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2012 FEB 16 PM 12:08

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February 16, 2012

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Health Care Authority

RULE: New Rule, 65CSR28, West Virginia Health Information Network

DATE FILED AS AN EMERGENCY RULE: February 8, 2012

DECISION NO. 1-12

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in black ink that reads "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 1-12-11)

AGENCY: West Virginia Health Care Authority
RULE: New rule, 65CSR28, West Virginia Health Information Network
FILED AS AN EMERGENCY RULE: February 8, 2012

- par. 1 The West Virginia Health Care Authority (HCA) has filed the above new rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The HCA filed this emergency rule with supporting documents with the Secretary of State February 8, 2012 and with the LRMRC February 8, 2012.
- par. 7 It is the determination of the Secretary of State that the HCA has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority -- W. Va. Code §16-29B-8(a)(1) reads:

§16-29B-8. Powers generally; budget expenses of the board.

(a) In addition to the powers granted to the board elsewhere in this article, the board may: (1) Adopt, amend and repeal necessary, appropriate and lawful policy guidelines and rules in accordance with article three, chapter twenty-nine-a of this code: Provided, That subsequent amendments and modifications to any rule promulgated pursuant to this article and not exempt from the provisions of article three, chapter twenty-nine-a of this code may be implemented by emergency rule;

par. 9 It is the determination of the Secretary of State that the HCA has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency -- W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the HCA are as follows:

The proposed West Virginia Health Information Network Emergency Rule (65 CSR 28) is necessary to preserve a \$7,819,000 American Recovery and Reinvestment Act of 2009 (ARRA) Grant and to provide for the rights, privileges and interests of those participating in the West Virginia Health Information Network (WVHIN) pilot sites in Wheeling and Morgantown, West Virginia. The proposed emergency rule will establish the standards for the development, the implementation and the operation of the WVHIN. T The proposed West Virginia Health Information Network Emergency Rule (65 CSR 28) is necessary to preserve a \$7,819,000 American Recovery and Reinvestment Act of 2009 (ARRA) Grant and to provide for the rights, privileges and interests of those participating in the West Virginia Health Information Network (WVHIN) pilot sites in Wheeling and Morgantown, West Virginia. The proposed emergency rule will establish the standards for the development, the implementation and the operation of the WVHIN. Without these emergency rules, necessary work with the pilot sites will not begin and the failure to perform the pilot studies will cause the loss of necessary federal funds. The WVHIN was created by the West Virginia Legislature under the oversight of the Health Care Authority (HCA) " ... to promote the design, implementation, operation and maintenance of a fully interoperable statewide network to facilitate public and private use of health care information in the state." (WV Code §16-296-1). The West Virginia Department of Health and Human Resources (WVDHHR) applied for and received a \$7,819,000 American Resource Recovery Act (ARRA) Grant for the planning, the development and the implementation of the aforementioned health information network. The ARRA Grant funds are allocated to Personnel, Fringe Benefits, Travel, Supplies, Contractual and Other. All costs are considered Direct Costs. The West Virginia Legislature has also appropriated \$3,500,000 to further facilitate the project. HCA has also allocated \$7,000,000 to further facilitate the project. The total costs to plan,

to develop and to implement the project is estimated at \$18,319,000. The ARRA Grant is a four year grant (February 8, 2010-February 7, 2014) that cannot be renewed or extended. (Please note the ARRA Grant years are from February 8-February 7, which is not a typical grant or fiscal period.) The Grant's first year was devoted to planning; the Grant's second year has been devoted to development; the Grant's third year will be devoted to implementation; and the Grant's four year will be devoted to completing the remaining and required operational elements. The ARRA Grant requires state matching funds allocated as follows: First and Second Years 10:1; Third Year 7:1; and Fourth Year 3:1. Please note that ARRA Grant matching calculations are based on the Federal Fiscal Year (October 1-September 30 each year.) The aforementioned legislative appropriation and the Health Care Authority's allocation are more than sufficient to meet the ARRA Grant matching requirements. On or about, August 15, 2011, HCA on behalf of the WVHIN entered into a \$6,559,499 contract with Thomson Reuters (Healthcare), Inc. (TRH) to provide, among other things, technical support and technical direction for the project's implementation. As a part of the agreed Contract and Workplan, the two aforementioned pilot sites will commence on or about March 15, 2012. The WVHIN will not be able to continue with the required pilot sites tests without these emergency rules, thereby jeopardizing the continued receipt of federal funds.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare" and "time limit established by the Code of federal statute or regulation"

par. 14 This decision shall be cited as Emergency Rule Decision 1-12 or ERD 1-12 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Health Care Authority, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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