



# South Carolina Commission on Higher Education

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CAAL  
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## **MEMORANDUM**

**To:** Dr. Bettie Rose Horne and Members, Committee on Academic Affairs and Licensing

**From:** MaryAnn Janosik, Ph.D., Director of Academic Affairs

### **Processes for Probation or Revocation of an Existing License Update on the Status of the Charleston School of Law (CSOL)**

In alignment with the Commission's strategic agenda, Academic Affairs staff is transitioning the emphasis of its review process from its current focus on initial reviews (e.g., new program proposals, program modifications, licensure applications) to regular monitoring and analyses of approved programs, projects, and institutional productivity and viability. In the Commission's statutory responsibility for licensing of nonpublic postsecondary institutions, this transition will shift staff energies toward more consistent, thorough monitoring of currently licensed schools. Targeted Objective #5 of the Commission's strategic agenda (Strengthen Monitoring and Assessment of Non-Public Post-Secondary Institutions Operating in SC) includes the following action steps:

- A) Establish performance metrics and outcome measures for assessment of programs at non-public institutions
- B) Redirect CHE staffing and resources to focus on performance metrics of programs at non-public institutions approved in past five years
- C) Improve functional collaboration between CHE's State Approving Agency (veterans' benefit programs) and Academic Affairs and Licensing Division

Included as Appendix A in this memorandum are an introduction to and excerpts from South Carolina statutes and regulations about the process for placing an institution on probation, or initiating steps for the revocation of an existing license. Links for the complete documents are included at the end of this memorandum.

Consideration of these processes has been prompted by CHE staff's determination that the Charleston School of Law (a licensed proprietary institution) is not currently in compliance with CHE regulations regarding financial viability and the school's obligation to provide a letter of credit or surety bond in the required amount. An update on Charleston School of Law's financial status is provided as Appendix B, and is current as of December 30, 2014.

Ongoing concerns over the School's financial viability provide one example to support the need for CHE to engage proactively in assessing the financial, academic, and other obligations of South Carolina's licensed nonpublic postsecondary institutions. Should CSOL fail to meet its increased surety bond submission deadline of January 9, 2015, or should other issues of non-compliance with federal agencies or external accrediting bodies persist or develop, the Commission may need to take steps to address how these issues can be resolved.

Options for consideration of next steps, should they be required, are also included for the Committee's review and discussion.

Links to referenced documents governing licensure of nonpublic postsecondary institutions:

The Nonpublic Postsecondary Institution License Act is available in its entirety at <http://www.scstatehouse.gov/code/t59c058.php>.

CHE Regulations Governing Licensure of Nonpublic Postsecondary Institutions are posted at: <http://www.scstatehouse.gov/codereqs/c062.php>

The State Agency Rule Making and Adjudication of Contested Cases statute, commonly referred to as the "Administrative Procedures Act" (APA), is available at the following link: <http://www.scstatehouse.gov/code/t01c023.php>

## **Information on the Process for Probation or Revocation of an Existing License**

### **Overview**

As stated in Appendix IIIA (see January 8, 2015 CAAL Agenda Item #3), pursuant to the authority granted to the Commission on Higher Education (CHE) by Chapter 58, Title 59 of the SC Code of Laws, as amended, regulations for the issuance of licenses to postsecondary educational institutions and the issuance of permits to agents representing such institutions have been established and are covered by regulations in Article 1 of Chapter 62 of the State Regulations.

In an effort to assist institutions and others in understanding and interpreting those regulations, CHE staff has prepared a summary that organizes many of the stated criteria into a more accessible, user friendly format (see January 8, 2015 CAAL Agenda Item #3, Appendix IIIA). This summary is intended as a guide to the enacted regulations and does not in any way replace, supplant, or pre-empt the regulations as stated in SC Regulations 62-1 through 62-100.

The Commission may license an institution after due investigation has revealed that the institution and its programs have met stated criteria. The licensing function is primarily designed for consumer protection and requires compliance with clearly defined academic- standards modeled after Southern Association of Colleges and Schools, Commission on Colleges, standards. The Commission licenses non-degree, occupational training programs and postsecondary degree programs.

### **Determining Noncompliance**

Commission staff typically becomes aware of areas of noncompliance of criteria by a licensed institution during review of an institution's annual report or through its periodic license renewal application. Institutions are advised of the area(s) of noncompliance and asked to provide a remedy by a prescribed date. Failure to address satisfactorily any identified areas of noncompliance may result in revocation of the institution's license or in the institution being placed on probation. Cancellation or nonrenewal of surety leads to automatic revocation of an institution's license.

Actions taken by CHE staff to remedy issues of noncompliance vary, depending on the nature and severity of the noncompliance, and also on the type of institution (i.e., degree or non-degree granting). Since statute and regulations do not currently distinguish between degree and non-degree granting institutions in terms of how noncompliance is handled, staff typically make judgments on a case-by-case basis using the information provided by each institution. Given declining resources available to CHE staff to conduct monitoring of nonpublic postsecondary institutions, consistent, periodic site visits to each institution in order to gather additional data and information have become logistically impractical.

In addition to annual reports, staff may become aware that a licensed institution is out of compliance by receiving a complaint about the institution; reviewing websites, advertisements, or other publications of the institution; being notified of issues by a consumer, licensing, or other oversight agency; or receiving information from a licensing colleague in another state where the institution also operates. Such alerts may prompt a scheduled or unscheduled visit to the institution to confirm the veracity of the information.

Should the information received prove to be accurate, CHE staff would follow the process of notifying the institution of noncompliance and proceed with whatever action it deems appropriate for the violation.

Placing an institution on probation allows any issues of noncompliance to be addressed and, if possible, remedied without loss of licensure. In such cases, CHE staff determines the terms of probation and monitors the institution's progress toward remedying noncompliance. The Nonpublic Postsecondary Institution License Act, CHE Regulations governing the licensure of nonpublic postsecondary institutions, and the Administrative Procedures Act (APA is only used if the institution's status moves from probation to license revocation.), provide the framework used by CHE staff to guide them through each probationary process.

There is no "one size fits all" model or set of specific circumstances that warrant placing an institution on probation. Probation is a discretionary authority that the Commission may choose to exercise, depending on the circumstances involved in issues of noncompliance, the conditions of which are evaluated on a case by case basis. Except for the cancellation of a surety bond or other acceptable forms of collateral which prompts the immediate revocation of license, the nature and severity of other areas of noncompliance (e.g., academic quality, false advertising, etc.), can be ambiguous and sometimes difficult to confirm.

CHE records indicate that the Commission has never revoked a license for an operating degree-granting institution. [NOTE: In 1992, Southern Technical College, which offered one associate's degree program in merchandising, closed after being evicted for nonpayment of rent. Its license was subsequently revoked.]

Additional information about processes for placing an institution on probation and beginning the process for revocation of license follow. Commissioners may want to review the current information with an eye to considering strategies that lead to a more formalized, data-driven monitoring process.

### **Surety Bond Requirement**

The statute and regulations under which CHE licenses nonpublic postsecondary institutions require, as a part of student tuition protection, that institutions post a surety bond or other acceptable collateral. Other acceptable collateral is typically a standby letter of credit (LOC). The amount of the surety is ten percent of the gross tuition income for the prior year.

An LOC typically requires a pledge to the guarantor financial institution of cash or other assets equal to the amount of the LOC. A surety bond typically requires a pledge to the guarantor insuring agency of cash or other assets equal to a small percentage (e.g., 10%) of the bond, but it does typically require unanimous consent of all corporate owners.

The purpose of the bond is to provide a means by which the Commission, in the event of the closing of the institution, is able to refund students for prepaid tuition, pay for or subsidize the costs of providing facilities and instruction for students to complete their programs, or to pay expenses to store and maintain student records.

The statute includes a provision that any time the insurance company (bank for LOC) cancels or discontinues coverage, the institution's license is revoked as a matter of law on the effective date of the cancellation or discontinuance of bond coverage unless a replacement is obtained and provided to the Commission prior to cancellation of the original (59-58-80(B)).

### **Provisions for revocation or other action for noncompliance**

The statute includes authorization for the Commission to impose a “probationary status” (59-58-110(C)) where there is an infraction that can be corrected within a given period of time. In probation status, the institution continues to operate but is prohibited from advertising or enrolling new students until the probation is removed. The Commission has not previously placed a license for a degree-granting institution into probation status.

The statute also includes authorization to revoke an institution’s license (59-58-110 (B)) where the Commission determines that the violations are habitual, willful, and therefore likely to reoccur, even though the institution agrees to comply with standards for licensure.

The statute requires that, prior to placing an institution’s license into probation or revoking the license, the Commission give notification of facts and conduct which warrant the intended action for denial, revocation, or suspension of a license; an opportunity to show compliance with the requirements; and notice and opportunity for a hearing (59-58-110) as provided in Administrative Procedures (1-23-310 through -370), *SC Code of Laws, 1976, as amended*, Chapter 23, State Agency Rule Making and Adjudication of Contested Cases.

### **Nonpublic Postsecondary Institution License Act**

#### **SECTION 59-58-110. Denial, revocation or suspension of license or permit; probation**

- (A) Before a final proceeding to deny, revoke or suspend a license or permit, the Commission shall give to the person to be affected by the decision notice of facts and conduct which warrant the intended action and an opportunity to show compliance with the minimum requirements for a license or permit. If the Commission determines that the violations are habitual, willful, and therefore likely to reoccur, the Commission may proceed with denial or revocation though the institution agrees to comply with the standards for licensure.
- (B) In any final agency proceeding to deny a license or permit to any person properly applying for one, or to revoke or suspend the license or permit of any licensee or permit holder, the Commission shall give the person to be affected by the intended action notice and an opportunity for a hearing as provided in the Administrative Procedures Act.
- (C) The Commission may give the institution a period of probation if in its judgment any unsatisfactory condition can reasonably be corrected within such time. The Commission may also require that an institution delay matriculation of new students into a new class term.

#### **SECTION 59-58-120. Judicial review of denial, revocation or suspension**

Any person aggrieved by the final decision of the Commission in refusing to issue a license or permit, or revoking or suspending a license or permit previously granted, is entitled to the same judicial review under this Chapter as provided in the Administrative Procedures Act concerning contested cases.

### **CHE Regulation 62-7. Bond Requirement**

- A. Before an institution is licensed, a surety bond must be provided by the institution. The obligation of the bond will be that the institution, its officers, agents, and employees will faithfully perform the terms and conditions of contracts for tuition and other instructional fees entered into between the institution and persons enrolling as students. The bond shall be issued by a company authorized to do business in the State. The bond shall be to the Commission, in such form as approved by the Commission, and is to be used for the benefit of students who suffer financial losses of tuition and fees prepaid to an institution. The losses must be as a result of the closing of the institution. The Commission may use the funds to pay refunds of unearned tuition and fees, to pay for or subsidize the cost of providing facilities and instruction for students to complete their programs, or to pay expenses to store and maintain records of these students.
- B. The bond company may not be relieved of liability on the bond unless it gives the institution and the Commission ninety days' notice by certified mail of the company's intent to cancel the bond. If at any time the company that issued the bond cancels or discontinues the coverage, the institution's license is revoked as a matter of law on the effective date of the cancellation or discontinuance of bond coverage unless a replacement bond is obtained and provided to the Commission.
- C. Before an original license is issued, the institution shall have executed a surety bond in an amount not less than ten percent of the projected annualized gross income of the proposed program(s) to be licensed, in ten thousand dollar increments. However, if the projected annualized gross tuition income of the proposed program(s) is less than five thousand dollars, the initial bond must be in an amount at least equal to the projected income, but in no event will the bond be less than five thousand dollars.
- D. The minimum amount of bond to be submitted with a renewal application will be based on the annual gross tuition income from licensed programs for the previous year. No additional programs may be offered without appropriate adjustment to the bond amount.

<b>(1) Previous year's Annual Gross Tuition Income</b>	<b>Minimum Bond</b>
\$ 0 - \$100,000	\$10,000
\$101,000 - \$200,000	\$20,000
\$201,000 - \$300,000	\$30,000
\$301,000 and above	10%, calculated at \$100,000 increments

- (2) For out-of-state institutions licensed to offer their program(s) to residents of the State, gross tuition income means that income generated from students enrolled in the State. The bond for an out-of-state institution shall not be less than \$20,000, unless otherwise specified by the Commission, but in no event shall be less than \$10,000.
- E. Institutions shall provide a statement by a school official and written evidence confirming that the amount of the bond meets the requirements of this regulation. The Commission may require that such statement be verified by an independent certified public accountant if the Commission determines that the written evidence confirming that the amount of the bond is questionable.

- F. Instead of the surety bond, the institution may pledge other means of collateral acceptable by the State Treasurer, in an aggregate market value of the required bond.

**CHE Regulation 62-28. Revoking, Suspending, or Refusing to Issue or Renew a License**

- A. The Commission may revoke or suspend, or refuse to issue or renew a license for any of the following:
  - (1) Violation of any provision of Chapter 58 of Title 59, South Carolina Code of Laws, 1976, as amended, or any rule and regulation made by the Commission.
  - (2) Furnishing false, misleading or incomplete information to the Commission or failure to furnish any information requested by the Commission.
  - (3) Violation of any commitment made in an application for a license.
  - (4) Failure to provide or maintain premises or equipment in a safe and sanitary condition as required by law, or State or local regulations or ordinances applicable at the location of the institution.
  - (5) Failing within a reasonable time to provide information requested by the Commission because of a complaint that would indicate a violation of Chapter 58 of Title 59, South Carolina Code of Laws, 1976.
  - (6) Attempting to use or employ enrolled students in any commercial activity without specific authorization from the Commission. Such authorization will be granted only when such activities are essential to the students' program. Such authorization will not be unreasonably withheld.
- B. The Commissioner may give the institution a period of probation if in the Commissioner's judgment any unsatisfactory condition can reasonably be corrected within such time. If the Commissioner determines that it is appropriate, he or she may require that an institution delay matriculation of new students into a new class term to give the Commissioner time to investigate, evaluate, and assist and to allow the institution officials time to evaluate and adjust.
- C. Any ruling of the Commissioner in application of these regulations may be appealed to the Commission by the institution in accordance with established procedures. Licenses shall be denied, revoked, suspended or not renewed by the Commission according to procedures for notice, hearing, applicable depositions, subpoenas, other related process matters and subsequent procedures in compliance with the Administrative Procedures Act, Chapter 23 of Title 1, South Carolina Code of Laws, 1976.
- D. If the Commission orders an institution to cease offering a program of instruction or revokes the institution's license, the Commission may delay approval for up to two years after the order to cease or revocation became effective. Before the Commission may grant any license, the institution shall establish that it complies with these regulations, that each program satisfies all the minimum standards prescribed by these regulations, and that the circumstances surrounding the institution's failure to meet the requirements have sufficiently changed so that the institution will be substantially likely to comply.

## STATE AGENCY RULE MAKING AND ADJUDICATION OF CONTESTED CASES

### ARTICLE 3

#### SECTION 1 23 320. Notice and hearing in contested case; depositions; subpoenas; informal disposition; content of record

(A) In a contested case, all parties must be afforded an opportunity for hearing after notice of not less than thirty days, except in proceedings before the Department of Employment and Workforce, which are governed by the provisions of Section 41 35 680.

(B) The notice must include a:

- (1) statement of the time, place, and nature of the hearing
- (2) statement of the legal authority and jurisdiction
- (3) reference to the particular sections of the statutes and rules involved
- (4) short and plain statement of the matters asserted. (If the agency or other party is unable to state the matters in detail at the time the notice is served, the initial notice may be limited to a statement of the issues involved. Thereafter, upon application, a more definite and detailed statement must be furnished.)

(C) A party to these proceedings may cause to be taken the depositions of witnesses within or without the State and either by commission or *de bene esse*. Depositions must be taken in accordance with and subject to the same provisions, conditions, and restrictions as apply to the taking of like depositions in civil actions at law in the court of common pleas; and the same rules with respect to the giving of notice to the opposite party, the taking and transcribing of testimony, the transmission and certification of it, and matters of practice relating to it apply.

(D) The agency hearing a contested case may issue subpoenas in the name of the agency for the attendance and testimony of witnesses and the production and examination of books, papers, and records on its own behalf or, upon request, on behalf of another party to the case. A party to the proceeding may seek enforcement of or relief from an agency subpoena before the Administrative Law Court pursuant to Section 1 23 600(F).

(E) Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved.

(F) Unless precluded by law, informal disposition may be made of a contested case by stipulation, agreed settlement, consent order, or default.

(G) The record in a contested case must include:

- (1) all pleadings, motions, intermediate rulings, and depositions
- (2) evidence received or considered
- (3) a statement of matters officially noticed
- (4) questions and offers of proof, objections, and rulings on the contested case
- (5) proposed findings and exceptions
- (6) any decision, opinion, or report by the officer presiding at the hearing.

(H) Oral proceedings or any part of the oral proceedings must be transcribed on request of a party.

(I) Findings of fact must be based exclusively on the evidence and on matters officially noticed.

## **SECTION 1 23 370. Procedures regarding issuance, denial or renewal of licenses**

(a) When the grant, denial or renewal of a license is required to be preceded by notice and opportunity for hearing, the provisions of this article and Article 1 concerning contested cases apply.

(b) 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.

(c) No revocation, suspension, annulment, or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by 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. If the agency finds that public health, safety or welfare imperatively requires emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. These proceedings shall be promptly instituted and determined.

## **SECTION 1 23 380. Judicial review upon exhaustion of administrative remedies**

A party who has exhausted all administrative remedies available within the agency and who is aggrieved by a final decision in a contested case is entitled to judicial review pursuant to this article and Article 1. This section does not limit utilization of or the scope of judicial review available under other means of review, redress, relief, or trial de novo provided by law. A preliminary, procedural, or intermediate agency action or ruling is immediately reviewable if review of the final agency decision would not provide an adequate remedy. Except as otherwise provided by law, an appeal is to the court of appeals.

(1) Proceedings for review are instituted by serving and filing notice of appeal as provided in the South Carolina Appellate Court Rules within thirty days after the final decision of the agency or, if a rehearing is requested, within thirty days after the decision is rendered. Copies of the notice of appeal must be served upon the agency and all parties of record.

(2) Except as otherwise provided in this chapter, the serving and filing of the notice of appeal does not itself stay enforcement of the agency decision. The serving and filing of a notice of appeal by a licensee for review of a fine or penalty or of its license stays only those provisions for which review is sought and matters not affected by the notice of appeal are not stayed. The serving or filing of a notice of appeal does not automatically stay the suspension or revocation of a permit or license authorizing the sale of beer, wine, or alcoholic liquor. The agency may grant, or the reviewing court may order, a stay upon appropriate terms, upon the filing of a petition under Rule 65 of the South Carolina Rules of Civil Procedure.

(3) If a timely application is made to the court for leave to present additional evidence, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceeding before the agency, the court may order that the additional evidence be taken before the agency upon conditions determined by the court. The agency may modify its findings and decision by reason of the additional evidence and shall file the evidence and modifications, new findings, or decisions with the reviewing court.

(4) The review must be conducted by the court and must be confined to the record. In cases of alleged irregularities in procedure before the agency, not shown in the record, and established by proof satisfactory to the court, the case may be remanded to the agency for action as the court considers appropriate.

(5) The court may not substitute its judgment for the judgment of the agency as to the weight of the evidence on questions of fact. The court may affirm the decision of the agency or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (a) in violation of constitutional or statutory provisions
- (b) in excess of the statutory authority of the agency
- (c) made upon unlawful procedure
- (d) affected by other error of law
- (e) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record or
- (f) arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

### **SECTION 1 23 390. Supreme Court review**

An aggrieved party may obtain a review of a final judgment of the circuit court or the court of appeals pursuant to this article by taking an appeal in the manner provided by the South Carolina Appellate Court Rules as in other civil cases.

The complete State Agency Rule Making and Adjudication of Contested Cases statute is available at the following link: <http://www.scstatehouse.gov/code/t01c023.php>

**Status of Compliance with CHE Criteria for Licensing**  
**Charleston School of Law**

**Background**

As a condition for initial licensure of the Charleston School of Law (CSOL), the founding owners posted an Irrevocable Standby Letter of Credit (LOC), effective June 29, 2005. On May 16, 2006, as a result of an increase in tuition income reported in CSOL's 2005-06 annual report, the LOC was increased and has remained the same since that time.

The current amount required of CSOL's surety bond reflects increased tuition revenues amid fluctuating enrollments. CSOL did not meet the established October 1, 2014 deadline for submission of the increased funds and requested an extension (approved by CHE staff) of November 1 to provide the remainder of the surety. Since then, CHE has extended the deadline for compliance two additional times, with the current (and third) deadline set for January 9, 2015.

**The Issue**

Since October 1, 2014, CSOL has not been in compliance with CHE's licensure requirement to post a surety bond or letter of credit equal to 10% of the previous fiscal year's tuition revenue. CHE staff has already granted CSOL three extensions to comply with the surety bond/letter of credit requirement. If CSOL fails to meet the upcoming January 9, 2015 deadline,

Commissioners may need to determine appropriate next steps regarding the continuation of the School's license.

**Options**

If CSOL fails to comply with regulatory requirements as specified in SC Code of Laws 59-58 and SC Regulations 62-28, there are three options CHE staff typically considers. They include the following:

- Extend deadline until surety bond requirement is satisfied
- Place license in probation status
- Begin process for revocation of license

Commissioners may want to consider next steps in the event CSOL does not meet the January 9, 2015 deadline. However, should CSOL meet the surety bond requirements by the appointed deadline, Commissioners may opt to continue monitoring the school closely, as other concerns about the School's ability to comply with CHE criteria for licensing (as well as standards set by external accrediting bodies and the federal government) may remain.

Since late September CHE staff has been in communication with the CSOL ownership group, their attorneys, and school president regarding CSOL's plans and capacity to restore compliance with relevant financial standards. To date, no formal plan that addresses the multiple components needed to restore the financial viability of CSOL has been presented to CHE for review.