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RULE ADOPTIONS
LAW AND PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS
UNIFORM REGULATIONS

Adopted New Rules: N.J.A.C. 13:45C-2 and 3

Waivers; Performance-Based Outcomes

Proposed: August 1, 2011 at 43 N.J.R. 1816(b).

Adopted: March 21, 2012 by Jeffrey S. Chiesa, Attorney General.

Filed: March 22, 2012 as R.2012 d.080, **with substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 5:8-6, 45:1-17(b), 49:3-67, and 52:17B-137.

Effective Date: April 16, 2012.

Expiration Date: March 25, 2018.

Summary of Public Comments and Agency Responses:

The official comment period ended on September 30, 2011. The Division received comments from the following:
Charles H. Fitzpatrick, O.D., President, New Jersey Society of Optometric Physicians
Douglas Johnston, AARP Governmental Affairs Manager
Jennifer Kim, NJPIRG Advocate

David McMillin, Legal Services of New Jersey

1. COMMENT: One commenter saw the proposed rules as an effort to develop a common sense approach to ensure that New Jersey has a modern and practical set of rules overseeing the professional boards in the Division and wished to be on record as being generally in agreement with the proposal.

RESPONSE: The Division thanks the commenter.

2. COMMENT: Three commenters opposed the proposed new rules authorizing waivers because of a concern that it would give the Division authority to ignore laws passed by the Legislature. One of the commenters argues that none of the statutes conferring authority for the Division to promulgate implementing regulations grants authority for administrative waivers of compliance with the statute and there is no general statutory authority for the Division to promulgate a regulation providing for waivers of compliance with any of its existing rules that implement laws enacted by the Legislature.

RESPONSE: The Division observes that the commenters have misread the proposed new rules. The proposed new rules concerns waiver of specific regulatory requirements, not statutory requirements, when strict compliance with that requirement would lead to an unfair, burdensome, or incongruous result; would conflict with the rules of another agency; or would result in undue hardship, economic or otherwise, provided that the waiver or relaxation of the regulatory requirements would not unduly burden any affected parties, and that the waiver is consistent with the underlying purposes of the agency's laws and rules.

3. COMMENT: Two commenters aver that the proposed new rules permit the Division to decide arbitrarily whether or not to enforce laws and regulations passed to protect the consumers of New Jersey. The commenters argue that standards are necessary to avoid ad hoc decision making, permit necessary consideration of the opposing views of relevant stakeholders, provide a basis for judicial review, and protect the public interest.

RESPONSE: The Division points out that the proposed rules do provide both substantive and procedural standards for the application of waiver authority, in order to ensure fairness and to prevent ad hoc decision making. Waivers may be

appropriate when one or more of the following specific substantive standards are met: when strict compliance with a requirement would lead to an unfair, burdensome, or incongruous result; would conflict with the rules of another agency; or would result in undue hardship, economic or otherwise, provided that the waiver or relaxation of the regulatory requirements would not unduly burden any affected parties, and that the waiver is consistent with the underlying purposes of the agency's laws and rules. Additionally, proposed N.J.A.C. 13:45C-2.3(b) and 2.4(b) provide specific procedural standards for the application of waiver authority, laying out the three components of a waiver application, and advance notice of the waiver process.

4. COMMENT: Two commenters assert that waivers of regulations must be accomplished through notice and comment rulemaking. They say the term "administrative rule" includes the amendment or repeal of a rule; every agency is bound by its own regulations and can rescind or suspend a regulation only through procedures that comply with the Administrative Procedure Act (APA), N.J.S.A. 52:14B-1 et seq. One of the commenters states that whenever a waiver pursuant to the Division's proposed new rules is concerned with broad policy issues that affect a large segment of the regulated or general public, notice and comment rulemaking is required.

RESPONSE: The Division disagrees with the commenters. The proposed new rules provide for a waiver of a specific requirement in the circumstances described in the proposed rule. For example, an applicant for licensure graduated with a Masters Degree in the appropriate discipline from a university whose program was accredited when the applicant first matriculated. The applicant graduated on May 7. The application for licensure was submitted several years after the applicant had graduated. The board determined that as of April 20 of the year in which the applicant graduated, the university's Masters Program was no longer accredited and, therefore, determined that the applicant did not meet the education requirements set forth in the board's rules. Had the proposed rule been adopted, the board would have authority to accept the applicant's Masters Degree as meeting the education requirement in the rule. These waivers would not implicate broad policy issues. The waiver does not repeal the rule waived and is not itself a rule; the notice and comment requirements of the APA are not applicable.

5. COMMENT: Two commenters assert that the proposed rules are too vague to provide any meaningful standards or guidance to the public regarding waiver of regulations or any meaningful limitations on the Division's exercise of discretion.

RESPONSE: The Division disagrees with the commenter. Waivers are not intended to provide guidance for future conduct; the rule remains operative. Moreover, proposed N.J.A.C. 13:45C-2.3 and 2.4 include specific and meaningful standards (See the Response to Comment 3) for deciding whether to waive a specific regulatory requirement. It may be waived when strict compliance with a requirement would lead to an unfair, burdensome, or incongruous result; would conflict with the rules [page=1278] of another agency; or would result in undue hardship, economic or otherwise, provided that the waiver or relaxation of the regulatory requirements would not unduly burden any affected parties, and that the waiver is consistent with the underlying purposes of the agency's laws and rules. These standards put licensees and applicants on notice of the specific factors that the Division would consider in determining whether a licensee or applicant qualifies for a waiver. Moreover, the caveat in the proposed rule that a "waiver is consistent with the underlying purposes of the agency's laws and rules" is a meaningful limitation on the Division's exercise of discretion in granting waivers, and prevents the agency from waiving or relaxing rules that enforce important policy considerations.

6. COMMENT: A commenter claims that the proposed new rules are unprecedented; that since the issuance of Executive Order No. 2 (2010), no agency has adopted waiver regulations like those in the proposed new rules, other than the Department of Environmental Protection (DEP) whose notice of proposal is the subject of a pending legislative resolution against its adoption.

RESPONSE: While the commenter may be correct insofar as no agency other than the DEP has adopted waiver rules like the Division's, the proposed new rules are not without precedent. The Division cites the Division of Alcoholic Beverages rule at N.J.A.C. 13:2-9.1:

"The rules of this chapter may be relaxed by the Director upon a showing of undue hardship, economic or otherwise, on a licensee; that the waiver of the rule would not unduly burden any affected parties; and that the waiver is consistent with the underlying purposes of Title 33 and the implementing rules. Waiver requests must be submitted in writing to the Director and shall include all documentation which supports the applicant's request for a waiver.";

the Election Law Enforcement Commission's rule at N.J.A.C. 19:25-1.4:

"The Commission may, upon notice to all parties or persons in interest, relax the application of this chapter whenever

the interest of justice shall so require.";

the DEP rule at N.J.A.C. 7:36-1.6:

"The Department may, in its discretion and if consistent with Green Acres laws, relax the strict application of any of the administrative or procedural requirements of in this chapter when necessary and in the public interest, for good cause shown. Such authority does not extend to statutory requirements, legislative mandates, or substantive requirements of the chapter."; and

the Police Training Commission (in the Department of Law and Public Safety) rule at N.J.A.C. 13:1-2.1:

"The rules in this chapter shall be considered as general rules for the operation of the Commission and the administration of the Police Training Act. These rules have been designed to facilitate the education and training of police officers. The rules may be relaxed or dispensed with by the Commission in any instance where it shall be apparent to the Commission that strict adherence would result in an injustice to an individual or a law enforcement agency."

7. COMMENT: Two commenters list the businesses registered, and occupations and professions licensed, by the Division and argues that the proposed rule opens the door to waiver requests from all of the businesses and all licensees as to every Division rule that is "putatively unfair, burdensome, or incongruous in any respect," impermissibly nullifying substantive provisions enacted by the Legislature. The commenter also posits that the Division would be overburdened by having to respond to thousands, tens of thousands, or even hundreds of thousands of requests for waivers.

RESPONSE: The Division disagrees with the commenter. The proposed rule permits waivers where the application of a rule in a particular instance yields a result that is unfair, burdensome, or incongruous. It does not purport to give authority to any agency to nullify a rule by waiver. Furthermore, the Division believes that the commenter is unduly alarmist about the number of waiver requests the Division will receive.

8. COMMENT: A commenter alleges that by virtue of the case-by-case consideration, grants of waivers to some businesses, but not others, would create a danger of creating an uneven competitive playing field in many areas under the Division's jurisdiction. The commenter asserts that large operations have access to sophisticated legal and regulatory counsel who will become skilled in filing waiver requests and thus waivers will go disproportionately to the big operations. Consumers would be disadvantaged because they would have fewer choices, would not have the protection of the rules as to which waivers have been granted, and would no longer have the ability to determine with reasonable certainty whether a particular rule is in effect with respect to a particular business.

RESPONSE: The waiver application process in proposed N.J.A.C. 13:45C-2.3(b) and 2.4(b) requires no legal expertise or sophistication, and has a simple three part format that a layperson may follow. Moreover, larger organizations may not be able to make the requisite hardship showing.

9. COMMENT: A commenter notes that New Jersey courts have recognized that the need for application of the Consumer Fraud Act's unconscionability standard is most acute when the professional seller is seeking the trade of those most subject to exploitation--the uneducated, the inexperienced, and the people of low incomes. The commenter states that it "can tell the Division in no uncertain terms that the prospect of waivers pursuant to the proposal poses particular risks to New Jersey's low-income consumers."

RESPONSE: The Division notes that under N.J.A.C. 13:45C-2.3, a waiver may not unduly burden any affected parties and must be consistent with the underlying purposes of the agency's laws and rules--in the commenter's example, the purposes of the Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. A waiver would not be available if it would run counter to fundamental consumer protection, contrary to statute.

10. COMMENT: One commenter argues that proposed new rules explicitly vest the Division with authority to waive enforcement, even where it has cause to find a violation. The commenter charges that N.J.A.C. 13:45C-3 not only excuses illegal acts, it also eliminates important remedies for consumers injured by fraud, deception, and misrepresentation in the marketplace. Another commenter contends that the Consumer Fraud Act mandates that the Division impose sanctions for violations of the Act, including administrative penalties against a person who violates the act; enhanced penalties if the violation causes pecuniary injury to a victim who is a senior citizen or a person with a disability or is part of a scheme directed at such victims; and restitution to victims harmed by violations. Another commenter does not oppose the concept of seeking compliance with rules rather than imposing penalties, as long as the

alternative measures are more likely to encourage the person to comply with the agency's rules and do not eliminate the person's payment of damages its violation causes.

RESPONSE: The Division disagrees that the proposed new rules would excuse illegal acts and eliminate important consumer remedies. N.J.A.C. 13:45C-3.3(a) authorizes an agency to pursue measures to encourage compliance with the agency's rules, rather than impose discipline or penalties. The proposed rule is consistent not only with Executive Order No. 2 (2010), but also with the Consumer Fraud Act and the Uniform Enforcement Act, N.J.S.A. 45:1-14 et seq. N.J.S.A. 56:8-17 provides: "In assessing any penalty under this act ... the Attorney General or his designee may provide for the remission of all or any part of such penalty conditioned upon prompt compliance with the requirements thereof and any order entered thereunder." The Division notes that some of the examples of measures to encourage compliance listed in proposed N.J.A.C. 13:45C-3.3(c) are similar to alternative remedies listed in N.J.S.A. 45:1-22 and to measures found in consent agreements. The possible alternatives to prosecution are designed to achieve compliance, and thus broader consumer protection than might be obtained in an enforcement proceeding. See also the Response to Comment No. 11.

11. COMMENT: A commenter charges that if the Division waives regulations or excuses the illegal conduct, the consumer loses not only the protection of, but also any rights and remedies under, the Consumer Fraud Act (CFA). The commenter cites as an example, a person who hires a home repair contractor to renovate a kitchen and the contractor starts work before obtaining a permit. The commenter asserts that the contractor may claim that it is a "technical" violation that does not injure anyone and therefore it is appropriate for a waiver. The commenter states that, under the proposed rules, the agency would be permitted to waive the requirement. Once waived, the person may no longer have the right to seek a remedy if [page=1279] the contractor is incompetent and does sloppy or unsafe work, such as installing faulty wiring that could cause a fire.

RESPONSE: The Division disagrees with the commenter. A consumer's right to commence an action for treble damages under N.J.S.A. 56:8-19 or the Division's authority to require restitution to consumers who lose money or property as a result of a CFA violation are unaffected by proposed N.J.A.C. 13:45C-3. Moreover, measures taken by an agency to encourage compliance with agency rules instead of imposing discipline or penalties do not diminish consumer protection. The rules are unaffected.

In addition, the Division observes that the commenter has misread the proposed new rules. A waiver is not appropriate in the example cited by the commenter. Construction permits are issued by the building inspector in the municipality where the construction takes place, not the Division. Moreover, no one could claim that failure to obtain building permits is a technical violation. Faulty wiring is a construction code violation, hardly a technical violation.

12. COMMENT: A commenter acknowledges that an agency necessarily exercises a degree of discretion in deciding when to commence an enforcement proceeding, but its discretion is not limitless.

RESPONSE: Please see the Response to Comment No. 9. The Division notes that in N.J.A.C. 13:45C-3.3(b), the proposed rule delineates the factors to be considered in eschewing prosecution, essentially codifying the process used when exercising prosecutorial discretion.

13. COMMENT: A commenter urges the Division to hold a public hearing on the notice of proposal.

RESPONSE: The Division declines to hold a public hearing, noting that it received negative comments from only three commenters.

Summary of Agency-Initiated Changes:

The Division will add N.J.A.C. 13:45C-2.1(b) stating that the rules do not give authority to boards, committees, or Division units to waive statutory requirements and that waivers of specific regulatory requirements may be granted only where the grant of a waiver will not compromise the spirit and intent of the agency's statutory goals of providing consumer protection or pose a risk to the health or welfare of the public. No republication is required because the change merely reinforces that which the Division believes is clear from N.J.A.C. 13:45C-2.3 and 2.4: what may be waived and when.

The Division will change "or" to "and" between N.J.A.C. 13:45C-3.3(b)6 and 7. In exercising its discretion, an agency may consider more than one of the factors listed as examples.

Federal Standards Statement

A Federal standards analysis is not required because the new rules are adopted pursuant to State statute and are not subject to any Federal requirements or standards.

Full text of the adopted new rules follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions

from proposal indicated in brackets with asterisks *[thus]*):

SUBCHAPTER 2. WAIVERS FROM REGULATORY REQUIREMENTS; APPLICATION

13:45C-2.1 Applicability; scope

(a) The rules in this subchapter shall apply to all licensees of the Division of Consumer Affairs, of any board, committee or unit within the Division of Consumer Affairs, and of the Legalized Games of Chance Control Commission; to all applicants for licensure by the Division, such boards, committees or units or the Commission; and to persons whose conduct is subject to, or regulated by, the laws and rules administered by the Division of Consumer Affairs, by any board, committee or unit within the Division of Consumer Affairs or by the Commission. For the purposes of this subchapter, units within the Division include, for example, the Bureau of Securities, the Charities Registration Unit and the Office of Weights and Measures.

(b) The purpose of the rules in this subchapter is to authorize boards, committees, and units within the Division, pursuant to the standards and according to the requirements enunciated in the rules, to waive a specific regulatory requirement in circumstances specified in the subchapter where the grant of a waiver will not compromise the spirit and intent of the agency's statutory goals of providing consumer protection or pose a risk to the health, safety, or welfare of the public. The rules of this subchapter do not grant authority to such boards, committees, and units to waive statutory requirements. A waiver under this subchapter shall not excuse a failure to obtain a license, permit, or other authorization required by ordinance, statute, or rule to be obtained from a unit within the Division or from another governmental agency.

13:45C-2.2 Definitions

For purposes of this subchapter, the following words shall have the following meaning, unless the context indicates otherwise:

"Agency" means:

1. The Division;
2. Any professional or occupational licensing board, committee or subunit of a board or committee located within the Division; or
3. The Commission.

"Applicant" means any person applying for a license, permit, certificate or registration issued by an agency.

"Commission" means the Legalized Games of Chance Control Commission.

"Division" means the Division of Consumer Affairs and all units within the Division of Consumer Affairs, including, without limitation the Bureau of Securities, the Charities Registration Unit and the Office of Weights and Measures.

"Licensee" means any licensee, permittee, certificate holder or registrant of an agency.

"Person" means any natural person, partnership, corporation, company, association or other business or non-profit entity.

"Regulated person" means a person, other than an applicant or licensee, whose commercial or not-for-profit activities are subject to, or regulated by, the laws and rules administered by an agency.

13:45C-2.3 Application for waiver request by licensee or applicant

(a) A licensee or an applicant may apply to an agency for a waiver or relaxation of a specific regulatory requirement when strict compliance with that requirement would lead to an unfair, burdensome or incongruous result; would conflict with the rules of another agency; or would result in undue hardship, economic or otherwise, provided that the waiver or relaxation of the regulatory requirements would not unduly burden any affected parties, and that the waiver is consistent with the underlying purposes of the agency's laws and rules.

(b) A licensee or an applicant shall submit a waiver request in writing which shall be timely and shall include the following:

1. The specific rule(s) or part(s) of the rule(s) for which the waiver is requested;
2. The reasons for requesting the waiver, including a statement detailing the hardship that would result to the licensee or applicant if the waiver is not approved; and
3. Documentation that supports the licensee's or applicant's request for the waiver, if applicable.

(c) Absent a request for a waiver, an agency may waive or relax its regulatory requirements on its own initiative if the consequence of requiring strict compliance with the rules, or parts of the rules, in a particular instance, would lead to an unfair, burdensome or incongruous result, or would endanger the health, safety and welfare of the general public.

13:45C-2.4 Application for waiver request by regulated person

(a) A regulated person may apply to an agency for a waiver or relaxation of a specific regulatory requirement when strict compliance with that requirement would conflict with the rules of another agency, would be unduly burdensome or would result in undue hardship, economic or otherwise, provided that the waiver or relaxation of the regulatory requirements would not unduly burden any affected parties, and that the waiver is consistent with the underlying purposes of the agency's laws and regulations.

(b) A regulated person shall submit a waiver request in writing, which shall be timely and shall include the following:

[page=1280] 1. The specific rule(s) or part(s) of the rule(s) for which the waiver is requested;

2. The reasons for requesting the waiver, including a statement detailing the hardship that would result to the regulated person if the waiver is not approved; and

3. Documentation that supports the regulated person's request for the waiver, if applicable.

(c) Absent a request for a waiver, an agency may waive or relax its regulatory requirements on its own initiative if the consequence of strict compliance with the rules, or parts of the rules, in a particular instance, would lead to an unfair, burdensome or incongruous result, or would endanger the health, safety and welfare of the general public.

13:45C-2.5 Agency authority not limited

Nothing contained in this subchapter shall limit, diminish or abrogate the authority of an agency to take such action as is available to it under applicable law or agency rule.

SUBCHAPTER 3. PERFORMANCE-BASED OUTCOMES

13:45C-3.1 Applicability; scope

The rules in this subchapter shall apply to alleged violations of the rules and regulations of the Division of Consumer Affairs, each board, committee and unit within the Division of Consumer Affairs and the Legalized Games of Chance Control Commission. For the purposes of this subchapter, units within the Division include, for example, the Bureau of Securities, the Charities Registration Unit and the Office of Weights and Measures.

13:45C-3.2 Definitions

For purposes of this subchapter, the following words shall have the following meaning, unless the context indicates otherwise:

"Agency" means:

1. The Division;
2. Any professional or occupational licensing board, committee or subunit of a board or committee located within the Division; or
3. The Legalized Games of Chance Control Commission.

"Charging document" means a document issued by an agency to commence an enforcement action including, but not limited to, an administrative complaint, provisional order of discipline, notice of violation or uniform penalty letter.

"Division" means the Division of Consumer Affairs and all units within the Division of Consumer Affairs, including, without limitation the Bureau of Securities, the Charities Registration Unit and the Office of Weights and Measures.

"Licensee" means any licensee, permittee, certificate holder or registrant of an agency.

"Person" means any natural person, partnership, corporation, company, association or other business or non-profit entity.

"Regulated person" means a person, other than an applicant or licensee, whose commercial or not-for-profit activities are subject to, or regulated by, the laws and rules administered by an agency.

13:45C-3.3 Resolving alleged violations without enforcement proceedings

(a) An agency that finds that there is a basis on which to file or issue a charging document to commence an enforcement proceeding against a person, at its discretion in appropriate circumstances and consistent with applicable law, may pursue measures to encourage the person to comply with the agency's rules rather than impose discipline or penalties.

(b) In exercising its discretion, the agency may consider, by way of example and not limitation, the following:

1. Whether the person made a good faith effort to comply;
2. The impact of the alleged violation on the quality of the product or service provided;
3. The impact of the alleged violation on the consumer for whom the product or service was provided;
4. The impact of the alleged violation on the public health, safety and welfare;
5. Whether the alleged violation is a first time violation or the same or similar to violations previously committed by the person;
6. Whether the alleged violation is isolated paperwork or procedural regulatory noncompliance; *[or]* ***and/or***
7. The seriousness of the alleged violation.

(c) Examples of agency measures to encourage compliance shall include, but not be limited to:

1. Issuing a letter of admonition or other warning to the alleged violator, which, unless otherwise provided by law, shall not be public information;
2. Suspending the obligation to pay fines or penalties subject to continuing compliance with agency rules;
3. Obtaining the agreement of the alleged violator, as a condition for continued, reinstated or renewed licensure, to secure medical or such other professional treatment as may be necessary to properly discharge licensee functions;
4. Obtaining the agreement of the alleged violator, as a condition for continued, reinstated or renewed licensure, to submit to any medical or diagnostic testing and monitoring or psychological evaluation that may be required to evaluate whether continued practice may jeopardize the safety and welfare of the public;
5. Obtaining the agreement of the alleged violator, as a condition for continued, reinstated or renewed licensure, to submit to an assessment of skills to determine whether the licensee can continue to practice with reasonable skill and safety, and to take and successfully complete educational training determined by the agency to be necessary;
6. Obtaining the agreement of the alleged violator to undergo corrective training or instruction;
7. Obtaining the agreement of the alleged violator to participate in consumer outreach programs conducted by the Division and to speak on topics selected by the Division; and
8. Obtaining the agreement of the alleged violator to contribute to the consumer fraud education fund.

(d) Nothing contained in this subchapter shall limit, diminish or abrogate the authority of an agency in the event of a violation to take such action as is available to it under applicable law or agency rule.