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TO: **KARIN CLARK**
Virginia Department of Social Services

FROM: **MICHELLE A. L'HOMMEDIEU** 
Assistant Attorney General

DATE: **August 25, 2016**

SUBJECT: **Exempt Final Regulations – Amend Neighborhood Assistance Program
Regulations, 22 VAC 40-41 et seq. (4550/7537)**

I am in receipt of the attached regulations to amend the Neighborhood Assistance Program regulations 22 VAC 40-41 *et seq.* You have asked the Office of the Attorney General to review and determine if the State Board of Social Services (“State Board”) has the statutory authority to promulgate these regulations and if they comport with applicable state law.

Virginia Code § 63.2-217 mandates that the State Board promulgate regulations that are necessary to carry out the provisions of Title 63.2 and Virginia Code § 58.1-439.20(B) authorizes the State Board to adopt those regulations necessary for administration of certain portions of the Neighborhood Assistance Tax Credit Program. The proposed amendments to the regulation are necessary to reflect the changes to § 58.1-439.18 and § 58.1-439.20 by the adoption of Chapter 426 of the 2016 Acts of Assembly.

Based on my review, it is my view that the State Board has the authority to promulgate the final regulations, subject to compliance with the provisions of Article 2 of the Administrative Process Act (“APA”) and Executive Order 17 (2014), and has not exceeded that authority. To date, the Board has not yet acted on these regulations; and the Agency Background Document available on Town Hall reflects the anticipated future date of Board action. Based on the foregoing, it is my view that the amendments to these regulations are exempt from the procedures of Article 2 of the APA under Virginia Code § 2.2-4006(A)(4)(a). If you have any questions or need additional information about these regulations, please contact me at 786-6005.

cc: Kim F. Piner, Esq.

Attachment

Project 4713 - Final

**DEPARTMENT OF SOCIAL SERVICES
Amend NAP Regulation to comply with Code**

22VAC40-41-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Affiliate" means with respect to any person, any other person directly or indirectly controlling, controlled by, or under common control with such person. For purposes of this definition, "control" (including controlled by and under common control with) means the power, directly or indirectly, to direct or cause the direction of the management and policies of such person whether through ownership or voting securities or by contract or otherwise.

"Approved organization" means a neighborhood organization that has been found eligible to participate in the Neighborhood Assistance Program.

"Audit" means any audit required under the federal Office of Management and Budget's Circular A-133, or, if a neighborhood organization is not required to file an audit under Circular A-133, a detailed financial statement prepared by an outside independent certified public accountant.

"Business firm" means any corporation, partnership, electing small business (Subchapter S) corporation, limited liability company, or sole proprietorship authorized to do business in this Commonwealth subject to tax imposed by Articles 2 (§ 58.1-320 et seq.) and 10 (§ 58.1-400 et seq.) of Chapter 3, Chapter 12 (§ 58.1-1200 et seq.), Article 1 (§ 58.1-2500 et seq.) of Chapter 25, or Article 2 (§ 58.1-2620 et seq.) of Chapter 26 of Title 58.1 of the Code of Virginia. "Business firm" also means any trust or fiduciary for a trust subject to tax imposed by Article 6 (§ 58.1-360 et seq.) of Chapter 3 of Title 58.1 of the Code of Virginia.

"Commissioner" means the Commissioner of ~~the Department of~~ Social Services, his designee or authorized representative.

"Community services" means any type of counseling and advice, emergency assistance, medical care, provision of basic necessities, or services designed to minimize the effects of poverty, furnished primarily to low-income persons.

"Contracting services" means the provision, by a business firm licensed by the Commonwealth of Virginia as a contractor under Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia, of labor or technical advice to aid in the development, construction,

renovation, or repair of (i) homes of low-income persons or (ii) buildings used by neighborhood organizations.

"Education" means any type of scholastic instruction or scholastic assistance to a low-income person or eligible student with a disability.

"Eligible student with a disability" means a student (i) for whom an individualized educational program has been written and finalized in accordance with the federal Individuals with Disabilities Education Act (IDEA), regulations promulgated pursuant to IDEA, and regulations of the Board of Education and (ii) whose family's annual household income is not in excess of 400% of the current poverty guidelines.

"Housing assistance" means furnishing financial assistance, labor, material, or technical advice to aid the physical improvement of the homes of low-income persons.

"Job training" means any type of instruction to an individual who is a low-income person that enables him to acquire vocational skills so that he can become employable or able to seek a higher grade of employment.

"Low-income person" means an individual whose family's annual household income is not in excess of 300% of the current poverty guidelines.

"Neighborhood assistance" means providing community services, education, housing assistance, or job training.

"Neighborhood organization" means any local, regional or statewide organization whose primary function is providing neighborhood assistance and holding a ruling from the Internal Revenue Service of the U.S. Department of the Treasury that the organization is exempt from income taxation under the provisions of § 501(c)(3) or § 501(c)(4) of the Internal Revenue Code of 1986, as amended from time to time, or any organization defined as a community action agency in the Economic Opportunity Act of 1964 (42 USC § 2701 et seq.), or any housing authority as defined in § 36-3 of the Code of Virginia.

"Poverty guidelines" means the poverty guidelines for the 48 contiguous states and the District of Columbia updated annually in the Federal Register by the U.S. Department of Health and Human Services under the authority of § 673(2) of the Omnibus Budget Reconciliation Act of 1981.

"Professional services" means any type of personal service to the public which requires as a condition precedent to the rendering of such service the obtaining of a license or other legal authorization and shall include, but not be limited to, the personal services rendered by medical

doctors, dentists, architects, professional engineers, certified public accountants, attorneys-at-law, and veterinarians.

"Scholastic assistance" means (i) counseling or supportive services to elementary school, middle school, secondary school, or postsecondary school students or their parents in developing a postsecondary academic or vocational education plan, including college financial options for such students or their parents, or (ii) scholarships.

22VAC40-41-20. Purpose; procedure for becoming an approved organization; eligibility criteria; termination of approved organization; appeal procedure.

A. The purpose of the Neighborhood Assistance Program is to encourage business firms and individuals to make donations to neighborhood organizations for the benefit of low-income persons.

B. Neighborhood organizations that do not provide education services and that wish to become an approved organization must submit an application to the commissioner. Neighborhood organizations that provide education services must submit an application to the Superintendent of Public Instruction. The application submitted to the Superintendent of Public Instruction must comply with regulations or guidelines adopted by the Board of Education. The application submitted to the commissioner must contain the following information:

1. A description of eligibility as a neighborhood organization, the programs being conducted, the low-income persons assisted, the estimated amount that will be donated to the programs, and plans for implementing the programs.
2. Proof of the neighborhood organization's current exemption from income taxation under the provisions of § 501(c)(3) or § 501(c)(4) of the Internal Revenue Code, or the organization's eligibility as a community action agency as defined in the Economic Opportunity Act of 1964 (42 USC § 2701 et seq.) or housing authority as defined in § 36-3 of the Code of Virginia.
3. For neighborhood organizations with total revenues (including the value of all donations) (i) in excess of \$100,000 for the organization's most recent year ended, an audit or review for such year performed by an independent certified public accountant or (ii) of \$100,000 or less for the organization's most recent year ended, a compilation for such year performed by an independent certified public accountant; a copy of the organization's current federal form 990; a current brochure describing the organization's programs; and a copy of the annual report filed with the Department of Agriculture and Consumer Services' Division of Consumer Protection.

4. A statement of objective and measurable outcomes that are expected to occur and the method the organization will use to evaluate the program's effectiveness.

C. To be eligible for participation in the Neighborhood Assistance Program, the applicant and any of its affiliates must meet the following criteria:

1. Applicants must have been in operation as a viable entity, providing neighborhood assistance for low-income people, for at least 12 months.

2. Applicants must be able to demonstrate that at least 50% of the total people served and at least 50% of the total expenditures were for low-income persons or eligible students with disabilities.

3. Applicant's audit must not contain any significant findings or areas of concern for the ongoing operation of the neighborhood organization.

4. Applicants must demonstrate that at least 75% of total revenue received is expended to support their ongoing programs each year.

D. Beginning with tax credit allocations for fiscal year 2016-2017, the applicant and any of its affiliates must meet the following requirements:

1. Affiliates of neighborhood organizations must demonstrate that at least 50% of the persons served are low-income persons;

2. Affiliates of neighborhood organizations must demonstrate that at least 50% of the revenues are used to provide services to such persons;

3. Affiliates must also meet the definition of "neighborhood organization" under § 58.1-439.18; and

4. Affiliates are not required to submit an audit, review, or compilation, and such reports shall not apply in determining the eligibility of the neighborhood organization submitting a proposal.

E. Requirements in 22VAC40-41-20.D. do not apply to a neighborhood organization submitting a proposal and any of its affiliates, provided that:

1. The neighborhood organization otherwise meets all statutory requirements and regulations;

2. The neighborhood organization received a fiscal year 2013-2014 allocation of neighborhood assistance tax credits; and

3. No affiliate of the neighborhood organization submits a proposal for or receives an allocation of tax credits pursuant to this article for the program year for which the neighborhood organization has submitted its proposal.

Ⓓ F. The application period will start no later than March 15 of each year. All applications must be received by the Department of Social Services no later than the first business day of May. An application filed without the required audit, review, or compilation will be considered timely filed provided that the audit, review, or compilation is filed within 30 days immediately following the deadline.

Ⓔ G. Those applicants submitting all required information and reports and meeting the eligibility criteria described in this section will be determined an approved organization. The program year will run from July 1 through June 30 of the following year.

Ⓕ H. The commissioner may terminate an approved organization's eligibility based on a finding of program abuse involving illegal activities or fraudulent reporting on contributions.