

# **E N R O L L E D**

COMMITTEE SUBSTITUTE

for

## **H. B. 2733**

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(BY DELEGATE(S) R. PHILLIPS, STAGGERS, FERRO,  
DISERIO AND REYNOLDS)

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[Passed April 13, 2013; in effect ninety days from passage.]

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AN ACT to amend and reenact §17C-5A-2 of the Code of West Virginia, 1931, as amended, relating to hearings before the Office of Administrative Hearings; specifying methods of service; providing permissible hearing locations; deleting the requirement that the Office of Administrative Hearings shall send hearing notices to certain witnesses; deleting an instance of a duplication of an element for driving under the influence; clarifying that the Office of Administrative Hearings shall rescind or modify the order of the Commissioner of the Division of Motor Vehicles in certain cases; noting that the Office of Administrative Hearings is not a party to an appeal; stating that a party filing an appeal is financially responsible for the transcription of the hearing and

transmission of file copy; and stating that the court shall provide a copy of its final order to the Office of Administrative Hearings.

*Be it enacted by the Legislature of West Virginia:*

That §17C-5A-2 of the Code of West Virginia, 1931, as amended, be amended and reenacted to read as follows:

**ARTICLE 5A. ADMINISTRATIVE PROCEDURES FOR SUSPENSION AND REVOCATION OF LICENSES FOR DRIVING UNDER THE INFLUENCE OF ALCOHOL, CONTROLLED SUBSTANCES OR DRUGS.**

**§17C-5A-2. Hearing; revocation; review.**

1 (a) Written objections to an order of revocation or  
2 suspension under the provisions of section one of this article or  
3 section seven, article five of this chapter shall be filed with the  
4 Office of Administrative Hearings. Upon the receipt of an  
5 objection, the Office of Administrative Hearings shall notify the  
6 Commissioner of the Division of Motor Vehicles, who shall stay  
7 the imposition of the period of revocation or suspension and  
8 afford the person an opportunity to be heard by the Office of  
9 Administrative Hearings. The written objection must be filed  
10 with Office of Administrative Hearings in person, by registered  
11 or certified mail, return receipt requested, or by facsimile  
12 transmission or electronic mail within thirty calendar days after  
13 receipt of a copy of the order of revocation or suspension or no  
14 hearing will be granted: *Provided*, That a successful transmittal  
15 sheet shall be necessary for proof of written objection in the case  
16 of filing by fax. The hearing shall be before a hearing examiner  
17 employed by the Office of Administrative Hearings who shall  
18 rule on evidentiary issues. Upon consideration of the designated  
19 record, the hearing examiner shall, based on the determination  
20 of the facts of the case and applicable law, render a decision  
21 affirming, reversing or modifying the action protested. The  
22 decision shall contain findings of fact and conclusions of law  
23 and shall be provided to all parties by registered or certified

24 mail, return receipt requested, or with a party's written consent,  
25 by facsimile or electronic mail.

26 (b) The hearing shall be held at an office of the Division of  
27 Motor Vehicles suitable for hearing purposes located in or near  
28 the county in which the arrest was made in this state or at some  
29 other suitable place in the county in which the arrest was made  
30 if an office of the division is not available. At the discretion of  
31 the Office of Administrative Hearings, the hearing may also be  
32 held at an office of the Office of Administrative Hearings  
33 located in or near the county in which the arrest was made in this  
34 state. The Office of Administrative Hearings shall send a notice  
35 of hearing to the person whose driving privileges are at issue and  
36 the person's legal counsel if the person is represented by legal  
37 counsel, by regular mail, or with the written consent of the  
38 person whose driving privileges are at issue or their legal  
39 counsel, by facsimile or electronic mail. The Office of  
40 Administrative Hearings shall also send a notice of hearing by  
41 regular mail, facsimile or electronic mail to the Division of  
42 Motor Vehicles, and the Attorney General's Office, if the  
43 Attorney General has filed a notice of appearance of counsel on  
44 behalf of the Division of Motor Vehicles.

45 (c) (1) Any hearing shall be held within one hundred eighty  
46 days after the date upon which the Office of Administrative  
47 Hearings received the timely written objection unless there is a  
48 postponement or continuance.

49 (2) The Office of Administrative Hearings may postpone or  
50 continue any hearing on its own motion or upon application by  
51 the party whose license is at issue in that hearing or by the  
52 commissioner for good cause shown.

53 (3) The Office of Administrative Hearings may issue  
54 subpoenas commanding the appearance of witnesses and  
55 subpoenas duces tecum commanding the submission of  
56 documents, items or other things. Subpoenas duces tecum shall

57 be returnable on the date of the next scheduled hearing unless  
58 otherwise specified. The Office of Administrative hearings shall  
59 issue subpoenas and subpoenas duces tecum at the request of a  
60 party or the party's legal representative. The party requesting the  
61 subpoena shall be responsible for service of the subpoena upon  
62 the appropriate individual. Every subpoena or subpoena duces  
63 tecum shall be served at least five days before the return date  
64 thereof, either by personal service made by a person over  
65 eighteen years of age or by registered or certified mail, return  
66 receipt requested, and received by the party responsible for  
67 serving the subpoena or subpoena duces tecum: *Provided*, That  
68 the Division of Motor Vehicles may serve subpoenas to  
69 law-enforcement officers through electronic mail to the  
70 department of his or her employer. If a person does not obey the  
71 subpoena or fails to appear, the party who issued the subpoena  
72 to the person may petition the circuit court wherein the action  
73 lies for enforcement of the subpoena.

74 (d) Law-enforcement officers shall be compensated for the  
75 time expended in their travel and appearance before the Office  
76 of Administrative Hearings by the law-enforcement agency by  
77 whom they are employed at their regular rate if they are  
78 scheduled to be on duty during said time or at their regular  
79 overtime rate if they are scheduled to be off duty during said  
80 time.

81 (e) The principal question at the hearing shall be whether the  
82 person did drive a motor vehicle while under the influence of  
83 alcohol, controlled substances or drugs, or did drive a motor  
84 vehicle while having an alcohol concentration in the person's  
85 blood of eight hundredths of one percent or more, by weight, or  
86 did refuse to submit to the designated secondary chemical test,  
87 or did drive a motor vehicle while under the age of twenty-one  
88 years with an alcohol concentration in his or her blood of two  
89 hundredths of one percent or more, by weight, but less than eight  
90 hundredths of one percent, by weight.

91 (f) In the case of a hearing in which a person is accused of  
92 driving a motor vehicle while under the influence of alcohol,  
93 controlled substances or drugs, or accused of driving a motor  
94 vehicle while having an alcohol concentration in the person's  
95 blood of eight hundredths of one percent or more, by weight, or  
96 accused of driving a motor vehicle while under the age of  
97 twenty-one years with an alcohol concentration in his or her  
98 blood of two hundredths of one percent or more, by weight, but  
99 less than eight hundredths of one percent, by weight, the Office  
100 of Administrative Hearings shall make specific findings as to:  
101 (1) Whether the investigating law-enforcement officer had  
102 reasonable grounds to believe the person to have been driving  
103 while under the influence of alcohol, controlled substances or  
104 drugs, or while having an alcohol concentration in the person's  
105 blood of eight hundredths of one percent or more, by weight, or  
106 to have been driving a motor vehicle while under the age of  
107 twenty-one years with an alcohol concentration in his or her  
108 blood of two hundredths of one percent or more, by weight, but  
109 less than eight hundredths of one percent, by weight; (2) whether  
110 the person was lawfully placed under arrest for an offense  
111 involving driving under the influence of alcohol, controlled  
112 substances or drugs, or was lawfully taken into custody for the  
113 purpose of administering a secondary test: *Provided*, That this  
114 element shall be waived in cases where no arrest occurred due to  
115 driver incapacitation; (3) whether the person committed an  
116 offense involving driving under the influence of alcohol,  
117 controlled substances or drugs and (4) whether the tests, if any,  
118 were administered in accordance with the provisions of this  
119 article and article five of this chapter.

120 (g) If, in addition to a finding that the person did drive a  
121 motor vehicle while under the influence of alcohol, controlled  
122 substances or drugs, or did drive a motor vehicle while having an  
123 alcohol concentration in the person's blood of eight hundredths  
124 of one percent or more, by weight, or did drive a motor vehicle  
125 while under the age of twenty-one years with an alcohol  
126 concentration in his or her blood of two hundredths of one

127 percent or more, by weight, but less than eight hundredths of one  
128 percent, by weight, the Office of Administrative Hearings also  
129 finds by a preponderance of the evidence that the person when  
130 driving did an act forbidden by law or failed to perform a duty  
131 imposed by law, which act or failure proximately caused the  
132 death of a person and was committed in reckless disregard of the  
133 safety of others and if the Office of Administrative Hearings  
134 further finds that the influence of alcohol, controlled substances  
135 or drugs or the alcohol concentration in the blood was a  
136 contributing cause to the death, the commissioner shall revoke  
137 the person's license for a period of ten years: *Provided*, That if  
138 the person's license has previously been suspended or revoked  
139 under the provisions of this section or section one of this article  
140 within the ten years immediately preceding the date of arrest, the  
141 period of revocation shall be for the life of the person.

142 (h) If, in addition to a finding that the person did drive a  
143 motor vehicle while under the influence of alcohol, controlled  
144 substances or drugs, or did drive a motor vehicle while having an  
145 alcohol concentration in the person's blood of eight hundredths  
146 of one percent or more, by weight, the Office of Administrative  
147 Hearings also finds by a preponderance of the evidence that the  
148 person when driving did an act forbidden by law or failed to  
149 perform a duty imposed by law, which act or failure proximately  
150 caused the death of a person, the commissioner shall revoke the  
151 person's license for a period of five years: *Provided*, That if the  
152 person's license has previously been suspended or revoked under  
153 the provisions of this section or section one of this article within  
154 the ten years immediately preceding the date of arrest, the period  
155 of revocation shall be for the life of the person.

156 (i) If, in addition to a finding that the person did drive a  
157 motor vehicle while under the influence of alcohol, controlled  
158 substances or drugs, or did drive a motor vehicle while having an  
159 alcohol concentration in the person's blood of eight hundredths  
160 of one percent or more, by weight, the Office of Administrative  
161 Hearings also finds by a preponderance of the evidence that the

162 person when driving did an act forbidden by law or failed to  
163 perform a duty imposed by law, which act or failure proximately  
164 caused bodily injury to a person other than himself or herself, the  
165 commissioner shall revoke the person's license for a period of  
166 two years: *Provided*, That if the license has previously been  
167 suspended or revoked under the provisions of this section or  
168 section one of this article within the ten years immediately  
169 preceding the date of arrest, the period of revocation shall be ten  
170 years: *Provided, however*, That if the person's license has  
171 previously been suspended or revoked more than once under the  
172 provisions of this section or section one of this article within the  
173 ten years immediately preceding the date of arrest, the period of  
174 revocation shall be for the life of the person.

175 (j) If the Office of Administrative Hearings finds by a  
176 preponderance of the evidence that the person did drive a motor  
177 vehicle while under the influence of alcohol, controlled  
178 substances or drugs, or did drive a motor vehicle while having an  
179 alcohol concentration in the person's blood of eight hundredths  
180 of one percent or more, by weight, but less than fifteen  
181 hundredths of one percent or more, by weight, or finds that the  
182 person knowingly permitted the persons vehicle to be driven by  
183 another person who was under the influence of alcohol,  
184 controlled substances or drugs, or knowingly permitted the  
185 person's vehicle to be driven by another person who had an  
186 alcohol concentration in his or her blood of eight hundredths of  
187 one percent or more, by weight, the commissioner shall revoke  
188 the person's license for a period of six months or a period of  
189 fifteen days with an additional one hundred and twenty days of  
190 participation in the Motor Vehicle Alcohol Test and Lock  
191 Program in accordance with the provisions of section three-a of  
192 this article: *Provided*, That any period of participation in the  
193 Motor Vehicle Alcohol Test and Lock Program that has been  
194 imposed by a court pursuant to section two-b, article five of this  
195 chapter shall be credited against any period of participation  
196 imposed by the commissioner: *Provided, however*, That a person  
197 whose license is revoked for driving while under the influence

198 of drugs is not eligible to participate in the Motor Vehicle  
199 Alcohol Test and Lock Program: *Provided further*, That if the  
200 person's license has previously been suspended or revoked under  
201 the provisions of this section or section one of this article within  
202 the ten years immediately preceding the date of arrest, the period  
203 of revocation shall be ten years: *And provided further*, That if the  
204 person's license has previously been suspended or revoked more  
205 than once under the provisions of this section or section one of  
206 this article within the ten years immediately preceding the date  
207 of arrest, the period of revocation shall be for the life of the  
208 person.

209 (k) (1) If in addition to finding by a preponderance of the  
210 evidence that the person did drive a motor vehicle while under  
211 the influence of alcohol, controlled substance or drugs, the  
212 Office of Administrative Hearings also finds by a preponderance  
213 of the evidence that the person did drive a motor vehicle while  
214 having an alcohol concentration in the person's blood of fifteen  
215 hundredths of one percent or more, by weight, the commissioner  
216 shall revoke the person's license for a period of forty-five days  
217 with an additional two hundred and seventy days of participation  
218 in the Motor Vehicle Alcohol Test and Lock Program in  
219 accordance with the provisions of section three-a, article five-a,  
220 chapter seventeen-c of this code: *Provided*, That if the person's  
221 license has previously been suspended or revoked under the  
222 provisions of this section or section one of this article within the  
223 ten years immediately preceding the date of arrest, the period of  
224 revocation shall be ten years: *Provided, however*, That if the  
225 person's license has previously been suspended or revoked the  
226 person's license more than once under the provisions of this  
227 section or section one of this article within the ten years  
228 immediately preceding the date of arrest, the period of  
229 revocation shall be for the life of the person.

230 (2) If a person whose license is revoked pursuant to  
231 subdivision (1) of this subsection proves by clear and convincing  
232 evidence that they do not own a motor vehicle upon which the



233 alcohol test and lock device may be installed or is otherwise  
234 incapable of participating in the Motor Vehicle Alcohol Test and  
235 Lock Program, the period of revocation shall be one hundred  
236 eighty days: *Provided*, That if the person's license has  
237 previously been suspended or revoked under the provisions of  
238 this section or section one of this article within the ten years  
239 immediately preceding the date of arrest, the period of  
240 revocation shall be ten years: *Provided, however*, That if the  
241 person's license has previously been suspended or revoked more  
242 than once under the provisions of this section or section one of  
243 this article within the ten years immediately preceding the date  
244 of arrest, the period of revocation shall be for the life of the  
245 person.

246 (l) If, in addition to a finding that the person did drive a  
247 motor vehicle while under the age of twenty-one years with an  
248 alcohol concentration in his or her blood of two hundredths of  
249 one percent or more, by weight, but less than eight hundredths of  
250 one percent, by weight, the Office of Administrative Hearings  
251 also finds by a preponderance of the evidence that the person  
252 when driving did an act forbidden by law or failed to perform a  
253 duty imposed by law, which act or failure proximately caused  
254 the death of a person, and if the Office of Administrative  
255 Hearings further finds that the alcohol concentration in the blood  
256 was a contributing cause to the death, the commissioner shall  
257 revoke the person's license for a period of five years: *Provided*,  
258 That if the person's license has previously been suspended or  
259 revoked under the provisions of this section or section one of this  
260 article within the ten years immediately preceding the date of  
261 arrest, the period of revocation shall be for the life of the person.

262 (m) If, in addition to a finding that the person did drive a  
263 motor vehicle while under the age of twenty-one years with an  
264 alcohol concentration in his or her blood of two hundredths of  
265 one percent or more, by weight, but less than eight hundredths of  
266 one percent, by weight, the Office of Administrative Hearings  
267 also finds by a preponderance of the evidence that the person

268 when driving did an act forbidden by law or failed to perform a  
269 duty imposed by law, which act or failure proximately caused  
270 bodily injury to a person other than himself or herself, and if the  
271 Office of Administrative Hearings further finds that the alcohol  
272 concentration in the blood was a contributing cause to the bodily  
273 injury, the commissioner shall revoke the person's license for a  
274 period of two years: *Provided*, That if the person's license has  
275 previously been suspended or revoked under the provisions of  
276 this section or section one of this article within the ten years  
277 immediately preceding the date of arrest, the period of  
278 revocation shall be ten years: *Provided, however*, That if the  
279 person's license has previously been suspended or revoked more  
280 than once under the provisions of this section or section one of  
281 this article within the ten years immediately preceding the date  
282 of arrest, the period of revocation shall be for the life of the  
283 person.

284 (n) If the Office of Administrative Hearings finds by a  
285 preponderance of the evidence that the person did drive a motor  
286 vehicle while under the age of twenty-one years with an alcohol  
287 concentration in his or her blood of two hundredths of one  
288 percent or more, by weight, but less than eight hundredths of one  
289 percent, by weight, the commissioner shall suspend the person's  
290 license for a period of sixty days: *Provided*, That if the person's  
291 license has previously been suspended or revoked under the  
292 provisions of this section or section one of this article, the period  
293 of revocation shall be for one year, or until the person's  
294 twenty-first birthday, whichever period is longer.

295 (o) If, in addition to a finding that the person did drive a  
296 motor vehicle while under the influence of alcohol, controlled  
297 substances or drugs, or did drive a motor vehicle while having an  
298 alcohol concentration in the person's blood of eight hundredths  
299 of one percent or more, by weight, the Office of Administrative  
300 Hearings also finds by a preponderance of the evidence that the  
301 person when driving did have on or within the Motor vehicle  
302 another person who has not reached his or her sixteenth birthday,

303 the commissioner shall revoke the person's license for a period  
304 of one year: *Provided*, That if the person's license has previously  
305 been suspended or revoked under the provisions of this section  
306 or section one of this article within the ten years immediately  
307 preceding the date of arrest, the period of revocation shall be ten  
308 years: *Provided, however*, That if the person's license has  
309 previously been suspended or revoked more than once under the  
310 provisions of this section or section one of this article within the  
311 ten years immediately preceding the date of arrest, the period of  
312 revocation shall be for the life of the person.

313 (p) For purposes of this section, where reference is made to  
314 previous suspensions or revocations under this section, the  
315 following types of criminal convictions or administrative  
316 suspensions or revocations shall also be regarded as suspensions  
317 or revocations under this section or section one of this article:

318 (1) Any administrative revocation under the provisions of  
319 the prior enactment of this section for conduct which occurred  
320 within the ten years immediately preceding the date of arrest;

321 (2) Any suspension or revocation on the basis of a  
322 conviction under a municipal ordinance of another state or a  
323 statute of the United States or of any other state of an offense  
324 which has the same elements as an offense described in section  
325 two, article five of this chapter for conduct which occurred  
326 within the ten years immediately preceding the date of arrest; or

327 (3) Any revocation under the provisions of section seven,  
328 article five of this chapter for conduct which occurred within the  
329 ten years immediately preceding the date of arrest.

330 (q) In the case of a hearing in which a person is accused of  
331 refusing to submit to a designated secondary test, the Office of  
332 Administrative Hearings shall make specific findings as to: (1)  
333 Whether the arresting law-enforcement officer had reasonable  
334 grounds to believe the person had been driving a motor vehicle

335 in this state while under the influence of alcohol, controlled  
336 substances or drugs; (2) whether the person was lawfully placed  
337 under arrest for an offense involving driving under the influence  
338 of alcohol, controlled substances or drugs, or was lawfully taken  
339 into custody for the purpose of administering a secondary test:  
340 *Provided*, That this element shall be waived in cases where no  
341 arrest occurred due to driver incapacitation; (3) whether the  
342 person committed an offense relating to driving a motor vehicle  
343 in this state while under the influence of alcohol, controlled  
344 substances or drugs; (4) whether the person refused to submit to  
345 the secondary test finally designated in the manner provided in  
346 section four, article five of this chapter; and (5) whether the  
347 person had been given a written statement advising the person  
348 that the person's license to operate a motor vehicle in this state  
349 would be revoked for at least forty-five days and up to life if the  
350 person refused to submit to the test finally designated in the  
351 manner provided in said section.

352 (r) If the Office of Administrative Hearings finds by a  
353 preponderance of the evidence that: (1) The investigating officer  
354 had reasonable grounds to believe the person had been driving  
355 a motor vehicle in this state while under the influence of alcohol,  
356 controlled substances or drugs; (2) whether the person was  
357 lawfully placed under arrest for an offense involving driving  
358 under the influence of alcohol, controlled substances or drugs, or  
359 was lawfully taken into custody for the purpose of administering  
360 a secondary test: *Provided*, That this element shall be waived in  
361 cases where no arrest occurred due to driver incapacitation; (3)  
362 the person committed an offense relating to driving a motor  
363 vehicle in this state while under the influence of alcohol,  
364 controlled substances or drugs; (4) the person refused to submit  
365 to the secondary test finally designated in the manner provided  
366 in section four, article five of this chapter; and (5) the person had  
367 been given a written statement advising the person that the  
368 person's license to operate a motor vehicle in this state would be  
369 revoked for at least forty-five days and up to life if the person  
370 refused to submit to the test finally designated, the commissioner

371 shall revoke the person's license to operate a motor vehicle in  
372 this state for the periods specified in section seven, article five  
373 of this chapter. The revocation period prescribed in this  
374 subsection shall run concurrently with any other revocation  
375 period ordered under this section or section one of this article  
376 arising out of the same occurrence. The revocation period  
377 prescribed in this subsection shall run concurrently with any  
378 other revocation period ordered under this section or section one  
379 of this article arising out of the same occurrence.

380 (s) If the Office of Administrative Hearings finds to the  
381 contrary with respect to the above issues, it shall rescind or  
382 modify the commissioner's order and, in the case of  
383 modification, the commissioner shall reduce the order of  
384 revocation to the appropriate period of revocation under this  
385 section or section seven, article five of this chapter. A copy of  
386 the Office of Administrative Hearings' final order containing its  
387 findings of fact and conclusions of law made and entered  
388 following the hearing shall be served upon the person whose  
389 license is at issue or upon the person's legal counsel if the person  
390 is represented by legal counsel by registered or certified mail,  
391 return receipt requested, or by facsimile or by electronic mail if  
392 available. The final order shall be served upon the commissioner  
393 by electronic mail. During the pendency of any hearing, the  
394 revocation of the person's license to operate a motor vehicle in  
395 this state shall be stayed.

396 A person whose license is at issue and the commissioner  
397 shall be entitled to judicial review as set forth in chapter  
398 twenty-nine-a of this code. Neither the commissioner nor the  
399 Office of Administrative Hearings may stay enforcement of the  
400 order. The court may grant a stay or supersede as of the order  
401 only upon motion and hearing, and a finding by the court upon  
402 the evidence presented, that there is a substantial probability that  
403 the appellant shall prevail upon the merits and the appellant will  
404 suffer irreparable harm if the order is not stayed: *Provided*, That  
405 in no event shall the stay or supersede as of the order exceed one

406 hundred fifty days. The Office of Administrative Hearings may  
407 not be made a party to an appeal. The party filing the appeal  
408 shall pay the Office of Administrative Hearings for the  
409 production and transmission of the certified file copy and the  
410 hearing transcript to the court. Notwithstanding the provisions of  
411 section four, article five of said chapter, the Office of  
412 Administrative Hearings may not be compelled to transmit a  
413 certified copy of the file or the transcript of the hearing to the  
414 circuit court in less than sixty days. Circuit Clerk shall provide  
415 a copy of the circuit court's final order on the appeal to the  
416 Office of Administrative Hearings by regular mail, by facsimile,  
417 or by electronic mail if available.

418 (t) In any revocation or suspension pursuant to this section,  
419 if the driver whose license is revoked or suspended had not  
420 reached the driver's eighteenth birthday at the time of the  
421 conduct for which the license is revoked or suspended, the  
422 driver's license shall be revoked or suspended until the driver's  
423 eighteenth birthday or the applicable statutory period of  
424 revocation or suspension prescribed by this section, whichever  
425 is longer.

426 (u) Funds for this section's hearing and appeal process may  
427 be provided from the Drunk Driving Prevention Fund, as created  
428 by section forty-one, article two, chapter fifteen of this code,  
429 upon application for the funds to the Commission on Drunk  
430 Driving Prevention.

That Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

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*Chairman, House Committee*

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*Chairman, Senate Committee*

Originating in the House.

In effect ninety days from passage.

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*Clerk of the House of Delegates*

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*Clerk of the Senate*

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*Speaker of the House of Delegates*

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*President of the Senate*

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The within \_\_\_\_\_ this the \_\_\_\_\_  
day of \_\_\_\_\_, 2013.

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*Governor*

