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VIRGINIA REGISTER INFORMATION PAGE

THE VIRGINIA REGISTER OF REGULATIONS is an official state publication issued every other week throughout the year. Indexes are published quarterly, and are cumulative for the year. The *Virginia Register* has several functions. The new and amended sections of regulations, both as proposed and as finally adopted, are required by law to be published in the *Virginia Register*. In addition, the *Virginia Register* is a source of other information about state government, including petitions for rulemaking, emergency regulations, executive orders issued by the Governor, and notices of public hearings on regulations.

ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS

An agency wishing to adopt, amend, or repeal regulations must first publish in the *Virginia Register* a notice of intended regulatory action; a basis, purpose, substance and issues statement; an economic impact analysis prepared by the Department of Planning and Budget; the agency's response to the economic impact analysis; a summary; a notice giving the public an opportunity to comment on the proposal; and the text of the proposed regulation.

Following publication of the proposal in the *Virginia Register*, the promulgating agency receives public comments for a minimum of 60 days. The Governor reviews the proposed regulation to determine if it is necessary to protect the public health, safety and welfare, and if it is clearly written and easily understandable. If the Governor chooses to comment on the proposed regulation, his comments must be transmitted to the agency and the Registrar no later than 15 days following the completion of the 60-day public comment period. The Governor's comments, if any, will be published in the *Virginia Register*. Not less than 15 days following the completion of the 60-day public comment period, the agency may adopt the proposed regulation.

The Joint Commission on Administrative Rules (JCAR) or the appropriate standing committee of each house of the General Assembly may meet during the promulgation or final adoption process and file an objection with the Registrar and the promulgating agency. The objection will be published in the *Virginia Register*. Within 21 days after receipt by the agency of a legislative objection, the agency shall file a response with the Registrar, the objecting legislative body, and the Governor.

When final action is taken, the agency again publishes the text of the regulation as adopted, highlighting all changes made to the proposed regulation and explaining any substantial changes made since publication of the proposal. A 30-day final adoption period begins upon final publication in the *Virginia Register*.

The Governor may review the final regulation during this time and, if he objects, forward his objection to the Registrar and the agency. In addition to or in lieu of filing a formal objection, the Governor may suspend the effective date of a portion or all of a regulation until the end of the next regular General Assembly session by issuing a directive signed by a majority of the members of the appropriate legislative body and the Governor. The Governor's objection or suspension of the regulation, or both, will be published in the *Virginia Register*. If the Governor finds that changes made to the proposed regulation have substantial impact, he may require the agency to provide an additional 30-day public comment period on the changes. Notice of the additional public comment period required by the Governor will be published in the *Virginia Register*.

The agency shall suspend the regulatory process for 30 days when it receives requests from 25 or more individuals to solicit additional public comment, unless the agency determines that the changes have minor or inconsequential impact.

A regulation becomes effective at the conclusion of the 30-day final adoption period, or at any other later date specified by the promulgating agency, unless (i) a legislative objection has been filed, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 21-day objection period; (ii) the Governor exercises his authority to require the agency to provide for additional public comment, in which event the regulation,

unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the period for which the Governor has provided for additional public comment; (iii) the Governor and the General Assembly exercise their authority to suspend the effective date of a regulation until the end of the next regular legislative session; or (iv) the agency suspends the regulatory process, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 30-day public comment period and no earlier than 15 days from publication of the readopted action.

A regulatory action may be withdrawn by the promulgating agency at any time before the regulation becomes final.

FAST-TRACK RULEMAKING PROCESS

Section 2.2-4012.1 of the Code of Virginia provides an exemption from certain provisions of the Administrative Process Act for agency regulations deemed by the Governor to be noncontroversial. To use this process, Governor's concurrence is required and advance notice must be provided to certain legislative committees. Fast-track regulations will become effective on the date noted in the regulatory action if no objections to using the process are filed in accordance with § 2.2-4012.1.

EMERGENCY REGULATIONS

Pursuant to § 2.2-4011 of the Code of Virginia, an agency, upon consultation with the Attorney General, and at the discretion of the Governor, may adopt emergency regulations that are necessitated by an emergency situation. An agency may also adopt an emergency regulation when Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment. The emergency regulation becomes operative upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. Emergency regulations are limited to no more than 18 months in duration; however, may be extended for six months under certain circumstances as provided for in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Register*. During the time the emergency status is in effect, the agency may proceed with the adoption of permanent regulations through the usual procedures. To begin promulgating the replacement regulation, the agency must (i) file the Notice of Intended Regulatory Action with the Registrar within 60 days of the effective date of the emergency regulation and (ii) file the proposed regulation with the Registrar within 180 days of the effective date of the emergency regulation. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

STATEMENT

The foregoing constitutes a generalized statement of the procedures to be followed. For specific statutory language, it is suggested that Article 2 (§ 2.2-4006 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia be examined carefully.

CITATION TO THE VIRGINIA REGISTER

The *Virginia Register* is cited by volume, issue, page number, and date. **29:5 VA.R. 1075-1192 November 5, 2012**, refers to Volume 29, Issue 5, pages 1075 through 1192 of the *Virginia Register* issued on November 5, 2012.

The Virginia Register of Regulations is published pursuant to Article 6 (§ 2.2-4031 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia.

Members of the Virginia Code Commission: **John S. Edwards**, Chair; **James M. LeMunyon**, Vice Chair; **Gregory D. Habeeb**; **Ryan T. McDougle**; **Robert L. Calhoun**; **Carlos L. Hopkins**; **Leslie L. Lilley**; **E.M. Miller, Jr.**; **Thomas M. Moncure, Jr.**; **Christopher R. Nolen**; **Timothy Oksman**; **Charles S. Sharp**; **Mark J. Vucci**.

Staff of the Virginia Register: **Jane D. Chaffin**, Registrar of Regulations; **Karen Perrine**, Assistant Registrar; **Anne Bloomsburg**, Regulations Analyst; **Rhonda Dyer**, Publications Assistant; **Terri Edwards**, Operations Staff Assistant.

PUBLICATION SCHEDULE AND DEADLINES

This schedule is available on the *Register's* Internet home page (<http://register.dls.virginia.gov>).

November 2016 through November 2017

<u>Volume: Issue</u>	<u>Material Submitted By Noon*</u>	<u>Will Be Published On</u>
33:7	November 9, 2016	November 28, 2016
33:8	November 22, 2016 (Tuesday)	December 12, 2016
33:9	December 7, 2016	December 26, 2016
33:10	December 19, 2016 (Monday)	January 9, 2017
33:11	January 4, 2017	January 23, 2017
33:12	January 18, 2017	February 6, 2017
33:13	February 1, 2017	February 20, 2017
33:14	February 15, 2017	March 6, 2017
33:15	March 1, 2017	March 20, 2017
33:16	March 15, 2017	April 3, 2017
33:17	March 29, 2017	April 17, 2017
33:18	April 12, 2017	May 1, 2017
33:19	April 26, 2017	May 15, 2017
33:20	May 10, 2017	May 29, 2017
33:21	May 24, 2017	June 12, 2017
33:22	June 7, 2017	June 26, 2017
33:23	June 21, 2017	July 10, 2017
33:24	July 5, 2017	July 24, 2017
33:25	July 19, 2017	August 7, 2017
33:26	August 2, 2017	August 21, 2017
34:1	August 16, 2017	September 4, 2017
34:2	August 30, 2017	September 18, 2017
34:3	September 13, 2017	October 2, 2017
34:4	September 27, 2017	October 16, 2017
34:5	October 11, 2017	October 30, 2017
34:6	October 25, 2017	November 13, 2017
34:7	November 8, 2017	November 27, 2017

*Filing deadlines are Wednesdays unless otherwise specified.

NOTICES OF INTENDED REGULATORY ACTION

TITLE 16. LABOR AND EMPLOYMENT

SAFETY AND HEALTH CODES BOARD

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Safety and Health Codes Board intends to consider amending **16VAC25-60, Administrative Regulation for the Virginia Occupational Safety and Health Program**. The purpose of the proposed action is to establish procedures for the application of penalties for state and local government employers in accordance with § 40.1-2.1 of the Code of Virginia. The proposed amendments will allow Virginia Occupational Safety and Health to issue proposed penalties to state and local government employers for willful, repeat, and failure-to-abate violations, as well as serious violations that cause a fatal accident or are classified as "high gravity," (i.e., a violation that is classified as "high severity" and "high probability"). Violations that are classified as non-high gravity serious, and other-than-serious violations would not receive a penalty.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 40.1-2.1, 40.1-6, and 40.1-22 of the Code of Virginia; Occupational Safety and Health Act of 1970 (P.L. 91-596).

Public Comment Deadline: December 28, 2016.

Agency Contact: John J. Crisanti, Policy and Planning Manager, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Richmond, VA 23219, telephone (804) 786-4300, FAX (804) 786-8418, or email john.crisanti@doli.virginia.gov.

VA.R. Doc. No. R17-4963; Filed November 1, 2016, 2:57 p.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF PHARMACY

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Pharmacy intends to consider amending **18VAC110-20, Regulations Governing the Practice of Pharmacy**. The purpose of the proposed action is to consider amendments to the regulation in response to two petitions for rulemaking that were granted by the board. The proposed amendments (i) authorize a pharmacist, when deemed appropriate in his professional judgment and upon request by the patient, to dispense a quantity of a Schedule VI drug in excess of the specific quantity prescribed for a dispensing, not to exceed the total

amount authorized in refills and (ii) authorize the use of an automated dispensing device in a nursing home for obtaining drugs that would be stocked in a stat-drug box and clarify the quantity of drugs in Schedules II through V that may be stocked in the device for this purpose. The board will consider the appropriateness of requiring a provider pharmacy to the nursing home to obtain a controlled substances registration at the location of the facility for the purpose of placing an automated dispensing device in the facility. The board's decisions regarding the petitions for rulemaking were published in [33:3 VA.R. 301 October 3, 2016](#).

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 54.1-2400 and 54.1-3307 of the Code of Virginia.

Public Comment Deadline: December 28, 2016.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4416, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

VA.R. Doc. No. R16-27; Filed November 4, 2016, 2:48 p.m.

BOARD OF SOCIAL WORK

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Social Work intends to consider amending **18VAC140-20, Regulations Governing the Practice of Social Work**. The purpose of the proposed action is to (i) amend the definition of clinical social work services to include psychosocial interventions and (ii) specify an amount of supervision that is required for a person who has not actively practiced and applies to reinstate or reactivate his license.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Public Comment Deadline: December 28, 2016.

Agency Contact: Jaime Hoyle, Executive Director, Board of Social Work, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4406, FAX (804) 527-4435, or email jaime.hoyle@dhp.virginia.gov.

VA.R. Doc. No. R17-4943; Filed November 4, 2016, 2:47 p.m.

Notices of Intended Regulatory Action

TITLE 22. SOCIAL SERVICES

DEPARTMENT OF SOCIAL SERVICES

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Social Services intends to consider amending **22VAC40-201, Permanency Services - Prevention, Foster Care, Adoption and Independent Living**, which encompasses the full range of services for prevention, foster care, adoption, and independent living services and provides local departments of social services with rules on the provision of child welfare services consistent with the Code of Virginia and federal law. The purpose of this action is to make the regulation consistent with federal laws and the Code of Virginia and to make any other changes the agency deems necessary after comments and review.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 63.2-217 and 63.2-900 of the Code of Virginia.

Public Comment Deadline: December 28, 2016.

Agency Contact: Em Parente, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7895, FAX (804) 726-7538, or email em.parente@dss.virginia.gov.

VA.R. Doc. No. R17-4957; Filed November 7, 2016, 11:21 a.m.

REGULATIONS

For information concerning the different types of regulations, see the Information Page.

Symbol Key

Roman type indicates existing text of regulations. Underscored language indicates proposed new text. Language that has been stricken indicates proposed text for deletion. Brackets are used in final regulations to indicate changes from the proposed regulation.

TITLE 4. CONSERVATION AND NATURAL RESOURCES

DEPARTMENT OF MINES, MINERALS AND ENERGY

Final Regulation

Title of Regulation: **4VAC25-150. Virginia Gas and Oil Regulation (amending 4VAC25-150-10, 4VAC25-150-30, 4VAC25-150-80, 4VAC25-150-100, 4VAC25-150-110, 4VAC25-150-160, 4VAC25-150-280, 4VAC25-150-300, 4VAC25-150-340, 4VAC25-150-360, 4VAC25-150-610; adding 4VAC25-150-95, 4VAC25-150-365, 4VAC25-150-535, 4VAC25-150-615).**

Statutory Authority: §§ 45.1-161.3, 45.1-361.4, and 45.1-361.27 of the Code of Virginia.

Effective Date: December 28, 2016.

Agency Contact: Michael Skiffington, Regulatory Coordinator, Department of Mines, Minerals and Energy, 1100 Bank Street, 8th Floor, Richmond, VA 23219-3402, telephone (804) 692-3212, FAX (804) 692-3237, TTY (800) 828-1120, or email mike.skiffington@dmme.virginia.gov.

Summary:

The amendments (i) adjust permit application requirements to include disclosure of all ingredients anticipated to be used in hydraulic fracturing operations, certification that the proposed operation complies with local land use ordinances, inclusion of a groundwater sampling and monitoring plan, and submission of an emergency response plan; (ii) require a pre-application meeting jointly conducted by the Department of Mines, Minerals and Energy (DMME) and the Department of Environmental Quality before an operator drills for gas or oil in Tidewater Virginia; (iii) require well operators to use FracFocus, the national hydraulic fracturing chemical registry website, to disclose the chemicals used in hydraulic fracturing operations; (iv) establish a groundwater sampling, analysis, and monitoring program before and after well construction; (v) add language related to the use of centralizers in the water protection string of the casing; (vi) strengthen casing and pressure testing requirements for well casings used in conventional and coalbed methane gas wells; and (vii) provide protection for trade secrets from public dissemination while allowing this information to be made available to first responders and local officials in the event of an emergency. Since the proposed stage, the following are added: (a) the criteria for DMME's decision that an ingredient qualifies as a trade secret; (b) a provision that

adjoining localities shall also be noticed of pre-application meetings; and (c) a provision that DMME shall obtain and maintain data submitted to the Chemical Disclosure Registry.

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

Part I

Standards of General Applicability

Article 1

General Information

4VAC25-150-10. Definitions.

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

"Act" means the Virginia Gas and Oil Act of 1990, Chapter 22.1 (§ 45.1-361.1 et seq.) of Title 45.1 of the Code of Virginia.

"Adequate channel" means a watercourse that will convey the designated frequency storm event without overtopping its banks or causing erosive damage to the bed, banks and overbank sections.

"Applicant" means any person or business who files an application with the Division of Gas and Oil.

"Approved" means accepted as suitable for its intended purpose when included in a permit issued by the director or determined to be suitable in writing by the director.

"Berm" means a ridge of soil or other material constructed along an active earthen fill to divert runoff away from the unprotected slope of the fill to a stabilized outlet or sediment trapping facility.

"Board" means the Virginia Gas and Oil Board.

"Bridge plug" means an obstruction intentionally placed in a well at a specified depth.

"CAS number" means the unique number identifier for a chemical substance assigned by the Chemical Abstracts Service.

"Cased completion" means a technique used to make a well capable of production in which production casing is set through the productive zones.

"Cased/open hole completion" means a technique used to make a well capable of production in which at least one zone is completed through casing and at least one zone is completed open hole.

Regulations

"Casing" means all pipe set in wells except conductor pipe and tubing.

"Causeway" means a temporary structural span constructed across a flowing watercourse or wetland to allow construction traffic to access the area without causing erosion damage.

"Cement" means hydraulic cement properly mixed with water.

"Cement bond log" means an acoustic survey or sonic-logging method that records the quality or hardness of the cement used in the annulus to bond the casing and the formation.

"Centralizer" means a device secured around the casing at regular intervals to center it in the hole.

"Channel" means a natural stream or man-made waterway.

"Chemical Disclosure Registry" means the chemical registry website known as FracFocus.org developed by the Ground Water Protection Council and the Interstate Oil and Gas Compact Commission.

"Chief" means the Chief of the Division of Mines of the Department of Mines, Minerals and Energy.

"Coal-protection string" means a casing designed to protect a coal seam by excluding all fluids, oil, gas, or gas pressure from the seam, except such as may be found in the coal seam itself.

"Cofferdam" means a temporary structure in a river, lake, or other waterway for keeping the water from an enclosed area that has been pumped dry so that bridge foundations, pipelines, etc., may be constructed.

"Completion" means the process ~~which~~ that results in a well being capable of producing gas or oil.

"Conductor pipe" means the short, large diameter string used primarily to control caving and washing out of unconsolidated surface formations.

"Corehole" means any hole drilled solely for the purpose of obtaining rock samples or other information to be used in the exploration for coal, gas, or oil. The term shall not include a borehole used solely for the placement of an explosive charge or other energy source for generating seismic waves.

"Days" means calendar days.

"Denuded area" means land that has been cleared of vegetative cover.

"Department" means the Department of Mines, Minerals and Energy.

"Detention basin" means a stormwater management facility which temporarily impounds and discharges runoff through an outlet to a downstream channel. Infiltration is negligible when compared to the outlet structure discharge rates. The facility is normally dry during periods of no rainfall.

"Dike" means an earthen embankment constructed to confine or control fluids.

"Directional survey" means a well survey that measures the degree of deviation of a hole from true vertical, and the distance and direction of points in the hole from vertical.

"Director" means the Director of the Department of Mines, Minerals and Energy or his authorized agent.

"Diversion" means a channel constructed for the purpose of intercepting surface runoff.

"Diverter" or "diverter system" means an assembly of valves and piping attached to a gas or oil well's casing for controlling flow and pressure from a well.

"Division" means the Division of Gas and Oil of the Department of Mines, Minerals and Energy.

"Emergency response plan" means the document that details the steps to prevent, control, and provide adequate countermeasures for a petroleum product discharge not covered by the spill prevention, control, and countermeasures plan or for a non-petroleum product discharge.

"Erosion and sediment control plan" means a document containing a description of materials and methods to be used for the conservation of soil and the protection of water resources in or on a unit or group of units of land. It may include appropriate maps, an appropriate soil and water plan inventory and management information with needed interpretations, and a record of decisions contributing to conservation treatment. The plan shall contain a record of all major conservation decisions to ensure that the entire unit or units of land will be so treated to achieve the conservation objectives.

"Expanding cement" means any cement approved by the director ~~which~~ that expands during the hardening process, including but not limited to regular oil field cements with the proper additives.

"Firewall" means an earthen dike or fire resistant structure built around a tank or tank battery to contain the oil in the event a tank ruptures or catches fire.

"Flume" means a constructed device lined with erosion-resistant materials intended to convey water on steep grades.

"Flyrock" means any material propelled by a blast that would be actually or potentially hazardous to persons or property.

"Form prescribed by the director" means a form issued by the division, or an equivalent facsimile, for use in meeting the requirements of the Act or this chapter.

"Gas well" means any well which produces or appears capable of producing a ratio of 6,000 cubic feet (6 Mcf) of gas or more to each barrel of oil, on the basis of a gas-oil ratio test.

"Gob well" means a coalbed methane gas well ~~which~~ that is capable of producing coalbed methane gas from the de-stressed zone associated with any full-seam extraction of coal that extends above and below the mined-out coal seam.

"Groundwater" means all water under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, which has the potential for being used for domestic, industrial, commercial, or agricultural use or otherwise affects the public welfare.

"Highway" means any public street, public alley, or public road.

"Hydraulic fracturing" means the treatment of a well by the application of hydraulic fracturing fluid under pressure for the express purpose of initiating or propagating fractures in a target geologic formation to enhance production of oil or natural gas.

"Hydraulic fracturing fluid" means the fluid, including the applicable base fluid and all additives, used to perform hydraulic fracturing treatment.

"Inclination survey" means a survey taken inside a wellbore that measures the degree of deviation of the point of the survey from true vertical.

"Inhabited building" means a building, regularly occupied in whole or in part by human beings, including, but not limited to, a private residence, church, school, store, public building or other structure where people are accustomed to assemble except for a building being used on a temporary basis, on a permitted site, for gas, oil, or geophysical operations.

"Intermediate string" means a string of casing that prevents caving, shuts off connate water in strata below the water-protection string, and protects strata from exposure to lower zone pressures.

"Live watercourse" means a definite channel with bed and banks within which water flows continuously.

"Mcf" means, when used with reference to natural gas, 1,000 cubic feet of gas at a pressure base of 14.73 pounds per square inch gauge and a temperature base of 60°F.

"Mud" means a mixture of materials that creates a weighted fluid to be circulated downhole during drilling operations for the purpose of lubricating and cooling the bit, removing cuttings, and controlling formation pressures and fluid.

"Natural channel" or "natural stream" means nontidal waterways that are part of the natural topography. They usually maintain a continuous or seasonal flow during the year, and are characterized as being irregular in cross section with a meandering course.

"Nonerodible" means a material such as riprap, concrete, or plastic that will not experience surface wear due to natural forces.

"Oil well" means any well ~~which~~ that produces or appears capable of producing a ratio of less than 6,000 cubic feet (6 Mcf) of gas to each barrel of oil, on the basis of a gas-oil ratio test.

"Open hole completion" means a technique used to make a well capable of production in which no production casing is set through the productive zones.

"Person" means any individual, corporation, partnership, association, company, business, trust, joint venture, or other legal entity.

"Plug" means the sealing of, or a device or material used for the sealing of, a gas or oil wellbore or casing to prevent the migration of water, gas, or oil from one stratum to another.

"Pre-development" means the land use and site conditions that exist at the time that the operations plan is submitted to the division.

"Produced waters" means water or fluids produced from a gas well, oil well, coalbed methane gas well, or gob well as a byproduct of producing gas, oil, or coalbed methane gas.

"Producer" means a permittee operating a well in Virginia that is producing or is capable of producing gas or oil.

"Production string" means a string of casing or tubing through which the well is completed and may be produced and controlled.

"Red shales" means the undifferentiated shaley portion of the Bluestone formation normally found above the Pride Shale Member of the formation, and extending upward to the base of the Pennsylvanian strata, which red shales are predominantly red and green in color but may occasionally be gray, grayish green, and grayish red.

"Red zone" is a zone in or contiguous to a permitted area that could have potential hazards to workers or to the public.

"Retention basin" means a stormwater management facility ~~which~~ that, similar to a detention basin, temporarily impounds runoff and discharges its outflow through an outlet to a downstream channel. A retention basin is a permanent impoundment.

"Sediment basin" means a depression formed from the construction of a barrier or dam built to retain sediment and debris.

"Sheet flow," ~~also called~~ or "overland flow," means shallow, unconcentrated and irregular flow down a slope. The length of strip for sheet flow usually does not exceed 200 feet under natural conditions.

"Slope drain" means tubing or conduit made of nonerosive material extending from the top to the bottom of a cut or fill slope.

"Special diligence" means the activity and skill exercised by a good businessperson in a particular specialty, which must be commensurate with the duty to be performed and the individual circumstances of the case, not merely the diligence of an ordinary person or nonspecialist.

"Spill prevention, control, and countermeasure plan" or "SPCC plan" means the document that details the steps to prevent, control, and provide adequate countermeasures to certain petroleum product discharges.

"Stabilized" means able to withstand normal exposure to air and water flows without incurring erosion damage.

Regulations

"Stemming" means the inert material placed in a borehole after an explosive charge for the purpose of confining the explosion gases in the borehole or the inert material used to separate the explosive charges (decks) in decked holes.

"Stimulate" means any action taken by a gas or oil operator to increase the inherent productivity of a gas or oil well, including, but not limited to, fracturing, shooting, or acidizing, but excluding (i) cleaning out, bailing, or workover operations and (ii) the use of surface-tension reducing agents, emulsion breakers, paraffin solvents, and other agents that affect the gas or oil being produced, as distinguished from the producing formation.

"Storm sewer inlet" means any structure through which stormwater is introduced into an underground conveyance system.

"Stormwater management facility" means a device that controls stormwater runoff and changes the characteristics of that runoff, including but not limited to, the quantity, quality, the period of release, or the velocity of flow.

"String of pipe" or "string" means the total footage of pipe of uniform size set in a well. The term embraces conductor pipe, casing, and tubing. When the casing consists of segments of different size, each segment constitutes a separate string. A string may serve more than one purpose.

"Sulfide stress cracking" means embrittlement of the steel grain structure to reduce ductility and cause extreme brittleness or cracking by hydrogen sulfide.

"Surface mine" means an area containing an open pit excavation, surface operations incident to an underground mine, or associated activities adjacent to the excavation or surface operations, from which coal or other minerals are produced for sale, exchange, or commercial use; and includes all buildings and equipment above the surface of the ground used in connection with such mining.

"Target formation" means the geologic gas or oil formation identified by the well operator in his application for a gas, oil or geophysical drilling permit.

"Temporary stream crossing" means a temporary span installed across a flowing watercourse for use by construction traffic. Structures may include bridges, round pipes or pipe arches constructed on or through nonerodible material.

"Ten-year storm" means a storm that is capable of producing rainfall expected to be equaled or exceeded on the average of once in 10 years. It may also be expressed as an exceedance probability with a 10% chance of being equaled or exceeded in any given year.

"Tidewater Virginia" means the region defined in § 62.1-44.15:68 of the Code of Virginia.

"Trade secret" means the term defined in § 59.1-336 of the Code of Virginia.

"Tubing" means the small diameter string set after the well has been drilled from the surface to the total depth and

through which the gas or oil or other substance is produced or injected.

"Two-year storm" means a storm that is capable of producing rainfall expected to be equaled or exceeded on the average of once in two years. It may also be expressed as an exceedance probability with a 50% chance of being equaled or exceeded in any given year.

"Vertical ventilation hole" means any hole drilled from the surface to the coal seam used only for the safety purpose of removing gas from the underlying coal seam and the adjacent strata, thus, removing the gas that would normally be in the mine ventilation system.

"Water bar" means a small obstruction constructed across the surface of a road, pipeline right-of-way, or other area of ground disturbance in order to interrupt and divert the flow of water on a grade for the purpose of controlling erosion and sediment migration.

"Water-protection string" means a string of casing designed to protect groundwater-bearing strata.

4VAC25-150-30. Other laws and regulations, and ordinances.

Nothing in this chapter shall relieve a permittee of the duty to comply with other laws and, regulations, and [applicable] local land use ordinances.

Article 2 Permitting

4VAC25-150-80. Application for a permit.

A. Applicability.

1. Persons required in § 45.1-361.29 of the Code of Virginia to obtain a permit or permit modification shall apply to the division on the forms prescribed by the director. All lands on which gas, oil, or geophysical operations are to be conducted shall be included in a permit application.

2. In addition to specific requirements for variances in other sections of this chapter, any applicant for a variance shall, in writing, document the need for the variance and describe the alternate measures or practices to be used.

3. Prior to accepting an application for a permit to drill for gas or oil in Tidewater Virginia, the department shall convene a preapplication meeting within the locality where the operation is proposed. The preapplication meeting shall ensure those who desire to submit an application are aware of the requirements established in § 62.1-195.1 of the Code of Virginia and 9VAC15-20. The department, in conjunction with the Department of Environmental Quality, shall conduct the meeting. The meeting shall be open to the public [.] and the department shall notify the locality in which the meeting is to take place [and adjacent localities]. No application for a permit to drill for gas or oil in Tidewater Virginia shall be accepted until the meeting is completed.

B. The application for a permit shall, as applicable, be accompanied by the fee in accordance with § 45.1-361.29 of the Code of Virginia, the bond in accordance with § 45.1-361.31 of the Code of Virginia, and the fee for the Orphaned Well Fund in accordance with § 45.1-361.40 of the Code of Virginia.

C. Each application for a permit shall include information on all activities, including those involving associated facilities, to be conducted on the permitted site. This shall include the following:

1. The name and address of:
 - a. The gas, oil, or geophysical applicant;
 - b. The agent required to be designated under § 45.1-361.37 of the Code of Virginia; and
 - c. Each person whom the applicant must notify under § 45.1-361.30 of the Code of Virginia;
2. The certifications required in § 45.1-361.29 E of the Code of Virginia;
3. Certification from the applicant that the proposed operation complies with all [applicable] local land use ordinances;
- ~~3.~~ 4. The proof of notice to affected parties required in § 45.1-361.29 E of the Code of Virginia, which shall be:
 - a. A copy of a signed receipt or electronic return receipt of delivery of notice by certified mail;
 - b. A copy of a signed receipt acknowledging delivery of notice by hand; or
 - c. If all copies of receipt of delivery of notice by certified mail have not been signed and returned within 15 days of mailing, a copy of the mailing log or other proof of the date the notice was sent by certified mail, return receipt requested;
- ~~4.~~ 5. If the application is for a permit modification, proof of notice to affected parties, as specified in subdivision C ~~3~~ 4 of this section;
- ~~5.~~ 6. Identification of the type of well or other gas, oil, or geophysical operation being proposed;
7. A list of ingredients anticipated to be used in any hydraulic fracturing operations [. The applicant should identify any ingredients claimed to be trade secrets, and the department shall utilize the process described in 4VAC25-150-365 C to determine if the identified ingredients are entitled to trade secret protection];
8. The groundwater baseline sampling, analysis, and monitoring plan in accordance with 4VAC25-150-95;
- ~~6.~~ 9. The plat in accordance with 4VAC25-150-90;
- ~~7.~~ 10. The operations plan in accordance with 4VAC25-150-100;
- ~~8.~~ 11. The information required for operations involving hydrogen sulfide in accordance with 4VAC25-150-350;

~~9.~~ 12. The location where the Spill Prevention Control and Countermeasure spill prevention, control, and countermeasure (SPCC) plan is available, if one is required;

13. The emergency response plan;

~~10.~~ 14. The Department of Mines, Minerals and Energy, Division of Mined Land Reclamation's permit number for any area included in a Division of Mined Land Reclamation permit on which a proposed gas, oil, or geophysical operation is to be located;

~~11.~~ 15. For an application for a conventional well, the information required in 4VAC25-150-500;

~~12.~~ 16. For an application for a coalbed methane gas well, the information required in 4VAC25-150-560;

~~13.~~ 17. For an application for a geophysical operation, the information required in 4VAC25-150-670; and

~~14.~~ 18. For an application for a permit to drill for gas or oil in Tidewater Virginia, the environmental impact assessment meeting the requirements of § 62.1-195.1 B of the Code of Virginia and 9VAC15-20.

D. ~~After July 1, 2009, all~~ All permit applications and plats submitted to the division shall be in electronic form or a format prescribed by the director.

4VAC25-150-95. Groundwater baseline sampling, analysis, and monitoring plan.

A. Each application for a permit shall include a groundwater baseline sampling, analysis, and monitoring plan. The groundwater monitoring program will consist of initial baseline groundwater sampling and testing followed by subsequent sampling and testing after setting the production casing or liner.

B. If four or fewer available groundwater sources are present within a one-quarter-mile radius of the location of a proposed oil or gas well, or department-approved monitoring well, the operator shall collect a sample from each available groundwater source.

C. If more than four available groundwater sources are present within the one-quarter-mile radius, the operator shall submit a plan for approval to the director for selecting the available groundwater sources based on all of the following criteria:

1. Available groundwater sources closest to the location of the (i) proposed oil or gas well, (ii) department-approved monitoring well, or (iii) multi-well pad are preferred.

2. Sample locations shall be chosen in a radial pattern around the permitted location.

3. Where available groundwater sources are present in different aquifers, a sample shall be collected from each aquifer. Where multiple available groundwater sources are present in a single aquifer, an operator shall give adequate consideration to vertical separation and aquifer zones in selecting available groundwater sources for sampling.

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4. If groundwater flow direction is known or reasonably can be inferred, samples from both upgradient and downgradient available groundwater sources are required, if available.

D. The initial sampling and testing shall be conducted within the 12-month period prior to drilling the well or the first well on a multi-well pad. Subsequent sampling and testing shall be conducted between six and 12 months after setting the production casing or liner. An operator shall make a reasonable attempt to conduct all sampling during the same month of the year. An operator may request in writing approval from the director to deviate from these sampling and testing timeframes in its permit application based on site specific geologic and hydrologic conditions (e.g., flow rate and direction). Previously sampled groundwater sources, including samples obtained by other operators, may be used if collection of the sample or samples meets all of the requirements of this section and are approved by the director.

E. All samples collected pursuant to this section shall be analyzed and tested by a laboratory certified or accredited under the Virginia Environmental Laboratory Accreditation Program established in 1VAC30-45 and 1VAC30-46.

F. Copies of all final laboratory analytical results and spatial coordinates of the available water source shall be provided by the operator or its representative to the department and water source owner within three months of sample collection. All analytical results and spatial coordinates of the available water source shall be made available to the public by the department.

G. The initial and subsequent sampling and testing described in this section shall, at a minimum, include the following items:

1. Chlorides;
2. Total dissolved solids;
3. Dissolved gases (methane, ethane, propane);
4. Hardness;
5. Iron;
6. Manganese;
7. pH;
8. Sodium; and
9. Sulfate.

Field observations such as odor, water color, sediment, bubbles, and effervescence shall also be documented. Handheld detection devices shall be sufficient for testing for methane.

H. If free gas or a dissolved methane concentration greater than 10.0 milligrams per liter (mg/L) is detected in a water sample, gas compositional analysis and stable isotope analysis of the methane (carbon and hydrogen – 12C, 13C, 1H, and 2H) shall be performed to determine gas type.

I. The operator shall provide verbal and written notification to the director and groundwater source owner within 24 hours if test results indicate:

1. The presence of thermogenic or a mixture of thermogenic and biogenic gas;
2. The methane concentration increases by more than 5.0 mg/L between sampling periods;
3. The methane concentration is detected at or above 10.0 mg/L; or
4. Exceedances of the parameters listed in 9VAC25-280-70.

J. Upon receiving notification pursuant to this subsection, the director shall have the authority to order an additional sampling test to be completed within six months of the test that resulted in the notification. This authority is in addition to enforcement actions the director may utilize pursuant to 4VAC25-150-170.

4VAC25-150-100. Operations plans.

A. Each application for a permit or permit modification shall include an operations plan, in a format approved by or on a form prescribed by the director. The operations plan and accompanying maps or drawings shall become part of the terms and conditions of any permit which is issued.

B. The operations plan shall describe the specifications for the use of centralizers to ensure casing is centered in the hole. The specifications shall include, at a minimum, one centralizer within 50 feet of the water protection string seat and then in intervals no greater than every 150 feet above the first centralizer and are subject to the approval of the director.

B- C. The applicant shall indicate how risks to the public safety or to the site and adjacent lands are to be managed, consistent with the requirements of § 45.1-361.27 B of the Code of Virginia, and shall provide a short narrative, if pertinent. The operations plan shall identify red zone areas.

4VAC25-150-110. Permit supplements and permit modifications.

A. Permit supplements.

1. Standard permit supplements. A permittee shall be allowed to submit a permit supplement when work being performed:

- a. Does not change the disturbance area as described in the original permit; and
- b. Involves activities previously permitted.

The permittee shall submit written documentation of the changes made to the permitted area no later than 30 days after completing the change. All other changes to the permit shall require a permit modification in accordance with § 45.1-361.29 of the Code of Virginia.

2. Permit supplements for disclosure of ingredients used in hydraulic fracturing. Prior to completion of a well, the permittee shall submit a permit supplement when the

ingredients [~~used or~~] expected to be used in the hydraulic fracturing process differ in any way from that which was submitted pursuant to subdivision C 7 of 4VAC25-150-80. [The permittee should identify any ingredients claimed to be trade secrets, and the department shall utilize the process described in 4VAC25-150-365 C to determine if the identified ingredients are entitled to trade secret protection.]

~~2.~~ 3. Emergency permit supplements. If a change must be implemented immediately for an area off the disturbance area as described in the original permit, or for an activity not previously permitted due to actual or threatened imminent danger to the public safety or to the environment, the permittee shall:

- a. Take immediate action to minimize the danger to the public or to the environment;
- b. Notify the director as soon as possible of actions taken to minimize the danger and, if the director determines an emergency still exists and grants oral approval, commence additional changes if necessary; and
- c. Submit a supplement to the permit within seven working days of notifying the director with a written description of the emergency and action taken. An incident report may also be required as provided for in 4VAC25-150-380.

Any changes to the permit are to be temporary and restricted to those that are absolutely necessary to minimize danger. Any permanent changes to the permit shall require a permit modification as provided for in subsection B of this section.

B. Permit modifications.

1. Applicability. All changes to the permit which do not fit the description contained in subsection A of this section shall require a permit modification in accordance with § 45.1-361.29 of the Code of Virginia.
2. Notice and fees. Notice of a permit modification shall be given in accordance with § 45.1-361.30 of the Code of Virginia. The application for a permit modification shall be accompanied, as applicable, by the fee in accordance with § 45.1-361.29 of the Code of Virginia and the bond in accordance with § 45.1-361.31 of the Code of Virginia.
3. Waiver of right to object. Upon receipt of notice, any person may, on a form approved by the director, waive the time requirements and their right to object to a proposed permit modification. The department shall be entitled to rely upon the waiver to approve the permit modification.
4. Permit modification. The permittee shall submit a written application for a permit modification on a form prescribed by the director. The permittee may not undertake the proposed work until the permit modification has been issued. As appropriate, the application shall include, but not be limited to:

- a. The name and address of:
 - (1) The permittee; and
 - (2) Each person whom the applicant must notify under § 45.1-361.30 of the Code of Virginia;
- b. The certifications required in § 45.1-361.29 E of the Code of Virginia;
- c. The proof of notice required in § 45.1-361.29 E of the Code of Virginia, as provided for in 4VAC25-150-80 C ~~3~~ 4;
- d. Identification of the type of work for which a permit modification is requested;
- e. The plat in accordance with 4VAC25-150-90;
- f. All data, maps, plats and plans in accordance with 4VAC25-150-100 necessary to describe the activity proposed to be undertaken;
- g. When the permit modification includes abandoning a gas or oil well as a water well, a description of the plugging to be completed up to the water-bearing formation and a copy of the permit issued for the water well by the Virginia Department of Health;
- h. The information required for operations involving hydrogen sulfide in accordance with 4VAC25-150-350 if applicable to the proposed operations;
- i. The location where the Spill Prevention Control and Countermeasure spill prevention, control, and countermeasure (SPCC) plan is available, if one has been developed for the site of the proposed operations, or the emergency response plan;
- j. The Department of Mines, Minerals and Energy, Division of Mined Land Reclamation's permit number for any area included in a Division of Mined Land Reclamation permit; and
- k. The information, as appropriate, required in 4VAC25-150-500, 4VAC25-150-560, 4VAC25-150-670, or 4VAC25-150-720.

5. Upon receipt of an application for a permit modification for a well in Tidewater Virginia, the director may require additional documentation to supplement information submitted to the department pursuant to subsection B of § 62.1-195.1 of the Code of Virginia. If additional documentation is required, the operator shall submit that documentation to the director and the Department of Environmental Quality.

4VAC25-150-160. Approval of permits and permit modifications.

- A. Permits, permit modifications, permit renewals, and transfer of permit rights shall be granted in writing by the director.
- B. The director may not issue a permit, permit renewal, or permit modification prior to the end of the time period for filing objections pursuant to § 45.1-361.35 of the Code of

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Virginia unless, upon receipt of notice, any person may, on a form approved by the director, waive the time requirements and their right to object to a proposed permit application or permit modification application. The director shall be entitled to rely upon the waiver to approve the permit application or permit modification.

C. The director may not issue a permit to drill for gas or oil or approve a permit modification for a well where additional documentation is required pursuant to subdivision B 5 of 4VAC25-150-110 in Tidewater Virginia until he has considered the findings and recommendations of the collaborated with the Department of Environmental Quality, as provided for in § 62.1-195.1 of the Code of Virginia and, where appropriate, has required changes in the permitted activity based on to ensure permit conditions accurately reflect the results from the Department of Environmental Quality's recommendations coordinated review of the environmental impact assessment required pursuant to § 62.1-195.1 of the Code of Virginia.

D. The provisions of any order of the Virginia Gas and Oil Board that govern a gas or oil well permitted by the director shall become conditions of the permit.

4VAC25-150-280. Logs and surveys.

A. Each permittee drilling a well or corehole shall complete a driller's log, a gamma ray log, or other log showing the top and bottom points of geologic formations and any other log required under this section. The driller's log shall state, at a minimum, the character, depth, and thickness of geological formations encountered, including groundwater-bearing strata, coal seams, mineral beds, and gas-bearing or oil-bearing formations.

B. When a permittee or the director identifies that a well or corehole is to be drilled or deepened in an area of the Commonwealth ~~which~~ that is known to be underlain by coal seams, the following shall be required:

1. The vertical location of coal seams in the well or corehole shall be determined and shown in the driller's log and gamma ray log or other log.
2. The horizontal location of the well or corehole in coal seams shall be determined through an inclination survey from the surface to the lowest known coal seam. Each inclination survey shall be conducted as follows:
 - a. The first survey point shall be taken at a depth not greater than the most shallow coal seam; and
 - b. Thereafter shot points shall be taken at each coal seam or at intervals of 200 feet, whichever is less, to the lowest known coal seam.
3. Prior to drilling any well or corehole within 500 feet of a coal seam in which there are active workings, the permittee shall conduct an inclination survey to determine whether the deviation of the well or corehole exceeds one degree from true vertical. If the well or corehole is found to exceed one degree from vertical, then the permittee shall:

- a. Immediately cease operations;
- b. Immediately notify the coal owner and the division;
- c. Conduct a directional survey to drilled depth to determine both horizontal and vertical location of the well or corehole; and
- d. Unless granted a variance by the director, correct the well or corehole to within one degree of true vertical.

4. Except as provided for in subdivision B 3 of this section, if the deviation of the well or corehole exceeds one degree from true vertical at any point between the surface and the lowest known coal seam, then the permittee shall:

- a. Correct the well or corehole to within one degree of true vertical; or
- b. Conduct a directional survey to the lowest known coal seam and notify the coal owner of the actual well or corehole location.

5. The director may grant a variance to the requirements of subdivisions B 3 and B 4 of this section only after the permittee and coal owners have jointly submitted a written request for a variance stating that a directional survey or correction to the well or corehole is not needed to protect the safety of any person engaged in active coal mining or to the environment.

6. If the director finds that the lack of assurance of the horizontal location of the well or corehole to a known coal seam poses a danger to persons engaged in active coal mining or the lack of assurance poses a risk to the public safety or the environment, the director may, until 30 days after a permittee has filed the completion report required in 4VAC25-150-360, require that a directional survey be conducted by the permittee.

7. The driller's log shall be updated on a daily basis. The driller's log and results of any other required survey shall be kept at the site until drilling and casing or plugging a dry hole or corehole are completed.

C. Each permittee completing a well shall complete a cement bond log for the water protection string. [Permittees may petition the director to submit alternative documentation that demonstrates effective bond between the casing and the formation.]

4VAC25-150-300. Pits.

A. General requirements.

1. Pits are to be temporary in nature and are to be reclaimed when the operations using the pit are complete. All pits shall be reclaimed within 180 days unless a variance is requested and granted by the field inspector.
2. Pits may not be used as erosion and sediment control structures or stormwater management structures, and surface drainage may not be directed into a pit.
3. Pits shall have a properly installed and maintained liner or liners made of 10 mil or thicker high-density polyethylene or its equivalent.

4. Pits shall be constructed of sufficient size and shape to contain all fluids and maintain a two-foot freeboard.

5. Pits shall be enclosed by adequate fencing to secure the site from access by the public and wildlife.

B. Operational requirements.

1. The integrity of lined pits ~~must~~ and their enclosures shall be maintained until the pits are reclaimed or otherwise closed. Upon failure of the lining or pit, the operation shall be shut down until the liner and pit are repaired or rebuilt. The permittee shall notify the division, by the quickest available means, of any pit leak.

2. Motor oil and, to the extent practicable, crude oil shall be kept out of the pit. Oil shall be collected and disposed of properly. Litter and other solid waste shall be collected and disposed of properly and not thrown into the pit.

3. At the conclusion of drilling and completion operations or after a dry hole, well, or corehole has been plugged, the pit shall be drained in a controlled manner and the fluids disposed of in accordance with 4VAC25-150-420. If the pit is to be used for disposal of solids, then the standards of 4VAC25-150-430 shall be met.

4VAC25-150-340. Drilling fluids.

A. Operations plan requirements. Applicants for a permit shall provide, prior to commencing drilling, documentation that the water meets the requirements of subsection B of this section, and a general description of the additives and muds to be used in all stages of drilling. Providing that the requirement in ~~4VAC25-150-340~~ subsection C of this section is met, variations necessary because of field conditions may be made with prior approval of the director and shall be documented in the driller's log.

B. Water quality in drilling.

1. Before the water-protection string is set, permittees shall use one of the following sources of water in drilling:

a. Water that is from a water well or spring located on the drilling site; or

b. Conduct an analysis of groundwater within ~~500 feet~~ a one-quarter-mile radius of the drilling location, and use:

(1) Water which is of equal or better quality than the groundwater; or

(2) Water which can be treated to be of equal or better quality than the groundwater. A treatment plan must be included with the application if water is to be treated.

~~(3)~~ (3) If, after a diligent search, a groundwater source (such as a well or spring) cannot be found within ~~500 feet~~ a one-quarter-mile radius of the drilling location, the applicant may use water meeting the parameters listed in the Department of Environmental Quality's "Ground water criteria," 9VAC25-280-70. The analysis shall include, but is not limited to, the following items:

~~(4)~~ (4) (a) Chlorides;

~~(2)~~ (2) (b) Total dissolved solids;

~~(3)~~ (3) (c) Hardness;

~~(4)~~ (4) (d) Iron;

~~(5)~~ (5) (e) Manganese;

~~(6)~~ (6) (f) PH;

~~(7)~~ (7) (g) Sodium; and

~~(8)~~ (8) (h) Sulfate.

(4) Drilling water analysis shall be taken within a one-year period preceding the drilling application.

2. After the water-protection string is set, permittees may use waters that do not meet the standards of subdivision B 1 of this section.

C. Drilling muds. No permittee may use an oil-based drilling fluid or other fluid which has the potential to cause acute or chronic adverse health effects on living organisms unless a variance has been approved by the director. Permittees must explain the need to use such materials and provide the material data safety sheets. In reviewing the request for the variance, the director shall consider the concentration of the material, the measures to be taken to control the risks, and the need to use the material. Permittees shall also identify what actions will be taken to ensure use of the additives will not cause a lessening of groundwater quality.

4VAC25-150-360. Drilling, completion, and other reports.

A. Each permittee conducting drilling shall file, electronically or on a form prescribed by the director, a drilling report within 90 days after a well reaches total depth.

B. Each permittee drilling a well shall file, electronically or on a form prescribed by the director, a completion report within 90 days after the well is completed. All completion reports shall include the cement bond log required in subsection C of 4VAC25-150-280. Subject to the approval of the director, permittees may submit alternative documentation that demonstrates effective bond between the casing and the formation.

C. The permittee shall file the driller's log, the results of any other log or survey required to be run in accordance with this chapter or by the director, and the plat showing the actual location of the well with the drilling report, unless they have been filed earlier.

D. The permittee shall, within 90 days of reaching total depth, file with the division the results of any gamma ray, density, neutron ~~and~~ induction, and cement bond logs, or their equivalent, that have been conducted on the wellbore in the normal course of activities that have not previously been required to be filed.

4VAC25-150-365. Disclosure of well stimulation fluids.

A. In addition to other requirements that may be prescribed by the director, each completion report required in 4VAC25-150-360 shall also contain the following disclosures:

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The operator of the well shall complete the Chemical Disclosure Registry form and upload the form on the Chemical Disclosure Registry, including:

- a. The operator name;
- b. The date of completion of the hydraulic fracturing treatment or treatments;
- c. The county in which the well is located;
- d. The American Petroleum Institute (API) number for the well;
- e. The well name and number;
- f. The longitude and latitude of the wellhead;
- g. The total vertical depth of the well;
- h. The total volume of water used in the hydraulic fracturing treatment or treatments of the well or the type and total volume of the base fluid used in the hydraulic fracturing treatment or treatments, if something other than water;
- i. Each additive used in the hydraulic fracturing treatments and the trade name, supplier, and a brief description of the intended use or function of each additive in the hydraulic fracturing treatment or treatments;
- j. Each chemical ingredient used in the hydraulic fracturing treatment or treatments of the well that is subject to the requirements of 29 CFR 1910.1200(g)(2), as provided by the chemical supplier or service company or by the operator, if the operator provides its own chemical ingredients;
- k. The actual or maximum concentration of each chemical ingredient listed under subdivision j of this subsection in percent by mass;
- l. The CAS number for each chemical ingredient listed, if applicable; and
- m. A supplemental list of all chemicals, their respective CAS numbers, and the proportions thereof not subject to the requirements of 29 CFR 1910.1200(g)(2), that were intentionally included in and used for the purpose of creating the hydraulic fracturing treatments for the well.

B. [The department shall obtain and maintain data submitted to the Chemical Disclosure Registry.] If the Chemical Disclosure Registry is temporarily inoperable, the operator of a well on which hydraulic fracturing treatment or treatments were performed shall supply the department with the required information and upload the information on the registry when it is again operable. The information required shall also be filed as an attachment to the completion report for the well, which shall be posted, along with all attachments, on the department's website, except that information determined to be subject to trade secret protection shall not be posted.

C. All information related to the specific identity or CAS number or amount of any additive or chemical ingredient

used in hydraulic fracturing shall be submitted to the department and shall be available to the public unless the department determines that information supplied by the operator and claimed to be a trade secret is entitled to such protection. All information claimed as a trade secret shall be identified as such at the time of submission of the appropriate report. The department shall treat as confidential in accordance with law, information that meets the criteria specified in law for a trade secret and is contained on such forms and filings as is required under this chapter. [Such criteria shall include a demonstration by the claimant that the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.]

Should the department determine that information is protected as a trade secret, the operator of the well shall indicate on the Chemical Disclosure Registry or the supplemental list that the additive or chemical ingredient or their amounts are entitled to trade secret protection. If a chemical ingredient name or CAS number is entitled to trade secret protection, the chemical family or other similar description associated with such chemical ingredient shall be provided. The operator of the well on which hydraulic fracturing was performed shall provide the contact information, including the name, authorized representative, mailing address, and phone number of the business organization for which trade secret protection exists. Unless the information is entitled to protection as a trade secret, information submitted to the department or uploaded on the Chemical Disclosure Registry is public information.

D. The operator understands that the director may disclose information regarding the specific identity of a chemical, the concentration of a chemical, or both the specific identity and concentration of a chemical claimed to be a trade secret to additional department staff to the extent that such disclosure is necessary to assist the department in responding to an emergency resulting in an order pursuant to subsection D of § 45.1-361.27 of the Code of Virginia provided that such individuals shall not disseminate the information further. In addition, the director may disclose such information to any relevant state or local government official to assist in responding to the emergency. Any information so disclosed shall at all times be considered confidential and shall not be construed as publicly available. [The director shall notify the trade secret claimant or holder of disclosures made to relevant state or local government officials as soon as practicable after such disclosure is made.]

E. An operator may not withhold information related to chemical ingredients used in hydraulic fracturing, including information identified as a trade secret, from any health professional or emergency responder who needs the information for diagnostic, treatment, or other emergency

response purposes subject to procedures set forth in 29 CFR 1910.1200(i). An operator shall provide directly to a health professional or emergency responder, all information in the person's possession that is required by the health professional or emergency responder, whether or not the information may qualify for trade secret protection under this section. The person disclosing information to a health professional or emergency responder shall include with the disclosure, as soon as circumstances permit, a statement of the health professional's confidentiality obligation. In an emergency situation, the operator shall provide the information immediately upon request to the person who determines that the information is necessary for emergency response or treatment. The disclosures required by this subsection shall be made in accordance with the procedures in 29 CFR 1910 with respect to a written statement of need and confidentiality agreements, as applicable.

4VAC25-150-535. Pressure testing requirements for production casing in conventional gas or oil wells.

A. The operator shall install casing that can withstand the effects of tension and can prevent leaks, burst, and collapse during (i) the casing's installation and cementing and (ii) subsequent drilling and producing operations.

B. Except as provided in subsection C of this section, all casing must be a string of new pipe with an internal pressure rating that is at least 20% greater than the anticipated maximum pressure to which the casing will be exposed.

C. Used casing may be approved for use as surface, intermediate, or production casing but shall be pressure tested after cementing and before completion. A passing pressure test is holding the anticipated maximum pressure to which it will be exposed for 30 minutes with not more than a 10% decrease in pressure.

D. New or used plain end casing, except when being used as conductor pipe, that is welded together for use must meet the following requirements:

1. The casing must pass a pressure test by holding the anticipated maximum pressure to which the casing will be exposed for 30 minutes with not more than a 10% decrease in pressure. The operator shall notify the department [electronically] at least 24 hours before conducting the test. The test results shall be entered on the drilling report.

2. The casing shall be welded using at least three passes with the joint cleaned between each pass.

4VAC25-150-610. Casing requirements for coalbed methane gas wells.

A. Water protection string.

1. Except as provided in subdivision A 5 of this section, the permittee shall set a water-protection string set to a point at least 300 feet below the surface or 50 feet below the deepest known groundwater horizon, whichever is deeper, circulated and cemented to the surface. If cement does not return to the surface, every reasonable effort shall

be made to fill the annular space by introducing cement from the surface.

2. The operator shall test or require the cementing company to test the cement mixing water for pH and temperature prior to mixing the cement and to record the results on the cementing ticket.

3. After the cement is placed, the operator shall wait a minimum of eight hours and allow the cement to achieve a calculated compressive strength of 500 psi before drilling, unless the director approves a shorter period of time. The wait-on-cement (WOC) time shall be recorded within the records kept at the drilling rig while drilling is taking place.

4. When requested by the director, the operator shall submit copies of cement tickets or other documents that indicate the above specifications have been followed.

5. A coal-protection string may also serve as a water protection string only for gob wells.

B. Coal protection strings.

1. When any well penetrates coal seams that have not been mined out, the permittee shall, except as provided in subdivisions B 2 and B 3 of this section, set a coal-protection string. The coal-protection string shall exclude all fluids, oil, gas, and gas pressure, except that which is naturally present in each coal seam. The coal-protection string shall also exclude all injected material or disposed waste from the coal seams or the wellbore. The string of casing shall be set to a point at least 50 feet below the lowest coal seam, or as provided in subdivision B 3 of this section, and shall be circulated and cemented from that point to the surface, or to a point not less than 50 feet into the water-protection string or strings which are cemented to the surface.

2. For good cause shown, either before or after the permit is issued, when the procedure specified in subdivision B 1 of this section is demonstrated by the permittee as not practical, the director may approve a casing program involving:

- a. The cementing of a coal-protection string in multiple stages;
- b. The cementing of two or more coal-protection strings; or
- c. The use of other alternative casing procedures.

3. The director may approve the program, provided he is satisfied that the result will be operationally equivalent to compliance with the provisions of subdivision B 1 of this section for the purpose of permitting the subsequent safe mining through the well or otherwise protecting the coal seams as required by this section. In the use of multiple coal-protection strings, each string below the topmost string shall be cemented at least 50 feet into the next higher string or strings that are cemented to the surface and be verified by a cement top log.

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4. Depth of coal-protection strings.

a. A coal-protection string shall be set to the top of the red shales in any area underlain by them unless, on a showing by the permittee in the permit application, the director has approved the casing point of the coal-protection string at some depth less than the top of the red shales. In such event, the permittee shall conduct a gamma-ray/density log survey on an expanded scale to verify whether the well penetrates any coal seam in the uncased interval between the bottom of the coal-protection string as approved and the top of the red shales.

b. If an unanticipated coal seam or seams are discovered in the uncased interval, the permittee shall report the discovery in writing to the director. The permittee shall cement the next string of casing, whether a part of the intermediate string or the production string, in the applicable manner provided in this section for coal-protection strings, from a point at least 50 feet below the lowest coal seam so discovered to a point at least 50 feet above the highest coal seam so discovered.

c. The gamma-ray/density log survey shall be filed with the director at the same time the driller's log is filed under 4VAC25-150-360.

d. When the director believes, after reviewing documentation submitted by the permittee, that the total drilling in any particular area has verified the deepest coal seam higher than the red shales, so that further gamma-ray/density logs on an expanded scale are superfluous for the area, he may waive the constructing of a coal-protection string or the conducting of such surveys deeper than 100 feet below the verified depth of the deepest coal seam.

C. Coal-protection strings of wells drilled prior to July 1, 1982. In the case of wells drilled prior to July 1, 1982, through coal seams without coal-protection strings as prescribed in subsection B of this section, the permittee shall retain such coal-protection strings as were set. During the life of the well, the permittee shall, consistent with a plan approved by the director, keep the annular spaces between the various strings of casing adjacent to coal seams open to the extent possible, and the top ends of all such strings shall be provided with casing heads, or such other approved devices as will permit the free passage of gas or oil and prevent filling of the annular spaces with dirt or debris.

D. Producing from more than one stratum. The casing program for any well designed or completed to produce from more than one stratum shall be designed in accordance with the appropriate standard practices of the industry.

E. Casing through voids.

1. When a well is drilled through a void, the hole shall be drilled at least 30 feet below the void. The annular space shall be cemented from the base of the casing up to the

void, and every reasonable attempt shall be made to fill up the annular space from the top of the void to the surface; or it shall be cemented at least 50 feet into the next higher string or strings of casing that are cemented to the surface, and shall be verified by a cement top log.

2. For good cause shown, the director may approve alternate casing procedures proposed by the permittee, provided that the director is satisfied that the alternative casing procedures are operationally equivalent to the requirements imposed by subdivision E 1 of this section.

3. For good cause shown, the director may impose special requirements on the permittee to prevent communication between two or more voids.

F. A well penetrating a mine other than a coal mine. In the event that a permittee has requested to drill a well in such a location that it would penetrate any active mine other than a coal mine, the director shall approve the safety precautions to be followed by the permittee prior to the commencement of activity.

G. Production casing.

1. Unless otherwise granted in a variance from the director:

a. For coalbed methane gas wells with cased completions and cased/open hole completions, production casing shall be set and cemented from the bottom of the casing to the surface or to a point not less than 50 feet into the lowest coal-protection or water-protection string or strings which are cemented to the surface.

b. For coalbed methane gas wells with open hole completions, the base of the casing shall be set to not more than 100 feet above the uppermost coalbed which is to be completed open hole. The casing shall be cemented from the bottom of the casing to the surface or to a point not less than 50 feet into the lowest coal-protection or water-protection string or strings which are cemented to the surface.

2. A coal-protection string may also serve as production casing.

H. Reporting of lost circulation zones. The permittee shall report to the director as soon as possible when an unanticipated void or groundwater horizon is encountered that results in lost circulation during drilling. The permittee shall take every necessary action to protect the lost circulation zone.

4VAC25-150-615. Pressure testing requirements for production casing in coalbed methane gas wells.

A. The operator shall install casing that can withstand the effects of tension and can prevent leaks, burst, and collapse during (i) the casing's installation and cementing and (ii) subsequent drilling and producing operations.

B. Except as provided in subsection C of this section, all casing must be a string of new pipe with an internal pressure

rating that is at least 20% greater than the anticipated maximum pressure to which the casing will be exposed.

C. Used casing may be approved for use as surface, intermediate, or production casing but shall be pressure tested after cementing and before completion. A passing pressure test is holding the anticipated maximum pressure to which it will be exposed for 30 minutes with not more than a 10% decrease in pressure.

D. New or used plain end casing, except when being used as conductor pipe, that is welded together for use must meet the following requirements:

1. The casing must pass a pressure test by holding the anticipated maximum pressure to which the casing will be exposed for 30 minutes with not more than a 10% decrease in pressure. The operator shall notify the department [electronically] at least 24 hours before conducting the test. The test results shall be entered on the drilling report.

2. The casing shall be welded using at least three passes with the joint cleaned between each pass.

E. The provisions of this section shall not apply to gob wells.

VA.R. Doc. No. R14-3940; Filed November 8, 2016, 8:34 a.m.



TITLE 8. EDUCATION

STATE COUNCIL OF HIGHER EDUCATION FOR VIRGINIA

Final Regulation

REGISTRAR'S NOTICE: The State Council of Higher Education for Virginia is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 B 4 of the Code of Virginia, which exempts regulations relating to grants of state or federal funds or property.

Title of Regulation: 8VAC40-160. New Economy Workforce Credential Grant Program Regulations (adding 8VAC40-160-10 through 8VAC40-160-70).

Statutory Authority: § 23.1-627.3 of the Code of Virginia.

Effective Date: November 17, 2016.

Agency Contact: Lee Ann Rung, Manager, Executive and Council Affairs, State Council of Higher Education for Virginia, 101 North 14th Street, 9th Floor, Richmond, VA 23219, telephone (804) 225-2602, FAX (804) 371-7911, or email leeanrung@schev.edu.

Summary:

This action implements Chapters 326 and 470 of the 2016 Acts of Assembly and establishes the regulations for the administration of the New Economy Workforce Credential Grant Program, including responsibilities of the State Council of Higher Education for Virginia, the Virginia

Board of Workforce Development, and eligible institutions; criteria for awards; and reporting requirements.

CHAPTER 160

NEW ECONOMY WORKFORCE CREDENTIAL GRANT PROGRAM REGULATIONS

8VAC40-160-10. Definitions.

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

"Board" means the Virginia Board of Workforce Development.

"Competency-based" means awarded on the basis of demonstrated knowledge and skills rather than completion of instructional hours or participation in an instructional course or program.

"Completion of a noncredit workforce training program" means that the student has satisfactorily completed the instructional program based on the criteria developed by the eligible institution and is prepared to complete a workforce credential.

"Cost of the program" means the cost of the workforce training program. Costs may include direct and indirect costs of the training program to the student. Institutions that charge additional fees that are not included in the costs of the program, such as books, supplies, or the cost of a workforce credential, should list these fees with the cost of the program to ensure that students are aware of the full cost of the workforce training program.

"Council" means the State Council of Higher Education for Virginia.

"Eligible institution" means a comprehensive Virginia community college, the Institute for Advanced Learning and Research, New College Institute, Richard Bland College, Roanoke Higher Education Center, Southern Virginia Higher Education Center, or Southwest Virginia Higher Education Center.

"Eligible student" means any Virginia student enrolled at an eligible institution who is domiciled in the Commonwealth as provided in § 23.1-502 of the Code of Virginia as determined by the eligible institution.

"Fund" means the New Economy Workforce Credential Grant Fund.

"Grant" means a New Economy Workforce Credential Grant.

"High-demand field" means a discipline or field in which there is a shortage of skilled workers to fill current job vacancies or anticipated additional job openings.

"Industry-recognized" means demonstrating competency or proficiency in the technical and occupational skills identified as necessary for performing functions of an occupation based on standards developed or endorsed by employers and industry organizations.

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"Noncredit workforce credential" means a competency-based, industry-recognized, portable, and third-party-validated certification or occupational license in a high-demand field.

"Noncredit workforce training program" means a program at an eligible institution that leads to an occupation or a cluster of occupations in a high-demand field, which may include the attainment of a noncredit workforce credential. A noncredit workforce training program may include a program that receives funding pursuant to the Carl D. Perkins Career and Technical Education Improvement Act of 2006, P.L. 109-270. A noncredit workforce training program shall not include certificates of completion.

"Portable" means recognized by multiple employers or educational institutions and, where appropriate, across geographic areas.

"Program" means the New Economy Workforce Credential Grant Program.

"Satisfactory proof of completion of a workforce credential" means that an institution validates that an individual received a workforce credential as a result of completing an approved noncredit workforce training program. Validated sources include (i) a copy of the workforce credential, (ii) a credential identification number that may be searched and validated by an individual through a website link or written confirmation from the organization that issues the credential, or (iii) a record match from the designated entity authorized to issue the workforce credential. Other sources are subject to approval by the council prior to claiming satisfactory completion of a workforce credential.

"Third-party-validated" means having an external process in place for determining validity and relevance in the workplace and for continuous alignment of demonstrated knowledge and skills with industry workforce needs.

8VAC40-160-20. Council or council staff responsibilities.

The council or its staff shall conduct the following activities as part of the council's or its staff's responsibilities:

1. Administer the program. The council or its staff is responsible for the overall administration of the program to ensure alignment with the goals and purpose set forth in Article 4.1 (§ 23.1-627.1 et seq.) of Chapter 6 of Title 23.1 of the Code of Virginia.
2. Conduct periodic program assessments. The council staff is responsible for conducting periodic assessments of the overall success of the program and recommending modifications, interventions, and other actions based on such assessments. These assessments shall include a review for both adherence to the regulations and legislative intent of the program and the overall success of the program. These assessments may include an onsite review of records related to the program, interviews with individuals responsible for the administration of the

program, surveys of students and staff, and analysis of data.

Upon completion of such assessments, the council staff shall issue a report that provides a summary of findings, recommendations, and appropriate actions to improve the success of the program. Institutions shall be asked to submit a corrective action plan within 30 days of receipt of report for any findings that do not comply with existing regulations and recommendations to improve the program. The corrective action plan shall describe actions the institution shall take and shall include expected completion dates. If an institution does not complete the proposed actions within an agreed upon time period or is found to be noncompliant with a similar finding in a subsequent review, then the council staff may take action to reduce or eliminate funding to a noncredit workforce training program or the institution.

3. Allocate and disburse funds. On a monthly basis or agreed upon time with council staff, eligible institutions shall submit student record data based on the requirements set forth in 8VAC40-160-70. Upon verification of the data by council staff, funds shall be:

a. Allocated to an eligible institution based on the total number of students enrolled in and the total cost of the noncredit workforce training program. The maximum amount of allocated funds shall be two-thirds of the cost of the noncredit workforce training program but shall not exceed \$3,000.

(1) The allocated funds shall be retained by the council until institutions submit data to validate that the students have completed the noncredit workforce training program and provided satisfactory proof of completion of a workforce credential as described in subdivisions (2) and (3) of this subdivision 3 a.

(2) Funds shall be allocated on a first-come, first-served basis as eligible institutions enroll and approve applications of students.

(3) If moneys in the fund are expected to be expended prior to the end of the fiscal year, council staff shall notify eligible institutions through regular reporting of the remaining amounts in the fund and shall work with eligible institutions to manage the remaining disbursements of funds through the end of the fiscal year. In addition, institutions should provide expected enrollments and cost data when available to allow adequate planning and notification to institutions and students when funds are limited.

b. Reimbursed for students who complete the noncredit workforce training program. Council staff shall reimburse eligible institutions for one-third of the cost of the noncredit workforce training program not to exceed \$1,500 per noncredit workforce training program per student.

c. Reimbursed for students who complete the workforce credential. Council staff shall reimburse eligible institutions for the remaining one-third of the cost of the noncredit workforce training program not to exceed \$1,500 per noncredit workforce training program per student.

d. Reduced from the initial allocation based on those students who do not complete the noncredit workforce training program or the workforce training credential. Allocated funds shall be reduced by one-third, not to exceed \$1,500 per student, for those students who do not successfully complete the noncredit workforce training program. Allocated funds shall be reduced by one-third of the cost of the noncredit workforce training program, not to exceed \$1,500 per student, for those students who do not complete the workforce training credential and who do not provide satisfactory proof of completion of a workforce credential. These recovered funds shall be allocated to other eligible students under subdivision a (1) of this subdivision 3.

Council staff shall not disburse more than one-quarter of the money in the fund to any one eligible institution in a fiscal year.

4. Administer an appeals process. The council staff shall make final decisions on any dispute between eligible institutions and grant recipients related to the administration of the program.

8VAC40-160-30. Virginia Board of Workforce Development responsibilities.

The Virginia Board for Workforce Development shall conduct the following activities as part of its responsibilities:

1. Maintain a list of high-demand fields. The board shall maintain a list of high-demand fields based on the criteria established by the board. The list shall be updated annually by January 31 for the upcoming fiscal year (i.e., July 1 through June 30). In addition, the board shall establish a procedure for updating the list outside of the annual review process based on additional demand.

2. Upon establishing and updating the list, the board shall post this list on its website within 15 calendar days of establishment or update.

3. Provide recommendations to eligible institutions to help determine high-demand fields for which noncredit workforce training programs may be offered. Upon updating the high-demand fields list, the board may make recommendations to institutions of the high-demand fields for which noncredit workforce training programs may be offered. These recommendations shall be posted on the board's website with the updated list.

4. Maintain a list of related noncredit workforce training programs and credentials. By July 1 of each year, an eligible institution shall submit its list of governing board approved noncredit workforce training programs and

related workforce credentials considering alignment with the high-demand fields to the board. If additional high-demand fields are identified outside of the annual review process by the board, then eligible institutions may submit approved updates to the board. The noncredit workforce training programs and workforce credentials list shall be updated within 15 calendar days of receiving the updated list from the eligible institution.

8VAC40-160-40. Eligible institution governing board responsibilities.

An eligible institution governing board shall conduct the following activities as part of its responsibilities:

1. Determine a list of noncredit workforce training programs and workforce credentials considering alignment with the board's list of high-demand fields. The list shall be approved by June 1 of each year and shall be submitted within 15 calendar days to the board and the council. If additional noncredit workforce training programs are identified during the program year, the eligible institution must notify the board within 15 days.

2. Adopt a policy for the award of academic credit to any eligible student who has earned a noncredit workforce credential that is applicable to the student's certificate or degree program requirements. If the eligible institution is a higher education center and does not award academic credit, then the policy should identify how the institution shall develop an agreement with at least one institution to articulate the workforce credential aligned with the noncredit training program for academic credit. If the institution is unable to develop an agreement, then it may request assistance from the council.

8VAC40-160-50. Eligible institution responsibilities.

An eligible institution shall conduct the following activities as part of its responsibilities:

1. Submit an intent to participate in the program to the State Council of Higher Education for Virginia and attest that the institution agrees to be in compliance with the requirements and procedures of this chapter prior to offering the program to students enrolled in noncredit workforce training programs.

2. Develop and implement procedures for determining domicile in Virginia.

3. Develop and maintain procedures for noncredit workforce training programs that address the following:

a. Withdrawal from a noncredit workforce training program;

b. Refunds in whole or in part for the cost of a noncredit workforce training program;

c. Repeating a noncredit workforce training program or portion thereof;

d. Completion of a noncredit workforce training program and noncompletion of a program, including how the

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student shall be notified of satisfactory completion or noncompletion of the program;

e. Expected time period for completion of a noncredit workforce training program and of a workforce credential;

f. Payment policies, including expected time to submit payment if the student does not complete the noncredit workforce training program and the processes for collection of funds if the account is in arrears;

g. Satisfactory proof of completion of a workforce credential; and

h. Complaint process for students.

4. Develop an agreement and the required procedures for a student to complete for each approved noncredit workforce training program that addresses the following:

a. Agreement requirements:

(1) Acknowledge that the grant is awarded to the eligible student, conditioned upon completion of the approved noncredit workforce training program. If the eligible student does not complete the approved noncredit workforce training program within a specified time period, then the student is obligated to reimburse the institution for one-third of the cost of the program.

(2) The eligible student agrees to the withdrawal, refund, repeat, completion, and noncompletion procedures identified by the eligible institution for the noncredit workforce training program.

(3) The eligible student agrees to provide proof of satisfactory completion of the workforce credential.

b. Procedures for filing a complaint if the student disputes the terms of the agreement. The procedures for the agreement shall identify the application period for which agreements may be accepted and completed for the approved noncredit workforce training program and how students will be notified of this requirement.

5. Submit electronic student level records to council staff for those students enrolling in noncredit workforce training programs, the completion status of the noncredit workforce training program, and the completion status of the workforce credential. These records should be submitted monthly to council staff unless an alternative schedule and submission is agreed upon by both the eligible institution and the council staff.

6. Retain all records regarding the application and award process for at least three years after the last award year for the student unless directed otherwise by the Library of Virginia's Virginia Records Retention and Disposition, Schedule GS-111.

8VAC40-160-60. Awards of student grants.

Students may be awarded grants based on the following activities and requirements:

1. In order for an individual to receive a grant for an eligible noncredit workforce training program, the individual must:

a. Be enrolled in an approved noncredit workforce training program that begins at an eligible institution after the fiscal year (July 1 through June 30) for which the noncredit workforce training program is approved unless otherwise stated by the eligible institution.

b. Be domiciled in the Commonwealth as provided in § 23.1-502 of the Code of Virginia. This determination is made by the eligible institution.

c. Submit a completed agreement during the eligible institution's published application period for the noncredit workforce training program based on the criteria outlined in section 8VAC40-160-50 C.

d. Provide initial payment of one-third of the cost of the noncredit workforce training program.

2. Students shall be funded on a first-come, first-served basis within the institution's published application period based upon the application receipt date. Students shall be funded in this order until all allocated funds are obligated.

a. If a student fails to provide all requested information necessary for determination of eligibility by the first day of class, the next eligible applicant shall receive the grant.

b. Due to the first-come, first-served nature of the program, the application period must specify both the first and last date an application shall be accepted.

3. A student may use other forms of financial assistance to pay for his responsible cost of the noncredit workforce training program, which includes the initial one-third cost of the noncredit workforce training program and an additional one-third cost if it is determined that he has not completed the noncredit workforce training program in accordance with the institution's policies. Forms of financial assistance may include financial aid, employer assistance, or vouchers through other training assistance programs or other third party payers, such as the Workforce Innovation and Opportunity Act.

4. Grants may be reduced or eliminated if moneys in the fund are fully allocated prior to the end of the fiscal year.

8VAC40-160-70. Reporting requirements.

A. No later than January 1 of each year, each eligible institution shall submit to the council a report with data from the previous fiscal year on noncredit workforce training program completion and noncredit workforce credential attainment by eligible students participating in the program that includes:

1. A list of the noncredit workforce credentials offered, by name and certification entity; (even if no student enrolled benefits from this grant);

- 2. The number of eligible students who enrolled in noncredit workforce credentials programs;
- 3. The number of eligible students who completed noncredit workforce credentials programs;
- 4. The number of eligible students who attained noncredit workforce credentials after completing noncredit workforce training programs, by credential name and relevant industry sector; and
- 5. The average cost per noncredit workforce credential attained, by credential name and relevant industry sector.

B. Eligible institutions also shall submit student record data to the council based on the data field requirements, submission process, and submission timeframes developed by council staff to (i) verify the data submitted in the reports outlined in subsection A of this section, (ii) determine the allocation of funds as described in 8VAC40-160-20 C, and (iii) assess the program per 8VAC40-160-20 B.

VA.R. Doc. No. R17-4827; Filed November 9, 2016, 10:01 a.m.

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TITLE 10. FINANCE AND FINANCIAL INSTITUTIONS

STATE CORPORATION COMMISSION

Proposed Regulation

REGISTRAR'S NOTICE: The State Corporation Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 A 2 of the Code of Virginia, which exempts courts, any agency of the Supreme Court, and any agency that by the Constitution is expressly granted any of the powers of a court of record.

Titles of Regulations: 10VAC5-160. Rules Governing Mortgage Lenders and Brokers (amending 10VAC5-160-10 through 10VAC5-160-90; adding 10VAC5-160-15, 10VAC5-160-25).

10VAC5-161. Mortgage Loan Originators (amending 10VAC5-161-60).

Statutory Authority: §§ 6.2-1613 and 12.1-13 of the Code of Virginia (10VAC5-160-10 through 10VAC5-160-90).

§§ 6.2-1720 and 12.1-13 of the Code of Virginia (10VAC5-161-60).

Public Hearing Information: A public hearing will be held upon request.

Public Comment Deadline: January 31, 2017.

Agency Contact: Susan Hancock, Deputy Commissioner, Bureau of Financial Institutions, State Corporation Commission, P.O. Box 640, Richmond, VA 23218, telephone (804) 371-9701, FAX (804)-371-9416, or email susan.hancock@scc.virginia.gov.

Summary:

The proposed amendments to 10VAC5-160 (i) require mortgage lenders and brokers (licensees) to renew their licenses at the end of each calendar year, file quarterly mortgage call reports through the Nationwide Mortgage Licensing System and Registry (Registry), maintain a transaction journal, and renew approved office locations each calendar year; (ii) define, among other things, "bona fide employee," "lead generator," and "mortgage broker"; (iii) clarify that licensees will receive from the Bureau of Financial Institutions a single license instead of a license for each approved location; and (iv) make other technical and clarifying changes.

The proposed amendments to 10VAC5-161 replace the annual report and report of condition filing requirements for mortgage loan originators with a requirement that quarterly mortgage call reports be filed through the Registry.

AT RICHMOND, NOVEMBER 7, 2016

COMMONWEALTH OF VIRGINIA, ex rel.
STATE CORPORATION COMMISSION

CASE NO. BFI-2016-00048

Ex Parte: In re: Rules Governing Mortgage Lenders and Brokers, and Mortgage Loan Originators

ORDER TO TAKE NOTICE

Sections 6.2-1613 and 6.2-1720 of the Code of Virginia ("Code") provide that the State Corporation Commission ("Commission") shall adopt such regulations as it deems appropriate to effect the purposes of Chapter 16 (§ 6.2-1600 et seq.) and Chapter 17 (§ 6.2-1700 et seq.) of Title 6.2 of the Code. The Commission's rules governing Mortgage Lenders and Brokers are set forth in Chapter 160 ("Chapter 160") and its rules governing Mortgage Loan Originators are found in Chapter 161 ("Chapter 161") of Title 10 of the Virginia Administrative Code.

The Bureau of Financial Institutions ("Bureau") has submitted to the Commission proposed amendments to Chapter 160. The proposed regulations capture changes made to §§ 6.2-1607 and 6.2-1610 of the Code in the 2016 session of the General Assembly, including requiring that mortgage lenders and brokers ("licensees") file quarterly mortgage call reports through the Nationwide Mortgage Licensing System and Registry ("Registry") instead of an annual report, and clarifying the annual license renewal requirements for licensees. The proposed regulations also define, among other things, "bona fide employee," "lead generator," and "mortgage broker;" require that approved office locations be renewed each calendar year; require licensees to maintain a transaction journal; and clarify that licensees will receive from the Bureau a single license instead of a license for each approved location. In addition, various technical amendments have been proposed.

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The Bureau has also submitted to the Commission proposed amendments to 10VAC5-161-60 in Chapter 161. The proposed regulation replaces the annual report and reports of condition filings with a requirement that quarterly mortgage call reports be filed through the Registry.

NOW THE COMMISSION, based on the information supplied by the Bureau, is of the opinion and finds that the proposed regulations should be considered for adoption with a proposed effective date of May 1, 2017.

Accordingly, IT IS ORDERED THAT:

(1) The proposed regulations are appended hereto and made a part of the record herein.

(2) Comments or requests for a hearing on the proposed regulations must be submitted in writing to Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218, on or before January 31, 2017. Requests for a hearing shall state why a hearing is necessary and why the issues cannot be adequately addressed in written comments. All correspondence shall contain a reference to Case No. BFI-2016-00048. Interested persons desiring to submit comments or request a hearing electronically may do so by following the instructions available at the Commission's website: <http://www.scc.virginia.gov/case>.

(3) This Order and the attached proposed regulations shall be posted on the Commission's website at <http://www.scc.virginia.gov/case>.

(4) The Commission's Division of Information Resources shall provide a copy of this Order, including a copy of the attached proposed regulations, to the Virginia Registrar of Regulations for publication in the Virginia Register of Regulations.

AN ATTESTED COPY hereof, together with a copy of the proposed regulations, shall be sent by the Clerk of the Commission to the Commission's Office of General Counsel and the Commissioner of Financial Institutions, who shall forthwith send by e-mail or U.S. mail a copy of this Order, together with a copy of the proposed regulations, to all licensed mortgage lenders, mortgage brokers, and mortgage loan originators, and such other interested parties as he may designate.

10VAC5-160-10. Definitions.

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

"Advertisement" means a commercial message in any medium that promotes, directly or indirectly, a mortgage loan. The term includes a communication sent to a consumer as part of a solicitation of business, but excludes messages on promotional items such as pens, pencils, notepads, hats, calendars, etc., as well as rate sheets or other information distributed or made available solely to other businesses.

"Affiliate," for purposes of subdivision 3 of § 6.2-1602 of the Code of Virginia, means an entity of which 25% or more of the voting shares or ownership interest is held, directly or indirectly, by a company that also owns a bank, savings institution, or credit union.

"Bona fide employee," for purposes of Chapter 16 and this chapter, means an individual (i) whose manner and means of performance of work are subject to the right of control of, or are controlled by, a person and (ii) whose compensation for federal income tax purposes is reported, or required to be reported, on a W-2 form issued by the controlling person. However, the term shall not include an individual who is concurrently employed by two or more persons that are engaged in business as a mortgage lender or mortgage broker.

"Bureau," "commission," and "commissioner" shall have the meanings ascribed to them in § 6.2-100 of the Code of Virginia.

"Chapter 16" means Chapter 16 (§ 6.2-1600 et seq.) of Title 6.2 of the Code of Virginia.

"Chapter 17" means Chapter 17 (§ 6.2-1700 et seq.) of Title 6.2 of the Code of Virginia.

"Commitment" means a written offer to make a mortgage loan signed by a person authorized to sign such offers on behalf of a mortgage lender.

"Commitment agreement" means a commitment accepted by an applicant for a mortgage loan, as evidenced by the applicant's signature thereon.

"Commitment fee" means any fee or charge accepted by a mortgage lender, or by a mortgage broker for transmittal to a mortgage lender, as consideration for binding the mortgage lender to make a mortgage loan in accordance with the terms of a commitment or as a requirement for acceptance by the applicant of a commitment, but the term does not include fees paid to third persons or interest.

"Dwelling" means one-family to four-family residential property located in the Commonwealth.

"Fees paid to third persons" means the bona fide fees or charges paid by the applicant for a mortgage loan to third persons other than the mortgage lender or mortgage broker, or paid by the applicant to, or retained by, the mortgage lender or mortgage broker for transmittal to such third persons in connection with the mortgage loan, including, but not limited to, recording taxes and fees, reconveyance or releasing fees, appraisal fees, credit report fees, attorney fees, fees for title reports and title searches, title insurance premiums, surveys and similar charges.

"Lead generator" means a person who engages in a form of marketing activity in which the person collects and transmits a prospective borrower's contact information and minimal information pertaining to potential mortgage loans. A person shall not be considered a lead generator if the person collects a prospective borrower's social security number or sufficient personal information to enable a mortgage lender or mortgage

broker to evaluate, in whole or in part, the prospective borrower's creditworthiness.

"Licensee" means a person licensed under Chapter 16.

"Loan processor or underwriter" means a person who, with respect to the origination of a residential mortgage loan, performs the following duties at the direction of and subject to the supervision and instruction of a licensed or exempt mortgage lender or mortgage broker: (i) receiving, collecting, distributing, or analyzing information common for the processing or underwriting of a residential mortgage loan or (ii) communicating with a consumer to obtain the information necessary for the processing or underwriting of a residential mortgage loan. A loan processor or underwriter does not include a person who (i) communicates with a consumer regarding a prospective residential mortgage loan prior to the consumer submitting a residential mortgage loan application, (ii) takes an application for or offers or negotiates the terms of a residential mortgage loan, or (iii) counsels consumers about residential mortgage loan terms. For purposes of this definition, the phrase "takes an application for or offers or negotiates the terms of a residential mortgage loan" shall be construed in accordance with subdivisions B 1 and B 2 of 10VAC5-161-20.

"Lock-in agreement" means a written agreement between a mortgage lender, or a mortgage broker acting on behalf of a mortgage lender, and an applicant for a mortgage loan that establishes and sets an interest rate and the points to be charged in connection with a mortgage loan that is closed within the time period specified in the agreement. ~~A lock-in agreement can be entered into before mortgage loan approval, subject to the mortgage loan being approved and closed, or after such approval.~~ A commitment agreement that establishes and sets an interest rate and the points to be charged in connection with a mortgage loan that is closed within the time period specified in the agreement is also a lock-in agreement. The interest rate that is established and set by the agreement may be either a fixed rate or an adjustable rate.

"Lock-in fee" means any fee or charge accepted by a mortgage lender, or by a mortgage broker for transmittal to a mortgage lender, as consideration for making a lock-in agreement, but the term does not include fees paid to third persons or interest.

"Mortgage lender," "mortgage broker," ~~and~~ "mortgage loan" and "person" shall have the meanings ascribed to them in § 6.2-1600 of the Code of Virginia. For purposes of Chapter 16 and this chapter, the term "mortgage broker" does not include the following persons, provided that they are not also engaged in any activities for which a mortgage broker license is required: (i) a person engaged in the business of a loan processor or underwriter ~~provided that such person is not engaged in any other activities for which a mortgage broker license is required,~~ (ii) a lead generator, and (iii) a noteholder, or servicer acting on behalf of a noteholder, that negotiates

the modification of a mortgage loan in its portfolio. The payee named in a mortgage loan note shall be deemed to be the mortgage lender for purposes of Chapter 16 and this chapter.

"Mortgage loan originator," "Nationwide Mortgage Licensing System and Registry," "Registry," and "residential mortgage loan" shall have the meanings ascribed to them in § 6.2-1700 of the Code of Virginia.

"Personal, family or household purposes," for purposes of § 6.2-1600 of the Code of Virginia, means that the individual obtaining the loan intends to use the proceeds to build or purchase a dwelling that will be occupied by such individual or another individual as ~~their~~ his temporary or permanent residence. The term includes a loan used to build or purchase a dwelling that will be (i) improved or rehabilitated by or on behalf of the purchaser for subsequent sale to one or more other individuals who will reside in the dwelling on a temporary or permanent basis, or (ii) leased by the purchaser to one or more other individuals who will reside in the dwelling on a temporary or permanent basis.

"Points" means any fee or charge retained or received by a mortgage lender or mortgage broker stated or calculated as a percentage or fraction of the principal amount of the loan, other than or in addition to fees paid to third persons or interest.

"Reasonable period of time" means that period of time, determined by a mortgage lender in good faith on the basis of its most recent relevant experience and other facts and circumstances known to it, within which the mortgage loan will be closed.

"Refinancing" for purposes of Chapter 16 and this chapter means an exchange of an old debt for a new debt, as by negotiating a different interest rate or term or by repaying an existing loan with money acquired from a new loan. "Refinancing" includes any loan modification.

"Senior officer," for purposes of §§ 6.2-1605, 6.2-1606, 6.2-1607, and 6.2-1608 of the Code of Virginia, means an individual who has significant management responsibility within an organization or otherwise has the authority to influence or control the conduct of the organization's affairs, including but not limited to its compliance with applicable laws and regulations.

"Stockholder," for purposes of § 6.2-1616 of the Code of Virginia, includes a member of a limited liability company.

"Subsidiary," for purposes of subdivision 3 of § 6.2-1602 of the Code of Virginia, means an entity of which 25% or more of the voting shares or ownership interest is held, directly or indirectly, by a bank, savings institution, or credit union.

10VAC5-160-15. Surety bond; required funds.

A. As required by § 6.2-1604 of the Code of Virginia, a surety bond shall be filed with the commissioner and continuously maintained thereafter in full force by each licensee. The minimum bond amount required for a mortgage

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broker shall be \$25,000, and the minimum amount required for a mortgage lender or for a mortgage company with dual authority as both a mortgage lender and mortgage broker shall be \$50,000. The bond amount shall be adjusted annually in accordance with the following scale based upon residential mortgage loans originated during the preceding calendar year:

<u>LOANS</u>	<u>BOND AMOUNT</u>
<u>\$0 - \$5,000,000</u>	<u>\$25,000</u>
<u>\$5,000,001 - \$20,000,000</u>	<u>\$50,000</u>
<u>\$20,000,001 - \$50,000,000</u>	<u>\$75,000</u>
<u>\$50,000,001 - \$100,000,000</u>	<u>\$100,000</u>
<u>over \$100,000,000</u>	<u>\$150,000</u>

B. If a person has been or is engaged in business as a mortgage lender or mortgage broker and has filed a bond with the commissioner, the bond shall be retained by the commissioner notwithstanding the occurrence of any of the following events:

1. The person's application for a license is withdrawn or denied;
2. The person's license is surrendered, suspended, or revoked; or
3. The person ceases engaging in business as a mortgage lender or mortgage broker.

C. As required by § 6.2-1606 of the Code of Virginia, a mortgage lender shall maintain at least \$200,000 in funds available for the operation of its business. To comply with this requirement, a mortgage lender shall maintain documentation of one of the following: (i) ownership of funds on deposit in a bank or other depository institution, (ii) an established line of credit from a bank or other depository institution; or (iii) a combination of clauses (i) and (ii). Neither letters of credit nor lines of credit from sources other than a bank or other depository institution shall satisfy this requirement.

10VAC5-160-20. Operating rules requirements.

A licensee shall conduct its business in accordance with the following rules requirements:

1. No licensee shall (i) misrepresent the qualification requirements for a mortgage loan or any material loan terms; (ii) make false or misleading statements to induce an applicant to apply for a mortgage loan, enter into any commitment agreement or lock-in agreement, or pay any commitment fee or lock-in fee in connection therewith; or (iii) provide any other information to a borrower or prospective borrower that is false, misleading, or deceptive. A "material loan term" means the loan terms required to be disclosed to a consumer pursuant to (i) the Truth in Lending Act (15 USC § 1601 et seq.); and the Real Estate Settlement Procedures Act of 1974 (12 USC § 2601 et seq.), and regulations and official commentary

issued thereunder, as amended from time to time, (ii) § 6.2-406 of the Code of Virginia, and (iii) 10VAC5-160-30. A misrepresentation or false or misleading statement resulting directly from incorrect information furnished to a licensee by a third party, or a good-faith misunderstanding of information furnished by a third party, shall not be considered a violation of this section if the licensee has supporting documentation thereof and the licensee's reliance thereon was reasonable.

2. No licensee shall retain any portion of any fees or charges imposed upon consumers for goods or services provided by third parties. All moneys received by a licensee from an applicant for fees paid to third persons shall be accounted for separately, and all disbursements for fees paid to third persons shall be supported by adequate documentation of the services for which such fees were or are to be paid. All such moneys shall be deposited in an escrow account in a bank, savings institution, or credit union segregated from other funds of the licensee.

3. The mortgagor who obtains a mortgage loan shall be entitled to continue to make payments to the transferor of the servicing rights under a mortgage loan until the mortgagor is given written notice of the transfer of the servicing rights by the transferor. ~~The notice shall specify the name and address to which future payments are to be made and shall be mailed or delivered to the mortgagor at least 10 calendar days before the first payment affected by the notice pursuant to the requirements set forth in the Real Estate Settlement Procedures Act of 1974 (12 USC § 2601 et seq.).~~

~~4. If a person has been or is engaged in business as a mortgage lender or mortgage broker and has filed a bond with the commissioner, as required by § 6.2-1604 of the Code of Virginia, such bond shall be retained by the commissioner notwithstanding the occurrence of any of the following events:~~

- ~~a. The person's application for a license is withdrawn or denied;~~
- ~~b. The person's license is surrendered, suspended, or revoked; or~~
- ~~c. The person ceases engaging in business as a mortgage lender or mortgage broker.~~

~~5.~~ 4. Pursuant to § 6.2-1621 of the Code of Virginia, within 15 days of becoming aware of the occurrence of any of the events enumerated in this subdivision, a licensed mortgage lender or mortgage broker shall file a written report with the commissioner describing such event and its expected impact, if any, on the activities of the licensee in the Commonwealth. If the Registry enables licensees to submit the information required by this subdivision, then the submission of this information through the Registry shall satisfy the requirement for a written report:

- a. The licensee files for bankruptcy or reorganization.

b. Any governmental authority institutes revocation or suspension proceedings against the licensee; or revokes or suspends a mortgage-related license held or formerly held by the licensee.

c. Any governmental authority takes (i) formal regulatory or enforcement action against the licensee relating to its mortgage business or (ii) any other action against the licensee relating to its mortgage business where the total amount of restitution or other payment from the licensee exceeds \$20,000. A licensee shall not be required to provide the commissioner with information about such event to the extent that such disclosure is prohibited by the laws of another state.

d. Based on allegations by any governmental authority that the licensee violated any law or regulation applicable to the conduct of its licensed mortgage business, the licensee enters into, or otherwise agrees to the entry of, a settlement or consent order, decree, or agreement with or by such governmental authority.

e. The licensee surrenders its license to engage in any mortgage-related business in another state in lieu of threatened or pending license revocation, license suspension, or other regulatory or enforcement action.

f. The licensee is denied a license to engage in any mortgage-related business in another state.

g. The licensee or any of its employees, officers, directors, principals, or exclusive agents is indicted for a felony.

h. The licensee or any of its employees, officers, directors, principals, or exclusive agents is convicted of a felony.

i. The licensee or any of its employees, officers, directors, principals, or exclusive agents is convicted of a misdemeanor involving fraud, misrepresentation, or deceit.

~~6.~~ 5. No licensee shall inform a consumer that such consumer has been or will be "preapproved" or "pre-approved" for a mortgage loan unless the licensee contemporaneously provides the consumer with a ~~separate~~ written disclosure (in at least 10-point type) that (i) explains what preapproved means; (ii) informs the consumer that the consumer's loan application has not yet been approved; (iii) states that a written commitment to make a mortgage loan has not yet been issued; and (iv) advises the consumer what needs to occur before the consumer's loan application can be approved. This provision shall not apply to advertisements subject to 10VAC5-160-60. In the case of a preapproval initially communicated to a consumer by telephone, the licensee shall provide the written disclosure to the consumer within three business days.

~~7.~~ 6. A licensee shall not permit any individual to take an application for or offer or negotiate the terms of a

residential mortgage loan on behalf of the licensee unless: (i) the individual is licensed as a mortgage loan originator pursuant to Chapter 17; (ii) the individual is covered by the licensee's surety bond; (iii) the licensee has submitted a sponsorship request for such individual through the Registry; and (iv) the individual is either (a) a bona fide employee of the licensee, or (b) an exclusive agent of the licensee pursuant to a written agreement with the licensee and the licensee has agreed to such conditions relating to its use of exclusive agents as may be prescribed by the bureau. The phrase "take an application for or offer or negotiate the terms of a residential mortgage loan" shall be construed in accordance with subdivisions B 1 and B 2 of 10VAC5-161-20.

~~8.~~ 7. Every licensee shall disclose on any application provided to the borrower associated with a Virginia residential mortgage loan: (i) the unique identifier assigned by the Registry to the licensed mortgage lender or mortgage broker that took the initial mortgage loan application; and (ii) the unique identifier assigned by the Registry to the licensed mortgage loan originator who took the initial mortgage loan application.

~~9.~~ 8. A licensee may outsource its loan processing or underwriting activities to a third party loan processor or underwriter pursuant to a written agreement with the loan processor or underwriter. Prior to entering into an agreement, the licensee shall conduct a due diligence review of the third party loan processor or underwriter. The agreement shall (i) require the loan processor or underwriter to comply with all applicable state and federal laws and regulations; (ii) require the loan processor or underwriter to permit the commission to investigate or examine its business pursuant to § 6.2-1611 of the Code of Virginia; and (iii) prohibit the loan processor or underwriter from subcontracting to another person, other than its bona fide employees, any of the services specified in the agreement to be performed on behalf of the licensee. A copy of the written agreement shall be retained by the licensee for at least three years after the agreement has been terminated by either party. The licensee shall be responsible for implementing and maintaining a reasonable program to monitor any third party loan processor or underwriter performing services on its behalf.

~~10.~~ 9. ~~If a licensee disposes of records containing a consumer's personal financial information following the expiration of any applicable record retention periods, such records shall be shredded, incinerated, or otherwise disposed of in a secure manner. Licensees may arrange for service from a business record destruction vendor.~~

~~11.~~ 9. Every licensee shall comply with Chapter 16, this chapter, and all other state and federal laws and regulations applicable to the conduct of its business.

10. A licensee shall continuously (i) maintain the requirements and standards for licensure prescribed in

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§ 6.2-1606 of the Code of Virginia and (ii) remain authorized to transact business in the Commonwealth pursuant to Title 13.1 of the Code of Virginia.

10VAC5-160-25. Books, accounts, and records.

A. A licensee shall maintain in its licensed offices all books, accounts, and records required by Chapter 16 and this chapter.

B. A licensee may maintain records electronically provided (i) the records are readily available for examination by the bureau and (ii) the licensee complies with the Uniform Electronic Transactions Act (§ 59.1-479 et seq. of the Code of Virginia) and the Electronic Signatures in Global and National Commerce Act (15 USC § 7001 et seq.). However, the written agreement specified in § 6.2-1616 B 4 of the Code of Virginia shall be maintained in the form in which it was originally provided and executed.

C. A licensee shall continuously maintain a mortgage loan transaction journal that includes the following information for each application received:

1. Applicant's name.
2. Application date.
3. Property address.
4. Loan amount.
5. Lien position.
6. Mortgage loan originator (licensed name).
7. Mortgage loan originator (license or Registry number).
8. Address of originating office.
9. Name of lender (if applicable).
10. Application status (e.g., in process, withdrawn, denied, closed).
11. Any other information reasonably required by the commissioner.

D. If a licensee disposes of records containing a consumer's personal or financial information following the expiration of any applicable record retention periods, such records shall be shredded, incinerated, or otherwise disposed of in a secure manner. Licensees may arrange for service from a business record destruction vendor.

10VAC5-160-30. Commitment agreements and lock-in agreements.

A. ~~A~~ If a commitment is issued and accepted, the commitment agreement shall be signed by the applicant and a person authorized to sign such agreement on behalf of a mortgage lender and include the following:

1. The name of the mortgage lender;
- ~~4.~~ 2. Identification of the property intended to secure the mortgage loan (this does not require a formal legal description);
- ~~2.~~ 3. The principal amount and term of the loan;

~~3.~~ 4. The interest rate and points for the mortgage loan if the commitment agreement is also a lock-in agreement or a statement that the mortgage loan will be made at the mortgage lender's prevailing rate and points for such loans at the time of closing or a specified number of three days prior to closing settlement;

~~4.~~ 5. The amount of any commitment fee and the time within which the commitment fee must be paid;

~~5.~~ 6. Whether or not funds are to be escrowed and for what purpose;

~~6.~~ 7. Whether or not private mortgage insurance is required;

~~7.~~ 8. The length of the commitment period;

~~8.~~ 9. A statement that if the loan is not closed within the commitment period, the mortgage lender is no longer obligated by the commitment agreement and any commitment fee paid by the applicant will be refunded only under the circumstances set forth in subsection C of this section and such other circumstances as are set forth in the commitment agreement; and

~~9.~~ 10. Any other terms and conditions of the commitment agreement required by the lender.

B. If a lock-in agreement is issued to a consumer by a mortgage lender, or a mortgage broker to a consumer acting on behalf of the mortgage lender, it shall be signed by a representative of the mortgage lender or mortgage broker and include the following:

1. The name of the mortgage lender or mortgage broker issuing the lock-in agreement;

~~4.~~ 2. The interest rate and points for the mortgage loan, and if the rate is an adjustable rate, the initial interest rate and a brief description of the method of determining the rate (such as the index and the margin);

~~2.~~ 3. The amount of any lock-in fee and the time within which the lock-in fee must be paid;

~~3.~~ 4. The length of the lock-in period;

~~4.~~ 5. A statement that if the loan is not closed within the lock-in period, the mortgage lender is no longer obligated by the lock-in agreement and any lock-in fee paid by the applicant will be refunded only under the circumstances set forth in subsection D of this section and such other circumstances as are set forth in the lock-in agreement;

~~5.~~ 6. A statement that any terms not locked-in locked in by the lock-in agreement are subject to change until the loan is closed at three days prior to settlement; and

~~6.~~ 7. Any other terms and conditions of the lock-in agreement required by the mortgage lender or mortgage broker acting on behalf of a mortgage lender.

C. If an applicant has paid any commitment fee, and the mortgage loan is not closed due to any of the following, such commitment fee shall be refunded:

1. The commitment period was not a reasonable period of time given the prevailing market conditions at the time the commitment agreement was entered into;
2. The mortgage loan is turned down because of the applicant's lack of creditworthiness; or
3. The mortgage loan is turned down because of the appraised value of the property intended to secure the mortgage loan.

D. If an applicant has paid any lock-in fee and the loan is not closed because the lock-in period was not a reasonable period of time given the prevailing market conditions at the time the lock-in agreement was entered into, such lock-in fee shall be refunded.

E. A mortgage broker shall not issue a lock-in agreement to a consumer unless the mortgage broker has actually locked in the mortgage loan, including the applicable interest rate, points, and other terms, with a mortgage lender. A mortgage broker shall maintain supporting written documentation from the mortgage lender of all lock-in information for at least three years from the date the lock-in expires.

10VAC5-160-40. Schedule of annual fees for the examination, supervision, and regulation of mortgage lenders and mortgage brokers.

Pursuant to § 6.2-1612 of the Code of Virginia, the ~~Commission~~ commission sets the following schedule of annual fees to be paid by mortgage lenders and mortgage brokers required to be licensed under Chapter 16. Such fees are to defray the costs of examination, supervision, and regulation of such lenders and brokers by the Bureau of Financial Institutions. The fees are related to the actual costs of the ~~Bureau~~ bureau, to the volume of business of the lenders and brokers, and to other factors relating to supervision and regulation.

SCHEDULE

LENDER LICENSEE: Minimum fee -- \$800, plus \$6.60 per loan

BROKER LICENSEE: Minimum fee -- \$400, plus \$6.60 per loan

DUAL AUTHORITY (LENDER/BROKER):
Minimum fee -- \$1,200, plus \$6.60 per loan

The annual fee for each mortgage lender shall be computed on the basis of the number of mortgage loans, as defined in § 6.2-1600 of the Code of Virginia, made or originated during the calendar year preceding the year of assessment. The annual fee for each mortgage broker shall be based on the number of such loans brokered. The annual fee for each mortgage lender/broker shall be based on the total number of mortgage loans made or originated and mortgage loans brokered. The annual fee computed using the above schedule shall be rounded down to the nearest whole dollar.

Fees shall be assessed on or before April 25 for the current calendar year. By law the fee must be paid on or before May 25.

The ~~annual report of quarterly mortgage call reports filed through the Registry by~~ each licensee ~~shall be due March 1 of each year and~~ shall provide the basis for licensee assessment, ~~i.e. that is,~~ the number of loans made or brokered. If the ~~annual report~~ required quarterly mortgage call reports of a licensee ~~has~~ have not been filed by the assessment date, a provisional fee, subject to adjustment when the report is filed, shall be assessed. In cases where a license or additional authority has been granted between January 1 and March 31, one of the following fees or additional fee shall be assessed: lender -- \$400; broker -- \$200; lender/broker -- \$600.

Fees prescribed and assessed by this schedule are apart from, and do not include, the reimbursement for expenses permitted by subsection C of § 6.2-1612 of the Code of Virginia.

10VAC5-160-50. Responding to requests from Bureau of Financial Institutions; providing false, misleading, or deceptive information; record retention.

A. If the bureau requests information from an applicant to complete a deficient application filed under §§ 6.2-1603, 6.2-1607, or 6.2-1608 of the Code of Virginia and the information is not received within 60 days of the request, the application shall be deemed abandoned unless a request for an extension of time is received and approved by the bureau prior to the expiration of the 60-day period.

B. When the bureau requests a written response, books, records, documentation, or other information from a licensee in connection with the bureau's investigation, enforcement, or examination of compliance with applicable laws, the licensee shall deliver a written response as well as any requested books, records, documentation, or information within the time period specified in the bureau's request. If no time period is specified, a written response as well as any requested books, records, documentation, or information shall be delivered by the licensee to the bureau not later than 30 days from the date of such request. In determining the specified time period for responding to the bureau and when considering a request for an extension of time to respond, the bureau shall take into consideration the volume and complexity of the requested written response, books, records, documentation or information and such other factors as the bureau determines to be relevant under the circumstances.

Requests made by the bureau pursuant to this subsection are deemed to be in furtherance of the bureau's investigation and examination authority provided for in § 6.2-1611 of the Code of Virginia.

C. A licensee shall not provide any information to the bureau, either directly or through the Registry, that is false, misleading, or deceptive.

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~~D. A licensee shall maintain in its licensed offices all books, accounts, and records required by Chapter 16 and this chapter.~~

10VAC5-160-60. Advertising.

A. Every advertisement used by, or published on behalf of, a licensed mortgage lender or mortgage broker shall clearly and conspicuously disclose the following information:

1. The name of the mortgage lender or mortgage broker as set forth in the license issued by the commission.
2. The abbreviation "NMLS ID #" followed immediately by both the unique identifier assigned by the Registry to the mortgage lender or mortgage broker ~~and~~ along with the address for the NMLS Consumer Access website ~~in parenthesis~~. For example: NMLS ID # 999999 (www.nmlsconsumeraccess.org). In a radio or television advertisement, this disclosure shall be provided after the name of the mortgage lender or mortgage broker.
3. If an advertisement contains a rate of interest, a statement that the stated rate may change or not be available at the time of loan commitment or lock-in.
4. If an advertisement contains specific information about a consumer's existing mortgage loan and such information was not obtained from the consumer, a statement identifying the source of such information (e.g., public court records, credit reporting agency, etc.).

B. No mortgage lender or mortgage broker shall deceptively advertise a mortgage loan, make false or misleading statements or representations, or misrepresent the terms, conditions, or charges incident to obtaining a mortgage loan.

C. No mortgage lender or mortgage broker shall use or cause to be published an advertisement that states or implies the following:

1. The mortgage lender or mortgage broker is affiliated with, or an agent or division of, a governmental agency, depository institution, or other entity with which no such relationship exists; or
2. A consumer has been or will be "preapproved" or "pre-approved" for a mortgage loan, unless the mortgage lender or mortgage broker (i) discloses on the face of the advertisement in at least 14-point bold type that "THIS IS NOT A LOAN APPROVAL" and (ii) clearly and conspicuously discloses the conditions and/or qualifications associated with such preapproval. This provision is intended to supplement the requirements of the Fair Credit Reporting Act, (15 USC § 1681 et seq.) relating to firm offers of credit.

D. A mortgage lender or mortgage broker shall not use or cause to be published any advertisement that gives a consumer the false impression that the advertisement is being sent by the consumer's current noteholder or lienholder. If an advertisement contains the name of the consumer's current noteholder or lienholder, it shall not be more conspicuous

than the name of the mortgage lender or mortgage broker using the advertisement.

E. A mortgage lender or mortgage broker shall not deliver or cause to be delivered to a consumer any envelope or other written material that gives the false impression that the mailing or written material is an official communication from a governmental entity, unless required by the United States Postal Service.

F. If an advertisement states or implies that a consumer can reduce his monthly payment by refinancing his current mortgage loan, ~~but as a result of such refinancing, the consumer's total finance charges may be higher over the life of the loan,~~ a mortgage lender or mortgage broker shall clearly and conspicuously disclose to the consumer that by refinancing the consumer's existing loan, the consumer's total finance charges may be higher over the life of the loan.

G. Every advertisement used by, or published on behalf of, a mortgage lender or mortgage broker shall comply with 12 CFR Part 1014 (Regulation N) and the disclosure requirements for advertisements contained in the Truth in Lending Act and Regulation Z, 12 CFR Part 226 1026 (Regulation Z).

H. For purposes of this section, the term "clearly and conspicuously" means that a required disclosure is reasonably understandable, prominently located, and readily noticeable by a potential borrower ~~of ordinary intelligence~~.

I. Every mortgage lender and mortgage broker shall retain for at least three years after it is last published, delivered, transmitted, or made available, an example of every advertisement used, including but not limited to solicitation letters, commercial scripts, and recordings of all radio and television broadcasts, but excluding copies of Internet web pages.

10VAC5-160-90. Nationwide Mortgage Licensing System and Registry.

A. Applications for a mortgage lender or mortgage broker license shall be made through the Registry in accordance with instructions provided by the commissioner. The commissioner may provide these instructions through the Registry, on the commission's Internet website, or by any other means the commissioner deems appropriate.

~~B. The commissioner shall notify all licensees no later than January 1 of each calendar year of the information required to be included in the annual report to be submitted by each licensee pursuant~~ Pursuant to § 6.2-1610 of the Code of Virginia, every licensee shall file quarterly mortgage call reports through the Registry as well as such other information pertaining to the licensee's financial condition as may be required by the Registry. Reports shall be in such form, contain such information, and be submitted with such frequency and by such dates as the Registry may require.

C. Entities exempt from the requirement for licensure under Chapter 16 that supervise mortgage loan originators licensed

pursuant to Chapter 17 may obtain a unique identifier through the Registry.

D. Every licensee shall maintain current information in its records with the Registry. Except as provided in subsection E of this section, changes to the licensee's address, principal officers, or any other information in the Registry shall be updated by the licensee as soon as is practicable, but in no event later than five business days from when the change takes effect.

E. A licensee shall update its sponsorship information in the Registry within five days after the occurrence of either of the following events: (i) a mortgage loan originator becomes a bona fide employee or exclusive agent of the licensee or (ii) a mortgage loan originator ceases to be a bona fide employee or exclusive agent of the licensee.

F. If (i) any provision of Chapter 16 or this chapter requires a licensee to provide the bureau or commissioner with a written notice and (ii) the Registry enables licensees to submit such notice through the Registry, then a licensee shall be deemed to have complied with the written notice requirement if the licensee timely submits the required notice through the Registry.

G. A mortgage lender or mortgage broker license shall expire at the end of each calendar year unless it is renewed by a licensee on or after November 1 of the same year. However, licenses that are granted between November 1 and December 31 shall not expire until the end of the following calendar year. A license shall be renewed upon the commission finding that the licensee has (i) requested license renewal through the Registry and (ii) complied with any requirements associated with such renewal request that are imposed by the Registry.

H. A licensee's approved office locations shall be subject to renewal each calendar year. However, office locations that are approved by the commission between November 1 and December 31 shall not be subject to renewal until the end of the following calendar year. An approved office location shall be renewed upon the commission finding that the licensee has (i) requested renewal for the location through the Registry and (ii) complied with any requirements associated with such renewal request that are imposed by the Registry.

I. If a licensee fails to timely meet the requirements specified in subsection G or H of this section, but meets such requirements before March 1 of the following calendar year, the license or approved office location shall be reinstated and renewed. If an approved office location is not renewed on or before March 1, the office location shall be deemed to be closed as of the preceding January 1 by the licensee.

J. A licensee shall not engage in business as a mortgage lender or mortgage broker from an office location that has not been (i) approved by the commission and (ii) renewed by the licensee as required by subsection H of this section. Any mortgage loan made or brokered by a licensee in violation of this subsection shall constitute a separate violation of Chapter 16.

K. Each licensee shall receive a single license from the commission that states the full legal name of the licensee as well as any fictitious names under which the licensee is conducting business under Chapter 16. The license issued by the commission shall identify the addresses of the offices at which the business is authorized to be conducted under Chapter 16 by referencing the approved office locations of the licensee as set forth in the Registry.

10VAC5-161-60. Required reports and notices; information in registry.

A. Each person for whom an individual described in 10VAC5-161-20 A 1 or A 2 engages in the business of a mortgage loan originator shall file, ~~on or before March 1 of each year, an annual report with the bureau~~ quarterly mortgage call reports through the registry stating the amount of residential mortgage loans made or brokered during the preceding ~~calendar year~~ quarter, identifying all licensees performing services for that person, and providing such additional information as the bureau may require. Call reports shall be in such form, contain such information, and be submitted with such frequency and by such dates as the registry may require. Timely filing of the ~~annual report~~ reports required by Chapter 16 by a person licensed under that chapter shall constitute compliance with this subsection by that person if the ~~annual report~~ reports contain the information specified in this subsection.

B. Each licensee who is an individual described in 10VAC5-161-20 A 3 shall file, ~~on or before March 1 of each year, an annual report with the bureau~~ quarterly mortgage call reports through the registry stating the amount of residential mortgage loans originated during the preceding ~~calendar year~~ quarter and providing such additional information as the bureau may require. Call reports shall be in such form, contain such information, and be submitted with such frequency and by such dates as the registry may require.

C. Each licensee shall give notice to the bureau through the registry within five days after the occurrence of either of the following events:

1. Termination of, or separation from, employment or exclusive agency as a mortgage loan originator for a person licensed or exempt from licensing under Chapter 16. A licensee who is no longer an employee or exclusive agent of a person licensed or exempt from licensing under Chapter 16 shall not engage in activities requiring licensure under Chapter 16 until such time as (i) the individual obtains a mortgage broker license under Chapter 16 or (ii) the individual becomes a bona fide employee or exclusive agent of a person who is licensed or exempt from licensing under Chapter 16 and the requirements set forth in clauses (i) and (ii) of subdivision 2 of this subsection have been satisfied.

2. Commencement of employment or exclusive agency as a mortgage loan originator for a person licensed or exempt from licensing under Chapter 16. A licensee who becomes

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an employee or exclusive agent of a person licensed or exempt from licensing under Chapter 16 shall not engage in activities requiring licensure under Chapter 16 until (i) the person licensed or exempt from licensing under Chapter 16 has complied with the surety bond filing requirements of § 6.2-1703 of the Code of Virginia, 10VAC5-161-30 B, and 10VAC5-161-50 and (ii) the bureau has received a sponsorship request through the registry.

D. Pursuant to subsection B of § 6.2-1711 of the Code of Virginia, each licensee shall notify the commissioner through the registry within 10 days of any change of residential or business address. A licensee described in 10VAC5-161-20 A 1 or A 2 shall be deemed to have complied with this requirement if a person licensed or exempt from licensing under Chapter 16 timely submits such notice on behalf of its employee or exclusive agent.

E. Each licensee shall ensure that all residential mortgage loans that close as a result of the licensee engaging in the business of a mortgage loan originator are included in quarterly mortgage call reports of condition submitted to the registry. ~~Reports of condition shall be in such form, contain such information, and be submitted with such frequency and by such dates as the registry may require.~~

F. The commissioner shall establish a process whereby mortgage loan originators may challenge information entered into the registry by the bureau.

VA.R. Doc. No. R17-4903; Filed November 9, 2016, 8:48 a.m.

Purpose: Chapter 806 of the 1997 Acts of Assembly created § 32.1-122.6:03 of the Code of Virginia to require the establishment of an annual physician assistant scholarship program for students who intend to enter an accredited physician assistant program. Regulations are necessary to support the implementation of § 32.1-122.6:03. The intent of this regulatory action is to implement the regulatory action required by § 32.1-122.6:03 and address the shortage of trained medical professionals in the Commonwealth. The regulation establishes administrative guidance for increasing the availability of health care providers in medically underserved areas in the Commonwealth.

Substance: This regulatory action will promulgate a new regulation, establishing a physician assistant scholarship program. The substantive elements of this program will be modeled after similar scholarship programs administered by the agency. Substantive elements include:

12VAC5-525-10 (Definitions) provides clarification on key or frequently use terms in the regulation.

12VAC5-525-20 (Physician assistant scholarship committee) establishes that a physician assistant scholarship committee as appointed by the State Board of Health shall make all scholarship recommendations.

12VAC5-525-10 (Eligibility for scholarships) provides eligibility requirements, including acceptance in or enrollment in an approved education program, a 3.0 cumulative GPA if already enrolled in a program, application, financial need, and no active military obligation.

12VAC5-525-40 (Conditions of scholarships) provides guidance and provisions on the contract requirements, calculations of the service obligation, employment requirements, transfer of practice site, default, waiver, partial, hardship, and default payments.

12VAC5-525-50 (Number of applications per student), 12VAC5-525-60 (Amounts of scholarships), and 12VAC5-525-70 (How to apply). These sections provide information and provisions regarding applicant renewals, minimum and maximum award amounts, location of application form, and deadline dates for submission of applications.

12VAC5-525-80 (Selection criteria) provides for preferential consideration of applications, including applications from Virginia residents, residents of medically underserved areas, and minority students.

12VAC5-525-90 (Scholarship contract) provides the required elements of the scholarship contract.

12VAC5-525-100 (Practice site selection) provides where a participant in the program will be able to perform his service obligation.

12VAC5-525-110 through 12VAC5-525-140 provide program reporting requirements, breach of contract, and deferments and waivers.

Issues: The primary advantage of the proposed regulatory action to the public will be an increase in the availability of

TITLE 12. HEALTH

STATE BOARD OF HEALTH

Proposed Regulation

Title of Regulation: **12VAC5-525. Regulations for Physician Assistant Scholarships (adding 12VAC5-525-10 through 12VAC5-525-140).**

Statutory Authority: § 32.1-122.6:03 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 27, 2017.

Agency Contact: Adrienne McFadden, Director, Minority Health and Health Equity, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7425, FAX (804) 864-7440, or email adrienne.mcfadden@vdh.virginia.gov.

Basis: The regulation is promulgated under the authority of § 32.1-122.6:03 of the Code of Virginia, which requires the board to establish an annual physician assistant scholarship program and mandates that the board promulgate regulations to administer the program.

primary care providers in medically underserved communities should this program be funded by the Commonwealth. Additionally, these medically underserved communities will be better positioned to retain qualified primary care providers because of the obligation created by accepting the scholarship funds. The Virginia Department of Health sees no disadvantage to the public, the agency, or the Commonwealth associated with the proposed regulatory action.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to § 32.1-122.6:03 of the Code of Virginia, the Board of Health (Board) proposes to promulgate a new regulation to establish rules and requirements for a physician assistant scholarship program. Consistent with the statute, under the proposed regulation scholarship recipients must commit to practicing as physician assistants in underserved areas of the Commonwealth in exchange for the scholarship funding.

Result of Analysis. The benefits likely exceed the costs.

Estimated Economic Impact. Chapter 806 of the 1997 Virginia Acts of Assembly amended and reenacted § 32.1-122.6:03 of the Code of Virginia to require the establishment of an annual physician assistant scholarship program for students who intend to enter an accredited physician assistant program, and mandated the Board to adopt regulations governing the implementation of such a scholarship program within 280 days of its enactment. Up until now no action has been taken to adopt such regulations. Also, no physician assistant scholarships have been awarded pursuant to § 32.1-122.6:03.¹

There are no funds currently budgeted for the physician assistant scholarship program. Thus, the promulgation of this regulation will not likely have an immediate impact. Nevertheless, the promulgation of this regulation will be beneficial in that a framework will be prepared concerning scholarship: committee appointments, eligibility, conditions, dollar amount to be awarded,² applications, selection criteria, contracts, practice sites, reporting requirements, breach of contract,³ deferment and waivers, and other information. When and if funds are appropriated for the physician assistant scholarship program, having an existing regulation would be beneficial in that it would reduce delays in implementing the program and reduce uncertainty for potential scholarship candidates.

Businesses and Entities Affected. The proposed regulation would particularly affect medical facilities that employ physician assistants located in underserved areas of the Commonwealth.

Localities Particularly Affected. The proposed regulation specifies that each scholarship recipient agrees to engage in the equivalent of one year of full-time primary care medical practice in a health professional shortage area (HPSA) or Virginia medically underserved area (VMUA) within the

Commonwealth. HPSA is defined as "an area in Virginia designated by the U.S. Secretary of Health and Human Services as having a shortage of health professionals in accordance with the procedures of the Public Health Service Act (42 USC § 254e) and implementing regulations (42 CFR Part 5)." VMUA is defined as "an area in Virginia designated by the State Board of Health in accordance with the Rules and Regulations for the Identification of Medically Underserved Areas (12VAC5-540) or § 32.1-122.5 of the Code of Virginia." Thus, localities most in need of additional health services are more likely to be affected by having additional care provided by a physician assistant.

Projected Impact on Employment. Depending upon future funding of the physician assistant scholarship program, the proposed regulation may help moderately increase the number of practicing physician assistants in the Commonwealth.

Effects on the Use and Value of Private Property. The proposed regulation does not significantly affect the use and value of private property.

Real Estate Development Costs. The proposed regulation does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed regulation does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed regulation does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed regulation does not adversely affect businesses.

Localities. The proposed regulation does not adversely affect localities.

Other Entities. The proposed regulation does not adversely affect other entities.

¹ Source: Virginia Department of Health

² The proposed regulation states that "Each participant shall receive an award of \$5,000 per year." § 32.1-122.6:03.A states that "The amounts and numbers of such scholarships shall be determined annually as provided in the appropriation act." Presuming that if and when funds are provided in the appropriation act for the physician assistant scholarship program that the amounts of the scholarships are specified, then the amounts in the appropriation act would be awarded rather than the \$5,000 specified in the regulation.

³ Under the proposed regulation it is a breach of contract to not begin continuous full-time employment within 180 days of graduation. There is no proviso for a graduate who actively seeks but is unable to find employment. Such an individual is required to repay the scholarship award amount plus

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interest and penalty. The penalty is "twice the amount of all monetary payments to the scholarship participant." This may be considered excessive; and an unemployed individual would likely be unable to pay. It may be beneficial to include a proviso to account for an unemployed scholarship recipient who can demonstrate their active seeking of physician assistant employment in an underserved area.

Agency's Response to Economic Impact Analysis: The Department of Health concurs with the economic impact analysis submitted by the Department of Planning and Budget.

Summary:

The proposed action creates a new regulation to comply with § 32.1-122.6:03 of the Code of Virginia, which requires the establishment of an annual physician assistant scholarship program for students who intend to enter an accredited physician assistant program. The substantive elements are modeled after similar scholarship incentive programs and include definitions; eligibility and selection criteria; conditions of participation; processes for applying, selecting a practice site, deferring or waiving scholarship, and repayment in cases of default; number of scholarships one student may have and amount of scholarships available to each student; reporting requirements; contract contents; and what constitutes a breach of contract.

CHAPTER 525
REGULATIONS FOR PHYSICIAN ASSISTANT
SCHOLARSHIP PROGRAM

Part I
General Information

12VAC5-525-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings:

"Approved physician assistant program" means a fully accredited physician assistant school in Virginia as approved by the board.

"Board" or "Board of Health" means the State Board of Health.

"Commissioner" means the State Health Commissioner.

"Department" means Virginia Department of Health.

"Full-time" means at least 32 hours per week for 45 weeks per year.

"Health professional shortage area" or "HPSA" means an area in Virginia designated by the U.S. Secretary of Health and Human Services as having a shortage of health professionals in accordance with the procedures of the Public Health Service Act (42 USC § 254e) and implementing regulations (42 CFR Part 5).

"Interest" means the legal rate of interest pursuant to § 6.2-302 of the Code of Virginia.

"Participant" or "recipient" means an eligible registered physician assistant student of an approved physician assistant

program who enters into a contract with the commissioner and participates in the scholarship program.

"Penalty" means twice the amount of all monetary payments to the scholarship participant, less any service obligation completed.

"Physician assistant" or "PA" means an individual who has met the requirements of the Board of Medicine for licensure and who works under the supervision of a licensed doctor of medicine, osteopathy, or podiatry as defined in § 54.1-2900 of the Code of Virginia.

"Practice" means the practice of medicine by a recipient in one of the defined primary care specialties in a location within Virginia that is designated as a health professional shortage area or a Virginia medically underserved area to fulfill the recipient's service obligation.

"Primary care" means the specialties of family practice medicine, general internal medicine, pediatric medicine, and obstetrics and gynecology.

"Virginia medically underserved area" or "VMUA" means an area in Virginia designated by the State Board of Health in accordance with the Rules and Regulations for the Identification of Medically Underserved Areas in Virginia (12VAC5-540) or § 32.1-122.5 of the Code of Virginia.

12VAC5-525-20. Physician assistant scholarship committee.

All scholarship awards shall be made by the physician assistant scholarship committee appointed by the board. The physician assistant scholarship committee shall consist of eight members: four deans or directors of physician assistant programs or their designees, two former scholarship recipients, and two members with experience in the administration of student financial aid programs. Committee appointments shall be for two-year terms, and members shall not serve for more than two successive terms.

Part II

Administration of Physician Assistant Scholarship Program

12VAC5-525-30. Eligibility for scholarships.

In order to be considered for a scholarship, an applicant shall:

1. Be a United States citizen, national, or a qualified alien pursuant to 8 USC § 1621;
2. Be accepted for enrollment or enrolled in an approved PA program in the Commonwealth of Virginia preparing him for examination for licensure as a PA in the Commonwealth of Virginia;
3. If already enrolled in an approved PA program in the Commonwealth, the student must have a cumulative grade point average of 3.0;
4. Submit a completed application form and appropriate grade transcript prior to the established deadline dates;

5. Demonstrate financial need, which is verified by the school's financial aid officer or authorized person, as part of the application process; and

6. Not have an active military obligation.

An applicant who fails to meet all of these requirements shall be ineligible for a scholarship.

12VAC5-525-40. Conditions of scholarships.

A. Prior to becoming a participant in the PA scholarship program, the applicant shall enter into a contract with the commissioner agreeing to the terms and conditions upon which the scholarship is granted.

B. For each \$5000 of scholarship money received, the participant agrees to engage in the equivalent of one year of full-time primary care medical practice in a HPSA or VMUA within the Commonwealth. The recipient shall notify the department, within 180 days of being awarded a PA degree, of the type of practice to be performed and give the name and address of the employer for approval. Voluntary military service, even if stationed in Virginia, cannot be used to repay the service obligation required when a scholarship is awarded.

C. If a participant fails to complete his studies, the full amount of the scholarship or scholarships received, plus the applicable interest charge, shall be repaid.

D. If upon graduation a participant leaves the Commonwealth or fails to engage or ceases to engage in primary care medical practice in Virginia before all employment conditions of the scholarship award are fulfilled, the participant shall repay the award amount reduced by the proportion of obligated years served plus the applicable interest and penalty.

E. If the participant is in default due to death or permanent disability so as not to be able to engage in medical practice, the participant or his personal representative, upon repayment of the total amount of scholarship funds received plus applicable interest, may be relieved of his obligation under the contract to engage in medical practice. For participants completing part of the PA obligation prior to becoming permanently disabled or in the event of death, the total amount of scholarship funds owed shall be reduced by the proportion of obligated years served. The obligation to make restitution may be waived by the board upon application of the participant or the participant's personal representative to the board.

F. All default payments shall be made payable to the Commonwealth of Virginia.

12VAC5-525-50. Number of applications per student.

Scholarships are awarded for single academic years. However, the same student may, after demonstrating satisfactory progress in his studies, which is demonstrated by a cumulative grade point average of 3.0, apply for and receive scholarship awards for a succeeding academic year or years. No student shall receive scholarships for more than a total of four years.

12VAC5-525-60. Amounts of scholarships.

The number of scholarships awarded shall be dependent upon the amount of money appropriated by the General Assembly, the amount of funds available within the Physician Assistant Scholarship Fund administered by the board, and the number of qualified applicants. Each participant shall receive an award of \$5,000 per year.

12VAC5-525-70. How to apply.

Eligible applicants shall submit a complete application made available by the department on the department's website. A complete application shall include documentation of all eligibility requirements. The deadline for submission of the application shall be announced by the department on the department's website.

12VAC5-525-80. Selection criteria.

Applicants shall be competitively reviewed and selected for participation in the Physician Assistant Scholarship Program based upon the following criteria pursuant to § 32.1-122.6:03 of the Code of Virginia:

1. Qualifications. All of an individual's professional qualifications and competency to practice in an underserved area will be considered, including eligibility for Virginia licensure, professional achievements, and other indicators of competency received from supervisors, program directors, or other individuals who have previously entered into an employment contract with the individual.

2. Virginia residents. Preferential consideration shall be given to individuals who are or have been Virginia residents (verification will be obtained by the Virginia Physician Assistant Scholarship Program).

3. Residents of medically underserved areas. Preferential consideration shall be given to individuals who reside in rural, Virginia medically underserved areas, or health professional shortage areas (verification shall be obtained by the Virginia Physician Assistant Scholarship Program).

12VAC5-525-90. Scholarship contract.

Applicants selected to receive scholarship awards by the physician assistant scholarship committee shall sign and return a written contract to the department by the specified deadline date. Failure to return the contract by the specified deadline date may result in the award being rescinded. At minimum, the scholarship contract shall include the following elements:

1. The total amount of the award and the award period;
2. Agreement to pursue a degree at an accredited PA program in the Commonwealth of Virginia that is approved by the board;
3. Agreement to begin continuous full-time employment within 180 days of the recipient's graduation;
4. Agreement to comply with all reporting requirements;

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5. Agreement to the terms of service requiring continuous full-time primary care medical practice in the Commonwealth for a specified period of time and the terms and conditions associated with a breach of contract;

6. Signature of the applicant; and

7. Signature of the commissioner or his designee.

A recipient may terminate a contract while enrolled in school after notice to the board and upon repayment within 90 days of the entire amount of the scholarship plus interest.

12VAC5-525-100. Practice site selection.

Each recipient shall perform his service obligation at a practice site in either a health professional shortage area or a Virginia medically underserved area. The participant shall agree to provide health services without discrimination, regardless of a patient's ability to pay. Maps of health professional shortage areas and Virginia medically underserved areas shall be available on the department's website.

12VAC5-525-105. Change of practice site.

Should any participant find that he is unable to fulfill the service commitment at the practice site to which he has committed to practice, he may request approval of a change of practice site. Such requests shall be made in writing. The department in its discretion may approve such a request. All practice sites, including changes of practice sites, shall be selected with the approval of the commissioner.

In the event of a dispute between the participant and the practice site, every effort shall be made to resolve the dispute before reassignment will be permitted.

12VAC5-525-110. Reporting requirements.

A. Each participant shall provide information as required by the department to verify compliance with the practice requirements of the PA scholarship program (e.g., verification of employment in a primary care setting form once every six months).

B. Each participant shall promptly notify the department in writing within 30 days if any of the following events occur:

1. Participant changes name;

2. Participant changes address;

3. Participant changes practice site. Participant is required to request in writing and obtain prior approval of changes in practice site;

4. Participant no longer intends or is able to fulfill service obligation as a PA in the Commonwealth;

5. Participant ceases to practice as a PA; or

6. Participant ceases or no longer intends to complete his PA academic program.

12VAC5-525-120. Breach of contract.

The following shall constitute a breach of contract:

1. The recipient fails to complete his PA studies;

2. The recipient fails to begin or complete the term of obligated service under the terms and conditions of the scholarship contract;

3. The recipient falsifies or misrepresents information on the program application, the verification of employment forms, or other required documents; and

4. The recipient's employment is terminated for good cause as determined by the employer and confirmed by the department. If employment is terminated for reasons beyond the participant's control (e.g., closure of site), the participant shall transfer to another site approved by the board in the Commonwealth within six months of termination. Failure of participant to transfer to another site shall be deemed to be a breach of the contract.

In the event of a breach of contract and in accordance with the terms of the contract, the recipient shall make default payments as described in 12VAC5-525-40. In the event of a breach of contract where the recipient has partially fulfilled his obligation, the total amount of reimbursement shall be prorated by the proportion of obligation completed.

12VAC5-525-130. Deferment and waivers.

A. If the participant is in default due to death or permanent disability so as not to be able to engage in primary care practice in a region designated as a HPSA or VMUA in the Commonwealth, the participant or his personal representative may be relieved of his obligation under the contract to engage in practice, upon repayment of the total amount of scholarship received plus applicable interest. For participants completing part of the obligation prior to becoming permanently disabled or in the event of death, the total amount of scholarship funds owed shall be reduced by the proportion of obligated years served. The obligation to make restitution may be waived by the board upon application of the participant or the participant's personal representative to the board.

B. Individual cases of undue hardship may be considered for a variance by the board of payment or service pursuant to § 32.1-12 of the Code of Virginia.

C. All requests for deferments, waivers, or variances must be submitted in writing to the department for consideration and final disposition by the board.

12VAC5-525-140. Fulfillment after default payments.

In the event that a recipient, in accordance with the terms of the contract, fully repays the Commonwealth for part or all of any scholarship because of breach of contract and later fulfills the terms of the contract after repayment, the Commonwealth shall reimburse the award amount repaid by the recipient minus applicable interest and fees.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the

Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (12VAC5-525)

[Verification of Employment form \(rev. 6/2016\)](#)

[Physician Assistant Scholarship Program Application \(includes Application Checklist and Requirements\) \(rev. 11/2016\)](#)

VA.R. Doc. No. R15-4416; Filed November 2, 2016, 4:08 p.m.

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Proposed Regulation

Titles of Regulations: 12VAC30-50. Amount, Duration, and Scope of Medical and Remedial Care Services (adding 12VAC30-50-600).

12VAC30-121. Commonwealth Coordinated Care Program (adding 12VAC30-121-10 through 12VAC30-121-250).

Statutory Authority: § 32.1-325 of the Code of Virginia; §§ 1932 and 1915(c) of the Social Security Act.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 27, 2017.

Agency Contact: Matthew Behrens, Project Manager, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 625-3673, FAX (804) 786-1680, or email matthew.behrens@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. Section 32.1-325 of the Code of Virginia authorizes the Director of the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the board's requirements. The Medicaid authority as established by § 1902(a) of the Social Security Act (42 USC § 1396a) provides governing authority for payments for services.

The Social Security Act § 1915(b) (42 USC § 1396n(b)) (the Act) permits the U.S. Secretary of Health and Human Services to waive certain requirements of the Act to permit states to implement primary care case management systems or managed care programs, which provide for recipients to be restricted to certain providers for their care. These managed care programs are permitted to render services to Medicaid individuals to the extent that they are cost effective and efficient and are not inconsistent with the purposes of this Title 42 of the United States Code.

In this regulatory action, DMAS is responding to multiple mandates: (i) Item 307 AAAA of Chapter 806 of the 2013 Acts of Assembly, Item 301 HHH of Chapter 3 of the 2014 Acts of Assembly, Special Session I, and Item 301 HHH of

Chapter 665 of the 2015 Acts of Assembly; (ii) Item 307 RRRR of Chapter 806 of the 2013 Acts of Assembly; and (iii) Item 307 RR of the 2013 Acts of Assembly, Item 301 TTT of Chapter 3 of the 2014 Acts of Assembly, Special Session I, and Item 301 TTT of Chapter 665 of the 2015 Acts of Assembly.

Item 307 AAAA directed DMAS to implement a process for administrative appeals of Medicaid-Medicare dual eligible recipients in accordance with the terms of the Memorandum of Understanding between DMAS and the Centers for Medicare and Medicaid Services (CMS) for the Financial Alignment Demonstration. DMAS was directed to promulgate regulations to implement these changes.

Item 307 RR directed DMAS to implement a care coordination program for Medicare-Medicaid dual eligible enrollees. This action included the joint Memorandum of Understanding between DMAS and the CMS as well as three-way contracts between CMS, DMAS, and participating health care plans. This program is established in 12VAC30-121, Commonwealth Coordinated Care Program.

Purpose: The Commonwealth of Virginia is implementing the Commonwealth Coordinated Care program to allow DMAS to continue to combine certain aspects of Medicaid managed care and long-term care, and Medicare into one program. To accomplish its goal, DMAS includes certain populations and services previously excluded from managed care into a new managed care program. The program was established under authority granted by a Social Security Act § 1932(a) state plan amendment and concurrent authority from the relevant existing § 1915(c) home and community based care Elderly or Disabled with Consumer Direction (EDCD) program.

In 2011, CMS announced an opportunity for states to align incentives between Medicare and Medicaid. CMS created a capitated model of care through which full-benefit dual eligible individuals would receive all Medicare and Medicaid covered benefits from one managed care plan and the health plans would receive a blended capitated rate. In May 2013, DMAS was accepted into the demonstration. The demonstration began on January 1, 2014, and is expected to operate through December 2017.

The populations include adults (21 years of age and older) who are eligible for both Medicare and Medicaid (full-benefit, dual eligible enrollees only), including individuals enrolled in the EDCD Waiver (one of six home and community-based waiver programs operated by DMAS) and individuals residing in nursing facilities. As of September 5, 2015, approximately 29,176 dual eligible individuals were enrolled in this program.

The goal of this action is to continue to provide integrated care to dual eligible individuals who are currently excluded from participating in managed care programs. This program enables these participants to access their primary, acute, behavioral health services, and long-term care services

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through a single managed delivery system, thereby increasing the coordination of services across the spectrum of care.

Substance: This action adds 12VAC30-121, Commonwealth Coordinated Care Program.

Program description and history: In 1996, Medallion II, a DMAS managed care program, was created to improve access to care, promote disease prevention, ensure quality care, and reduce Medicaid expenditures. Since that time, this DMAS managed care program has met these objectives and has undergone numerous expansions. In July 2012, the managed care program became operational statewide.

In Virginia, pregnant women and children comprise the majority of managed care organization (MCO) participants, and these participants have experienced positive health outcomes together with cost-effective management of their health care expenditures. Virginia has also proactively moved individuals with disabilities and seniors who are not Medicare-eligible into managed care. However, compared to children and families who comprise approximately 70% of Medicaid beneficiaries, but account for less than one-third of Medicaid spending, the elderly and disabled populations make up less than one-third of Medicaid enrollees, but account for approximately 65% of Medicaid spending because of their intensive use of acute and long-term care services.

As the managed care program exists today, the majority of individuals who are in the elderly or disabled populations are excluded from managed care. Specifically, the DMAS managed care program does not include dual eligible enrollees or individuals who receive long-term care services through home and community-based waiver programs or an admission to a nursing facility.

Chapter 847 of the 2008 Acts of Assembly directed DMAS to implement two different models for the integration of acute and long-term care services: a community model and a regional model. The community model entailed developing Programs of All-Inclusive Care for the Elderly (PACE) across the Commonwealth. PACE serves individuals 55 years and older who meet nursing facility criteria in the community, provides all health and long-term care services centered on the adult day health care model, and combines Medicaid and Medicare funding. With eight providers, DMAS currently operates 12 PACE sites, and two more will be implemented in the next 12 months.

The regional model, referred to as Health and Acute Care Program (HAP), which became effective September 1, 2007, focuses on care coordination and integrating acute and long-term care services for seniors and certain individuals with disabilities. HAP allows individuals currently enrolled in an MCO to remain in their MCO if they subsequently become eligible for a Medicaid home and community-based waiver (except for the Technology Assisted Waiver). These individuals receive their primary and acute medical services through an MCO and receive long-term care services through

the DMAS fee-for-service system. However, HAP neither addresses dual eligible individuals nor individuals residing in nursing facilities. It also did not fully integrate acute and long-term care services.

Program enrollees and care plans: Commonwealth Coordinated Care program (CCC) enrollees include adult full benefit dual eligible individuals (ages 21 years and older), including full benefit dual eligible individuals in the EDCD Waiver and full benefit dual eligible individuals residing in nursing facilities. Individuals who are required to "spend down" income in order to meet Medicaid eligibility requirements are not eligible. CCC also does not include individuals for whom DMAS only pays a limited amount each month toward their cost of care (e.g., deductibles only) such as: (1) qualified Medicare beneficiaries; (2) special low income Medicare beneficiaries; (3) qualified disabled working individuals; or (4) qualified individuals.

This regulatory action allows DMAS to continue to combine certain aspects of managed care, long-term care, and Medicare into one program. The program offers participants care coordination, which will, it is anticipated, improve their quality of care. To accomplish this, DMAS includes certain populations and certain services previously excluded from managed care into a managed care program. This managed care program will continue to be offered on a voluntary basis in five regions of the Commonwealth: Central Virginia, Tidewater, Northern Virginia, Western/Charlottesville, and the Roanoke region.

Covered services include the following:

All Medicare Parts A, B, and D services, including inpatient, outpatient, durable medical equipment, skilled nursing facilities, home health, and pharmacy.

The majority of Medicaid State Plan services that are not covered by Medicare, including behavioral health and transportation services.

Medicaid-covered EDCD Waiver services: adult day health care, personal care (consumer and agency directed), respite services (consumer and agency directed), personal emergency response system, transition coordination, and transition services.

Personal care services for persons enrolled in the Medicaid Works program.

Nursing facility services.

Flexible benefits that will be at the option of participating plans.

The program offers dual eligible individuals care coordination, health risk assessments, interdisciplinary care teams, and plans of care, which are otherwise unavailable for this population. Care coordination is essential to providing appropriate and timely services to often vulnerable participants.

Under the program, EDCD Waiver participants who receive personal and respite care continue to have the option of

consumer direction. Consumer direction allows participants to serve as employers of their personal care attendants. Under consumer direction, participants are responsible for hiring, training, supervising, and firing their attendants. The consumer directed model of care is freely chosen by participants, or their authorized representatives if the participants are not able to direct their own care.

Enrollment in CCC is voluntary for qualified individuals. An opt-in period will be followed by passive enrollment. Individuals can switch among participating plans in their regions or opt-out altogether of the new program at any time at the end of each month.

Issues: The primary advantage to those individuals enrolled in the Commonwealth Coordinated Care program is receiving coordinated and integrated health care through a managed care program. This change enables these participants to access their primary, acute, behavioral health services, and long-term care services through a single managed delivery system, thereby increasing the coordination of services across the spectrum of care.

The primary advantage to the Commonwealth is shared Medicare savings that could result from care coordination and the ability to deliver acute and long-term care services under one, streamlined delivery system with a capitation payment rate. Alternatively, the department would continue to experience rising expenditures for primary, acute, and long-term care costs for these populations.

There are no disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to legislative mandates from the 2013, 2014, and 2015 Acts of Assembly¹ relating to the coordinated care of health care services, the Board of Medical Assistance Services (Board) promulgated a new chapter² of the Virginia Administrative Code on an emergency basis.³ The Board now proposes to promulgate the chapter on a permanent basis.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The Department of Medical Assistance Services (DMAS) implemented the Commonwealth Coordinated Care (CCC) program to combine certain aspects of Medicaid managed care and long-term care and Medicare into one program. To accomplish its goal, DMAS included certain populations and services previously excluded from managed care into a new managed care program. The program was implemented through an emergency action; and now the Board proposes to make the regulation permanent so that the program can continue past the expiration of the emergency regulation.

Federal Government Impetus for this Action. In 2011, the federal Centers for Medicare and Medicaid Services (CMS)

announced an opportunity for states to align incentives between Medicare and Medicaid. CMS created a capitated model of care through which full-benefit dual eligible individuals would receive all Medicare and Medicaid covered benefits from one managed care plan and the health plans would receive a blended capitated rate. In May 2013, DMAS was accepted into the demonstration. The demonstration began on January 1, 2014, and is expected to operate through December 2017.

Substance of this Proposal. This regulatory proposal establishes on a permanent basis the CCC program, which allows DMAS to combine certain aspects of Medicaid managed care and long-term care and Medicare into one program. CCC provides integrated care to dual eligible individuals who are eligible for both Medicare and Medicaid and who were excluded from participating in Virginia's managed care programs. This change enables these participants to access their primary, acute, behavioral health services, and long-term care services through a single managed delivery system, thereby increasing the coordination of services across the spectrum of care.

Covered services under the CCC include the following:

- All Medicare Parts A, B, and D services (including inpatient, outpatient, durable medical equipment, skilled nursing facilities, home health, and pharmacy);
- The majority of Medicaid State Plan services that are not covered by Medicare, including behavioral health and transportation services;
- Medicaid-covered Elderly or Disabled with Consumer Direction (EDCD) Waiver services: adult day health care, personal care (consumer and agency directed), respite services (consumer and agency directed), personal emergency response system, transition coordination, and transition services;
- Personal care services for persons enrolled in the Medicaid Works program;
- Nursing facility services; and,
- Flexible benefits that will be at the option of participating plans.

The eligible populations include adults (21 years of age and older) who are eligible for both Medicare and Medicaid (full-benefit duals only), including individuals enrolled in the home and community-based care EDCD Waiver program and individuals residing in nursing facilities. The program is voluntary.

Effect. The option of CCC likely benefits those qualified individuals who choose to participate. The program offers dual eligible individuals care coordination, health risk assessments, interdisciplinary care teams, and plans of care, which are otherwise unavailable for this population. Care coordination increases the likelihood that patients receive appropriate and timely services.

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Additionally, CCC is designed to provide cost savings. DMAS estimates that the Medicaid savings for individuals enrolling in CCC were \$2.5 million in fiscal year 2015 and \$4.4 million in fiscal year 2016. Thus, the proposed regulation should provide a net benefit.

Businesses and Entities Affected. The proposed regulation applies to the three health insurance firms with Medicare/Medicaid Plans that have contracted with CMS and DMAS for the CCC program. None qualify as a small business. The proposed regulation also affects individuals qualified to enroll in CCC. As of August 1, 2016 there were 61,595 people eligible for the program and 27,294 that had enrolled.⁴

Localities Particularly Affected. The CCC program is available in the following localities: Albemarle, Alexandria, Alleghany, Amelia, Arlington, Augusta, Bath, Bedford City, Bedford County, Botetourt, Brunswick, Buckingham, Buena Vista, Caroline, Charles City, Charlottesville, Chesapeake, Chesterfield, Colonial Heights, Covington, Craig, Culpeper, Cumberland, Dinwiddie, Emporia, Essex, Fairfax City, Fairfax County, Falls Church, Fauquier, Floyd, Fluvanna, Franklin City, Franklin County, Fredericksburg, Giles, Gloucester, Goochland, Greene, Greensville, Hampton, Hanover, Harrisonburg, Henrico, Henry, Highland, Hopewell, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Lexington, Loudoun, Louisa, Lunenburg, Madison, Manassas City, Manassas Park City, Martinsville, Mathews, Mecklenburg, Middlesex, Montgomery, Nelson, New Kent, Newport News, Norfolk, Northampton, Northumberland, Nottoway, Orange, Patrick, Petersburg, Poquoson, Portsmouth, Powhatan, Prince Edward, Prince George, Prince William, Pulaski, Radford, Richmond City, Richmond County, Roanoke City, Roanoke County, Rockbridge, Rockingham, Salem, Southampton, Spotsylvania, Stafford, Staunton, Suffolk, Surry, Sussex, Virginia Beach, Waynesboro, Westmoreland, Williamsburg, Wythe, and York.⁵

Projected Impact on Employment. The proposed regulation does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed regulation does not significantly affect the use and value of private property.

Real Estate Development Costs. The proposed regulation does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed regulation does not significantly affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed regulation does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed regulation does not adversely affect businesses.

Localities. The proposed regulation does not adversely affect localities.

Other Entities. The proposed regulation does not adversely affect other entities.

¹ (i) Chapter 806 Item 307 AAAA of the 2013 Acts of the Assembly, Chapter 3 Item 301 HHH of the 2014 Acts of the Assembly, and Chapter 665 Item 301 HHH of the 2015 Acts of the Assembly; (ii) Chapter 806 Item 307 RRRR of the Acts; and (iii) Item 307 RR of the 2013 Acts of the Assembly, Chapter 3 Item 301 TTT of the 2014 Acts of the Assembly, and Chapter 665 Item 301 TTT of the 2015 Acts of the Assembly.

² 12 VAC 30-121

³ For the text of the emergency regulation and other details, see <http://register.dls.virginia.gov/details.aspx?id=4750>.

⁴Source: Department of Medical Assistance Services

⁵ Ibid

Agency's Response to Economic Impact Analysis: The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget regarding the regulations concerning the Commonwealth Coordinated Care program. The agency concurs with this analysis.

Summary:

Item 307 RR of Chapter 806 of the 2013 Acts of Assembly, Item 301 TTT of Chapter 3 of the 2014 Acts of Assembly, Special Session I, and Item 301 TTT of Chapter 665 of the 2015 Acts of Assembly directs the Department of Medical Assistance Services (DMAS) to implement a care coordination program for a Medicare-Medicaid dual eligible enrollee. Item 307 AAAA of Chapter 806 of the 2013 Acts of Assembly, Item 301 HHH of Chapter 3 of the 2014 Acts of Assembly, Special Session I, and Item 301 HHH of Chapter 665 of the 2015 Acts of Assembly directs DMAS to implement a process for administrative appeals of Medicaid/Medicare dual eligible recipients in accordance with the terms of the Memorandum of Understanding between DMAS and the Centers for Medicare and Medicaid Services for the Virginia Medicare-Medicaid Financial Alignment Demonstration Model. Item 307 RRRR of Chapter 806 of the 2013 Acts of Assembly provides for achieving cost savings and standardization of administrative and other processes for providers. The proposed amendments conform DMAS regulations to these requirements.

The establishment of Commonwealth Coordinated Care as the mandated care coordination program allows DMAS to combine certain aspects of Medicaid managed care and long-term care and Medicare into one program. The purpose of this regulatory action is to provide integrated

care to dual eligible individuals who are currently excluded from participating in managed care programs. This change will enable participants to access their primary and acute medical services, behavioral health services, and long-term care services through a single managed delivery system, thereby increasing the coordination of services across the spectrum of care. The new program offers dual eligible individuals care coordination, health risk assessments, interdisciplinary care teams, and plans of care, which are currently unavailable for this population. Care coordination is essential to providing appropriate and timely services to often vulnerable participants.

Part IX

Commonwealth Coordinated Care Program

12VAC30-50-600. Section 1932 Medicare-Medicaid eligible individuals.

A. Consistent with § 1932(a)(1)(A) of the Social Security Act (Act), the Commonwealth enrolls Medicaid enrollees on a voluntary basis into Medicare-Medicaid plans (MMPs) in the absence of § 1115 or 1915(b) waiver authority.

B. Consistent with § 1932(a)(1)(B) of the Act, the Commonwealth shall contract with MMPs. The payment method to the contracting entity shall be a capitation method.

C. Enrollment is voluntary in the counties and cities designated by the following regions: (i) Central Virginia, (ii) Northern Virginia, (iii) Tidewater, (iv) Western/Charlottesville, and (v) Roanoke.

D. The Commonwealth assures that all of the applicable requirements of § 1903(m) of the Act for MMPs and MMP contracts are met.

E. The Commonwealth assures that all the applicable requirements of § 1932 of the Act for the state's option to limit freedom of choice by requiring enrollees to receive their benefits through managed care entities will be met. MMPs shall be required to pass readiness reviews prior to enrolling individuals.

F. The Commonwealth assures that all the applicable requirements of 42 CFR 431.51 regarding freedom of choice for family planning services and supplies as defined in § 1905(a)(4)(C) of the Act will be met.

G. The Commonwealth assures that all applicable managed care requirements of 42 CFR Part 438 for MMPs will be met. Enrollees shall be permitted to opt out at any time with or without cause from the program pursuant to 42 CFR 438.56(c).

H. The Commonwealth assures that all applicable requirements of 42 CFR 438.6(c) for payments under any risk contracts will be met.

I. The Commonwealth assures that all applicable requirements of 45 CFR 92.36 for procurement of contracts will be met.

J. Enrollment process.

1. The Department of Medical Assistance Services (DMAS) shall use a preassignment algorithm, through its Medicaid Management Information System, and a contracted enrollment broker to facilitate the continuity of care for Medicaid individuals by providers that have traditionally served this population.

2. DMAS shall not use a lock in (i.e., restricting a beneficiary's ability to move between health plans except during the designated annual open enrollment period) for managed care.

3. Individuals shall have 60 days to choose a health plan before being automatically assigned.

4. Eligible individuals will receive a notice that indicates to which MMP they have been assigned. The notice will have instructions for the individual to contact the DMAS contracted enrollment facilitator to:

a. Accept the preassigned MMP;

b. Select a different MMP that is operating in their region; or

c. Opt out of the program altogether.

5. If an individual does not select an MMP, he shall be passively enrolled into the preassigned MMP.

6. Enrollees shall be assigned to an MMP based on six months of claims prior to preassignment using the rules in this subdivision in order of priority:

a. Individuals in a nursing facility shall be preassigned to an MMP that includes the individual's nursing facility in its provider network.

b. Individuals in the Elderly or Disabled with Consumer Direction Waiver shall be assigned to an MMP that includes the individual's current adult day health care provider in its provider network.

c. If more than one MMP network includes the nursing facility or adult day health care provider used by an individual, the individual will be assigned to the MMP with which he has previously been assigned in the past six months. If he has no history of previous MMP assignment, he shall be randomly assigned to an MMP in which his provider participates.

d. Individuals shall be preassigned to an MMP with whom they have previously been assigned within the past six months.

K. The Commonwealth assures that it has an enrollment system that allows individuals who are already enrolled to be given priority to continue that enrollment if the MMP does not have capacity to accept all who are seeking enrollment under the program.

L. The Commonwealth assures that, pursuant to the choice requirements in 42 CFR 438.52, Medicaid individuals who are enrolled in an MMP will have a choice of at least two

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entities unless the area is considered rural as defined in 42 CFR 438.52(b)(3).

M. The Commonwealth shall apply the automatic reenrollment provision in accordance with 42 CFR 438.56(g) if the individual is disenrolled solely because he loses Medicaid eligibility for a period of two months or less.

N. The following services shall be excluded from coverage by the MMP in this program:

1. Induced abortions;
2. Targeted case management; and
3. Dental services (see 12VAC30-121-70 for specific coverage).

O. The Commonwealth shall intentionally limit the number of entities it contracts with under the option permitted by § 1932 of the Act. The Commonwealth assures that such limits on the number of contracting entities shall not substantially impair enrollee access to services.

P. DMAS has established an advisory committee that meets quarterly throughout the duration of the program to discuss topics such as program design, educational and outreach materials, and provider and beneficiary issues.

CHAPTER 121

COMMONWEALTH COORDINATED CARE PROGRAM 12VAC30-121-10. Commonwealth Coordinated Care program authority.

A. Medicare authority. The Medicare elements of the Commonwealth Coordinated Care (CCC) program shall operate according to existing Medicare Part C and Part D laws and regulations, as amended or modified, except to the extent these requirements are waived or modified as provided for in the memorandum of understanding (MOU) between the Centers for Medicare and Medicaid Services (CMS) and the department. As a term and condition of the CCC program, participating plans will be required to comply with Medicare Advantage and Medicare Prescription Drug Program requirements in Part C and Part D of Title XVIII of the Social Security Act (the Act) and 42 CFR Parts 422 and 423, as amended from time to time, except to the extent specified in the MOU for waivers and the three-way contract.

B. Medicaid authority. The Medicaid elements of the CCC program shall operate according to existing Medicaid laws and regulations, including but not limited to all requirements of the § 1915(c) of the Act waivers for individuals enrolled in the Elderly or Disabled with Consumer Direction Waiver, as amended or modified, except to the extent waived as provided for in the MOU. As a term and condition of the CCC program, the Commonwealth and participating plans shall comply with Medicaid managed care requirements under (i) Title XIX of the Act, 42 CFR Part 438 and other applicable regulations, as amended or modified, except to the extent specified in the MOU; and (ii) the three-way contract.

12VAC30-121-20. Definitions.

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

"Action" or "adverse decision" means, consistent with 42 CFR 438.400, a decision by the participating plan, subcontractor, service provider, or Department of Medical Assistance Services that constitutes a denial or limited authorization of a service authorization request, including (i) type or level of service; (ii) reduction, suspension, or termination of a previously authorized service; (iii) failure to act on a service request; (iv) denial in whole or in part of a payment for a covered service; (v) failure by the participating plan to render a decision within the required timeframes; or (vi) denial of an enrollee's request to exercise his right under 42 CFR 438.52(b)(2)(ii) to obtain services outside of the network.

"Appellant" means an applicant for or recipient of Medicaid benefits who seeks to challenge an action taken by the participating plan regarding eligibility for services and payment determinations.

"Capitation payment" means a payment the department makes periodically to a participating plan on behalf of each enrollee enrolled under a contract with that participating plan for the provision of services under the state plan and waivers, regardless of whether the enrollee receives services during the period covered by the payment.

"Capitation rate" means the monthly amount payable to the participating plan per enrollee for the provision of contract services. The participating plan shall accept the established capitation rates paid each month by the department and CMS as payment in full for all Medicaid and Medicare services to be provided pursuant to the three-way contract and all associated administrative costs, pending final recoupment, reconciliation, sanctions, or payment of quality withhold amounts as detailed in the MOU and the three-way contract.

"Care management" means the collaborative, person-centered process that assists enrollees in gaining access to needed health care services and includes (i) assessing for and planning of health care services; (ii) linking the enrollee to services and supports identified in the plan of care; (iii) working with the enrollee directly for the purpose of locating, developing, or obtaining needed health care services and resources; (iv) coordinating health care services and service planning with other agencies, providers, and family members involved with the enrollee; (v) making collateral contacts to promote the implementation of the plan of care and community integration; (vi) monitoring to assess ongoing progress and ensuring services are delivered; and (vii) education and counseling that guides the enrollee and develops a supportive relationship that promotes the plan of care.

"Centers for Medicare and Medicaid Services" or "CMS" means the federal agency of the U.S. Department of Health

and Human Services that is responsible for the administration of Titles XVIII, XIX, and XXI of the Social Security Act.

"Commonwealth Coordinated Care," "CCC," or "CCC program" means the program for the Virginia Medicare-Medicaid Financial Alignment Demonstration Model.

"Covered services" means the set of required services offered by the participating plan as set forth in the three-way contract.

"Cultural competency" means understanding those values, beliefs, and needs that are associated with an enrollee's age, gender identity, sexual orientation, or racial, ethnic, or religious background. Cultural competency (i) includes a set of competencies that are required to ensure appropriate, culturally sensitive health care to persons with congenital or acquired disabilities and (ii) is based on the premise of respect for the enrollee and his existing cultural differences and on an implementation of a trust-promoting method of inquiry and assistance.

"Demonstration" means the capitated model under the Medicare-Medicaid Financial Alignment Demonstration Model as authorized by the Centers for Medicare and Medicaid Services and as set out in the Patient Protection and Affordable Care Act of 2010 (P.L. 111-148) and authorized under § 1115A of the Social Security Act.

"Department of Medical Assistance Services," "department," or "DMAS" means the Virginia Department of Medical Assistance Services, the single state agency for the Medicaid program in Virginia that is responsible for implementation and oversight of the demonstration.

"Disenroll" or "disenrollment" means the process of changing enrollment from one participating plan to another participating plan or opting out of the demonstration altogether but shall not include ending eligibility in the Medicare or Medicaid programs.

"Division" or "Appeals Division" means the Appeals Division of the Department of Medical Assistance Services.

"Effective date of enrollment" means the date on which a participating plan's coverage begins for an enrollee.

"Elderly or Disabled with Consumer Direction Waiver" or "EDCD Waiver" means, as provided in Part IX (12VAC30-120-900 et seq.) of Waivered Services (12VAC30-120), the CMS-approved waiver that covers a limited range of community support services offered to enrollees who are elderly or have a disability and meet Virginia nursing facility level of care criteria as set out in 12VAC30-60-300, 12VAC30-60-303, and 12VAC30-60-307.

"Enrollee appeal" means an enrollee's request for review of a participating plan's coverage or payment determination. In accordance with 42 CFR 438.400, a Medicaid-based appeal is defined as a request for review of an action, as defined in this section. An appeal is an enrollee's challenge to the actions regarding services, benefits, and reimbursement provided by the participating plan, its service providers, or the Department

of Medical Assistance Services. Enrollees or providers or other individuals acting on behalf of enrollees and with the enrollee's written consent may appeal adverse decisions to the participating plan and to DMAS (for Medicaid covered services) after the participating plan's internal appeals process is exhausted.

"Enrollee communications" means the materials designed to communicate to enrollees the plan benefits, policies, processes, and enrollee rights. Enrollee communications includes pre-enrollment, post-enrollment, and operational materials.

"Enrollment" means the completion of approved enrollment forms by or on behalf of an eligible person and assignment of an enrollee to a participating plan by DMAS in accordance with federal law.

"Evidence of coverage" or "EOC" means a document prepared by the Medicare-Medicaid plan and provided to the enrollee that is consistent with the requirements of 42 CFR 438.10, 42 CFR 422.11, and 42 CFR 423.128 and includes information about all the services covered by that plan.

"Expedited appeal" means the process by which DMAS must respond to an appeal by an enrollee if a denial of care decision and the subsequent internal appeal by a participating plan may jeopardize life, health, or the ability to attain, maintain, or regain maximum function.

"External appeal" means an appeal, subsequent to the participating plan appeal decision, to the state fair hearing process for Medicaid-based adverse decisions or to the Medicare process for Medicare-based adverse decisions. The department's external appeal decision shall be binding upon the participating plan and not subject to further appeal by the participating plan.

"Fee-for-service" or "FFS" means the traditional health care payment system in which physicians and other providers receive a payment for each service they provide.

"Final decision" means a written determination by a hearing officer that is binding on DMAS, unless modified during or after the judicial process, and that may be appealed to the local circuit court.

"Good cause" means to provide sufficient cause or reason for failing to file a timely appeal or for missing a scheduled appeal hearing.

"Health risk assessment" or "HRA" means a comprehensive assessment of an enrollee's medical, psychosocial, cognitive, and functional status in order to determine his medical, behavioral health, long-term care services and supports, and social needs.

"Hearing" means an informal evidentiary proceeding conducted by a DMAS hearing officer during which an enrollee has the opportunity to present his concerns with or objections to the participating plan's internal appeal decision.

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"Hearing officer" means an impartial decision maker who conducts evidentiary hearings for enrollee appeals on behalf of the department.

"Interdisciplinary care team" or "ICT" means a team of professionals who collaborate, either in person or through other means, with the enrollee to develop and implement (employing both medical and social models of care) a plan of care that meets the enrollee's medical, behavioral health, long-term care services and supports, and social needs. ICTs may include physicians, physician assistants, long-term care providers, nurses, specialists, pharmacists, behavior health specialists, and social workers, as may be appropriate for the enrollee's medical diagnoses and health condition, comorbidities, and community support needs.

"Intermediate sanctions" means sanctions that may be imposed on a Medicare-Medicaid plan such as civil money penalties, appointment of temporary management, permission for individuals to terminate enrollment in the Medicare-Medicaid plan without cause, suspension or default of all enrollment of individuals, and suspension of payment to the Medicare-Medicaid plan for individuals enrolled pursuant to 42 USC § 1396u-2(e)(2).

"Internal appeal" means an enrollee's initial request to the participating plan for review of the participating plan's coverage or payment determination.

"Long-term services and supports" or "LTSS" means a variety of services and supports that (i) help elderly enrollees and enrollees with disabilities who need assistance to perform activities of daily living and instrumental activities of daily living to improve the quality of their lives and (ii) are provided over an extended period, predominantly in homes and communities, but also in facility-based settings such as nursing facilities. Examples of these activities include assistance with bathing, dressing, and other basic activities of daily life and self-care, as well as support for everyday tasks such as laundry, shopping, and transportation.

"Medicaid" means the program of medical assistance benefits under Title XIX of the Social Security Act and various demonstrations and waivers thereof.

"Medically necessary" means (i) for Medicare, services that are reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member and (ii) for Virginia Medicaid, an item or service provided for the diagnosis or treatment of a patient's condition consistent with community standards of medical practice and in accordance with Part IX (12VAC30-130-600 et seq.) of 12VAC30-130. Furthermore, services must be sufficient in amount, duration, and scope to reasonably achieve their purpose. Services must be provided in a way that provides all protections to covered individuals provided by Medicare and Virginia Medicaid.

"Medicare" means Title XVIII of the Social Security Act, the federal health insurance program for people age 65 or older, people younger than 65 years of age who have certain

disabilities, and people with end stage renal disease or amyotrophic lateral sclerosis.

"Medicare Part A" means hospital insurance that helps cover inpatient care in hospitals, skilled nursing facilities, hospice, and home health care.

"Medicare Part B" means insurance that helps cover medically necessary services such as doctor's services, outpatient care, durable medical equipment, home health services, other medical services, and some preventive services.

"Medicare Part C" or "Medicare Advantage" means a plan that (i) provides all of an enrollee's Medicare Part A and Medicare Part B coverage; (ii) may offer extra coverage, such as vision, hearing, dental, or health and wellness programs; and (iii) may include Medicare prescription drug coverage (Part D).

"Medicare Part D" means Medicare prescription drug coverage.

"Memorandum of understanding" or "MOU" means the Memorandum of Understanding between the Centers for Medicare and Medicaid Services (CMS) and the Commonwealth of Virginia Regarding a Federal-State Partnership to Test a Capitated Financial Alignment Model for Medicare-Medicaid Enrollees (5/2013), which is the document that sets out the mutually agreed to understanding of this program between CMS and DMAS.

"Minimum data set" or "MDS" means part of the federally-mandated process for assessing enrollees receiving care in certified skilled nursing facilities in order to record their overall health status, regardless of payer source.

"Money Follows the Person" or "MFP" means a demonstration project administered by DMAS that is designed to create a system of long-term services and supports that better enable enrollees to transition from certain long-term care institutions into the community.

"Network" means doctors, hospitals, or other health care providers that participate or contract with a participating plan and, as a result, agree to accept a mutually-agreed upon payment amount or fee schedule as payment in full for covered services that are rendered to eligible enrollees.

"Nursing facility" means any skilled nursing facility, skilled care facility, intermediate care facility, nursing care facility, or nursing facility, whether freestanding or a portion of a freestanding medical care facility, that is certified for participation as a Medicare or Medicaid provider, or both, pursuant to Title XVIII and Title XIX of the Social Security Act, as amended, and § 32.1-137 of the Code of Virginia.

"Participating plan," "Medicare-Medicaid plan," or "MMP" means a health plan that is selected to participate in Virginia's Medicare-Medicaid Financial Alignment Demonstration Model and that is a party to the three-way contract with CMS and DMAS.

"Passive enrollment" means an enrollment process through which an eligible enrollee is enrolled by DMAS or its vendor into a participating plan, when not otherwise affirmatively electing one plan following a minimum 60-day advance notification that includes the opportunity to make another enrollment decision or opt out of the demonstration prior to the enrollment effective date.

"Plan of care" or "POC" means a plan, primarily directed by the enrollee and family members of the enrollee as appropriate with the assistance of the enrollee's interdisciplinary care team to meet the enrollee's medical, behavioral health, long-term care services and supports, and social needs.

"Preadmission screening" means the process to (i) evaluate the functional, medical or nursing, and social support needs of enrollees referred for preadmission screening; (ii) assist enrollees in determining what specific services the enrollees need; (iii) evaluate whether a service or a combination of existing community services are available to meet the needs of the enrollees; and (iv) refer enrollees to the appropriate entity for either Medicaid-funded nursing facility services or home and community-based care for those enrollees who meet the criteria for nursing facility level of care.

"Preadmission screening team" means the entity contracted with DMAS that is responsible for performing preadmission screening pursuant to § 32.1-330 of the Code of Virginia.

"Previously authorized" means, in relation to continuation of benefits, as described in 42 CFR 438.420, a prior approved course of treatment. "Previously authorized" is further clarified in 12VAC30-121-150.

"Privacy" means the requirements established in (i) the Health Insurance Portability and Accountability Act of 1996 and implementing regulations, (ii) Medicaid regulations, including 42 CFR 431.300 through 42 CFR 431.307, and (iii) relevant Virginia privacy laws.

"Provider appeal" means an appeal filed by a Medicare, Medicaid, or other service provider that has already provided a service and has received an action regarding payment or audit result.

"Remand" means the return of a case by the hearing officer to the participating plan for further review, evaluation, and action.

"Remote patient monitoring" means monitoring a patient remotely and is often used for patients with one or more chronic conditions, such as congestive heart failure, cardiac arrhythmias, diabetes, pulmonary diseases, or the need for anticoagulation treatment. Remote patient monitoring must be agreed to by the enrollee. Examples of remote patient monitoring activities include transferring vital signs such as weight, blood pressure, blood sugar, and heart rate from the enrollee to the physician's office.

"Representative" means an attorney or other individual who has been authorized to represent an enrollee pursuant to this chapter.

"Reverse" means to overturn the participating plan's action and internal appeal decision and to direct that the participating plan fully approve the amount, duration, and scope of requested services.

"Secretary" means the Secretary of the U.S. Department of Health and Human Services.

"Social Security Act" means the federal act codified through Chapter 7 of Title 42 of the United States Code that established social insurance programs including Medicare and Medicaid.

"State fair hearing" means the DMAS evidentiary hearing process for enrollees as administered by the Appeals Division of DMAS.

"State Plan for Medical Assistance" or "State Plan" means the comprehensive written statement submitted to CMS by DMAS describing the nature and scope of the Virginia Medicaid program and giving assurance that the program will be administered in conformity with the requirements, standards, procedures, and conditions for obtaining federal financial participation. DMAS has the authority to administer such State Plan for the Commonwealth pursuant to the authority of the § 32.1-325 of the Code of Virginia.

"Sustain" means to uphold the participating plan's appeal decision.

"Targeted case management" or "TCM" means the Medicaid-funded State Plan case management service provided by private providers for enrollees with substance use disorders or developmental disabilities and by community services boards or behavioral health authorities for enrollees with behavioral health disorders or intellectual disabilities. TCM encompasses both referral and transition management and clinical services such as monitoring, self-management support, and medication review and adjustment. TCM is separate from "care management" as defined in the MOU.

"Three-way contract" means the three-way agreement between CMS, DMAS, and a participating plan specifying the terms and conditions pursuant to which a participating plan shall participate in the CCC program.

"Vulnerable subpopulation" means, at a minimum, individuals from the following groups: (i) individuals who are enrolled in the Elderly or Disabled with Consumer Direction Waiver (12VAC30-120-900 et seq.); (ii) individuals who have either intellectual or developmental disabilities, or both; (iii) individuals who have cognitive or memory problems, or both, (e.g., dementia and traumatic brain injury); (iv) individuals with physical or sensory disabilities; (v) individuals who are residing in nursing facilities; (vi) individuals who have serious and persistent mental illness or illnesses; (vii) individuals who have end stage renal disease;

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and (viii) individuals who have complex or multiple chronic health conditions, or both.

"Withdraw" means the enrollee or the enrollee's representative makes a written request for the department to terminate the appeal process without a final decision on the merits.

12VAC30-121-30. Selected localities.

A. The demonstration shall operate in specific regions within the Commonwealth.

B. The department and CMS will implement the demonstration in Central Virginia, Northern Virginia, Roanoke, Tidewater, and Western/Charlottesville regions.

C. Under the demonstration, DMAS will conduct a regional phase in. Phase I will impact Central Virginia and Tidewater. Phase II will impact Western/Charlottesville, Northern Virginia, and Roanoke.

D. Participating plans must cover all eligible enrollees in all localities within the region or regions in which such plans participate.

12VAC30-121-40. Eligible enrollees.

A. Medicaid-eligible enrollees who meet the following qualifications may be eligible to be enrolled in the demonstration:

1. Individuals who are 21 years of age or older at the time of enrollment;
2. Individuals who are entitled to benefits under Medicare Part A, enrolled under Medicare Part B and Part D, and who are receiving full Medicaid benefits. This includes enrollees participating in the EDCD Waiver and those residing in nursing facilities;
3. Individuals who reside in a program region; and
4. Individuals who do not meet any of the exclusions identified in 12VAC30-121-45.

B. Individuals who have been excluded from the CCC program, for any reason, shall be permitted to opt in to the CCC program once the reason for their exclusion no longer exists.

12VAC30-121-45. Individuals excluded from enrollment.

Individuals who meet at least one of the following criteria shall be excluded from the CCC program:

1. Individuals who are younger than 21 years of age.
2. Individuals who are required to "spend down" income in order to meet Medicaid eligibility requirements. "Spend down" means when a Medicaid applicant meets all Medicaid eligibility requirements other than income. Medicaid eligibility staff conduct a medically needy calculation that compares the enrollee's income to a medically needy income limit for a specific period of time referred to as the "budget period" (not to exceed six months). When a Medicaid applicant's incurred medical expenses equal the spend down amount, the applicant is

eligible for full benefit Medicaid for the remainder of the spend down budget period.

3. Individuals for whom DMAS only pays a limited amount each month toward their cost of care (e.g., deductibles), including non-full-benefit Medicaid beneficiaries. These individuals may receive Medicaid coverage for the following: (i) Medicare monthly premiums for Medicare Part A, Medicare Part B, or both (carved-out payment); (ii) coinsurance, copayment, and deductible for Medicare-allowed services; and (iii) Medicaid-covered services, including those that are not covered by Medicare. These individuals may include:

- a. Qualified Medicare beneficiaries;
- b. Special low income Medicare beneficiaries;
- c. Qualified disabled working individuals; or
- d. Qualifying individuals.

4. Individuals who are inpatients in state mental hospitals, including Catawba Hospital, Central State Hospital, Eastern State Hospital, Hiram W. Davis Medical Center, Northern Virginia Mental Health Institute, Piedmont Geriatric Hospital, Southern Virginia Mental Health Institute, Southwestern Virginia Mental Health Institute, and Western State Hospital.

5. Individuals who are residents of state hospitals, intermediate care facilities for individuals with intellectual disabilities, residential treatment facilities, or long-stay hospitals. Long-stay hospitals are specialty Medicaid facilities that serve enrollees who require a higher intensity of nursing care than that which is normally provided in a nursing facility and who do not require the degree of care and treatment that an acute care hospital is designed to provide.

6. Individuals who are participating in federal waiver programs for home and community-based Medicaid coverage other than the EDCD Waiver (e.g., Individual and Family Developmental Disabilities Support, Intellectual Disability, Day Support, Technology Assisted, and Alzheimer's Assisted Living waivers).

7. Individuals receiving hospice services at the time of enrollment. If an enrollee enters hospice while enrolled in the CCC program, he shall be disenrolled from the CCC program. If an enrollee opts out of the CCC program, he shall not be permitted to reenter it. If an enrollee does not opt out but leaves the CCC program due to a CCC program action, he shall be permitted to return to the CCC program upon leaving hospice. However, participating plans shall refer these individuals to the preadmission screening team for additional LTSS if not already in place.

8. Individuals receiving the end stage renal disease (ESRD) Medicare benefit at the time of enrollment into the CCC program. However, an enrollee who develops ESRD while enrolled in the CCC program shall remain in the CCC

program unless he opts out. If he opts out, the enrollee shall not be permitted to opt back into the CCC program.

9. Individuals with other comprehensive group or enrollee health insurance coverage, other than full benefit Medicare, insurance provided to military dependents, and any other insurance purchased through the Health Insurance Premium Payment Program.

10. Individuals who have a Medicaid eligibility period that is less than three months.

11. Individuals who have a Medicaid eligibility period that is only retroactive.

12. Individuals enrolled in the Virginia Birth-Related Neurological Injury Compensation Program established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 of the Code of Virginia.

13. Individuals enrolled in the Money Follows the Person program.

14. Individuals residing outside of the CCC program coverage regions.

15. Individuals enrolled in a Program of All-Inclusive Care for the Elderly (PACE). However, PACE participants may enroll in the CCC program if they choose to disenroll from their PACE providers.

16. Individuals participating in the CMS Independence at Home demonstration or any other demonstration that bases some or all payment on achievement of Medicare savings.

12VAC30-121-50. Enrollment process.

Individuals who qualify as indicated in 12VAC30-121-40 and are not excluded as provided in 12VAC30-121-45 shall be enrolled as follows, except if they choose to opt out:

1. Enrollees shall be passively assigned to a participating plan based on their previous six months of Medicaid claims history prior to preassignment using the rules in this order of priority:

a. Enrollees in a nursing facility shall be preassigned to a participating plan that includes the enrollee's nursing facility in its provider network.

b. Enrollees in the EDCD Waiver shall be assigned to a participating plan that includes the enrollee's current adult day health care provider in the MMP's existing provider network.

c. If more than one participating plan network includes the nursing facility or adult day health care provider used by an enrollee, the enrollee shall be assigned to the participating plan with which he has previously been assigned in the past six months.

d. If the enrollee has no history of previous participating plan assignment, he shall be randomly assigned to a participating plan in which his provider participates.

e. In the absence of the conditions in subdivisions 1 a through 1 d of this section, enrollees shall be preassigned

to a participating plan with whom they have previously been assigned within the past six months. The order of assignment shall be first the Medicare plan and secondly the Medicaid participating plan.

2. Utilizing passive enrollment, eligible enrollees shall be notified of their right to select among contracted participating plans no fewer than 60 days prior to the effective date of enrollment.

3. Eligible enrollees shall receive a notice that indicates the participating plan to which they have been preassigned. The notice shall have instructions for the enrollee to contact the department's contracted enrollment facilitator to (i) accept the preassigned participating plan; (ii) actively select a different participating plan that is operating in the enrollee's region; or (iii) to opt out of the program.

An enrollment facilitator is an independent entity contracted with DMAS that (i) enrolls beneficiaries in the plan, (ii) is responsible for the operation and documentation of a toll-free helpline, (iii) educates enrollees about the plan, (iv) assists with and tracks enrollee grievance resolutions, and (v) may market and perform outreach to potential enrollees.

4. If an enrollee does not select a participating plan, he shall be passively enrolled into the preassigned participating plan.

5. Prior to the effective date of their plan enrollment, enrollees who would be passively enrolled shall have the opportunity to opt out and shall receive sufficient notice and information with which to do so.

6. All enrollment effective dates shall be prospective. Enrollment shall be effective the first day of the month following an enrollee's request to enroll, so long as the request is received on or before five days before the end of the month. Active enrollment requests, including requests to change among participating plans, received later than five days before the end of the month shall become effective the first of the second month following the request. Passive enrollment shall be effective not sooner than 60 days after enrollee notification.

7. Disenrollment from participating plans and transfers between participating plans shall be allowed on a month-to-month basis any time during the year; however, coverage for these enrollees shall continue through the end of the month. All disenrollment requests shall be effective the first day of the month following an enrollee's request to disenroll from the CCC program.

8. CMS and DMAS monitor enrollments and disenrollments for both evaluation purposes and for compliance with applicable marketing and enrollment laws, regulations, and CMS policies for the purpose of identifying any inappropriate or illegal marketing practices. As part of this analysis, CMS and DMAS monitor any unusual shifts in enrollment by enrollees

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identified for passive enrollment into a particular participating plan to a Medicare Advantage plan operated by the same parent organization. If those shifts appear to be due to inappropriate or illegal marketing practices, CMS or DMAS, or both, may require corrective action. Any illegal marketing practices shall be referred to appropriate agencies for investigation.

9. As mutually agreed upon in the three-way contract, CMS and DMAS shall utilize an independent third party entity to facilitate all enrollments into the participating plans.

10. Participating plan enrollments, transfers, and opt-outs shall become effective on the same day for both Medicare and Medicaid. For enrollees who lose Medicaid eligibility during a month, coverage and federal financial participation will continue through the end of the month in which Medicaid eligibility is ended.

12VAC30-121-60. (Reserved.)

12VAC30-121-70. Covered services.

A. CMS and DMAS shall contract with participating plans that demonstrate the capacity to provide directly, or by subcontracting with other qualified entities, the full continuum of medically necessary Medicare and Medicaid covered services to enrollees, in accordance with (i) the MOU; (ii) CMS guidance; (iii) the three-way contract; (iv) 42 CFR Part 422, 42 CFR Part 423, and 42 CFR Part 438; (v) the requirements in the State Plan for Medical Assistance, including any applicable State Plan amendments and § 1915(c) of the Act; (vi) the EDCD Waiver (12VAC30-120-900 et seq.); (vii) 42 USC § 1395y; (viii) Part IX (12VAC30-130-600 et seq.) of 12VAC30-130; (ix) the Americans with Disabilities Act; and (x) the Olmstead decision (Olmstead v. L.C. (98-536) 527 U.S. 581 (1999)). Furthermore, as set out in 42 CFR 440.230, services shall be sufficient in amount, duration, and scope to reasonably achieve their purpose. Participating plans shall be required to provide services in a way that preserves all protections to enrollees and provides enrollees with coverage to at least the same extent provided by Medicare and Medicaid. Where there is overlap between Medicare and Medicaid benefits, coverage and rules shall be delineated in the three-way contract. Participating plans shall be required to abide by the more generous of the applicable Medicare, Medicaid, or the combined Medicare-Medicaid standard.

B. With the exception of those services that are specifically carved out of this program as set out in 12VAC30-121-83, the required covered services shall include:

1. Medicare Part A, Part B, and Part D services.

2. Medically necessary procedures. Participating plans will be responsible for medically necessary procedures, including but not limited to, the following:

a. CPT codes, from the Current Procedural Terminology, Revised 2015, as published by the American Medical

Association, billed for dental services performed as a result of a dental accident (i.e., an accident that damages the mouth).

b. Preparation of the mouth for radiation therapy, maxillary or mandibular frenectomy when not related to a dental procedure, orthognathic surgery to attain functional capacity, and surgical services on the hard or soft tissue in the mouth where the main purpose is not to treat or help the teeth and their supporting structures.

c. Anesthesia and hospitalization for medically necessary services.

d. At the option of the MMP, additional flexible dental services for program enrollees.

e. For participants of auxiliary grants, case management services. Although not widely used, this service is included as part of the annual reassessment screening process for assisted living recipients and will be provided under fee-for-service.

3. Acute care services provided under the State Plan for Medical Assistance as found in 12VAC30-50, and further defined by DMAS written regulations, policies, and instructions, except as otherwise modified or excluded in the three-way contract.

4. Covered LTSS provided under the EDCD Waiver, including adult day health care, personal care (agency and consumer-directed options), personal emergency response services with or without medication monitoring, respite care (agency and consumer-directed options), transition coordination, and transition services.

5. The integrated formulary for prescription drugs, including Medicaid-covered drugs that are excluded by Medicare Part D. Participating plans shall also cover drugs covered by Medicare Part A and Part B. In all respects, unless stated otherwise in the MOU or the three-way contract, Medicare Part D requirements continue to apply.

6. Nursing facility services as defined in 42 CFR 440.40. Skilled nursing level care may be provided in a long-term care facility without a preceding acute care inpatient stay for enrollees enrolled in the program when the provision of this level of care can avert the need for an inpatient hospital stay.

7. Participating plans shall be permitted to use and reimburse telehealth for Medicare and Medicaid services as an innovative, cost effective means to decrease hospital admissions, reduce emergency department visits, address disparities in care, increase access, and increase timely interventions. Participating plans shall also encourage the use of telehealth to promote community living and improve access to behavioral health services. Participating plans shall be permitted to use telehealth in rural and urban settings and reimburse for store-and-forward applications. Participating plans shall also have the ability to cover remote patient monitoring. All telehealth and remote

patient monitoring activities shall be compliant with Health Insurance Portability and Accountability Act requirements and as further set out in the three-way contract.

For the purposes of this section:

a. "Store-and-forward" means when prerecorded images, such as x-rays, video clips, and photographs, are captured and then forwarded to and retrieved, viewed, and assessed by a provider at a later time. Some common applications include (i) teledermatology, where digital pictures of a skin problem are transmitted and assessed by a dermatologist; (ii) teleradiology, where x-ray images are sent to and read by a radiologist; and (iii) teleretinal imaging, where images are sent to and evaluated by an ophthalmologist to assess for diabetic retinopathy; and

b. "Telehealth" means the real time or near real time two-way transfer of data and information using an interactive audio and video connection for the purposes of medical diagnosis and treatment.

8. Health risk assessments.

a. Each enrollee shall receive and be an active participant in a timely, comprehensive assessment completed by the participating plan's care management team. All health risk assessment tools are subject to approval by DMAS. Assessment domains shall include the following: medical, psychosocial, functional, cognitive, and behavioral health. Relevant and comprehensive data sources, including the enrollee, providers, family, caregivers, and additional significant others as may be designated by the enrollee, shall be used by the participating plans in order to thoroughly complete the assessment.

b. During the first year of the program, any enrollee meeting any one of the following criteria shall receive a health risk assessment to be completed no later than 60 days from the onset of the enrollee's enrollment:

- (1) Individuals enrolled in the EDCD Waiver;
- (2) Individuals with intellectual or developmental disabilities;
- (3) Individuals with cognitive or memory problems (e.g., dementia or traumatic brain injury);
- (4) Individuals with physical or sensory disabilities;
- (5) Individuals residing in nursing facilities;
- (6) Individuals with serious and persistent mental illnesses;
- (7) Individuals with end stage renal disease; and
- (8) Individuals with complex or multiple chronic health conditions.

c. During the first year of the program and for all other enrollees, health risk assessments shall be conducted within 90 days of enrollment.

d. Health risk assessments for individuals enrolled in the EDCD Waiver and for individuals residing in nursing facilities shall be conducted face to face. The health risk assessments for individuals residing in nursing facilities shall also incorporate the MDS.

e. During subsequent years of the program, individuals enrolled in the EDCD Waiver shall receive a health risk assessment within 30 days of enrollment and all other enrollees shall receive a health risk assessment within 60 days of enrollment.

12VAC30-121-73. Level of care determinations.

A. Initial level of care (LOC) determinations shall be conducted by hospitals and local preadmission screening teams as defined in § 32.1-330 of the Code of Virginia.

B. Participating plans shall ensure that LOC annual reassessments are conducted timely for EDCD Waiver participants (minimum within 365 days of the last annual reassessment or as the participant's needs change). Participating plans shall conduct annual face-to-face assessments for continued nursing facility LOC eligibility requirements for the EDCD Waiver.

C. The plans shall establish criteria including health status changes (i.e., the triggering events that precipitate a need for reassessment, including a change in the ability to perform activities of daily living and instrumental activities of daily living) for reassessments to be performed prior to the reassessment.

D. The LOC annual reassessment shall include all the elements required by the three-way contract for enrollees who are in the EDCD Waiver.

E. LOC annual reassessments for EDCD Waiver enrollees shall be performed by providers with the following qualifications: (i) a registered nurse (RN) licensed in Virginia with at least one year of experience as an RN; (ii) a social worker licensed in Virginia; or (iii) an individual who holds at least a bachelor's degree in a health or human services field and has at least two years of experience working with individuals who are elderly or have disabilities, or both.

F. Participating plans shall ensure that quarterly and annual assessments are conducted timely for nursing facility residents based on the MDS process and shall work cooperatively with nursing facilities to provide information regarding the completion of the assessments for continued nursing facility placement.

G. Participating plans shall communicate annual LOC reassessment data for EDCD Waiver enrollees and nursing facility residents to DMAS according to requirements in the three-way contract.

12VAC30-121-75. Plans of care.

A. Participating plans shall develop a person-centered plan of care (POC) for each enrollee. The POC shall be tailored to the individual enrollee's needs and be agreed to and signed by the enrollee or the enrollee's employer of record. An

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employer of record is the person who performs the functions of the employer in the consumer-directed model of service delivery and may be the individual enrolled in the waiver, a family member, caregiver, or other person.

B. Participating plans shall implement a person-centered and culturally competent POC development process. Participating plans shall also develop a process that will incorporate but not duplicate targeted case management for applicable enrollees.

C. During the first year of the CCC program, participating plans shall ensure that plans of care for all enrollees are completed within 90 days of the enrollee's enrollment. Participating plans shall honor all existing plans of care and service authorizations until the authorization ends or 180 days from an enrollee's enrollment, whichever is sooner. For EDCD Waiver individuals, the plan of care shall be developed and implemented by the participating plan no later than the end date of any existing service authorization.

D. During subsequent years of the program, participating plans shall ensure that plans of care are developed within the following timeframes:

1. Within 30 days of enrollment for EDCD Waiver participants;
2. Within 60 days of enrollment for vulnerable subpopulations (excluding EDCD Waiver participants); and
3. Within 90 days of enrollment for all other enrollees.

E. Participating plans shall incorporate information from the Uniform Assessment Instrument and the LOC determinations into the POCs for individuals in the EDCD Waiver.

F. Participating plans shall develop a process for obtaining nursing facility MDS data and incorporating that information into the POC. Participating plans shall ensure that nursing facility residents who wish to move to the community will be referred to the preadmission screening teams or the MFP program. If the individual enrolls in the MFP program, he will be disenrolled from the CCC program.

G. Participating plans shall develop a process for addressing health, safety (including minimizing risk), and welfare of the enrollee in the POC.

H. The POC shall contain the following:

1. Prioritized list of enrollee's concerns, needs, and strengths;
2. Attainable goals, outcome measures, and target dates selected by the enrollee or caregiver, or both;
3. Strategies and actions, including interventions and services to be implemented, the providers responsible for specific interventions and services, and the frequency of the interventions and strategies;
4. Progress noting success, barriers, or obstacles;
5. Enrollee's informal support network and services;

6. Back up plans as appropriate for EDCD Waiver enrollees using personal care and respite services in the event that the scheduled provider or providers are unable to provide services;

7. Determined need and plan to access community resources and noncovered services;

8. Enrollee choice of services (including consumer direction) and service providers; and

9. Elements included in the DMAS-97AB form, (which can be downloaded from <https://www.virginiamedicaid.dmas.virginia.gov/wps/porta>) for individuals enrolled in the EDCD Waiver.

I. Participating plans shall ensure that reassessments and POC reviews are conducted:

1. By the POC anniversary for vulnerable subpopulations (excluding EDCD Waiver participants and nursing facility residents) and all other enrollees;
2. By the POC anniversary, not to exceed 365 days for EDCD Waiver enrollees (must be face to face); and
3. Following MDS guidelines and timeframes for quarterly and annual POC development for nursing facility residents.

J. Participating plans shall ensure that POCs are revised based on triggering events, such as hospitalizations or significant changes in health or functional status.

12VAC30-121-78. Interdisciplinary care team.

A. For each enrollee, participating plans shall support an interdisciplinary care team (ICT) to ensure the integration of the enrollee's medical, behavioral health, substance abuse/use, LTSS, and social needs. The team's focus shall be person centered, built on the enrollee's specific preferences and needs, and deliver services with transparency, individualization, respect, linguistic and cultural competency, and dignity.

B. Participating plans ICTs shall employ both medical and social models of care, as appropriate for the enrollee's documented needs.

C. Participating plan members of the team shall agree to participate in approved training on the person-centered planning processes, cultural competency, accessibility and accommodations, independent living and recovery, Americans with Disabilities Act/Olmstead requirements, and wellness principles, along with other required training as specified by the Commonwealth. Participating plans shall offer training to additional members of the team such as primary care providers and specialists, as appropriate.

D. If an enrollee is receiving targeted case management services, the participating plans shall develop a mechanism to include the targeted case manager as a member of the ICT.

E. If an enrollee is identified to be eligible to transition into the community through the Department of Justice Settlement Agreement (Case: 3:12-CV-00059-JAG, available at <http://www.dbhds.virginia.gov/settlement/FullAgreement.pdf>),

the participating plan's ICT shall collaborate with the locality's community services board (CSB) or behavioral health authority, as appropriate, and the Department of Behavioral Health and Developmental Services to successfully transition the enrollee into the community. The enrollee's CSB case manager shall participate as a part of the participating plan's ICT to monitor the enrollee's service needs. If the enrollee transitions into either the Individuals with Intellectual Disabilities Waiver or Developmental Disability Waiver, the enrollee shall be disenrolled from the CCC program. If the enrollee transitions to the EDCD Waiver, the enrollee may remain in the CCC program.

12VAC30-121-80. Requirements for care coordination.

A. The participating plan shall provide person-centered care management functions for all enrollees.

B. All enrollees shall have access to the following supports depending on their needs and preferences; however, care management for vulnerable subpopulations shall include the items described in subdivisions 6 through 12 of this subsection:

1. A single, toll-free point of contact for all questions;
2. Ability to develop, maintain, and monitor the POC;
3. Assurance that referrals result in timely appointments;
4. Communication and education regarding available services and community resources;
5. Assistance developing self-management skills to effectively access and use services;
6. Assistance in receiving needed medical and behavioral health services, preventive services, medications, LTSS, social services, and enhanced benefits; this includes (i) setting up appointments, (ii) in-person contacts as appropriate, (iii) strong working relationships between care managers and physicians; (iv) evidence-based enrollee education programs, and (v) arranging transportation as needed;
7. Monitoring of functional and health status;
8. Seamless transitions of care across specialties and care settings;
9. Assurance that enrollees with disabilities have effective communication with health care providers and participate in making decisions with respect to treatment options;
10. Connecting enrollees to services that promote community living and help avoid premature or unnecessary nursing facility placements;
11. Coordination with social service agencies (e.g., local departments of health, local departments of social services, and community services boards) and referrals for enrollees to state, local, and other community resources; and
12. Collaboration with nursing facilities to promote adoption of evidence-based interventions to reduce avoidable hospitalizations and to include management of chronic conditions, medication optimization, prevention of

falls and pressure ulcers, and coordination of services beyond the scope of the nursing facility benefit.

C. Participating plans shall develop innovative arrangements to provide care management such as:

1. Partnering or contracting, or both, with entities, such as community services boards, adult day care centers, and nursing facilities, that currently perform care management and offer support services to individuals eligible for the program;
2. Medical homes;
3. Sub-capitation, such as payment arrangement where the MMP pays its contracted providers on a capitated basis rather than a fee-for-service basis;
4. Shared savings; and
5. Performance incentives.

D. Participating plans and DMAS shall collaborate to avoid duplication of care management services provided under the program.

E. Participating plans shall be required to use one statewide F/EA to manage the F/EA services for individuals using consumer direction. The F/EA, or fiscal/employer agent, is an organization (i) operating under § 3504 of the IRS Code, IRS Revenue Procedure 70-6, and IRS Notice 2003-70 and (ii) that has a separate federal employer identification number used for the sole purpose of filing federal employment tax forms and payments on behalf of program enrollees who are receiving consumer-directed services.

12VAC30-121-83. Carved out services.

A. Carved-out services are the subset of Medicaid and Medicare covered services for which the participating plan shall not be fiscally responsible under the CCC program.

B. The services are carved out services of the CCC program and are provided under the fee-for-service system:

1. Abortions, induced (this service shall be provided under limited circumstances, e.g., when the life of the mother is endangered);
2. Targeted case management services; and
3. Dental services (in limited cases).

12VAC30-121-85. Flexible benefits.

A. Flexible benefits are those that participating plans may elect to offer to their enrollees.

B. Examples of such benefits are (i) annual physical examinations, (ii) meal benefits, (iii) preventive and comprehensive dental services for adults, (iv) eye examinations, (v) prescription eyeglasses, (vi) hearing examinations, (vii) hearing aids, and (viii) reduced or eliminated drug co-pays.

12VAC30-121-90. Capitation payment rates.

A. Capitation rates and payment rules shall be established in the MOU and three-way contract and may be adjusted by state or federal regulatory changes.

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B. If other state or federal statutory changes enacted after the annual baseline determination and rate development process are jointly determined by CMS and DMAS to have a material change in baseline estimates for any given payment year, baseline estimates and corresponding standardized payment rates shall be updated outside of the annual rate development process.

C. Any and all costs incurred by the participating plan in excess of the capitation payment shall be borne in full by the plan.

D. Additional costs shall not be balance billed to the plan's enrollees.

E. Out-of-network reimbursement rules.

1. In an urgent or emergency situation, participating plans shall reimburse an out-of-network provider of emergency or urgent care at the Medicare or Medicaid FFS rate applicable for that service, or as otherwise required under Medicare Advantage rules for Medicare services. For example, where this service would traditionally be covered under Medicare FFS, the participating plan shall pay out-of-network providers the lesser of provider charges or the Medicare FFS.

2. During the 180-day transition period as outlined in the MOU, the participating plan shall honor existing service authorization timeframes and continue to provide access to the same services and providers at the same levels and rates of Medicare or Medicaid FFS payment (not to exceed 180 days) as enrollees were receiving prior to entering the participating plan.

3. Beyond this 180-day period, the participating plan will be required to offer single-case out-of-network agreements to providers that are currently serving enrollees and are willing to continue serving them at the participating plan's in-network payment rate, but are not willing to accept new patients or enroll in the participating plan's network.

12VAC30-121-100. (Reserved.)

12VAC30-121-110. Cost sharing requirements.

A. For the purposes of this section, "cost sharing" means copayments, coinsurance, or deductibles paid by an enrollee when receiving medical services.

B. Participating plans shall not charge a Medicare Part C or Part D premium nor assess any cost sharing for Medicare Part A and Part B services.

C. For drugs and pharmacy products (including those covered by both Medicare Part D and Medicaid), participating plans shall be permitted to charge co-pays to enrollees currently eligible to make such payments consistent with co-pays applicable for Medicare and Medicaid drugs, respectively. Co-pays charged by participating plans for Part D drugs shall not exceed the applicable amounts for brand and generic drugs established yearly by CMS under the Part D Low Income Subsidy.

D. Patient pay requirements, which are applicable to long-term care services, shall be detailed in the contract between CMS, DMAS, and the participating plans.

E. Participating plans shall not assess any cost sharing for DMAS services, beyond the pharmacy cost sharing amounts allowed under Medicaid coverage rules.

F. No enrollee may be balance billed by any provider for any reason for covered services or flexible benefits (see 12VAC30-121-90).

12VAC30-121-120. (Reserved.)

12VAC30-121-130. Access standards.

A. Participating plans shall have the capacity to provide, directly or by subcontracting with other qualified entities, the full continuum of Medicare and Medicaid covered services to enrollees, in accordance with the MOU, CMS guidance, and the three-way contract.

B. Network adequacy. State Medicaid standards shall be utilized for long-term services and supports or for other services for which Medicaid is exclusively responsible for payment, and Medicare standards shall be utilized for pharmacy benefits and for other services for which Medicare is primary, unless applicable Medicaid standards for such services are more stringent. Home health and durable medical equipment requirements, as well as any other services for which Medicaid and Medicare may overlap, shall be subject to the more stringent of the applicable Medicare and Medicaid standards.

C. Participating plans shall ensure that they maintain a network of providers that is sufficient in number, mix of primary care and specialty providers, and geographic distribution to meet the complex and diverse needs of the anticipated number of enrollees in the service area as defined by CMS for Medicare and defined by DMAS for Medicaid.

D. For services for which Medicaid is the traditional primary payer (including LTSS and community mental health and substance abuse services), each enrollee shall have a choice of at least two providers of each covered service type located within no more than 30 minutes travel time from any enrollee in urban areas unless the participating plan has a DMAS-approved alternative time standard. Travel time shall be determined based on driving during normal traffic conditions (i.e., not during commuting hours).

E. The participating plan shall ensure that each enrollee shall have a choice of at least two providers of each covered service type located within no more than 60 minutes travel time from any enrollee in rural areas unless the participating plan has a DMAS-approved alternative time standard.

F. DMAS shall require contractual agreements between nursing facilities and participating plans. Participating plans shall be required to contract with any nursing facility that is eligible to participate in Medicare and Medicaid and is willing to accept the participating plan payment rates and contract requirements for the time duration of the

demonstration period. Participating plans shall make payments for services directly to nursing facilities.

G. For any covered services for which Medicare requires a more rigorous network adequacy standard than Medicaid (including time, distance, or minimum number of providers or facilities), the participating plan shall meet the Medicare requirements.

12VAC30-121-140. Medicare-Medicaid plans having low performance.

A. As long as the MMP is determined by DMAS to meet all plan selection requirements in the three-way contract, an interested organization that (i) is an outlier in the CMS past performance analysis for the upcoming contract year, (ii) has a low performance indicator (LPI) on the Medicare Plan Finder website for the upcoming year, or (iii) both may still qualify to offer CCC program services.

B. Such MMPs shall not be eligible to receive new enrollees (via passive enrollment) until the MMP is either (i) no longer considered by CMS to be a past performance outlier or (ii) no longer has an LPI on the Medicare Plan Finder.

C. CMS or DMAS, or both, shall determine if an MMP is eligible to accept passive enrollment prior to the scheduled date of execution of the three-way contract.

D. An MMP that is ineligible to receive passive enrollment shall only be able to enroll (i) individuals who are currently enrolled in another Medicare or Medicaid managed care plan sponsored by the same organization and (ii) individuals who opt in to the organization's MMP.

12VAC30-121-145. Sanctions for noncompliance.

A. DMAS may impose intermediate sanctions, which may include any of the types described in subsection C of this section, or terminate the MMP's contract if the MMP:

1. Fails substantially to provide medically necessary items and services that are required under law or under the MMP's contract with DMAS to be provided under the contract;
2. Imposes premiums or charges on enrollees in excess of the premiums or charges permitted under this chapter;
3. Acts to discriminate among enrollees on the basis of their health status or requirements for health care services, including expulsion or refusal to reenroll an individual, except as permitted by this chapter, or engages in any practice that would reasonably be expected to have the effect of denying or discouraging enrollment with the organization by eligible individuals whose medical conditions or histories indicate a need for substantial future medical services;
4. Misrepresents or falsifies information that is furnished to either:
 - a. The Secretary or DMAS under this chapter; or
 - b. To an enrollee, potential enrollee, or a health care provider under this chapter; or

5. Fails to comply with the applicable requirements of 42 USC § 1396b(m)(2)(A)(x).

B. DMAS may also impose such intermediate sanction against an MMP if DMAS determines that the MMP distributed directly or through any agent or independent contractor marketing materials in violation of 12VAC30-121-250.

C. The sanctions shall be as follows:

1. Civil money penalties.

- a. Except as provided in subdivision 1 b, 1 c, or 1 d of this subsection, not more than \$25,000 for each determination under subsection A of this section.
- b. With respect to a determination under subdivision A 3 or A 4 a of this section, not more than \$100,000 for each such determination.
- c. With respect to a determination under subdivision A 2 of this section, double the excess amount charged in violation, and the excess amount charged shall be deducted from the penalty and returned to the individual concerned.
- d. Subject to subsection 1 b of this subsection, with respect to a determination under subdivision A 3 of this section, \$15,000 for each individual not enrolled as a result of a practice described in subdivision A 3.

2. The appointment of temporary management.

- a. To oversee the operation of the MMP upon a finding by DMAS that there is continued egregious behavior by the organization or there is a substantial risk to the health of enrollees;
- b. To assure the health of the organization's enrollees if there is a need for temporary management while there is an orderly termination or reorganization of the organization; or
- c. To make improvements to remedy the violations found under subsection A of this section except that temporary management under this subdivision 2 may not be terminated until DMAS has determined that the MMP has the capability to ensure that the violations shall not recur.

3. Requiring the MMP (i) to permit individuals enrolled with the MMP to terminate enrollment without cause and (ii) to notify such individuals of such right to terminate enrollment.

4. Suspension or default of all enrollment of individuals under this chapter after the date the Secretary or DMAS notifies the MMP of a determination of a violation of any requirement of 42 USC § 1396b(m) or this section.

5. Suspension of payment to the entity under this chapter for individuals enrolled after the date the Secretary or DMAS notifies the MMP of such a determination and until the Secretary or DMAS is satisfied that the basis for such determination has been corrected and is not likely to recur.

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12VAC30-121-150. Continuity of care.

A. As provided by the MOU and the three-way contract, participating plans shall be required to provide or arrange for all medically necessary services, whether by subcontract or by single-case agreement, in order to meet the health care and support needs of their enrollees.

B. Participating plans shall allow enrollees to maintain their current Medicaid providers (including out-of-network providers) for up to 180 days from enrollment. Participating plans shall also allow enrollees to maintain their previously authorized Medicaid services, including frequency and payment rate, for the duration of the prior authorization or for 180 days from enrollment, whichever is less. This shall not apply to enrollees residing in a nursing facility on the date of each region's program implementation.

C. Enrollees in nursing facilities at the time of program implementation may remain in the facility, or move to another nursing facility, as long as they continue to meet DMAS criteria for nursing facility care. In order to move to another nursing facility, the enrollee or his family, or both as may be appropriate, has to agree to the move.

D. During the 180-day period specified in subsection B of this section, change from an existing Medicaid provider can only occur in the following circumstances:

1. The enrollee requests a change;
2. The provider chooses to discontinue providing services to an enrollee as currently allowed by Medicare or Medicaid;
3. The participating plan, CMS, or DMAS identifies provider performance issues that affect the enrollee's health and welfare; or
4. The provider is excluded from participation in Medicare and Medicaid under state or federal exclusion requirements pursuant to the U.S. Department of Health and Human Services Office of Inspector General List of Excluded Individuals or Entities (LEIE) website. Immediately report in writing to DMAS any exclusion information discovered to (i) DMAS, ATTN: Program Integrity/Exclusions, 600 East Broad Street, Suite 1300, Richmond, VA 23219 or (ii) providerexclusion@dmass.virginia.gov.

E. Out-of-network reimbursement rules. See 12VAC30-121-90 for requirements for out-of-network reimbursement.

12VAC30-121-160. (Reserved.)

12VAC30-121-170. Model of care.

A. For the purposes of this section, "model of care" or "MOC" means a comprehensive plan that (i) describes the plan's population; (ii) identifies measurable goals for providing high quality care and improving the health of the enrolled population; (iii) describes the plan's staff structure and care management roles; (iv) describes the interdisciplinary care team and the system for disseminating the model of care to plan staff and network providers; and (v)

contains other information designed to ensure that the plans provide services that meet the needs of enrollees.

B. All participating plans in partnership with contracted providers shall implement an evidence-based model of care. Participating plans shall meet all CMS MOC standards for Special Needs Plans as well as additional requirements established in the contract by the Commonwealth. The Virginia-specific MOC elements are in addition to CMS elements; likewise, the CMS and DMAS reviews and approvals are separate processes. Participating plans shall obtain approvals from both CMS and DMAS before a MOC is considered final and approved.

C. Participating plans shall be permitted to cure problems with their MOC submissions after their initial submissions. Participating plans with MOCs scoring below 85% shall have the opportunity to improve their scores based on CMS and DMAS feedback on the elements and factors that require improvement. At the end of the review process, MOCs that do not meet CMS standards for approval will not be eligible for selection as participating plans. CMS standards for approval are issued to the states and made available on the DMAS website at http://www.dmass.virginia.gov/Content_atchs/altc/altc-fp1.pdf.

12VAC30-121-180. (Reserved.)

12VAC30-121-190. State fair hearing process.

A. Notwithstanding the provisions of 12VAC30-110-10 through 12VAC30-110-370, the provisions of this section govern state fair hearings for individuals enrolled in the CCC program.

B. The Appeals Division maintains an appeals and fair hearings system for enrollees (also referred to as appellants) to challenge appeal decisions rendered by participating plans in response to enrollee appeals of actions related to Medicaid services. Exhaustion of the participating plan's appeals process is a prerequisite to filing for a state fair hearing with the department. Appellants who meet criteria for a state fair hearing shall be entitled to a hearing before a department hearing officer.

C. The participating plan shall conduct an internal appeal hearing, pursuant to 42 CFR Part 431 Subpart E, 42 CFR Part 438, and 12VAC30-110-10 through 12VAC30-110-370, and issue a written decision that includes its findings and information regarding the appellant's right to file an appeal with DMAS for a state fair hearing for Medicaid appeals.

D. Enrollees must be notified in writing of the participating plan's internal appeals process:

1. At the time of the request for services;
2. With the evidence of coverage; and
3. Upon receipt of a notice of action from the participating plan.

E. Enrollees must be notified in writing of their right to an external appeal upon receipt of the participating plan's internal appeal decision.

F. An appellant shall have the right to representation by an attorney or other individual of his choice at all stages of an appeal.

1. For those appellants who wish to have a representative, a representative shall be designated in a written statement that is signed by the appellant whose Medicaid benefits were adversely affected. If the appellant is physically unable to sign a written statement, the division shall allow a family member or other person acting on the appellant's behalf to be the representative. If the appellant is mentally unable to sign a written statement, the division shall require written documentation that a family member or other person has been appointed or designated as his legal representative.

2. If the representative is an attorney or a paralegal working under the supervision of an attorney, a signed statement by such attorney or paralegal that he is authorized to represent the appellant prepared on the attorney's letterhead shall be accepted as a designation of representation.

3. A member of the same law firm as a designated representative shall have the same rights as the designated representative.

4. An appellant may revoke representation by another person at any time. The revocation is effective when the department receives written notice from the appellant.

G. Any written communication from an enrollee or his representative that clearly expresses that he wants to present his case to a reviewing authority shall constitute an appeal request.

1. This communication should explain the basis for the appeal of the participating plan's internal appeal decision.

2. The enrollee or his representative may examine witnesses or documents, or both; provide testimony; submit evidence; and advance relevant arguments during the hearing.

H. Appeals to the state fair hearing process shall be made to the DMAS Appeals Division in writing, with the exception of expedited appeals, and may be made via U.S. mail, fax transmission, hand delivery, or electronic transmission.

I. Expedited appeals referenced in subsection L of this section may be filed by telephone, or any of the methods set forth in subsection H of this section.

J. Participating plans shall continue benefits while the participating plan's appeal or the state fair hearing is pending when all of the following criteria are met:

1. The enrollee or representative files the appeal within 10 calendar days of the mail date of the participating plan's internal appeal decision;

2. The appeal involves the termination, suspension, or reduction of a previously authorized course of treatment;

3. The services were ordered by an authorized provider;

4. The original period covered by the initial authorization has not expired; and

5. The enrollee requests continuation of benefits.

K. After the final resolution and if the final resolution of the appeal is adverse to the enrollee (e.g., participating plan's internal appeal is upheld), the participating plan may recover the costs of services furnished to the enrollee while the appeal was pending, to the extent they were furnished solely because of the pending appeal.

L. The department shall maintain an expedited process for appeals when an appellant's treating provider certifies that taking the time for a standard resolution could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function. Expedited appeal decisions shall be issued as expeditiously as the enrollee's health condition requires, but no later than three business days after the agency receives a fair hearing request on an appeal decision to uphold denial of a service that it determines meets the criteria for expedited resolution.

12VAC30-121-195. Appeal timeframes.

A. Appeals to the Medicaid state fair hearing process must be filed with the DMAS Appeals Division within 60 days of the date of the participating plan's internal appeal decision, unless the time period is extended by DMAS upon a finding of good cause in accordance with state fair hearing regulations.

B. It is presumed that appellants will receive the participating plan's internal appeal decision five days after the participating plan mails it unless the appellant shows that he did not receive the notice within the five-day period.

C. A request for appeal on the grounds that the participating plan has not acted with reasonable promptness in response to an internal appeal request may be filed at any time until the participating plan has acted.

D. The date of filing shall be the date the request is postmarked if mailed, or the date the request is received by the department if delivered other than by mail.

E. Documents postmarked on or before a time limit's expiration shall be accepted as timely.

F. In computing any time period under these regulations, the day of the act or event from which the designated period of time begins to run shall be excluded and the last day included. If a time limit would expire on a Saturday, Sunday, or state or federal holiday, it shall be extended until the next regular business day.

G. An extension of the 60-day period for filing a request for appeal may be granted for good cause shown. Examples of good cause include, but are not limited to, the following situations:

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1. Appellant was seriously ill and was prevented by illness from contacting DMAS;

2. The participating plan's decision was not sent to the appellant. The plan may rebut this claim by evidence that the decision was mailed to the appellant's last known address or that the decision was received by the appellant;

3. Appellant sent the request for appeal to another government agency or another division within DMAS that is not the Appeals Division in good faith within the time limit; or

4. Unusual or unavoidable circumstances prevented a timely filing.

H. During the first year of the program, appeals shall be heard and decisions issued within 90 days of the postmark date (if delivered by U.S. mail) or receipt date (if delivered by any method other than U.S. mail).

I. The timeframes for issuing decisions will change to 75 days (during the second year of the program), and 30 days (during the third year of the program and thereafter).

J. Exceptions to standard appeal resolution timeframes. Decisions may be issued beyond the standard appeal resolution timeframes when the appellant or his representative requests or causes a delay. Decisions may also be issued beyond the standard appeal resolution timeframe when any of the following circumstances exist:

1. The appellant or representative requests to reschedule or continue the hearing;

2. The appellant or representative provides good cause for failing to keep a scheduled hearing appointment, and the Appeals Division reschedules the hearing;

3. Inclement weather, unanticipated system outage, or the department's closure that prevents the hearing officer's ability to work;

4. Following a hearing, the hearing officer orders an independent medical assessment as described in 12VAC30-121-210;

5. The hearing officer leaves the hearing record open after the hearing in order to receive additional evidence or argument from the appellant;

6. The hearing officer receives additional evidence from a person other than the appellant or his representative and the appellant requests to comment on such evidence in writing or to have the hearing reconvened to respond to such evidence; or

7. The Appeals Division determines that there is a need for additional information and documents how the delay is in the appellant's best interest.

K. For delays requested or caused by an appellant or his representative the delay date for the decision will be calculated as follows:

1. If an appellant or representative requests or causes a delay within 30 days of the request for a hearing, the 90-

day time limit will be extended by the number of days from the date when the first hearing was scheduled until the date to which the hearing is rescheduled.

2. If an appellant or representative requests or causes a delay within 31 to 60 days of the request for a hearing, the 90-day time limit will be extended by 1.5 times the number of days from the date when the first hearing was scheduled until the date to which the hearing is rescheduled.

3. If an appellant or representative requests or causes a delay within 61 to 90 days of the request for a hearing, the 90-day time limit will be extended by two times the number of days from the date when the first hearing was scheduled until the date to which the hearing is rescheduled.

L. Post hearing delays requested or caused by an appellant or representative (e.g., requests for the record to be left open) will result in a day-for-day delay for the decision date. The department shall provide the appellant and representative with written notice of the reason for the decision delay and the delayed decision date, if applicable.

12VAC30-121-200. Prehearing decisions.

A. If the Appeals Division determines that any of the conditions as described in this subsection exist, a hearing will not be held, and the appeal process shall be terminated.

1. A request for appeal may be invalidated if:

a. It was not filed within the time limit imposed by 12VAC30-121-195 or extended pursuant to 12VAC30-121-195 J, and the hearing officer sends a letter to the appellant for an explanation as to why the appeal request was not filed timely, and

(1) The appellant did not reply to the hearing officer's request within 10 calendar days for an explanation that met good cause criteria, or

(2) The appellant did reply and the hearing officer had sufficient facts to determine that the reply did not meet good cause criteria pursuant to 12VAC30-121-195.

b. The individual who filed the appeal (filer) is not the appellant, or parent of a minor appellant, and the hearing officer sends a letter to the filer requesting proof of his authority to appeal on behalf of the appellant, and

(1) The filer did not reply to the hearing officer's request for authorization to represent the appellant within 10 calendar days, or

(2) The filer did reply and the hearing officer determined that the authorization submitted was insufficient to allow the filer to represent the appellant under the provisions of 12VAC30-121-190 F.

2. A request for appeal may be administratively dismissed if:

a. The participating plan's internal appeals process was not exhausted prior to the enrollee's request for a state fair hearing;

b. The issue of the appeal is not related to the participating plan's internal appeal decision;

c. The action being appealed was not taken by DMAS or the participating plan;

d. The services denied or terminated were Medicare covered services; or

e. The sole issue is a federal or state law requiring an automatic change adversely affecting some or all beneficiaries.

3. An appeal case may be closed if:

a. The Appeals Division schedules a hearing and sends a written schedule letter notifying the appellant or his representative of the date, time, and location of the hearing; the appellant or his representative failed to appear at the scheduled hearing; and the hearing officer sends a letter to the appellant for an explanation as to why he failed to appear, and

(1) The appellant did not reply to the hearing officer's request within 10 calendar days for an explanation that met good cause criteria, or

(2) The appellant did reply and the hearing officer determined that the reply did not meet good cause criteria.

b. The Appeals Division sends a written schedule letter requesting that the appellant or his representative provide a telephone number at which he can be reached for a telephonic hearing, and the appellant or his representative failed to respond within 10 calendar days to the hearing officer's request for a telephone number at which he could be reached for a telephonic hearing.

c. The appellant or his representative withdraws the appeal request in writing.

d. The participating plan approves the full amount, duration, and scope of services requested.

e. The evidence in the record shows that the participating plan's decision was clearly in error and that the case should be fully resolved in the appellant's favor.

B. The appellant shall have no opportunity to seek judicial review except in cases where the hearing officer receives and analyzes a response from the appellant or representative as described in subdivisions A 1 a (2), A 1 b (2), and A 3 a (2), and subsection C of this section.

C. Remand to the participating plan. If the hearing officer determines from the record, without conducting a hearing, that the case might be resolved in the appellant's favor if the participating plan obtains and develops additional information, documentation, or verification, the hearing officer may remand the case to the participating plan for action consistent with the hearing officer's written instructions pursuant to 12VAC30-121-210 I.

D. A letter shall be sent to the appellant or his representative that explains the determination made on his appeal.

12VAC30-121-210. Hearing process and final decision.

A. All hearings must be scheduled at a reasonable time, date, and place, and the appellant and his representative shall be notified in writing at least 15 days before the hearing.

1. The hearing location will be determined by the Appeals Division.

2. A hearing shall be rescheduled at the appellant's request no more than twice unless compelling reasons exist.

3. Rescheduling the hearing at the appellant's request will result in automatic waiver of the 90-day (or 75-day or 30-day) deadline for resolution of the appeal. The delay date for the decision will be calculated as set forth in 12VAC30-121-195 K.

B. The hearing shall be conducted by one or more hearing officers or other impartial individuals who have not been directly involved in the initial determination of the action in question or in the participating plan's appeal decision process. The hearing officer shall review the complete record for all participating plan decisions that are properly appealed, conduct informal, fact-gathering hearings, evaluate evidence presented, research the issues, and render a written final decision.

C. Subject to the requirements of all applicable federal and state laws regarding privacy, confidentiality, disclosure, and personally identifiable information, the appeal record shall be made accessible to the appellant and representative at a convenient place and time before the date of the hearing, as well as during the hearing. The appellant and his representative may examine the content of the appellant's case file and all documents and records the department will rely on at the hearing except those records excluded by law.

D. Appellants who require the attendance of witnesses or the production of records, memoranda, papers, and other documents at the hearing may request in writing the issuance of a subpoena. The request must be received by the department at least 10 working days before the scheduled hearing. Such request shall (i) include the witness's or respondent's name, home and work addresses, county or city of work and residence, and (ii) identify the sheriff's office that will serve the subpoena.

E. The hearing officer shall conduct the hearing; decide on questions of evidence, procedure, and law; question witnesses; and assure that the hearing remains relevant to the issue or issues being appealed. The hearing officer shall control the conduct of the hearing and decide who may participate in or observe the hearing.

F. Hearings shall be conducted in an informal, nonadversarial manner. The appellant or his representative shall have the right to bring witnesses, establish all pertinent facts and circumstances; present an argument without undue interference, and question or refute the testimony or evidence, including the opportunity to confront and cross-examine agency representatives.

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G. The rules of evidence shall not strictly apply. All relevant, nonrepetitive evidence may be admitted, but the probative weight of the evidence will be evaluated by the hearing officer.

H. The hearing officer may leave the hearing record open for a specified period of time after the hearing in order to receive additional evidence or argument from the appellant or his representative.

1. The hearing officer may order an independent medical assessment when the appeal involves medical issues, such as a diagnosis, an examining physician's report, or a medical review team's decision, and the hearing officer determines that it is necessary to have an assessment by someone other than the person or team who made the original decision (e.g., to obtain more detailed medical findings about the impairments, to obtain technical or specialized medical information, or to resolve conflicts or differences in medical findings or assessments in the existing evidence). A medical assessment ordered pursuant to this regulation shall be at the department's expense and shall become part of the record.

2. The hearing officer may receive evidence that was not presented by either party if the record indicates that such evidence exists, and the appellant or his representative requests to submit it or requests that the hearing officer secure it.

3. If the hearing officer receives additional evidence from an entity other than the appellant or his representative, the hearing officer shall send a copy of such evidence to the appellant and his representative and give the appellant or his representative the opportunity to comment on such evidence in writing or to have the hearing reconvened to respond to such evidence.

4. Any additional evidence received will become a part of the hearing record, but the hearing officer must determine whether or not it will be used in making the decision.

I. After conducting the hearing, reviewing the record, and deciding questions of law, the hearing officer shall issue a written final decision that either sustains or reverses the participating plan's action or remands the case to the participating plan for further evaluation consistent with his written instructions. Some decisions may be a combination of these dispositions. The hearing officer's final decision shall be considered as the department's final administrative action pursuant to 42 CFR 431.244(f). The final decision shall include:

1. Identification of the issue or issues;
2. Relevant facts, to include a description of the procedural development of the case;
3. Conclusions of law, regulations, and policy that relate to the issue or issues;
4. Discussions, analysis of the accuracy of the participating plan's decision, conclusions, and hearing officer's decision;

5. Further action, if any, to be taken by the participating plan to implement the decision;

6. The deadline date by which further action must be taken; and

7. A cover letter informing the appellant and his representative of the hearing officer's decision. The letter must indicate that the hearing officer's decision is final, and that the final decision may be appealed directly to circuit court.

J. A copy of the hearing record shall be forwarded to the appellant and his representative with the final decision.

K. An appellant who disagrees with the hearing officer's final decision described in this section may seek judicial review pursuant to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) and Rules of the Supreme Court of Virginia, Part Two A. Written instructions for requesting judicial review must be provided to the appellant or his representative with the hearing officer's decision, and upon request by the appellant or representative.

12VAC30-121-220. Division appeal records.

A. No person shall take from the division's custody any original record, paper, document, or exhibit that has been certified to the division except as the Appeals Division director or his designee authorizes, or as may be necessary to furnish or transmit copies for other official purposes.

B. Information in the appellant's record can be released only to the appellant, his authorized representative, the participating plan, other entities for official purposes, and other persons named in a release of information authorization signed by an appellant or his representative.

C. The fees to be charged and collected for any copy of division records will be in accordance with Virginia's Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) or other controlling law.

D. When copies are requested from records in the division's custody, the required fee shall be waived if the copies are requested in connection with an enrollee's own appeal.

12VAC30-121-230. Provider appeals.

A. The Appeals Division maintains an appeal process for enrolled providers of Medicaid services who have rendered services and are requesting to challenge a participating plan's internal appeal of an adverse decision regarding payment. The participating plan's internal appeal process is a prerequisite to filing for an external appeal to the department's appeal process. The appeal process is available to (i) enrolled Medicaid service providers that have rendered services and have been denied payment in whole or part for Medicaid covered services and (ii) enrolled Medicaid service providers who have received a Notice of Program Reimbursement or overpayment demand from the department or its contractors.

B. Department provider appeals shall be conducted in accordance with the department's provider appeal regulations

(12VAC30-20-500 et seq.), § 32.1-325 et seq. of the Code of Virginia, and the Virginia Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

C. The department's external appeal decision shall be binding upon the participating plan and not subject to further appeal by the participating plan.

D. If the provider is successful in its appeal, then the MMP shall reimburse it for the appealed issue.

12VAC30-121-240. (Reserved.)

12VAC30-121-250. Marketing and enrollee communication standards for participating plans.

A. Participating plans shall be subject to rules governing their marketing and enrollee communications as specified under §§ 1851(h) and 1932(d)(2) of the Social Security Act; 42 CFR 422.111, 42 CFR 422.2260 et seq., 42 CFR 423.120(b) and (c), 42 CFR 423.128, and 42 CFR 423.2260 et seq.; and the Medicare Marketing Guidelines (Chapter 2 of the Medicare Managed Care Manual and Chapter 3 of the Prescription Drug Benefit Manual).

1. Participating plans shall not be allowed to market directly to potential enrollees. Instead, plans may participate in group marketing events, provide general audience materials (such as general circulation brochures, and media and billboard advertisements), and provide responses to individual-initiated requests for enrollment.

2. Participating plans shall receive prior approval of all marketing and enrollee communications materials except those that are exempt pursuant to 42 CFR 422.2262(b) and 42 CFR 423.2262(b).

3. Participating plans shall not begin marketing activity earlier than 90 days prior to the effective date of enrollment for the contract year.

B. At a minimum, participating plans will provide current and prospective enrollees the following materials, subject to the rules regarding content and timing of enrollee receipt as applicable under § 1851(h) of the Social Security Act, 42 CFR 422.111, 42 CFR 422.2260 et seq., 42 CFR 423.120(b) and (c), 42 CFR 423.128, 42 CFR 423.2260 et seq., 42 CFR 438.10, 42 CFR 438.104, the three-way contract, and the Medicare Marketing Guidelines.

C. Notification of formulary changes. The requirement at 42 CFR 423.120(b)(5) that participating plans provide at least 60 days advance notice regarding Medicare Part D formulary changes also applies to participating plans for outpatient prescription or over-the-counter drugs or products covered under Medicaid or as additional benefits.

NOTICE: The following forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the

Registrar of Regulations, General Assembly Building, 2nd Floor, Richmond, Virginia 23219.

FORMS (12VAC30-121)

[Agency or Consumer Direction Provider Plan of Care, DMAS-97A/B \(rev. 3/10\)](#)

[Commonwealth Coordinated Care Enrollment Application Form](#)

DOCUMENTS INCORPORATED BY REFERENCE (12VAC30-121)

[Memorandum of Understanding \(MOU\) Between the Centers for Medicare & Medicaid Services \(CMS\) and the Commonwealth of Virginia Regarding a Federal-State Partnership to Test a Capitated Financial Alignment Model for Medicare-Medicaid Enrollees \(Commonwealth Coordinated Care\), signed May 21, 2013](#)

[Medical Marketing Guidelines, Centers for Medicare & Medicaid Services, revised June 17, 2014](#)

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TITLE 16. LABOR AND EMPLOYMENT

SAFETY AND HEALTH CODES BOARD

Fast-Track Regulation

Title of Regulation: 16VAC25-11. Public Participation Guidelines (amending 16VAC25-11-50).

Statutory Authority: §§ 2.2-2007.02 and 40.1-22 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 16, 2017.

Agency Contact: Holly Raney, Regulatory Coordinator, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Richmond, VA 23219, telephone (804) 371-2631, FAX (804) 786-8418, or email holly.raney@doli.virginia.gov.

Basis: Pursuant to § 40.1-22 of the Code of Virginia, the Safety and Health Codes Board is authorized "...to adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in place of employment over which it has jurisdiction...and as may be necessary to carry out its functions established under this title." The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose of this amendment is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the

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promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to statute. The rulemaking is not expected to be controversial.

Substance: The Safety and Health Codes Board has amended subsection A of 16VAC25-50-11 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions since it is already in the Code of Virginia. There are no primary advantages or disadvantages for the agency or the Commonwealth.

Small Business Impact Review Report of Findings: This fast-track regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Safety and Health Codes Board (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The Department of Labor and Industry has no additional comment in response to the economic impact analysis.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

16VAC25-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such

opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropounded regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4911; Filed November 7, 2016, 2:05 p.m.

Proposed Regulation

Title of Regulation: 16VAC25-60. **Administrative Regulation for the Virginia Occupational Safety and Health Program (amending 16VAC25-60-30, 16VAC25-60-90, 16VAC25-60-110 through 16VAC25-60-150, 16VAC25-60-245, 16VAC25-60-260).**

Statutory Authority: §§ 40.1-6 and 40.1-22 of the Code of Virginia.

Public Hearing Information:

February 16, 2017 - 10 a.m. - Main Street Centre, 600 East Main Street, 12th Floor Conference Room South, Richmond, VA 23219.

Public Comment Deadline: January 27, 2017.

Agency Contact: Jay Withrow, Director of Legal Support, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Richmond, VA 23219, telephone (804) 786-9873, or email jay.withrow@doli.virginia.gov.

Basis: The Safety and Health Codes Board is authorized by subdivision 5 of § 40.1-22 of the Code of Virginia to "adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title." The board is required to adopt the standard that most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity. The standards must be at least as stringent as the standards promulgated by the federal Occupational Safety and Health (OSH) Act of 1970 (P.L. 91-596). In addition to the attainment of the highest degree of health and safety protection for the employee, the board must consider the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws.

Purpose: The purpose of amending the regulation is to make certain substantive, procedural, and clarifying changes that reflect current Virginia Occupational Safety and Health (VOSH) policy and protect and promote the safety and health of employees in the workplace. Proposed changes include:

1. The amendment to 16VAC25-60-130 allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition) in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an employer, when such contract provides that the parties assure compliance with the VDOT Work Area Protection Manual. A housekeeping change to renumber all paragraphs in 16VAC25-60-120 through 16VAC25-60-150 correctly is also proposed here.

Although the federal MUTCD has been adopted by OSHA and VOSH in 29 CFR 1926.200 through 29 CFR 1926).202 (16VAC25-175-1926), a significant amount of the language provisions are merely recommended and noncompulsory (i.e., the terms "should" or "may" are used rather than the mandatory "must" or "shall" for desired activities and procedures) and are therefore not enforceable in a compliance setting. To mitigate this problem, VDOT has adopted its own Work Area Protection Manual that contains fewer "shoulds"

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and "mays." VDOT routinely specifies language in its contracts with employers that requires employer compliance with the VDOT Work Area Protection Manual.

2. The amendment to 16VAC25-60-30 D clarifies whistleblower anti-retaliation safeguards for public sector employees other than those employees of the Commonwealth and its agencies, for example political subdivisions such as city and county governments.

Section 40.1-2.1 of the Code of Virginia provides that: "The provisions of this title and any rules and regulations promulgated pursuant thereto shall not apply to the Commonwealth or any of its agencies, institutions, or political subdivisions, or any public body, unless, and to the extent that, coverage is extended by specific regulation of the Commissioner or the Safety and Health Codes Board. The Commissioner is authorized to establish and maintain an effective and comprehensive occupational safety and health program applicable to employees of the Commonwealth, its agencies, institutions, political subdivisions, or any public body. Such program shall be subject to any State plan submitted to the federal government for State enforcement of the Federal Occupational Safety and Health Act of 1970 (P.L. 91-596), or any other regulation promulgated under Title 40.1. The commissioner shall establish procedures for enforcing the program which shall include provisions for fair hearings including judicial review and sanctions to be applied for violations."

The VOSH Administrative Regulations Manual (ARM) defines the term "public employer" in 16VAC25-60-10 as the Commonwealth of Virginia, including its agencies, authorities, or instrumentalities or any political subdivision or public body.

The current wording of 16VAC25-60-30 D applies § 40.1-51.2:2 A of the Code of Virginia to all public employers (i.e., both state and local government) but states that the Commissioner of Labor and Industry shall not bring an action in circuit court for a violation involving a public employer. This language appears to conflict with 16VAC25-60-30 E, which contains a comprehensive application of § 40.1-51.2:2 to political subdivisions or public bodies and allows the commissioner to litigate such a violation in circuit court.

Prior to proposing this amendment, it has been the Department of Labor and Industry's position that the right of the commissioner to litigate a violation against a political subdivision or public body in 16VAC25-60-30 E, takes precedence over 16VAC25-60-30 D, because subsection E is the more specific provision in that it specifically applies § 40.1-51.2:2 to a subset of the broader category of the term "public employer." The proposed amendment will eliminate this conflict.

3. The amendment to 16VAC25-60-30 E applies § 40.1-7 of the Code of Virginia to public employers other than the Commonwealth and its agencies, which will allow Commonwealth's attorneys to act on behalf of the

commissioner in certain situations involving those public sector employers.

16VAC25-60-30 E provides that the following apply to public employers other than the Commonwealth and its agencies, and are actions that would need the assistance of local Commonwealth's attorneys: (i) commissioner's authority to seek injunctive relief in certain situations, § 40.1-49.4 F of the Code of Virginia and (ii) commissioner's authority to obtain administrative search warrants under §§ 40.1-49.9 through 40.1-49.12 of the Code of Virginia.

4. The amendment to 16VAC25-60-30 G clarifies that when seeking to resolve whistleblower anti-retaliation cases involving the Commonwealth and its agencies, the commissioner will petition the appropriate state official in a manner similar to that specified in 16VAC25-60-300 B, which outlines the process for resolving failure to abate issues involving the Commonwealth and its agencies.

Section 16VAC25-60-300 B provides: "Whenever the Commonwealth or any of its agencies fails to abate a violation within the time provided in an appropriate final order, the Commissioner of Labor and Industry shall normally petition for redress as follows: For violations in the Department of Law, to the Attorney General; for violations in the Office of the Lieutenant Governor, to the Lieutenant Governor; for violations otherwise in the executive branch, to the appropriate cabinet secretary; for violations in the State Corporation Commission, to a judge of the commission; for violations in the Department of Workers' Compensation, to the Chairman of the Workers' Compensation Commission; for violations in the legislative branch of government, to the Chairman of the Senate Committee on Commerce and Labor; for violations in the judicial branch, to the chief judge of the circuit court or to the Chief Justice of the Supreme Court. Where the violation cannot be timely resolved by this petition, the commissioner shall bring the matter to the Governor for resolution."

5. The amendment to 16VAC25-60-90 clarifies Virginia Freedom of Information Act (FOIA) requirements in regard to the Voluntary Protection Program, § 40.1-49.13 of the Code of Virginia. The proposed amendment tracks federal OSHA's Freedom of Information Act provisions for the federal Voluntary Protection Program and provides that the following documents are releasable pursuant to request (i) participant applications and amendments; (ii) onsite evaluation reports; (iii) annual self-evaluations; (iv) agency staff correspondence containing recommendations to the commissioner; (v) approval letters; and (vi) notifications to compliance staff removing the participants from the general inspection list and related formal correspondence.

6. The amendment to 16VAC25-60-110 specifies that occupational safety and health anti-discrimination cases will also be referred to as "whistleblower" cases. This terminology change reflects changes implemented by federal OSHA to refer to employees who allege discriminatory practices by an

employer when the employees have engaged in activities protected by § 11(c) of the OSH Act of 1970, as "whistleblowers."

7. The amendment to 16VAC25-60-110 clarifies that the commissioner may request penalties that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage pursuant to § 40.1-51.2:2 of the Code of Virginia.

Section 40.1-51.2:1 of the Code of Virginia prohibits employers from discriminating against employees who have exercised their safety and health rights under Title 40.1 of the Code of Virginia. Subsection A of § 40.1-51.2:2 provides that the commissioner shall bring an action in circuit court when it is determined that a violation of § 40.1-51.2:1 has occurred and attempts at conciliation have failed. Subsection A of § 40.1-51.2:2 further provides that the court "...shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief...."

The amendment clarifies that the court's authority to "restrain violations and order appropriate relief" includes the ability to issue penalties or fines to the employer that would be payable to the employee.

8. The amendment to 16VAC25-60-245 clarifies that the commissioner's authority in subdivision 4 of § 40.1-6 of the Code of Virginia to take and preserve testimony, examine witnesses and administer oaths constitutes an administrative subpoena power.

9. The amendment to 16VAC25-60-260 clarifies that the commissioner's burden of proving the basis for a VOSH citation, penalty, and order of abatement is by a "preponderance of the evidence." While the Court of Appeals of Virginia has ruled that the burden of proof for the commissioner in a VOSH case is by a preponderance of the evidence (National College of Business and Technology Inc. v. Davenport, 57 Va. App. 677, 685, 705 S.E. 2d 519, 523 (2011)), the issue has not been definitively ruled on by the Supreme Court of Virginia.

10. The amendment to 16VAC25-60-260 clarifies that the burden for proving an affirmative defense to a citation lies with the defendant. While it is generally accepted in case law that the burden for proving an affirmative defense to an OSHA/VOSH citation lies with the employer, it is not conclusively so. For instance, the U.S. Court of Appeals for the Fourth Circuit has ruled that the burden of proving unforeseeable and unpreventable employee misconduct lies with the government (Ocean Electric Corporation v. Secretary of Labor, 594 F. 2d 396 (4th Cir. 1979) and L.R. Willson & Sons, Inc. v. Occupational Safety and Health Review Commission, 134 F. 3d 1235 (4th Cir.), cert denied, 525 U.S. 962 (1998)). While the Court of Appeals of Virginia has ruled that the burden of proof on the issue of employee misconduct lies with the employer in Virginia (Magco of Maryland, Inc. v. Barr, 33 Va. App. 78, 531 S. E. 2d 614 (2000)), the issue

has not been definitively ruled on by the Supreme Court of Virginia.

Substance: The proposed amendments address certain issues in regard to 16VAC25-60. Substantive changes proposed include:

1. Allowing VOSH to enforce the requirements of the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition) in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an employer, when such contract stipulates employer compliance with the VDOT Work Area Protection Manual.

2. Clarification of anti-retaliation safeguards for public sector employees, including allowing a Commonwealth's attorney to act on behalf of the commissioner for public sector employers (16VAC25-60-30 F) and allowing the commissioner to petition the cabinet secretary and then the executive branch regarding resolution of anti-retaliation violations with a state agency (16VAC25-60-30 G).

3. Adding Virginia Freedom of Information Act requirements in regard to the Voluntary Protection Program (16VAC25-60-90).

4. Changing terminology from occupational discrimination or anti-retaliation to "whistleblower" to clarify that the commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage (16VAC25-60-110).

5. Changing terminology to reflect that the commissioner's authority to take and preserve testimony and administer oaths is an administrative subpoena (16VAC25-60-245).

6. Clarifying that the burden of proof in VOSH court cases is by a preponderance of the evidence (16VAC25-60-260) and that the burden for proving an affirmative defense to a citation lies with the employer (16VAC25-60-260).

Issues: The amendment to 16VAC25-60-130, which allows VOSH to enforce the Virginia Department of Transportation (VDOT) Work Area Protection Manual, will subject employers to the potential for VOSH citations and penalties should they violate requirements in the VDOT Manual. However, by the terms of the regulation, such violations and penalties will only be issued in situations where the employer violates a contract freely and voluntarily entered into with a public sector body. Since such an employer is bound contractually to comply with the VDOT Work Area Protection Manual and incur the costs associated with compliance, the proposed regulation will place no additional financial burden on the employer for compliance with the VDOT requirements.

Employers could accrue increased costs in cases where the commissioner files a complaint in circuit court alleging that

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an employer discriminated against a whistleblower employee should the commissioner request and the court grant additional penalties or fines under its authority to restrain violations and order appropriate relief. The fiscal impact is very limited as VOSH whistleblower court cases average less than one per year.

Employees should be provided with additional safety and health protections in construction work zones as the amendment to 16VAC25-60-130 will permit VOSH to enforce the VDOT Work Area Protection manual in certain situations in lieu of enforcing §§ 1926.200 through 1926.202, which incorporate by reference Part VI of the Manual of Uniform Traffic Control Devices (MUTCD), 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition.

Employees should benefit from the amendment to 16VAC25-60-110 that clarifies that the commissioner may request penalties or fines that would be paid to the employee for occupational whistleblower discrimination or anti-retaliation cases at the litigation stage, pursuant to § 40.1-51.2:2 of the Code of Virginia. Although litigated cases are infrequent, the possibility that a court could restrain violations by adding additional fines or penalties should serve to deter discriminatory conduct by employers.

No adverse impacts to employees are anticipated from the adoption of the proposed amendments.

Other than training Department of Labor and Industry employees on the changes to the regulation, no additional fiscal or other programmatic impacts are anticipated for the department from the adoption of the proposed amendments.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Safety and Health Codes Board proposes to allow the Department of Labor and Industry (DOLI) to enforce the requirements of the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices and make several clarifying changes.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The employers in highway, street, and bridge construction are primarily engaged in construction, reconstruction, rehabilitation, and repairs of highways, streets, roads, airport runways, public sidewalks, or bridges. Employers in this industry are currently required to comply with the federal Manual on Uniform Traffic Control Devices which is adopted by reference to 29 CFR Part 1926. However, DOLI contends that the federal manual is permissive in general and consequently difficult to enforce. The proposed regulation will require employers to comply with the VDOT Work Area Protection Manual in any contract for construction, repair, or maintenance between either the Commonwealth or one of its local governments and an

employer, where such contract stipulates employer compliance with the VDOT manual. Since the VDOT manual will apply where an employer already agreed to comply with it through a contract, no additional compliance costs on employers is expected. However, the proposed change will allow DOLI to issue citations for violations of the VDOT manual and strengthen compliance. DOLI estimates an additional \$6,440 in penalties based on seven violations with an average penalty of \$920 as a result of this particular change.

In general, improved safety and health enforcement can create significant savings and cost avoidances associated with workplace injuries and illnesses for employers, while having no discernible damage to employers' ability to stay in business and to their sales or credit ratings.¹ In addition, the injury and illness rates for the construction industry as a whole are higher than those for the private sector for all industries both nationally and in Virginia; the incident rates for highway, street, and bridge construction are higher than the incident rates for general construction both nationally and in Virginia; and the incident rates for road construction in Virginia are lower than those nationally with the notable exception that the Virginia's Days Away, Restrictions and Transfers rate for highway, street and bridge construction, which is an indicator of more serious injuries, was significantly higher than the national average for two of the last three years.² Given the fact that road construction in Virginia is more prone to incidents relative to some other benchmarks, stronger enforcement in road construction industry appears to have potential to create net benefits.

The proposed changes will also clarify: 1) whistleblower anti-retaliation safeguards for public sector employees and the procedures to enforce such safeguards, 2) that the Commissioner can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage, 3) requirements of Virginia Freedom of Information Act in regard to the Voluntary Protection Program, 4) the Commissioner's authority to take and preserve testimony and administer oaths is an administrative subpoena, 5) that the burden of proof in court cases is by a preponderance of the evidence, and 6) that the burden for proving an affirmative defense to a citation lies with the employer. These proposed changes are not anticipated to create any significant economic impact other than improving the clarity of the regulation.

Businesses and Entities Affected. The proposed regulation applies to all public and private sector places of employment in the state, with the exception of federal workers, the United States Postal Service, private sector maritime, federal military facilities, and other federal enclaves where the state has ceded jurisdiction to the federal government. Based on data from 2014, approximately 234,644 establishments employing 3.6 million employees are subject to this regulation. There are 505 establishments and 20,849 employees in Virginia's highway, street, and bridge construction industry.³

Localities Particularly Affected. The proposed changes apply statewide.

Projected Impact on Employment. No significant impact on employment is expected.

Effects on the Use and Value of Private Property. No significant impact on the use and value of private property is expected.

Real Estate Development Costs. No significant impact on real estate development costs is expected.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. Most of the affected employers are considered small businesses. The costs and other effects on them are the same as those discussed above.

Alternative Method that Minimizes Adverse Impact. As discussed above, compliance with the VDOT manual may increase citations issued to employers, some of which may be small businesses. There is no known alternative to minimize adverse impact of penalties associated with enforcement while accomplishing the intended policy goal.

Adverse Impacts:

Businesses. Non-small businesses may be issued penalties if they contract to perform work according to the VDOT manual and do not comply with it.

Localities. The proposed amendments will not adversely affect localities.

Other Entities. The proposed amendments will not adversely affect other entities.

¹ "Randomized Government Safety Inspections Reduce Worker Injuries with No Detectable Job Loss," David I. Levine, Haas School of Business, University of California, Berkeley, Prepared for the House of Representatives Subcommittee on Workforce Protections, Hearing on "Promoting Safe Workplaces through Voluntary Protection Programs" June 28, 2012.

² Source: Bureau of Labor Statistics

³ Source: Virginia Employment Commission

Agency's Response to Economic Impact Analysis: The Department of Labor and Industry has no additional comment in response to the economic impact analysis.

Summary:

The proposed amendments include (i) requiring an employer to comply with the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices when working under a contract for construction, repair, or maintenance between the employer and either the Commonwealth or any political subdivision or public body when the contract requires employer compliance with

the VDOT manual; (ii) clarifying the anti-retaliation safeguards for public sector employees and the procedures to enforce those safeguards; (iii) clarifying what documents may be disclosed in regards to the Voluntary Protection Program (§ 40.1-49.13 of the Code of Virginia); (iv) clarifying that the Commissioner of Labor and Industry can request penalties or fines for occupational discrimination or anti-retaliation cases at the litigation stage; (v) establishing that the commissioner's burden of proof is a preponderance of the evidence and that burden for proving an affirmative defense lies with the employer; and (vi) making certain changes in terminology.

16VAC25-60-30. Applicability to public employers.

A. All occupational safety and health standards adopted by the board shall apply to public employers and their employees in the same manner as to private employers.

B. All sections of this chapter shall apply to public employers and their employees. Where specific procedures are set out for the public sector, such procedures shall take precedence.

C. The following portions of Title 40.1 of the Code of Virginia shall apply to public employers: §§ 40.1-10, subdivision A 1 of § 40.1-49.4 A(1), 40.1-49.8, 40.1-51, 40.1-51.1, 40.1-51.2, 40.1-51.2:1, 40.1-51.3, 40.1-51.3:2, and 40.1-51.4:2.

D. Section 40.1-51.2:2 A of the Code of Virginia shall apply to ~~public employers~~ the Commonwealth and its agencies except that the commissioner shall not bring action in circuit court in the event that a voluntary agreement cannot be obtained.

E. Sections ~~40.1-7~~, 40.1-49.4 F, 40.1-49.9, 40.1-49.10, 40.1-49.11, 40.1-49.12, and 40.1-51.2:2 of the Code of Virginia shall apply to public employers other than the Commonwealth and its agencies.

F. If the commissioner determines that an imminent danger situation, as defined in § 40.1-49.4 F of the Code of Virginia, exists for an employee of the Commonwealth or one of its agencies, and if the employer does not abate that imminent danger immediately upon request, the Commissioner of Labor and Industry shall forthwith petition the governor to direct that the imminent danger be abated.

G. If the commissioner is unable to obtain a voluntary agreement to resolve a violation of § 40.1-51.2:1 of the Code of Virginia by the Commonwealth or one of its agencies, the Commissioner of Labor and Industry shall petition for redress in the manner provided in ~~this chapter~~ 16VAC25-60-300 B.

16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.

A. Pursuant to the Virginia Freedom of Information Act (FOIA) (§ 2.2-3700 et seq. of the Code of Virginia) and with the exceptions stated in subsections B through H of this section, employers, employees and their representatives shall

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have access to information gathered in the course of an inspection.

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner pursuant to § 40.1-49.8 of the Code of Virginia are confidential. Pursuant to the requirements set forth in § 40.1-11 of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.

C. All file documents contained in case files ~~which that~~ are under investigation, and where a citation has not been issued, are not disclosable until:

1. The decision has been made not to issue citations; or
2. Six months has lapsed following the occurrence of an alleged violation.

D. Issued citations, orders of abatement, and proposed penalties are public documents and are releasable upon a written request. All other file documents in cases where a citation has been issued are not disclosable until the case is a final order of the commissioner or the court, except that once a copy of file documents in a contested case has been provided to legal counsel for the employer in response to a request for discovery, or to a third party in response to a subpoena duces tecum, such documents shall be releasable upon a written request, subject to the exclusions in this ~~regulation~~ section and the Virginia Freedom of Information Act.

E. Information required to be kept confidential by law shall not be disclosed by the commissioner or by any employee of the department. In particular, the following specific information is deemed to be nondisclosable:

1. The identity of and statements of an employee or employee representative who has complained of hazardous conditions to the commissioner;
2. The identities of employers, owners, operators, agents, or employees interviewed during inspections and their interview statements;
3. Employee medical and personnel records obtained during VOSH inspections. Such records may be released to the employee or his duly authorized representative upon a written, and endorsed request; and
4. Employer trade secrets, commercial, and financial data.

F. The commissioner may decline to disclose a document that is excluded from the disclosure requirements of the Virginia FOIA, particularly documents and evidence related to criminal investigations, writings protected by the attorney-client privilege, documents compiled for use in litigation, and personnel records.

G. An effective program of investigation and conciliation of complaints of discrimination requires confidentiality. Accordingly, disclosure of records of such complaints, investigations, and conciliations will be presumed to not serve the purposes of Title 40.1 of the Code of Virginia,

except for statistical and other general information that does not reveal the identities of particular employers or employees.

H. All information gathered through participation in consultation services or training programs of the department shall be withheld from disclosure except for statistical data ~~which that~~ does not identify individual employers.

I. All information gathered through participation in voluntary protection programs of the department pursuant to § 40.1-49.13 of the Code of Virginia shall be withheld from disclosure except for statistical data that does not identify individual employers and for the following:

1. Participant applications and amendments, onsite evaluation reports, and annual self-evaluations;
2. Agency staff correspondence containing recommendations to the commissioner, approval letters, notifications to compliance staff removing the participants from the general inspection list, and related formal correspondence.

~~I.~~ J. The commissioner, in response to a subpoena, order, or other demand of a court or other authority in connection with a proceeding to which the department is not a party, shall not disclose any information or produce any material acquired as part of the performance of his official duties or because of his official status without the approval of the Commissioner of Labor and Industry.

~~J.~~ K. The commissioner shall disclose information and statistics gathered pursuant to the enforcement of Virginia's occupational safety and health laws, standards, and regulations where it has been determined that such a disclosure will serve to promote the safety, health, and welfare of employees. Any person requesting disclosure of such information and statistics should include in his written request any information that will aid the commissioner in this determination.

16VAC25-60-110. Discrimination Whistleblower discrimination; discharge or retaliation; remedy for retaliation.

A. In carrying out his duties under § 40.1-51.2:2 of the Code of Virginia, the commissioner shall consider case law, regulations, and formal policies of federal OSHA. An employee's engagement in activities protected by Title 40.1 does not automatically render him immune from discharge or discipline for legitimate reasons. Termination or other disciplinary action may be taken for a combination of reasons, involving both discriminatory and nondiscriminatory motivations. In such a case, a violation of § 40.1-51.2:1 of the Code of Virginia has occurred if the protected activity was a substantial reason for the action, or if the discharge or other adverse action would not have taken place "but for" engagement in protected activity.

Employee whistleblower activities, protected by § 40.1-51.2:1 of the Code of Virginia, include, ~~but are not limited to:~~

1. Making any complaint to his employer or any other person under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
2. Instituting or causing to be instituted any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
3. Testifying or intending to testify in any proceeding under or related to the safety and health provisions of Title 40.1 of the Code of Virginia;
4. Cooperating with or providing information to the commissioner during a worksite inspection; or
5. Exercising on his own behalf or on behalf of any other employee any right afforded by the safety and health provisions of Title 40.1 of the Code of Virginia.

Discharge or discipline of an employee who has refused to complete an assigned task because of a reasonable fear of injury or death will be considered retaliatory only if the employee has sought abatement of the hazard from the employer and the statutory procedures for securing abatement would not have provided timely protection. The condition causing the employee's apprehension of death or injury must be of such a nature that a reasonable person, under the circumstances then confronting the employee, would conclude that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement. In addition, in such circumstances, the employee, where possible, must also have sought from his employer, and been unable to obtain, an abatement of the dangerous condition.

Disciplinary measures taken by employers solely in response to employee refusal to comply with appropriate safety rules and regulations shall not be regarded as retaliatory action prohibited by § 40.1-51.2:1 of the Code of Virginia.

B. A complaint pursuant to § 40.1-51.2:2 of the Code of Virginia may be filed by the employee himself or anyone authorized to act in his behalf.

The investigation of the commissioner shall include an opportunity for the employer to furnish the commissioner with any information relevant to the complaint.

An attempt by an employee to withdraw a previously filed complaint shall not automatically terminate the investigation of the commissioner. Although a voluntary and uncoerced request from the employee that his complaint be withdrawn shall receive due consideration, it shall be the decision of the commissioner whether further action is necessary to enforce the statute.

The filing of a retaliation complaint with the commissioner shall not preclude the pursuit of a remedy through other channels. Where appropriate, the commissioner may postpone his investigation or defer to the outcome of other proceedings.

C. Subsection A of § 40.1-51.2:2 of the Code of Virginia provides that the commissioner shall bring an action in circuit court when it is determined that a violation of § 40.1-51.2:1 of the Code of Virginia has occurred and a voluntary agreement could not be obtained. Subsection A of § 40.1-51.2:2 further provides that the court "shall have jurisdiction, for cause shown, to restrain violations and order appropriate relief." The court's authority to restrain violations and order appropriate relief includes the ability to issue penalties or fines to the employer that would be payable to the employee. In determining the appropriate level of penalties or fines, the court may look to subsections G, H, I, and J of § 40.1-49.4 of the Code of Virginia.

Part III

Occupational Safety and Health Standards

16VAC25-60-120. General industry standards.

A. The occupational safety or health standards adopted as rules or regulations by the board either directly or by reference, from 29 CFR Part 1910 shall apply by their own terms to all employers and employees at places of employment covered by the Virginia State Plan for Occupational Safety and Health.

B. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited; and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

16VAC25-60-130. Construction industry standards.

A. The occupational safety or health standards adopted as rules or regulations by the Virginia Safety and Health Codes Board either directly, or by reference, from 29 CFR Part 1926 shall apply by their own terms to all employers and employees engaged in either construction work or construction related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1926. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited, and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

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4- C. For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.

D. The employer shall comply with the Virginia Department of Transportation (VDOT) Work Area Protection Manual in lieu of the federal Manual on Uniform Traffic Control Devices (Part VI of the MUTCD, 1988 Edition, Revision 3, or Part VI of the MUTCD, Millennium Edition - referenced in 16VAC25-175-1926.200 through 16VAC25-175-1926.202) when working under a contract for construction, repair, or maintenance between the employer and the Commonwealth; agencies, authorities, or instrumentalities of the Commonwealth; or any political subdivision or public body of the Commonwealth when such contract stipulates employer compliance with the VDOT Work Area Protection Manual in effect at the time of contractual agreement.

2- E. Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.

3- F. The standards adopted from 29 CFR Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.

16VAC25-60-140. Agriculture standards.

A. The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1910 and 29 CFR Part 1928 shall apply by their own terms to all employers and employees engaged in either agriculture or agriculture related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include

construction work as described in ~~subdivision 4~~ subdivision C of 16VAC25-60-130, nor ~~does it~~ do they include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.

C. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in 29 CFR Part 1910 or 29 CFR Part 1928. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited; and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

16VAC25-60-150. Maritime standards.

A. The occupational safety or health standards adopted as rules or regulations by the board either directly, or by reference, from 29 CFR Part 1915, 29 CFR Part 1917, 29 CFR Part 1918, and 29 CFR Part 1919 shall apply by their own terms to all public sector employers and employees engaged in maritime related activities covered by the Virginia State Plan for Occupational Safety and Health.

B. The employer shall comply with the manufacturer's specifications and limitations applicable to the operation, training, use, installation, inspection, testing, repair and maintenance of all machinery, vehicles, tools, materials and equipment, unless specifically superseded by a more stringent corresponding requirement in Part 1915, 1917, 1918 or 1919. The use of any machinery, vehicle, tool, material or equipment that is not in compliance with any applicable requirement of the manufacturer is prohibited; and shall either be identified by the employer as unsafe by tagging or locking the controls to render them inoperable or be physically removed from its place of use or operation.

16VAC25-60-245. Take Use of administrative subpoenas to take and preserve testimony, examine witnesses, and administer oaths.

A. Subdivision 4 of § 40.1-6 of the Code of Virginia authorizes the commissioner, in the discharge of his duties, to take and preserve testimony, examine witnesses and administer oaths. In accordance with subdivision 5 of § 40.1-6 of the Code of Virginia, the Commissioner of Labor and Industry may appoint such representatives as are necessary to carry out the functions outlined in subdivision 4 of § 40.1-6 of the Code of Virginia. Such appointments shall be made in writing; identify the individual being appointed, the length of appointment, and the method of withdrawal of such appointment; and specify what duties are being prescribed.

B. The oath shall be administered by the commissioner's appointed representative to the witness as follows: "Do you swear or affirm to tell the truth."

C. Testimony given under oath shall be recorded by a court reporter.

D. Questioning of employers, owners, operators, agents or employees under oath shall be in private in accordance with subdivision 2 of § 40.1-49.8 of the Code of Virginia.

E. An employer's refusal to make an owner, operator, agent or employee available to the commissioner for examination under this section shall be considered a refusal to consent to the commissioner's inspection authority under § 40.1-49.8 of the Code of Virginia. Upon such refusal the commissioner may seek an administrative search warrant in accordance with the provisions contained in §§ 40.1-49.9 through 40.1-49.12 of the Code of Virginia, and obtain an order from the appropriate judge commanding the employer to make the subject owner, operator, agent or employee available for examination at a specified location by a date and time certain.

F. In accordance with § 40.1-10 of the Code of Virginia, if any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of the examination under § 40.1-6 of the Code of Virginia, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days or both. Any such refusal on the part of any person to comply with this section may be referred by the Commissioner of Labor and Industry to the appropriate attorney for the Commonwealth for prosecution.

Part VI
Citation and Penalty

16VAC25-60-260. Issuance of citation and proposed penalty.

A. Each citation shall be in writing and describe with particularity the nature of the violation or violations, including a reference to the appropriate safety or health provision of Title 40.1 of the Code of Virginia or the appropriate rule, regulation, or standard. In addition, the citation must fix a reasonable time for abatement of the violation. The citation will contain substantially the following: "NOTICE: This citation will become a final order of the commissioner unless contested within fifteen working days from the date of receipt by the employer." The citation may be delivered to the employer or his agent by the commissioner or may be sent by certified mail or by personal service to an officer or agent of the employer or to the registered agent if the employer is a corporation.

~~4.~~ No citation may be issued after the expiration of six months following the occurrence of any alleged violation. The six-month ~~time frame~~ timeframe is deemed to be tolled on the date the citation is issued by the commissioner, without regard for when the citation is received by the employer. For purposes of calculating the six-month ~~time frame~~ timeframe for citation issuance, the following requirements shall apply:

~~a.~~ 1. The six-month ~~time frame~~ timeframe begins to run on the day after the incident or event occurred or notice was received by the commissioner (as specified below), in accordance with § 1-210 A of the Code of Virginia. The word "month" shall be construed to mean one calendar month in accordance with § 1-223 of the Code of Virginia.

~~b.~~ 2. An alleged violation is deemed to have "occurred" on the day it was initially created by commission or omission on the part of the creating employer, and every day thereafter that it remains in existence uncorrected.

~~e.~~ 3. Notwithstanding subdivision ~~1-b~~ 2 of this subsection, if an employer fails to notify the commissioner of any work-related incident resulting in a fatality or in the in-patient hospitalization of three or more persons within eight hours of such occurrence as required by § 40.1-51.1 D of the Code of Virginia, the six-month ~~time frame~~ timeframe shall not be deemed to commence until the commissioner receives actual notice of the incident.

~~d.~~ 4. Notwithstanding subdivision ~~1-b~~ 2 of this subsection, if the commissioner is first notified of a work-related incident resulting in an injury or illness to an ~~employee(s)~~ employee or employees through receipt of an Employer's Accident Report (EAR) form from the Virginia Workers' Compensation Commission as provided in § 65.2-900 of the Code of Virginia, the six-month ~~time frame~~ timeframe shall not be deemed to commence until the commissioner actually receives the EAR form.

~~e.~~ 5. Notwithstanding subdivision ~~1-b~~ 2 of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an ~~employee(s)~~ employee or employees, through receipt of a complaint in accordance with 16VAC25-60-100 or referral, the six-month ~~time frame~~ timeframe shall not be deemed to commence until the commissioner actually receives the complaint or referral.

B. A citation issued under subsection A of this section to an employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

1. Employees of such employer have been provided with the proper training and equipment to prevent such a violation;
2. Work rules designed to prevent such a violation have been established and adequately communicated to employees by such employer and have been effectively enforced when such a violation has been discovered;
3. The failure of employees to observe work rules led to the violation; and
4. Reasonable steps have been taken by such employer to discover any such violation.

C. For the purposes of subsection B of this section only, the term "employee" shall not include any officer, management official, or supervisor having direction, management control,

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or custody of any place of employment which was the subject of the violative condition cited.

D. The penalties as set forth in § 40.1-49.4 of the Code of Virginia shall also apply to violations relating to the requirements for ~~record-keeping~~ recordkeeping, reports, or other documents filed or required to be maintained and to posting requirements.

E. In determining the amount of the proposed penalty for a violation the commissioner will ordinarily be guided by the system of penalty adjustment set forth in the VOSH Field Operations Manual. In any event the commissioner shall consider the gravity of the violation, the size of the business, the good faith of the employer, and the employer's history of previous violations.

F. On multi-employer worksites for all covered industries, citations shall normally be issued to an employer whose employee is exposed to an occupational hazard (the exposing employer). Additionally, the following employers shall normally be cited, whether or not their own employees are exposed:

1. The employer who actually creates the hazard (the creating employer);
2. The employer who is either:
 - a. Responsible, by contract or through actual practice, for safety and health conditions on the entire worksite, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
 - b. Responsible, by contract or through actual practice, for safety and health conditions for a specific area of the worksite, or specific work practice, or specific phase of a construction project, and has the authority for ensuring that the hazardous condition is corrected (the controlling employer); or
3. The employer who has the responsibility for actually correcting the hazard (the correcting employer).

G. A citation issued under subsection F of this section to an exposing employer who violates any VOSH law, standard, rule or regulation shall be vacated if such employer demonstrates that:

1. The employer did not create the hazard;
2. The employer did not have the responsibility or the authority to have the hazard corrected;
3. The employer did not have the ability to correct or remove the hazard;
4. The employer can demonstrate that the creating, the controlling ~~and/or~~ or the correcting employers, as appropriate, have been specifically notified of the hazards to which his employees were exposed;
5. The employer has instructed his employees to recognize the hazard and, where necessary, informed them how to avoid the dangers associated with it;

6. Where feasible, an exposing employer must have taken appropriate alternative means of protecting employees from the hazard; and

7. When extreme circumstances justify it, the exposing employer shall have removed his employees from the job.

H. The commissioner's burden of proving the basis for a VOSH citation, penalty, or order of abatement is by a preponderance of the evidence.

I. The burden of proof in establishing an affirmative defense to a VOSH citation resides with the employer.

VA.R. Doc. No. R16-4561; Filed November 1, 2016, 3:42 p.m.



TITLE 17. LIBRARIES AND CULTURAL RESOURCES

BOARD OF HISTORIC RESOURCES

Final Regulation

Title of Regulation: **17VAC5-30. Evaluation Criteria and Procedures for Designations by the Board of Historic Resources (amending 17VAC5-30-100, 17VAC5-30-110, 17VAC5-30-120, 17VAC5-30-160).**

Statutory Authority: § 10.1-2205 of the Code of Virginia.

Effective Date: December 29, 2016.

Agency Contact: Jennifer Pullen, Executive Assistant, Department of Historic Resources, 2801 Kensington Avenue, Richmond, VA 23221, telephone (804) 482-6085, FAX (804) 367-2391, or email jennifer.pullen@dhr.virginia.gov.

Summary:

The amendments address the process of owner objection to designation of properties by the Board of Historic Resources for inclusion in the Virginia Landmarks Register. The amendments (i) clarify that written notification of the proposed designation and written notification of the public hearing will be sent to property owners listed within 90 days prior to the notification in official land recordation records or tax records; (ii) require property owners to submit their formal objections seven business days prior to the board meeting; (iii) require that the objection letter, in addition to being notarized, must be attested and reference the property by address or parcel number, or both; (iv) require that an objecting party who was not listed on the official land recordation records or tax records submit a copy of the recorded deed evidencing transfer of ownership with the attested and notarized statement to be counted by the director in determining whether a majority of the owners object; and (v) provide that formal designations may be reconsidered at a subsequent board meeting if the director receives, at least 30 days prior to the next scheduled board

meeting, written, attested, and notarized statements stating that there is no longer an objection.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

Part IV

Public Notice and Public Hearings

17VAC5-30-100. Written notice of proposed nominations.

In any county, city, or town where the board proposes to designate property for inclusion in the Virginia Landmarks Register, the department shall give written notice of the proposal to the governing body and to the owner, owners, or the owner's agent (i) of property proposed to be designated as a historic landmark building, structure, object, or site, or to be included in a historic district, and ~~to the owners, or their agents,~~ (ii) of all abutting property and property immediately across the street or road or across any railroad or waterway less than 300 feet wide. The list of such owners shall be obtained from either the official land recordation records or tax records, whichever is more appropriate, within 90 days prior to the notification of the proposal.

17VAC5-30-110. Public hearing for historic district; notice of hearing.

A. Prior to the designation by the board of a historic district, the department shall hold a public hearing at the seat of government of the county, city, or town in which the proposed historic district is located or within the proposed historic district. The public hearing shall be for the purpose of supplying additional information to the board. The time and place of such hearing shall be determined in consultation with a duly authorized representative of the local governing body, and shall be scheduled at a time and place that will reasonably allow for the attendance of the affected property owners.

B. The department shall publish notice of the public hearing once a week for two successive weeks in a newspaper published or having general circulation in the county, city, or town. Such notice shall specify the time and place of the public hearing at which persons affected may appear and present their views, not less than six days or more than 21 days after the second publication of the notice in such newspaper.

C. In addition to publishing the notice, the department shall give written notice of the public hearing at least five days before such hearing to the owner, owners, or the owner's agent of (i) each parcel of real property to be included in the proposed historic district, and ~~to the owners, or their agents,~~ ~~of~~ (ii) all abutting property and property immediately across the street or road or across any railroad or waterway less than 300 feet wide pursuant to 17VAC5-30-100. Notice required to be given to owners by this section may be given concurrently with the notice required to be given to the owners by 17VAC5-30-100. A complete copy of the nomination report and a map of the historic district showing the boundaries shall be sent to the local jurisdiction for public

inspection at the time of notice. The notice shall include a synopsis of why the district is significant.

D. The department shall make and maintain an appropriate record of all public hearings held pursuant to this section.

17VAC5-30-120. Mailings and affidavits; concurrent state and federal notice.

The department shall send the required notices by first class mail to the last known address of each person entitled to notice, ~~as shown on the current real estate tax assessment books pursuant to 17VAC5-30-100.~~ A representative of the department shall make an affidavit that the required mailings have been made. In the case where property is also proposed for inclusion in the National Register of Historic Places pursuant to nomination by the director, the department may provide concurrent notice of and hold a single public hearing on the proposed state designation and the proposed nomination to the National Register.

17VAC5-30-160. Owner objections.

A. Upon receiving the notification required by 17VAC5-30-100, any owner or owners of property proposed for designation by the board shall have the opportunity to concur in or object to that designation.

B. Property owners who wish to object to designation shall submit ~~to the director~~ a written, attested, and notarized statement ~~certifying~~ of objection. The statement of objection shall (i) reference the subject property by address or parcel number, or both; (ii) certify that the objecting party is the sole or partial owner of the property, as appropriate; and (iii) certify that the objecting party objects to the designation. The statement of objection must be received by the director at least seven business days prior to the meeting of the board at which the property is considered for designation.

~~If an owner~~ C. An objecting party whose name did not appear on the ~~current real estate tax assessment list~~ official land recordation records or tax records used by the director pursuant to 17VAC5-30-120 ~~certifies in a~~ must submit with the written, attested, and notarized statement that of objection an attested and notarized copy of the party is the sole or partial owner of a nominated property, such owner recorded deed evidencing transfer of ownership to such objecting party. Only upon such submission shall such objecting owner be counted by the director in determining whether a majority of the owners has objected. The statement of objection must be received by the director at least seven business days prior to the meeting of the board at which the property is considered for designation.

D. The board shall take no formal action to designate the property or district for inclusion in the Virginia Landmarks Register if (i) the owner of a property, ~~or~~ (ii) the majority of owners of a single property with multiple owners, or (iii) a majority of the owners in a district, ~~have~~ has objected to the designation. ~~These objections must be received prior to the~~

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~~meeting of the board at which the property is considered for designation.~~

E. Where formal designation at a board meeting has been prevented by owner objection, the board may reconsider the property for designation at a subsequent board meeting upon presentation to the director, at least 30 days prior to the next scheduled meeting of the board, of written, attested, and notarized statements sufficient to indicate that the owner or majority of owners no longer ~~object~~ objects to the designation. In the case of a proposed reconsideration, the notification procedures set out in Part IV (17VAC5-30-100 et seq.) of this chapter shall apply.

F. Each owner of property in a district has one vote regardless of how many properties or what part of one property that party owns and regardless of whether the property contributes to the significance of the district.

V.A.R. Doc. No. R16-4259; Filed November 7, 2016, 11:37 a.m.

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TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD FOR ARCHITECTS, PROFESSIONAL ENGINEERS, LAND SURVEYORS, CERTIFIED INTERIOR DESIGNERS AND LANDSCAPE ARCHITECTS

Fast-Track Regulation

Title of Regulation: **18VAC10-11. Public Participation Guidelines (amending 18VAC10-11-50).**

Statutory Authority: §§ 2.2-4007.02, 54.1-201, and 54.1-404 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Kathleen R. Nosbisch, Executive Director, Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (866) 465-6206, or email apelscidla@dpor.virginia.gov.

Basis: The Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects is authorized under § 54.1-201 of the Code of Virginia to promulgate regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners, and to effectively administer the regulatory system administered by the regulatory board. The authority granted under § 54.1-404 of the Code of Virginia includes the promulgation of regulations governing the proper discharge of the board's duties. The amendments conform to

Chapter 795 of the 2012 Acts of Assembly, which provides that in formulating any regulation or in evidentiary hearings on regulations, an interested party shall be entitled to be accompanied by and represented by counsel or other qualified representative.

Purpose: The purpose of this action is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform to the statute. Therefore, there is no controversy in its promulgation.

Substance: The amendment provides that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis: Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board for Architects, Engineers, Surveyors, Landscape Architects and Interior Designers (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect,

but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>
Agency's Response to Economic Impact Analysis: The agency concurs with the approval.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC10-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by

and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropoed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4921; Filed October 28, 2016, 4:55 p.m.

VIRGINIA BOARD FOR ASBESTOS, LEAD, AND HOME INSPECTORS

Fast-Track Regulation

Title of Regulation: **18VAC15-11. Public Participation Guidelines (amending 18VAC15-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-501 of the Code of Virginia.

Regulations

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Trisha Henshaw, Executive Director, Virginia Board for Asbestos, Lead, and Home Inspectors, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email alhi@dpor.virginia.gov.

Basis: The Virginia Board for Asbestos, Lead, and Home Inspectors is authorized under § 54.1-501 of the Code of Virginia to promulgate regulations necessary to carry out the requirements of Chapter 5 of Title 54.1 of the Code of Virginia in accordance with the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). The amendments conform to Chapter 795 of the 2012 Acts of Assembly, which provides that in formulating any regulation or in evidentiary hearings on regulations, an interested party shall be entitled to be accompanied by and represented by counsel or other qualified representative.

Purpose: The purpose of this action is clarity and conformity to the Administrative Process Act. Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform to the statute. Therefore, there is no controversy in its promulgation.

Substance: The amendment provides that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact

Analysis: Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Virginia Board for Asbestos, Lead, and Home Inspectors (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford

interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The agency concurs with the approval.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

18VAC15-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.
2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).
2. For a minimum of 60 calendar days following the publication of a proposed regulation.
3. For a minimum of 30 calendar days following the publication of a repropoed regulation.
4. For a minimum of 30 calendar days following the publication of a final adopted regulation.
5. For a minimum of 30 calendar days following the publication of a fast-track regulation.
6. For a minimum of 21 calendar days following the publication of a notice of periodic review.
7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

V.A.R. Doc. No. R17-4888; Filed October 28, 2016, 4:57 p.m.

AUCTIONEERS BOARD

Fast-Track Regulation

Title of Regulation: 18VAC25-11. Public Participation Guidelines (amending 18VAC25-11-50).

Statutory Authority: §§ 2.2-4007.02 and 54.1-201 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Marian H. Brooks, Regulatory Board Administrator, Auctioneers Board, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (866) 465-6206, or email auctioneers@dpor.virginia.gov.

Basis: The Auctioneers Board is authorized under § 54.1-201 of the Code of Virginia to promulgate regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners, and to effectively administer the regulatory system administered by the regulatory board. The amendments conform to Chapter 795 of the 2012 Acts of Assembly, which provides that in formulating any regulation or in evidentiary hearings on regulations, an interested party shall be entitled to be accompanied by and represented by counsel or other qualified representative.

Purpose: The purpose of this action is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform to the statute. Therefore, there is no controversy in its promulgation.

Substance: The amendment provides that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of

Regulations

Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Auctioneers Board (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The agency concurs with the approval.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

18VAC25-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropounded regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4919; Filed October 28, 2016, 4:58 p.m.

BOARD OF AUDIOLOGY AND SPEECH-LANGUAGE PATHOLOGY

Fast-Track Regulation

Title of Regulation: 18VAC30-11. Public Participation Guidelines (amending 18VAC30-11-50).

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Leslie L. Knachel, Executive Director, Board of Audiology and Speech-Language Pathology, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4630, FAX (804) 527-4471, or email auidbd@dhp.virginia.gov.

Basis: The Board of Audiology and Speech-Language Pathology is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the

regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC30-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board of Audiology and Speech-Language Pathology (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Regulations

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The Board of Audiology and Speech-Language Pathology concurs with the analysis.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

18VAC30-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropounded regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4864; Filed November 3, 2016, 3:35 p.m.

BOARD FOR BARBERS AND COSMETOLOGY

Fast-Track Regulation

Title of Regulation: **18VAC41-11. Public Participation Guidelines (amending 18VAC41-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-201 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Demetrios J. Melis, Executive Director, Board for Barbers and Cosmetology, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8590, FAX (804) 527-4295, or email barbercosmo@dpor.virginia.gov.

Basis: The Board for Barbers and Cosmetology is authorized under § 54.1-201 of the Code of Virginia to promulgate regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners, and to effectively administer the regulatory system administered by the regulatory board. The amendments conform to Chapter 795 of the 2012 Acts of Assembly, which provides that in formulating any regulation or in evidentiary hearings on regulations, an interested party shall be entitled to be accompanied by and represented by counsel or other qualified representative.

Purpose: The purpose of this action is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform to the statute. Therefore, there is no controversy in its promulgation.

Substance: The amendment provides that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board for Barbers and Cosmetology (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an

opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses: The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The agency concurs with the approval.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Regulations

Part III
Public Participation Procedures

18VAC41-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropoed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4881; Filed October 28, 2016, 4:59 p.m.

**BOARD OF FUNERAL DIRECTORS AND
EMBALMERS**

Fast-Track Regulation

Title of Regulation: **18VAC65-11. Public Participation Guidelines (amending 18VAC65-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Corie Tillman Wolf, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4479, FAX (804) 527-4471, or email fanbd@dhp.virginia.gov.

Basis: The Board of Funeral Directors and Embalmers is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC65-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board of Funeral Directors and Embalmers (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when

submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The Board of Funeral Directors and Embalmers concurs with the analysis.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC65-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropoed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

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D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4936; Filed November 3, 2016, 4:00 p.m.

BOARD OF HEALTH PROFESSIONS

Fast-Track Regulation

Title of Regulation: **18VAC75-11. Public Participation Guidelines (amending 18VAC75-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Elizabeth A. Carter, Ph.D., Executive Director, Board of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4426, FAX (804) 527-4466, or email elizabeth.carter@dhp.virginia.gov.

Basis: The Board of Health Professions is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC75-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended

provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board of Health Professions (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The Board of Health Professions concurs with the analysis.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

18VAC75-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropoed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4859; Filed November 3, 2016, 3:37 p.m.

BOARD FOR HEARING AID SPECIALISTS AND OPTICIANS

Fast-Track Regulation

Title of Regulation: **18VAC80-11. Public Participation Guidelines (amending 18VAC80-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-201 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Demetrios J. Melis, Executive Director, Board for Hearing Aid Specialists and Opticians, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8590, FAX (804) 527-4295, or email hearingaidspec@dpor.virginia.gov.

Basis: The Board for Hearing Aid Specialists and Opticians is authorized under § 54.1-201 of the Code of Virginia to promulgate regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners, and to effectively administer the regulatory system administered by the regulatory board. The amendments conform to Chapter 795 of the 2012 Acts of Assembly, which provides that in formulating any regulation or in evidentiary hearings on regulations, an interested party shall be entitled to be accompanied by and represented by counsel or other qualified representative.

Regulations

Purpose: The purpose of this action is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform to the statute. Therefore, there is no controversy in its promulgation.

Substance: The amendment provides that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board for Hearing Aid Specialists and Opticians (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The agency concurs with the approval.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

18VAC80-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).
2. For a minimum of 60 calendar days following the publication of a proposed regulation.
3. For a minimum of 30 calendar days following the publication of a repropoed regulation.
4. For a minimum of 30 calendar days following the publication of a final adopted regulation.
5. For a minimum of 30 calendar days following the publication of a fast-track regulation.
6. For a minimum of 21 calendar days following the publication of a notice of periodic review.
7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4883; Filed October 28, 2016, 5:01 p.m.

BOARD OF NURSING
Fast-Track Regulation

Title of Regulation: 18VAC90-11. Public Participation Guidelines (amending 18VAC90-11-50).

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Jay P. Douglas, R.N., Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4520, FAX (804) 527-4455, or email jay.douglas@dhp.virginia.gov.

Basis: The Board of Nursing is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC90-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board of Nursing (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already

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specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The Board of Nursing concurs with the analysis.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC90-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropoed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4868; Filed November 3, 2016, 3:40 p.m.

BOARD OF LONG-TERM CARE ADMINISTRATORS
Fast-Track Regulation

Title of Regulation: 18VAC95-11. Public Participation Guidelines (amending 18VAC95-11-50).

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Corie Tillman Wolf, Executive Director, Board of Long-Term Care Administrators, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4595, FAX (804) 527-4413, or email corie.wolf@dhp.virginia.gov.

Basis: The Board of Long-Term Care Administrators is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC95-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board of Long-Term Care Administrators (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Regulations

Agency's Response to Economic Impact Analysis: The Board of Long-Term Care Administrators concurs with the analysis.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC95-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropoed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the

changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4747; Filed November 3, 2016, 3:38 p.m.

BOARD OF COUNSELING

Fast-Track Regulation

Title of Regulation: **18VAC115-11. Public Participation Guidelines (amending 18VAC115-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Jaime Hoyle, Executive Director, Board of Counseling, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4406, FAX (804) 527-4435, or email jaime.hoyle@dhp.virginia.gov.

Basis: The Board of Counseling is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC115-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board of Counseling (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The Board of Counseling concurs with the analysis.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III
Public Participation Procedures

18VAC115-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.
2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).
2. For a minimum of 60 calendar days following the publication of a proposed regulation.
3. For a minimum of 30 calendar days following the publication of a repropoed regulation.
4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

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5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4863; Filed November 3, 2016, 3:36 p.m.

BOARD OF PSYCHOLOGY

Fast-Track Regulation

Title of Regulation: 18VAC125-11. Public Participation Guidelines (amending 18VAC125-11-50).

Statutory Authority: §§ 2.2-4007.02 and 54.1-2400 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Jaime Hoyle, Executive Director, Board of Psychology, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4406, FAX (804) 327-4435, or email jaime.hoyle@dhp.virginia.gov.

Basis: The Board of Psychology is authorized under § 54.1-2400 of the Code of Virginia to promulgate regulations that are reasonable and necessary to administer effectively the regulatory system. The action conforms the board's regulation to Chapter 795 of the 2012 Acts of Assembly.

Purpose: The purpose is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform the regulation to the statute. Therefore, there is no controversy in its promulgation.

Substance: The board has amended subsection A of 18VAC125-11-50 to provide that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board of Psychology (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The Board of Psychology concurs with the analysis.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

18VAC125-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).
2. For a minimum of 60 calendar days following the publication of a proposed regulation.
3. For a minimum of 30 calendar days following the publication of a repropoed regulation.
4. For a minimum of 30 calendar days following the publication of a final adopted regulation.
5. For a minimum of 30 calendar days following the publication of a fast-track regulation.
6. For a minimum of 21 calendar days following the publication of a notice of periodic review.
7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4806; Filed November 3, 2016, 3:41 p.m.

BOARD FOR PROFESSIONAL SOIL SCIENTISTS, WETLAND PROFESSIONALS, AND GEOLOGISTS

Fast-Track Regulation

Title of Regulation: 18VAC145-11. Public Participation Guidelines (amending 18VAC145-11-50).

Statutory Authority: §§ 2.2-4007.02 and 54.1-201 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Kathleen R. Nosbisch, Executive Director, Board for Professional Soil Scientists, Wetland Professionals, and Geologists, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (866) 465-6206, or email soilscientist@dpor.virginia.gov.

Basis: The Board for Professional Soil Scientists, Wetland Professionals, and Geologists is authorized under § 54.1-201 of the Code of Virginia to promulgate regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners, and to effectively

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administer the regulatory system administered by the regulatory board. The amendments conform to Chapter 795 of the 2012 Acts of Assembly, which provides that in formulating any regulation or in evidentiary hearings on regulations, an interested party shall be entitled to be accompanied by and represented by counsel or other qualified representative.

Purpose: The purpose of this action is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform to the statute. Therefore, there is no controversy in its promulgation.

Substance: The amendment provides that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board for Professional Soil Scientists, Wetland Professionals, and Geologists (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02. "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel

or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The agency concurs with the approval.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

18VAC145-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an

opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropoed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

5. For a minimum of 30 calendar days following the publication of a fast-track regulation.

6. For a minimum of 21 calendar days following the publication of a notice of periodic review.

7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4922; Filed October 28, 2016, 5:02 p.m.

BOARD FOR WATERWORKS AND WASTEWATER WORKS OPERATORS AND ONSITE SEWAGE SYSTEM PROFESSIONALS

Fast-Track Regulation

Title of Regulation: 18VAC160-11. Public Participation Guidelines (amending 18VAC160-11-50).

Statutory Authority: §§ 2.2-4007.02 and 54.1-201 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 12, 2017.

Agency Contact: Trisha Henshaw, Executive Director, Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email waterwasteoper@dpor.virginia.gov.

Basis: The Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals is authorized under § 54.1-201 of the Code of Virginia to promulgate regulations necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners, and to effectively administer the regulatory system administered by the regulatory board. The amendments conform to Chapter 795 of the 2012 Acts of Assembly, which provides that in formulating any regulation or in evidentiary hearings on regulations, an interested party shall be entitled to be accompanied by and represented by counsel or other qualified representative.

Purpose: The purpose of this action is clarity and conformity to the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: The amendment was recommended by the Department of Planning and Budget and is intended to merely conform to the statute. Therefore, there is no controversy in its promulgation.

Substance: The amendment provides that interested persons may be accompanied by and represented by counsel or other representative when presenting their views in the promulgation of any regulatory action.

Issues: Other than conformity and consistency between law and regulation, there are no primary advantages or disadvantages to the public in implementing the amended provisions, since the provisions are already in the Code of Virginia. There are no primary advantages and disadvantages to the agency or the Commonwealth.

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Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,¹ the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative."

Chapter 795 of the 2012 Acts of Assembly added to § 2.2-4007.02, "Public participation guidelines" of the Code of Virginia that interested persons also be afforded an opportunity to be accompanied by and represented by counsel or other representative. Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes.

Localities Particularly Affected. The proposed amendment does not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendment does not significantly affect employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property.

Real Estate Development Costs. The proposed amendment does not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendment does not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendment does not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendment does not adversely affect businesses.

Localities. The proposed amendment does not adversely affect localities.

Other Entities. The proposed amendment does not adversely affect other entities.

¹ See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

Agency's Response to Economic Impact Analysis: The board concurs with the approval.

Summary:

Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.

Part III

Public Participation Procedures

18VAC160-11-50. Public comment.

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).

2. For a minimum of 60 calendar days following the publication of a proposed regulation.

3. For a minimum of 30 calendar days following the publication of a repropoed regulation.

4. For a minimum of 30 calendar days following the publication of a final adopted regulation.

- 5. For a minimum of 30 calendar days following the publication of a fast-track regulation.
- 6. For a minimum of 21 calendar days following the publication of a notice of periodic review.
- 7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R17-4823; Filed October 28, 2016, 5:02 p.m.



TITLE 22. SOCIAL SERVICES

STATE BOARD OF SOCIAL SERVICES

Fast-Track Regulation

Title of Regulation: 22VAC40-670. Degree Requirements for Family Services Occupational Group (amending 22VAC40-670-20).

Statutory Authority: §§ 63.2-217 and 63.2-219 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: December 28, 2016.

Effective Date: January 13, 2017.

Agency Contact: Holly Clary, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7196, or email holly.clary@dss.virginia.gov.

Basis: Section 63.2-217 of the Code of Virginia provides the board general authority for the development of regulations to carry out the purposes of Title 63.2. Section 63.2-219 of the Code of Virginia requires the board to establish employee entrance and performance standards.

Purpose: The amendments are necessary for effective recruitment of qualified individuals to fill positions assigned to the Family Services Occupational Group. The amendments also clarify requirements for promotion and consideration for hire by other local departments of individuals employed in the Family Service Occupational Group or its equivalent prior to January 1, 1999, who do not meet the degree requirements.

Information regarding training was revised to be consistent with child welfare training requirements. The amendments comply with federal and state laws and ensure appropriate oversight of local departments who are providing vital services that protect the health, safety, and welfare of citizens.

Rationale for Using Fast-Track Rulemaking Process: Section 2.2-4012.1 of the Code of Virginia allows state agencies to use a fast-track rulemaking process to expedite regulatory changes that are expected to be noncontroversial. The amendments to the regulation incorporate requirements of federal and state laws and make technical corrections. The amended regulation will have a positive impact on hiring in local departments of social services. As a result, no objections are anticipated.

Substance: The amendment allows evaluation of individuals who are in their final semester of a degree program at the time of application for a position and who, upon completion of the degree program, would meet the degree requirement prior to the employment date.

Issues: The advantage of this regulatory action to the agency and to the public is that it makes the requirements of the regulation favorable for individuals seeking employment and for local departments in staffing positions assigned to the Family Services Occupational Group, while remaining in compliance with the requirements of federal and state laws. There are no disadvantages to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The State Board of Social Services (Board) proposes to permit individuals in their last semester of a degree program to be evaluated for positions in the Family Services Occupational Group at local departments of social services. Additionally, the Board proposes to correct a date for consistency with the Code of Virginia and revise language for clarity.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Code of Virginia § 63.2-219 states that "... the Department and its local boards or local departments shall not employ any person in any family-services specialist position that provides direct client services unless that person holds at least a baccalaureate degree." The current regulation requires that in order to be evaluated for vacancies in the Family Services Occupational Group, applicants must possess a baccalaureate degree.¹ This prevents individuals who are near completion of their degree from being considered for positions. The Board's proposed language permits individuals in their last semester of a qualifying baccalaureate degree program to be evaluated for Family Services Occupational Group employment, but still requires the individual to have earned the degree prior to the start of employment. This is beneficial for employing local departments of social services in that their pool of candidates

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to consider for open positions can be greater without lowering the degree requirement; it is beneficial for individuals in their last semester in that if they can be considered for employment before graduation, they are more likely to be employed soon after graduation.

Businesses and Entities Affected. The proposed amendments affect the 120 local departments of social services in the Commonwealth.

Localities Particularly Affected. The proposed amendments do not disproportionately affect specific localities.

Projected Impact on Employment. The proposed amendments are unlikely to affect total employment, but may permit graduating seniors to gain employment sooner.

Effects on the Use and Value of Private Property. The proposed amendments do not significantly affect the use and value of private property.

Real Estate Development Costs. The proposed amendments do not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed amendments do not affect costs for small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendments do not adversely affect small businesses.

Adverse Impacts:

Businesses. The proposed amendments do not adversely affect businesses.

Localities. The proposed amendments do not adversely affect localities.

Other Entities. The proposed amendments do not adversely affect other entities.

¹ The degree must either 1) be in counseling, gerontology, guidance and counseling, family and child development, psychology, sociology, or another related degree, or 2) be accompanied by a minimum of two years appropriate and related experience in a human services related area.

Agency's Response to Economic Impact Analysis: The Department of Social Services concurs with the September 28, 2016, economic impact analysis prepared by the Department of Planning and Budget.

Summary:

The amendments permit individuals in their last semester of a degree program to be evaluated for positions in the Family Services Occupational Group at local departments of social services.

22VAC40-670-20. Policy Minimum employee entrance and performance standards.

~~Section 63.2-219 of the Code of Virginia requires the board to establish minimum entrance and performance standards.~~

A. In order to be evaluated for vacancies hired for positions in the Family Services Occupational Group, applicants individuals shall possess prior to their employment date a minimum of:

- ~~1. Possess a minimum of a A~~ baccalaureate degree in the human services field; or
- ~~2. Possess a minimum of a A~~ baccalaureate degree in any field accompanied by a minimum of two years appropriate and related experience in a human services related area; ~~or.~~

B. In order to be evaluated for positions in the Family Services Occupational Group, individuals who do not meet the degree requirement at the time of application for employment must be in their last semester of a degree program that will meet the requirements of subsection A of this section.

~~3. C. To be considered for promotion, persons currently individuals employed in the Family Services Occupational Group or its equivalent without a break in service by a local department prior to September 1, 1990 who do not meet the requirements of subdivision 1 or 2 of this section, January 1, 1999, shall possess four:~~

1. Meet the requirements in subsection A or B of this section; or
2. Possess four years of appropriate and related experience in a human services area and must have successfully completed all available competency-based required training related to the promotional area.

~~If an individual does not indicate possession of the requirements in subdivision 1, 2, or 3 of this section on the application, he will not be qualified for the position.~~

~~Once the applicant has noted the possession of a baccalaureate degree in the human services field on the application or resume, the evaluation process will continue using knowledge, skill, and ability criteria.~~

D. For individuals who indicate meeting the requirements in subsection A, B, or C of this section on the application for employment, the evaluation process will continue using knowledge, skill, and ability criteria. For individuals who do not indicate meeting the requirements in subsection A, B, or C of this section on the application for employment, the individuals will be unqualified and will not be further evaluated.

E. Individuals employed in the Family Services Occupational Group or its equivalent without a break in service by a local department prior to September 1, 1990 January 1, 1999, who do not meet the requirements of subdivision 1, 2, or 3 of this section subsection A of this section, will be retained in their current occupational title or

any lesser occupational title without having to meet the above requirements of subsection A of this section. This includes the same occupational title in another local department. These individuals may be considered for employment in the same occupational title in another local department provided that there is no break in service. These individuals will be required to meet the requirements of subdivision 1, 2, or 3, subsection A, B, or C of this section for application to any higher occupational title in the Family Services Occupational Group other than their current occupational title.

VA.R. Doc. No. R17-4758; Filed November 7, 2016, 4:12 p.m.

Proposed Regulation

Title of Regulation: 22VAC40-920. Appeals of Financial Recoveries for Local Departments of Social Services (adding 22VAC40-920-10 through 22VAC40-920-40).

Statutory Authority: § 63.1-217 of the Code of Virginia; 2 CFR 200.341.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 27, 2017.

Agency Contact: David Morrison, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7266, or email david.morrison@dss.virginia.gov.

Basis: The State Board of Social Services has the authority to promulgate this regulation under § 63.2-217 of the Code of Virginia, which provides that the board shall adopt regulations, not in conflict with Title 63.2 of the Code of Virginia, as may be necessary or desirable to carry out the purpose of such title.

The Code of Federal Regulations states in 2 CFR 200.341 that the department will provide the local department an opportunity to appeal an enforcement action to which the local department is entitled to under any statute or regulation. Currently, there is no statute or regulation under which local departments are entitled to appeal an enforcement action.

Purpose: The Virginia Department of Social Services (DSS) needs to provide local departments the statutory right to appeal an enforcement action. A new regulation will provide clear, understandable requirements for local departments to decide on appealing an enforcement action and will best protect the health, safety, and welfare of the citizens receiving services from the local department.

Substance: The proposed regulation provides local departments the appeals process for any enforcement action taken by DSS. The proposed regulation describes the appeals process specifically for a local department that has an enforcement action taken against it by DSS. Specifically, the proposed regulation (i) defines a notification of a recovery, (ii) provides a timeline of actions for the locality to appeal a recovery, (iii) places the burden of proof on the local department of social services, (iv) provides a timeline for

action and approval of the Commissioner of DSS, and (v) establishes the commissioner's decision as final and binding.

Issues: This action poses no disadvantages to the public or the Commonwealth. The proposed regulation will bring Virginia into compliance with federal regulations affording a local department of social services a right to appeal financial recoveries applied by DSS.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to the federal regulation 2 CFR 200.341,¹ the State Board of Social Services (Board) proposes to establish rules for local departments of social services (local departments) to appeal State Department of Social Services (SDSS) notifications of recovery.

Result of Analysis. The proposed regulation is beneficial in that it will provide a regulatory framework for local departments of social services that contest a notification of recovery and provides standards for the appeal process. However, the proposal to exclude the Commissioner's decisions from judicial review and the proposed timeframes within which to file an appeal and documentation supporting that appeal may be costly for local departments that receive a notification of recovery.

Estimated Economic Impact. The SDSS conducts administrative reviews of funds sent to local departments for programs such as food stamp assistance and temporary assistance for needy families. When through administrative review the SDSS determines that a payment to a local department was too high, it issues a notification of recovery. Examples of causes of payments being too high include incorrectly claiming certain items or activities as being reimbursable and charging too much for rent.² The SDSS recovers the excess payment by reducing a future payment or payments by the amount of the overpayment. No penalty or interest is charged.³

Pursuant to federal regulation 2 CFR 200.341, the Board is required to provide the local departments an opportunity to appeal an enforcement action (notification of recovery) involving federal awards such as food stamp assistance or temporary assistance for needy families. Currently the SDSS provides local departments the ability to appeal a financial recovery in various guidance manuals, but there are no standard rules.⁴ Furthermore, there is no known Virginia statute or regulation addressing this appeals process. Thus, the Board proposes to establish regulatory rules for appeals of notification of recovery by local departments.

The proposed rules establish that local departments have 15 calendar days from the date of notification of a recovery decision to object to it in writing, and 15 calendar days from the date the local department objected in writing to submit all relevant information, documentation or data supporting the appeal. In addition, the Commissioner has 60 days to issue his/her decision. Failure to comply with the timelines would

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result in the loss of the right to appeal. The decision of the Commissioner is final, binding, and is not subject to judicial review.⁵

Since 2008 there have been 42 notifications of recovery issued. The magnitude of the 42 assessed overpayments ranged from \$15 to \$2.9 million; however, most have been under \$1,000. Of the 42 cases, only two have been appealed.⁶

The proposed action will establish the regulation for the appeals process and ensure compliance with the federal regulation. The rules will also inform all parties as to their respective appeal rights. Moreover, the proposed regulation will bring consistency to the process. Finally, the rules will have the force of law, which is more enforceable compared to guidance manuals.

The stated intent of the proposed regulation is to provide a regulatory framework in which a local department is afforded an opportunity to appeal an enforcement action involving federal awards. Some of the proposed rules may be costly for local departments that receive a notification of recovery. For example, the proposed regulation will exclude the Commissioner's decisions from judicial review. This proposed requirement is not necessary for compliance with federal regulation 2 CFR 200.341. This particular change prevents local departments from challenging decisions in court. Similarly, the right to appeal will be lost if a local department fails to note its objection within 15 calendar days or fails to make its case with information, documents, and data within 15 calendar days after the notice of appeal. In some cases, a large dollar amount may be at issue, and the issue may be complicated requiring research. In such cases, the proposed deadlines may not be sufficient to give the local departments enough time to act on recovery decisions, especially during the holiday season. Extending the time lines somewhat would not introduce significant costs for the SDSS, but may enable local departments with staff busy on other matters sufficient time to determine whether they should appeal, and to prepare documents for appeal if necessary.

Businesses and Entities Affected. The proposed appeal process applies to 120 local departments of social services.

Localities Particularly Affected. The proposed changes apply statewide.

Projected Impact on Employment. No impact on employment is expected.

Effects on the Use and Value of Private Property. No impact on the use and value of private property is expected.

Real Estate Development Costs. No impact on real estate development costs is expected.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The proposed regulation does not apply to small businesses.

Alternative Method that Minimizes Adverse Impact. No adverse impact on small businesses is expected.

Adverse Impacts:

Businesses. The proposed regulation does not apply to non-small businesses.

Localities. The proposed regulation may adversely affect local departments of social services and localities as discussed above.

Other Entities. The proposed regulation does not apply to other entities.

¹ See http://www.ecfr.gov/cgi-bin/text-idx?SID=30737db065c6bf2b497c1aaee3cd9a3&mc=true&node=pt2.1.200&rgn=div5#se2.1.200_1341

²Source: State Department of Social Services

³Ibid

⁴ See the Brief Summary section of the Agency Background Document: http://townhall.virginia.gov/1/GetFile.cfm?File=C:\TownHall\docroot\73\4369\7486\AgencyStatement_DSS_7486_v3.pdf

⁵ The proposed process does not provide an opportunity for the local departments to ask the Commissioner to reconsider the decision.

⁶Source: State Department of Social Services

Agency's Response to Economic Impact Analysis: The Department of Social Services reviewed the economic impact analysis prepared by the Department of Planning and Budget and has no comments.

Summary:

The proposed regulation establishes procedures for local departments of social services to appeal a financial recovery levied by the Virginia Department of Social Services.

CHAPTER 920

APPEALS OF FINANCIAL RECOVERIES FOR LOCAL DEPARTMENTS OF SOCIAL SERVICES

22VAC40-920-10. Definitions.

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

"Commissioner" means the commissioner of the department, his designee, or his authorized representative.

"Department" means the Virginia Department of Social Services.

"Local department" means the local department of social services of any county or city in the Commonwealth.

"Notification of a recovery" means any report, letter, email, or other type of communication describing the noncompliance action or recovery.

22VAC40-920-20. Objections to notifications of recovery.

A local department that wants to appeal a notification of recovery shall:

TITLE 23. TAXATION**DEPARTMENT OF TAXATION****Fast-Track Regulation**

Title of Regulation: **23VAC10-140. Income Tax Withholding (amending 23VAC10-140-10).**

Statutory Authority: § 58.1-203 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: January 27, 2017.

Effective Date: February 13, 2017.

Agency Contact: James Savage, Tax Policy Analyst, Department of Taxation, P.O. Box 27185, Richmond, VA 23219, telephone (804) 371-2301, or email james.savage@tax.virginia.gov.

Basis: Section 58.1-203 of the Code of Virginia provides that the "Tax Commissioner shall have the power to issue regulations relating to the interpretation and enforcement of the laws of this Commonwealth governing taxes administered by the Department." The authority for the current regulatory action is discretionary.

Purpose: This regulatory action is needed to amend 23VAC10-140-10 that does not conform to legislative changes and current tax policy. Many of the definitions in this section are repealed because they provide no additional guidance to clear and unambiguous statutes. Other definitions are updated so that they conform to legislative changes and current tax policy. Amendment of this section does not reflect any change in existing tax policy and has no impact on the administration of the tax. As this regulatory action does not reflect a change in existing departmental policy, it will have no effect on the health, safety, and welfare of citizens.

Rationale for Using Fast-Track Rulemaking Process: The fast-track rulemaking process is intended for proposed regulations that are expected to be noncontroversial. As the regulation will be amended to reflect current law and will not make any changes to the department's current policy regarding income tax withholding, this action is not expected to be controversial. The department has issued numerous published ruling letters and other public documents that address income tax withholding. These public documents and recent law changes form the basis for the proposed changes to this regulation.

Substance: This regulatory action will amend 23VAC10-140-10, relating to income tax withholding definitions. Many of these definitions are outdated because they have not been amended to conform to the following legislation enacted by the General Assembly:

- House Bill 1734 (1991 Acts of Assembly, Chapter 362) and Senate Bill 765 (1991 Acts of Assembly, Chapter 456): This legislation amended Virginia withholding

1. Within 15 calendar days of issuance of a notification of a recovery, provide written notice to the commissioner of its objection to the recovery; and

2. Within 15 calendar days of filing its notice of objection with the commissioner, submit all relevant additional information, documentation, or other pertinent data to the commissioner supporting its appeal of the recovery, termination action, or the disallowed costs.

22VAC40-920-30. Dismissal; burden of proof.

A. If the local department fails to appeal the recovery within the timeframe specified in 22VAC40-920-20, the right to appeal is lost.

B. The local department has the burden of proof to provide additional information that would reduce or remove the recovery.

C. If the local department fails to timely file a notice of appeal or fails to timely provide additional information for appealing the recovery, the requirements of the recovery shall become effective 30 calendar days from the date of issuance of the notification of a recovery.

22VAC40-920-40. Final decision by the commissioner.

A. The commissioner shall provide an opportunity for a hearing, reasonable notice of which shall be given in writing to the local department. All hearings and meetings related to appeals shall be held in the Richmond, Virginia, area.

1. The local department is entitled to be represented by counsel at all hearings and meetings related to appeals.

2. The local department will forfeit its right to further its appeal if it fails to show for the hearing, unless the commissioner approves the local department's request to reschedule the hearing.

B. The commissioner shall issue a final decision within 60 days following the date the local department filed its objection with the commissioner. The final decision shall be based on the commissioner's review of the recovery details in addition to the evidence, information, and documentation provided by the local department pertaining to the recovery being appealed. The final decision shall be made in accordance with all applicable laws, regulations, and policies.

C. The final decision of the commissioner is (i) final, (ii) binding, and (iii) not subject to judicial review.

D. The local department shall implement the decision within 30 days of the date of the final decision.

VA.R. Doc. No. R16-4569; Filed November 7, 2016; 11:27 a.m.



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requirements to conform to federal withholding requirements. See public document 91-297.

- House Bill 950 (1987 Acts of Assembly, Chapter 531); Senate Bill 623 (1993 Acts of Assembly, Chapter 54), and House Bill 1079 (2014 Acts of Assembly, Chapter 225): This legislation amended Virginia withholding requirements to require withholding of tax on certain prizes paid by the Virginia Lottery.
- Senate Bill 389 (1992 Acts of Assembly, Chapter 519): This legislation excluded from withholding individual retirement plans and simplified employee pension plans.

Many of these definitions are also unnecessary because they provide no additional guidance to clear and unambiguous statutes. Therefore, this regulatory action will repeal definitions that are unnecessary and will update all other definitions to conform legislative changes and current tax policy. Amending this section does not reflect any change in existing tax policy and will have no impact on the administration of tax. Because of this, the amendment of this section is not expected to be controversial.

Issues: This regulatory action will ease voluntary taxpayer compliance and the Department of Tax's administration of the state tax laws by amending a regulation section that does not conform to legislative changes and current policy. Amending of this regulatory section will result in no disadvantage to the public or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Department of Taxation (Department) proposes to revise or repeal several definitions related to income tax withholding.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. This regulation contains definitions related to income tax withholding that are either unnecessary in light of clear and unambiguous statutes or are in conflict with statutes or current tax policy. For example, the current definition of "employee" does not conform to Chapter 519 of 1992 Acts of Assembly and therefore the Department proposes a new definition to replace the old one. The definition of "wages" is also being revised due to enactment of various other statutes. The Department further proposes to repeal definitions of "commissioner," "miscellaneous payroll period," and "payroll period" because they are unnecessary. Since the proposed amendments have no impact on existing tax policy, no significant economic impact is expected. However, the proposed changes are beneficial because they will improve the clarity of the regulation.

Businesses and Entities Affected. This regulation applies to individuals and businesses subject to income tax withholding. In fiscal year 2014, approximately 244,598 entities paid Virginia income tax withholding. In addition, according to the

2013 North American Industry Classification System, there were 1,154 certified public accountant (CPA) establishments, 628 non-CPA tax preparation establishments, and 1,187 non-CPA establishments offering accounting, bookkeeping, or billing services along with payroll services in Virginia.

Localities Particularly Affected. The proposed changes apply statewide.

Projected Impact on Employment. No impact on employment is expected.

Effects on the Use and Value of Private Property. No impact on the use and value of private property is expected.

Real Estate Development Costs. No impact on real estate development costs is expected.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Costs and Other Effects. The Department of Taxation estimates that there are about 143,612 small businesses with employees in Virginia. In addition, almost all tax preparation or payroll service providers are small businesses. The proposed amendments do not impose costs on these entities, but will benefit them by improving the clarity of the regulation.

Alternative Method that Minimizes Adverse Impact. No adverse impact on small businesses is expected.

Adverse Impacts:

Businesses. A small percentage of the entities this regulation applies to is believed to be non-small businesses. The proposed amendments do not impose any adverse impact on them.

Localities. The proposed amendments will not adversely affect localities.

Other Entities. The proposed amendments will not adversely affect other entities.

Agency's Response to Economic Impact Analysis: The Department of Taxation agrees with the Department of Planning and Budget's economic impact analysis.

Summary:

The amendments repeal definitions that are unnecessary and update other definitions to conform to legislative changes and current tax policy. The amendments neither reflect a change in existing tax policy nor have an impact on the administration of the tax.

23VAC10-140-10. Definitions.

~~For the purpose of this chapter and unless otherwise required by the context~~ The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Commissioner" means the Tax Commissioner.

"Employee" ~~includes an individual, whether a resident or nonresident of Virginia, who performs or performed any service in Virginia for wages, or a resident of Virginia who performs or performed any service outside Virginia for wages. The word "employee" also includes an officer, employee, or elected official of the United States, Virginia, or any other state or any territory, or any political subdivision thereof, or the District of Columbia, or any agency or instrumentality of any one or more of the foregoing or an officer of a corporation. means "employee" as defined in § 58.1-460 of the Code of Virginia. The relationship of employer and employee is determined in accordance with the test set forth in 26 CFR 31.3401(c)-1.~~

"Employer" means the Commonwealth of Virginia, or any of its political subdivisions, the United States, or any agency or instrumentality of any one or more of the foregoing, or the person, whether a resident or a nonresident of Virginia, for whom an individual performs or performed any service as an employee, except that:

1. If the person, governmental unit, or agency thereof, for whom the individual performs or performed the service does not have control of the payment of the wages for such services, the term "employer" (except as used in the definition of "wages" herein) means the person having control of the payment of such wages. For example, where wages, such as certain types of pensions or retired pay, are paid by a trust and the person for whom the services were performed has no legal control over the payment of such wages, the trust is the "employer."

2. In the case of a person paying wages on behalf of a nonresident person not engaged in trade or business within Virginia or on behalf of any governmental unit or agency thereof not located within Virginia, the term "employer" (except as used in the definition of "wages" herein) means such person.

For Virginia purposes, whether the relationship of employer and employee exists is determined in accordance with the test set forth in U.S. Treasury Reg. Section 31.3401(c)-1.

"Miscellaneous payroll period" means a payroll period other than a daily, weekly, biweekly, semi-monthly, monthly, quarterly, semiannual, or annual payroll period.

"Payroll period" means a period for which a payment of wages is ordinarily made to the employee by his employer.

"Wages" means all remuneration for services performed by an employee for his employer, including the cash value of all remuneration paid in any medium other than cash. Wages paid in any form other than money are measured by the fair value of the goods, lodging, meals or other consideration given in payment for services. "Wages" does not include remuneration paid as follows:

1. As fees to a public official.

2. For agricultural labor where remuneration is paid to workers employed on the farm for services rendered on the farm in the production, harvesting, and transportation of agricultural products to market for the farmer-employer.

3. For domestic service in a private home, local college club, or local chapter of a college fraternity or sorority.

4. For service not in the course of the employer's trade or business performed in any calendar quarter by an employee, unless the cash remuneration paid for the service is \$50 or more and the service is performed by an individual who is regularly employed by the employer to perform the service.

The term "service not in the course of the employer's trade or business" includes services that do not promote or advance the trade or business of the employer. As used in this section, the term does not include service not in the course of the employer's trade or business performed on a farm operated for profit or domestic service in a private home, local college club, or local chapter of a college fraternity or sorority. Remuneration paid for service performed for a corporation does not come within the exception.

An individual is "regularly employed by an employer during a calendar quarter" only if:

(i) The individual performs service not in the course of the employer's trade or business for such employer for some portion of the day on at least 24 days (whether or not consecutive) during such calendar quarter; or

(ii) The individual was regularly employed (as determined under subparagraph (i) above) by the employer in the performance of service not in the course of the employer's trade or business during the preceding calendar quarter.

5. For services performed by a duly ordained, commissioned, or licensed minister of a church in the exercise of the ministry or by a member of a religious order in the exercise of duties required by such order.

6. For services not in the course of the employer's trade or business, to the extent paid in any medium other than cash.

7. To, or on behalf of, an employee or his beneficiary from or to a trust described in IRC § 401(a) which is exempt from tax under IRC § 501(a) at the time of such payment unless such payment is made to an employee of the trust as remuneration for services rendered as such employee and not as a beneficiary of the trust. A qualified cash or deferred arrangement meeting the requirements of IRC § 401(k) is deemed to be a trust described in IRC § 401(a).

8. To, or on behalf of, an employee or his beneficiary under or to an annuity plan which, at the time of such

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payment, meets the requirements of IRC § 401(a)(3), (4), (5), and (6).

~~9. For acting in or service as a member of the crew of a (i) motion picture feature film, (ii) television series or commercial, or (iii) promotional film filmed totally or partially in Virginia by an individual or corporation which conducts business in Virginia for fewer than 90 days of the tax year and when such film series or commercial is processed, edited and marketed outside Virginia. Every such individual or corporation shall, immediately after the filming of such portion of the film, series or commercial filmed in Virginia, file with the Commissioner on forms furnished by the Department, a list of the names and social security account numbers of each actor or crew member who is a resident of Virginia and is compensated by such individual or corporation.~~

~~The exclusion from "wages" of the remuneration set forth in subdivisions 1 through 9 above does not exempt the recipient from income tax liability for such remuneration.~~

"Wages" means "wages" as defined in § 58.1-460 of the Code of Virginia. The exclusion from wages of a payment does not exempt the payee from income tax liability for the payment. However, the payee and the payor may agree pursuant to § 58.1-466 of the Code of Virginia to have amounts withheld from payments that are not considered wages. A payor who voluntarily withholds income tax consents to be treated as an employer making payment of wages subject to Article 16 (§ 58.1-460 et seq.) of Chapter 3 of Title 58.1 of the Code of Virginia and this chapter.

VA.R. Doc. No. R17-4745; Filed November 2, 2016, 3:53 p.m.

GENERAL NOTICES/ERRATA

AIR POLLUTION CONTROL BOARD

State Implementation Plan Revision - Clean Air Interstate Rule Regulations Repeal

Notice of action: The Department of Environmental Quality (DEQ) is announcing an opportunity for public comment on a proposed revision to the Commonwealth of Virginia State Implementation Plan (SIP). The SIP is a plan developed by the Commonwealth in order to fulfill its responsibilities under the federal Clean Air Act to attain and maintain the ambient air quality standards promulgated by the U.S. Environmental Protection Agency (EPA) under the Act. The Commonwealth intends to submit the regulations to the EPA as a revision to the SIP in accordance with the requirements of § 110(a) of the federal Clean Air Act.

Regulations affected: The regulation of the board affected by this action is the Regulation for Emissions Trading, specifically, the NOX Annual Trading Program, the NOX Ozone Season Trading Program, and the SO2 Annual Trading Program (Parts II, III, and IV of 9VAC5-140), Revision D16. These regulations comprise the Clean Air Interstate Rule (CAIR) Program.

Purpose of notice: DEQ is seeking comment on the issue of whether the regulation amendments should be submitted as a revision to the SIP.

Public comment period: November 28, 2016, to December 28, 2016.

Public hearing: A public hearing may be conducted if a request is made in writing to the contact listed below. In order to be considered, the request must include the full name, address, and telephone number of the person requesting the hearing and be received by DEQ by the last day of the comment period. Notice of the date, time, and location of any requested public hearing will be announced in a separate notice, and another 30-day comment period will be conducted.

Public comment stage: The regulation amendments are exempt from the state administrative procedures for adoption of regulations contained in Article 2 of the Administrative Process Act by the provisions of § 2.2-4006 A 4 c of the Code of Virginia because the amendments are necessary to meet the requirements of the federal Clean Air Act and do not differ materially from the pertinent EPA regulations. Since the amendments are exempt from administrative procedures for the adoption of regulations, DEQ is accepting comment only on the issue cited under "purpose of notice" and not on the content of the regulation amendments.

Description of proposal: CAIR was an emissions trading program intended to control nitrogen oxides (NO_x) and sulfur dioxide (SO₂), which contribute to harmful levels of fine particle matter and ozone in downwind states. On August 8, 2011 (76 FR 48208), EPA replaced CAIR with the Cross-

State Air Pollution Rule (CSAPR). CSAPR Phase 1 implementation was scheduled for 2015, with Phase 2 beginning in 2017. CSAPR is being implemented in Virginia under the associated federal implementation plan (FIP) and no further regulatory action is needed at the state level for this purpose. Chapter 291 of the 2011 Acts of Assembly requires that §§ 10.1-1327 and 10.1-1328 of the Code of Virginia, and any regulations implementing CAIR, be repealed when facilities in the Commonwealth become subject to the requirements of a FIP adopted by EPA in response to the remand of CAIR. Because CAIR has been replaced by CSAPR, and Virginia is subject to the CSAPR FIP, Virginia may now, as required by Chapter 291, repeal its CAIR regulations.

Federal information: This notice is being given to satisfy the public participation requirements of federal regulations (40 CFR 51.102) and not any provision of state law. The proposal will be submitted as a revision to the Commonwealth of Virginia SIP under § 110(a) of the federal Clean Air Act in accordance with 40 CFR 51.104. It is planned to submit all provisions of the proposal as a revision to the SIP.

How to comment: DEQ accepts written comments by email, fax, and postal mail. In order to be considered, comments must include the full name, address, and telephone number of the person commenting and be received by DEQ by the last day of the comment period. All materials received are part of the public record.

To review regulation documents: The proposal and any supporting documents are available on the DEQ Air Public Notices for Plans website at <http://www.deq.virginia.gov/Programs/Air/PublicNotices/airplansandprograms.aspx>. The documents may also be obtained by contacting the DEQ representative named below. The public may review the documents between 8:30 a.m. and 4:30 p.m. of each business day until the close of the public comment period at the following DEQ locations:

- 1) Main Street Office, 8th Floor, 629 East Main Street, Richmond, VA, telephone (804) 698-4070,
- 2) Southwest Regional Office, 355 Deadmore Street, Abingdon, VA, telephone (276) 676-4800,
- 3) Blue Ridge Regional Office, Roanoke Location, 3019 Peters Creek Road, Roanoke, VA, telephone (540) 562-6700,
- 4) Blue Ridge Regional Office, Lynchburg Location, 7705 Timberlake Road, Lynchburg, VA, telephone (434) 582-5120,
- 5) Valley Regional Office, 4411 Early Road, Harrisonburg, VA, telephone (540) 574-7800,
- 6) Piedmont Regional Office, 4949-A Cox Road, Glen Allen, VA, telephone (804) 527-5020,

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7) Northern Regional Office, 13901 Crown Court, Woodbridge, VA, telephone (703) 583-3800, and

8) Tidewater Regional Office, 5636 Southern Boulevard, Virginia Beach, VA, telephone (757) 518-2000.

Contact Information: Karen G. Sabasteanski, Department of Environmental Quality, 629 East Main Street,

P.O. Box 1105, Richmond, VA 23218, (804) 698-4426, FAX (804) 698-4510, or email karen.sabasteanski@deq.virginia.gov.

DEPARTMENT OF ENVIRONMENTAL QUALITY

SunPower Corporation - Notice of Intent for Small Renewable Energy (Solar) Project Permit by Rule - James City County

SunPower Corporation has provided a notice of intent to the Department of Environmental Quality of its intention to submit the necessary documentation for a permit by rule for a small renewable energy project (solar) in James City County, Virginia, pursuant to 9VAC15-60. The project will consist of a photovoltaic solar facility of up to 35-megawatt capacity on approximately 225 acres of land. The proposed site is situated north and south of Norge Farm Lane and is located about two miles northwest of Lightfoot, Virginia. When fully commissioned the facility will have 430,000 solar panels.

Contact Information: Mary E. Major, Department of Environmental Quality, Renewable Energy Program, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4423, FAX (804) 698-4510, or email mary.major@deq.virginia.gov.

Virginia Solar/Belcher Solar LLC - Notice of Intent for Small Renewable Energy (Solar) Project Permit by Rule - Louisa County

Virginia Solar/Belcher Solar LLC has provided the Department of Environmental Quality a notice of intent to submit the necessary documentation for a permit by rule for a small renewable energy project (solar) in Louisa County, Virginia, pursuant to 9VAC15-60. The project will be located on 1305 acres across multiple parcels, on land east of Waldrop Church Road, north of Bickley Road, south of Desper Road, and west of Harris Creek and Courthouse Road. The solar project conceptually consists of approximately 370,000 335-watt panels plus 35 2.7-megawatt inverters, which will provide a maximum 88.2 megawatts of nameplate capacity.

Contact Information: Mary E. Major, Department of Environmental Quality, 629 East Main Street, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4423, FAX (804) 698-4510, or email mary.major@deq.virginia.gov.

VIRGINIA FIRE SERVICES BOARD

Notice of Periodic Review and Small Business Impact Review

Pursuant to Executive Order 17 (2014) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Department of Fire Programs is conducting a periodic review and small business impact review of **19VAC15-11, Public Participation Guidelines**. The review of this regulation will be guided by the principles in Executive Order 17 (2014).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

The comment period begins November 3, 2016, and ends November 28, 2016.

Comments may be submitted online to the Virginia Regulatory Town Hall at <http://www.townhall.virginia.gov/L/Forums.cfm>. Comments may also be sent to Mohamed Abbamin, Policy Manager, 1005 Technology Park Drive, Glen Allen, VA 23059, telephone (804) 249-1982, FAX (804) 371-3444, or email mohamed.abbamin@vdfp.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

VIRGINIA LOTTERY

Director's Orders

The following Director's Orders of the Virginia Lottery were filed with the Virginia Registrar of Regulations on November 9, 2016. The orders may be viewed at the Virginia Lottery, 900 East Main Street, Richmond, Virginia, or at the office of the Registrar of Regulations, 201 North 9th Street, 2nd Floor, Richmond, Virginia.

Director's Order Number One Hundred Fifty (16)

Virginia Lottery's Scratch Game 1732 "20 Years of Cash!" Final Rules for Game Operation (effective November 4, 2016)

Director's Order Number One Hundred Fifty-One (16)

Virginia Lottery's Scratch Game 1738 "\$4,000,000 Spectacular Riches" Final Rules for Game Operation (effective November 4, 2016)

Director's Order Number One Hundred Fifty-Two (16)

Virginia Lottery's Scratch Game 1736 "10X The Money" Final Rules for Game Operation (effective November 4, 2016)

Director's Order Number One Hundred Fifty-Three (16)

Virginia Lottery's Scratch Game 1686 "Triple Play" Final Rules for Game Operation (effective November 4, 2016)

Director's Order Number One Hundred Fifty-Four (16)

Virginia Lottery's Scratch Game 1709 "Extreme Green" Final Rules for Game Operation (effective November 4, 2016)

Director's Order Number One Hundred Fifty-Seven (16)

"Retailer Recruitment Incentive Promotion" Virginia Lottery Retailer Incentive Program Requirements (This Director's Order is effective nunc pro tunc to October 1, 2016, fully and completely replaces Director's Order 95(15), and shall remain in full force and effect until 90 days after the conclusion of the Incentive Program, unless otherwise extended by the Director)

Director's Order Number One Hundred Fifty-Eight (16)

Virginia Lottery's Scratch Game 1722 "Festive \$50s" Final Rules for Game Operation (effective October 31, 2016)

Director's Order Number One Hundred Fifty-Nine (16)

Virginia Lottery's Scratch Game 1723 "Sneak A Peek" Final Rules for Game Operation (effective October 31, 2016)

Director's Order Number One Hundred Sixty (16)

Virginia Lottery's Scratch Game 1724 "Tacky Sweater Surprise" Final Rules for Game Operation (effective October 31, 2016)

Director's Order Number One Hundred Sixty-One (16)

Virginia Lottery's Scratch Game 1725 "Holiday Riches" Final Rules for Game Operation (effective October 31, 2016)

STATE WATER CONTROL BOARD

Total Maximum Daily Load for the James River Watershed

Purpose of notice: To seek public comment and announce a public meeting on a water quality study by the Department of Environmental Quality (DEQ) for the James River watershed in Lynchburg, Virginia.

Public meeting: Tuesday, December 6, 2016, from 6 p.m. to 8 p.m. at Riveredge Park Community Center, 150 Rocky Hill

Road, Madison Heights, Virginia. In the case of inclement weather, the meeting will be held on Monday, December 12, 2016, from 6 p.m. to 8 pm.

Meeting description: This is the second public meeting on a study to restore water quality in various streams within the James River Watershed.

Description of study: Virginia agencies are working to identify sources of fecal bacteria contamination in stream segments from the James River Watershed in Central Virginia. This contamination exceeds water quality standards and thus, impairs, or decreases, the quality of the water.

The streams segments that will be included in the study are: 10.53 miles James River, 20.8 miles Ivy Creek, 5.89 miles Tomahawk Creek, 6.89 miles Burton Creek, 3.43 miles unnamed tributary to Burton Creek, 10.54 miles Judith Creek, 5.44 miles Fishing Creek, 10.3 miles Blackwater Creek, 8.5 miles Beaver Creek, 7.72 miles Harris Creek, 4.69 miles Dreaming Creek, 3.04 miles Opossum Creek, 6.37 miles Williams Run, 5.17 miles Graham Creek, and 9.46 miles Pedlar River.

During the study, DEQ will develop a total maximum daily load, or TMDL, for the impaired waters. A TMDL is the total amount of a pollutant a water body can contain and still meet water quality standards. To restore water quality, contamination levels have to be reduced to the TMDL amount.

Public comment period: The public comment period on the materials presented at the public meeting begins December 6, 2016, and ends January 6, 2017.

How to comment: DEQ accepts written comments by email, fax, or postal mail. Written comments should include the name, address, and telephone number of the person commenting and be received during the comment period. DEQ also accepts written and oral comments at the public meeting announced in this notice. For additional information, or to submit comments, contact Paula Main, Department of Environmental of Quality, Blue Ridge Regional Office, 7705 Timberlake Road, Lynchburg, VA 24502, telephone (434) 582-6216, or email paula.main@deq.virginia.gov.

Total Maximum Daily Load for McClure River, Big Spraddle Branch, Buffalo Creek, and Roaring Fork

The Department of Environmental Quality (DEQ) seeks written and oral comments from interested persons on the development of total maximum daily loads (TMDLs) for the McClure River, Big Spraddle Branch, Buffalo Creek, and Roaring Fork in Dickenson County, Virginia. These streams are listed on the 2012 § 303(d) TMDL Priority List and Report as impaired due to violations of the state's water quality standards for bacteria.

Section 303(d) of the Clean Water Act and § 62.1-44.19:7 C of the Code of Virginia requires DEQ to develop TMDLs for

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pollutants responsible for each impaired water contained in Virginia's § 303(d) Priority List and Report.

The impaired segments include: 21.76 miles of the McClure River, from the headwaters downstream to the Road Branch confluence near Steinman; 2.31 miles of Big Spraddle Branch, a tributary to the McClure River west of Stratton; 3.25 miles of Buffalo Creek, a tributary to the McClure River north of Nora; 1.08 miles of Roaring Fork, a tributary to the McClure River upstream of Nora.

The final public meeting on the development of the TMDL to address the bacteria impairments for these segments will be held on November 29, 2016, from 6 p.m. to 8 p.m. at the McClure Kiwanis Building located at the intersection of State Route 63 (Dante Mountain Road) and State Route 773 (Herndon Road) in the McClure Community, Dickenson County, Virginia.

The public comment period begins November 29, 2016, and ends December 29, 2016.

A component of a TMDL is the wasteload allocations (WLAs); therefore, this notice is provided pursuant to § 2.2-4006 A 14 of the Code of Virginia for any future adoption of the TMDLs associated WLAs. Information on the development of the TMDLs for these impairments is available upon request. Questions or information requests should be addressed to Martha Chapman, Department of Environmental Quality, Southwest Regional Office, 355-A Deadmore Street, Abingdon, VA 24210, telephone (276) 676-4800, or email martha.chapman@deq.virginia.gov.

Please note, all written comments should include name, address, and telephone number of the person submitting the comments and should be sent to the Department of Environmental Quality contact person listed above.

VIRGINIA CODE COMMISSION

Notice to State Agencies

Contact Information: *Mailing Address:* Virginia Code Commission, General Assembly Building, 201 North 9th Street, 2nd Floor, Richmond, VA 23219; *Telephone:* Voice (804) 786-3591; *Email:* varegs@dls.virginia.gov.

Meeting Notices: Section 2.2-3707 C of the Code of Virginia requires state agencies to post meeting notices on their websites and on the Commonwealth Calendar at <http://www.virginia.gov/connect/commonwealth-calendar>.

Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed: A table listing regulation sections that have been amended, added, or repealed in the *Virginia Register of Regulations* since the regulations were originally published or last supplemented in the print version of the Virginia Administrative Code is available at <http://register.dls.virginia.gov/documents/cumulatab.pdf>.

Filing Material for Publication in the *Virginia Register of Regulations*: Agencies use the Regulation Information System (RIS) to file regulations and related items for publication in the *Virginia Register of Regulations*. The Registrar's office works closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.