2 [General Contractors Licensing Board])

Board Member Compensation

Compensation to board or commission members for days spent conducting the business of the board or commission must be specifically granted in an agency's enabling statutes in order to be paid. If the enabling statutes of a board or commission are silent as to compensation, then none may be paid. Compensation of this type only applies to members of the board or commission, not to staff. Compensation of board or commission members is a separate entitlement from travel expense allowances, and is paid in addition to travel expense allowances. In some statutes, compensation of board or commission members is also called "per diem." "Per diem" and "per day" are synonymous terms. Compensation and travel expense allowances are both termed "per diem" only because they are both paid on a per day basis. Language in the statutes may set compensation at a specific amount or may give the board or commission the authority to set compensation. If the board or commission is allowed to set compensation, it may be limited by conditions specified in the statute. Examples showing the different conditions under which compensation may be paid are as follows:

- "…and, in addition thereto, they shall receive the sum of $50 per diem for every day not to exceed 10 days per year actually spent by the member upon the business of the board." (***Code of Alabama 1975***, Section 34-13-23(c) [Board of Funeral Service])
- "Each member of the board shall receive a per diem fee of not less than fifty dollars ($50) nor more than one hundred dollars ($100) to be determined by the board for the time spent in the performance of official duties…In setting the per diem fee, the board shall give due consideration to funds which are available for that purpose." (***Code of Alabama 1975***, Section 34-20-4(h) [Board of Examiners of Nursing Home Administrators])
- "…in addition to any daily compensation or allowance, if any, as may be provided by the board, in such amount as may be determined by the board…" (***Code of Alabama 1975***, Section 34-21-2(e) [Board of Nursing])

Normally, if compensation is due to a board member, it must be paid unless formally declined by the board member. However, Attorney General Opinion 2008-038 opines that a member of a board, who is also a state employee, cannot be paid compensation for both positions. State employees who serve on state boards are only entitled to receive compensation for the highest paid office, position, or employment. The public official or employee is entitled to paid travel expenses while on duty for their normal salaried position.

Section Four: Internal Controls

Internal controls are procedures designed to provide reasonable assurance that transactions are carried out correctly and that assets are protected.

Control Measures

It is the agency's responsibility to safeguard its assets and to carry out management instructions and comply with legal requirements. While there is no statutory requirement to implement control procedures, management has not done its job unless there are measures in place to protect the agency's assets and to ensure compliance with instructions and legal requirements. Ultimately, the board or commission or head of an agency is responsible and should work with the agency's staff to put effective control measures in place, integrated into the day-to-day operations of the agency, and to monitor compliance with the measures.

A control deficiency exists when procedures in place do not allow management or employees in the normal course of carrying out their duties to prevent or detect improper transactions or improper disposition of assets. The deficiency could be caused by inadequately designed procedures or lack of adherence to procedures. Loss of assets through fraud or theft can usually be traced to control deficiencies.

Controls must fit the agency's activities, but some common controls are as follows:

Cash or Near Cash

- Prohibit checks made payable to "cash" and signing of blank checks,
- Bank accounts balances should be reconciled to records of transactions on a regular basis by someone other than persons who handle money or make deposits.
- Minimize cash transactions because of the ease by which cash can be lost, stolen, or misused.
- Prohibit journal entries without approval or review.
- Reconcile all amounts received to deposits.

Controls over Property

- Equipment should be properly marked or tagged to identify the ownership of the property promptly when received and before it is put into use.
- Furniture, fixtures and equipment should be physically inventoried on a regular schedule and compared with records of furniture, fixtures, and equipment on hand.

Controls over Expenditures

- Only authorized person(s) should sign vouchers.
- Double signatures should be required for bank checks.
- Blank checks should be physically secured.
- Audit statements/invoices against prepared vouchers by someone who did not prepare the vouchers to verify accuracy before payment.
- A person collecting and depositing receipts should not approve vouchers or checks for payment of invoices.

- Original invoices should be paid in a timely manner. See Attorney General's Opinions 83-432, 92-074, and 93-266 for more information.

Controls over Receipts

Control procedures should be designed to ensure that all funds due are received and deposited. Controls should be designed so that missing funds will be detected within the normal course of work. Some examples of appropriate controls are listed below:

- Revenues/receipts should be promptly deposited, at least weekly, and more often if large amounts accumulate.
- Checks should be restrictively endorsed immediately upon receipt.
- A record of all receipts should be kept and regularly reconciled to amounts deposited.
- Duties should be separated as much as possible so that one person cannot both perpetrate and conceal theft or misuse of funds. For instance, one person should not receive the funds from unopened mail, record the receipt, complete the deposit slip, make the deposit, and reconcile the monthly statement.

Personnel and Payroll

- The record-keeping function should be separated from the payroll process. Record keeping involves maintaining the names, addresses and bank routing and account numbers of every person on the payroll. The person responsible for collecting and maintaining this information should not prepare payrolls. This procedure prevents a payroll clerk from creating a non-existent employee and receiving the employee's paycheck.
- Official time records and leave records should be maintained by designated personnel other than the employee submitting the original timesheet or taking the leave.
- Leave should be entered into the state's Government Human Resources System (GHRS) each pay period. Incorrect balances in the state's system due to unrecorded leave transactions can result in improper taking of leave, improper leave carryover, or improper payroll amounts.
- Prior state service should be verified for new employees, even if this information was transferred from another state agency. Length of service can affect payroll amounts.
- No person should have responsibility for hiring, supervising, approving and reviewing payments for, and maintaining records for employees. These duties should be segregated to the extent possible.

Section Five: Membership

Board or commission members become public officials upon appointment and are responsible for ensuring the proper operation of the agencies they control. They are considered officers of the state. All of the resources they control and their actions as members are subject to public accountability. Funds under their direction are public funds subject to the legal restrictions placed upon public funds.

When the legislature enacts laws authorizing the creation of an entity for regulation of a profession or occupation, they establish requirements for the composition of the regulatory entity's controlling board or commission. This composition is unique to the board or commission. There are legal requirements inherent in all board/commission memberships that the member must meet in order to be qualified to hold the office. These requirements must be met at the commencement of the member's term of office and must continue during the entire occupancy of the office. See Attorney General's opinion 2011-016 and the Alabama Suprememe Court decision in State Ex rel Graddick v. Rampey, 407 So. 2d 823 (Ala. 1981).

Here are some examples of legal requirements:

- *Mandated Residency*
  - Must be an Alabama resident
  - Must be a resident of a specific congressional district
  - Must have been a resident for a specific period of time
    "…consisting of …members who shall be citizens of the United States and residents of the state for at least two years prior to appointment…." [Polygraph Examiners Board]

- *Mandated Professional Qualifications*
  Professional members must usually meet education and experience requirements.
  - "…all of whom shall have been engaged for a period of four consecutive years in their profession as polygraph examiners prior to appointment to the board and engaged at the time of appointment as an active polygraph examiner…" [Polygraph Examiners Board]
  - "…a graduate of a chartered chiropractic school or college, which required actual attendance in the school as a prerequisite to graduation; currently engaged in the practice of chiropractic and has been engaged in the practice in this state for at least five years; …" [Board of Chiropractic Examiners]

- *Mandated Consumer Qualifications/Restrictions*
  "One member of the board shall be a consumer member… Neither the consumer member, nor his or her spouse, shall be a chiropractor. The consumer member shall not be an immediate family member of a chiropractor, nor shall he or she be employed in the chiropractic field." [Board of Chiropractic Examiners]

- *Mandated Nomination/Election and Appointment*
  - Nomination by professional association(s)
  - Nomination by body of licensees

- Election by district or at large
- Appointment of selected nominee by the appointing authority (usually the governor)

"There is hereby created a board to be known as the Alabama Board of Examiners in Counseling composed of seven members, appointed by the Governor of this state … the Executive Committee of the Alabama Counseling Association, or its successor organization, shall submit to the Governor a list of qualified candidates for the board." [Board of Examiners in Counseling]

- *Senate Confirmation*
  Appointments subject to Senate confirmation are not effective until confirmation occurs, unless the agency's specific law provides otherwise. If a legislative session ends without confirmation, the appointment is considered to have been rejected.

- *Terms and Succession*
  - Appointments are normally to unexpired terms of a specific number of years. The terms end on specific, predetermined dates without regard to the date of appointment, unless otherwise provided in the agency's law. See Attorney General's Opinion 2005-066 for more information regarding unexpired terms. Additionally, Attorney General's Opinion 2006-110 explains that terms of office of new board members begin upon the expiration of the previous members' terms of office.
  - Appointments are normally staggered so the positions are not all filled at once with new members. The staggering of appointments is created by law and is intended to ensure a sufficient level of experience among board members in conducting board business.
  - Some boards/commissions have limits on the number of consecutive terms a member can serve. Attorney General's Opinion 2005-040 states that a member of a board may not resign from the board and then be reappointed to another full term if the member is resigning for the purpose of circumventing the consecutive term limitations.
  - Unless otherwise provided in the agency's law, a member may continue to serve past the end of a term until a replacement is appointed and confirmed [if required]. See Attorney General's Opinion 2005-070.
  - Attorney General's Opinion 95-169, regarding the appointment of members to fill positions vacated prior to their original term of office, states that replacements must be appointed to the unexpired portion of the term in question, that it is the legislature's intent that terms continue to expire in accordance with whatever staggering scheme is incorporated in the entity's enabling laws.
    - Member A's term runs from October 1, 2001 through September 30, 2005, four years later. Member A resigns January 1, 2004. The term of the individual replacing Member A ends on September 30, 2005, which is the original end-of-term date.
    - Member A's term runs from October 1, 2001 through September 30, 2005, four years later. As of September 30, 2005, Member A has not been reappointed nor has a replacement been appointed. Member A, if willing and statutes allow, continues to serve, waiting for a replacement. A replacement is appointed January 20, 2006. The replacement's term must expire on September 30, 2009, four years from the

expiration date of the previous term, rather than on January 19, 2010, four years from the individual's appointment.

- *Mandated Composition*
  - Must be composed of a certain number of persons
  - Must be composed of a specific number or type of professionals and/or consumers. Attorney General's Opinion 2006-114 explains that board members who no longer fulfill the professional requirements of their position on the board must be removed so that new members who meet the requirements may be appointed.
  - Must be composed of a membership that is representative of the state population or licensed professionals
    - "…Two of the board members must be qualified polygraph examiners of a governmental law enforcement agency, and one must be a qualified polygraph examiner, and an Alabama resident in the commercial field…" [Polygraph Examiners Board]
    - "The board shall consist of two citizens from the general public, two counselor educators, and three counselors in private practice." [Board of Examiners in Counseling]

Removal of Members

The board/commission's enabling statutes may or may not dictate how and why members can be removed. Members may also be removed if they fail to continue to meet the requirements for being a member.

If the regulatory entity has a congressional district residency requirement and a member moves to another district or out-of-state, that person is no longer entitled to hold that membership position.

Attorney General's Opinion 92-204, dated March 9, 1992, states, "A member of a state board or commission, who is required to be a resident of Alabama, vacates his position on such board or commission when he moves outside the state with the intent of establishing a new residence and abandoning his former one." Attorney General's Opinion 2006-114 gives further guidance on the need for board or commission members to meet all eligibility requirements for continued inclusion on the board.

Removal of disqualified members normally does not occur automatically. If an unqualified member does not resign and there is no specific authority, such as the governor, named in the law to remove the member, he or she can usually be removed only by a specific type of court action known as "quo warranto".

- *Immunity for Official Actions* – The law normally grants immunity from litigation for good-faith actions made in one's official capacity. However, a member or employee may be personally liable for acting outside of official capacity.

If it can be proven that a member, acting on personal bias (i.e. doesn't like the school an applicant graduated from), denies an applicant licensure who meets all statutory requirements, the member has acted outside his or her official capacity.

- *Resignation and Rescinding a Resignation* – Membership on a regulatory board or commission can be resigned at any time, for any reason. However, rescinding such a resignation can only be done prior to the resignation actually taking effect. Should a member resign and the resignation become effective, the member cannot be reinstated and must be subjected to the regular process for becoming a new member. Attorney General's Opinion 95-00182 discusses this matter in greater detail.

Ethics

The state's Ethics Law is found in the ***Code of Alabama 1975***, Sections 36-25-1 through 36-25-30. This law addresses many aspects of conduct by regulatory entity members and employees.

- *Conflict of Interest and Personal Gain*

  The ***Code of Alabama 1975***, Section 36-25-1(8), defines conflict of interest as "A conflict on the part of a public official or public employee between his or her private interests and the official responsibilities inherent in an office of public trust."

  While a member of a regulatory board, a member may be in a position to vote for a regulatory proposal that will affect the member's private business.

  The ***Code of Alabama 1975***, Section 36-25-5(a), states, "A conflict of interest involves any action, inaction, or decision by a public official or public employee in the discharge of his or her official duties which would materially affect his or her financial interest or those of his or her family members or any business with which the person is associated in a manner different from the manner it affects the other members of the class to which he or she belongs."

  The ***Code of Alabama 1975***, Section 36-25-5(c), states "No public official or public employee shall use…equipment, facilities, time, materials, human labor, or other public property…for the private benefit or business benefit of the public official, public employee, any other person,…which would materially affect his or her financial interest, except as otherwise provided by law or as provided pursuant to a lawful employment agreement regulated by agency policy."

  For instance: As a board member, you recommend and vote to purchase insurance from an insurance business owned by a family member who is also your dependent.

- *Disclosure of Confidential Information Prohibited*

  Section 36-25-8 states that "No public official, public employee, former public official or former public employee…shall *use or disclose confidential information* gained in the course of or by reason of his or her position or employment in any way that could result in financial gain other than his or her regular salary..."

- *Revolving Door Law*
  Section 36-25-13(d) states "No public official or public employee who personally participates in the direct regulation, audit, or investigation of a private business… or individual shall within two years of his or her departure from such employment solicit or accept employment with such private business… or individual."

- *Notice of Representation for Fee*
  The ***Code of Alabama 1975***, Section 36-25-10, states, "If a public official or public employee *...represents a client or constituent for a fee* before any…*regulatory body…notice* of the representation shall be given *within 10 days* after the first day of the appearance. Notice shall be filed with the commission in the manner prescribed by it…"

- *Notice of Contract*
  The ***Code of Alabama 1975***, Section 36-25-11, states, "Unless exempt pursuant to Alabama competitive bid laws … no public official or public employee, … shall enter into any contract to provide goods… unless the contract has been awarded through a process of competitive bidding … All such contract awards shall be made as a result of original bid takings… *A copy of each contract, regardless of the amount ... shall be filed with the commission within 10 days after the contract has been entered into."*

- *Bribes and Solicitations*
  The ***Code of Alabama 1975***, Section 36-25-12, states, "No person shall offer or give to a member or employee of a governmental agency, board, or commission … and no member or employee of a regulatory body, shall solicit or accept a thing of value … other than in the ordinary course of business…"

- *Statements of Economic Interest*
  The ***Code of Alabama 1975***, Section 36-25-14, provides for the filing of a statement of economic interest by certain persons no later than April 30 of each year covering the period of the preceding calendar year.

  Who Must File – Several classifications of people must file statements of economic interest. The following is a partial list of those required to file. See Section 36-25-14 for further details.

  - Any appointed public official and public employee whose base pay is $50,000 or more annually
  - Members of the Alabama Ethics Commission
  - Appointed members of boards and commissions having statewide jurisdiction (but excluding members of solely advisory boards)
  - All full-time non-merit employees, other than those employed in maintenance, clerical, secretarial, or other similar positions
  - Purchasing or procurement agents having the authority to make any purchase
  - Directors and assistant directors of state agencies
  - Chief financial and accounting directors

What General Information Must Be Reported – The statement of economic interest must contain the following information on the person making the filing:

- Name, residential address, business
- Name, address, and business of living spouse and dependents
- Name of living adult children
- Name of parents and siblings
- Name of living parents of spouse.

What Financial Information Must Be Reported – The statement of economic interest must include a list of occupations to which one third or more of working time was given during the previous reporting year by the public official, public employee, or his or her spouse. Financial information is reported in two groups:

- Income
- Indebtedness

Failure to File – Section 36-25-14(d) states, in part, "If the information is not filed as required, the commission shall notify the person concerned…that he or she has 10 days to file the report…The commission may, in its discretion, assess a fine of ten dollars ($10) a day, not to exceed one thousand dollars ($1,000), for failure to file timely."

Filing Inaccurate Information (Intentionally) – A person who *intentionally* violates any financial disclosure filing requirement of this chapter shall be subject to administrative fines imposed by the commission, or shall, upon conviction, be guilty of a Class A misdemeanor, or both.

- *Filing Inaccurate Information (Unintentionally)* – Any person who *unintentionally* neglects to include any information relating to the financial disclosure filing requirements of this chapter shall have 90 days to file an amended statement of economic interest without penalty.

- *Employment by Regulated Person/Business*

  The ***Code of Alabama 1975***, Section 36-25-9(a), states that, unless expressly provided otherwise by law, no person shall serve as a member or employee of a state, county, or municipal regulatory board or commission or other body *that regulates any business with which he is associated***.** The section continues:

  "Nothing herein shall prohibit real estate brokers, agents, developers, appraisers, mortgage bankers, or other persons in the real estate field, or other state-licensed professionals, from serving on any planning boards or commissions, housing authorities, zoning board, board of adjustment, code enforcement board, industrial board, utilities board, state board, or commission."

  Please note that the section provides an exemption for members of state boards. No such exemption is provided for employees of the boards. According to Attorney General's Opinion 2006-061, it would be a conflict of interest for a board member to be employed

by his or her board. A board member may handle the administrative duties of the board without compensation other than as allowed by law.

- *"Business with Which Associated" Defined*

  The ***Code of Alabama 1975***, Section 36-25-1(2), defines "business with which he is associated" as, "Any business of which the person *or a member of his family* is an officer, owner, partner, board of director member, *employee* or holder of more than five percent of the fair market value of the business."

  For example, an employee of a board that licenses a business has a spouse working for that business. There is a potential violation of the Ethics Law.

  The Ethics Law should also be reviewed for the definition of "family". It changes depending on position in state government.

  *NOTE***:** The State Ethics Commission offers specific training on the State Ethics Law and should be contacted as indicated on the contact list.

  Attorney General's Opinion 2006-061 gives further guidance on board of commission members being hired by the board or commission to perform work other than his or her board member duties.

- *Reporting*

  If you become aware of a possible ethics violation, there are specific reporting requirements that must be followed, subject to a charge of violation of the Ethics Law. The ***Code of Alabama 1975***, Section 36-25-17(a), requires every governmental agency head to file a report with the Ethics Commission within 10 days on any matters that come to his or her attention in his or her official capacity which constitute a violation of the state Ethics Law. Subsection (b) further requires all governmental agency heads to cooperate in every possible manner in connection with any investigation or hearing, public or private, which may be conducted by the commission.

  NOTE: There is a Unites States Constitutional 5th Amendment exception to reporting a violation, if such reporting would result in self-incrimination.

- *Ethics Session Attendance*

  Executive Order Number 58, dated August 23, 2001, signed by Governor Don Siegelman, orders all departmental and cabinet-level officials and appointed agency directors to attend an "Ethics and Public Service Continuing Education" session every two years, for a minimum of two hours, beginning in the year 2002. Notification of upcoming training sessions may be found on the Ethics Commission website, which is included in the contact list in this manual.

  Ethics training is required for public officials and public employees who file statements of Economic Interest forms. Under new legislation passed during the 2010 Special Legislative Session, training must be completed by April 30, 2011 for current public

officials and public employees. This is an on-line educational review of the Alabama Ethics Law provided on the website of the Ethics Commission. After this date, the training should be completed within 90 days of appointment or hire date.

Section Six: Administrative Procedures

Adoption of Rules

Rules are adopted to make the law practically functional. The power to adopt rules must be specifically given before a state agency can adopt administrative rules, normally known as rules and regulations. This power is bestowed on most state agencies in the powers and duties section of the agency's enabling statutes. Once the authority is granted, and unless specifically exempted, state agencies must conform to the Administrative Procedure Act (***Code of Alabama 1975***, Sections 41-22-1 through 41-22-27) with regard to the creation and adoption of its administrative rules.

- *Administrative Procedure Act (APA) Compliance*
  The APA is intended to provide a minimum procedural code for the operation of all state agencies when they take action affecting the rights and duties of the public.

- The APA defines "agency" as every board, bureau, commission, department, officer, or other administrative office or unit of the state, including the Alabama Department of Environmental Management, other than the Legislature and its agencies, the Alabama State Port Authority, the courts, the Alabama Public Service Commission, or the State Banking Department, whose administrative procedures are governed by Sections 5-2A-8 and 5-2A-9.
- The APA defines a "rule" as each regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule or by federal statute or by federal rule or regulation; provided, however, all forms shall be filed with the secretary of the agency and with the Legislative Reference Service and all forms, except intergovernmental, interagency, and intra-agency forms which do not affect the rights of the public and emergency forms adopted pursuant to Section 41-22-5, shall be published in the Agency Administrative Code.
- The requirement for creation and the method of adoption for rules is detailed in the Act. The process embodied in the law must be followed exactly or the rule is invalid and cannot be enforced. For detailed instruction, consult the Administrative Procedures Division of the Legislative Reference Service.
- The state agency is required to designate a secretary and to file in the secretary's office a certified copy of each rule adopted. The agency is also required to make available for public inspection and copying, at cost, all rules and other written statements of policy used in the discharge of the agency's functions.
- Agencies must, in addition, make available for public inspection and copying, at cost, an index by name and subject of all final orders, decisions, and opinions which are issued

after October 1, 1982, except those expressly made confidential or privileged by statute or order of court.

- *Cannot Exceed Law*
  Attorney General's Opinions have maintained that a state agency may not exceed in its rules the authority granted to it by the agency's enabling statutes. The area most frequently prone to improper enlargement is fees. An agency may only charge fees that are specifically allowed by law. If no specific authority is granted, then the agency may not charge a fee. Also, an agency may not add to or upgrade requirements for licensure through its rule-making authority.

  The enabling statutes of the Alabama Furniture Movers Board mandate licensing master, journeyman, and apprentice furniture movers. Apprentice furniture movers must pass an examination to work as furniture movers. Higher levels of licensure are achieved through subsequent experience. The board adopts a rule requiring a permit for furniture movers who have taken the examination, but have not yet received notification of passing or failing. In this way, the movers can be hired and begin working in anticipation of passing the exam and becoming licensed. This rule would exceed the authority granted in the board's enabling statutes and is not legal. Since the law requires that passing an examination is prerequisite to working as an apprentice, the board cannot by rule legally authorize practice before the candidate has officially passed the examination.

Setting Fees
In their enabling statutes, state agencies are generally granted the authority to collect fees for licensing and regulatory activities, but for most, there are limits embodied in the law. Absent specific statutory authority, no fee can be charged. The following discussion addresses some of the conditions placed upon the charging of fees by language in the law.

- *Fees Set by Administrative Action*
  In this circumstance, the enabling statutes grant the state agency the authority to set fees. Frequently, the authority only applies to the amount of fees charged. The types of fees the agency can collect are usually specified in the statutes. The fee amounts are set by official action of the state agency and can be changed or affirmed each year. State agencies are to include a fee schedule as a part of their administrative code. The rule-making process as outlined in the Administrative Procedure Act must be adhered to when setting and changing the fees. Examples of fees set by state agency action include:

- "Any person desiring a license to practice Veterinary Medicine in this state shall make written application in the English language to the board. The application shall show that the applicant is at least 21 years old, is a graduate of an accredited Veterinary School, and any other information and proof as the board may require pursuant to the administrative code of the board. The application shall be accompanied by application and examination fees in the amounts established and published by the board". (***Code of Alabama 1975***, Section 34-29-72(a) [Board of Veterinary Medical Examiners])

- "(a) The board shall admit to examination for licensure as a nursing home administrator …Each candidate shall also be required, prior to admission to the examination, to pay an examination fee established by the board pursuant to its rule-making authority.
  (b) The board may establish an application fee for the internship or administrator in training (AIT) program and a fee for preceptor, certification, and recertification of the administrator in training (AIT) program pursuant to its rule-making authority." (***Code of Alabama 1975***, Section 34-20-9(a)(b) Board of Examiners of [Nursing Home Administrators])

- *Cannot Exceed What is Allowed by Law*
  Numerous Attorney General Opinions have maintained that, where the enabling statutes of an agency do not grant specific authority to set the type or amount of a fee, the agency cannot do so through the rule-making process. If the law is silent on the issue of charging fees for licensing and regulatory functions, then the agency has no authority to charge fees.

  The Alabama Board of Frisbee Throwers' enabling statutes mandate that an applicant will provide proof of education, a completed application, and an application fee of $80 to be licensed. In addition, the applicant must pass an examination prepared by the board. No fee for the examination is mentioned in the statutes. The board votes to charge a $30 examination fee to cover the costs of preparing, proctoring, and grading the examination. As the examination fee was not included in the board's statutes, it is not legal. Upon discovering the examination fee is illegal, the board votes to increase the application fee by $30 to $110. As the fee is set by law at $80, this rule is also illegal.

- *Negotiated Settlements*
  The ***Code of Alabama 1975***, Section 41-22-12(f), the Administrative Procedure Act, provides that, "Unless precluded by statute, informal dispositions may be made of any contested case by stipulation, agreed settlement, consent order, or default or by another method agreed upon by the parties in writing." This section authorizes negotiated settlements as a means of resolving a disciplinary hearing. The amount of the monetary settlement or other conditions agreed upon is not governed by the agency's enabling statutes for penalties and fines, but is set according to conditions the parties to the case agree upon. Funds received by state agencies through negotiated settlements can be deposited in the agencies' operating funds.

Section Seven: Meetings

Meetings

- *Mandated Meetings*

  Some state agencies have a minimum number of meetings mandated by enabling statutes. If so mandated, the agency must meet as required by statute. Other aspects of meetings may be mandated by law, such as the location of the meeting or the purpose of the meeting. Usually, a specification is also set for additional special, or called, meetings. In some enabling statutes, a time period for notice of meetings to agency members is set. Examples of mandated meetings include:

  - "The board shall meet at least four times a year on a quarterly basis with the board designating the months of the meetings for the coming year at its annual organizational meeting. Regular meetings shall be called by the chair who shall designate the time and place of each regular meeting. The chair or a majority of the members of the board may also call a special meeting of the board." (***Code of Alabama 1975***, Section 34-21A-4(b) [Onsite Waste Water Board])
  - "The board shall meet at least once each calendar quarter to conduct its business. Places of future meetings shall be decided by the vote of the members at meetings." (***Code of Alabama 1975***, Section 34-27A-4 [Real Estate Appraisers Board])

- *Minutes*

  Minutes should record the official actions of the agency. The Department of Archives and History has a procedural leaflet on its website that is a useful guide for producing minutes and making them available to the public. This leaflet is the guideline used for reviewing meeting minutes during a compliance examination.

Open Meetings Act Compliance

The Open Meetings Act of 2005 effective as of October 1, 2005 is codified as Section 36-25A-1 et seq. in the ***Code of Alabama 1975***. Under this law, all boards, bodies, and commissions of the executive and legislative branches of the state, including political subdivisions and municipalities, which expend or appropriate public funds; all multi-member governing bodies of the executive and legislative branches of the state, including political subdivisions and municipalities; all quasi-judicial bodies of the executive and legislative branches of the state; and all standing, special, or advisory committees or subcommittees, are to comply. Therefore, all committees and subcommittees of a governmental body are subject to this law. Only legislative party caucuses or coalitions, the Alabama appellate or trial courts, and voluntary membership associations which have not been delegated any legislative or executive functions by the legislature or governor are not affected.

- *Adequate Public Notice*

  In order for the public to be aware of a public meeting, the public must have the opportunity for notification of the meeting. Notification must include the time, date, and the nature of the meeting. If a preliminary agenda is available at the time of notification, this shall also be included. If there is no preliminary agenda, a general

description of the nature and purpose of the meeting shall accompany the notification. Agencies with statewide jurisdiction must submit a notice to the secretary of state so that it may be posted on the website of the secretary within the act's stated deadlines. Under Section 36-25A-2 (6)(a)(1), a seven-day notice is required of all pre-arranged meetings stated by law to be held at a certain place or time. For instance, the Licensure Board for General Contractors must meet in January, April, July, and October of each year (Section 34-8-24). Therefore, the Licensure Board for General Contractors must submit notice of the meeting to the secretary of state several days prior to the seven-day deadline. The secretary of state has formulated a policy by which the agencies are to submit the notification, and it is available at www.sos.alabama.gov.

Section 36-25A-2 (6)(a)(2) and (3) require a one-day notice to be given for pre-arranged meetings to possess or approve the expenditure of funds. They also require a one-day notice of all meetings to discuss business matters of the agency. For instance, if the Licensure Board for General Contractors wanted to meet in December to discuss issues concerning licensees, a one-day notice would be required. Notice must be submitted to the secretary of state's website with enough time to allow processing and posting of the notice for at least one day prior to the meeting.

Section 36-25A-3(b) states, "Unless seven days notice is required, notice for the following meetings shall be posted as soon as practicable after the meeting is called and in no event less than 24 hours before the meeting is scheduled to begin." "As soon as practicable" means as soon as can be accomplished after the meeting is called. This section does not give the body blanket approval to give 24 hour notice of all of its meetings. For example, if a body sets its next meeting time and place during the current meeting, the person responsible for notification should post the next meeting as soon as possible. Also, if a body sets its meeting annually (sets dates for all regular meetings its October meeting), the entire schedule should be posted as soon as possible. Amendments may be made as necessary.

Emergency meetings must have at least a one-hour notice. There are only two reasons for less than 24-hours' notice. One exception is that the agency requires a meeting in order to avoid immediate physical injury to persons or damage to property. The other exception is that a public official or employee is resigning, and the agency wants to accept the resignation. No other business of the agency shall be conducted while accepting a resignation.

The Open Meetings Act also requires direct notification to interested parties when the parties so request. The agency will set reasonable rules for direct notification, and can charge or request advance payment of the cost for direct notification to the requesting party. Any reasonable method of direct notification can be used, such as e-mail, phone, fax, etc.

Meeting Protocol
Each agency should adopt parliamentary procedures to govern meetings. All meetings should be preserved in writing through the minutes. The Act requires that the agency record the date, time, place, members present and absent, and any actions taken by the agency during the meeting. The Open Meetings Act allows the media and public to record meetings via tape recorder, video camera, and photo camera. All votes should be taken in the open portion of the meeting. No particular type of voting is required by the Open Meetings Act, but voice vote is allowed. Secret ballots are not allowed; therefore, no secret voting may occur. As a general rule, the records of the meeting are open to public inspection (73 *CJS* 22). Executive or secret sessions are held to keep a person's good name and character from being publicly impugned. Therefore, a recording of such discussions should not be made. See Attorney General's Opinion 97-0013 for more information.

Quorum
A quorum is the number of people required to be present before a meeting can conduct business. The ***Code of Alabama 1975***, Section 41-22-3(8), defines a quorum as no less than a majority of the members of a multimember agency, unless provided otherwise by statute. In Opinion 93-095, the attorney general stated that if vacancies occur on a state agency, a majority of the remaining members would constitute a quorum. The Open Meetings Act also counts as part of a quorum those individuals who have not officially taken office, but who come to a "pre-swearing-in" meeting.

- *Physical Presence of Members Is Necessary to be Counted Toward a Quorum*
  The Supreme Court ruled that a quorum must be physically present to do business, and that telephoning cannot constitute a quorum. (*Penton v. Brown-Crummer Inv. Co.*, AL Supreme Ct 1/23/1930, 222 Ala. 155, 131So.14.) The attorney general, in an opinion dated 11/6/78 to J. Al Poe, Mayor of Cordova, affirms that a quorum consists of persons who are physically present, and cannot be made of members attending via teleconferencing technology (telephone, video, etc.), nor can a quorum be constituted by proxy or through designees. In 83-397, the attorney general opined that actions taken by a state agency without a quorum present were void. Attorney General Opinion 94-248 states that, although the courts of Alabama have not ruled on voting by telephone conference call, the courts of other states have concluded that, absent specific legislation, the use of telephone conference calls to cast votes violates the intent of open meeting laws (*Finucane vs. Pennsylvania Milk Marketing Board*, 584 A.2d 1069 (1990), *Babac vs. Pennsylvania Milk Marketing Board*, 584 A.2d 399 (1990)). Attorney General's Opinion 2006-071 also states that, to be counted towards establishing a quorum, board members attending meetings that are subject to the Open Meetings Act are required to be physically present. Text messaging also is not an allowable way to include an absent person as present.

  Attorney General Opinion 2011-14 opines that a quorum of a board of trustees may attend a committee meeting, where notice was properly given for the committee meeting under the Open Meetings Act ("OMA"), without also providing notice of a board meeting, as long as the board does not deliberate matters at the committee meeting that it expects to come before the board at a later date. If a quorum of the board has prearranged

a board meeting to occur at the committee meeting, the board must provide notice of this meeting under the OMA. A quorum of the board may not hold an impromptu board meeting at the committee meeting, at which it deliberates specific matters expected to come before the board at a later date, such as other board business without violating the OMA.

There are at least two exceptions provided by law to the requirement for the physical presence of members in order to be counted and to vote.

- *The Alabama Port Authority*
  § 33-1-8. Board of directors.
  (d) The board shall meet monthly on the call of the chair, who shall designate the time and place. The chair also may call special meetings. A quorum of the board for any regular or special meeting shall consist of not less than five members. At least two meetings per year shall be held outside the metropolitan Mobile area in a place selected by the chair. Board members shall be given at least 10 days' notice of regular meetings and five days' notice of special meetings, except that, if, in the judgment of the chair, urgent business so requires, the chair may give such shorter notice of a meeting as is practicable. *Members of the board or any committee thereof may participate in meetings of the board or such committees by telephone conference or similar communications equipment through which all persons participating in the meeting can hear each other at the same time, and such participation by the members shall constitute presence at a meeting for all purposes.* The director of the port authority shall give notice of any meeting to the media as the board and the director together consider appropriate under the circumstances.

- *State Board of Medical Examiners*
  § 34-24-361. Investigations; reporting offenses; proceedings and actions; privileged information.
  (f) The commission shall, temporarily, suspend the license of a physician or osteopath without a hearing simultaneously with the institution of proceedings for a hearing provided under this section on the request of the State Board of Medical Examiners if the board finds that evidence in its possession indicates that the physician's or osteopath's continuation in practice may constitute an immediate danger to his or her patients or to the public. *The commission may meet by telephone conference call to act upon any such request.*

All Voting Must Occur in a Public Meeting

All votes taken in a meeting, including those concerning a matter discussed in executive session, must be made in the public portion of the meeting. Attorney General Opinion 2001-106 states that all votes must be taken at a public meeting with a quorum of members present. The Alabama Supreme Court ruled that "[i]t is intended that the whole deliberative process be open to public scrutiny, rather than that there be the mere formal announcement of decisions already made in private." (*Miglionico v. Birmingham News Co.,* 378 So. 2d 677 at 680 (Ala. 1979))

Executive Sessions

The Open Meetings Act specifies and strictly limits the reasons for an executive session. The agency may not enter an executive session without first convening an open meeting. The Act requires the following procedures for holding an executive session:

- Hold an open meeting as defined by Section 36-25A-2(6)(a)(1) and 2(6)(a)(2)
- Motion to enter an executive session and state the reason for the session. A designated person shall certify that an executive session is warranted if it is for one of the following:
  - Discussion with the agency's attorney concerning litigation, mediation, or arbitration
  - Discussions that would disclose the identity of an undercover informer, or about criminal investigations of non-public officials
  - Discussions concerning competition with private entities in trade or commerce
  - Discussions concerning negotiations between the agency and a group of public employees
- Vote with majority approval on the motion to enter executive session. This vote must be in the open meeting, and each individual member's vote must be recorded in the minutes.
- State whether the agency will reconvene after the executive session, and, if so, at about what time it is expected to do so.

There are nine reasons allowed under the Open Meetings Act to hold an executive session. These nine reasons do not preclude reasons as provided by law under other statutes. The nine reasons are as follows:

- Discussion of job performance, general reputation and character, physical condition, professional competence, and mental health
  - Physical condition and mental health are appropriate executive session subjects
  - Discussing a person's general reputation and character outside of job performance is appropriate for an executive session
  - Attorney General Opinion 2006-088 allows an executive session to be called for the purpose of interviewing current public employees for promotion to fill vacant positions when those positions do not require the interviewee to file a Statement of Economic Interests with the Alabama Ethics Commission
  - Discussing a person's job performance must be done during the open portion of the meeting
- Discussion of formal written complaints or charges against an individual or legal entity
- Discussions with an agency's attorney

Some items that may be discussed in executive session:

- Pending litigation
- Controversies not currently being litigated, but likely to be if the agency takes a proposed course of action
- Meetings with an arbitrator or mediator due to litigation or any decision concerning matters within the jurisdiction of the agency involving another party, group, or body
- Deliberations of the attorney's advice must be held in open session

- Before voting to enter executive session, the agency must receive a "written opinion or oral declaration" from an attorney that the executive session discussion is warranted, and the declaration must be reflected in the minutes
- Discussions of security plans and safety measures
- Discussion must regard critical infrastructure and critical energy infrastructure as defined by federal law
- Discussion must be determined as detrimental to public safety or welfare
- The owner or operator of the critical infrastructure and/or critical energy infrastructure shall be notified of the meeting in advance to allow that individual or company to attend the executive session
- Discussions of criminal investigation and undercover agent or informer identity
- Discussion of criminal investigations of an individual who is not a public official is proper for executive session
- Before voting to enter executive session, a declaration made by a law enforcement official, district attorney, assistant district attorney, attorney general, or assistant attorney general must be recorded in the minutes, and must state that open discussions would "imperil effective law enforcement"
- Discussions of negotiations to buy/sell/lease real property
- Discussion of what the agency is willing to offer when considering buying, selling, leasing, or exchanging real property, or when considering the market value of real property
  - The agency cannot discuss this in executive session if the real property being considered is owned by a member of the agency participating in the executive session, or if the property has been condemned
  - The terms of the contract must be openly discussed before executing the contract
- Discussion of preliminary negotiations in trade competition and trade secrets
- Discussion of competition with private individuals or entities, other Alabama government bodies, or other states or foreign nations
- Before voting to enter executive session, a declaration must be made by a person involved in the recruitment or retention effort, or that has personal knowledge that the discussion will involve matters or information covered under the Alabama Trade Secrets Act. The declaration would state that an open discussion would have detrimental effect on the competitive position of the agency; or upon the location, retention, expansion, or upgrading of a public employee or business entity; or that discussion would disclose information protected by the Alabama Trade Secrets Act. This declaration must be entered into the minutes of the agency
- Discussion of negotiation between the agency and a group of public employees
- Discussions of labor negotiations are generally covered
- Before voting to enter executive session, a declaration must be made by a person representing the interests of the agency involved in such negotiations, and the declaration must be recorded in the minutes. The declaration will certify that "the discussions would have a detrimental effect upon the negotiating position of the agency if discussed openly"
- Discussion of a public or contested case hearing
- Discussions and deliberations of evidence and/or testimony of a public or contested case hearing *and* a vote upon the outcome are allowed if the agency is acting in its "quasi-judicial" role

- The requirements of the outcome are that the agency must either vote upon the decision in an open meeting or must issue a written decision, which can be reviewed by a hearing officer, an administrative board, court, or other body that is able to conduct a hearing or an appeal of the matter

Attorney General Opinion 99-00247 instructs that only state agency members, the person being discussed – *if circumstances dictate, such as the necessity of providing due process* – and *any other person needed in an official capacity* should be present during an executive session. The names of the persons present at the executive session should be disclosed in the minutes of the regular meeting (Attorney General Opinion 2004-151).

Attorney General Opinion 2010-011 reviews the discussion of the general reputation and character of an individual. The opinion states "This Office has explained that "[s]ection 36-25A-7(a) states nine instances when an executive session is permissible. More particularly, section 36-25A-7(a)(1) states that an executive session is permissible to discuss the general reputation and character . . . of individuals." Opinion to Honorable William T. Musgrove, III, Attorney, City of Florence, dated April 17, 2006, A.G. No. 2006-088, at 6-7. Section 36-25A-2(3) defines "general reputation and character" as "[c]haracteristics or actions of a person directly involving good or bad ethical conduct, moral turpitude, or suspected criminal activity, not including job performance." Ala. Code § 36-25A-2(3) (Supp. 2009).

Section 36-25A-2(2) defines "executive session" as "[t]hat ***portion*** of a meeting of a governmental body from which the public is excluded for one or more of the reasons prescribed in Section 36-25A-7(a)." Ala. Code § 36-25A-2(2) (Supp. 2009) (emphasis added). The OMA generally precludes voting in executive session. Ala. Code § 36-25A-5(b) (Supp. 2009). Therefore, the *Musgrove* opinion further observed that a governmental body may convene an "executive session to the extent that the topics discussed . . . are expressly limited to the general reputation and character" of the individual. *Id.* at 9. Furthermore, in concluding that the Alabama Board of Pardons and Paroles could deliberate statutorily privileged portions of its files in executive session, this Office emphasized that "[t]hereafter, the Board would be required to complete its deliberate process in a reconvened open meeting." Opinion to Honorable William C. Segrest, Executive Director, State of Alabama, Pardons and Paroles, dated May 9, 2005, A.G. No. 2005-125, at 3-4. "The Board, however, in convening an executive session, should follow the procedures as set forth in section 36-25A-7(b) of the Code." *Musgrove*, at 9."

Please note that votes may not be taken during an executive session. All votes must be made in the public portion of the meeting (*Miglionico v. Birmingham News Co.*, 378 So.2d 677 at 680 (Ala. 1979)). After the executive session discussion is complete, the members must reconvene in the regular or special meeting. Then, voting may occur in the open portion of the meeting. **NOTE**: We have noticed that some boards are recording a vote in the executive session to reconvene. What should occur is that the agency initially votes to go into executive session for a valid stated reason and also state the expected time that the public meeting will reconvene.

Meeting Follow-up
The agency must ensure that the open portion of the meeting is properly recorded and made available to the public "as soon as practicable after approval." At the conclusion of the meeting, the agency should know the date of its next meeting. The Open Meetings Act has deadlines for posting notice of meetings, but it also encourages the posting of such notice as soon as practicable. There is no penalty for posting early, but there is for posting late or not posting at all.

Violations and Penalties of the Open Meetings Act

- The following are violations of the Open Meetings Act:
  - Failing to give proper notice of an agency meeting
  - Failing to adhere to the Open Meetings Act during an open meeting
  - Going into executive session and discussing business other than what was openly voted on in the open meeting to discuss
  - Holding secret meetings
  - Any other violation not mentioned above
- Civil action against the agency may result in the following penalties:
  - A maximum penalty for each member of the agency for each violation, which is the lesser of $1,000 or one-half the defendant's monthly salary for serving on the agency
  - Temporary restraining orders
  - Invalidation of the meeting's actions

Meals during meetings
Attorney General Opinion 2010-75 opines that monies may be used to provide food for staff meetings, committee meetings, and educational sessions that require attendance if the meals are offered so that business may be conducted during a mealtime. In an opinion to Honorable N. Genelle Lee, Executive Officer, Alabama Board of Nursing, dated May 6, 2003, A.G. No. 2003-137, this Office stated as follows:

[P]ublic funds may be used to pay for meals and/or refreshments served at business meetings when the meals are directly related to the business of the entity, and the meals and refreshments are incidental to the meeting. In order for meals to be an incidental part of the meeting, the primary purpose of the gathering must be to have an official meeting at which business is conducted, not a social gathering at which food is provided.

Meals and refreshments may be provided when a meeting lasts all day and participants work through lunch or when an examination lasts all day and participants are not allowed to leave the area. Meals have also been allowed in instances where meetings include out-of-state consultants and due to shortness of time the meetings continue through lunch. This Office has previously stated that state agencies may not provide refreshments at a break during a meeting that does not extend through lunch or a mealtime.

Section Eight: Public Records

Record-Keeping

- *Public Records*

  The ***Code of Alabama 1975***, Section 36-12-40, grants citizens the right to inspect and copy public writings, with the exception of public library registration and circulation records. Each request for disclosure will be considered on its own merits, with public policy generally favoring disclosure.

  A "public writing" is a record that is reasonably necessary to record the business and activities required or carried on by a public officer so that the citizens can know the status and condition of such business and activities. The ***Code of Alabama 1975***, Section 41-13-1, states, "…the term 'public records' shall include all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business and shall also include any record authorized to be made by any law of this state belonging or pertaining to any court of record or any other public record authorized by law or any paper, pleading, exhibit or other writing filed with, in or by any such court, office or officer." The Alabama Department of Archives and History has a leaflet, *Providing Access to Government Records*, on its website, www.archives.alabama.gov, which gives guidance concerning public access to records. Access the archives website, and click on the link "For State and Local Officials". Then click on the links labeled "Publications" and "General". The leaflet will be listed in the general publications section.

The rule of reason must be applied when determining which records the public can view, how the viewing will occur, and when. The state agency has the right to promulgate reasonable rules that define the scope of the inspection process. For example, the agency could require that records be viewed by appointment, and that the citizen complete and submit a request form detailing the record or records desired. Rules that provide for the convenience of staff, which must locate and retrieve records during the records inspection process, would be considered reasonable. Attorney General Opinion 2007-001 states, "Because a state agency may regulate the manner in which public records are produced, inspected, and copied, a state agency, to be in compliance with Sections 36-12-40 and 36-12-41, is not required to distribute public records in the manner that a requestor specifies."

Some records, although certainly created by public officials and employees, are deemed sensitive and can be exempted from public inspection. Recorded information received by a public officer in confidence; sensitive personnel records; pending criminal investigations; and records, the disclosure of which would be detrimental to the best interests of the public, need not be disclosed. (*Blankenship v. City of Hoover*, 590 So. 2d 245, 248 (Ala. 1991)) Attorney General Opinion 2007-031 gives guidance on additional types of writings that are not considered public records. **Attorney General Opinion 2008-030 states "The criminal complaint supporting an unexecuted arrest warrant is not subject to disclosure under the Open Records Act. Once the warrant has been executed, the complaint supporting the same becomes public record. Attorney General Opinion 2008-073 states**

"…(Commission) must make available, for inspection and copy, time sheets of employees…Certain sensitive information, however, that may be contained in those records, such as doctor's excuses or time off taken for medical reasons or personal vacation time, is not public record. Other information that may be contained in the records requested, such as medical history, confidential recommendations for employment, drug or alcohol testing results, home addresses, telephone numbers, social security numbers, and marital status of public employees, are not public records and are not subject to disclosure. The custodian of records responding to these requests for public records should ensure that the aforementioned sensitive personnel information is redacted from any publicly disclosed records."

Attorney General Opinion 98-00161 states, "A custodian of public records may recoup reasonable costs incurred in providing public documents to a citizen, including, where necessary, costs for preparation of the records, and the actual cost of copying the records, but may not recoup the cost of attorney's fees incurred in determining whether the public writings are subject to an exception that would prevent their release to the public." Other opinions indicate that the fees charged for providing copies of public records must be based upon the actual incremental cost incurred by the agency, and not upon the recipient's use of the records or the agency's need for additional funds.

Attorney General Opinion 2009-076 states, "The regular copy fee may not be assessed if individuals use personal cameras or other electronic devices to make a copy of a public record."

- *Records Responsibilities*

  Every agency is obligated to create and maintain records to adequately document the business of their agency. These documents record evidence of agency operations and serve as a mechanism of accountability. Effective record-keeping also helps to ensure that documents will be legally admissible in court.

The following ***Code of Alabama 1975*** statutes charge public officials to meet these obligations:

- Section 36-12-2 requires officials to create and maintain records that provide full and detailed information regarding the office's business and activities
- Section 36-12-2 requires officials to protect and preserve records from mutilation, loss, or destruction
- Section 36-12-4 requires officials to transfer all current records pertaining to agency business affairs or transactions to any successors in office
- Section 36-12-5 requires officials to contact the Alabama Department of Archives and History when records pertaining to the conduct of office business cease to be current
- Section 41-5-23 requires officials to keep the office's books, records, and accounts, and to make reports in accordance with procedures and forms prescribed by the Chief Examiner of Pubic Accounts for audit purposes

Additional requirements may be set forth in other provisions, including an agency's enabling statutes, legislative acts, or oversight authorities.

Public records encompass records in all types of media, including electronic format. The Department of Archives and History has posted technical guidance on determining what constitutes a record and how to preserve it on its website. Click "Records Storage" on the "Publications" page.

- *Administrative Procedure Act Index of Formal Orders*
  The ***Code of Alabama 1975***, Section 41-22-4(a)(4), requires all agencies that must comply with the state's Administrative Procedure Act to make available for public inspection and copying, at cost, an index by name and subject of all final orders, decisions, and opinions which have been issued after October 1, 1982, except those expressly made confidential or privileged by statute or order of the court.

Records Disposition Authority

The ***Code of Alabama 1975***, Section 41-13-21, states, "No state officer or agency head shall cause any state record to be destroyed or otherwise disposed of without first obtaining approval of the State Records Commission…" Section 41-13-1 defines "public record" as "all written, typed or printed books, papers, letters, documents and maps made or received in pursuance of law by the public officers of the state, counties, municipalities and other subdivisions of government in the transactions of public business ...." To ensure that state records are appropriately preserved, the State Records Commission requires state agencies to prepare, adopt, and approve a records disposition authority, or RDA. The RDA will list all records of the agency and detail a destruction schedule for them, depending on the sensitive/historic/relevant nature of the records. The Department of Archives and History must be contacted to assist agencies in beginning the RDA creation process. Once an agency has an RDA approved by the State Records Commission, the agency is required to submit an annual report to the commission. The commission publishes compliance with their requirement on the website of the Department of Archives and History. The examiners use this posting during the compliance examinations it performs of state agencies, boards, and commissions. See the Archives and History website for informational and technical leaflets and publications, such as the following:

- *Developing An Agency Records Disposition Authority*
- *Legal Admissibility of Public Records*
- *What a Public Official Needs to Know About Records Maintained on Digital Imaging Systems*
- *Managing State Records in Alabama*
- *Guidelines for Managing E-Mail*
- *Making a Case for a Records Management Program*
- *Public Officials: Your Records Responsibilities and the Law*
- *Records Storage Centers: Construction, Environment, Containers, Shelving, and Security*
- *Guidelines for the Preservation and Transfer of Agency Website Records*

Please note that the confirmation e-mails from the secretary of state's website detailing posting of the public notice of board meetings has been included in recent RDAs. Standards

set by the Department of Archives and History require that these e-mail confirmations be retained for at least three years, or until an examination or audit of that time period has been completed, whichever is longer.

Off-Site Storage and Back-Up Information
The ***Code of Alabama 1975***, Section 36-12-2, requires state agencies to protect and preserve records from mutilation, loss, or destruction. Please refer to your agency's Records Disposition Authority, as it may reference a requirement for off-site storage and back-up information. The events of September 11, 2001, as well as the loss suffered due to Hurricane Katrina, demonstrate the importance of backing up information and storing information off-site. Many companies lost valuable information in the attack and hurricane due to inadequate back-up and storage procedures. Information that is vital to the operation of your agency should be backed up, and the back-up records should be safeguarded, tested, and available for recovery. Licensing information, disciplinary information, state agency decisions/processes/actions, grant applications, or any information necessary to your agency that is not backed up elsewhere should be captured, updated periodically, tested, and stored off-site in a secure, climate-controlled area. Back-ups or updates to the back-ups should be made frequently. Records recovery plans for disasters should be a part of your agency's procedures, and responsibility should be assigned to a member of agency personnel. A disaster that destroys records does not have to be as profound as the September 11th attack or Hurricane Katrina. A broken water pipe or a fire can destroy paper records and computer files and make recovery of the information a long and costly process.

Section Nine: Public Protection Responsibilities

Registration, certification, and licensure, as defined below, have different meanings, but they are often used by regulatory agencies interchangeably to describe operations.

- *Registration*
  Registration is a recording of individuals in a like classification, profession, or occupation with no determination of one's qualification and no regulatory activity included. (i.e., a register of all tattoo artists in the state of Alabama).

- *Certification*
  Certification is the process by which recognition of competence is granted to an individual who has met pre-determined qualifications specified by an agency or association (i.e., the certification of a person as a mine foreman or fire boss). No on-going regulatory activity or renewal of certification occurs.

- *Licensure*
  Licensing is the issuing of a permit or license to engage in a certain profession or occupation. Licensing is often done on more than one level in a given profession, such as the licensing at the apprenticeship level through the master level. Licensing also includes a regulatory aspect. A person cannot legally practice his or her profession unless he or she is licensed and agrees to follow the law and the licensing board's regulations, with

the understanding that failure to do so may result in disciplinary action. Licenses must be renewed periodically, often conditioned upon a certain amount of continuing education. On-going regulatory activity, such as inspections or complaint investigation resulting in disciplinary actions, normally occurs.

The primary reason to have laws requiring individuals who practice a profession or engage in an occupation to be licensed is to protect the public. This is accomplished by requiring individuals to be properly qualified before engaging in a particular profession or occupation, and by providing a method for ensuring that licensees provide services to the public in a competent manner according to accepted standards.

Licensing Issues

Only as Authorized by Law

A state agency has no authority to adopt and cannot enforce different standards for licensure than those required by the agency's enabling statutes, nor may a board or commission institute a fee structure different from that established by statutes.

- A regulatory agency may not promulgate a rule requiring applicants for licensure to have a higher level of education than the minimum requirements stated in the enabling statutes. For example, an agency cannot require a four-year degree when the agency's enabling statutes require only a high-school diploma or equivalent. Attorney General Opinion 2002-088 states, "An administrative agency cannot make a rule that institutes requirements higher than the minimum requirements stated in the ***Code.***"
- If an agency's enabling statutes set a maximum amount to be charged for a license, the board or commission cannot adopt rules that set the license fee above that maximum level. In other words, an agency may not promulgate rules setting the licensing fee at $150 if the enabling statutes establish the maximum fee for licensing at $100.
- If an agency's enabling statutes set a specific amount to be charged for a license, the agency cannot adopt rules to collect a lesser fee. An agency may not adopt a rule to prorate a license fee at less than the statutory amount, if the license will not be in effect for a full licensing period before renewal, unless statutes specifically authorize the agency to do so.
- If an agency is required by law to collect a fee, the fee cannot be waived without specific exemption authorized in the law. A license fee, active or inactive, cannot be waived for a public official or employee, or for reasons of advanced age, unless specifically authorized by law.

Attorney General Opinion 87-00222 states, "Where the legislature has established a sufficiently definite policy, standard or rule, an administrative agency may be empowered to deal with the issuing of a license or permit and to fix reasonable fees for such issuance; where the legislature has not established such a sufficiently definite policy, rule or standard, the administrative agency may not be empowered to deal with such issuing of licensing or permits or establishing of fees."

No Restraint of Trade

No state agency may participate in any action that is in conflict with Section 103 of the *Constitution of Alabama of 1901* that prohibits the establishment of monopolies through the restraint of trade. The constitution provides as follows:

"The Legislature shall provide by law for the regulation, prohibition, or reasonable restraint of common carriers, partnerships, associations, trusts, monopolies, and combinations of capital, so as to prevent them or any of them from making scarce articles of necessity, trade or commerce, or from increasing unreasonably the cost thereof to the consumer, or preventing reasonable competition in the calling, trade, or business."

There have been instances when business practices of industries have been limited by legislation of regulated monopolies because it is not practical to have competing businesses for the same customers, such as generating and providing electricity.

Section 103 has the effect of prohibiting the legislature from establishing monopolies or adopting statutes which *unreasonably* limit competition in the marketplace.

A state agency may not require an applicant to be a resident of Alabama or a citizen of the United States, nor may the agency give applicants who are licensed in other states a different and separate examination than resident applicants. State law echoes the 14th Amendment of the United States Constitution in this respect.

- Attorney General Opinion 83-00010 states, "…The clear language of Section 34-27-32(f) is that a person submitting an application to take the examination shall also submit evidence that he is a resident of this state. However, similar provisions or similar laws have been held unconstitutional as violative of Article 4, Section 2, and the 14th Amendment of the United States Constitution. State v. Rose, 122 So. 225 at 238; but see dissent, State v. Rose, supra, at 239."
- Attorney General Opinion 81-00450 states, "…We find, however, no provision which would permit the Board to administer a separate and different examination to licensees of other states. In a separate examination, is quite likely that such an examination would violate the Due Process and Equal Protection clauses of the United States and Alabama constitutions."

Initial Licensing

- *Creating Standards, Forms, and Procedures*

  A state board or commission that issues licenses should adopt, impose, and enforce standards for licensure within the authority and limits specified by law. These standards should be designed to ensure that licensees are suitable and qualified to practice. A state board or commission should also develop standard forms for application for licensure, renewal of licenses, and for other information to be gathered from licensees. Additionally, appropriate techniques and procedures, including examinations and investigations, for determining whether an individual meets the required standards should be developed and applied.

- *Social Security Number on Forms*
  Federal law and the ***Code of Alabama 1975*** require all applicants for the issuance or renewal of a license, certificate, or permit to provide their social security numbers to the licensing agency. The ***Code of Alabama 1975***, Section 30-3-194, states, "Any agency charged with the administration of any law concerning the issuance or renewal of a license, certificate, permit … to engage in a profession, occupation, … shall require all applicants for issuance or renewal of the license, certificate, permit, or other authorization to provide the applicant's Social Security number…" These requirements are mandated by the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (P.L. 104-193).

In addition, Attorney General Opinion 2004-22 opines that an agency must obtain the social security number of any individual or individuals of a corporation, partnership, or limited liability company who are responsible for providing an application for that entity.

Attorney General Opinion 2010-74 opines that the plain language of section 30-3-194(a) of the Code requires that Social Security numbers are collected from all applicants, whether they are renewing a license or seeking a new license. In addition, this Office has previously concluded that if a Social Security number is not given, then the license application is not in conformity with the statutes, and no license may be issued. Opinion to Honorable Tish P. Spencer, Executive Director, Home Builders Licensure Board, dated January 5, 1998, A.G. No. 98-00066. Therefore, the Board of Licensure for Professional Engineers and Land Surveyors is required to obtain the entire Social Security number for each new or renewal license application.

Examinations

- *Agency-Created Examination*
  A licensing board or commission, if authorized in enabling statutes, may create and administer examinations for applicants. The agency should determine the subject, scope, content and format of the examinations, which must be the same for all candidates. The examination of the applicant should demonstrate the applicant's professional proficiency and understanding of the laws, rules, and regulations that apply. Security of testing materials is an important issue and a responsibility of the agency. This type of examination is declining, as the availability of nationally recognized examinations proliferates.

- *National Examination*
  Many licensing boards and commissions use national examinations developed by professional associations or testing services. Some agencies are now opting to also have the testing accomplished by independent testing services. The licensing agency may require the applicant to pay an examination fee directly to the testing company, as discussed in Attorney General Opinion 86-088, but may not establish a lower fee for applicants who take national board examinations. See Attorney General Opinion 87-242 for more information.

Renewal of License

- *License Renewal, Expiration, and Grace Period*

  The Administrative Procedure Act, ***Code of Alabama 1975***, Section 41-22-19(b), states, "When a licensee has made timely and sufficient application for the renewal of a license or a new license with reference to any activity of a continuing nature, the existing license does not expire until the application has been finally determined by the agency, and, in case the application is denied or the terms of the new license limited, until the last day for seeking review of the agency order or a later date fixed by order of the reviewing court."

  - Renewal Date – The license renewal date is normally set by statute and is the due date for receiving applications for renewal. Renewal is normally considered delinquent after that date.
  - Grace Period – A grace period specified in the enabling statutes may provide an amount of time that may elapse after the renewal date during which a license can be renewed. If grace periods are not authorized by statute, a board or commission may not set them. Renewal during a grace period normally includes a monetary penalty which must be authorized in the enabling statutes. The grace period for renewal does not automatically provide a grace period to practice after license expiration.
  - Expiration Date – The license expiration date is normally set by statute. If the date is not named, expiration occurs at the ending date of the period for which the license was issued. A person with an expired license has no authority to practice the profession after the license expiration date, even though the grace period for license renewal has not expired. A person with an expired license must either apply for a license as a new applicant or have the license reinstated. Reinstatement cannot occur unless reinstatement is specifically authorized in the enabling statutes. Reinstatement must occur according to the terms specified in the enabling statutes. ***Note***: A condition may occur in which the license expiration date falls within the license renewal grace period. Under such conditions, renewing within the grace period reinstates the license.

- *Continuing Education*

  A board or commission cannot mandate continuing education for its licensees unless it is authorized in the enabling statutes. If statutes authorize the establishment of mandatory continuing education, it must be done according to the terms of the statute. If statutes mandate continuing education as a prerequisite for licensure, a board or commission is not authorized to waive the requirement, unless the law authorizes the waiver.

  Reviewing, approving, and certifying continuing education courses and providers is a task sometimes assigned by law to a regulatory board or commission. This task is not assigned to all agencies, but there must be some criteria for acceptance of continuing education by the board.

  Attorney General's Opinion 96-099, in response to questions asked by the Board of Cosmetology, stated, "The statutory requirements for renewal of all licenses issued by the Board of Cosmetology, including instructors' licenses, is set out in ***Code of Alabama 1975***, Section 34-7-19. This section allows renewal upon application and payment of the applicable renewal fee provided under Section 34-7-11. Neither Section 34-7-19 nor any

other provision of Sections 34-7-1, *et seq*., authorizes the imposition of a continuing education requirement for renewal.

"For this reason, this office has previously opined, in its opinion to Ms. Billie Jehle, dated March 16, 1979, No. 79-00333, that the Alabama Board of Cosmetology has no authority to require continuing education for renewal of a cosmetologist license or a managing cosmetologist license. The same rationale should apply to an instructor license. To the extent that the Attorney General opinion to Ms. E. Elaine Wiggins, dated March 23, 1984, No. 84-00214, suggests to the contrary, it is hereby overruled."

- *Reciprocity*
  Reciprocity is the practice of issuing a license to an applicant who is licensed in another state. Upon complying with the provisions of licensure and paying a fee established by the regulatory agency, a reciprocal license is issued.

  Normally, statutes provide that, in order for reciprocity to occur, the reciprocal state must maintain a system and standards of qualification and examinations that were substantially equivalent to those required in Alabama at the time the reciprocal license was issued. The reciprocal state may be required to extend similar treatment to Alabama licensees applying for licensure there. As always, the terms of reciprocity must follow the terms specified in the enabling statutes. If the statutes do not provide for reciprocity, a board or commission cannot issue reciprocal licenses as such. However, the board may find that the applicant has met some or all of Alabama's requirements during the process of becoming licensed in the other state.

  - The ***Code of Alabama 1975***, Section 34-12-11, for the State Board of Registration for Foresters states, "(a) A person not a resident of, and having no established place of business in Alabama, or who has recently become a resident thereof, may use the title of registered forester and practice forestry provided: (1) Such person is legally licensed as a registered forester in his or her own state or country and has submitted evidence to the board that he or she is so licensed; (2) The state or country in which he or she is so licensed: a.) Has standards for licensing comparable to Alabama and acceptable to the board; and b.) Observes these same rules of reciprocity in regard to persons licensed under the provisions of this chapter."
  - The ***Code of Alabama 1975***, Section 34-16-8, for the Alabama Licensure Board for Interpreters and Transliterators states, "a) The board may enter into a reciprocal agreement with any state, agency, or other organization that licenses, certifies, or registers professional interpreters or transliterators, or both, if the board finds that the state, agency, or organization has substantially the same requirements or more stringent requirements. (b) The reciprocity agreement shall provide that the board shall license anyone who is currently licensed, certified, or registered in that state or by that agency or other organization if that state, agency, or other organization agrees to license, certify, or register any practitioners who are currently licensed pursuant to this chapter. (c) The board shall set by regulation the fees appropriate in processing reciprocity."

Code of Professional Standards or Ethics

Some administrative agencies have a statutory requirement to develop, implement, and enforce a code of professional conduct including, but not limited to, regulations that establish ethical standards of practice. In such case, these codes of conduct or ethical practice must be adopted by administrative rule, in accordance with the Administrative Procedure Act. Following their adoption, these rules must be enforced equally upon all licensees. If enabling statutes are silent on this matter, then no enforceable codes of conduct or ethical standards can be adopted by rule.

Complaints

Licensing boards are normally tasked with insuring that licensing and professional practice is done according to the requirements of the licensing law. To carry out this task, a licensing board or commission must develop a formal mechanism for identifying and disciplining persons who fail to adhere to requirements for the practice of the licensed profession. An important part of this mechanism is a system for receiving and resolving complaints.

Any person should be able to file a complaint, including board or commission members. Common reasons for filing complaints are negligence, incompetence, dishonest practice, other misconduct, failure to adhere to the license law, failure to adhere to administrative rules, and unlicensed practice.

A board or commission may not be able to act on all complaints due to the limitations of its authority, but it can investigate all complaints to the extent that it determines if the complaint has merit and is within its authority to resolve.

- *Record of Complaints*

  To do its job properly, a board or commission should maintain records from which it can determine the status of any complaint at any time. Effective management cannot take place without such records. To enable effective tracking, a record should be kept of each complaint received and the steps taken during its resolution. An adequate record should include ***at least*** the following:

  - The date the complaint was received
  - How the complaint was received (letter, telephone, e-mail, etc.)
  - The name and address of the complainant
  - The nature of the complaint
  - Against whom the complaint is lodged (respondent)
  - Actions taken
  - Resolution of complaint
  - Date of resolution of the complaint
  - Date(s) complainant/respondent notified of complaint status

- *Anonymous Complaints*

  Action on anonymous complaints, though not precluded by law, has not been looked upon favorably by the Joint Legislative Sunset Review Committee and will be reported as

an item of significance by the Examiners of Public Accounts during the sunset review process. The assumption is that every licensee upon whom a complaint has been filed has the right to face his accuser, should disciplinary proceedings arise from the complaint.

- *Communication with Complainants*
  Complainants should be kept informed of the progress and final disposition of their complaints. A frequent condition reported to the Sunset Committee by the Examiners of Public Accounts is that complainants do not receive any information about their complaints after they are made.

- *Non-Licensed Practitioner*

  - In Alabama, actions against non-licensed practitioners are normally reserved for the courts, not the regulatory boards. However, the regulatory boards can bring the matter to the courts. The ***Code of Alabama 1975***, Section 6-6-503 states, "The unauthorized or unlawful practice of any profession, occupation or calling by any person, firm, or corporation may be enjoined by any court of competent jurisdiction on complaint brought in the name of any public body or officer having authority conferred by statute to regulate or to license the activity engaged in by such person, firm, or corporation." Enabling statutes normally include prohibition of unlicensed practice, with attached criminal penalties. These penalties are reserved for the courts upon a finding of guilt.
  - Negotiated settlement is a method that has been used by regulatory boards as an alternative to bringing action in the courts against unlicensed practitioners. The unlicensed practitioner may agree to discontinue practice and/or pay a monetary amount or such other penalty as the board or commission and the unlicensed practitioner agree upon. Should the unlicensed practitioner not agree to settlement, the regulatory board or commission can only take action through the courts.

Investigations

- *Timeliness of Investigations*
  The investigative process, unless there are mitigating circumstances, should begin promptly. The proper conduct of an investigation can be a time-consuming process, and it may be several months before the investigation is completed.

- *Hiring Qualified Investigators*
  When hiring investigators, several factors should be considered:

  - Ideally, investigators should be knowledgeable in gathering, analyzing, and presenting evidence, and knowledgeable concerning the profession and the requirements necessary for professional practice in Alabama.
  - If your agency is required to employ investigators with arrest powers, they must be sworn peace officers authorized to use police powers and must meet the minimum requirements of the Peace Officers Standards and Training Commission (POST). The

Code of Alabama 1975, Section 36-21-46, sets the minimum standards for peace officers, while Section 36-21-53 sets the continuing education requirements.

- The Alabama Peace Officers Standards and Training Commission sets the education requirements for certification of law enforcement officers, which may be found in the Alabama Administrative Code, Section 650-X-4-.01. Section 650-X-8-.04 names the classifications of officers not required to satisfy these requirements.

Discipline

Sanctions against licensees or registrants by regulatory entities are primarily designed to protect the health and welfare of the public from practitioners who do not meet the standards of practice. Discipline against practitioners who behave negligently and/or fraudulently, or who are unqualified and/or impaired by drugs or alcohol is done to protect the reputation of the profession and to encourage consumers to use the services of the licensees with confidence.

- *Due Process*

  Due process is extremely important when meting out discipline or sanctions. Agencies must ensure due process is followed. The 14th Amendment of the U.S. Constitution states, "…No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

  The Alabama Administrative Procedure Act, found in the ***Code of Alabama 1975***, Sections 41-22-1 *et seq*., addresses administrative due process for boards and commissions.

  Procedural due process, broadly speaking, is fair play, whether in a court or an administrative authority, which includes a fair and open hearing before a legally constituted court or other authority, with notice and opportunity to present evidence and argument; representation by counsel, if desired; and information as to the claims of the opposing party, with reasonable opportunity to controvert them. (*Pike v. Southern Bell Tel. & Tel. Co.*, 263 Ala. 59, 81 So.2d 254 (Ala.1955)).

  - *Using Board Members in Investigation and Hearing Process*

    A board or commission member may be involved in the investigation process, but to maintain the impartiality of the ruling body, the member should recuse himself from the disciplinary hearing process in any capacity other than as a witness. At a hearing, the board or commission members must act in an impartial manner. To include a member who investigated the matter being heard is to increase the risk that bias will be brought into the process. All of the investigative work could be nullified if a licensee appealed a board decision and demonstrated that a board member's decision was not impartial.

  - *Using an Administrative Hearing Officer*

The Administrative Hearing Division of the Attorney General's Office can provide a hearing officer for a regulatory agency. The ***Code of Alabama 1975***, Section 41-22-12(c), authorizes hearings officers who preside over hearings and may issue subpoenas, discover orders related to relevant matters, and protective orders in accordance with the rules of civil procedure.

The hearing officer provides a summary of findings of facts and conclusions of law, along with a recommendation to the board or commission, who will then vote to accept, modify, or reject the hearing officer's summary and recommendation.

At times, boards or commissions have contracted with private persons for hearing officer services.

- *Disciplinary Actions*

  - *Options*
    Disciplinary actions by a board may include both actions authorized in the law and those agreed upon by the board and the disciplined person in a negotiated settlement. Should a violator not agree to a negotiated settlement, the board is limited to actions authorized in the law. Actions authorized by law may include administrative fines, and usually include some limitation of practice due to suspension or revocation of license. In addition, the agency can bring the matter before the courts.

  - *Grounds For Action*
    Disciplinary actions must be based upon the grounds for disciplinary action authorized by law. Usually, statutes provide that a board can bring disciplinary actions based upon any violations of the board's enabling statutes; however, if the statutes provide specific grounds for disciplinary action, the board cannot bring disciplinary actions based upon any other grounds.

  - *Notification of Suspension or Revocation of License*
    Alabama's Administrative Procedure Act in the ***Code of Alabama 1975***, Section 41-22-19(c), states, "No revocation, suspension, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by certified mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license."

  - *Negotiated Settlements and Consent Orders*
    Although negotiated settlements are not an option normally provided in a board's enabling statutes, the state's Administrative Procedure Act in the ***Code of Alabama 1975***, Section 41-22-12(f), states, "Unless precluded by statute, informal dispositions may be made of any contested case by stipulation, agreed settlement, consent order, or default or by another method agreed upon by the parties in writing." What this means is that the board can offer a disciplinary measure to an offender in lieu of

taking specific disciplinary action provided in the board's enabling statutes. If the offender agrees, the conditions of the settlement become binding and enforceable.

Attorney General Opinion 2001-44 states, "…the State Oil and Gas Board of Alabama may enter into informal settlement agreements with persons who violate the Alabama oil and gas laws and the Board's regulations. The use of settlement agreements to dispose of disputes is supported by the Alabama Administrative Code and encouraged by the Alabama judiciary, as well as the United States Supreme Court. In this instance, once the Attorney General approves a proposed settlement agreement, the Board may make a settlement agreement to enforce the laws and rules of the Board and to accept money to recover the investigative costs and administrative costs of the Board."

The court further offered an excellent summary of Alabama law regarding settlement agreements:

"Generally, the substantive law of Alabama governs the interpretation and effect of [a] settlement agreement. See generally, 15A Am. Jur. 2d Compromise and Settlement (1976). In Alabama the substantive law of settlement agreements is well established. 'When parties who are sui juris make a final settlement between themselves, such settlement is as binding on them in many respects as a decree of a court. Such an agreement may only be opened for fraud, accident, or mistake.' Burks v. Parker, 192 Ala. 250, 68 So. 271, 272 (1915), citing, Scheuer v. Berringer, 102 Ala. 216, 14 So. 640 (1894); Brocato v. Brocato, 332 So.2d 722, 723-24 (Ala. 1976); O'Rear v. Sutton, 215 Ala. 630, 112 So. 159 (1927); Nero v. Chastang, 358 So.2d 740, 741, 743 (Ala.Civ.App. 1978)."

Alabama's Child Support Law and Licensure

The ***Code of Alabama 1975***, Section 30-3-174, states in part:

"(a) Upon receipt of a notice from the Department of Human Resources or its agent to withhold, restrict use of, suspend, or revoke a license, a licensing authority shall implement the withholding, restricted use, suspension, or revocation of the license by doing the following:

(1) Determining that it has issued a license to the obligor whose name appears on the notice.

(2) Entering the suspension or revocation on the appropriate records.

(3) If required by law, demanding surrender of the suspended or revoked license.

(b) A notice issued by the department or its agent to withhold, restrict use of, suspend, or revoke a license shall be processed by the licensing authority without any additional review or hearing by the licensing authority. The licensing authority shall have no jurisdiction to modify, reword, reverse, vacate, or stay the decision of the department or its agent.

(c) Any decision issued by the department or its agent to withhold, restrict use of, suspend, or revoke a license continues until the department or its agent advises the licensing authority that the decision to withhold, restrict use of, suspend, or revoke has

been stayed or is no longer in effect. While the department's decision is in effect, the licensing authority may not issue, reissue, or renew the obligor's license.
(d) The licensing authority is exempt from any liability to the licensee for activities conducted in compliance with this article."

Impaired Professionals
An impaired professional is defined as a professional having an inability to practice with reasonable skill and safety to patients by reason of illness, inebriation, misuse of drugs, narcotics, alcohol, chemicals, or any other substance, or as a result of any mental or physical condition. Remedy of this condition through mandated intervention is an alternative to disciplinary action.

For example, the boards that license veterinarians, dentists, and pharmacists have the statutory authority to enter into an agreement with a non-profit corporation, health provider, or professional association for:

- Contracting with providers of treatment programs
- Receiving and evaluating reports of suspected impairment from any source
- Intervening in cases of verified impairment
- Referring impaired professional to treatment programs
- Monitoring the treatment and rehabilitation of impaired professionals
- Providing post-treatment monitoring and support of rehabilitated impaired professionals
- Performing such other activities as agreed upon by the respective boards

Section Ten: Personnel

Staffing and Personnel
State agencies that have funds within the State Treasury use the Government Human Resource System (GHRS). GHRS is an integrated payroll/personnel system for the State of Alabama, operated jointly by the State Personnel Department and the State Comptroller's Office. The Personnel Department assigns a GHRS payroll assistant to aid state agencies in the payroll process. Many of the agencies are on-line, or connected by computer, with the State Personnel Department and submit payroll information electronically. The employees of these agencies are paid via the State Comptroller's Office by state warrant or electronic transfer. For more information, refer to the *State Personnel Manual*, the *State Personnel Board Rules and Regulations*, and/or the *Fiscal Policies and Procedures Manual*. Payroll is only one aspect of the GHRS System. GHRS also maintains other pertinent information regarding length-of-service entitlement to various employee benefits, such as leave accrual and use, and longevity pay.

Agencies operating from checking accounts do not process payrolls through the State Personnel Department or the State Comptroller's office for payment. Employees are paid by check according to the rules and regulations of the agency, which must ensure compliance with applicable federal and state laws regarding employment and related benefits.

One important duty of a regulatory entity is to employ sufficient, competent staff to meet responsibilities. The state's Merit System Act, which governs the hiring of employees in state service, is found in the ***Code of Alabama 1975***, Title 36, Chapter 26, which also creates the State Personnel Board and the State Personnel Department to administer the state's hiring. Unless specific statutory authority is granted to hire outside of the merit system, state agencies must comply with the Merit System Act and with State Personnel Board's rules and policies, detailed in the State Personnel Department's Personnel Procedures Manual. These rules and policies include detailed procedures necessary to remain in compliance with federal and state laws regarding hiring, promotion, non-discrimination, benefits, and termination.

In the merit system, positions of service are divided into three categories:

- *Exempt Service*
  These positions are completely exempt from the requirements of the merit system law, the State Personnel Department's policies, and the rules of the State Personnel Board. The positions include, among others, officers elected by the vote of the people; officers and employees of the legislature; all employees of a district attorney's office; members of boards and commissions, whether appointed or self-perpetuating; and heads of departments required by law to be appointed by the governor or by boards or commissions with the approval of the governor; the governor's private secretary, legal advisor, recording secretary, and those employees of the governor's office paid exclusively out of the Governor's Emergency or Contingent Funds.

- *Unclassified Service*
  These positions are subject to the same rules and regulations as classified employees except as to their appointment and dismissal. The positions include one confidential assistant or secretary for each board, commission, and elected officer, and, when requested by the governor, for each department head appointed by the governor; and all employees of the governor's office not defined as exempted employees. The positions in the unclassified service may, at the request of the appointing authority, be filled by classified employees. Each of the employees thus appointed shall, at the conclusion of his or her occupancy of such position, resume his or her previous status in the classified service.

- *Classified Service*
  These positions include all other officers and positions in the state service. They must comply fully with the requirements of the merit system law, the State Personnel Department's policies, and the rules of the State Personnel Board.

Under the classified service, a special classification has been created for hiring retired state employees. To continue to draw retirement benefits while employed by a state agency, a retired state employee must work in a part-time position and must not earn more than $21,000 for 2008. The amount is upgraded periodically and can be found on the Retirement System website, as included in the contact list at the back of this manual. If either condition is breached, the employee's retirement benefits will be suspended. **It is the responsibility of the employer and the employee to notify the Retirement System if the employee earns more than the annual amount or becomes a full-time employee.**

Retired state employees can also be re-hired under their original classification on the re-hire list. However, they still must comply with the restrictions on hours worked and on wages earned put in place by the Retirement System. Regardless of whether the state agency must hire within the merit system or is allowed to hire without regard to the merit system, retired state employees who are re-hired must meet wage and hour requirements.

If specific authority to hire outside the merit system is granted in an agency's law, the agency incurs additional responsibility to ensure compliance with federal and state laws concerning hiring, promotion, non-discrimination, benefits, and termination that are not part of the state's merit system. The agency can accomplish this by creating and adopting its own policies and procedures, or by adopting the State Personnel Board's policies and procedures. A strong argument can be made for state agencies granted the authority to hire outside the merit system to adopt State Personnel Board polices and rules, because the policies and rules regarding hiring, employment, and termination have been created by the State Personnel Board to ensure compliance with existing laws.

> "The executive director and other employees of the board shall not be subject to or governed by the provisions of the state Merit System law but shall be entitled to all benefits accruing to Merit System employees including, but not limited to, the right to accumulate leave, participate in the Employees' Retirement System, and participate in the State Employees' Health Insurance Plan." [Board of Public Accountancy]

Appointment of Executive Officer and Assignment of Duties

- *Power to Appoint an Executive Officer Granted by Agency's Enabling Statutes*

  Most, but not all, state agencies are granted the authority, by statue, to appoint a person to serve as executive officer. This authority is generally found in the part of the law that defines the composition of the agency or the powers and duties of the agency. Unless authority to hire outside the merit system is granted by law, the agency is obligated to hire the executive officer through the merit system. If the enabling statutes of an agency are completely silent on the hiring of an executive officer, the merit system law is in force. However, the merit system law itself provides an exemption from the merit system law for executive officers of boards and commissions that are appointed by the governor, or by boards or commissions with the approval of the governor. The executive officers of other regulatory boards or commissions must be employed in the unclassified service of the merit system.

  The ***Code of Alabama 1975***, Section 36-26-10 (c)(1), states, "The unclassified service shall include: One confidential assistant or secretary for each board, commission and elected officer and, when requested by the Governor, for each department head appointed by the Governor; …" Persons in the unclassified service can be terminated without cause, but are subject to all other benefits and restrictions that apply to regular, classified merit system employees.

  The initial compensation of an executive officer must be approved by the Personnel Board. The ***Code of Alabama 1975,*** Section 36-6-6, states, "…provided, that where some authority other than the Governor appoints such an officer or employee, the salary shall be fixed by the appointing authority with the approval of the Governor and the state personnel board". Therefore, when appointing an executive officer, sufficient time must be allowed to have the appointment and salary approved by the Personnel Board and governor. Until that happens, the executive officer cannot be paid.

  Please note that the merit system law is a general law that is automatically in force, unless there is a specific exemption from it in other law.

  Examples of necessity to hire under the merit system:

  - "To hire the executive director of the board who shall administer this chapter, and may employ, subject to the approval of the board, other staff members, consultants, or service contractors as are necessary to discharge the board's duties and administer this chapter." (***Code of Alabama 1975***, Section 34-27A-5(11) [Real Estate Appraisers])
  - "The board shall have the authority to fix the number of its full-time employees, and such full-time employees shall be employed pursuant to the provisions of the merit system." (***Code of Alabama 1975***, Section 34-25-4(b) [Polygraph Examiners])

If the power to appoint an executive officer outside the merit system is granted, it falls upon the board or commission to ensure that the hiring complies with federal and state laws regarding employment practices, which will be discussed below. Non-merit employees are frequently hired by contract, in which case the scope of employment, compensation, benefits, and termination issues are defined by the terms of the contract. Hiring by contract will be discussed later.

Examples of authority to hire outside the merit system:

- "Appoint and employ a qualified person, not subject to the State Merit System, who shall not be a member of the board, to serve as executive officer." (***Code of Alabama 1975***, Section 34-21-2 (13) [Board of Nursing])
- "The commission may employ an executive director and an assistant executive director, both of whom shall be exempted from the classified service under the general laws of the state, and other staff members necessary to discharge its duties and administer this chapter. The executive director and assistant executive director shall be employed on the basis of their education, experience, and skills in administration and management. The commission shall advertise to seek quality applicants possessing the qualifications and shall conduct interviews of the top applicants. The assistant executive director shall act as and have authority of the executive director in his or her absence." (***Code of Alabama 1975***, Section 34-27-7 (h) [Real Estate Commission])

- *Hiring an Executive Officer by Contract with or without Other Facilities or Services Included*

  If there is statutory authority to hire an executive officer without regard to the merit system, the agency may do so by hiring a consultant under contract. Frequently, administrative staff, equipment, and facilities are included in the contract. Attorney General Opinion 2002-078, dated December 3, 2001, to the Honorable Jimmy Warren, opined that since the consultant provided primarily administrative and clerical skills, and that all final policy decisions must be made by the state agency, the consultant is not required to have any specific training or degree. The opinion stated that executive directors, therefore, do not fit the definition for "professionals", as defined by the competitive bid law. Consequently, state agencies that wish to use consultants to provide administrative services cannot use the request for proposal procedures (***Code of Alabama 1975,*** Section 41-16-70, *et seq*.) reserved in the law for employment of professionals, and must hire them through a formal competitive bid process (***Code of Alabama 1975,*** Section 41-16-20, *et seq*.). At present, neither formal bids nor requests for proposals are necessary to hire employees (not consultants) to perform administrative services, including persons employed as executive directors. There is little guidance available for consultant contracts for the services of executive directors, with or without additional administrative services, facilities, and equipment. The State Purchasing Department of the Department of Finance will likely be the best source of information on procurement of executive director services and other administrative services. If your agency operates from the State Treasury, the State Purchasing Department will process formal bids for

executive director services and associated administrative services. The Department of Finance's *Fiscal Policies and Procedures Manual* and the State Personnel Department's policies and procedures provide information concerning employment contracts.

The five-year term limit for contracts is in place when contracting for executive director services.

- *Assigning Duties to the Executive Officer*
  The statutes that give the authority to specifically appoint an executive officer normally give the regulating agency the authority to set the salary of the executive officer and assign duties to that officer. For example:

  - "Define the duties and fix the compensation for the executive officer." (***Code of Alabama 1975***, Section 34-21-2 (14) [Board of Nursing])
  - "The commission shall determine the duties and fix the compensation of the executive director, assistant executive director, and other staff members, subject to the general laws of the state." (***Code of Alabama 1975***, Section 34-27-7 (h) [Real Estate Commission])

  The assignment of duties in the law is as diverse as the number of state agencies existing. Commonly, executive officers are assigned hiring of personnel and managing the day-to-day operations of the agency. The board or commission monitors operations through reports from the executive officer or staff. This is a preferable course of action for a state agency as maintaining day-to-day operations is not a board or commission's central purpose. The purpose of a regulatory board or commission is the protection of the public good through regulation and discipline. Normally, board or commission members meet infrequently and are engaged in doing business as private citizens. Maintaining a state office in compliance with state laws is usually better done by a competent executive officer.

Hiring other Staff

Frequently, this function is assigned to the executive officer with final approval reserved by the board or commission. The authority to hire staff is usually included in the powers and duties section of the agency's enabling statutes. For example:

- "Employ or contract for necessary personnel, including a director, and provide necessary offices, supplies, and equipment to fulfill the requirements of this chapter." (***Code of Alabama 1975***, Section 34-1A-3 9(14) [Electronic Security Board])
- "Employ full-time or part-time personnel, including an executive director as previously provided, professional, clerical, or special personnel as necessary to effectuate this article and to purchase or rent necessary office space, equipment, and supplies." (***Code of Alabama 1975***, Section 34-29-69(5) [Board of Veterinary Medical Examiners])

In order to carry out the provisions of enabling and governing statutes, state agencies may hire employees. However, unless specific authority to hire outside the merit system is granted in an agency's enabling statutes, or if no guidance is given, the merit system law, a law of general applicability, is considered to be in force.

Please note that within the merit system, it is possible to hire both full-time and part-time employees. Part-time merit employees earn leave and longevity pay at a percentage rate that equals the percentage of full-time work for which they are employed. If a part-time employee works 20 hours and full-time work is 40 hours, the employee earns 50% of the leave and longevity that would be earned if the person was employed full-time. Also, if a part-time employee is regularly scheduled to work on a holiday, the part-time employee receives the holiday with pay. The schedule of days and hours to be worked by part-time employees should be documented, with the information kept in the employee's file.

For non-merit system employees, the employees receive only the benefits agreed to and voted upon by the regulatory board. If an employment contract is used, the benefits are limited to those included in the contract. Documentation of schedule, ratio of hours, and benefits for non-merit full- and part-time employees is important for maintaining an accurate disbursement of payroll and benefits.

- *Contract Hiring of Employees, Including Executive Officers Hired as Employees*
  Employees of state agencies are hired through the state's merit system, by contract, or at will without a contract, depending on circumstances. For state agencies operating through the State Treasury but granted authority to hire without regard to the merit system, the guidance found in the Department of Finance's *Fiscal Policies and Procedures Manual* will assist in the creation of contracts for contract employees. While compliance with the *Fiscal Policies and Procedures Manual* is not mandatory for those state agencies operating through checking accounts, the guidelines for contracts in the manual and in the Personnel Department's policies and procedures manual will assist in preparing contracts for employees. Other laws may also apply to employees hired by contract, such as mandatory review by the Permanent Joint Legislative Contract Review Oversight Committee (***Code of Alabama 1975***, Sections 29-2-40 through 29-2-41.3). If the agency must hire through the merit system, the law found at the ***Code of Alabama 1975***, Sections 36-26-1 through 36-26-108, will apply. State Personnel Board rules, and State Personnel Department policies and procedures, will also apply. In addition, the governor must sign all contracts, whether or not the agency operates through the State Treasury. Two types of contracts exist for procurement of employees: the personal service contract and the professional service contract.

  - *Personal Service Contracts*
    Generally, a personal service contract is for non-professional employment. For example, proctors for examinations or data entry personnel for a short-term project could be hired under personal service contracts. However, professional employees can be hired as employees under personal service contracts, if merit system employment either is not required or is not possible. At times, federal

grant programs provide funds to hire employees to support the grant program only for the duration, and a permanent, classified merit system employee would not be appropriate. In a personal service contract, an employer-employee relationship exists. The employee works under the supervision of the employer and has all space, equipment, and supplies provided by the employer, who has the right to direct work activities. For an agency that must hire through the merit system, the State Personnel Department must determine whether the job could be filled by merit system employment, either full- or part-time, and whether the rate of pay is commensurate with the qualifications of the individual and appropriate for the work to be done. Contract hiring cannot be used to circumvent the merit system, and personal service contracts are closely reviewed.

- *Professional Service Contracts*
  The services of a professional, where specific training and/or unique talent are required to perform the work, are obtained through a professional service contract. For example, architects, actuaries, and calligraphers are professionals whose services would be contracted. The Personnel Department does not review professional service contracts, although all other reviewing agencies will do so. In a professional service contract, an independent contractor relationship should exist. The state agency will define, through the terms of the contract, what is expected and what outcome is required. The independent contractor works without supervision and provides his or her own equipment, space, and supplies to perform the agreed-upon service. The Internal Revenue Service has created a list of questions to help employers determine whether an independent contractor or employee/employer relationship exists. The list is also published in the Comptroller's *Fiscal Policies and Procedures Manual*. It is important to know whether or not an independent contractor relationship exists, as the state agency must withhold and submit payroll withholding taxes on an employee, but not an independent contractor, as defined by the Internal Revenue Service. Also, at year-end, the employer would need to know whether a form W-2 or 1099 MISC should be prepared.

  In 2001, the competitive bid law was updated to require a competitive selection process for professional service contracts. To hire a professional, an agency must first obtain a list of interested parties. There are four sources for lists named in the law:

  - For attorneys for litigation, contact the Attorney General's Office
  - For non-litigation attorneys, contact the Governor's Legal Advisor
  - For physicians, contact the Medical Licensure Commission
  - For all other professions, contact the Purchasing Division of the Department of Finance.

  Additional names may be added to the list of interested parties. Once the list is obtained and updated as necessary, prepare specifications for the job and selection criteria or evaluation objectives for the proposal selection process. When the job

specifications are completed, a request for proposal plus a copy of the specifications must be sent to *all* interested parties. Evaluate all returned proposals and choose one based on the selection criteria established. Once the proposal is selected, a contract may be prepared, signed, and approved.

If a proposal is chosen in which the fee is 10% more than the lowest ***responsible*** proposal, a written statement must be prepared explaining why a more costly proposal was chosen, and the statement must be kept as part of the documentation for the proposal.

Poorly-written contracts are a common pitfall in the hiring of contract personnel. A poorly-written contract can be difficult to enforce. For example, it can be difficult to recover funds expended in a breach of contract situation if the contract is not clearly written and the expected outcomes are not sufficiently detailed and understandable. A contract for personal or professional services should include, among other things:

- A statement identifying the parties to contract
- The scope of work to be performed, including a complete description of the work to be performed, the qualifications of the person being contracted with, and that person's social security number
- The period of agreement, which must begin after Personnel Board approval and review by the Permanent Joint Legislative Contract Review Oversight Committee, if applicable *(the personnel director/board cannot approve retroactive contracts and neither can the Contract Committee)*
- The compensation for the services performed, including a statement of the dollar amount that compensation will not exceed
- The expenses to be paid, including a dollar limit that expenses will not exceed
- The total amount of the contract
- A termination clause with a specified number of days
- A statement of merit system exclusion so the contractor understands he or she is not eligible for merit system benefits
- The following required language: "It is agreed that the terms and commitments contained herein shall not be constituted as a debt of the State of Alabama in violation of Article 11, Section 213 of the Constitution of Alabama, 1901, as amended by Amendment Number 26. It is further agreed that if any provision of this contract shall contravene any statute or Constitutional provision or amendment, either now in effect or which may, during the course of this contract, be enacted, then that conflicting provision in the contract shall be deemed null and void. The contractor's sole remedy for the settlement of any and all disputes arising under the terms of this agreement shall be limited to the filing of a claim with the Board of Adjustment for the State of Alabama. In the event of the proration of the fund from which payment under this contract is to be made, the contract will be subject to termination."

Further details concerning components of a contract are discussed in the Department of Finance's *Fiscal Policies and Procedures Manual* and the State Personnel Board's policies and procedures.

Finally, payments under a contract should be monitored closely to ensure that payments do not exceed the total of the contract. Without a monitoring system, a greater risk exists that the contract will be overpaid.

Employee Issues

While board or commission members are not expected to verify the agency's compliance with the following requirements, members are expected to hire competent personnel who will ensure and monitor compliance. Please be aware that if authority is granted to hire without regard to the merit system, the agency will need to create its own personnel policies and procedures that ensure compliance with federal and state laws that govern discrimination in hiring, promoting, compensating, and terminating employees. The state agency can vote to adopt the State Personnel Board's policies and procedures as they are organized to ensure compliance with employment requirements. All of the employment issues discussed below apply, whether or not an agency hires through the merit system. Two issues, retirement and state employee health insurance, apply to agencies that operate through the State Treasury. Some employment issues regulated by law include:

- *Discrimination in Hiring, Promoting, and Terminating*
  For state agencies that are not required to use and do not choose to adopt the Personnel Board's policies, rules, and regulations, the agency must ensure that its hiring, promoting, and termination practices are non-discriminatory and comply with federal law. Federal laws, such as the *Equal Pay Act of 1963;* Title VII of the *Civil Rights Act of 1964;* the *Age Discrimination in Employment Act of 1967;* the *Rehabilitation Act of 1973*, Sections 501 and 505; and the *Americans with Disabilities Act of 1990*, Titles I and V, all affect the hiring practices that employers use, and must be taken into account when preparing employment policies. Information web links and contact information are provided in the contact list accompanying this manual.

Family Medical Leave Act

29 *United States Code* 2601, and 25 *Code of Federal Regulations* 825 – This act requires employers to provide an employee up to twelve weeks of leave, without losing his or her job, to care for a family member or to seek medical treatment.

Fair Labor Standards Act

29 *United States Code* 201 – This act addresses minimum wage, child labor provisions, and the payment of overtime. It requires an employment relationship to exist between employer and employee to be in effect. Employees in the service of the state usually receive comp time. It is calculated the same as overtime.

Immigration Reform and Control Act of 1986

This act is codified in several sections of the US Code, so a single cite is not available. It requires employers to verify the resident status of persons hired, and to ensure they

are not hiring illegal aliens. A standard Form I-9 must be completed and retained for each employee.

Selective Service Act

50 *United States Code* App 453, and ***Code of Alabama 1975***, Section 36-26-15.1 – This act requires that no eligible person be enrolled in post-secondary education, hired, or promoted who has not registered with the Selective Service Administration. Eligible persons are citizen and non-citizen males between the ages of 18 and 25. The Alabama ***Code*** requires agencies to obtain a certification from persons employed that the person registered or that registration did not apply (in the case of males who were born from 3/29/57 through 12/31/59 and all females). Registration can be verified at the Selective Service Administration's website, www.sss.gov

New Hire Act

In response to the Federal Welfare Reform Act of 1996, the ***Code of Alabama 1975***, Sections 25-11-1 through 17, require that specific information on each newly hired or recalled employee be provided to the Department of Industrial Relations within seven days from the date of hire or rehire. For the purposes of this legislation, "employee" is defined as an individual in the employ of another who performs a service for hire and receives wages. "Employer" is defined as a person or agency, including a state or local government agency or labor organization, which employs an individual to perform a service for hire and pays wages directly to the individual. Information regarding this requirement may be found on the website of the Department of Industrial Relations at http://dir.alabama.gov/nh/default.aspx

State Holidays

Official state holidays are enumerated in the ***Code of Alabama 1975***, Section 1-3-8. The holidays apply to all state employees and all state offices. The section requires the holidays to be observed by closing all state offices. This law is not part of the merit system law and applies whether the state agency is authorized to hire without regard to the merit system or not. If personnel work on an official holiday, the law requires that they are to be provided a day of compensatory time in lieu of the holiday.

Payroll Withholding Taxes

Employers must comply with federal and state Social Security, Medicare, Unemployment Compensation, and Income Tax laws. If an agency operates outside the State Treasury, it will be responsible for computing and submitting the employee and employer portions of payroll withholding taxes. The Internal Revenue Service provides guidance for taxes that must be withheld in its Circular E. In addition, the agency will be responsible for preparing forms W-2 or 1099 MISC at year-end. Form W-2 is prepared for employees, while form 1099 MISC is prepared for independent contractors. If a contractor submits a social security number for tax identification purposes, the contractor receives a W-2. Corporations typically do not receive a 1099 MISC, unless they provided medical or legal services. Timely submission of employees' income tax withholdings according to the IRS schedule is required.

Military Leave

38 *United States Code*, Chapter 43, is the Uniformed Services Employment and Reemployment Rights Act. 38 *United States Code* 4311 states in pertinent part, "A person who is a member of, applies to be a member of, performs, has performed, applies to perform or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service or obligation." The ***Code of Alabama 1975***, Section 31-12-13, guarantees employees up to 168 hours per calendar year of paid leave for qualifying federal military service and an additional 168 hours per calendar year for active duty called by the governor in service of the state. The section entitles employees to military leaves of absence from civil duties and occupations on all days engaged in field or coast defense or other training or service ordered under the National Defense Act, or federal laws governing the United States reserves, without loss of pay, time, efficiency rating, annual vacation, or sick leave. The ***Code of Alabama 1975***, Section 36-26-31, states, "Upon the application in writing of any such person, which application shall be directed to and filed with the state director of personnel, the state personnel board shall enter upon its minutes an order or memorandum granting to such applicant an indefinite leave of absence for such length of time as such applicant shall honorably serve in any of the armed forces of the United States." Therefore, if an employee is on continuous active duty status for more than 168 hours, on January 1 of each year, the employee is entitled to an additional 168 hours of military leave. The employee does not have to return to the job to be entitled to the leave. While caps have been placed on pay for leave at 168 hours, it does not cap the benefits that can be provided to an employee while on active duty. Benefits that do not require the employee to be in a pay status, such as insurance and longevity pay, are not waived while the employee is on active duty. State agencies may not enact personnel policies which conflict with the law in amount of pay provided, number of hours of leave provided, or any other matter. Attorney General Opinion 2003-070 addresses the carry-over of more than 480 hours per calendar year of annual leave earned by returning military personnel. The State Personnel Department has provided guidelines for the carry-over and use of restored annual leave for military personnel. Attorney General Opinion 2004-29 opines that the use of sick leave while on military leave is prohibited by the rules of the State Personnel Board.

- Attorney General Opinions 2006-135, 2002-090, 96-207, 96-188, and 84-289 expand on the items discussed above.
- Additional information on the impact of the federal law can be obtained from the Employer Support of the Guard and Reserve (ESGR), an agency within the office of the Assistant Secretary of Defense for Reserve Affairs, at 1-800-336-4590, or on line at www.esgr.org.

Longevity Pay

The ***Code of Alabama 1975***, Sections 36-6-11, 36-6-12, and 36-21-3, govern longevity pay for state employees. Please note that 36-6-11(a) states:

> "Each person employed by the State of Alabama, and all legislative personnel, officers or employees, including but not limited to Legislative Reference Service personnel, whether subject to the state Merit System or not, shall be entitled to and receive in a lump sum the first pay day of December each year…".

The pay amount begins at $300 and increases by $100 at the end of each subsequent five-year period of service, to a maximum of $700. Beginning October 1, 2006, and continuing each fiscal year thereafter in which an employee does not receive a cost-of-living increase in compensation, each per annum amount provided in this subsection shall be increased by one hundred dollars ($100) per year to a maximum amount of one thousand dollars ($1,000) for 25 years of total service as long as the employee remains in service. In addition, employees of the state are also authorized to receive additional amounts of longevity pay in the years that they do not receive a cost-of-living adjustment, up to a total of $300 above their appropriate longevity step, based on their years of service with the state. Once a cost-of-living adjustment is given, however, the longevity pay amounts go back to their original base amounts. The longevity pay statutes apply to any permanent full-time or permanent part-time person employed by the state of Alabama, including hourly workers. Longevity pay eligibility is not limited to merit system employees. The comptroller's office, through the *Fiscal Policies and Procedures Manual*, states that longevity pay does not apply to independent contractors. Attorney General Opinions 88-061, 88-062, 88-066, 88-067, 88-198, 88-241, 88-271, 90-111, 92-083, and 92-195 discuss various issues surrounding longevity pay.

Retirement

The ***Code of Alabama 1975***, Sections 36-27-1 through 36-27-161, establishes the State Employees Retirement System. Sections 36-27-1(2) and (3) define "employee" as one in state service who is paid by state warrant, and define "employer" as the state of Alabama or any department, commission, institution, or any other agency of and within the state by which an employee is paid.

- An "employee" is defined as being paid by a state warrant. Employees of state agencies operating from a checking account are not included in the regular employees' retirement system, unless specifically authorized by law.
- A state agency that operates from a checking account can elect, with the approval of the retirement system board of control, to enter the employees' retirement system as a separate account apart from the regular system, and with its own separate benefits and contributions package.

According to the ***Code of Alabama 1975***, Section 36-21-8, certain law enforcement officers shall receive, without cost, his or her badge and pistol as part of his or her retirement benefit. Agencies include the Department of Conservation and Natural Resources, Alcoholic Beverage Control Board, Forestry Commission, Alabama Criminal Justice Information Center, Department of Public Safety, Capitol Police, and other agencies employing officers who are required to be Peace Officers Standards and Training Commission-certified.

State Employee Health Insurance

The ***Code of Alabama 1975***, Sections 36-29-1 through 36-29-30, establishes the State Employees' Health Insurance Plan. Section 36-29-1(3) defines "employee" as "a person who works full time for the State of Alabama or for a county health department and who receives his full compensation on a monthly basis through means of a state warrant drawn upon the State Treasury…and any person employed part time by the State of Alabama on a wage and hourly basis, excluding fee compensations and other like arrangements, shall be included in the definition of employee as defined in this chapter provided such person shall agree to have deducted from his or her hourly wage, as stipulated, a pro rata portion of the premium cost of a full time employee based on the percentage of time such person is employed by the state according to rules and regulations established by the State Employees' Insurance Board." Due to this definition, employees of state agencies that operate from a checking account cannot participate in the state employees' insurance plan, unless otherwise specifically authorized by law.

Nepotism Law

The ***Code of Alabama 1975***, Section 41-1-5, requires that no person with hiring authority may hire any person within four degrees of affinity (marriage) or consanguinity (genetic kinship). The chart below shows the four degrees:

Table of Consanguinity and Affinity			
Within 4 Degrees Of Relationship			**Great Grandparents (3 degrees)**
		Grand Parents (2 degrees)	**Great Uncles & Aunts (4 degrees)**
	Parents (1 degree)	**Uncles & Aunts (3 degrees)**	
Office Holder	**Brothers & Sisters (2 degrees)**	**First Cousins (4 degrees)**	
Children (1 degree)	**Nephews & Nieces (3 degrees)**		
Grand Children (two degrees)	**Grand Nephews & Nieces (4 degrees)**		
Great Grand Children (3 degrees)			

Controversy in the Workplace

Controversy that could open a state agency to litigation, such as sexual harassment, intolerance, and violence in the workplace, is becoming more commonplace. While there are no federal or state laws or regulations requiring a state agency to provide training on sexual harassment, intolerance, or violence, sound personnel practices include providing employees with training on recognizing, reporting, and controlling sexual harassment, intolerance, and violence in the workplace. The State Personnel Department has developed training classes to help employers and employees understand the laws that govern non-discrimination and safe work environments, and to recognize and deal with controversial work environment issues. Information, Internet links, and contact numbers are provided in the contact list accompanying this manual.

Terminating Employees

Unclassified employees in the merit system, including the executive officer, serve at the pleasure of the appointing authority and can be dismissed by that authority without cause. Classified, merit system employees must be suspended or dismissed in accord with rules promulgated by the State Personnel Board. Contract employees are terminated according to the terms of the contract. Non-contract employees who are not merit system employees may be terminated by the appointing authority according to conditions of employment set by the appointing authority. Federal laws that govern discrimination in hiring also govern discrimination in termination. State agencies hiring outside the merit system should review terminations and termination policies to determine whether they are in compliance with federal law.

Acquiring Legal Counsel/Representation

The ***Code of Alabama 1975***, Section 36-15-1, states, "...no attorney shall represent the State of Alabama, or any agency, department, or instrumentality of the state in any litigation in any court or tribunal unless the attorney has been appointed as a deputy attorney general or assistant attorney general."

- *Attorney General's Office*

  The attorney general (AG) is the legal counsel for the state. Among other duties, all litigation concerning the state, or any agency of the state, is under the direction and control of the attorney general. He also gives his opinion, in writing, on any question of law connected with the interests of the state or with the duties of the agencies. Most state agencies have a representative of the AG's office assigned to them to provide legal counsel. In many instances, there is an agreement by which the agency pays for the services of the AG's attorney. If your agency is involved in litigation, an attorney other than the one assigned to assist you with routine legal matters can be appointed by the attorney general with the approval of the governor for your particular litigation (***Code of Alabama 1975***, Section 36-15-21).

- *Private Attorneys Hired by Contract*

  When necessary, additional legal counsel may be obtained. An attorney's services come under the definition of "professional services" in the competitive bid law and are, therefore, exempt from the competitive bid law requirements. Outside attorneys

retained to represent the state in litigation must be appointed by the attorney general in consultation with the governor from a list of attorneys maintained by the attorney general. Fees will be negotiated between the agency and the attorney and are approved by the governor in consultation with the attorney general. Maximum fees paid for legal representation may be established by executive order of the governor (currently $195 per hour-Executive Order 51 of Governor Bob Riley).

Section Eleven: Appropriations and Budgets

An agency, in order to finance its operations, will need to receive and spend money. Agencies that operate through the State Treasury deposit and spend monies through a separate account known as a fund. A fund is similar to a checking account, in that monies are deposited into and expended from a central account. All expenditures of agencies that operate through the State Treasury must be budgeted and authorized by the legislature through an appropriation, or the treasury and the comptroller will not disburse funds.

Appropriation Authority

An agency operating through the State Treasury is bound by a multitude of requirements, the first being that money cannot be spent without an appropriation from the State Legislature. An appropriation is loosely defined as permission to spend or obligate money. This requirement applies equally to money collected as fees by state licensing boards and money in the state's General Fund. State agencies may not spend more than the amount appropriated by the legislature.

- *Requires Legislative Action*
  The *Alabama Constitution of 1901*, Article IV Section 72, states, "no money shall be paid out of the treasury except upon appropriations made by law, and on warrant (state check) drawn by the proper officer in pursuance thereof; … The funds are required to be appropriated by the legislature of which power cannot be transferred or delegated."

- *Budget Requirement*
  Each year, state agencies request an appropriation, the aggregation of which becomes the budget submitted by the governor to the legislature. The annual appropriation request is initiated by submitting information to the Executive Budget Office (EBO).

  Normally, a licensing board's appropriation is based on their projected receipts and any balance of funds available from previous years. In the event an agency does not have sufficient cash to finance its operations, the legislature may make an appropriation to the agency from the state's General Fund (supplemental appropriations), or money may be obtained from the Governor's Departmental Emergency Fund. Obtaining money from these sources often requires repayment.

- *Year-End Balance*
  Optimally, receipts should meet operational needs, including a reserve for unexpected costs. Some money must be retained at the end of the fiscal year to fund the first quarter of the next year's operations and to meet contingencies such as litigation.

Some agencies are required by law to transfer all or part of their remaining fund balances at year-end to the state's General Fund or other fund as stated by law. This transfer is not optional and should be made shortly after obligations of prior year appropriated funds have been paid.

- *Treasury Funds and Checking Accounts*
  All receipts collected in the name of the state are state funds. Most agencies are required to operate through a fund within the State Treasury and to comply with the State Comptroller's *Fiscal Policy and Procedure Manual*. However, some agencies are allowed to operate outside of the State Treasury through a bank checking account. It should be noted that an agency must be specifically authorized by law to operate from a checking account in order to do so. The ***Code of Alabama 1975***, Section 41-4-92, states, "All fees, receipts and income collected or received by any department, board, bureau, commission, agency or office or institution of the state shall be paid into the state treasury or deposited in an approved state depository." Some examples are listed below, where agencies are allowed to maintain a checking account.

  - "All money received by the board under this chapter shall be paid to and received by the secretary-treasurer of the board. The secretary-treasurer shall deposit to the credit of the board all funds paid to the board in a bank selected by its members…"(***Code of Alabama 1975***, Section 34-9-41[Board of Dental Examiners])
  - "(a) All funds received by the board shall be deposited to the credit of the board in a federally insured bank selected by the board…"(***Code of Alabama 1975***, Section 34-24-258 [Board of Podiatry])

Budgeting

- *Budget Management Act*
  Formulation of the budget begins with the preparation of estimates of expenditures for the next fiscal year by the administrative head of each budgeted agency. These estimates are submitted annually to the Executive Budget Office on or before each regular session of the legislature. Annually, the EBO provides to the agencies a set of instructions and forms for preparing a budget request. The budget is prepared for each fund, appropriation unit, and activity by major object of expenditure in accordance with the state-level chart of accounts.

  A detailed statement showing actual agency revenue for the preceding year and estimated revenue for the current and the next fiscal year must be submitted by each agency. Each budgeted agency is also required to submit a performance statement that includes a list of annual agency performance indicators for the preceding year, and estimated agency performance indicators for the current and next fiscal years. Additionally, the agency is required to provide a personnel classification budget request form showing employees (full-time equivalents) and amounts by classification. The information must be filed by November 1st each year.

Section Twelve: Cash, Investments, Receipts

Cash and Near Cash

- *Petty Cash*
  A petty cash fund is cash on hand to pay incidental expenses. Petty cash funds are not allowed unless specific authority is granted to the agency. Petty cash should be reconciled on a regular basis by someone other than the custodian. All expenditures should be supported by documents, such as receipts.

- *Investments*
  Only agencies specifically authorized to invest their funds may do so. The *Constitution of Alabama 1901*, Amendment No. 450, states that agencies may invest their funds in the following:

  - Interest-bearing demand deposits in federally insured banks, and interest-bearing deposits, whether or not evidenced by certificates of deposit, in federally insured banks
  - Bonds, notes, and other evidences of indebtedness that are direct obligations of the United States of America or that are unconditionally guaranteed as to both principal and interest by the United States of America
  - Bonds, debentures, notes, or other evidences of indebtedness issued or guaranteed by any federal agencies or government-sponsored enterprises authorized to issue their own debt instruments
  - Repurchase agreements with federally-insured banks or with government bond dealers reporting to and trading with the Federal Reserve Bank of New York
  - Interest-bearing time deposits (whether or not evidenced by certificates of deposit) in savings and loan associations, following certain restrictions
  - Corporate securities, following certain restrictions.

- *Collateralization and Security for Alabama Funds Enhancement Program (SAFE)*
  Funds deposited and held in accounts outside of the State Treasury must be sufficiently protected, or collateralized, with securities provided by the depository. For each depository, if it is a member of the Federal Deposit Insurance Corporation (FDIC), the total of accounts of each ownership category for each depositor will be insured up to $100,000. All funds in the accounts over the $100,000 in each ownership category must be protected with collateralized securities pledged by the depository. A discussion of the FDIC and its deposit insurance can be found on the Internet at www.fdic.gov. Prior to January 1, 2001, each state agency was responsible for ensuring that its funds were fully protected, either with FDIC coverage or collateralized securities. With the passage of the SAFE Act, this responsibility has been entrusted to the Board of Directors of the SAFE program. The ***Code of Alabama 1975***, Section 41-14A-3(2), requires all public depositors to place their public deposits with one or more qualified public depositories. If your

agency operates outside the state treasury, you can access the treasurer's website at www.treasury.alabama.gov to determine if your agency's bank is a qualified public depository.

All state agencies that do not operate from the State Treasury must deposit their funds into a qualified public depository. The Examiners of Public Accounts will ask for documentation of agency compliance with the SAFE program. This request can be met by having a Public Deposit Identification and Acknowledgement Form in your files. The form should be signed by the bank and department representatives and should contain the bank balance in the upper right hand corner of the form. Your bank statement should exhibit wording such as "Public Funds" or "SAFE Deposit" or "Government Funds". We have encountered several instances where the wording "not for profit" was used. This may or may not mean compliance with the SAFE program. When in doubt, verify with the bank in writing. If the Public Deposit Identification and Acknowledgement Form is properly signed and on file, the wording, or lack of wording, on the bank statement is not important. The most important point is that the bank should be aware that the accounts in question are public funds and that they must be covered under the SAFE program.

Receipts

- *Treasurer's Office*
  Absent specific authority to operate from a checking account, all fees, receipts, and income collected or received by any state department or agency must be deposited into the State Treasury or an approved state depository to the credit of a special fund as required by law. All fees collected in the name of a state agency are state funds. As evidence, *Attorney General Opinion 2002-349, dated 9/26/2002, relates that the Alabama Board of Auctioneers is not exempt from the provisions of Section 41-16-70, et seq., of the* ***Code of Alabama****, as the agency does receive state funds. Any funds collected by the board are collected under the authority and direction of the state. These funds are state funds and must be deposited in the appropriate account in the Office of the State Treasury.* The State Comptroller's Office, Division of Control and Accounts, is charged with controlling and recording all payments into and out of the State Treasury.

- *Bad Check Fee*
  The ***Code of Alabama 1975***, Section 8-8-15, allows agencies to assess a fee for checks returned for non-payment due to insufficient funds, etc. The maximum bad check charge is $30 or an amount equal to the actual charge by the depository institution for the return of unpaid or dishonored instruments. **The agency must adopt a rule regarding the amount of the fee the agency intends to charge.**

  There are procedures an agency must follow to collect bad checks. Section 13A-9-13.1 gives a ten-day period of written notice for the maker of a bad check to make payment to the holder of the bad check, along with a service charge. If the notice of the bad check is mailed by certified or registered mail and returned undeliverable, it is

evidence that the maker of the check intended to not honor the check. This section also states that, "negotiating a worthless negotiable instrument is a Class A misdemeanor." Section 13A-9-13.2 gives the form of the notice to be sent to the maker of a bad check. After an agency has followed the procedures in Section 13A-9-13.1, a complaint to the Worthless Check Unit of the District Attorney's Office may be presented.

- *Payment of Fee as Part of Qualifications*
  Payment of fees is part of the qualification to be licensed. If the fee is not received, the payer is not qualified to be licensed. Also, an agency cannot receive partial payment, as it is not constitutional for an agency to extend credit.

- *Credit Card Receipts*
  Below is a brief statement covering the acceptance of credits cards for payment of fees by agencies. The acceptance of credit cards allows persons to apply for an original license and for licensees to renew via the Internet. For further information on credit card receipts, refer to the complete section in the ***Code of Alabama 1975***, Section 41-1-60 - Acceptance of credit card payments.

  > "…Any officer or unit of state government required or authorized to receive or collect any payments to state government may accept a credit card payment of the amount that is due. This section shall only apply to departments, agencies, boards, bureaus, commissions, and authorities which are units of state government, and shall not apply to any departments, agencies, boards, bureaus, commissions, or authorities which are units of county or municipal government and come under the provisions of Chapter 103 of Title 11."

  If your agency decides to accept credit cards, then your agency must adopt reasonable policies, rules, or regulations governing the acceptance of credit card payments that are not in conflict with the law. The state has a contract with a third party, Alabama Interactive, to process transactions between the state and its citizens over the Internet, including credit card processing, application development, integration with the agency's existing systems, security, application hosting, application support, and management reporting.

- *Type and Amount of Fees Stated in the Agency's Enabling Statutes*
  In this instance, the enabling statutes themselves specifically state what type fees can be charged and the amount of the fees. Sometimes the fees are discretionary within a range, such as "not to exceed $500." At other times specific amounts are named. When fees are set by law, they cannot be changed, except within the range specified, without a change to the enabling statutes. The prohibition against change applies not only to the amount, but also to the type of fee. If the law allows you to charge only an application fee, you cannot later decide by the rule-making process to charge an additional license issuance fee. Legislation would have to be introduced and passed to effect a change. Examples of mandated fees include:

- "…the Board of Social Work Examiners shall receive applications from individuals, such applications being duly notarized and sworn, which outline the applicant's eligibility for licensure under the criteria specified in either subdivision (1), (2) or (3) of this section, accompanied by an initial application fee of $50.00 in the form of a certified check made payable to the Alabama State Board of Social Work Examiners…" (***Code of Alabama 1975***, Section 34-30-23 [Board of Social Work Examiners])

- The fees prescribed by this chapter shall be in the following amounts:
  (1) The fee for application to the board is seventy-five dollars ($75).
  (2) The fee for examination or reexamination shall be in an amount as established by the board in order to cover all costs of examination, but in no event shall the fee exceed the actual cost of preparing and administering the examination.
  (3) The fee for an original certificate is fifty dollars ($50).
  (4) The fee for a duplicate certificate is fifty dollars ($50).
  (5) The annual license fee is one hundred fifty dollars ($150) for residents of Alabama and for nonresidents.
  (6) The penalty fee is fifty dollars ($50), as provided in Section 34-17-24.
  (***Code of Alabama 1975***, Section 34-17-25 [Board of Examiners of Landscape Architects])

- *Fees Are Not Refundable*
  If the enabling statutes of a state agency specify that fees will not be refunded to an applicant, then the agency is not allowed to return the fees. However, should an amount in excess of the correct fee be submitted, the difference must be refunded, as the agency has no authority to collect more than the correct amount.

  "The sum or fee of three hundred dollars ($300) accompanying original applications and sum or fee of two hundred dollars ($200) accompanying applications for renewals under this section are for the administration and enforcement of this chapter and shall not be refunded to the applicant." (***Code of Alabama 1975***, Section 34-8-2 [Licensing Board for General Contractors])

- *Cost Recovery*
  State agencies are allowed to recover reasonable amounts for the cost of providing services and information. If a roster of licensees is to be maintained and provided to the public on demand, the agency is allowed to recover the cost of providing a copy to members of the public. Cost recovery must be based on reasonable estimates of the amount it actually cost to provide the copy, and may not be used as a revenue-generating mechanism.

- *Fee vs. Fees*
  If the law specifies that the board may charge a fee, the board is only given the authority to set one amount that must be charged in all circumstances. If the board is given the authority to charge fees, then it may charge graduated amounts, depending on circumstances. This issue is discussed in Attorney General Opinion 2002-302.

Section Thirteen: Contracts

Contracts
The preparation of contracts involving public funds is one of the most involved procedures covered in the law. The agency has sole responsibility for full compliance with the law.

Statutory Requirements

- *Governor's Approval of Contracts*
  All contracts for personal or professional services with private entities or with individuals must be approved in writing by the governor. See Governor Folsom's Executive Order, August 28, 1957 and Attorney General Opinion, June 9, 1948, to McFarland for more information.

- *Review by the Legislative Contract Review Oversight Committee*
  The Oversight Committee must review all contracts for personal and professional services within a reasonable time, not to exceed 45 days after the contract has been submitted by the department (***Code of Alabama 1975***, Section 29-2-41, as amended). Review is not required for contracts that will not be paid with state warrants, except that all legal services contracts must be reviewed by the committee.

- *Disclosure Requirements*
  Act 2001-955, now incorporated into state law as the ***Code of Alabama 1975***, Sections 41-16-80 through 41-16-88, requires a disclosure statement from the vendor revealing any family relationship of the vendor to public officials or employees or their family members. The disclosure statement is to be completed and filed for all proposals, bids, contracts, or grant proposals to the state of Alabama in excess of $5,000. The disclosure statement is not required for contracts for gas, water, and electric services where no competition exists, or where law or ordinance fixes rates.

  A copy of the disclosure statement must be filed with the awarding agency, with the Department of Examiners of Public Accounts, and with the Contract Review Permanent Legislative Oversight Committee if the contract is required to be submitted to the committee. The disclosure form can be found on the Examiners of Public Accounts Internet website under *Forms/Publications*.

  There is an exemption from this act for agencies that do not receive state funds. However, the attorney general has rendered his Opinion 2002-178 to the Alabama Port authority that all funds received by a state agency are state funds for purposes of Act 2002-955.

  Note: It is the responsibility of the agency to notify the vendor of the need to file and to provide the disclosure form, but it is the responsibility of the vendor to file.

The disclosure statement should identify the specific contract, proposal, bid, or grant proposal to which the statement is related.

Contracts for the purchase of personal property or contractual services shall be let for periods not greater than five years (***Code of Alabama 1975***, Section 41-16-27(d), as amended). ***NOTE***: This restriction only applies to contracts that must be bid. Contracts made with two-year or four-year colleges and universities may be let for periods not to exceed ten years.

Bid law

The following information addresses only contracts that are required to be open for public bidding. All purchases of $7,500 not exempted from the bid law are required to be bid. In some cases, the State Purchasing Division of the Department of Finance accepts bids in advance, resulting in contracts with the state by which state agencies can purchase goods or services at a predetermined price. Listings of goods or services under contract are available at the State Purchasing Division. For agencies that operate through the State Treasury, the State Purchasing Division will process bids for goods or services not on contract. Agencies that operate from checking accounts must process bids on their own in accordance with the bid law. An Attorney General Opinion dated March 14, 1978, states that, "Competitive bids must be taken in spite of past purchase from a particular vendor."

- *Contracts that Require Competitive Bidding*
  The ***Code of Alabama 1975***, Section 41-16-20, is known as the competitive bid law. The bid law requires that, with the exception of contracts for public works for which competitive bidding requirements are governed exclusively by Title 39, all contracts of whatever nature for labor, services, work, or for the purchase or lease of materials, equipment, supplies, or other personal property, involving $7,500 or more, made by or on behalf of any state department, board, bureau, commission, committee, institution, corporation, authority, or office shall, except as otherwise provided in this article, be let by free and open competitive bidding, on sealed bids, to the lowest responsible bidder.

Requests for Proposals

Contracts that Do Not Require Competitive Bidding (Professional Services)

Act 2001-956 modified the ***Code of Alabama 1975***, Section 41-16-21, and created Sections 41-16-70 through 41-16-79. The act addresses contracts for which competitive bidding is not required. Some relevant points of the act are:

- Attorneys retained to represent the state in litigation must be appointed by the attorney general in consultation with the governor from a listing of attorneys maintained by the attorney general. Fees must be negotiated and approved by the governor in consultation with the attorney general.
- Attorneys retained for non-litigation services must be selected from a listing of attorneys maintained by the legal advisor to the governor. Fees must be negotiated by the entity

purchasing the services of the attorney (not to exceed $195 per hour) and are subject to the review and approval of the governor or the director of finance, if so designated by the governor.

- Physicians retained to provide medical services must be selected from a list of physicians maintained by the Medical Licensure Commission.
- The services of professionals are not required to be bid, but must be procured through other competitive procedures, as described by law. Notice of the need for these services must be widely distributed to the professional community in a full and open manner. The director of finance, through the Division of Purchasing, must establish and maintain lists of professional service providers from which to select. The purchasing department, board, agency, etc., must solicit proposals from providers desiring to receive requests for proposals from a list of registered suppliers. The list will be provided to the agency upon request by the Division of Purchasing. If the fees paid to a selected provider exceed by 10 percent the professional service fee offered by the lowest qualified proposal, the reasons for selection must be justified in writing and signed by the director of the department, board, agency, etc. This writing must be made a part of the selection record. Once a provider has been chosen through the request for proposal process, the appropriate business contract can be crafted, detailing all pertinent aspects of the services to be rendered and payment to be made. Contracts must go before the Legislative Contract Review Oversight Committee before the effective date of the contract. All awards arising from the request for proposal process are subject to the ***Code of Alabama 1975***, Sections 29-2-40 through 29-2-41.3. Attorney General's Opinion 2006-086 gives guidance for the purchase of airtime on radio and television stations, versus purchase of assistance in procuring such airtime.
- Services provided by a sole source do not require a request for proposals, as only one vendor provides these services. However, the contract must be approved by the purchasing director.
- Emergency contracts are another special contracts area. In order to contract under emergency situations, the director of an agency must make a written declaration of a state of emergency to the governor and the attorney general. The emergency contract drawn as a result of the emergency situation is valid for 60 days only. This time period allows the emergency situation to resolve, or allows the director of the agency to draw up a normal contract and send it through the appropriate review process. The request for proposal for the emergency contract should contain all the terms and conditions for the work in question, as is usually necessary for the particular agency; however, a scope of work section should be included in the emergency contract, completely defining the emergency problem to be resolved. Be aware that the Department of Finance thoroughly reviews the situations detailed in emergency contracts. Declaring a state of emergency so that an agency may hire an employee to take the place of one who has retired is *not* allowed.

Section Fourteen: Disbursements

Laws

Laws Governing Expenditures (Sufficient Documentation, Etc.)

Statutory requirements must be met before honoring a claim or an account against the state. The State Comptroller must determine that sufficient funds and budgetary or appropriation authority exists in order to pay a vendor. When a request for payment is received from an agency, the required documentation is audited by the comptroller's office for completeness to determine that the claim is legal and accurate. Checking account agencies are exempt from the rules of the Finance Department, which are embodied in the Department of Finance's *Fiscal Policies and Procedures Manual*; however, some of these rules are based upon state law that applies to all state agencies. A checking account agency should either implement its own control procedures to ensure that expenditures are appropriate and in accordance with the law, or adopt applicable procedures and requirements of Finance Department's *Fiscal Policy and Procedures Manual*. Specific ***Code*** sections follow which address legal requirements for specific types of payments.

- Comptroller Duties, Section 41-4-50
- Accounts Against State To Be Itemized, Section 41-4-54
- Purchasing Procedures, Section 41-4-113
- Governor's Approval, Section 41-4-55
- Allotment Of Appropriated Funds, Section 41-4-90
- Travel Expense, Sections 36-7-20 through 36-7-24, Section 41-4-57
- Public Contracts, Sections 41-16-20, 21, 50
- Property Tax Exemption, *Alabama Constitution 1901*, Article IV, Section 91
- Sales Tax Exemption, Section 40-23-4(a)(11)

Purchasing

Authority And Responsibility

The Division of Purchasing in the Department of Finance is, by law, responsible for the purchase of all personal property, except alcoholic beverages, for all state departments, boards, bureaus, commissions, agencies, offices, and institutions.

Purchases made on the behalf of state agencies by the Division of State Purchasing are categorized into two basic categories: those requiring a purchase order and those that do not require a purchase order.

Payment for Goods and Services Purchased Without a Purchase Order (Agencies That Operate Through the State Treasury)

- Purchases up to, and including, $500 – The State Purchasing Division has delegated its authority to individual state agencies to purchase goods and services of an emergency or non-recurring nature up to and including $500.
- Purchases from $500.01 up to, and including, $7,499.99 – Prior approval must be obtained from the State Purchasing Division to purchase goods or services from

$500.01 to $7,499.99. The agency must contact the State Purchasing Division buyer responsible for purchases of the goods. The buyer can provide approval as a telephone authorization in an emergency.

- Purchases in excess of $7,499.99 – These purchases must comply with the requirements of the state's bid law. The State Purchasing Division will transact the bid process for the agency.

NOTE: State agencies are exempt from paying sales taxes on purchases, per ***Code of Alabama 1975***, Section 40-23-4(11). However, Act 2006-557 adds Section 41-4-116 to the ***Code of Alabama 1975***. This act requires that state agencies get certification of registration with the Department of Revenue to *collect* and remit sales, use, and lease taxes. Attorney General Opinion 2008-036 states "…gift shop sales are not exempt from Alabama sales tax in accordance with Section 40-23-2(1) of the Code of Alabama…Section 41-9-256 corresponds with Section 4-23-4(a)(15), which indicates that state agencies are exempt from payment of sales tax. Section 41-9-256, however, does not preclude the Commission from the collection of sales taxes to be remitted to the State of Alabama, counties, or municipalities."

Lease of Office Space

Before an agency leases office space, the Office of Space Management within the Department of Finance should be contacted for leasing options. Space Management has adopted uniform standards for allocation of facilities owned or leased by the state. Space Management also investigates all requests for additional facilities needed by all state agencies and makes recommendations concerning the need for and the best method of allocating or acquiring such facilities. The Office of Space Management is noted in the contact list in this manual.

NOTE: State agencies are exempt from paying privilege and license taxes, per the ***Code of Alabama 1975***, Section 40-12-222(6).

Travel Expenses

Travel expense reimbursement is addressed by the ***Code of Alabama 1975***, Sections 36-7-20 through 36-7-22. Any person traveling in the service of the state is entitled to reimbursement of travel expenses.

In-state travel statutes provide a specific daily allowance, called per diem, and a payment of mileage at a specified rate. Payment of per diem and mileage allowances are made in lieu of actual expenses. Generally, out-of-state travel is reimbursed at actual expenses. For some agencies, the enabling statutes provide for actual expense reimbursement for all travel. State agencies have no discretion in this matter. Travel expense reimbursement must be made as specified by law.

As travel expense reimbursement is an entitlement, travelers cannot be refused payment for expenses resulting from authorized travel. Travelers can, if they desire, waive payment of expenses. If he or she chooses to do so, the traveler should provide a written statement to the

executive officer stating the waiver. The statement should be retained in the agency's records.

Anyone traveling in the service of the state is entitled to payment of travel expenses. Travel expenses are divided into two basic categories and then into further sub-categories.

- *In-State Travel*

  - *Per Diem*
    Reimbursement for daily expenses (meals and lodging) during travel away from home or base is made through daily allowances rather than through reimbursement for actual expenses.

    Governor Riley has placed conditions on travel allowances that result in the following computations.

Travel time	Entitlement
6 hours or less	No per diem (per day) allowance
6 to 12 Hours	$11.25 (1 meal allowance at 15% of a per diem allowance of $75)
More than 12 hours but not over-night	$30 (1 meal at 15% of the daily per diem rate of $75 + ¼ of the daily per diem rate of $75)
Over-night	$75 per day, no matter the number of days/nights

    - Montgomery to Birmingham and back from 8 A.M. to 3 P.M. 7 hours would be $11.25 (one meal allowance)
    - Montgomery to Huntsville and back from 8 A.M. to 9 P.M. 13 hours would be $30.00 (one meal allowance + ¼ per diem)
    - Montgomery to Mobile for a two-day meeting leaving at 8 A.M. on Monday and returning anytime Tuesday would be $150.00 ($75.00 for each day of travel)

  - *Mileage*
    Mileage is reimbursable at the federal rate. As of July 1, 2011 and continues for 2012 beginning January 1st, this amount is 55.5 cents per mile and is payable for any mileage traveled in the course of business. The rate is subject to change. Mileage is paid for the shorter distance between your base or home and your destination. (***Code of Alabama 1975***, Section 36-7-22)

    For example, if your base is Montgomery but your home is in Clanton, and you traveled from home to Birmingham, you would only be allowed to claim mileage from Clanton to Birmingham and back to Clanton. However, if your trip were to Mobile and back, you would be allowed the mileage from Montgomery to Mobile

and back to Montgomery. See Attorney General Opinions 80-144 and 81-345 for more information.

- *Motor Pool Vehicle Requirements*
  State employees who are based in Montgomery and required to travel by automobile on official business must use State Motor Pool vehicles, unless a vehicle is not available at the time of travel or an exemption to the use of the motor pool has been granted by the director of finance. The comptroller will not reimburse a traveler for the use of a privately-owned vehicle without a motor pool non-availability certificate or a properly approved exemption letter. Motor pool exemptions will be granted sparingly, and only for good cause shown. Exemption requests must be approved by the agency or department director prior to submission to the director of finance, and must be based upon a legitimate need. Motor pool exemption letters approved during previous administrations will no longer be accepted by the comptroller.

- *Actual Expenses for National Conferences*
  Pursuant to Act 2005-251, actual travel expenses are allowed for in-state travel when a state employee is attending a national conference held in Alabama.

  The ***Code of Alabama 1975***, Section 36-7-21(a), states, "Persons traveling in the service of the state or any of its departments, institutions, boards, bureaus, commissions, councils, committees, or other agencies . . . within the State of Alabama for purposes of attending or assisting in hosting a convention, conference, seminar, or other meeting of a national organization of which the state is a dues-paying member that is held within the state shall be allowed all of their actual and necessary expenses in addition to the actual expenses for transportation. In-state travel authorized under this section is subject to the same documentation requirements as out-of-state travel."

  Reimbursement for actual expenses for in-state national conference travel must be authorized by the governor for most state employees. Subsections (b) through (f) of ***Code*** Section 36-7-21 detail other travel authorization for various legislative agencies, state agencies, and institutions of higher learning.

- *How to Claim Payment*
  Complete form FRMS-6, Statement of Official In-State Travel, indicating dates, distance, hours of travel, and certain miscellaneous expenses, such as parking fees, emergency vehicle repairs, etc. You should fully complete the form, which has space for location of travel, mileage traveled, time of departure and return, and per diem claimed. Be sure to include all areas of travel for each day. Include receipts for any miscellaneous expenses, and send the signed and notarized form to your agency's accounting staff. It is a good idea to make a copy of all records for your records.

To claim payment for in-state national conferences or conventions, see the instructions for out-of-state travel following this section.

Travel claim forms can be obtained from the State Comptroller's Internet website at www.comptroller.alabama.gov and select *On-Line Forms*.

***Note**: When an agency employs persons by contract, the travel amount in the contract must not exceed the amount provided by state law for payment of travel expenses. Reference Attorney General Opinion 2002-219 for more information.*

- *Out-of-State Travel*

  Persons who travel out-of-state on state business are entitled to be reimbursed for all actual and necessary expenses including air fare, registration fees, lodging, meals, etc. (Beginning fiscal year 2012, reimbursement for meals is capped. See the official Out-of-State travel form available on the Comptroller's website at: http://comptroller.alabama.gov/pages/online_forms.aspx) The words *actual* and *necessary* should be taken literally. The traveler must have actually incurred the expense and it must be necessary to accomplish the state agency's business. Sight-seeing expenses are not necessary expenses for the accomplishment of state business. Attorney General Opinion dated September 9, 1975 to Betty Frink, State Auditor, states that, "Any person traveling on state business outside of Alabama must travel on tourist-class ticket unless tourist-class is not available."

  ***NOTE**: Alcoholic beverages cannot be claimed. Meals included with conference registrations cannot be claimed. Expenses of spouses or others not traveling on state business cannot be claimed. Failure to use the least costly method of travel may result in an audit finding.*

  - *Approvals*

    For state agencies that are executive branch agencies (agencies that are not legislative or judicial), all out-of-state travel must be pre-approved by the governor.

  - *Documentation*

    Claims for reimbursement of travel expenses should be accompanied by documentation sufficient to reveal the nature and extent of expenses actually incurred by the traveler, such as itemized receipts for hotel and meal charges. The Governor's office requires an itemized invoice/meal ticket as well as the total amount payment receipt to accompany a request for travel reimbursement. Receipts must indicate the date, name, and location of the vendor, with an itemized listing of goods or services rendered. Restaurant receipts must also indicate the number of persons served. Reimbursement for meals or other charges for a person not traveling on the business of the state will not be allowed. The traveler may submit meal expenses of up to $10 per meal without providing receipts; however, the traveler's statement of such expense should accompany the travel reimbursement claim. Breakfast is only allowed for travel beginning at or

before 6 a.m., and dinner is only allowed if a traveler will be returning to base after 6 p.m. When meals are provided for the traveler at a conference or other meeting, no meal reimbursement should be requested. The Governor's office requires a conference itinerary to accompany the out-of-state travel request. For audit purposes, retain a copy of the conference itinerary.

The Department of Finance's *Fiscal Policy and Procedures Manual* mandates the documentation necessary for travel expense reimbursement, based on federal guidelines found in IRS Publications 463. This manual, available for download on the comptroller's website, carries the force of law for agencies that operate through the State Treasury, and provides guidance for agencies that operate from checking accounts. Failure to provide the documentation mandated by the manual can result in audit findings and demand for the return of funds from the traveler.

- *How to Claim Payment*
  Complete form FRMS-6A, Statement of Official Out-Of-State Payment. Attach the governor's approval, the conference registration and/or itinerary, airline tickets indicating the name of the traveler and amount, registrations, motel/hotel receipts, any parking fees, taxi fare, etc. If daily meals were more than $10.00 each, receipts must be attached. Reimbursement for meals with receipts are capped at $10.00 for breakfast, $15.00 for lunch, and $25.00 for the evening meal. Be sure to complete all areas of the form correctly. Be sure to make copies for your own records. Submit the signed and notarized form with the supporting documents to your agency's accounting staff.

  Forms can be obtained from the State Comptroller's Internet website at www.comptroller.state.al.us by selecting *On-Line Forms*.

NOTE**:** *There are numerous Attorney General Opinions regarding travel. Search the Attorney General's website for "travel". It is likely that one of the opinions will address the issue in question.*

Reimbursements
Sometimes it is necessary for an employee or board/commission member to purchase items for official use. For instance, an inspector may need to obtain file folders while in the field. For such purchases, an original receipt should be obtained and submitted to the agency prior to reimbursement. State agencies are not required to pay sales tax. Normally, when a purchase is made outside of normal venues, sales tax is paid. If possible, agencies should set up a credit account where purchases may be made without the incurrence of sales tax.

If an agency uses a credit card to make purchases, all original receipts should be maintained and retained for audit. Once the monthly billing is received, receipts should be checked against the statement for correctness and completeness. Accountability of the purchases should be maintained. For instance: Purchases of supply inventories should be traceable and normally the quantity purchased does not vary noticeably year to year. A sharp increase in

supply purchases but low inventory could indicate pilfering. A copy of the statement along with the original receipts should be kept for audit purposes.

Section Fifteen: Property

Personal Property

- *State Auditor's Office, Property Inventory Control Division (PIC)*
  The State Auditor's Office is responsible for enforcing laws regarding non-consumable property held by state agencies. In meeting this requirement, the State Auditor's Office, through the Property Inventory Control Division (PIC), has devised rules and regulations and conducts periodic 100% audits for each agency's property. Property that is unaccounted for is reported to the Attorney General's Office, as required by ***Code of Alabama 1975***, Section 36-16-9. The State Auditor's Office uses a computer application, Protégé, to manage the state's property. Attorney General Opinion 2003-180 states that, "The State Auditor may require state agencies to use an electronic inventory control system established or specified by the State Auditor."

- *Mandated Controls Include PIC's Biannual Inventory*
  Biannually, the Property Inventory Control Division of the State Auditor's Office shall conduct an inventory of all such state personal property. The ***Code of Alabama 1975***, Section 36-16-8(4), authorizes the biannual inventory.

  - *Appointment of Property Manager*
    The head of each state agency shall designate one of its employees as property manager, as mandated by the ***Code of Alabama 1975***, Section 36-16-8(1). The head of the agency assumes responsibility for the agency's property in the event that no property manager has been designated. The property manager shall contact the Property Inventory Control Division within five work days to schedule an orientation. A "Designation of Property Manager" form shall be completed and submitted to PIC Division. A copy should be retained at the agency for audit purposes. The property manager is responsible for all property, except that for which a hand receipt has been executed by the person responsible. For example, if an employee or official takes possession of a laptop computer to complete agency work at home, he or she must complete a hand receipt, which is to be kept on file at the agency. This hand receipt relieves the property manager of responsibility for that particular property. The property manager is to ensure that no property is entrusted to anyone other than agency employees or officials. Anyone assigned or having possession of personal property will be held strictly accountable, regardless of value. See Attorney General Opinion 96-130, dated February 9, 1996, and Opinion 97-035, dated November 5, 1996.

    The property manager is to maintain property records in accordance with the *Property Manual*. When changes occur, such as additions or deletions, the property records should reflect such changes. Changes are not limited to additions or deletions. When property changes hands or locations, such changes should be made in the property

records and submitted to PIC Division. It is up to the property manager to ensure that the Property Inventory Control Division has up-to-date information. The property manager, upon receipt of property, shall immediately affix a property inventory control number prior to placing the property in use. When leasing property, the property should be labeled "LEASED FROM (give the company name, address and telephone number)". If state officials or employees bring personally-owned property to the office, such property will be labeled or marked "Personal Property of (owner's name)".

- *State Auditor's Property Records Are the Agency's Official Property Records*
  The records in the State Auditor's Protégé database are the official property inventory records of each agency. Consequently, the Examiners of Public Accounts will audit the accuracy and completeness of the records in the database and will hold each agency accountable to ensure that the records are complete and accurate. The property manager should periodically check the accuracy of the records and make any necessary corrections. Attorney General's Opinion 2003-180 states that, "The State Auditor may require state agencies to use an electronic inventory control system established or specified by the State Auditor."

- *Termination of Property Manager Duties*
  Whenever any property manager ceases for any reason to be the property manager of a department or agency, the director of the department or agency shall immediately notify in writing the Property Inventory Control Division. The division shall immediately check the inventories of all property in the department or agency, and the successor to the property manager shall execute a written receipt for all property received by him or her, or coming into his or her custody or control. The last payment of salary due the property manager shall be withheld until a complete check of the inventory of the property has been made and approved. In the event of any shortages, the property manager shall be held strictly accountable, per the ***Code of Alabama 1975***, Section 36-16-8(6).

- <u>*Full and Complete Inventory*</u>
  Present law requires that the property manager shall make a full and complete inventory of all nonconsumable personal property and certain other sensitive items of $500 or more. The inventory shall show the complete description, manufacturer's serial number, cost price, date of purchase, location, custodial agency, responsible officer or employee, and the state property control marking. A copy of the inventory shall be submitted to the Property Inventory Control Division on October 1 and April 1 of each year. Each inventory shall show all property acquired since the date of the last inventory. When any inventory fails to show any property shown on the previous inventory, then a complete explanation accounting for the property or the disposition thereof shall be attached to the inventory and submitted to the PIC Division. All property managers shall keep in their files at all times a copy of all inventories submitted to the PIC Division, and the copies shall be subject to examination by any and all state auditors or employees of the Department of Examiners of Public Accounts, as directed by the ***Code of Alabama 1975***, Section 36-16-8 (1).

***NOTE**: Technology has rendered this law partly obsolete. For most state agencies, transactions involving nonconsumable personal property are made directly through the Internet to the State Auditor's AssetWorks database by the state agency. Consequently, the agency's records and the State Auditor's records are the same records. Agencies that are not on-line are required to periodically submit a Microsoft Excel spreadsheet of changes to the State Auditor's PIC Division where they are entered into the Protégé database by the division's personnel.*

- *Hand Receipts*

  When any property is entrusted to other employees or officers of the agency, the property manager shall require a written receipt of the property so entrusted. This procedure is outlined in the ***Code of Alabama 1975***, Section 36-16-8(2). Attorney General Opinion 2002-333 to Susan D. Parker, State Auditor, states that, "When property is assigned to a specific employee, that employee is to execute a written receipt of the property." A hand receipt relieves the property manager of responsibility, and the person signing the hand receipt will be held strictly accountable for the property entrusted to his or her care. A hand receipt is only valid from the time of preparation until the next inventory; therefore, a new hand receipt must be issued at every inventory. **NOTE**: A notarized affidavit stating a person has possession of an item is not a hand receipt. No relief of responsibility is given to the property manager through the completion of an affidavit. *The Examiners of Public Accounts will check to see that hand receipts are updated at least annually, and that they are accurate with respect to the location of the hand-receipted equipment.*

- *Surplus Property*

  No property shall be disposed of, transferred, assigned, or entrusted to any other department, agency, or employee thereof without the written permission of the director of the Alabama Department of Economic and Community Affairs or the governor, or the designee of either of them. See the ***Code of Alabama 1975***, Section 36-16-8(3), for more information. All agencies must use AssetWorks to dispose of property, regardless of the property's value. No property may be disposed of without adhering to the proper procedures in the *Property Manual*.

- *Penalties*

  In the event of lost property, the person having custody of the property will be responsible for the recovery of the property via the Attorney General Office. If the head of the agency neglects his or her duties in the performance of duties imposed by the ***Code of Alabama 1975***, Sections 36-16-8 through 11, he or she shall be liable for the sum of $5 a day for as long as the neglect continues, and for any value of lost property due to such neglect.

Section Sixteen: SMART Budgeting

Governor Riley has instituted SMART budgeting. SMART budgeting is designed to improve government by requiring organizational planning, linking plans to budget requests and appropriations, and creating meaningful performance measurements. See SMART budgeting's website, www.smart.alabama.gov, to obtain forms and instructions. You will also see other agencies' information, which may help you in the development of your budget information. The Examiners of Public Accounts will review several items during their compliance examinations, to include:

- Submission of SMART Budgeting documents
- Goals and objectives
- Performance indicators
- Performance reports

Acts of Alabama, 2004-50 (HJR89) states, "That all state agencies and entities receiving legislative appropriations are requested to submit to the Joint Legislative Budget Committee budget proposals for the 2005-2006 fiscal year to be submitted to the 2005 Regular Session and for each succeeding fiscal year. The Director of Finance is requested to inform each public agency or entity of our desires concerning this matter."

To comply with this request, the Director of Finance implemented a system of budgeting that requires each agency to report its performance, the system to be named SMART, an acronym for Specific, Measurable, Accountable, Responsive, and Transparent. As a part of the SMART Budgeting system, each agency is required to submit its performance goals and objectives to the Department of Finance.

- Goals are defined as multi-year targets
- They are achieved by meeting directly-related objectives, which are single-year targets

The SMART Budgeting system includes, among other items, an Operations Plan and a Quarterly Performance Report. The multi-year goals are presented on the Operations Plan. The annual objectives are presented and reported on the Quarterly Performance Report. In order to show performance, the goals and objectives must be designed so that performance can be measured, AND THEN performance must actually be measured and reported.

Definition of an Objective:
A numerical target that shows the level of performance an agency will try to achieve over one fiscal year and which is related to a previously stated goal.

The Quarterly Performance Report is supposed to show progress toward achievement of annual objectives (not goals). It is the only SMART Budgeting report that presents performance information. Because the Quarterly Performance Report is the only report that presents performance information, and because it only reports on progress related to

objectives, if at least one objective that is directly related to a goal is not included, performance relative to that goal will not be reported.

Good Examples

- OBJECTIVE - To create a system to issue licenses within 30 days after completed application. [Objective is acceptable]
- REPORTED PERFORMANCE – 42 days [Reported performance shows level of achievement of objective]

- GOAL - Complete initial processing of all registration filings within five business days of receipt. [Acceptable goal]
- OBJECTIVE – Issue registration licenses where appropriate for complete applications within five business days of receipt [Acceptable objective]
- REPORTED PERFORMANCE - % licenses issued within time frame [Should be acceptable]

- GOAL - Conduct a routine audit of at least 25 state registered and state domiciled licensees annually so that all are audited within a 3 year cycle. [Acceptable goal, but would have been better if 3-year cycle was goal, and 25 audited annually was an objective]
- OBJECTIVE #1 – Conduct on-site component of routine audits within 2 day time frame. [Acceptable objective]
- REPORTED PERFORMANCE – Average days [not yet end of year – should be acceptable]
-
- OBJECTIVE #2 – Produce 1st report on completed routine audits within 14 day time frame. [Acceptable objective]
- REPORTED PERFORMANCE – Average days [not yet end of year – should be acceptable]

- OBJECTIVE #3 - Complete 6.25 audits per FTE [Acceptable objective]
- REPORTED PERFORMANCE - # of audits per analyst [not yet end of year – should be acceptable]

We will audit for the follow:

- Our main attention will be directed to the end of year Quarterly Performance Reports, especially concerning:
  - Adequacy of objectives and reported data
  - Verifiability of reported data
- ADEQUACY OF OBJECTIVES AND REPORTED DATA
  - Are objectives really performance objectives (address how well an activity is done)?
  - Do the objectives have a stated target level of performance

  - Does reported data directly address the objective?
  - Are reported units of measure the same as for the objective's target?
- VERIFIABILITY OF REPORTED DATA
  - Is the method used to obtain data a valid method?
  - Is the method recorded and available to the examiner?
  - Are computations used to produce reported data available for audit?
  - Were the records used to obtain the data accurate and complete?
  - Were the records retained for audit?
  - Can the reported data be reproduced from records available to the auditor?

Checklist

- ✓ Goals and objectives should have a stated target level of performance
- ✓ The stated target should be measurable
- ✓ Goals and objectives should address how well an activity is being done, not whether it is being done.
- ✓ Every goal should have at least one directly related objective
- ✓ The unit of measure used to report actual performance in the Quarterly Performance Report should be the same as the unit of measure stated in the target of the objective.
- ✓ Sufficient records should be kept to allow determination of the actual level of performance.
- ✓ Performance data reported in the Quarterly Performance Report should be the result of an analysis of the recorded data.
- ✓ Computations and methods used to measure the reported performance data should be recorded and retained for audit.
- ✓ Records used to derive the reported performance data should be available for audit and should be sufficient to reproduce the reported data.

Section Seventeen: Audits, Examinations, Reviews

In addition to the audits performed by the Comptroller's Office, whereby transactions are audited as they are processed; and by the State Auditor's Offices, which post audits transactions the comptroller has processed, as well as property audits; the Department of Examiners of Public Accounts performs financial and legal compliance examinations, sunset reviews, and federal Single Audits of the operations of all state agencies. The examiners also audit Alabama's Comprehensive Annual Financial Report (CAFR).

The ***Code of Alabama 1975***, Section 41-5-14(a), provides for periodic examinations and audits of state and county offices, departments, boards, etc., by the Examiners of Public Accounts.

> "The books, records, vouchers and accounts of every state and county office, officer, bureau, board, commission, corporation, institution, department and agency shall be examined and audited at least once in every period of two years and more frequently or continuously if that is deemed necessary or desirable by the Chief Examiner. The books,

records, vouchers and accounts of municipal boards of education may be examined and audited upon request."

In addition to performing these audits, the Chief Examiner is empowered by law to mandate accounting procedures and forms, where necessary.

The ***Code of Alabama 1975***, Section 41-5-23 charges financial officers to keep uniform accounts.

> "Every state and county officer shall keep the books, records and accounts and make the reports of his office in accordance with such systems, procedures and forms as may be prescribed by the Chief Examiner pursuant to this chapter. Any officer who fails or refuses willfully to do so and the surety on his official bond shall be liable for a penalty of $50.00 for each week such failure or refusal continues. Penalties imposed and collected under this section shall be paid into the General Fund of the State Treasury."

Information regarding each type of audit, examination, or review follows.

Comprehensive Annual Financial Report (CAFR)

The Office of the State Comptroller prepares the state's Comprehensive Annual Financial Report (CAFR). This report presents financial information on state government as a single entity. It is the responsibility of the Department of Examiners of Public Accounts to issue an opinion on the financial statements of the CAFR based on the Examiners' audit. CAFR information is required from all agencies, including those maintaining checking accounts outside the State Treasury. Production of the CAFR requires the assistance of all agencies, which are asked to supply accurate financial information at fiscal year-end. Failure of agencies to supply the information by the deadline can result in an audit finding.

A CAFR packet is sent to all agencies around October 1 of each year. The information requested in the packet should be submitted to the comptroller's office by the deadline, which is usually near the end of October. The packet requests all agencies to make adjustments and accruals for accounting events that have not been captured through daily transactions. Items that may require adjustments and accruals include accounts receivable, accounts payable, deferred revenue, depreciation, capital leases, sale of fixed assets, inventory adjustments, investments, and certain balance sheet accounts unique to individual funds. In addition, certain information is requested in order to meet financial statement note disclosure requirements. "Comparative Balance Sheet by Fund" and "General Information" forms are included in the packet. General instructions are included for completing the forms in the packet, in addition to information on who to contact with questions. Additionally, more detailed instructions can be found in Chapter 8 of the Department of Finance's *Fiscal Policy and Procedures Manual*, available on-line. Each form should be completed and returned to the comptroller's office.

Single Audits (Federal Compliance)

Single Audits are audits of agencies that spend federal money, usually in the form of grants. Single Audits are performed in accordance with either the Federal Single Audit Act Amendments of 1996, or OMB Circular A-133, *Audits of State, Local Governments and Non-Profit Organizations.* For federal Single Audit purposes, Alabama is audited on a state-wide basis. Federal Single Audits have the same requirements as financial and legal compliance audits, with the added requirements of determining:

- The effectiveness of internal controls and reasonable assurance that the state is managing federal awards in compliance with laws, regulations, contracts, and grants applicable to federal programs
- Compliance with laws, regulations, contracts, and grants, in all material respects, applicable to each of its major federal programs
- Whether the Supplementary Schedule of Expenditures of Federal Awards is fairly presented in all material respects in relation to the financial statements taken as a whole

States, local governments, or non-profit organizations that expend less than $300,000 in a fiscal year in federal awards are exempt from the federal audit requirements for that year. However, these agencies are not exempt from other federal requirements, including those to maintain records, concerning federal awards provided to the agency. Such records must be available for review or audit by appropriate officials of a federal and pass-through agency.

Compliance Examinations

The Department of Examiners of Public Accounts conducts examinations of state agencies, including regulatory boards and commissions, to ensure that the agencies are complying with applicable federal, state, and local laws, rules and regulations, policies and procedures, entity resolutions, legally adopted motions, sound financial practices, etc. The examiners also check to ensure that control procedures are in place to protect assets and ensure compliance with laws. Discussion of some of the compliance areas follows.

- *Meetings*

  In addition to reviewing the minutes of the agency for the legality of official actions, the minutes are reviewed for the presence of a quorum and to determine if the minutes were properly signed. Examiners will also determine if policies were adopted which meet the definition of rules and should be adopted and implemented under the provisions of the Administrative Procedure Act. The examiners will ask for proof of reasonable public notice of all meetings, such as the retention of confirmation e-mails for the notice publication from the secretary of state's website, as well as declarations for the purposes of executive sessions, and other compliance items as required by the Open Meetings Act.

- *Administrative Rules*

  Agency administrative rules will be compared to agency statutes to ensure that the rules do not exceed board or commission authority and do not enlarge upon the law.

The examiners will also determine if any forms the agency uses, such as application or renewal forms, request information not required by law or other rules, and that any such forms have been filed as part of the agency's administrative code as required by Alabama's Administrative Procedure Act. The examiners will determine if the agency has adopted rules by the process outlined in the Administrative Procedure Act.

- *Enabling and General Statutes*
  Agency operations will be compared to the agency's enabling statutes, or the law that establishes the entity and grants its powers and duties, and statutes of general applicability in order to determine compliance with the law.

- *Equipment and Other Fixed Assets*
  The examiners will determine if records of personal property are maintained as required by ***Code of Alabama 1975***, Section 36-16-8, and if records on other fixed assets are adequate for audit purposes. The form for designated property manager will be reviewed. The agency's property records recorded in the State Auditor's Protégé database will be tested for accuracy. Written receipts for personal property, for which responsibility rests with someone other than the property manager, will be reviewed. Inventory will be located, and the examiner will compare inventory numbers, serial numbers, and descriptions to records maintained by the Property Inventory Control Division of the State Auditor's Office. Reductions to property will be reviewed for correct procedure and for indications of theft, loss due to neglect, or abuse. Land filings will be compared to filings recorded with the State Lands Division of the Department of Conservation and Natural Resources.

- *Receipts and Revenues*
  Deposits of receipts will be reviewed for proper classification, coding, and recording in the proper period. Any missing or voided receipt forms or licenses will be investigated. Refunds against disbursements and transfers will be reviewed for proper purpose and process. Licensee files will be examined to determine whether fees charged were in accordance with the fees allowed by law, and persons licensed proved eligibility by submitting proper documentation of qualifications. If the agency is assessing fines or penalties, the examiners will determine if the agency is authorized by law to do so.

- *Personnel*
  Payroll and personnel records of employees will be reviewed for compliance with laws, rules, and regulations addressing employment, termination, compensation, benefit accrual and usage, and documentation of transactions affecting personnel. Noncompliance with the Merit System Law will result in a finding, unless the agency is authorized to operate outside the merit system. If an agency's enabling statutes are silent on the applicability of Merit System Law, then Merit System Law is considered to apply, given that Merit System Law is of general applicability. If an agency does not hire its employees within the merit system, the agency is responsible for adopting its own personnel policies and procedures.

Note: Only personnel benefits formally conferred by documented vote of a board or commission or by contract are considered to exist. Deviance from formally conferred benefits can result in audit findings.

- *Disbursements*
  Disbursements and supporting documentation will be examined to determine compliance with applicable laws and regulations, such as the bid law, law and rules governing purchase of goods and services, reimbursement for official travel, contracts, required account coding, etc.

  Note: State law requires that "All accounts against the state must be accurately and fully itemized." See the ***Code of Alabama 1975***, Section 41-4-54, for more information.

- *Compliance with General Federal and State Statutes*
  State agencies are examined for compliance with the following areas:

Recycling	Sections 22-22B-1 through 22-22B-5
Records retention	Section 41-13-21
Legal services	Section 36-15-21 and *Fiscal Policy and Procedures Manual*
Appointment of members	Agencies enabling statutes
Public records	Sections 41-13-1 through 44, 36-12-1 through 64
Computer Crime	Sections13A-8-100 through 103
Forgery and Fraudulent Practices	Section 13A-9-1 through 52
Governmental Records	Section 13A-10-1, tampering 13A-10-12
Business Records	Sections 12-21-42 and 43
Competitive Bid Law	Sections 41-16-1 through 125
Public Works Law	Sections 39-2-1 through 13 and 39-5-1
Extra compensation not allowed	Constitution of Alabama Article IV SS68
Holding more than one office of profit	Constitution of Alabama Article XVII Section 280
Revenues and Expenditures	*Fiscal Policy and Procedures Manual*
CAFR (Comprehensive Annual Financial Report)	Sections 41-4-3 and 36-16-1
Minimum wage, overtime compensation	*Federal Fair Labor Standards Act* 29 CFR 785
Personal Property Law	Section 36-16
Administrative Procedure Act	Sections 41-22-1 through 41-22-27
Open Meetings Act	Section 36-25A
Travel Law	Sections 36-7 and 41-4-7
Merit System Law	Section 36-26

Sunset Reviews

- *Sunset Committee Composition and Selection*
  The Department of Examiners of Public Accounts conducts reviews on behalf of the Joint Legislative Sunset Committee. The twelve members of the committee are equally divided between the Senate and the House of Representatives. Three members are elected from each house and serve during their terms as legislators, or until successors are elected. Two members from each house are appointed by the respective presiding officers of the houses. Two ex officio members, the President Pro Tempore of the Senate and the Speaker Pro Tem of the House of Representatives, serve on the committee. Finally, a chairman is elected by the committee members, alternating annually between the Senate and the House of Representatives. If any member is unable to fulfill his or her duties and resigns from the committee, the presiding officer of the house in which the vacancy occurs chooses another member to fill the vacancy.

  - *Scope of Committee Operations*
    The Sunset Committee must review the operations of state agencies named in the law as subject to the sunset law, or enumerated agencies, and can review the operations of any state agency, or non-enumerated agencies. The Sunset Committee can recommend one of three alternatives for each agency:

    - Continuance without statutory modification
    - Continuance with statutory modification
    - Termination

    The law schedules automatic termination of operations for enumerated agencies. A legislative act to continue enumerated agencies is necessary to prevent termination. For non-enumerated agencies, there is no scheduled termination, and no continuance act is necessary.

    The committee's recommendations take the form of bills submitted to the legislative house of which the chairman is a member.

  - *Frequency and Timing of Review*
    The frequency of review is every four years for state agencies named in the sunset law in the ***Code of Alabama 1975***, Section 41-20-3. For agencies with sunset provisions in their enabling statutes, the review period is every four years unless a different schedule is provided. The Sunset Committee can review agencies sooner than the schedule prescribed by law. All state agencies, whether enumerated or not, can be reviewed at the discretion of the committee. Either house of the legislature may, by resolution, require the Sunset Committee to review any agency of the state.

Review of an enumerated agency is done in the calendar year prior to the regular legislative session that precedes the date on which the agency is scheduled by law for termination. For example, agencies scheduled to terminate on October 1, 2003 are reviewed in the 2002 calendar year. Non-enumerated agencies are also reviewed at this time.

- *Committee Procedures Generally*

  The following procedures have evolved over time and have remained relatively constant from year to year. The ***Code of Alabama 1975***, Section 41-20-6(c), requires agencies under review to provide specified information about their operations and any other information the committee desires concerning agency operations.

  The Department of Examiners of Public Accounts assists the committee by acting as its agent to obtain, compile, and evaluate information concerning agency operations, and by producing a report on the operations of each agency for use by the committee. These reports become public documents following their presentation to the Sunset Committee, and are published at the Examiners of Public Accounts' website.

  The examiners' report to the Sunset Committee will normally include, and the committee will consider, among other things, the following:

  - Compliance with the state's Open Meetings Act
  - Compliance with the state's Administrative Procedure Act regarding proper adoption of administrative rules
  - Compliance with specific statutory requirements included in the agency's statutes
  - Determination of whether the agency is charging fees not authorized by statute, or is not charging fees it should be charging
  - Determination that board/commission minutes are appropriate and record the official actions of the board/commission
  - Identification of significant issues facing the agency and determination of how the agency is dealing or will deal with them
  - Determination of the nature and extent of agency communication with the public and with its clients
  - Determination that the agency's rules are not in conflict with state statutes
  - Comparison with other states
  - Explanation of any large changes or pronounced trends in financial status, both overall and within categories presented on the financial schedule
  - Evaluation of the agency's licensing process
  - Evaluation of the agency's regulatory and disciplinary process, especially focusing on the handling of complaints
  - Evaluation of other agency processes that are not licensing/regulatory in nature
  - Development of statistical information necessary for presentation of the report or to support report information
  - Determination of the extent of overlapping jurisdiction with other agencies
  - Confirmation of statements concerning prior audit findings obtained at the entrance conference to determine if prior audit findings have been resolved

- Survey of board members, licensees, and complainants

The Sunset Committee also may consider any other information that may come to its members in their capacity as legislators and members of the Sunset Committee.

When reviewing agencies, the Sunset Committee is required by law to hold public hearings and receive testimony from the public and all interested parties. The committee schedules two-day meetings as frequently as necessary to review all of the agencies on its schedule. On the first day, representatives from the Examiners of Public Accounts brief the committee on their reports and answer any questions the committee may have. On the second day, a public hearing is held. The hearing usually consists of a presentation by the agency head and by other interested parties, and questions by the Sunset Committee.

Sunset Committee meetings begin following the end of the regular legislative session on a schedule adopted by the committee at its first meeting. In addition to representatives from the Examiners of Public Accounts, an attorney from the Legislative Reference Service is routinely present at committee meetings.

The committee normally takes no official action until its final meeting, which is a business meeting to decide the contents of sunset bills, the means by which the committee makes its recommendations. Once the contents have been decided, the Legislative Reference Service prepares the bills. At the discretion of the Sunset Committee chairman, the Examiners of Public Accounts and the Legislative Reference Service produce a narrative report to the legislature, explaining the bills and containing such other information as the chairman desires regarding the actions of the Sunset Committee.

- *Legislative Actions on Sunset Bills*

  The ***Code of Alabama 1975***, Section 41-20-10, describes the conditions of debate and voting on bills submitted by the Sunset Committee. The sunset bills are submitted to the legislative house of which the committee chairman is a member. On the tenth legislative day of the regular session, one hour after convening of the house of which the committee chairman is a member, sunset bills must become the first order of business from day to day until voting is complete. Other business may take precedence by a three-fifths vote of members present and voting.

  On the fifth legislative day after passage of sunset bills by the legislative house in which they were introduced, sunset bills must become the first order of business from day to day in the other legislative house until voting is complete. Other business may take precedence by a three-fifths vote of members present and voting. The provisions of Section 41-20-10 limit debate.

  Like other bills, sunset bills can be amended or substituted in the legislative committees or on the floor of either legislative house.

- *Cessation of Operations by Terminated Agencies*
  A bill to continue the operations of an enumerated agency reviewed according to the schedule specified by law is necessary to prevent its automatic termination. If a continuation bill does not pass, the agency automatically terminates on October 1 and can engage only in administratively winding up its affairs. The ***Code of Alabama 1975***, Sections 41-20-12 and 41-20-14, address cessation of operations by terminated agencies.

Section Eighteen: Examples of Common Findings

Frequent Non-Compliance Issues

Based on a review of legal compliance reports and sunset review reports, instances of non-compliance have a history of repeating themselves. The following list includes the most common noncompliance issues:

- *Administrative Rules*
  - Rules placed in effect without procedures required by the Alabama Administrative Procedure Act
  - No rules when the law states a rule is required
  - Rules improperly enlarge upon the law
  - Rules in conflict with the law
  - Forms do not accompany published administrative rules
  - Agency not complying with its own rules

"The Board adopted changes for its Administrative Rule 364-X-13-.03; however, the rule change was not processed according to procedures required by the State's Administrative Procedure Act. Consequently, the rule change is not valid and is unenforceable."

"The Board has not set by administrative rule two fees required by statute. The Board's enabling statutes require the Board to set a fee for a copy of a roster of licensed geologists and a fee for the replacement of any license lost, destroyed, or mutilated. The exact amount is not stated in the law. Since the exact amount is not stated in the law, the Board becomes responsible for setting the fee amounts. Setting the fee amounts creates Board policy that meets the definition of an administrative rule, which is required to be adopted and executed by the Board in accordance with procedures provided in the State's Administrative Procedure Act in order to be valid and enforceable. The executive assistant stated that the charge for producing a paper copy of the roster would be $0.25 per page, but that policy has not been adopted as an administrative rule. The ***Code of Alabama 1975***, Section 34-41-16 states, "Copies of this roster shall be made available to the public upon request and payment of a reasonable fee." The Code of Alabama 1975, Section 34-41-12(d) states, "A new license to replace any license lost, destroyed, or mutilated may be issued subject to the rules of the Board and payment of a fee established by the Board."

"The Board's Internet website listed an application request fee for which there is no specific statutory authority or administrative rule that addresses fees. Consequently, the website presented a fee the Board had no authority to collect. Upon inquiry by the examiner, the

Board's executive secretary stated that the Board does not collect an application request fee. He further stated that the fee would be removed from the Board's website. At the close of this examination, the fee had been removed."

"In the prior examination, we found that various fees charged by the Board were not within the limits prescribed by law. When fees are named within the law, the Board is prevented from charging additional fees or fees that differ from the amounts prescribed by law. Numerous opinions of the attorney general have stated that fees are limited to those specifically authorized by law. The following fee charged by the Board continues to be outside statutory limits. Prosthetists and Orthotists Dual Discipline License Fee – The Board's administrative rule 746-X-2-.04(3)(c) and (d) provides for a dual-discipline license fee of $800 and a single-discipline license fee of $500. Since the licensing law does not provide for a dual-discipline license, the board can issue only single discipline licenses, and must charge a separate license fee for each discipline. The ***Code of Alabama 1975***, Section 34-25A-12 provides for a license fee [singular] not to exceed $950 per discipline per term of license. This language requires the Board to set one fee per discipline and to charge it for each discipline that is licensed. By adopting its administrative rule 746-x-2-.04(3)(c) and (d), which provides for a fee of $500 for a single discipline license and $800 ($400 per discipline) for a person licensed in both disciplines, the Board is providing a discount to dual licensed persons that is not authorized by law."

"The Board has by administrative rule improperly set a quorum different from the quorum provided for by law. The Board's enabling statutes are silent regarding the number of members required to compose a quorum. However, the Board's administrative rule 746-X-1-.07 states that "Four (4) licensed prosthetists and/or orthotists or orthotic suppliers who are members of the Board shall constitute a quorum." The Code of Alabama 1975, Section 41-22-3(8) provides that "No less than a majority of the members of a multimember agency shall constitute a quorum authorized to act in the name of the agency, unless provided otherwise by statute." Because the Board's enabling statutes are silent as to quorum, the quorum is therefore required to be a majority of the Board members rather than the four-member quorum stated in the Board's rules. The Board currently consists of ten members of which a quorum would be six members. Numerous Attorney General Opinions have held that state agencies cannot use rules to change law."

"The Board's administrative rules were not amended to reflect changes in the Board's licensing law. Acts of Alabama, Act Number 2003-61 amended the ***Code of Alabama 1975***, Section 34-25-4 to provide diversity in the Board membership and to increase the membership of the Board from three to five members. The Board's administrative rule 740-X-2.01 addresses Board membership and was not amended to include the requirement for diversity and the increase in Board membership. Since we had brought this condition to the Board's attention in the last examination, we again recommended that the Board update its administrative rules to conform to the amendments to its licensing law provided in Acts of Alabama, Act Number 2003-61. No action was taken, and this condition continued to exist."

"The Board's forms are not included in the Board's administrative rules on file with the

Legislative Reference Service's Administrative Procedure Division, as required by law. The ***Code of Alabama 1975***, Section 41-22-3(9) as, "Each agency regulation, standard, or statement of general applicability that implements, interprets, or prescribes law or policy, or that describes the organization, procedure, or practice requirements of any agency and includes any form which imposes any requirement or solicits any information not specifically required by statute or by an existing rule or by federal statute or by federal rule or regulation; provided, however, all forms shall be filed with the secretary of the agency and with the Legislative Reference Service and all forms, except intergovernmental, interagency, and intra-agency forms which do not affect the rights of the public and emergency forms adopted pursuant to Section 41-22-5, shall be published in the Agency Administrative Code."

"On four occasions, the Board failed to meet on the dates prescribed by its rules. The Board did not meet on the second Thursday of the months of January, April, July and October as stated in Rule 135-X-3-.01 (1), which has been in effect for the last three years. The Board did not meet in January 2006. The Board met on Wednesday, October 19, 2005, on Tuesday, April 18, 2006, and on Friday, July 21, 2006.
The Code of Alabama 1975, Section 34-2A-3 (i) requires the Board to hold four or more meetings a year. The Board's administrative rule 135-X-3-.01 (1) states, "The Board shall hold not less than four meetings each year. The Board shall meet in the conference room of the Board of Examiners' office building at 10:00 a.m. on the second Thursday of the first month of each quarter (January, April, July, and October) unless such date is a federal or state holiday, as posted on the Board of Examiners' website or as notified in the Alabama Administrative Monthly."

"The Public Service Commission's Rules and Regulations are not filed with the Legislative Reference Website as required. The Commission rules are voluminous and diverse causing difficulties in filing them with the Legislative Reference Service."

- *Meetings*
  - Public notice of meetings was not posted on the Secretary of State's website
  - Voting with less than a quorum present
  - Meetings were not held according to the law
  - Executive sessions were held

"The Board did not promptly post notice of its upcoming meetings as required by the State's Open Meetings Act. State law in the ***Code of Alabama 1975***, Section 36-25A-3(b) requires the Board to post notice of its meetings, "as soon as practicable [reasonably capable of being accomplished] after the meeting is called and in no event less than 24 hours before the meeting is scheduled to begin…" The next meeting of the Board is routinely announced at the close of the current meeting. The number of days between announcement and posting of the next meeting ranged from 20 days to 110 days, with an average of 58 days."

"During the period examined, there were 19 instances for which notice of meetings was posted more than a month after the date of the meeting was set, and in two instances no notice was posted. These practices do not conform to the requirements of the State's Open Meetings Act (***Code of Alabama 1975***, Section 36-25A-3(b), which requires the Board to

post prior notice of all of its meetings and to post them on an Internet website maintained for that purpose by the Secretary of State "as soon as practicable [reasonably possible] after the meeting is called."

"The Board held two meetings without a quorum present. Only four members were present for the April 30, 2007 Board meeting, and only five were present at the July 21, 2007 Board meeting. Only ten members were serving at the time of these meetings, of which a quorum is six members. The Alabama Supreme Court stated in Auburn University v. Advertiser Co. (867 So.2d 293) that, "The attendance of a quorum is a condition precedent to everything. Until then there is an absolute incapacity to consider or act in any way upon any matter. When the body is so legally convened and constituted, it has power to consider what is within its jurisdiction and authority, and to declare the existence of facts other than the fact of its own existence. Until it comes into existence, it cannot proceed, nor make any record of its proceedings. It has no authority to make a record showing anything. Less than a quorum are without power to act or bind anybody in any manner. Their action, being absolutely void, may be ignored or attacked in any proceeding."

"The ***Code of Alabama 1975***, Section xx-x-x states that, "The commissioners shall meet at least once every three months at such time and place as may be by them selected and may meet oftener as business requires." A review of the minutes of the commission meetings revealed that on three occasions the board failed to meet within the required three months."

- *Minutes*
  - Minutes of all meetings were not taken
  - Minutes were not signed
  - Minutes did not reflect individual votes
  - Minutes were not approved
  - Minutes do not document all official actions decided by board or commission
  - Executive sessions

"The State and Local Government Records Commissions' Guidelines for Taking Formal Meeting Minutes provide that official government body meeting minutes should be signed and dated by the recording secretary and the presiding officer should sign the minutes when the minutes are approved. In the review of the minutes of the meetings of the Committee, there was one instance where the presiding officer did not sign the minutes."

"Votes to enter executive session were not individually recorded in the minutes, as required by the State's Open Meetings Act. The ***Code of Alabama 1975***, Section 36-25A-7(b) states that, "A governmental body desiring to convene an executive session, other than to conduct a quasi-judicial or contested case hearing, shall utilize the following procedure:… (3) The vote of each member shall be recorded in the minutes…"

"The State and Local Government Records Commissions' Guidelines for Taking Formal Meeting Minutes provide that official board meeting minutes should be signed by the recording secretary and the presiding officer (chairman). The minutes should be signed once

approved. In a review of the minutes of the meetings of the Alabama Public Health Care Authority, there were two instances where the minutes were not approved by the Authority at the following board meeting."

"Contract employees claim that they were given benefits not disclosed in their employment contract or the minutes of the board. Since the benefits are written in the contract or minutes, the official position of the board is not recorded; therefore, the employees are not entitled to such benefits."

"During the period examined, there were seven instances where the individual votes of members to enter executive session were not recorded in the minutes. According to the State's Open Meetings Act in the ***Code of Alabama 1975***, Section 36-25A-7(b) (3), "The vote of each member shall be recorded in the minutes" prior to convening an executive session."

"In two instances, the Board had improper discussions in executive session. One was held to discuss personnel evaluations and the other was held "to discuss Board personnel." In both instances, the Board discussed all board personnel, including the executive director. The executive director must file a Statement of Economic Interest, which disqualifies discussion of the executive director's job performance during an executive session."

- *Financial Issues*
  - Inadequate separation of duties surrounding custody and accounting for funds
  - Inadequate documentation to support receipts and/or disbursements
  - Payment for unallowable travel expenses
  - Incorrect travel expense reimbursement
  - Noncompliance with the Alabama Competitive Bid Law
  - Charging fees not authorized by law, most frequently seen enlarging on the law issue (previously covered in Administrative Rules)
  - Not charging fees required by law to be charged (Previously covered in Administrative Rules)
  - Failure to follow up on bad checks
  - Failure to deposit receipts in a timely manner
  - Payment twice for same service
  - Legal service contracts were not submitted to the Legislative Oversight Committee for review
  - Professional services were not procured via request for proposal (RFP) process
  - Payment of taxes
  - Failure to report unclaimed payments to the Treasurer
  - Excessive fees
  - Charging fees without making rules
  - Failure to maintain a mail receipt log
  - Unauthorized signature
  - Credit card usage

"Codification of Statements on Auditing Standards, Section 319.06, defines internal control as a process, affected by an entity's board of directors, management, and other personnel, designed to provide reasonable assurance regarding the achievement of objectives in the reliability of financial reporting and compliance with applicable laws and regulations. A deficiency was noted in the segregation of duties. The accountant who reconciles the bank accounts has the ability to create and post journal vouchers to the general ledger and also has access to the accounts payable module from which signed checks are prepared."

"Internal control procedures should be in place to ensure that all accounts are substantiated by adequate supporting documentation. The board did not provide documentation to support prepaid items totaling $198,453.48."

"Information was not made available for audit purposes. Numerous requests, both verbal and written beginning in February 2008, were made regarding this information."

"While attending an out-of-state conference, one Board member improperly claimed and was reimbursed for three meals that were provided by the conference over a two-day period, an overpayment of $39.00. The member selected the available option of claiming the daily maximum meal reimbursement of $39.00 without submitting receipts, without considering the effect of having been provided the meals. In addition, a Board member traveling out-of-state was reimbursed $9.00 for alcoholic beverages. The Department of Finance Fiscal Policy and Procedures Manual states that, "When meals are provided to the employee, the $39.00 [daily] amount allowed for meals with no receipts is to be adjusted downward by $13.00 for each meal provided. Meals are to be reasonable for the location and individuals will not be reimbursed for alcoholic beverages." These amounts were reimbursed when brought to the travelers' attention."

"Of forty-eight claims for travel expenses reviewed, five had errors. The errors included three claims that did not show a departure/return time, one claim in which a Board member was paid the incorrect per diem rate, and one claim in which a Board member was paid in-state travel allowances from the location where the Board member crossed the state line into Alabama rather than from the member's base. Attorney General Opinions Number's 89-00288 and 89-00371 state that a Board member traveling to a Board meeting from an out of state location where the traveler was on personal business should receive travel allowances from the member's base rather than from the out of state location."

"Travel allowances were not always paid in accordance with state law and regulations. We identified two instances where persons traveling on behalf of the Commission were paid a daily meal allowance when travel status for less than 6 hours. In 13 instances, one employee was reimbursed for travel on official state business in a privately owned vehicle for mileage in excess of that which was actually traveled. We identified one occurrence for which the employee was reimbursed for approximately ten times the actual mileage traveled. We noted two occurrences in which Montgomery-based employees did not obtain non-availability slip from the State Motor Pool prior to renting a car for travel on official business. The Finance Department's Fiscal Policies and Procedures Manual, Section 6-5F 1 b requires Montgomery-based employees to obtain a non-availability slip from the State Motor Pool as a prerequisite

to receiving mileage reimbursement for travel in a private vehicle. As an alternative, a memo from the Finance Director dated 8/28/03 informs state agencies that rental cars from a specified vendor may be used in lieu of a private vehicle, but there is no authorization to utilize a rental car as an alternative to seeking a vehicle from the State Motor Pool."

"Proper internal controls require that disbursements of funds be made in a timely manner. Some vendor invoices were not paid timely (within 30 days of receipt as stated on the invoice)."

"Proper internal controls require monthly bank reconciliations to be performed for each bank account of the Commission's accounting records. Bank reconciliations were not performed for the entire fiscal year 2007."

"A lack of necessary procedural controls or the failure to follow prescribed procedures indicated a deficiency in internal control. 1) Procedures were not in place to ensure adequate security of the accounting system. All employees of the business office have access to prepare and post journal entries to the general ledger without approval or review. The employees that reconcile the bank statements have access to the cash receipting module. 2) Procedures were not in place to ensure the security of the check signature stamp. The stamp is maintained in an office desk drawer unlocked that is easily accessible to unauthorized personnel. 3) Procedures were not in place to ensure the security of the check writing machine. The keys to the check machine are left in the machine in an unlocked room that is easily accessible to unauthorized personnel. 4) Procedures were not in place to ensure the security of blank checks. Blank checks are left in a box next to the check writing machine in an unlocked room that is easily accessible to unauthorized personnel."

"Expenditure testing revealed that 3 payments totaling $9,949.87 were made for the rental of a truck for the District #4 Commissioner. The Alabama Competitive Bid Law requires payments exceeding $7,500 to be bid. The Commission exceeded the required bid limit and did not bid the truck rental for fiscal year 2007. Furthermore, these payments are still being made through the current period."

"Checks returned for nonsufficient funds were not always posted to the records as being returned."

"Amounts received were not always deposited into the bank in a timely manner. This condition unnecessarily increases the risk of loss or misuse of state funds. In addition, amounts held in the bank were not always promptly certified into State Treasury for use by the Board, thus delaying the availability of funds for use by the Board. In reviewing nine certificates of deposit into the State Treasury, which were composed of multiple bank deposits, 27 bank deposits were certified into the Treasury between 16 and 86 days after the deposit in the bank. A review of deposits disclosed six fees received that were held at the Board's offices between 21 and 62 days before being deposited."

"An adequate system of internal controls includes policies and procedures to prevent duplicate payments. The Department made a duplicate travel payment to an employee in the amount of $75. We notified the employee and the employee repaid the amount charged."

"A review of legal services provided by three private attorneys revealed that the Board did not submit the contracts for these services to the Contract Review Permanent Legislative Oversight Committee as required by state law and did not obtain Deputy Attorney General appointments for the attorneys as required by the Attorney General, or obtain the Governor's approval to contract the attorneys at a higher rate than the standard $85/hour, as required by the State's Attorney General. The ***Code of Alabama 1975***, Section 29-2-41.2(b) states that, "Notwithstanding any other provisions of this article, all contracts for employment of an attorney to provide legal services, including contracts involving an attorney providing legal services under an agreement with the Attorney General, shall be reviewed by the committee." In Attorney General Bill Pryor's memorandum dated February 4, 2003 and attached policy statement, to all state departments, boards, agencies, commissions and institutions, he states that, "An attorney must be appointed in writing and approved [by the Attorney General's Office] before performing any work for the agency." . . . "Legal services are to be provided at the rate of $85/hour; however, in the event that an attorney is entitled to a higher rate because of the specialty or uniqueness of the situation, arrangements must be made with the Governor's Legal Advisor to approve such higher rate." "All legal services contracts must be sent to the Legislative Contract Review Committee."

"During the prior examination, the Board utilized the professional services of three private companies. None were obtained by means of the competitive selection process required by the ***Code of Alabama 1975***, Sections 41-16-70 through 41-16-72. We recommended that the Board should obtain professional services in accordance with procedures provided in the ***Code of Alabama 1975***, Sections 41-16-70 through 41-16-72 and should maintain such records as are necessary to show compliance with these procedures. In the current period examined, the Board did not comply with Alabama's competitive selection process before signing a contract with New Tech Solutions to provide various IT services. The contract amount is $60 per hour, not to exceed $100,000 over the length of the contract. The Board did not solicit requests for proposal (RFP) or otherwise afford other IT professionals an opportunity to apply for the work contracted with New Tech Solutions. The ***Code of Alabama 1975,*** Section 41-16-72 requires that, "Notice of need for professional services shall be widely disseminated to the professional community in a full and open manner. Procuring state entities shall evaluate such professionals that respond to the notice of need based on such state entity's qualification-based selection process criteria. Any such procuring state entity shall then make a good faith effort to negotiate a contract for professional services from the selected professional after first discussing and refining the scope of services for the project with such professional."

"We found several instances in which an employee of the Commission's historic sites made personal purchases of minor items needed for maintenance of the site and was reimbursed by the Commission. Sales tax was paid on the purchases and was reimbursed by the Commission. As a state agency, the Commission is exempted from payment of sales tax by the ***Code of Alabama 1975***, Section 40-23-4(a)(11)."

"The Board has not reported or forwarded to the State Treasurer's Unclaimed Property Division checks issued by the Survey that have remained uncleared by the bank for more than three years. The Board's Map Fund Account retained six such checks in its account.
The Alabama Disposition of Unclaimed Property Act of 2004 (***Code of Alabama 1975***, Sections 35-12-70 through 96) mandates that unclaimed and abandoned personal property be reported to the State of Alabama Treasury Office. Checks in dormancy three years are considered unclaimed and abandoned property."

"The Board is charging excessive fees for licensee mailing lists ($60 for an e-mail file and $70 for a diskette file). Such information is considered a public record for which a copy is required to be furnished to the requestor. Attorney General's opinions indicate that amounts charged for copies of public records should be based upon the actual cost of providing the copy"

"Although required by the State's Administrative Procedure Act, the Board has not incorporated into its administrative rules the following policies regarding collection of fees: bad check charge; specifically named fees; and examination/re-examination fees."

"The Board did not consistently maintain its receipts log or reconcile the log to amounts deposited. In order to insure that all amounts received are deposited, a common control practice is to maintain a log of amounts received and to reconcile it to deposits. The Board created such a log but did not properly maintain it or reconcile it to deposits. Consequently, there was in increased risk that amounts received could be lost or misused without detection."

"Two former executive directors remained on the official list of persons who have permission to authorize disbursements of Board funds. The list is provided to the State Comptroller's Office. This condition unnecessarily increases the risk of loss or misuse of State funds. The former executive directors were removed from the list of authorized signers when the matter was brought to the attention of staff."

"The Board utilized credit cards but did not have policies in effect regarding the use of credit cards. Controls were not in place to assure that purchases were for allowable items. Some credit card purchases were not documented with receipts showing what was purchased. One authorized user of the card was an ex-employee who left the Board at the end of January 2007. These conditions unnecessarily increased the risk of loss or misuse state funds."

"Seven of the twenty-nine payment vouchers associated with out-of-state travel allowances exhibited discrepancies consisting of untimely submission of required forms to support advance payments for travel expenses. The travel form is a notarized affidavit, with supporting receipts or other documentation prepared by the traveler that itemizes the claimed amounts. The form was submitted by the travelers 15, 23, 23, 23, 30, 58, and 212 days respectively, after the travel was completed."

"Beginning with the examination for the period October 1, 2001 through September 30, 2003 and in each following examination, there were significant instances of payment for travel expenses that were not in accordance with state law and/or were not supported with adequate documentation, resulting in both overpayments and underpayments to travelers. These instances included:

- Underpayment of overnight travel allowances
- Expenses paid for traveler's family
- Payment for alcoholic beverages
- Duplicate payments for a meal
- Insufficient documentation to determine eligibility for amount claimed
- Miscalculation
- Payment for overnight travel 10 miles from base
- Payment at incorrect mileage rates.

In each instance, overpayments and underpayments were resolved by reimbursements of overpaid amounts to the Board by the travelers and additional payments to the travelers who had been underpaid. Current Status:

During the period covered by this examination, these discrepancies continued. A sample of disbursements disclosed sixteen payments of travel expenses for which there were undocumented claims and net overpayments totaling $3,384.94 to five Board members and the executive director. Claims for reimbursement of travel expenses were not always correctly completed or accompanied by sufficient documentation to reveal the nature and extent of expenses actually incurred by the traveler. There were also inaccurate calculations within the travel claims. When the Board was notified of the discrepancies, overpayments totaling $1,325.16 were reimbursed to the Board's checking account; and additional documentation necessary to support $2,086.00 of inadequately documented expenses was provided by the travelers. The Board issued checks totaling $26.22 to settle underpayments."

"Records were insufficient to verify that all online renewal receipts were deposited.

The Board did not retain documentation of transactions provided during processing of online renewals. Consequently, we could not compare online renewal receipts with amounts deposited and could not verify that the Board had done so."

"The Board expended state funds for unallowable items. On three occasions, the Board purchased coffee, water, and coffee supplies (cups, sugar, creamer, etc.) for use at board meetings. According to Board staff, the purpose of the coffee was to provide refreshment during the meetings. Board meetings are recessed for lunch."

"The Board paid sales tax on some purchases; although, it is exempt from payment of sales taxes. Of 133 invoices selected in a sample, the board paid sales tax of $63.93 on three invoices for supplies."

"The Board twice split purchases to circumvent a requirement to obtain approval for purchases over $500. The Board purchased copies of software costing $449.00 each on two consecutive days from the same vendor. The Board also purchased two notebook computers costing $429.99 each on two consecutive days from the same vendor. The Board did not

obtain approval from the Purchasing Division of the Department of Finance to purchase the software or the notebook computers."

"The former executive director used her position to make personal purchases totaling $1,443.82 using the Board's credit accounts with three office supply vendors. No sales tax was paid on four of the five purchases. The items purchased during the period examined included a digital photo frame, three computers, a wireless stereo headset, and a Bluetooth ear bud. With one exception, all of the purchases were paid for at the time of purchase. During a property audit by the State Auditor's Office, one computer was not found. Upon inquiry, the former employee executive director stated it was a personal purchase, and reimbursed the board for the amount of the computer. Because the Board is exempt from payment of sales tax on its purchases, no sales tax was paid on four of the five purchases. According to a letter received from the former executive director, she normally deducted the amount of personal purchases from the invoice before submitting the invoice to the Comptroller's office for payment."

"Controls over vehicle operations were insufficient. Gasoline purchase records, when compared to recorded odometer readings, produced gas mileage for the Board's 2006 Chevrolet Trailblazer that ranged from 9 MPG to 41 MPG. There are no fuel purchases between October 22, 2008 and November 30, 2008. However, odometer readings reported on invoices indicate that 1,504 miles of travel occurred during this period. This type of discrepancy indicates that improper use of a state-owned vehicle may have occurred."

"The Board's contract investigator and inspector were not paid mileage allowances in accordance with the terms of their contracts, which resulted in overpayments to the investigator and underpayments to the inspector. Also, motel expenses claimed by the inspector were often not accompanied by either the name of the motel or a motel receipt.
The Board employs an investigator and an inspector under contract. The investigator's contract provides compensation of "$55.00 an hour and state mileage rate…". The inspector's contract provides compensation of "$100 per job plus mileage cost and any expense occurred if overnight stay is required". The mileage rate payable to both is the mileage rate paid by the state for persons who travel on behalf of the State, which is set by the Code of Alabama 1975, Section 36-7-22 at the amount allowed by the Internal Revenue Code for income tax deductions. The rate is changed at least annually and is communicated to state agencies by the State Comptroller. Billings from the investigator and the inspector often included mileage billed at incorrect rates. The billings were paid as billed without correction. Consequently, the investigator was overpaid $306.75 for mileage, which he returned to the Board, and the inspector was underpaid $1,137.19 for mileage. When the matter was brought to the Board's attention, the inspector was paid the amount due him. Also, in 12 instances, the inspector submitted a claim and was paid for motel expenses although the claim was not accompanied by either a receipt or the name of the motel."

"An adequate system of internal controls over expenditures should provide reasonable assurance that improper expenditures of funds cannot occur without detection during the normal course of work. During expenditure testing, examiners discovered a payment made

to the wrong vendor by the Board. The vendor realized the payment was in error and returned the payment to the Board. This is considered an internal control weakness."

"Examiners identified twenty-two (22) instances where invoices did not have either a material receipt attached or the signature of a staff member indicating that the purchased goods were received or that the purchased services were performed."

"Twenty-six (26) instances were found for which invoices indicated excessive personal us of a state-supplied cellullar telephone by a staff member. Additional audit procedures revealed that the staff member was using the state-supplied cell phone in the operation of her privately-owned business. The Commission incurred charges of $938.19 during the period examined for calls that exceeded the cellular telephone plan's allotted minutes. The employee reimbursed the Commission $938.19 for the cost of exceeding the allotted minutes. Upon notification of the staff member's usage of the cellular telephone, the Public Service Commission notified the State Ethics Commission of the circumstances. The Code of Alabama 1975, Section 36-25-17 (a) provides that, "Every governmental agency head shall within 10 days file reports with the Commission [State Ethics Commission] on any matters that come to his or her attention in his or her official capacity which constitute a violation of this chapter.""

- *Personnel*
  - Inaccurate leave accrual start dates recorded for employees
  - Inaccurate annual, sick, personal, and compensatory leave balances
  - Incorrect computation of overtime
  - Inaccurate computation of longevity
  - Overpayments or underpayments at termination of employment
  - New Hire forms were not in the personnel files of newly hired personnel
  - Improper withholding taxes

"The ***Code of Alabama 1975***, Section 36-6-11 which states in part: "Each person employed by The State of Alabama, and all legislative personnel, officers or employees, including but not limited to Legislative Reference Service personnel, whether subject to the state Merit System or not, shall be entitled to and receive in a lump sum the first pay day of December each year the sum of three hundred dollars ($300) per annum after such employee has served for a total period of five years and shall receive the payment until the tenth year of total service, at which time the payment shall be made in a like manner and at a like time but in the amount of four hundred dollars ($400) per annum until the fifteenth year of total service, at which time the payment shall be made in a like manner and at a like time but in the amount of five hundred dollars ($500) per annum until the twentieth year of total service, at which time the payment shall be made in a like manner and at a like time but in the amount of six hundred dollars ($600) per annum until the twenty-fifth year of total service, at which time the payment shall be made in a like manner and at a like time, but in the amount of seven hundred dollars ($700) as long as the employee remains in service." Out of thirteen employees tested, one employee's longevity counter was incorrect which resulted in an overpayment of one hundred dollars. This has been resolved by the Department."

“The Commission had incorrectly computed an employee’s leave progression start date (LPSD), thereby improperly crediting the employee with two month’s additional service time. An inaccurate leave progression start date can result in incorrect computation of leave balances and incorrect payment of amounts due. The error was corrected prior to completion of this examination.”

“Compensatory time for Commission employees who are subject to the federal Fair labor Standards Act (FLSA) overtime provisions was awarded at straight time rather than time and one- half, as required by the FLSA. Employees governed by the Fair Labor Standards Act are subject to the provisions of Section 7(o)(1) of the Act, which states “Employees of a public agency which is a State, a political subdivision of a State, or an interstate governmental agency may receive, in accordance with this subsection and in lieu of overtime compensation, compensatory time off at a rate not less than one and one-half hours for each hour of employment for which overtime compensation is required by this section.”

“During the prior examination, three employees were found to have leave balance errors. This type of error continues. In the current examination, we found errors in the leave balances of three other employees, including an understatement of annual leave of 1 hour, overstatement of annual leave by 4 hours, understatement of sick leave by 8 hours, and overstatement of sick leave by 20 hours. All of the errors occurred at the end of the year, with the errors for two persons consisting of incorrect leave balances brought forward into the new year. In the prior examination, we recommended that leave balances should be reported to all employees for confirmation at least monthly and immediately prior to payment of unused balances at termination of employment.”

“One employee was improperly awarded compensatory time for each day worked in excess of eight hours rather than for hours worked in excess of 40 hours, as provided in the federal Fair Labor Standards Act in 29CFR778.103. Consequently, the employee was incorrectly compensated.”

“Two employees used annual leave rather than accumulated compensatory time, a practice that does not comply with Rules of the State Personal Board #670-X-11-.07. Rule 670-X-11-.07 requires use of compensatory time before annual leave is used, unless such use would result in the loss of annual leave balance at the end of the year due to annual leave carryover limits.”

“The ***Code of Alabama 1975***, Section 36-26-26 states "Upon retirement, each employee who acquires sick leave pursuant to the State Merit System shall receive payment of 50 percent of his or her accrued and unused sick leave, not to include escrowed sick leave as provided herein, at the time of his or her retirement, and payments for the sick leave shall be made at the same rate as his or her regular pay, not to exceed 600 hours. In the review of 25 employees that were terminated, separated, or retired during the examination period, there was one instance in which a retired person received more sick leave than the allowed maximum hours. As a result, an overpayment of $439.29 was paid to an employee. Once this error was brought to the attention of the agency, the money was returned by the employee prior to the end of fieldwork.”

"Due to an erroneous payroll entry, an employee was paid $75.84 at termination for overtime hours that the employee did not work. The employee failed to respond to requests for repayment by the board and by the Examiners of Public Accounts."

"The longevity counter must be recorded correctly in the Governmental Human Resources System (GHRS) in order for annual longevity payments to be made in the correct amount. In a review of 25 personnel files, there was one instance in which the longevity counter was not accurately adjusted to reflect an employee's break in State service. This error resulted in an employee receiving a longevity payment of $300 before he was entitled to receive one. This error was corrected prior to the end of fieldwork."

"According to State Personnel Rule 670-X-13-.06, upon separation from service an employee shall be paid for the actual number of days annual leave he has earned, up to a maximum of sixty days. The computed amount will be based on the daily pay rate at the time of separation multiplied by the number of days leave due. In a review of 25 employees who separated from state service, we noted an error with one person in regards to payment for their ending leave balance. An employee resigned from state service with an annual leave balance of 12 hours and 20 minutes. The computed amount of termination pay for annual leave due was $111.77. After payroll records were carefully searched, it was determined that this employee did not receive payment for the final annual leave balance as reconciled to the GHRS. After we informed the Department of this error, it paid this individual the amount they were due."

"Act Number 97-228, Acts of Alabama, requires that an employer obtain certain information from newly hired, recalled, or rehired individuals and that this information be submitted to the Department of Industrial Relations within seven days. The board had no evidence of completing or submitting New Hire Reporting Forms."

"Procedures were not in place to ensure that correct income tax withholdings were deducted. The accuracy of federal and state withholdings could not be verified because Employee's Withholding Allowance Certificates, Federal Forms W-4 and Alabama Forms A-4, could not be located for twelve of sixty employees tested."

- *Licensing*
  - Failure to require a Social Security Number on licensee forms
  - Inadequate documentation of each licensee's compliance with requirements necessary to do business in Alabama, including payment of fees
  - Exempting persons not specified in the law as exempted
  - Conditions of licensing not fully met
  - Conditions of licensing different from conditions specified by law
  - Voided forms

"We recommended that the Board should ensure that all qualifying criteria are met prior to issuing any license and that proof of having met the criteria are documented in the records of each licensee. Of 67 licensees sampled, 12 did not report their social security numbers, 6 did

not have renewal documentation in their files, 24 had no proof of required liability insurance, f4did not answer criminal background questions, 2 were not notarized, and one did not have the required educational hours.

Establishment Licensees

Of 14 licensees sampled, 5 did not include the Social Security number of the person completing the application, 4 lacked proof of insurance, and one application was not notarized.

Of 16 schools sampled, 13 had no renewal documentation, 2 did not submit the required documents for licensure, one listed an instructor who held an expired license, and none of the schools submitted a social security number of the person applying for the license.

None of the schools had documentation of accreditation or licensure from either the State Department of Education (state school) or Postsecondary Education (private school). The examiner was able to locate state education licensure status for all but 4 schools on the Department of Postsecondary Education website. These 4 schools do not appear to be accredited or licensed by the State Department of Education, the Department of Postsecondary Education, or an accreditation commission or agency recognized by the U. S. Department of Education.

Instructor Licensees

Of 13 instructors sampled, none provided their social security numbers, six did not have proof of experience, and one was not a currently licensed massage therapist (LMT).

Licensees Generally

Of 53 insured licensees tested, six were not insured by a company rated "A" or better, as required. The examiner asked the executive director, how the Board checked for the required rating. The executive director stated that he did not know it had to be done and it is not being done. The examiner was able to locate a rating for most of the companies from which licensees had insurance.

In the current examination, the discrepancies continued. In a sample of 138 license files, there were ten instances where licenses were renewed without general liability insurance. Six had been renewed for more than one license period without proof of insurance (licenses are renewed biennially). The executive director stated that the Board had directed the license renewals to be issued without requiring these licensees to have general liability insurance, a practice for which the board has no authority in its enabling statutes. There is no exception in the law to the requirement for insurance.

Also, in a sample of seven school licensee files, none of the applications included the Social Security number of the person signing the application for licensure/renewal. Social Security numbers are required to be submitted by applicants for original licensure or license renewal. Attorney General's opinion 2004-022 extends this requirement to the individual or individuals in a corporation, partnership, or limited liability company required to make application for a license."

"The Board purchases and issues pre-numbered preprinted licenses but does not retain voided license forms for audit. This creates an unnecessary risk of misuse of license forms without detection."

"The Board did not charge the correct fee to issue a funeral director or embalmer license by reciprocity. The Board is charging $50.00 rather than the $100.00 fee required by law."

"The last examination revealed that the Board's administrative rules required all of its licenses to expire on August 31 of each year although state law requires the licenses to expire on the anniversary date of original issuance. The Board's administrative rules in Chapter 473-X-3-.01 (9) state that, "all licenses expire on August 31st of each year. If not renewed within sixty (60) days of the expiration date, the license is considered expired…" The administrative rules in Chapter 473-X-8-.01 (1) repeat that licenses expire on August 31st of each year.

These rules are in conflict with state law, which provides in the Code of Alabama 1975, Section 34-14C-4(d) that, "Licenses issued pursuant to this chapter expire on the anniversary date of the original license unless renewed".

We recommended that Board should amend its rules to comply with the law.

The current examination revealed that the Board had not amended its rules and continued to cause its licenses to expire on August 31 of each year. No bill had been filed to amend the law to require licenses to expire on August 31."

"The Code of Alabama 1975, Section 28-3A-21(a)(12) requires the Alabama Alcoholic Beverage Control Board (ABC) to levy an annual license fee of one hundred fifty dollars ($150) for a retail beer license for off-premises consumption. During the examination period, ABC levied only one hundred dollars ($100) for a retail beer license for off-premises consumption."

- *Public Records*
  - Failure to obtain and implement a State Records Commission-approved Records Disposition Authority (RDA)
  - Failure to report annually the disposition of records destruction
  - Charging fees in excess of reasonable cost of copying public records

"The Board does not have an approved Records Disposition Authority (RDA). The Board's retention of all records has resulted in a records storage problem. The ***Code of Alabama 1975***, Section 41-13-21 provides for the State Records Commission to make a determination as to which state records to be preserved or destroyed and requires state officers not to cause the destruction of state records without prior approval of the commission. To implement this requirement, state agencies consult with the Department of Archives and History, Records Division to develop a plan of records disposition for approval by the State Records Commission. Since we had brought this condition to the Board's attention in the last examination, we again recommended that the Board contact the Records Division of the Department of Archives and History for consultation and development of an approved RDA. No action was taken, and this condition continued to exist."

"The Board did not submit to the State Records Commission a required annual report of records management activity for the 2006 fiscal year. The Board's Records Disposition Authority, a document approved by the State Records Commission that is required of all agencies and which provides for retention periods for various types of records states on page 3-5, "One condition of this authorization is that the agency submit an annual Records Disposition Authority (RDA) Implementation Report on agency records management

activities, including documentation of records destruction, to the State Records Commission in October of each year." The Board's executive secretary stated that no report was filed because no reportable activity occurred."

"Public records were shredded, placed in bags, and transported in an employee's personal vehicle. No record was maintained of what was shredded."

"During the last examination, we found that the Board charged excessive fees for lists of its licensees. The Board charged $100 for a list of its licensees with addresses, and $125 for the same list on labels. According to the Board's executive director, the fees are based on the cost of maintaining the records from which the list is produced. The Code requires the Board to keep a record of licensees along with their addresses as a part of its duties, and the law authorizes the Board to collect licensing and regulatory fees to carry out this and other duties. It is improper for the Board to impose a charge for providing a copy of the names and addresses of licensees that includes the cost of maintaining the record, because the law has already provided funds to maintain the record. The only appropriate charge for a copy of the names and addresses of licensees is the incremental actual cost of extracting the information and conveying it to the requestor, without regard to the cost of maintaining the record. The Attorney General in his opinion 2004-108 reiterates that fees charged for copies of public records must be based upon actual cost, cannot be imposed to restrict public access, and that copies are available to businesses to the same extent as to private individuals.
We recommended that the Board should limit the fees it charges for copies of the names and addresses of its licensees to the incremental actual cost of producing the copies, without regard to the cost of maintaining the records.
During a Board meeting on November 12, 2004, the Board reestablished the fees for lists of its licensees. We found no record that the amended fees were based upon the actual incremental cost of producing a copy, and the fees remain excessive. The Board's executive director stated that part of the fees was to deter mass mailings to licensees.
Type Fee - Previous Fee
List of all licensees $ 75 - $100
List of all licensees on diskette $ 75 - $100
List of all licensees on labels $100 - $125"

- *Property/Fixed Assets*
  - Inadequate controls over property
  - Failure to have an accurate property listing
  - Failure to capture all information required by law
  - Failure to receipt equipment to person with custody

"Good internal control procedures require that assets belonging to the Commission be properly identified as such with permanent tags or markers. This practice helps facilitate the inventory of the assets and prevents theft or improper use of the equipment. Audit tests revealed that much of the equipment owned by the Commission was not marked or tagged as property of the Commission."

"The property manager does not conduct a full and complete property inventory at least annually. Also, two leased copy machines with purchase agreements were not included in the Board's property inventory listing. These conditions unnecessarily increase the risk of loss or misuse of state-owned property or property in the custody of the state. The ***Code of Alabama 1975***, Section 36-16-8(1) states: "Except for books, the property manager shall make a full and complete inventory of all nonconsumable personal property and certain other items of personal property deemed important or sensitive enough by the Property Inventory Control Division to be included in the inventory of state property of the value of five hundred dollars ($500) or more owned by the state and used or acquired by the department or agency. The inventory shall show the complete description, manufacturer's serial number, cost price, date of purchase, location, and custodial agency, responsible officer, or employee, and the state property control marking. A copy of the inventory shall be submitted to the Property Inventory Control Division on October 1 and April 1 of each year." Attorney General's Opinion 97-00035 states that property should be placed on inventory when the state has title to the property and uses the property or when the state has use and control of the property, even though it may not have title to the property."

"The Commission did not have adequate accountability for its nonconsumable property items. We found the following discrepancies: Written receipts to record the transfer of custody of property from the agency's property manager to its user were not current. Of 24 receipts sampled, ten were for items that had been salvaged but had not been removed from the property inventory records. We also found three items entrusted to someone other than the property manager for which there was no receipt signed by the person responsible for the item. Property with an acquisition value of $500 or greater purchased by state agencies is recorded in a common database maintained by the State Auditor. Property with an acquisition cost of less than $500 is accounted for with agency records according to agency policy. Disposition of all property items is required by law to be disposed of in a formal manner utilizing the state's procedures for disposal. 118 items with a value of less than $500 were recorded in the agency's inventory records, but the location of these items was not known. Staff stated that the location of these items was unknown for years, but no action was taken to remove them from inventory utilizing the state's disposal procedures."

- *Miscellaneous*
  - Failure to send annual reports to the governor and/or other officials
  - SMART reporting non-compliance
  - Insufficient controls over information technology
  - Failure to post board/commission vacancies
  - Staggered appointments
  - Destruction of records prematurely

"During the last examination period, the Board did not annually report the amount of the unobligated balance in its fund on April 1 of each year, as required by law.
The ***Code*** states, "Not later than April 5 of each year, the Board shall report the amount of the unobligated balance of the fund on April 1 of such year. The Board shall notify the public and the Department of Revenue if the registration fee imposed by Section 22-30D-6 will be abated or be payable on the following July 1." We recommended that the Board

should annually report on its Internet website not later than April 5 of each year its fund's unobligated balance on April 1 of that year. The report should also state whether registration fees will be collected. The report should also be made in writing to the Department of Revenue.

Current Status

The unobligated balance of the fund is reported on the Board's internet website after each Board meeting. However, the Board did not send a report to the Department of Revenue and the Board did not notify the public or the Department of Revenue whether the registration fee will be collected, as required by law."

"The Commission did not comply with the Department of Finance SMART program. The Commission's SMART goals and objectives were too abstract to be measurable. Performance targets were not established, and performance was not reported nor could it have been meaningfully reported. The Director of Finance implemented a system of budgeting that requires each agency to report its performance, the system to be named SMART, an acronym for Specific, Measurable, Accountable, Responsive, and Transparent. As a part of the SMART program, each agency is required to submit its goals and objectives to the Department of Finance - the goals to be stated as long-term, multi-year targets, which are to be achieved through accomplishment of stated objectives, which are single-year targets. In order to report progress, the agency must design the goals and objectives so that progress toward their achievement can be measured. The SMART system includes a Quarterly Performance Report, which presents information to the public on achievement of an agency's annual objectives during each fiscal year. The report is required to include quality and efficiency objectives and to report the Commission's performance toward achieving the objectives during the year."

"Performance data provided by the board to the Department of Finance on the Board's SMART performance report could not be substantiated. Reported cost for the objective of, "Maintain unit cost of licensing and file maintenance" for the 2007 fiscal year could not be verified from the Board's records. In addition, the Board's performance report stated that four newsletters were published, although only two newsletters were published. The Director of Finance implemented a system of budgeting that requires each agency to report its performance, the system to be named SMART, an acronym for Specific, Measurable, Accountable, Responsive, and Transparent. As a part of the SMART system, each agency is required to submit its goals and objectives to the Department of Finance - the goals to be stated as long-term, multi-year targets, which are to be achieved through accomplishment of stated objectives, which are single-year targets. In order to report progress, the goals and objectives must be designed so that the agency can measure annual progress toward their achievement. The SMART Budgeting system includes a Quarterly Performance Report, which presents information to the public on achievement of an agency's annual objectives during each fiscal year. The report is required to include quality and efficiency objectives and to report the Board's performance on the objectives during the year."

"In the State's SMART budgeting effort, each agency is required to report its performance to the Department of Finance. For the 2007 fiscal year, there were no records from which to verify data reported by the Board regarding its objective, "Decrease money spent on

reproduction and mailing paper forms." The Board reported actual performance of "$1,500 per thousand"."

"The Commission appears to have implemented the strategic planning and other applicable requirements of the SMART Governing program except with regards to its procedures over its preparation of the Quarterly Performance Report that is required by the SMART Governing program. When preparing the Quarterly Performance Report, an effective internal control system would ensure that documentation supporting amounts included in the report is available and maintained. When testing the Quarterly Performance Report of the Commission for the 2006-2007 fiscal year, I found that documentation was not always available to support amounts included in the report."

"We reviewed the internal control policies and procedures affecting the Board's ability to provide reasonable assurance that data, programs, systems, and related information will be protected from unauthorized use, disclosure, modification, damage, loss or other inappropriate access by persons or programs. We determined that these controls were not adequate to provide such assurance. Lack of adequate controls over agency data increases the risk of unauthorized use, disclosure, modification, damage, loss or inappropriate access by persons or programs."

"The Board did not provide notices of vacancies on the board to Secretary of State's Office as required by the ***Code of Alabama 1975***, Section 36-14-17 (d). Notices of seven (7) vacancies that occurred due to expiration of terms and of two additional vacancies that occurred due to resignation of the incumbents, were not communicated to the Secretary of State before the vacancies occurred. The Secretary of State maintains an Internet website that includes information about incumbencies and vacancies of boards and commissions, which is updated through notifications from the boards and commissions. Lack of notification or untimely notification contributes to inaccuracy of information available to the public."

"In the last audit, we found that recent appointments to replace three Board members did not meet the staggered-term requirements of the Board's enabling statutes. Three Board members were appointed in error to two-year terms rather than the statutorily required three-year terms. The length of these appointments defeats the staggered-term scheme created by statute. We also found that the terms of all Board members had expired. Two members were original appointees whose terms expired in 2002 and who continued to serve, but had not been reappointed. One member whose term expired in 2003 continued to serve, but had not been reappointed. One member whose term expired in 2003 was no longer serving, thereby creating a vacancy. The appointed terms of three members expired in 2006 (should statutorily have expired in 2007) and the members continued to serve, but had not been reappointed. We recommended that the Board should contact the Governor's Office and request appointments to terms that will restore the staggering scheme provided by law."

"In 2007, the Board destroyed records prematurely. Disposition of the records of each state agency is done under authority of a records disposition authority approved by the State

Records Commission, which prescribes the length of time various records must be retained. The Board's records disposition authority provides that business information files should be retained for 10 years after the closure of the business (page 3-3). The records disposition authority also states that records documenting employee hours worked, leave earned, and leave taken should be retained for 3 years after the end of the fiscal year in which created (page 3-5). According to the Board's executive director, the Board thought it had completed the process to update its records disposition authority to reduce the retention period for the records destroyed."

"In the last examination, we found that the Board's administrative rule regarding transfer of surplus funds to the State's General Fund was in conflict with state law. Consequently, the rule was void.

Opinion of the Attorney General 2006-147 states in reference, "The administrative rules and regulations, however, must be consistent with the constitutional or statutory authority by which they are promulgated, and a rule or regulation created out of harmony with the statute is null and void,

Ex parte State Dep't of Human Resources, 548 So.2d 176, 178 (Ala. 1988)"

The Board's administrative rule 798-X-3-.13(2) stated, "After the first three full fiscal years from the effective date of this act, if a surplus of funds exists which is greater than one year's operating expense, the funds shall be distributed to the general fund."

The Code of Alabama 1975, Section 34-27B-6 states that, "After the first three full fiscal years from May 17, 2004, and every three years thereafter,

if a surplus of funds exists which is greater than two years' operating expense, the funds shall be distributed to the General Fund."

After the prior finding, the Board amended its Administrative Rule 798-X-3-13 (2) to state that, "After the first three full fiscal years from May 17, 2004, and every three years thereafter, if a surplus of funds exists which is greater than two year's operating expense, which is the prior two year's annual budgets, the funds shall be distributed to the general fund." The amended rule remains in conflict with the statute. Operating expenses are actual expenses. Budgets are anticipated expenses."

CONTACT LIST

Contact	*Available Information*	*Contact Information*	***Notes***
Alabama Interactive	Renewing licenses on-line	www.alabamainteractive.org	The State of Alabama has a contract in place for this vendor, but interested agencies will still need to sign a Memorandum of Understanding, as well as set up a fee schedule, etc.
State Web Site	Personnel and agency listings	www.alabama.gov	
State Operator	Telephone listings	(334) 242-8000	
Department of Archives & History, Governmental Records Division	Public records, records retention	www.archives.alabama.gov (334) 242-4452	Click on "For State and Local Officials"
Attorney General's Office	Legal counsel/representation, hearing officers, AG Opinions	www.ago.alabama.gov (334) 242-7300	
State Auditor's Office	State property	www.auditor.alabama.gov (334) 242-7028	
Finance Department	Fiscal Policy and Procedure	www.finance.alabama.gov (334) 242-7160	
Comptroller's Office	Fiscal Policy and Procedure	www.comptroller.alabama.gov (334) 242-7160	
Budget Office	Budget request and associated information	www.budget.alabama.gov (334) 242-7230	
Motor Pool Division	A State Motor Pool vehicle may now be reserved on-line	www.sd.alabama.gov	
Purchasing Division	Information and guidance regarding purchases	www.purchasing.alabama.gov (334) 242-7250	Lists are available for products and services and professional services

Risk Management Division	Insurance and bonding	www.riskmgt.alabama.gov (334) 223-6120	
Space Management Division	Office space – leases	(334) 242-2773	
Comprehensive Annual Financial Report (CAFR)	Statewide financial reporting	(334) 242-2193	See Comptrollers' website and click "CAFR instructions"
GHRS (Payroll)	Payroll issues	(334) 242-2200	See Comptroller's website and click "Monthly Reports"
Central Mail	Send and receive mail	(334) 242-2773	
Information Services Division	Information Technology and communication services, including phone, fax, internet, computers, computer systems, etc.	www.isd.alabama.gov (334) 242-3045	
Information Services Division Training	Computer classes	(334) 215-8256	
Printing & Publications	Printing and publishing services, pamphlets, brochures, books, presentation certificates, etc.	(334) 242-2808	See Finance's website and click on "Printing and Publications"
Department of Conservation and Natural Resources (DCNR) – State Lands Division	To sell or lease state lands, to report inventory of state owned lands	http://www.outdooralabama.com/public-lands/stateLands/ (334) 242-3484	
Alabama Department of Economic and Community Affairs (ADECA)	State recycling program	www.adeca.alabama.gov Van Johnson (334) 242-5332	
Ethics Commission	Filing statements of economic interests, notices of representation for fee, notices of contract, and reporting violations of the ethics law, and training	**www.ethics.alabama.gov** (334) 242-2997	

Examiners of Public Accounts	Copies of issued reports, questions relative to audits, filing disclosure notices relative to contracts	www.examiners.alabama.gov (334) 242-9200	
Governor's Office		www.governor.alabama.gov (334) 242-7100	
Appointment Secretary	Notify Governor's Office of vacancies in board membership	(334) 242-2429	
Legislative Reference Service	Bill drafting, legislative reference information	www.lrs.state.al.us (334) 242-7560	
Administrative Procedure Division	Administrative Rules and Regulations – all state agencies	www.alabamaadministrativecode.state.al.us (334) 242-7570	
Legislative Fiscal Office	State fiscal information, legislator's guide to Alabama taxes	www.lfo.alabama.gov (334) 242-7950	
Peace Officers Standards and Training Board	Verify status of law enforcement employees regarding minimum standards qualifications	http://www.apostc.state.al.us/ (334) 242-4045	
Personnel Department		www.personnel.alabama.gov (334) 242-3389	
Employee Records	File documents regarding employee personnel transactions (hiring, terminating, promotions, raises, etc.)	(334) 242-3279	
Training	Training on personnel issues	(334) 242-3494	

Secretary of State	To register oaths, copies of acts, copies of the *Code of Alabama*, verifying registration status of out-of-state vendors, etc.	www.sos.alabama.gov (334) 242-7200	Boards must supply a listing of board members and vacancies on the board to the Secretary of State by December 4, 2006. Boards must also register with the Secretary of State to comply with Open Meetings Act requirements for public notification of board meetings.
State Treasurer's Office		www.treasury.alabama.gov (334) 242-7500	
Receipts/Deposits	To deposit money collected in the name of the state or its agencies	(334) 242-7520	
Collateralization/SAFE	Collateralization of agency funds held in banks in excess of the $100,000.00 FDIC Coverage	(334) 242-7506	
State Employees Insurance Board (SEIB)	State Employees Health Insurance Plan	www.alseib.org (334) 833-5900 1-800-513-1384	
Retirement Systems of Alabama (RSA)	State Employees Retirement System	www.rsa-al.gov (334) 832-4140 1-800-214-2158	
SMART Budgeting	Information on SMART budgeting and forms	www.smart.alabama.gov	May contact the Budget Office with questions
PERMANENT JOINT LEGISLATIVE CONTRACT REVIEW OVERSIGHT COMMITTEE	Information on contract review committee	www.legislature.state.al.us/joint committees/contract review.html	

Other Resources*

Auburn University Montgomery (AUM) / Alabama Training Institute	Governmental Accountant and Auditor Training (GAAT) Certified Public Manager (CPM) Program	http://www.ati.aum.edu/GAAT.aspx http://www.ati.aum.edu/CPM.aspx	
Council on Licensure, Enforcement, and Regulations (CLEAR)	Training on regulatory board issues and investigations	www.clearhq.org (859) 269-1601	
Center for Consumer Advocacy	Training for consumer members on consumer issues	www.cacenter.org (202) 462-1174	
Alabama Press	Information on public access	www.alabamapress.org	Select "Legal Issues"

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