



# VIRGINIA

## REGISTER OF REGULATIONS

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Virginia Code Commission

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# THE VIRGINIA REGISTER INFORMATION PAGE

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**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

Unless exempted by law, an agency wishing to adopt, amend, or repeal regulations must follow the procedures in the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). Typically, this includes first publishing 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 proposed regulation 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 of Regulations 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 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 the final regulation contains changes made after publication of the proposed regulation that 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*. Pursuant to § 2.2-4007.06 of the Code of Virginia, any person may request that the agency solicit additional public comment on certain changes made after publication of the proposed regulation. The agency shall suspend the regulatory process for 30 days upon such request from 25 or more individuals, 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 alternative to the standard process set forth in the Administrative Process Act for regulations deemed by the Governor to be noncontroversial. To use this process, the Governor's concurrence is required and advance notice must be provided to certain legislative committees. Fast-track regulations become effective on the date noted in the regulatory action if fewer than 10 persons object to using the process in accordance with § 2.2-4012.1.

## EMERGENCY REGULATIONS

Pursuant to § 2.2-4011 of the Code of Virginia, an agency may adopt emergency regulations if necessitated by an emergency situation or when Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or fewer from its enactment. In either situation, approval of the Governor is required. The emergency regulation is effective upon its filing with the Registrar of Regulations, unless a later date is specified per § 2.2-4012 of the Code of Virginia. Emergency regulations are limited to no more than 18 months in duration; however, may be extended for six months under the circumstances noted in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Virginia Register* and are on the Register of Regulations website at [register.dls.virginia.gov](http://register.dls.virginia.gov).

During the time the emergency regulation is in effect, the agency may proceed with the adoption of permanent regulations in accordance with the Administrative Process Act. 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. **34:8 VA.R. 763-832 December 11, 2017**, refers to Volume 34, Issue 8, pages 763 through 832 of the *Virginia Register* issued on December 11, 2017.

*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.

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# PUBLICATION SCHEDULE AND DEADLINES

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This schedule is available on the Virginia Register of Regulations website (<http://register.dls.virginia.gov>).

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## May 2021 through June 2022

<u>Volume: Issue</u>	<u>Material Submitted By Noon*</u>	<u>Will Be Published On</u>
37:20	May 5, 2021	May 24, 2021
37:21	May 19, 2021	June 7, 2021
37:22	June 2, 2021	June 21, 2021
37:23	June 16, 2021	July 5, 2021
37:24	June 30, 2021	July 19, 2021
37:25	July 14, 2021	August 2, 2021
37:26	July 28, 2021	August 16, 2021
38:1	August 11, 2021	August 30, 2021
38:2	August 25, 2021	September 13, 2021
38:3	September 8, 2021	September 27, 2021
38:4	September 22, 2021	October 11, 2021
38:5	October 6, 2021	October 25, 2021
38:6	October 20, 2021	November 8, 2021
38:7	November 3, 2021	November 22, 2021
38:8	November 15, 2021 ( <b>Monday</b> )	December 6, 2021
38:9	December 1, 2021	December 20, 2021
38:10	December 17, 2021	January 3, 2022
38:11	December 31, 2021	January 17, 2022
38:12	January 14, 2022	January 31, 2022
38:13	January 26, 2022	February 14, 2022
38:14	February 9, 2022	February 28, 2022
38:15	February 23, 2022	March 14, 2022
38:16	March 9, 2022	March 28, 2022
38:17	March 23, 2022	April 11, 2022
38:18	April 6, 2022	April 25, 2022
38:19	April 20, 2022	May 9, 2022
38:20	May 4, 2022	May 23, 2022
38:21	May 18, 2022	June 6, 2022

\*Filing deadlines are Wednesdays unless otherwise specified.

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# PETITIONS FOR RULEMAKING

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## TITLE 2. AGRICULTURE

### BOARD OF AGRICULTURE AND CONSUMER SERVICES

#### Initial Agency Notice

**Title of Regulation: 2VAC5 - a regulation regarding home service contract providers currently does not exist.**

**Statutory Authority:** § 59.1-434.4 of the Code of Virginia.

**Name of Petitioner:** David Sacks.

**Nature of Petitioner's Request:** Petitioner requests that the Board of Agriculture and Consumer Services promulgate regulations governing the issuance and provision of home service contracts to protect the Virginia consumers who purchase these contracts.

**Agency Plan for Disposition of Request:** The Board of Agriculture and Consumer Services will consider this request at its next scheduled meeting following the public comment period. This meeting will occur in July 2021. As of April 12, 2021, the board has not established the date for its July 2021 meeting. The agency will update its plan when this meeting date is established.

**Public Comment Deadline:** May 30, 2021.

**Agency Contact:** Michael Menefee, Program Manager, Charitable and Regulatory Programs, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-3983, or email [michael.menefee@vdacs.virginia.gov](mailto:michael.menefee@vdacs.virginia.gov).

VA.R. Doc. No. PFR21-31; Filed April 12, 2021, 10:46 a.m.

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## TITLE 12. HEALTH

### STATE BOARD OF HEALTH

#### Agency Decision

**Title of Regulation: 12VAC5-371. Regulations for the Licensure of Nursing Facilities.**

**Statutory Authority:** § 32.1-127 of the Code of Virginia.

**Name of Petitioner:** Vic Nicholls.

**Nature of Petitioner's Request:** Virginia regulations must be changed to conform to federal Medicare and Medicaid regulations for long-term care facilities to comply with the clear direction of § 32.1-127 of the Code of Virginia. That law requires that Virginia regulations for hospitals and nursing homes "conform" to "health and safety standards established under provisions of Title XVIII (Medicare) and Title XIX

(Medicaid) of the Social Security Act." 42 CFR Part 483.12VAC5-371, Regulations for the Licensure of Nursing Facilities, contains Virginia licensure regulations for the same facilities. The Virginia licensure regulations not only do not conform to their federal certification counterparts but are weaker across the board. That is, 95% of Virginia NFs and SNFs seek certification for Medicare or Medicaid and thus must comply with the more stringent federal regulations. There is no reason that Virginia regulations for licensing the other 5.0% should be different, and by Virginia law they may not be. A few of the federal regulations allow for waivers in the presence of verified temporary shortages of health personnel or in the presence of equivalent alternative patient safeguards. CMS Medicare SNF waiver authority is re-delegated to the CMS Regional Offices (ROs). Waivers for NFs to provide licensed personnel on a 24-hour basis repose with the states. Life safety code waivers for NFs and Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF/IIDs) are the responsibility of the states (See 42 CFR 483.470(j)(2)(A)). I recommend that the State Board of Health delete the current contents of 12VAC5-371 and incorporate by reference 42 CFR Part 483 to comply with Virginia law. Incorporation by reference rather than mirroring the language will ensure that they are always in compliance with Virginia law and always up to date. I also recommend that the Board of Nursing review 18VAC90-19-250. Criteria for delegation, and other nursing practice regulations to ensure they conform to the federal rules for nursing homes and hospitals. Similarly, the Department of Medical Assistance Services should review its regulations for conformity. A list of waived and emergency regulations, whether for a single home or for the industry, can be maintained on a web page of the Department of Health.

**Agency Decision:** Request granted.

**Statement of Reason for Decision:** The State Health Commissioner, acting on behalf of the State Board of Health, has decided that a standard regulatory action should be initiated.

**Agency Contact:** Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, or email [regulatorycomment@vdh.virginia.gov](mailto:regulatorycomment@vdh.virginia.gov).

VA.R. Doc. No. R20-53; Filed April 7, 2021, 4:51 p.m.

#### Agency Decision

**Title of Regulation: 12VAC5-501. Rules and Regulations Governing the Construction and Maintenance of Migrant Labor Camps.**

**Statutory Authority:** § 32.1-211 of the Virginia Code.

**Name of Petitioner:** Legal Aid Justice Center.

**Nature of Petitioner's Request:** "Dear Commissioner Oliver: We write to follow up on our petitions of March 30 and May 6 requesting rulemaking and immediate protection for the

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## Petitions for Rulemaking

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Commonwealth's farmworker and migrant worker community during this dire health crisis. We just entered June. We must act now, as many migrant workers are already here, imminently arriving, or slated to arrive in the thousands in the coming months.

The Present and Looming Crisis for Farmworkers in the Commonwealth. As we have noted, migrant workers are plainly essential workers, feeding both Virginians and indeed the world, but they are also highly vulnerable to COVID-19, particularly in light of their lack of access to medical care, health insurance, and personal transportation; their incredibly close-quartered living and working conditions (often working shoulder to shoulder); and their often limited English proficiency (leaving them less likely to have access to testing or treatment). Many workers are also older, adding additional risk factors. Additionally, hundreds of these workers will be located on the Eastern Shore, which has been a hotspot both for Virginia and indeed nationwide. Without further protections, they are left abandoned while they work to feed us.

The Commonwealth has not Enacted Enforceable COVID Protections for Farmworkers. Despite numerous petitions from our office for enforceable regulations and protections for farmworkers, we have not seen anything issued beyond recommendations, many of which are untenable or shift the burden to the workers; none of them can be enforced against an employer who chooses not to follow them. Recommendations plainly do not create enforceable protections for workers. That is: None of the Virginia Department of Health's (VDH's) suggestions are mandatory.

Other States Are Proactively Taking Enforceable Measures to Protect Vulnerable Workers. By way of contrast, other state governments, in recognition of the need to treat essential workers as essential, have been implementing measures to protect farmworkers. As we previously noted, in late April and early May in Oregon, temporary regulations were enacted by the Oregon Occupational Safety and Health Administration to require farms to maintain social distancing during work, break and meal periods, and in employer-provided housing and transportation. Oregon also released \$12 million in emergency housing funds, for which a large portion was earmarked for providing safe housing for migrant and seasonable farmworkers. In Wisconsin, in late April, the Wisconsin Department of Health Services issued an emergency order that mandated agricultural employers to take certain steps to prevent the spread of COVID-19.

The Commonwealth Can and Should Do More to Protect Farmworkers. Although some states have indeed begun to take measures to protect their most vulnerable workers, many been derelict in their duties to these workers. Virginia still has the opportunity to be a leader amongst states to enact enforceable protections. Virginia law grants the State Board of Health additional powers that may be used to protect public health

during public health emergencies. Governor Northam declared COVID-19 a communicable disease of public health threat in his state-of-emergency order in March 2020, which has been extended. VDH, moreover, has broad authority to issue orders and special regulations needed to protect public health in emergencies. See § 32.1-13 of the Code of Virginia. It has the authority to issue mandatory requirements for employers to protect farmworkers' health, not just recommendations. VDH additionally has broad oversight over migrant labor camps. See §§ 32.1-203 through 32.1-211 of the Code of Virginia. Thus, pursuant to § 32.1-13 of the Code of Virginia, we again request VDH to promulgate regulations for the following:

1. Requiring Additional COVID-19 Plans Prior to Issuance of License for Migrant Housing. VDH must review and license farmworker housing. In addition to its current checklist, VDH should add additional COVID-19 plans prior to the issuance of any license. 1. Those requirements should include, but not be limited to: (a) Ensuring that employer provided migrant housing sleeping arrangements comply with recommended six feet apart social distancing and are highly ventilated. (b) Providing separate living facilities for workers that are over 60 or have underlying health conditions and have these workers work within six feet of other workers. (c) Requiring designated quarantine sleeping areas with separate cooking and bathing facilities for quarantined workers. (d) Requiring proof of sufficient sanitizing and handwashing supplies. (e) Requiring proof of sufficient masks for all quarantined workers who develop COVID-19 symptoms or test positive for COVID-19. (f) Requiring a designated specific individual responsible for ensuring workers comply with health and sanitation requirements. (g) Requiring a designated specific individual to receive reports from workers who may have COVID-19 symptoms and be able to coordinate and transport such workers to obtain medical services. (h) Requiring a designated specific individual whose sole responsibility is to care for quarantined workers and ensure they have sufficient food, that the quarantine is enforced, and that transportation to medical care is provided.

2. Requiring Employers to Inform Workers about COVID-19 Concerns. In addition to informing workers about the terms and conditions of employment when workers are still in their hometowns, all persons who are recruiting workers for agricultural and migrant employment in Virginia in 2020 must provide detailed information about the risks of COVID-19. That information should include how employers will protect their safety while transporting, housing, and employing them in the United States. Prospective workers should also be advised that they will not be required to pay for any cleaning and sanitizing products and the agricultural employer will have an approved health plan for all workers that includes regular sanitizing of the housing and vehicles and other communal areas. All prospective H-2A and H-2B employees should also be informed that they will receive

health care at no cost should they develop COVID-19 symptoms and need to be tested, and how they will be quarantined if they develop symptoms or test positive.

3. **Requiring Employers to Implement COVID-19 Workplace Protections and Plans.** Employers must plan work crew activity to ensure proper distancing to avoid unnecessary transmission of the disease at work. Additionally, most H-2A worker housing is located in rural areas, and employers normally bus workers into small towns to purchase groceries and obtain banking and financial services. Sufficient vehicles must be available such that workers are not sitting directly next to other workers and sufficient ventilation exists. Given the recent hoarding of essential supplies and food, it is possible that small grocery stores could run out of such items and leave workers or members of the community vulnerable. Moreover, a busload of 50 to 100 or so H-2 workers all entering stores at busy times for local shoppers could drastically increase the likelihood of spreading COVID-19. Therefore, advance arrangements must be made with these services to avoid creating a scarcity of essential food and supplies at grocery stores and to protect against the spread of the virus in these small communities already stressed by the impacts of this global pandemic.

4. **Disallowing Terminations Based on COVID-19.** Under no circumstances should growers or their agents be allowed to terminate and send home H-2A and H-2B workers who are sick with or have been exposed to COVID-19.

5. **Disallowing Evictions from Employer Housing.** H-2A employers (and many H-2B employers) control workers' housing, and have, in the past, revoked workers' access to that housing on short notice. No H-2A or H-2B workers should be evicted or in any way removed from their housing without prior review and approval of the Department of Health (H-2A) and written notification provided to the Mexican Consulate.

6. **Ensuring Medical Coverage and Resources for Migrant Workers.** All medical treatment and costs for all COVID-19 related treatment and medical expenses should be covered by the Commonwealth of Virginia, and no worker should be sent home with any COVID-19 symptoms. In order to help stop the spread of COVID-19, all H-2A and H-2B workers need to know their medical treatment and expenses related to COVID-19 will be fully covered during the time they are working and residing in Virginia. This should include assurances that any worker who is tested for COVID-19 will have those costs covered even if the result is negative for COVID-19. A designated hotline in Spanish capable of receiving information or messages 24 hours a day should be established within the Department of Health to allow workers to report potential symptoms and request medical assistance, and the Departments should have ready access to COVID-19 testing. Workers' compensation coverage needs

to cover H-2A and H-2B workers who contract COVID-19 or must be quarantined due to the virus. These workers would not be exposed to the virus if they had not come to Virginia to perform migrant work.

**Conclusion.** Legal Aid Justice Center reiterates its petition for prompt rulemaking and emergency, enforceable measures to ensure the protection of all farmworkers, their families and communities, and the residents of the Commonwealth of Virginia and asks the Commonwealth to support our most vulnerable workers in these harrowing times."

Agency Decision: Request denied.

Statement of Reason for Decision: This petition for rulemaking was considered by the State Health Commissioner on April 8, 2021. After a review of the information provided, wherein no comments were received, the State Health Commissioner on behalf of the State Board of Health responds as follows:

**Response to Section 1:** Proactively, the Virginia Department of Health has coordinated with both private and state agency stakeholders to convey best practices and guidance to mitigate the spread of COVID-19 within agricultural worker communities. This guidance encompasses the concerns outlined in section 1 of the petition; a sample of available guidance is listed.

- [Meat and Poultry Industry Guidance \(VDH\) \(3/12/2021\)](#)
- [Summary of Options for Managing COVID-19 Exposed, Asymptomatic Meat and Poultry Plant Workers \(3/12/2021\)](#)
- [Poultry Plant Workers Tested for COVID-19 \(VDH\) \(3/12/2021\)](#)
- [Poultry Employer Toolkit for COVID-19 \(VDH\): English, Spanish, Korean, Mandarin Chinese, Arabic, Haitian Creole](#)
- [Meat and Poultry Industry Guidance \(CDC\)](#)
- [Protecting Seafood Processing Workers from COVID-19 \(CDC\)](#)
- [Guidance for Meat and Seafood Processors \(CDC\)](#)
- [Interim Guidance for Migrant Labor Camp Operators and Employees Regarding COVID-19](#)

**Response to Sections 2-3:** In January of 2021, the Virginia Department of Labor and Industry finalized emergency standards to establish requirements for employers to control, prevent, and mitigate the spread of COVID-19. It appears these standards address the concerns of sections 2 and 3 of the petition.

**Response to Sections 4-6:** The Virginia Department of Health does not hold the statutory or regulatory authority to administer or enforce the rules regarding termination of employment or eviction of H-2A or H-2B workers. In regards to treatment and costs associated with COVID-19 treatment, the Virginia Department of Health has embarked on a campaign to ensure

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# Petitions for Rulemaking

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equitable access to COVID-19 testing and vaccines for all Virginians while focusing on vulnerable populations, such as our agriculture workers. Costs associated with COVID-19 testing or vaccines are typically covered by state or federal funds where services are rendered at no cost. It appears the items listed in sections 4-6 fall outside of the scope of authority of the Virginia Department of Health.

Agency Contact: Kristin Marie Clay, Senior Policy Analyst, Virginia Department of Health, 109 Governor Street, 5th Floor, Richmond, VA 23219, telephone (804) 864-7474, or email [kristin.clay@vdh.virginia.gov](mailto:kristin.clay@vdh.virginia.gov).

VA.R. Doc. No. PFR21-17; Filed April 8, 2021, 2:21 p.m.



## TITLE 24. TRANSPORTATION AND MOTOR VEHICLES

### COMMISSION ON THE VIRGINIA ALCOHOL SAFETY ACTION PROGRAM

#### Initial Agency Notice

Title of Regulation: **24VAC35-30. VASAP Case Management Policy and Procedure Manual.**

Statutory Authority: §§ 18.2-271.1 and 18.2-271.2 of the Code of Virginia.

Name of Petitioner: Cynthia Hites.

Nature of Petitioner's Request: "I, Cynthia Hites, a citizen of the Commonwealth of Virginia, pursuant to § 2.2-4007 of the Code of Virginia, do humbly submit this petition.

For years VASAP has been flying blind regarding the number of false positive interlock readings being suffered by their clients.

Unexplained instances of failed interlock readings have classically been attributed to a glitch, or malfunction in an individual device, instead of VASAP admitting the issue is systemic in nature.

Utilizing the electrochemical fuel cell as sensor technology for interlock devices means a very high number of failed readings are expected due to sources other than consumed ethanol (C<sub>2</sub>H<sub>6</sub>O). ASAP has chosen to adopt this vastly inferior technology and has also grossly misapplied it.

In order to evaluate the full scope of effects wrought by using the fuel cell, it is now imperative the VASAP agency strive to quantify how this choice impacts the efficacy of its Interlock Program.

Certain metrics need to be consistently and continually obtained for review in order to properly evaluate the VASAP IID program.

We need to know how many IIDs are installed, and how many failed readings (>.02) occur per device. Then, out of those fails, how many are deemed "violations," and of those "violations" the number of revocation hearings set, the number of clients denied due process by having their interlock time altered by ASAP, and the number of subsequent convictions.

It was estimated during a recent quarterly VASAP meeting that there are 200 failed IID readings per day. If this holds true, and if there are 7000 interlocks installed at any given time, then statistically, after 35 days, every single client has one failed reading; after 70 days that jumps to two failed readings per client, and these numbers are unacceptable.

A high number of failed interlock readings due to high BrAc would clearly be indicative of a failed program. Either the IID machines are detecting non-consumed ethanol at an unacceptably high rate, indicating systemic failure, or despite their installation, people in large numbers are deciding to attempt drunk driving, indicating systemic failure.

For VASAP to continue to neglect the obscenely high number of false positives and operate as if interlocks were reasonably accurate, would be irresponsible and highly suspect.

VASAP owes the citizens of Virginia a level of interlock accountability that, to this date, has not been realized. Without obtaining this empirical data, VASAP can continue to claim program integrity and assert purely anecdotal evidence that the interlock devices are accurate.

I would be very willing to wager that after the number of Virginia's false positives is ascertained, the interlock devices will lose all of their assumed credibility.

Employing any language the agency sees fit, I propose that the following amendment of interlock data acquisition be made to either 24VAC35-30-150, included in the annual VASAP Executive Summary, and/or included in an otherwise appropriate agency document, to be publicly disseminated on a yearly basis.

To be broken down by each individual ASAP, and by case worker, we need to know:

- 1) Number of IIDs installed
- 2) Number of failed IID readings per machine (per client).

Of all the interlock fails, further disseminated by:

- (A) Number of men, and number of women
- (B) Number of fails occurring upon rolling retest
- (C) Number of those clients with readings deemed "violations."
  - a) Number of clients with "violations" being given the benefit of a revocation hearing.
  - b) Number of clients with "violations" being given additional interlock time without being afforded due process.

(D) Number of these revocation hearings resulting in conviction.

Keeping track of these statistics will serve a vital role in affirming program integrity.

Most humbly,

Cynthia Hites"

Agency Plan for Disposition of Request: This petition will be considered by the Commission on Virginia Alcohol Safety Action Program at its quarterly meeting on September 17, 2021.

Public Comment Deadline: September 10, 2021.

Agency Contact: Richard L. Foy, Field Services Specialist, Commission on the Virginia Alcohol Safety Action Program, 1111 East Main Street, Suite 801, Richmond, VA 23219, telephone (804) 786-5895, or email [richard.foy@vasap.virginia.gov](mailto:richard.foy@vasap.virginia.gov).

VA.R. Doc. No. PFR21-32; Filed April 21, 2021, 1:16 p.m.

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# PERIODIC REVIEWS AND SMALL BUSINESS IMPACT REVIEWS

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## TITLE 4. CONSERVATION AND NATURAL RESOURCES

### VIRGINIA SOIL AND WATER CONSERVATION BOARD

#### Agency Notice

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the following regulation is undergoing a periodic review and a small business impact review: **4VAC50-85, Nutrient Management Training and Certification Regulations**. The review will be guided by the principles in Executive Order 14 (as amended July 16, 2018). 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.

Public comment period begins May 10, 2021, and ends May 31, 2021.

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 Virginia Regulatory Town Hall and published in the Virginia Register of Regulations.

Contact Information: Lisa McGee, Policy and Planning Director, Virginia Soil and Water Conservation Board, 600 East Main Street, 24th Floor, Richmond, VA 23219, telephone (804) 786-4378.

## TITLE 12. HEALTH

### STATE BOARD OF HEALTH

#### Agency Notice

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the following regulation is undergoing a periodic review and a small business impact review: **12VAC5-71, Regulations Governing Virginia Newborn Screening Services**. The review will be guided by the principles in Executive Order 14 (as amended July 16, 2018). 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.

Public comment period begins May 10, 2021, and ends May 31, 2021.

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 Virginia Regulatory Town Hall and published in the Virginia Register of Regulations.

Contact Information: Robin Buskey, Policy Analyst, Office of Family Health Services, Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 863-7253.

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#### Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Health conducted a periodic review and a small business impact review of **12VAC5-165, Regulations for the Repacking of Crab Meat**, and determined that this regulation should be retained in its current form. The department is publishing its report of findings dated December 3, 2020, to support this decision.

This regulation meets the criteria set out in Executive Order 14 (2010) because it is necessary to protect public health. The Regulations for the Repacking of Crab Meat (12VAC5-165) pertain to the practice of transferring crab meat from one container of one establishment, and the term is defined in § 28.2-800 in the Code of Virginia, into the container of an establishment certified by the Division of Shellfish Sanitation. This regulation pertains to the source of crabmeat and handling to prevent pathogenic growth in the ready to eat product to protect the consumer.

The Department of Health recommends that this regulation remain in effect with no change. No public comments were received about this regulation during the public comment period, which began December 9, 2019, and ended December 30, 2019. The regulation was amended in 2014.

There is a continuing need for this regulation because the regulation protects public health in regards to consumption of imported crabmeat that is repacked into containers that differ from the original processor. This periodic review is the first evaluation of the regulation since it was amended in 2014. In that time, technology, economic conditions, and other factors have not changed in the area affected by this regulation. No comments were received on this regulation during the public comment period, which began December 9, 2019, and

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# Periodic Reviews and Small Business Impact Reviews

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concluded December 30, 2019. This regulation is required by state law, and is not overly complex. Consistent with the stated objectives of applicable law, it has no negative impact on the regulated community or on small businesses and does not overlap, duplicate, or conflict with federal or state law or regulation. As a result of this periodic review, the Department of Health recommends retention of the existing regulation with no changes.

Contact Information: Danielle Schools, Shellfish Plant Program Manager, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7467.

## TITLE 22. SOCIAL SERVICES

### DEPARTMENT FOR AGING AND REHABILITATIVE SERVICES

#### Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Department for Aging and Rehabilitative Services (DARS) conducted a periodic review and a small business impact review of **22VAC30-20, Provision of Vocational Rehabilitation Services**, and determined that this regulation should be amended. The department is publishing its report of findings dated April 13, 2021, to support this decision.

The agency recommends that the regulation be amended. Upon review of the chapter during the periodic review, DARS identified a few areas that could benefit from minor revisions and clarifications.

The regulation meets the criteria set out in Executive Order 14 (2018) as it is necessary for the protection of public health, safety, and welfare of individuals in the Commonwealth. The regulation ensures vocational rehabilitation (VR) services are provided in accordance with federal laws and regulations and state laws. The regulation provides VR clients and the public clarity with regard to VR eligibility, types of services, participation in the cost of services, and client rights. No comments have been received indicating that the regulation was not clearly written or easily understandable.

There is a continued need for the regulation as it protects the health, welfare, and safety of VR clients. During the periodic review, DARS received one comment regarding pre-employment transition services for youth in psychiatric residential treatment facilities and other temporary congregate residential settings. The regulation is designed to support clarity and ensure transparency in the delivery of VR services in the Commonwealth. The regulation ensures VR services are provided in accordance with federal laws and regulations and state laws. The regulation aligns and supports compliance with the federal Rehabilitation Act of 1973 (29 USC § 701 et seq.) and the ensuing federal VR regulations found at 34 CFR Part

361. The regulation does not conflict with federal or state law or regulation. The regulation ensures fidelity to the federal and state intent of the VR program. The chapter was last revised in 2018 to bring the existing regulation into conformity with the federal regulations found at 34 CFR Part 361 that were amended in 2016. During the 2018 revision, 22VAC30-20 was amended to (i) provide for pre-employment transition services for students with disabilities; (ii) require that a client obtain competitive employment in an integrated setting before the client's vocational rehabilitation case be closed with the client obtaining a successful employment outcome; (iii) disallow the case of a vocational rehabilitation client to be closed as successful if the client is earning less than the minimum or customary wages or benefits paid for the client's employment; and (iv) require that individuals with disabilities receive vocational counseling before they can be employed in positions earning less than minimum or customary wages or benefits paid for their employment. There is a no small business impact as a result of this regulation.

Contact Information: Charlotte Arbogast, Policy Analyst, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7063, FAX (804) 662-7663, TDD (800) 464-9950, or email [charlotte.arbogast@dars.virginia.gov](mailto:charlotte.arbogast@dars.virginia.gov).

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#### Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Department for Aging and Rehabilitative Services conducted a periodic review and a small business impact review of **22VAC30-50, Policies and Procedures for Administering the Commonwealth Neurotrauma Initiative Trust Fund**, and determined that this regulation should be amended. Upon review, DARS identified several areas that could benefit from minor revisions. The changes align the regulatory chapter with the Code of Virginia and current practices and reduce potential ambiguities.

The fast-track regulatory action to amend 22VAC30-50, which is published in this issue of the Virginia Register, serves as the report of findings.

Contact Information: Charlotte Arbogast, Policy Advisor, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7063, FAX (804) 662-7663, TDD (800) 464-9950, or email [charlotte.arbogast@dars.virginia.gov](mailto:charlotte.arbogast@dars.virginia.gov).

### STATE BOARD OF SOCIAL SERVICES

#### Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Social Services conducted a periodic review and a small business impact review of

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## Periodic Reviews and Small Business Impact Reviews

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### **22VAC40-221, Additional Daily Supervision Rate Structure.**

This regulation is essential in determining additional daily supervision (ADS) payments for children in foster care, adopted youth, and youth participating in the kinship guardianship assistance program. There were no public comments during the NOIRA stage. This regulation does not overlap or conflict with federal or state laws or regulations. This regulation became effective on January 1, 2014, and this is the first comprehensive review.

The proposed action to amend 22VAC40-221, which is published in this issue of the Virginia Register, serves as the report of findings.

Contact Information: Traci B. Jones, Program Manager, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7499, or email [traci.jones@dss.virginia.gov](mailto:traci.jones@dss.virginia.gov).

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# NOTICES OF INTENDED REGULATORY ACTION

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## TITLE 9. ENVIRONMENT

### STATE AIR POLLUTION CONTROL BOARD

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Air Pollution Control Board intends to consider amending **9VAC5-80, Permits for Stationary Sources**, and **9VAC5-170, Regulation for General Administration**. The purpose of the proposed action is to provide greater detail as to how the site suitability requirements of § 10.1-1307 E of the Code of Virginia will be carried out in the permitting process. Section 10.1-1307 E provides that the board in making regulations and in approving variances, control programs, or permits shall consider facts and circumstances relevant to the reasonableness of the activity involved and the regulations proposed to control it. Currently, these criteria are examined on a case-by-case basis, however, setting forth the parameters the board and the agency will use to implement these criteria in the context of air permitting will provide clarity for the regulated community and the public. The intent of this action is to consider amending the regulations to provide greater detail as to how the requirements of § 10.1-1307 E are to be met, with the goal of greater consistency, clarity, and effectiveness of the site suitability determination process.

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

Statutory Authority: § 10.1-1308 of the Code of Virginia; Clean Air Act §§ 110, 112, 165, 173, 182 and Title V; 40 CFR Parts 51, 61, 63, 70, and 72.

Public Comment Deadline: July 9, 2021.

Agency Contact: Karen G. Sabasteanski, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4426, or email karen.sabasteanski@deq.virginia.gov.

VA.R. Doc. No. R21-6537; Filed April 8, 2021, 8:36 a.m.

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## TITLE 16. LABOR AND EMPLOYMENT

### DEPARTMENT OF LABOR AND INDUSTRY

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Department of Labor and Industry intends to consider promulgating **16VAC15-60, Regulation Governing On-The-Job Training Programs or Other Training Programs**. The purpose of the proposed action is to provide the standards required for any employer on-the-job training program or other training program established in accordance with § 40.1-28.10 of the Code of Virginia. The proposed action promulgates a new regulation that sets forth the standards required for any on-the-job training or other

training program that an employer must establish if the employer wishes to pay its employees the reduced rate for the duration of the 90-day training period, including the period for which the employee can be paid the training wage, what type of employee qualifies for the program, what type of program qualifies, and what type of skills an employee must learn in the training program.

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

Statutory Authority: §§ 40.1-6 and 40.1-28.10 of the Code of Virginia.

Agency Contact: Holly Trice, Attorney, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Richmond, VA 23219, telephone (804) 786-2641, FAX (804) 786-8418, or email holly.trice@doli.virginia.gov.

VA.R. Doc. No. R21-6714; Filed April 28, 2021, 11:26 a.m.

### 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 promulgating **16VAC25-210, Heat Illness Prevention Standard**. The purpose of the proposed action is to reduce or eliminate employee injuries, illnesses, and fatalities by considering adoption of a comprehensive regulation to address employee exposure to heat illness hazards during indoor and outdoor work activities in all industries under the jurisdiction of the Virginia State Plan for occupational safety and health. Goals of the regulation include (i) identifying methods to reduce or eliminate heat illness hazards and (ii) educating employees and employers about heat-related illness external risk factors, heat-related illness internal risk factors, medical conditions that can contribute to heat illness, symptoms of heat-related illness, and precautions to take to reduce or eliminate heat illness hazards.

A review of existing federal and state regulations, national consensus standards, and guidelines designed to protect employees from heat illness hazards will be conducted. The proposed regulation will address indoor and outdoor heat illness hazards experienced by similarly situated employees in all industries covered by the Virginia Occupational Safety and Health jurisdiction.

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

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

Public Comment Deadline: June 9, 2021.

Agency Contact: Jay Withrow, Director, Legal Support, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Suite 207, Richmond, VA 23219, telephone (804) 786-9873, FAX (804) 786-8418, or email jay.withrow@doli.virginia.gov.

VA.R. Doc. No. R21-6753; Filed April 12, 2021, 3:34 p.m.

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# REGULATIONS

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

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## 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.

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## TITLE 1. ADMINISTRATION

### DEPARTMENT OF GENERAL SERVICES

#### Proposed Regulation

Titles of Regulations: **1VAC30-45. Certification for Noncommercial Environmental Laboratories (amending 1VAC30-45-40, 1VAC30-45-95, 1VAC30-45-100, 1VAC30-45-130, 1VAC30-45-520, 1VAC30-45-650, 1VAC30-45-730, 1VAC30-45-750, 1VAC30-45-760, 1VAC30-45-771).**

**1VAC30-46. Accreditation for Commercial Environmental Laboratories (amending 1VAC30-46-15, 1VAC30-46-40, 1VAC30-46-70, 1VAC30-46-95, 1VAC30-46-100, 1VAC30-46-140, 1VAC30-46-150, 1VAC30-46-200, 1VAC30-46-210, 1VAC30-46-220).**

Statutory Authority: § 2.2-1105 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: July 9, 2021.

Agency Contact: Rhonda Bishton, Executive Administrative Assistant to the Director, Department of General Services, 1100 Bank Street, Suite 420, Richmond, VA 23219, telephone (804) 786-3311, FAX (804) 371-8305, or email rhonda.bishton@dgs.virginia.gov.

Basis: Section 2.2-1102 A 1 of the Code of Virginia authorizes the Department of General Services to prescribe regulations necessary or incidental to the performance of the department's duties or execution of powers conferred by the Code of Virginia. Section 2.2-1105 of the Code of Virginia authorizes the Division of Consolidated Laboratory Services (DCLS) to establish and conduct a program for the certification of laboratories conducting any tests, analyses, measurements, or monitoring and establish a fee system to pay for the costs of the certification program.

Purpose: The NELAC Institute (TNI) program standards are widely recognized standards for the accreditation of environmental laboratories and are currently incorporated by reference in 1VAC30-46. TNI revises their standards regularly to improve those standards and to provide the most up-to-date information available for the accreditation of environmental laboratories.

Accrediting commercial environmental laboratories to a single set of standards has several benefits. Environmental laboratories test environmental samples to determine whether the samples meet the air, water, and waste pollutant limits set by the Department of Environmental Quality (DEQ). Under the

accreditation program, all environmental laboratories meet the same proficiency testing and quality assurance and quality control standards. Meeting these standards ensures that the laboratories are capable of providing results of known quality and defensibility for measurements of pollutants in environmental samples. The limits set by DEQ for air, water, and waste pollutants protect public health and welfare. Laboratory measurements of environmental samples determine compliance with Virginia's environmental laws and therefore are the key to providing protection of public health and welfare.

Certifying noncommercial environmental laboratories to a single set of standards provides the same benefits as those described for commercial environmental laboratories. Noncommercial environmental laboratories are certified to standards that are similar to the TNI standards.

Substance: In 1VAC30-46, DCLS is updating to the 2016 TNI standards. Commercial environmental laboratories and DCLS must meet the standards in order to remain accredited under the nationally accepted TNI program. DCLS is revising the dates for the transition period for laboratories to meet the 2016 TNI standards in 1VAC30-46-15. DCLS is adding to the Certificate of Compliance a provision for the laboratory to acknowledge it has a copy of the TNI standards incorporated by reference into 1VAC30-46.

DCLS is revising the definitions in 1VAC30-46 to conform to the 2016 TNI standards. When appropriate, DCLS is revising the definitions for the same terms in 1VAC30-45. This ensures compatibility between the programs for commercial and noncommercial environmental laboratories.

In both 1VAC30-46 and 1VAC30-45, DCLS is adding as a cause for suspension, laboratory failure to submit an acceptable corrective action plan after two opportunities. DCLS currently may only withdraw accreditation or certification. This adds flexibility for DCLS and provides the possibility of a less onerous outcome for a laboratory; adding as a reason to withdraw accreditation or certification, laboratory failure to correct the causes for suspension within the term of suspension; adding as a reason to withdraw accreditation in part or in total when a laboratory fails three consecutive proficiency testing (PT) studies; adding as a reason to withdraw accreditation or certification when a laboratory fails to meet the provisions concerning communicating with other laboratories with regard to proficiency testing; adding a statement that the agency will regularly review its budget to determine if the fees charged under the program offset its costs; and adding a provision requiring a laboratory to pay the cost of compliance determination when the agency has suspended

accreditation or certification in total and the laboratory wishes to demonstrate that reasons for suspension have been resolved.

DCLS is revising 1VAC30-45 in two cases to provide more flexibility for the laboratory. First DCLS is revising the time between PT supplemental studies in 1VAC30-45-520 B. Second DCLS is deleting the requirement for an access log to archived records in 1VAC30-45-650 E.

DCLS is revising 1VAC30-45 to require a successful performance of the demonstration of capability procedure when the laboratory has not performed this procedure within 12 months. This change strengthens the defensibility of a laboratory's records.

DCLS is revising 1VAC30-45 to conform to the Environmental Protection Agency's 2017 Methods Update Rule regarding testing done in accordance with the federal Clean Water Act using the approved methods listed in 40 CFR Part 136.

**Issues:** The primary advantage to the public associated with this proposed action is the maintenance of up-to-date standards for the certification (1VAC30-45) and accreditation (1VAC30-46) of environmental laboratories. For commercial laboratories, the 2016 TNI Standards are the most current version of these national accreditation standards for environmental laboratories. Accrediting environmental laboratories benefits the public because it ensures that the laboratories can produce environmental data of known quality and defensibility. DEQ uses these environmental data to determine compliance with environmental standards that protect the public health and welfare. The second advantage is for DEQ permit holders who contract with the commercial laboratories to analyze environmental samples. The permit holders are assured of the quality of the laboratory analyses. There are no disadvantages to the public.

With regard to DCLS and the Commonwealth, TNI requires accreditation bodies to use the latest TNI standards to accredit environmental laboratories. This proposed action is necessary for DCLS to meet that requirement. There are no disadvantages to the agency or Commonwealth.

The primary advantage of the proposed action for the affected noncommercial laboratories is increased flexibility in one revised provision and the deletion of another provision of 1VAC30-45. The primary disadvantage of the proposed action for the affected noncommercial laboratories are additional requirements in two provisions of the revised regulation. The balance between the advantages and disadvantages should limit the impact for these laboratories.

The primary advantage of the proposed action for the affected commercial laboratories is maintaining their accreditation under TNI. By meeting the 2016 TNI Standards, the laboratories will continue to be recognized as TNI-accredited laboratories. This enables the Virginia commercial laboratories to obtain secondary accreditation from other National Environmental Laboratory Accreditation Program

accreditation bodies so that they can provide laboratory services as accredited laboratories in these other states.

The primary disadvantage of the proposed action for the affected commercial laboratories is the time it may take to meet the 2016 TNI standards. DCLS is allowing six months for this transition. The length of this transition period benefits both the agency and the affected laboratories. This disadvantage should be offset for the affected commercial laboratories because of the benefits to remaining accredited under TNI.

#### Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Division of Consolidated Laboratory Services (DCLS) of the Department of General Services (DGS) proposes to amend 1VAC30-45 Certification for Noncommercial Environmental Laboratories and 1VAC30-46 Accreditation for Commercial Environmental Laboratories to reflect the most recent revision<sup>1</sup> of the standards of the National Environmental Laboratory Accreditation Conference, now known as The NELAC Institute (TNI). Additionally, DCLS proposes a new fee covering the cost of compliance determination when the division has suspended accreditation or certification in total and the laboratory wishes to demonstrate that the reasons for suspension have been resolved. DCLS proposal also includes adding violations to the lists of causes that could result in suspension or withdrawal of certification and accreditation.

Background. Section 2.2-1105<sup>2</sup> of the Code of Virginia requires DCLS to by regulation establish a program for the certification of laboratories conducting any tests, analyses, measurements, or monitoring required pursuant to Air Pollution Control Board statutes,<sup>3</sup> the Virginia Waste Management Act,<sup>4</sup> or the State Water Control Law.<sup>5</sup> Such a program for noncommercial environmental laboratories is established in 1VAC30-45, Certification for Noncommercial Environmental Laboratories. A program for commercial environmental laboratories is established in 1VAC30-46, Accreditation for Commercial Environmental Laboratories (certification is referred to as accreditation throughout 1VAC30-46).<sup>6</sup> Code of Virginia § 2.2-1105 further requires that the regulations shall be promulgated only after adoption of national accreditation standards by the National Environmental Laboratory Accreditation Conference sponsored by the United States Environmental Protection Agency.

For both regulations, "commercial environmental laboratory" and "noncommercial environmental laboratory" are defined as follows. "Commercial environmental laboratory" means an environmental laboratory where environmental analysis is performed for another person. "Noncommercial environmental laboratory" means either of the following:

1. An environmental laboratory where environmental analysis is performed solely for the owner of the laboratory.

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## Regulations

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2. An environmental laboratory where the only performance of environmental analysis for another person is one of the following:

a. Environmental analysis performed by an environmental laboratory owned by a local government for an owner of a small wastewater treatment system treating domestic sewage at a flow rate of less than or equal to 1,000 gallons per day.

b. Environmental analysis performed by an environmental laboratory operated by a corporation as part of a general contract issued by a local government to operate and maintain a wastewater treatment system or a waterworks.

c. Environmental analysis performed by an environmental laboratory owned by a corporation as part of the prequalification process or to confirm the identity or characteristics of material supplied by a potential or existing customer or generator as required by a hazardous waste management permit under 9VAC20-60.

d. Environmental analysis performed by an environmental laboratory owned by a Publicly Owned Treatment Works (POTW) for an industrial source of wastewater under a permit issued by the POTW to the industrial source as part of the requirements of a pretreatment program under Part VII (9VAC25-31-730 et seq.) of 9VAC25-31.

e. Environmental analysis performed by an environmental laboratory owned by a county authority for any municipality within the county's geographic jurisdiction when the environmental analysis pertains solely to the purpose for which the authority was created.

f. Environmental analysis performed by an environmental laboratory owned by an authority or a sanitation district for any participating local government of the authority or sanitation district when the environmental analysis pertains solely to the purpose for which the authority or sanitation district was created."

Generally speaking, noncommercial laboratories provide limited analytical services either for their own organization or for other entities (such as wastewater treatment facilities).<sup>7</sup> Moreover, in contrast to commercial laboratories, noncommercial laboratories generally use a more limited number and complexity of methods.

Although the noncommercial laboratories meet similar standards to those met by the commercial laboratories, according to DGS the differences are sufficient to require separate regulations. In addition, the TNI Standards include provisions that do not pertain to the noncommercial laboratories work. For example, the TNI Standards include provisions related to the commercial provision of laboratory services such as contracting. Further, the TNI Standards cover asbestos, radiochemical, and toxicity testing which the noncommercial laboratories do not perform. The commercial laboratories typically want to meet the nationally-recognized

TNI Standards<sup>8</sup> because this provides them with accreditation credentials that can be used to market their services.

Estimated Benefits and Costs. DCLS proposed amendments include numerous changes in testing specifics to comply with the latest TNI Standards, as well as changes in definitions and changes to improve clarity. Amending the regulations to match the most up-to-date TNI Standards may improve the quality and reliability of environmental testing. According to DGS, all of these amendments would have minimal impact on lab staff time and the cost of any needed materials would be negligible.

Suspension and Withdrawal. Both regulations have a list of violations for which certification (noncommercial) or accreditation (commercial) can be suspended in part or in total. For the most part these violations can be identified either during annual proficiency tests or from reassessments. Environmental laboratories may not continue to analyze samples or report analysis for the fields of certification/accreditation for which DCLS has suspended certification or accreditation. The term of suspension is six months or the remaining period of certification/accreditation, whichever is longer. If the laboratory demonstrates to DCLS that it has corrected the deficiency or deficiencies for which its certification or accreditation was suspended within the term of the suspension, the laboratory's suspended status changes to certified or accredited and it may resume analyzing samples and reporting analysis. If the laboratory fails to correct the causes of suspension within the term of suspension, DCLS withdraws<sup>9</sup> the laboratory's certification or accreditation in total or in part. In order to resume operations, the lab would have to file a new application. DCLS has 90 days to determine if applications are complete, then another 120 days to schedule an on-site assessment before granting, if merited, certification or accreditation. Application fees are the same as renewal fees. The fees vary greatly depending on the number of methods of analysis, the categories of the methods of analysis, and the number of components to be analyzed for each method.<sup>10</sup> Both regulations also have a list of violations for which certification (noncommercial) or accreditation (commercial) can be withdrawn directly.

Providing for Suspension in Addition to Withdrawal. DCLS reassesses each noncommercial laboratory at least once every three years or more often under specified circumstances, and each commercial laboratory every two years. If in its assessment the division finds deficiencies, the laboratory has 30 days to provide a response. This response is called a corrective action plan. Under the current regulations if a laboratory fails to submit an acceptable corrective action plan after two opportunities, DCLS may withdraw accreditation or certification, but suspension is not an option. DCLS proposes to add this violation to the lists of causes for which a lab can be suspended in part or in total, in addition to withdrawal of accreditation or certification. By expanding the enforcement options, this proposal is beneficial in that it provides the division with a less onerous option for when that is deemed most appropriate. Affected labs that are suspended, rather than

having their certification or accreditation withdrawn, and that are able to rectify their deficiencies in a timely manner would be able to resume operations much sooner. Once a suspended lab demonstrates to DCLS that it has corrected the deficiency for which its certification or accreditation was suspended within the term of the suspension, it may essentially resume operations immediately. In contrast, it can take seven months or more for a reapplication after withdrawal to be approved.

**Expanding Reasons for Withdrawal.** Certification for Noncommercial Environmental Laboratories currently includes failure to successfully complete three consecutive proficiency tests as a cause for which DCLS may withdraw certification in part or total. Proficiency tests are defined as a process to evaluate a laboratory's performance under controlled conditions relative to a given set of criteria through analysis of unknown samples provided by an external source. This cause for withdrawal is not currently in Accreditation for Commercial Environmental Laboratories. DCLS proposes to add it to the list of causes for which the division may withdraw accreditation of commercial labs in part or total. To the extent that this proposed amendment helps prevent inaccurate testing or analyses of the safety of air, waste, and water in the Commonwealth from being conducted and communicated to the public and environmental regulators, it may be beneficial.

The regulations include prohibitions on communicating with any individual at another laboratory concerning the labs proficiency testing sample prior to the time the results of the study are released. Exchanging information with other labs or asking other labs about running proficiency test samples violates the rules for running proficiency tests. The current regulations do not include explicit repercussions if this is violated. DCLS proposes to add this violation to the causes for which it may withdraw certification or accreditation in part or in total. To the extent that this proposed amendment helps maintain the integrity of proficiency testing by creating a strong deterrent to biasing the results, it may be beneficial.

**New Fee.** Pursuant to § 2.2-1105 of the Code of Virginia, the certification and accreditation programs are funded through fees charged to the laboratories. DCLS proposes to add a provision in both regulations requiring a laboratory to pay a fee covering the cost of compliance determination when the division has suspended accreditation or certification in total and the laboratory wishes to demonstrate that the reasons for suspension have been resolved. The laboratory would be charged the cost of any necessary follow-up on-site assessments or data review or both. Depending on the laboratory's overall scope of certification or accreditation and the number and complexity of the noncompliances causing the suspension, DCLS estimates that the fee could range from approximately \$400 to approximately \$4,000. Currently the general pool of fees charged to all laboratories pays for these costs. By charging this proposed fee to the lab that causes the cost to be incurred, the cost would no longer be subsidized by other labs that had no involvement in creating the cost. Though laboratories would not intentionally have their operations

suspended in total, this extra cost could provide some extra incentive to avoid violations.

**Documentation.** The current 1VAC30-45, Certification for Noncommercial Environmental Laboratories, requires that access to archived information be documented with an access log. DCLS has determined that the access log does not serve a useful purpose in practice. Thus, the division proposes to eliminate this requirement. This should save some staff time for noncommercial labs.

**Businesses and Other Entities Affected.** The proposal affects the 85 noncommercial certified environmental laboratories that are subject to 1VAC30-45, Certification for Noncommercial Environmental Laboratories, which consist of 64 public utilities, 11 industrial laboratories, five laboratories associated with educational institutions, four laboratories run by the federal government, and one laboratory at a state correctional facility. The proposal affects the 48 commercial accredited environmental laboratories that are subject to 1VAC30-46, Accreditation for Commercial Environmental Laboratories, which consist of 33 small businesses, 11 industrial laboratories, three public utilities, and one university.<sup>11</sup> The proposed new fee would adversely impact<sup>12</sup> labs that have their accreditation or certification suspended in total that wish to demonstrate that the reasons for suspension have been resolved.

**Small Businesses<sup>13</sup> Affected.**

**Types and Estimated Number of Small Businesses Affected.** The proposed amendments affect 33 small commercial environmental laboratories.<sup>14</sup>

**Costs and Other Effects.** If any of the 33 small commercial environmental laboratories were to be suspended in total and wishes to demonstrate that the reasons for suspension have been resolved, the proposed new fee would increase their costs from approximately \$400 to approximately \$4,000, depending on the laboratory's overall scope of certification or accreditation and the number and complexity of the noncompliances causing the suspension.

**Alternative Method that Minimizes Adverse Impact.** There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

**Localities<sup>15</sup> Affected.<sup>16</sup>** The proposal affects 133 environmental laboratories that test for air and water quality and contaminated waste throughout the Commonwealth. No particular localities are known to be disproportionately affected. The proposal does not appear to directly introduce costs for local governments.

**Projected Impact on Employment.** The proposed amendments are unlikely to substantively affect total employment.

**Effects on the Use and Value of Private Property.** For private labs that may have substantial difficulty demonstrating proficiency or that may participate in unethical communication, the proposed additions to causes for potential withdrawal of certification or accreditation would potentially

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have a large negative impact on their firm value. If DCLS did choose to withdraw their certification or accreditation, the labs would be prevented from analyzing samples or reporting analyses for customers for possibly seven months or longer.

The proposed addition of failure to submit an acceptable corrective action plan after two opportunities to the list of causes for which DCLS may suspend certification or accreditation, may have a positive impact on the value of private labs in this situation if suspension is used instead of withdrawal by the division. As described, a lab rectifying this deficiency could potentially resume operations many months earlier if its certification or accreditation is suspended rather than withdrawn.

The proposal does not appear to affect real estate development costs.

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<sup>1</sup>The current regulations reflect the 2009 TNI Standards. The proposed regulation would reflect the 2016 TNI Standards.

<sup>2</sup>See <https://law.lis.virginia.gov/vacode/title2.2/chapter11/section2.2-1105/>

<sup>3</sup>See <https://law.lis.virginia.gov/vacode/title10.1/chapter13/>

<sup>4</sup>See <https://law.lis.virginia.gov/vacode/title10.1/chapter14/>

<sup>5</sup>See <https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/>

<sup>6</sup>See <https://law.lis.virginia.gov/admincode/title1/agency30/chapter46/section10/>

<sup>7</sup>Source: DGS

<sup>8</sup>Ibid

<sup>9</sup>1VAC30-45 uses the term "decertification," while 1VAC30-46 uses "withdrawal of accreditation". For ease of reading, this document uses withdrawal for both certification and accreditation.

<sup>10</sup>For detail on fee calculation, see <https://law.lis.virginia.gov/admincode/title1/agency30/chapter45/section130/> and <https://law.lis.virginia.gov/admincode/title1/agency30/chapter46/section150/>

<sup>11</sup>Data source: DGS

<sup>12</sup>Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

<sup>13</sup>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."

<sup>14</sup>Data source: DGS

<sup>15</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>16</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

**Agency's Response to Economic Impact Analysis:** The agency has reviewed the economic impact analysis prepared by the Department of Planning and Budget and has no comment.

## Summary:

*The proposed amendments update the regulations to the 2016 TNI standards, including adding (i) as a cause for suspension, laboratory failure to submit an acceptable corrective action plan after two opportunities; (ii) as a reason to withdraw accreditation or certification,*

*laboratory failure to correct the causes for suspension within the term of suspension; (iii) as a reason to withdraw accreditation in part or in total, when a laboratory fails three consecutive proficiency testing (PT) studies; (iv) as a reason to withdraw accreditation or certification, when a laboratory fails to meet the provisions concerning communicating with other laboratories with regard to proficiency testing; (v) a statement that the agency will regularly review its budget to determine if the fees charged under the program offset its costs; and (vi) a provision requiring a laboratory to pay the cost of compliance determination when the agency has suspended accreditation or certification in total and the laboratory wishes to demonstrate that reasons for suspension have been resolved.*

*In 1VAC30-45, the proposed amendments revise the time between PT supplemental studies, delete the requirement for an access log to archived records, require a successful performance of the demonstration of capability procedure when the laboratory has not performed this procedure within 12 months, and conform to the U.S. Environmental Protection Agency's 2017 Methods Update Rule.*

## **1VAC30-45-40. Definitions.**

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

"Acceptance criteria" means specified limits placed on characteristics of an item, process, or service defined in requirement documents.

"Accuracy" means the degree of agreement between an observed value and an accepted reference value. Accuracy includes a combination of random error (precision) and systematic error (bias) components that are due to sampling and analytical operations. Accuracy is an indicator of data quality.

"Algae" means simple single-celled, colonial, or multicelled, mostly aquatic plants, containing chlorophyll and lacking roots, stems and leaves that are either suspended in water (phytoplankton) or attached to rocks and other substrates (periphyton).

"Aliquot" means a portion of a sample taken for analysis.

"Analyte" means the substance ~~or physical property to be determined in samples examined,~~ organism, physical parameter, or chemical constituent for which an environmental sample is being analyzed.

"Analytical method" means a technical procedure for providing analysis of a sample, defined by a body such as the Environmental Protection Agency or the American Society for Testing and Materials, that may not include the sample preparation method.

"Assessment" means the evaluation process used to measure or establish the performance, effectiveness, and conformance of an organization and its systems or both to defined criteria (i.e., to the standards and requirements of laboratory certification).

"Assessor" means the person assigned by DCLS to perform, alone or as part of an assessment team, an assessment of an environmental laboratory.

"Audit" means a systematic evaluation to determine the conformance to quantitative and qualitative specifications of some operational function or activity.

"Authority" means, in the context of a governmental body or local government, an authority created under the provisions of the Virginia Water and Waste Authorities Act, Chapter 51 (§ 15.2-5100 et seq.) of Title 15.2 of the Code of Virginia.

"Batch" means environmental samples that are prepared together or analyzed together or both with the same process and personnel, using the same lot or lots of reagents. "Analytical batch" means a batch composed of prepared environmental samples (extracts, digestates, or concentrates) that are analyzed together as a group. An analytical batch can include prepared samples originating from various environmental matrices and can exceed 20 samples. "Preparation batch" means a batch composed of one to 20 environmental samples of the same matrix that meets the criteria in this definition for "batch" and with a maximum time between the start of processing of the first and last sample in the batch to be 24 hours.

"Benthic macroinvertebrates" means bottom dwelling animals without backbones that live at least part of their life cycles within or upon available substrates within a body of water.

"Blank" means a sample that has not been exposed to the analyzed sample stream in order to monitor contamination during sampling, transport, storage or analysis. The blank is subjected to the usual analytical and measurement process to establish a zero baseline or background value and is sometimes used to adjust or correct routine analytical results. Blanks include the following types:

1. Field blank. A blank prepared in the field by filling a clean container with pure deionized water and appropriate preservative, if any, for the specific sampling activity being undertaken.
2. Method blank. A sample of a matrix similar to the batch of associated samples (when available) that is free from the analytes of interest and is processed simultaneously with and under the same conditions as samples through all steps of the analytical procedures, and in which no target analytes or interferences are present at concentrations that impact the analytical results for sample analyses.

"Calibration" means to determine, by measurement or comparison with a standard, the correct value of each scale reading on a meter, instrument or other device. The levels of the applied calibration standard should bracket the range of planned or expected sample measurements.

"Calibration curve" means the graphical relationship between the known values, such as concentrations, of a series of calibration standards and their instrument response.

"Calibration standard" means a substance or reference material used to calibrate an instrument.

"Certified reference material" means a reference material one or more of whose property values are certified by a technically valid procedure, accompanied by or traceable to a certificate or other documentation that is issued by a certifying body.

"Client" or "customer" means the Department of Environmental Quality (DEQ) when used in the context of quality assurance and specific quality control provisions.

"Commercial environmental laboratory" means an environmental laboratory where environmental analysis is performed for another person.

"Corrective action" means the action taken to eliminate the causes of an existing nonconformity, defect or other undesirable situation in order to prevent recurrence.

"DCLS" means the Division of Consolidated Laboratory Services of the Department of General Services.

"Demonstration of capability" means the procedure to establish the ability of the analyst to generate data of acceptable accuracy and precision.

"Detection limit" means the lowest concentration or amount of the target analyte that can be determined to be different from zero by a single measurement at a stated degree of confidence.

"Environmental analysis" or "environmental analyses" means any test, analysis, measurement, or monitoring used for the purposes of the Virginia Air Pollution Control Law, the Virginia Waste Management Act or the State Water Control Law (§ 10.1-1300 et seq., § 10.1-1400 et seq., and § 62.1-44.2 et seq., respectively, of the Code of Virginia). For the purposes of these regulations, any test, analysis, measurement, or monitoring required pursuant to the regulations promulgated under these three laws, or by any permit or order issued under the authority of any of these laws or regulations is "used for the purposes" of these laws. The term shall not include the following:

1. Sampling of water, solid and chemical materials, biological tissue, or air and emissions.
2. Field testing and measurement of water, solid and chemical materials, biological tissue, or air and emissions, except when performed in an environmental laboratory rather than at the site where the sample was taken.

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3. Taxonomic identification of samples for which there is no national accreditation standard such as algae, benthic macroinvertebrates, macrophytes, vertebrates, and zooplankton.

4. Protocols used pursuant to § 10.1-104.2 of the Code of Virginia to determine soil fertility, animal manure nutrient content, or plant tissue nutrient uptake for the purposes of nutrient management.

5. Geochemical and permeability testing for solid waste compliance.

6. Materials specification for air quality compliance when product certifications specify the data required by an air permit such as fuel type, Btu content, sulfur content, or VOC content.

"Environmental laboratory" or "laboratory" means a facility or a defined area within a facility where environmental analysis is performed. A structure built solely to shelter field personnel and equipment from inclement weather shall not be considered an environmental laboratory.

"Establishment date" means the date set for the accreditation program under 1VAC30-46 and the certification program to be established under this chapter.

"Establishment of certification program" or "established program" means that DCLS has completed the initial accreditation of environmental laboratories covered by 1VAC30-46 and the initial certification of environmental laboratories covered by 1VAC30-45.

"Facility" means something that is built or installed to serve a particular function.

"Field of certification" or "FoC" means those matrix, technology/method, and analyte combinations for which DCLS offers certification.

"Field of proficiency testing" or "FoPT" means ~~analytes for which a laboratory is required to successfully analyze a PT sample in order to obtain or maintain certification, collectively defined as the~~ matrix, technology/method, and analyte combinations for which the composition spike concentration ranges and acceptance criteria have been established by the Proficiency Testing Program Executive Committee of TNI.

"Field testing and measurement" means any of the following:

1. Any test for parameters under 40 CFR Part 136 for which the holding time indicated for the sample requires immediate analysis; or
2. Any test defined as a field test in federal regulation.

The following is a limited list of currently recognized field tests or measures that is not intended to be inclusive: continuous emissions monitoring; online monitoring; flow monitoring; tests for pH, residual chlorine, temperature and dissolved oxygen; and field analysis for soil gas.

"Finding" means an assessment conclusion referenced to a laboratory certification standard and supported by objective evidence that identifies a deviation from a laboratory certification standard requirement.

"Governmental body" means any department, agency, bureau, authority, or district of the United States government, of the government of the Commonwealth of Virginia, or of any local government within the Commonwealth of Virginia.

"Holding time" means the maximum time that can elapse between two specified activities.

"International System of Units (SI)" means the coherent system of units adopted and recommended by the General Conference on Weights and Measures.

"Laboratory control sample" or "LCS" means a sample matrix, free from the analytes of interest, spiked with verified known amounts of analytes or a material containing known and verified amounts of analytes. It is generally used to establish intra-laboratory or analyst specific precision and bias or to assess the performance of all or a portion of the measurement system. "Laboratory control sample" or "LCS" may also be named laboratory fortified blank, spiked blank, or QC check sample.

"Laboratory manager" means the person who has overall responsibility for the technical operation of the environmental laboratory and who exercises actual day-to-day supervision of laboratory operation for the appropriate fields of testing and reporting of results. The title of this person may include ~~but is not limited to~~ laboratory director, technical director, laboratory supervisor, or laboratory manager.

"Legal entity" means an entity, other than a natural person, ~~who that~~ has sufficient existence in legal contemplation that it can function legally, be sued or sue, and make decisions through agents as in the case of corporations.

"Limit of detection" or "LOD" means an estimate of the minimum amount of a substance that an analytical process can reliably detect. An LOD is analyte and matrix specific and may be laboratory dependent.

"Limit of quantitation" or "LOQ" means the minimum levels, concentrations, or quantities of a target variable (e.g., target analyte) that can be reported with a specified degree of confidence.

"Local government" means a municipality (city or town), county, sanitation district, or authority.

"Macrophytes" means any aquatic or terrestrial plant species that can be identified and observed with the eye, unaided by magnification.

"Matrix" means the component or substrate that may contain the analyte of interest. A matrix can be a field of certification matrix or a quality system matrix.

1. Field of certification matrix. These matrix definitions shall be used when certifying a laboratory.

- a. Nonpotable water. Any aqueous sample that has not been designated a potable or potential potable water source. Includes surface water, groundwater, effluents, water treatment chemicals, and TCLP or other extracts.
- b. Solid and chemical materials. Includes soils, sediments, sludges, products, and byproducts of an industrial process that results in a matrix not previously defined.
- c. Biological tissue. Any sample of a biological origin such as fish tissue, shellfish, or plant material. Such samples shall be grouped according to origin.
- d. Air and emissions. Whole gas or vapor samples including those contained in flexible or rigid wall containers and the extracted concentrated analytes of interest from a gas or vapor that are collected with a sorbent tube, impinger solution, filter or other device.

2. Quality system matrix. For purposes of batch and quality control requirement determinations, the following matrix types shall be used:

- a. Drinking water. Any aqueous sample that has been designated a potable or potential potable water source.
- b. Aqueous. Any aqueous sample excluded from the definition of drinking water matrix or saline/estuarine source. Includes surface water, groundwater, effluents, and TCLP or other extracts.
- c. Saline/estuarine. Any aqueous sample from an ocean or estuary, or other salt water source.
- d. Nonaqueous liquid. Any organic liquid with less than 15% settleable solids.
- e. Biological tissue. Any sample of a biological origin such as fish tissue, shellfish, or plant material. Such samples shall be grouped according to origin.
- f. Solids. Includes soils, sediments, sludges, and other matrices with more than 15% settleable solids.
- g. Chemical waste. A product or byproduct of an industrial process that results in a matrix not previously defined.
- h. Air and emissions. Whole gas or vapor samples including those contained in flexible or rigid wall containers and the extracted concentrated analytes of interest from a gas or vapor that are collected with a sorbent tube, impinger solution, filter, or other device.

"Matrix spike (spiked sample or fortified sample)" means a sample prepared by adding a known mass of target analyte to a specified amount of matrix sample for which an independent estimate of target analyte concentration is available. Matrix spikes are used, for example, to determine the effect of the matrix on a method's recovery efficiency.

"Matrix spike duplicate (spiked sample or fortified sample duplicate)" means a second replicate matrix spike prepared in

the laboratory and analyzed to obtain a measure of the precision of the recovery for each analyte.

"National Environmental Laboratory Accreditation Conference (~~NELAC~~)" or "NELAC" means a voluntary organization of state and federal environmental officials and interest groups with the primary purpose to establish mutually acceptable standards for accrediting environmental laboratories. NELAC preceded the formation of The NELAC Institute or TNI.

"National Institute of Standards and Technology" or "NIST" means an agency of the U.S. Department of Commerce's Technology Administration that is working with EPA, states, NELAC, and other public and commercial entities to establish a system under which private sector companies and interested states can be certified by NIST to provide NIST-traceable proficiency testing (PT) samples.

"Negative control" means measures taken to ensure that a test, its components, or the environment do not cause undesired effects, or produce incorrect test results.

"Noncommercial environmental laboratory" means either of the following:

- 1. An environmental laboratory where environmental analysis is performed solely for the owner of the laboratory.
- 2. An environmental laboratory where the only performance of environmental analysis for another person is one of the following:
  - a. Environmental analysis performed by an environmental laboratory owned by a local government for an owner of a small wastewater treatment system treating domestic sewage at a flow rate of less than or equal to 1,000 gallons per day.
  - b. Environmental analysis performed by an environmental laboratory operated by a corporation as part of a general contract issued by a local government to operate and maintain a wastewater treatment system or a waterworks.
  - c. Environmental analysis performed by an environmental laboratory owned by a corporation as part of the prequalification process or to confirm the identity or characteristics of material supplied by a potential or existing customer or generator as required by a hazardous waste management permit under 9VAC20-60.
  - d. Environmental analysis performed by an environmental laboratory owned by a Publicly Owned Treatment Works (POTW) for an industrial source of wastewater under a permit issued by the POTW to the industrial source as part of the requirements of a pretreatment program under Part VII (9VAC25-31-730 et seq.) of 9VAC25-31.
  - e. Environmental analysis performed by an environmental laboratory owned by a county authority for any municipality within the county's geographic jurisdiction

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when the environmental analysis pertains solely to the purpose for which the authority was created.

f. Environmental analysis performed by an environmental laboratory owned by an authority or a sanitation district for any participating local government of the authority or sanitation district when the environmental analysis pertains solely to the purpose for which the authority or sanitation district was created.

"Owner" means any person who owns, operates, leases, or controls an environmental laboratory.

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

"Physical," for the purposes of fee test categories, means the tests to determine the physical properties of a sample. Tests for solids, turbidity, and color are examples of physical tests.

"Positive control" means measures taken to ensure that a test or its components are working properly and producing correct or expected results from positive test subjects.

"Precision" means the degree to which a set of observations or measurements of the same property, obtained under similar conditions, conform to themselves. Precision is an indicator of data quality. Precision is expressed usually as standard deviation, variance, or range, in either absolute or relative terms.

"Primary accreditation body" means the accreditation body responsible for assessing a laboratory's total quality system, on-site assessment, and PT performance tracking for fields of accreditation.

"Proficiency test or testing ~~(PT)~~ or "PT" means evaluating a process to evaluate a laboratory's performance under controlled conditions relative to a given set of criteria through analysis of unknown samples provided by an external source.

"Proficiency test (PT) sample" means a sample, the composition of which is unknown to the laboratory and is provided to test whether the laboratory can produce analytical results within specified acceptance criteria.

"Proficiency testing (PT) program" means the aggregate of providing rigorously controlled and standardized environmental samples to a laboratory for analysis, reporting of results, statistical evaluation of the results, and the collective demographics and results summary of all participating laboratories.

"Program," in the context of a regulatory program, means the relevant U.S. Environmental Protection Agency program such as the water program under the Clean Water Act (CWA), the air program under the Clean Air Act (CAA), the waste program under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), or

the waste program under the Resource Conservation and Recovery Act (RCRA).

"Publicly Owned Treatment Works ~~(POTW)~~ or "POTW" means a treatment works as defined by § 212 of the CWA, which is owned by a state or municipality (as defined by § 502(4) of the CWA). This definition includes any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes, and other conveyances only if they convey wastewater to a POTW treatment plant. The term also means the municipality as defined in § 502(4) of the CWA, which has jurisdiction over the indirect discharges to and the discharges from such a treatment works.

"Quality assurance" or "QA" means an integrated system of management activities involving planning, implementation, assessment, reporting, and quality improvement to ensure that a process, item, or service is of the type and quality needed and expected by the client.

"Quality assurance officer" means the person who has responsibility for the quality system and its implementation. Where staffing is limited, the quality assurance officer may also be the laboratory manager.

"Quality control" or "QC" means the overall system of technical activities that measures the attributes and performance of a process, item, or service against defined standards to verify that they meet the stated requirements established by the customer; operational techniques and activities that are used to fulfill requirements for quality; and also the system of activities and checks used to ensure that measurement systems are maintained within prescribed limits, providing protection against "out of control" conditions and ensuring that the results are of acceptable quality.

"Quality manual" means a document stating the management policies, objectives, principles, organizational structure and authority, responsibilities, accountability, and implementation of an agency, organization, or laboratory, to ensure the quality of its product and the utility of its product to its users.

"Quality system" means a structured and documented management system describing the policies, objectives, principles, organizational authority, responsibilities, accountability, and implementation plan of an organization for ensuring quality in its work processes, products (items), and services. The quality system provides the framework for planning, implementing, and assessing work performed by the organization and for carrying out required quality assurance and quality control activities.

"Range" means the difference between the minimum and maximum of a set of values.

"Reference material" means a material or substance one or more properties of which are sufficiently well established to be

used for the calibration of an apparatus, the assessment of a measurement test method, or for assigning values to materials.

"Reference standard" means a standard, generally of the highest metrological quality available at a given location, from which measurements made at that location are derived.

"Responsible official" means one of the following, as appropriate:

1. If the laboratory is owned or operated by a private corporation, "responsible official" means (i) a president, secretary, treasurer, or a vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy-making or decision-making functions for the corporation or (ii) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated in accordance with corporate procedures.
2. If the laboratory is owned or operated by a partnership, association, or a sole proprietor, "responsible official" means a general partner, officer of the association, or the proprietor, respectively.
3. If the laboratory is owned or operated by a governmental body, "responsible official" means a director or highest official appointed or designated to oversee the operation and performance of the activities of the environmental laboratory.
4. Any person designated as the responsible official by an individual described in subdivision 1, 2, or 3 of this definition, provided the designation is in writing, the designation specifies an individual or position with responsibility for the overall operation of the environmental laboratory, and the designation is submitted to DCLS.

"Sampling" means ~~the act of collection for the purpose of analysis~~ an activity related to obtaining a representative sample of the object of conformity assessment, according to a procedure.

"Sanitation district" means a sanitation district created under the provisions of Chapters 3 (§ 21-141 et seq.) through 5 (§ 21-291 et seq.) of Title 21 of the Code of Virginia.

"Selectivity" means the ability to analyze, distinguish, and determine a specific analyte from another component that may be a potential interferent or that may behave similarly to the target analyte within the measurement system.

"Sewage" means the water-carried human wastes from residences, buildings, industrial establishments, or other places together with such industrial wastes and underground, surface, storm, or other water as may be present.

"Simple test procedures" or "STP" means any of the following:

1. Field testing and measurement performed in an environmental laboratory.
2. The test procedures to determine:
  - a. Biochemical oxygen demand (BOD) or carbonaceous BOD (CBOD);
  - b. Fecal coliform;
  - c. Total coliform;
  - d. Fecal streptococci;
  - e. E. coli;
  - f. Enterococci;
  - g. Settleable solids (SS);
  - h. Total dissolved solids (TDS);
  - i. Total solids (TS);
  - j. Total suspended solids (TSS);
  - k. Total volatile solids (TVS); and
  - l. Total volatile suspended solids (TVSS).

"Standard operating procedure" or "SOP" means a written document that details the method for an operation, analysis, or action with thoroughly prescribed techniques and steps. An SOP is officially approved as the method for performing certain routine or repetitive tasks.

"Standardized reference material" or "SRM" means a certified reference material produced by the U.S. National Institute of Standards and Technology or other equivalent organization and characterized for absolute content, independent of analytical method.

"System laboratory" means a noncommercial laboratory that analyzes samples from multiple facilities having the same owner.

"Test" means a technical operation that consists of the determination of one or more characteristics or performance of a given product, material, equipment, organism, physical phenomenon, process, or service according to a specified procedure.

"Test, analysis, measurement or monitoring required pursuant to the Virginia Air Pollution Control Law" means any method of analysis required by the Virginia Air Pollution Control Law (§ 10.1-1300 et seq.); by the regulations promulgated under this law (9VAC5) including any method of analysis listed either in the definition of "reference method" in 9VAC5-10-20, or listed or adopted by reference in 9VAC5; or by any permit or order issued under and in accordance with this law and these regulations.

"Test, analysis, measurement or monitoring required pursuant to the Virginia Waste Management Act" means any method of analysis required by the Virginia Waste Management Act

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(§ 10.1-1400 et seq.); by the regulations promulgated under this law (9VAC20), including any method of analysis listed or adopted by reference in 9VAC20; or by any permit or order issued under and in accordance with this law and these regulations.

"Test, analysis, measurement or monitoring required pursuant to the Virginia Water Control Law" means any method of analysis required by the Virginia Water Control Law (§ 62.1-44.2 et seq.); by the regulations promulgated under this law (9VAC25), including any method of analysis listed or adopted by reference in 9VAC25; or by any permit or order issued under and in accordance with this law and these regulations.

"Test method" means an adoption of a scientific technique for performing a specific measurement as documented in a laboratory standard operating procedure or as published by a recognized authority.

"The NELAC Institute" or "TNI" means the organization whose standards environmental laboratories must meet to become accredited under 1VAC30-46, the regulation governing commercial environmental laboratories in Virginia.

"Toxicity characteristic leachate procedure" or "TCLP" means Test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in 40 CFR 260.11. This method is used to determine whether a solid waste exhibits the characteristic of toxicity (see 40 CFR 261.24).

"Traceability" means the property of a result of a measurement whereby it can be related to appropriate standards, generally international or national standards, through an unbroken chain of comparisons.

"U.S. Environmental Protection Agency" or "EPA" means the federal government agency with responsibility for protecting, safeguarding, and improving the natural environment (i.e., air, water, and land) upon which human life depends.

"Virginia Air Pollution Control Law" means Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 of the Code of Virginia, which is titled "Air Pollution Control Board."

"Virginia Environmental Laboratory Accreditation Program" or "VELAP" means the program DCLS operates to certify environmental laboratories under this chapter.

"Wastewater" means liquid and water-carried industrial wastes and domestic sewage from residential dwellings, commercial buildings, industrial and manufacturing facilities, and institutions.

"Waterworks" means each system of structures and appliances used in connection with the collection, storage, purification, and treatment of water for drinking or domestic use and the distribution thereof to the public, except distribution piping.

"Zooplankton" means microscopic animals that float freely with voluntary movement in a body of water.

## **1VAC30-45-95. Suspension of certification.**

A. DCLS may suspend certification from an environmental laboratory in total or in part to allow the laboratory time to correct the reason for which DCLS may withdraw certification. Suspension is limited to the reasons listed in subsection B of this section.

B. DCLS may suspend certification from an environmental laboratory in part or in total when the laboratory has failed to do any of the following:

1. Participate in the proficiency testing program as required by Article 3 (1VAC30-45-500 et seq.) of Part II of this chapter.
2. Satisfactorily complete proficiency testing studies as required by Article 3 (1VAC30-45-500 et seq.) of Part II of this chapter.
3. Submit an acceptable corrective action plan after two opportunities as specified in 1VAC30-45-390.
4. Maintain a quality system as defined in Article 4 (1VAC30-45-600 et seq.) of Part II of this chapter.
4. Employ staff that meets the personnel qualifications of Article 1 (1VAC30-45-200 et seq.) of Part II of this chapter.
5. Notify DCLS of any changes in key certification criteria as set forth in 1VAC30-45-90.

C. Process to suspend certification.

1. When DCLS becomes aware of a cause to suspend a laboratory, the agency shall send notification to the responsible official and the laboratory manager stating it appears to DCLS that the laboratory has failed to meet the 1VAC30-45 standards for one or more of the reasons listed in subsection B of this section. DCLS shall send the notification by certified mail.
2. The DCLS notification shall do the following:
  - a. Require the laboratory to provide DCLS with documentation of the corrective action already taken with regard to its failure to meet a standard under subsection B of this section.
  - b. State the corrective action the laboratory must take and the time allowed for this corrective action to be completed in order to retain certification.
3. The environmental laboratory may proceed to correct the deficiencies for which DCLS may suspend the laboratory's certification.
4. Alternatively the laboratory may state in writing that DCLS is incorrect in its observations regarding potential suspension and give specific reasons why the laboratory believes DCLS should not suspend certification. The

laboratory has the right to due process as set forth in 1VAC30-45-110, the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia), and Part 2A of the Rules of the Supreme Court of Virginia.

5. With the exception of subdivision B 4 of this section, DCLS may allow the laboratory up to 60 days to correct the problem for which it may have its certification suspended.

6. DCLS shall set a date for suspension that follows the period provided under subdivision 5 of this subsection to restore certification.

7. If the laboratory does not correct its deficiencies within the time period allowed or pursue options under subdivision 4 of this subsection, DCLS may suspend a laboratory in part or in total.

8. DCLS shall notify the laboratory by letter if the laboratory's certification is suspended in part or in total. DCLS shall send the notification by certified mail. DCLS shall also notify the pertinent Virginia state agency of the laboratory's suspension status.

9. The laboratory may provide information demonstrating why suspension is not warranted in accordance with subdivision 4 of this subsection.

**D. Responsibilities of the environmental laboratory and DCLS when certification has been suspended.**

1. The term of suspension shall be limited to six months or the period of certification whichever is longer.

2. The environmental laboratory shall not continue to analyze samples or report analysis for the fields of certification for which DCLS has suspended certification.

3. The environmental laboratory shall retain certification for the fields of certification, methods, and analytes where it continues to meet the requirements of this chapter.

4. The laboratory's suspended certification status shall change to certified when the laboratory demonstrates to DCLS that the laboratory has corrected the deficiency or deficiencies for which its certification was suspended.

5. An environmental laboratory with suspended certification shall not have to reapply for certification if the cause or causes for suspension are corrected within the term of suspension.

6. An environmental laboratory that DCLS has suspended in total shall pay the cost of any necessary follow-up on-site assessments or data review or both to determine compliance. This cost shall be calculated under the provisions of 1VAC30-45-130 F and G.

7. If the laboratory fails to correct the causes of suspension within the term of suspension, DCLS shall decertify the laboratory in total or in part.

**1VAC30-45-100. Decertification.**

A. DCLS shall decertify an environmental laboratory in total if the laboratory is found to be falsifying any data or providing false information to support certification.

B. DCLS may decertify an environmental laboratory in part or in total when the laboratory has failed to do any of the following:

1. Participate in the proficiency testing program as required by Article 3 (1VAC30-45-500 et seq.) of Part II of this chapter.

2. Satisfactorily complete proficiency testing studies as required by Article 3 (1VAC30-45-500 et seq.) of Part II of this chapter.

3. Successfully complete three consecutive PT studies, either by failure to participate in the required PT study or by failure to obtain acceptable results for the same field of certification.

4. Maintain a quality system as defined in Article 4 (1VAC30-45-600 et seq.) of Part II of this chapter.

~~4-5.~~ Employ staff that meets the personnel qualifications in Article 1 (1VAC30-45-200 et seq.) of Part II of this chapter.

~~5-6.~~ Submit an acceptable corrective action plan after two opportunities as specified in 1VAC30-45-390.

~~6-7.~~ Implement corrective action specified in the laboratory's corrective action plan as set out under 1VAC30-45-390.

~~7-8.~~ Correct the causes of suspension within the term of suspension.

9. Notify DCLS of any changes in key certification criteria as set forth in 1VAC30-45-90.

~~8-10.~~ Use accurate references to the laboratory's certification status in the laboratory's documentation.

~~9-11.~~ Allow a DCLS assessment team entry during normal business hours to conduct an on-site assessment required by Article 2 (1VAC30-45-300 et seq.) of Part II of this chapter.

~~10-12.~~ Pay the required fees specified in 1VAC30-45-130.

13. Meet the provisions regarding communication with others in 1VAC30-45-510 C.

C. DCLS shall follow the process specified in 1VAC30-45-110 when decertifying an environmental laboratory.

D. Responsibilities of the environmental laboratory and DCLS when certification has been withdrawn.

1. Laboratories that lose their certification in full shall return their certificate to DCLS.

2. If a laboratory loses certification in part, DCLS shall issue a revised certificate to the laboratory.

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3. When the environmental laboratory has lost certification in full or in part, the laboratory shall not continue to analyze samples or report analyses for the fields of certification that DCLS has decertified.

E. After correcting the reason or cause for decertification under subsection A or B of this section, the laboratory owner may reapply for certification under 1VAC30-45-70.

## 1VAC30-45-130. Fees.

### A. General.

1. Environmental laboratories shall pay a fee with all applications, including reapplications, for certification. DCLS shall not designate an application as complete until it receives payment of the fee.

2. Each certified environmental laboratory shall pay an annual fee to maintain its certification. DCLS shall send an invoice to the certified environmental laboratory.

3. Fees shall be nonrefundable.

4. DCLS, as part of its regular budgetary review of the program, shall determine whether the fees charged under this section offset the program costs as required under § 2.2-1105 of the Code of Virginia.

B. Environmental laboratories performing only simple test procedures shall pay an annual fee of \$690.

### C. Fee computation for general environmental laboratories.

1. Fees shall be applied on an annual basis.

2. Environmental laboratories shall pay the total of the base fee and the test category fees set out in subsections D and E of this section.

### D. Base fees for general environmental laboratories.

1. DCLS determines the base fee for a laboratory by taking into account both the total number of methods and the total number of field of certification matrices for which the laboratory would be certified.

2. DCLS shall charge the base fees set out in Table 1. The base fee for a laboratory is located by first finding the row for the total number of methods to be certified and then finding the box on that row located in the column headed by the total number of matrices to be certified. For example, DCLS charges a base fee of \$1495 to a laboratory performing a total of eight methods for one matrix.

Number of Methods	1 Matrix	2 Matrices
1 - 9	\$1495	\$1645
10 - 29	\$1610	\$1811
30 - 99	\$1783	\$2099

### E. Test category fees for general environmental laboratories.

1. The test category fees cover the types of testing for which a laboratory may be certified as specified in the laboratory's application or as certified at the time of annual billing.

2. Fees shall be charged for each category of tests to be certified.

3. Fees shall be charged for the total number of field of certification matrices to be certified under the specific test category. For example, if a laboratory is performing inorganic chemistry for both nonpotable water and solid and chemical materials matrices, the fee for this test category would be found in the column for two matrices.

4. The fee for each category includes one or more analytical methods unless otherwise specified.

5. DCLS shall charge the test category fees set out in Table 2. The test category fees for a laboratory are located by first finding the row with the total number of test methods for the test category to be certified. The fee to be charged for the test category will be found on that row in the column headed by the total number of matrices to be certified. A laboratory performing four test methods for inorganic chemistry in nonpotable water and solid and chemical materials (two matrices) would be charged a test category fee of \$431.

6. Noncommercial environmental laboratories that perform toxicity, radiochemical, or asbestos testing shall pay the test category fees established for these types of testing in 1VAC30-46-150.

Test Category	Fees by Number of Matrices	
	One	Two
Oxygen demand	\$259	\$385
Bacteriology, 1 - 3 total methods	\$201	\$305
Bacteriology, 4 or more total methods	\$253	\$380
Physical, 1 - 5 total methods	\$201	\$305
Physical, 6 - 10 total methods	\$253	\$380
Inorganic chemistry, 1 - 10 total methods	\$288	\$431
Inorganic chemistry, 11 - 20 total methods	\$362	\$546
Inorganic chemistry, 21 - 49 total methods	\$453	\$679

Chemistry metals, 1 - 5 total methods	\$374	\$564
Chemistry metals, 6 - 20 total methods	\$472	\$707
Organic chemistry, 1 - 5 total methods	\$460	\$690
Organic chemistry, 6 - 20 total methods	\$575	\$863

7. Fee examples. Three examples are provided.

a. Example 1:

Base Fee	One matrix and four test methods	\$1495
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (2 methods)	\$201
Nonpotable Water	Oxygen demand (1 method)	\$259
Nonpotable Water	Physical (1)	\$201
TOTAL		\$2156

b. Example 2:

Base Fee	One matrix and 15 test methods	\$1610
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (2 methods)	\$201
Nonpotable Water	Inorganic chemistry (9 methods)	\$288
Nonpotable Water	Chemistry metals (2 methods)	\$374
Nonpotable Water	Oxygen demand (1 method)	\$259
Nonpotable Water	Physical (1)	\$201
TOTAL		\$2933

c. Example 3:

Base Fee	Two matrices and 27 test methods	\$1811
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (4 methods)	\$253
Nonpotable Water	Oxygen demand (1 method)	\$259
Solid and Chemical Materials	Chemistry metals (1 method)	\$374
Two Matrices		
Nonpotable Water and Solid and Chemical Materials	Inorganic chemistry (13 methods)	\$546
Nonpotable Water and Solid and Chemical Materials	Physical (7 methods)	\$380
TOTAL		\$3623

F. Additional fees. Additional fees shall be charged to laboratories applying for the following: (i) modification to scope of certification under 1VAC30-45-90 B, (ii) transfer of ownership under 1VAC30-45-90 C, (iii) review of compliance following total suspension, (iv) exemption under 1VAC30-45-120, or ~~(iv)~~ (v) petition for a variance under 1VAC30-45-140.

1. For any certified environmental laboratory that applies to modify its scope of certification as specified under 1VAC30-45-90 B, DCLS shall assess a fee determined by the method in subsection G of this section.

2. Under 1VAC30-45-90 C, DCLS may charge a transfer fee to a certified laboratory that transfers ownership. A fee shall be charged if DCLS (i) needs to review documentation sent by the laboratory about the transfer of ownership or (ii) determines that an on-site assessment is necessary to evaluate the effect of the transfer of ownership. DCLS shall assess a fee determined by the method in subsection G of this section. If, under 1VAC30-45-90 C, DCLS determines that the change of ownership or location of laboratory requires recertification of or reapplication by the laboratory, the laboratory shall pay the application fees required under this section.

3. Under 1VAC30-45-95 D 6, an environmental laboratory that DCLS has suspended in total shall be charged the cost

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of any necessary follow-up on-site assessments or data review or both to determine compliance. This charge shall be calculated under the method specified in subsection G of this section.

4. General environmental laboratories applying for an exemption under 1VAC30-45-120 shall pay an initial application fee of \$700 plus an additional fee based on the actual time needed for DCLS to assess the exemption request. The total fee shall not exceed the actual time DCLS takes to assess the exemption request. Laboratories performing only simple test procedures applying for an exemption under 1VAC30-45-120 shall pay an initial application fee of \$300 plus an additional fee based on the actual time needed for DCLS to assess the exemption request. The total fee shall not exceed the actual time DCLS takes to assess the exemption request. The fee assessed shall be calculated using the method in subsection G of this section.

~~4.~~ 5. Under 1VAC30-45-140, any person regulated by this chapter may petition the director to grant a variance from any requirement of this chapter. DCLS shall charge an initial fee of \$700 plus an additional fee based on the actual time needed for DCLS to review the petition, including any on-site assessment required. The total fee shall not exceed the actual time DCLS takes to review and make a determination on the request for a variance. The fee shall be determined by the method specified in subsection G of this section.

## G. Fee determination.

1. The fee shall be the sum of the total hourly charges for all reviewers plus any on-site review costs incurred.
2. An hourly charge per reviewer shall be determined by (i) obtaining a yearly cost by multiplying the reviewer's annual salary by 1.35 (accounts for overhead such as taxes and insurance) and then (ii) dividing the yearly cost by 1,642 (number of annual hours established by Fiscal Services, the Department of General Services, for billing purposes).
3. The charge per reviewer shall be determined by multiplying the number of hours expended in the review by the reviewer's hourly charge.
4. If an on-site review is required, travel time and on-site review time shall be charged at the same hourly charge per reviewer, and any travel expenses shall be added.

H. Out-of-state laboratories - travel costs. The owner of an environmental laboratory located in another state who applies for certification under this chapter shall also pay a fee equal to the reasonable travel costs associated with conducting an on-site assessment at the laboratory. Reasonable travel costs include transportation, lodging, per diem, and telephone and duplication charges.

I. DCLS shall derive the travel costs charged under subsections G and H of this section from the Commonwealth

of Virginia reimbursement allowances and rates for lodging, per diem, and mileage.

## 1VAC30-45-520. PT criteria for laboratory certification.

### A. Result categories.

1. The criteria described in this section apply individually to each FoPT, as defined by the laboratory seeking to obtain or maintain certification in its certification request. These criteria apply only to the PT portion of the overall certification standard.
2. There are two PT result categories: "acceptable" and "not acceptable."

### B. Initial and continuing certification.

1. A laboratory seeking to obtain or maintain certification shall successfully complete one PT study for each requested FoC.
2. Once a laboratory has been granted certification status, it shall continue to complete PT studies for each FoPT and maintain a history of at least one acceptable PT study each calendar year. The laboratory shall complete its PT studies by September 30 of each calendar year.
3. When the PT sample used for initial certification was analyzed by the laboratory prior to the date of application, the analysis date of the PT sample shall be no more than 12 months prior to the application date of certification.
4. For a laboratory performing supplemental testing, the PT studies shall be at least ~~45~~ seven calendar days apart from the closing date of one study to the ~~shipment~~ shipment opening date of another study for the same FoPT.
5. When the PT study result is reported by the PT provider as "acceptable" the environmental laboratory has satisfied the PT requirement.
6. When the PT study result is "not acceptable," the environmental laboratory shall follow the procedure in subsection C of this section.
7. DCLS shall consider a laboratory's analytical result for a FoPT not acceptable when the laboratory makes any reporting error or omission that results in a nonspecific match between the analytical result for the FoPT and any criterion that identifies the laboratory or the field of certification for which the PT sample was analyzed for the purpose of initial or continued certification.

### C. Procedure and requirements for "not acceptable" PT study results.

1. When a laboratory receives a PT study result of "not acceptable," the laboratory shall determine the cause for the failure and perform and document corrective action. The corrective action documentation shall be completed within 30 days of receiving the "not acceptable" PT study result and

be submitted to DCLS upon request. DCLS may extend the time for corrective action and documentation.

2. Upon completion of the corrective action the laboratory shall perform another PT study for each FoPT that had a "not acceptable" result.

3. If the laboratory successfully completes the makeup PT study by receiving an "acceptable" result before December 31, DCLS shall not suspend the laboratory's certification for the pertinent FoC.

4. If the laboratory receives a "not acceptable" result on the makeup PT study, DCLS shall notify the laboratory that there is cause to suspend the laboratory's certification for the FoC for which the PT study was "not acceptable."

5. DCLS shall not extend the period for annual PT study completion beyond December 31 each year. Failure to satisfactorily complete a PT study, including any corrective action and makeup PT study, by December 31 shall result in suspension of certification in total or in part.

6. If the laboratory receives a "not acceptable" result on three successive PT studies, DCLS shall decertify the laboratory for the pertinent FoC until such time that the laboratory:

- a. Completes corrective action for all failed studies and submits its corrective action report to DCLS;
- b. Obtains an "acceptable" result for the PT studies; and
- c. Applies for a change to its scope of certification and pays applicable fees required by 1VAC30-45-90 B and 1VAC30-45-130 F.

7. DCLS shall follow the provisions of 1VAC30-45-110 in decertifying the laboratory.

D. Withdrawal from PT studies. A laboratory may withdraw from a PT study for any FoPT on or before the close date of the study. Withdrawing from a study shall not exempt the laboratory from meeting the annual analysis requirements necessary for continued certification.

### **1VAC30-45-650. Records management and storage.**

A. The laboratory shall keep all records, certificates, and reports as required by applicable state and federal recordkeeping laws and regulations. The laboratory shall safely store these records and hold them secure.

B. The laboratory shall retain all records for a minimum of three years from generation of the last entry in the records, or longer, if required by an applicable regulatory program, whichever is greater. The laboratory shall maintain all information necessary for the historical reconstruction of data, including all original observations, calculations and derived data, calibration records and a copy of the test report.

C. Records that are stored only on electronic media shall be supported by the hardware and software necessary for their retrieval. Records that are stored or generated by computers or

personal computers shall have hard copy or write-protected backup copies.

D. The laboratory shall establish a record management system for control of laboratory notebooks, instrument logbooks, standards logbooks, and records for data reduction, validation storage and reporting.

E. ~~Access to archived information shall be documented with an access log.~~ The laboratory shall protect these records against fire, theft, loss, environmental deterioration, vermin and, in the case of electronic records, electronic or magnetic sources.

F. The laboratory shall have a plan to ensure that the records are maintained or transferred in the event that a laboratory transfers ownership or goes out of business. In addition, in cases of bankruptcy, the laboratory shall follow appropriate regulatory and state legal requirements concerning laboratory records.

### **1VAC30-45-730. Test methods and standard operating procedures.**

#### A. Methods documentation.

1. The laboratory shall have documented instructions on the use and operation of all relevant equipment, on the handling and preparation of samples, and for calibration or testing, where the absence of such instructions could jeopardize the calibrations or tests.

2. All instructions, standards, manuals, and reference data relevant to the work of the laboratory shall be maintained up to date and be readily available to the staff.

#### B. Standard operating procedures (SOPs).

1. Laboratories shall maintain SOPs that accurately reflect all phases of current laboratory activities such as assessing data integrity, corrective actions, handling customer complaints, and all test methods. These documents, for example, may be equipment manuals provided by the manufacturer or internally written documents. The test methods may be copies of published methods as long as any changes or selected options in the methods are documented and included in the laboratory methods manual.

2. The SOPs shall be organized. Each SOP shall clearly indicate the effective date of the document, the revision number, and the signature or signatures of the responsible laboratory manager or managers.

3. Copies of all SOPs shall be accessible to all personnel.

#### C. SOPs for laboratory methods.

1. The laboratory shall have and maintain an SOP for each certified analyte or test method.

2. This SOP may be a copy of a published or referenced method or may be written by the laboratory. In cases where modifications to the published method have been made by

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the laboratory or where the referenced test method is ambiguous or provides insufficient detail, these changes or clarifications shall be clearly described. Each test method shall include or reference where applicable:

- a. Identification of the test method;
- b. Applicable matrix or matrices;
- c. Limits of detection or quantitation;
- d. Scope and application, including parameters to be analyzed;
- e. Summary of the test method;
- f. Definitions;
- g. Interferences;
- h. Safety;
- i. Equipment and supplies;
- j. Reagents and standards;
- k. Sample collection, preservation, shipment, and storage;
- l. Quality control;
- m. Calibration and standardization;
- n. Procedure;
- o. Data analysis and calculations;
- p. Method performance;
- q. Pollution prevention;
- r. Data assessment and acceptance criteria for quality control measures;
- s. Corrective actions for out-of-control data;
- t. Contingencies for handling out-of-control or unacceptable data;
- u. Waste management;
- v. References; and
- w. Any tables, diagrams, flowcharts, and validation data.

## D. Test methods.

1. Laboratories shall use (i) promulgated test methods in accordance with the Code of Federal Regulations; (ii) test methods stated in any current permit issued by the State Air Pollution Control Board, the Virginia Waste Management Board, or the State Water Control Board; or (iii) alternate test procedures approved by the board issuing the permit or the Department of Environmental Quality, including applicable quality assurance requirements, and sample preservation, container, storage, and holding time requirements.

2. The laboratory shall use appropriate test methods and procedures for all tests and related activities within its responsibility (including sample handling, transport and storage, preparation, and analysis). The method and procedures shall be consistent with the accuracy required and with any standard specifications relevant to the calibrations or tests concerned.

3. When the use of reference test methods for a sample analysis is mandated, only those methods shall be used.

4. Where test methods are employed that are not required, as in the Performance Based Measurement System approach, the methods shall be fully documented and validated (see subsection E of this section).

## E. Demonstration of capability.

1. Prior to acceptance and institution of any test method, satisfactory initial demonstration of method capability is required. In general, this demonstration does not test the performance of the method in real world samples, but in the applicable and available clean quality system matrix sample (a quality system matrix in which no target analytes or interferences are present at concentrations that impact the results of a specific test method), for example, drinking water, solids, biological tissue, and air. Laboratories shall follow the procedure in subsection F of this section to demonstrate capability.

2. Thereafter, ongoing demonstration of method performance, such as laboratory control samples, is required.

3. In cases where a laboratory analyzes samples using a test method that has been in use by the laboratory for at least one year prior to applying for certification, and there have been no significant changes in instrument type, personnel or test method, the continuing demonstration of method performance and the analyst's documentation of continued proficiency shall be acceptable. The laboratory shall have records on file to demonstrate that an initial demonstration of capability is not required.

4. In cases where a laboratory analyzes samples using a test method that has not been in use by an individual in the laboratory for at least one 12-month period, another successful demonstration of capability in accordance with subsection F of this section shall be required for that individual to resume testing by the method.

5. In all cases, the laboratory shall document each demonstration of capability as required by subsection G of this section.

~~5.~~ 6. The laboratory shall complete a demonstration of capability each time there is a change in instrument type, personnel or test method, including the addition of an analyte to a certified test method.

F. Procedure for demonstration of capability. The following steps shall be performed for mandated test methods. However, before any results are reported using this method, actual sample spike results may be used to meet this standard (i.e., at least four consecutive matrix spikes within the last 12 months). For analytes that do not lend themselves to spiking (e.g., TSS) the demonstration of capability may be performed using quality control samples. The laboratory may document that other approaches to demonstration of capability are adequate.

This documentation shall be included in the laboratory's quality manual:

1. A quality control (QC) sample may be obtained from an outside source or may be prepared by the laboratory using alternate source stock standards that are prepared independently from those used in instrument calibration.

2. The analyte or analytes shall be diluted in a volume of clean quality system matrix sufficient to prepare four aliquots at the concentration specified, or if unspecified, to a concentration of 1-4 times the limit of quantitation.

3. At least four aliquots shall be prepared and analyzed according to the test method either concurrently or over a period of days.

4. Using all of the results, calculate the mean recovery in the appropriate reporting units (such as g/L) and the standard deviations of the population sample (n-1) (in the same units) for each parameter of interest. When it is not possible to determine mean and standard deviations, such as for presence or absence of the analyte and logarithmic values, the laboratory shall assess performance against established and documented criteria.

5. Compare the information from subdivision 4 of this subsection to the corresponding acceptance criteria for precision and accuracy in the test method (if applicable) or in laboratory-generated acceptance criteria (if there are not established mandatory criteria). If all parameters meet the acceptance criteria, the analysis of actual samples may begin. If any one of the parameters do not meet the acceptance criteria, the performance is unacceptable for that parameter.

6. When one or more of the tested parameters fail at least one of the acceptance criteria, the analyst shall proceed according to either subdivision 6 a or 6 b of this subsection.

a. Locate and correct the source of the problem and repeat the test for all parameters of interest beginning with subdivision 3 of this subsection.

b. Beginning with subdivision 3 of this subsection, repeat the test for all parameters that failed to meet criteria. Repeated failure, however, confirms a general problem with the measurement system. If this occurs, locate and correct the source of the problem and repeat the test for all compounds of interest beginning with subdivision 3 of this subsection.

G. Documentation of demonstration of capability. The laboratory shall document each demonstration of capability so that the following information shall be readily available for each employee:

1. Analyst or analysts involved in preparation and analysis.
2. Matrix.

3. Analytes, class of analytes, measured parameters, or organisms.

4. Identification of methods performed.

5. Identification of laboratory-specific SOP used for analysis, including revision number.

6. Date or dates of analysis.

7. All raw data necessary to reconstruct and validate the analyses.

8. Data evaluation required by subsection F of this section.

H. Sample aliquots. Where sampling (as in obtaining sample aliquots from a submitted sample) is carried out as part of the test method, the laboratory shall use documented procedures and appropriate techniques to obtain representative subsamples.

I. Data verification. Calculations and data transfers shall be subject to appropriate checks. The laboratory shall establish standard operating procedures to ensure that (i) the reported data are free from transcription and calculation errors and (ii) all quality control measures are reviewed and evaluated before data are reported. The laboratory also shall establish standard operating procedures addressing manual calculations including manual integrations.

J. Documentation and labeling of standards and reagents. Documented procedures shall exist for the reception and storage of consumable materials used for the technical operations of the laboratory.

1. The laboratory shall retain records for all standards, reagents, reference materials, and media including the manufacturer/vendor, the manufacturer's Certificate of Analysis or purity (if available), the date of receipt, recommended storage conditions, and an expiration date after which the material shall not be used unless its reliability is verified by the laboratory.

2. Original containers (such as provided by the manufacturer or vendor) shall be labeled with an expiration date if this date is provided by the manufacturer or vendor.

3. Records shall be maintained on standard and reference material preparation. These records shall indicate traceability to purchased stocks or neat compounds, reference to the method of preparation, date of preparation, expiration date and preparer's initials.

4. Sufficient identification of containers of prepared reagents and standards shall be provided to ensure proper performance of tests.

K. Computers and electronic data related requirements. Where computers, automated equipment or microprocessors are used for the capture, processing, manipulation, recording, reporting, storage or retrieval of test data, the laboratory shall ensure the following:

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1. Computer software developed by the user is documented in sufficient detail and is suitably validated as being adequate for use.
2. Procedures are established and implemented for protecting the integrity of data, such as integrity of data entry or capture, data storage, data transmission and data processing.
3. Computer and automated equipment are maintained to ensure proper functioning and provided with the environmental and operating conditions necessary to maintain the integrity of calibration and test data.
4. Appropriate procedures are established and implemented for the maintenance of security of data including the prevention of unauthorized access to, and the unauthorized amendment of, computer records.

## **1VAC30-45-750. Quality assurance.**

A. General. The laboratory shall have quality control procedures for monitoring the validity of environmental tests undertaken. The resulting data shall be recorded in such a way that trends are detectable and, where practicable, statistical techniques shall be applied to the reviewing of the results. This monitoring shall be planned and reviewed and may include, but not be limited to, the following:

1. Regular use of certified reference materials or internal quality control using secondary reference materials or both.
2. Participation in interlaboratory comparison or proficiency testing program.
3. Replicate tests using the same or different methods.
4. Retesting of retained samples.
5. Correlation of results for different characteristics of a sample (e.g., total phosphate should be greater than or equal to orthophosphate).

B. Essential quality control procedures. The general quality control principles in subsection C of this section shall apply, where applicable, to all environmental laboratories. The manner in which they are implemented is dependent on the types of tests performed by the laboratory. 1VAC30-45-770 through 1VAC30-45-775, 1VAC30-45-790 through 1VAC30-45-798, and 1VAC30-45-810 through 1VAC30-45-818 specify quality control requirements for chemical testing, microbiological testing, and air testing, respectively. Noncommercial environmental laboratories that analyze environmental samples using ~~other types of testing such as~~ toxicity, radiochemical, or asbestos testing shall meet the quality control standards for the specific method and the specific type of testing in ~~the 2009~~ Modules 3, 6, and 7 of Volume 1 of the 2016 TNI Standards for Environmental Laboratories. The standards for any given test type shall assure that the applicable principles are addressed.

C. All laboratories shall have detailed written protocols in place to monitor the following quality controls:

1. Positive and negative controls to monitor tests such as blanks, spikes, reference toxicants.
2. Tests to define the variability or repeatability of the laboratory results or both such as replicates.
3. Measures to assure the accuracy of the test method including calibration or continuing calibrations or both, use of certified reference materials, proficiency test samples, or other measures.
4. Measures to evaluate test method capability, such as method detection limits and quantitation limits or range of applicability such as linearity.
5. Selection of appropriate formulae to reduce raw data to final results such as regression analysis, comparison to internal and external standard calculations, and statistical analyses.
6. Selection and use of reagents and standards of appropriate quality.
7. Measures to assure the selectivity of the test for its intended purpose.
8. Measures to assure constant and consistent test conditions (both instrumental and environmental) where required by the test method such as temperature, humidity, light, or specific instrument conditions.

## **1VAC30-45-760. Quality control requirements.**

A. General.

1. The quality control protocols specified by the laboratory's SOPs shall be followed (1VAC30-45-730 C). The laboratory shall ensure that either the (i) applicable essential standards outlined in this section through 1VAC30-45-775, 1VAC30-45-790 through 1VAC30-45-798, and 1VAC30-45-810 through 1VAC30-45-818 or (ii) mandated methods or regulations, whichever are more stringent, are incorporated into their method SOPs. When it is not apparent which is more stringent, the quality controls in the mandated method or regulations are to be followed.
2. All quality control measures shall be assessed and evaluated on an ongoing basis and quality control acceptance criteria shall be used to determine the validity of the data. The laboratory shall have procedures for the development of acceptance/rejection criteria where no method or regulatory criteria exists.

B. Initial test method evaluation. For all test methods other than microbiology, the requirements of subdivisions 1 and 2 of this subsection apply. For microbiology testing, the initial test method evaluation requirements are contained in 1VAC30-45-790 through 1VAC30-45-798. For the evaluation of precision and bias (subdivision 3 of this subsection), the requirements of

subdivision 3 a of this subsection apply to standard methods. The requirements of subdivision 3 b of this subsection apply to the methods referenced in that subdivision.

1. Limit of detection (LOD).

a. The laboratory shall determine the LOD for the method for each target analyte of concern in the quality system matrices. ~~All when the testing is done in accordance with the federal Clean Water Act using approved methods listed in 40 CFR Part 136, except when the procedure for Determination of Method Detection Limit at 40 CFR Part 136 Appendix B states the procedure is not applicable to a measurement.~~

b. The laboratory shall determine the LOD for the method for each target analyte of concern in the quality system matrices when test results are to be reported to the LOD (versus the limit of quantitation or working range of instrument calibration), according to 1VAC30-45-771 and 1VAC30-45-814. Where an LOD study is not performed, the laboratory may not report a value below the limit of quantitation.

c. When the LOD is required under subdivision 1 a or 1 b of this subsection, all sample processing steps of the analytical method shall be included in the determination of the LOD.

~~b.~~ d. The validity of the LOD shall be confirmed as described in 40 CFR Part 136 Appendix B as applicable, or by qualitative identification of the analyte or analytes in a quality control sample in each quality system matrix containing the analyte at no more than two to three times the LOD for single analyte tests and one to four times the LOD for multiple analyte tests. This verification shall be performed on every instrument that is to be used for analysis of samples and reporting of data.

~~e. An LOD study is not required for any component for which spiking solutions or quality control samples are not available such as temperature, or, when test results are not to be reported to the LOD (versus the limit of quantitation or working range of instrument calibration), according to 1VAC30-45-771 and 1VAC30-45-814. Where an LOD study is not performed, the laboratory may not report a value below the limit of quantitation.~~

2. Limit of quantitation (LOQ).

a. The laboratory shall determine the LOQ for each analyte of concern according to a defined, documented procedure.

b. The LOQ study is not required for any component or property for which spiking solutions or quality control samples are not commercially available or otherwise inappropriate (e.g., pH).

c. The validity of the LOQ shall be confirmed by successful analysis of a QC sample containing the analytes of concern in each quality system matrix ~~one to~~ at a concentration at or below the LOQ or no more than two

times the concentration of the claimed LOQ. A successful analysis is one where the recovery of each analyte is within the established test method acceptance criteria or client data quality objectives for accuracy. This single analysis is not required if the bias and precision of the measurement system is evaluated at the LOQ.

3. Evaluation of precision and bias.

a. Standard methods. The laboratory shall evaluate the precision and bias of a standard method for each analyte of concern for each quality system matrix according to either of the following:

(1) The single-concentration four-replicate recovery study procedures in 1VAC30-45-730 F; or

(2) An alternate procedure documented in the quality manual when the analyte cannot be spiked into the sample matrix and quality control samples are not commercially available.

b. Nonstandard methods.

(1) For laboratory-developed test methods or nonstandard test methods that were not in use by the laboratory before July 2003, the laboratory shall have a documented procedure to evaluate precision and bias. The laboratory shall also compare results of the precision and bias measurements with criteria given in the reference method or criteria established by the laboratory.

(2) Precision and bias measurements shall evaluate the method across the analytical calibration range of the method. The laboratory shall also evaluate precision and bias in the relevant quality system matrices and shall process the samples through the entire measurement system for each analyte of interest.

(3) The following are examples of a systematic approach to evaluate precision and bias:

(a) Example 1. Analyze QC samples in triplicate containing the analytes of concern at or near the limit of quantitation, at the upper-range of the calibration (upper 20%) and at a mid-range concentration. Process these samples on different days as three sets of samples through the entire measurement system for each analyte of interest. Each day one QC sample at each concentration is analyzed. A separate method blank shall be subjected to the analytical method along with the QC samples on each of the three days. (Note that the three samples at the LOQ concentration can demonstrate sensitivity as well.) For each analyte, calculate the mean recovery for each day, for each level over days, and for all nine samples. Calculate the relative standard deviation for each of the separate means obtained. Compare the standard deviations for the different days and the standard deviations for the different concentrations. If the different standard deviations are all statistically insignificant (e.g., F-test), then compare the overall mean and standard deviation with the established criteria from above.

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(b) Example 2. A validation protocol such as the Tier I, Tier II, and Tier III requirements in U.S. EPA Office of Water's Alternate Test Procedure (ATP) approval process.

4. Evaluation of selectivity. The laboratory shall evaluate selectivity by following the checks established within the method. These checks may include mass spectral tuning, second column confirmation, ICP inter-element interference checks, chromatography retention time windows, sample blanks, spectrochemical absorption or fluorescence profiles, co-precipitation evaluations, and electrode response factors.

## **1VAC30-45-771. Chemical testing: limit of detection and limit of quantitation.**

A. General. All procedures used shall be documented. Documentation shall include the quality system matrix type. All supporting data shall be retained.

B. Limit of detection (LOD). The laboratory shall utilize a test method that provides an LOD that is appropriate and relevant for the intended use of the data. ~~An LOD is not required for a test method when test results are not reported outside of the calibration range.~~ LOD determination and validation are required as specified by 1VAC3045-760 B 1. LODs shall be determined by the protocol in the mandated test method or applicable regulation. If the protocol for determining LODs is not specified, the selection of the procedure shall reflect instrument limitations and the intended application of the test method.

1. The LOD shall be initially determined for the compounds of interest in each test method in a quality system matrix in which there are no target analytes or interferences at a concentration that would impact the results. Alternatively the LOD shall be determined in the quality system matrix of interest (see definition of matrix).

2. LODs shall be determined each time there is a change in the test method that affects how the test is performed, or when a change in instrumentation occurs that affects the sensitivity of the analysis.

3. The LOD shall be verified annually for each quality system matrix, method and analyte according to the procedure as specified in 1VAC30-45-760 B 1.

C. Limit of quantitation (LOQ).

1. Any established LOQ shall be above the LOD.

2. The LOQ shall be verified annually for each quality system matrix, method and analyte according to the procedure specified in 1VAC30-45-760 B 2. Alternatively, the annual LOQ verification is not required if the LOD is reevaluated or verified according to subdivision B 3 of this section.

**NOTICE:** The following forms used in administering the regulation have been filed by the agency. Amended or added forms are reflected in the listing and are published following

the listing. Online users of this issue of the Virginia Register of Regulations may also click on the name to access a form. The forms are also available from the agency contact or may be viewed at the Office of Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

## FORMS (1VAC30-45)

~~Application for Certification of Environmental Laboratories DGS 21-156 (eff. 1/2009)~~ (Application for Certification Laboratories applying for certification under 1VAC30-45 must ~~be obtained~~ obtain the application from DCLS program staff at [Lab\\_Cert@dgs.virginia.gov](mailto:Lab_Cert@dgs.virginia.gov))

## DOCUMENTS INCORPORATED BY REFERENCE (1VAC30-45)

The Standards for Environmental Laboratories and Accreditation Bodies, ~~2009~~ 2016, The NELAC Institute (TNI), P.O. Box 2439, Weatherford, TX 76086; [www.nelac-institute.org](http://www.nelac-institute.org):

~~Volume 1: Management and Technical Requirements for Laboratories Performing Environmental Analysis (EL-V1-2009)~~

~~Volume 2: General Requirements for Accreditation Bodies Accrediting Environmental Laboratories (EL-V2-2009)~~

[Volume 1: Management and Technical Requirements for Laboratories Performing Environmental Analysis \(EL-V1-2016, rev. 2.1\). Modules 3, 6, and 7 only](#)

## **1VAC30-46-15. Standards for accreditation transition.**

A. Commercial environmental laboratories are accredited under the standards of ~~the National Environmental Laboratory Accreditation Conference (NELAC), now~~ The NELAC Institute (TNI).

B. DCLS shall accredit commercial environmental laboratories under the ~~2003 NELAC~~ 2009 TNI Standards as specified by the provisions of this chapter that became effective on ~~January 1, 2009~~ November 1, 2015, for the first ~~40~~ six months following ~~November 1, 2015~~ (insert the effective date of this chapter).

C. DCLS shall accredit commercial environmental laboratories under the ~~2009~~ 2016 TNI Standards as specified by the provisions of this chapter effective ~~on November 1, 2015~~ (insert the effective date of this chapter), beginning on the first day of the ~~11th~~ seventh month following ~~November 1, 2015~~ (insert the effective date of this chapter).

## **1VAC30-46-40. Definitions.**

A. The definitions contained in the ~~2009~~ 2016 TNI Standards are incorporated by reference into this section. Some of these definitions are included in this section because the terms are used throughout this chapter.

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

"Acceptance criteria" means specified limits placed on characteristics of an item, process, or service defined in requirement documents.

"Accreditation" means the process by which an agency or organization evaluates and recognizes a laboratory as meeting certain predetermined qualifications or standards, thereby accrediting the laboratory. "Accreditation" is the term used as a substitute for the term "certification" under this chapter.

"Accreditation body" or "AB" means the territorial, state, or federal agency having responsibility and accountability for environmental laboratory accreditation and which grants accreditation.

"Algae" means simple single-celled, colonial, or multicelled, mostly aquatic plants, containing chlorophyll and lacking roots, stems and leaves that are either suspended in water (phytoplankton) or attached to rocks and other substrates (periphyton).

"Analyte" means the substance ~~or physical property to be determined in samples examined.~~ organism, physical parameter, or chemical constituent for which an environmental sample is being analyzed.

"Analytical method" means a technical procedure for providing analysis of a sample, defined by a body such as the Environmental Protection Agency or the American Society for Testing and Materials, that may not include the sample preparation method.

"Assessment" means the evaluation process used to measure or establish the performance, effectiveness, and conformance of an organization and its systems or both to defined criteria (i.e., to the standards and requirements of laboratory accreditation).

"Assessor" means the person assigned by DCLS to perform, alone or as part of an assessment team, an assessment of an environmental laboratory.

"Authority" means, in the context of a governmental body or local government, an authority created under the provisions of the Virginia Water and Waste Authorities Act, Chapter 51 (§ 15.2-5100 et seq.) of Title 15.2 of the Code of Virginia.

"Benthic macroinvertebrates" means bottom dwelling animals without backbones that live at least part of their life cycles within or upon available substrates within a body of water.

"Commercial environmental laboratory" means an environmental laboratory where environmental analysis is performed for another person.

"Corrective action" means the action taken to eliminate the causes of an existing nonconformity, defect or other undesirable situation in order to prevent recurrence.

"DCLS" means the Division of Consolidated Laboratory Services of the Department of General Services.

"Environmental analysis" or "environmental analyses" means any test, analysis, measurement, or monitoring used for the purposes of the Virginia Air Pollution Control Law, the Virginia Waste Management Act or the State Water Control Law (§ 10.1-1300 et seq., § 10.1-1400 et seq., and § 62.1-44.2 et seq., respectively, of the Code of Virginia). For the purposes of these regulations, any test, analysis, measurement, or monitoring required pursuant to the regulations promulgated under these three laws, or by any permit or order issued under the authority of any of these laws or regulations is "used for the purposes" of these laws. The term shall not include the following:

1. Sampling of water, solid and chemical materials, biological tissue, or air and emissions.
2. Field testing and measurement of water, solid and chemical materials, biological tissue, or air and emissions, except when performed in an environmental laboratory rather than at the site where the sample was taken.
3. Taxonomic identification of samples for which there is no national accreditation standard such as algae, benthic macroinvertebrates, macrophytes, vertebrates, and zooplankton.
4. Protocols used pursuant to § 10.1-104.2 of the Code of Virginia to determine soil fertility, animal manure nutrient content, or plant tissue nutrient uptake for the purposes of nutrient management.
5. Geochemical and permeability testing for solid waste compliance.
6. Materials specification for air quality compliance when product certifications specify the data required by an air permit such as fuel type, Btu content, sulfur content, or volatile organic chemical (VOC) content.

"Environmental laboratory" or "laboratory" means a facility or a defined area within a facility where environmental analysis is performed. A structure built solely to shelter field personnel and equipment from inclement weather shall not be considered an environmental laboratory.

"Establishment date" means the date set for the accreditation program under this chapter and the certification program under 1VAC30-45 to be established.

"Establishment of accreditation program" or "established program" means that DCLS has completed the initial accreditation of environmental laboratories covered by this chapter and the initial certification of environmental laboratories covered by 1VAC30-45.

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"Facility" means something that is built or installed to serve a particular function.

"Field of accreditation" means those matrix, technology/method, and analyte combinations for which DCLS offers accreditation.

"Field of accreditation matrix" means the following when accrediting a laboratory:

1. Drinking water. Any aqueous sample that has been designated a potable or potential potable water source.
2. Nonpotable water. Any aqueous sample excluded from the definition of drinking water matrix. Includes surface water, groundwater, effluents, water treatment chemicals, and TCLP or other extracts.
3. Solid and chemical materials. Includes soils, sediments, sludges, products and byproducts of an industrial process that results in a matrix not previously defined.
4. Biological tissue. Any sample of a biological origin such as fish tissue, shellfish, or plant material. Such samples shall be grouped according to origin (i.e., by species).
5. Air and emissions. Whole gas or vapor samples including those contained in flexible or rigid wall containers and the extracted concentrated analytes of interest from a gas or vapor that are collected with a sorbent tube, impinger solution, filter or other device.

"Field of proficiency testing" or "FoPT" means ~~analytes for which a laboratory is required to successfully analyze a PT sample in order to obtain or maintain accreditation, collectively defined as:~~ the matrix, technology/method, and analyte combinations for which the composition spike concentration ranges and acceptance criteria have been established by the Proficiency Testing Program Executive Committee of TNI.

"Field testing and measurement" means any of the following:

1. Any test for parameters under 40 CFR Part 136 for which the holding time indicated for the sample requires immediate analysis; or
2. Any test defined as a field test in federal regulation.

The following is a limited list of currently recognized field tests or measures that is not intended to be inclusive: continuous emissions monitoring; online monitoring; flow monitoring; tests for pH, residual chlorine, temperature and dissolved oxygen; and field analysis for soil gas.

"Finding" means an assessment conclusion referenced to a laboratory accreditation standard incorporated by reference or contained in this chapter and supported by objective evidence that identifies a deviation from a laboratory accreditation standard requirement.

"Governmental body" means any department, agency, bureau, authority, or district of the United States government,

of the government of the Commonwealth of Virginia, or of any local government within the Commonwealth of Virginia.

"Holding time" means the maximum time that can elapse between two specified activities.

"Legal entity" means an entity, other than a natural person, who has sufficient existence in legal contemplation that it can function legally, be sued or sue and make decisions through agents as in the case of corporations.

"Local government" means a municipality (city or town), county, sanitation district, or authority.

"Macrophytes" means any aquatic or terrestrial plant species that can be identified and observed with the eye, unaided by magnification.

"Matrix" means the substrate of a test sample.

"National Environmental Laboratory Accreditation Conference (~~NELAC~~)" or "NELAC" means a voluntary organization of state and federal environmental officials and interest groups with the primary purpose to establish mutually acceptable standards for accrediting environmental laboratories. NELAC preceded the formation of The NELAC Institute or TNI.

"National Environmental Laboratory Accreditation Program" or "NELAP" means the program under TNI the purpose of which is to establish and implement a program for the accreditation of environmental laboratories. This program is comprised in part of NELAP Accreditation Bodies which are recognized and approved under the program to implement the TNI standards. The NELAP accreditation bodies currently are state programs such as the one in Virginia.

"Noncommercial environmental laboratory" means either of the following:

1. An environmental laboratory where environmental analysis is performed solely for the owner of the laboratory.
2. An environmental laboratory where the only performance of environmental analysis for another person is one of the following:
  - a. Environmental analysis performed by an environmental laboratory owned by a local government for an owner of a small wastewater treatment system treating domestic sewage at a flow rate of less than or equal to 1,000 gallons per day.
  - b. Environmental analysis performed by an environmental laboratory operated by a corporation as part of a general contract issued by a local government to operate and maintain a wastewater treatment system or a waterworks.
  - c. Environmental analysis performed by an environmental laboratory owned by a corporation as part of the prequalification process or to confirm the identity or characteristics of material supplied by a potential or

existing customer or generator as required by a hazardous waste management permit under 9VAC20-60.

d. Environmental analysis performed by an environmental laboratory owned by a Publicly Owned Treatment Works (POTW) for an industrial source of wastewater under a permit issued by the POTW to the industrial source as part of the requirements of a pretreatment program under Part VII (9VAC25-31-730 et seq.) of 9VAC25-31.

e. Environmental analysis performed by an environmental laboratory owned by a county authority for any municipality within the county's geographic jurisdiction when the environmental analysis pertains solely to the purpose for which the authority was created.

f. Environmental analysis performed by an environmental laboratory owned by an authority or a sanitation district for any participating local government of the authority or sanitation district when the environmental analysis pertains solely to the purpose for which the authority or sanitation district was created.

"Owner" means any person who owns, operates, leases, or controls an environmental laboratory.

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

"Physical," for the purposes of fee test categories, means the tests to determine the physical properties of a sample. Tests for solids, turbidity, and color are examples of physical tests.

"Pretreatment requirements" means any requirements arising under Part VII (9VAC25-31-730 et seq.) of 9VAC25-31 including the duty to allow or carry out inspections, entry, or monitoring activities; any rules, regulations, or orders issued by the owner of a POTW; or any reporting requirements imposed by the owner of a POTW or by the regulations of the State Water Control Board. Pretreatment requirements do not include the requirements of a national pretreatment standard.

"Primary accreditation body" or "primary AB" means the accreditation body responsible for assessing a laboratory's total quality system, on-site assessment, and PT performance tracking for fields of accreditation.

"Proficiency test," "proficiency testing," or "PT" means ~~evaluating a process to evaluate~~ a laboratory's performance under controlled conditions relative to a given set of criteria through analysis of unknown samples provided by an external source.

"Proficiency test sample" or "PT sample" means a sample, the composition of which is unknown to the laboratory and is provided to test whether the laboratory can produce analytical results within specified acceptance criteria.

"Proficiency testing program" or "PT program" means the aggregate of providing rigorously controlled and standardized environmental samples to a laboratory for analysis, reporting

of results, statistical evaluation of the results and the collective demographics and results summary of all participating laboratories.

"Publicly Owned Treatment Works" or "POTW" means a treatment works as defined by § 212 of the CWA, which is owned by a state or municipality (as defined by § 502(4) of the CWA). This definition includes any devices and systems used in the storage, treatment, recycling, and reclamation of municipal sewage or industrial wastes of a liquid nature. It also includes sewers, pipes, and other conveyances only if they convey wastewater to a POTW treatment plant. The term also means the municipality as defined in § 502(4) of the CWA, which has jurisdiction over the indirect discharges to and the discharges from such a treatment works.

"Quality assurance" or "QA" means an integrated system of management activities involving planning, implementation, assessment, reporting, and quality improvement to ensure that a process, item, or service is of the type and quality needed and expected by the client.

"Quality assurance officer" means the person who has responsibility for the quality system and its implementation. Where staffing is limited, the quality assurance officer may also be the technical manager.

"Quality control" or "QC" means the (i) overall system of technical activities that measures the attributes and performance of a process, item, or service against defined standards to verify that they meet the stated requirements established by the customer; (ii) operational techniques and activities that are used to fulfill requirements for quality; and (iii) system of activities and checks used to ensure that measurement systems are maintained within prescribed limits, providing protection against "out of control" conditions and ensuring that the results are of acceptable quality.

"Quality manual" means a document stating the management policies, objectives, principles, organizational structure and authority, responsibilities, accountability, and implementation of an agency, organization, or laboratory, to ensure the quality of its product and the utility of its product to its users.

"Quality system" means a structured and documented management system describing the policies, objectives, principles, organizational authority, responsibilities, accountability, and implementation plan of an organization for ensuring quality in its work processes, products (items), and services. The quality system provides the framework for planning, implementing, and assessing work performed by the organization and for carrying out required quality assurance and quality control activities.

~~"Quality system matrix," for purposes of batch and quality control requirements, means the following:~~

- ~~1. Air and emissions. Whole gas or vapor samples, including those contained in flexible or rigid wall containers and the~~

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~~extracted concentrated analytes of interest from a gas or vapor that are collected with a sorbent tube, impinger solution, filter, or other device.~~

~~2. Aqueous. Any aqueous sample excluded from the definition of drinking water matrix or saline/estuarine source. Includes surface water, groundwater, effluents, and TCLP or other extracts.~~

~~3. Biological tissue. Any sample of a biological origin such as fish tissue, shellfish, or plant material. Such samples shall be grouped according to origin.~~

~~4. Chemical waste. A product or byproduct of an industrial process that results in a matrix not previously defined.~~

~~5. Drinking water. Any aqueous sample that has been designated a potable or potential potable water source.~~

~~6. Non aqueous liquid. Any organic liquid with less than 15% settleable solids.~~

~~7. Saline/estuarine. Any aqueous sample from an ocean or estuary, or other salt water source such as the Great Salt Lake.~~

~~8. Solids. Includes soils, sediments, sludges, and other matrices with more than 15% settleable solids.~~

"Responsible official" means one of the following, as appropriate:

1. If the laboratory is owned or operated by a private corporation, "responsible official" means (i) a president, secretary, treasurer, or a vice-president of the corporation in charge of a principal business function, or any other person who performs similar policy-making or decision-making functions for the corporation or (ii) the manager of one or more manufacturing, production, or operating facilities employing more than 250 persons or having gross annual sales or expenditures exceeding \$25 million (in second-quarter 1980 dollars), if authority to sign documents has been assigned or delegated in accordance with corporate procedures.

2. If the laboratory is owned or operated by a partnership, association, or a sole proprietor, "responsible official" means a general partner, officer of the association, or the proprietor, respectively.

3. If the laboratory is owned or operated by a governmental body, "responsible official" means a director or highest official appointed or designated to oversee the operation and performance of the activities of the governmental laboratory.

4. Any person designated as the responsible official by an individual described in subdivision 1, 2, or 3 of this definition provided the designation is in writing, the designation specifies an individual or position with responsibility for the overall operation of the laboratory, and the designation is submitted to DCLS.

"Sampling" means ~~the act of collection for the purpose of analysis an activity related to obtaining a representative sample of the object of conformity assessment, according to a procedure.~~

"Sanitation district" means a sanitation district created under the provisions of Chapters 3 (§ 21-141 et seq.) through 5 (§ 21-291 et seq.) of Title 21 of the Code of Virginia.

"Secondary accreditation body" or "secondary AB" means the accreditation body that grants ~~TNI accreditation to laboratories based on their accreditation by a TNI recognized primary accreditation body~~ laboratory accreditation for a field of accreditation based on recognition of accreditation from a primary accreditation body for the same field of accreditation.

"Sewage" means the water-carried human wastes from residences, buildings, industrial establishments, or other places together with such industrial wastes and underground, surface, storm, or other water as may be present.

"Standard operating procedure" or "SOP" means a written document that details the method for an operation, analysis, or action with thoroughly prescribed techniques and steps. An SOP is officially approved as the method for performing certain routine or repetitive tasks.

"TCLP" or "toxicity characteristic leachate procedure" means Test Method 1311 in "Test Methods for Evaluating Solid Waste, Physical/Chemical Methods," EPA Publication SW-846, as incorporated by reference in 40 CFR 260.11. This method is used to determine whether a solid waste exhibits the characteristic of toxicity (see 40 CFR 261.24).

"Technical manager (however named)" means the person who has overall responsibility for the technical operation of the environmental laboratory and who exercises actual day-to-day supervision of laboratory operation for the appropriate fields of testing and reporting of results. The title of this person may include but is not limited to laboratory director, technical manager, laboratory supervisor, or laboratory manager.

"Technology" means a specific arrangement of analytical instruments, detection systems, or preparation techniques, or any combination of these elements.

"Test" means a technical operation that consists of the determination of one or more characteristics or performance of a given product, material, equipment, organism, physical phenomenon, process, or service according to a specified procedure.

"Test, analysis, measurement or monitoring required pursuant to the Virginia Air Pollution Control Law" means any method of analysis required by the Virginia Air Pollution Control Law (§ 10.1-1300 et seq. of the Code of Virginia); by the regulations promulgated under this law (9VAC5), including any method of analysis listed either in the definition of "reference method" in 9VAC5-10-20, or listed or adopted by reference in 9VAC5; or

by any permit or order issued under and in accordance with this law and these regulations.

"Test, analysis, measurement or monitoring required pursuant to the Virginia Waste Management Act" means any method of analysis required by the Virginia Waste Management Act (§ 10.1-1400 et seq. of the Code of Virginia); by the regulations promulgated under this law (9VAC20), including any method of analysis listed or adopted by reference in 9VAC20; or by any permit or order issued under and in accordance with this law and these regulations.

"Test, analysis, measurement or monitoring required pursuant to the Virginia Water Control Law" means any method of analysis required by the Virginia Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia); by the regulations promulgated under this law (9VAC25), including any method of analysis listed or adopted by reference in 9VAC25; or by any permit or order issued under and in accordance with this law and these regulations.

"Test method" means an adoption of a scientific technique for performing a specific measurement, as documented in a laboratory standard operating procedure or as published by a recognized authority.

"The NELAC Institute—(~~TNI~~)" or "TNI" means the organization whose standards environmental laboratories must meet to be accredited in Virginia.

"TNI standards" means the ~~2009~~ 2016 Standards for Environmental Laboratories and Accreditation Bodies approved by TNI.

"Virginia Air Pollution Control Law" means Chapter 13 (§ 10.1-1300 et seq.) of Title 10.1 of the Code of Virginia that is titled "Air Pollution Control Board."

"Virginia Environmental Laboratory Accreditation Program" or "VELAP" means the program DCLS operates to accredit environmental laboratories under this chapter.

"Wastewater" means liquid and water-carried industrial wastes and domestic sewage from residential dwellings, commercial buildings, industrial and manufacturing facilities, and institutions.

"Waterworks" means each system of structures and appliances used in connection with the collection, storage, purification, and treatment of water for drinking or domestic use and the distribution thereof to the public, except distribution piping.

"Zooplankton" means microscopic animals that float freely with voluntary movement in a body of water.

**1VAC30-46-70. Process to apply and obtain accreditation.**

A. Duty to apply. All owners of (i) commercial environmental laboratories and (ii) TNI-accredited commercial environmental laboratories applying for secondary

accreditation shall apply for accreditation as specified by the provisions of this section. Applications for accreditation must be obtained from DCLS program staff by email at Lab\_Cert@dgs.virginia.gov.

B. Initial applications. Owners of commercial environmental laboratories applying for accreditation under this chapter for the first time shall submit an application to DCLS as specified under subsection F of this section.

C. Renewal and reassessment.

1. DCLS shall renew accreditation annually for the accredited laboratory provided the laboratory does the following:

- a. Maintains compliance with this chapter.
- b. Attests to this compliance by signing the certificate of compliance provided under subdivision F 3 of this section.
- c. Reports acceptable proficiency test values as required by 1VAC30-46-210 B.
- d. Pays the fee required by 1VAC30-46-150.

2. DCLS shall reassess the accredited environmental laboratory during an on-site assessment as required by 1VAC30-46-220.

D. Responsibilities of the owner and operator when the laboratory is owned by one person and operated by another person.

- 1. When an environmental laboratory is owned by one person but is operated by another person, the operator may submit the application for the owner.
- 2. If the operator fails to submit the application, the owner is not relieved of his responsibility to apply for accreditation.
- 3. While DCLS may notify environmental laboratories of the date their applications are due, failure of DCLS to notify does not relieve the owner of his obligation to apply under this chapter.

E. Submission of applications for modifications to accreditation. An owner of an accredited environmental laboratory shall follow the process set out in 1VAC30-46-90 B to modify the laboratory's scope of accreditation.

F. Contents of application.

- 1. Applications shall include but not be limited to the following information and documents:
  - a. Legal name of laboratory;
  - b. Name of owner of laboratory;
  - c. Name of operator of laboratory, if different than owner;
  - d. Street address and description of location of laboratory;
  - e. Mailing address of laboratory, if different from street address;
  - f. Address of owner, if different from laboratory address;

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- g. Name, address, telephone number, facsimile number, and email, as applicable, of responsible official;
  - h. Name, address, telephone number, facsimile number, and email, as applicable, of technical manager;
  - i. Name, address, telephone number, facsimile number, and email, as applicable, of designated quality assurance officer;
  - j. Name and telephone number of laboratory contact person;
  - k. Laboratory type (e.g., commercial, public wastewater system, mobile);
  - l. Laboratory hours of operation;
  - m. Fields of accreditation for which the laboratory is seeking accreditation;
  - n. The results of two successful unique TNI-compliant PT studies for each accreditation field of proficiency testing as required by 1VAC30-46-210 B (for primary accreditation only);
  - o. Quality assurance manual (for primary accreditation only);
  - p. Copy of the primary certificate of accreditation for secondary accreditation applications; and
  - q. For mobile laboratories, a unique vehicle identification number, such as a manufacturer's vehicle identification number (VIN #), serial number, or license number.
2. Fee. The application shall include payment of the fee as specified in 1VAC30-46-150.
3. Certification of compliance.
- a. The application shall include a "Certification of Compliance" statement signed and dated by (i) the quality assurance officer, and (ii) the responsible official or the technical manager, or both.
  - b. The certification of compliance shall state: "The applicant understands and acknowledges that the laboratory is required to be continually in compliance with the Virginia environmental laboratory accreditation program regulation (1VAC30 Chapter 46) and is subject to the provisions of 1VAC30-46-100 in the event of noncompliance. Specifically the applicant:
    - (1) Shall commit to fulfill continually the requirements for accreditation set by DCLS for the areas where accreditation is sought or granted.
    - (2) When requested, shall afford such accommodation and cooperation as is necessary to enable DCLS to verify fulfillment of requirements for accreditation. This applies to all premises where laboratory services take place.
    - (3) Shall provide access to information, documents, and records as necessary for the assessment and maintenance of the accreditation.

(4) Shall provide access to those documents that provide insight into the level of independence and impartiality of the laboratory from its related bodies, where applicable.

(5) Shall arrange the witnessing of laboratory services when requested by DCLS.

(6) Shall claim accreditation only with respect to the scope for which it has been granted accreditation.

(7) Shall pay fees as shall be determined by the accreditation body.

(8) Shall have access to a copy of the TNI standards incorporated by reference into this chapter.

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the laboratory or those persons directly responsible for gathering and evaluating the information, the information submitted is, to the best of my knowledge and belief, true, accurate and complete. Submitting false information or data shall result in denial or withdrawal of accreditation. I further certify that I am authorized to sign this application."

## G. Completeness determination.

1. DCLS shall determine whether an application is complete and notify the laboratory of the result of such determination. DCLS shall provide this notice within 90 calendar days of its receipt of the application.

2. An application shall be determined complete if it contains all the information required pursuant to subsection F of this section and is sufficient to evaluate the laboratory prior to the on-site assessment. Designating an application complete does not preclude DCLS from requesting or accepting additional information.

3. If DCLS determines that an application is incomplete, the DCLS notification of such determination shall explain why the application is incomplete and specify the additional information needed to make the application complete.

4. If DCLS makes no determination within 90 calendar days of its receipt of either (i) the application or (ii) additional information, in the case of an application determined to be incomplete, the application shall be determined to be complete.

5. If the laboratory has not submitted the required additional information within 90 days of receiving a notice from DCLS requesting additional information, DCLS may inform the laboratory that the application cannot be processed. The laboratory may then submit a new application.

H. Grant of interim accreditation pending final determination on application.

1. DCLS shall grant interim accreditation status to laboratories applying initially under the following conditions:

- a. The laboratory's application is determined to be complete;
- b. The laboratory has satisfied all the requirements for accreditation, including all requests for additional information, with the exception of on-site assessment; and
- c. DCLS is unable to schedule the on-site assessment within 120 days of its determination that the application is complete.

2. A laboratory with interim accreditation status shall have the same rights and status as a laboratory that has been granted accreditation by DCLS.

3. Interim accreditation status shall not exceed 12 months.

I. On-site assessment. An on-site assessment shall be performed and the follow-up and reporting procedures for such assessments shall be completed in accordance with 1VAC30-46-220 prior to issuance of a final determination on accreditation.

J. Final determination on accreditation. Upon completion of the accreditation review process and corrective action, if any, DCLS shall grant accreditation in accordance with subsection K of this section or deny accreditation in accordance with subsection L of this section.

K. Grant of accreditation.

1. When a laboratory meets the requirements specified for receiving accreditation, DCLS shall issue a certificate to the laboratory. The certificate shall be sent to the technical manager, and the responsible official shall be notified.

2. The director of DCLS or his designee shall sign the certificate.

3. The certificate shall include the following information:

- a. Name of owner of laboratory;
- b. Name of operator of laboratory, if different from owner;
- c. Name of responsible official;
- d. Address and location of laboratory;
- e. Laboratory identification number;
- f. Fields of accreditation (matrix, technology/method, and analyte) for which accreditation is granted;
- g. Any addenda or attachments; and
- h. Issuance date and expiration date.

4. TNI accreditation status.

- a. Laboratories accredited under this chapter are accredited under the standards of TNI.
- b. The certificate of accreditation shall contain the TNI insignia.

c. Accredited laboratories shall comply with the provisions of 1VAC30-46-130 with regard to the use of these certificates and their status as TNI-accredited laboratories.

5. The laboratory shall post the most recent certificate of accreditation and any addenda to the certificate issued by DCLS in a prominent place in the laboratory facility.

6. Accreditation shall expire one year after the date on which accreditation is granted.

L. Denial of accreditation.

1. DCLS shall deny accreditation to an environmental laboratory in total if the laboratory is found to be falsifying any data or providing false information to support accreditation.

2. Denial of accreditation in total or in part.

a. DCLS may deny accreditation to an environmental laboratory in total or in part if the laboratory fails to do any of the following:

- (1) Pay the required fees;
- (2) Employ laboratory staff to meet the personnel qualifications as required by 1VAC30-46-210 A;
- (3) Successfully analyze and report proficiency testing samples as required by 1VAC30-46-210 B;
- (4) Submit a corrective action plan in accordance with 1VAC30-46-220 in response to a deficiency report from the on-site assessment team within the required 30 calendar days;
- (5) Implement the corrective actions detailed in the corrective action plan within the time frame specified by DCLS;
- (6) Pass required on-site assessment as specified in 1VAC30-46-220; or
- (7) Implement a quality system as defined in 1VAC30-46-210 C.

b. DCLS may deny accreditation to an environmental laboratory in total or in part if the laboratory's application is not determined to be complete within 90 days following notification of incompleteness because the laboratory is delinquent in submitting information required by DCLS in accordance with this chapter.

c. DCLS may deny accreditation to an environmental laboratory in total or in part if the DCLS on-site assessment team is unable to carry out the on-site assessment pursuant to 1VAC30-46-220 because a representative of the environmental laboratory denied the team entry during the laboratory's normal business hours that it specified in the laboratory application.

3. DCLS shall follow the process specified in 1VAC30-46-110 when denying accreditation to an environmental laboratory.

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M. Reapplication following denial of accreditation. DCLS shall not waive application fees for a laboratory reapplying for accreditation.

## **1VAC30-46-95. Suspension of accreditation.**

A. Before withdrawing accreditation, DCLS may suspend accreditation from an environmental laboratory in total or in part to allow the laboratory time to correct the reason for which DCLS may withdraw accreditation. Suspension is limited to the reasons listed in subsection B of this section.

B. DCLS may suspend accreditation from an environmental laboratory in part or in total when the laboratory has failed to do any of the following:

1. Participate in the proficiency testing program as required by 1VAC30-46-210 B.
2. Complete proficiency testing studies and maintain a history of at least two successful proficiency testing studies for each accredited field of testing out of the three most recent proficiency testing studies as defined in 1VAC30-46-210 B.
3. Submit an acceptable corrective action plan after two opportunities as specified in 1VAC30-46-220 L.
4. Maintain a quality system as defined in 1VAC30-46-210 C.
- 4-5. Employ staff that meets the personnel qualifications of 1VAC30-46-210 A.
- 5-6. Notify DCLS of any changes in key accreditation criteria as set forth in 1VAC30-46-90.

C. Process to suspend accreditation.

1. When DCLS determines that cause exists to suspend a laboratory, the agency shall send notification to the responsible official and the technical manager stating the agency's determination that the laboratory has failed to meet the 1VAC30-46 standards for one or more of the reasons listed in subsection B of this section. DCLS shall send the notification by certified mail.
2. In its notice, DCLS shall request the laboratory to notify DCLS in writing if the laboratory believes the agency is incorrect in its determination.
3. The notification shall state that the laboratory is required to take corrective action whenever a failure occurs and to document the corrective action. The notification shall require the laboratory to provide DCLS with documentation of the corrective action taken with regard to its failure to meet a standard under this chapter.
4. The notification shall state what the laboratory is required to do to restore its accreditation status and the time allowed to do so.

5. The environmental laboratory may proceed to correct the deficiencies for which DCLS has suspended the laboratory's accreditation.

6. Alternatively the laboratory may state in writing that DCLS is incorrect in its determination regarding suspension, giving specific reasons why the laboratory believes DCLS should not suspend accreditation.

7. With the exception of subdivision B 4 of this section, DCLS may allow the laboratory up to 60 days to correct the problem for which it may have its accreditation suspended.

8. DCLS shall set a date for suspension that follows the period provided under subdivision 7 of this subsection to restore accreditation.

9. If the laboratory does not correct its deficiencies within the time period allowed, DCLS shall suspend a laboratory in part or in total.

10. DCLS shall notify the laboratory by letter of its suspension status. DCLS shall send the notification by certified mail. DCLS shall also notify the pertinent Virginia state agency of the laboratory's suspension status.

11. The laboratory may provide information demonstrating why suspension is not warranted in accordance with the standard referenced in the initial DCLS notification. If such information is not provided prior to the suspension date, the laboratory accepts the DCLS decision to suspend.

12. The laboratory has the right to due process as set forth in 1VAC30-46-110.

D. Responsibilities of the environmental laboratory and DCLS when accreditation has been suspended.

1. The term of suspension shall be limited to six months or the period of accreditation whichever is longer.
2. The environmental laboratory shall not continue to analyze samples or report analysis for the fields of accreditation for which DCLS has suspended accreditation.
3. The environmental laboratory shall retain accreditation for the fields of accreditation, methods, and analytes where it continues to meet the requirements of this chapter.
4. The laboratory's suspended accreditation status shall change to accredited when the laboratory demonstrates to DCLS that the laboratory has corrected the deficiency or deficiencies for which its accreditation was suspended.
5. An environmental laboratory with suspended accreditation shall not have to reapply for accreditation if the cause or causes for suspension are corrected within the term of suspension.
6. An environmental laboratory that DCLS has suspended in total shall pay the cost of any necessary follow-up on-site assessments or data review or both to determine compliance.

This cost shall be calculated under the provisions of 1VAC30-46-150 E and F.

~~7.~~ If the laboratory fails to correct the causes of suspension within the term of suspension, DCLS shall withdraw the laboratory's accreditation in total or in part.

**1VAC30-46-100. Withdrawal of accreditation.**

A. DCLS shall withdraw accreditation from an environmental laboratory in total if the laboratory is found to be falsifying any data or providing false information to support accreditation.

B. DCLS may withdraw accreditation from an environmental laboratory in part or in total when the laboratory has failed to do any of the following:

1. Participate in the proficiency testing program as required by 1VAC30-46-210 B.

2. Complete proficiency testing studies and maintain a history of at least two successful proficiency testing studies for each affected accredited field of testing out of the three most recent proficiency testing studies as defined in 1VAC30-46-210 B.

3. Successfully complete three consecutive PT studies, either by failure to participate in the required PT study or by failure to obtain acceptable results for the same field of accreditation.

4. ~~5.~~ Maintain a quality system as defined in 1VAC30-46-210 C.

~~5.~~ ~~6.~~ Employ staff that meets the personnel qualifications of 1VAC30-46-210 A.

~~6.~~ ~~7.~~ Submit an acceptable corrective action plan after two opportunities as specified in 1VAC30-46-220.

~~7.~~ ~~8.~~ Implement corrective action specified in the laboratory's corrective action plan as set out under 1VAC30-46-220.

~~8.~~ ~~9.~~ Correct the causes of suspension within the term of suspension.

~~9.~~ ~~10.~~ Notify DCLS of any changes in key accreditation criteria as set forth in 1VAC30-46-90.

~~10.~~ ~~11.~~ Use correct and authorized references to the laboratory's accreditation status or that of DCLS in the laboratory's documentation and advertising as set forth in 1VAC30-46-130.

~~11.~~ ~~12.~~ Allow a DCLS assessment team entry during normal business hours to conduct an on-site assessment required by 1VAC30-46-220.

~~12.~~ ~~13.~~ Pay required fees specified in 1VAC30-46-150.

13. Meet the provisions regarding communication with others in Volume 1, Module 1, Section 4.1.5 of the 2016 TNI Standards.

C. DCLS shall follow the process specified in 1VAC30-46-110 when withdrawing accreditation from an environmental laboratory.

D. Responsibilities of the environmental laboratory and DCLS when accreditation has been withdrawn.

1. Laboratories that lose their accreditation in full shall return their certificate to DCLS.

2. If a laboratory loses accreditation in part, DCLS shall issue a revised certificate to the laboratory.

3. The laboratory shall discontinue the use of all materials that contain either a reference to the environmental laboratory's past accreditation status or that display the TNI logo. These materials may include catalogs, advertising, business solicitations, proposals, quotations, laboratory analytical reports, or other materials.

4. The environmental laboratory shall not continue to analyze samples or report analyses for the fields of accreditation for which DCLS has withdrawn accreditation.

E. After correcting the reason or cause for the withdrawal of accreditation under 1VAC30-46-100 A or B, the laboratory owner may reapply for accreditation under 1VAC30-46-70 B and E.

**1VAC30-46-140. Secondary accreditation.**

A. DCLS may grant secondary accreditation to an environmental laboratory that holds a current accreditation from another ~~TNI-recognized~~ NELAP-recognized primary accreditation body.

B. The owner of a TNI-accredited environmental laboratory that seeks accreditation under this chapter shall apply as specified in 1VAC30-46-70 with the exception of 1VAC30-46-70 F n and o.

C. The owner of the applicant laboratory shall pay the fee required by 1VAC30-46-150.

D. DCLS shall not require a TNI-accredited environmental laboratory that seeks accreditation under this section to meet any additional proficiency testing, quality assurance, or on-site assessment requirements for the fields of accreditation for which the laboratory holds primary TNI accreditation.

E. DCLS shall consider only the current certificate of accreditation issued by the TNI-recognized primary accreditation body.

F. DCLS shall grant secondary accreditation for only the fields of accreditation offered under this chapter for which the laboratory holds current primary TNI accreditation.

**1VAC30-46-150. Fees.**

A. General.

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1. Environmental laboratories shall pay a fee with all applications, including reapplications, for accreditation. DCLS shall not designate an application as complete until it receives payment of the fee.

2. Each accredited environmental laboratory shall pay an annual fee to maintain its accreditation. DCLS shall send an invoice to the accredited environmental laboratory.

3. An environmental laboratory applying for secondary accreditation under 1VAC30-46-140 shall pay the same fee as other laboratories subject to this chapter.

4. Fees shall be nonrefundable.

5. DCLS, as part of its regular budgetary review of the program, shall determine whether the fees charged under this section offset the program costs as required under § 2.2-1105 of the Code of Virginia.

## B. Fee computation.

1. Fees shall be applied on an annual basis.

2. Environmental laboratories shall pay the total of the base fee and the test category fees set out in subsections C and D of this section.

## C. Base fee.

1. DCLS determines the base fee for a laboratory by taking into account both the total number of methods and the total number of field of accreditation matrices for which the laboratory would be accredited.

2. DCLS shall charge the base fees set out in Table 1. The base fee for a laboratory is located by first finding the row for the total number of methods to be accredited and then finding the box on that row located in the column headed by the total number of matrices to be accredited. For example, DCLS charges a base fee of \$1625 to a laboratory performing a total of eight methods for one matrix.

Number of Methods	One Matrix	Two Matrices	Three Matrices	Four or more Matrices
1 - 9	\$1625	\$1788	\$1969	\$2163
10 - 29	\$1750	\$1969	\$2188	\$2438
30 - 99	\$1938	\$2281	\$2688	\$3188
100 - 149	\$2063	\$2475	\$2969	\$3563
150+	\$2250	\$2813	\$3531	\$4406

## D. Test category fees.

1. The test category fees cover the types of testing for which a laboratory may be accredited as specified in the

laboratory's application or as accredited at the time of annual billing.

2. Fees shall be charged for each category of tests to be accredited.

3. Fees shall be charged for the total number of field of accreditation matrices to be accredited under the specific test category. For example, if a laboratory is performing inorganic chemistry for both nonpotable water and solid and chemical matrices, the fee for this test category would be found in the column for two matrices.

4. The fee for each category includes one or more analytical methods unless otherwise specified.

5. Test category fees. DCLS shall charge the test category fees set out in Table 2. The test category fees for a laboratory are located by first finding the row with the total number of test methods for the test category to be accredited. The fee to be charged for the test category will be found on that row in the column headed by the total number of matrices to be accredited. A laboratory performing four test methods for bacteriology in both nonpotable and drinking water (two matrices) would be charged a test category fee of \$413.

Test Category	Fees by Number of Matrices		
	One	Two	Three or More
Aquatic toxicity, acute methods only	\$740	N/A	N/A
Aquatic toxicity, acute and chronic methods	\$990	N/A	N/A
Oxygen demand	\$281	\$419	\$544
Bacteriology, 1 - 3 total methods	\$219	\$331	\$431
Bacteriology, 4 or more total methods	\$275	\$413	\$538
Physical, 1 - 5 total methods	\$219	\$331	\$431
Physical, 6 - 10 total methods	\$275	\$413	\$538
Physical, 11 or more total methods	\$344	\$519	\$675
Inorganic chemistry, 1 - 10 total methods	\$313	\$469	\$613
Inorganic chemistry, 11 - 20 total methods	\$394	\$594	\$775

Inorganic chemistry, 21 - 49 total methods	\$493	\$738	\$959
Inorganic chemistry, 50 or more total methods	\$615	\$925	\$1203
Chemistry metals, 1 - 5 total methods	\$406	\$613	\$796
Chemistry metals, 6 - 20 total methods	\$513	\$769	\$1000
Chemistry metals, 21 or more total methods	\$640	\$963	\$1250
Organic chemistry, 1 - 5 total methods	\$1020	\$1270	\$1495
Organic chemistry, 6 - 20 total methods	\$1145	\$1458	\$1739
Organic chemistry, 21 - 40 total methods	\$1301	\$1695	\$2048
Organic chemistry, 41 or more total methods	\$1495	\$1983	\$2420
Radiochemical, 1 - 10 total methods	\$990	\$1365	\$1703
Radiochemical, 11 or more total methods	\$1146	\$1603	\$2015
Asbestos	\$1146	\$1603	\$2015

6. Fee examples. Three examples are provided.

a. Example 1:

Base Fee	One matrix and four test methods	\$1625
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (2 methods)	\$219
Nonpotable Water	Oxygen demand (1 method)	\$281
Nonpotable Water	Physical (1 method)	\$219
TOTAL		\$2344

b. Example 2:

Base Fee	One matrix and 15 test methods	\$1750
Test Category Fees		

One Matrix		
Nonpotable Water	Bacteriology (2 methods)	\$219
Nonpotable Water	Inorganic chemistry (9 methods)	\$313
Nonpotable Water	Metals (2 methods)	\$406
Nonpotable Water	Oxygen demand (1 method)	\$281
Nonpotable Water	Physical (1 method)	\$219
TOTAL		\$3188

c. Example 3:

Base Fee	Two matrices and 27 test methods	\$1969
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (4 methods)	\$275
Nonpotable Water	Oxygen demand (1 method)	\$281
Solid and Chemical Materials	Metals (1 method)	\$406
Two Matrices		
Nonpotable Water and Solid and Chemical Materials	Inorganic chemistry (13 methods)	\$594
Nonpotable Water and Solid and Chemical Materials	Physical (7 methods)	\$413
TOTAL		\$3938

E. Additional fees. Additional fees shall be charged to laboratories applying for the following: (i) modification to scope of accreditation under 1VAC30-46-90 B, (ii) transfer of ownership under 1VAC30-46-90 C, (iii) review of compliance following total suspension, or ~~(iii)~~ (iv) petition for a variance under 1VAC30-46-160.

1. For any accredited environmental laboratory that applies to modify its scope of accreditation as specified under 1VAC30-46-90 B, DCLS shall assess a fee determined by the method in subsection F of this section.

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2. Under 1VAC30-46-90 C, DCLS may charge a transfer fee to a certified laboratory that transfers ownership. A fee shall be charged if DCLS (i) needs to review documentation sent by the laboratory about the transfer of ownership or (ii) determines that an on-site assessment is necessary to evaluate the effect of the transfer of ownership. DCLS shall assess a fee determined by the method in subsection F of this section. If, under 1VAC30-46-90 C, DCLS determines that the change of ownership or location of laboratory requires reaccreditation of or reapplication by the laboratory, the laboratory shall pay the application fee required under this section.

3. Under 1VAC30-46-95 D 6, an environmental laboratory that DCLS has suspended in total shall be charged the cost of any necessary follow-up on-site assessments or data review or both to determine compliance. This charge shall be calculated under the method specified in subsection F of this section.

4. Under 1VAC30-46-160, any person regulated by this chapter may petition the director to grant a variance from any requirement of this chapter. DCLS shall charge a fee for the time needed to review the petition, including any on-site assessment required. The fee shall be determined by the method specified in subsection F of this section.

#### F. Additional fees determination.

1. The fee shall be the sum of the total hourly charges for all reviewers plus any on-site review costs incurred.

2. An hourly charge per reviewer shall be determined by (i) obtaining a yearly cost by multiplying the reviewer's annual salary by 1.35 (accounts for overhead such as taxes and insurance) and then (ii) dividing the yearly cost by 1,642 (number of annual hours established by Fiscal Services, Department of General Services, for billing purposes).

3. The charge per reviewer shall be determined by multiplying the number of hours expended in the review by the reviewer's hourly charge.

4. If an on-site review is required, travel time and on-site review time shall be charged at the same hourly charge per reviewer, and any travel expenses shall be added.

#### G. Out-of-state laboratories applying for primary accreditation.

1. The owner of an environmental laboratory located in another state who applies for primary accreditation under this chapter shall pay a surcharge of \$5000 plus the labor costs of the on-site assessment and reasonable travel costs associated with conducting an on-site assessment at the laboratory. Reasonable travel costs include transportation, lodging, per diem, and telephone and duplication charges. These charges shall be in addition to the fees charged under subdivision A 1 and subsections B through D of this section.

2. Once the laboratory is accredited, DCLS shall charge the annual fee specified in subdivision A 2 and subsections B through D of this section, the labor costs for the on-site assessment, and reasonable travel costs associated with conducting the on-site assessment.

H. DCLS shall derive the travel costs charged under subsections F and G of this section from the Commonwealth of Virginia reimbursement allowances and rates for lodging, per diem, and mileage.

#### **1VAC30-46-200. Incorporation by reference of TNI standards.**

A. The following TNI standards are incorporated by reference into this chapter: The Standards for Environmental Laboratories and Accreditation Bodies, ~~2009~~ 2016 (The NELAC Institute (TNI)), Volume 1: Management and Technical Requirements for Laboratories Performing Environmental Analysis, and Volume 2: General Requirements for Accreditation Bodies Accrediting Environmental Laboratories, except for ~~section~~ Section 6.6 of Module 3 concerning confidential business information.

B. Environmental laboratories applying for accreditation and accredited under this chapter shall comply with the TNI standards incorporated by reference into subsection A of this section. For convenience these standards are specified by accreditation component in 1VAC30-46-210 and 1VAC30-46-220.

C. The TNI standards are organized by volume and module.

1. Volume 1 - Management and Technical Requirements for Laboratories Performing Environmental Analysis includes the following modules:

- a. Proficiency Testing.
- b. Quality Systems General Requirements.
- c. Quality Systems for Asbestos Testing.
- d. Quality Systems for Chemical Testing.
- e. Quality Systems for Microbiological Testing.
- f. Quality Systems for Radiochemical Testing.
- g. Quality Systems for Toxicity Testing.

2. Volume 2 - General Requirements for Accreditation Bodies Accrediting Environmental Laboratories includes the following modules:

- a. General Requirements.
- b. Proficiency Testing.
- c. On-Site Assessment.

#### **1VAC30-46-210. Standards for accreditation.**

A. Standards for personnel. The standards for personnel are found in Section 5.2 of Volume 1, Module 2 of the TNI standards.

B. Standards for proficiency testing.

4- The standards for proficiency testing are found in (i) Module 1 and (ii) section 4.11 of Module 2 of Volume 1 of the TNI standards.

~~2. Additional requirements from Volume 2, Module 2 of the TNI standards.~~

~~a. A laboratory shall perform two proficiency test studies each calendar year for each FoPT. These proficiency testing studies shall be performed at least five months apart and no longer than seven months apart within the calendar year.~~

~~b. The following proficiency testing studies shall not apply when meeting the requirements of subdivision 2 a of this subsection:~~

~~(1) Studies used for corrective action to reestablish successful history in order to maintain accreditation; and~~

~~(2) Studies used to reinstate accreditation after DCLS suspends accreditation.~~

~~c. DCLS shall consider a laboratory's analytical result for a FoPT not acceptable for the following reasons:~~

~~(1) When the laboratory does not report the results within the time frames specified in Volume 1, Module 1 of the TNI standards.~~

~~(2) When the laboratory makes any reporting error or omission that results in a nonspecific match between the analytical result for the FoPT and any criterion that identifies the laboratory or the field of accreditation for which the PT sample was analyzed for the purpose of initial or continued accreditation.~~

~~d. If DCLS requests a corrective action plan from a laboratory, the laboratory shall provide the plan within 30 calendar days of the request.~~

~~e. A laboratory may withdraw from a study for any FoPT on or before the close date of the study. Withdrawing from a study shall not exempt the laboratory from meeting the semiannual analysis requirements necessary for continued accreditation.~~

C. Standards for quality systems.

1. General requirements for all environmental laboratories are found in Volume 1, Module 2 of the TNI standards.

2. Requirements for the specific types of testing that may be performed by an individual environmental laboratory are found in Volume 1, Modules 3 through 7 of the TNI standards.

3. Drinking water laboratories obtaining certification under this chapter shall meet the reporting requirements set out in 1VAC30-41 for compliance with 12VAC5-590-530 and 12VAC5-590-540.

**1VAC30-46-220. On-site assessment.**

A. The standards for on-site assessment are found in Volume 2, Module 3 of the TNI standards. The requirements specific to environmental laboratories are set out in this section.

B. DCLS shall conduct a comprehensive on-site assessment of an environmental laboratory prior to granting final primary accreditation to the laboratory.

C. Frequency of on-site assessment.

1. DCLS shall reassess each accredited laboratory every two years starting from the date of the previous assessment plus or minus six months.

2. Other on-site assessments.

a. If DCLS identified a deficiency on a previous on-site assessment, the agency may conduct a follow-up on-site assessment.

b. DCLS may conduct an on-site assessment under the following circumstances:

(1) A laboratory applies to modify its scope of accreditation;

(2) A transfer of ownership occurs that affects personnel, equipment, or the laboratory facilities; or

(3) A laboratory applies for an exemption or a variance.

c. Any other change occurring in a laboratory's operations that might reasonably be expected to alter or impair analytical capability and quality may trigger an on-site assessment.

D. Announced and unannounced on-site assessments. DCLS, at its discretion, may conduct either announced or unannounced on-site assessments. Advance notice of an assessment shall not be necessary.

E. Preparation for the on-site assessment.

1. Prior to the actual site visit, DCLS may request in writing from a laboratory those records required to be maintained by this chapter.

2. DCLS may opt not to proceed with an on-site assessment based on nonconformities found during document and record review.

F. Areas to be assessed.

1. DCLS shall assess the laboratory against the standards incorporated by reference and specified in 1VAC30-46-200 and 1VAC30-46-210.

2. The laboratory shall ensure that its quality manual, analytical methods, quality control data, proficiency test data, laboratory SOPs, and all records needed to verify compliance with the standards specified in 1VAC30-46-200 and 1VAC30-46-210 are available for review during the on-site assessment.

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## G. National security considerations.

1. Assessments at facilities owned or operated by federal agencies or contractors may require security clearances, appropriate badging, or a security briefing before the assessment begins.
2. The laboratory shall notify DCLS in writing of any information that is controlled for national security reasons and cannot be released to the public.

## H. Arrival, admittance, and opening conference.

1. Arrival. DCLS and the laboratory shall agree to the date and schedule for announced on-site assessments.
2. Admittance of assessment personnel. A laboratory's refusal to admit the assessment personnel for an on-site assessment shall result in an automatic failure of the laboratory to receive accreditation or loss of an existing accreditation by the laboratory, unless there are extenuating circumstances that are accepted and documented by DCLS.
3. Health and safety. Under no circumstance, and especially as a precondition to gain access to a laboratory, shall assessment personnel be required or even allowed to sign any waiver of responsibility on the part of the laboratory for injuries incurred during an assessment.
4. Opening conference. An opening conference shall be conducted and shall address the following topics:
  - a. The purpose of the assessment;
  - b. The identification of assessment personnel;
  - c. The test methods that will be examined;
  - d. Any pertinent records and procedures to be examined during the assessment and the names of the individuals in the laboratory responsible for providing assessment personnel with such records;
  - e. The roles and responsibilities of laboratory staff and managers;
  - f. Any special safety procedures that the laboratory may think necessary for the protection of assessment personnel;
  - g. The standards and criteria that will be used in judging the adequacy of the laboratory operation;
  - h. Confirmation of the tentative time for the exit conference; and
  - i. Discussion of any questions the laboratory may have about the assessment process.

## I. On-site laboratory records review and collection.

1. Records shall be reviewed by assessment personnel for accuracy, completeness, and the use of proper methodology for each analyte and test method to be evaluated.
2. Records required to be maintained pursuant to this chapter shall be examined as part of an assessment for accreditation.

## J. Observations of and interviews with laboratory personnel.

1. As an element of the assessment process, the assessment team shall evaluate an analysis regimen by requesting that the analyst normally conducting the procedure give a step-by-step description of exactly what is done and what equipment and supplies are needed to complete the regimen. Any deficiencies shall be noted and discussed with the analyst. In addition, the deficiencies shall be discussed in the closing conference.
2. Assessment personnel may conduct interviews with appropriate laboratory personnel.
3. Calculations, data transfers, calibration procedures, quality control, and quality assurance practices, adherence to test methods, and report preparation shall be assessed for the complete scope of accreditation with appropriate laboratory analysts.

## K. Closing conference.

1. Assessment personnel shall meet with representatives of the laboratory following the assessment for a closing conference.
2. During the closing conference, assessment personnel shall inform the laboratory of the preliminary findings and the basis for such findings. The laboratory shall have an opportunity to provide further explanation or clarification relevant to the preliminary findings. If the laboratory objects to the preliminary findings during the closing conference, all objections shall be documented by the assessment personnel and included in the final report to DCLS.
3. Additional problem areas may be identified in the final report.

## L. Follow-up and reporting procedures.

1. DCLS shall provide an on-site assessment report to the laboratory documenting any deficiencies found by DCLS within 30 calendar days of the last day of the on-site assessment.
2. When deficiencies are identified in the assessment report, the laboratory shall have 30 calendar days from the date of its receipt of the on-site assessment report to provide a corrective action plan to DCLS.
3. The laboratory's corrective action plan shall include the following:
  - a. Any objections that the laboratory has with regard to the on-site assessment report;
  - b. The action that the laboratory proposes to correct each deficiency identified in the assessment report;
  - c. The time period required to accomplish the corrective action; and

d. Documentation of corrective action that the laboratory has already completed at the time the corrective action plan is submitted.

4. If the corrective action plan, or a portion of the plan, is determined to be unacceptable to remedy the deficiency, DCLS shall provide written notification to the responsible official and technical manager of the laboratory, including a detailed explanation of the basis for such determination. Following receipt of such notification, the laboratory shall have an additional 30 calendar days to submit a revised corrective action plan acceptable to DCLS.

5. DCLS may suspend accreditation from a laboratory under 1VAC30-46-95 B 3 or withdraw accreditation from a laboratory under 1VAC30-46-100 B 5 if DCLS finds the second revised corrective action plan to be unacceptable.

6. The laboratory shall submit documentation to DCLS that the corrective action set out in its plan has been completed within the time period specified in the plan.

7. DCLS, under 1VAC30-46-100 B 6, may withdraw accreditation from a laboratory if the laboratory fails to implement the corrective actions set out in its corrective action plan.

8. DCLS shall grant final accreditation as specified in 1VAC30-46-70 K upon successful completion of any required corrective action following the on-site assessment.

**DOCUMENTS INCORPORATED BY REFERENCE**  
(1VAC30-46)

The Standards for Environmental Laboratories and Accreditation Bodies, ~~2009~~ 2016, The NELAC Institute (TNI), P.O. Box 2439, Weatherford, TX 76086; [www.nelac-institute.org](http://www.nelac-institute.org):

~~Volume 1: Management and Technical Requirements for Laboratories Performing Environmental Analysis (EL-V1-2009)~~

~~Volume 2: General Requirements for Accreditation Bodies Accrediting Environmental Laboratories (EL-V2-2009)~~

[Volume 1: Management and Technical Requirements for Laboratories Performing Environmental Analysis \(EL-V1-2016, rev. 2.1\)](#)

[Volume 2: General Requirements for Accreditation Bodies Accrediting Environmental Laboratories \(EL-V2-2016, rev. 2.0\)](#)

VA.R. Doc. No. R20-6196; Filed April 14, 2021, 11:22 a.m.



**TITLE 2. AGRICULTURE**

**BOARD OF AGRICULTURE AND CONSUMER SERVICES**

**Fast-Track Regulation**

Title of Regulation: **2VAC5-585. Retail Food Establishment Regulations (amending 2VAC5-585-20, 2VAC5-585-30, 2VAC5-585-40, 2VAC5-585-50, 2VAC5-585-65, 2VAC5-585-67, 2VAC5-585-80, 2VAC5-585-180, 2VAC5-585-255, 2VAC5-585-300, 2VAC5-585-310, 2VAC5-585-330, 2VAC5-585-400, 2VAC5-585-410, 2VAC5-585-440, 2VAC5-585-470, 2VAC5-585-540, 2VAC5-585-700, 2VAC5-585-720, 2VAC5-585-730, 2VAC5-585-740, 2VAC5-585-790, 2VAC5-585-820, 2VAC5-585-850, 2VAC5-585-870, 2VAC5-585-880, 2VAC5-585-950, 2VAC5-585-980, 2VAC5-585-1180, 2VAC5-585-1190, 2VAC5-585-1230, 2VAC5-585-1300, 2VAC5-585-1310, 2VAC5-585-1430, 2VAC5-585-1435, 2VAC5-585-1535, 2VAC5-585-1620, 2VAC5-585-1700, 2VAC5-585-1780, 2VAC5-585-1900, 2VAC5-585-2100, 2VAC5-585-2120, 2VAC5-585-2190, 2VAC5-585-2200, 2VAC5-585-2230, 2VAC5-585-2270, 2VAC5-585-2320, 2VAC5-585-2520, 2VAC5-585-2570, 2VAC5-585-2750, 2VAC5-585-2790, 2VAC5-585-3390, 2VAC5-585-3510, 2VAC5-585-3520, 2VAC5-585-3540, 2VAC5-585-3541, 2VAC5-585-3542, 2VAC5-585-3630, 2VAC5-585-3800, 2VAC5-585-3815, 2VAC5-585-3820, 2VAC5-585-3860, 2VAC5-585-3910, 2VAC5-585-3940; adding 2VAC5-585-235, 2VAC5-585-3740, 2VAC5-585-3750; repealing 2VAC5-585-3655, 2VAC5-585-3660).**

Statutory Authority: § 3.2-5121 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: June 9, 2021.

Effective Date: June 24, 2021.

Agency Contact: Ryan Davis, Program Manager, Office of Dairy and Foods, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-8910, FAX (804) 371-7792, TDD (800) 828-1120, or email [ryan.davis@vdacs.virginia.gov](mailto:ryan.davis@vdacs.virginia.gov).

Basis: Section 3.2-109 of the Code of Virginia establishes the Board of Agriculture and Consumer Services as a policy board with the authority to adopt regulations in accordance with the provisions of Title 3.2 of the Code of Virginia. Section 3.2-5121 of the Code of Virginia provides the legal basis for the promulgation and modification of this regulation.

Purpose: This regulation is essential to the protection of the health and welfare of citizens in that it sets the necessary standards of operation for the retail segment of Virginia's food industry to (i) provide a system of prevention and overlapping safeguards designed to minimize foodborne illness; (ii) ensure employee health; industry manager knowledge; safe food;

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equipment that is used, easily cleaned, and kept in a sanitary condition; and acceptable levels of sanitation for food establishments; and (iii) promote fair dealings with the consumer. The regulation is essential in order to provide a regulatory framework necessary to educate the industry and protect the public.

The first goal of the regulation and the proposed amendments is to maintain a scientifically sound basis for regulation of the retail food industry. The modifications proposed to the existing regulation are necessary to ensure appropriate measures are in place to address emerging and ongoing food safety concerns that exist within an evolving food industry.

The second goal is to facilitate the shared responsibility of the food industry and the government in ensuring that food provided to the consumer is safe and does not become a vehicle in a disease outbreak or in the transmission of communicable disease. Foodborne disease in the United States is a major cause of personal distress, preventable death, and avoidable economic burden. The U.S. Centers for Disease Control and Prevention estimate that foodborne diseases cause approximately 48 million people to become ill, 128,000 hospitalizations, and 3,000 deaths each year in the United States. Epidemiological outbreak data repeatedly identify five major risk factors related to employee behaviors and preparation practices in retail and food service establishments as contributing to foodborne illness. Those risk factors include (i) improper holding temperatures; (ii) inadequate cooking, such as undercooking raw eggs; (iii) contaminated equipment; (iv) food from unsafe sources; and (v) poor personal hygiene. The amendments address controls for these risk factors. The regulation also provides the necessary guidance to the retail food industry relative to controlling risk factors and implementing appropriate intervention strategies.

The third goal of the proposed regulation is to ensure a regulatory approach that is uniform throughout the retail segment of Virginia's food industry by administering standards that are equivalent to those administered by the Virginia Department of Health (VDH) in restaurants and food service establishments. This regulatory uniformity also extends throughout the nation, as most states have adopted versions of Food and Drug Administration (FDA) Food Code.

Rationale for Using Fast-Track Rulemaking Process: This regulatory action will update the existing regulation, which is based on FDA's 2013 Food Code and the 2015 Food Code Supplement, so that it is consistent with FDA's 2017 Food Code and the 2019 Food Code Supplement as well as the regulations adopting FDA's Food Code that VDH enforces. The proposed amendments are necessary to address changes that have occurred in the food industry and emerging science relating to the prevention of foodborne illnesses. The new regulations will assist in optimizing public health protection. This regulatory action is expected to be noncontroversial because the proposed amendments were generated from the Conference for Food Protection, which provides a formal

process whereby members of industry, regulatory, academia, consumer, and professional organizations are afforded equal input in the modification of the FDA Food Code.

Substance: The proposed changes would: (i) allow an exception for providing a person in charge for certain types of food establishments; (ii) require that the person in charge be a certified food protection manager (CFPM), including exemptions for certain low risk establishments; (iii) require, if used, an impermeable cover such as a bandage located on the wrist, hand, or finger of a food employee be covered with a single-use glove; (iv) add information regarding labeling requirements for commercially slaughtered or processed rabbits; (v) harmonize cooking time/temperature parameters for intact and non-intact meat and poultry in accordance with guidance from U.S. Department of Agriculture (USDA) and add cooking time/temperature for commercially slaughtered rabbits; and (vi) allow the regulatory authority to agree to continuing operation in the event of an extended interruption of electrical or water service if certain conditions are met.

Issues: The primary advantage of the proposed amendments to this regulation for the public is that they will further enhance the safety of food products sold through the retail segment of the food industry. The regulation and the proposed amendments are based on the most current sound science available. Consumers purchasing food products from retail establishments should develop greater confidence in the safety of the retail food supply.

There do not appear to be any disadvantages to the public.

The advantage for regulated business is that the benefits of well-written, scientifically sound, and up-to-date retail food safety requirements have long been recognized by industry and regulatory officials. Industry conformance with acceptable procedures and practices is far more likely where regulatory officials speak with one voice about what is required to protect public health, why it is important, and which alternatives for compliance may be accepted. With both the Virginia Department of Agriculture and Consumer Services (VDACS) and VDH administering equivalent food safety requirements in each agency's respective portion of the retail segment of the food industry, Virginia's regulatory officials will be speaking with one voice, greatly enhancing the uniform application of retail standards and requirements. This will in turn prevent the retail food industry from adhering to separate standards, which will ultimately eliminate confusion and additional costs relative to compliance with two different regulations and will further enhance the industry's ability to comply with existing food safety standards. The standards and requirements of this proposal can also be used by the retail segment of the food industry in training and quality assurance programs.

The requirement that each retail food establishment have a person in charge who is a certified food protection manager (CFPM) may pose an initial disadvantage in that it may require some level of effort by them to ensure the presence of a CFPM at the establishment. However, the designation of a person in

charge within each retail food establishment who is knowledgeable regarding food safety will ultimately provide an advantage to each establishment, as taking additional steps to further ensure that food products produced and offered for sale should enhance consumer confidence and ultimately food product sales.

The advantage to the agency and the Commonwealth is that the proposed changes will further ensure the safety of the food supply. This will, in turn, engender a greater level of confidence by the public that both the agency and the Commonwealth are taking the necessary steps to provide an appropriate level of public health protection. This confidence in the food supply should ultimately enhance Virginia's economy via enhanced food product sales.

There do not appear to be any disadvantages to the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

The Board of Agriculture and Consumer Services (Board) proposes numerous amendments to 2VAC5-585, Retail Food Establishment Regulations, mostly for consistency with the latest U.S. Food and Drug Administration (FDA) model regulations, (i.e., the FDA's 2017 Food Code and the 2019 Food Code Supplement).

**Background.**

The Retail Food Establishment Regulations establish minimum sanitary standards for retail food establishments such as supermarkets, grocery stores, and convenience stores. Those standards include the safe and sanitary maintenance, storage, operation, and use of equipment; the safe preparation, handling, protection, and preservation of food, including necessary refrigeration or heating methods; procedures for vector and pest control; requirements for toilet and hand washing facilities for employees; requirements for appropriate lighting and ventilation; requirements for an approved water supply and sewage disposal system; personal hygiene standards for employees; and the appropriate use of precautions to prevent the transmission of communicable diseases. The current regulation is based on the FDA's 2013 Food Code and the 2015 Food Code Supplement.

The FDA describes its Food Code as "a model for safeguarding public health and ensuring food is unadulterated and honestly presented when offered to the consumer." It represents FDA's best advice for a uniform system of provisions that address the safety and protection of food offered at retail and in food service.<sup>1</sup> The FDA encourages states to adopt the latest version of the FDA Food Code,<sup>2</sup> but it is not federal law.

Conforming to 2017 FDA Food Code and 2019 Food Code Supplement. The following proposed amendments to the regulation conform to requirements in the 2017 FDA Food Code or the 2019 Food Code Supplement:

- Require that the person in charge be a certified food protection manager (CFPM).

- Add an exception to the requirement that a person in charge<sup>3</sup> is present at the food establishment during all hours of operation. The exception is proposed for food establishments deemed by the Virginia Department of Agriculture and Consumer Services (VDACS) to pose minimal risk of causing, or contributing to, foodborne illness based on the nature of the operation and the extent of the food preparation.

- Require that if used, an impermeable cover such as a bandage, finger cot, or finger stall located on the wrist, hand or finger of the food employee working with exposed food shall be covered with a single-use glove.

- Require that food establishments have written procedures for employees to follow when responding to vomiting or diarrheal events that involve the discharge of vomitus or fecal matter onto surfaces in the food establishment. The procedures must address the specific actions employees must take to minimize the spread of contamination and the exposure of employees, consumers, food, and surfaces to vomitus or fecal matter.

- Require the protection of prewashed fruits and vegetables from cross contamination by separating them from raw animal foods during storage, preparation holding and display.

- Increase the minimum required cooking time from 15 to 17 seconds (at 155°F) for certain raw animal foods.<sup>4</sup>

- Reduce the minimum required cooking time from 15 seconds to less than one second (165°F or above) for certain raw animal foods.<sup>5</sup>

- Include timelines for required reporting of nitrate and E. coli positive lab results to VDACS.

- Permit VDACS to allow the continuing operation of food establishments in the event of an extended interruption of electrical or water service if certain conditions are met.

When inspectors find violations of any of the regulation's requirements, the food establishment must correct the deficiencies within specified time periods. All requirements are delineated as priority, priority foundation, or core. Priority items must be remedied within 72 hours, priority foundation items within 10 calendar days, and core items within 90 days. In order to conform to the 2017 FDA Food Code, the Board proposes to decrease the length of time in which certain violations of requirements must be corrected, as follows:

Priority instead of Core (requiring correction within 72 hours instead of 90 calendar days):

- Except during preparation, cooking, or cooling, or when time is used as the public health control,<sup>6,7</sup> time/temperature control for safety food must be maintained at 41°F (5°C) or less.

- Priority Foundation instead of Core (requiring correction within 10 calendar days instead of 90 calendar days):

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- Water from a private well must be sampled and tested at least annually for nitrate and total coliform.
- Various specifications for thawing of food.
- Cleaning agents and chemical sanitizer must be provided and available for use during all hours of operation.

Other Proposed Changes. The following proposed amendments to the regulation are not related to the 2017 FDA Food Code or the 2019 Food Code Supplement:

- Specify that shucked shellfish from one tagged or labeled container are not commingled with shellstock<sup>8</sup> or shucked shellfish from another container with different certification numbers, different harvest dates, or different growing areas as identified on the tag or label before being ordered by the consumer.
- Require that labels for commercially slaughtered or processed rabbits that are offered for sale or service contain certain specified information, including a producer number, safe handling instructions, identifying code, and a warning statement.

## Estimated Benefits and Costs.

Conforming to 2017 FDA Food Code and 2019 Food Code Supplement. The current regulation requires food establishments to employ a CFPM; however, they are not required to be onsite at all times of operation. The proposed regulation expands this time requirement, and effectively requires that a CFPM be onsite at all times of operation. More specifically, the person in charge of the open food establishment would have to be a CFPM. The regulation defines "person in charge" as "the individual present at a food establishment who is responsible for the operation at the time of inspection." Since most food establishments are unlikely to have one person who works 100% of open hours, many would likely need to get one or more additional employees certified.

Under both the existing and proposed regulations, proficiency as a CFPM is established through passing a test, not completing a program. Certification costs (for the test) are approximately \$100 per individual<sup>9</sup> and renewal is required every five years. Tests are available via six accredited programs and take approximately two hours. Those persons who elect to take training (not required) may sign up for a training course via an accredited provider, and the training time varies from self-pace to approximately sixteen hours. Training and tests are available both online and in person.<sup>10</sup> The total cost of requiring that a CFPM be onsite at all times of operation would therefore be: a) the test fees for each additional needed CFPM, b) fees for training if needed to pass the test, and c) the value of the staff time spent preparing for and taking the test. For example, if a CFPM candidate spends eight hours preparing for the test and two hours taking the test, the ten hours of staff time represents a cost that has to be covered by another employee. However, having a CFPM always present in the open operation, who is certified to be knowledgeable about food protection, would

likely reduce the probability that unsafe food practices would occur.

The proposal to provide an exception for certain food establishments to the requirement that a person in charge be present during all hours of operation could potentially reduce costs for such establishments; this exception would apply to food establishments deemed by VDACS to pose minimal risk of causing, or contributing to, foodborne illness. For example, such minimal risk establishments would not need incur the cost of additional staff becoming a CFPM. Since by definition these establishments pose minimal risk, the absence of having a CFPM always present in the open operation would not likely substantively affect the probability of unsafe food practices occurring.

The current regulation only requires the use of a single-use glove when "a lesion containing pus such as a boil or infected wound that is open or draining and is on the hands or wrists." The proposed regulation would require that "If used, an impermeable cover such as a bandage, finger cot, or finger stall located on the wrist, hand or finger of the food employee working with exposed food shall be covered with a single use glove." This would include band aids for simple uninfected cuts. Thus, single use gloves would need to be purchased and used more often under the proposed regulation. Single-use gloves are available for about five cents a glove when purchasing in bulk (100 gloves).<sup>11</sup>

The current regulation requires that food establishments have procedures for employees to follow when responding to vomiting or diarrheal events that involve the discharge of vomitus or fecal matter onto surfaces in the food establishment. The procedures must address the specific actions employees must take to minimize the spread of contamination and the exposure of employees, consumers, food, and surfaces to vomitus or fecal matter. The Board proposes to specify that those procedures be written. This would help ensure that those procedures are consistent, regardless of whoever is in charge at a given time. VDACS has a template that can be made available to food establishments to use for their written procedures. Thus, it should not be costly for the businesses to produce written procedures that satisfy the department.

The FDA believes that certain requirements would protect food safety: a) protecting prewashed fruits and vegetables from cross contamination by separating them from raw animal foods during storage, preparation holding and display, and b) increasing the minimum required cooking time from 15 to 17 seconds (at 155°F) for certain raw animal foods.<sup>12</sup> For any food establishments that do not already protect prewashed fruits and vegetables from cross contamination in the above manner, there may be some cost in finding additional space to keep these items separated. For establishments that already keep such separation, neither of these two proposals appear to be particularly costly. For other raw animal foods,<sup>13</sup> which must be cooked at 165°F or above, the FDA believes that it is safe to reduce the minimum required cooking time from 15 seconds

to less than one second (instantaneous). The Board's proposal to make this amendment would cumulatively moderately reduce the time necessary to prepare such food without apparently increasing health risks.

The current regulation requires that water from a private well be sampled and tested at least annually for nitrate and total coliform. If nitrate exceeds 10 milligrams per liter, the operator must notify VDACS. If a sample is total coliform positive, the positive culture medium must be further analyzed to determine if *E. coli* is present. The operator must notify VDACS within two days from when the operator is notified of the coliform positive test result. If *E. coli* is present, the operator must notify VDACS. The current regulation does not specify deadlines for notification for positive results of either nitrate exceeding 10 mg/L or the presence of *E. coli*. The Board proposes to specify that notification must be within 24 hours. This would be beneficial in that it would enable VDACS to take faster action regarding a potential health threat.

The proposal to permit VDACS to allow food establishments to continue operating in the event of an extended interruption of electrical or water service if certain conditions are met, would give greater flexibility to retail food establishments to continue operations if they have a written emergency operation plan that has been approved by the department.

**Other Proposed Changes.** The current regulation specifies that shellstock from one tagged or labeled container are not to be commingled with shellstock from another container with different certification numbers, different harvest dates, or different growing areas as identified on the tag or label before being ordered by the consumer. "Shellstock" is defined as "raw, in-shell molluscan shellfish," and thus does not include shucked shellfish. The Board proposes to mandate that shucked shellfish from one tagged or labeled container not be commingled with shellstock or shucked shellfish from another container with different certification numbers, different harvest dates, or different growing areas as identified on the tag or label before being ordered by the consumer. To the extent that this is not already done by food establishments with shucked shellfish, this proposal would be beneficial in that it would likely reduce the probability that spoiled shellfish is mistakenly sold.

The proposal to require that the labels for commercially slaughtered or processed rabbits that are offered for sale or service contain certain specified information, including a producer number, safe handling instructions, identifying code, and a warning statement may effectively require the size of labels used for such rabbits to be larger (or the use of a smaller font) for those that are not already providing this information. The potential cost for larger labels would not likely be large. The provision of information such as safe handling instructions may reduce the likelihood of illness.

**Businesses and Other Entities Affected.** The proposed amendments would affect the approximate 9,411 retail food stores in the Commonwealth<sup>14</sup> and the six accredited CFPM

programs.<sup>15</sup> As described in the Estimated Benefits and Costs section, the proposal to require that there be a CFPM on the premises of the food establishment at all times of operation would likely increase costs for most food establishments. The proposal to mandate that single-use gloves be worn whenever there is an impermeable cover such as a bandage, finger cot, or finger stall located on the wrist, hand, or finger of the food employee would also modestly increase costs for most food establishments.

Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. While the benefits to public health may be large, there would likely be some increases in net costs for some of the affected entities as described in the Estimated Benefits and Costs section.

**Small Businesses<sup>16</sup> Affected:**

**Types and Estimated Number of Small Businesses Affected.** VDACS estimates that 4,705 of the retail food stores in the Commonwealth are small businesses. The sizes of the six accredited CFPM programs are unknown.

**Costs and Other Effects.** Costs for small food establishments would be affected by the proposed amendments as described in the Estimated Benefits and Costs section. The proposal to require that there be a CFPM on the premises of the food establishment at all times of operation would very likely increase revenue for at least some of the six accredited CFPM programs.

**Alternative Method that Minimizes Adverse Impact.** There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

**Localities<sup>17</sup> Affected.<sup>18</sup>** The proposed amendments would affect food establishments in all localities, not disproportionately affecting any particularly. The proposed amendments do not appear to introduce additional costs for local governments.

**Projected Impact on Employment.** The proposal to require that there be a CFPM on the premises of the food establishment at all times of operation would very likely increase demand for the services of the six accredited CFPM programs, which may moderately increase their employment.

**Effects on the Use and Value of Private Property.** The proposals to require that there be a CFPM on the premises of the food establishment at all times of operation and that single-use gloves be worn whenever there is an impermeable cover on the wrist, hand, or finger of the food employee would likely increase costs for most food establishments. These cost increases would likely moderately reduce the value of affected firms commensurately.

The proposal to require that there be a CFPM on the premises of the food establishment at all times of operation would very likely increase demand for the services of the six accredited CFPM programs, which may moderately increase their value.

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The proposed amendments do not appear to affect real estate development costs.

<sup>1</sup>See <https://www.fda.gov/food/fda-food-code/food-code-2017>

<sup>2</sup>Ibid

<sup>3</sup>"Person in charge" is defined as the individual present at a food establishment who is responsible for the operation at the time of inspection.

<sup>4</sup>See 2VAC5-585-700 A 2 for affected raw animal foods. <https://townhall.virginia.gov/l/viewXML.cfm?textid=14682&replace=yes>

<sup>5</sup>See 2VAC5-585-700 A 3 for affected raw animal foods.

<sup>6</sup>See 2VAC5-585-850 for time is used as the public health control <https://law.lis.virginia.gov/admincode/title2/agency5/chapter585/section850/>

<sup>7</sup>The situations described in 2VAC5-585-820 B and C would also be excepted: <https://law.lis.virginia.gov/admincode/title2/agency5/chapter585/section820/>

<sup>8</sup>"Shellstock" is defined as "raw, in-shell molluscan shellfish."

<sup>9</sup>Source: VDACS

<sup>10</sup>Data and other information source: Virginia Department of Health (VDH)

<sup>11</sup>Source: Amazon.com accessed on March 13, 2020.

<sup>12</sup>See 2VAC5-585-700 A 2 for affected raw animal foods. <https://townhall.virginia.gov/l/viewXML.cfm?textid=14682&replace=yes>

<sup>13</sup>See 2VAC5-585-700 A 3 for affected raw animal foods.

<sup>14</sup>Source: VDACS

<sup>15</sup>Source: VDH

<sup>16</sup>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."

<sup>17</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>18</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

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

Summary:

*The amendments update the current regulation so that it is consistent with the Food and Drug Administration's 2017 Food Code and the 2019 Food Code Supplement. Many of the changes simply refine and clarify provisions in the existing regulation. Substantive amendments include (i) providing an exemption from the requirement that a food establishment have a person in charge present during all hours of operation for certain types of food establishments; (ii) requiring that the person in charge be a Certified Food Protection Manager and providing exemptions for certain low risk establishments; (iii) requiring an impermeable cover, such as a bandage, that is located on the wrist, hand, or finger of a food employee be covered with a single-use glove; (iv) labeling requirements for commercially slaughtered or processed rabbits; (v) harmonizing cooking time/temperature parameters for intact and non-intact meat and poultry in accordance with guidance from the U.S. Department of Agriculture and adding cooking time/temperature for commercially slaughtered rabbits; and*

*(vi) allowing the regulatory authority to allow the continued operation of a food establishment in the event of an extended interruption of electrical or water service if certain conditions are met.*

## **2VAC5-585-20. Food safety, illness prevention, and honest presentation.**

The purpose of this regulation chapter is to safeguard public health and provide to consumers food that is safe, unadulterated, and honestly presented.

## **2VAC5-585-30. Statement.**

This regulation chapter establishes definitions; sets standards for management and personnel, food operations, and equipment and facilities; and provides for inspection, food establishment plan review, and employee restriction.

## **2VAC5-585-40. Definitions.**

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

"Accredited program" means a food protection manager certification program that has been evaluated and listed by an accrediting agency as conforming to national standards for organizations that certify individuals. "Accredited program" refers to the certification process and is a designation based upon an independent evaluation of factors such as the sponsor's mission; organizational structure; staff resources; revenue sources; policies; public information regarding program scope, eligibility requirements, recertification, discipline, and grievance procedures; and test development and administration. "Accredited program" does not refer to training functions or educational programs.

"Additive" means either a (i) "food additive" having the meaning stated in the Federal Food, Drug, and Cosmetic Act, 21 USC § 321(s) and 21 CFR 170.3(e)(1) or (ii) "color additive" having the meaning stated in the Federal Food, Drug, and Cosmetic Act, 21 USC § 321(t) and 21 CFR 70.3(f).

"Adulterated" has the meaning stated in the Federal Food, Drug, and Cosmetic Act, 21 USC § 342.

"Approved" means acceptable to the department based on a determination of conformity with principles, practices, and generally recognized standards that protect public health.

"Approved water system" means a permitted waterworks constructed, maintained, and operated pursuant to 12VAC5-590 or a private well constructed, maintained, and operated pursuant to 12VAC5-630.

"Asymptomatic" means without obvious symptoms; not showing or producing indications of a disease or other medical condition, such as an individual infected with a pathogen but not exhibiting or producing any signs or symptoms of vomiting, diarrhea, or jaundice. "Asymptomatic" includes not

showing symptoms because symptoms have resolved or subsided, or because symptoms never manifested.

"A<sub>w</sub>" means water activity that is a measure of the free moisture in a food, is the quotient of the water vapor pressure of the substance divided by the vapor pressure of pure water at the same temperature, and is indicated by the symbol A<sub>w</sub>.

"Balut" means an embryo inside a fertile egg that has been incubated for a period sufficient for the embryo to reach a specific stage of development after which it is removed from incubation before hatching.

"Beverage" means a liquid for drinking, including water.

~~"Board" means the Board of Agriculture and Consumer Services.~~

"Bottled drinking water" means water that is sealed in bottles, packages, or other containers and offered for sale for human consumption, including bottled mineral water.

"Casing" means a tubular container for sausage products made of either natural or artificial (synthetic) material.

"Certification number" means a unique combination of letters and numbers assigned by a shellfish control authority to a molluscan shellfish dealer according to the provisions of the National Shellfish Sanitation Program.

"CFR" means Code of Federal Regulations. Citations in this chapter to the CFR refer sequentially to the title, part, and section numbers. For example, 40 CFR 180.194 refers to Title 40, Part 180, Section 194.

"CIP" means cleaned in place by the circulation or flowing by mechanical means through a piping system of a detergent solution, water rinse, and sanitizing solution onto or over equipment surfaces that require cleaning, such as the method used, in part, to clean and sanitize a frozen dessert machine. "CIP" does not include the cleaning of equipment such as band saws, slicers, or mixers that are subjected to in-place manual cleaning without the use of a CIP system.

"Commingle" means:

1. To combine shellstock harvested on different days or from different growing areas as identified on the tag or label; or
2. To combine shucked shellfish from containers with different container codes or different shucking dates.

"Comminuted" means reduced in size by methods including chopping, flaking, grinding, or mincing. "Comminuted" includes (i) fish or meat products that are reduced in size and restructured or reformulated such as gefilte fish, gyros, ground beef, and sausage and (ii) a mixture of two or more types of meat that have been reduced in size and combined, such as sausages made from two or more meats.

"Commissioner" means the Commissioner of Agriculture and Consumer Services, his duly designated officer, or his agent.

"Conditional employee" means a potential food employee to whom a job offer is made, conditional on responses to subsequent medical questions or examinations designed to identify potential food employees who may be suffering from a disease that can be transmitted through food and done in compliance with Title 1 of the Americans with Disabilities Act of 1990.

"Confirmed disease outbreak" means a foodborne disease outbreak in which laboratory analysis of appropriate specimens identifies a causative agent and epidemiological analysis implicates the food as the source of the illness.

"Consumer" means a person who is a member of the public, takes possession of food, is not functioning in the capacity of an operator of a food establishment or food processing plant, and does not offer the food for resale.

"Core item" means a provision in this chapter that is not designated as a priority item or a priority foundation item. "Core item" includes an item that usually relates to general sanitation, operational controls, sanitation standard operating procedures (SSOPs), facilities or structures, equipment design, or general maintenance.

"Corrosion-resistant materials" means a material that maintains acceptable surface cleanability characteristics under prolonged influence of the food to be contacted, the normal use of cleaning compounds and sanitizing solutions, and other conditions of the use environment.

"Counter-mounted equipment" means equipment that is not portable and is designed to be mounted off the floor on a table, counter, or shelf.

"Critical control point" means a point or procedure in a specific food system where loss of control may result in an unacceptable health risk.

"Critical limit" means the maximum or minimum value to which a physical, biological, or chemical parameter must be controlled at a critical control point to minimize the risk that the identified food safety hazard may occur.

"Cut leafy greens" means fresh leafy greens whose leaves have been cut, shredded, sliced, chopped, or torn. The term "leafy greens" includes iceberg lettuce, romaine lettuce, leaf lettuce, butter lettuce, baby leaf lettuce (i.e., immature lettuce or leafy greens), escarole, endive, spring mix, spinach, cabbage, kale, arugula, and chard. The term "leafy greens" does not include herbs such as cilantro or parsley.

"Dealer" means a person who is authorized by a shellfish control authority for the activities of a shellstock shipper, shucker-packer, repacker, reshipper, or depuration processor of molluscan shellfish according to the provisions of the National Shellfish Sanitation Program.

"Department" means the Virginia Department of Agriculture and Consumer Services.

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"Disclosure" means a written statement that clearly identifies the animal-derived foods that are, or can be ordered, raw, undercooked, or without otherwise being processed to eliminate pathogens, or items that contain an ingredient that is raw, undercooked, or without otherwise being processed to eliminate pathogens.

"Dry storage area" means a room or area designated for the storage of packaged or containerized bulk food that is not time/temperature control for safety food and dry goods such as single-service items.

"Easily cleanable" means a characteristic of a surface that:

1. Allows effective removal of soil by normal cleaning methods;
2. Is dependent on the material, design, construction, and installation of the surface; and
3. Varies with the likelihood of the surface's role in introducing pathogenic or toxigenic agents or other contaminants into food based on the surface's approved placement, purpose, and use.

"Easily cleanable" includes a tiered application of the criteria that qualify the surface as easily cleanable as specified above in this definition to different situations in which varying degrees of cleanability are required such as:

1. The appropriateness of stainless steel for a food preparation surface as opposed to the lack of need for stainless steel to be used for floors or for tables used for consumer dining; or
2. The need for a different degree of cleanability for a utilitarian attachment or accessory in the kitchen as opposed to a decorative attachment or accessory in the consumer dining area.

"Easily movable" means:

1. Portable; mounted on casters, gliders, or rollers; or provided with a mechanical means to safely tilt a unit of equipment for cleaning; and
2. Having no utility connection, a utility connection that disconnects quickly, or a flexible utility connection line of sufficient length to allow the equipment to be moved for cleaning of the equipment and adjacent area.

"Egg" means the shell egg of avian species such as chicken, duck, goose, guinea, quail, ratites, or turkey. "Egg" does not include a balut, egg of the reptile species such as alligator, or an egg product.

"Egg product" means all, or a portion of, the contents found inside eggs separated from the shell and pasteurized in a food processing plant, with or without added ingredients, intended for human consumption, such as dried, frozen, or liquid eggs. "Egg product" does not include food that contains eggs only in a relatively small proportion such as cake mixes.

"Employee" means the operator, person in charge, food employee, person having supervisory or management duties, person on the payroll, family member, volunteer, person performing work under contractual agreement, or other person working in a food establishment.

"EPA" means the U.S. Environmental Protection Agency.

"Equipment" means an article that is used in the operation of a food establishment, such as a freezer, grinder, hood, ice maker, meat block, mixer, oven, reach-in refrigerator, scale, sink, slicer, stove, table, temperature measuring device for ambient air, vending machine, or warewashing machine. "Equipment" does not include apparatuses used for handling or storing large quantities of packaged foods that are received from a supplier in a cased or overwrapped lot, such as hand trucks, forklifts, dollies, pallets, racks, and skids.

"Exclude" means to prevent a person from working as an employee in a food establishment or entering a food establishment as an employee.

"FDA" means the U.S. Food and Drug Administration.

"Fish" means fresh or saltwater finfish, crustaceans, ~~and~~ other forms of aquatic life (including alligator, frog, aquatic turtle, jellyfish, sea cucumber, and sea urchin and the roe of such animals) other than birds or mammals; and all mollusks, if such animal life is intended for human consumption; and includes ~~any~~ an edible human food product derived in whole or in part from fish, including fish that has been processed in any manner.

"Food" means (i) a raw, cooked, or processed edible substance, ice, beverage, or ingredient used or intended for use or for sale in whole or in part for human consumption or (ii) chewing gum.

"Foodborne disease outbreak" means the occurrence of two or more cases of a similar illness resulting from the ingestion of a common food.

"Food-contact surface" means a surface of equipment or a utensil with which food normally comes into contact, or a surface of equipment or a utensil from which food may drain, drip, or splash into a food, or onto a surface normally in contact with food.

"Food employee" means an individual working with unpackaged food, food equipment or utensils, or food-contact surfaces.

"Food establishment" means an operation that (i) stores, prepares, packages, serves, vends food directly to the consumer, or otherwise provides food for human consumption (⊕) such as a market, restaurant, satellite or catered feeding location, catering operation if the operation provides food directly to a consumer or to a conveyance used to transport people, vending location, conveyance used to transport people, institution, or food bank and (ii) ~~that~~ relinquishes possession of

a food to a consumer directly, or indirectly through a delivery service such as home delivery of grocery orders or restaurant takeout orders, or delivery service that is provided by common carriers.

"Food establishment" includes (i) an element of the operation such as a transportation vehicle or a central preparation facility that supplies a vending location or satellite feeding location unless the vending or satellite feeding location is inspected by the regulatory authority and (ii) an operation that is conducted in a mobile, stationary, temporary, or permanent facility or location where consumption is on or off the premises.

"Food establishment" does not include:

1. An establishment that offers only prepackaged foods that are not time/temperature control for safety foods;
2. A produce stand that only offers whole, uncut fresh fruits and vegetables;
3. A food processing plant, including those that are located on the premises of a food establishment;
4. A food warehouse;
5. A kitchen in a private home; or
6. A private home that receives catered or home delivered food.

"Food processing plant" means a commercial operation that manufactures, packages, labels, or stores food for human consumption and provides food for sale or distribution to other business entities such as food processing plants or food establishments. "Food processing plant" does not include a "food establishment."

"Game animal" means an animal, the products of which are food, that is not classified as (i) livestock, sheep, swine, goat, horse, mule, or other equine in 9 CFR 301.2; (ii) poultry; or (iii) fish. "Game animal" includes mammals such as reindeer, elk, deer, antelope, water buffalo, bison, rabbit, squirrel, opossum, raccoon, nutria, or muskrat, and nonaquatic reptiles such as land snakes. "Game animal" does not include ratites.

"General use pesticide" means a pesticide that is not classified by EPA for restricted use as specified in 40 CFR 152.175.

"Grade A standards" means the requirements of the Grade "A" Pasteurized Milk Ordinance, ~~2013~~ 2017 Revision, (U.S. Food and Drug Administration) with which certain fluid and dry milk and milk products comply.

"HACCP plan" means a written document that delineates the formal procedures for following the Hazard Analysis and Critical Control Point principles developed by the National Advisory Committee on Microbiological Criteria for Foods.

"Handwashing sink" means a lavatory, a basin or vessel for washing, a wash basin, or a plumbing fixture especially placed for use in personal hygiene and designed for the washing of

hands. "Handwashing sink" includes an automatic handwashing facility.

"Hazard" means a biological, chemical, or physical property that may cause an unacceptable consumer health risk.

"Health practitioner" means a physician licensed to practice medicine, or if allowed by law, a nurse practitioner, physician assistant, or similar medical professional.

"Hermetically sealed container" means a container that is designed and intended to be secure against the entry of microorganisms and, in the case of low acid canned foods, to maintain the commercial sterility of its contents after processing.

"Highly susceptible population" means persons who are more likely than other people in the general population to experience foodborne disease because they are (i) immunocompromised; preschool age children, or older adults; and (ii) obtaining food at a facility that provides services such as custodial care, health care, or assisted living, such as a child or adult day care center, kidney dialysis center, hospital or nursing home, or nutritional or socialization services such as a senior center.

"Imminent health hazard" means a significant threat or danger to health that is considered to exist when there is evidence sufficient to show that a product, practice, circumstance, or event creates a situation that requires immediate correction or cessation of operation to prevent injury based on the number of potential injuries, and the nature, severity, and duration of the anticipated injury.

"Injected" means manipulating meat to which a solution has been introduced into its interior by processes such as that are referred to as "injecting," "pump marinating," or "stitch pumping."

"Intact meat" means a cut of whole muscle meat that has not undergone comminution, vacuum tumbling with solutions, mechanical tenderization, or reconstruction.

"Juice" means the aqueous liquid expressed or extracted from one or more fruits or vegetables, purées of the edible portions of one or more fruits or vegetables, or any concentrate of such liquid or purée. "Juice" does not include, for purposes of HACCP, liquids, purées, or concentrates that are not used as beverages or ingredients of beverages.

"Kitchenware" means food preparation and storage utensils.

"Law" means applicable local, state, and federal statutes, regulations, and ordinances.

"Linens" means fabric items such as cloth hampers, cloth napkins, table cloths, wiping cloths, and work garments, including cloth gloves.

"Major food allergen" means milk, egg, fish (such as bass, flounder, cod, and including crustacean shellfish such as crab, lobster, or shrimp), tree nuts (such as almonds, pecans, or

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walnuts), wheat, peanuts, and soybeans or a food ingredient that contains protein derived from one of these foods. "Major food allergen" does not include (i) any highly refined oil derived from a major food allergen in this definition and any ingredient derived from such highly refined oil or (ii) any ingredient that is exempt under the petition or notification process specified in the Food Allergen Labeling and Consumer Protection Act of 2004 (P.L. 108-282).

"Meat" means the flesh of animals used as food including the dressed flesh of cattle, swine, sheep, or goats and other edible animals, except fish, poultry, and wild game animals as specified under 2VAC5-585-330 A 2 and 3.

"Mechanically tenderized" means manipulating meat ~~with deep penetration by processes that may be referred to as "blade tenderizing," "jaccarding," "pinning," "needling," or using blades, pins, needles or any mechanical device.~~ "Mechanically tenderized" does not include processes by which solutions are injected into meat. by piercing with a set of needles, pins, blades, or any mechanical device that breaks up muscle fiber and tough connective tissue to increase tenderness. This includes injection, scoring, and processes that may be referred to as "blade tenderizing," "jaccarding," "pinning," or "needling."

"mg/L" means milligrams per liter, which is the metric equivalent of parts per million (ppm).

"Molluscan shellfish" means any edible species of fresh or frozen oysters, clams, mussels, and scallops or edible portions thereof, except when the scallop product consists only of the shucked adductor muscle.

"Noncontinuous cooking" means the cooking of food in a food establishment using a process in which the initial heating of the food is intentionally halted so that it may be cooled and held for complete cooking at a later time prior to sale or service. "Noncontinuous cooking" does not include cooking procedures that only involve temporarily interrupting or slowing an otherwise continuous cooking process.

"Operator" means the entity that is legally responsible for the operation of the food establishment such as the owner, the owner's agent, or other person.

"Packaged" means bottled, canned, cartoned, bagged, or wrapped, whether packaged in a food establishment or a food processing plant. "Packaged" does not include wrapped or placed in a carry-out container to protect the food during service or delivery to the consumer, by a food employee, upon consumer request.

"Person" means an association, a corporation, individual, partnership, other legal entity, government, or governmental subdivision or agency.

"Person in charge" means the individual present at a food establishment who is responsible for the operation at the time of inspection.

"Personal care items" means items or substances that may be poisonous, toxic, or a source of contamination and are used to maintain or enhance a person's health, hygiene, or appearance. "Personal care items" include items such as medicines, first aid supplies, and other items such as cosmetics and toiletries such as toothpaste and mouthwash.

"pH" means the symbol for the negative logarithm of the hydrogen ion concentration, which is a measure of the degree of acidity or alkalinity of a solution. Values between 0 and 7.0 indicate acidity and values between 7.0 and 14 indicate alkalinity. The value for pure distilled water is 7.0, which is considered neutral.

"Physical facilities" means the structure and interior surfaces of a food establishment including accessories such as soap and towel dispensers and attachments such as light fixtures and heating or air conditioning system vents.

"Plumbing fixture" means a receptacle or device that is permanently or temporarily connected to the water distribution system of the premises and demands a supply of water from the system or discharges used water, waste materials, or sewage directly or indirectly to the drainage system of the premises.

"Plumbing system" means the water supply and distribution pipes; plumbing fixtures and traps; soil, waste, and vent pipes; sanitary and storm sewers and building drains, including their respective connections, devices, and appurtenances within the premises; and water-treating equipment.

"Poisonous or toxic materials" means substances that are not intended for ingestion and are included in four categories:

1. Cleaners and sanitizers, which include cleaning and sanitizing agents and agents such as caustics, acids, drying agents, polishes, and other chemicals;
2. Pesticides, except sanitizers, which include substances such as insecticides and rodenticides;
3. Substances necessary for the operation and maintenance of the establishment such as nonfood grade lubricants and personal care items that may be deleterious to health; and
4. Substances that are not necessary for the operation and maintenance of the establishment and are on the premises for retail sale, such as petroleum products and paints.

"Potable water" means water fit for human consumption that is obtained from an approved water supply and that is (i) sanitary and normally free of minerals, organic substances, and toxic agents in excess of reasonable amounts and (ii) adequate in quantity and quality for the minimum health requirements of the person served. Potable water is traditionally known as drinking water and excludes such nonpotable forms as boiler water, mop water, rainwater, wastewater, and nondrinking water.

"Poultry" means any domesticated bird (chickens, turkeys, ducks, geese, guineas, ratites, or squabs), whether live or dead, as defined in 9 CFR 381.1 and any migratory waterfowl, game bird, pheasant, partridge, quail, grouse, or pigeon, whether live or dead, as defined in 9 CFR 362.1.

"Premises" means the physical facility, its contents, and the contiguous land or property under the control of the operator or the physical facility, its contents, and the land or property not described above if its facilities and contents are under the control of the operator and may impact food establishment personnel, facilities, or operations, and a food establishment is only one component of a larger operation.

"Primal cut" means a basic major cut into which carcasses and sides of meat are separated, such as a beef round, pork loin, lamb flank, or veal breast.

"Priority foundation item" means a provision in this chapter whose application supports, facilitates, or enables one or more priority items. "Priority foundation item" includes an item that requires the purposeful incorporation of specific actions, equipment, or procedures by industry management to attain control of risk factors that contribute to foodborne illness or injury such as personnel training, infrastructure or necessary equipment, HACCP plans, documentation or recordkeeping, and labeling and is denoted in this chapter with a superscript "Pf," which looks like this: <sup>Pf</sup>.

"Priority item" means a provision in this chapter whose application contributes directly to the elimination, prevention, or reduction to an acceptable level of hazards associated with foodborne illness or injury and there is no other provision that more directly controls the hazard. "Priority item" includes items with a quantifiable measure to show control of hazards such as cooking, reheating, cooling, and handwashing and is denoted in this chapter with a superscript "P," which looks like this: <sup>P</sup>.

~~"Priority foundation item" means a provision in this chapter whose application supports, facilitates, or enables one or more priority items. "Priority foundation item" includes an item that requires the purposeful incorporation of specific actions, equipment, or procedures by industry management to attain control of risk factors that contribute to foodborne illness or injury such as personnel training, infrastructure or necessary equipment, HACCP plans, documentation or recordkeeping, and labeling and is denoted in this chapter with a superscript <sup>Pf</sup>.~~

"Private well" means any water well constructed for a person on land that is owned or leased by that person and is usually intended for household, groundwater source heat pump, agricultural use, industrial use, or other nonpublic water well.

"Pure water" means potable water fit for human consumption that is (i) sanitary and normally free of minerals, organic substances, and toxic agents in excess of reasonable amounts and (ii) adequate in quantity and quality for the minimum

health requirements of the persons served. ~~Potable water is traditionally known as drinking water and excludes such nonpotable forms as boiler water, mop water, rainwater, wastewater, and nondrinking water.~~

"Ratite" means a flightless bird such as an emu, ostrich, or rhea.

"Ready-to-eat food" means food that:

1. (i) Is in a form that is edible without additional preparation to achieve food safety, as specified under 2VAC5-585-700 A, B, and C; 2VAC5-585-710; or 2VAC5-585-730; (ii) is a raw or partially cooked animal food and the consumer is advised as specified under 2VAC5-585-700 D 1 and D 3; or (iii) is prepared in accordance with a variance that is granted as specified under 2VAC5-585-700 D 4; and

2. May receive additional preparation for palatability or aesthetic, epicurean, gastronomic, or culinary purposes.

"Ready-to-eat food" includes:

1. Raw animal food that is cooked as specified under 2VAC5-585-700 or 2VAC5-585-710, or frozen as specified under 2VAC5-585-730;
2. Raw fruits and vegetables that are washed as specified under 2VAC5-585-510;
3. ~~Fruits and vegetables~~ Plant food that ~~are~~ is cooked for hot holding as specified under 2VAC5-585-720;
4. All time/temperature control for safety food that is cooked to the temperature and time required for the specific food under Article 4 (2VAC5-585-700 et seq.) of Part III of this chapter and cooled as specified in 2VAC5-585-800;
5. Plant food for which further washing, cooking, or other processing is not required for food safety, and from which rinds, peels, husks, or shells, if naturally present, are removed;
6. Substances derived from plants such as spices, seasonings, and sugar;
7. A bakery item such as bread, cakes, pies, fillings, or icing for which further cooking is not required for food safety;
8. The following products that are produced in accordance with USDA guidelines and that have received a lethality treatment for pathogens: dry, fermented sausages, such as dry salami or pepperoni; salt-cured meat and poultry products, such as prosciutto ham, country cured ham, and Parma ham; and dried meat and poultry products, such as jerky or beef sticks; and
9. Food manufactured ~~according to~~ as specified in 21 CFR Part 113.

"Reduced oxygen packaging" means (i) the reduction of the amount of oxygen in a package by removing oxygen; displacing oxygen and replacing it with another gas or

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combination of gases; or otherwise controlling the oxygen content to a level below that normally found in the atmosphere (approximately 21% at sea level); and (ii) a process as specified in clause (i) of this definition that involves a food for which the hazards *Clostridium botulinum* or *Listeria monocytogenes* require control in the final packaged form.

"Reduced oxygen packaging" includes:

1. Vacuum packaging, in which air is removed from a package of food and the package is hermetically sealed so that a vacuum remains inside the package;
2. Modified atmosphere packaging, in which the atmosphere of a package of food is modified so that its composition is different from air, but the atmosphere may change over time due to the permeability of the packaging material or the respiration of the food. Modified atmosphere packaging includes reduction in the proportion of oxygen, total replacement of oxygen, or an increase in the proportion of other gases such as carbon dioxide or nitrogen;
3. Controlled atmosphere packaging, in which the atmosphere of a package of food is modified so that until the package is opened, its composition is different from air, and continuous control of that atmosphere is maintained, such as by using oxygen scavengers or a combination of total replacement of oxygen, nonrespiring food, and impermeable packaging material;
4. Cook chill packaging, in which cooked food is hot filled into impermeable bags that have the air expelled and are then sealed or crimped closed. The bagged food is rapidly chilled and refrigerated at temperatures that inhibit the growth of psychotropic pathogens; or
5. Sous vide packaging, in which raw or partially cooked food is vacuum packaged in an impermeable bag, cooked in the bag, rapidly chilled, and refrigerated at temperatures that inhibit the growth of psychotropic pathogens.

"Refuse" means solid waste not carried by water through the sewage system.

"Regulatory authority" means local, state, or federal enforcement body or their authorized representative having jurisdiction over the food establishment.

"Reminder" means a written statement concerning the health risk of consuming animal foods raw, undercooked, or without otherwise being processed to eliminate pathogens.

"Reservice" means the transfer of food that is unused and returned by a consumer after being served or sold and in the possession of the consumer, to another person.

"Restrict" means to limit the activities of a food employee so that there is no risk of transmitting a disease that is transmissible through food and the food employee does not work with exposed food, clean equipment, utensils, linens, or unwrapped single-service or single-use articles.

"Restricted egg" means any check, dirty egg, incubator reject, inedible, leaker, or loss as defined in 9 CFR Part 590.

"Restricted use pesticide" means a pesticide product that contains the active ingredients specified in 40 CFR 152.175 and that is limited to use by or under the direct supervision of a certified applicator.

"Risk" means the likelihood that an adverse health effect will occur within a population as a result of a hazard in a food.

"Safe material" means an article manufactured from or composed of materials that may not reasonably be expected to result, directly or indirectly, in their becoming a component or otherwise affecting the characteristics of any food; an additive that is used as specified in § 409 of the Federal Food, Drug, and Cosmetic Act (21 USC § 348); or other materials that are not additives and that are used in conformity with applicable regulations of the Food and Drug Administration.

"Sanitization" means the application of cumulative heat or chemicals on cleaned food-contact surfaces that, when evaluated for efficacy, is sufficient to yield a 5-log reduction, which is equal to a 99.999% reduction, of representative disease microorganisms of public health importance.

"Sealed" means free of cracks or other openings that allow the entry or passage of moisture.

"Service animal" means an animal such as a guide dog, signal dog, or other animal individually trained to provide assistance to an individual with a disability.

"Servicing area" means an operating base location to which a mobile food establishment or transportation vehicle returns regularly for such things as vehicle and equipment cleaning, discharging liquid or solid wastes, refilling water tanks and ice bins, and boarding food.

"Sewage" means liquid waste containing animal or vegetable matter in suspension or solution and may include liquids containing chemicals in solution. "Sewage" includes water-carried and non-water-carried human excrement or kitchen, laundry, shower, bath, or lavatory waste separately or together with such underground surface, storm, or other water and liquid industrial wastes as may be present from residences, buildings, vehicles, industrial establishments, or other places.

"Shellfish control authority" means a state, federal, foreign, tribal, or other government entity legally responsible for administering a program that includes certification of molluscan shellfish harvesters and dealers for interstate commerce.

"Shellstock" means raw, in-shell molluscan shellfish.

"Shiga toxin-producing *Escherichia coli*" or "STEC" means any *E. coli* capable of producing Shiga toxins (also called verocytotoxins). STEC infections can be asymptomatic or may result in a spectrum of illness ranging from mild nonbloody diarrhea to hemorrhagic colitis (i.e., bloody diarrhea) to

hemolytic uremic syndrome (HUS), which is a type of kidney failure. Examples of serotypes of STEC include: E. coli O157:H7, E. coli O157:NM, E. coli O26:H11, E. coli O145:NM, E. coli O103:H2, and E. coli O111:NM. STEC are sometimes referred to as VTEC (verocytotoxigenic E. coli) or as EHEC (enterohemorrhagic E. coli). EHEC are a subset of STEC that can cause hemorrhagic colitis or HUS.

"Shucked shellfish" means molluscan shellfish that have one or both shells removed.

"Single-service articles" means tableware, carry-out utensils, and other items such as bags, containers, placemats, stirrers, straws, toothpicks, and wrappers that are designed and constructed for one time, one person use after which they are intended for discard.

"Single-use articles" means utensils and bulk food containers designed and constructed to be used once and discarded. "Single-use articles" includes items such as wax paper, butcher paper, plastic wrap, formed aluminum food containers, jars, plastic tubs or buckets, bread wrappers, pickle barrels, ketchup bottles, and number 10 cans that do not meet the materials, durability, strength, and cleanability specifications under 2VAC5-585-960, 2VAC5-585-1080, and 2VAC5-585-1100 for multiuse utensils.

"Slacking" means the process of moderating the temperature of a food such as allowing a food to gradually increase from a temperature of -10°F (-23°C) to 25°F (-4°C) in preparation for deep-fat frying or to facilitate even heat penetration during the cooking of previously block-frozen food such as shrimp.

"Smooth" means a food-contact surface having a surface free of pits and inclusions with a cleanability equal to or exceeding that of (100 grit) number three stainless steel; a nonfood-contact surface of equipment having a surface equal to that of commercial grade hot-rolled steel free of visible scale; and a floor, wall, or ceiling having an even or level surface with no roughness or projections that render it difficult to clean.

"Tableware" means eating, drinking, and serving utensils for table use such as flatware including forks, knives, and spoons; hollowware including bowls, cups, serving dishes, and tumblers; and plates.

"Temperature measuring device" means a thermometer, thermocouple, thermistor, or other device that indicates the temperature of food, air, or water.

"Temporary food establishment" means a food establishment that operates for a period of no more than 14 consecutive days in conjunction with a single event or celebration.

"Time/temperature control for safety food" or "TCS" (formerly "potentially hazardous food") means a food that requires time/temperature control for safety to limit pathogenic microorganism growth or toxin formation:

1. "Time/temperature control for safety food" includes an animal food that is raw or heat treated; a plant food that is heat treated or consists of raw seed sprouts, cut melons, cut leafy greens, cut tomatoes or mixtures of cut tomatoes that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation, or garlic-in-oil mixtures that are not modified in a way so that they are unable to support pathogenic microorganism growth or toxin formation; and except as specified in subdivision 2 d of this definition, a food that because of the interaction of its  $A_w$  and pH values is designated as product assessment required (PA) in Table A or B of this definition:

Table A. Interaction of pH and  $A_w$  for control of spores in food heat treated to destroy vegetative cells and subsequently packaged.

$A_w$ values	pH values		
	4.6 or less	>4.6 - 5.6	>5.6
≤0.92	non-TCS food*	non-TCS food	non-TCS food
>0.92 - 0.95	non-TCS food	non-TCS food	PA**
>0.95	non-TCS food	PA	PA

\*TCS means time/temperature control for safety food  
\*\*PA means product assessment required

Table B. Interaction of pH and  $A_w$  for control of vegetative cells and spores in food not heat treated or heat treated but not packaged.

$A_w$ values	pH values			
	< 4.2	4.2 - 4.6	> 4.6 - 5.0	> 5.0
<0.88	non-TCS food*	non-TCS food	non-TCS food	non-TCS food
0.88 - 0.90	non-TCS food	non-TCS food	non-TCS food	PA**
>0.90 - 0.92	non-TCS food	non-TCS food	PA	PA
>0.92	non-TCS food	PA	PA	PA

\*TCS means time/temperature control for safety food  
\*\*PA means product assessment required

2. "Time/temperature control for safety food" does not include:

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- a. An air-cooled hard-boiled egg with shell intact, or an egg with shell intact that is not hard boiled, but has been pasteurized to destroy all viable salmonellae;
- b. A food in an unopened hermetically sealed container that is commercially processed to achieve and maintain commercial sterility under conditions of nonrefrigerated storage and distribution;
- c. A food that because of its pH or  $A_w$  value, or interaction of  $A_w$  and pH values, is designated as a non-TCS food in Table A or B of this definition;
- d. A food that is designated as PA in Table A or B of this definition and has undergone a product assessment showing that the growth or toxin formation of pathogenic microorganisms that are reasonably likely to occur in that food is precluded due to:
  - (1) Intrinsic factors including added or natural characteristics of the food such as preservatives, antimicrobials, humectants, acidulants, or nutrients;
  - (2) Extrinsic factors including environmental or operational factors that affect the food such as packaging, modified atmosphere such as reduced oxygen packaging, shelf-life and use, or temperature range of storage and use; or
  - (3) A combination of intrinsic and extrinsic factors; or
- e. A food that does not support the growth or toxin formation of pathogenic microorganisms in accordance with one of the subdivisions 2 a through 2 d of this definition even though the food may contain a pathogenic microorganism or chemical or physical contaminant at a level sufficient to cause illness or injury.

"USDA" means the U.S. Department of Agriculture.

"Utensil" means a food-contact implement or container used in the storage, preparation, transportation, dispensing, sale, or service of food, such as kitchenware or tableware that is multiuse, single service, or single use; gloves used in contact with food; temperature sensing probes of food temperature measuring devices; and probe-type price or identification tags used in contact with food.

"Variance" means a written document issued by the department that authorizes a modification or waiver of one or more requirements of this chapter if, in the opinion of the department, a health hazard or nuisance will not result from the modification or waiver.

"Vending machine" means a self-service device that, upon insertion of a coin, paper currency, token, card, or key, or by electronic transaction or optional manual operation, dispenses unit servings of food in bulk or in packages without the necessity of replenishing the device between each vending operation.

"Vending machine location" means the room, enclosure, space, or area where one or more vending machines are

installed and operated and includes the storage areas and areas on the premises that are used to service and maintain the vending machines.

"Warewashing" means the cleaning and sanitizing of utensils and food-contact surfaces of equipment.

"Waterworks" means a system that serves piped water for human consumption to at least 15 service connections or 25 or more individuals for at least 60 days out of the year. "Waterworks" includes all structures, equipment, and appurtenances used in the storage, collection, purification, treatment, and distribution of potable pure water except the piping and fixtures inside the building where such water is delivered.

"Whole-muscle, intact beef" means whole muscle beef that is not injected, mechanically tenderized, reconstructed, or scored and marinated, from which beef steaks may be cut.

## **2VAC5-585-50. Assignment.**

A. Except as specified in subsection B or C of this section, the operator shall be the person in charge or shall designate a person in charge and shall ensure that a person in charge is present at the food establishment during all hours of operation.<sup>Pf</sup>

B. In a food establishment with two or more separately inspected departments that are the legal responsibility of the same operator and that are located on the same premises, the operator may, during specific time periods when food is not being prepared, packaged, or served, designate a single person in charge who is present on the premises during all hours of operation, and who is responsible for each separately inspected food establishment on the premises.<sup>Pf</sup>

C. This section does not apply to certain types of food establishments deemed by the department to pose minimal risk of causing, or contributing to, foodborne illness based on the nature of the operation and the extent of the food preparation.<sup>Pf</sup>

## **2VAC5-585-65. Certified food protection manager.**

A. At least one employee who has supervisory and management responsibility and the authority to direct and control food preparation and service shall be a certified food protection manager who has shown proficiency of required information through passing a test that is part of an accredited program.

B. The person in charge shall be a certified food protection manager who has shown proficiency of required information through passing a test that is part of an accredited program. For purposes of enforcing this subsection, this requirement will take effect on June 24, 2023.

C. This section does not apply to certain types of food establishments deemed by the ~~regulatory authority~~ department to pose minimal risk of causing, or contributing to, foodborne

illness based on the nature of the operation and extent of food preparation.

~~C. For purposes of enforcing this section, this requirement will take effect July 1, 2018.~~

**2VAC5-585-67. Food protection manager certification.**

A. A person in charge who demonstrates knowledge by being a food protection manager ~~and~~ who is certified by a food protection manager certification program that is evaluated and listed by a Conference for Food Protection-recognized accrediting agency as conforming to the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Programs, April 2012, 2018, (Conference for Food Protection) is deemed to comply with subdivision 2 of 2VAC5-585-60.

B. A food establishment that has ~~an employee~~ a person in charge who is certified by a food protection manager certification program that is evaluated and listed by a Conference for Food Protection-recognized accrediting agency as conforming to the Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Programs, April 2012, 2018, (Conference for Food Protection) is deemed to comply with 2VAC5-585-65.

**2VAC5-585-80. Responsibility of operator, person in charge, and conditional employees.**

A. The operator shall require food employees and conditional employees to report to the person in charge information about their health and activities as they relate to diseases that are transmissible through food. A food employee or conditional employee shall report the information in a manner that allows the person in charge to reduce the risk of foodborne disease transmission, including providing necessary additional information, such as the date of onset of symptoms and an illness, or of a diagnosis without symptoms, if the food employee or conditional employee:

1. Has any of the following symptoms:
  - a. Vomiting;<sup>P</sup>
  - b. Diarrhea;<sup>P</sup>
  - c. Jaundice;<sup>P</sup>
  - d. Sore throat with fever;<sup>P</sup> or
  - e. A lesion containing pus such as a boil or infected wound that is open or draining and is:
    - (1) On the hands or wrists, unless an impermeable cover such as a finger cot or stall protects the lesion and a single-use glove is worn over the impermeable cover;<sup>P</sup>
    - (2) On exposed portions of the arms, unless the lesion is protected by an impermeable cover;<sup>P</sup> or
    - (3) On other parts of the body, unless the lesion is covered by a dry, durable, tight-fitting bandage;<sup>P</sup>

2. Has an illness diagnosed by a health practitioner due to:
    - a. Norovirus;<sup>P</sup>
    - b. Hepatitis A virus;<sup>P</sup>
    - c. Shigella spp.;<sup>P</sup>
    - d. Shiga toxin-producing Escherichia coli;<sup>P</sup>
    - e. Typhoid fever (caused by Salmonella typhi);<sup>P</sup> or
    - f. Salmonella (nontyphoidal);<sup>P</sup>
  3. Had typhoid fever, diagnosed by a health practitioner, within the past three months ~~due to Salmonella typhi~~, without having received antibiotic therapy, as determined by a health practitioner;<sup>P</sup>
  4. Has been exposed to, or is the suspected source of, a confirmed disease outbreak, because the food employee or conditional employee consumed or prepared food implicated in the outbreak, or consumed food at an event prepared by a person who is infected or ill with:
    - a. Norovirus within the past 48 hours of the last exposure;<sup>P</sup>
    - b. Shiga toxin-producing Escherichia coli, or Shigella spp. within the past three days of the last exposure;<sup>P</sup>
    - c. Typhoid fever within the past 14 days of the last exposure;<sup>P</sup> or
    - d. Hepatitis A virus within the past 30 days of the last exposure;<sup>P</sup> or
  5. Has been exposed by attending or working in a setting where there is a confirmed disease outbreak, or living in the same household as, and has knowledge about an individual who works or attends a setting where there is a confirmed disease outbreak, or living in the same household as, and has knowledge about, an individual diagnosed with an illness caused by:
    - a. Norovirus within the past 48 hours of the last exposure;<sup>P</sup>
    - b. Shiga toxin-producing Escherichia coli or Shigella spp. within the past three days of the last exposure;<sup>P</sup>
    - c. Typhoid fever (caused by Salmonella typhi) within the past 14 days of the last exposure;<sup>P</sup> or
    - d. Hepatitis A virus within the past 30 days of the last exposure.<sup>P</sup>
- B. The person in charge shall notify the department when a food employee is:
1. Jaundiced;<sup>Pf</sup> or
  2. Diagnosed with an illness due to a pathogen as specified under subdivisions A 2 a through f of this section.<sup>Pf</sup>
- C. The person in charge shall ensure that a conditional employee:
1. Who exhibits or reports a symptom, or who reports a diagnosed illness as specified under subdivisions A 1 through 3 of this section, is prohibited from becoming a food employee until the conditional employee meets the criteria

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for the specific symptoms or diagnosed illness as specified under 2VAC5-585-100;<sup>P</sup> and

2. Who will work as a food employee in a food establishment that serves a highly susceptible population and reports a history of exposure as specified under subdivisions A 4 and 5 of this section, is prohibited from becoming a food employee until the conditional employee meets the criteria specified under subdivision 10 of 2VAC5-585-100.<sup>P</sup>

D. The person in charge shall ensure that a food employee who exhibits or reports a symptom, or who reports a diagnosed illness or a history of exposure as specified under subsection A of this section is:

1. Excluded as specified under subdivisions 1 through 3 and 4 a, 5 a, 6 a, 7, or 8 a of 2VAC5-585-90 and in compliance with the provisions specified under subdivisions 1 through 8 of 2VAC5-585-100;<sup>P</sup> or

2. Restricted as specified under subdivision 4 b, 5 b, 6 b, 8 b, 9, or 10 of 2VAC5-585-90 and in compliance with the provisions specified under subdivisions 4 through 10 of 2VAC5-585-100.<sup>P</sup>

E. A food employee or conditional employee shall report to the person in charge the information as specified under subsection A of this section.<sup>Pf</sup>

F. A food employee shall:

1. Comply with an exclusion as specified under subdivisions 1 through 3 and 4 a, 5 a, 6 a, 7, or 8 a of 2VAC5-585-90, and with the provisions specified under subdivisions 1 through 8 of 2VAC5-585-100;<sup>P</sup> or

2. Comply with a restriction specified under subdivision 4 b, 5 b, 6 b, 7, or 8 b of 2VAC5-585-90 or under subdivision 8, 9, or 10 of 2VAC5-585-90 and comply with the provisions specified under subdivisions 4 through 10 of 2VAC5-585-100.<sup>P</sup>

## **2VAC5-585-180. Hand antiseptics.**

A. A hand antiseptic used as a topical application, a hand antiseptic solution used as a hand dip, or a hand antiseptic soap shall:

1. Comply with one of the following:

a. Be an approved drug that is listed in the "Approved Drug Products with Therapeutic Equivalence Evaluations, ~~34th~~ 39th Edition," ~~2014~~, 2019 (U.S. Food and Drug Administration) as an approved drug based on safety and effectiveness;<sup>Pf</sup> or

b. Have active antimicrobial ingredients that are listed in the FDA ~~tentative final~~ monograph for over the counter (OTC) Health-Care Antiseptic Drug Products, ~~59 FR 31402-31452 (June 17, 1994)~~ 82 FR 60474 (December 20, 2017) as an antiseptic handwash;<sup>Pf</sup>

2. Consist only of components that the intended use of each complies with one of the following:

a. A threshold of regulation exemption under 21 CFR 170.39;<sup>Pf</sup>

b. 21 CFR Part 178, as regulated for use as a food additive with conditions of safe use;<sup>Pf</sup>

c. A determination of generally recognized as safe (GRAS). Partial listings of substances with food uses that are GRAS may be found in 21 CFR Part 182, 21 CFR Part 184, or 21 CFR Part 186; and in FDA's Inventory of GRAS Notices;<sup>Pf</sup>

d. A prior sanction listed under 21 CFR Part 181;<sup>Pf</sup> or

e. A food contact notification that is effective;<sup>Pf</sup> and

3. Be applied only to hands that are cleaned as specified under 2VAC5-585-140.<sup>Pf</sup>

B. If a hand antiseptic or a hand antiseptic solution used as a hand dip does not meet the criteria specified under subdivision A 2 of this section, use shall be:

1. Followed by thorough hand rinsing in clean water before hand contact with food or by the use of gloves;<sup>Pf</sup> or

2. Limited to situations that involve no direct contact with food by the bare hands.<sup>Pf</sup>

C. A hand antiseptic solution used as a hand dip shall be maintained clean and at a strength equivalent to at least 100 mg/l (ppm) chlorine.<sup>Pf</sup>

## **2VAC5-585-235. Use of bandages, finger cots, or finger stalls.**

If used, an impermeable cover such as a bandage, finger cot, or finger stall located on the wrist, hand, or finger of a food employee working with exposed food shall be covered with a single-use glove.

## **2VAC5-585-255. Clean-up of vomiting and diarrheal events.**

A. A food establishment shall have written procedures for employees to follow when responding to vomiting or diarrheal events that involve the discharge of vomitus or fecal matter onto surfaces in the food establishment.<sup>Pf</sup>

B. The procedures shall address the specific actions employees must take to minimize the spread of contamination and the exposure of employees, consumers, food, and surfaces to vomitus or fecal matter.<sup>Pf</sup>

## **2VAC5-585-300. Fish.**

A. Fish that are received for sale or service shall be:

1. Commercially and legally caught or harvested;<sup>P</sup> or

2. Approved for sale or service ~~by a regulatory authority.~~<sup>P</sup>

B. Molluscan shellfish that are recreationally caught may not be received for sale or service.<sup>P</sup>

**2VAC5-585-310. Molluscan shellfish.**

A. Molluscan shellfish shall be obtained from sources according to law and the requirements specified in the National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish, ~~2013~~ 2017 Revision, (U.S. Food and Drug Administration).<sup>P</sup>

B. Molluscan shellfish shall be from sources that are listed in the "Interstate Certified Shellfish Shippers ~~List,~~ updated monthly List" (U.S. Food and Drug Administration).<sup>P</sup>

**2VAC5-585-330. Game animals.**

A. If game animals are received for sale or service they shall be:

1. Commercially raised for food and raised, slaughtered, and processed under a voluntary inspection program that is conducted by the state agency that has animal health jurisdiction or under a voluntary inspection program administered by the USDA for game animals such as exotic animals (i.e., reindeer, elk, deer, antelope, water buffalo, or bison) that are "inspected and approved" in accordance with 9 CFR Part 352;<sup>P</sup>

2. As allowed by law, for wild game animals that are live-caught:

a. Under a routine inspection program conducted by a regulatory agency such as the agency that has animal health jurisdiction;<sup>P</sup>

b. Slaughtered and processed according to:

(1) Laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program;<sup>P</sup> and

(2) Requirements that are developed by the agency that has animal health jurisdiction and the agency that conducts the inspection program with consideration of factors such as the need for antemortem and postmortem examination by an approved veterinarian or veterinarian's designee;<sup>P</sup> or

3. As allowed by law for field-dressed wild game animals under a routine inspection program that ensures the animals:

a. Receive a postmortem examination by an approved veterinarian or veterinarian's designee;<sup>P</sup>

b. Are field-dressed and transported according to requirements specified by the agency that has animal health jurisdiction and the agency that conducts the inspection program;<sup>P</sup> and

c. Are processed according to laws governing meat and poultry as determined by the agency that has animal health jurisdiction and the agency that conducts the inspection program.<sup>P</sup>

B. A game animal may not be received for sale or service if it is a species of wildlife that is listed in 50 CFR Part 17.

C. The requirements of subsection A of this section shall not apply to commercially slaughtered or processed rabbits that are offered for sale or service.

D. Commercially slaughtered or processed rabbits that are offered for sale or service shall be packaged with a label that complies with 2VAC5-585-900 B and includes the following information:

1. Producer number;

2. Safe handling instructions, as required by 9 CFR 317.2(l) and 9 CFR 381.125(b);

3. An identifying code that is permanently visible to the naked eye to aid in traceback throughout sale and distribution; and

4. The statement: "WARNING: EXEMPT FROM CARCASS INSPECTION. PREPARED IN COMPLIANCE WITH THE VIRGINIA RABBIT PROGRAM." on the principal display panel.

E. An entity commercially slaughtering or processing rabbits that are offered for sale or service may elect to participate in a voluntary inspection program that is conducted by the state agency that has animal health jurisdiction or a voluntary inspection program that is administered by USDA. The requirements of subsection D of this section shall not apply to commercially slaughtered or processed rabbits that are offered for sale or service that bear a mark of inspection and that are under a voluntary inspection program that is conducted by the state agency that has animal health jurisdiction or that is administered by USDA.

**2VAC5-585-400. Shucked shellfish, packaging and identification.**

A. Raw shucked shellfish shall be obtained in nonreturnable packages that bear a legible label that identifies the:<sup>Pf</sup>

1. Name, address, and certification number of the ~~shucker, packer,~~ shucker-packer or repacker of the molluscan shellfish;<sup>Pf</sup> and

2. The "sell by" or "best if used by" date for packages with a capacity of less than ~~one-half gallon~~ 64 fluid ounces (1.89 L) or the date shucked for packages with a capacity of ~~one-half gallon~~ 64 fluid ounces (1.89 L) or more.<sup>Pf</sup>

B. A package of raw shucked shellfish that does not bear a label or that bears a label that does not contain all the information as specified under subsection A of this section shall be subject to a hold order, as allowed by law, or seizure and destruction in accordance with 21 CFR 1240.60(d).

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## 2VAC5-585-410. Shellstock identification.

A. Shellstock shall be obtained in containers bearing legible source identification tags or labels that are affixed by the dealer that depurates, ships, or reships the shellstock, as specified in the National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish, 2013 Revision, (U.S. Food and Drug Administration) and that list on each dealer's tag or label the following information in the following order:<sup>Pf</sup>

1. The dealer's name and address, and the certification number assigned by the shellfish control authority;<sup>Pf</sup>
2. The original shipper's certification number assigned by the shellfish control authority;<sup>Pf</sup>
3. The harvest date, or if depurated, the date of depuration processing, or if wet stored, the original harvest date and the final harvest date;<sup>Pf</sup>
4. If wet stored or depurated, the wet storage or depuration cycle or lot number. The wet storage lot number shall begin with the letter "w";<sup>Pf</sup>
5. The harvest area including the initials of the state or country of harvest;<sup>Pf</sup>
6. The type and quantity of shellstock;<sup>Pf</sup>
7. The following statement in bold, capitalized type: "~~THIS TAG IS REQUIRED TO BE ATTACHED UNTIL CONTAINER IS EMPTY AND THEREAFTER KEPT ON FILE FOR 90 DAYS~~" "THIS TAG (or LABEL) IS REQUIRED TO BE ATTACHED UNTIL CONTAINER IS EMPTY OR IS RETAGGED AND THEREAFTER KEPT ON FILE IN CHRONOLOGICAL ORDER FOR 90 DAYS." "RETAILERS: DATE WHEN LAST SHELLFISH FROM THIS CONTAINER SOLD OR SERVED (INSERT DATE)";<sup>Pf</sup> and
8. A consumer advisory as specified in 2VAC5-585-930.

B. A container of shellstock that does not bear a tag or label or that bears a tag or label that does not contain all the information as specified under subsection A of this section shall be subject to a hold order, as allowed by law, or seizure and destruction in accordance with 21 CFR 1240.60(d) and § 28.2-801 of the Code of Virginia.

## 2VAC5-585-440. Shellstock; maintaining identification.

A. Except as specified under subdivision C 2 of this section, shellstock tags or labels shall remain attached to the container in which the shellstock are received until the container is empty.<sup>Pf</sup>

B. The date when the last shellstock from the container is sold or served shall be recorded on the tag or label.<sup>Pf</sup>

C. The identity of the source of shellstock that are sold or served shall be maintained by retaining shellstock tags or labels

for 90 calendar days from the date that is recorded on the tag or label as specified in subsection B of this section by:<sup>Pf</sup>

1. Using an approved recordkeeping system that keeps the tags or labels in chronological order correlated to the date that is recorded on the tag or label, as specified under subsection B of this section;<sup>Pf</sup> and
2. If shellstock are removed from its tagged or labeled container:
  - a. Preserving source identification by using a recordkeeping system as specified under subdivision 1 of this subsection;<sup>Pf</sup> and
  - b. Ensuring that shellstock or shucked shellfish from one tagged or labeled container are not commingled with shellstock or shucked shellfish from another container with different certification numbers; different harvest dates; or different growing areas as identified on the tag or label before being ordered by the consumer.<sup>Pf</sup>

## 2VAC5-585-470. Packaged and unpackaged food - separation, packaging, and segregation.

A. Food shall be protected from cross contamination by:

1. Except as specified in ~~subdivision 1 e of this subsection, subsection C of this section,~~ separating raw animal foods during storage, preparation, holding, and display from:
  - a. Raw ready-to-eat food including other raw animal food such as fish for sushi or molluscan shellfish, or other raw ready-to-eat food such as fruits and vegetables;<sup>P</sup>
  - b. Cooked ready-to-eat food;<sup>P</sup> and
  - c. ~~Frozen, commercially processed and packaged raw animal food may be stored or displayed with or above frozen, commercially processed and packaged, ready to eat food~~ Fruits or vegetables before they are washed;
2. Except when combined as ingredients, separating types of raw animal foods from each other such as beef, fish, lamb, pork, and poultry during storage, preparation, holding, and display by:
  - a. Using separate equipment for each type;<sup>P</sup>
  - b. Arranging each type of food in equipment so that cross contamination of one type with another is prevented;<sup>P</sup> and
  - c. Preparing each type of food at different times or in separate areas;<sup>P</sup>
3. Cleaning equipment and utensils as specified under 2VAC5-585-1780 A and sanitizing as specified under 2VAC5-585-1900;
4. Except as specified in subdivision B 2 of 2VAC5-585-810 and subsection B of this section, storing the food in packages, covered containers, or wrappings;
5. Cleaning hermetically sealed containers of food of visible soil before opening;

6. Protecting food containers that are received packaged together in a case or overwrap from cuts when the case or overwrap is opened;
7. Storing damaged, spoiled, or recalled food being held in the food establishment as specified under 2VAC5-585-3150; and
8. Separating fruits and vegetables before they are washed as specified under 2VAC5-585-510 from ready-to-eat food.

B. Subdivision A 4 of this section does not apply to:

1. Whole, uncut, raw fruits and vegetables and nuts in the shell that require peeling or hulling before consumption;
2. Primal cuts, quarters, or sides of raw meat or slab bacon that are hung on clean, sanitized hooks or placed on clean, sanitized racks;
3. Whole, uncut, processed meats such as country hams, and smoked or cured sausages that are placed on clean, sanitized racks;
4. Food being cooled as specified under 2VAC5-585-810 B 2; or
5. Shellstock.

C. Frozen, commercially processed and packaged raw animal food may be stored or displayed with or above frozen, commercially processed and packaged, ready-to-eat food.

**2VAC5-585-540. Food contact with equipment and utensils.**

Food shall only contact surfaces of:

1. Equipment and utensils that are cleaned as specified under 2VAC5-585-1770 through 2VAC5-585-1860 and sanitized as specified under 2VAC5-585-1885, 2VAC5-585-1890, and 2VAC5-585-1900;<sup>P</sup>
2. Single-service and single-use articles;<sup>P</sup> or<sup>P</sup>
3. Linens, such as cloth napkins, as specified under 2VAC5-585-560, that are laundered as specified under 2VAC5-585-1910 through 2VAC5-585-1950.<sup>P</sup>

**2VAC5-585-700. Raw animal foods.**

A. Except as specified in subsections B, C, and D of this section, raw animal foods such as eggs, fish, meat, poultry, and foods containing these raw animal foods shall be cooked to heat all parts of the food to a temperature and for a time that complies with one of the following methods based on the food that is being cooked:

1. 145°F (63°C) or above for 15 seconds for:<sup>P</sup>
  - a. Raw eggs that are broken and prepared in response to a consumer's order and for immediate service;<sup>P</sup> and
  - b. Except as specified under subdivisions A 2 and 3 and subsections B and C of this section, fish and intact meat,

including game animals commercially raised for food and under a voluntary inspection program as specified under 2VAC5-585-330 A 1;<sup>P</sup>

2. 155°F (68°C) for ~~15~~ 17 seconds or the temperature specified in the following chart that corresponds to the holding time for ratites, mechanically tenderized, and injected meats; the following if they are comminuted: fish, meat, game animals commercially raised for food and under a voluntary inspection program as specified under 2VAC5-585-330 A 1; and raw eggs that are not prepared as specified under subdivision A 1 a of this section:<sup>P</sup>

Minimum	
Temperature °F (°C)	Time
145 (63)	3 minutes
150 (66)	1 minute
158 (70)	<1 second (instantaneous)

3. 165°F (74°C) or above for ~~15 seconds~~ less than one second (instantaneous) for poultry, baluts, wild game animals as specified under 2VAC5-585-330 A 2 and 3, commercially raised rabbits as specified under 2VAC5-585-330 C, stuffed fish, stuffed meat, stuffed pasta, stuffed poultry, stuffed ratites, or stuffing containing fish, meat, poultry, or ratites.<sup>P</sup>

B. Whole meat roasts including beef, corned beef, lamb, pork, and cured pork roasts such as ham shall be cooked:

1. ~~In an oven that is preheated to the temperature specified for the roast's weight As specified in the following chart and that is held at chart, to heat all parts of the food to a temperature and for the holding time that corresponds to that temperature;~~<sup>P</sup> <sup>P</sup> and

	Oven Temperature Based on Roast Weight	
Oven Type	Less than 10 lbs (4.5 kg)	10 lbs (4.5 kg) or more
Still Dry	350°F (177°C) or more	250°F (121°C) or more
Convection	325°F (163°C) or more	250°F (121°C) or more
High Humidity <sup>†</sup>	250°F (121°C) or less	250°F (121°C) or less

<sup>†</sup>Relative humidity greater than 90% for at least one hour as measured in the cooking chamber or exit of the oven; or in a moisture impermeable bag that provides 100% humidity

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Temperature °F (°C)	Time <sup>1</sup> in Minutes	Temperature °F (°C)	Time <sup>1</sup> in Seconds
<u>130 (54.4)</u>	<u>112</u>	<u>147 (63.9)</u>	<u>134</u>
<u>131 (55.0)</u>	<u>89</u>	<u>149 (65.0)</u>	<u>85</u>
<u>133 (56.1)</u>	<u>56</u>	<u>151 (66.1)</u>	<u>54</u>
<u>135 (57.2)</u>	<u>36</u>	<u>153 (67.2)</u>	<u>34</u>
<u>136 (57.8)</u>	<u>28</u>	<u>155 (68.3)</u>	<u>22</u>
<u>138 (58.9)</u>	<u>18</u>	<u>157 (69.4)</u>	<u>14</u>
<u>140 (60.0)</u>	<u>12</u>	<u>158 (70.0)</u>	<u>0</u>
<u>142 (61.1)</u>	<u>8</u>		
<u>144 (62.2)</u>	<u>5</u>		
<u>145 (62.8)</u>	<u>4</u>		

<sup>1</sup>Holding time may include postoven heat rise.

2. As specified in the following chart, to heat all parts of the food to a temperature and for the holding time that corresponds to that temperature.<sup>P</sup>

Temperature °F (°C)	Time <sup>1</sup> in Minutes	Temperature °F (°C)	Time <sup>1</sup> in Seconds
<u>130 (54.4)</u>	<u>112</u>	<u>147 (63.9)</u>	<u>134</u>
<u>131 (55.0)</u>	<u>89</u>	<u>149 (65.0)</u>	<u>85</u>
<u>133 (56.1)</u>	<u>56</u>	<u>151 (66.1)</u>	<u>54</u>
<u>135 (57.2)</u>	<u>36</u>	<u>153 (67.2)</u>	<u>34</u>
<u>136 (57.8)</u>	<u>28</u>	<u>155 (68.3)</u>	<u>22</u>
<u>138 (58.9)</u>	<u>18</u>	<u>157 (69.4)</u>	<u>14</u>
<u>140 (60.0)</u>	<u>12</u>	<u>158 (70.0)</u>	<u>0</u>
<u>142 (61.1)</u>	<u>8</u>		
<u>144 (62.2)</u>	<u>5</u>		
<u>145 (62.8)</u>	<u>4</u>		

<sup>1</sup>Holding time may include postoven heat rise.

If cooked in an oven, use an oven that is preheated to the temperature specified for the roast's weight in the following chart and that is held at that temperature.<sup>Pf</sup>

Oven Type	Oven Temperature Based on Roast Weight	
	Less than 10 lbs (4.5 kg)	10 lbs (4.5 kg) or more
<u>Still Dry</u>	<u>350°F (177°C) or more</u>	<u>250°F (121°C) or more</u>
<u>Convection</u>	<u>325°F (163°C) or more</u>	<u>250°F (121°C) or more</u>

<u>High Humidity<sup>1</sup></u>	<u>250°F (121°C) or less</u>	<u>250°F (121°C) or less</u>
<u><sup>1</sup>Relative humidity greater than 90% for at least one hour as measured in the cooking chamber or exit of the oven; or in a moisture-impermeable bag that provides 100% humidity</u>		

C. A raw or undercooked whole-muscle, intact beef steak may be served or offered for sale in a ready-to-eat form if:

1. The food establishment serves a population that is not a highly susceptible population;
2. The steak is labeled, as specified under 2VAC5-585-270 E, to indicate that it meets the definition of "~~whole muscle~~, whole-muscle, intact beef"; ~~beef~~; and
3. The steak is cooked on both the top and bottom to a surface temperature of 145°F (63°C) or above and a cooked color change is achieved on all external surfaces.

D. A raw animal food such as raw egg, raw fish, raw-marinated fish, raw molluscan shellfish, or steak tartare or a partially cooked food such as lightly cooked fish, soft cooked eggs, or rare meat other than whole-muscle, intact beef steaks as specified in subsection C of this section may be served or offered for sale upon consumer request or selection in a ready-to-eat form if:

1. As specified under subdivisions 3 a and 3 b of 2VAC5-585-950, the food establishment serves a population that is not a highly susceptible population;
2. The food, if served or offered for service by consumer selection from a children's menu, does not contain comminuted meat;<sup>Pf</sup> and
3. The consumer is informed as specified under 2VAC5-585-930 that to ensure its safety, the food should be cooked as specified under subsection A or B of this section; or
4. The department grants a variance from subsection A or B of this section as specified in 2VAC5-585-3540 based on a HACCP plan that:
  - a. Is submitted by the operator and approved as specified under 2VAC5-585-3541;
  - b. Documents scientific data or other information showing that a lesser time and temperature regimen results in a safe food; and
  - c. Verifies that equipment and procedures for food preparation and training of food employees at the food establishment meet the conditions of the variance.

## 2VAC5-585-720. Plant food cooking for hot holding.

~~Fruits and vegetables~~ Plant foods that are cooked for hot holding shall be cooked to a temperature of 135°F (57°C).<sup>Pf</sup>

**2VAC5-585-730. Parasite destruction.**

A. Except as specified in subsection B of this section, before service or sale in ready-to-eat form, raw, raw-marinated, partially cooked, or marinated-partially cooked fish shall be:

1. Frozen and stored at a temperature of -4°F (-20°C) or below for a minimum of 168 hours (seven days) in a freezer;<sup>P</sup>
2. Frozen at -31°F (-35°C) or below until solid and stored at -31°F (-35°C) or below for a minimum of 15 hours;<sup>P</sup> or
3. Frozen at -31°F (-35°C) or below until solid and stored at -4°F (-20°C) or below for a minimum of 24 hours.<sup>P</sup>

B. Subsection A of this section does not apply to:

1. Molluscan shellfish;
2. A scallop product consisting only of the shucked ~~abductor~~ adductor muscle;
3. Tuna of the species *Thunnus alalunga*, *Thunnus albacares* (Yellowfin tuna), *Thunnus atlanticus*, *Thunnus maccoyii* (Bluefin tuna, Southern), *Thunnus obesus* (Bigeye tuna), or *Thunnus thynnus* (Bluefin tuna, Northern);
4. Aquacultured fish, such as salmon, that:
  - a. If raised in open water, are raised in net pens, or
  - b. Are raised in land-based operations such as ponds or tanks, and
  - c. Are fed formulated feed, such as pellets, that contains no live parasites infective to the aquacultured fish; or
5. Fish eggs that have been removed from the skein and rinsed.

**2VAC5-585-740. Records; creation and retention.**

A. Except as specified in 2VAC5-585-730 B and subsection B of this section, if raw, ~~marinated~~, raw-marinated, partially cooked, or marinated-partially cooked fish are served or sold in ready-to-eat form, the person in charge shall record the freezing temperature and time to which the fish are subjected and shall retain the records at the food establishment for 90 calendar days beyond the time of service or sale of the fish.<sup>Pf</sup>

B. If the fish are frozen by a supplier, a written agreement or statement from the supplier stipulating that the fish supplied are frozen to a temperature and for a time specified under 2VAC5-585-730 may substitute for the records specified under subsection A of this section.

C. If raw, raw-marinated, partially cooked, or marinated-partially cooked fish are served or sold in ready-to-eat form, and the fish are raised and fed as specified in 2VAC5-585-730 B 4, a written agreement or statement from the supplier or aquaculturist stipulating that the fish were raised and fed as specified in 2VAC5-585-730 B 4 shall be obtained by the person in charge and retained in the records of the food

establishment for 90 calendar days beyond the time of service or sale of the fish.<sup>Pf</sup>

**2VAC5-585-790. Thawing.**

A. Except as specified in subdivision 4 of this subsection, time/temperature control for safety food shall be thawed:

1. Under refrigeration that maintains the food temperature at 41°F (5°C) or less;<sup>Pf</sup>
2. Completely submerged under running water:
  - a. At a water temperature of 70°F (21°C) or below;<sup>Pf</sup>
  - b. With sufficient water velocity to agitate and float off loose particles in an overflow;<sup>Pf</sup> and
  - c. For a period of time that does not allow thawed portions of ready-to-eat food to rise above 41°F (5°C);<sup>Pf</sup> or
  - d. For a period of time that does not allow thawed portions of a raw animal food requiring cooking as specified under 2VAC5-585-700 A or B to be above 41°F (5°C) for more than four hours including:
    - (1) The time the food is exposed to the running water and the time needed for preparation for cooking;<sup>Pf</sup> or
    - (2) The time it takes under refrigeration to lower the food temperature to 41°F (5°C);<sup>Pf</sup>
3. As part of a cooking process if the food that is frozen is:
  - a. Cooked as specified under 2VAC5-585-700 A or B or 2VAC5-585-710;<sup>Pf</sup> or
  - b. Thawed in a microwave oven and immediately transferred to conventional cooking equipment, with no interruption in the process;<sup>Pf</sup> or

4. Using any procedure if a portion of frozen ready-to-eat food is thawed and prepared for immediate service in response to an individual consumer's order.

B. Reduced oxygen packaged fish that bears a label indicating that it is to be kept frozen until time of use shall be removed from the reduced oxygen environment:

1. Prior to its thawing under refrigeration as specified in subdivision A 1 of this section; or
2. Prior to, or immediately upon completion of, its thawing using procedures specified in subdivision A 2 of this section.

**2VAC5-585-820. Time/temperature control for safety food; hot and cold holding.**

A. Except during preparation, cooking, or cooling, or when time is used as the public health control as specified under 2VAC5-585-850, and except as specified under subsections B and C of this section, time/temperature control for safety food shall be maintained:

1. At 135°F (57°C) or above, except that roasts cooked to a temperature and for a time specified in 2VAC5-585-700 B

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or reheated as specified in 2VAC5-585-760 E may be held at a temperature of 130°F (54°C) or above;<sup>P</sup> or

2. At 41°F (5°C) or less.<sup>P</sup>

B. Eggs that have not been treated to destroy all viable Salmonellae shall be stored in refrigerated equipment that maintains an ambient air temperature of 45°F (7°C) or less.<sup>P</sup>

C. Time/temperature control for safety food in a homogenous liquid form may be maintained outside of the temperature control requirements, as specified in subsection A of this section, while contained within specially designed equipment that complies with the design and construction requirements as specified under subdivision 5 of 2VAC5-585-1230.

## **2VAC5-585-850. Time as a public health control.**

A. Except as specified under subsection D of this section, if time without temperature control is used as the public health control for a working supply of time/temperature control for safety food before cooking, or for ready-to-eat, time/temperature control for safety food that is displayed or held for sale or service. ~~Written, written~~ procedures shall be prepared in advance, maintained in the food establishment, and made available to the department upon request that specify:<sup>Pf</sup>

1. Methods of compliance with ~~subdivisions B 1, 2, and 3 or~~ subsection B or C of this section;<sup>Pf</sup> and

2. Methods of compliance with 2VAC5-585-800 for food that is prepared, cooked, and refrigerated before time is used as a public health control.<sup>Pf</sup>

B. If time without temperature control is used as the public health control up to a maximum of 4 four hours:

1. ~~The~~ Except as specified in subdivision B 2 of this section, the food shall have an initial temperature of 41°F (5°C) or less when removed from cold holding temperature control, ~~or~~ 135°F (57°C) or greater when removed from hot-holding temperature control;<sup>P</sup>

2. The food ~~shall be marked or otherwise identified to indicate the time that is four hours past the point in time when the food is removed from temperature control;~~<sup>Pf</sup> may have an initial temperature of 70°F (21°C) or less if:

a. It is a ready-to-eat (i) fruit or vegetable that, upon cutting, is rendered a time/temperature control for safety food or (ii) hermetically sealed food that, upon opening, is rendered a time/temperature control for safety food;

b. The food temperature does not exceed 70°F (21°C) within a maximum time period of four hours from the time it was rendered a time/temperature control for safety food; and

c. The food is marked or otherwise identified to indicate the time that is four hours past the point in time when the food is rendered a time/temperature control for safety food as specified in subdivision B 2 a of this section.

3. The food shall be ~~cooked and served, served at any temperature if ready to eat, or discarded, within four hours from~~ marked or otherwise identified to indicate the time that is four hours past (i) the point in time when the food is removed from temperature control;<sup>P</sup> ~~and~~ or (ii) the time that the food becomes a time/temperature control for safety food;<sup>Pf</sup>

4. The food ~~in unmarked containers or packages or marked to exceed a four hour limit shall be discarded.~~<sup>P</sup> shall be cooked and served; served at any temperature, if ready-to-eat; or discarded within four hours from the point in time when the food is removed from temperature control.<sup>P</sup>

5. The food in unmarked containers or packages or marked to exceed a four-hour limit shall be discarded.<sup>P</sup>

C. If time without temperature control is used as the public health control up to a maximum of six hours:

1. The food shall have an initial temperature of 41°F (5°C) or less when removed from temperature control and the food temperature may not exceed 70°F (21°C) within a maximum time period of six hours;<sup>P</sup>

2. The food shall be monitored to ensure the warmest portion of the food does not exceed 70°F (21°C) during the six-hour period, unless an ambient air temperature is maintained that ensures the food does not exceed 70°F (21°C) during the six-hour holding period;<sup>Pf</sup>

3. The food shall be marked or otherwise identified to indicate:<sup>Pf</sup>

a. The time when the food is removed from 41°F (5°C) or less cold holding temperature control;<sup>Pf</sup> and

b. The time that is six hours past the point in time when the food is removed from 41°F (5°C) or less cold holding temperature control;<sup>Pf</sup>

4. The food shall be:

a. Discarded if the temperature of the foods exceeds 70°F (21°C);<sup>P</sup> or

b. Cooked and served, served at any temperature if ready-to-eat, or discarded within a maximum of six hours from the point in time when the food is removed from 41°F (5°C) or less cold holding temperature control;<sup>P</sup> and

5. The food in unmarked containers or packages, or marked with a time that exceeds the six-hour limit shall be discarded.<sup>P</sup>

D. A food establishment that serves a highly susceptible population may not use time as specified under subsection A, B, or C of this section as the public health control for raw eggs.

## **2VAC5-585-870. Reduced oxygen packaging without a variance; criteria.**

A. Except for a food establishment that obtains a variance as specified under 2VAC5-585-860, a food establishment that

packages time/temperature control for safety food using a reduced oxygen packaging method shall control the growth and toxin formation of *Clostridium botulinum* and the growth of *Listeria monocytogenes*.<sup>P</sup>

B. Except as specified in subsection ~~F~~ E of this section, a food establishment that packages time/temperature control for safety food using a reduced oxygen packaging method shall implement a HACCP plan that contains the information specified under ~~subdivisions 3 and 4~~ of 2VAC5-585-3630 and that:<sup>Pf</sup>

1. ~~Identifies food to be packaged;~~<sup>Pf</sup>

~~2.~~ Except as specified in subsections ~~C, D,~~ and E ~~D~~ of this section, requires that the packaged food shall be maintained at 41°F (5°C) or less and meet at least one of the following criteria:<sup>Pf</sup>

- a. Has an  $A_w$  of 0.91 or less,<sup>Pf</sup>
- b. Has a pH of 4.6 or less,<sup>Pf</sup>
- c. Is a meat or poultry product cured at a food processing plant regulated by the USDA using substances specified in 9 CFR 424.21 and is received in an intact package,<sup>Pf</sup> ~~or~~
- d. Is a food with a high level of competing organisms such as raw meat, raw poultry, or raw vegetables;<sup>Pf</sup> or
- e. Is a cheese that is commercially manufactured in a food processing plant with no ingredients added in the food establishment and that meets the Standards of Identity as specified in 21 CFR 133.150, 21 CFR 133.169, or 21 CFR 133.187;<sup>P</sup>

~~3. Describes how the package shall be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instructions to:~~<sup>Pf</sup>

- ~~a. Maintain the food at 41°F (5°C) or below;~~<sup>Pf</sup> and
- ~~b. Discard the food within 30 calendar days of its packaging if it is not served for on premises consumption, or consumed if served or sold for off premises consumption;~~<sup>Pf</sup>

~~4.~~ 2. Limits the refrigerated shelf life to no more than 30 calendar days from packaging to consumption, except the time the product is maintained frozen, or the original manufacturer's "sell by" or "use by" date, whichever occurs first;<sup>P</sup>

~~5.~~ 3. Includes operational procedures that:

- a. Prohibit contacting ready-to-eat food with bare hands as specified under 2VAC5-585-450 B;<sup>Pf</sup>
- b. Identify a designated work area and the method by which:<sup>Pf</sup>
  - (1) Physical barriers or methods of separation of raw foods and ready-to-eat foods minimize cross contamination,<sup>Pf</sup> and

(2) Access to the processing equipment is limited to responsible trained personnel familiar with the potential hazards of the operation;<sup>Pf</sup> ~~and~~

c. Delineate cleaning and sanitization procedures for food-contact surfaces;<sup>Pf</sup> and

d. Describe how the package shall be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instructions to:<sup>Pf</sup>

(1) Maintain the food at 41°F (5°C) or below;<sup>Pf</sup> and

(2) Discard the food if, within 30 calendar days of its packaging, it is not served for on-premises consumption or consumed, if served or sold for off-premises consumption;<sup>Pf</sup>

~~6.~~ 4. Describes the training program that ensures that the individual responsible for the reduced oxygen packaging operation understands the:<sup>Pf</sup>

- a. Concepts required for safe operation;<sup>Pf</sup>
- b. Equipment and facilities;<sup>Pf</sup> and
- c. Procedures specified under subdivision 5 3 of this subsection and ~~subdivisions 3 and 4~~ of 2VAC5-585-3630;<sup>Pf</sup> and

~~7.~~ 5. Is provided to the department prior to implementation as specified under subsection B of 2VAC5-585-3620.

C. Except for fish that is frozen before, during, and after packaging and that bears a label indicating that it is to be kept frozen until time of use, a food establishment may not package fish using a reduced oxygen packaging method.<sup>P</sup>

D. Except as specified in subsections C and ~~F~~ E of this section, a food establishment that packages time/temperature control for safety food using a cook-chill or sous vide process shall:

1. Provide to the department prior to implementation, a HACCP plan that contains the information as specified under ~~subdivisions 3 and 4~~ of 2VAC5-585-3630;<sup>Pf</sup>

2. Ensure the food is:

- a. Prepared and consumed on the premises, or prepared and consumed off the premises but within the same business entity with no distribution or sale of the packaged product to another business entity or the consumer;<sup>Pf</sup>
- b. Cooked to heat all parts of the food to a temperature and for a time as specified under 2VAC5-585-700 A, B, and C;<sup>P</sup>
- c. Protected from contamination before and after cooking as specified in 2VAC5-585-450 through 2VAC5-585-765;<sup>P</sup>
- d. Placed in a package with an oxygen barrier and sealed before cooking, or placed in a package and sealed immediately after cooking, and before reaching a temperature below 135°F (57°C);<sup>P</sup>

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e. Cooled to 41°F (5°C) in the sealed package or bag as specified under 2VAC5-585-800 and <sup>P</sup>

(1) Cooled to 34°F (1°C) within 48 hours of reaching 41°F (5°C) and held at that temperature until consumed or discarded within 30 calendar days after the date of packaging;<sup>P</sup>

(2) Held at 41°F (5°C) or less for no more than seven calendar days, at which time the food must be consumed or discarded;<sup>P</sup> ~~or~~

(3) Cooled to 34°F (1°C) within 48 hours of reaching 41°F (5°C), removed from refrigeration equipment that maintains a 34°F (1°C) food temperature, and then held at 41°F (5°C) or less for no more than seven calendar days, not to exceed 30 calendar days from its date of packaging, at which time the food must be consumed or discarded;<sup>P</sup> or

(4) Held frozen with no shelf-life restriction while frozen until consumed or used;<sup>P</sup>

f. Held in a refrigeration unit that is equipped with an electronic system that continuously monitors time and temperature and is visually examined for proper operation twice daily;<sup>Pf</sup>

g. If transported off-site to a satellite location of the same business entity, equipped with verifiable electronic monitoring devices to ensure that times and temperatures are monitored during transportation;<sup>Pf</sup> and

h. Labeled with the product name and the date packaged;<sup>Pf</sup> and

3. Maintain the records required to confirm that cooling and cold holding refrigeration time/temperature parameters are required as part of the HACCP plan and:

a. Make such records available to the department upon request;<sup>Pf</sup> and

b. Hold such records for at least six months;<sup>Pf</sup> and

4. Implement written operational procedures as specified under subdivision B ~~5~~ 3 of this section and a training program as specified under subdivision B ~~6~~ 4 of this section.<sup>Pf</sup>

~~E. Except as specified under subsection F of this section, a food establishment that packages cheese using a reduced oxygen packaging method shall:~~

~~1. Limit the cheeses packaged to those that are commercially manufactured in a food processing plant with no ingredients added in the food establishment and that meet the Standards of Identity as specified in 21 CFR 133.150, 21 CFR 133.169, or 21 CFR 133.187;<sup>P</sup>~~

~~2. Have a HACCP plan that contains the information specified in subdivisions 3 and 4 of 2VAC5-585-3630 and as specified in subdivisions B 1, B 3 a, B 5, and B 6 of this section;<sup>Pf</sup>~~

~~3. Label the package on the principal display panel with a "use by" date that does not exceed 30 days from its packaging or the original manufacturer's "sell by" or "use by" date, whichever occurs first;<sup>Pf</sup> and~~

~~4. Discard the reduced oxygen packaged cheese if it is not sold for off premises consumption or consumed within 30 calendar days of its packaging.<sup>Pf</sup>~~

~~F. E.~~ A HACCP plan is not required when a food establishment uses a reduced oxygen packaging method to package time/temperature control for safety food that is always:

1. Labeled with the production time and date;

2. Held at 41°F (5°C) or less during refrigerated storage; and

3. Removed from its packaging in the food establishment within 48 hours after packaging.

## **2VAC5-585-880. Standards of identity.**

Packaged food shall comply with standard of identity requirements in 21 CFR Parts 131-169 and 9 CFR Part 319; ~~Definitions and Standards of Identity or Composition,~~ and the general requirements in 21 CFR Part 130, ~~Food Standards: General,~~ and 9 CFR Part 319, ~~Subpart A, General.~~

## **2VAC5-585-950. Pasteurized foods, prohibited reservice, and prohibited food.**

In a food establishment that serves a highly susceptible population:

1. The following criteria apply to juice:

a. For the purposes of subdivision 1 of this section only, children who are age nine years or younger and receive food in a school, day care setting, or similar facility that provides custodial care are included as highly susceptible populations;

b. Prepackaged juice or a prepackaged beverage containing juice that bears a warning label as specified in 21 CFR 101.17(g) or a packaged juice or beverage containing juice that bears a warning label as specified under subdivision 2 of 2VAC5-585-765 may not be served or offered for sale;<sup>P</sup> and

c. Unpackaged juice that is prepared on the premises for service or sale in a ready-to-eat form shall be processed under a HACCP plan that contains the information specified in subdivisions 3 through 5 of 2VAC5-585-3630 and as specified in 21 CFR 120.24.<sup>P</sup>

2. Pasteurized eggs or egg products shall be substituted for raw eggs in the preparation of:<sup>P</sup>

a. Foods such as Caesar salad, hollandaise or béarnaise sauce, mayonnaise, meringue, eggnog, ice cream, and egg-fortified beverages;<sup>P</sup> and

- b. Except as specified in subdivision 6 of this section, recipes in which more than one egg is broken and the eggs are combined.<sup>P</sup>
- 3. The following foods may not be served or offered for sale in a ready-to-eat form:<sup>P</sup>
  - a. Raw animal foods such as raw fish, raw-marinated fish, raw molluscan shellfish, and steak tartare;<sup>P</sup>
  - b. A partially cooked animal food such as lightly cooked fish, rare meat, soft-cooked eggs that are made from raw eggs, and meringue;<sup>P</sup> and
  - c. Raw seed sprouts.<sup>P</sup>
- 4. Food employees may not contact ready-to-eat food as specified in 2VAC5-585-450 B and E.<sup>P</sup>
- 5. Time only, as the public health control as specified under 2VAC5-585-850 D, may not be used for raw eggs.<sup>P</sup>
- 6. Subdivision 2 b of this section does not apply if:
  - a. The raw eggs are combined immediately before cooking for one consumer's serving at a single meal, cooked as specified under 2VAC5-585-700 A 1, and served immediately, such as an omelet, soufflé, or scrambled eggs;
  - b. The raw eggs are combined as an ingredient immediately before baking and the eggs are thoroughly cooked to a ready-to-eat form, such as a cake, muffin, or bread; or
  - c. The preparation of the food is conducted under a HACCP plan that:
    - (1) Identifies the food to be prepared;
    - (2) Prohibits contacting ready-to-eat food with bare hands;
    - (3) Includes specifications and practices that ensure:
      - (a) Salmonella Enteritidis growth is controlled before and after cooking; and
      - (b) Salmonella Enteritidis is destroyed by cooking the eggs according to the temperature and time specified in 2VAC5-585-700 A 2;
    - ~~(4)~~ (4) Contains the information specified under subdivision 4 5 of 2VAC5-585-3630 including procedures that:
      - ~~(1)~~ (a) Control cross contamination of ready-to-eat food with raw eggs; and
      - ~~(2)~~ (b) Delineate cleaning and sanitization procedures for food-contact surfaces; and
    - ~~e.~~ (5) Describes the training program that ensures that the food employee responsible for the preparation of the food understands the procedures to be used.
- 7. Except as specified in subdivision 8 of this section, food may be re-served as specified under 2VAC5-585-680 B 1 and 2.

8. ~~Foods~~ Food may not be re-served under the following conditions:

- a. Any food served to patients or clients who are under contact precautions in medical isolation or quarantine, or protective environment isolation may not be re-served to others outside.
- b. Packages of food from any patients, clients, or other consumers should not be re-served to persons in protective environment isolation.

**2VAC5-585-980. Lead use limitation.**

A. Ceramic, china, and crystal utensils, and decorative utensils such as hand-painted ceramic or china that are used in contact with food shall be lead-free or contain levels of lead not exceeding the limits of the following utensil categories:<sup>P</sup>

Utensil Category	Ceramic Article Description	Maximum Lead (mg/L) (ppm)
Beverage Mugs, Cups, Pitchers	Coffee Mugs	0.5
Large Hollowware (excluding pitchers)	Bowls ≥1.1 Liter (1.16 Quart)	1.0
Small Hollowware (excluding cups and mugs)	Bowls <1.1 Liter (1.16 Quart)	2.0
Flat Tableware	Plates, Saucers	3.0

B. Pewter alloys containing lead in excess of 0.05% may not be used as a food-contact surface.<sup>P</sup>

C. Solder and flux containing lead in excess of 0.2% may not be used as a food-contact surface.

**2VAC5-585-1180. Temperature measuring devices; food.**

A. Food temperature measuring devices that are scaled only in Fahrenheit ~~or dually scaled in Fahrenheit and Celsius~~ shall be ~~sealed in 2°F increments and~~ accurate to ± plus or minus 2°F in the intended range of use.<sup>Pf</sup>

B. Food temperature measuring devices that are scaled only in Celsius ~~or dually scaled in Celsius and Fahrenheit~~ shall be ~~sealed in 1°C increments~~ accurate to ± plus or minus 1°C in the intended range of use.<sup>Pf</sup>

**2VAC5-585-1190. Temperature measuring devices; ambient air and water.**

A. Ambient air and water temperature measuring devices that are scaled only in Fahrenheit ~~or dually scaled in Fahrenheit and Celsius~~ and shall be ~~designed to be easily readable and sealed~~

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in 3°F increments and accurate to  $\pm$  plus or minus 3°F in the intended range of use.<sup>Pf</sup>

B. Ambient air and water temperature measuring devices that are scaled ~~only~~ in Celsius or dually scaled in Celsius and Fahrenheit shall be ~~sealed in 1.5°C increments~~ designed to be easily readable and accurate to  $\pm$  plus or minus 1.5°C in the intended range of use.<sup>Pf</sup>

## **2VAC5-585-1230. Dispensing equipment, protection of equipment and food.**

In equipment that dispenses or vends liquid food or ice in unpackaged form:

1. The delivery tube, chute, orifice, and splash surfaces directly above the container receiving the food shall be designed in a manner, such as with barriers, baffles, or drip aprons, so that drips from condensation and splash are diverted from the opening of the container receiving the food.
2. The delivery tube, chute, and orifice shall be protected from manual contact such as by being recessed.
3. The delivery tube or chute and orifice of equipment used to vend liquid food or ice in unpackaged form to self-service consumers shall be designed so that the delivery tube or chute and orifice are protected from dust, insects, rodents, and other contamination by a self-closing door if the equipment is:
  - a. Located in an outside area that does not otherwise afford the protection of an enclosure against the rain, windblown debris, insects, rodents, and other contaminants that are present in the environment; or
  - b. Available for self-service during hours when it is not under the full-time supervision of a food employee.
4. The dispensing equipment actuating lever or mechanism and filling device of consumer self-service beverage dispensing equipment shall be designed to prevent contact with the lip-contact surface of glasses or cups that are refilled.
5. Dispensing equipment in which time/temperature control for safety food in homogenous liquid form is maintained outside of the temperature control requirements as specified in 2VAC5-585-820 A shall:
  - a. Be specifically designed and equipped to maintain the commercial sterility of aseptically packaged food in a homogenous liquid form for a specified duration from the time of opening the packaging within the equipment;<sup>P</sup> and
  - b. Conform to the requirements for this equipment as specified in NSF/ANSI ~~18-2012~~ 18-2016 Manual Food and Beverage Dispensing Equipment, ~~2012~~ 2016, (NSF International).<sup>P</sup>

## **2VAC5-585-1300. Molluscan shellfish tanks.**

A. Except as specified under subsection B of this section, molluscan shellfish life support system display tanks may not be used to store or display shellfish that are offered for human consumption and shall be conspicuously marked so that it is obvious to consumers that the shellfish are for display only.<sup>P</sup>

B. Molluscan shellfish life-support system display tanks that are used to store or display shellfish that are offered for human consumption shall be operated and maintained in accordance with a variance granted by the department as specified in 2VAC5-585-3540 and a HACCP plan that:<sup>Pf</sup>

1. Is submitted by the operator and approved as specified under 2VAC5-585-3541;<sup>Pf</sup> and
2. Ensures that:
  - a. Water used with fish other than molluscan shellfish does not flow into the molluscan tank;<sup>Pf</sup>
  - b. The safety and quality of the shellfish as they were received are not compromised by the use of the tank;<sup>Pf</sup> and
  - c. The identity of the source of the shellstock is retained as specified under 2VAC5-585-440.<sup>Pf</sup>

## **2VAC5-585-1310. Vending machines, automatic shutoff.**

A. A machine vending time/temperature control for safety food shall have an automatic control that prevents the machine from vending food:

1. If there is a power failure, mechanical failure, or other condition that results in an internal machine temperature that cannot maintain food temperatures as specified under Part III (2VAC5-585-260 et seq.) of this chapter;<sup>P</sup> and
2. If a condition specified under subdivision 1 of this subsection occurs, until the machine is serviced and restocked with food that has been maintained at temperatures specified under Part III (2VAC5-585-260 et seq.) of this chapter.<sup>P</sup>

B. When the automatic shutoff within a machine vending time/temperature control for safety food is activated:

1. In a refrigerated vending machine, the ambient temperature may not exceed 41°F (5°C) for more than 30 minutes immediately after the machine is filled, serviced, or restocked;<sup>P</sup> or
2. In a hot holding vending machine, the ambient temperature may not be less than 135°F (57°C) for more than 120 minutes immediately after the machine is filled, serviced, or restocked.<sup>P</sup>

## **2VAC5-585-1430. Vending machine doors and openings.**

A. Vending machine doors and access opening covers to food and container storage spaces shall be tight-fitting so that the space along the entire interface between the doors or covers and the cabinet of the machine, if the doors or covers are in a

closed position, is no greater than one-sixteenth inch or 1.5 millimeters by:

1. Being covered with louvers, screens, or materials that provide an equivalent opening of not greater than one-sixteenth inch or 1.5 millimeters. Screening of 12 mesh to one inch (12 or more mesh to 2.5 centimeters) meets this requirement;
2. Being effectively gasketed;
3. Having interface surfaces that are at least one-half inch wide or 13 millimeters; or
4. Jambs or surfaces used to form an L-shaped entry path to the interface.

B. Vending machine service connection openings through an exterior wall of a machine shall be closed by sealants, clamps, or grommets so that the openings are no larger than ~~1.5 millimeters or~~ one-sixteenth inch or 1.5 millimeters.

**2VAC5-585-1435. Food equipment, certification and classification.**

Food equipment that is certified or classified for sanitation in conformance to a recognized American National Standard by an American National Standards Institute accredited certification program is deemed to comply with the requirements of Articles 1 (2VAC5-585-960 et seq.) and 2 (2VAC5-585-1080 et seq.) of this part.

**2VAC5-585-1535. Cleaning agents and sanitizers; availability.**

A. Cleaning agents that are used to clean equipment and utensils as specified under Article 6 (2VAC5-585-1770 et seq.) of this part shall be provided and available for use during all hours of operation.<sup>Pf</sup>

B. Except for ~~chemical sanitizers~~ those that are generated on site at the time of use, chemical sanitizers that are used to sanitize equipment and utensils as specified under Article 7 (2VAC5-585-1885 et seq.) of this part shall be provided and available for use during all hours of operation.<sup>Pf</sup>

**2VAC5-585-1620. Warewashing sinks, use limitation.**

A. A warewashing sink may not be used for handwashing as specified under 2VAC5-585-170.

B. If a warewashing sink is used to wash wiping cloths, wash produce, or thaw food, the sink shall be cleaned as specified under 2VAC5-585-1600 before and after each time it is used to wash wiping cloths or wash produce or thaw food. Sinks used to wash or thaw food shall be sanitized as specified under Article 7 (~~2VAC5-585-1880 et seq.~~) (2VAC5-585-1885 et seq.) of this part before and after using the sink to wash produce or thaw food.

**2VAC5-585-1700. Manual and mechanical warewashing equipment, chemical sanitization - temperature, pH, concentration, and hardness.**

A chemical sanitizer used in a sanitizing solution for a manual or mechanical operation at contact times specified under subdivision 3 of 2VAC5-585-1900 shall meet the criteria specified under 2VAC5-585-3380, shall be used in accordance with the EPA-registered label use instructions,<sup>P</sup> and shall be used as follows:

1. A chlorine solution shall have a minimum temperature based on the concentration and pH of the solution as listed in the following chart;<sup>P</sup>

Minimum Concentration	Minimum Temperature	
	pH 10 or less °F (°C)	pH 8.0 or less °F (°C)
mg/L (ppm) 25-49	120 (49)	120 (49)
50-99	100 (38)	75 (24)
100	55 (13)	55 (13)

2. An iodine solution shall have a:
  - a. Minimum temperature of 68°F (20°C);<sup>P</sup>
  - b. pH of 5.0 or less or a pH no higher than the level for which the manufacturer specifies the solution is effective;<sup>P</sup> and
  - c. Concentration between 12.5 ~~mg/L (ppm)~~ mg/L (ppm) and 25 mg/L (ppm);<sup>P</sup>
3. A quaternary ammonium compound solution shall:
  - a. Have a minimum temperature of 75°F (24°C);<sup>P</sup>
  - b. Have a concentration as specified under 2VAC5-585-3380 and as indicated by the manufacturer's use directions included in the labeling;<sup>P</sup> and
  - c. Be used only in water with 500 mg/L (ppm) hardness or less or in water having a hardness no greater than specified by the EPA-registered label use instructions;<sup>P</sup>
4. If another solution of a chemical specified under subdivisions 1 through 3 of this section is used, the operator shall demonstrate to the department that the solution achieves sanitization and the use of the solution shall be approved;<sup>P</sup> or
5. If a chemical sanitizer other than chlorine, iodine, or a quaternary ammonium compound is used, it shall be applied in accordance with the EPA-registered label use instructions;<sup>P</sup> and
6. If a chemical sanitizer is generated by a device located on site at the food establishment, it shall be used as specified in subdivisions 1 through 4 of this section and shall be produced by a device that:

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- a. Complies with regulation as specified in §§ 2(q)(1) and 12 of the Federal Insecticide, Fungicide, and Rodenticide Act (7 USC § 136(q)(1) and 7 USC § 136j);<sup>P</sup>
- b. Complies with 40 CFR 152.500 and 40 CFR 156.10;<sup>P</sup>
- c. Displays the EPA device manufacturing facility registration number on the device;<sup>Pf</sup> and
- d. Is operated and maintained in accordance with manufacturer's instructions.<sup>Pf</sup>

**2VAC5-585-1780. Equipment food-contact surfaces and utensils.**

A. Equipment food-contact surfaces and utensils shall be cleaned:

- 1. Except as specified in subsection B of this section, before each use with a different type of raw animal food such as beef, fish, lamb, pork, or poultry;<sup>P</sup>
- 2. Each time there is a change from working with raw foods to working with ready-to-eat foods;<sup>P</sup>
- 3. Between uses with raw fruits and vegetables and with time/temperature control for safety food;<sup>P</sup>
- 4. Before using or storing a food temperature measuring device;<sup>P</sup> and
- 5. At any time during the operation when contamination may have occurred.<sup>P</sup>

B. Subdivision A 1 of this section does not apply if the food-contact surface or utensil is in contact with a succession of different types of raw meat and poultry each requiring a higher cooking temperature as specified under 2VAC5-585-700 than the previous type.

C. Except as specified in subsection D of this section, if used with time/temperature control for safety food, equipment food-contact surfaces and utensils shall be cleaned throughout the day at least every four hours.<sup>P</sup>

D. Surfaces of utensils and equipment contacting time/temperature control for safety food may be cleaned less frequently than every four hours if:

- 1. In storage, containers of time/temperature control for safety food and their contents are maintained at temperatures specified under Part III (2VAC5-585-260 et seq.) of this chapter and the containers are cleaned when they are empty;
- 2. Utensils and equipment are used to prepare food in a refrigerated room or area that is maintained at one of the temperatures in the following chart and:

a. The utensils and equipment are cleaned at the frequency in the following chart that corresponds to the temperature; and

Temperature	Cleaning Frequency
41°F (5.0°C) or less	24 hours

>41°F - 45°F (>5.0°C - 7.2°C)	20 hours
>45°F - 50°F (>7.2°C - 10.0°C)	16 hours
>50°F - 55°F (>10.0°C - 12.8°C)	10 hours

b. The cleaning frequency based on the ambient temperature of the refrigerated room or area is documented in the food establishment.

3. Containers in serving situations such as salad bars, delis, and cafeteria lines that hold ready-to-eat time/temperature control for safety food that is maintained at the temperatures specified under Part III, are intermittently combined with additional supplies of the same food that is at the required temperature, and the containers are cleaned at least every 24 hours;

4. Temperature measuring devices are maintained in contact with food, such as when left in a container of deli food or in a roast, held at temperatures specified under Part III;

5. Equipment is used for storage of packaged or unpackaged food such as a reach-in refrigerator and the equipment is cleaned at a frequency necessary to preclude accumulation of soil residues;

6. The cleaning schedule is approved based on consideration of:

- a. Characteristics of the equipment and its use;
- b. The type of food involved;
- c. The amount of food residue accumulation; and
- d. The temperature at which the food is maintained during the operation and the potential for the rapid and progressive multiplication of pathogenic or toxigenic microorganisms that are capable of causing foodborne disease; or

7. In-use utensils are intermittently stored in a container of water in which the water is maintained at 135°F (57°C) or more and the utensils and container are cleaned at least every 24 hours or at a frequency necessary to preclude accumulation of soil residues.

E. Except when dry cleaning methods are used as specified under 2VAC5-585-1810, surfaces of utensils and equipment contacting food that is not time/temperature control for safety food shall be cleaned:

- 1. At any time when contamination may have occurred;
- 2. At least every 24 hours for iced tea dispensers and consumer self-service utensils such as tongs, scoops, or ladles;

3. Before restocking consumer self-service equipment and utensils such as condiment dispensers and display containers; and

4. In equipment such as ice bins and beverage dispensing nozzles and enclosed components of equipment such as ice makers, cooking oil storage tanks and distribution lines, beverage and syrup dispensing lines or tubes, coffee bean grinders, and water vending equipment:

- a. At a frequency specified by the manufacturer; or
- b. Absent manufacturer specifications, at a frequency necessary to preclude accumulation of soil or mold.

#### **2VAC5-585-1900. Hot water and chemical.**

After being cleaned, equipment food-contact surfaces and utensils shall be sanitized in:

1. Hot water manual operations by immersion for at least 30 seconds as specified under 2VAC5-585-1670;<sup>P</sup>

2. Hot water mechanical operations by being cycled through equipment that is set up as specified under 2VAC5-585-1610, 2VAC5-585-1680, and 2VAC5-585-1690 and achieving a utensil surface temperature of 160°F (71°C) as measured by an irreversible registering temperature indicator;<sup>P</sup> or

3. Chemical manual or mechanical operations, including the application of sanitizing chemicals by immersion, manual swabbing, brushing, or pressure spraying methods, using a solution as specified under 2VAC5-585-1700. Contact times shall be consistent with those on EPA-registered label use instructions by providing:

- a. Except as specified under subdivision 3 b of this section, a contact time of at least 10 seconds for a chlorine solution specified under subdivision 1 of 2VAC5-585-1700;<sup>P</sup>
- b. A contact time of at least seven seconds for a chlorine solution of 50 mg/L (ppm) that has a pH of 10 or less and a temperature of at least 100°F (38°C) or a pH of 8.0 or less and a temperature of at least 75°F (24°C);<sup>P</sup>
- c. A contact time of at least 30 seconds for other chemical sanitizing solutions;<sup>P</sup> or
- d. A contact time used in relationship with a combination of temperature, concentration, and pH that, when evaluated for efficacy, yields sanitization as defined in 2VAC5-585-40.<sup>P</sup>

#### **2VAC5-585-2100. Sampling.**

A. Water from a private well shall be sampled and tested at least annually for nitrate and total coliform.<sup>Pf</sup>

B. If nitrate, which is reported as "N" on the test results, exceeds 10 mg/L (ppm), the operator shall notify the department ~~by the end of the day~~ within 24 hours from when the operator is notified of the nitrate positive test result. ~~Additional sampling may be required.~~<sup>Pf</sup>

C. If a sample is total coliform positive, the positive culture medium shall be further analyzed to determine if E. coli is present. The operator shall notify the department within two calendar days from when the operator is notified of the coliform-positive test result.<sup>Pf</sup>

D. If E. coli is present, the operator shall notify the department ~~by the end of the day~~ within 24 hours from when the operator is notified of the E. coli positive test result.<sup>Pf</sup>

#### **2VAC5-585-2120. Capacity.**

A. The water source and system shall be of sufficient capacity to meet ~~the maximum daily water demands and~~ the peak hourly water demands of the food establishment.<sup>Pf</sup>

B. Hot water generation and distribution systems shall be sufficient to meet the peak hot water demands throughout the food establishment.<sup>Pf</sup>

#### **2VAC5-585-2190. Handwashing sink, water temperature, and flow.**

A. A handwashing sink shall be equipped to provide water at a temperature of at least 100°F (38°C) through a mixing valve or combination faucet.<sup>Pf</sup>

B. A steam mixing valve may not be used at a handwashing sink.

C. A self-closing, slow-closing, or metering faucet shall provide a flow of water for at least 15 seconds without the need to reactivate the faucet.

D. ~~If an~~ An automatic handwashing facility ~~is installed, it~~ shall be installed in accordance with manufacturer's instructions.

#### **2VAC5-585-2200. Backflow prevention, air gap.**

An air gap between the water supply ~~inlet~~ outlet and the flood level rim of the plumbing fixture, equipment, or nonfood equipment shall be at least twice the diameter of the water supply ~~inlet~~ outlet and may not be less than one inch (25 mm).<sup>P</sup>

#### **2VAC5-585-2230. Handwashing sinks, numbers and capacities.**

A. Except as specified in ~~subsections~~ subsection ~~B and C~~ of this section, at least one handwashing sink, or the number of handwashing sinks necessary for their convenient use by employees in areas specified under 2VAC5-585-2280, and not fewer than the number of handwashing sinks required by law shall be provided.<sup>Pf</sup>

B. If approved and capable of removing the types of soils encountered in the food operations involved, automatic handwashing facilities may be substituted for handwashing sinks in a food establishment that has at least one handwashing sink.

~~C. If approved, when food exposure is limited and handwashing sinks are not conveniently available, such as in~~

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~~some mobile or temporary food establishments or at some vending machine locations, employees may use chemically-treated towelettes for handwashing.~~

## **2VAC5-585-2270. Backflow prevention device, carbonator.**

A. If not provided with an air gap as specified under 2VAC5-585-2200, a ~~double~~ dual check valve with an intermediate vent preceded by a screen of not less than 100 mesh to one inch (100 mesh to 25.4mm) shall be installed upstream from a carbonating device and downstream from any copper in the water supply line.<sup>P</sup>

B. A dual check valve attached to the carbonator need not be of the vented type if an air gap or vented backflow prevention device has been otherwise provided as specified under subsection A of this section.

## **2VAC5-585-2320. Prohibiting a cross connection.**

A. A person may not create a cross connection by connecting a pipe or conduit between the ~~drinking pure~~ drinking pure water system and a ~~nondrinking nonpotable~~ nondrinking nonpotable water system or a water system of unknown quality.<sup>P</sup>

B. The piping of a ~~nondrinking nonpotable~~ nondrinking nonpotable water system shall be durably identified so that it is readily distinguishable from piping that carries ~~drinking pure~~ drinking pure water.<sup>Pf</sup>

## **2VAC5-585-2520. Backflow prevention.**

A. Except as specified in subsections B, C, and D of this section, a direct connection may not exist between the sewage system and a drain originating from equipment in which food, portable equipment, or utensils are placed.<sup>P</sup>

B. Subsection A of this section does not apply to floor drains that originate in refrigerated spaces that are constructed as an integral part of the building.

C. If allowed by law, a warewashing machine may have a direct connection between its waste outlet and a floor drain when the machine is located within five feet (1.5 meters) of a trapped floor drain and the machine outlet is connected to the inlet side of a properly vented floor drain trap.

D. If allowed by law, a warewashing ~~or culinary~~ sink may have a direct connection.

## **2VAC5-585-2570. Approved sewage disposal system.**

Sewage shall be disposed through an approved facility that is:

1. A public sewage treatment plant;<sup>P</sup> or
2. An individual sewage disposal system that is sized, constructed, maintained, and operated in accordance with the regulations promulgated pursuant to Chapter 6 (§ 32.1-163 et seq.) of Title 32.1 of the Code of Virginia or in accordance with the related local ordinance.<sup>P</sup>

## **2VAC5-585-2750. Cleaning receptacles.**

A. Receptacles and waste handling units for refuse, recyclables, and returnables shall be thoroughly cleaned in a way that does not contaminate food, equipment, utensils, linens, or single-service and single-use articles, and waste water shall be disposed of as specified under ~~2VAC5-585-2550~~ 2VAC5-585-2540.

B. Soiled receptacles and waste handling units for refuse, recyclables, and returnables shall be cleaned at a frequency necessary to prevent them from developing a buildup of soil or becoming attractants for insects and rodents.

## **2VAC5-585-2790. Indoor areas; surface characteristics.**

A. Except as specified in subsection B of this section, materials for indoor floor, wall, and ceiling surfaces under conditions of normal use shall be:

1. Smooth, durable, and easily cleanable for areas where food establishment operations are conducted;
2. Closely woven and easily cleanable carpet for carpeted areas; and
3. Nonabsorbent for areas subject to moisture such as food preparation areas, walk-in refrigerators, warewashing areas, toilet rooms, mobile food establishment servicing areas, and areas subject to flushing or spray cleaning methods.

B. In a temporary food establishment:

1. ~~A floor may be concrete, if~~ If graded to drain, a floor may be concrete, machine-laid asphalt, or dirt or gravel if it is covered with mats, removable platforms, duckboards, or other approved materials that are effectively treated to control dust and mud; and
2. Walls and ceilings may be constructed of a material that protects the interior from the weather and windblown dust and debris.

## **2VAC5-585-3390. Chemicals for washing, treating, storing, and processing fruits and vegetables, criteria.**

~~A. Chemicals, including those generated on site, used to wash or peel raw, whole fruits and vegetables or used in the treatment, storage, and processing of fruits and vegetables shall meet the requirements specified in 40 CFR Part 156 and shall:~~<sup>P</sup>

1. Be an approved food additive listed for this intended use in 21 CFR Part 173;<sup>P</sup>
2. Be generally recognized as safe for this intended use;<sup>P</sup> or
3. Be the subject of an effective food contact notification for this intended use (only effective for the manufacturer or supplier identified in the notification).<sup>P</sup>

~~B. Ozone as an antimicrobial agent used in the treatment, storage, and processing of fruits and vegetables in a food~~

establishment shall meet the requirements specified in 21 CFR 173.368.<sup>P</sup>

**2VAC5-585-3510. Public health protection.**

A. The department shall apply this chapter to promote its underlying purpose, as specified in 2VAC5-585-20, of safeguarding public health and ensuring that food is safe, unadulterated, and honestly presented when offered to the consumer.

B. In enforcing the provisions of this chapter, the department shall assess existing facilities or equipment that were in use before the effective date of this chapter based on the following considerations:

1. Whether the facilities or equipment are in good repair and capable of being maintained in a sanitary condition;
2. Whether food-contact surfaces comply with 2VAC5-585-960 through 2VAC5-585-1060;
3. Whether the capacities of cooling, heating, and holding equipment are sufficient to comply with 2VAC5-585-1450; and
4. The existence of a documented agreement with the establishment operator that the facilities or equipment will be replaced or upgraded as specified in subdivision 6 of ~~2VAC5-585-3660~~ 2VAC5-585-3750.

**2VAC5-585-3520. Preventing health hazards, provision for conditions not addressed.**

A. If necessary to protect against public health hazards or nuisances, the department may impose specific requirements in addition to the requirements contained in this ~~regulation~~ chapter that are authorized by law.

B. The department shall document the conditions that necessitate the imposition of additional requirements and the underlying public health rationale. The documentation shall be provided to the establishment operator or person in charge and a copy shall be maintained in the department's file for the food establishment.

**2VAC5-585-3540. Variances, modifications and waivers.**

The department may grant a variance by modifying or waiving the requirements of this ~~regulation~~ chapter if, in the opinion of the department, a health hazard or nuisance will not result from the variance. If a variance is granted, the department shall retain the information specified under 2VAC5-585-3541 in its records for the food establishment.

**2VAC5-585-3541. Documentation of proposed variance and justification.**

Before a variance from a requirement of this chapter is approved, the information that shall be provided by the person requesting the variance and retained by the food establishment and in the department's file on the food establishment includes:

1. A statement of the proposed variance of the ~~regulation~~ chapter requirement citing relevant ~~regulation~~ chapter section numbers;<sup>Pf</sup>
2. An analysis of the rationale for how the potential public health hazards and nuisances addressed by the relevant ~~regulation~~ chapter sections will be alternatively addressed by the proposal;<sup>Pf</sup> and
3. A HACCP plan if required as specified under 2VAC5-585-3620 A that includes the information specified under 2VAC5-585-3630 as it is relevant to the variance requested.<sup>Pf</sup>

**2VAC5-585-3542. Conformance with approved procedures.**

If the department grants a variance as specified in 2VAC5-585-3540, or a HACCP plan is otherwise required as specified under 2VAC5-585-3620, the operator shall:

1. Maintain the approved variance at the food establishment;<sup>Pf</sup>
2. Comply with the HACCP plans and procedures that are submitted as specified under 2VAC5-585-3630 and approved as a basis for the modification or waiver;<sup>P</sup> and
- ~~2.~~ 3. Maintain and provide to the department, upon request, records specified under subdivisions 4 5 and ~~5~~ 6 c of 2VAC5-585-3630 that demonstrate that the following are routinely employed:
  - a. Procedures for monitoring critical control points;<sup>Pf</sup>
  - b. Monitoring of the critical control points;<sup>Pf</sup>
  - c. Verification of the effectiveness of ~~an~~ the operation or process;<sup>Pf</sup> and
  - d. Necessary corrective actions if there is failure at a critical control point.<sup>Pf</sup>

**2VAC5-585-3630. Contents of a HACCP plan.**

For a food establishment that is required under 2VAC5-585-3620 to have a HACCP plan, the operator shall submit to the department a properly prepared HACCP plan that includes:

1. General information such as the name of the operator, the food establishment address, and contact information;
2. A categorization of the types of time/temperature control for safety foods that are to be controlled under the HACCP plan;<sup>Pf</sup>
3. A flow diagram or chart for each specific food or category type that identifies:
  - a. Each step in the process;<sup>Pf</sup> and
  - b. ~~The hazards and controls for each step in the flow diagram or chart;~~<sup>Pf</sup>
  - e. The steps that are critical control points;<sup>Pf</sup>

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d. ~~The ingredients, materials, and equipment used in the preparation of that food;~~<sup>Pf</sup> and

e. ~~4. The ingredients, recipes, or formulations; or recipe that delineates materials and equipment used in the preparation of each specific food or category type; and methods and procedural control measures that address the food safety concerns involved;~~<sup>Pf</sup>

~~5. 5. A critical control points summary for each specific food category type that clearly identifies:~~

a. Each critical control point;<sup>Pf</sup>

b. The significant hazards for each critical control point;<sup>Pf</sup>

c. The critical limits for each critical control point;<sup>Pf</sup>

e. ~~d. The method and frequency for monitoring and controlling each critical control point by the designated food employee or the person in charge;~~<sup>Pf</sup>

~~d. The method and frequency for the person in charge to routinely verify that the food employee is following standard operating procedures and monitoring critical control points;~~<sup>Pf</sup>

e. Action to be taken by the designated food employee or person in charge if the critical limits for each critical control point are not met;<sup>Pf</sup> and

f. The method and frequency for the person in charge to routinely verify that the food employee is following standard operating procedures and monitoring critical control points;<sup>Pf</sup> and

g. Records to be maintained by the person in charge to demonstrate that the HACCP plan is properly operated and managed;<sup>Pf</sup>

~~5. 6. Supporting documents such as:~~

a. Food employee and supervisory training plan and operating procedures that addresses address the food safety issues of concern;<sup>Pf</sup>

b. Copies of blank record forms that are necessary to implement the HACCP plan;<sup>Pf</sup>

c. Additional scientific data or other information, as required by the department, supporting the determination that food safety is not compromised by the proposal;<sup>Pf</sup> and

~~6. 7. Any other information required by the department.~~

## Article 3

### ~~(Reserved)~~ Conditions to Operate

#### **2VAC5-585-3655. Responsibilities of the department. (Repealed.)**

~~A. At the time of the initial inspection, the department shall provide to the operator a copy of this chapter so that the operator is notified of the compliance requirements and the conditions of retention, as specified under 2VAC5-585-3660, that are applicable to the food establishment.~~

~~B. Failure to provide the information specified in subsection A of this section does not prevent the department from taking authorized action or seeking remedies if the operator fails to comply with this chapter or an order, warning, or directive of the department.~~

#### **2VAC5-585-3660. Responsibilities of the operator. (Repealed.)**

~~The operator shall:~~

~~1. Comply with the provisions of this chapter including the conditions of a granted variance as specified under 2VAC5-585-3542 and approved plans as specified under 2VAC5-585-3610;~~

~~2. If a food establishment is required under 2VAC5-585-3620 to operate under a HACCP plan, comply with the plan as specified under 2VAC5-585-3542;~~

~~3. Immediately contact the department to report an illness of a food employee or conditional employee as specified under 2VAC5-585-80 B;~~

~~4. Immediately discontinue operations and notify the department if an imminent health hazard may exist as specified under 2VAC5-585-3910;~~

~~5. Allow authorized representatives of the commissioner access to the food establishment as specified under 2VAC5-585-3820;~~

~~6. Replace existing facilities and equipment specified in 2VAC5-585-3510 with facilities and equipment that comply with this chapter if:~~

~~a. The department directs the replacement because the facilities and equipment constitute a public health hazard or nuisance or no longer comply with the criteria upon which the facilities and equipment were accepted;~~

~~b. The department directs the replacement of the facilities and equipment because of a change of ownership; or~~

~~c. The facilities and equipment are replaced in the normal course of operation;~~

~~7. Comply with directives of the department including timeframes for corrective actions specified in inspection reports, notices, orders, warnings, and other directives issued by the department in regard to the operator's food establishment or in response to community emergencies;~~

~~8. Accept notices issued and served by the department according to law;~~

~~9. Be subject to the administrative, civil, injunctive, and criminal remedies authorized in law for failure to comply with this chapter or a directive of the department, including timeframes for corrective actions specified in inspection reports, notices, orders, warnings, and other directives; and~~

10. Notify customers that a copy of the most recent establishment inspection report is available upon request by posting a sign or placard in a location in the food establishment that is conspicuous to customers or by another method acceptable to the department.

**2VAC5-585-3740. Responsibilities of the department.**

A. At the time of the initial inspection, the department shall provide to the operator a copy of this chapter so that the operator is notified of the compliance requirements and the conditions of retention, as specified under 2VAC5-585-3750, that are applicable to the food establishment.

B. Failure to provide the information specified in subsection A of this section does not prevent the department from taking authorized action or seeking remedies if the operator fails to comply with this chapter or an order, warning, or directive of the department.

**2VAC5-585-3750. Responsibilities of the operator.**

The operator shall:

1. Comply with the provisions of this chapter including the conditions of a granted variance as specified under 2VAC5-585-3542 and approved plans as specified under 2VAC5-585-3610;

2. If a food establishment is required under 2VAC5-585-3620 to operate under a HACCP plan, comply with the plan as specified under 2VAC5-585-3542;

3. Immediately contact the department to report an illness of a food employee or conditional employee as specified under 2VAC5-585-80 B;

4. Immediately discontinue operations and notify the department if an imminent health hazard may exist as specified under 2VAC5-585-3910;

5. Allow authorized representatives of the commissioner access to the food establishment as specified under 2VAC5-585-3820;

6. Replace existing facilities and equipment specified in 2VAC5-585-3510 with facilities and equipment that comply with this chapter if:

a. The department directs the replacement because the facilities and equipment constitute a public health hazard or nuisance or no longer comply with the criteria upon which the facilities and equipment were accepted;

b. The department directs the replacement of the facilities and equipment because of a change of ownership; or

c. The facilities and equipment are replaced in the normal course of operation;

7. Comply with directives of the department, including timeframes for corrective actions specified in inspection reports, notices, orders, warnings, and other directives issued

by the department in regard to the operator's food establishment or in response to community emergencies;

8. Accept notices issued and served by the department according to law;

9. Be subject to the administrative, civil, injunctive, and criminal remedies authorized in law for failure to comply with this chapter or a directive of the department, including timeframes for corrective actions specified in inspection reports, notices, orders, warnings, and other directives; and

10. Notify customers that a copy of the most recent establishment inspection report is available upon request by posting a sign or placard in a location in the food establishment that is conspicuous to customers or by another method acceptable to the department.

**2VAC5-585-3800. Frequency, establishing inspection interval.**

A. Except as specified in subsections B and C of this section, the department shall inspect a food establishment at least once every six months.

B. The department may increase the interval between inspections beyond six months if:

1. The food establishment is fully operating under an approved and validated HACCP plan as specified under subdivisions 4 2 and 2 3 of 2VAC5-585-3542 and 2VAC5-585-3630-;

2. The food establishment is assigned a less frequent inspection frequency based on a written risk-based inspection schedule that is being uniformly applied throughout the jurisdiction-; or

3. The establishment's operation involves only coffee service and other unpackaged or prepackaged food that is not time/temperature control for safety food such as carbonated beverages and snack food such as chips, nuts, popcorn, and pretzels.

C. The department shall periodically inspect a temporary food establishment that prepares, sells, or serves unpackaged time/temperature control for safety food and that:

1. Has improvised rather than permanent facilities or equipment for accomplishing functions such as handwashing, food preparation and protection, food temperature control, warewashing, providing drinking water, waste retention and disposal, and insect and rodent control; or

2. Has inexperienced food employees.

**2VAC5-585-3815. Competency of inspectors.**

A. An authorized representative of the commissioner who inspects a food establishment or conducts plan review for compliance with this ~~regulation~~ chapter shall have the

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knowledge, skills, and ability to adequately perform the required duties.

B. The department shall ensure that authorized representatives who inspect a food establishment or conduct plan review for compliance with this chapter have access to training and continuing education as needed to properly identify violations and apply the chapter.

## **2VAC5-585-3820. Access allowed at reasonable times.**

After the authorized representative of the commissioner presents official credentials and provides notice of the purpose of, and an intent to conduct, an inspection, the person in charge shall allow the authorized representative to determine if the food establishment is in compliance with this chapter by allowing access to the establishment, allowing inspection, and providing information and records specified in this chapter and to which the department is entitled according to law, during the food establishment's hours of operation and other reasonable times.

## **2VAC5-585-3860. Documenting information and observations.**

The authorized representative of the commissioner shall document ~~on an inspection report form:~~

1. Administrative information about the food establishment's legal identity, street and mailing addresses, type of establishment and operation, inspection date, and other information such as type of water supply and sewage disposal, and personnel certificates that may be required; and
2. Specific factual observations of violative conditions or other deviations from this chapter that require correction by the establishment operator including:
  - a. Failure of the person in charge to demonstrate the knowledge of foodborne illness prevention, application of HACCP principles, and the requirements of this chapter specified under 2VAC5-585-60;
  - b. Failure of food employees, conditional employees, and the person in charge to report a disease or medical condition as specified under 2VAC5-585-80 B and D;
  - c. Nonconformance with priority items and priority foundation items of this chapter;
  - d. Failure of the appropriate food employees to demonstrate their knowledge of, and ability to perform in accordance with, the procedural, monitoring, verification, and corrective action practices required by the department as specified under 2VAC5-585-3542;
  - e. Failure of the person in charge to provide records required by the department for determining conformance with a HACCP plan as specified under subdivision 4 ~~f~~ 5 g of 2VAC5-585-3630; and
  - f. Nonconformance with critical limits of a HACCP plan.

## **2VAC5-585-3910. Imminent health hazard, ceasing operations and reporting.**

A. Except as specified in ~~subsection~~ subsections B and C of this section, an operator shall immediately discontinue operations and notify the department if an imminent health hazard may exist because of an emergency such as a fire, flood, extended interruption of electrical or water service, sewage backup, misuse of poisonous or toxic materials, onset of an apparent foodborne illness outbreak, gross insanitary occurrence or condition, or other circumstance that may endanger public health.<sup>P</sup>

B. An operator need not discontinue operations in an area of an establishment that is unaffected by the imminent health hazard.

C. Considering the nature of the potential hazard involved and the complexity of the corrective action needed, the department may agree to continuing operations in the event of an extended interruption of electrical or water service if:

1. A written emergency operating plan has been approved by the department;
2. Immediate corrective action is taken to eliminate, prevent, or control any food safety risk and imminent health hazard associated with the electrical or water service interruption; and
3. The department is informed upon implementation of the written emergency operating plan.

## **2VAC5-585-3940. Verification and documentation of correction.**

A. After observing at the time of inspection a correction of a violation of a priority item or priority foundation item or a HACCP plan deviation, the authorized representative of the commissioner shall enter the violation and information about the corrective action on the inspection report.

B. As specified under 2VAC5-585-3930 B, after receiving notification that the operator has corrected a violation of a priority item or priority foundation item or HACCP plan deviation, or at the end of the specified period of time, the authorized representative shall verify correction of the violation or deviation during the next ~~scheduled~~ inspection of the establishment and shall document the information on an inspection report, and enter the report in the department's records.

**NOTICE:** The following forms used in administering the regulation have been filed by the agency. Amended or added forms are reflected in the listing and are published following the listing. Online users of this issue of the Virginia Register of Regulations may also click on the name to access a form. The forms are also available from the agency contact or may be viewed at the Office of Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

## FORMS (2VAC5-585)

~~Retail Inspection Report, ODF-FSP-10001 (rev. 7/2016)~~

~~Foodborne Illness Complaint Report, ODF-FSP-10003 (rev. 6/2016)~~

~~Complaint Form, ODF-FSP-10004 (rev. 6/2016)~~

[Retail Inspection Report, ODF-FSP-10001 \(rev. 7/2018\)](#)

## DOCUMENTS INCORPORATED BY REFERENCE (2VAC5-585)

~~Approved Drug Products with Therapeutic Equivalence Evaluations, 34th Edition, 2014, U.S. Department of Health and Human Services, Food and Drug Administration, Center for Drug Evaluation and Research, Office of Pharmaceutical Science, Office of Generic Drugs at <http://www.fda.gov/cder/ob/default.htm>~~

~~Grade "A" Pasteurized Milk Ordinance, 2013 Revision, U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, Milk Safety Branch (HFS-626), 5100 Paint Branch Parkway, College Park, MD 20740-3835~~

[Approved Drug Products with Therapeutic Equivalence Evaluations, 39th Edition, 2019, U.S. Department of Health and Human Services, Food and Drug Administration, Center for Drug Evaluation and Research, Office of Pharmaceutical Science, Office of Generic Drugs at <http://www.fda.gov/cder/ob/default.htm>](#)

[Conference for Food Protection Standards for Accreditation of Food Protection Manager Certification Programs, April 2018, Conference for Food Protection, 30 Elliott Court, Martinsville, IN 46151-1331](#)

[Grade "A" Pasteurized Milk Ordinance, 2017 Revision, U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, Milk Safety Branch \(HFS-626\), 5100 Paint Branch Parkway, College Park, MD 20740-3835](#)

Interstate Certified Shellfish Shippers List (updated monthly), published by the U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, Office of Seafood (HFS-417), 5100 Paint Branch Parkway, College Park, MD 20740-3835

~~National Shellfish Sanitation Program (NSSP) Guide for the Control of Molluscan Shellfish, 2013 Revision, U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, Office of Seafood (HFS-417), 5100 Paint Branch Parkway, College Park, MD 20740-3835~~

~~NSF/ANSI 18-2012 Manual Food and Beverage Dispensing Equipment, 2012, NSF International, 789 North Dixboro Road, P.O. Box 130140, Ann Arbor, MI 48113-0140, [www.nsf.org](http://www.nsf.org)~~

~~Standards for Accreditation of Food Protection Manager Certification Programs, April 2012, Conference for Food Protection, 30 Elliott Court, Martinsville, IN 46151-1331~~

[National Shellfish Sanitation Program \(NSSP\) Guide for the Control of Molluscan Shellfish, 2017 Revision, U.S. Department of Health and Human Services, Public Health Service, Food and Drug Administration, Office of Seafood \(HFS-417\), 5100 Paint Branch Parkway, College Park, MD 20740-3835](#)

[NSF/ANSI 18-2012 Manual Food and Beverage Dispensing Equipment, 2012, NSF International, 789 North Dixboro Road, P.O. Box 130140, Ann Arbor, MI 48113-0140, \[www.nsf.org\]\(http://www.nsf.org\)](#)

United States Standards, Grades, and Weight Classes for Shell Eggs, AMS-56, effective July 20, 2000, U.S. Department of Agriculture, Agricultural Marketing Service, Poultry Programs, STOP 0259, Room 3944-South, 1400 Independence Avenue, SW, Washington, DC 20250-0259

VA.R. Doc. No. R21-5895; Filed April 12, 2021, 1:32 p.m.



## TITLE 4. CONSERVATION AND NATURAL RESOURCES

### MARINE RESOURCES COMMISSION

#### Final Regulation

**REGISTRAR'S NOTICE:** The Marine Resources Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

**Title of Regulation:** **4VAC20-252. Pertaining to the Taking of Striped Bass (amending 4VAC20-252-20, 4VAC20-252-50, 4VAC20-252-130, 4VAC20-252-135).**

**Statutory Authority:** § 28.2-201 of the Code of Virginia.

**Effective Date:** May 1, 2021.

**Agency Contact:** Jennifer Farmer, Marine Resources Commission, 380 Fenwick Road, Fort Monroe, VA 23551, telephone (757) 247-2248, or email [jennifer.farmer@mrc.virginia.gov](mailto:jennifer.farmer@mrc.virginia.gov).

**Summary:**

*The amendments establish a definition of bait as it pertains to the use of non-offset, non-stainless steel circle hooks when fishing recreationally and clarify existing language relevant to reporting and commercial fisheries.*

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## 4VAC20-252-20. Definitions.

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

"Bait" means any whole or part of any marine or aquatic organism, live or dead.

"Chesapeake Bay area" means the commercial fishing area that includes the Chesapeake Bay and its tributaries and the Potomac River tributaries.

"Chesapeake Bay and its tributaries" means all tidal waters of the Chesapeake Bay and its tributaries within Virginia, westward of the shoreward boundary of the Territorial Sea, excluding the coastal area and the Potomac River tributaries as defined in this section.

"Circle hook" means a non-offset, non-stainless steel hook with the point turned sharply and straight back toward the shank.

"Coastal area" means the area that includes Virginia's portion of the Territorial Sea, plus all of the creeks, bays, inlets, and tributaries on the seaside of Accomack County, Northampton County (including areas east of the causeway from Fisherman Island to the mainland), and the City of Virginia Beach (including federal areas and state parks, fronting on the Atlantic Ocean and east and south of the point where the shoreward boundary of the Territorial Sea joins the mainland at Cape Henry).

"Commercial fishing," "fishing commercially," or "commercial fishery" means fishing by any person where the catch is or is intended for sale, barter, trade, or any commercial purpose.

"Great Wicomico-Tangier Striped Bass Management Area" means the area that includes the Great Wicomico River and those Virginia waters bounded by a line beginning at Dameron Marsh at NAD 83 North Latitude 37-46.9535, West Longitude 76-17.1294; extending to the southernmost point of Tangier Island, and north to a point on the Virginia-Maryland state boundary at NAD 83 North Latitude 37-57.0407, West Longitude 75-58.5043, and then westerly along the Virginia-Maryland state boundary to Smith Point.

"Potomac River tributaries" means all the tributaries of the Potomac River that are within Virginia's jurisdiction beginning with, and including, Flag Pond extending upstream to the District of Columbia boundary.

"Recreational fishing," "fishing recreationally," or "recreational fishery" means fishing by any person, whether licensed or exempted from licensing, where the catch is not or is not intended for sale, barter, trade, or any commercial purpose.

"Recreational vessel" means any vessel, kayak, charter vessel, or headboat participating in the recreational striped bass fishery.

"Share" means a percentage of the striped bass commercial harvest quota.

"Snout" means the most forward projection from a fish's head that includes the upper and lower jaw.

"Spawning reaches" means sections within the spawning rivers as follows:

1. James River from a line connecting Dancing Point and New Sunken Meadow Creek upstream to a line connecting City Point and Packs Point.
2. Pamunkey River from the Route 33 Bridge at West Point upstream to a line connecting Liberty Hall and the opposite shore.
3. Mattaponi River from the Route 33 Bridge at West Point upstream to the Route 360 bridge at Aylett.
4. Rappahannock River from the Route 360 Bridge at Tappahannock upstream to the Route 1 Falmouth Bridge.

"Spear" or "spearing" means to fish while the person is fully submerged under the water's surface with a mechanically aided device designed to accelerate a barbed spear.

"Striped bass" means any fish or any hybrid of the species *Morone saxatilis*.

"Total length" means the length of a fish measured from the most forward projection of the snout, with the mouth closed, to the tip of the longer lobe of the tail (caudal) fin, measured with the tail compressed along the midline, using a straight-line measure, not measured over the curve of the body.

## 4VAC20-252-50. Concerning recreational fishing: general.

A. It shall be unlawful for any person fishing recreationally to take, catch, or attempt to take or catch any striped bass by any gear or method other than hook-and-line, rod and reel, hand line, or spearing.

B. Any person fishing recreationally shall use non-offset, corrodible, non-stainless steel circle hooks when fishing with ~~bait, live or chunk~~.

C. When fishing from a boat or vessel where the entire catch is held in a common hold or container, the possession limit shall be for the boat or vessel and shall be equal to the number of persons on board legally eligible to fish multiplied by the applicable personal possession limit. The captain or operator of the boat or vessel shall be responsible for any boat or vessel possession limit.

D. When fishing from a boat or vessel where the entire catch is held in a common hold or container, the captain or operator of the boat or vessel shall be responsible for any minimum or maximum size limits.

E. It shall be unlawful to combine possession limits when there is more than one area or season open at the same time.

F. It shall be unlawful for any person while actively fishing pursuant to a recreational fishery to possess any striped bass that are smaller than the minimum size limit or larger than the maximum size limit for the area and season then open and being fished.

G. It shall be unlawful for any person fishing recreationally to transfer any striped bass to another person, while on the water or while fishing from a pier or shore.

**4VAC20-252-130. Entry limits, permits, and reports.**

A. There is established a special permit for engaging in either the Chesapeake Bay area commercial fishery for striped bass or the coastal area commercial fishery for striped bass. It shall be unlawful for any person to engage in either commercial fishery for striped bass without first having obtained the permit from the commission and meeting the following conditions:

1. The person shall be a licensed registered commercial fisherman.
2. The person shall have reported all prior fishing activity in accordance with 4VAC20-610 and shall not be under any sanction by the Marine Resources Commission for noncompliance with the regulation.

B. Permits for the commercial harvest of striped bass in the Chesapeake Bay area or coastal area shall be issued to any registered commercial fishermen holding striped bass quota shares issued under the provisions of 4VAC20-252-150 and 4VAC20-252-160.

C. Permits shall be in the possession of the permittee while catching, harvesting, selling, or possessing striped bass. Failure to have the appropriate permit in possession shall be a violation of this chapter.

D. It shall be unlawful for any person, business, or corporation, except for licensed restaurants, to purchase from the harvester any quantity of striped bass greater than 10 pounds in total weight taken from Virginia's tidal waters for the purpose of resale without first obtaining a striped bass buyer's permit from the commission, except as described in subsection E of this section. Such permit shall be completed in full by the permittee and kept in possession of the permittee while selling or possessing striped bass. Failure to have the appropriate permit in possession shall be a violation of this chapter.

E. Restaurants shall not be required to obtain a striped bass buyer's permit from the commission but shall be required to certify and maintain a record of any striped bass purchased from any harvester for a period of not less than one year.

F. All permitted commercial harvesters of striped bass shall report to the commission in accordance with 4VAC20-610. In addition to the reporting requirements of 4VAC20-610, all

permitted commercial harvesters of striped bass shall record and report daily striped bass harvest by specifying the number of tags used on striped bass harvested for each day in either the Chesapeake Bay area or coastal area and reporting the daily total whole weight of striped bass harvested in either the Chesapeake Bay area or coastal area. Daily striped bass tag use on harvested striped bass and daily total whole weight of harvested striped bass from either the Chesapeake Bay area or coastal area, within any month, shall be recorded on forms provided by the commission and shall accompany the monthly catch report submitted no later than the fifth day of the following month.

G. Any permitted commercial harvester of striped bass who sell markets his striped bass to a restaurant, person, or out-of-state market shall be required to prepare a receipt describing each sale greater than 10 pounds in total weight. Each receipt shall be a record and report of the date of transaction, name and signature of buyer, address and phone number of buyer, number and total weight of striped bass sold, and name and signature of harvester. Copies of each receipt shall be ~~forwarded~~ submitted to the commission ~~in accordance with 4VAC20-610~~ no later than the fifth day of the following month.

H. Any buyer permitted to purchase striped bass harvested from Virginia tidal waters shall provide written reports to the commission of daily purchases and harvest information on forms provided by the Marine Resources Commission. Such information shall include the date of the purchase, buyer's name, and harvester's Commercial Fisherman Registration License number. In addition, for each different purchase of striped bass harvested from Virginia waters, the buyer shall record the weight of whole fish and number and type of tags (Chesapeake Bay area or coastal area) that applies to that harvest. These reports shall be completed in full and submitted monthly to the Marine Resources Commission no later than the fifth day of the following month.

I. Failure of any person permitted to harvest, buy, or sell striped bass, to submit the required written report for any fishing day shall constitute a violation of this chapter.

**4VAC20-252-135. Gill net mesh size and tending restrictions: exemptions.**

A. Any registered commercial fisherman who is ~~permitted to harvest~~ harvesting striped bass from the coastal area in accordance with 4VAC20-252-130 A and C and sets or fishes any gill net in the coastal area shall be prohibited from using a gill net mesh size greater than nine inches in stretched mesh.

B. Any registered commercial fisherman who is ~~permitted to harvest~~ harvesting striped bass from the coastal area in accordance with 4VAC20-252-130 A and C and sets or fishes any gill net in the coastal area shall be exempt from the maximum gill net mesh size requirements during November and December as described in 4VAC20-430-65 A and B.

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C. Any registered commercial fisherman who is ~~permitted to harvest~~ harvesting striped bass from the coastal area in accordance with 4VAC20-252-130 A and C and sets or fishes any gill net seven inches or greater in stretched mesh in the coastal area shall be exempt from the tending requirements described in 4VAC20-430-65 E and F during the months of November and December.

D. Any registered commercial fisherman who is ~~permitted to harvest~~ harvesting striped bass from the coastal area in accordance with 4VAC20-252-130 A and C shall display an optic yellow flag issued by the commission while fishing for striped bass in the coastal area and while transiting the coastal area before and after a striped bass fishing trip. This flag shall be prominently displayed on the starboard side of the vessel.

E. Any registered commercial fisherman who is ~~permitted to harvest~~ harvesting striped bass from the Chesapeake Bay area in accordance with 4VAC20-252-130 A and C and sets or fishes any gill net in the Chesapeake Bay area shall be prohibited from using a gill net greater than seven inches in stretched mesh with the exception of restricted areas as defined in 4VAC20-751-20.

VA.R. Doc. No. R21-6770; Filed April 28, 2021, 11:08 a.m.

## Final Regulation

**REGISTRAR'S NOTICE:** The Marine Resources Commission is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4006 A 11 of the Code of Virginia; however, the commission is required to publish the full text of final regulations.

**Title of Regulation:** 4VAC20-950. **Pertaining to Black Sea Bass (amending 4VAC20-950-45).**

**Statutory Authority:** § 28.2-201 of the Code of Virginia.

**Effective Date:** May 1, 2021.

**Agency Contact:** Jennifer Farmer, Marine Resources Commission, 380 Fenwick Road, Fort Monroe, VA 23551, telephone (757) 247-2248, or email jennifer.farmer@mrc.virginia.gov.

**Summary:**

*The amendment extends the 2021 recreational black sea bass fishing season from May 15 through May 31 and June 16 through December 31, 2021.*

**4VAC20-950-45. Recreational possession limits and seasons.**

A. It shall be unlawful for any person fishing with hook-and-line, rod and reel, spear, gig, or other recreational gear to possess more than 15 black sea bass. When fishing from a recreational vessel where the entire catch is held in a common hold or container, the possession limit shall be for that vessel and shall be equal to the number of persons on board legally licensed to fish, multiplied by 15. The captain or operator of the vessel shall be responsible for that vessel possession limit.

Any black sea bass taken after the possession limit has been reached shall be returned to the water immediately.

B. Possession of any quantity of black sea bass that exceeds the possession limit described in subsection A of this section shall be presumed to be for commercial purposes.

C. The open recreational fishing season shall be from February 1 through the last day of February, May 15 through May 31, and June ~~22~~ 16 through December 31.

D. It shall be unlawful for any person fishing recreationally to take, catch, or possess any black sea bass, except during an open recreational season.

E. From February 1 through the last day of February, it shall be unlawful for any person to possess or land any black sea bass harvested from a recreational vessel, unless the captain or operator of that recreational vessel has obtained a Recreational Black Sea Bass Permit from the Marine Resources Commission.

1. The captain or operator shall be responsible for reporting for all anglers on the recreational vessel and shall provide that captain's or that operator's Marine Resources Commission identification (MRC ID) number, the date of fishing, the number of persons on board, the mode of fishing, and the number of black sea bass kept or released. That report shall be submitted to the Marine Resources Commission (commission) on forms provided by the commission or through the Virginia Saltwater Fisherman's Journal.

a. It shall be unlawful for any permittee to fail to report each trip where black sea bass were targeted, whether black sea bass were harvested, released, or not caught, by March 15 of the current calendar year.

b. It shall be unlawful for any permittee who did not take any fishing trips to target black sea bass in the February recreational black sea bass season to fail to report lack of participation by March 15 of the current calendar year.

2. It shall be unlawful for any permittee to fail to contact the Law Enforcement Operations at 1-800-541-4646 before or immediately after the start of each fishing trip. The permittee shall provide the Law Enforcement Operations with the permittee's name, MRC ID number, the point of landing, a description of the vessel, estimated return to shore time, and a contact phone number.

3. Any permittee shall allow the commission to sample the vessel's catch to obtain biological information for scientific and management purposes.

VA.R. Doc. No. R21-6769; Filed April 28, 2021, 11:08 a.m.



**TITLE 12. HEALTH****STATE BOARD OF HEALTH****Proposed Regulation**

**Title of Regulation: 12VAC5-71. Regulations Governing Virginia Newborn Screening Services (amending 12VAC5-71-30).**

**Statutory Authority:** §§ 32.1-12 and 32.1-67 of the Code of Virginia.

**Public Hearing Information:** No public hearing is currently scheduled.

**Public Comment Deadline:** July 9, 2021.

**Agency Contact:** Joseph Hilbert, Deputy Commissioner, Government and Regulatory Affairs, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7001, FAX (804) 864-7022, email joe.hilbert@vdh.virginia.gov.

**Basis:** The State Board of Health is authorized to make, adopt, promulgate, and enforce regulations by § 32.1-12 of the Code of Virginia. Section 32.1-65 of the Code of Virginia requires newborn screening to be conducted on every infant born in the Commonwealth of Virginia. Section 32.1-67 of the Code of Virginia requires the State Board of Health to promulgate regulations as necessary to implement Newborn Screening Services.

**Purpose:** Spinal muscular atrophy (SMA) is a genetic disorder characterized by weakness and wasting (atrophy) in muscles used for movement (skeletal muscles). SMA is caused by a loss of specialized nerve cells, called motor neurons, which control muscle movement. SMA affects 9.1 out of every 100,000 births and there are five classification types. Type 0 often leads to fetal loss or newborns with significant involvement and death in early infancy; this is the rarest and most severe form of the condition. Type I, the most common form, leads to progressive weakness in the first six months of life and, without targeted intervention, death prior to two years of age. Type II is associated with progressive weakness by 15 months of life and, without targeted intervention, respiratory failure and death after the third decade of life. Types III and IV are associated with progressive weakness that develops after one year of life or in adulthood, and most individuals have a normal lifespan. Treatment for SMA generally includes a disease-modifying therapy that uses FDA-approved Spinraza, as well as clinical care support therapies such as nutritional support, respiratory support, pulmonary care, orthopedic and rehabilitation care, and palliative care.

X-linked adrenoleukodystrophy (X-ALD) is a genetic disorder that occurs primarily in males, mainly affecting the nervous system and the adrenal glands. In the United States, X-ALD affects six out of every 100,000 births, regardless of sex. There are three distinct types of X-ALD: a childhood cerebral form, an adrenomyeloneuropathy type, and a form called Addison

disease only. Childhood cerebral X-ALD is the most serious form of X-ALD and it usually presents between 2.5 and 10 years of age. It is associated with rapid neurologic decline and death or disability an average three years after onset. Signs and symptoms of the adrenomyeloneuropathy type appear between early adulthood and middle age. People with X-ALD whose only symptom is adrenocortical insufficiency are said to have the Addison disease only form, which is the mildest form of the three types. In these individuals, adrenocortical insufficiency can begin anytime between childhood and adulthood. Treatment for X-ALD is difficult to predict since symptom onset varies and, in many cases, might not occur until after infancy. Treatment options include hormone therapy and hematopoietic stem cell transplantation, depending on the severity of the disorder.

All newborns in Virginia would be screened for SMA and X-ALD as a result of this proposed regulatory action. Screening for SMA and X-ALD can provide affected infants the benefit of early diagnosis and treatment. Screening is an effective diagnostic tool since these disorders cannot be detected at birth through a physical examination. Laboratory screening is available at a cost.

The addition of SMA and X-ALD to the core panel will result in an increase to the newborn screening fee. The VDH Office of Family Health Services has a longstanding partnership with the Division of Consolidated Laboratory Services (DCLS) to provide blood spot newborn screening services. The Virginia Newborn Screening Program is solely funded through Enterprise Funding, which is generated from the collection of fees from dried blood spot specimen kits sold to submitting birthing facilities and health care providers statewide. As of October 1, 2019, the newborn screening fee is \$138 per card. To implement these two screenings statewide, DCLS will require infrastructure investment that includes additional laboratory equipment; programmatic staff; application development to incorporate screening results; incorporation of new education modules; identification of specialized medical support systems for infants and their families; and family support and case management services for infants diagnosed with SMA or X-ALD. Adding SMA to the newborn screening panel results in an increase of \$2.16, and adding X-ALD to the newborn screening results in an increase of \$10.84 per sample, for a total of \$13 for both of these disorders.

**Substance:** The proposed changes to 12VAC5-71-30, which lists the specific disorders and genetic diseases that must be screened in Virginia, add SMA and X-ALD to the state's core panel. Currently, DCLS analyzes biological markers that may be indicative of 31 certain disorders that constitute the core panel. Section 32.1-67 of the Code of Virginia requires that this list of screened disorders be in the regulation. Section 32.1-65 of the Code of Virginia requires that Virginia's screening tests are consistent with the panel recommended by the U.S. Secretary of Health and Human Services (HHS) Advisory Committee on Heritable Disorders in Newborns and Children Recommended Uniform Screening Panel.

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**Issues:** The primary advantage of the proposed regulatory action to the public is that screening for SMA and X-ALD can provide affected infants the benefit of early diagnosis and treatment. Screening is an effective diagnostic tool since these disorders cannot be detected at birth through a physical examination. The primary disadvantage to the public is that adding these two screenings to the panel results in a cost increase.

A primary advantage of the proposed regulatory action to the agency is that the action aligns with the recommendation from the Virginia Genetics Advisory Committee to add SMA and X-ALD to the state's core panel. This also aligns with the panel recommended by the U.S. Secretary of HHS Advisory Committee on Heritable Disorders in Newborns and Children Recommended Uniform Screening Panel.

A disadvantage to the regulated community, government officials, and the public is the projected increase in the cost of the two screenings. Newborn screening is a fee-for-service program, and the fee is paid by hospitals and other screeners who must purchase the filter paper kits used for blood spot collection. Most screening is performed in hospitals, with about 10% to 15% of screening performed by private physicians and military facilities. Hospitals do not generally pass on these costs to patients because third-party payers usually pay a negotiated bundled amount per delivery, and Medicaid reimbursed delivery payment is set by the state. Self-pay patients may be responsible to pay the screening fee themselves if they have the resources to do so.

## Department of Planning and Budget's Economic Impact Analysis:

**Summary of the Proposed Amendments to Regulation.** The State Board of Health (Board) seeks to amend the existing newborn screening regulation to add spinal muscular atrophy (SMA) and X-linked adrenoleukodystrophy (X-ALD) to the newborn screening panel (NSP). The additions of SMA and X-ALD to the NSP have been recommended by the Virginia Genetics Advisory Committee. Blood spot newborn screening services are provided by the Department of General Services Division of Consolidated Laboratory Services (DCLS) in partnership with the Virginia Department of Health (VDH) Office of Family Health Services, and as required by 12VAC5-71-100.

**Background.** The Board proposes to amend 12VAC5-71-30, Core Panel of Heritable Disorders and Genetic Diseases, to add SMA and X-ALD. VDH reports that SMA is estimated to occur in approximately 9.1 out of every 100,000 live births and X-ALD is estimated to occur in approximately six out of every 100,000 live births. If these disorders progress undetected, they are known to cause severe disabilities or a severely shortened lifespan.<sup>1</sup> However, treatment for both these genetic disorders are available if they are detected early. Blood spot tests are necessary to detect these disorders as they cannot be detected at birth through physical examinations. Virginia currently screens for 33 genetic disorders: 31 genetic disorders by dried

blood spot screening along with critical congenital heart disease and hearing loss by point of care testing. With the addition of X-ALD and SMA, Virginia will be in alignment with the 35 disorders on the Secretary of the U.S. Department of Health and Human Services Recommended Uniform Screening Panel.

**Estimated Benefits and Costs.** In Virginia, DCLS conducts roughly 99,000 newborn screening tests per year. Thus, the proposed amendments would result in the screening of all newborns in Virginia for these disorders; this would potentially benefit approximately 15 newborns each year who might be born with SMA or X-ALD, as well as their families. The benefits of early detection and treatment include not only the avoidance of disability but also the associated costs and other detrimental effects. These benefits would accrue over the entire lifespan of individuals having these genetic disorders.

However, laboratory screening comes at a cost. The Virginia Newborn Screening Program is solely funded through enterprise funding, which is generated from the collection of fees from dried blood spot specimen kits sold to submitting birthing facilities and health care providers statewide. VDH notes that in order to implement these two screenings statewide, DCLS would require infrastructure investment that includes additional laboratory equipment, programmatic staff, application development to incorporate screening results, incorporation of new education modules, identification of specialized medical support systems for infants and their families, and family support and case management services for infants diagnosed with SMA or X-ALD.

Specifically, adding SMA to the newborn screening panel results in an increase of \$2.16, and adding X-ALD to the newborn screening results in an increase of \$10.84 per sample, for a total of \$13 for both of these disorders per sample. Further, the Board anticipates VDH costs to include one full-time employee for follow-up activities and education, and incurring outreach costs. The Board estimates DCLS costs related to capital equipment, staff, application development and education modules to be \$389,631 in start-up costs and \$192,262 annually for SMA screenings, and \$1,101,568 in start-up costs and \$1,073,422 annually for X-ALD screenings. These costs amount to an additional \$13-\$15 per test, since DCLS conducts roughly 99,000 tests a year.

These projected costs would be funded through a fee increase for the blood spot screening panel, which would need to go into effect 12 months prior to implementation to accrue start-up costs. Therefore, in order to begin including tests for SMA and X-ALD in the NSP in the 2020-2021 fiscal year, DCLS increased the fee for the blood spot specimen kit from \$101.20 to \$138 effective October 1, 2019. An estimated \$26-28 of this increase can be attributed directly to the changes proposed by the Board in this action. The overall fee increase would cover the cost of the two tests as well as other costs DCLS seeks to recoup for the expected addition of other tests in fiscal year 2021. Since the fees for the blood spot screening panel are set

by DCLS and not the Board, this action does not directly lead to the introduction of new costs per se.

**Businesses and Other Entities Affected.** The increased fee directly affects hospitals, birth centers, and midwives who purchase the dried blood spot specimen kits from DCLS, as well as health insurance companies. VDH estimates that there are 58 hospitals, 10 to 15 birth centers, and an unknown number of midwives who would be affected by the fee increase.<sup>2</sup> Most private health insurance plans include the fee for the NSP in the negotiated reimbursement amount for childbirth. Hence, hospitals and birth centers are unlikely to pass on the increased costs directly to their patients. However, not all midwives accept health insurance and may pass on the increased costs to their patients. Further, the Department of Medical Assistance Services may have to update the reimbursements made on behalf of Medicaid enrollees to cover the increased fee. An adverse impact is indicated for the increased fee, since adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

**Small Businesses Affected.**

**Types and Estimated Number of Small Businesses Affected.** It is not known if any of the hospitals qualify as small businesses, as many are nonprofits, and those that are for profit may be too large.<sup>3</sup> Additionally, affected health insurance companies may be too large to qualify. Birth centers and independent midwives are more likely to meet the definition of a small business. VDH estimates that there are 10 to 15 birth centers in Virginia; the number of midwives is unknown.

**Costs and Other Effects.** Any hospitals, birth centers, or midwives that do qualify as a small business would likely be adversely affected by the proposed fee increase.

**Alternative Method that Minimizes Adverse Impact.** There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

**Localities<sup>4</sup> Affected.<sup>5</sup>** The proposed amendments do not disproportionately affect any specific localities, nor do they introduce new costs for local governments.

**Projected Impact on Employment.** The proposed amendments are directly linked to allocations for six full-time employees at DCLS and one full-time employee at VDH. The proposed amendments are unlikely to affect employment at hospitals, birth centers, or health insurance companies more generally.

**Effects on the Use and Value of Private Property.** Private businesses that end up paying for either part of or all of the fee increase either directly or through reimbursements may be moderately reduced in value. Real estate development costs would not be affected.

<sup>1</sup>Page 3 of the Agency Background Document includes further details about each disorder, including the various sub-types, symptoms, and typical outcomes. See [https://townhall.virginia.gov/l/GetFile.cfm?File=58\5259\8965\AgencyStatement\\_VDH\\_8965\\_v1.pdf](https://townhall.virginia.gov/l/GetFile.cfm?File=58\5259\8965\AgencyStatement_VDH_8965_v1.pdf).

<sup>2</sup>The Department of Health Professions lists 95 currently licensed midwives, but many of them are likely to be employed by hospitals or birth centers.

<sup>3</sup>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".

<sup>4</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>5</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

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

**Summary:**

*The proposed amendments add spinal muscular atrophy (SMA) and X-linked adrenoleukodystrophy (X-ALD) to the newborn screening panel. The additions of SMA and X-ALD to the newborn screening panel have been recommended by the Virginia Genetics Advisory Committee. On the national level, these disorders have been added to the core panel of 35 genetic disorders included in the Recommended Uniform Screening Panel of the U.S. Secretary of Health and Human Services Advisory Committee on Heritable Disorders in Newborns and Children.*

**12VAC5-71-30. Core panel of heritable disorders and genetic diseases.**

A. The Virginia Newborn Screening System, which includes the Virginia Newborn Screening Program, the Virginia Early Hearing Detection and Intervention Program, and the Virginia critical congenital heart disease screening, shall ensure that the core panel of heritable disorders and genetic diseases for which newborn screening is conducted is consistent with but not necessarily identical to the U.S. Department of Health and Human Services Secretary's Recommended Uniform Screening Panel.

B. The department shall review, at least biennially, national recommendations and guidelines and may propose changes to the core panel of heritable disorders and genetic diseases for which newborn dried-blood-spot screening tests are conducted.

C. The Virginia Genetics Advisory Committee may be consulted and provide advice to the commissioner on proposed changes to the core panel of heritable disorders and genetic diseases for which newborn dried-blood-spot screening tests are conducted.

D. Infants under six months of age who are born in Virginia shall be screened in accordance with the provisions set forth in this chapter for the following heritable disorders and genetic diseases, which are identified through newborn dried-blood-spot screening tests:

1. Argininosuccinic aciduria (ASA);

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2. Beta-Ketothiolase deficiency (BKT);
3. Biotinidase deficiency (BIOT);
4. Carnitine uptake defect (CUD);
5. Classical galactosemia (galactose-1-phosphate uridyltransferase deficiency) (GALT);
6. Citrullinemia type I (CIT-I);
7. Congenital adrenal hyperplasia (CAH);
8. Cystic fibrosis (CF);
9. Glutaric acidemia type I (GA I);
10. Hb S beta-thalassemia (Hb F,S,A);
11. Hb SC-disease (Hb F,S,C);
12. Hb SS-disease (sickle cell anemia) (Hb F, S);
13. Homocystinuria (HCY);
14. Isovaleric acidemia (IVA);
15. Long chain L-3-Hydroxy acyl-CoA dehydrogenase deficiency (LCHAD);
16. Maple syrup urine disease (MSUD);
17. Medium-chain acyl-CoA dehydrogenase deficiency (MCAD);
18. Methylmalonic acidemia (Methylmalonyl-CoA mutase deficiency) (MUT);
19. Methylmalonic acidemia (Adenosylcobalamin synthesis deficiency) (CBL A, CBL B);
20. Multiple carboxylase deficiency (MCD);
21. Phenylketonuria (PKU);
22. Primary congenital hypothyroidism (CH);
23. Propionic acidemia (PROP);
24. Severe combined immunodeficiency (SCID);
25. Tyrosinemia type I (TYR I);
26. Trifunctional protein deficiency (TFP);
27. Very long-chain acyl-CoA dehydrogenase deficiency (VLCAD);
28. 3-hydroxy 3-methyl glutaric aciduria (HMG);
29. 3-Methylcrotonyl-CoA carboxylase deficiency (3-MCC);
30. Pompe disease; ~~and~~
31. Mucopolysaccharidosis type I (MPS I);
32. Spinal muscular atrophy (SMA); and
33. X-linked adrenoleukodystrophy (X-ALD).

E. Infants born in Virginia shall be screened for hearing loss in accordance with provisions set forth in §§ 32.1-64.1 and 32.1-64.2 of the Code of Virginia and as governed by 12VAC5-80.

F. Newborns born in Virginia shall be screened for critical congenital heart disease in accordance with provisions set forth in §§ 32.1-65.1 and 32.1-67 of the Code of Virginia and as governed by 12VAC5-71-210 through 12VAC5-71-260.

VA.R. Doc. No. R19-5996; Filed April 13, 2021, 10:48 a.m.

## Forms

**NOTICE:** The following forms used in administering the regulation have been filed by the agency. Amended or added forms are reflected in the listing and are published following the listing. Online users of this issue of the Virginia Register of Regulations may also click on the name to access a form. The forms are also available from the agency contact or may be viewed at the Office of Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

**Title of Regulation: 12VAC5-381. Regulations for the Licensure of Home Care Organizations.**

**Agency Contact:** Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, FAX (804) 527-4502, or email [regulatorycomment@vdh.virginia.gov](mailto:regulatorycomment@vdh.virginia.gov).

FORMS (12VAC5-381)

~~[Application for Home Care Organization Licensure \(rev. 2/2021\)](#)~~

[Application for Home Care Organization Licensure \(rev. 4/2021\)](#)

[Renewal Addendum for Licenses Expiring July 31, 2021 \(eff. 4/2021\)](#)

VA.R. Doc. No. R21-6758; Filed April 21, 2021, 10:18 a.m.

## Final Regulation

**Title of Regulation: 12VAC5-410. Regulations for the Licensure of Hospitals in Virginia (amending 12VAC5-410-442, 12VAC5-410-445, 12VAC5-410-650, 12VAC5-410-760, 12VAC5-410-1350).**

**Statutory Authority:** §§ 32.1-127 and 32.1-127.001 of the Code of Virginia.

**Effective Date:** June 9, 2021.

**Agency Contact:** Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, FAX (804) 527-4502, or email [regulatorycomment@vdh.virginia.gov](mailto:regulatorycomment@vdh.virginia.gov).

Summary:

*The amendments conform the regulation to § 32.1-127.001 of the Code of Virginia, which requires the State Board of Health to adopt minimum standards for design and construction that are consistent with the current edition of the Guidelines for Design and Construction of Hospital and Health Care Facilities issued by the American Institute of Architects Academy of Architecture for Health. The American Institute of Architects Academy of Architecture for Health has become the Facility Guidelines Institute (FGI). The latest guidelines published by the FGI are the 2018 editions of the Guidelines for Design and Construction of Hospitals and the Guidelines for Design and Construction of Outpatient Facilities.*

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

**12VAC5-410-442. Obstetric service design and equipment criteria.**

A. Renovation or construction of a hospital's obstetric unit shall be consistent with (i) section ~~2-1-4~~ [ ~~2.2-2.11~~ 2.2-2.9 ] of Part 2 of the ~~2006~~ [ ~~2014~~ 2018 ] Guidelines for Design and Construction of ~~Health Care Hospitals~~ [ ~~and Outpatient Facilities~~ ] of the ~~American Facility Guidelines Institute of Architects~~ pursuant to § 32.1-127.001 of the Code of Virginia and (ii) the Virginia Uniform Statewide Building Code (13VAC5-63).

B. Delivery rooms, ~~LDR/LDRP labor~~, [ ~~delivery deliver~~ ], and [ ~~recovery recover~~ ] (LDR) rooms; ~~labor delivery, recovery, and postpartum (LDRP) rooms;~~ and nurseries shall be equipped to provide emergency resuscitation for mothers and infants.

C. Equipment and supplies shall be assigned for exclusive use in the obstetric and newborn units.

D. The same equipment and supplies required for the labor room and delivery room shall be available for use in the LDR/LDRP rooms during periods of labor, delivery, and recovery.

E. Sterilizing equipment shall be available in the obstetric unit or in a central sterilizing department. Flash sterilizing equipment or sterile supplies and instruments shall be provided in the obstetric unit.

F. Daily monitoring is required of the stock of necessary equipment in the ~~labor, delivery, and recovery~~ LDR rooms (~~LDR~~) and ~~labor, delivery, recovery and postpartum (LDRP)~~ LDRP rooms and nursery.

G. The hospital shall provide the following equipment in the labor, delivery and recovery rooms and, except where noted, in the LDR/LDRP rooms:

1. Labor rooms.

- a. A labor or birthing bed with adjustable side rails.

- b. Adjustable lighting adequate for the examination of patients.
- c. An emergency signal and intercommunication system.
- d. A sphygmomanometer, stethoscope and fetoscope or doppler.
- e. Fetal monitoring equipment with internal and external attachments.
- f. Mechanical infusion equipment.
- g. Wall-mounted oxygen and suction outlets.
- h. Storage equipment.
- i. Sterile equipment for emergency delivery to include at least one clamp and suction bulb.
- j. Neonatal resuscitation cart.

2. Delivery rooms.

- a. A delivery room table that allows variation in positions for delivery. This equipment is not required for the LDR/LDRP rooms.
- b. Adequate lighting for vaginal deliveries or cesarean deliveries.
- c. Sterile instruments, equipment, and supplies to include sterile uterine packs for vaginal deliveries or cesarean deliveries, episiotomies or laceration repairs, postpartum sterilizations and cesarean hysterectomies.
- d. Continuous in-wall oxygen source and suction outlets for both mother and infant.
- e. Equipment for inhalation and regional anesthesia. This equipment is not required for LDR/LDRP rooms.
- f. A heated, temperature-controlled infant examination and resuscitation unit.
- g. An emergency call system.
- h. Plastic pharyngeal airways, adult and newborn sizes.
- i. Laryngoscope and endotracheal tubes, adult and newborn sizes.
- j. A self-inflating bag with manometer and adult and newborn masks that can deliver 100% oxygen.
- k. Separate cardiopulmonary crash carts for mothers and infants.
- l. Sphygmomanometer.
- m. Cardiac monitor. This equipment is not required for the LDR/LDRP rooms.
- n. Gavage tubes.
- o. Umbilical vessel catheterization trays. This equipment is not required for LDR/LDRP rooms.
- p. Equipment that provides a source of continuous suction for aspiration of the pharynx and stomach.
- q. Stethoscope.
- r. Fetoscope.
- s. Intravenous solutions and equipment.

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- t. Wall clock with a second hand.
- u. Heated bassinets equipped with oxygen and transport incubator.
- v. Neonatal resuscitation cart.

### 3. Recovery rooms.

- a. Beds with side rails.
- b. Adequate lighting.
- c. Bedside stands, overbed tables, or fixed shelving.
- d. An emergency call signal.
- e. Equipment necessary for a complete physical examination.
- f. Accessible oxygen and suction equipment.

### 12VAC5-410-445. Newborn service design and equipment criteria.

A. Construction ~~and or~~ renovation of a hospital's nursery shall be consistent with ~~sections 2.2-2.12.1 through 2.2-2.12.6.6 (i) section [ 2.2-2.12 2.2-2.10 ] of Part 2 of the 2010 [ 2014 2018 ] Guidelines for Design and Construction of Health Care Hospitals [ and Outpatient Facilities ] of the Facilities Facility Guidelines Institute (formerly of the American Institute of Architects) pursuant to § 32.1-127.001 of the Code of Virginia and (ii) the Virginia Uniform Statewide Building Code (13VAC5-63). Hospitals with higher-level nurseries shall comply with ~~sections 2.2-2.10.1 through 2.2-10.9.3 section [ 2.2-2.10 2.2-2.8 ] of Part 2 of the 2010 guideline [ 2014 2018 ] edition of the guidelines~~ as applicable.~~

B. The hospital shall provide the following equipment in the general level nursery and all higher level nurseries, unless additional equipment requirements are imposed for the higher level nurseries:

1. Resuscitation equipment as specified for the delivery room in 12VAC5-410-442 G 2 shall be available in the nursery at all times;
2. Equipment for the delivery of 100% oxygen concentration, properly heated, blended, and humidified, with the ability to measure oxygen delivery in fractional inspired concentration (FI<sub>O2</sub>). The oxygen analyzer shall be calibrated every eight hours and serviced according to the manufacturer's recommendations by a member of the hospital's respiratory therapy department or other responsible personnel trained to perform the task;
3. Saturation monitor (pulse oximeter or equivalent);
4. Equipment for monitoring blood glucose;
5. Infant scales;
6. Intravenous therapy equipment;
7. Equipment and supplies for the insertion of umbilical arterial and venous catheters;

8. Open bassinets, self-contained incubators, open radiant heat infant care system or any combination thereof appropriate to the service level;

9. Equipment for stabilization of a sick infant prior to transfer that includes a radiant heat source capable of maintaining an infant's body temperature at 99°F;

10. Equipment for insertion of a thoracotomy tube; and

11. Equipment for proper administration and maintenance of phototherapy.

C. The additional equipment required for the intermediate level newborn service and for any higher service level is:

1. Pediatric infusion pumps accurate to plus or minus 1 milliliter (ml) per hour;
2. On-site supply of PgE1;
3. Equipment for 24-hour cardiorespiratory monitoring for neonatal use available for every incubator or radiant warmer;
4. Saturation monitor (pulse oximeter or equivalent) available for every infant given supplemental oxygen;
5. Portable x-ray machine; and
6. If a mechanical ventilator is selected to provide assisted ventilation prior to transport, it shall be approved for the use of neonates.

D. The additional equipment required for the specialty level newborn service and a higher newborn service is as follows:

1. Equipment for 24-hour cardiorespiratory monitoring with central blood pressure capability for each neonate with an arterial line;
2. Equipment necessary for ongoing assisted ventilation approved for neonatal use with ~~on-line~~ online capabilities for monitoring airway pressure and ventilation performance;
3. Equipment and supplies necessary for insertion and maintenance of chest tube for drainage;
4. On-site supply of surfactant;
5. Computed axial tomography equipment (CAT) or magnetic resonance imaging equipment (MRI);
6. Equipment necessary for initiation and maintenance of continuous positive airway pressure (CPAP) with ability to constantly measure delineated pressures and including alarm for abnormal pressure (i.e., vent with PAP mode); and
7. Cardioversion unit with appropriate neonatal paddles and ability to deliver appropriate small watt discharges.

E. The hospital shall document that it has the appropriate equipment necessary for any of the neonatal surgical and special procedures it provides that are specified in its medical protocol and that are required for the specialty level newborn service.

F. The additional equipment requirements for the subspecialty level newborn service are:

1. Equipment for emergency gastrointestinal, genitourinary, central nervous system, and sonographic studies available 24 hours a day;
2. Pediatric cardiac catheterization equipment;
3. Portable echocardiography equipment; and
4. Computed axial tomography equipment (CAT) and magnetic resonance imaging equipment (MRI).

G. The hospital shall document that it has the appropriate equipment necessary for any of the neonatal surgical and special procedures it provides that are specified in the medical protocol and are required for the subspecialty level newborn service.

**12VAC5-410-650. General building and physical plant information.**

A. All construction of new buildings and additions, renovations, alterations or repairs of existing buildings for occupancy as a hospital shall conform to state and local codes, zoning and building ordinances, and the Virginia Uniform Statewide Building Code (13VAC5-63).

In addition, hospitals shall be designed and constructed according to consistent with Part 1 and sections 2.1 through 2.2 through 8 of Part 2 of the 2010 [ 2014 2018 ] Guidelines for Design and Construction of Health-Care Hospitals [ and Outpatient Facilities ] of the Facilities Facility Guidelines Institute (formerly of the American Institute of Architects). However, the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence pursuant to § 32.1-127.001 of the Code of Virginia.

B. All buildings shall be inspected and approved as required by the appropriate building regulatory entity. Approval shall be a Certificate of Use and Occupancy indicating the building is classified for its proposed licensed purpose. Architectural drawings and specifications for all new construction or for additions, alterations, or renovations to any existing building shall be dated, stamped with professional seal, and signed by the architect. The architect shall certify that the drawings and specifications were prepared to conform to the Virginia Uniform Statewide Building Code (13VAC5-63) and be consistent with Part 1 and Part 2 of the [ 2014 2018 ] Guidelines for Design and Construction of Hospitals [ and Outpatient Facilities ] of the Facility Guidelines Institute. [ The certification shall be forwarded to the OLC. ]

**12VAC5-410-760. Long-term care nursing units.**

Construction and renovation of long-term care nursing units, including intermediate and skilled nursing care nursing units, shall conform to be designed and constructed consistent with section 2.1 through 3.9 [ 2.2-2.15 2.2-2.13 ] of Part 2 of the 2006 [ 2014 2018 ] Guidelines for Design and Construction of

Health-Care Hospitals [ and Outpatient Facilities ] of the American Facility Guidelines Institute of Architects pursuant to § 32.1-127.001 of the Code of Virginia.

Architectural drawings and specifications for all new construction or for additions, alterations, or renovations to any existing building shall be dated, stamped with professional seal, and signed by the architect. The architect shall certify that the drawings and specifications were prepared to conform to the Virginia Uniform Statewide Building Code (13VAC5-63) and be consistent with section [ 2.2-2.15 2.2-2.13 ] of Part 2 of the [ 2014 2018 ] Guidelines for Design and Construction of Hospitals [ and Outpatient Facilities ] of the Facility Guidelines Institute [ The certification shall be forwarded to the OLC. ]

**12VAC5-410-1350. Codes; fire safety; zoning; construction Local and state codes and standards.**

A. All construction of new buildings and additions [ , ] alterations [ , ] or repairs to existing buildings for occupancy as a "free-standing" outpatient hospital shall conform to state and local codes, zoning and building ordinances, and the Statewide Virginia Uniform Statewide Building Code (13VAC5-63).

In addition, hospitals shall be designed and constructed according to consistent with Part 1 and sections 3.1 through 3.1 through 8 [ 3.1 and 3.7 of Part 3 2.1 and 2.7 of Part 2 ] of the 2010 [ 2014 2018 ] Guidelines for Design and Construction of Health-Care [ Hospitals and ] Outpatient Facilities of the Facilities Facility Guidelines Institute (formerly of the American Institute of Architects). However, the requirements of the Uniform Statewide Building Code and local zoning and building ordinances shall take precedence pursuant to § 32.1-127.001 of the Code of Virginia.

Architectural drawings and specifications for all new construction or for additions, alterations, or renovations to any existing building shall be dated, stamped with professional seal, and signed by the architect. The architect shall certify that the drawings and specifications were prepared to conform to the Virginia Uniform Statewide Building Code (13VAC5-63) and be consistent with Part 1 and sections [ 3.1 and 3.7 of Part 3 2.1 and 2.7 of Part 2 ] of the [ 2014 2018 ] Guidelines for Design and Construction of [ Hospitals and ] Outpatient Facilities of the Facility Guidelines Institute. [ The certification shall be forwarded to the OLC. ]

B. All buildings shall be inspected and approved as required by the appropriate building regulatory entity. Approval shall be a Certificate of Use and Occupancy indicating the building is classified for its proposed licensed purpose.

C. B. The use of an incinerator shall require permitting from the nearest regional office of the Department of Environmental Quality.

D. C. Water shall be obtained from an approved water supply system. Outpatient surgery centers shall be connected to

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sewage systems approved by the Department of Health or the Department of Environmental Quality.

~~E. D.~~ Each outpatient surgery center shall establish a monitoring program for the internal enforcement of all applicable fire and safety laws and regulations.

~~F. E.~~ All radiological machines shall be registered with the Office of Radiological Health of the Virginia Department of Health. Installation, calibration and testing of machines and storage facilities shall comply with ~~12VAC5-480~~ 12VAC5-481, Virginia Radiation Protection Regulations.

~~G. F.~~ Pharmacy services shall comply with Chapter 33 (§ 54.1-3300 et seq.) of Title 54.1 of the Code of Virginia and 18VAC110-20, Regulations Governing the Practice of Pharmacy.

DOCUMENTS INCORPORATED BY REFERENCE (12VAC5-410)

[ ~~Guidelines for Design and Construction of Health Care and Outpatient Facilities, 2014 Edition, Facility Guidelines Institute (formerly of the American Institute of Architects), Washington, D.C., 2010 Edition, <http://www.fgiguilines.org>~~

Guidelines for Design and Construction of Hospitals, 2018 Edition, Facility Guidelines Institute, Washington, D.C., <http://www.fgiguilines.org>

Guidelines for Design and Construction of Outpatient Facilities, 2018 Edition, Facility Guidelines Institute, Washington, D.C., <https://fgiguilines.org> ]

VA.R. Doc. No. R13-23; Filed April 13, 2021, 10:52 a.m.

## DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

### Action Withdrawn

Titles of Regulations: 12VAC30-60. Standards Established and Methods Used to Assure High Quality Care (amending 12VAC30-60-5).

**12VAC30-141. Family Access to Medical Insurance Security Plan (amending 12VAC30-141-570).**

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Notice is hereby given that the Department of Medical Assistance Services has WITHDRAWN the proposed regulatory action for 12VAC30-60, Standards Established and Methods Used to Assure High Quality Care, and 12VAC30-141, Family Access to Medical Insurance Security Plan, that was published in 33:24 2675-2677 July 24, 2017. The provisions from this action will be included in a different regulatory action in order to ensure consistency of amendments.

Agency Contact: Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219,

telephone (804) 371-4300, FAX (804) 786-1680, or email [emily.mcclellan@dmas.virginia.gov](mailto:emily.mcclellan@dmas.virginia.gov).

VA.R. Doc. No. R16-4492; Filed April 15, 2021, 1:26 p.m.

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## TITLE 16. LABOR AND EMPLOYMENT

### DEPARTMENT OF LABOR AND INDUSTRY

#### Emergency Regulation

Title of Regulation: 16VAC15-60. Regulation Governing On-The-Job Training Programs or Other Training Programs (adding 16VAC15-60-10).

Statutory Authority: §§ 40.1-6 and 40.1-28.10 of the Code of Virginia.

Effective Dates: May 1, 2021, through October 31, 2022.

Agency Contact: Holly Trice, Attorney, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Richmond, VA 23219, telephone (804) 786-2641, FAX (804) 786-8418, or email [holly.trice@doli.virginia.gov](mailto:holly.trice@doli.virginia.gov).

#### Preamble:

*Section 2.2-4011 A of the Code of Virginia states that regulations that an agency finds are necessitated by an emergency situation may be adopted upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor.*

*In response to Chapters 1204 and 1242 of the 2020 Acts of Assembly and pursuant to § 40.1-28.10 of the Code of Virginia, the new regulation provides the standards required for any employer on-the-job training program or other training program established in accordance with the requirements of § 40.1-28.10.*

#### Chapter 60

Regulation Governing On-The-Job Training Programs or Other Training Programs

**16VAC15-60-10. Requirements for job training programs.**

A. This chapter is promulgated pursuant to § 40.1-28.10 of the Code of Virginia. Its purpose is to provide the standards required for any employer on-the-job training program or other training program established in accordance with § 40.1-28.10.

B. Beginning May 1, 2021, an employee enrolled in an established on-the-job or other training program may, for the first 90 calendar days after start of employment, be paid a training wage of not less than 75% of the minimum hourly wage specified at § 40.1-28.10, provided the following conditions are met:

1. The employee has been hired in, and is receiving training for, an occupation in which the employee has no previous similar or related experience;

2. The employer is not utilizing the employee being paid the training wage in a manner that causes, induces, encourages, or assists any displacement or partial displacement of any currently employed worker, including:

- a. By displacing any previous recipient of the training wage;
- b. By reducing hours of a currently employed worker;
- c. By replacing a current or laid off employee with a trainee;
- d. By relocating operations resulting in a loss of employment at a previous workplace; or
- e. In a manner that replaces, supplants, competes with, or duplicates any approved apprenticeship program.

3. The occupation for which the employee is receiving training must require a sufficient degree of technical skill to necessitate a learning period. The training must not be for the purpose of acquiring manual dexterity and high production speed in repetitive operations;

4. Such a training program must involve either formal instruction or on-the-job training during a period when the learners are entrusted with limited responsibility and are under supervision or guidance;

5. Such a training program shall describe in writing the nature and extent of the instruction and supervision provided;

6. The employer makes a good faith effort to continue to employ the employee after the period of the training wage expires;

7. The employer shall not hire the employee at the training wage unless there is a reasonable expectation that there will be regular employment, paying at or above the effective minimum wage, for the trainee upon the successful completion of the period of the training wage. The training wage shall not be applied to:

- a. Seasonal employees; or
- b. Temporary employees; and

8. An employee can only undergo one on-the-job training program or other training program established in accordance with § 40.1-28.10 per employer.

a. A change in employment classification or duties required by the employer of the employee would not allow an employer to place that employee in another on-the-job training program or other training program established in accordance with § 40.1-28.10.

b. An employee may be placed in another on-the-job training program or other training program established in accordance with § 40.1-28.10 with a subsequent employer

so long as placing that employee in the on-the-job training program or other training program established in accordance with § 40.1-28.10 would not violate subdivision 1 of this subsection.

VA.R. Doc. No. R21-6714; Filed April 28, 2021, 11:26 a.m.

**TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING**

**BOARD FOR BARBERS AND COSMETOLOGY**

**Reproposed Regulation**

**Titles of Regulations: 18VAC41-50. Tattooing Regulations (amending 18VAC41-50-10, 18VAC41-50-20, 18VAC41-50-30, 18VAC41-50-40, 18VAC41-50-80, 18VAC41-50-100, 18VAC41-50-110, 18VAC41-50-120, 18VAC41-50-130, 18VAC41-50-150, 18VAC41-50-160, 18VAC41-50-180, 18VAC41-50-210, 18VAC41-50-230, 18VAC41-50-250, 18VAC41-50-280, 18VAC41-50-290, 18VAC41-50-310, 18VAC41-50-360, 18VAC41-50-370, 18VAC41-50-380, 18VAC41-50-390, 18VAC41-50-400, 18VAC41-50-410, 18VAC41-50-420; adding 18VAC41-50-91, 18VAC41-50-92 [ ,—18VAC41-50-93 ]; repealing 18VAC41-50-50, 18VAC41-50-60, 18VAC41-50-90, 18VAC41-50-240, 18VAC41-50-260, 18VAC41-50-270, 18VAC41-50-320, 18VAC41-50-340, 18VAC41-50-350).**

**18VAC41-60. Body-Piercing Regulations (amending 18VAC41-60-10, 18VAC41-60-20, 18VAC41-60-30, 18VAC41-60-40, 18VAC41-60-80, 18VAC41-60-110, 18VAC41-60-120, 18VAC41-60-140, 18VAC41-60-190, 18VAC41-60-200, 18VAC41-60-220; repealing 18VAC41-60-50, 18VAC41-60-60).**

Statutory Authority: § 54.1-201 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: June 9, 2021.

Agency Contact: Stephen Kirschner, Executive Director, Board for Barbers and Cosmetology, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8590, FAX (866) 245-9693, or email [barbercosmo@dpor.virginia.gov](mailto:barbercosmo@dpor.virginia.gov).

Basis: Section 54.1-201.5 of the Code of Virginia authorizes the Board of Nursing to promulgate regulations necessary to assure continued competency, prevent deceptive or misleading practices by practitioners, and effectively administer the regulatory system administered by the regulatory board.

Purpose: The board seeks to amend its current regulations to ensure they are as least intrusive and burdensome as possible; provide an environment with the most minimal regulations necessary to protect the health, safety, and welfare of the

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public; and ensure regulations are clearly written, easily understandable, and are representative of current industry advancements and standards.

**Substance:** Following are the proposed substantive changes:

18VAC41-50-10. Definitions. New definitions of business entity, firm, guest tattooer, guest tattooer sponsor, pigments, responsible management, sole proprietor, post-secondary education level, and tattoo convention have been added. Licensee and master permanent cosmetic tattooer have been amended to further clarify terms used in subsequent regulations. Limited term tattooer has been eliminated and limited term tattoo parlor has been changed to event parlor.

18VAC41-50-20. General Requirements for tattooer, guest tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer. The proposed amendments update this section to further clarify and standardize entry requirements, including changing the limited term tattooer license into a guest tattooer license. The proposed amendments require applicants disclose all felony convictions during their lifetime and certain misdemeanors within the last two years, add that the board may deny licensure to any applicant having prior disciplinary violations for which the board deems the applicant unfit to engage in the profession, and change the exam eligibility requirements for master permanent cosmetic tattooers.

18VAC41-50-30. License by endorsement. The proposed amendments update this section to further clarify endorsement requirements.

18VAC41-50-40. Examination requirements and fees. The proposed amendments update this section to further clarify and consolidate examination requirements. The proposed amendments also add requirements that if an applicant does not apply for licensure within five years of passing both exams, he must reapply, and that the board will only retain examination records for non-applicants' for a maximum of five years.

18VAC41-50-50. Reexamination requirements. The proposed amendments repeal this section and incorporate the content into 18VAC41-50-40.

18VAC41-50-60. Examination administration. The proposed amendments repeal this section and incorporate the content into 18VAC41-50-40.

18VAC41-50-80. Tattoo parlor, event tattoo parlor, or permanent cosmetic tattoo salon license. The proposed amendments update this section to further clarify and standardize the regulation, including changing the limited term tattoo parlor license into an event tattoo parlor license. The proposed amendments (i) add the requirement that the applicant's license be in good standing; (ii) require applicants and all members of responsible management to disclose all felony convictions during their lifetime, certain misdemeanors within the last two years, and any prior discipline by a licensing entity; (iii) add that the board may deny licensure to any applicant having prior disciplinary violations for which the

board deems the applicant unfit to engage in the profession; (iv) require disclosure of the applicant's physical address, the firm's responsible management, and certification that the applicant has read applicable laws and regulations; (v) add the requirement that voided licenses be returned to the board within 30 days and set forth what events void a license; (vi) require any change in responsible management be reported to the board within 30 days of the change; (vii) add the requirement of parlors or salons that host guest tattooers must identify themselves as the sponsor and provide direct supervision of the guest tattooer.

18VAC41-50-90. Limited term tattooer license. The proposed amendments repeal this section.

18VAC41-50-91. Guest tattooer license. The proposed amendments create a two-week guest tattooer license and set the requirements for licensure, including the requirements set forth in 18VAC41-50-20 A 1 through A 4, out-of-state residency, and health education in certain areas. Up to five guest tattooer licenses may be obtained per calendar year.

18VAC41-50-92. Guest tattooer sponsor. The proposed amendments create requirements for parlor and salons to sponsor guest tattooers, including direct supervision by a licensee.

18VAC41-50-100. School license. The proposed amendments update this section to further clarify and standardize the regulation. The proposed amendments (i) add the requirement that the applicant's license be in good standing; (ii) require applicants and all members of responsible management to disclose all felony convictions during their lifetime, certain misdemeanors within the last two years, and any prior discipline by a licensing entity; (iii) add that the board may deny licensure to any applicant having prior disciplinary violations for which the board deems the applicant unfit to engage in the profession; (iv) require disclosure of the applicant's physical address, the firm's responsible management, and certification that the applicant has read applicable laws and regulations; (v) add the requirement that voided licenses be returned to the board within 30 days and set forth what events void a license; and (vi) require any change in responsible management be reported to the board within 30 days of the change.

18VAC41-50-110. Tattooer instructor certificate. The proposed amendments update this section to add the additional requirement that instructors pass a course in teaching techniques at the post-secondary education level and increase the experience requirement from three to five years.

18VAC41-50-120. Permanent cosmetic tattooer instructor certificate. The proposed amendments update this section to add the additional requirement that instructors pass a course in teaching techniques at the post-secondary education level and increase the experience requirement from three to five years.

18VAC41-50-130. Fees. The proposed amendments remove the fee for tattoo instructor endorsement, as the regulation does not allow for instructor endorsement.

18VAC41-50-150. License renewal required. The proposed amendments update this section to further clarify and standardize the requirements. Additionally, the amendments identify the expiration for the guest tattooer licenses.

18VAC41-50-160. Continuing education requirement. The proposed amendment removes the clock hour requirement from the health education needed to renew a license.

18VAC41-50-180. Failure to renew. The proposed amendments update this section to further clarify and standardize the requirements, including the addition of reinstatement requirements for tattoo schools that are consistent with other schools licensed under the board.

18VAC41-50-210. Hours of instruction and performances. The amendment changes the performances requirement from total amount to a minimum amount.

18VAC41-50-230. General Requirements. The proposed amendments update this section to further clarify and standardize the regulations. The proposed amendments also require schools to hold tattoo parlor licenses as required under § 54.1-700 of the Code of Virginia.

18VAC41-50-240. Apprenticeship curriculum requirements. The proposed action repeals this section.

18VAC41-50-250. Records. The proposed amendments add a requirement that schools provide certain documentation to students within specified time periods.

18VAC41-50-260. Hour reported. The proposed action repeals this section.

18VAC41-50-270. Health education. The proposed action repeals this section and moves its requirement to 18VAC41-50-280.

18VAC41-50-280. Tattooing school curriculum requirements. The proposed amendments update this section for consistency, add the requirement for health education from 18VAC41-50-270 and add a method for tattooer schools to award credits to transfer students.

18VAC41-50-290. Hours of instruction and performances. The proposed amendments change the hours of instruction for tattooing schools from 750 to 1,000 and the amount of hours that can be award for prior training and experience.

18VAC41-50-310. General Requirements. The proposed amendments incorporate the addition of the master permanent cosmetic tattooing program and instructor requirements for schools.

18VAC41-50-320. School Identification. The proposed action repeals this section.

18VAC41-50-340. Hour reported. The proposed action repeals this section.

18VAC41-50-350. Health education. The proposed action repeals this section and moves its requirement to 18VAC41-50-280.

18VAC41-50-360. Permanent cosmetic tattooing school curriculum requirements. The proposed amendments update

this section for consistency, add the requirement for health education from 18VAC41-50-350, and add a method for tattooer schools to award credits to transfer students and creates a curriculum for the master permanent cosmetic tattooer program.

18VAC41-50-370. Hours of instruction and performances. The proposed amendments revise the clock hour length and performances requirements of the permanent cosmetic tattooing program, and create hours and performances requirements for the master permanent cosmetic tattooing program.

18VAC41-50-380. Display of License. The proposed amendments change the location where licenses are to be displayed from the reception area to the licensee's station.

18VAC41-50-390. Physical facilities. The proposed amendments update this section to further clarify and standardize the regulation.

18VAC41-50-400. Tattooer or permanent cosmetic tattooer or master permanent cosmetic tattooer responsibilities. The proposed amendments update this section to further clarify and standardize the regulation, provide new requirements for wrapping multiuse equipment in a nonporous disposable barrier, add disinfection requirements for multiuse equipment, and add the requirement to maintain a dirty tube receptacle and sharps containers.

18VAC41-50-410. Client qualifications, disclosures, and records. The proposed amendments add a prohibition of tattooing on skin that manifests any asymmetrical, irregular, blurred, or multicolored mole.

18VAC41-50-420. Grounds for license revocation or suspension; denial of application, renewal or reinstatement; or imposition of a monetary penalty. The proposed amendments update this section to further clarify and simplify the requirements. The proposed amendments (i) provide grounds for discipline for failing to teach the approved curriculum, bribery, failing to respond or providing false or misleading information to the board or its agents, and refusing to allow inspection of any parlor, salon, or school; (ii) clarify and refine grounds for discipline for certain criminal convictions and failing to report convictions within a certain time period; and (iii) provide grounds for discipline for allowing unlicensed activity, failing to take sufficient measures to prevent transmission of communicable disease and failing to comply with all procedures with regard to conduct at the examination.

18VAC41-60-10. Definitions. New definitions of business entity, firm, responsible management, and sole proprietor have been added. Licensee has been amended to further clarify terms used in subsequent sections.

18VAC41-60-20. General requirements. The proposed amendments update this section to further clarify and standardize entry requirements. The proposed amendments require applicants to disclose all felony convictions during their lifetime and certain misdemeanors within the last two

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years, add that the board may deny licensure to any applicant having prior disciplinary violations for which the board deems the applicant unfit to engage in the profession, and incorporate registered apprenticeship as the means for qualifying for the exam.

18VAC41-60-30. License by endorsement. The proposed amendments update this section to further clarify endorsement requirements.

18VAC41-60-40. Examination requirements and fees. The proposed amendments update this section to further clarify and consolidate examination requirements. The proposed amendments also add requirements that if an applicant does not apply for licensure within five years of passing both exams, the applicant must reapply, and that the board will only retain examination records for nonapplicants for a maximum of five years.

18VAC41-60-50. Reexamination requirements. The proposed action repeals this section and incorporates the content into 18VAC41-60-40.

18VAC41-60-60. Examination administration. The proposed action repeals this section and incorporates the content into 18VAC41-60-40.

18VAC41-60-70. General requirements for a body piercing apprenticeship sponsor. The proposed amendments update this section to further clarify and standardize entry requirements.

18VAC41-60-80. Salon license. The proposed amendments update this section to further clarify and standardize the regulation. The proposed amendments (i) add the requirement that the applicant's license be in good standing; (ii) require applicants and all members of responsible management to disclose all felony convictions during their lifetime, certain misdemeanors within the last two years, and any prior discipline by a licensing entity; (iii) add that the board may deny licensure to any applicant having prior disciplinary violations for which the board deems the applicant unfit to engage in the profession; (iv) require disclosure of the applicant's physical address, the firm's responsible management, and certification that the applicant has read applicable laws and regulations; (v) add the requirement that voided licenses be returned to the board within 30 days and set forth what events void a license; and (vi) require any change in responsible management be reported to the board within 30 days of the change.

18VAC41-60-110. License renewal required. The proposed amendments update this section to further clarify and standardize the regulation.

18VAC41-60-120. Continuing education requirement. The proposed amendments update this section to further clarify the regulation.

18VAC41-60-140. Failure to renew. The proposed amendments update this section to further clarify and standardize the requirements.

18VAC41-60-160. Body piercing apprenticeship curriculum requirements. The proposed amendments update this section to further clarify and standardize the requirements.

18VAC41-60-170. Body piercing hours of instruction and performances. The proposed amendments update this section to further clarify and standardize the requirements.

18VAC41-60-180. Display of License. The proposed amendments update this section to further clarify and standardize the regulation.

18VAC41-60-190. Physical facilities. The proposed amendments update this section to further clarify and standardize the regulation.

18VAC41-60-200. Body piercer and body piercer ear only responsibilities. The proposed amendments update this section to further clarify and standardize the regulation.

18VAC41-60-210. Body piercer client qualifications, disclosures, and records. The proposed amendments update this section to further clarify and standardize the regulation.

18VAC41-60-220. Grounds for license revocation or suspension; denial of application, renewal or reinstatement; or imposition of a monetary penalty. The proposed amendments update this section to further clarify and simplify the requirements. The proposed amendments (i) provide grounds for discipline for failing to teach the approved curriculum, bribery, failing to respond or providing false or misleading information to the board or its agents, and refusing to allow inspection of any salon; (ii) clarify and refine grounds for discipline for certain criminal convictions and failing to report convictions within a certain time period; and (iii) provide grounds for discipline for allowing unlicensed activity, failing to take sufficient measures to prevent transmission of communicable disease, and failing to comply with all procedures with regard to conduct at the examination.

Issues: A primary advantage of the proposed amendments to the public is the addition of the responsible management system for tracking ownership of tattooing and body piercing businesses. This will allow the board to better identify when individuals previously disciplined by the board are attempting to reenter the profession. The addition of a two-week guest tattooer license will facilitate businesses providing better services to the public and out-of-state tattooers working as guests in Virginia and contributing to Virginia's economy, all without diminishing health and safety protections for the public. The board will continue to approve applicants and license professionals for which it has safeguards to ensure proper competency and standards of conduct as required by statute.

Another primary advantage is the improvements to the training programs. A major critique of the tattoo school programs from public comment was that the school programs do not adequately train tattooers. These changes address both the length of the program and the qualifications of the instructors, in an effort to reach minimally competent training. These

amendments also create a much-needed master permanent cosmetic tattooing training program. The services under this license are growing in demand, but there has not been a formal training curriculum in place, and individuals have had a hard time finding training in these services.

The addition of prohibited acts will reduce fraud and better ensure the regulant population is minimally competent. Further, regulants and applicants within these professions will be able to read the board's requirements with greater clarity and understanding. The added clarity of the language in the proposed regulation will facilitate a quicker and more efficient process for applicants and regulants by enhancing their understanding of their individual requirements. Consumers in the public, as well as regulators from related agencies, will have a better understanding of the board's requirements, which will also allow them to conduct business with greater efficiency and ultimately lead to a more protected public.

There are no disadvantages to the public that have been identified.

The primary advantage to the Commonwealth will be the continued successful regulation of tattooers and body piercers who meet the minimum entry standards as required by statute. The proposed amendments strengthen the department's ability to investigate and discipline regulants who disregard the health, safety, and welfare of the public. The primary disadvantage to the department is that by adding the responsible management systems, as well as adding a new type of training program, there is more complexity added to the administration of the regulation.

The clarification of the proposed language will facilitate greater understanding of the board's requirements for all involved. Several changes, including teaching techniques training for tattoo instructors, guest licenses, the master permanent cosmetic tattooing curriculum, and increasing the hours of training, were included at the request of the regulants.

### Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board for Barbers and Cosmetology (Board) proposes to: 1) add the responsible management system for tracking ownership of tattooing and body piercing businesses, 2) significantly alter the limited-term tattooer license structure, 3) amend training requirements for tattooing schools and tattoo instructors, 4) address the release of tattoo school records, and 5) make other amendments for improved clarity.

Result of Analysis. The benefits likely exceed the costs for the majority of proposed changes. For other proposed amendments it is uncertain.

### Estimated Economic Impact:

Responsible Management. The Board proposes to add the requirement that applicants for tattoo parlor, limited term tattoo parlor, permanent cosmetic tattoo salon, body piercing salon, or body piercing ear only salon, disclose the names of the firm's

responsible management. The proposed regulation defines responsible management as:

1. The sole proprietor of a sole proprietorship;
2. The partners of a general partnership;
3. The managing partners of a limited partnership;
4. The officers of a corporation;
5. The managers of a limited liability company;
6. The officers or directors of an association or both; and
7. Individuals in other business entities recognized under the laws of the Commonwealth as having a fiduciary responsibility to the firm.

The applicant and all members of the responsible management would be required to be in good standing as a licensed shop or salon in Virginia and all other jurisdictions where licensed and disclose any disciplinary action taken in Virginia and all other jurisdictions. This would allow the Board to better identify when individuals previously disciplined by the Board are attempting to re-enter the profession.

Limited-term Tattooer License. The current regulation contains a limited term tattooer license that is effective for five consecutive days prior to the expiration date. A person may obtain a maximum of five limited term tattooer licenses within a calendar year and a maximum of two limited term tattooer licenses within 30 consecutive days.

According to the Department of Professional and Occupational Regulation (DPOR), out-of-state tattooers coming to Virginia for tattoo conventions and the licensee hosts of the convention have found the need to reapply for licensure and pay the licensing fee multiple times each year to be onerous. Also according to the agency, potential guest tattooers from out-of-state and the potential hosts of the guest tattooers have often found the five-day licensing period inadequate to sufficiently justify traveling to Virginia. Parlor owners at times find having guest tattooers to be good for business. The Board proposes to eliminate the current five-day limited-term tattooer license and replace it with a one-year convention tattooer license and a two-week guest tattooer license.

For both the one-year convention tattooer license and the two-week guest tattooer license, the applicant would need to: 1) present documentation showing out-of-state residency, 2) provide documentation of health education knowledge to include but not limited to bloodborne disease, sterilization, and aseptic techniques related to tattooing, and first aid and CPR that is acceptable to the Board, 3) disclose any disciplinary action taken in Virginia or any other jurisdiction in connection with the applicant's practice, 4) disclose criminal convictions in Virginia and all other jurisdictions, and 5) sign a statement certifying that the applicant has read and understands the Virginia tattooing license laws and regulation. The guest tattooer license applicant would also need to show guest tattooer sponsorship, including signature of the sponsor parlor's responsible management. An out of state resident would be able to obtain up to three guest tattooer licenses per

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calendar year. The proposed requirements help ensure the same level of health, safety and welfare protections as under the current regulation.

Both the existing and proposed regulation contain a \$75 fee for all individual licenses.<sup>1</sup> The one-year convention license reduces administrative hassle and fees expended for applicants who intend to participate in more than one Virginia convention per year. Under the current regulation, licensure for participating at two conventions (that are not entirely within the same five-day period) would cost \$150 in fees, and licensure for participating at three conventions would cost \$225 in fees. With the proposed one-year convention license, the tattooer would only need to apply for one license a year and pay only \$75 in fees. This may encourage greater participation at Virginia tattoo conventions, helping ensure the success and continuation of such conventions.

As mentioned above, the limited term tattooer license that is effective for only five consecutive days has discouraged Virginia tattoo parlors from having out-of-state guest tattooers. The proposed two-week guest tattooer license would likely greatly alleviate that problem by providing sufficient time for the guest tattoo artist to practice and make the trip worthwhile. As some parlor owners may find having guest tattooers to be good for business, this proposal would be beneficial for the Commonwealth.

**Training Requirements.** DPOR reports that there have been numerous complaints concerning tattoo instructor teaching ability. Consequently, the Board proposes to require that tattoo instructor applicants and permanent cosmetic tattoo instructor applicants pass a course on teaching techniques at the post-secondary level. There is presumably variation in the effectiveness of such courses. Thus it is not known whether the benefits would exceed the costs of this proposed requirement. As for cost, DPOR has indicated that it would accept online courses that may cost about \$150 in fees and 24 hours (spread over six weeks) in time.<sup>2</sup>

The regulation includes an extensive list of topics to be addressed within tattooing school instruction. It currently states that the curriculum requirements shall be taught over a minimum of 750 hours. According to DPOR, there is a consensus that the curriculum requirements cannot be adequately taught within that time. Thus, the Board proposes to increase the minimum hours to 1,000. DPOR does not anticipate any objection to this change.

**Tattooing School Records.** DPOR has heard frequent complaints that tattooing schools are withholding progress documentation from their students. In response, the Board proposes to require that schools, within 21 days of a student's request, produce documentation and performances completed by that student. This provision would assist students in obtaining their records, which are needed for licensure applications.

**Businesses and Entities Affected.** The proposed amendments potentially affect the 642 tattooers, 242 tattoo parlors, 9

tattooing instructors, 5 tattoo schools, 355 permanent cosmetic tattooers, 7 master permanent cosmetic tattooers, 24 permanent cosmetic tattoo instructors, 105 permanent cosmetic tattooing salons, 14 permanent cosmetic tattooing schools, 127 body piercers, 97 body piercing salons, 304 "ear-only" body piercers, and 62 body piercer ear only salons licensed by the Board. The Board received 191 limited-term tattooer license applications in 2017, which would be replaced by an estimated 100 to 150 convention and guest tattooer applications under the proposed regulatory change.<sup>3</sup> Most, if not all, of the parlors and salons would qualify as small businesses. The proposal to require that tattoo instructor applicants and permanent cosmetic tattoo instructor applicants pass a course on teaching techniques at the post-secondary level would also affect providers of such courses.

**Localities Particularly Affected.** The proposed amendments do not disproportionately affect particular localities.

**Projected Impact on Employment.** The proposal to require that tattoo instructor applicants and permanent cosmetic tattoo instructor applicants pass a course on teaching techniques at the post-secondary level may moderately increase employment at private providers of such courses.

**Effects on the Use and Value of Private Property.** The proposal to require that tattoo instructor applicants and permanent cosmetic tattoo instructor applicants pass a course on teaching techniques at the post-secondary level would increase demand for and perhaps increase the value of private providers of such courses. To the extent that the proposed one-year convention license encourages greater participation at Virginia tattoo conventions and the proposed two-week guest tattooer license increases the profitable use of such tattoo artists at Virginia parlors, the use and value of Virginia tattoo conventions and tattoo parlors may be positively affected.

**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 proposal to require that tattoo instructor applicants and permanent cosmetic tattoo instructor applicants pass a course on teaching techniques at the post-secondary level increases costs for these individuals. This would likely add cost for tattooing schools, as they may pay for all or part of the instructor's cost, or find it more difficult to find qualified instructors. The tattooing schools are likely all small businesses.

**Alternative Method that Minimizes Adverse Impact.** The adverse impact stems from increased cost associated with trying to improve teaching quality at tattooing schools. There

is no clear alternative that would achieve this goal at lower cost.

**Adverse Impacts:**

**Businesses.** The proposal to require that tattoo instructor applicants and permanent cosmetic tattoo instructor applicants pass a course on teaching techniques at the post-secondary level increases costs for these individuals. This would likely add cost for tattooing schools, as they may pay for all or part of the instructor's cost, or find it more difficult to find qualified instructors.

**Localities.** The proposed amendments do not adversely affect localities.

**Other Entities.** The proposal to require that tattoo instructor applicants and permanent cosmetic tattoo instructor applicants pass a course on teaching techniques at the post-secondary level increases costs for these individuals.

<sup>1</sup>The existing and proposed regulations specify a \$75 fee through August 31, 2020, and a \$105 fee for September 1, 2020, and after.

<sup>2</sup>For example, as of August 24, 2018, the URL the ed2go course Teaching Adult Learners indicated a \$149 fee and 24 hours of course time over 6 weeks. <https://www.ed2go.com/courses/teacher-professional-development/child-development/ilc/teaching-adult-learners>

<sup>3</sup>Data source: Department of Professional and Occupational Regulation

**Agency's Response to Economic Impact Analysis:** The agency concurs with the approval of the economic impact analysis performed by the Department of Planning and Budget.

**Summary:**

*The proposed amendments (i) add the responsible management system for tracking ownership of tattooing and body-piercing businesses; (ii) significantly alter the limited term tattooer license structure; (iii) update training requirements for tattoo schools and tattoo instructors; (iv) address the release of tattoo school records; and (v) make other changes to clarify, update, and standardize the regulations.*

*The revised proposed amendments include (i) additional changes to the limited-term tattooer license structure, which eliminate the five-day limited-term tattooer license and replace it with a two-week guest tattooer license; (ii) further update training requirements for schools and instructors; and (iii) create a curriculum for master permanent cosmetic tattooing instruction.*

**18VAC41-50-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise. All terms defined in Chapter 7 (§ 54.1-700 et seq.) of Title 54.1 of the Code of Virginia are incorporated in this chapter.

"Apprenticeship program" means an approved tattooing training program conducted by an approved apprenticeship sponsor.

"Apprenticeship sponsor" means an individual approved to conduct tattooing apprenticeship training who meets the qualifications in 18VAC41-50-70.

"Aseptic technique" means a hygienic practice that prevents and hinders the direct transfer of microorganisms, regardless of pathogenicity, from one person or place to another person or place.

"Business entity" means a sole proprietorship, partnership, corporation, limited liability company, limited liability partnership, or any other form of organization permitted by law.

[ "Convention tattooer" means a tattooer residing outside Virginia who is licensed to work only at a tattoo convention located in Virginia. ]

"Direct supervision" means (i) that a Virginia licensed tattooer shall be present in the tattoo parlor at all times when services are being performed by an apprentice, (ii) that a Virginia licensed tattooing instructor shall be present in the tattooing school at all times when services are being performed by a student, or (iii) that a Virginia licensed permanent cosmetic tattooing instructor shall be present in the permanent cosmetic tattooing school at all times when services are being performed by a student.

"Endorsement" means a method of obtaining a license by a person who is currently licensed in another state.

[ "Event tattoo parlor" means a tattoo parlor temporary location licensed to operate for a maximum of five consecutive days. ]

"Firm" means any business entity recognized under the laws of the Commonwealth of Virginia.

"Gratuitous services" as used in § 54.1-701.5 of the Code of Virginia means providing tattooing services without receiving compensation or reward, or obligation. Gratuitous services do not include services provided at no charge when goods are purchased.

"Guest tattooer" means a tattooer or permanent cosmetic tattooer residing outside of Virginia who is licensed only to work for a two-week period at a specified tattoo parlor or permanent cosmetic tattoo salon.

"Guest tattooer sponsor" means a licensed tattoo parlor or permanent cosmetic tattooing salon that is sponsoring and providing direct supervision of a guest tattooer.

"Licensee" means any person, sole proprietorship, partnership, association, corporation, limited liability company, or corporation limited liability partnership, or any other form of organization permitted by law holding a license issued by the Board for Barbers and Cosmetology, as defined in § 54.1-700 of the Code of Virginia.

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~~"Limited term tattooer" means a tattooer licensed to perform tattooing for a maximum of five consecutive days in an organized event or in a Virginia licensed tattoo parlor.~~

~~[ "Limited term tattoo parlor" means a tattoo parlor temporary location licensed to operate for a maximum of five consecutive days. ]~~

"Master permanent cosmetic tattooer" means any person who for compensation practices permanent cosmetic tattooing known in the industry as advanced permanent cosmetic tattooing, including ~~but not limited to cheek blush~~, eye shadow, and breast and scar repigmentation or camouflage.

"Permanent cosmetic tattoo salon" means any place in which permanent cosmetic tattooing is offered or practiced for compensation.

"Permanent cosmetic tattooer" means any person who for compensation practices permanent cosmetic tattooing known in the industry as basic permanent cosmetic tattooing, including ~~but not limited to~~ eyebrows, [ microblading, ] eyeliners, lip coloring, lip liners, or full lips.

"Permanent cosmetic tattooing" means placing marks upon or under the skin of any person with ink or any other substance, resulting in the permanent coloration of the skin on the face, including ~~but not limited to~~ eyebrows, eyeliners, lip coloring, lip liners, full lips, cheek blush, eye shadow, [ forehead and scalp micropigmentation, ] and on the body for breast and scar repigmentation or camouflage; also known as permanent ~~make up~~ makeup or micropigmentation.

"Permanent cosmetic tattooing instructor" means a person who has been certified by the board who meets the competency standards of the board as an instructor of permanent cosmetic tattooing.

"Permanent cosmetic tattooing school" means a place or establishment licensed by the board to accept and train students and offers a permanent cosmetic tattooing curriculum approved by the board.

[ "Pigments" means tattooing ink designed for use on human skin. ]

"Post-secondary educational level" means an accredited college or university that is approved or accredited by an accrediting agency that is recognized by the U.S. Department of Education.

"Reinstatement" means having a license restored to effectiveness after the expiration date has passed.

"Renewal" means continuing the effectiveness of a license for another period of time.

"Responsible management" means the following individuals:

1. The sole proprietor of a sole proprietorship;
2. The partners of a general partnership;

3. The managing partners of a limited partnership;

4. The officers of a corporation;

5. The managers of a limited liability company;

6. The officers or directors of an association or both; and

7. Individuals in other business entities recognized under the laws of the Commonwealth as having a fiduciary responsibility to the firm.

"Sole proprietor" means any individual, not a corporation, who is trading under his own name or under an assumed or fictitious name pursuant to the provisions of §§ 59.1-69 through 59.1-76 of the Code of Virginia.

"Sterilization area" means a separate room or area separate from workstations with restricted client access in which tattooing instruments are cleaned, disinfected, and sterilized.

"Tattoo convention" means an event where Virginia and out-of-state tattooers gather for no more than five consecutive days to offer tattooing services to the public.

"Tattooing instructor" means a person who has been certified by the board who meets the competency standards of the board as an instructor of tattooing.

"Temporary location" means a fixed location at which tattooing is performed for a specified length of time of not more than five days in conjunction with a single event or celebration.

**18VAC41-50-20. General requirements for tattooer, limited term [ ~~convention tattooer~~ ] guest tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer.**

~~A. In order to receive a license as a tattooer, limited term tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer in compliance with § 54.1-703 of the Code of Virginia, an applicant must~~ Any individual wishing to engage in tattooing, [ ~~limited term guest~~ ] tattooing, permanent cosmetic tattooing, or master permanent cosmetic tattooing shall obtain a license in compliance with § 54.1-703 of the Code of Virginia and meet the following qualifications:

1. The applicant must be in good standing as a tattooer, limited term [ ~~convention tattooer~~, ] guest tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer in every jurisdiction where licensed, certified, or registered. The applicant shall disclose to the board at the time of application for licensure any disciplinary action taken in ~~another~~ Virginia or any other jurisdiction in connection with the applicant's practice as a tattooer, [ ~~limited term guest~~ ] tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer. This disclosure includes monetary penalties, fines, suspensions, revocations, surrender of a license in connection with a disciplinary action, or voluntary termination of a license. The applicant

shall disclose to the board at the time of application for licensure ~~whether~~ if he has been previously licensed in Virginia as a tattooer, [ ~~limited-term~~ guest ] tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer.

Upon review of the applicant's prior disciplinary action, the board, in its discretion, may deny licensure to any applicant wherein the board deems the applicant is unfit or unsuited to engage in tattooing, [ ~~convention tattooing,~~ ] guest tattooing, permanent cosmetic tattooing, or master permanent cosmetic tattooing. The board will decide each case by taking into account the totality of the circumstances. Any plea of nolo contendere or comparable plea shall be considered a disciplinary action for the purposes of this subdivision. The applicant shall provide a certified copy of a final order, decree, or case decision by a court, regulatory agency, or board with the lawful authority to issue such order, decree, or case decision, and such copy shall be admissible as prima facie evidence of such disciplinary action.

2. The applicant shall disclose his physical address. A post office box is not acceptable.

3. The applicant shall sign, as part of the application, a statement certifying that the applicant has read and understands the Virginia tattooing license laws and ~~the board's tattooing regulations~~ this chapter.

4. In accordance with § 54.1-204 of the Code of Virginia, ~~the each applicant must not have been convicted in any jurisdiction of a misdemeanor or felony that directly relates to the profession of tattooing. The board shall have the authority to determine, based upon all the information available, including the applicant's record of prior convictions, if the applicant is unfit or unsuited to engage in the profession of tattooing. The board will decide each case by taking into account the totality of the circumstances. Any plea of nolo contendere shall be considered a conviction for the purposes of this section. The applicant shall provide a certified copy of a final order, decree or case decision by a court or regulatory agency with the lawful authority to issue such order, decree or case decision, and such copy shall be admissible as prima facie evidence of such conviction. This record shall be forwarded by the applicant to the board within 10 days after all appeal rights have expired. shall disclose the following information regarding criminal convictions in Virginia and all other jurisdictions:~~

- a. All misdemeanor convictions involving moral turpitude, sexual offense, drug distribution, or physical injury within two years of the date of the application; and
- b. All felony convictions within 20 years of the date of application.

Any plea of nolo contendere shall be considered a conviction for purposes of this subdivision. The record of a conviction

received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

5. The applicant shall provide evidence satisfactory to the board that the applicant has passed the board approved examination, administered either by the board or by a designated testing service.

~~6. Persons who (i) make application for licensure between October 1, 2006, and September 30, 2007; (ii) have completed three years of documented work experience within the preceding five years as a tattooer; and (iii) have completed a minimum of five hours of health education to include but not limited to bloodborne disease, sterilization, and aseptic techniques related to tattooing and first aid and CPR that is acceptable to the board are not required to complete subdivision 5 of this subsection.~~

B. Eligibility to sit for board-approved examination.

1. Training in the Commonwealth of Virginia.

[ ~~a.~~ ] Any person completing an approved tattooing apprenticeship program in a Virginia licensed tattoo parlor or completing an approved tattooing training program in a Virginia licensed school of tattooing, or completing a permanent cosmetic tattooing [ or master permanent cosmetic tattooing ] training program in a Virginia licensed permanent cosmetic tattooing school shall be eligible to sit for the applicable examination.

[ ~~b. Any person completing master permanent cosmetic tattooing training that is acceptable to the board shall be eligible to sit for the examination. Training should be conducted in a permanent facility.~~ ]

2. Training outside of the Commonwealth of Virginia, but within the United States and its territories.

[ ~~a.~~ ] Any person completing a tattooing [ ~~or,~~ ] permanent cosmetic tattooing [ training, or master permanent cosmetic tattooing training program, ] or tattooing apprenticeship [ ~~program,~~ ] that is substantially equivalent to the Virginia program but is outside of the Commonwealth of Virginia must submit to the board documentation of the successful completion of training or apprenticeship to be eligible for examination. If less than the required hours [ ~~of tattooing or permanent cosmetic tattooing training or tattooing apprenticeship was were~~ ] completed, an applicant must submit (i) documentation acceptable to the board verifying the completion of a substantially equivalent tattooing training or tattooing apprenticeship or permanent cosmetic tattooing training [ or master permanent cosmetic tattooing ] or documentation of three years of work experience within the preceding five years as a tattooer; and (ii) documentation of completion of a minimum of five hours of health education to include ~~but not limited to blood-~~

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borne disease (a) bloodborne pathogens, sterilization, and aseptic techniques related to tattooing and; (b) first aid; and (c) CPR that is acceptable to the board in order to be eligible for examination.

[ ~~b. Any person completing master permanent cosmetic tattooing training that is acceptable to the board shall be eligible to sit for the examination. Training should be conducted in a permanent facility. ]~~

## 18VAC41-50-30. License by endorsement.

Upon proper application to the board, any person currently licensed to practice as a tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer in any other state or jurisdiction of the United States and who has completed a training or apprenticeship program and an examination that is substantially equivalent to that required by this chapter may be issued a tattooer license, permanent cosmetic tattooer license, or master permanent cosmetic tattooer license, respectively, without an examination. The applicant must also meet the requirements set forth in 18VAC41-50-20 A 1 through A 4.

## 18VAC41-50-40. Examination requirements and fees.

A. Applicants for initial licensure shall pass an examination approved by the board. The examinations may be administered by the board or by a designated testing service.

B. Any candidate failing to appear as scheduled for examination shall forfeit the examination fee.

C. The applicant shall follow all procedures established by the board with regard to conduct at the examination. Such procedures shall include any written instructions communicated prior to the examination date and any instructions communicated at the site, either written or oral, on the date of the examination. Failure to comply with all procedures established by the board and the testing service with regard to conduct at the examination may be grounds for denial of application.

D. Any applicant who does not pass a reexamination within one year of the initial examination date shall be required to submit a new application.

E. The fee for examination or reexamination is subject to contracted charges to the board by an outside vendor. These contracts are competitively negotiated and bargained for in compliance with the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). Fees may be adjusted and charged to the candidate in accordance with these contracts. The fee shall not exceed \$225 per candidate.

F. Any candidate failing to apply for initial licensure within five years of passing the written examination shall be required to retake the examination. Records of examinations shall be maintained for a maximum of five years.

## 18VAC41-50-50. ~~Reexamination~~ requirements. ~~(Repealed.)~~

~~Any applicant who does not pass a reexamination within one year of the initial examination date shall be required to submit a new application and examination fee.~~

## 18VAC41-50-60. Examination administration. ~~(Repealed.)~~

~~A. The examinations may be administered by the board or the designated testing service.~~

~~B. The applicant shall follow all procedures established by the board with regard to conduct at the examination. Such procedures shall include any written instructions communicated prior to the examination date and any instructions communicated at the site, either written or oral, on the date of the examination. Failure to comply with all procedures established by the board and the testing service with regard to conduct at the examination may be grounds for denial of application.~~

~~C. The fee for examination or reexamination is subject to contracted charges to the board by an outside vendor. These contracts are competitively negotiated and bargained for in compliance with the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). Fees may be adjusted and charged to the candidate in accordance with these contracts. The fee shall not exceed \$225 per candidate.~~

## 18VAC41-50-80. Tattoo parlor, [ limited term event ] tattoo parlor, or permanent cosmetic tattoo.

A. Any ~~individual~~ firm wishing to operate a tattoo parlor, [ limited term event ] tattoo parlor, or permanent cosmetic tattoo salon shall obtain a tattoo parlor license, [ limited term event ] tattoo parlor license, or permanent cosmetic tattoo salon license in compliance with § 54.1-704.1 of the Code of Virginia, and shall meet the following qualifications in order to receive a license:

1. The applicant and all members of the responsible management shall be in good standing as a licensed parlor or salon in Virginia and all other jurisdictions where licensed. The applicant and all members of the responsible management shall disclose to the board at the time of application for licensure any disciplinary action taken in Virginia and all other jurisdictions in connection with the applicant's operation of any tattoo parlor, [ limited term event ] tattoo parlor, or permanent cosmetic tattoo salon or practice of the profession. This disclosure includes monetary penalties, fines, suspensions, revocations, surrender of a license in connection with a disciplinary action, or voluntary termination of a license. The applicant shall disclose to the board at the time of application for licensure if the applicant or any member of the responsible management has been previously licensed in Virginia as a tattoo parlor, [ limited term event ] tattoo parlor, or permanent cosmetic tattoo salon.

Upon review of the applicant's and all members of the responsible management's prior disciplinary action, the board, in its discretion, may deny licensure to any applicant wherein it deems the applicant is unfit or unsuited to engage in the operation of a tattoo parlor, [ ~~limited term event~~ ] tattoo parlor, or permanent cosmetic tattoo salon. The board will decide each case by taking into account the totality of the circumstances. Any plea of nolo contendere or comparable plea shall be considered a disciplinary action for the purposes of this subdivision. The applicant shall provide a certified copy of a final order, decree, or case decision by a court, regulatory agency, or board with the lawful authority to issue such order, decree, or case decision, and such copy shall be admissible as prima facie evidence of such disciplinary action.

2. The applicant shall disclose his physical address. A post office box is not acceptable.

3. The applicant shall sign, as part of the application, a statement certifying that the applicant has read and understands the Virginia tattooing license laws and this chapter.

4. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose the following information about the firm and all members of the responsible management regarding criminal convictions in Virginia and all other jurisdictions:

- a. All misdemeanor convictions involving moral turpitude, sexual offense, drug distribution, or physical injury within two years of the date of the application; and
- b. All felony convictions within 20 years of the date of application.

Any plea of nolo contendere shall be considered a conviction for purposes of this subdivision. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

5. The applicant shall disclose the firm's responsible management.

B. A tattoo parlor license, [ ~~limited term event~~ ] tattoo parlor license, or permanent cosmetic tattoo salon license shall not be transferable and shall bear the same name and address of the business. Any changes in the name, ~~or~~ address, ~~or~~ ownership of the parlor or salon shall be reported to the board in writing within 30 days of such changes. New owners shall be responsible for ~~reporting such changes in writing to the board~~ applying for a new license within 30 days of the changes.

C. In the event of a closing of a tattoo parlor or permanent cosmetic tattoo salon, the board must be notified by the owners in writing within 30 days of the closing, and the license must be returned by the owners to the board. ~~Whenever the legal~~

business entity holding the license is dissolved or altered to form a new business entity, the original license becomes void and shall be returned to the board within 30 days of the change. Additionally, the firm shall apply for a new license within 30 days of the change in the business entity. Such changes include:

- 1. Death of a sole proprietor;
- 2. Death or withdrawal of a general partner in a general partnership or the managing partner in a limited partnership; and
- 3. Conversion, formation, or dissolution of a corporation, a limited liability company, an association, or any other business entity recognized under the laws of the Commonwealth of Virginia.

D. Any change in the officers of a corporation, managers of a limited liability company, or officers or directors of an association shall be reported to the board in writing within 30 days of the change.

E. Any tattoo parlor or permanent cosmetic tattoo salon wishing to host a guest tattooer must identify itself as the guest tattooer sponsor and must provide direct supervision of any tattooing by the guest tattooer.

~~D. F.~~ Any individual firm wishing to operate a tattoo parlor in a temporary location must have a tattoo parlor license or [ ~~limited term event~~ ] tattoo parlor license issued by the board.

~~E. G.~~ A [ ~~limited term event~~ ] tattoo parlor license is effective for five consecutive days prior to the expiration date.

~~F. H.~~ A person or entity firm may obtain a maximum of five [ ~~limited term event~~ ] tattoo parlor licenses within a calendar year.

~~G. [ ~~I. A person or entity firm may obtain a maximum of two limited term tattoo parlor licenses within a 30 consecutive days time period. ]~~~~

**18VAC41-50-90. Limited term tattooer license. (Repealed.)**

~~A. A limited term tattooer license is effective for five consecutive days prior to the expiration date.~~

~~B. A person may obtain a maximum of five limited term tattooer licenses within a calendar year.~~

~~C. A person may obtain a maximum of two limited term tattooer licenses within a 30 consecutive days time period.~~

~~D. A limited term tattooer applicant must meet the following qualifications:~~

- ~~1. Requirements set forth in 18VAC41-50-20 A 1 through A 4.~~
- ~~2. Documentation of health education knowledge to include but not limited to blood borne disease, sterilization, and~~

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aseptic techniques related to tattooing, and first aid and CPR that is acceptable to the board.

~~E. A limited term tattooer applicant is not required to complete 18VAC41-50-20 A 5.~~

## **18VAC41-50-91. [ Convention Guest ] tattooer license.**

~~[ A. A convention tattooer license shall expire one year from the last day of the month in which it was issued.~~

~~B. A convention tattooer applicant must meet the following qualifications:~~

~~1. Requirements set forth in 18VAC41-50-20 A 1 through A 4.~~

~~2. Present documentation showing out of state residency.~~

~~3. Documentation of health education knowledge to include (i) bloodborne disease, sterilization, and aseptic techniques related to tattooing; (ii) first aid; and (iii) CPR that is acceptable to the board.~~

~~C. A convention tattooer applicant is not required to complete 18VAC41-50-20 A 5.~~

~~A. A guest tattooer license is effective for 14 days prior to the expiration date.~~

~~B. An out-of-state resident may obtain up to five guest tattooer licenses per calendar year.~~

~~C. A guest tattooer applicant must meet the following qualifications:~~

~~1. Requirements set forth in 18VAC41-50-20 A 1 through A 4.~~

~~2. Present documentation showing out-of-state residency.~~

~~3. Documentation of health education knowledge to include (i) bloodborne disease, sterilization, and aseptic techniques related to tattooing; (ii) first aid; and (iii) CPR that is acceptable to the board.~~

~~4. Documentation showing guest tattooer sponsor, including signature of sponsor parlor's responsible management.~~

~~D. A guest tattooer must provide the name and license number of the guest tattooer's sponsor, and the duration of the guest tattooer's tattooing for all guest tattooer locations.~~

~~E. A guest tattooer applicant is not required to complete 18VAC41-50-20 A 5. ]~~

## **18VAC41-50-92. Guest tattooer [ sponsor ].**

~~[ A. A guest tattooer license is effective for 14 days prior to the expiration date.~~

~~B. An out of state resident may obtain up to three guest tattooer licenses per calendar year.~~

~~C. A guest tattooer applicant must meet the following qualifications:~~

~~1. Requirements set forth in 18VAC41-50-20 A 1 through A 4.~~

~~2. Present documentation showing out of state residency.~~

~~3. Documentation of health education knowledge to include (i) bloodborne disease, sterilization, and aseptic techniques related to tattooing; (ii) first aid; and (iii) CPR that is acceptable to the board.~~

~~4. Documentation showing guest tattooer sponsor including signature of sponsor parlor's responsible management.~~

~~D. A guest tattooer applicant is not required to complete 18VAC41-50-20 A 5.~~

~~A. The licensed tattoo parlor that agrees to sponsor a guest tattooer shall ensure that the guest tattooer:~~

~~1. Has a valid, current guest tattooer license for the entire duration of his tattooing at the parlor.~~

~~2. Is directly supervised by a licensed tattooer.~~

~~3. Complies with all Virginia regulations relating to health, sanitation, client qualifications, and standards of practice.~~

~~B. The licensed permanent cosmetic tattooing salon that agrees to sponsor a guest tattooer shall ensure that the guest tattooer:~~

~~1. Has a valid, current guest tattooer licensed for the entire duration of his tattooing at the salon.~~

~~2. Is directly supervised by a licensed tattooer or permanent cosmetic tattooer.~~

~~3. Complies with all Virginia regulations relating to health, sanitation, client qualifications, and standards of practice.~~

~~C. With the exception of tattoo conventions, a member of the guest tattooer sponsor's responsible management must sign the guest tattooer application certifying the sponsor will ensure the requirements of subsections A and B of this section.~~

~~D. The guest tattooer sponsor shall be responsible for the acts or omissions of the guest tattooer in the performance of tattooing or permanent cosmetic tattooing. ]~~

## **[ 18VAC41-50-93. Guest tattooer sponsor.**

~~A. The licensed tattoo parlor that agrees to sponsor a guest tattooer shall ensure that the guest tattooer:~~

~~1. Has a valid, current guest tattooer license for the entire duration of his tattooing at the parlor.~~

~~2. Is directly supervised by a licensed tattooer.~~

~~3. Complies with all Virginia regulations relating to health, sanitation, client qualifications, and standards of practice.~~

~~B. The licensed permanent cosmetic tattooing salon that agrees to sponsor a guest tattooer shall ensure that the guest tattooer:~~

~~1. Has a valid, current guest tattooer licensed for the entire duration of his tattooing at the salon.~~

~~2. Is directly supervised by a licensed tattooer or permanent cosmetic tattooer.~~

~~3. Complies with all Virginia regulations relating to health, sanitation, client qualifications, and standards of practice.~~

~~C. The guest tattooer sponsor's responsible management must sign the guest tattooer application certifying the sponsor will ensure the requirements of subsections A and B of this section.~~

~~D. The guest tattooer sponsor shall be responsible for the acts or omissions of the guest tattooer in the performance of tattooing or permanent cosmetic tattooing. ]~~

## 18VAC41-50-100. School license.

A. Any ~~individual~~ firm wishing to operate a tattooing school or permanent cosmetic tattooing school shall obtain a school license in compliance with § 54.1-704.2 of the Code of Virginia ~~and shall meet the following qualifications in order to receive a license:~~

1. The applicant and all members of the responsible management shall be in good standing as a licensed parlor or salon in Virginia and all other jurisdictions where licensed. The applicant and all members of the responsible management shall disclose to the board at the time of application for licensure any disciplinary action taken in Virginia and all other jurisdictions in connection with the applicant's operation of any tattoo parlor, event tattoo parlor, or permanent cosmetic tattoo salon or practice of the profession. This disclosure includes monetary penalties, fines, suspensions, revocations, surrender of a license in connection with a disciplinary action, or voluntary termination of a license. The applicant shall disclose to the board at the time of application for licensure if the applicant or any member of the responsible management has been previously licensed in Virginia as a tattoo parlor, event tattoo parlor, or permanent cosmetic tattoo salon.

Upon review of the applicant's and all members of the responsible management's prior disciplinary action, the board, in its discretion, may deny licensure to any applicant wherein it deems the applicant is unfit or unsuited to engage in the operation of a tattoo parlor, event tattoo parlor, or permanent cosmetic tattoo salon. The board will decide each case by taking into account the totality of the circumstances. Any plea of nolo contendere or comparable plea shall be considered a disciplinary action for the purposes of this subdivision. The applicant shall provide a certified copy of a final order, decree, or case decision by a court, regulatory agency, or board with the lawful authority to issue such order, decree, or case decision, and such copy shall be admissible as prima facie evidence of such disciplinary action.

2. The applicant shall disclose his physical address. A post office box is not acceptable.

3. The applicant shall sign, as part of the application, a statement certifying that the applicant has read and understands the Virginia tattooing license laws and this chapter.

4. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose the following information about the firm and all members of the responsible management regarding criminal convictions in Virginia and all other jurisdictions:

- a. All misdemeanor convictions involving moral turpitude, sexual offense, drug distribution, or physical injury within two years of the date of the application; and
- b. All felony convictions within 20 years of the date of application.

Any plea of nolo contendere shall be considered a conviction for purposes of this subdivision. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

5. The applicant shall disclose the firm's responsible management.

B. A tattooing school license or permanent cosmetic tattooing school license shall not be transferable and shall bear the same name and address as the school. Any changes in the name or address of the school shall be reported to the board in writing within 30 days of such change. The name of the school must indicate that it is an educational institution. All signs or other advertisements must reflect the name as indicated on the license issued by the board and contain language indicating it is an educational institution.

~~C. In the event of a change of ownership of a school, the new owners shall be responsible for reporting such changes in writing to the board within 30 days of the changes. Whenever the legal business entity holding the license is dissolved or altered to form a new business entity, the original license becomes void and shall be returned to the board within 30 days of the change. Additionally, the firm shall apply for a new license within 30 days of the change in the business entity. Such changes include:~~

1. Death of a sole proprietor;
2. Death or withdrawal of a general partner in a general partnership or the managing partner in a limited partnership; and
3. Conversion, formation, or dissolution of a corporation, a limited liability company, an association, or any other business entity recognized under the laws of the Commonwealth of Virginia.

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D. ~~In the event of a school closing, the board must be notified by the owners in writing within 30 days of the closing, and the license must be returned. Within 30 days of the closing, the school shall return the license to the board and provide a written report to the board on performances and hours of each student who has not completed the program.~~

E. Any change in the officers of a corporation, managers of a limited liability company, or officers or directors of an association shall be reported to the board in writing within 30 days of the change.

## 18VAC41-50-110. Tattooing instructor certificate.

A. Upon filing an application with the Board for Barbers and Cosmetology, any person meeting the qualifications set forth in this section shall be eligible for a tattooing instructor certificate if the person:

1. Holds a current Virginia tattooer license; ~~and~~
2. Provides documentation of [ ~~three years of work experience within the past~~ legally tattooing for at least ] five years; ~~and~~
3. Passes a course on teaching techniques in a post-secondary education level.

B. Tattooing instructors shall be required to maintain a tattooer license.

## 18VAC41-50-120. Permanent cosmetic tattooing instructor certificate.

A. Upon filing an application with the Board for Barbers and Cosmetology, any person meeting the qualifications set forth in this section shall be eligible for a permanent cosmetic tattooing instructor certificate if the person:

1. Holds a current Virginia permanent cosmetic tattooer license or master permanent cosmetic tattooer license; ~~and~~
2. Provides documentation of [ ~~three years of work experience within the past~~ legally tattooing for at least ] five years; ~~and~~
3. Passes a course on teaching techniques at the post-secondary education level.

B. Permanent cosmetic tattooing instructors shall be required to maintain a permanent cosmetic tattooer license or master permanent cosmetic tattooer license.

## 18VAC41-50-130. Fees.

The following fees apply:

FEE TYPE	AMOUNT DUE September 1, 2016, through August 31, 2020	AMOUNT DUE September 1, 2020, and after	WHEN DUE
Individuals:			
Application	\$75	\$105	With application
License by Endorsement	\$75	\$105	With application
Renewal	\$75	\$105	With renewal card prior to expiration date
Reinstatement	\$150* *includes \$75 renewal fee and \$75 reinstatement fee	\$210* *includes \$105 renewal fee and \$105 reinstatement fee	With reinstatement application
Instructors:			
Application	\$100	\$125	With application
<del>License by Endorsement</del>	<del>\$100</del>	<del>\$125</del>	<del>With application</del>
Renewal	\$100	\$150	With renewal card prior to expiration date
Reinstatement	\$200* *includes \$100 renewal fee and \$100 reinstatement fee	\$300* *includes \$150 renewal fee and \$150 reinstatement fee	With reinstatement application
Parlors or salons:			
Application	\$130	\$190	With application
Renewal	\$130	\$190	With renewal card prior to expiration date

Reinstatement	\$260* *includes \$130 renewal fee and \$130 reinstatement fee	\$380* *includes \$190 renewal fee and \$190 reinstatement fee	With reinstatement application
Schools:			
Application	\$140	\$220	With application
Renewal	\$140	\$220	With renewal card prior to expiration date
Reinstatement	\$280* *includes \$140 renewal fee and \$140 reinstatement fee	\$440* *includes \$220 renewal fee and \$220 reinstatement fee	With reinstatement application

Part IV

Renewal/Reinstatement Renewal and Resinstatement

**18VAC41-50-150. License renewal required.**

All ~~tattooer~~ [ ~~1. A.~~ ] Tattooer licenses, tattoo parlor licenses, tattooing instructors licenses, tattooing schools licenses, permanent cosmetic tattooer licenses, master permanent cosmetic tattooer licenses, permanent cosmetic tattoo salon licenses, and permanent cosmetic tattooing schools licenses shall expire two years from the last day of the month in which they were issued.

[ ~~2. Convention tattooer licenses shall expire one year from the last day of the month in which it was issued.~~

~~3. B.~~ ] Guest tattooer licenses will expire 14 days after the effective date of the license and may not be renewed.

**18VAC41-50-160. Continuing education requirement.**

All licensed tattooers, permanent cosmetic tattooers, and master permanent cosmetic tattooers shall be required to satisfactorily complete [ ~~a minimum of five hours of~~ ] health education to include ~~but not limited to~~ (i) bloodborne disease, sterilization, and aseptic techniques related to tattooing; (ii) first aid; and (iii) CPR during their licensed term. Documentation of training completion shall be provided at the time of renewal along with the required fee.

**18VAC41-50-180. Failure to renew.**

A. When a ~~tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer~~ licensed or certified individual or business entity fails to renew his its license within 30 days following ~~its~~ the expiration date of the license, the licensee shall meet the renewal requirements as prescribed in

18VAC41-50-170 and apply for reinstatement of the license by submitting to the Department of Professional and Occupational Regulation a reinstatement application along with the required renewal and reinstatement fees.

B. When a ~~tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer~~ licensed or certified individual or business entity fails to renew his its license within two years following the expiration date, reinstatement is no longer possible. To resume practice, the former licensee shall apply for licensure as a new applicant, shall meet all current application requirements, shall pass the board's current examination, and shall receive a new license.

C. ~~When a tattoo parlor or permanent cosmetic tattoo salon fails to renew its license within 30 days following the expiration date, it shall be required to apply for reinstatement of the license by submitting to the Department of Professional and Occupational Regulation a reinstatement application along with the required renewal and reinstatement fees.~~

~~D. When a tattoo parlor or permanent cosmetic tattoo salon fails to renew its license within two years following the expiration date, reinstatement is no longer possible. To resume practice, the former licensee shall apply for licensure as a new applicant and shall meet all current application requirements.~~

~~E. When a tattooing school or permanent cosmetic tattooing school fails to renew its license within 30 days following the expiration date, the licensee shall be required to apply for reinstatement of the license by submitting to the Department of Professional and Occupational Regulation a reinstatement application along with the required renewal and reinstatement fees.~~

~~F. When a tattooing school or permanent cosmetic tattooing school fails to renew its license within two years following the expiration date, reinstatement is no longer possible. To resume practice, the former licensee shall apply for licensure as a new applicant and shall meet all current application requirements.~~

C. The application for reinstatement for a school shall provide (i) the reasons for failing to renew prior to the expiration date, and (ii) a notarized statement that all students currently enrolled or seeking to enroll at the school have been notified in writing that the school's license has expired. All of these materials shall be called the application package. Reinstatement will be considered by the board if the school consents to and satisfactorily passes an inspection of the school and if the school's records are maintained in accordance with 18VAC41-50-250 and 18VAC41-50-330. Pursuant to 18VAC41-50-100, 18VAC41-50-230, and 18VAC41-50-310 upon receipt of the reinstatement fee, application package, and inspection results, the board may reinstate the school's license or require requalification or both. If the reinstatement application package and reinstatement fee are not received by the board within six months following the expiration date of the school's license, the board will notify the testing service

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that prospective graduates of the unlicensed school are not acceptable candidates for the examination. Such notification will be sent to the school and must be displayed in a conspicuous manner by the school in an area that is accessible to the public. No student shall be disqualified from taking the examination because the school was not licensed for a portion of the time the student attended if the school license is reinstated by the board.

~~G. D.~~ The date a renewal fee is received by the Department of Professional and Occupational Regulation, or its agent, will be used to determine whether the requirement for reinstatement of a license is applicable and an additional fee is required.

~~H. E.~~ When a license is reinstated, the licensee shall have the same license number and shall be assigned an expiration date two years from the previous expiration date of the license date of the last day of the month of reinstatement.

~~I. F.~~ A licensee ~~who that~~ reinstates ~~his its~~ license shall be regarded as having been continuously licensed without interruption. Therefore, a licensee shall be subject to the authority of the board for activities performed prior to reinstatement.

~~J. G.~~ A licensee ~~who that~~ fails to reinstate ~~his its~~ license shall be regarded as unlicensed from the expiration date of the license forward. Nothing in this chapter shall divest the board of its authority to discipline a licensee for a violation of the law or regulations during the period of time for which the individual was licensed.

## [ 18VAC41-50-210. Hours of instruction and performances.

A. Curriculum requirements specified in 18VAC41-50-200 shall be taught over a minimum of 1500 hours as follows:

1. 350 hours shall be devoted to theory pertaining to subdivisions 1, 2, 4, 5, 6, 8, and 9 of 18VAC41-50-200;
2. 150 hours shall be devoted to theory pertaining to subdivision 3 of 18VAC41-50-200; and
3. The remaining 1000 hours shall be devoted to practical training to include but not limited to apprenticeship curriculum requirements and a ~~total~~ minimum of 100 performances pertaining to subdivision 7 of 18VAC41-50-200.

B. An approved tattooing apprenticeship program may conduct an assessment of an apprentice's competence in the theory and practical requirements for tattooing and, based on the assessment, give a maximum of 700 hours of credit towards the requirements in subdivisions A 1 and A 3 of this section. No credit shall be allowed for the 150 hours required in subdivision A 2 of this section. ]

## 18VAC41-50-230. General requirements.

A tattooing school shall:

1. Hold a tattooing school license for each and every location.
2. Hold a tattoo parlor license ~~if the school receives compensation for services provided in the area where practical instruction is conducted and services are provided.~~
3. Employ a staff of certified tattooing instructors.
4. Develop individuals for entry-level competency in tattooing.
5. Submit its curricula for board approval. All changes to curricula must be resubmitted and approved by the board.
6. Inform the public that all services are performed by students if the tattooing school receives compensation for services provided in its clinic by posting a notice in the reception area of the shop or salon in plain view of the public.
7. Conduct classroom instruction in an area separate from the area where practical instruction is conducted and services are provided.
8. Conduct all instruction and training of tattooers under the direct supervision of a certified tattooing instructor.

## 18VAC41-50-240. School identification. (Repealed.)

~~Each tattooing school approved by the board shall identify itself to the public as a teaching institution.~~

## 18VAC41-50-250. Records.

A. Schools are required to keep upon graduation, termination, or withdrawal, written records of hours and performances showing what instruction a student has received for a period of five years after the student terminates or completes the curriculum of the school. These records shall be available for inspection by the department. All records must be kept on the premises of each school.

B. For a period of five years after a student completes the curriculum, terminates, or withdraws from the school, schools are required to provide documentation of hours and performances completed by a student upon receipt of a written request from the student.

C. Schools shall within 21 days upon receipt of a written request from a student provide documentation of hours and performances completed by the student as required to be maintained by subsection A of this section.

~~C. D.~~ Prior to a school changing ownership or a school closing, the schools are required to provide to current students documentation of hours and performances completed.

~~D. E.~~ For a period of one year after a school changes ownership, schools are required to provide documentation of

hours and performances completed by a current student upon receipt of a written request from the student.

**18VAC41-50-260. Hours reported. (Repealed.)**

~~Within 30 days of the closing of a licensed tattooing school for any reason, the school shall provide a written report to the board on performances and hours of each of its students who has not completed the program.~~

**18VAC41-50-270. Health education. (Repealed.)**

~~Any person desiring to enroll in the tattooing school shall be required to provide documentation of satisfactory completion of a minimum of five hours of health education to include but not limited to blood borne disease, sterilization, and aseptic techniques related to tattooing, and first aid and CPR.~~

**18VAC41-50-280. Tattooing school curriculum requirements.**

A. Any person desiring to enroll in the tattooing school shall be required to provide documentation of satisfactory completion of a minimum of five hours of health education to include (i) bloodborne disease, sterilization, and aseptic techniques related to tattooing; (ii) first aid; and (iii) CPR.

B. Tattooing school curriculum requirements are as follows:

1. Microbiology.
  - a. Microorganisms, viruses, bacteria, fungus;
  - b. Transmission cycle of infectious diseases; and
  - c. Characteristics of antimicrobial agents.
2. Immunization.
  - a. Types of immunizations;
  - b. Hepatitis ~~A—G~~ A through G transmission and immunization;
  - c. HIV/AIDS;
  - d. Tetanus, streptococcal, zoonotic, tuberculosis, pneumococcal, and influenza;
  - e. Measles, mumps, and rubella;
  - f. Vaccines and immunization; and
  - g. General preventative measures to be taken to protect the tattooer and client.
3. Sanitation and disinfection.
  - a. Definition of terms:
    - (1) Sterilization;
    - (2) Disinfection and disinfectant;
    - (3) Sterilizer or sterilant;
    - (4) Antiseptic;
    - (5) Germicide;
    - (6) Decontamination; and
    - (7) Sanitation.
4. Safety.
  - a. Proper needle handling and disposal;
  - b. How to avoid overexposure to chemicals;
  - c. The use of Material Safety Data Sheets;
  - d. Blood spill procedures;
  - e. Equipment and instrument storage; and
  - f. First aid and CPR.
5. ~~Blood borne~~ Bloodborne pathogen standards.
  - a. OSHA and CDC ~~blood borne~~ bloodborne pathogen standards;
  - b. Control plan for ~~blood borne~~ bloodborne pathogens;
  - c. Exposure control plan for tattooers;
  - d. Overview of compliance requirements; and
  - e. Disorders and when not to service a client.
6. Professional standards.
  - a. History of tattooing;
  - b. Ethics;
  - c. Recordkeeping:
    - (1) Client health history;
    - (2) Consent forms; and
    - (3) HIPAA (Health Insurance Portability and Accountability Act of 1996 Privacy Rule) Standards.
  - d. Preparing station, making appointments, parlor ethics:
    - (1) Maintaining professional appearance, notifying clients of schedule changes; and
    - (2) Promoting services of the parlor and establishing clientele.
  - e. Parlor management.
    - (1) Licensing requirements; and
    - (2) Taxes.
  - f. Supplies.
    - (1) Usages;
    - (2) Ordering; and
    - (3) Storage.
7. Tattooing.
  - a. Client consultation;
  - b. Client health form;
  - c. Client disclosure form;

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- d. Client preparation;
- e. Sanitation and safety precautions;
- f. Implement selection and use;
- g. Proper use of equipment;
- h. Material selection and use;

i. Needles;

[ (1) Groupings;

(2) Properties; and

(3) Making; ]

j. Ink;

k. Machine:

(1) Construction;

(2) Adjustment; and

(3) Power supply;

l. Art, drawing; and

m. Portfolio.

8. Anatomy.

a. Understanding of skin; and

b. Parts and functions of skin.

9. Virginia tattooing laws and regulations.

[ C. A licensed tattoo school may conduct an assessment of a student's competence in the respective profession and, based on the assessment, give credit toward the hours requirements specified in this section and 18VAC41-50-290.

The school shall make the assessment based on a review of the student's transcript and the successful completion of a board-approved competency examination administered by the school. The school may also request a copy of a catalog or bulletin giving the full course description when making the evaluation. The number of credit hours awarded shall not exceed the actual hours of instruction verified on the transcript or the number of hours specified in the board-approved curriculum for a specific topic. Credit may only be given for in-person training. ]

## **18VAC41-50-290. Hours of instruction and performances.**

A. Curriculum requirements specified in 18VAC41-50-280 shall be taught over a minimum of ~~750~~ 1,000 hours as follows:

1. 350 hours shall be devoted to theory pertaining to ~~subdivisions 18VAC41-50-280 B 1, 2, 4, 5, 6, 8, and 9 of 18VAC41-50-280;~~

2. 150 hours shall be devoted to theory pertaining to subdivision 3 of 18VAC41-50-280; and

3. The remaining ~~250~~ 500 hours shall be devoted to practical training to include ~~but not limited to~~ tattooing curriculum requirements and a [ ~~total~~ minimum ] of 100 performances pertaining to ~~subdivision 7 of 18VAC41-50-280 B 7.~~

B. An approved tattooing school may conduct an assessment of a student's competence in the theory and practical requirements for tattooing and, based on the assessment, give a maximum of [ ~~350-700~~ ] hours of credit ~~towards~~ toward the requirements in subdivisions A 1 and A 3 of this section. No credit shall be allowed for the 150 hours required in subdivision A 2 of this section.

## **[ 18VAC41-50-310. General requirements.**

A permanent cosmetic tattooing school shall:

1. Hold a permanent cosmetic tattooing school license for each and every location.

2. Hold a permanent cosmetic tattoo salon license if the school receives compensation for services provided in the area where practical instruction is conducted and services are provided.

3. Employ a staff of certified permanent cosmetic tattooing instructors or certified master permanent cosmetic tattooing instructors.

4. Develop individuals for entry-level competency in permanent cosmetic tattooing or master permanent cosmetic tattooing.

5. Submit its curricula for board approval.

6. Inform the public that all services are performed by students if the permanent cosmetic tattooing school receives compensation for services provided in its clinic by posting a notice in the reception area of the shop or salon in plain view of the public.

7. Conduct classroom instruction in an area separate from the area where practical instruction is conducted and services are provided.

8. Conduct all instruction and training of permanent cosmetic tattooers under the direct supervision of a certified permanent cosmetic tattooing instructor or a certified master permanent cosmetic tattooing instructor.

9. Conduct all instruction and training of master permanent cosmetic tattooers under the direct supervision of a certified master permanent cosmetic tattooing instructor. ]

## **18VAC41-50-320. School identification. (Repealed.)**

~~Each permanent cosmetic tattooing school approved by the board shall identify itself to the public as a teaching institution.~~

## **18VAC41-50-340. Hours reported. (Repealed.)**

~~Within 30 days of the closing of a licensed permanent cosmetic tattooing school for any reason, the school shall provide a written report to the board on performances and hours of each of its students who have not completed the program.~~

**18VAC41-50-350. Health education. (Repealed.)**

~~Any person desiring to enroll in the permanent cosmetic tattooing school shall be required to provide documentation of satisfactory completion of health education on blood borne disease.~~

**18VAC41-50-360. Permanent cosmetic tattooing school curriculum requirements.**

A. Any person desiring to enroll in the permanent cosmetic tattooing school shall be required to provide documentation of satisfactory completion of health education on bloodborne disease.

B. Permanent cosmetic tattooing school curriculum requirements are as follows:

1. Virginia tattooing laws and regulations.
2. Machines and devices.
  - a. Coil machine;
  - b. Hand device; and
  - c. Others devices.
3. Needles.
  - a. Types;
  - b. Uses; and
  - c. Application.
4. Anatomy.
  - a. Layers of skin;
  - b. Parts and functions of skin; and
  - c. Diseases.
5. Color theory.
  - a. Skin and pigment color; and
  - b. Handling and storage of pigments.
6. Transmission cycle of infectious diseases.
7. Immunization.
  - a. Types of immunizations; and
  - b. General preventative measures to be taken to protect the tattooer and client.
8. Sanitation and disinfection.
  - a. Definition of terms:
    - (1) Sterilization;
    - (2) Disinfection and disinfectant;
    - (3) Sterilizer or sterilant;
    - (4) Antiseptic;
    - (5) Germicide;
    - (6) Decontamination; and
    - (7) Sanitation;

- b. The use of steam sterilization equipment and techniques;
  - c. The use of chemical agents, antiseptics, and disinfectants;
  - d. The use of sanitation equipment;
  - e. Preservice sanitation procedure; and
  - f. Postservice sanitation procedure.
9. Safety.
    - a. Proper needle handling and disposal;
    - b. Blood spill procedures;
    - c. Equipment and instrument storage; and
    - d. First aid.
  10. ~~Blood-borne~~ Bloodborne pathogen standards.
    - a. OSHA and CDC ~~blood-borne~~ bloodborne pathogen standards;
    - b. Overview of compliance requirements; and
    - c. Disorders and when not to service a client.
  11. Anesthetics.
    - a. Use;
    - b. Types;
    - c. Application; and
    - d. Removal.
  12. Equipment.
    - a. Gloves;
    - b. Masks;
    - c. Apron;
    - d. Chair;
    - e. Lighting; and
    - f. Work table.
  13. Professional standards.
    - a. History of permanent cosmetic tattooing;
    - b. Ethics;
    - c. Recordkeeping:
      - (1) Client health history; and
      - (2) Consent forms.
    - d. Preparing station, making appointments, salon ethics:
      - (1) Maintaining professional appearance, notifying clients of schedule changes; and
      - (2) Promoting services of the salon and establishing clientele.
    - e. Salon management:
      - (1) Licensing requirements; and
      - (2) Taxes.
  14. Permanent cosmetic tattooing.

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- a. Client consultation;
- b. Client health form;
- c. Client disclosure form;
- d. Client preparation;
- e. [ Drawing and mapping;
- f. ] Sanitation and safety precautions;
- [ ~~f~~. ~~g~~. ] Implement selection and use;
- [ ~~g~~. ~~h~~. ] Proper use of equipment;
- [ ~~h~~. ~~i~~. ] Material selection and use.
- [ ~~i~~. ~~j~~. ] Eyebrows;
- [ ~~j~~.-Eyeliner;
- ~~k. Lip coloring; and~~
- ~~l. Lip liners.~~
- k. Microblading;
- l. Eyeliner;
- m. Lip coloring; and
- n. Lip liners.

C. Master permanent cosmetic tattooing program curriculum requirements are as follows:

- 1. Virginia tattooing laws and regulations.
- 2. Machines and devices.
  - a. Coil machine;
  - b. Hand device; and
  - c. Others devices.
- 3. Needles.
  - a. Types;
  - b. Uses; and
  - c. Application.
- 4. Advanced Practical Clinical Anatomy.
  - a. Eyelid Anatomy;
  - b. Lip Anatomy; and
  - c. Breast Anatomy.
- 5. Advanced Color theory.
- 6. Organic and Inorganic Pigment.
- 7. Understanding the Surgical Process.
  - a. The Latissimus Dorsi Flap Procedure;
  - b. Abdominoplasty and Breast Reconstruction;
  - c. Other Reconstruction Procedures;
    - (1) Deep Inferior Epigastric Artery Perforator Flap (DIEP); and
    - (2) Superior Gluteal Artery Perforator Flap (SGAP);
  - d. Flap size vs. Areola size; and
  - e. Implant Reconstruction;

- (1) Tissue Expansion;
- (2) Placing the Implant;
- (3) Implant vs. Flap Reconstruction;
- (4) Saline vs. Silicone;
- (5) Radiation Therapy; and
- (6) Lymphedema.

## 8. Client Consultation.

## 9. Breast Areolar Pigmentation.

- a. Chart Notes;
- b. Health Insurance Portability and Accountability Act (HIPAA);
- c. Room Setup;
- d. Anesthetic for Breast Procedures;
- e. Color Selection;
- f. Needle Selection;
- g. Design and Placement;
  - (1) Position of the Areola/ Nipple Complex;
  - (2) The Penn Triangle;
  - (3) Diameter of the Areola; and
  - (4) Nipple Reconstruction;
- h. Creating 3-dimensional Nipple/Areola;
  - (1) Understanding and creating a reflection of light; and
  - (2) The Value of Color;
- i. Covering scar tissue and Periareolar scar blending;
- j. Aftercare;
  - (1) Tegraderm Aftercare Instructions; and
  - (2) Follow up; and
- k. Precautions and Contraindications.

## 10. Skin Cancer.

- a. Basal Cell Carcinomas;
- b. Squamous Cell Carcinomas;
- c. Melanoma.

## 11. The Art of Camouflage.

- a. Client/Patient Selection and Handling;
- b. Contraindications and When Not to Perform Services;
- c. Skin Tones;
- d. Color Selection and Skin Tone Matching;
- e. Scars;
- f. Burn Scar; and
- g. Common Needle Configurations Used for Camouflage.

## 12. Side Effects.

## 13. Insurance.

## 14. Master Permanent Cosmetic Tattooing Procedures.

- a. Lip;
- b. Areola;
- c. Scalp;
- d. Blush;
- e. Camouflage;
- f. Eyeshadow.

Eyeshadow	10
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D. A licensed school with an approved permanent cosmetic tattooing or master permanent cosmetic tattooing program may conduct an assessment of a student's competence in the respective profession and, based on the assessment, give credit towards the hours requirements specified in the respective subsection of this section and 18VAC41-50-370.

D. Completion of performances are determined as follows:

- 1. Two complete eyebrows constitutes one performance;
- 2. Two complete eye liners constitutes one performance; and
- 3. One complete lip liner constitutes one performance.

The school shall make the assessment based on a review of the student's transcript and the successful completion of a board-approved competency examination administered by the school. The school may also request a copy of a catalog or bulletin giving the full course description when making the evaluation. The number of credit hours awarded shall not exceed the actual hours of instruction verified on the transcript or diploma or the number of hours specified in the board-approved curriculum for a specific topic. Credit may only be given for in-person training. ]

**18VAC41-50-380. Display of license.**

**[ 18VAC41-50-370. Hours of instruction and performances.**

A. Curriculum and performance requirements specified in 18VAC41-50-360 and this section shall be taught over a minimum of ~~90~~ 200 clock hours for permanent cosmetic tattooing and 200 clock hours for master permanent cosmetic tattooing.

A. Each tattoo parlor owner or permanent cosmetic tattoo salon owner shall ensure that all current licenses issued by the board shall be displayed ~~in the reception area of the parlor or salon at the licensee's station~~ or in plain view of the public. Duplicate licenses shall be posted in a like manner in every parlor or salon or location where the licensee provides services.

B. Each parlor owner or permanent cosmetic tattoo salon owner shall ensure that no licensee, apprentice, or student performs any service beyond the scope of practice for the applicable license.

C. Each tattoo parlor owner or permanent cosmetic tattoo salon owner shall offer to licensees the full series of Hepatitis B vaccine.

D. Each tattoo parlor owner or permanent cosmetic tattoo salon owner shall maintain a record for each licensee of one of the following:

B. A minimum of 50 performances shall be completed as part of the ~~required~~ permanent cosmetic tattooing instruction, including two eyebrow, two microblading procedures, two lip liners, one lip color, and one full lips. Completion of performances are determined as follows:

- 1. Two complete eyebrows constitutes one performance;
- 2. Two complete eye liners constitutes one performance; and
- 3. One complete lip liner constitutes one performance.

- 1. Proof of completion of the full series of Hepatitis B vaccine;
- 2. Proof of immunity by blood titer; or
- 3. Written declaration of refusal of the owner's offer of a full series of Hepatitis B vaccine.

E. All licensees shall operate under the name in which the license is issued.

C. A minimum of 70 performances shall be completed as part of the master permanent cosmetic tattooing instruction, including:

**18VAC41-50-390. Physical facilities.**

<u>Lip (cleft lip repigmentation)</u>	<u>10</u>
<u>Areola</u>	<u>10</u>
<u>Scalp Repigmentation</u>	<u>10</u>
<u>Blush Application</u>	<u>10</u>
<u>Camouflage</u>	<u>10</u>
<u>Scar Repigmentation</u>	<u>10</u>

A. A parlor or salon must be in a permanent building or portion of a building, which must be in a location permissible under local zoning codes, if any. If applicable, the parlor or salon shall be separated from any living quarters by complete floor to ceiling partitioning and shall contain no access to living quarters.

B. The parlor, salon or temporary location shall be maintained in a clean and orderly manner.

C. All facilities shall have a blood spill clean-up kit in the work area.

D. Work surfaces shall be cleaned with an EPA registered, hospital grade disinfectant. Surfaces that come in contact with blood or other body fluids shall be immediately disinfected with an EPA registered germicide solution. Appropriate

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personal protective equipment shall be worn during cleaning and disinfecting procedures.

E. Cabinets for the storage of instruments, ~~eyes~~, pigments, single-use articles, ~~carbon~~ stencils and other utensils shall be provided for each operator and shall be maintained in a sanitary manner.

F. Bulk single-use articles shall be commercially packaged and handled in such a way as to protect them from contamination.

G. All materials applied to the human skin shall be from single-use articles or transferred from bulk containers to single-use containers and shall be disposed of after each use.

H. The walls, ceilings, and floors shall be kept in good repair. The tattooing area shall be constructed of smooth, hard surfaces that are nonporous, free of open holes or cracks, light colored, and easily cleaned. New parlors shall not include any dark-colored surfaces in the tattooing area. Existing parlors or salons with dark-colored surfaces in the tattooing area shall replace the dark-colored surfaces with light-colored surfaces whenever the facilities are extensively remodeled or upon relocation of the business.

I. Parlors, salons or temporary locations shall have adequate lighting of at least 50-foot candles of illumination in the tattooing and sterilization areas.

J. Adequate mechanical ventilation shall be provided in the parlor.

K. Each parlor, salon or temporary location shall be equipped with hand-cleaning facilities for its personnel with unobstructed access to the tattooing area such that the tattooer can return to the area without having to touch anything with his hands. Hand-cleaning facilities shall be equipped either with hot and cold or tempered running water under pressure and liquid germicidal soap or with a sanitizing solution to clean hands. Hand-cleaning facilities shall be equipped with single-use towels or mechanical hand drying devices and a covered refuse container. Such facilities shall be kept clean and in good repair. All facilities must have running water and soap accessible for cleaning of hands contaminated by body fluids.

L. Animals are not permitted in the parlor, salon, or temporary location except for guide or service animals accompanying persons with disabilities, or nonmammalian animals in enclosed glass containers such as fish aquariums, which shall be outside of the tattooing or sterilization areas. No animals are allowed in the tattooing or sterilization areas.

M. Use of tobacco products and consumption of alcoholic beverages shall be prohibited in the tattooing or sterilization areas.

N. No food or drink will be stored or consumed in the tattooing or sterilization areas except for client's use in order to

sustain optimal physical condition; such food and drink must be individually packaged.

O. If tattooing is performed where cosmetology services are provided, it shall be performed in an area that is separate and enclosed.

P. All steam sterilizers shall be biological spore tested at least monthly.

Q. Biological spore tests shall be verified through an independent laboratory.

R. Biological spore test records shall be retained for a period of three years and made available upon request.

S. Steam sterilizers shall be used only for instruments used by the parlor's employees. ]

## **18VAC41-50-400. Tattooer or permanent cosmetic tattooer or master permanent cosmetic tattooer responsibilities.**

A. All tattooers shall provide to the [ ~~owner~~ responsible management ] one of the following:

1. Proof of completion of the full series of Hepatitis B vaccine;
2. Proof of immunity by blood titer; or
3. Written declaration of refusal of the owner's offer of a full series of Hepatitis B vaccine.

B. All tattooers shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygienic practices while on duty.

C. All tattooers shall clean their hands thoroughly using hot or tempered water with a liquid germicidal soap or use sanitizing solution to clean hands before and after tattooing and as necessary to remove contaminants.

D. All tattooers must wear single-use examination gloves while assembling tattooing instruments and while tattooing.

E. Each time there is an interruption in the service, [ ~~each time~~ ] the gloves become torn or perforated, or whenever the ability of the gloves to function as a barrier is compromised:

1. Gloves shall be removed and disposed of; and
2. Hands shall be cleaned and a fresh pair of gloves used.

F. Tattooers shall use standard precautions while tattooing. A tattooer diagnosed with a communicable disease shall provide to the department a written statement from a health care practitioner that the tattooer's condition no longer poses a threat to public health.

G. Tattooers with draining lesions on their hands or face will not be permitted to work until cleared by a [ ~~health care~~ health care ] professional.

H. The area of the client's skin to be tattooed shall be cleaned with an approved germicidal soap according to label directions.

I. Tattooing [ ~~inks and dyes pigments~~ ] shall be placed in a single-use disposable container for each client. Following the procedure, the unused contents and container will be properly disposed of.

J. If shaving is required, razors shall be single-use [ ~~and. After use, razors shall be recapped and properly~~ ] disposed of [ ~~in a puncture resistant container~~ ].

K. Each tattooer performing any tattooing procedures in the parlor or salon shall have the education, training, and experience, or any combination thereof, to practice aseptic technique and prevent the transmission of bloodborne pathogens. All procedures shall be performed using aseptic technique.

L. [ Multiuse instruments, equipment, furniture, and surfaces that may be contaminated during the tattooing process should be covered or wrapped in a nonporous disposable barrier. This barrier should be removed and disposed of after each service.

M. After the disposable barrier is removed, covered items should be wiped down with an Environmental Protection Agency (EPA) registered disinfectant that is bactericidal, virucidal, and fungicidal.

N. ] A set of individual, sterilized needles shall be used for each client. Single-use disposable instruments shall be disposed of in a puncture resistant container.

[ ~~M. O.~~ ] Used, nondisposable instruments [ ~~, such as stainless steel tubes, tips, and grips,~~ ] shall be kept in a separate, puncture resistant container until brush scrubbed in hot water soap and then sterilized by autoclaving. Contaminated instruments shall be handled with disposable gloves.

[ ~~N. P.~~ ] Used [ ~~nondisposable~~ ] instruments that are ultrasonically cleaned shall be rinsed under running hot water prior to being placed in the used instrument container;

[ ~~O. Q.~~ ] Used [ ~~nondisposable~~ ] instruments that are not ultrasonically cleaned prior to being placed in the used instrument container shall be kept in a germicidal or soap solution until brush scrubbed in hot water and soap and sterilized by autoclaving.

[ ~~P. R.~~ ] The ultrasonic unit shall be sanitized daily with a germicidal solution.

[ ~~Q. S.~~ ] Nondisposable instruments shall be sterilized and shall be handled and stored in a manner to prevent contamination. Instruments to be sterilized shall be sealed in bags made specifically for the purpose of autoclave sterilization and shall include the date of sterilization. If nontransparent bags are utilized, the bag shall also list the contents.

[ ~~R. T.~~ ] Autoclave sterilization bags with a color code indicator that changes color upon proper sterilization shall be utilized during the autoclave sterilization process.

[ ~~S. Instruments~~ U. Nondisposable instruments ] shall be placed in the autoclave in a manner to allow live steam to circulate around them.

[ ~~V. A Sealed, puncture proof dirty tube receptacle with cool, liquid sterilant should be maintained in the biohazard or cleanup room.~~

W. Sharps containers should be located within reach of the tattooing area. ]

[ ~~T. X.~~ ] Contaminated disposable and single-use items shall be disposed of in accordance with federal and state regulations regarding disposal of biological hazardous materials.

[ ~~U. Y.~~ ] The manufacturer's written instructions of the autoclave shall be followed.

**[ 18VAC41-50-410. Client qualifications, disclosures, and records.**

A. Except as permitted in § 18.2-371.3 of the Code of Virginia, a client must be a minimum of 18 years of age and shall present at the time of the tattooing or permanent cosmetic tattooing a valid, government issued, positive identification card including, but not limited to, a driver's license, passport, or military identification. The identification must contain a photograph of the individual and a printed date of birth.

B. The tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer shall verify and document in the permanent client record the client's age, date of birth, and the type of identification provided.

C. No person may be tattooed or permanent cosmetic tattooed who appears to be under the influence of alcohol or drugs.

D. Tattooing or permanent cosmetic tattooing shall not be performed on any skin surface that manifests any evidence of unhealthy conditions such as rashes, boils, infections, ~~or~~ abrasions, or on any asymmetrical, irregular, blurred, or multicolored mole.

E. Before receiving a tattoo or permanent cosmetic tattoo, each client and client's parent or guardian, if applicable, shall be informed verbally and in writing, using the client disclosure form prescribed by the board, about the possible risk and dangers associated with the application of each tattoo. Signatures of both the client and the tattooer shall be required on the client disclosure form to acknowledge receipt of both the verbal and written disclosures.

F. The tattoo parlor or temporary location or permanent cosmetic tattoo salon shall maintain proper records for each client. The information shall be permanently recorded and made available for examination by the department or authorized agent. Records shall be maintained at the tattoo parlor or permanent cosmetic tattoo salon for at least two years following the date of the last entry. The temporary location client records shall be maintained by the license holder. The permanent records shall include the following:

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1. The name, address, and telephone number of the client;
2. The date tattooing or permanent cosmetic tattooing was performed;
3. The client's age, date of birth, and a copy of the positive identification provided to the tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer;
4. The specific color or colors of the tattoo or permanent cosmetic tattoo and, when available, the manufacturer's catalogue or identification number of each color used;
5. The location on the body where the tattooing or permanent cosmetic tattooing was performed;
6. The name of the tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer;
7. A statement that the client has received a copy of applicable written care instructions, and that the client has read and understands the instructions; and
8. The signature of the client and if applicable parent or guardian. ]

**18VAC41-50-420. Grounds for license or certificate revocation, suspension or probation; denial of application, renewal, or reinstatement; or imposition of a monetary penalty.**

A. The board may, in considering the totality of the circumstances, fine any licensee or certificate holder and suspend, place on probation, or revoke or refuse to renew or reinstate any license or certificate, or deny any application issued under the provisions of Chapter 7 (§ 54.1-700 et seq.) of Title 54.1 of the Code of Virginia and the regulations of the board this chapter if the board it finds that the licensee, certificate holder, or applicant:

1. ~~The licensee, certificate holder, or applicant is~~ Is incompetent, or negligent in practice tattooing, or incapable mentally or physically, as those terms are generally understood in the profession, to (i) practice as a tattooer, limited term tattooer, tattooer apprentice, permanent cosmetic tattooer, or master permanent cosmetic tattooer or (ii) operate a parlor, permanent cosmetic tattooing salon, or school;
2. ~~The licensee, certificate holder, or applicant is~~ Is convicted of fraud or deceit in the practice of tattooing or fails to teach the curriculum as provided for in this chapter;
3. ~~The licensee, certificate holder, or applicant obtained~~ Obtained, attempted to obtain, renewed, or reinstated a license by false or fraudulent representation;
4. ~~The licensee, certificate holder, or applicant violates~~ Violates or induces others to violate, or cooperates with others in violating, any of the provisions of this chapter or Chapter 7 (§ 54.1-700 et seq.) of Title 54.1 of the Code of Virginia or any local ordinance or regulation governing

standards of health and sanitation of the establishment in which tattooers may practice or offer to practice;

5. Offers, gives, or promises anything of value or benefit to any federal, state, or local employee for the purpose of influencing that employee to circumvent, in the performance of his duties, any federal, state, or local law, regulation, or ordinance governing tattooing as defined in § 54.1-700 of the Code of Virginia;

6. Fails to respond to the board or any of its agents or provides false, misleading, or incomplete information to an inquiry by the board or any of its agents;

7. Fails or refuses to allow the board or any of its agents to inspect during reasonable hours any licensed parlor, salon, or school for compliance with provisions of Chapter 7 (§ 54.1-700 et seq.) or this chapter;

~~5. The licensee, certificate holder, or applicant fails~~ 8. Fails to produce, upon request or demand of the board or any of its agents, any document, book, record, or copy thereof in a licensee's or owner's possession or maintained in accordance with this chapter;

~~6. A licensee or certificate holder fails~~ 9. Fails to notify the board of a change of name or address in writing within 30 days of the change for each and every license. ~~The board shall not be responsible for the licensee's or certificate holder's failure to receive notices, communications and correspondence caused by the licensees' or certificate holder's failure to promptly notify the board in writing of any change of name or address or for any other reason beyond the control of the board;~~

~~7. The licensee, certificate holder, or applicant~~ 10. Makes any misrepresentation or publishes or causes to be published any advertisement that is false, deceptive, or misleading;

~~8. The licensee, certificate holder, or applicant fails~~ 11. Fails to notify the board in writing within 30 days of the suspension, revocation, or surrender of a license or certificate in connection with a disciplinary action in any other jurisdiction or of any license or certificate that has been the subject of disciplinary action in any other jurisdiction; ~~or~~

9. In accordance with § 54.1-204 of the Code of Virginia, the licensee or certificate holder has been convicted in any jurisdiction of a misdemeanor or felony that directly relates to the profession of tattooing. The board shall have the authority to determine, based upon all the information available, including the regulant's record of prior convictions, if the regulant is unfit or unsuited to engage in the profession of tattooing or permanent cosmetic tattooing. The board will decide each case by taking into account the totality of the circumstances. Any plea of nolo contendere shall be considered a conviction for the purposes of this section. The applicant shall provide a certified copy of a final order, decree or case decision by a court or regulatory

agency with the lawful authority to issue such order, decree or case decision, and such copy shall be admissible as prima facie evidence of such conviction. This record shall be forwarded by the applicant to the board within 10 days after all appeal rights have expired.

~~B. In addition to subsection A of this section, the board may, in considering the totality of the circumstances, revoke, suspend, place on probation or refuse to renew or reinstate the license of any tattoo parlor, limited term tattoo parlor, or permanent cosmetic tattoo salon or impose a fine as permitted by law, or both, if the board finds that:~~

- ~~1. The owner or operator of the tattoo parlor, limited term tattoo parlor, or permanent cosmetic tattoo salon fails to comply with the facility requirements of tattoo parlors, limited term tattoo parlors, or permanent cosmetic tattoo salons provided for in this chapter or in any local ordinances; or~~
- ~~2. The owner or operator allows a person who has not obtained a license to practice as a tattooer, limited term tattooer, permanent cosmetic tattooer, or master permanent cosmetic tattooer unless the person is duly enrolled as an apprentice.~~

~~C. In addition to subsection A of this section, the board may, in considering the totality of the circumstances, revoke, suspend, place on probation, or refuse to renew or reinstate the license of any school or impose a fine as permitted by law, or both, if the board finds that:~~

- ~~1. An instructor of the approved school fails to teach the curriculum as provided for in this chapter;~~
- ~~2. The owner or director of the approved school permits or allows a person to teach in the school without a current tattooing instructor certificate; or~~
- ~~3. The instructor, owner or director is guilty of fraud or deceit in the teaching of tattooing.~~

~~D. In addition to subsection A of this section, the board may, in considering the totality of the circumstances, revoke, suspend, place on probation, or refuse to renew or reinstate the license of any licensee or impose a fine as permitted by law, or both, if the board finds that the licensee fails to take sufficient measures to prevent transmission of communicable or infectious diseases or fails to comply with any local, state or federal law or regulation governing the standards of health and sanitation for the practice of tattooing.~~

12. Has been convicted or found guilty, regardless of the manner of adjudication in Virginia or any other jurisdiction of the United States, of a misdemeanor involving moral turpitude, sexual offense, drug distribution, or physical injury or any felony, there being no appeal pending therefrom or the time for appeal having elapsed. Review of convictions shall be subject to the requirements of § 54.1-204 of the Code of Virginia. Any plea of nolo contendere

shall be considered a conviction for purposes of this subdivision. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where convicted shall be admissible as prima facie evidence of such conviction or guilt;

13. Fails to inform the board in writing within 30 days of pleading guilty or nolo contendere or being convicted or found guilty regardless of adjudication of any convictions as stated in subdivision 12 of this section;

14. Allows, as responsible management of a parlor, salon, or school, a person who has not obtained a license or guest tattooer license to practice as a tattooer or permanent cosmetic tattooer unless the person is duly enrolled as an apprentice;

15. Allows, as responsible management of a school, a person who has not obtained an instructor certificate to practice as a tattooing or permanent cosmetic tattooing instructor;

16. Fails to take sufficient measures to prevent transmission of communicable or infectious diseases or fails to comply with sanitary requirements provided for in this chapter or any local, state, or federal law or regulation governing the standards of health and sanitation for the practice of tattooing, or the operation of tattoo parlors or permanent cosmetic tattooing salons; or

17. Fails to comply with all procedures established by the board and the testing service with regard to conduct at any board examination.

**NOTICE:** The following forms used in administering the regulation have been filed by the agency. Amended or added forms are reflected in the listing and are published following the listing. Online users of this issue of the Virginia Register of Regulations may also click on the name to access a form. The forms are also available from the agency contact or may be viewed at the Office of Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

FORMS (18VAC41-50)

~~Tattooer Examination & License Application, A425-1231EXLIC (eff. 9/2011)~~

~~Tattoo Training & Experience Verification Form, A425-12TATTREXP (eff. 9/2011)~~

~~Tattooer Examination & License Application, A425-1231EXLIC (eff. 9/2011)~~

~~Tattoo Training & Experience Verification Form, A425-12TATTREXP (eff. 9/2011)~~

[Tattooing Apprenticeship Sponsor Application, A425-12TATSPON \(eff. 9/2011\)](#)

[Tattooer Apprenticeship Certification Application, A425-1234TAC \(eff. 9/2011\)](#)

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[Tattoo Apprenticeship Completion Form, A425-12TAC \(eff. 9/2011\)](#)

[Tattoo Client Disclosure Form, A425-12DIS, A425-12TDIS \(eff. 9/2011\)](#)

[Limited Term Tattooer License Application, A450-1233LIC-v8 \(rev. 9/2016\)](#)

[Limited Term Tattoo Parlor License Application, A450-1235LIC-v5 \(rev. 9/2016\)](#)

[Permanent Cosmetic Tattooer Examination & License Application, A425-1236EXLIC \(eff. 9/2011\)](#)

[Master Permanent Cosmetic Tattooer Examination & License Application, A425-1237EXLIC \(eff. 9/2011\)](#)

[License by Endorsement Application, A450-1213END-v9 \(rev. 9/2016\)](#)

[Training & Experience Verification Form, A425-1213TREXP \(eff. 9/2011\)](#)

[Salon, Shop, Spa & Parlor License/Reinstatement Application, A450-1213BUS-v8 \(rev. 9/2016\)](#)

[Licensure Fee Notice, A450-1213FEE-v6 \(rev. 9/2016\)](#)

[Instructor Certification Application, A450-1213INST-v7 \(rev. 9/2016\)](#)

[Individuals - Reinstatement Application, A450-1213REI-v8 \(rev. 9/2016\)](#)

[School License Application, A450-1213SCHL-v9 \(rev. 9/2016\)](#)

[School Reinstatement Application, A450-1213SCH-REIN-v2 \(rev. 9/2016\)](#)

[Tattooer Examination & License Application, A450-1231EXLIC \(rev. 7/2019\)](#)

[Tattoo Client Disclosure Form, A450-12TDIS \(rev. 4/2013\)](#)

[\[ ~~Limited Term Event~~ \] \[Tattoo Parlor License Application, A450-1235LIC-v6 \\(rev. \\[ 7/2019-3/2020 \\]\\)\]\(#\)](#)

[Permanent Cosmetic Tattooer Examination & License Application, A450-1236EXLIC-v13 \(rev. 7/2019\)](#)

[Master Permanent Cosmetic Tattooer Examination & License Application, A450-1237EXLIC-v11 \(rev. 7/2019\)](#)

[License by Endorsement Application, A450-1213END-v10 \(rev. 2/2017\)](#)

[Training & Experience Verification Form, A450-1213TREXP-v6 \(eff. 2/2017\)](#)

[Salon, Shop, Spa & Parlor License/Reinstatement Application, A450-1213BUS-v12 \(rev. 7/2019\)](#)

[Licensure Fee Notice, A450-1213FEE-v7 \(rev. 4/2017\)](#)

[Instructor Certification Application, A450-1213INST-v11 \(rev. 7/2019\)](#)

[Individuals - Reinstatement Application, A450-1213REI-v9 \(rev. 2/2017\)](#)

[School License Application, A450-1213SCHL-v11 \(rev. 2/2017\)](#)

[School Reinstatement Application, A450-1213SCH-REIN-v5 \(rev. 3/2017\)](#)

[\[ ~~Convention Tattooer License Application, A450-1233COVLIC-v1 \(eff. 7/2019\)~~ \]](#)

[Guest Tattooer License Application, A450-1233GLIC-v1 \(eff. 7/2019\)](#)

## **18VAC41-60-10. Definitions.**

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise. All terms defined in Chapter 7 (§ 54.1-700 et seq.) of Title 54.1 of the Code of Virginia are incorporated in this chapter.

"Apprenticeship program" means an approved body-piercing training program conducted by an approved apprenticeship sponsor.

"Apprenticeship sponsor" means an individual approved to conduct body-piercing apprenticeship training who meets the qualifications in 18VAC41-60-70.

"Aseptic technique" means a hygienic practice that prevents and hinders the direct transfer of microorganisms, regardless of pathogenicity, from one person or place to another person or place.

"Body piercer ear only" means any person who uses only a mechanized, presterilized ear-piercing system that penetrates the outer perimeter or lobe of the ear or both for compensation.

"Body piercing ear only" means the use of a mechanized, presterilized ear-piercing system that penetrates the outer perimeter or lobe of the ear or both.

"Body-piercing ear only salon" means any place in which a fee is charged for the act of using a mechanized, presterilized ear-piercing system that penetrates the outer perimeter or lobe of the ear or both.

"Business entity" means a sole proprietorship, partnership, corporation, limited liability company, limited liability partnership, or any other form of organization permitted by law.

"Endorsement" means a method of obtaining a license by a person who is currently licensed in another state.

"Firm" means any business entity recognized under the laws of the Commonwealth of Virginia.

"Gratuitous services" as used in § 54.1-701.5 of the Code of Virginia means providing body-piercing services without receiving compensation or reward, or obligation. Gratuitous services do not include services provided at no charge when goods are purchased.

"Licensee" means any person, partnership, ~~association, corporation,~~ limited liability company, ~~or corporation sole proprietorship, limited liability partnership, or any other form of organization permitted by law~~ holding a license issued by the Board for Barbers and Cosmetology as defined in § 54.1-700 of the Code of Virginia.

"Reinstatement" means having a license restored to effectiveness after the expiration date has passed.

"Renewal" means continuing the effectiveness of a license for another period of time.

"Responsible management" means the following individuals:

1. The sole proprietor of a sole proprietorship;
2. The partners of a general partnership;
3. The managing partners of a limited partnership;
4. The officers of a corporation;
5. The managers of a limited liability company;
6. The officers or directors of an association or both; and
7. Individuals in other business entities recognized under the laws of the Commonwealth as having a fiduciary responsibility to the firm.

"Sole proprietor" means any individual, not a corporation, who is trading under his own name or under an assumed or fictitious name pursuant to the provisions of §§ 59.1-69 through 59.1-76 of the Code of Virginia.

"Sterilization area" means a separate room or area separate from workstations with restricted client access in which body-piercing instruments are cleaned, disinfected, and sterilized.

"Temporary location" means a fixed location at which body piercing is performed for a specified length of time of not more than seven days in conjunction with a single event or celebration.

### **18VAC41-60-20. General requirements.**

~~A. In order to receive a license as a body piercer in compliance with § 54.1-703 of the Code of Virginia, an applicant must~~ Any individual wishing to engage in body piercing shall obtain a license in compliance with § 54.1-703 of the Code of Virginia and meet the following qualifications:

1. The applicant shall be in good standing as a body piercer in every jurisdiction where licensed, certified, or registered. The applicant shall disclose to the board at the time of application for licensure any disciplinary action taken in ~~another~~ Virginia or any other jurisdiction in connection with

the applicant's practice as a body piercer. This disclosure includes monetary penalties, fines, suspensions, revocations, surrender of a license in connection with a disciplinary action, or voluntary termination of a license. The applicant shall disclose to the board at the time of application for licensure ~~whether if~~ he has been previously licensed in Virginia as a body piercer.

Upon review of the applicant's prior disciplinary action, the board, in its discretion, may deny licensure to any applicant wherein the board deems the applicant is unfit or unsuited to engage in body piercing and body piercing ear only. The board will decide each case by taking into account the totality of the circumstances. Any plea of nolo contendere or comparable plea shall be considered a disciplinary action for the purposes of this subdivision. The applicant shall provide a certified copy of a final order, decree, or case decision by a court, regulatory agency, or board with the lawful authority to issue such order, decree, or case decision, and such copy shall be admissible as prima facie evidence of such disciplinary action.

2. The applicant shall disclose his physical address. A post office box is not acceptable.

3. The applicant shall sign, as part of the application, a statement certifying that the applicant has read and understands the Virginia body-piercing license laws and ~~the board's body piercing regulations~~ this chapter.

4. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose ~~a conviction, in any jurisdiction, of any misdemeanor or felony. Any plea of nolo contendere shall be considered a conviction for this purpose of this section. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where convicted shall be admissible as prima facie evidence of such guilt. The board, at its discretion, may deny licensure or certification to any applicant in accordance with § 54.1-204 of the Code of Virginia.~~ the following information regarding criminal convictions in Virginia and all other jurisdictions:

- a. All misdemeanor convictions involving moral turpitude, sexual offense, drug distribution, or physical injury within two years of the date of the application; and
- b. All felony convictions within 20 years of the date of application.

Any plea of nolo contendere shall be considered a conviction for purposes of this subdivision. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

5. The applicant shall provide evidence satisfactory to the board that the applicant has passed the board-approved

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examination, administered either by the board or by a designated testing service.

~~6. Persons who (i) make application between April 1, 2007, and March 31, 2008; (ii) have completed three years of documented work experience within the preceding five years as a body piercer; and (iii) have completed a minimum of five hours of health education including but not limited to blood borne disease, sterilization, and aseptic techniques related to body piercing and first aid and CPR that is acceptable to the board are not required to complete subdivision 5 of this subsection.~~

B. Eligibility to sit for board-approved body-piercer examination.

1. Training in the Commonwealth of Virginia. Any person completing an approved body-piercing apprenticeship program in a Virginia licensed body-piercing salon shall be eligible to sit for the examination.

2. Training outside of the Commonwealth of Virginia, but within the United States and its territories. Any person completing a body-piercing training or apprenticeship program that is substantially equivalent to the Virginia program but is outside of the Commonwealth of Virginia must submit to the board documentation of the successful completion of training or apprenticeship to be eligible for examination. If less than required hours of body-piercing training or body-piercing apprenticeship was completed, an applicant must submit (i) documentation acceptable to the board verifying the completion of a substantially equivalent body-piercing training or body-piercing apprenticeship or documentation of three years of work experience within the preceding five years as a body piercer and (ii) documentation of completion of a minimum of five hours of health education to include ~~but not limited to blood borne~~ (a) bloodborne disease, sterilization, and aseptic techniques related to body piercing ~~and;~~ (b) first aid; and (c) CPR that is acceptable to the board in order to be eligible for examination.

C. In order to receive a license as a body piercer ear only, an applicant must meet the following qualifications:

1. The applicant shall have completed a minimum of three hours of health education to include ~~but not limited to blood borne~~ bloodborne disease and first aid that is acceptable to the board and provide verification of training on a mechanized, presterilized ear-piercing system that penetrates the outer perimeter or lobe of the ear or both and aftercare of piercing.

2. The applicant shall be in good standing in every jurisdiction where licensed, certified, or registered. The applicant shall disclose to the board at the time of application for licensure any disciplinary action taken in another jurisdiction in connection with the applicant's licensed, certified, or registered practice. The applicant shall disclose

to the board at the time of application for licensure whether he has been previously licensed in Virginia in any profession regulated by the board.

3. The applicant shall disclose his physical address. A post office box is not acceptable.

4. The applicant shall sign, as part of the application, a statement certifying that the applicant has read and understands the Virginia body-piercing license laws and the board's body-piercing regulations.

5. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose ~~a conviction, in any jurisdiction, of any misdemeanor or felony. Any plea of nolo contendere shall be considered a conviction for this purpose of this section. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where convicted shall be admissible as prima facie evidence of such guilt. The board, at its discretion, may deny licensure or certification to any applicant in accordance with § 54.1-204 of the Code of Virginia.~~ the following information regarding criminal convictions in Virginia and all other jurisdictions:

a. All misdemeanor convictions involving moral turpitude, sexual offense, drug distribution, or physical injury within two years of the date of the application; and

b. All felony convictions within 20 years of the date of application.

Any plea of nolo contendere shall be considered a conviction for purposes of this subdivision. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

## **18VAC41-60-30. License by endorsement.**

Upon proper application to the board, any person currently licensed to practice as a body piercer in any other state or jurisdiction of the United States and who has completed a training or apprenticeship program and an examination that is substantially equivalent to that required by this chapter may be issued a ~~body piercer~~ body piercer license without an examination. The applicant must also meet the requirements set forth in 18VAC41-60-20 A 1 through A 4.

## **18VAC41-60-40. Examination requirements and fees.**

A. Applicants for initial licensure shall pass an examination approved by the board. The examinations may be administered by the board or by a designated testing service.

B. Any candidate failing to appear as scheduled for examination shall forfeit the examination fee.

C. The applicant shall follow all procedures established by the board with regard to conduct at the examination. Such procedures shall include any written instructions

communicated prior to the examination date and any instructions communicated at the site, either written or oral, on the date of the examination. Failure to comply with all procedures established by the board and the testing service with regard to conduct at the examination may be grounds for denial of application.

D. Any applicant who does not pass a reexamination within one year of the initial examination date shall be required to submit a new application.

E. The fee for examination or reexamination is subject to contracted charges to the board by an outside vendor. These contracts are competitively negotiated and bargained for in compliance with the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). Fees may be adjusted and charged to the candidate in accordance with these contracts. The fee shall not exceed \$225 per candidate.

F. Any candidate failing to apply for initial licensure within five years of passing the written examination shall be required to retake the examination. Records of examinations shall be maintained for a maximum of five years.

**18VAC41-60-50. ~~Reexamination—requirements.~~ (Repealed.)**

~~Any applicant who does not pass a reexamination within one year of the initial examination date shall be required to submit a new application and examination fee.~~

**18VAC41-60-60. ~~Examination administration.~~ (Repealed.)**

~~A. The examinations may be administered by the board or the designated testing service.~~

~~B. The applicant shall follow all procedures established by the board with regard to conduct at the examination. Such procedures shall include any written instructions communicated prior to the examination date and any instructions communicated at the site, either written or oral, on the date of the examination. Failure to comply with all procedures established by the board and the testing service with regard to conduct at the examination may be grounds for denial of application.~~

~~C. The fee for examination or reexamination is subject to contracted charges to the board by an outside vendor. These contracts are competitively negotiated and bargained for in compliance with the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia). Fees may be adjusted and charged to the candidate in accordance with these contracts. The fee shall not exceed \$225 per candidate.~~

**18VAC41-60-80. Salon license.**

A. Any individual firm wishing to operate a body-piercing salon or body-piercing ear only salon shall obtain a salon license in compliance with § 54.1-704.1 of the Code of Virginia; and shall meet the following qualifications in order to receive a license:

1. The applicant and all members of the responsible management shall be in good standing as a licensed salon in Virginia and all other jurisdictions where licensed. The applicant and all members of the responsible management shall disclose to the board at the time of application for licensure any disciplinary action taken in Virginia and all other jurisdictions in connection with the applicant's operation of any body-piercing salon or body-piercing ear only salon or practice of the profession. This disclosure includes monetary penalties, fines, suspensions, revocations, surrender of a license in connection with a disciplinary action, or voluntary termination of a license. The applicant shall disclose to the board at the time of application for licensure if the applicant or any member of the responsible management has been previously licensed in Virginia as a body-piercing salon or body-piercing ear only salon.

Upon review of the applicant's and all members of the responsible management's prior disciplinary action, the board, in its discretion, may deny licensure to any applicant wherein it deems the applicant is unfit or unsuited to engage in the operation of a body-piercing salon or body-piercing ear only salon. The board will decide each case by taking into account the totality of the circumstances. Any plea of nolo contendere or comparable plea shall be considered a disciplinary action for the purposes of this subdivision. The applicant shall provide a certified copy of a final order, decree, or case decision by a court, regulatory agency, or board with the lawful authority to issue such order, decree, or case decision, and such copy shall be admissible as prima facie evidence of such disciplinary action.

2. The applicant shall disclose his physical address. A post office box is not acceptable.

3. The applicant shall sign, as part of the application, a statement certifying that the applicant has read and understands the Virginia body-piercing license laws and this chapter.

4. In accordance with § 54.1-204 of the Code of Virginia, each applicant shall disclose the following information about the firm and all members of the responsible management regarding criminal convictions in Virginia and all other jurisdictions:

- a. All misdemeanor convictions involving moral turpitude, sexual offense, drug distribution, or physical injury within two years of the date of the application; and
- b. All felony convictions within 20 years of the date of application.

Any plea of nolo contendere shall be considered a conviction for purposes of this subsection. The record of a conviction received from a court shall be accepted as prima facie evidence of a conviction or finding of guilt. The board, in its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia.

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5. The applicant shall disclose the firm's responsible management.

B. A body-piercing salon license or body-piercing ear only salon license shall not be transferable and shall bear the same name and address of the business. Any changes in the name, ~~or~~ address, ~~or ownership~~ of the salon shall be reported to the board in writing within 30 days of such changes. New owners shall be responsible for ~~reporting such changes in writing to the board~~ applying for a new license within 30 days of the changes.

C. ~~In the event of a closing of a body piercing salon or body-piercing ear only salon, the board must be notified by the owners in writing within 30 days of the closing, and the license must be returned by the owners to the board. Whenever the legal business entity holding the license is dissolved or altered to form a new business entity, the original license becomes void and shall be returned to the board within 30 days of the change. Additionally, the firm shall apply for a new license within 30 days of the change in the business entity. Such changes include:~~

1. Death of a sole proprietor;

2. Death or withdrawal of a general partner in a general partnership or the managing partner in a limited partnership; and

3. Conversion, formation, or dissolution of a corporation, a limited liability company, an association, or any other business entity recognized under the laws of the Commonwealth of Virginia.

D. Any change in the officers of a corporation, managers of a limited liability company, or officers or directors of an association shall be reported to the board in writing within 30 days of the change.

~~D. E.~~ E. Any individual firm wishing to operate a body-piercing salon in a temporary location must have a body-piercing salon license issued by the board.

## Part IV

### ~~Renewal/Reinstatement~~ Renewal and Reinstatement

#### **18VAC41-60-110. License renewal required.**

All ~~body piercer body piercer, body piercer body piercer~~ body piercer, body-piercing salon, and body-piercing ear only salon licenses shall expire two years from the last day of the month in which they were issued.

#### **18VAC41-60-120. Continuing education requirement.**

All licensed body piercers shall be required to satisfactorily complete a minimum of five hours of health education to include ~~but not limited to blood borne~~ (i) bloodborne disease, sterilization, and aseptic techniques related to body piercing ~~and;~~ (ii) first aid; and (iii) CPR during their licensed term. All licensed body piercers ear only shall be required to satisfactorily complete a minimum of three hours of health

education to include ~~but not limited to blood borne~~ bloodborne disease and first aid during their licensed term. Documentation of training completion shall be provided at the time of renewal along with the required fee.

#### **18VAC41-60-140. Failure to renew.**

A. ~~When a body piercer an individual or body piercer ear only business entity fails to renew their license within 30 days following its expiration date, the licensee shall meet the renewal requirements prescribed in 18VAC41-60-120 and 18VAC41-60-130 and apply for reinstatement of the license by submitting to the Department of Professional and Occupational Regulation a reinstatement application along with the required renewal and reinstatement fees.~~

B. ~~When a body piercer or body piercer ear only an individual or business entity fails to renew his its license within two years following the expiration date, reinstatement is no longer possible. To resume practice, the former body piercer licensee shall apply for licensure as a new applicant, shall meet all current application requirements, shall pass the board's current examination if applicable, and shall receive a new license. To resume practice, the former body piercer ear only licensee shall apply for licensure as a new applicant, shall meet all current application requirements, and shall receive a new license.~~

~~C. When a body piercing salon or body piercing ear only salon fails to renew its license within 30 days following the expiration date, it shall be required to apply for reinstatement of the license by submitting to the Department of Professional and Occupational Regulation a reinstatement application along with the required renewal and reinstatement fees.~~

~~D. When a body piercing salon or body piercing ear only salon fails to renew its license within two years following the expiration date, reinstatement is no longer possible. To resume practice, the former licensee shall apply for licensure as a new applicant and shall meet all current application requirements.~~

~~E. C.~~ C. The date a renewal fee is received by the Department of Professional and Occupational Regulation, or its agent, will be used to determine whether the requirement for reinstatement of a license is applicable and an additional fee is required.

~~F. D.~~ D. When a license is reinstated, the licensee shall have the same license number and shall be assigned an expiration date two years from the ~~previous expiration date of the license~~ date of the last day of the month of reinstatement.

~~G. E.~~ E. A licensee ~~who that~~ who reinstates ~~his its~~ his license shall be regarded as having been continuously licensed without interruption. Therefore, a licensee shall be subject to the authority of the board for activities performed prior to reinstatement.

~~H. F.~~ F. A licensee ~~who that~~ who fails to reinstate ~~his its~~ his license shall be regarded as unlicensed from the expiration date of the license forward. Nothing in this chapter shall divest the board

of its authority to discipline a licensee for a violation of the law or regulations during the period of time for which the individual was licensed.

## **18VAC41-60-190. Physical facilities.**

A. A body-piercing salon or body-piercing ear only salon must be in a permanent building, which must be in a location permissible under local zoning codes, if any. If applicable, the body-piercing salon or body-piercing ear only salon shall be separated from any living quarters by complete floor to ceiling partitioning and shall contain no access to living quarters.

B. The body-piercing salon, body-piercing ear only salon, or temporary location shall be maintained in a clean and orderly manner.

C. A body-piercing salon, body-piercing ear only salon, or temporary location shall have a blood spill clean-up kit in the work area.

D. Work surfaces in a body-piercing salon, body-piercing ear only salon, or temporary location shall be cleaned with an EPA-registered, hospital grade disinfectant. Surfaces that come in contact with blood or other body fluids shall be immediately disinfected with an EPA-registered germicide solution. Appropriate personal protective equipment shall be worn during cleaning and disinfecting procedures.

E. In a body-piercing salon, body-piercing ear only salon, or temporary location, cabinets or containers for the storage of instruments, single-use articles, and other utensils shall be provided for each operator and shall be maintained in a sanitary manner.

F. In a body-piercing salon, body-piercing ear only salon, or temporary location, bulk single-use articles shall be commercially packaged and handled in such a way as to protect ~~them~~ the articles from contamination.

G. In a body-piercing salon, body-piercing ear only salon, or temporary location, all materials applied to the human skin shall be from single-use articles or transferred from bulk containers to single use containers and shall be disposed of after each use.

H. In a body-piercing salon or body-piercing ear only salon, the walls, ceilings, and floors shall be kept in good repair. The body-piercing area shall be constructed of smooth, hard, surfaces that are nonporous, free of open holes or cracks, light colored, and easily cleaned. New physical facilities shall not include any dark-colored surfaces in the body-piercing area. Existing physical facilities with dark-colored surfaces in the body-piercing area shall replace the dark-colored surfaces with light-colored surfaces whenever the facilities are extensively remodeled or upon relocation of the business.

I. A body-piercing salon, body-piercing ear only salon, or temporary location shall have adequate lighting of at least 50

foot-candles of illumination in the body-piercing and sterilization areas.

J. In a body-piercing salon, body-piercing ear only salon, or temporary location, adequate mechanical ventilation shall be provided.

K. A body-piercing salon, body-piercing ear only salon, or temporary location shall be equipped with hand-cleaning facilities for its personnel with unobstructed access to the body-piercing area or body-piercing ear only area such that the body piercer or body piercer ear only can return to the area without having to touch anything with his hands. Hand-cleaning facilities shall be equipped either with hot and cold or tempered running water under pressure and liquid germicidal soap or with a sanitizing solution to clean hands. Hand-cleaning facilities shall be equipped with single-use towels or mechanical hand drying devices and a covered refuse container. Such facilities shall be kept clean and in good repair. All facilities must have running water and soap accessible for cleaning of hands contaminated by body fluids.

L. Animals are not permitted in the body-piercing salon, body-piercing ear only salon, or temporary location except for guide or service animals accompanying persons with disabilities or nonmammalian animals in enclosed glass containers such as fish aquariums, which shall be outside of the body-piercing area or sterilization ~~areas~~ area. No animals are allowed in the body-piercing area, body-piercing ear only area, or sterilization ~~areas~~ area.

M. In a body-piercing salon, body-piercing ear only salon, or temporary location, the use of tobacco products and consumption of alcoholic beverages shall be prohibited in the body-piercing area, body-piercing ear only area, or sterilization ~~areas~~ area.

N. In a body-piercing salon, body-piercing ear only salon, or temporary location, no food or drink will be stored or consumed in the body-piercing area, body-piercing ear only area, or sterilization ~~areas~~ area.

O. In a body-piercing salon, body-piercing ear only salon, or temporary location, if body-piercing or body-piercing ear only is performed where cosmetology services are provided, it shall be performed in an area that is separate and enclosed.

P. All steam sterilizers shall be biological spore tested at least monthly.

Q. Biological spore tests shall be verified through an independent laboratory.

R. Biological spore test records shall be retained for a period of three years and made available upon request.

S. Steam sterilizers shall be used only for instruments used by the salon's employees.

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## [ 18VAC41-60-200. Body piercer and body piercer ear only responsibilities.

A. All body piercers and body piercers ear only shall provide to the owner one of the following:

1. Proof of completion of the full series of Hepatitis B vaccine;
2. Proof of immunity by blood titer; or
3. Written declaration of refusal of the owner's offer of a full series of Hepatitis B vaccine.

B. All body piercers and body piercers ear only shall wear clean outer garments, maintain a high degree of personal cleanliness, and conform to hygienic practices while on duty.

C. All body piercers and body piercers ear only shall clean their hands thoroughly using hot or tempered water with a liquid germicidal soap or use sanitizing solution to clean hands before and after body piercing and as necessary to remove contaminants.

D. All body piercers and body piercers ear only must wear single-use examination gloves while assembling instruments and another pair of single-use examination gloves while providing piercing services.

E. Each time there is an interruption in the service, each time the gloves become torn or perforated or become contaminated, or whenever the ability of the gloves to function as a barrier is compromised:

1. Gloves shall be removed and disposed of; and
2. Hands shall be cleaned and a fresh pair of gloves used.

F. Body piercers and body piercers ear only shall use standard precautions while providing piercing services. A body piercer or body piercer ear only diagnosed with a communicable disease shall provide to the department a written statement from a health care practitioner that the body piercer's condition no longer poses a threat to public health.

G. Body piercers and body piercers ear only with draining lesions on their hands or face will not be permitted to work until cleared by a health care professional.

H. The area of the client's skin to be pierced shall be cleaned with an approved germicidal soap or antiseptic product according to label directions.

I. The external skin of the client to be pierced shall be cleaned with an approved germicidal soap or antiseptic product according to the label directions. In the case of oral piercings, the operator shall provide the individual with antiseptic mouthwash in a single-use cup and shall ensure that the individual utilizes the mouthwash provided. In the case of a lip, labret or cheek piercing, procedures described in this subsection for both skin and oral piercings shall be followed.

J. If shaving is required, razors shall be single-use and disposed of in a puncture-resistant container.

K. Each body piercer or body piercer ear only performing any piercing procedures in the salon shall have the education, training and experience, or any combination thereof, to practice aseptic technique and prevent the transmission of blood borne pathogens. All procedures shall be performed using aseptic technique.

L. An individual, single-use, pre-sterilized piercing needle shall be used for each client. Single-use disposable instruments shall be disposed of in a puncture-resistant container.

M. Used, nondisposable instruments shall be kept in a separate, puncture-resistant container until brush scrubbed in hot water soap and then sterilized by autoclaving. Contaminated instruments shall be handled with disposable gloves.

N. Used nondisposable instruments that are ultrasonically cleaned shall be rinsed under running hot water prior to being placed in the used instrument container.

O. Used nondisposable instruments that are not ultrasonically cleaned prior to being placed in the used instrument container shall be kept in a germicidal or soap solution until brush scrubbed in hot water and soap and sterilized by autoclaving.

P. The ultrasonic unit shall be sanitized daily with a germicidal solution.

Q. Nondisposable instruments shall be sterilized and shall be handled and stored in a manner to prevent contamination. Instruments to be sterilized shall be sealed in bags made specifically for the purpose of autoclave sterilization and shall include the date of sterilization. If nontransparent bags are utilized, the bag shall also list the contents.

R. Autoclave sterilization bags with a color code indicator that changes color upon proper sterilization shall be utilized during the autoclave sterilization process.

S. ~~Instruments~~ Nondisposable instruments shall be placed in the autoclave in a manner to allow live steam to circulate around them.

T. Contaminated disposable and single-use items shall be disposed of in accordance with federal and state regulations regarding disposal of biological hazardous materials.

U. The manufacturer's written instruction of the autoclave shall be followed. ]

## **18VAC41-60-220. Grounds for license revocation or suspension or probation; denial of application, renewal, or reinstatement; or imposition of a monetary penalty.**

~~A.~~ The board may, in considering the totality of the circumstances, fine any licensee and suspend, place on probation, or revoke or refuse to renew or reinstate any license, or deny any application issued under the provisions of Chapter

7 (§ 54.1-700 et seq.) of Title 54.1 of the Code of Virginia and ~~the regulations of the board~~ this chapter if ~~the board~~ it finds that the licensee or applicant:

1. ~~The licensee is~~ Is incompetent or negligent in practice, or incapable mentally or physically, as those terms are generally understood in the profession, to ~~(i) practice as a body piercer or body piercer ear only, or (ii) operate a body piercing salon;~~

2. ~~The licensee or applicant is~~ Is convicted of fraud or deceit in the practice body piercing or body piercing ear only;

3. ~~The licensee or applicant attempted~~ Attempted to obtain, obtained, renewed, or reinstated a license by false or fraudulent representation;

4. ~~The licensee or applicant violates~~ Violates or induces others to violate, or cooperates with others in violating, any of the provisions of this chapter or Chapter 7 (§ 54.1-700 et seq.) of Title 54.1 of the Code of Virginia or any local ordinance or regulation governing standards of health and sanitation of the establishment in which body piercers or body piercers ear only may practice or offer to practice;

5. Offers, gives, or promises anything of value or benefit to any federal, state, or local employee for the purpose of influencing that employee to circumvent in the performance of his duties any federal, state, or local law, regulation, or ordinance governing body piercing as defined in § 54.1-700 of the Code of Virginia;

6. Fails to respond to the board or any of its agents or provides false, misleading, or incomplete information to an inquiry by the board or any of its agents;

7. Fails or refuses to allow the board or any of its agents to inspect during reasonable hours any licensed salon for compliance with provisions of Chapter 7 (§ 54.1-700 et seq.) or this chapter;

5. ~~The licensee or applicant fails~~ 8. Fails to produce, upon request or demand of the board or any of its agents, any document, book, record, or copy thereof in a licensee's or owner's possession or maintained in accordance with this chapter;

6. ~~A licensee fails~~ 9. Fails to notify the board of a change of name or address in writing within 30 days of the change for each and every license. ~~The board shall not be responsible for the licensee's failure to receive notices, communications and correspondence caused by the licensee's failure to promptly notify the board in writing of any change of name or address or for any other reason beyond the control of the board;~~

7. ~~The licensee or applicant~~ 10. Makes any misrepresentation or publishes or causes to be published any advertisement that is false, deceptive, or misleading;

8. ~~The licensee or applicant fails~~ 11. Fails to notify the board in writing within 30 days of the suspension, revocation, or surrender of a license, certificate, or permit in connection with a disciplinary action in any other jurisdiction or of any license, certificate, or permit which has been the subject of disciplinary action in any other jurisdiction;

9. ~~The licensee or applicant has been convicted or found guilty in any jurisdiction of any misdemeanor or felony. Any plea of nolo contendere shall be considered a conviction for the purpose of this section. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where convicted shall be admissible as prima facie evidence of such guilt; or~~

10. ~~The licensee, certificate holder, temporary license holder, or applicant fails to notify the board in writing within 30 days that the licensee, certificate holder, temporary license holder, or applicant has pleaded guilty or nolo contendere or was convicted and found guilty of any misdemeanor or felony.~~

~~B. In addition to subsection A of this section, the board may, in considering the totality of the circumstances, revoke, suspend, place on probation or refuse to renew or reinstate the license of any body piercing salon or body piercing ear only salon or impose a fine as permitted by law, or both, if the board finds that:~~

1. ~~The owner or operator of the body piercing salon or body piercing ear only salon fails to comply with the facility requirements of body piercing salons or body piercing ear only salons provided for in this chapter or in any local ordinances; or~~

2. ~~The owner or operator allows a person who has not obtained a license to practice as a body piercer or body piercer ear only unless the person is duly enrolled as an apprentice.~~

~~C. In addition to subsection A of this section, the board may, in considering the totality of the circumstances, revoke, suspend, place on probation or refuse to renew or reinstate the license of any licensee or impose a fine as permitted by law, or both, if the board finds that the licensee fails to take sufficient measures to prevent transmission of communicable or infectious diseases or fails to comply with any local, state or federal law or regulation governing the standards of health and sanitation for the practice of body piercing or body piercing ear only.~~

12. Has been convicted or found guilty, regardless of the manner of adjudication in Virginia or any other jurisdiction of the United States, of a misdemeanor involving moral turpitude, sexual offense, drug distribution, or physical injury or any felony, there being no appeal pending therefrom or the time for appeal having elapsed. Review of convictions shall be subject to the requirements of § 54.1-204 of the Code of Virginia. Any plea of nolo contendere

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shall be considered a conviction for purposes of this subdivision. The record of a conviction certified or authenticated in such form as to be admissible in evidence under the laws of the jurisdiction where convicted shall be admissible as prima facie evidence of such conviction or guilt;

13. Fails to inform the board in writing within 30 days of pleading guilty or nolo contendere or being convicted or found guilty regardless of adjudication of any convictions as stated in subdivision 12 of this section;

14. Allows, as responsible management of a salon, a person who has not obtained a license to practice as a body piercer or body piercer ear only unless the person is duly enrolled as an apprentice;

15. Fails to take sufficient measures to prevent transmission of communicable or infectious diseases or fails to comply with sanitary requirements provided for in this chapter or any local, state, or federal law or regulation governing the standards of health and sanitation for the practice of body piercing, or the operation of body-piercing salon or body-piercing ear only salon; or

16. Fails to comply with all procedures established by the board and the testing service with regard to conduct at any board examination.

**NOTICE:** The following forms used in administering the regulation have been filed by the agency. Amended or added forms are reflected in the listing and are published following the listing. Online users of this issue of the Virginia Register of Regulations may also click on the name to access a form. The forms are also available from the agency contact or may be viewed at the Office of Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

## FORMS

~~Body Piercer Examination & License Application, A425-1241EXLIC (eff. 9/2011)~~

~~Body Piercing Training & Experience Verification Form, A425-12BPTREXP (eff. 9/2011)~~

[Body-Piercing Apprenticeship Sponsor Application, A425-12BPSPON \(eff. 9/2011\)](#)

[Body-Piercing Apprentice Certification Application, A425-1244BPAC \(eff. 9/2011\)](#)

[Body-Piercing Apprenticeship Completion Form, A425-12BPAC \(eff. 9/2011\)](#)

~~Body Piercing Client Disclosure Form, A425-12BPDIS (eff. 9/2011)~~

~~Body Piercer Ear Only License Application, A450-1245LIC-v6 (rev. 9/2016)~~

~~License by Endorsement Application, A450-1213END-v9 (rev. 9/2016)~~

~~Training & Experience Verification Form, A425-1213TREXP (eff. 9/2011)~~

~~Salon, Shop, Spa & Parlor License/Reinstatement Application, A450-1213BUS v8 (rev. 9/2016)~~

~~Licensure Fee Notice, A450-1213FEE v6 (rev. 9/2016)~~

~~Individuals Reinstatement Application, A450-1213REI v8 (rev. 9/2016)~~

[Body Piercer Examination & License Application, A450-1241EXLIC-v13 \(rev. 7/2019\)](#)

[Body-Piercing Client Disclosure Form, A450-12BPDIS-v2 \(rev. 4/2013\)](#)

[Body Piercer Ear Only License Application, A450-1245LIC-v7 \(rev. 7/2019\)](#)

[License by Endorsement Application, A450-1213END-v10 \(rev. 2/2017\)](#)

[Training & Experience Verification Form, A450-1213TREXP-v6 \(eff. 2/2017\)](#)

[Salon, Shop, Spa & Parlor License/Reinstatement Application, A450-1213BUS-v12 \(rev. 7/2019\)](#)

[Licensure Fee Notice, A450-1213FEE-v7 \(rev. 4/2017\)](#)

[Individuals - Reinstatement Application, A450-1213REI-v9 \(rev. 2/2017\)](#)

VA.R. Doc. No. R18-5125; Filed April 13, 2021, 5:49 p.m.

## BOARD OF DENTISTRY

### Proposed Regulation

**Title of Regulation:** **18VAC60-21. Regulations Governing the Practice of Dentistry (adding 18VAC60-21-107).**

**Statutory Authority:** §§ 54.1-2400 and 54.1-3408.02 of the Code of Virginia.

**Public Hearing Information:**

June 11, 2021 - 9:05 a.m. - Department of Health Professions, Perimeter Building, 9960 Mayland Drive, 2nd Floor, Board Room 4, Henrico, VA 23233 (Location subject to change - check the Virginia Regulatory Town Hall website at <https://townhall.virginia.gov> prior to meeting.)

**Public Comment Deadline:** July 9, 2021.

**Agency Contact:** Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4437, FAX (804) 527-4428, or email [sandra.reen@dhp.virginia.gov](mailto:sandra.reen@dhp.virginia.gov).

**Basis:** Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the

Board of Dentistry the authority to promulgate regulations to administer the regulatory system. The specific statutory provisions for electronic prescribing and the authority for granting a waiver are found in § 54.1-3408.02 of the Code of Virginia.

**Purpose:** The purpose of this regulatory action is compliance with a statutory requirement to promulgate regulations setting out the conditions upon which the board may grant a one-year waiver from the requirement for e-prescribing of a controlled substance containing an opioid pursuant to Chapter 664 of the 2019 Acts of Assembly. Since the circumstances may vary from practitioner to practitioner, the board has used the conditions set forth in statute as the basis for the regulation and will take into consideration in making a case-by-case decision on a waiver the health, safety, and welfare of a practitioner's patients.

**Substance:** 18VAC60-21-107 is added to reiterate the requirement effective July 1, 2020, that a prescription for a controlled substance that contains an opioid must be issued as an electronic prescription unless the prescriber qualifies for an exemption provided in the law and provide for a one-year from the requirement if the practitioner can demonstrate economic hardship technological limitations or other exceptional circumstances beyond the practitioner's control.

**Issues:** There are no advantages or disadvantages to the public apart from those in the statutory language. Submitting opioid prescriptions electronically has been shown to reduce prescription fraud and thereby reduce the volume of opioids available for abuse or misuse. The waiver provision, in addition to the specific exemptions to electronic prescribing, will allow for continued prescribing for practitioners who are not able to comply for exceptional circumstances beyond their control. There are no particular advantages or disadvantages to the agency; there may be an advantage to the Commonwealth by a reduction in fraudulent prescriptions. Other matters of interest revolve around the implementation and application of statutory and regulatory provisions. Some prescribers are concerned about the requirement for electronic prescribing, which is required by statute by July 1, 2020.

**Department of Planning and Budget's Economic Impact Analysis:**

Summary of the Proposed Amendments to Regulation. The Board of Dentistry (Board) proposes to amend 18VAC60-210 Regulations Governing the Practice of Dentistry in order to require that prescriptions of medications containing opioids be transmitted electronically from the prescribing authority to the pharmacist and to grant one-time waivers up to one year if a prescriber cannot transmit prescriptions electronically as of July 1, 2020. The proposed amendment would make permanent the existing emergency text and is intended to prevent the abuse of prescription drugs containing opioids.

Background. Section 54.1-3408.02 of the Code of Virginia states that prescriptions may be transmitted electronically or by facsimile machine and shall be treated as valid original

prescriptions.<sup>1</sup> The 2017 Acts of Assembly (Chapters 115 and 429) amended and reenacted this section of the Code to require that any prescription for a controlled substance that contains an opiate shall be issued as an electronic prescription. The reenacted section containing this requirement took effect on July 1, 2020.<sup>2</sup> The same legislation also updated the definition of electronic prescriptions to be a written prescription that is generated on an electronic application and is transmitted to a pharmacy as an electronic data file; Schedules II through V prescriptions shall be transmitted in accordance with 21 CFR Part 1300.<sup>3</sup>

Subsequently, pursuant to a statutory change requested by the Board,<sup>4</sup> Chapter 664 of the 2019 Acts of Assembly further amended this section to insert 10 exemptions to this requirement and to authorize the licensing health regulatory board to grant a hardship waiver for one year.<sup>5</sup> Chapter 664 also required that the Board of Medicine, the Board of Nursing, the Board of Dentistry, and the Board of Optometry promulgate regulations to implement the waivers within 280 days of the acts enactment. Hence, the Board promulgated an emergency regulation that became effective on December 2, 2019.<sup>6</sup>

The proposed amendment adds a section to the regulation (specifically 18VAC60-21-107) containing the two subsections as quoted below:

- 18VAC60-21-107. Waiver for electronic prescribing.
  - A. Beginning July 1, 2020, a prescription for a controlled substance that contains an opioid shall be issued as an electronic prescription consistent with § 54.1-3408.02 of the Code of Virginia, unless the prescription qualifies for an exemption as set forth in subsection C of that section.
  - B. Upon written request, the board may grant a one-time waiver of the requirement of subsection A of this section, for a period not to exceed one year, due to demonstrated economic hardship, technological limitations that are not reasonably within the control of the prescriber, or other exceptional circumstances demonstrated by the prescriber.

Thus, the proposed amendment would inform readers as to the electronic transmission requirement and the waiver that may be obtained, but readers would need to refer to § 54.1-3408.02 of the Code to find the exemptions that were added by Chapter 664 of the 2019 Acts of Assembly.

The exemptions provided in the Code would directly affect the potential cost of transmitting electronic prescriptions in a

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variety of settings. Thus, and although they are not explicitly mentioned in the text of the regulation, the exemptions are listed here for the reader's reference, with parenthetical notes inserted for clarity of context.

§ 54.1-3408.02 C. The requirements of subsection B (electronic transmission) shall not apply if:

1. The prescriber dispenses the controlled substance that contains an opioid directly to the patient or the patient's agent;
2. The prescription is for an individual who is residing in a hospital, assisted living facility, nursing home, or residential health care facility or is receiving services from a hospice provider or outpatient dialysis facility;
3. The prescriber experiences temporary technological or electrical failure or other temporary extenuating circumstance that prevents the prescription from being transmitted electronically, provided that the prescriber documents the reason for this exception in the patient's medical record;
4. The prescriber issues a prescription to be dispensed by a pharmacy located on federal property, provided that the prescriber documents the reason for this exception in the patient's medical record;
5. The prescription is issued by a licensed veterinarian for the treatment of an animal;
6. The FDA requires the prescription to contain elements that are not able to be included in an electronic prescription;
7. The prescription is for an opioid under a research protocol;
8. The prescription is issued in accordance with an executive order of the Governor of a declared emergency;
9. The prescription cannot be issued electronically in a timely manner and the patient's condition is at risk, provided that the prescriber documents the reason for this exception in the patient's medical record; or
10. The prescriber has been issued a waiver pursuant to subsection D (hardship waiver).

Further, Chapter 664 also amended § 54.1-3410 of the Code, effective July 1, 2020, which addresses when pharmacists may sell and dispense drugs. It adds a subsection to clarify that, "A dispenser who receives a non-electronic prescription for a controlled substance containing an opioid is not required to verify that one of the exceptions set forth in § 54.1-3408.02 applies and may dispense such controlled substance pursuant to such prescription and applicable law."

**Estimated Benefits and Costs.** The 2017 Acts of Assembly (Chapters 115 and 429) also directed the Secretary of Health and Human Resources to convene a work group of interested stakeholders to review actions necessary for the implementation of electronic prescriptions for controlled substances and evaluate the burden on prescribers, including

the inability of prescribers to comply with the deadline. The E-Prescribing Workgroups final report indicates that roughly 61 percent of prescribers and nearly 99% of pharmacies in Virginia had already adopted electronic prescriptions by 2018 and faced no additional costs.<sup>7</sup> The Department of Health Professions (DHP) states that all dentists who had a proper application (approximately 1,430) have been granted a waiver thus far.

It appears those who needed a waiver have already been granted an extension and those with a waiver who need to implement e-prescribing before their waiver expires would face additional costs such as acquisition and integration of software and possibly internet connectivity. The public would benefit to the extent that increasing electronic prescriptions of controlled substances decreases diversion and instances of substance abuse.

**Businesses and Other Entities Affected.** The Board currently regulates approximately 7,288 dentists. Licensees would only be affected by the new requirements if (i) they prescribe medications containing opioids, (ii) they do not work in a type of facility that is included in the exemptions listed, and (iii) they do not already use e-prescription technology. According to DHP, approximately 1,430 dentists have been granted a waiver.

**Small Businesses<sup>8</sup> Affected.** It is not known exactly how many dentists are small businesses or employees of a small business, but most dentists do work in small businesses. However, there does not appear to be disproportionately higher costs for small businesses.

**Localities<sup>9</sup> Affected.**<sup>10</sup> The proposed amendments potentially affect prescribers and patients in all localities. The proposed amendments are unlikely to introduce new costs for local governments.

**Projected Impact on Employment.** The proposed amendments are unlikely to affect total employment in the industry.

**Effects on the Use and Value of Private Property.** The proposed amendments are unlikely to substantively affect the use or value of private property. Real estate development costs are unlikely to be affected.

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<sup>1</sup>See <https://law.lis.virginia.gov/vacode/title54.1/chapter34/section54.1-3408.02/>

<sup>2</sup>See <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+CHAP0429>

<sup>3</sup>See Definitions effective July 1, 2020: <https://law.lis.virginia.gov/vacode/title54.1/chapter34/section54.1-3401/>

<sup>4</sup>See [https://townhall.virginia.gov/L/GetFile.cfm?File=Meeting\30\26790\Agenda\\_DHP\\_26790\\_v1.pdf](https://townhall.virginia.gov/L/GetFile.cfm?File=Meeting\30\26790\Agenda_DHP_26790_v1.pdf) (page 172)

<sup>5</sup>See <http://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+CHAP0664>

<sup>6</sup>See <https://townhall.virginia.gov/l/ViewStage.cfm?stageid=8755>

<sup>7</sup><https://rga.lis.virginia.gov/Published/2018/RD416>

<sup>8</sup>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."

"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>10</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

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

**Summary:**

*Pursuant to Chapter 664 of the 2019 Acts of Assembly, the proposed amendment adds a section to (i) reiterate the requirement effective July 1, 2020, that a prescription for a controlled substance that contains an opioid must be issued as an electronic prescription unless the prescriber qualifies for an exemption set out in the law and (ii) provide for a one-year from the requirement if the practitioner can demonstrate economic hardship technological limitations or other exceptional circumstances beyond the practitioner's control.*

**18VAC60-21-107. Waiver for electronic prescribing.**

A. Beginning July 1, 2020, a prescription for a controlled substance that contains an opioid shall be issued as an electronic prescription consistent with § 54.1-3408.02 of the Code of Virginia, unless the prescription qualifies for an exemption as set forth in subsection C of § 54.1-3408.02.

B. Upon written request, the board may grant a one-time waiver of the requirement of subsection A of this section for a period not to exceed one year, due to demonstrated economic hardship, technological limitations that are not reasonably within the control of the prescriber, or other exceptional circumstances demonstrated by the prescriber.

VA.R. Doc. No. R20-6114; Filed April 19, 2021, 8:50 a.m.

**BOARD OF FUNERAL DIRECTORS AND EMBALMERS**

**Proposed Regulation**

**Title of Regulation:** 18VAC65-40. Regulations for the Funeral Service Internship Program (amending 18VAC65-40-90, 18VAC65-40-110, 18VAC65-40-130, 18VAC65-40-220, 18VAC65-40-250, 18VAC65-40-280, 18VAC65-40-320, 18VAC65-40-340, 18VAC65-40-640).

**Statutory Authority:** §§ 54.1-2400 and 54.1-2817 of the Code of Virginia.

**Public Hearing Information:**

June 9, 2021 - 9 a.m. - Electronic only meeting through WebEx. Link to the meeting is <https://covaconf.webex.com/covaconf/j.php?MTID=m868a4f502a8842fd890e02ecf0808f0e>. Join by audio only through US toll free 1-866-692-4530 or US toll 1-517-466-2023. Meeting number (access code): 185 627 2752.

**Public Comment Deadline:** July 9, 2021.

**Agency Contact:** Corie Tillman-Wolf, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4424, FAX (804) 527-4637, or email [corie.wolf@dhp.virginia.gov](mailto:corie.wolf@dhp.virginia.gov).

**Basis:** Regulations for the Funeral Intern Program are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the board with authority to promulgate regulations to administer the regulatory system. Authority for the board to take disciplinary action for failure to adequately supervise funeral service interns is found in § 54.1-2806 of the Code of Virginia. Authority to regulate funeral service interns is found in § 54.1-2817 of the Code of Virginia.

**Purpose:** The purpose of this regulatory action is to provide clear, enforceable regulations for the supervision and practice of interns so that interns and funeral homes are not misleading the public about an intern's status and that interns are being appropriately supervised to protect the public health and safety in the handling of human remains.

**Substance:** The Board of Funeral Directors and Embalmers has adopted proposed regulations to (i) reduce the number of hours required for an internship from 3,000 to 2,000 and specify that an extension beyond 48 months for completion of an internship will only be granted for extenuated circumstances; (ii) require supervisors to register for supervision of each funeral service intern with an expiration for the registration of 48 months or at the completion of the intern's training, whichever occurs first in order to allow the board to track active supervisors and make sure supervisors are in good standing; (iii) require that interns be identified to the public as interns in titles, correspondence, and communications with the public; (iv) clarify that a notice of renewal may be transmitted electronically, consistent with legislation that became effective on July 1, 2018; (v) specify that supervision must be provided under a funeral service licensee with an unrestricted license and restrict approval of supervisors with previous board action within the previous two years; (vi) remove language related to deduction of credit hours for late intern reports; (vii) clarify that an intern may not receive credit for training if they fail to submit a training report, rather than forfeiting partial credit for training; and (ix) clarify that disciplinary action may be imposed for failure to comply with the statutes or regulations of the Board of Funeral Directors and Embalmers.

**Issues:** The primary advantage to the public is more clarity in oversight of funeral interns and assurance that the persons supervising their practice hold appropriate licensure that is in good standing. All amendments are intended to provide additional consumer protection. There are no disadvantages to the public.

There are no advantages or disadvantages to the Commonwealth, except more clarity in regulation will assist the board in interpretation of the law.

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## Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Following a periodic review,<sup>1</sup> the Board of Funeral Directors and Embalmers (Board) proposes to: (1) reduce the number of hours required for a funeral service internship from 3,000 to 2,000, (2) require supervisors to register for the supervision of each funeral service intern, (3) prohibit licensees with disciplinary records within the last two years from supervising interns, and (4) require that interns be identified as interns in titles, correspondence, and communications with the public.

Background. During its periodic review of this regulation, the Board compared the number of hours required in Virginia to complete an internship to those required in other states, including Maryland (1,000 hours), North Carolina (2,000), and Kentucky (one year of full time training at 40 hours per week which appears to be 2,080 hours). The Board concluded Virginia appeared to be out of line with almost every other state. Also, a commenter on the periodic review noted that a Funeral Service Provider Workforce Study<sup>2</sup> showed that funeral service licensees are retiring or leaving the profession at a higher rate than licensees are entering the profession. The Board concurred with the commenter that the current 3,000-hour internship requirement is one factor that limits the ability to continually have a pool of qualified funeral service licensees. The Board further compared internship hours for other health professions, which range from one year for professions such as speech language pathologists to 2,000 hours as an administrator-in-training for a nursing home administrator. To qualify as an assisted living facility administrator (a profession with similar educational requirements), a person must have 30 hours of post-secondary education and 640 hours of training as an administrator-in-training.

Estimated Benefits and Costs. One of the proposed changes represents a 1,000-hour reduction in the time required to complete a funeral service internship, which corresponds to 125 eight-hour business days or 25 full-working weeks (six months). Although interns earn some money during their internships, they would likely earn more as a full-time employee. The opportunity to increase their earning potential six months earlier is clearly beneficial to the interns.

The impact on the pool of interns is two-fold. On one hand, a funeral service intern would be able to complete the program about six months earlier under the proposed regulation. This change would decrease the current pool of interns. On the other hand, the Department of Health Professions (DHP) points out that the relatively high number of required internship hours currently discourages some potential candidates from obtaining their licenses in Virginia. To the extent that a decrease in the number of hours would encourage internships, funeral homes would benefit from an increase in the pool of interns. Whether one of these opposite impacts would dominate the other is not clear.

Similarly, the impact on affected funeral establishments is not clear. Generally, under the new rule funeral establishments that currently employ interns would likely pay higher wages to replace lower-cost intern labor six months earlier, assuming another intern cannot be hired. However, whether existing establishments can easily replace interns who would complete their training earlier than before will depend on the interaction of the two opposing factors noted and how they jointly impact the intern pool, which cannot be determined.

DHP does not expect any reduction in the quality of services offered by interns who would get their certificates six months early. This expectation is supported by the fact that the statutory requirements (that an intern assist in embalming at least 25 bodies and conduct at least 25 funerals), the requirement to pass the licensing examination, and the inspection requirements to ensure minimum quality remain the same.

The Board also proposes to require intern supervisors to register for the supervision of each intern, and that the registration expire after 48 months or at the completion of the interns training, whichever occurs first. No fee is proposed for this registration. According to the Board, the intent of this rule is to ensure that the Board is aware of who is currently supervising interns, so there is greater accountability and consistency. Currently, 567 persons are registered as supervisors, but there are only 186 interns. As a result, the Board contends that the majority of those registered are not actively supervising interns, since each supervisor may have two interns. This change will place on the supervisor the burden of sending registration documents for each intern supervised.

The Board further proposes to prohibit someone who has been disciplined within the past two years from supervising an intern. Since the professionalism, skills, and integrity of the supervisor is critical to training an intern for competency in the profession, the Board is concerned about the effect upon competency if a supervisor has recently been disciplined by the Board. Supervisors with a disqualifying record would lose the ability to supervise an intern under this change.

Finally, the Board proposes to require that interns be identified as interns in titles, correspondence, and communications with the public. The intent of the additional language is protection for consumers so that they understand that a person is receiving training in a funeral home and is not a licensed funeral service provider.

Businesses and Other Entities Affected. There are 420 licensed funeral establishments, and another 79 are licensed as branch establishments. Both individual establishments and branch establishments hold licenses, but either may be owned by large national companies. There are 1,463 funeral service licensees with current, active licenses; 567 licensees are also registered as supervisors. In the 4th quarter of FY 2019, there were 186 funeral interns.<sup>3</sup> The proposed amendments would introduce additional burden in terms of the newly required registration

for each intern and prohibition of supervision if someone has been disciplined within the past two years. An adverse economic impact on businesses is indicated because there do not appear to be any offsetting direct benefit to the burden and the prohibition.

Localities<sup>4</sup> Affected.<sup>5</sup> The proposed amendments should not affect any locality more than others. The proposed amendments do not introduce costs for localities.

Projected Impact on Employment. The proposal to reduce the number of hours required for an internship from 3,000 to 2,000 would allow interns to start earning higher wages six months earlier. This may change their employment status but is unlikely to directly affect total employment. The impact on the available pool of interns is mixed due to competing opposite effects of the reduction in internship hours as discussed above.

Effects on the Use and Value of Private Property. The proposed amendments would not substantively affect the use and value of private property. No significant effect is expected on real estate development costs.

Adverse Effect on Small Businesses.<sup>6</sup>

Types and Estimated Number of Small Businesses Affected. The proposed amendments affect licensed funeral establishments and branch establishments that employ interns, most if not all of which are likely small businesses.<sup>7</sup> As indicated, DHP reports 567 licensees are registered as supervisors, but there were only 186 funeral interns.

Costs and Other Effects. Additional burdens in terms of the newly required registration for each intern and prohibition of supervision if someone has been disciplined within the past two years as discussed are also applicable to the businesses that are small in size.

Alternative Method that Minimizes Adverse Impact. There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

<sup>1</sup><https://townhall.virginia.gov/l/ViewPReview.cfm?PRid=1642>

<sup>2</sup>[https://townhall.virginia.gov/l/GetFile.cfm?File=22\5221\8787\AgencyState\ment\\_DHP\\_8787\\_v3.pdf](https://townhall.virginia.gov/l/GetFile.cfm?File=22\5221\8787\AgencyState\ment_DHP_8787_v3.pdf)

<sup>3</sup>Data source: Department of Health Professions

<sup>4</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>5</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

<sup>6</sup>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."

<sup>7</sup>Virginia Employment Commission records indicate that as of the first quarter of 2019, the Commonwealth had: a) 349 Funeral Homes and Funeral Services firms, all of which had fewer than 500 employees, and b) 131 Cemeteries and Crematories firms, all of which had fewer than 500 employees.

Agency's Response to Economic Impact Analysis: The Board of Funeral Directors and Embalmers concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

*The proposed amendments (i) reduce the number of hours required for an internship to 2,000; (ii) require supervisors to register for supervision of each funeral service intern with an expiration for the registration of 48 months or at the completion of the intern's training, whichever occurs first, in order to allow the board to track active supervisors and make sure supervisors are in good standing; (iii) require that interns be identified to the public as interns in titles, correspondence, and communications with the public; (iv) clarify that a notice of renewal may be transmitted electronically, consistent with legislation that became effective on July 1, 2018; (v) specify that supervision must be provided under a funeral service licensee with an unrestricted license and restrict approval of supervisors with previous board action within the previous two years; (vi) remove language related to deduction of credit hours for late intern reports; (vii) clarify that an intern may not receive credit for training if the intern fails to submit a training report, rather than forfeiting partial credit for training; and (viii) clarify that disciplinary action may be imposed for failure to comply with the statutes or regulations of the Board of Funeral Directors and Embalmers.*

**18VAC65-40-90. Renewal of registration.**

A. The funeral service intern registration shall expire on March 31 of each calendar year and may be renewed by submission of the renewal notice and prescribed fee.

B. A person who fails to renew a registration by the expiration date shall be deemed to have an invalid registration. No credit will be allowed for an internship period served under an expired registration.

C. The funeral service intern is responsible for notifying the board within 14 days of any changes in name, address, employment, or supervisor. Any notices shall be validly given when mailed to the address on record with the board. Renewal notices may be mailed or sent electronically.

**18VAC65-40-110. Reinstatement Renewal or reinstatement of expired registration.**

A. A funeral service intern whose registration has expired may be ~~reinstated~~ renewed within one year following expiration by payment of the current renewal fee and the late renewal fee.

B. A funeral service intern whose registration has been expired for more than one year shall apply for reinstatement by submission of an application and payment of a reinstatement

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fee. The board may consider reinstatement of an expired registration for up to three years following expiration.

C. When a registration is not reinstated within three years of its expiration date, a new application for registration shall be filed and a new internship begun.

## **18VAC65-40-130. Funeral service internship.**

A. The internship shall consist of at least ~~3,000~~ 2,000 hours of training to be completed within no less than 12 months and no more than 48 months. ~~For good cause shown, the~~ The board may grant an extension of time for completion of an internship only for extenuating circumstances.

B. The funeral service intern shall be assigned a work schedule of not less than 20 hours nor more than 60 hours per week in order to receive credit for such training. For good cause shown, the board may waive the limitation on an intern's work schedule.

C. A funeral service intern shall receive training in all areas of funeral service.

D. A funeral service intern shall be identified to the public as a funeral service intern in a title used, name tag worn, and any correspondence or communication in which the intern's name is used.

## **18VAC65-40-220. Qualifications of training site.**

A. The board shall approve only an establishment or two combined establishments to serve as the training site or sites that:

1. Have a full and unrestricted Virginia license;
2. Have complied in all respects with the provisions of the regulations of the Board of Funeral Directors and Embalmers; and
3. Have 50 or more funerals and 50 or more bodies for embalming over a 12-month period for each person to be trained. This total must be maintained throughout the period of training. If the establishment does not meet the required number of funerals or embalmings, the funeral service intern may seek approval for an additional training site.

B. The board may grant approval for ~~a resident trainee an~~ intern to receive all or a portion of the embalming training at a facility of state or federal government or an accredited educational institution.

## **18VAC65-40-250. Requirements for supervision.**

A. Training shall be conducted under the direct supervision of a licensee ~~or licensees~~ approved by the board. Credit shall only be allowed for training under direct supervision.

B. The board shall approve only funeral service licensees, licensed funeral directors, or licensed embalmers to give funeral training who have a full and unrestricted Virginia funeral license, have at least two consecutive years in practice

as a funeral service licensee, funeral director, or embalmer and are employed full time in or under contract with the establishment, facility, or institution where training occurs. The board will not approve registration of a supervisor who has been subject to board disciplinary action within the most recent two years.

C. A supervisor licensed as an embalmer or a funeral director shall provide supervision only in the areas of funeral practice for which he is licensed. A supervisor shall ensure that a funeral service intern receives training under the direct supervision of a licensee who has a current license in good standing.

D. A supervisor shall register with the board for each funeral service intern for whom the supervisor is providing supervision. Such registration shall expire 48 months after registration or at the completion of the intern's training, whichever occurs first. If the intern has been granted an extension beyond 48 months for extenuating circumstances, the supervisor may continue to provide supervision for a time period specified by the board.

~~D.~~ E. Failure to register as a supervisor may subject the licensee to disciplinary action by the board.

~~E.~~ F. If a supervisor is unable or unwilling to continue providing supervision, the funeral service intern shall obtain a new supervisor. Credit for training shall resume when a new supervisor is approved by the board and the intern has paid the prescribed fee for the change of supervisor.

G. No more than two funeral service interns shall be concurrently registered under any one person licensed for the practice of funeral service, funeral directing, or embalming.

## **18VAC65-40-280. Supervisor application package.**

A. A licensee seeking approval by the board as a supervisor of an intern shall submit a completed application and any additional documentation as may be required to determine eligibility for each intern to be supervised.

B. The application for supervision of a funeral service intern shall be signed by the establishment manager and by the persons who will be providing supervision for embalming and for the funeral services.

## **18VAC65-40-320. Reports to the board.**

A. The intern, the supervisor ~~or supervisors~~, and the establishment shall submit a written report to the board at the end of every 1,000 hours of training. The report shall:

1. Specify the period of time in which the 1,000 hours has been completed and verify that the intern has actually served in the required capacity during the preceding period; and
2. Be received in the board office no later than 14 days following the end of the completion of 1,000 hours. ~~Late~~

~~reports may result in additional time being added to the internship.~~

B. If the internship is terminated or interrupted prior to completion of 1,000 hours or if the intern is changing supervisors or training sites, the intern and the supervisor shall submit a partial report to the board with a written explanation of the cause of program termination or interruption or of the change in training or supervision.

1. The partial report shall provide the amount of time served and the dates since the last reporting period. Credit for partial reports shall be given for the number of hours of training completed.

2. Partial reports shall be received in the board office no later than 14 days after the interruption or termination of the internship or after the change in supervisors or training sites. ~~Credit may be deducted for late reports.~~

### **18VAC65-40-340. Supervisors' responsibilities.**

A. The supervisor shall provide the intern with all applicable laws and regulations or sections of regulations relating to the funeral industry.

B. The supervisor shall provide the intern with copies of and instruction in the use of all forms and price lists employed by the funeral establishment.

C. The supervisor shall provide the intern with instruction in all aspects of funeral services and shall allow the intern under direct supervision to ~~conduct all necessary arrangements for~~ assist in conducting a minimum of 25 funerals.

D. The embalming supervisor shall provide instruction on all necessary precautions, embalming functions, and reporting forms and shall allow the intern under direct supervision to ~~perform~~ assist in the performance of a minimum of 25 embalmings.

E. The supervisor shall provide the intern with instruction in making preneed funeral arrangements and instruction on the laws and regulations pertaining to preneed funeral contracts and disclosures.

F. The supervisor shall provide instruction on cremation and on the laws and regulations pertaining to cremation.

G. If a training site does not offer preneed funeral planning or cremation services, the supervisor shall arrange for such training at another licensed funeral establishment that does.

### **18VAC65-40-640. Disciplinary action.**

The board may refuse to issue or renew a license, registration, or approval to any applicant; and may suspend for a stated period of time or indefinitely, or revoke any license, registration, or approval, or reprimand any person, or place his license or registration on probation with such terms and conditions and for such time as it may designate or impose a

monetary penalty for failure to comply with the laws or regulations of the Board of Funeral Directors and Embalmers.

VA.R. Doc. No. R19-6053; Filed April 16, 2021, 9:34 a.m.

## **BOARD OF MEDICINE**

### **Final Regulation**

Title of Regulation: **18VAC85-21. Regulations Governing Prescribing of Opioids and Buprenorphine (adding 18VAC85-21-21).**

Statutory Authority: §§ 54.1-2400 and 54.1-2928.2 of the Code of Virginia.

Effective Date: June 9, 2021.

Agency Contact: William L. Harp, M.D., Executive Director, Board of Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4558, FAX (804) 527-4429, or email william.harp@dhp.virginia.gov.

#### Summary:

*The amendments (i) require a prescription for a controlled substance that contains an opioid to be issued as an electronic prescription unless the prescriber qualifies for an exemption set out in the law and (ii) provide a one-time waiver of this requirement for a maximum of one year if a practitioner can demonstrate economic hardship, technological limitations, or other exceptional circumstances beyond the practitioner's control.*

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.

### **18VAC85-21-21. Electronic prescribing.**

A. Beginning July 1, 2020, a prescription for a controlled substance that contains an opioid shall be issued as an electronic prescription consistent with § 54.1-3408.02 of the Code of Virginia [ , unless the prescription qualifies for an exemption as set forth in subsection C of § 54.1-3408.02 ].

B. Upon written request, the board may grant a one-time waiver of the requirement of subsection A of this section for a period not to exceed one year due to demonstrated economic hardship, technological limitations that are not reasonably within the control of the prescriber, or other exceptional circumstances demonstrated by the prescriber.

VA.R. Doc. No. R20-6085; Filed April 12, 2021, 3:47 p.m.

## **BOARD OF NURSING**

### **Proposed Regulation**

Title of Regulation: **18VAC90-40. Regulations for Prescriptive Authority for Nurse Practitioners (adding 18VAC90-40-122).**

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Statutory Authority: §§ 54.1-2400 and 54.1-3408.02 of the Code of Virginia.

Public Hearing Information:

May 18, 2021 - 10:30 a.m. - Electronic only. The link and instructions to attend the electronic meeting will be in the agenda package posted prior to the meeting at <http://www.dhp.virginia.gov> and on the Virginia Regulatory Town Hall at <https://townhall.virginia.gov>.

Public Comment Deadline: July 9, 2021.

Agency Contact: Jay P. Douglas, R.N., Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4520, FAX (804) 527-4455, or email [jay.douglas@dhp.virginia.gov](mailto:jay.douglas@dhp.virginia.gov).

Basis: Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the Boards of Nursing and Medicine the authority to promulgate regulations to administer the regulatory system. The specific statutory provisions for electronic prescribing and the authority for granting a waiver are found in § 54.1-3408.02 of the Code of Virginia.

Purpose: The purpose of this regulatory action is compliance with a statutory requirement to promulgate regulations setting out the conditions upon which the boards may grant a one-year waiver from the requirement for e-prescribing of a controlled substance containing an opioid. Since the circumstances may vary from practitioner to practitioner, the boards have used the conditions set forth in statute as the basis for the regulation and take into consideration in making a case-by-case decision on a waiver the health, safety, and welfare of a practitioner's patients.

Substance: 18VAC90-40-122 reiterates the requirement that takes effect on July 1, 2020, that a prescription for a controlled substance that contains an opioid must be issued as an electronic prescription unless the prescriber qualifies for an exemption provided in the law and provides for a one-year from the requirement if the practitioner can demonstrate economic hardship technological limitations or other exceptional circumstances beyond the practitioner's control.

Issues: There are no advantages or disadvantages to the public apart from those in the statutory language. Submitting opioid prescriptions electronically has been shown to reduce prescription fraud and thereby reduce the volume of opioids available for abuse or misuse. The waiver provision, in addition to the specific exemptions to electronic prescribing, will allow for continued prescribing for practitioners who are not able to comply for exceptional circumstances beyond their control. There are no particular advantages or disadvantages to the agency; there may be an advantage to the Commonwealth by a reduction in fraudulent prescriptions. Other matters of interest revolve around the implementation and application of statutory and regulatory provisions. Some prescribers are concerned about the requirement for electronic prescribing, which is required by statute by July 1, 2020.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Nursing (Board) proposes to amend 18VAC90-40 Regulations for Prescriptive Authority for Nurse Practitioners in order to require that prescriptions of medications containing opioids be transmitted electronically from the prescribing authority to the pharmacist and to grant one-time waivers up to one year if a prescriber cannot transmit prescriptions electronically as of July 1, 2020. The proposed amendment would make permanent the existing emergency text and is intended to prevent the abuse of prescription drugs containing opioids.

Background. Section 54.1-3408.02 of the Code of Virginia states that prescriptions may be transmitted electronically or by facsimile machine and shall be treated as valid original prescriptions.<sup>1</sup> The 2017 Acts of Assembly (Chapters 115 and 429) amended and reenacted this section of the Code to require that any prescription for a controlled substance that contains an opiate shall be issued as an electronic prescription. The reenacted section containing this requirement took effect on July 1, 2020.<sup>2</sup> The same legislation also updated the definition of electronic prescriptions to be a written prescription that is generated on an electronic application and is transmitted to a pharmacy as an electronic data file; Schedule II through V prescriptions shall be transmitted in accordance with 21 CFR Part 1300.<sup>3</sup>

Subsequently, pursuant to a statutory change requested by the Board,<sup>4</sup> Chapter 664 of the 2019 Acts of Assembly further amended this section to insert 10 exemptions to this requirement and to authorize the licensing health regulatory board to grant a hardship waiver for one year.<sup>5</sup> Chapter 664 also required that the Board of Medicine, the Board of Nursing, the Board of Dentistry, and the Board of Optometry promulgate regulations to implement the waivers within 280 days of the acts enactment. Hence, the Board of Nursing promulgated an emergency regulation that became effective on December 23, 2019.<sup>6</sup>

The proposed amendment adds a section to the regulation (specifically 18VAC90-40-122) containing two sub-sections as quoted below.

18VAC90-40-122. Waiver for electronic prescribing.

A. Beginning July 1, 2020, a prescription for a controlled substance that contains an opioid shall be issued as an electronic prescription consistent with § 54.1-3408.02 of the Code of Virginia, unless the prescription qualifies for an exemption as set forth in subsection C of that section.

B. Upon written request, the boards may grant a one-time waiver of the requirement of subsection A of this section, for a period not to exceed one year, due to demonstrated

economic hardship, technological limitations that are not reasonably within the control of

the prescriber, or other exceptional circumstances demonstrated by the prescriber.

Thus, the proposed amendment would inform readers as to the electronic transmission requirement and the waiver that may be obtained, but readers would need to refer to § 54.1-3408.02 of the Code to find the exemptions that were added by Chapter 664 of the 2019 Acts of Assembly.

The exemptions provided in the Code would directly affect the potential cost of transmitting electronic prescriptions in a variety of settings. Thus, although they are not explicitly mentioned in the text of the regulation, the exemptions are listed here for the readers reference, with parenthetical notes inserted for clarity of context.

§ 54.1-3408.02 C. The requirements of subsection B (electronic transmission) shall not apply if:

1. The prescriber dispenses the controlled substance that contains an opioid directly to the patient or the patient's agent;
2. The prescription is for an individual who is residing in a hospital, assisted living facility, nursing home, or residential health care facility or is receiving services from a hospice provider or outpatient dialysis facility;
3. The prescriber experiences temporary technological or electrical failure or other temporary extenuating circumstance that prevents the prescription from being transmitted electronically, provided that the prescriber documents the reason for this exception in the patient's medical record;
4. The prescriber issues a prescription to be dispensed by a pharmacy located on federal property, provided that the prescriber documents the reason for this exception in the patient's medical record;
5. The prescription is issued by a licensed veterinarian for the treatment of an animal;
6. The FDA requires the prescription to contain elements that are not able to be included in an electronic prescription;
7. The prescription is for an opioid under a research protocol;
8. The prescription is issued in accordance with an executive order of the Governor of a declared emergency;
9. The prescription cannot be issued electronically in a timely manner and the patient's condition is at risk, provided that the prescriber documents the reason for this exception in the patient's medical record; or
10. The prescriber has been issued a waiver pursuant to subsection D (hardship waiver).

Further, Chapter 664 also amended § 54.1-3410 of the Code, effective July 1, 2020, which addresses when pharmacists may sell and dispense drugs. It adds a subsection to clarify that, A

dispenser who receives a non-electronic prescription for a controlled substance containing an opioid is not required to verify that one of the exceptions set forth in § 54.1-3408.02 applies and may dispense such controlled substance pursuant to such prescription and applicable law.

Estimated Benefits and Costs. The 2017 Acts of Assembly (Chapters 115 and 429) also directed the Secretary of Health and Human Resources to convene a work group of interested stakeholders to review actions necessary for the implementation of electronic prescriptions for controlled substances and evaluate the burden on prescribers, including the inability of prescribers to comply with the deadline. The E-Prescribing Workgroups final report indicates that roughly 61% of prescribers and nearly 99% of pharmacies in Virginia had already adopted electronic prescriptions by 2018 and faced no additional costs.<sup>7</sup> The Department of Health Professions (DHP) states that all nurse practitioners who had a proper application (approximately 150) have been granted a waiver thus far.

It appears those who needed a waiver have already been granted an extension and those with a waiver who need to implement e-prescribing before their waiver expires would face additional costs such as acquisition and integration of software and possibly internet connectivity. The public would benefit to the extent that increasing electronic prescriptions of controlled substances decreases diversion and instances of substance abuse.

Businesses and Other Entities Affected. The Board currently has approximately 8,700 nurse practitioners with prescriptive authority. Licensees would only be affected by the new requirements if (i) they prescribe medications containing opioids, (ii) they do not work in a type of facility that is included in the exemptions listed above, and (iii) they do not already use e-prescription technology. According to DHP, approximately 150 nurse practitioners have been granted a waiver.

Small Businesses<sup>8</sup> Affected. DHP could not provide information on the number of licensees who may be proprietors or employees of a small business. However, there does not appear to be disproportionately higher costs for small businesses.

Localities<sup>9</sup> Affected.<sup>10</sup> The proposed amendments potentially affect prescribers and patients in all localities. The proposed amendments are unlikely to introduce new costs for local governments.

Projected Impact on Employment. The proposed amendments are unlikely to affect total employment in the industry.

Effects on the Use and Value of Private Property. The proposed amendments are unlikely to substantively affect the use or value of private property. Real estate development costs are unlikely to be affected.

<sup>1</sup>See <https://law.lis.virginia.gov/vacode/title54.1/chapter34/section54.1-3408.02/>

<sup>2</sup>See <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+CHAP0429>

<sup>3</sup>See Definitions effective July 1, 2020: <https://law.lis.virginia.gov/vacode/title54.1/chapter34/section54.1-3401/>

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<sup>4</sup>See [https://townhall.virginia.gov/L/GetFile.cfm?File=Meeting\30\26790\Agenda\\_DHP\\_26790\\_v1.pdf](https://townhall.virginia.gov/L/GetFile.cfm?File=Meeting\30\26790\Agenda_DHP_26790_v1.pdf) (page 172)

<sup>5</sup>See <http://lis.virginia.gov/cgi-bin/legp604.exe?191+ful+CHAP0664>

<sup>6</sup>See <https://townhall.virginia.gov/ViewStage.cfm?stageid=8798>

<sup>7</sup><https://rga.lis.virginia.gov/Published/2018/RD416>

<sup>8</sup>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."

<sup>9</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>10</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency's Response to Economic Impact Analysis: The Boards of Nursing and Medicine concur with the economic impact analysis of the Department of Planning and Budget.

## Summary:

*The proposed amendment adds a section to (i) reiterate the requirement that takes effect on July 1, 2020, that a prescription for a controlled substance that contains an opioid must be issued as an electronic prescription unless the prescriber qualifies for an exemption set out in the law and (ii) provides for a one-year from the requirement if the practitioner can demonstrate economic hardship technological limitations or other exceptional circumstances beyond the practitioner's control.*

## **18VAC90-40-122. Waiver for electronic prescribing.**

A. Beginning July 1, 2020, a prescription for a controlled substance that contains an opioid shall be issued as an electronic prescription consistent with § 54.1-3408.02 of the Code of Virginia, unless the prescription qualifies for an exemption as set forth in subsection C of § 54.1-3408.02.

B. Upon written request, the boards may grant a one-time waiver of the requirement of subsection A of this section for a period not to exceed one year, due to demonstrated economic hardship, technological limitations that are not reasonably within the control of the prescriber, or other exceptional circumstances demonstrated by the prescriber.

VA.R. Doc. No. R20-6115; Filed April 21, 2021, 8:28 a.m.

## **BOARD OF PHARMACY**

### **Final Regulation**

**Title of Regulation: 18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-275).**

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

**Effective Date: June 9, 2021.**

**Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email [caroline.juran@dhp.virginia.gov](mailto:caroline.juran@dhp.virginia.gov).**

## **Summary:**

*The amendments (i) require the specialty pharmacy participating in white bagging to notify the receiving pharmacy or alternative delivery site of the shipment to ensure appropriate coordination of patient care; (ii) require the pharmacy to provide to the receiving pharmacy an estimated arrival date, to provide the name of the patient to whom the drug has been dispensed, and to provide the exact address where the product has been shipped; (iii) require appropriate storage and security for a shipped product; and (iv) prohibit delivery to a patient's residence of any drug that requires special storage, reconstitution, or compounding prior to administration is intended and that will be subsequently transported by the patient for administration.*

**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.

## **18VAC110-20-275. Delivery of dispensed prescriptions.**

A. Pursuant to § 54.1-3420.2 B of the Code of Virginia, in addition to direct hand delivery to a patient or patient's agent or delivery to a patient's residence, a pharmacy may deliver a dispensed prescription drug order for Schedule VI controlled substances to another pharmacy, to a practitioner of the healing arts licensed to practice pharmacy or to sell controlled substances, or to an authorized person or entity holding a controlled substances registration issued for this purpose in compliance with this section and any other applicable state or federal law. Prescription drug orders for Schedule II through Schedule V controlled substances may not be delivered to an alternate delivery location unless such delivery is authorized by federal law and regulations of the board.

B. Delivery to another pharmacy.

1. One pharmacy may fill prescriptions and deliver the prescriptions to a second pharmacy for patient pickup or direct delivery to the patient provided the two pharmacies have the same owner, or have a written contract or agreement specifying the services to be provided by each pharmacy, the responsibilities of each pharmacy, and the manner in which each pharmacy will comply with all applicable federal and state law.

2. Each pharmacy using such a drug delivery system shall maintain and comply with all procedures in a current policy and procedure manual that includes the following information:

- A description of how each pharmacy will comply with all applicable federal and state law;
- The procedure for maintaining required, retrievable dispensing records to include which pharmacy maintains the hard-copy prescription, which pharmacy maintains the active prescription record for refilling purposes, how each pharmacy will access prescription information necessary

to carry out its assigned responsibilities, method of recordkeeping for identifying the pharmacist or pharmacists responsible for dispensing the prescription and counseling the patient, and how and where this information can be accessed upon request by the board;

- c. The procedure for tracking the prescription during each stage of the filling, dispensing, and delivery process;
- d. The procedure for identifying on the prescription label all pharmacies involved in filling and dispensing the prescription;
- e. The policy and procedure for providing adequate security to protect the confidentiality and integrity of patient information;
- f. The policy and procedure for ensuring accuracy and accountability in the delivery process;
- g. The procedure and recordkeeping for returning to the initiating pharmacy any prescriptions that are not delivered to the patient; and
- h. The procedure for informing the patient and obtaining consent for using such a dispensing and delivery process.

3. Drugs waiting to be picked up at or delivered from the second pharmacy shall be stored in accordance with subsection A of 18VAC110-20-200.

C. Delivery to a practitioner of the healing arts licensed by the board to practice pharmacy or to sell controlled substances or other authorized person or entity holding a controlled substances registration authorized for this purpose.

- 1. A prescription may be delivered by a pharmacy to the office of such a practitioner or other authorized person provided there is a written contract or agreement between the two parties describing the procedures for such a delivery system and the responsibilities of each party.
- 2. Each pharmacy using this delivery system shall maintain a policy and procedure manual that includes the following information:
  - a. Procedure for tracking and assuring security, accountability, integrity, and accuracy of delivery for the dispensed prescription from the time it leaves the pharmacy until it is handed to the patient or agent of the patient;
  - b. Procedure for providing counseling;
  - c. Procedure and recordkeeping for return of any prescription medications not delivered to the patient;
  - d. The procedure for assuring confidentiality of patient information; and
  - e. The procedure for informing the patient and obtaining consent for using such a delivery process.

3. Prescriptions waiting to be picked up by a patient at the alternate site shall be stored in a lockable room or lockable cabinet, cart, or other device that cannot be easily moved and

that shall be locked at all times when not in use. Access shall be restricted to the licensed practitioner of the healing arts or the responsible party listed on the application for the controlled substances registration, or either person's designee.

D. The contracts or agreements and the policy and procedure manuals required by this section for alternate delivery shall be maintained both at the originating pharmacy as well as the alternate delivery site.

E. A controlled substances registration as an alternate delivery site shall only be issued to an entity without a prescriber or pharmacist present at all times the site is open if there is a valid patient health or safety reason not to deliver dispensed prescriptions directly to the patient and if compliance with all requirements for security, policies, and procedures can be reasonably assured.

F. The pharmacy and alternate delivery site shall be exempt from compliance with subsections B through E of this section if (i) the alternate delivery site is a pharmacy, a practitioner of healing arts licensed by the board to practice pharmacy or sell controlled substances, or other entity holding a controlled substances registration for the purpose of delivering controlled substances; (ii) the alternate delivery site does not routinely receive deliveries from the pharmacy; and (iii) compliance with subsections B through E of this section would create a delay in delivery that may result in potential patient harm. However, the pharmacy and alternate delivery site shall comply with following requirements:

- 1. To ensure appropriate coordination of patient care, the pharmacy shall notify the alternate delivery site of the anticipated arrival date of the shipment, the exact address to where the drug was shipped, the name of the patient for whom the drug was dispensed, and any special storage requirements.
- 2. The pharmacy shall provide counseling or ensure a process is in place for the patient to receive counseling.
- 3. Prescriptions delivered to the alternate delivery site shall be stored in a lockable room or lockable cabinet, cart, or other device that cannot be easily moved and that shall be locked at all times when not in use. Access shall be restricted to the licensed prescriber, pharmacist, or either person's designee.
- 4. The pharmacy shall provide a procedure for the return of any prescription drugs not delivered or subsequently administered to the patient.

G. A pharmacy shall not deliver dispensed drugs to a patient's residence that are intended to be subsequently transported by the patient or patient's agent to a hospital, medical clinic, prescriber's office, or pharmacy for administration and that require special storage, reconstitution or compounding prior to administration. An exception to this requirement may be made for patients with [ hemophilia inherited bleeding disorders ]

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who may require [ ~~emergent blood factor treatment~~ therapy to prevent or treat bleeding episodes ].

VA.R. Doc. No. R18-5376; Filed April 12, 2021, 3:45 p.m.

## Forms

**REGISTRAR'S NOTICE:** Forms used in administering the regulation have been 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, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

**Title of Regulation:** **18VAC110-60. Regulations Governing Pharmaceutical Processors.**

**Agency Contact:** Elaine Yeatts, Board Of Pharmacy, 9960 Mayland Drive, Henrico, VA 23233, telephone (804) 367-4688, FAX (804) 527-4434, or email [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov).

FORMS (18VAC110-60)

~~Application for registration of a patient, online form available at <https://www.license.dhp.virginia.gov/apply>~~

~~Application for registration of a parent or legal guardian, online form available at <https://www.license.dhp.virginia.gov/apply>~~

~~Application for registration of a practitioner to issue certifications, online form available at <https://www.license.dhp.virginia.gov/apply>~~

[Application for Registration as a Patient for Cannabis Oil \(rev. 3/2021\)](#)

[Application for Registration as a Parent/Guardian for Cannabis Oil \(rev. 3/2021\)](#)

[Application for Registration as a Registered Agent for Cannabis Oil \(rev. 3/2021\)](#)

[How to Register with the Board as a Patient, Parent or Legal Guardian \(rev. 7/2020\)](#)

[Application for a Pharmaceutical Processor Permit \(rev. 1/2021\)](#)

[Practitioner Reporting Requirements \(eff. 6/2019\)](#)

[Registration of CBD or THC-A Oil Products \(eff. 6/2019\)](#)

[Pharmaceutical Processor & Dispensing Facility Inspection Report \(rev. 3/2021\)](#)

[Application for Registration as a Registered Agent \(eff. 12/2019\)](#)

[Request for Visitor Approval \(eff. 5/2020\)](#)

VA.R. Doc. No. R21-6748; Filed April 11, 2021, 10:15 a.m.

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## TITLE 22. SOCIAL SERVICES

### DEPARTMENT FOR AGING AND REHABILITATIVE SERVICES

#### Fast-Track Regulation

**Title of Regulation:** **22VAC30-50. Policies and Procedures for Administering the Commonwealth Neurotrauma Initiative Trust Fund (amending 22VAC30-50-40 through 22VAC30-50-70, 22VAC30-50-120).**

**Statutory Authority:** §§ 51.5-131 and 51.5-181 of the Code of Virginia.

**Public Hearing Information:** No public hearing is currently scheduled.

**Public Comment Deadline:** June 9, 2021.

**Effective Date:** June 25, 2021.

**Agency Contact:** Charlotte Arbogast, Policy Advisor, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7093, FAX (804) 662-7663, TDD (800) 464-9950, or email [charlotte.arbogast@dars.virginia.gov](mailto:charlotte.arbogast@dars.virginia.gov).

**Basis:** The Commonwealth Neurotrauma Initiative (CNI) Trust Fund is authorized under Article 12 (§ 51.5-178 et seq.) of Chapter 14 of Title 51.5 of the Code of Virginia. Specifically, § 51.5-181 of the Code of Virginia requires that the Commissioner of the Department for Aging and Rehabilitative Services (DARS) promulgate regulations establishing procedures and policies for soliciting and receiving grant applications and criteria for reviewing and ranking such applications, including goals, timelines, forms, eligibility, and mechanisms to ensure avoidance of any conflicts of interest or appearances thereof. In addition, § 51.5-131 of the Code of Virginia authorizes the commissioner to promulgate regulations necessary to carry out the provisions of the laws of the Commonwealth administered by DARS.

**Purpose:** The CNI Trust Fund is a special nonreverting fund established in the Code of Virginia that provides funding to Virginia-based organizations, institutions, and researchers to address the needs of people with acquired neurotrauma. Neurotrauma is defined as injury to the central nervous system (i.e., a traumatic spinal cord or brain injury) that results in loss of physical functions, cognitive functions, or both. The source of revenue for the CNI Trust Fund is a portion of the reinstatement fees that are charged before restoring an operator's license to any person whose driver's license has been revoked or suspended upon conviction for specified dangerous driving offenses. In accordance with the Code of Virginia and 22VAC30-50, the CNI Trust Fund Program provides funding for projects that are either researched-based or community-based rehabilitative programs and services.

As outlined in 22VAC30-50-30, the regulatory chapter establishes (i) policies and procedures for soliciting and receiving applications for grants from the fund, (ii) criteria for reviewing and ranking such applications, and (iii) procedures for distributing moneys in the fund. The chapter requirements ensure fidelity to the purpose of the CNI Trust Fund and proper use of public funds to improve the lives of individuals who have acquired neurotrauma.

**Rationale for Using Fast-Track Rulemaking Process:** This fast-track rulemaking regulatory action was initiated following a periodic review of the chapter. Section 51.5-181 of the Code of Virginia stipulates the commissioner shall receive the recommendations of the CNI Trust Fund Advisory Board prior to promulgating or revising any such regulations. In accordance, the department shared the potential regulatory revisions with the CNI Trust Fund Advisory Board, and the CNI Trust Fund Advisory Board unanimously endorsed the changes proposed by the department through the fast-track rulemaking process, therefore the action is deemed noncontroversial.

**Substance:** The following changes are being made to this chapter:

In 22VAC30-50-40, strike case decisions reference language. This does not apply to the CNI Trust Fund Program. DARS and the CNI Trust Fund Advisory Board do not make case decisions related to 22VAC30-50.

In 22VAC30-50-50, correct the subdivision reference from 12 to 9. The reference relates to the Freedom of Information Act exclusions in § 2.2-3705.5 of the Code of Virginia.

In 22VAC30-50-60, improve clarity and align with practice and requirements in 22VAC30-50-120.

In 22VAC30-50-70, strike the word "three" in relation to the reference to Virginia medical schools.

In 22VAC30-50-120, improve clarity and align with practice and requirements in 22VAC30-50-60.

**Issues:** The primary advantages of the revisions are to clarify language that is ambiguous and align the chapter with the Code of Virginia and current practices. The regulatory action poses no disadvantages to the public or the Commonwealth.

**Department of Planning and Budget's Economic Impact Analysis:**

Summary of the Proposed Amendments to Regulation. Following a periodic review,<sup>1</sup> the Department for Aging and Rehabilitative Services (DARS) proposes to clarify existing regulatory text.

Background. This regulation establishes: (i) policies and procedures for soliciting and receiving applications for grants from the Commonwealth Neurotrauma Initiative (CNI) Trust Fund, (ii) criteria for reviewing and ranking such applications, and (iii) procedures for distributing moneys in the fund.

The CNI Trust Fund is a special nonreverting fund established in § 51.5-178 et seq. of the Code of Virginia that provides

funding to Virginia-based organizations, institutions, and researchers to address the needs of people with acquired neurotrauma. Neurotrauma is defined as "injury to the central nervous system (i.e., a traumatic spinal cord or brain injury) that results in loss of physical functions, cognitive functions, or both." The source of revenue for the CNI Trust Fund is a portion of the reinstatement fees that are charged before restoring an operator's license to any person whose driver's license has been revoked or suspended upon conviction for specified dangerous driving offenses.

According to DARS, almost all research or service projects are solicited through a Request for Proposals depending on the availability of funds. Most projects are funded for three years. Individual grants cannot exceed \$300,000.

**Estimated Benefits and Costs.** The proposed changes in this action are strictly clarifying in nature and are not expected to affect the programs operation. Thus, no significant economic impact other than improving the clarity of the existing requirements is expected.

**Businesses and Other Entities Affected.** The CNI Trust Fund Program currently funds 11 ongoing projects. Seven projects are based in Virginia higher education institutions, which may include Virginia's public universities.<sup>2</sup> Four projects are based in community organizations or private research entities. However, there are no projected costs or impacts on the funded organizations or institutions that may seek CNI Trust Funds. Thus, no adverse<sup>3</sup> or disproportionate economic impact is indicated.

**Small Businesses<sup>4</sup> Affected.** Although small businesses may qualify for grants from the fund, none of the current 11 recipients is believed to be a for-profit small business. In addition, the proposed changes do not introduce costs or other effects for any entities. Thus, proposed amendments do not appear to adversely affect small businesses.

**Localities<sup>5</sup> Affected.<sup>6</sup>** The proposed amendments do not disproportionately affect any localities or introduce costs for local governments.

**Projected Impact on Employment.** The proposed amendments do not affect employment.

**Effects on the Use and Value of Private Property.** The proposed amendments do not affect real estate development costs.

<sup>1</sup><https://townhall.virginia.gov/l/ViewPReview.cfm?PRid=2004>

<sup>2</sup>Data source: Virginia Employment Commission

<sup>3</sup>Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

<sup>4</sup>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."

<sup>5</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

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<sup>6</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency's Response to Economic Impact Analysis: The Department for Aging and Rehabilitative Services concurs with the economic impact analysis performed by the Department of Planning and Budget.

Summary:

*The amendments, which result from a periodic review of the regulation, make technical and clarifying changes to the policies and procedures for administering the Commonwealth Neurotrauma Initiative Trust Fund to better align the chapter with the Code of Virginia and current practices.*

**22VAC30-50-40. Compliance with the Administrative Process Act.**

Chapter 40 (§ 2.2-4000 et seq.) of Title 2.2 of the Code of Virginia (the Administrative Process Act) governs the promulgation and administration of this chapter ~~and applies to any appeal of a case decision made pursuant to or based upon this chapter.~~

**22VAC30-50-50. Application of exemption to the Virginia Freedom of Information Act.**

Pursuant to subdivision ~~4~~ 9 of § 2.2-3705.5 of the Virginia Freedom of Information Act, Chapter 37 (§ 2.2-3700 et seq.) of Title 2.2 of the Code of Virginia, records submitted to the advisory board as a grant application, or accompanying a grant application, pursuant to Article 12 (§ 51.5-178 et seq.) of Chapter 14 of Title 51.5 of the Code of Virginia and this chapter are excluded from the requirement of open inspection to the extent that they contain medical or mental health records or other data identifying individual patients, or proprietary business or research-related information produced or collected by an applicant in the conduct of or as a result of study or research on medical, rehabilitative, scientific, technical, or scholarly issues. This exemption shall apply when the information has not been publicly released, published, copyrighted, or patented, if the disclosure of the information would be harmful to the competitive position of the applicant. The advisory board intends to rely upon this exemption in order to encourage the submission of applications.

**22VAC30-50-60. Requests for proposals.**

The advisory board shall solicit applications for grants of moneys from the fund by issuing RFPs from time to time. These RFPs shall be issued at the discretion of the advisory board and shall depend upon the availability of moneys in the fund. ~~Each~~ Notwithstanding 22VAC30-50-120, each application for a grant must be submitted in response to an actual RFP and received by a deadline specified in the RFP.

**22VAC30-50-70. Grant reviewers and technical advisors.**

The advisory board may choose, at any time, to appoint grant reviewers or other technical advisors, or both, to assist in

reviewing and ranking applications. Such reviewers and advisors may represent medical researchers, medical practitioners, community-based service providers, consumers, advocates for consumers, or others deemed appropriate by the advisory board for this purpose. Reviewers and advisors shall be appointed so as to provide equal representation from Virginia's ~~three~~ medical schools. Reviewers and advisors shall be selected so as to avoid any conflict of interests or the appearance thereof, and the advisory board may choose reviewers and advisors residing or working outside Virginia to ensure impartiality. Whenever reviewers or advisors sit as a committee, the chair of the advisory board or his designee shall serve as chair of the committee but shall not vote on individual applications.

**22VAC30-50-120. Unexpended funds.**

~~Notwithstanding any other law to the contrary,~~ The commissioner may reallocate up to \$500,000 from unexpended balances in the fund for new grant awards for research on traumatic brain and spinal cord injuries.

V.A.R. Doc. No. R21-6597; Filed April 12, 2021, 2:40 p.m.

## Fast-Track Regulation

Title of Regulation: **22VAC30-70. The Virginia Public Guardian and Conservator Program (amending 22VAC30-70-10 through 22VAC30-70-60).**

Statutory Authority: § 51.5-131 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: June 9, 2021.

Effective Date: June 25, 2021.

Agency Contact: Charlotte Arbogast, Policy Advisor, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7093, FAX (804) 662-7663, TDD (800) 464-9950, or email charlotte.arbogast@dars.virginia.gov.

Basis: The Virginia Public Guardian and Conservator Program is established under Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 of the Code of Virginia. Section 51.5-149 gives the Department for Aging and Rehabilitative Services (DARS) the oversight for the provision of the program. In accordance with § 51.5-150 B 3 of the Code of Virginia, the department is authorized to adopt reasonable regulations to implement, administer, and manage the program, including the adoption of minimum training and experience requirements for staff and volunteers, client-to-staff ratios, and person-centered practices.

Purpose: The purpose of this action is to improve consistency, transparency, clarity, and enforcement of program requirements. The program serves some of the Commonwealth's most vulnerable citizens: individuals who are incapacitated, unbefriended, and indigent. Clear regulatory requirements are vital to protecting their health, welfare, and safety.

Rationale for Using Fast-Track Rulemaking Process: Upon review of the Code of Virginia and the requirements in the department's contract with public guardian program contractors, the department decided to pursue regulatory revisions. As the program has grown in size and scope over the last decade, an update to the chapter for these reasons is needed. Most revisions made through this regulatory action align with the Code of Virginia or requirements of public guardian program contractors under contracts with the department and are intended to clarify or improve the logic and flow of the chapter.

The department shared the potential revisions with the Virginia Public Guardian and Conservator Advisory Board and the department's 13 public guardian program contractors. The department received no objections from the entities for these revisions, and therefore the amendments are deemed noncontroversial.

Substance: New substantive provisions in the regulation include:

Technical changes that update Code of Virginia references in various places to align with Code of Virginia requirements and remove unnecessary and duplicative terminology.

Definitions are added for "face-to-face" and "volunteer", and the definition of "public guardian program" is differentiated from the "public guardian program contractor", which is the legal entity that operates the public guardian program under contract with the department. The terms are clarified throughout the chapter in various places. The term "indigent" is updated, and the definition revised to reflect criteria found in the Code of Virginia.

Definitions for "local program" and "regional program" are removed. As the program has evolved, the terms no longer apply, and the requirements are equivalent for both. The public guardian program staffing and volunteer requirements are restructured for improved logic and flow. A new requirement for a face-to-face meeting with the client once per month is added. This is best practice and a longstanding contract requirement for public guardian program contractors. This inclusion will not change the current practices of programs. Requirement for coordination on clients receiving case management services through the Department of Behavioral Health and Developmental Services (DBHDS) is clarified. The current requirement was unclear and referenced the client's court order, which generally does not discuss planning goals in specificity.

The multidisciplinary panel requirements are restructured to improve logic and flow. A requirement for representatives on the panel from each jurisdiction when public guardian programs are regional is removed. This requirement was overly burdensome to some programs and did not add specific value to the multidisciplinary panel. Referral screening considerations are updated so that the current requirements reflect the department's expectations and current panel practices. The requirement that panels consider if a limited

guardianship or conservatorship is appropriate is moved. In such cases, specific instructions for how to make recommendations to that effect are added. This reflects best practice and the department's expectation of programs.

Volunteers are added to the requirement to report suspected abuse, neglect, and exploitation. This was likely an omission, and adding volunteers is in keeping with best practice and ethical obligations.

The requirements for new staff hires and training and orientation for staff upon hire and for volunteers is updated. The requirements for staff criminal record checks and drug testing are clarified. The Virginia-specific requirement for a diploma or GED from an accredited program for staff qualification is removed. A diploma or GED from outside Virginia should be acceptable. The requirement for knowledge and course work on guardianship prior to hire is removed. For non-program director staff, this is best covered upon hire during training and orientation, and it is not realistic to expect all new staff to have that knowledge upon hire. A new requirement that volunteers receive a drug screening is added. This is a new requirement. However, many contractors have already been doing this as a standard practice.

That the client's Uniform Assessment Instrument (UAI) or other assessment instrument should be a current version and that the care plan required should be the guardian program care plan and be current are all clarified. This is consistent with the intent of § 51.5-150 B 6 of the Code of Virginia. Values history report must be current, and guardian report to the court should be the most recent one filed. Conservator report to the court should be the most recent one filed.

Requirements for the department for evaluating and monitoring public guardian programs and for public guardian programs to maintain compliance and provide reports to the department are restructured.

Issues: With ever increasing attention on both public and private guardianships in the Commonwealth, the primary advantage of the regulatory action is the increased protection and clarity it provides to clients and public guardian programs. The action is needed to protect the health, safety, and welfare of the vulnerable clients served by the program. The new regulation also provides clear and consistent requirements for public guardian program contractors and public guardian programs and for department staff to use in monitoring compliance with standards.

In the proposed regulatory action, a fair and reasonable balance has been attempted to ensure adequate protection of clients while considering the impact on public guardian program contractors. While requirements have been added to the regulation, including volunteer drug screening, volunteer reporting of abuse, neglect, and exploitation, face-to-face meetings with clients, and instructions for how to make recommendations for limited guardianship or conservatorships, these requirements are either already in place with contract provisions or are standard practices for the public

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guardian programs. Further, some requirements for public guardian programs that were deemed unnecessary, outdated, or burdensome have been removed, including distinctions between local and regional programs, local jurisdiction membership on the multidisciplinary panels of regional programs, and initial knowledge requirements for staff upon hire.

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 Department for Aging and Rehabilitative Services (DARS) proposes to: 1) align the regulation with current Code of Virginia requirements and with requirements already in place in contracts between the public guardian program contractors and DARS, and 2) clarify and improve the logic and flow of the regulation.

Background. The Virginia Public Guardian and Conservator Program provides public guardian and conservator services for adults who are incapacitated, indigent, and for whom no other proper or suitable person can be identified who is willing and able to serve as the individual's guardian, or conservator, or both. The program reports it has capacity to provide public guardianship services, public conservatorship services, or both to 1,049 incapacitated adult residents of Virginia who are found by a Virginia circuit court to be (i) incapacitated, and (ii) meet the criteria for public guardianship as set forth in § 64.2-2010 of the Code of Virginia. These services are provided by 13 local public guardian programs, which are operated by local public guardian program contractors under contract with DARS.

Estimated Benefits and Costs. The proposed changes align the regulation with the current Code of Virginia requirements and with requirements already in place in contracts between the public guardian program contractors and DARS and clarify or improve the logic and flow of the regulation. None of the proposed changes appear likely to alter the current practices followed in the operation of the program. Thus, no significant economic effect is expected other than improving the clarity of the regulatory language.

Businesses and Other Entities Affected. This regulation applies to 13 local public guardian programs which are operated by local public guardian program contractors under contract with DARS. The number of individuals the program can serve is currently capped at 1,049 incapacitated adult residents.<sup>1</sup> No adverse or disproportional impact is indicated for any of the affected entities.<sup>2</sup>

Small Businesses<sup>3</sup> Affected. The proposed amendments do not appear to adversely affect small businesses.

Localities<sup>4</sup> Affected.<sup>5</sup> The proposed amendments do not appear to adversely or particularly affect any localities.

Projected Impact on Employment. The proposed amendments do not appear to affect total employment.

Effects on the Use and Value of Private Property. The proposed amendments do not appear to affect the use and value of private property or the real estate development costs.

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<sup>1</sup>Data source: DARS

<sup>2</sup>Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

<sup>3</sup>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."

<sup>4</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>5</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency's Response to Economic Impact Analysis: The Department for Aging and Rehabilitative Services concurs with the economic impact analysis performed by the Department of Planning and Budget.

## Summary:

*The amendments, which reflect current practices of the department and the public guardian program, (i) align the regulation with the Code of Virginia and requirements already in place in contracts between the public guardian program contractors and the department and (ii) clarify or improve the logic and flow of the chapter.*

## **22VAC30-70-10. Definitions.**

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

"Advisory board" means the Virginia Public Guardian and Conservator Advisory Board as authorized by §§ ~~2.2-2411~~ ~~51.5-149.1~~ and ~~2.2-2412~~ ~~51.5-149.2~~ of the Code of Virginia.

"Client" means a person who has been adjudicated incapacitated and who is receiving public guardian or conservator services from a public guardian program.

"Conservator" means a person appointed by ~~the~~ a court who is responsible for managing the estate and financial affairs of an incapacitated person and, where the context plainly indicates, includes a "limited conservator" or a "temporary conservator." The term includes (i) a local or regional program designated by the Department for Aging and Rehabilitative Services as a public conservator pursuant to §§ Article 6 (§ 51.5-149, 51.5-150, and 51.5-151 et seq.) of Chapter 14 of Title 51.5 of the Code of Virginia or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide conservatorial services to incapacitated persons. Such tax-

exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the Virginia Department for Aging and Rehabilitative Services as a public conservator, it may also serve as a conservator for other individuals. ~~Incorporated by reference to this definition is the definition of "conservator" found in § 37.2-1000 of the Code of Virginia and any successor language thereof.~~

"Department" means the Department for Aging and Rehabilitative Services.

"Face-to-face" means an in-person meeting with the client.

"Guardian" means a person appointed by ~~the~~ a court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The term includes (i) a local or regional program designated by the department as a public guardian pursuant to §§ Article 6 (§ 51.5-149, 51.5-150, and 51.5-151 et seq.) of Chapter 14 of Title 51.5 of the Code of Virginia or (ii) any local or regional tax-exempt charitable organization established pursuant to § 501(c)(3) of the Internal Revenue Code to provide guardian services to incapacitated persons. Such tax-exempt charitable organization shall not be a provider of direct services to the incapacitated person. If a tax-exempt charitable organization has been designated by the department as a public guardian, it may also serve as a guardian for other individuals. ~~Incorporated by reference to this definition is the definition of "guardian" found in § 37.2-1000 of the Code of Virginia and any successor language thereof.~~

"Incapacitated person" means an adult who has been found by a court to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements for his health, care, safety, or therapeutic needs without the assistance or protection of a guardian or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator. A finding that the individual displays poor judgment alone shall not be considered sufficient evidence that the individual is an incapacitated person within the meaning of this definition. A finding that a person is incapacitated shall be construed as a finding that the person is "mentally incompetent" as that term is used in Article II, Section 1 of the Constitution of Virginia and Title 24.2 of the Code of Virginia unless the court order entered pursuant to ~~this chapter~~ Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2 of the Code of Virginia specifically provides otherwise. ~~Incorporated by reference to this definition is the definition of "incapacitated person" found in § 37.2-1000 of the Code of Virginia and any successor language thereof.~~

"Indigency" "Indigent" means the client is a current recipient of a state funded a person who (i) is eligible for or receiving state-funded or federally funded federally-funded public assistance program for the indigent or as otherwise defined in § 19.2-159 of the Code of Virginia benefits whose eligibility for such benefits is based in whole or part upon an evaluation of their income against federal poverty guidelines, (ii) as otherwise defined in § 19.2-159 of the Code of Virginia, or (iii) whose resources have been determined by a Virginia circuit court to be so limited as to satisfy the criteria for appointment of a public guardian, public conservator, or both set forth in § 64.2-2010 of the Code of Virginia.

"Least restrictive alternatives" means, but is not limited to money management services including bill payer and representative payee services, care management, and services provided pursuant to a financial or health care power of attorney.

"Minimal fee" means allowable fees collected or payable from government sources and shall not include any funds from an incapacitated person's estate.

"Public guardian program" means the program operated by the public guardian program contractor pursuant to a contract with the department to provide public guardianship services, public conservatorship services, or both pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 of the Code of Virginia. For the purposes of this chapter, a regional public guardian program shall be equivalent to a local public guardian program.

"Public guardian program contractor" means a local or regional public or private nonprofit legal entity or program designated by with whom the department as a public guardian, a public conservator or both, pursuant to §§ 51.5-150 and 51.5-151 of the Code of Virginia, and operating under has entered into a contract entered into with the department to operate a public guardian program.

"Virginia Public Guardian and Conservator Program" means the statewide program administered by the department pursuant to Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 of the Code of Virginia and operationalized through a network of public guardian program contractors under contract with the department.

"Volunteer" means a person, including an unpaid intern, who works with the public guardian program and:

1. Is not paid for services provided to the public guardian program; and
2. Is not counted in the client-to-staff ratio.

**22VAC30-70-20. Introduction and purpose.**

A. Introduction. Pursuant to § 51.5-149 of the Code of Virginia, the General Assembly declared that the policy of the Commonwealth is to ensure the appointment of a guardian or

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conservator to that persons who cannot adequately care for themselves because of incapacity are able to meet essential living requirements for physical and emotional health and management of financial resources with the assistance of a guardian or conservator, as appropriate, in circumstances where (i) the incapacitated person is indigent person's financial resources are insufficient to fully compensate a private guardian or conservator and pay court costs and fees associated with the appointment proceeding, and (ii) there is no other proper and suitable person willing and able to serve in such capacity or there is no guardian or conservator appointed within one month of adjudication pursuant to § 64.2-2015 of the Code of Virginia.

B. Purpose. This regulation sets forth requirements for the ~~statewide program of local and regional public guardian programs~~ Virginia Public Guardian and Conservator Program and establishes the requirements for ~~local and regional entities~~ public guardian program contractors to operate a designated public guardian program.

## **22VAC30-70-30. Public guardian programs.**

A. Designation. The department shall select public guardian ~~programs~~ program contractors in accordance with the requirements of the Virginia Public Procurement Act. Only those ~~programs that~~ operations of the public guardian program contractor governed by and funded pursuant to the department's contract with the department shall be designated as public guardian programs. Funding for public guardian programs is provided by the appropriation of general funds.

B. Authority. A public guardian program appointed as a guardian, a conservator, or both ~~as a guardian and conservator,~~ shall have all the powers and duties specified in Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2 of the Code of Virginia, except as otherwise specifically limited by a court.

### **C. ~~Structure~~ Staff.**

1. Program director. Each public guardian program shall have a program director who supervises and is responsible for providing public guardianship and public conservatorship services to any incapacitated persons assigned by the court and to provide overall administration for the public guardian program. ~~The program director shall be a full-time employee of the program and have experience as a service provider or administrator in one or more of the following areas: social work, case management, mental health, nursing or other human service programs. The program director shall also demonstrate, by objective criteria, a knowledge and understanding of Virginia's guardianship laws, alternatives to guardianship, and surrogate decision-making activities. The program director shall attend all training and activities required by the department.~~

2. ~~Each public guardian program shall establish a multidisciplinary panel to (i) screen cases for the purpose of~~

~~ensuring that appointment of a guardian or conservator is appropriate under the circumstances and is the least restrictive alternative available to assist the incapacitated person. This screening shall include a duty to recommend the most appropriate limitations on the power of the guardian or conservator, if any, to ensure that the powers and duties assigned are the least restrictive, and (ii) annually review cases being handled by the program to ensure that a guardian or conservator appointment remains appropriate. Composition of a multidisciplinary panel should include representatives from various human services agencies serving the city, county, or region where the public guardian program accepts referrals. If serving a region, the multidisciplinary panel shall have at least one representative from each local jurisdiction within the region. To the extent appropriate disciplines are available, this panel should include but is not limited to representation from:~~

- ~~a. Local departments of social services, adult protective services;~~
- ~~b. Community services boards or behavioral health authorities;~~
- ~~c. Attorneys licensed by the Virginia State Bar;~~
- ~~d. Area agencies on aging;~~
- ~~e. Local health departments;~~
- ~~f. Nursing home, assisted living, and group home administrators; and~~
- ~~g. Physicians and community representatives.~~

### **D. ~~Client ratio~~ to paid staff ratio.**

1. a. Each public guardian program shall maintain a direct service ratio of clients to paid staff that does not exceed the department's established ideal ratio of 20 ~~incapacitated persons~~ clients to every one paid full-time staff person ~~20:1~~ 20 to one.

2. b. Each public guardian program shall have in place a plan to immediately provide notice to the circuit court or courts and sheriffs in its jurisdiction, where appropriate, and to the department when the public guardian program determines that it may exceed ~~its~~ the ideal ratio of clients to paid staff.

3. c. In an emergency or unusual circumstance, each public guardian program, in its discretion, may exceed the ~~department's established~~ ideal ratio by no more than five additional ~~incapacitated persons~~ clients. Each public guardian program shall have in place a policy to immediately provide notice to the department when such an emergency or unusual circumstance occurs and when the emergency or unusual circumstance ends and the ideal ratio has returned to ~~20:1~~ 20 to one. The notice to the department shall comply with policy established by the department. Other than an emergency or unusual circumstance as described in the preceding sentence, a waiver must be requested to exceed the ~~department's~~

~~established~~ ideal ratio. The department, in consultation with the advisory board, shall establish written procedures for public guardian programs to obtain appropriate waivers regarding deviations in the ideal ratio of clients to paid staff. Procedures shall comply with §§ 51.5-150 and 51.5-151 of the Code of Virginia. The department shall report waiver requests and status of granted waivers to the advisory board at its regularly scheduled meetings. The department shall review such waivers every six months to ensure that there is no immediate threat to the person or property of any ~~incapacitated person nor client and~~ that exceeding the ~~department's established~~ ideal ratio is not having or will not have a material and adverse effect on the ability of the public guardian program to properly serve all of the ~~incapacitated persons~~ clients it has been designated to serve.

3. Volunteers.

- a. Volunteers may be recruited and used to supplement paid staff. However, volunteers shall not be counted in the client to staff ratio.
- b. Volunteers may not exercise the authority of a public guardian or conservator.
- c. Each public guardian program that uses volunteers shall develop and implement written procedures for volunteer management and supervision.

~~E. Appointments~~ D. Multidisciplinary panel.

1. Each public guardian program shall establish a multidisciplinary panel to (i) screen cases, consistent with subdivision 3 of this subsection, for the purpose of ensuring that appointment of a public guardian or public conservator is appropriate under the circumstances and is the least restrictive alternative available to assist the incapacitated person, and (ii) annually review cases being handled by the program to ensure that a public guardian or conservator appointment remains appropriate.

2. Composition of a multidisciplinary panel shall include representatives from various human services agencies serving the city, county, or region where the public guardian program accepts referrals. To the extent appropriate disciplines are available, this panel may include representation from:

- a. Local departments of social services, including adult protective services;
- b. Community services boards or behavioral health authorities;
- c. Attorneys licensed by the Virginia State Bar;
- d. Area agencies on aging;
- e. Local health departments;
- f. Nursing home, assisted living, and group home administrators;
- g. Physicians; and

h. Other community representatives.

~~4. 3.~~ Prior to the public guardian program accepting an individual for services, the multidisciplinary panel ~~described in subdivision C 2 of this section~~ shall screen referrals to ensure that:

- a. The public guardian program is appointed as guardian, or conservator, or both only in those cases where public guardianship or public conservatorship is the least restrictive alternative available to assist the individual;
- b. ~~The appointment~~ The public guardian program has the resources to serve the individual, and the appointment of the public guardian program is consistent with serving the type of client identified by the established priorities of the public guardian program;
- c. The individual cannot adequately care for himself;
- d. The individual is indigent; and
- e. There is no other proper or suitable person or entity to serve as guardian.
- f. In the case of an individual who receives case management services from a community services board (~~CSB~~) or behavioral health authority (~~BHA~~), the multidisciplinary panel may also request the results of the "determination of capacity" as authorized by 12VAC35-115-145 (Determination of capacity to give consent or authorization) and verification that no other person is available or willing to serve as guardian pursuant to 12VAC35-115-146 E (Authorized representatives).

~~2- 4.~~ In the event the multidisciplinary panel determines that the referred individual should be accepted as a client, the panel shall further consider what, if any, limitations should be imposed on the powers of the public guardian or public conservator to ensure that the powers and duties assigned are the least restrictive necessary. Any such limitations recommended by the multidisciplinary panel shall be communicated to the person or entity that made the referral and to the guardian ad litem appointed in any court proceeding pursuant to Chapter 20 (§ 64.2-2000 et seq.) of Title 64.2 of the Code of Virginia in which the public guardian program has been recommended as the guardian, conservator, or both.

5. The multidisciplinary panel shall review active cases at least once every 12 months to determine that:

- a. The client continues to be incapacitated;
- b. The client continues to be indigent; and
- c. There is no other proper or suitable person or entity to serve as guardian, conservator, or both.

E. Appointments.

1. Appointments by a circuit court shall name the public guardian program, rather than an individual person, as the public guardian, the public conservator or both ~~guardian and conservator~~, as applicable.

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~~3.~~ 2. A public guardian program shall only accept appointments as public guardian, public conservator, or both guardian and conservator that generate no fee or that generate a minimal fee.

## F. Services.

1. A public guardian program shall have a continuing duty to seek a proper and suitable person who is willing and able to serve as guardian, conservator, or both ~~guardian and conservator~~ for the ~~incapacitated person~~ client.

2. The public guardian program shall, at a minimum, have one face-to-face meeting with every client each calendar month.

3. The public guardian or conservator program shall encourage the ~~incapacitated person~~ client to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage his personal affairs to the extent feasible.

~~3.~~ 4. The public guardian or conservator program shall be guided by person-centered planning that:

- a. Focuses on the expressed preferences, personal values, and needs of the ~~individual receiving public guardian program services~~ client; and
- b. Empowers and supports the ~~individual receiving public guardian program services~~ client, to the extent feasible, in defining the direction for his life and promoting self-determination and community involvement.

~~4.~~ 5. To the maximum extent feasible, the person-centered planning process shall:

- a. Include people chosen by the ~~individual~~ client;
- b. Provide necessary information and support to enable the ~~individual~~ client to direct the process and to make informed choices and decisions;
- c. Be timely and occur at times and locations convenient for the ~~individual~~ client;
- d. ~~Require participation and collaboration, in~~ In the case of an individual receiving case management services licensed or funded by the Department of Behavioral Health and Developmental Services, require participation and collaboration among the public guardian or conservator program, case managers, and service providers in meeting the ~~individual's~~ client's planning goals, ~~in conformity with the guardian or conservator's court order~~;
- e. Reflect the ~~individual's~~ client's cultural values;
- f. Offer choices to the ~~individual~~ client regarding the services the ~~individual~~ client receives and from whom the ~~individual~~ client receives those services; and
- g. Include documentation of processes employed in and the outcomes of person-centered planning.

~~5.~~ The multidisciplinary panel described in subdivision C-2 of this section shall review active cases at least once every ~~12 months to determine that:~~

- ~~a. The client continues to be incapacitated;~~
- ~~b. The client continues to be indigent; and~~
- ~~c. There is no other proper or suitable person or entity to serve as guardian, conservator, or both guardian and conservator.~~

6. Each public guardian program shall set priorities with regard to services to be provided to ~~incapacitated persons~~ clients in accordance with its contract with the department.

7. Each public guardian program shall develop written procedures and standards to make end-of-life decisions or other health-related interventions in accordance with the expressed desires and personal values of the ~~incapacitated person~~ client to the extent known. If expressed desires or personal values are unknown, then written procedures, including an ethical decision-making process, shall be used to ensure that the public guardian or conservator program acts in the ~~incapacitated person's~~ client's best interest and exercises reasonable care, diligence and prudence on behalf of the client.

8. The public guardian program shall avoid even the appearance of a conflict of interest or impropriety when dealing with the needs of the ~~incapacitated person~~ client. Impropriety or conflict of interest arises where the public guardian program has some personal or agency interest that might be perceived as self-serving or adverse to the position or the best interest of the ~~incapacitated person~~ client. Examples include, ~~but are not limited to,~~ situations where the public guardian program provides services such as housing, hospice or medical care directly to the client. ~~The department reserves the right to monitor all administrative, programmatic, and financial activities related to the public guardian program to ensure compliance with the terms of the contract between the department and the public guardian program.~~

9. Each public guardian program and its ~~employees paid staff and volunteers~~ are required to report any suspected abuse, neglect, or exploitation in accordance with § 63.2-1606 of the Code of Virginia, which provides for the protection of aged or incapacitated adults, mandates reporting, and provides for a penalty for failure to report.

~~10.~~ Each public guardian program shall submit data and reports as required by the department and maintain compliance with the department's program guidelines. ~~The department shall periodically monitor administrative, programmatic, and financial activities related to the public guardian program, including person centered planning utilization and documentation, to ensure compliance with the terms of the contract between the public guardian program and the department.~~

**22VAC30-70-40. Personnel standards.**

A. Each paid staff who is working in the public guardian program and has direct contact with clients or client estates shall:

1. ~~Complete an orientation program concerning guardian and conservator duties to include the following subjects:~~
  - a. ~~Privacy and confidentiality requirements;~~
  - b. ~~Recordkeeping;~~
  - c. ~~Services provided, and standards for these services;~~
  - d. ~~A historical and factual review about the needs of the elderly and people with disabilities; and~~
  - e. ~~Indications of and actions to be taken where adult abuse, neglect, or exploitation is suspected.~~

~~2. Have a satisfactory work record and be a person of good character; demonstrate a concern for the well-being of others to the extent that the individual person is considered suitable to be entrusted with the care, guidance, and protection of an incapacitated person; and shall not have not been convicted of any criminal offense involving any physical attack, neglect or abuse of a person, lying, cheating, or stealing, nor convicted of any felony. A criminal record check will shall be conducted on each person hired on or after January 1, 2009.~~

~~3. 2. Be free of illegal drug use as confirmed by a drug screening test conducted prior to the assumption of any duties with an incapacitated person for. For each person hired on or after January 1, 2009, a drug screening test shall be conducted.~~

~~4. Demonstrate, by objective criteria, knowledge of Virginia's guardianship laws and alternatives to guardianship. For each 3. Each person hired on or after January 1, 2009, shall have, at a minimum education requirements apply and include, a high school diploma or a general education diploma (GED) from a Virginia an accredited program and training or course work on (i) the duties and powers of guardians and conservators in Virginia, including an understanding of surrogate decision making and how it differs from substituted judgment decision-making standards, (ii) mandatory reporting requirements to the Department of Social Services and Commissioner of Accounts where applicable, and (iii) working with special needs populations including individuals with physical and mental disabilities. Program directors have additional requirements as specified in 22VAC30-70-30 C 1.~~

~~5. 4. Participate in mandatory training programs required by the department.~~

5. In addition, each program director shall:
- a. Be a full-time employee of the public guardian program;
  - b. Have experience as a service provider or administrator in one or more of the following areas: (i) social work, (ii)

case management, (iii) mental health, (iv) nursing, (v) or other human service program; and

c. Demonstrate, by objective criteria, a knowledge and understanding of Virginia's guardianship laws, alternatives to guardianship, and surrogate decisionmaking activities.

**B. Volunteers.**

~~1. Volunteers may be recruited and used to supplement paid staff. However, volunteers shall not be included in the public guardian program direct service ratio of 20 incapacitated persons to every one paid staff person as required under 22VAC30-70-30 D 1.~~

~~2. Volunteers may not exercise the authority of a guardian or conservator.~~

~~3. Each public guardian program that uses volunteers shall develop and implement written procedures for volunteer management and supervision including requirements that each volunteer shall:~~

- a. ~~Complete an orientation program that provides an overview of the~~

Prior to having direct contact with any clients or client estates, each paid staff of the public guardian program shall complete a training and orientation program. The training and orientation program shall include instruction on the following topics:

1. Virginia's guardianship laws and alternatives to guardianship, including the duties and powers of guardians and conservators in Virginia;

2. Surrogate decision-making and how it differs from substituted judgment decisionmaking standards;

3. The reporting requirements to the local department of social services and Commissioner of Accounts where applicable, mandated in §§ 64.2-1305 and 64.2-2020 of the Code of Virginia;

4. Working with special needs populations including individuals with physical and mental disabilities;

5. The provisions governing the operations of the Virginia Public Guardian and Conservator Program set forth in Article 6 (§ 51.5-149 et seq.) of Chapter 14 of Title 51.5 of the Code of Virginia and all ensuing applicable regulations and related policies and procedures issued by the department;

6. The policies and procedures of the public guardian program including:

- a. Privacy and confidentiality requirements;
- b. Recordkeeping;
- c. Services provided and the standards for services; and
- d. Indications of and actions to be taken when adult abuse, neglect, or exploitation is suspected.

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C. Each person serving as a public guardian program volunteer with direct contact with any client or client estates shall comply with the provisions of subdivisions A 1 and A 2 of this section. In addition, prior to having direct contact with any client or client estates, each volunteer shall complete an orientation program that provides an overview of:

1. The Virginia Public Guardian and Conservator Program (§§ 51.5-149, 51.5-150, and 51.5-151 of the Code of Virginia); and

b. Complete an orientation program that provides an overview of the 2. The local public guardian program for which the person intends to serve as a volunteer, including (i) services provided by the local public guardian program, (ii) specific duties of the volunteer, (iii) privacy and confidentiality requirements, (iv) recordkeeping and documentation requirements, and (v) indications of and action to be taken where adult abuse, neglect, or exploitation is suspected.

e. Have a satisfactory work record and personal record and be a person of good character and have not been convicted of any criminal offense involving any physical attack, neglect or abuse of a person, lying, cheating, or stealing nor convicted of any felony. A criminal record check will be conducted on each volunteer accepted by the local program on or after January 1, 2009.

## **22VAC30-70-50. Recordkeeping.**

A. Each public guardian program shall maintain an accurate and complete client record for each incapacitated person. Records shall be kept confidential. Access to client records shall be limited to (i) the client's legal representative public guardian or conservator as designated by a Virginia circuit court; (ii) as otherwise directed by court order; (iii) as directed by duly authorized government authorities or; and (iv) as specifically authorized by the Code of Virginia or federal statutes, including by written consent of the client's legal representative public guardian or conservator. Provision shall be made for the safe storage of client records or accurate and legible reproductions for a minimum of five years following termination of the guardian or conservator court order.

B. ~~The~~ Each client's record shall contain a current Virginia Uniform Assessment Instrument (UAI) or a similar comprehensive assessment instrument, a current public guardian program care plan, a current values history, the most recent annual report by guardians of the guardian submitted to the Department of Social Services as required by § 64.2-2020 of the Code of Virginia, the most recent annual accounting by the conservator to the Commissioner of Accounts as required by § 64.2-1305 of the Code of Virginia, and all applicable court orders and petitions. A client's record shall be completed and on file within 60 days of the public guardian program's appointment as public guardian, public conservator, or both.

C. Each public guardian program contractor shall maintain all records, provide reports, including audit information and documents in accordance with its contract with the department.

## **22VAC30-70-60. Evaluation and monitoring of public guardian programs.**

A. Each public guardian program shall submit data and reports as required by the department and maintain compliance with the department's program guidelines.

B. The department reserves the right to monitor all administrative, programmatic, and financial activities related to the public guardian program, including person-centered planning utilization and documentation, to ensure compliance with the terms of the contract between the department and the public guardian program contractor.

C. The department shall periodically administer, monitor, evaluate, provide technical assistance and expertise, and shall ensure fiscal accountability and quality of service of public guardian programs.

VA.R. Doc. No. R21-6322; Filed April 12, 2021, 2:43 p.m.

## **Final Regulation**

Title of Regulation: **22VAC30-100. Adult Protective Services (amending 22VAC30-100-10, 22VAC30-100-20, 22VAC30-100-40 through 22VAC30-100-80; adding 22VAC30-100-45; repealing 22VAC30-100-30).**

Statutory Authority: §§ 51.5-131 and 51.5-148 of the Code of Virginia; 42 USC § 1397(3).

Effective Date: June 9, 2021.

Agency Contact: Paige L. McCleary, Adult Services Program Consultant, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7605, or email paige.mccleary@dars.virginia.gov.

### Summary:

*The amendments update standards for local departments of social services (LDSSs) for the provision of adult protective services (APS) investigations and post-investigation services and provisions for the imposition of civil penalties on mandated reporters who fail to report suspected adult abuse, neglect, or exploitation, including (i) updating definitions used during the course of reporting adult abuse, neglect, and exploitation; APS investigations; and the provision of services to adults who may be victims; (ii) clarifying the specific actions an APS worker must take; and (iii) establishing a process to afford certain alleged perpetrators of adult abuse, neglect, or exploitation the opportunity to review the actions taken by an LDSS. The only change to the proposed regulation increases the length of time for the LDSS to conduct the initial face-to-face contact with the alleged victim to seven calendar days.*

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.

**22VAC30-100-10. Definitions.**

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

"Abuse" means the willful infliction of physical pain, injury, or mental anguish or unreasonable confinement of an adult as defined in § 63.2-1603 of the Code of Virginia.

"Adult" means any person ~~in the Commonwealth who is abused, neglected, or exploited, or is at risk of being abused, neglected, or exploited; and is 18 years of age or older and incapacitated, or is 60 years of age and older, or any person 18 years of age or older who is incapacitated and who resides in the Commonwealth; provided, however, "adult" may include qualifying nonresidents who are temporarily in the Commonwealth and who are in need of temporary or emergency protective services.~~

"Adult protective services" or "APS" means services provided by the local department that are necessary to protect an adult as defined in § 63.2-1603 of the Code of Virginia from abuse, neglect, or exploitation.

"APS case management information system" means the computer system that collects and maintains information on APS reports, investigations, and service provision. The system is the official state automated system for APS.

"Collateral" means a person whose personal or professional knowledge may help confirm or rebut the allegations of adult abuse, neglect, or exploitation or whose involvement may help ensure the safety of the adult.

"Commissioner" means the commissioner of the department.

"Conservator" means a person appointed by the court who is responsible for managing the estate and financial affairs of an incapacitated person, and where the context plainly indicates, includes a "limited conservator" or a "temporary conservator."

"Department" or "DARS" means the Virginia Department for Aging and Rehabilitative Services.

"Director" means the director or his ~~delegated designated~~ representative of the local department of social services of ~~the any city or county in which the adult resides or is found the Commonwealth.~~

"Disposition" means the determination by the local department of whether or not adult abuse, neglect, or exploitation has occurred.

"Documentation" means information and materials, written or otherwise, concerning allegations, facts, and evidence.

"Exploitation" means the illegal, unauthorized, improper, or fraudulent use of an adult as defined in § 63.2-1603 of the Code

of Virginia or ~~his the adult's~~ funds, property, benefits, resources, or other assets for another's profit, benefit, or advantage, including a caregiver or person serving in a fiduciary capacity, or that deprives the adult of his rightful use of or access to such funds, property, benefits, resources, or other assets. "Adult exploitation" includes (i) an intentional breach of a fiduciary obligation to an adult to his detriment or an intentional failure to use the financial resources of an adult in a manner that results in neglect of such adult; (ii) the acquisition, possession, or control of an adult's financial resources or property through the use of undue influence, coercion, or duress; and (iii) forcing or coercing an adult to pay for goods or services or perform services against his will for another's profit, benefit, or advantage if the adult did not agree, or was tricked, misled, or defrauded into agreeing, to pay for such goods or services or perform such services.

"Guardian" means a person ~~who has been legally invested with the authority and charged with the duty of taking care of the person and managing his property and protecting the rights of the person who has been declared by the circuit court to be incapacitated and incapable of administering his own affairs~~ appointed by the court who is responsible for the personal affairs of an incapacitated person, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, therapeutic treatment, and, if not inconsistent with an order of involuntary admission, residence. Where the context plainly indicates, the term includes a "limited guardian" or a "temporary guardian." The powers and duties of the guardian are defined by the court and are limited to matters within the areas where in which the person in need of a guardian has been determined to be incapacitated.

"Guardian ad litem" means an attorney appointed by the court to represent the interest of the adult for whom a guardian or conservator is requested. ~~On the hearing of the petition for appointment of a guardian or conservator, the guardian ad litem advocates for the adult who is the subject of the hearing, and his duties are usually concluded when the case is decided.~~

"Incapacitated person" means any adult who is impaired by reason of mental illness, intellectual disability, physical illness or disability, advanced age, or other causes to the extent that the adult lacks sufficient understanding or capacity to make, communicate, or carry out ~~reasonable~~ responsible decisions concerning his well-being. ~~This definition is~~ As used in this chapter for the purpose of establishing an adult's eligibility for adult protective services and APS, such adult may or may not have been found adjudicated incapacitated through by a court procedures.

"Involuntary protective services" means those services authorized by the court for an adult who has been determined to need protective services and who has been adjudicated incapacitated and lacking the capacity to consent to receive the needed protective services.

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"Lacks capacity to consent" means a preliminary judgment of a local department of social services ~~social worker~~ that an adult is unable to consent to receive needed services for reasons that relate to an emotional or psychiatric ~~problems condition~~, intellectual disability, developmental ~~delay~~ disability, or other reasons ~~which that~~ impair the adult's ability to recognize a substantial risk of death or immediate and serious harm to himself. The lack of capacity to consent may be either permanent or temporary. The ~~worker must~~ local department shall make a preliminary judgment that the adult lacks capacity to consent before petitioning the court for authorization to provide protective services on an emergency basis pursuant to § 63.2-1609 of the Code of Virginia.

"Legally incapacitated" means that the person has been adjudicated incapacitated by a circuit court because of a mental or physical condition ~~which that~~ renders him, either wholly or partially, incapable of taking care of himself or his estate.

~~"Legally incompetent" means a person who has been adjudicated incompetent by a circuit court because of a mental condition which renders him incapable of taking care of his person or managing his estate.~~

"Legitimate interest" means a lawful, demonstrated privilege right to access the requested information ~~as defined in § 63.2-104 pursuant to § 51.5-122~~ of the Code of Virginia.

"Local department" means any local department of social services in the Commonwealth of Virginia.

"Mandated reporters" means those persons identified in § 63.2-1606 of the Code of Virginia who are required to report ~~pursuant to § 63.2-1606 of the Code of Virginia to APS~~ when such persons have reason to suspect that an adult is abused, neglected, or exploited or is at risk of ~~adult~~ abuse, neglect, or exploitation.

"Mental anguish" means a state of emotional pain or distress resulting from ~~activity (verbal or behavioral)~~ verbal or behavioral actions of an alleged perpetrator. The intent of the ~~activity~~ action is to threaten or intimidate, cause sorrow or fear, humiliate, change behavior, or ridicule the adult. There must be observable or documented evidence that it is the alleged perpetrator's activity action that has caused the adult's ~~feelings~~ of emotional pain or distress.

"Neglect" means that an adult as defined in § 63.2-1603 of the Code of Virginia is living under such circumstances that he is not able to provide for himself or is not being provided such services as are necessary to maintain his physical and mental health and that the failure to receive such necessary services impairs or threatens to impair his well-being. However, no adult shall be considered neglected solely on the basis that such adult is receiving religious nonmedical treatment or religious nonmedical nursing care in lieu of medical care, provided that such treatment or care is performed in good faith and in accordance with the religious practices of the adult and there is written or oral expression of consent by that adult. Neglect

includes the failure of a caregiver or another responsible person to provide for basic needs to maintain the adult's physical and mental health and well-being, and it includes the adult's neglect of self. Neglect includes:

1. The lack of clothing considered necessary to protect a person's an adult's health;
2. The lack of food necessary to prevent physical injury or to maintain life, including failure to receive appropriate food for adults with conditions requiring special diets;
3. Shelter that is not structurally safe; has rodents or other infestations ~~which that~~ may result in serious health problems; or does not have a safe and accessible water supply, safe heat source, or sewage disposal. Adequate shelter for an adult ~~will depend~~ depends on the impairments of ~~an the~~ adult; however, the adult must be protected from the elements that would seriously endanger his health (e.g., rain, cold, or heat) and could result in serious illness or debilitating conditions;
4. Inadequate supervision by a paid or unpaid caregiver (~~paid or unpaid~~) who ~~has been designated to provide~~ provides the supervision necessary to protect the safety and well-being of an adult in his care;
5. The failure of persons who are responsible for caregiving to seek needed medical care or to follow medically prescribed treatment for an adult, or the adult has failed to obtain such care for himself. The needed medical care is believed to be of such a nature as to result in physical or mental injury or illness if it is not provided;
6. Medical neglect includes the withholding of medication or aids needed by the adult ~~such as including~~ dentures, eye glasses, hearing aids, ~~walker, etc or walkers~~. It also includes the unauthorized administration of prescription drugs, over-medicating or under-medicating, and the administration of drugs for other than ~~bona fide~~ medical reasons, as determined by a licensed health care professional; ~~and or~~
7. Self-neglect by an adult who is not meeting his own basic needs due to mental or physical impairments. Basic needs refer to such things as food, clothing, shelter, health, or medical care.

"Notification" means informing designated and appropriate individuals or agencies of the local department's action and the individual's rights.

"Preponderance of evidence" means the evidence as a whole shows that the facts are more probable and credible than not. It is evidence that is of greater weight or more convincing than the evidence offered in opposition.

"Report" means an allegation made in writing or orally by any person that an adult is ~~in need of protective services~~ suspected of being abused, neglected, or exploited or at risk of being abused, neglected, or exploited. The term "report" shall refer

~~to both reports and complaints of abuse, neglect, and exploitation of adults. The report may shall be made orally or in writing to the local department or by calling the Adult Protective Services APS Hotline.~~

"Responsible person" means an individual who is authorized by state law to make decisions concerning the adult and to receive information about the adult.

"Service plan" means a written plan of action to address the service needs of an adult in order to protect the adult, to prevent future abuse, neglect, or exploitation, and to preserve the autonomy of the adult whenever possible.

"Unreasonable confinement" means the use of physical or chemical restraints (physical or chemical), isolation, or any other means of confinement ~~without medical orders~~, when there is no emergency and for reasons other than the adult's safety or well-being or the safety of others.

"Valid report" means the local department ~~of social services~~ has evaluated the information and allegations of the report and determined that the local department shall conduct an investigation because all of the ~~following~~ following elements of 22VAC30-100-20 C for a valid report are present:

- ~~1. The alleged victim adult is 60 years of age or older or is 18 years of age or older and is incapacitated;~~
- ~~2. There is a specific adult with enough identifying information to locate the adult;~~
- ~~3. Circumstances allege abuse, neglect or exploitation or risk of abuse, neglect or exploitation; and~~
- ~~4. The local department receiving the report is a local department of jurisdiction as described in 22VAC30-100-20.~~

~~"Voluntary protective services" means those services provided to an adult who, after investigation by a local department, is determined to be in need of protective services and consents to receiving the services so as to prevent further abuse, neglect, and exploitation of an adult at risk of abuse, neglect and exploitation.~~

**22VAC30-100-20. Adult protective services intake and investigation.**

A. This section establishes the process for ~~the adult protective services~~ APS intake and investigation and provides priority to situations that are most critical.

B. ~~The validity of the report shall be determined. Investigations shall be initiated by the local department not later than 24 hours from the time a valid report was received in the local department. All reports shall be entered into the APS case management information system within 48 hours of its receipt by the local department.~~

C. The local department shall determine if the report is valid by evaluating the information and allegations in the report. A report is valid if all of the following elements are present:

1. The alleged adult victim is 60 years of age or older or is 18 years of age or older and is incapacitated;
2. There is a specific adult with enough identifying information to locate the adult;
3. Circumstances allege abuse, neglect, or exploitation or risk of abuse, neglect, or exploitation; and
4. The local department receiving the report is the local department of jurisdiction as described in this section.

D. Within 24 hours after receiving a valid report, the local department shall initiate an investigation.

1. To initiate the investigation, the ~~social worker must~~ local department shall gather enough information concerning the report to determine (i) ~~if the report is valid and~~ (ii) if an immediate response is needed to ensure the safety of the alleged victim. Pertinent information may be obtained from the report, case record reviews, contact with the alleged victim, the reporter, friends ~~and~~, neighbors ~~and~~, service providers, or other sources of information.

2. When determining the need for an immediate response, the ~~social worker~~ local department shall consider the following factors:

- a. The imminent danger to the adult or to others;
- b. The severity of the alleged abuse, neglect, or exploitation;
- c. The circumstances surrounding the alleged abuse, neglect, or exploitation; and
- d. The physical and mental condition of the adult.

3. A face-to-face contact with the alleged victim shall be made as soon as possible but not later than [ ~~five~~ seven ] calendar days after the date of the initiation of the investigation unless there are valid reasons that the contact could not be made. Those reasons shall be documented in the ~~Adult Protective Services Assessment Narrative as described in 22VAC30-100-40 APS case management information system.~~ The timing of the interview with the alleged victim should occur in a reasonable amount of time ~~pursuant to~~ consistent with the local department's consideration of the circumstances in subdivision 2 of this subsection.

~~C. The report shall be reduced to writing within 72 hours of receiving the report on a form prescribed by the department.~~

~~D. E.~~ The purpose of the investigation is to determine whether the adult alleged to be abused, neglected, or exploited or at risk of abuse, neglect, or exploitation is in need of protective services and, if so, to identify those services ~~needed to provide the protection.~~

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~~E. F.~~ The local department shall conduct a thorough investigation of the report.

~~F. G.~~ The investigation shall include a visit and private interview with the adult alleged to be abused, neglected, or exploited.

~~G. H.~~ The investigation shall include consultation with others having who may have knowledge of the facts of or information about the particular case report.

I. An APS assessment shall be required for all APS investigations and shall be entered into the APS case management information system. The APS assessment shall address the following:

1. Allegations in the report or circumstances discovered during the investigation that meet the definitions of adult abuse, neglect, or exploitation.
2. The extent to which the adult is physically, emotionally, and mentally capable of making and carrying out decisions concerning his health and well-being.
3. How the adult's environment, functional ability, physical and mental health, support system, and income and resources may be contributing factors in the abuse, neglect, or exploitation.
4. The risk of serious harm to the adult.
5. The need for an immediate response by the local department to a valid report.
6. The circumstances and information concerning an interview with the alleged victim, the alleged perpetrator (if known), and any collateral contacts having knowledge of the case.

~~H. J.~~ Primary responsibility for the investigation when more than one local department may have jurisdiction under § 63.2-1605 of the Code of Virginia shall be assumed by the local department:

1. Where the subject of the investigation resides when the place of residence is known and when the alleged abuse, neglect, or exploitation occurred in the city or county of residence;
2. Where the abuse, neglect, or exploitation is believed to have occurred when the report alleges that the incident occurred outside the city or county of residence;
3. Where the abuse, neglect, or exploitation was discovered if the incident did not occur in the city or county of residence or if the city or county of residence is unknown and the place where the abuse, neglect, or exploitation occurred is unknown; or
4. Where the abuse, neglect, or exploitation was discovered if the subject of the report is a nonresident who is temporarily in the Commonwealth.

K. An adult's residence is determined by the physical location of the residence. An adult's residence is not determined by the locality to which the adult may pay or previously paid taxes or by whether the adult currently or previously received services or public assistance from another local department.

L. A local department that may have previously provided a service to or conducted an APS investigation on an adult shall assist with the investigation at the request of the local department with primary responsibility for investigation.

~~I. M.~~ When an investigation extends ~~across city or county lines~~ into the jurisdiction of another local department, the local departments department in those cities or counties the other jurisdiction shall assist with the investigation at the request of the local department with primary responsibility for the investigation.

~~J. N.~~ When the local department receives information on suspicious deaths of adults, the local department ~~staff~~ shall immediately notify the appropriate medical examiner and law enforcement.

## **22VAC30-100-30. Application for the provision of services. (Repealed.)**

~~A. Local departments are authorized to receive and investigate reports of suspected adult abuse, neglect and exploitation pursuant to Article 2 (§ 63.2-1603 et seq.) of Chapter 16 of Title 63.2 of the Code of Virginia.~~

~~B. Upon completion of the investigation and the determination that the adult is in need of protective services, the adult protective services worker must obtain an application signed by the adult in need of services or his representative prior to service provision.~~

~~C. The application process is designed to assure the prompt provision of needed adult protective services including services to adults who are not able to complete and sign a service application.~~

~~D. Persons who may complete and sign an application for adult protective services on behalf of an adult who needs the service include:~~

- ~~1. The adult who will receive the services or the adult's legally appointed guardian or conservator;~~
- ~~2. Someone authorized by the adult; or~~
- ~~3. The local department.~~

## **22VAC30-100-40. Assessment narrative and Adult protective services disposition.**

~~A. An assessment narrative shall be required for all adult protective services investigations and shall be titled "Adult Protective Services Assessment Narrative." The narrative must address, but is not limited to, the following:~~

~~1. Allegations in the report or circumstances discovered during the investigation that meet the definitions of abuse, neglect or exploitation.~~

~~2. The extent to which the adult is physically, emotionally and mentally capable of making and carrying out decisions concerning his health and well being.~~

~~3. The risk of serious harm to the adult.~~

~~4. The need for an immediate response by the adult protective services worker upon receipt of a valid report.~~

~~5. The ability to conduct a private interview with the alleged victim, the alleged perpetrator (if known) and any collateral contacts having knowledge of the case.~~

~~B. A.~~ After investigating the report, the ~~adult protective services worker must~~ local department shall review and evaluate the facts collected and make a disposition as to whether the adult is in need of protective services and, if so, what services are needed.

~~C. B.~~ The disposition that the adult needs protective services shall be based on the preponderance of evidence that abuse, neglect, or exploitation has occurred or that the adult is at risk of abuse, neglect, or exploitation. The local department may be unable to determine the identity of the alleged perpetrator but the inability to determine the identity of the alleged perpetrator shall not prohibit the local department from issuing a disposition reflecting the need for protective services.

~~D. C.~~ Possible dispositions.

1. Needs protective services and accepts. This disposition shall be used when:

a. A review of the facts shows a preponderance of evidence that adult abuse, neglect, or exploitation has occurred or is occurring; and

(1) The adult consents to receive services pursuant to § 63.2-1610 of the Code of Virginia; or

(2) Involuntary protective services are ordered by a court pursuant to § 63.2-1609 or Article 1 (§ 64.2-2000 et seq.) of Chapter 20 of Title 64.2 of the Code of Virginia; or

b. A review of the facts shows a preponderance of evidence that the adult is at risk of abuse, neglect, or exploitation and needs protective services in order to reduce that risk; and

~~e.~~ (1) The adult consents to receive services pursuant to § 63.2-1610 of the Code of Virginia; or

~~e.~~ (2) Involuntary protective services are ordered by the a court pursuant to § 63.2-1609 or Article 1 (§ 64.2-2000 et seq.) of Chapter 20 of Title 64.2 of the Code of Virginia.

2. Needs protective services and refuses. This disposition shall be used when:

a. A review of the facts shows a preponderance of evidence that adult abuse, neglect, or exploitation has

occurred or is occurring or the adult is at risk of abuse, neglect, and exploitation; and

b. The adult refuses or withdraws consent to accept protective services pursuant to § 63.2-1610 of the Code of Virginia.

3. Need for protective services no longer exists. This disposition shall be used when the subject of the report no longer needs protective services. A review of the facts shows a preponderance of evidence that adult abuse, neglect, or exploitation has occurred. However, at the time the investigation is initiated or during the course of the investigation, the adult who is the subject of the report ceases to be at risk of further abuse, neglect, or exploitation due to the circumstances or actions that have occurred or have been initiated by the adult or an entity or person other than the local department.

4. Unfounded. This disposition shall be used when review of the facts does not show a preponderance of evidence that abuse, neglect, or exploitation occurred or that the adult is at risk of abuse, neglect, or exploitation.

5. Invalid. This disposition shall be used when, after initiating the investigation, it is determined that the report does not meet the criteria for a valid report.

~~E. D.~~ The investigation shall be completed and a disposition assigned by the local department within 45 calendar days of the date the report was received. If the investigation is not completed within 45 calendar days, the ~~record~~ local department shall document reasons for the delay. The disposition shall be entered into the APS case management information system no later than five working days of the conclusion of the investigation.

~~F. A notice~~ E. Notification of the completion of the investigation ~~must~~ shall be made in writing and shall be mailed to the reporter within 10 working days of the completion of the investigation.

F. Written notification.

1. The local department shall provide written notification to the alleged perpetrator within 30 calendar days of the conclusion of the investigation when:

a. The disposition (i) is needs protective services and accepts, (ii) needs protective services and refuses, or (iii) need for protective services no longer exists; and

b. The local department notified a licensing, regulatory, or legal authority of the disposition pursuant to § 63.3-1605 D of the Code of Virginia.

2. The notification shall include a summary of the evidence and information used by the local department to support the findings of the investigation; inform the alleged perpetrator about his right to review; and if applicable, identify all licensing, regulatory, or legal authorities and the date these authorities were notified.

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3. The local department may delay notification to the alleged perpetrator by an additional 30 calendar days at the request of a law-enforcement agency.

4. It is optional for the local department to provide such notification to an adult whom the local department determines to be self-neglecting and is therefore considered to be the alleged perpetrator.

~~G. The Adult Protective Services Program~~ local department shall respect the rights of adults with capacity to consider options offered by the program local department and refuse services, even if those decisions do not appear to reasonably be in the best interests of the adult.

## **22VAC30-100-45. Right to review.**

A. Right to review is the process by which the alleged perpetrator may request a hearing to amend the record when the investigation has resulted in a disposition that the local department has communicated to a licensing, regulatory, or legal authority.

B. A written request for an informal hearing with the local department must be received by the local department within 30 calendar days of the date of the local department's written notification that meets the requirements of 22VAC30-100-40 F to be deemed timely.

C. The local department shall conduct an informal hearing within 30 calendar days of receiving the written request for an informal hearing.

D. The director shall preside over the informal hearing. Except for the director, no person whose regular duties include substantial involvement with the local department's adult abuse, neglect, or exploitation investigations shall preside over the hearing.

E. The alleged perpetrator may be represented by counsel. The alleged perpetrator shall be entitled to present the testimony of witnesses, documents, factual data, arguments, or other submissions of proof.

F. The director shall have the authority to sustain, amend, or reverse the findings of the investigation or the disposition.

G. The director shall notify the alleged perpetrator, in writing, of the results of the informal hearing within 30 calendar days of the date of the hearing. The decision of the director shall be final. The results of the informal hearing shall be mailed, certified with return receipt, to the alleged perpetrator. A copy of the final decision shall be mailed to the appropriate licensing, regulatory, or legal authority.

H. If the director reverses the identification of the alleged perpetrator, the local department shall continue to offer services to the adult if the disposition remains needs protective services and accepts.

I. All written findings and actions of the local department or its director, including the decision of the director at the conclusion of the review, are final and shall not be (i) appealable to the Commissioner for Aging and Rehabilitative Services or (ii) considered a final agency action for purposes of judicial review pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

## **22VAC30-100-50. Disclosure of adult protective services information.**

A. This chapter describes the protection of confidential information including a description of when such information ~~must~~ shall be disclosed, when such disclosure of the information is at the discretion of the local department, what information may be disclosed, and the procedure for disclosing the information.

B. Department staff having legitimate interest shall have regular access to ~~adult protective services~~ APS records maintained by the local department.

C. The following agencies have licensing, regulatory, and legal authority for administrative action or criminal investigations, and they have a legitimate interest in confidential information when such information is relevant and reasonably necessary for the fulfillment of their licensing, regulatory, and legal responsibilities:

1. Department of Behavioral Health and Developmental Services;
2. disAbility Law Center of Virginia;
3. Office of the Attorney General, including the Medicaid Fraud Control Program;
4. Department for Aging and Rehabilitative Services;
5. Department of Health, including the Office of Licensure and Certification and the Office of the Chief Medical Examiner;
6. Department of Medical Assistance Services;
7. Department of Health Professions;
8. Department for the Blind and Vision Impaired;
9. Department of Social Services, including the Division of Licensing Programs;
10. The Office of the State Long-Term Care Ombudsman and local ombudsman;
11. Law-enforcement agencies;
12. Medical examiners;
13. Adult fatality review teams;
14. ~~Prosecutors~~ Commonwealth's attorneys; and

15. Any other entity deemed appropriate by the commissioner or ~~local department~~ director that demonstrates a legitimate interest.

D. The local department shall disclose all relevant information to representatives of the agencies identified in subsection C of this section except the identity of the person who reported the abuse, neglect, or exploitation unless the reporter authorizes the disclosure of his identity or the disclosure is ordered by the court.

E. The local department shall refer any appropriate matter and all relevant documentation to the appropriate licensing, regulatory, or legal authority for administrative action or criminal investigation.

F. Local departments may release information to the following persons when the local department has determined the person making the request has legitimate interest in accordance with ~~§ 63.2-104~~ § 51.5-122 of the Code of Virginia and the release of information is in the best interest of the adult:

1. Representatives of public and private agencies including community services boards, area agencies on aging, and local health departments requesting disclosure when the agency has legitimate interest;
2. A physician or other licensed health care professional who is treating an adult whom he reasonably suspects is abused, neglected, or exploited;
3. The adult's legally appointed guardian or conservator;
4. A guardian ad litem who has been appointed for an adult who is the subject of an ~~adult protective services~~ APS report;
5. A family member who is responsible for the welfare of an adult who is the subject of an ~~adult protective services~~ APS report;
6. An attorney representing a local department in an ~~adult protective services case~~ APS matter;
7. The Social Security Administration; or
8. Any other entity that demonstrates to the commissioner or ~~local department~~ director that legitimate interest is evident.

G. Local departments are required to disclose certain requested information under the following circumstances:

1. When disclosure is ordered by a court;
2. When a person has made an ~~adult protective services~~ APS report and an investigation has been completed; or
3. When a request for access to information is made pursuant to the Government Data Collection and Dissemination Practices Act (§ 2.2-3800 et seq. of the Code of Virginia).

H. Any or all of the following specific information may be disclosed at the discretion of the local department to agencies or persons specified in subsection F of this section:

1. Name, address, age, race, and gender of the adult who is the subject of the request for information;
2. Name, address, age, race, and gender of the person who is alleged to have perpetrated the abuse, neglect, or exploitation;
3. Description of the incident or ~~incidents~~ of abuse, neglect, or exploitation;
4. Description of the adult's medical ~~problems~~ conditions to the extent known;
5. Disposition of the ~~adult protective services~~ APS report; and
6. The protective service needs of the adult.

I. The identity of the person who reported the suspected abuse, neglect, or exploitation shall be held confidential unless the reporter authorizes the disclosure of his identity or disclosure is ordered by the court.

J. Agencies or persons who receive confidential information pursuant to subsection G of this section shall provide the following assurances to the local department:

1. The purpose for which information is requested is related to the protective services goal in the service plan for the adult;
2. The information will be used only for the purpose for which it is made available; and
3. The information will be held confidential by the department or individual receiving the information except to the extent that disclosure is required by law.

K. Methods of obtaining assurances. Any one of the following methods may be used to obtain assurances required in subsection J of this section:

1. Agreements between local departments and other community service agencies that provide blanket assurances required in subsection J of this section for all ~~adult protective services~~ APS cases; or
2. State-level agreements that provide blanket assurances required in subsection C of this section for all ~~adult protective services~~ APS cases.

L. Notification that information has been disclosed. When information has been disclosed pursuant to this ~~chapter~~ section, notice of the disclosure shall be given to the adult who is the subject of the information or to his legally appointed guardian. If the adult has given permission to release the information, further notification shall not be required.

**22VAC30-100-60. Opening a case for service provision.**

~~A. The local department shall offer a range of services must be made available to any abused, neglected and exploited adult or to adults at risk of abuse, neglect or exploitation to protect~~

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~~the adult and to prevent any future abuse, neglect or exploitation to the adult when the disposition is needs protective services and accepts as defined in 22VAC30-100-40.~~

~~1. Opening a case to adult protective services. Once a disposition of the report and an assessment of the adult's needs and strengths have been made, the department shall assess the adult's service needs.~~

## B. Application for services.

1. The local department shall obtain an application when the disposition is needs protective services and accepts.

2. Representatives who may complete and sign an application on behalf of an adult who needs protective services include:

- a. The adult's legally appointed guardian or conservator;
- b. The adult's responsible person; or
- c. The local department.

## C. A case shall be opened for adult protective services when:

- ~~a. 1. The service needs are identified;~~
- ~~b. 2. The disposition is that the adult needs protective services and accepts; and~~
- ~~c. 3. The adult or the adult's representative as identified in subdivision B 2 of this section agrees to accept protective services or protective services are ordered by the court.~~

~~2. Service planning. D. A service plan which that is based on the investigative findings and the assessment of the adult's need for protective services shall be developed. The service plan is the basis for the activities that the worker local department, the adult, and other persons individuals will undertake to provide the services necessary to protect the adult. The service plan shall be documented in the APS case management information system.~~

~~3. E. Implementation of the service plan. Implementation of the service plan is the delivery of the services necessary to provide adequate protection to the adult. The services may be delivered directly, through purchase of service, through informal support, or through referral. The continuous monitoring of the adult's progress and the system's response is a part of the implementation.~~

~~4. F. Local departments are required to provide services beyond the investigation to the extent that federal or state matching funds are made available.~~

## **22VAC30-100-70. Civil penalty for nonreporting.**

A. The department commissioner may impose civil penalties when it is determined that a mandated reporter failed to report suspected adult abuse, neglect, or exploitation pursuant to § 63.2-1606 of the Code of Virginia.

~~B. Civil penalties for all mandated reporters except law-enforcement officers shall be imposed as described in 22VAC30-100-80 determined by a court of competent jurisdiction, at its discretion.~~

## **22VAC30-100-80. Imposition of civil penalty.**

### A. Local department review and recommendation.

~~1. Based on a decision by the local department When a director or his designee determines that a mandated reporter failed to report as required by § 63.2-1606 of the Code of Virginia, the local director shall prepare a written statement of fact on a form provided by the department concerning the mandated reporter's failure to report and submit the statement of fact to the commissioner. The director also shall prepare a letter notifying the mandated reporter of the intent to request imposition of a civil penalty. The letter shall state the mandated reporter's right to submit a written statement to the commissioner concerning the mandated reporter's failure to report. The date of the director's notification shall be the date of the letter to the mandated reporter. Any supporting documentation that the director considered in requesting the imposition of a civil penalty shall be provided to the mandated reporter. The letter, statement of facts, and any supporting documentation that the director considered in requesting the imposition of a civil penalty shall be sent to the mandated reporter by registered or certified mail, return receipt requested.~~

~~2. The local director or his designee shall notify the mandated reporter in writing within 15 calendar days from the date of the determination of the intent to recommend that a civil penalty be imposed. The notification will include a copy of the local director's statement of fact concerning the mandated reporter's failure to report. The notification shall state the mandated reporter's right to submit a written statement to the commissioner concerning the mandated reporter's failure to report. The date of the notification is the postage date At such time as the letter required under subdivision 1 of this subsection is sent, the director shall send a letter to the commissioner requesting the imposition of a civil penalty on the mandated reporter for failure to report. The statement of fact and the letter to the mandated reporter shall accompany the letter to the commissioner. Any supporting documentation that the director considered in requesting the imposition of a civil penalty shall be provided to the commissioner.~~

~~3. The mandated reporter's statement concerning his failure to report must be received by the commissioner within 45 days from the date of the local director's notification of intent to recommend the imposition of a civil penalty. A mandated reporter's statement received after the 45 days shall not be considered by the commissioner.~~

### B. Review by the commissioner or his designee

~~1. The commissioner or his designee shall review the local director's written statement of fact concerning the mandated reporter's failure to report and the mandated reporter's written statement in determining whether to impose a civil penalty.~~

~~2. In the case of law enforcement officers who are alleged to have not reported as required, the commissioner or his designee shall forward the recommendation to a court of competent jurisdiction.~~

~~3. The commissioner or his designee shall impose a civil penalty upon a mandated reporter who is determined to have not reported as required pursuant to § 63.2-1606 of the Code of Virginia. Penalties shall be imposed as follows:~~

~~a. For first offenses of nonreporting pursuant to § 63.2-1606 H of the Code of Virginia, the penalty shall be not more than \$500.~~

~~b. For second and subsequent offenses pursuant to § 63.2-1606 H of the Code of Virginia, the penalty shall be not less than \$100 and not more than \$1,000.~~

~~4. The commissioner or his designee shall notify the mandated reporter whether a civil penalty will be imposed and, if so, the amount of the penalty. This written notice shall describe the reasons for the imposition of the civil penalty. The date of notification shall be deemed to be the date the mandated reporter received written notice of the alleged violation. This notice shall include specifics of the violation charged and shall be sent by overnight express mail or by registered or certified mail, return receipt requested.~~

~~5. If a civil penalty is imposed, a copy of the notice to the mandated reporter shall be sent to the appropriate licensing, regulatory, or administrative agency and to the local director who recommended the imposition of the penalty.~~

B. Statement from mandated reporter. Within 45 calendar days from the date of the director's notification to the mandated reporter of intent to request the imposition of a civil penalty, the mandated reporter may submit a written statement concerning his failure to report to the commissioner. Statements received by the commissioner after 45 calendar days will be deemed untimely and will not be considered.

C. Review by the commissioner's designee.

1. The commissioner's designee shall review the director's statement of facts, the mandated reporter's written statement, and any supporting documentation provided by the director in determining whether to impose a civil penalty.

2. In the case of law-enforcement officers who are alleged not to have reported as required, the commissioner or the commissioner's designee shall forward a recommendation to the court of competent jurisdiction.

3. Within 30 calendar days after the deadline for the commissioner's receipt of the mandated reporter's written

statement, the commissioner's designee shall issue a final decision to the mandated reporter in writing, addressing whether a civil penalty will be imposed. The final decision shall include specifics of the violation charged, the reasons for the imposition of the civil penalty, and the amount of the penalty. The date of the final decision is the date the final decision is sent to the mandated reporter. The commissioner's designee shall also send a copy of the final decision to the director who recommended the imposition of the civil penalty.

D. Reconsideration of a final decision imposing a civil penalty shall be conducted in accordance with § 2.2-4023.1 of the Code of Virginia. The commissioner's review on reconsideration shall not include testimony, statements, or documentary submissions that were not included in the director's intent to request imposition of a civil penalty or presented to the commissioner or the commissioner's designee prior to issuance of the final decision.

6. E. Any mandated reporter has the right to appeal the decision to impose a civil penalty in accordance with § 2.2-4026 of the Code of Virginia and pursuant to Part 2 A of the Rules of the Supreme Court of Virginia.

VA.R. Doc. No. R18-5270; Filed April 12, 2021, 2:44 p.m.

**Final Regulation**

Title of Regulation: 22VAC30-110. Assessment in Assisted Living Facilities (amending 22VAC30-110-10 through 22VAC30-110-50, 22VAC30-110-80 through 22VAC30-110-110).

Statutory Authority: §§ 51.5-131 and 51.5-146 of the Code of Virginia.

Effective Date: June 9, 2021.

Agency Contact: Paige McCleary, Adult Services Program Consultant, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7605, or email paige.mccleary@dars.virginia.gov.

Summary:

*The amendments (i) permit the use of video conferencing for assessments when there are hazardous travel conditions or the individual to be assessed is in another state, (ii) specify that qualified assessors who are employees of local departments of social services shall enter assisted living facility assessments in the case management system designated by the department, (iii) specify that the earliest date that an annual reassessment may be completed is 60 calendar days prior to the annual reassessment due date, (iv) require that qualified assessors and case managers make housing options clear, (v) no longer require that qualified assessors and case managers advise public pay individuals of the outcome of the assessment or the annual reassessment orally and in writing, and (vi) amend other language for improved clarity.*

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Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

## **22VAC30-110-10. Definitions.**

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

"Activities of daily living" or "ADLs" means bathing, dressing, toileting, transferring, bowel control, bladder control, and eating/feeding. An individual's degree of independence in performing these activities is a part of determining appropriate level of care and services.

"Administrator" means the licensee or person designated by the licensee who (†) is responsible for the general administration and management of an assisted living facility and who oversees the day-to-day operation of the facility, including compliance with all regulations for assisted living facilities ~~and (ii) meets the requirements of 22VAC40-72.~~

"Assessment" means a standardized approach using common definitions to gather sufficient information about an individual applying to or residing in an assisted living facility to determine the need for appropriate level of care and services.

"Assisted living care" means a level of service provided by an assisted living facility to individuals who may have physical or mental impairments and require at least moderate assistance with the activities of daily living. ~~Moderate assistance means dependency in two or more of the activities of daily living.~~ Included in this level of service are individuals who are dependent in behavior pattern (i.e., abusive, aggressive, disruptive) as documented on the uniform assessment instrument.

"Assisted living facility" or "ALF" means any ~~public or private ALF that is required to be licensed as an ALF by the Department of Social Services under Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia, specifically, any~~ congregate residential setting that provides or coordinates personal and health care services, 24-hour supervision, and assistance (scheduled and unscheduled) for the maintenance or care of four or more adults who are aged, infirm, or disabled and who are cared for in a primarily residential setting, except (i) a facility or portion of a facility licensed by the State Board of Health or the Department of Behavioral Health and Developmental Services, but including any portion of such facility not so licensed; (ii) the home or residence of an individual who cares for or maintains only persons related to him by blood or marriage; (iii) a facility or portion of a facility serving infirm or disabled persons between the ages of 18 and 21 years, or 22 years if enrolled in an educational program for the handicapped pursuant to § 22.1-214 of the Code of Virginia, when such facility is licensed by the Department of Social Services as a children's residential facility under Chapter 17 (§ 63.2-1700 et seq.) of Title 63.2 of the Code of Virginia, but including any portion of the facility not so

licensed; and (iv) any housing project for persons 62 years of age or older or the disabled that provides no more than basic coordination of care services and is funded by the U.S. Department of Housing and Urban Development, by the U.S. Department of Agriculture, or by the Virginia Housing Development Authority. Included in this definition are any two or more places, establishments or institutions owned or operated by a single entity and providing maintenance or care to a combined total of four or more aged, infirm, or disabled adults. Maintenance or care means the protection, general supervision, and oversight of the physical and mental well-being of an aged, infirm, or disabled individual. ~~Assuming responsibility for the well being of individuals, either directly or through contracted agents, is considered general supervision and oversight.~~

"Auxiliary Grants Program" means a state and locally funded assistance program to supplement the income of an individual who is receiving Supplemental Security Income (SSI) or an individual who would be eligible for SSI except for excess income, and who resides in an ALF ~~with an approved rate, an adult foster care home, or supportive housing setting with an established rate [ in ] the [ annual appropriations act Appropriation Act ]~~. The total number of individuals within the Commonwealth of Virginia eligible to receive auxiliary grants in a supportive housing setting shall not exceed the number individuals designated in the [ annual appropriations act Virginia law ] and the signed agreement between the department and the Social Security Administration.

"Case management" means multiple functions designed to link individuals to appropriate services. Case management may include a variety of common components such as initial screening of need, comprehensive assessment of needs, development and implementation of a plan of care, service monitoring, and follow-up.

"Case management agency" means a public human service agency which employs a case manager or contracts for case management.

"Case manager" means an employee of a public human services agency who is qualified to perform assessments and to develop and coordinate plans of care.

"Department" or "DARS" means the Virginia Department for Aging and Rehabilitative Services.

"Department designated case management system" means the official state automated computer system that collects and maintains information on assessments conducted by employees of the local department who meet the definition of qualified assessor.

"Dependent" means, ~~for ADLs and instrumental activities of daily living (IADLs)~~, the individual needs the assistance of another person or needs the assistance of another person and equipment or a device to safely complete ~~the activity~~ an ADL or IADL. For medication administration, dependent means the

individual needs to have medications administered or monitored by another person or professional staff. For behavior pattern, dependent means the individual's behavior is aggressive, abusive, or disruptive.

"Discharge" means the process that ends an individual's stay in the ALF.

"Emergency placement" means the temporary status of an individual in an ALF when the individual's health and safety would be jeopardized by ~~not permitting~~ denying entry into the facility until requirements for admission have been met.

"Face-to-face" means interacting with an individual in need of an assessment in a manner that enables the qualified assessor or case manager to observe the individual's behavior and ability to perform ADLs and IADLs.

"Facility" means an ALF.

"Independent physician" means a physician who is chosen by an individual residing in the ALF and who has no financial interest in the ALF, directly or indirectly, as an owner, officer, or employee or as an independent contractor with the facility.

"Instrumental activities of daily living" or "IADLs" means for the purposes of this chapter, meal preparation, housekeeping, laundry, and money management. An individual's degree of independence in performing these activities is a part of determining appropriate level of care and services.

"Local department" means any local department of social services in the Commonwealth of Virginia.

"Maximum physical assistance" means that an individual has a rating of total dependence in four or more of the seven activities of daily living as documented on the uniform assessment instrument.

"Medication administration" means for purposes of this chapter, assessing the degree of assistance an individual requires to take medications in order to determine the individual's appropriate level of care.

"Minimal assistance" means dependency in only one ADL or dependency in one or more IADLs as documented on the uniform assessment instrument. Included in this level of services are individuals who are dependent in medication administration as documented on the UAI.

"Moderate assistance" means dependency in two or more ADLs as documented on the UAI.

"Private pay" means that an individual residing in an ~~assisted living facility~~ ALF is not eligible for ~~benefits under~~ the Auxiliary Grants Program.

"Prohibited conditions" means physical or mental health conditions or care needs as described in § 63.2-1805 of the Code of Virginia. An ALF shall not admit or allow the continued residence of an individual with a prohibited condition. Prohibited conditions include, ~~but are not limited to,~~

an individual who requires maximum physical assistance as documented on the uniform assessment instrument and meets nursing facility level of care criteria as defined in the State Plan for Medical Assistance. Unless the individual's independent physician determines otherwise, an individual who requires maximum physical assistance and meets nursing facility level of care criteria as defined on the State Plan for Medical Assistance shall not be admitted to or continue to reside in an ALF.

"Public human services agency" means an agency established or authorized by the General Assembly under Chapters 2 and 3 (§§ 63.2-200 et seq. and 63.2-300 et seq.) of Title 63.2, Chapter 14 (§ 51.5-116 et seq.) of Title 51.5, Chapters 1 and 5 (§§ 37.2-100 et seq. and 37.2-500 et seq.) of Title 37.2, or Article 5 (§ 32.1-30 et seq.) of Chapter 1 of Title 32.1, or hospitals operated by the state under Chapters 6.1 and 9 (§§ 23-50.4 et seq. and 23-62 et seq.) of Title 23 of the Code of Virginia and supported wholly or principally by public funds, including but not limited to funds provided expressly for the purposes of case management.

"Public pay" means that an individual residing in an ALF is eligible for ~~benefits under~~ the Auxiliary Grants Program.

"Qualified assessor" means a person who is authorized to perform an assessment, reassessment, or change in level of care for an individual who is seeking admission to an ALF or who resides in an ALF. For public pay individuals, a qualified assessor is an employee of a public human services agency who is trained in the completion of the uniform assessment instrument and is authorized to approve placement for an individual who is seeking admission to or residing in an ALF. For private pay individuals, a qualified assessor is staff of the ALF trained in the completion of the uniform assessment instrument or an independent physician or a qualified assessor for public pay individuals.

"Reassessment" means an update of information on the ~~uniform assessment instrument at any time~~ UAI after the initial assessment. In addition to an annual reassessment, a reassessment shall be completed whenever there is a significant change in the individual's condition.

"Residential living care" means a level of service provided by an ALF for individuals who may have physical or mental impairments and require only minimal assistance ~~with the activities of daily living. Minimal assistance means dependency in only one ADL or dependency in one or more of the selected IADLs as documented on the uniform assessment instrument. Included in this level of service are individuals who are dependent in medication administration as documented on the uniform assessment instrument.~~ The definition of residential living care includes the services provided by the ALF to individuals who are assessed as capable of maintaining themselves in an independent living status.

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"Significant change" means a change in an individual's condition that is expected to last longer than 30 days. It does not include short-term changes that resolve with or without intervention, a short-term acute illness or episodic event, or a well-established, predictive, cyclic pattern of clinical signs and symptoms associated with a previously diagnosed condition where an appropriate course of treatment is in progress.

"Targeted case management" means the provision of ongoing case management services by an employee of a public human services agency contracting with the Department of Medical Assistance Services to an individual who is receiving an auxiliary grant in an ALF who meets the criteria set forth in 12VAC30-50-470.

"Total dependence" means the individual is entirely unable to participate in the performance of an ADL.

"Uniform assessment instrument" or "UAI" means the department-designated assessment form. There is an alternate version of the uniform assessment instrument that may be used for individuals paying privately to reside in the ALF. Social and financial information that is not relevant because of the individual's payment status is not included on the private pay version.

~~"User's Manual: Virginia Uniform Assessment Instrument" means the department designated handbook containing common definitions and procedures for completing the department designated assessment form.~~

"Virginia Department of Medical Assistance Services" or "DMAS" means the single state agency designated to administer the Medical Assistance Services Program in Virginia.

## **22VAC30-110-20. Individuals to be assessed.**

A. All individuals applying to or residing in an ALF shall be assessed face-to-face using the UAI prior to admission, at least annually, and whenever there is a significant change in the individual's condition.

1. When the qualified assessor or case manager and individual are unable to be in the same physical space to conduct an assessment due to the individual's location in another state or due to hazardous travel conditions for the qualified assessor or case manager, the use of video conferencing to conduct the assessment shall be permitted.

2. The appropriate qualified assessor or case manager shall review the assessment with the adult within seven working days of admission to the ALF to ensure all assessment information is accurate.

B. For private pay individuals, qualified staff of the ALF or an independent physician may complete the UAI. Qualified staff are ALF employees who have successfully completed ~~state approved~~ department designated training course on the UAI for either public or private pay assessments. The ALF

maintains documentation of the completed training. The administrator or the administrator's designated representative shall approve and sign the completed UAI for private pay individuals. A private pay individual may request the assessment be completed by a qualified public human services agency assessor. When a public human services agency assessor completes the UAI for a private pay individual, the agency may determine and charge a fee for private pay assessments that may not exceed the amount DMAS reimburses for public pay assessments.

C. For public pay individuals, the UAI shall be completed by a case manager or a qualified assessor to determine the need for residential care or assisted living care services. The assessor is qualified to complete the assessment if the assessor has completed ~~a state approved~~ the department designated training course on the UAI. Assessors who prior to January 1, 2004, routinely completed UAIs as part of their job descriptions may be deemed to be qualified assessors without the completion of the training course. Qualified assessors who may initially authorize ALF services for public pay individuals are employees of:

1. Local departments ~~of social services~~;
2. Area agencies on aging;
3. Centers for independent living;
4. Community services boards or behavioral health authorities;
5. Local departments of health;
6. State facilities operated by the Department of Behavioral Health and Developmental Services;
7. Acute-care hospitals;
8. Department of Corrections; and
9. Independent physicians who have a ~~contract~~ signed provider agreement with DMAS to conduct ALF assessments.

D. For public pay individuals, the ALF shall coordinate with the qualified assessor or case manager to ensure that the UAI is completed as required. If the individual has not been assessed, the local department ~~of social services eligibility benefits~~ worker shall inform the individual or the individual's legal representative of the need to be assessed ~~by a qualified assessor~~ prior to admission. If the individual has not applied for an auxiliary grant, the qualified assessor or case manager conducting the assessment shall inform the individual or the individual's legal representative of the need to submit an application for an auxiliary grant.

## **22VAC30-110-30. Determination of services to be provided.**

A. The assessment shall be conducted using the UAI ~~that sets forth an individual's care needs. The UAI is designed to be a~~

~~comprehensive, accurate, standardized, and reproducible assessment of individuals seeking or receiving long term care services.~~ The UAI is comprised of a short assessment and a full assessment. The short assessment is designed to briefly assess the individual's need for appropriate level of care and services and to determine if a full assessment is needed.

B. The following sections of the UAI shall be completed as follows:

1. For private pay individuals, the assessment shall include sections related to identification and background, functional status, which includes ADLs, continence, ambulation, IADLs, medication administration, and behavior pattern. The private pay or public pay UAI may be used.

2. For public pay individuals, the short form of the UAI shall be completed. The short form consists of sections related to identification and background, and functional status (i.e., the first four pages of the UAI), plus sections on medication administration, and behavior pattern. If, upon assessment, it is determined that the individual is dependent in at least two ADLs or is dependent in behavior, then the full assessment shall be completed.

3. For private pay and public pay individuals, the prohibited conditions section shall be completed.

C. The UAI shall be completed within 90 days prior to the date of admission to the ALF. If there has been a significant change in the individual's condition since the completion of the UAI that would affect the admission to an ALF, a new UAI shall be completed as specified in 22VAC30-110-20.

D. When an individual moves to an ALF from another ALF, a new UAI is not required except that a new UAI shall be completed whenever there is a significant change in the individual's condition or the ~~assessment~~ most recent UAI was completed more than 12 months ago.

E. In emergency placements, the UAI shall be completed within seven working days from the date of placement. An emergency placement shall occur only when the emergency is documented and approved by (i) a ~~Virginia local department~~ adult protective services worker for public pay individuals or by (ii) a ~~Virginia local department~~ adult protective services worker or independent physician for private pay individuals.

F. The UAI shall be completed annually on all individuals residing in ALFs ~~and whenever there is a significant change in the individual's condition.~~ UAI's shall be completed whenever there is a significant change in the individual's condition. ~~All UAI's shall be completed as required by 22VAC30-110-20. The ALF shall provide an area for assessments and reassessment to be conducted that ensures the individual's privacy and protects confidentiality.~~

G. The ALF shall provide an area for assessments and reassessment to be conducted that ensures the individual's privacy and protects confidentiality.

~~H.~~ At the request of the ALF, the individual residing in the ALF, the individual's legal representative, the individual's physician, the Virginia Department of Social Services, or the local department ~~of social services~~, an independent assessment using the UAI shall be completed to determine whether the individual's care needs are being met in the current ALF. An independent assessment is an assessment that is completed by an entity other than the original assessor. The ALF shall assist the individual in obtaining the independent assessment as requested. If the request is for a private pay individual, the entity requesting the independent assessment shall be responsible for paying for the assessment.

~~H. I.~~ The assessor shall consult with other appropriate human service professionals as needed to complete the assessment.

J. Qualified assessors who are employees of local departments shall enter ALF assessments in the department designated case management system.

~~I. K.~~ DMAS shall reimburse for completion of assessments and authorization of ALF placement for public pay individuals pursuant to this section.

**22VAC30-110-40. Discharge.**

A. ALF staff shall assist the individual and the individual's legal representative in the discharge or transfer process. For public pay individuals, ALF staff shall provide written notification of the individual's date and place of discharge or of the individual's death to the local department ~~of social services~~ eligibility benefits worker in the jurisdiction responsible for authorizing the auxiliary grant and the qualified assessor or case manager who conducted the most recent assessment. The ALF shall make these notifications at least 14 calendar days prior to the individual's planned discharge or within five calendar days after the individual's death. In the event of an emergency discharge as specified in ~~22VAC40-72-420~~ 22VAC40-73-430, the notification shall be made as rapidly as possible, but must be made by close of ~~business on~~ the day following the emergency discharge.

B. Upon issuing a notice of summary order of suspension to an ALF, the Commissioner of the Virginia Department of Social Services or his designee shall contact the appropriate local department ~~of social services~~ to develop a relocation plan. Individuals residing in an ALF whose license has been summarily suspended pursuant to § 63.2-1709 of the Code of Virginia shall be relocated as soon as possible to reduce the risk to their health, safety, and welfare. New assessments of the individuals who are relocating are not required, pursuant to 22VAC30-110-30 D.

**22VAC30-110-50. Authorization of services to be provided.**

A. The qualified assessor or case manager is responsible for authorizing public payment to the individual for the appropriate level of care upon admission to and for continued stay in an ALF.

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B. The ALF staff shall be knowledgeable of the criteria for level of care in an ALF and are responsible for discharging the individual when the individual does not meet the criteria for level of care in an ALF upon admission or at any later time.

C. The appropriate level of care shall be documented on the UAI, and the UAI shall be completed in a manner consistent with the definitions of ADLs and directions provided in the this chapter. The User's Manual: Virginia Uniform Assessment Instrument as well as the requirements set forth in this chapter is the department-designated handbook containing procedures that may be used in completing the UAI.

D. During an inspection or review, staff from the Virginia Department of Social Services or the local department of ~~social services~~ may initiate a change in level of care for any individual residing in the ALF for whom it is determined that the UAI does not reflect the individual's current status.

## **22VAC30-110-80. Rating of levels of care on the uniform assessment instrument.**

A. The rating of functional dependencies on the UAI shall be based on the individual's ability to function in a community environment.

B. For purposes of this chapter, the following abbreviations shall mean: D = dependent; and TD = totally dependent. Mechanical help means equipment or a device or both are used; human help includes supervision and physical assistance. Asterisks (\*) denote dependence in a particular function.

### 1. Activities of daily living.

#### a. Bathing.

- (1) Without help
- (2) Mechanical help only
- (3) Human help only\* (D)
- (4) Mechanical help and human help\* (D)
- (5) ~~Is performed~~ Performed by others\* (TD)

#### b. Dressing.

- (1) Without help
- (2) Mechanical help only
- (3) Human help only\* (D)
- (4) Mechanical help and human help\* (D)
- (5) ~~Is performed~~ Performed by others\* (TD)
- (6) Is not performed\* (TD)

#### c. Toileting.

- (1) Without help
- (2) Mechanical help only
- (3) Human help only\* (D)
- (4) Mechanical help and human help\* (D)
- (5) Performed by others\* (TD)
- (6) Is not performed\* (TD)

### d. Transferring.

- (1) Without help
- (2) Mechanical help only
- (3) Human help only\* (D)
- (4) Mechanical help and human help\* (D)
- (5) ~~Is performed~~ Performed by others\* (TD)
- (6) Is not performed\* (TD)

### e. Bowel function.

- (1) Continent
- (2) Incontinent less than weekly
- (3) Ostomy self-care
- (4) Incontinent weekly or more\* (D)
- (5) Ostomy not self-care\* (TD)

### f. Bladder function.

- (1) Continent
- (2) Incontinent less than weekly
- (3) External device, indwelling catheter, ostomy, self-care
- (4) Incontinent weekly or more\* (D)
- (5) External device, not self-care\* (TD)
- (6) Indwelling catheter, not self-care\* (TD)
- (7) Ostomy, not self-care\* (TD)

### g. Eating/feeding.

- (1) Without help
- (2) Mechanical help only
- (3) Human help only\* (D)
- (4) Mechanical help and human help\* (D)
- (5) Performed by others (includes spoon fed, syringe/tube fed, fed by IV)\* (TD)

### 2. Behavior pattern.

- a. Appropriate
- b. Wandering/passive less than weekly
- c. Wandering/passive weekly or more
- d. Abusive/aggressive/disruptive less than weekly\* (D)
- e. Abusive/aggressive/disruptive weekly or more\* (D)

### 3. Instrumental activities of daily living.

#### a. Meal preparation.

- (1) No help needed
- (2) Needs help\* (D)

#### b. Housekeeping.

- (1) No help needed
- (2) Needs help\* (D)

#### c. Laundry.

- (1) No help needed
- (2) Needs help\* (D)

- d. Money management.
  - (1) No help needed
  - (2) Needs help\* (D)
- 4. Medication administration.
  - a. Without assistance
  - b. Administered/monitored by lay person\* (D)
  - c. Administered/monitored by professional staff\* (D)

**22VAC30-110-90. Actions to be taken upon completion of the uniform assessment instrument.**

**A. Public Actions to be taken upon completion of the uniform assessment instrument for public pay individuals.**

1. Upon completion of the UAI for initial assessment for admission, a significant change in the individual's condition, or the annual reassessment, the case manager or a qualified assessor shall forward to the local department of ~~social services~~ eligibility benefits worker in the appropriate agency of jurisdiction, in the format specified by the department, the effective date of admission or change in level of care. Qualified assessors who are authorized to perform the annual reassessment or a change in level of care for public pay individuals are employees of (i) local departments of ~~social services~~; (ii) area agencies on aging; (iii) centers for independent living; (iv) community services boards or behavioral health authority; and (v) local departments of health, or an independent physician who has a ~~contract~~ signed provider agreement with DMAS to conduct assessments.

2. ~~The completed~~ A [ completed ] copy of the UAI, the referral to the ~~eligibility~~ local department benefits worker, and other relevant data shall be maintained in the individual's record at the ALF.

3. The annual reassessment shall be completed by the qualified assessor or case manager conducting the initial assessment. If the original assessor is neither willing nor able to complete the assessment and another assessor is not available, the local department of ~~social services~~ where the individual resides ~~in the ALF~~ shall be the assessor, except that individuals who receive services from a community service board or behavioral health authority shall be assessed and reassessed by qualified assessors employed by the community services board or behavioral health authority.

4. The earliest date that an annual reassessment may be completed is 60 calendar days prior to the annual reassessment due date.

5. After the annual reassessment has been completed, if the individual still meets either residential or assisted living level of care, the qualified assessor or case manager shall offer the individual the choice, based on availability, of housing option pursuant to § 51.5-160 of the Code of Virginia.

4. 6. The ALF shall notify the community services board or behavioral health authority when UAIs indicate observed behaviors or patterns of behavior indicative of mental illness, intellectual disability, substance abuse, or behavioral disorders, pursuant to § 63.2-1805 B of the Code of Virginia.

B. ~~For Actions to be taken upon completion of the uniform assessment instrument for~~ private pay individuals, the ALF shall ensure that assessments for all individuals at admission and at subsequent intervals are completed as required in this chapter. The ALF shall maintain the individual's UAI and other relevant data in the individual's ALF record.

**22VAC30-110-100. Targeted case management for individuals receiving an auxiliary grant.**

A. Targeted case management shall be limited to those individuals who have multiple needs across multiple providers and this coordination is beyond the scope of the ALF. It shall be the responsibility of the qualified assessor or case manager who identifies the individual's need for residential care or assisted living care in an ALF to assess the need for targeted case management as defined in 12VAC30-50-470.

B. A case management agency shall have signed ~~an a~~ provider agreement with DMAS to be reimbursed for the provision of targeted case management for individuals receiving an auxiliary grant.

C. The local department of ~~social services~~ where the individual resides, following admission to an ALF, shall be the case management agency when there is no other qualified case management provider willing or able to provide case management.

D. A qualified case manager shall possess a combination of relevant work experience in human services or health care and relevant education which indicates that the individual possesses the knowledge, skills, and abilities at entry level as defined in 12VAC30-50-470. This must be documented on the case manager's job application form or supporting documentation. When the provider agency is a local department of ~~social services~~, case managers shall meet the qualifications for family services occupational group as specified in 22VAC40-670-20.

**22VAC30-110-110. Notifications.**

~~Assessors~~ Qualified assessors and case managers shall ~~advise orally and in writing~~ provide to all public pay individuals written notice of the outcome of the assessment or the annual reassessment, including a statement indicating that the local department of ~~social services~~ will notify the individual whether he is eligible to receive the auxiliary grant. An individual who is denied an auxiliary grant because the assessor determines that the individual does not meet the care needs for residential level of care has the right to file an appeal with the Virginia Department of Social Services under § 63.2-517 of the Code of Virginia. Notification of the right to appeal will be included

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in the notice of action provided by the local department of social services. A determination that the individual does not meet the criteria to receive targeted case management is an action that is appealable to DMAS in accordance with the provisions of 12VAC30-110.

~~DOCUMENTS INCORPORATED BY REFERENCE (22VAC30-110)~~

~~User's Manual: Virginia Uniform Assessment Instrument (UAI), Commonwealth of Virginia (rev. 7/05)~~

VA.R. Doc. No. R18-5335; Filed April 12, 2021, 2:44 p.m.

## Final Regulation

Title of Regulation: **22VAC30-130. Adult Services Standards (adding 22VAC30-130-10 through 22VAC30-130-60).**

Statutory Authority: §§ 51.5-131 and 51.5-145 of the Code of Virginia.

Effective Date: June 9, 2021.

Agency Contact: Paige McCleary, Adult Protective Services Division Director, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Henrico, VA 23229, telephone (804) 662-7605, FAX (804) 662-9531, TDD (800) 464-9950, or email paige.mccleary@dars.virginia.gov.

### Summary:

*This regulatory action establishes a new regulation, Adult Services Standards (22VAC30-130). Provisions include definitions, principles inherent in the provision of adult services, the process for client intake and service delivery, descriptions of the types of services that may be provided, eligibility for services, and local department of social services responsibilities.*

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

### Chapter 130

#### Adult Services Standards

### **22VAC30-130-10. Definitions.**

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

"Activities of daily living" or "ADLs" means bathing, dressing, toileting, transferring, eating/feeding, and bowel and bladder continence.

"Adult" means any individual 18 years of age or older, or younger than 18 years of age if legally emancipated.

"Adult services" means services that are provided by local departments of social services to adults with an impairment.

"Adult with an impairment" means an adult whose physical or mental capacity is diminished to the extent that the adult

needs counseling or supervisory assistance with ADLs or instrumental activities of daily living.

"Auxiliary Grants" or "AG" means cash payments made to certain aged, blind, or disabled individuals who receive benefits under Title XVI of the Social Security Act, as amended, or would be eligible to receive these benefits except for excess income.

"Chore services" means nonroutine, heavy home maintenance services provided to adults, including minor repair work on furniture and appliances in the adult's home; carrying coal, wood, or water; chopping wood; removing snow; yard maintenance; and painting.

"Companion services" means services to an adult, including light housekeeping, companionship, shopping, meal preparation, transportation, laundry, money management, and assistance with ADLs.

"Department" means the Department for Aging and Rehabilitative Services.

"Department-designated case management system" means the official state automated computer system for adult services that collects and maintains information on adult services provided by the local department.

"Eligibility based on income" means an eligibility category under which the adult's eligibility for services is based upon an income scale issued annually by the department.

"Home-based services" means companion, chore, and homemaker services that allow adults to attain or maintain self-care and are likely to prevent or reduce dependency.

"Homemaker services" means services that provide the adult instruction in or the performance of activities to maintain a household. Homemaker services may include personal care, home management, household maintenance, nutrition, and consumer or hygiene education.

"Income maintenance" means an eligibility category under which the adult is eligible for a service because the adult receives Temporary Assistance for Needy Families (TANF), Supplemental Security Income (SSI), or AG.

"Instrumental activities of daily living" or "IADLs" means tasks such as meal preparation, shopping, housekeeping, money management, transportation, using the telephone, home maintenance, and laundry.

"Local board" means the local board of social services representing one or more counties or cities.

"Local department" means the local department of social services of any county or city in the Commonwealth.

"Public assistance" means TANF, AG, medical assistance, energy assistance, supplemental nutritional assistance program, employment services, child care, and general relief.

"Responsible person" means an individual who is authorized under state or federal law to make decisions concerning the adult and to receive information about the adult.

"Service plan" means a written plan to address the needs of the adult.

"Social supports" means individuals or organizations who routinely provide assistance or support to the adult.

"Uniform Assessment Instrument" or "UAI" means the department-designated assessment form. It is used to record information about the adult's level of service needs.

"Universal access" means an eligibility category under which the adult is eligible for services without consideration of the adult's income.

**22VAC30-130-20. Intake process.**

A. Intake is designed to provide a timely, coordinated method for the adult to request services or assistance or to obtain sufficient information about other resources.

B. The local department shall be responsible for performing intake activities. These activities may include information and referral or initial assessment for assistance as indicated by the adult's situation.

**22VAC30-130-30. Services and activities.**

Local departments shall provide the following adult services:

1. Services provided under universal access.
  - a. Screening for long-term care services and supports pursuant to § 32.1-330 of the Code of Virginia.
  - b. Public pay assisted living facility assessment pursuant to § 63.2-1804 of the Code of Virginia.
  - c. Review of annual reports submitted by guardians pursuant to § 64.2-2020 of the Code of Virginia.
2. Home-based services provided under universal access, income maintenance, or eligibility based on income.
  - a. Home-based services shall be provided, to the extent that federal or state funding is available, as requested by an adult with an impairment who meets financial and functional eligibility criteria.
  - b. Local boards shall establish a local home-based services policy that includes the types of home-based services that are offered in the locality, the functional eligibility criteria, and the financial eligibility criteria as decided by the local board.
  - c. The local department, upon the decision of the local board, may choose to offer home-based services under universal access. If the local department does not offer home-based services under universal access, the adult shall be evaluated by the local department under the eligibility categories of income maintenance or eligibility based on income. Adults who are not eligible under

universal access or income maintenance shall be evaluated by the local department under the eligibility based on income category.

**22VAC30-130-40. Eligibility determination.**

A. To request home-based services, the adult or the adult's responsible person shall submit a service application (Application for Adult Services Form) to the local department. The service application shall be on a form provided by the department. The local department shall document receipt of the application in the department-designated case management system. A service application shall not be required to request a screening for long-term care services and supports, for an assisted living facility assessment, or for review of an annual guardian report.

B. Determinations for functional eligibility and financial eligibility are separate processes but shall be pursued simultaneously. Functional and financial eligibility shall be determined as promptly as possible. The local department shall notify the adult of its eligibility determination decision no later than 45 days from the date the application is received by the local department.

C. The local department shall determine the adult's functional eligibility for home-based services. Home-based services shall not be available to adults who reside in an institutional setting including a nursing facility, assisted living facility, or hospital. The local department shall assess the adult using the UAI, the department-designated form, including evaluating the adult's degree of independence or need for assistance with performing ADLs and IADLs.

D. The local department shall determine the adult's financial eligibility for home-based services.

1. If the local department chooses to offer home-based services under universal access, the adult is financially eligible for home-based services without consideration of the adult's income.
2. If the local department chooses to offer home-based services under income maintenance, the local department shall verify and document the adult's source of income in the department-designated case management system, and document whether the adult is eligible for an Auxiliary Grant, Temporary Assistance for Needy Families, or Supplemental Security Income. Adults who receive an Auxiliary Grant, Temporary Assistance for Needy Families, or Supplemental Security Income meet the financial eligibility requirement for home-based services offered under the income maintenance category.
3. If the local department chooses to offer home-based services under eligibility based on income, each local board shall select a threshold percentage of the median income to evaluate financial eligibility for adults. The department shall provide a scale of the median income for a family of four in

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Virginia as updated periodically in the Federal Register by the U.S. Department of Health and Human Services annually to local departments to use to determine financial eligibility. The adult's income, not resources, shall be counted when determining the adult's financial eligibility. The local department shall verify and document the adult's income in the department-designated case management system. Income from the following resources shall be disregarded when determining financial eligibility for home-based services in eligibility based on income category:

- a. Home produce utilized by the adult for his own consumption;
- b. The value of food benefits under the Supplemental Nutrition Assistance Program;
- c. The value of supplemental food assistance received under the Child Nutrition Act of 1966 (42 USC §§ 1771 through 1789). This includes all school meals programs; the Women, Infants and Children program; and the Child Care Food program;
- d. The value of foods donated under the U.S. Department of Agriculture Commodity Distribution Program, including those foods furnished through the school meal programs;
- e. Benefits received under Nutrition Program for the Elderly, Title VII of the Older Americans Act of 1965, as amended (42 USC §§ 3001 et seq.);
- f. Grants or loans to any undergraduate students for educational purposes made or insured under any program administered by the U.S. Secretary of Education;
- g. A scholarship or grant obtained and used under conditions that preclude its use for current living costs;
- h. Training allowance provided by the department for persons participating in rehabilitative services programs;
- i. Payments to VISTA volunteers;
- j. The Veterans Administration educational amount for the caretaker 18 years of age or older when used specifically for educational purposes. Any additional money included in the benefit amount for dependents is to be counted as income;
- k. Income tax refunds including earned income tax credit advance payments and refunds;
- l. Payments made under the Energy Assistance Program;
- m. All federal, state, and local government rent and housing subsidies and utility payments;
- n. Funds distributed to or held in trust for members of any Indian tribe under Public Laws 92-254, 93-134, 94-540, 97-458, 98-64, 98-123, or 98-124. Additionally, interest and investment income accrued on such funds while held in trust, and purchases made with such interest and investment income;
- o. All bona fide loans. The loan may be for any purpose and may be from a private individual as well as from a

commercial institution. The amount disregarded is limited to the principal of the loan;

- p. Monetary gifts for special occasions such as the adult's birthday, holidays, or graduations;
- q. Withdrawals of bank deposits;
- r. Payments to vendors for services provided to the adult; and
- s. Lump sum insurance payments.

## **22VAC30-130-50. Service planning.**

A. A variety of interventions including referral to public assistance and other resources, case management, and other programs may be provided depending on the adult's needs.

B. The services or activities may be provided directly by local department staff or volunteers, purchased from local department approved providers or contracted vendors, or provided through referral to other community resources.

C. If an adult is determined eligible for home-based services, the local department shall develop a service plan, enter the plan into the department-designated case management system, and review the plan at least annually. A service plan shall not be required when the only intervention or activity provided by the local department is screening for long-term services and supports, public pay assisted living facility annual assessment, or review of an annual guardian report. The local department, the adult and the adult's family, the responsible person, or other social supports, if applicable, shall collaborate to evaluate progress toward meeting the goals and objectives of the service plan. The local department shall document progress toward meeting service plan goals and objectives at least quarterly in the department-designated case management system.

D. For any services for which a payment is made on behalf of an adult, the service, service provider, and payment authorization shall be documented in the service plan. Any local department hard copy records documenting the provision of adult services shall be made available to the department upon request.

## **22VAC30-130-60. Responsibilities of local department.**

A. The local department shall comply with all laws, regulations, and department guidance regarding the provision of adult services.

B. The local department shall notify the adult on a form approved by the department when the local department takes an action regarding home-based services pursuant to § 51.5-147 of the Code of Virginia.

C. The local department shall close the adult's case in the department-designated case management system in the following circumstances, including:

- 1. When the adult dies;

2. When the adult with capacity or the adult's responsible person requests closure;
3. When the local department is unable to locate the adult and attempts to contact the adult are unsuccessful;
4. When the adult is no longer functionally or financially eligible for the service;
5. When the local department has no funding to provide home-based services;
6. When the service or activity identified on the service plan is complete; or
7. With exception of annual guardian report reviews, when the adult relocates to another state.

**NOTICE:** Forms used in administering the regulation have been 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, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

**FORMS (22VAC30-130)**

[Application for Adult Services Form. 032-26-0001-01-eng. \(rev. 5/2017\)](#)

[Virginia Uniform Assessment Instrument, UAI. \(eff. 1994\)](#)

VA.R. Doc. No. R18-5230; Filed April 12, 2021, 2:44 p.m.

**STATE BOARD OF SOCIAL SERVICES**

**Final Regulation**

**Title of Regulation:** **22VAC40-201. Permanency Services - Prevention, Foster Care, Adoption and Independent Living (amending 22VAC40-201-10, 22VAC40-201-100, 22VAC40-201-190).**

**Statutory Authority:** §§ 63.2-217 and 63.2-319 of the Code of Virginia.

**Effective Date:** June 10, 2021.

**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.

**Summary:**

*The amendments conform the permanency regulation to three acts of the 2017 Session of the General Assembly by (i) changing the name of the Putative Father Registry to the Virginia Birth Father Registry (Chapter 200 of the 2017 Acts of Assembly); (ii) requiring that youth turning 18 years old in foster care be enrolled in Medicaid, provided they are eligible and do not object (Chapter 203 of the 2017 Acts of Assembly); and (iii) requiring that youth turning 18 years*

*old in foster care be given the opportunity to participate in a survey to provide feedback on their experience in foster care (Chapter 187 of the 2017 Acts of Assembly).*

**Summary of Public Comments and Agency's Response:** No public comments were received by the promulgating agency.

**22VAC40-201-10. Definitions.**

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

"Administrative panel review" means a review of a child in foster care that the local board conducts on a planned basis pursuant to § 63.2-907 of the Code of Virginia to evaluate the current status and effectiveness of the objectives in the service plan and the services being provided for the immediate care of the child and the plan to achieve a permanent home for the child. The administrative review may be attended by the birth parents or prior custodians and other interested individuals significant to the child and family as appropriate.

"Adoption" means a legal process that entitles the person being adopted to all of the rights and privileges, and subjects the person to all of the obligations of a birth child.

"Adoption assistance" means a money payment provided to adoptive parents or other persons on behalf of a child with special needs who meets federal or state requirements to receive such payments.

"Adoption assistance agreement" means a written agreement between the local board and the adoptive parents of a child with special needs or in cases in which the child is in the custody of a licensed child-placing agency, an agreement between the local board, the licensed child-placing agency, and the adoptive parents that sets out the payment and services that will be provided to benefit the child in accordance with Chapter 13 (§ 63.2-1300 et seq.) of Title 63.2 of the Code of Virginia.

"Adoption Progress Report" means a report filed with the juvenile court on the progress being made to place the child in an adoptive home. Section 16.1-283 of the Code of Virginia requires that an Adoption Progress Report be submitted to the juvenile court every six months following termination of parental rights until the adoption is final.

"Adoptive home" means any family home selected and approved by a parent, local board, or a licensed child-placing agency for the placement of a child with the intent of adoption.

"Adoptive home study" means an assessment of a family completed by a child-placing agency to determine the family's suitability for adoption.

"Adoptive parent" means any provider selected and approved by a parent or a child-placing agency for the placement of a child with the intent of adoption.

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"Adoptive placement" means arranging for the care of a child who is in the custody of a child-placing agency in an approved home for the purpose of adoption.

"Adult adoption" means the adoption of any person 18 years of age or older, carried out in accordance with § 63.2-1243 of the Code of Virginia.

"Agency placement adoption" means an adoption in which a child is placed in an adoptive home by a child-placing agency that has custody of the child.

"AREVA" means the Adoption Resource Exchange of Virginia that maintains a registry and photo-listing of children waiting for adoption and families seeking to adopt.

"Assessment" means an evaluation of the situation of the child and family to identify strengths and services needed.

"Birth family" means the child's biological family.

"Birth parent" means the child's biological parent and for purposes of adoptive placement means a parent by previous adoption.

"Birth sibling" means the child's biological sibling.

"Board" means the State Board of Social Services.

"Child" means any natural person under 18 years of age or, for the purposes of the Fostering Futures program set forth in Article 2 (§ 63.2-917 et seq.) of Chapter 9 of the Code of Virginia, under 21 years of age and meeting the eligibility criteria set forth in § 63.2-919 of the Code of Virginia.

"Child-placing agency" means any person who places children in foster homes, adoptive homes, or independent living arrangements pursuant to § 63.2-1819 of the Code of Virginia or a local board that places children in foster homes or adoptive homes pursuant to §§ 63.2-900, 63.2-903, and 63.2-1221 of the Code of Virginia. Officers, employees, or agents of the Commonwealth, or any locality acting within the scope of their authority as such, who serve as or maintain a child-placing agency, shall not be required to be licensed.

"Child with special needs" as it relates to adoption assistance means a child who meets the definition of a child with special needs set forth in §§ § 63.2-1300 or 63.2-1301 B of the Code of Virginia.

"Children's Services Act" or "CSA" means a collaborative system of services and funding that is child centered, family focused, and community based when addressing the strengths and needs of troubled and at-risk youth and their families in the Commonwealth.

"Claim for benefits," as used in § 63.2-915 of the Code of Virginia and 22VAC40-201-115, means (i) foster care maintenance, including enhanced maintenance; (ii) the services set forth in a court approved foster care service plan, the foster care services identified in an individual family service plan developed by a family assessment and planning

team or other multi-disciplinary team pursuant to the Children's Services Act (§ 2.2-5200 et seq. of the Code of Virginia), or a transitional living plan for independent living services; (iii) the placement of a child through an agreement with the child's parents or guardians, where legal custody remains with the parents or guardians; (iv) foster care prevention services as set out in a prevention service plan; or (v) placement of a child for adoption when an approved family is outside the locality with the legal custody of the child, in accordance with 42 USC § 671(a)(23).

"Close relative" means a grandparent, great-grandparent, adult nephew or niece, adult brother or sister, adult uncle or aunt, or adult great uncle or great aunt.

"Commissioner" means the commissioner of the department, his designee, or his authorized representative.

"Community Policy and Management Team" or "CPMT" means a team appointed by the local governing body pursuant to Chapter 52 (§ 2.2-5200 et seq.) of Title 2.2 of the Code of Virginia. The powers and duties of the CPMT are set out in § 2.2-5206 of the Code of Virginia.

"Concurrent permanency planning" means utilizing a structured case management approach in which reasonable efforts are made to achieve a permanency goal, usually a reunification with the family, simultaneously with an established alternative permanent plan for the child.

"Department" means the state Department of Social Services.

"Denied," as used in § 63.2-915 of the Code of Virginia and 22VAC40-201-115, means the refusal to provide a claim for benefits.

"Dually approved" means applicants have met the required standards to be approved as a foster and adoptive family home provider.

"Entrustment agreement" means an agreement that the local board enters into with the parent, ~~parents~~, or guardian to place the child in foster care either to terminate parental rights or for the temporary care and placement of the child. The agreement specifies the conditions for the care of the child.

"Family assessment and planning team" or "FAPT" means the local team created by the CPMT (i) to assess the strengths and needs of troubled youths and families who are approved for referral to the team and (ii) to identify and determine the complement of services required to meet their unique needs. The powers and duties of the FAPT are set out in § 2.2-5208 of the Code of Virginia.

"Foster care" means 24-hour substitute care for children in the custody of the local board or who remain in the custody of their parents, but are placed away from their parents or guardians and for whom the local board has placement and care responsibility through a noncustodial agreement.

"Foster care maintenance payments" means payments to cover those expenses made on behalf of a child in foster care including the cost of, and the cost of providing, food, clothing, shelter, daily supervision, school supplies, a child's incidentals, reasonable travel to the child's home for visitation, and reasonable travel to remain in the school in which the child is enrolled at the time of the placement. The term also includes costs for children in institutional care and costs related to the child of a child in foster care as set out in 42 USC § 675.

"Foster care plan" means a written document filed with the court in accordance with § 16.1-281 of the Code of Virginia that describes the programs, care, services, and other support that will be offered to the child and his parents and other prior custodians. The foster care plan defined in this definition is the case plan referenced in 42 USC § 675.

"Foster care prevention" means the provision of services to a child and family to prevent the need for foster care placement.

"Foster care services" means the provision of a full range of casework, treatment, and community services, including independent living services, for a planned period of time to a child meeting the requirements as set forth in § 63.2-905 of the Code of Virginia.

"Foster child" means a child for whom the local board has assumed placement and care responsibilities through a noncustodial foster care agreement, entrustment, or court commitment before 18 years of age.

"Foster home" means the place of residence of any natural person in which any child, other than a child by birth or adoption of such person, resides as a member of the household.

"Foster parent" means an approved provider who gives 24-hour substitute family care, room and board, and services for children or youth committed or entrusted to a child-placing agency.

"Independent living arrangement" means placement of a child at least 16 years of age who is in the custody of a local board or licensed child-placing agency and has been placed by the local board or licensed child-placing agency in a living arrangement in which ~~he~~ the child does not have daily substitute parental supervision.

"Independent living services" means services and activities provided to a child in foster care 14 years of age or older who was committed or entrusted to a local board of social services, child welfare agency, or private child-placing agency. Independent living services may also mean services and activities provided to a person who (i) was in foster care on his 18th birthday and has not yet reached the age of 21 years or (ii) is at least 18 years of age and who, immediately prior to his commitment to the Department of Juvenile Justice, was in the custody of a local department of social services. Such services shall include counseling, education, housing, employment, and money management skills development, access to essential

documents, and other appropriate services to help children or persons prepare for self-sufficiency.

"Individual family service plan" or "IFSP" means the plan for services developed by the FAPT in accordance with § 2.2-5208 of the Code of Virginia.

"Intercountry placement" means the arrangement for the care of a child in an adoptive home or foster care placement into or out of the Commonwealth by a licensed child-placing agency, court, or other entity authorized to make such placements in accordance with the laws of the foreign country under which it operates.

"Interstate Compact on the Placement of Children" or "ICPC" means a uniform law that has been enacted by all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, ~~which~~ that establishes orderly procedures for the interstate placement of children and sets responsibility for those involved in placing those children.

"Interstate placement" means the arrangement for the care of a child in an adoptive home, foster care placement, or in the home of the child's parent or with a relative or nonagency guardian, into or out of the Commonwealth, by a child-placing agency or court when the full legal right of the child's parent or nonagency guardian to plan for the child has been voluntarily terminated or limited or severed by the action of any court.

"Investigation" means the process by which the child-placing agency obtains information required by § 63.2-1208 of the Code of Virginia about the placement and the suitability of the adoption. The findings of the investigation are compiled into a written report for the circuit court containing a recommendation on the action to be taken by the court.

"Kinship foster parent" means a relative or fictive kin who gives 24-hour substitute family care, room and board, and services for children or youth committed or entrusted to a child-placing agency.

"Local board" means the local board of social services in each county and city in the Commonwealth required by § 63.2-300 of the Code of Virginia.

"Local department" means the local department of social services of any county or city in the Commonwealth.

"Nonagency placement adoption" means an adoption in which the child is not in the custody of a child-placing agency and is placed in the adoptive home directly by the birth parent or legal guardian.

"Noncustodial foster care agreement" means an agreement that the local department enters into with the parent or guardian of a child to place the child in foster care when the parent or guardian retains custody of the child. The agreement specifies the conditions for placement and care of the child.

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"Nonrecurring expenses" means expenses of adoptive parents directly related to the adoption of a child with special needs as set out in § 63.2-1301 D of the Code of Virginia.

"Normalcy" means allowing children and youth in foster care to experience childhood and adolescence in ways similar to their peers who are not in foster care by empowering foster parents and congregate care staff to use the reasonable and prudent parent standard as referenced in Public Law 113-183 (42 USC §§ 671 and 675) when making decisions regarding extracurricular, enrichment, and social activities.

"Parental placement" means locating or effecting the placement of a child or the placing of a child in a family home by the child's parent or legal guardian for the purpose of foster care or adoption.

"Permanency" means establishing family connections and placement options for a child to provide a lifetime of commitment, continuity of care, a sense of belonging, and a legal and social status that go beyond a child's temporary foster care placements.

"Permanency planning" means a social work practice philosophy that promotes establishing a permanent living situation for every child with an adult with whom the child has a continuous, reciprocal relationship within a minimum amount of time after the child enters the foster care system.

"Prior custodian" means the person who had custody of the child and with whom the child resided, other than the birth parent, before custody was transferred to or placement made with the child-placing agency when that person had custody of the child.

"Prior family" means the family with whom the child resided, including birth parents, relatives, or prior custodians, before custody was transferred to or placement made with the child-placing agency.

~~"Putative Father Registry" means a confidential database designed to protect the rights of a putative father who wants to be notified in the event of a proceeding related to termination of parental rights or adoption for a child he may have fathered.~~

"Reasonable and prudent parent standard," in accordance with 42 USC § 675(10), means the standard characterized by careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child that foster parents and congregate care staff shall use when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, and social activities.

"Residential placement" means a placement in a licensed publicly or privately owned facility, other than a private family home, where 24-hour care is provided to children separated from their families. A residential placement includes

placements in children's residential facilities as defined in § 63.2-100 of the Code of Virginia.

"Reunification" means the return of the child to his home after removal for reasons of child abuse and neglect, abandonment, child in need of services, parental request for relief of custody, noncustodial agreement, entrustment, or any other court-ordered removal.

"Service worker" means a worker responsible for case management or service coordination for prevention, foster care, or adoption cases.

"Sibling" means each of two or more children having one or more parents in common.

"SSI" means Supplemental Security Income.

"State pool funds" means the pooled state and local funds administered by CSA and used to pay for services authorized by the CPMT.

"Step-parent adoption" means the adoption of a child by a spouse or the adoption of a child by a former spouse of the birth or adoptive parent in accordance with § 63.2-1201.1 of the Code of Virginia.

"Supervised independent living setting" means the residence of a person 18 years of age or older who is participating in the Fostering Futures program set forth in Article 2 (§ 63.2-917 et seq.) of Chapter 9 of the Code of Virginia where supervision includes a monthly visit with a service worker or, when appropriate, contracted supervision. "Supervised independent living setting" does not include residential facilities or group homes.

"Title IV-E" means the title of the Social Security Act that authorizes federal funds for foster care and adoption assistance.

"Virginia Birth Father Registry" means the established confidential database designed to protect the rights of a putative father who wants to be notified in the event of a proceeding related to termination of parental rights or adoption for a child he may have fathered.

"Visitation and report" means the visits conducted pursuant to § 63.2-1212 of the Code of Virginia and the written report of the findings made in the course of the visitation. The report is filed in the circuit court in accordance with § 63.2-1212 of the Code of Virginia.

"Wrap around services" means an individually designed set of services and supports provided to a child and his family that includes treatment services, personal support services or any other supports necessary to achieve the desired outcome. Wrap around services are developed through a team approach.

"Youth" means any child in foster care between 14 and 18 years of age or any person 18 to 21 years of age transitioning out of foster care and receiving independent living services pursuant to § 63.2-905.1 of the Code of Virginia. "Youth" may

also mean an individual older than the age of 16 years who is the subject of an adoption assistance agreement.

**22VAC40-201-100. Providing independent living services: service for youth 14 years of age and older.**

A. Independent living services shall be identified by the youth, foster or adoptive family, local department, service providers, legal community, and other interested individuals and shall be included in the service plan. Input from the youth in assembling these individuals and developing the services is required.

B. Independent living services shall be provided to all youth ages 14 to 18 years and shall be offered to any person between 18 and 21 years of age who is in the process of transitioning from foster care to self-sufficiency.

C. Independent living services include education, vocational training, employment, mental and physical health services, transportation, housing, financial support, daily living skills, counseling, and development of permanent connections with adults.

D. Local departments shall assess the youth's independent living skills and needs and incorporate the assessment results into the youth's service plan.

E. A youth placed in foster care before the age of 18 years who turns age 18 years prior to July 1, 2016, may continue to receive independent living services from the local department between the ages of 18 and 21 years if:

1. The youth is making progress in an educational or vocational program, has employment, or is in a treatment or training program; and
2. The youth agrees to participate with the local department ~~in~~ (i) in developing a service agreement and (ii) signing the service agreement. The service agreement shall require that the youth shall cooperate with all services; or
3. The youth is in permanent foster care and is making progress in an educational or vocational program, has employment, or is in a treatment or training program.

F. A youth age 16 years and older is eligible to live in an independent living arrangement provided the local department utilizes the independent living arrangement placement criteria developed by the department to determine that such an arrangement is in the youth's best interest. An eligible youth may receive an independent living stipend to assist him with the costs of maintenance. The eligibility criteria for receiving an independent living stipend will be developed by the department.

G. Any person who was committed or entrusted to a local department, turned 18 years of age prior to July 1, 2016, and chooses to discontinue receiving independent living services after age 18 years may request a resumption of independent living services provided that (i) the person has not yet reached

21 years of age and (ii) the person has entered into a written agreement, less than 60 days after independent living services have been discontinued, with the local board regarding the terms and conditions of his receipt of independent living services. Local departments shall provide any person who chooses to leave foster care or terminate independent living services before his 21st birthday written notice of his right to request restoration of independent living services in accordance with § 63.2-905.1 of the Code of Virginia by including such written notice in the person's transition plan.

H. Local departments shall assist eligible youth in applying for educational and vocational financial assistance. Educational and vocational specific funding sources shall be used prior to using other sources.

I. Local departments shall provide independent living services to any person between 18 and 21 years of age who:

1. Turned 18 years of age prior to July 1, 2016;
2. Was in the custody of the local board immediately prior to his commitment to the Department of Juvenile Justice;
3. Is in the process of transitioning from a commitment to the Department of Juvenile Justice to self-sufficiency; and
4. Provides written notice of his intent to receive independent living services and enters into a written agreement ~~which~~ that sets forth the terms and conditions for the provision of independent living services with the local board within 60 days of his release from commitment.

J. Every six months a supervisory review of service plans for youth receiving independent living services after age 18 years shall be conducted to assure the effectiveness of service provision.

K. A youth who has been in care six months or more and turns 18 years of age while in foster care shall receive a certified copy of his birth certificate, social security card, health insurance information, medical records, and state-issued identification or driver's license.

L. The local department shall run annual credit checks on all youth in foster care who are 14 years of age and older. The local department shall assist a youth in resolving any discrepancies in the youth's credit report. The local department shall assist a youth in foster care over 18 years of age in obtaining the youth's annual credit report.

M. The local department shall ensure that any youth in foster care on the youth's 18th birthday is enrolled in Medicaid, unless the youth objects or is otherwise ineligible.

N. The local department shall ensure that any youth who turns 18 years of age while in foster care is given the opportunity to complete a survey to provide feedback regarding the youth's experience in foster care.

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## **22VAC40-201-190. Virginia ~~Putative~~ Birth Father Registry.**

A. The department shall establish and maintain a putative father registry ~~which~~ that is a confidential database.

B. A search of the Virginia ~~Putative~~ Birth Father Registry shall be conducted for all adoptions except when the child has been adopted according to the laws of a foreign country or when the child was placed in Virginia from a foreign country for the purpose of adoption in accordance with § 63.2-1104 of the Code of Virginia.

C. Any petitioner who files a petition for termination of parental rights or for an adoption proceeding shall request a search of the Virginia ~~Putative~~ Birth Father Registry. The certificate of search and finding must be filed with the court before an adoption or termination of parental rights proceeding can be concluded.

D. Any man who desires to be notified of an adoption proceeding or termination of parental rights regarding a child that he may have fathered shall register with the Virginia Birth Father Registry.

E. A registration is timely when it is received by the department within:

1. 10 days of the child's birth;
2. 10 days of the date of personal service of the written notice required under subsection F of § 63.2-1250 or within 13 days of the certified mailing date of such written notice; or
3. 10 days upon the registrant's discovery of misrepresentation by the birth mother that led him to believe that (i) the pregnancy was terminated or the mother miscarried when in fact the baby was born or (ii) the child died when in fact the child is alive.

~~D. F.~~ The department may require additional information to determine that the individual requesting information from the ~~Putative~~ Virginia Birth Father Registry is eligible to receive information in accordance with § 63.2-1251 of the Code of Virginia.

VA.R. Doc. No. R18-5305; Filed April 13, 2021, 12:50 p.m.

### **Proposed Regulation**

Title of Regulation: **22VAC40-201. Permanency Services - Prevention, Foster Care, Adoption and Independent Living (amending 22VAC40-201-10, 22VAC40-201-110; adding 22VAC40-201-165).**

Statutory Authority: §§ 63.2-217 and 63.2-319 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: July 9, 2021.

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.

Basis: Section 63.2-217 of the Code of Virginia requires the State Board of Social Services to adopt such regulations as may be necessary to carry out the purpose of Title 63.2 of the Code of Virginia. This regulatory action complies with Chapters 769 and 770 of the 2018 Acts of Assembly, which establish the Kinship Guardianship Assistance Program in the Code of Virginia, and Chapter 704 of the 2016 Acts of Assembly, which outlines the petitions local departments of social services (LDSS) employees are authorized to file.

Purpose: The proposed action is to update this regulation, which provides for the safety of children who come into the child welfare system and for children in the Commonwealth who are adopted, to incorporate the Kinship Guardianship Assistance Program that went into effect July 1, 2018. The Kinship Guardianship Assistance Program provides an additional permanency option for youth in foster care. In order for the youth and relative to be eligible for the program, the youth must (i) be in foster care and have been placed in the relative foster home for six consecutive months, (ii) the goals of return home and adoption must have been ruled out, (iii) the relative must be willing to accept custody of the youth, and (iv) the relative must commit to providing a permanent and self-sustaining relationship with the child. The program allows the relative custodians to continue to receive financial support in the form of maintenance payments after custody is transferred and the youth is discharged from foster care. This allows the youth to achieve permanency while providing the necessary support and services to the youth and relative to ensure that the youth does not return to foster care.

Substance: This regulatory action will incorporate technical information, language, and processes necessary to ensure consistency with the Code of Virginia, federal legislation, and requirements that have been passed into law since the introduction of the current Permanency Services regulation. This regulatory action includes adding a new section that will outline the Kinship Guardianship Assistance Program. The section will include eligibility criteria, the process by which the maintenance payments will be negotiated, and the annual review process. Additionally, information will be incorporated regarding the types of petitions that may be completed by the designated nonattorney employee of the LDSS.

Issues: The advantages of this regulatory action are that it addresses recent statutory changes to incorporate the Kinship Guardianship Assistance Program that went into effect July 1, 2018. This program must comply with Title IV-E requirements as set forth in 42 USC § 673. Compliance with federal mandates are a requirement for continuing to receive federal funding for the operation of child welfare service programs in Virginia. Additionally, this regulatory action clarifies procedure for the filing of petitions related to foster care court

proceedings to ensure that LDSS employees are not engaging in the unauthorized practice of law. This regulatory action poses 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) seeks to amend regulations pertaining to permanency for children in foster care (22VAC40-201) in order to implement the Kinship Guardianship Assistance Program (KinGAP). This program creates a channel for children in foster care, for whom neither reunification with parents nor adoption is deemed possible, to attain permanency with a relative by the time they turn 18. The proposed amendments define and detail the actions required of local departments of social services (LDSS) in order to comply with the Code of Virginia (§ 63.2-1305) and 42 USC § 673, which establish the Kinship Guardianship Assistance Program at the state and federal levels, respectively.

Background. The 2018 Acts of Assembly (Chapters 769 and 770) established KinGAP and the proposed regulation provides comprehensive technical direction for the program to be implemented in a consistent manner across the state by the LDSS. The Board proposes to add a section to the regulation that specifies the eligibility criteria for children and the actions required of LDSS and the child's relatives under KinGAP. The Board also proposes to amend definitions to add terms specific to KinGAP. The language used is nearly identical to the language in the Code, which went into effect July 1, 2018, and complies with title IV-E requirements as set forth in 42 USC § 673. The proposed language also clarifies the procedures followed by LDSS for filing petitions related to foster care court proceedings. In summary, the proposed new KinGAP section makes the following stipulations, as in the Code:

1. Only children for whom reunification and adoption have been ruled out are eligible
2. LDSS caseworkers are to find a relative who can provide permanency.<sup>1</sup>
3. The relatives must first foster the child for a minimum of six consecutive months. During this period, the state retains legal custody, LDSS continues to provide caseworker support and oversight, and the relatives are entitled to foster care monthly maintenance payments.
4. After the six months, LDSS is to enter into a Kinship Guardianship Assistance Agreement with the relative (henceforth the kinship guardian) wherein both parties agree to a monthly assistance payment that will replace the foster care maintenance payment once the kinship guardian obtains legal custody and the child obtains permanency.
5. The kinship guardian is required to file for custody of the child. They are entitled to a reimbursement of non-recurring costs up to \$2000.

6. The Agreement could also allow the child and/or guardian to continue to access services that may be necessary for the child's mental health or developmental needs.

The proposed regulations exceed the prescriptions of the Code in adding an annual review requirement, intended to reassess the kinship guardians financial situation and amend the payment amount and agreement. Although the Code indicates that the Kinship Guardianship Assistance Payment and Agreement are to be reviewed and amended with the agreement of both parties, it does not specify a timeline or require this. By adding an annual review requirement, the Board specifies a point of ongoing contact for the kinship guardian, while adding a nominal administrative burden on the LDSS caseworker.

Estimated Benefits and Costs. For the discussion of costs and benefits that follows, it is important to note that both federal and state laws explicitly state that the kinship guardianship assistance payments shall not exceed the foster care maintenance payment, either IV-E or state funded, that would have been paid if the child were to remain in foster care. Therefore, any costs or benefits that can be reasonably attributed to KinGAP directly are nominal in comparison to the overall costs and benefits of the foster care system.

The proposed amendments appear to directly benefit relatives who may not have been able to afford to take custody of the foster child and can now take custody and receive assistance payments. It benefits older children in foster care by marginally increasing the likelihood that they will attain permanency with a relative before their 18th birthday. Ordinarily, taking legal custody would preclude relatives from receiving any further foster care maintenance payments or other services that the child may need. To the extent that losing these payments may have actually prevented relatives from taking custody of the child, KinGAP is beneficial in that it realigns incentives such that children are able to find permanency within their own extended families and communities.

The proposed amendments create direct program costs, which have been estimated (as part of the fiscal analysis for SB 636 and HB 1333 in the 2018 GA session) at roughly \$83,475 for the first year, \$139,125 in the second year and \$166,950 per year thereafter. The total expenditure for KinGAP in SFY 2019 has been reported to be \$29,535, which is significantly lower than the estimated cost for the first year of the programs implementation. However, implementation of the program may have been uneven across the state in the absence of the regulations currently under consideration.

The costs reported represent those foster children whose relatives may have taken custody even if it meant losing the foster care maintenance payments, but now continue to receive KinGAP payments. The fiscal analysis makes a key assumption that only about six children a year will be on this margin, thereby imposing additional ongoing costs. The Board

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estimates that about 50 children a year will be KinGAP participants, but the vast majority of them do not create additional ongoing costs since the assistance payments are simply diverted from existing allocations of foster care maintenance payments.

Future participation in KinGAP and resulting expenditures are unlikely to exceed these estimates because the program is fairly narrow in its scope: the children who would be eligible for KinGAP would have been eligible for foster care maintenance anyway, and most potential relatives who meet all the requirements to be a foster parent were likely already fulfilling that role. The six-month fostering requirement places an important limit on the size of the KinGAP program, since relatives in low-income households may not have the resources or meet the criteria to be a foster parent.

In 2015, the Department of Social Services reported on the outcomes for children who age out of foster care, finding that they were significantly less likely to graduate high school, more likely to participate in SNAP, TANF, and Medicaid, and more likely to find themselves unstably housed, potentially homeless, parenting children they cannot adequately support, and involved with the criminal justice system.<sup>2</sup> Foster children most at risk of these adverse outcomes may not have family members that would qualify for being foster parents. The same report also indicated that foster placement of children with relatives is limited by Virginia's extensive list of barrier crimes. Future regulatory actions that either amend the list of barrier crimes or otherwise explicitly ease the requirements for family members to be foster parents could increase the size of the KinGAP program.

Finally, KinGAP could potentially create higher costs in the future if, for example, attaining permanency by age 18 increased participation in other public programs such as Fostering Futures, which extends foster care benefits up to age 21 for children engaged in education, training, or employment. Relieving older foster children of the anxiety of having to survive independently once they turn 18 could plausibly enable them to pursue education, training, or employment thereby increasing the overall costs of that program. This would also, of course, be beneficial for the older children.

**Businesses and Other Entities Affected.** No businesses are directly affected by this program. The proposed regulation would affect the 120 LDSS and the children in their custody.

**Localities<sup>3</sup> Affected.<sup>4</sup>** Based on preliminary fiscal analysis, local governments as a whole are estimated to face aggregate costs of \$13,937 in FY 2019, \$25,775 in FY 2020 and \$27,874 in FY 2021 and thereafter. Because KinGAP is likely to remain a relatively small program, some localities may not be affected at all. Conversely, the localities where kinship guardians happen to reside would be disproportionately affected. The identity of these localities is not known.

**Projected Impact on Employment.** The proposed amendments do not appear to affect total employment.

**Effects on the Use and Value of Private Property.** The proposed amendments have no effect on the value of private property. Some homeowners may add a new member or two to their household. There would be no impact on real estate development costs.

**Adverse Effect on Small Businesses.<sup>5</sup>** The proposed amendments do not appear to adversely affect small businesses.

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<sup>1</sup>Permanency is defined as establishing family connections and placement options for a child to provide a lifetime of commitment, continuity of care, a sense of belonging, and a legal and social status that go beyond a child's temporary foster care placements. This definition in 22VAC40-201-10 predates the introduction of KinGAP.

<sup>2</sup>RD365 [Improving Outcomes for Older Youth In Foster Care: An Analysis of the Impact of Adoption and Independent Living Services on the Transition to Adulthood \(2015\)](#)

<sup>3</sup> "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>4</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

<sup>5</sup>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."

**Agency's Response to Economic Impact Analysis:** The Department of Social Services concurs with the economic impact analysis prepared by the Department of Planning and Budget.

**Summary:**

*The proposed amendments update technical information, language, and processes necessary for consistency with the Code of Virginia and federal legislation and requirements and add (i) a new section outlining the Kinship Guardianship Assistance Program to include eligibility criteria, the process by which the maintenance payments will be negotiated, and the annual review process and (ii) types of petitions that may be completed by the designated nonattorney employee of a local department of social services.*

**22VAC40-201-10. Definitions.**

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

"Administrative panel review" means a review of a child in foster care that the local board conducts on a planned basis pursuant to § 63.2-907 of the Code of Virginia to evaluate the current status and effectiveness of the objectives in the service plan and the services being provided for the immediate care of the child and the plan to achieve a permanent home for the child. The administrative review may be attended by the birth parents or prior custodians and other interested individuals significant to the child and family as appropriate.

"Adoption" means a legal process that entitles the person being adopted to all of the rights and privileges, and subjects the person to all of the obligations of a birth child.

"Adoption assistance" means a money payment provided to adoptive parents or other persons on behalf of a child with special needs who meets federal or state requirements to receive such payments.

"Adoption assistance agreement" means a written agreement between the local board and the adoptive parents of a child with special needs or in cases in which the child is in the custody of a licensed child-placing agency, an agreement between the local board, the licensed child-placing agency, and the adoptive parents that sets out the payment and services that will be provided to benefit the child in accordance with Chapter 13 (§ 63.2-1300 et seq.) of Title 63.2 of the Code of Virginia.

"Adoption Progress Report" means a report filed with the juvenile court on the progress being made to place the child in an adoptive home. Section 16.1-283 of the Code of Virginia requires that an Adoption Progress Report be submitted to the juvenile court every six months following termination of parental rights until the adoption is final.

"Adoptive home" means any family home selected and approved by a parent, local board, or a licensed child-placing agency for the placement of a child with the intent of adoption.

"Adoptive home study" means an assessment of a family completed by a child-placing agency to determine the family's suitability for adoption.

"Adoptive parent" means any provider selected and approved by a parent or a child-placing agency for the placement of a child with the intent of adoption.

"Adoptive placement" means arranging for the care of a child who is in the custody of a child-placing agency in an approved home for the purpose of adoption.

"Adult adoption" means the adoption of any person 18 years of age or older, carried out in accordance with § 63.2-1243 of the Code of Virginia.

"Agency placement adoption" means an adoption in which a child is placed in an adoptive home by a child-placing agency that has custody of the child.

"AREVA" means the Adoption Resource Exchange of Virginia that maintains a registry and photo-listing of children waiting for adoption and families seeking to adopt.

"Assessment" means an evaluation of the situation of the child and family to identify strengths and services needed.

"Birth family" means the child's biological family.

"Birth parent" means the child's biological parent and for purposes of adoptive placement means a parent by previous adoption.

"Birth sibling" means the child's biological sibling.

"Board" means the State Board of Social Services.

"Child" means any natural person under 18 years of age or, for the purposes of the Fostering Futures program set forth in Article 2 (§ 63.2-917 et seq.) of Chapter 9 of the Code of Virginia, under 21 years of age and meeting the eligibility criteria set forth in § 63.2-919 of the Code of Virginia.

"Child-placing agency" means any person who places children in foster homes, adoptive homes, or independent living arrangements pursuant to § 63.2-1819 of the Code of Virginia or a local board that places children in foster homes or adoptive homes pursuant to §§ 63.2-900, 63.2-903, and 63.2-1221 of the Code of Virginia. Officers, employees, or agents of the Commonwealth, or any locality acting within the scope of their authority as such, who serve as or maintain a child-placing agency, shall not be required to be licensed.

"Child with special needs" as it relates to adoption assistance means a child who meets the definition of a child with special needs set forth in §§ § 63.2-1300 or 63.2-1301 B of the Code of Virginia.

"Children's Services Act" or "CSA" means a collaborative system of services and funding that is child centered, family focused, and community based when addressing the strengths and needs of troubled and at-risk youth and their families in the Commonwealth.

"Claim for benefits," as used in § 63.2-915 of the Code of Virginia and 22VAC40-201-115, means (i) foster care maintenance, including enhanced maintenance; (ii) the services set forth in a court approved foster care service plan, the foster care services identified in an individual family service plan developed by a family assessment and planning team or other multi-disciplinary team pursuant to the Children's Services Act (§ 2.2-5200 et seq. of the Code of Virginia), or a transitional living plan for independent living services; (iii) the placement of a child through an agreement with the child's parents or guardians, where legal custody remains with the parents or guardians; (iv) foster care prevention services as set out in a prevention service plan; or (v) placement of a child for adoption when an approved family is outside the locality with the legal custody of the child, in accordance with 42 USC § 671(a)(23).

"Close relative" means a grandparent, great-grandparent, adult nephew or niece, adult brother or sister, adult uncle or aunt, or adult great uncle or great aunt.

"Commissioner" means the commissioner of the department, his designee, or his authorized representative.

"Community Policy and Management Team" or "CPMT" means a team appointed by the local governing body pursuant to Chapter 52 (§ 2.2-5200 et seq.) of Title 2.2 of the Code of Virginia. The powers and duties of the CPMT are set out in § 2.2-5206 of the Code of Virginia.

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"Concurrent permanency planning" means utilizing a structured case management approach in which reasonable efforts are made to achieve a permanency goal, usually a reunification with the family, simultaneously with an established alternative permanent plan for the child.

"Department" means the state Department of Social Services.

"Denied," as used in § 63.2-915 of the Code of Virginia and 22VAC40-201-115, means the refusal to provide a claim for benefits.

"Dually approved" means applicants have met the required standards to be approved as a foster and adoptive family home provider.

"Entrustment agreement" means an agreement that the local board enters into with the parent, parents, or guardian to place the child in foster care either to terminate parental rights or for the temporary care and placement of the child. The agreement specifies the conditions for the care of the child.

"Family assessment and planning team" or "FAPT" means the local team created by the CPMT (i) to assess the strengths and needs of troubled youths and families who are approved for referral to the team and (ii) to identify and determine the complement of services required to meet their unique needs. The powers and duties of the FAPT are set out in § 2.2-5208 of the Code of Virginia.

"Foster care" means 24-hour substitute care for children in the custody of the local board or who remain in the custody of their parents, but are placed away from their parents or guardians and for whom the local board has placement and care responsibility through a noncustodial agreement.

"Foster care maintenance payments" means payments to cover those expenses made on behalf of a child in foster care including the cost of, and the cost of providing, food, clothing, shelter, daily supervision, school supplies, a child's incidentals, reasonable travel to the child's home for visitation, and reasonable travel to remain in the school in which the child is enrolled at the time of the placement. The term also includes costs for children in institutional care and costs related to the child of a child in foster care as set out in 42 USC § 675.

"Foster care plan" means a written document filed with the court in accordance with § 16.1-281 of the Code of Virginia that describes the programs, care, services, and other support that will be offered to the child and his parents and other prior custodians. The foster care plan defined in this definition is the case plan referenced in 42 USC § 675.

"Foster care prevention" means the provision of services to a child and family to prevent the need for foster care placement.

"Foster care services" means the provision of a full range of casework, treatment, and community services, including independent living services, for a planned period of time to a

child meeting the requirements as set forth in § 63.2-905 of the Code of Virginia.

"Foster child" means a ~~child~~ person younger than 21 years of age for whom the local board has assumed placement and care responsibilities through a noncustodial foster care agreement, entrustment, or court commitment ~~before 18 years of age prior to such person's 18th birthday.~~

"Foster home" means the place of residence of any natural person in which any child, other than a child by birth or adoption of such person, resides as a member of the household.

"Foster parent" means an approved provider who gives 24-hour substitute family care, room and board, and services for children or youth committed or entrusted to a child-placing agency.

"Independent living arrangement" means placement of a child at least 16 years of age who is in the custody of a local board or licensed child-placing agency and has been placed by the local board or licensed child-placing agency in a living arrangement in which he does not have daily substitute parental supervision.

"Independent living services" means services and activities provided to a child in foster care 14 years of age or older who was committed or entrusted to a local board of social services, child welfare agency, or private child-placing agency. Independent living services may also mean services and activities provided to a person who (i) was in foster care on his 18th birthday and has not yet reached the age of 21 years or (ii) is at least 18 years of age and who, immediately prior to his commitment to the Department of Juvenile Justice, was in the custody of a local department of social services. Such services shall include counseling, education, housing, employment, and money management skills development, access to essential documents, and other appropriate services to help children or persons prepare for self-sufficiency.

"Individual family service plan" or "IFSP" means the plan for services developed by the FAPT in accordance with § 2.2-5208 of the Code of Virginia.

"Intercountry placement" means the arrangement for the care of a child in an adoptive home or foster care placement into or out of the Commonwealth by a licensed child-placing agency, court, or other entity authorized to make such placements in accordance with the laws of the foreign country under which it operates.

"Interstate Compact on the Placement of Children" or "ICPC" means a uniform law that has been enacted by all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, which establishes orderly procedures for the interstate placement of children and sets responsibility for those involved in placing those children.

"Interstate placement" means the arrangement for the care of a child in an adoptive home, foster care placement, or in the

home of the child's parent or with a relative or nonagency guardian, into or out of the Commonwealth, by a child-placing agency or court when the full legal right of the child's parent or nonagency guardian to plan for the child has been voluntarily terminated or limited or severed by the action of any court.

"Investigation" means the process by which the child-placing agency obtains information required by § 63.2-1208 of the Code of Virginia about the placement and the suitability of the adoption. The findings of the investigation are compiled into a written report for the circuit court containing a recommendation on the action to be taken by the court.

"Kinship foster parent" means a relative or fictive kin who gives 24-hour substitute family care, room and board, and services for children or youth committed or entrusted to a child-placing agency.

"Kinship guardian" means the adult relative of a child in a kinship guardianship established in accordance with § 63.2-1305 who has been awarded custody of the child by the court after acting as the child's foster parent.

"Kinship guardianship" means a relationship established in accordance with § 63.2-1305 between a child and an adult relative of the child who has formerly acted as the child's foster parent that is intended to be permanent and self-sustaining as evidenced by the transfer by the court to the adult relative of the child of the authority necessary to ensure the protection, education, care and control, and custody of the child and the authority for decision making for the child.

"Kinship Guardianship Assistance Agreement" means a written agreement, binding on the parties to the agreement, between the agency and the kinship guardian of the minor child that specifies the nature and the amount of any payments and assistance to be provided under such agreement and stipulates that the agreement shall remain in effect regardless of the state in which the kinship guardian resides.

"Kinship Guardianship Assistance payment" means a money payment provided to a kinship guardian on behalf of a child that was discharged from foster care to the kinship guardian's custody in accordance with the requirements of § 63.2-1305 of the Code of Virginia.

"Kinship Guardianship Assistance Program" means a program consistent with 42 USC § 673 that provides, subject to a kinship guardianship assistance agreement developed in accordance with § 63.2-1305 of the Code of Virginia, payments to eligible individuals who have received custody of a relative child of whom they had been the foster parents.

"Local board" means the local board of social services in each county and city in the Commonwealth required by § 63.2-300 of the Code of Virginia.

"Local department" means the local department of social services of any county or city in the Commonwealth.

"Nonagency placement adoption" means an adoption in which the child is not in the custody of a child-placing agency and is placed in the adoptive home directly by the birth parent or legal guardian.

"Noncustodial foster care agreement" means an agreement that the local department enters into with the parent or guardian of a child to place the child in foster care when the parent or guardian retains custody of the child. The agreement specifies the conditions for placement and care of the child.

"Nonrecurring expenses" means expenses of adoptive parents directly related to the adoption of a child with special needs as set out in § 63.2-1301 D of the Code of Virginia or the expenses of a kinship guardian directly related to obtaining legal custody of the child subject to 42 USC § 673(d)(1)(D).

"Normalcy" means allowing children and youth in foster care to experience childhood and adolescence in ways similar to their peers who are not in foster care by empowering foster parents and congregate care staff to use the reasonable and prudent parent standard as referenced in Public Law 113-183 (42 USC §§ 671 and 675) when making decisions regarding extracurricular, enrichment, and social activities.

"Parental placement" means locating or effecting the placement of a child or the placing of a child in a family home by the child's parent or legal guardian for the purpose of foster care or adoption.

"Permanency" means establishing family connections and placement options for a child to provide a lifetime of commitment, continuity of care, a sense of belonging, and a legal and social status that go beyond a child's temporary foster care placements.

"Permanency planning" means a social work practice philosophy that promotes establishing a permanent living situation for every child with an adult with whom the child has a continuous, reciprocal relationship within a minimum amount of time after the child enters the foster care system.

"Prior custodian" means the person who had custody of the child and with whom the child resided, other than the birth parent, before custody was transferred to or placement made with the child-placing agency when that person had custody of the child.

"Prior family" means the family with whom the child resided, including birth parents, relatives, or prior custodians, before custody was transferred to or placement made with the child-placing agency.

"Putative Father Registry" means a confidential database designed to protect the rights of a putative father who wants to be notified in the event of a proceeding related to termination of parental rights or adoption for a child he may have fathered.

"Reasonable and prudent parent standard," in accordance with 42 USC § 675(10), means the standard characterized by

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careful and sensible parental decisions that maintain the health, safety, and best interests of a child while at the same time encouraging the emotional and developmental growth of the child that foster parents and congregate care staff shall use when determining whether to allow a child in foster care to participate in extracurricular, enrichment, cultural, and social activities.

"Residential placement" means a placement in a licensed publicly or privately owned facility, other than a private family home, where 24-hour care is provided to children separated from their families. A residential placement includes placements in children's residential facilities as defined in § 63.2-100 of the Code of Virginia.

"Reunification" means the return of the child to his home after removal for reasons of child abuse and neglect, abandonment, child in need of services, parental request for relief of custody, noncustodial agreement, entrustment, or any other court-ordered removal.

"Service worker" means a worker responsible for case management or service coordination for prevention, foster care, or adoption cases.

"Sibling" means each of two or more children having one or more parents in common.

"SSI" means Supplemental Security Income.

"State pool funds" means the pooled state and local funds administered by CSA and used to pay for services authorized by the CPMT.

"Step-parent adoption" means the adoption of a child by a spouse or the adoption of a child by a former spouse of the birth or adoptive parent in accordance with § 63.2-1201.1 of the Code of Virginia.

"Supervised independent living setting" means the residence of a person 18 years of age or older who is participating in the Fostering Futures program set forth in Article 2 (§ 63.2-917 et seq.) of Chapter 9 of the Code of Virginia where supervision includes a monthly visit with a service worker or, when appropriate, contracted supervision. "Supervised independent living setting" does not include residential facilities or group homes.

"Title IV-E" means the title of the Social Security Act that authorizes federal funds for foster care and adoption assistance.

"Visitation and report" means the visits conducted pursuant to § 63.2-1212 of the Code of Virginia and the written report of the findings made in the course of the visitation. The report is filed in the circuit court in accordance with § 63.2-1212 of the Code of Virginia.

"Voluntary placement" means the placement of a child in foster care with the agreement of the child's parent through a noncustodial foster care or entrustment agreement.

"Wrap around services" means an individually designed set of services and supports provided to a child and his family that includes treatment services, personal support services or any other supports necessary to achieve the desired outcome. Wrap around services are developed through a team approach.

"Youth" means any child in foster care between 14 and 18 years of age or any person 18 to 21 years of age transitioning out of foster care and receiving independent living services pursuant to § 63.2-905.1 of the Code of Virginia. "Youth" may also mean an individual older than the age of 16 years who is the subject of an adoption assistance agreement or kinship guardianship assistance agreement.

## **22VAC40-201-110. Court hearings and case reviews.**

A. For all court hearings, local departments shall:

1. Facilitate a meeting prior to the development of the foster care service plan and foster care service plan review to ensure participation and consider input from the child, the birth parents or prior custodians, the foster or adoptive parents, and any other interested individuals, who may include service providers, in the development of the service plan and service plan review. All youth 14 years of age and older shall be given the opportunity to choose up to two people to attend the meeting who are not the foster parent or caseworker. All of these persons shall be involved in sharing information for the purposes of well-informed decisions and planning for the child with a focus on safety and permanence.
2. File petitions in accordance with subsection L of this section and the requirements for the type of hearing.
3. Obtain and consider the child's input as to who should be included in the court hearing. If persons identified by the child will not be included in the court hearing, the service worker shall explain the reasons to the child for such a decision consistent with the child's developmental and psychological status.
4. Inform the court of reasonable efforts made to achieve concurrent permanency goals.
5. Document the appropriateness of the placement, including the continued appropriateness of an out-of-state placement if applicable.
6. Ensure the child or youth is present for the permanency planning hearing unless the court determines this not to be in the child's best interest.

B. The child or youth shall be consulted in an age-appropriate manner about his permanency plan at the permanency planning hearing and subsequent administrative panel reviews.

C. An administrative panel review shall be held six months after a permanency planning hearing when the goal of permanent foster care has been approved by the court. A foster care review hearing will be held annually. The child will

continue to have administrative panel reviews or review hearings every six months until the child reaches age 18 years.

D. The local department shall invite the child; the child's birth parents or prior custodians when appropriate; and the child's foster or adoptive parents, placement providers, guardian ad litem, court appointed special advocate, relatives, and service providers to participate in the administrative panel reviews.

E. The local department shall consider all recommendations made during the administrative panel review in planning services for the child and birth parents or prior custodians and document the recommendations on the department approved form. Individuals who were invited, including those not in attendance, shall be given a copy of the results of the administrative panel review as documented on the department approved form.

F. A supervisory review is required every six months for youth ages 18 to 21 years who are receiving independent living services only.

G. An administrative panel review is required every six months for Fostering Futures program participants unless a court review is held.

H. In accordance with § 16.1-242.1 of the Code of Virginia, when a case is on appeal for termination of parental rights, the juvenile and domestic relations district court retains jurisdiction on all matters not on appeal. The circuit court appeal hearing may substitute for a review hearing if the circuit court addresses the future status of the child.

I. An adoption progress report shall be prepared every six months after a permanency planning hearing when the goal of adoption has been approved by the court. The adoption progress report shall be entered into the automated child welfare data system. The child will continue to have annual review hearings in addition to adoption progress reports until a final order of adoption is issued or the child reaches age 18 years.

J. If a child is in the custody of the local department and a preadoptive family has not been identified and approved for the child, the child's guardian ad litem or the local board of social services may file a petition to restore the previously terminated parental rights of the child's parent in accordance with § 16.1-283.2 of the Code of Virginia.

K. If a child has been in foster care 15 out of the last 22 months or if the parent of a child in foster care has been convicted of an offense as outlined in § 63.2-910.2 of the Code of Virginia, the local department shall file a petition to terminate the parental rights and concurrently identify, recruit, process, and approve a qualified family for adoption of the child unless certain exceptions as outlined in § 63.2-910.2 are met.

L. Designated nonattorney employees of a local department may only file petitions that are outlined in this subsection. All

other petitions must be filed by an attorney, including petitions for the termination of parental rights. In accordance with §§ 16.1-260, 54.1-3900, and 63.2-332 of the Code of Virginia, nonattorney employees of a local department may only do the following:

1. Initiate a case on behalf of the local department by appearing before an intake officer; and

2. Complete, sign, and file with the clerk, on forms approved by the Supreme Court of Virginia, petitions for foster care review hearings, petitions for permanency planning hearings, petitions to establish paternity, motions to establish or modify support, motions to amend or review an order, and motions for a rule to show cause.

## **22VAC40-201-165. Kinship Guardianship Assistance Program.**

A. The purpose of the Kinship Guardianship Assistance Program is to facilitate placements with relatives and ensure permanency for children for whom adoption or reunification are not appropriate permanency options.

B. A child is eligible for the Kinship Guardianship Assistance Program if:

1. The child has been removed from the child's home pursuant to a voluntary placement agreement or as a result of a judicial determination that continuation in the home would be contrary to the welfare of the child;

2. The child was eligible for foster care maintenance payments under 42 USC § 672 or under state law while residing for at least six consecutive months in the home of the prospective kinship guardian;

3. Reunification or adoption are not appropriate permanency options for the child;

4. The child demonstrates a strong attachment to the prospective kinship guardian, and the prospective kinship guardian has a strong commitment to caring permanently for the child; and

5. The child has been consulted regarding the kinship guardianship if the child is 14 years of age or older.

C. If a child does not meet the eligibility criteria set forth in subsection B of this section but has a sibling who meets such criteria, the child may be placed in the same kinship guardianship with the child's eligible sibling in accordance with 42 USC § 671(a)(31) if the local department and kinship guardian agree that such placement is appropriate. In such cases, kinship guardianship may be paid on behalf of each sibling so placed.

D. Kinship Guardianship Assistance payments may not exceed the foster care maintenance payment, either IV-E or state funded, which would have been paid on behalf of the child if the child had remained in a foster home. Once the

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Kinship Guardianship Assistance Agreement becomes effective in accordance with subsection H of this section, foster care payments will cease and kinship guardianship assistance payments will begin. Kinship Guardianship Assistance payments include the following, where appropriate:

1. Title IV-E maintenance payments if the child meets federal eligibility requirements.

2. State-funded maintenance payments when the local department determines that the child does not meet the requirements in § 473 of Title IV-E of the Social Security Act (42 USC § 673).

3. Nonrecurring expense payments associated with the costs of obtaining legal custody of the child when a Kinship Guardianship Assistance Agreement is completed prior to legal custody transfer to the kinship guardian. Claims for nonrecurring expense payments must be filed within two years of the date that legal custody transferred to the kinship guardian.

E. The local department shall inform the prospective kinship guardian whether the child is eligible for Medicaid in relation to the Kinship Guardianship Assistance Agreement. For the child who meets the requirements in § 473 of Title IV-E of the Social Security Act (42 USC § 673), Medicaid shall be included in the Kinship Guardianship Assistance Agreement.

F. Additional criteria for the payments and services specified in subsection D of this section are as follows:

1. A maintenance payment, whether under Title IV-E or state funded, shall be approved for a child who is eligible for Kinship Guardianship Assistance payment unless the kinship guardian indicates, or it is determined through negotiation, that the payment is not needed.

a. The amount of all payments shall be negotiated by a representative of the department with the kinship guardian, taking into consideration the needs of the child and circumstances of the kinship guardian.

b. The amount of maintenance payments made shall not exceed the foster care maintenance payment that would have been paid during the period if the child had remained in a foster family home.

c. The maintenance payments shall not be reduced below the amount specified in the Kinship Guardianship Assistance Agreement without the concurrence of the kinship guardian or a statewide reduction in maintenance rates.

d. The maintenance payment specified in the Kinship Guardianship Assistance Agreement may only be increased if the child is already receiving the maximum amount allowed and (i) the child reaches an age at which the foster care maintenance rate would increase or (ii) statewide increases are approved for foster care maintenance rates.

e. The kinship guardian shall be required under the Kinship Guardianship Assistance Agreement to keep the local department informed of the circumstances that would make them ineligible for a maintenance payment or eligible for a different amount of maintenance payment than that specified in the Kinship Guardianship Assistance Agreement.

2. Children who are living with a kinship guardian participating in the Kinship Guardianship Assistance Program are eligible for foster care services under § 63.2-905 of the Code of Virginia, including a full range of casework, treatment, and community services. The kinship guardian may request services through the family assessment and planning team (FAPT) in accordance with state and local policies and procedures.

3. The kinship guardian shall be reimbursed, upon request, for the nonrecurring expenses of obtaining legal custody of the child. The total amount of reimbursement shall be based on actual costs and shall not exceed the amount established by federal law. Claims for nonrecurring expense payments must be filed within two years of the date that legal custody transferred to the kinship guardian.

4. When the kinship guardian declines a specific payment or agrees to a reduced payment amount and the kinship guardian's family circumstances or the child's needs change, the kinship guardian may request a change to the agreement, and an addendum to the Kinship Guardianship Assistance Agreement may be negotiated. The requirements for addendums to an existing Kinship Guardianship Assistance Agreement are in subsection K of this section.

G. All Kinship Guardianship Assistance payments and agreements shall be negotiated with the kinship guardian by a representative of the department, taking into consideration the needs of the child, the circumstances of the family, and the limitations specified in subsections B, C, D, and E of this section. Documentation supporting the requests for payments shall be provided by the kinship guardian and shall be considered in the negotiation of the Kinship Guardianship Assistance Agreement. Income shall not be the sole factor in considering the family's circumstances during the negotiations. Available family and community resources shall be explored as an alternative or supplement to the Kinship Guardianship Assistance payment.

H. A Kinship Guardianship Assistance Agreement shall be entered into by the local board and the kinship guardian for a child who has been determined eligible for Kinship Guardianship Assistance payments. Local departments shall use the Kinship Guardianship Assistance Agreement form provided by the department.

I. The Kinship Guardianship Assistance Agreement shall:

1. Be signed prior to legal custody transfer of the child to the kinship guardian;

2. Specify the payment types and monthly amounts to be provided;

3. Become effective on the date that the judge signs the court order transferring legal custody of the child to the kinship guardian; and

4. Absent modification or revocation of the kinship guardianship, remain in effect and governed by the laws of the Commonwealth of Virginia regardless of the state to which the kinship guardian may relocate.

J. The kinship guardian shall:

1. Annually submit a signed kinship guardianship assistance affidavit to the local department by the date the Kinship Guardianship Assistance Agreement was effective; and

2. Report changes in circumstances to the local department as outlined in the Kinship Guardianship Assistance Agreement.

K. Kinship Guardianship Assistance Agreements may be modified beyond the original provisions of the agreement to the extent provided by law when the local department and the kinship guardian agree in writing to new or renewed provisions in an addendum signed and dated by the local department and the kinship guardian. The local departments shall use the addendum form provided by the department and the changes to the agreement shall be negotiated by a representative of the department.

L. The Kinship Guardianship Assistance Agreement and any amendments may name an appropriate person to act as a successor legal guardian to provide care and guardianship in the event of death or incapacitation of the relative guardian. The successor guardian must be named in the agreement or addendum prior to the kinship guardian's death or incapacitation. The successor guardian does not need to be a relative or licensed as a foster parent to receive the Kinship Guardianship Assistance payment. Before the successor guardian may receive the Kinship Guardianship Assistance payments, the following requirements shall be met:

1. A new amendment to the Kinship Guardianship Assistance Agreement will need to be completed, outlining the terms of the kinship guardianship assistance and responsibilities of the successor guardian. The amendment to the Kinship Guardianship Assistance Agreement must specify that the agency will pay the total cost of nonrecurring expenses associated with obtaining legal guardianship of the child to the extent that the total cost does not exceed the amount authorized by federal law;

2. The successor guardian must complete a fingerprint based criminal background check and a central registry check of the successor guardian and all other adults living in the successor guardian's home; and

3. The successor guardian must obtain legal custody of the child.

M. The local department is responsible for the following:

1. Maintaining payments identified in the Kinship Guardianship Assistance Agreement and any addendum in effect, regardless of where the family resides;

2. Notifying kinship guardians who are receiving Kinship Guardianship Assistance payments that the annual affidavit is due;

3. Assisting the kinship guardian in coordinating services to meet the child's needs upon request;

4. Managing requests for changes in Kinship Guardianship Assistance payments and foster care services from the kinship guardian; and

5. Notifying the kinship guardians of a suspension or termination in payments or foster care services.

N. The Kinship Guardianship Assistance Agreement shall be terminated when the child reaches the age of 18 years, unless:

1. The child has a physical or mental disability that was present at the time of the custody transfer or a physical or mental disability that is related to a hereditary tendency, congenital problem, or birth injury and the local department determines the child requires ongoing treatment and intervention. The Kinship Guardianship Assistance payment may be continued by amending the original Kinship Guardianship Assistance Agreement or completing an addendum. The terms of the agreement or addendum may be for any period after the child's 18th birthday up to the child's 21st birthday; or

2. The child was subject to a Kinship Guardianship Assistance Agreement that became effective after the child reached the age of 16 years. In addition, the child shall meet at least one of the following participation criteria:

a. Completing secondary education or an equivalent credential;

b. Enrolled in an institution that provides post-secondary or vocational education;

c. Participating in a program or activity designed to promote employment or remove barriers to employment;

d. Employed at least 80 hours per month; or

e. Is incapable of doing any of the activities described in subdivisions a through d of this subsection due to a medical condition, which incapability is supported by regularly updated information in the program participant's case record.

O. The Kinship Guardianship Assistance Agreement shall not be terminated before the child's 18th birthday without the consent of the kinship guardian unless:

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1. The kinship guardian adopts the child subsequent to the Kinship Guardianship Assistance Agreement and transfer of legal custody. The kinship guardian and a representative of the department shall negotiate adoption assistance payments independently from any negotiated terms of the Kinship Guardianship Assistance Agreement.
  2. The kinship guardian requests in writing that the agreement ends.
  3. The kinship guardian fails to comply with the annual review process.
  4. The kinship guardian is no longer legally responsible for the care of the child.
  5. The kinship guardian is not providing any financial support for the child.
  6. The kinship guardian dies or becomes incapacitated. If a successor legal guardian is named in the Kinship Guardianship Assistance Agreement or amendments prior to the kinship guardian's death or incapacitation, then Kinship Guardianship Assistance payments may continue to the successor legal guardian under the requirements outlined in subsection L of this section.
  7. The kinship guardian and the local department agree in writing to terminate the agreement.
- P. Local boards of social services are responsible for informing kinship guardians in writing of their right to appeal decisions relating to the child's eligibility for the Kinship Guardianship Assistance Program and decisions relating to payments within 30 days of receiving written notice of such decisions. In accordance with § 63.2-915 of the Code of Virginia, applicants for and recipients of the Kinship Guardianship Assistance Program shall have the right to appeal these decisions by a local board or licensed child-placing agency in granting, denying, changing, or discontinuing Kinship Guardianship Assistance payments.

VA.R. Doc. No. R19-5722; Filed April 13, 2021, 12:40 p.m.

## Proposed Regulation

Title of Regulation: **22VAC40-201. Permanency Services - Prevention, Foster Care, Adoption and Independent Living (amending 22VAC40-201-40, 22VAC40-201-70, 22VAC40-201-100, 22VAC40-201-110, 22VAC40-201-140; adding 22VAC40-201-145).**

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

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: July 9, 2021.

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.

Basis: Section 63.2-217 of the Code of Virginia requires the State Board of Social Services to adopt such regulations as may be necessary to carry out the purpose of Title 63.2 of the Code of Virginia. This regulatory action is necessary to comply with Chapter 446 of the 2019 Acts of Assembly that makes numerous changes to the laws governing the provisions of foster care services, Chapters 677 and 676 of the 2019 Acts of Assembly that amend the age range for credit checks on children in foster care, and Chapter 934 of the 2020 Acts of Assembly that requires case consultation when reunification remains the goal after 12 months and reporting requirements when termination of parental rights do not occur in a timely manner.

Purpose: This regulatory action is necessary to amend the existing regulation so for consistency with the Code of Virginia. This regulation is essential to support the health, safety, and permanency of children in foster care and facilitate the provision of foster care services to children and families.

Substance: This regulatory action will incorporate technical corrections, language, and processes necessary to ensure consistency with the Code of Virginia. This regulatory action includes changes to the regulation on credit checks and independent living services, relative search and notification, a foster care complaint system, case consultation when reunification remains the goal after 12 months, acceptable reasons for not filing for termination of parental rights and reporting requirements for those cases, and caseload standards.

Issues: This regulatory action proposes amendments to the Permanency Services regulation, which provides for the safety of children who come into the child welfare system and for children in the Commonwealth who are adopted. In particular, this action makes changes to help improve the safety, permanency, and well-being of children and youth in foster care. This regulatory action poses 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 Board of Social Services (Board) proposes to make a number of changes to the regulation in response to 2019 and 2020 legislation. The proposed amendments would conform the regulation to the Code of Virginia as well as federal regulations. The Board proposes to establish caseload limits, add requirements regarding the termination of parental rights, and require case consultation when reunification remains the goal after 12 months. The proposed amendments would also add specific requirements for reporting by local boards and the identification and notification of relatives. The Board also seeks to update certain provisions of independent living services, and establish a protocol for the Department of Social Services (DSS) to respond to complaints regarding foster care.

Background. The Board seeks to make a number of amendments that would conform the regulation to new legislation pertaining to foster care and permanency that were

passed in 2019 and 2020. The legislation and subsequent changes to the regulation, including those proposed here, were at least in part prompted by a 2018 study of Virginia's foster care system undertaken by the Joint Legislative Audit and Review Commission (JLARC report).<sup>1</sup> The proposed changes are summarized below:

1. Local departments of social services are currently required to identify and notify all adult relatives within 30 days of a child entering foster care. Pursuant to Chapter 446 of the 2019 Acts of Assembly (2019 foster care omnibus), the Board seeks to require the local departments to search for relatives at the time the child enters foster care, annually, and prior to any subsequent placement changes for the child.<sup>2</sup> The Board also seeks to remove the requirement that a home or licensed facility be approved so that children may be placed in homes or licensed facilities that meet federal and state requirements even if full foster home approval has not yet been granted.

2. Pursuant to Chapter 934 of the 2020 Acts of Assembly, the Board seeks to modify the requirements and exceptions regarding the termination of parental rights for children who enter foster care.<sup>3</sup> 22 VAC 40-201-110 Court hearings and reviews currently requires local departments to file a petition to terminate parental rights if a child has been in foster care 15 out of the last 22 months. The Board seeks to amend this section so that local departments would also be required to file a petition to terminate parental rights if the parent has been convicted of the offenses listed in Virginia Code § 63.2-910.2.<sup>4</sup> The Board also seeks to add the following exceptions, which would need to be documented in the child's case plan and submitted to court:

- a. A relative who is caring for the child is also pursuing custody but does not want to adopt.
- b. The local department has not provided services to the parents deemed necessary for the safe return of the child.
- c. The local department has documented a compelling reason why termination of parental rights is not in the best interest of the child.<sup>5</sup>

Local departments that do not file petitions to terminate parental rights in accordance with regulation would be required to report to the commissioner or designee a clear description of the reason why the petition has not been filed and the reasonable efforts made toward reunification or placement with a relative. The Board also seeks to require the commissioner or designee to compile this information (without any identifying details) into an annual report to be shared with all local departments, and to use this information to establish a training program that educates local departments regarding common errors made by local departments when declining to file a petition for termination of parental rights. In keeping with this change, the Board also seeks to amend 22VAC40-201-70 to add that when a child has been in care for 12 months and reunification continues to be the goal, the local department

shall consult with the commissioner or designee regarding case planning.

3. The Board seeks to make a number of changes to 22VAC40-201-100 Providing independent living services: service for youth 14 years of age and older:

- a. Add parent or custodian to the list of individuals who are involved in identifying necessary independent living services.
- b. Specify that the independent living services provisions apply to youth in foster care at ages 14-21 and youth aged 14-23 who were in foster care at any point between ages 14-21.<sup>6</sup>
- c. Mandate that local departments conduct life skills assessments and develop transition plans within 30 days of the foster care child reaching 14 years of age or within 30 days of a child who is 14 years or older when entering foster care.
- d. Insert a requirement that life skills assessments and transition plans must be updated annually.
- e. Repeal the language relating to the independent living program for youth aged 18-21, as it has been made obsolete by the Fostering Futures program.<sup>7</sup>
- f. Revise the annual credit check requirement to only apply to youth in foster care who are 14-18 years old.<sup>8</sup>

4. Pursuant to the 2019 foster care omnibus, the Board seeks to establish a maximum caseload of 15 cases per foster care worker and state that each child in foster care is considered to be an individual foster care case. While the omnibus bill only required that the Board establish a maximum caseload, the specific choice of the limit was made by the Board using the range recommended in the JLARC report based on caseload standards in other states.

5. The Board seeks to add a new section 22VAC40-201-145 Foster Care Complaint System, which was also mandated by the 2019 foster care omnibus, delineating the steps to be taken by DSS in response to a complaint. The new section would require that DSS (i) investigate such complaint by conducting a review of case documentation, foster care policy, and state and federal code, and gather information from the constituent, local department, and other collaterals as needed, and (ii) provide the constituent a resolution to their concern that includes the methods used to assess the concern and a response to the concern, via the communication method of the constituent.

The new section would also state that all information received or maintained by the Department in connection with such reports, complaints, or investigations shall be confidential and not subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq.), except that such information may be relayed and used on a confidential basis for the purposes of investigation

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and to protect the health, safety, and well-being of children in foster care.<sup>9</sup>

**Estimated Benefits and Costs.** The proposed amendments would primarily benefit the children and families that the foster care system aims to serve. Specifying that local departments search for relatives at multiple points during the foster care placement process and removing the requirement that relative's homes be approved prior to placement would benefit children who would otherwise be separated from their extended family.

While the move to enforce the termination of parental rights more swiftly may seem concerning, doing so would allow the child to become eligible for adoption and attain permanency. The exceptions provided by the Board include placements with relatives, where children would attain permanency with kinship guardians, and a range of situations where reunification remains a viable goal. The requirement that such exceptions be documented might pose an additional administrative burden but ultimately provides greater transparency and accountability regarding the status of each child in the system. The expansion of independent living services would benefit those who were in foster care at any time between ages 14 to 21 until they turn 23. Moreover, these amendments would maintain compliance with the federal Chafee program, thereby allowing DSS to obtain federal funding for the same.

Implementing a maximum limit of 15 cases per caseworker not only benefits the children in foster care and their families, but also the caseworkers, some of whom previously had up to 30 cases. The caseload limit would also ensure that any additional administrative burden created by the other requirements described can be reasonably met. Further adding a complaint system allows the Board to have greater oversight of complaints regarding foster care that may previously have been addressed without their knowledge or left unaddressed, even if such information is protected from broader access under FOIA.

The proposed amendments would also impose costs on the state as well as local governments. However, these costs result from the legislation that prompted them. The Fiscal Impact Statement (FIS) for the 2019 foster care omnibus (which included changes beyond those being implemented in this action) estimated the total cost to be roughly \$3.5 million in the first year and \$4.5 million in the second year.<sup>10</sup> Although the FIS associated with Chapter 934 of the 2020 Acts does not indicate any direct costs, the increased case reviews and documentation requirements would impose additional time costs for caseworkers and other staff at local departments of social services.

**Businesses and Other Entities Affected.** The proposed amendments primarily affect all 120 local departments of social services as well as the local governments that are partly responsible for funding them.

**Small Businesses<sup>11</sup> Affected.** The proposed amendments would have no effect on small businesses.

**Localities<sup>12</sup> Affected.<sup>13</sup>** The proposed amendments broadly increase the responsibilities to be undertaken by case workers

and local departments of social services. To the extent that this leads to new hiring or overtime by the staff, the proposed amendments would introduce new costs for local governments. Some of these costs would be absorbed by DSS using federal funding earmarked for such use; for example, increased eligibility for independent living services arising from the increased age limit would create costs that would be covered in part through the funding provided by the federal Chafee program.

The proposed caseload limit would increase the costs for local governments where caseworkers previously had more than 15 cases each on average, since these local departments would need to hire additional caseworkers. According to the FIS accompanying the 2019 foster care omnibus, As of the January 2, 2019, Active Foster Care Children Report, 25 localities have between one and eight family services specialists, each of whom carries a foster care caseload of between 16 to 30 foster care children. These specific 25 localities would need funding for the equivalent of an additional 25.5 positions, in order for each of their specialists to have no more than 15 assigned foster care cases. The estimated annual cost for one family services specialist is \$84,180, therefore 25.5 new local specialists will cost \$1,609,952 the first year and \$2,146,602 each year thereafter.<sup>14</sup> Note the costs listed here refer to the total costs and localities would only be responsible for roughly 15.5% of the overall costs, with state general and nongeneral fund allocations covering the bulk of the costs.

Since the caseload limit has already been implemented, DSS reports that for fiscal year 2020, 29 localities and combined localities received a total of \$1,862,486 representing funding for the first nine months. The local departments receiving these funds, some of which serve multiple localities, are as follows: Alleghany/Covington, Amherst, Appomattox, Augusta/Staunton/Waynesboro, Bedford, Carroll, Franklin County, Henrico, Loudoun, Louisa, Madison, Nelson, Rappahannock, Rockbridge/Buena Vista/Lexington, Rockingham/Harrisonburg, Scott, Spotsylvania, Tazewell, Washington, Wise, Bristol, Galax, Hampton, Norfolk, Portsmouth, Richmond City, Roanoke City, Virginia Beach, and Winchester.<sup>15</sup>

**Projected Impact on Employment.** The proposed amendments would directly contribute to the employment of at least 25 caseworkers by local departments.

**Effects on the Use and Value of Private Property.** The proposed amendments would not affect the use and value of private property. Real estate development costs would not be affected.

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<sup>1</sup>See <http://jlarc.virginia.gov/2018-foster-care.asp>

<sup>2</sup>See <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=ch446>. The 2019 foster care omnibus also included other requirements pertaining to the staffing and operations of regional offices, the creation of a dashboard, and DSS takeover of local departments. Not all requirements are being implemented through this action: some of these requirements have been implemented through other regulatory change actions, while other

requirements have been implemented directly, without any changes to the regulation.

<sup>3</sup>See <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=ch934>.

<sup>4</sup>See <https://law.lis.virginia.gov/vacode/title63.2/chapter9/section63.2-910.2/>.

<sup>5</sup>The regulation lists the following as examples of compelling reasons: the parent has made substantial progress towards eliminating the conditions that caused the foster care placement, the child can safely return home within six months, and the return home would be in the child's best interest; or another permanency plan is better suited to meet the child's needs.

<sup>6</sup>As per DSS, the provision of independent living services follows the requirements of the John H. Chafee Foster Care Program for Successful Transition to Adulthood authorized in 42 USC 677 (4). The program expanded to age 23 to those states that have implemented extended foster care.

<sup>7</sup>The Fostering Futures program has been implemented through budget language since 2016, but was added to the Code of Virginia by Chapter 732 of the 2020 Acts of Assembly. See <https://lis.virginia.gov/cgi-bin/legp604.exe?201 ful CHAP0732>.

<sup>8</sup>The current requirement imposes the annual credit check on all youth in foster care who are 14 years of age and older. The upper limit of 18 years is derived from Chapters 676 and 677 of the 2019 Acts of Assembly. See <https://lis.virginia.gov/cgi-bin/legp604.exe?ses=191&typ=bil&val=ch676>.

<sup>9</sup>DSS cites § 2.2-3705.5 of the Code of Virginia as the basis for its FOIA exemption. See <https://law.lis.virginia.gov/vacode/title2.2/chapter37/section2.2-3705.5/>.

<sup>10</sup>See <https://lis.virginia.gov/cgi-bin/legp604.exe?191 oth SB1339FER122 PDF> for a breakdown of expenditures allocated to the general fund, nongeneral fund, and local match.

<sup>11</sup>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."

<sup>12</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>13</sup>§ 2.2-4007.04 defines particularly affected" as bearing disproportionate material impact.

<sup>14</sup>See <https://lis.virginia.gov/cgi-bin/legp604.exe?191 oth SB1339FER122 PDF>.

<sup>15</sup>A list of all local departments can be found at <https://www.dss.virginia.gov/localagency/index.cgi>.

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

Summary:

*The proposed amendments make changes in response to Chapters 446, 676, and 677 of the 2019 Acts of Assembly and Chapter 934 of the 2020 Acts of Assembly, including (i) requiring the local departments to search for relatives at the time the child enters foster care, annually, and prior to any subsequent placement changes for the child; (ii) removing the requirement that a home or licensed facility be approved so that children may be placed in homes or licensed facilities that meet federal and state requirements even if full foster home approval has not yet been granted; (iii) modifying the requirements and exceptions regarding the termination of parental rights for children who enter foster care; (iv) requiring local departments to file a petition to terminate parental rights if the parent has been convicted of*

*the offenses listed in § 63.2-910.2 of the Code of Virginia; (v) requiring that the department investigate a complaint by conducting a review of case documentation, foster care policy, and state and federal code, and gather information from the constituent, local department, and other collaterals as needed and provide the constituent a resolution to their concern that includes the methods used to assess the concern and a response to the concern via the communication method of the constituent; and (vi) establishing a maximum caseload per foster care worker and stating that each child in foster care is considered to be an individual foster care case.*

**22VAC40-201-40. Foster care placements.**

A. Within 30 days of the child being placed in the custody of the local board, the local department shall exercise due diligence to identify and notify in writing all adult relatives, including the parents of siblings who have legal custody of such siblings, that the child has been removed and explain the options to relatives to participate in the care and placement of the child including eligibility as a kinship foster parent and the services and supports that may be available for children placed in such a home. The local department may determine it is not in the child's best interest to notify relatives who have a history of domestic violence; have been convicted of barrier crimes as defined in § 63.2-1719 of the Code of Virginia other than those described in subsections E, F, G, and H of § 63.2-1721 of the Code of Virginia; or are listed on the Virginia State Police Sex Offender Registry. Additionally, if the birth father is unknown, the local department shall search the Virginia Birth Father Registry within 30 days of the child entering foster care. At a minimum, the local department shall search for relatives at the time the child enters foster care, annually, and prior to any subsequent placement changes for the child.

B. The local department shall ensure a child in foster care is placed in ~~an approved~~ a home or licensed facility that complies with all applicable federal and state requirements for safety and child well-being. Placements shall be made subject to the requirements of § 63.2-901.1 of the Code of Virginia. The following requirements shall be met when placing a child in an approved home or licensed facility:

1. The local department shall exercise due diligence to locate and assess relatives as a foster home placement for the child, including in emergency situations.
2. The local department shall place the child in the least restrictive, most family like setting consistent with the best interests and needs of the child.
3. The local department shall attempt to place the child in as close proximity as possible to the birth parent's or prior custodian's home to facilitate visitation, provide continuity of connections, and provide educational stability for the child.

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4. The local department shall take reasonable steps to place the child with siblings unless such a joint placement would be contrary to the safety or well-being of the child or siblings.

5. The local department shall, when appropriate, consider placement in a dually approved home so that if reunification fails, the placement is the best available placement to provide permanency through adoption for the child.

6. The local department shall not delay or deny placement of a child into a foster or adoptive family placement on the basis of race, color, or national origin of the foster or adoptive parent or child.

7. When a child being placed in foster care is of Native American, Alaskan Eskimo, or Aleut heritage and is a member of a nationally recognized tribe, the local department shall follow all federal laws, regulations, and policies regarding the referral of the child. The local department may contact the Department of Historic Resources for information on contacting Virginia tribes and shall consider tribal culture and connections in the placement and care of a child of Virginia Indian heritage.

8. If a child is placed in a kinship foster placement pursuant to § 63.2-900.1 of the Code of Virginia, the child shall not be removed from the physical custody of the kinship foster parent, provided the child has been living with the kinship foster parent for six consecutive months and the placement continues to meet approval standards for foster care, unless (i) the kinship foster parent consents to the removal; (ii) removal is agreed upon at a family partnership meeting; (iii) removal is ordered by a court of competent jurisdiction; or (iv) removal is warranted pursuant to § 63.2-1517 of the Code of Virginia.

C. A service worker shall make a preplacement visit to any out-of-home placement to observe the environment where the child will be living and ensure that the placement is safe and capable of meeting the needs of the child. The preplacement visit shall precede the placement date except in cases of emergency. In cases of emergency, the visit shall occur on the same day as the placement.

D. Foster or adoptive homes shall meet standards established by the board and shall be approved by child-placing agencies. Prior to the placement of a child in a licensed child-placing agency (LCPA) foster home, the local department shall verify that the LCPA approved the foster home. Prior to the placement of a child in a children's residential facility, the local department shall verify that the facility is licensed to operate by the appropriate state regulatory authority.

E. Local departments shall receive notice of the approval from the department's office of the ICPC prior to placing a child out of state.

F. When the local department is considering placement of a child in a foster or adoptive home approved by another local department within Virginia, the local department intending to place the child shall consult with the approving local department about the placement of the child and shall also verify that the home is still approved.

G. When a child is moving with a foster or adoptive family from one jurisdiction to another, the local department holding custody shall notify the local department in the jurisdiction to which the foster or adoptive family is moving.

H. When a child moves with a foster or adoptive family from one jurisdiction to another in Virginia, the local department holding custody shall continue supervision of the child unless supervision is transferred to the other local department.

I. A local department may petition the court to transfer custody of a child to another local department when the birth parent or prior custodian has moved to that locality.

J. In planned placement changes or relocation of foster parents, birth parents with residual parental rights or prior custodians and all other relevant parties shall be notified that a placement change or move is being considered if such notification is in the best interest of the child. The service worker shall consider the child's best interest and safety needs when involving the birth parent or prior custodian and all other relevant parties in the decision-making process regarding placement change or notification of the new placement.

K. In the case where an emergency situation requires an immediate placement change, the birth parent with residual parental rights or prior custodian and all other relevant parties shall be notified immediately of the placement change. The local department shall inform the birth parent or prior custodian why the placement change occurred and why the birth parent or prior custodian and all other relevant parties could not be involved in the decision-making process.

## **22VAC40-201-70. Foster care goals.**

A. Foster care goals are established to assure permanency is achieved for the child. Permissible foster care goals are:

1. Transfer custody of the child to his prior family;
2. Transfer custody of the child to a relative other than his prior family;
3. Finalize adoption of the child;
4. Place the child in permanent foster care;
5. Transition to independent living if the child is admitted to the United States as a refugee or asylee or is 18 years of age or older; or
6. Place the child in another planned permanent living arrangement in accordance with § 16.1-282.1 A2 of the Code of Virginia.

B. When the permanency goal is changed to adoption, the local department shall file petitions with the court 30 days prior to the hearing to:

1. Approve the foster care service plan seeking to change the permanency goal to adoption; and
2. Terminate parental rights.

Upon termination of parental rights, the local department shall provide an array of adoption services to support obtaining a finalized adoption.

C. The local department shall engage in concurrent permanency planning in order to achieve timely permanency for the child. Permanency goals shall be considered and addressed from the beginning of placement and continuously evaluated.

D. The goal of another planned permanent living arrangement may be chosen when the court has found that:

1. The child has a severe and chronic emotional, physical, or neurological disabling condition;
2. The child requires long-term residential care for the condition;
3. None of the alternatives listed in clauses (i) through (v) of § 16.1-282.1 A of the Code of Virginia is achievable for the child at the time placement in another planned permanent living arrangement is approved as the permanent goal for the child; and
4. The youth is 16 years of age or older.

E. The goal of permanent foster care may be chosen when the court has found that:

1. The child is placed in a foster home;
2. The child has developed a clearly established and documented significant relationship with a foster parent;
3. None of the alternatives listed in clauses (i) through (v) of § 16.1-282.1 A of the Code of Virginia is achievable for the child at the time placement in permanent foster care is approved as the permanent goal for the child; and
4. The youth is 16 years of age or older.

F. If either the goal of permanent foster care or another planned permanent living arrangement is selected, the local department shall continue to search for relatives and significant individuals as permanent families throughout the child's involvement with the child welfare system. The local department shall continuously evaluate the best interests of the child in light of the changing circumstances of the child and extended family to determine whether a change in goal to return home, placement with relatives, or adoption can achieve permanency.

G. The goal of independent living services shall only be selected for those children admitted to the United States as a refugee or asylee, those youth age 18 years leaving foster care and meeting the requirements to receive independent living services, or youth participating in the Fostering Futures program, as described in 22VAC40-201-105. For those youth with this goal, the service worker shall continue diligent efforts to search for a relative or other interested adult who will provide a permanent long-term family relationship for the youth.

H. When a child has been in care for 12 months and reunification remains the goal, the local department shall consult with the commissioner or designee regarding case planning.

**22VAC40-201-100. Providing independent living services: service for youth 14 years of age and older.**

A. Independent living services shall be identified by the youth, parent or prior custodian, foster or adoptive family, local department, service providers, legal community, and other interested individuals and shall be included in the service plan. Input from the youth in assembling these individuals and developing the services is required.

B. Independent living services shall be provided to all youth in foster care ages 14 to ~~18~~ 21 years and shall be offered to any person ~~between 18 and 21~~ from the age of 14 until they reach 23 years of age and who is in the process of transitioning from foster care to self-sufficiency was in foster care at any point between 14 and 21 years of age.

C. Independent living services include education, vocational training, employment, mental and physical health services, transportation, housing, financial support, daily living skills, counseling, and development of permanent connections with adults.

D. Local departments shall ~~assess the youth's independent living skills and needs and incorporate the assessment results into the youth's service plan~~ conduct life skills assessments and develop transition plans, which include independent living services to be offered, within 30 days of a child in foster care reaching 14 years of age or within 30 days of a child who is 14 years of age or older entering foster care and update such assessments and plans annually.

E. ~~A youth placed in foster care before the age of 18 years who turns age 18 years prior to July 1, 2016, may continue to receive independent living services from the local department between the ages of 18 and 21 years if:~~

- ~~1. The youth is making progress in an educational or vocational program, has employment, or is in a treatment or training program; and~~
- ~~2. The youth agrees to participate with the local department in (i) developing a service agreement and (ii) signing the~~

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~~service agreement. The service agreement shall require that the youth shall cooperate with all services; or~~

~~3. The youth is in permanent foster care and is making progress in an educational or vocational program, has employment, or is in a treatment or training program.~~

F. A youth age 16 years and older is eligible to live in an independent living arrangement provided the local department utilizes the independent living arrangement placement criteria developed by the department to determine that such an arrangement is in the youth's best interest. An eligible youth may receive an independent living stipend to assist him with the costs of maintenance. The eligibility criteria for receiving an independent living stipend will be developed by the department.

~~G. Any person who was committed or entrusted to a local department, turned 18 years of age prior to July 1, 2016, and chooses to discontinue receiving independent living services after age 18 years may request a resumption of independent living services provided that (i) the person has not yet reached 21 years of age and (ii) the person has entered into a written agreement, less than 60 days after independent living services have been discontinued, with the local board regarding the terms and conditions of his receipt of independent living services. Local departments shall provide any person who chooses to leave foster care or terminate independent living services before his 21st birthday written notice of his right to request restoration of independent living services in accordance with § 63.2-905.1 of the Code of Virginia by including such written notice in the person's transition plan.~~

~~H. F.~~ Local departments shall assist eligible youth in applying for educational and vocational financial assistance. Educational and vocational specific funding sources shall be used prior to using other sources.

~~I. Local departments shall provide independent living services to any person between 18 and 21 years of age who:~~

- ~~1. Turned 18 years of age prior to July 1, 2016;~~
- ~~2. Was in the custody of the local board immediately prior to his commitment to the Department of Juvenile Justice;~~
- ~~3. Is in the process of transitioning from a commitment to the Department of Juvenile Justice to self sufficiency; and~~
- ~~4. Provides written notice of his intent to receive independent living services and enters into a written agreement which sets forth the terms and conditions for the provision of independent living services with the local board within 60 days of his release from commitment.~~

~~J. Every six months a supervisory review of service plans for youth receiving independent living services after age 18 years shall be conducted to assure the effectiveness of service provision.~~

~~K. G.~~ A youth who has been in care six months or more and turns 18 years of age while in foster care shall receive a certified copy of his birth certificate, social security card, health insurance information, medical records, and state-issued identification or driver's license.

~~L. H.~~ The local department shall run annual credit checks on all youth in foster care who are 14 years of age and older but younger than 18 years of age. The local department shall assist a youth in resolving any discrepancies in the youth's credit report. The local department shall assist a youth in foster care over 18 years of age in obtaining the youth's annual credit report.

## **22VAC40-201-110. Court hearings and case reviews.**

A. For all court hearings, local departments shall:

1. Facilitate a meeting prior to the development of the foster care service plan and foster care service plan review to ensure participation and consider input from the child, the birth parents or prior custodians, the foster or adoptive parents, and any other interested individuals, who may include service providers, in the development of the service plan and service plan review. All youth 14 years of age and older shall be given the opportunity to choose up to two people to attend the meeting who are not the foster parent or caseworker. All of these persons shall be involved in sharing information for the purposes of well-informed decisions and planning for the child with a focus on safety and permanence.
2. File petitions in accordance with the requirements for the type of hearing.
3. Obtain and consider the child's input as to who should be included in the court hearing. If persons identified by the child will not be included in the court hearing, the service worker shall explain the reasons to the child for such a decision consistent with the child's developmental and psychological status.
4. Inform the court of reasonable efforts made to achieve concurrent permanency goals.
5. Document the appropriateness of the placement, including the continued appropriateness of an out-of-state placement if applicable.
6. Ensure the child or youth is present for the permanency planning hearing unless the court determines this not to be in the child's best interest.

B. The child or youth shall be consulted in an age-appropriate manner about his permanency plan at the permanency planning hearing and subsequent administrative panel reviews.

C. An administrative panel review shall be held six months after a permanency planning hearing when the goal of permanent foster care has been approved by the court. A foster care review hearing will be held annually. The child will

continue to have administrative panel reviews or review hearings every six months until the child reaches age 18 years.

D. The local department shall invite the child; the child's birth parents or prior custodians when appropriate; and the child's foster or adoptive parents, placement providers, guardian ad litem, court appointed special advocate, relatives, and service providers to participate in the administrative panel reviews.

E. The local department shall consider all recommendations made during the administrative panel review in planning services for the child and birth parents or prior custodians and document the recommendations on the department approved form. Individuals who were invited, including those not in attendance, shall be given a copy of the results of the administrative panel review as documented on the department approved form.

F. A supervisory review is required every six months for youth ages 18 to 21 years who are receiving independent living services only.

G. An administrative panel review is required every six months for Fostering Futures program participants unless a court review is held.

H. In accordance with § 16.1-242.1 of the Code of Virginia, when a case is on appeal for termination of parental rights, the juvenile and domestic relations district court retains jurisdiction on all matters not on appeal. The circuit court appeal hearing may substitute for a review hearing if the circuit court addresses the future status of the child.

I. An adoption progress report shall be prepared every six months after a permanency planning hearing when the goal of adoption has been approved by the court. The adoption progress report shall be entered into the automated child welfare data system. The child will continue to have annual review hearings in addition to adoption progress reports until a final order of adoption is issued or the child reaches age 18 years.

J. If a child is in the custody of the local department and a preadoptive family has not been identified and approved for the child, the child's guardian ad litem or the local board of social services may file a petition to restore the previously terminated parental rights of the child's parent in accordance with § 16.1-283.2 of the Code of Virginia.

K. If a child has been in foster care 15 out of the last 22 months or if the parent of the child in foster care has been convicted of an offense as outlined in § 63.2-910.2 of the Code of Virginia, the local department shall file a petition to terminate the parental rights and concurrently identify, recruit, process, and approve a qualified family for adoption of the child, unless certain exceptions as outlined in § 63.2-910.2, are met. These exceptions, which shall be documented in the child's case plan submitted to court, include:

1. The child is being cared for by a relative, and the relative is pursuing custody of the child and does not want to adopt.

2. The local department has not provided services to the parents deemed necessary for the safe return of the child.

3. Termination of parental rights is not in the best interests of the child and the local department has documented a compelling reason explaining why termination is not in the best interests of the child. Determinations regarding compelling reasons not to terminate parental rights shall be made based on the unique circumstances of the case. Compelling reasons may include:

a. A parent has made substantial progress toward eliminating the conditions that caused the child's placement in foster care; it is possible for the child to safely return home within six months; and the child's return home will be in the child's best interest.

b. Another permanency plan is better suited to meet the health and safety needs of the child.

L. If a local department does not file a petition to terminate parental rights when a child has been in care for 15 of the most recent 22 months, the local department shall report to the commissioner or designee a clear description of the reason why such petition has not been filed and the reasonable efforts made regarding reunification or placement of the child with a relative.

1. The commissioner or designee shall compile the information reported into a de-identified annual report and provide such report to all local departments.

2. The commissioner or designee shall use the information contained in the report to establish a training program that educates local departments regarding common errors made by local departments when declining to file a petition for termination of parental rights.

## **22VAC40-201-140. Other foster care requirements.**

A. Pursuant to § 63.2-908 of the Code of Virginia, a foster parent may consent to a marriage or entry into the military if the child has been placed with him through a permanent foster care agreement that has been approved by the court.

B. An employee of a local department, including a relative, cannot serve as a foster, adoptive, or licensed child-placing agency parent for a child in the custody of that local department. In the event it is in the child's best interest that a local employee be the foster parent, the child's custody may be transferred to another local department.

C. The child of a foster child remains the responsibility of his parent, unless custody has been removed by the court.

1. The child is not subject to requirements for foster care plans, reviews, or hearings. However, the needs and safety of the child shall be considered and documented in the foster care plan for the foster child (parent).

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2. The child is eligible for maintenance payments in accordance with 42 USC § 675(4)(B) and Medicaid in accordance with 42 USC § 672(h).

D. When a child in foster care is committed to the Department of Juvenile Justice, the local department no longer has custody or placement and care responsibility for the child. As long as the discharge or release plan for the child is to return to the local department prior to reaching age 18 years, the local department shall maintain a connection with the child.

E. At least 90 days prior to a child's release from commitment to the Department of Juvenile Justice, the local department shall:

1. Consult with the court services unit concerning the child's return to the locality; and
2. Work collaboratively with the court services unit to develop a plan for the child's successful transition back to the community, which will identify the services necessary to facilitate the transition and will describe how the services will be provided.

F. The caseload standard for foster care workers is 15 cases maximum per foster care worker. Each child in foster care is considered an individual foster care case.

## **22VAC40-201-145. Foster care complaint system.**

A. Upon receipt of a complaint from a constituent regarding a foster care case, the department will investigate such complaint by conducting a review of case documentation, foster care policy, and state and federal code, and gather information from the constituent, local department, and other collaterals as needed.

B. The department shall provide the constituent a resolution to the constituent's concern that includes the methods used to assess the concern and a response to the concern. This resolution will be provided via the communication method of the constituent.

C. All information received or maintained by the department in connection with such reports, complaints, or investigations shall be confidential and not subject to the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia), except that such information may be relayed and used on a confidential basis for the purposes of investigation and to protect the health, safety, and well-being of children in foster care.

VA.R. Doc. No. R20-6266; Filed April 13, 2021, 12:48 p.m.

### **Proposed Regulation**

**Title of Regulation: 22VAC40-221. Additional Daily Supervision Rate Structure (amending 22VAC40-221-10, 22VAC40-221-20, 22VAC40-221-30, 22VAC40-221-50, 22VAC40-221-70; adding 22VAC40-221-80; repealing 22VAC40-221-25).**

Statutory Authority: § 63.2-217 of the Code of Virginia; 42 USC § 673.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: July 9, 2021.

Agency Contact: Traci B. Jones, Program Manager, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7499, or email [traci.jones@dss.virginia.gov](mailto:traci.jones@dss.virginia.gov).

Basis: Section 63.2-217 of the Code of Virginia requires the State Board of Social Services to adopt such regulations as may be necessary to carry out the purpose of Title 63.2 of the Code of Virginia.

Purpose: The proposed regulatory action makes additional daily supervision (ADS) payments a requirement to be offered to all foster parents based on the needs of the child, regardless of whether the foster family is approved through a therapeutic foster care (TFC) agency or a local department of social services (LDSS). The uniform assessment tool is used to determine payments that are available for a child who has a clearly-defined need that requires a parent to provide increased support and supervision based on the child's needs. This proposed regulatory action is necessary to protect the welfare of citizens serving as foster and adoptive placements and those children being placed in foster and adoptive homes by ensuring that they receive any ADS payments that are due under the uniform rate assessment tool. Requiring the LDSS to offer ADS to all families will ensure fair and consistent treatment of foster families and provide the necessary support to ensure the health and well-being of children placed in their homes. The proposed regulatory action will also incorporate language specific to the administration of the uniform assessment tool for the purpose of adoption assistance by extending the timeframe for the readministration of the uniform rate assessment tool. The proposed regulatory change will increase the timeliness of adoptions because it will allow the LDSS and the adoptive parents to use an existing uniform assessment tool that was administered within the last six months instead of the previous requirement that the uniform assessment tool be readministered after three months. Finally, the proposed regulatory action will incorporate language specific to the kinship guardianship assistance program and the administration of the uniform assessment tool for the purpose of determining additional daily supervision payments for children who exit foster care to the custody of a relative through this recently enacted program.

Substance: The agency conducted a periodic review of the regulation. The greatest substantive changes are (i) the proposal that ADS be offered to all foster, adoptive, and kinship families regardless of their status of therapeutic or nontherapeutic and (ii) the amendment of the timeframe for the readministration of the uniform rate assessment tool from three to six months for the purpose of determining ADS payments for adoption assistance. Language has also been added to

incorporate Virginia's kinship guardianship assistance program. Additionally, it was determined that all references to the Child and Family Services Manual must be removed to make this chapter consistent with other chapters of regulation.

Issues: This regulatory action poses both advantages and disadvantages to the public and the Commonwealth. The requirement to offer ADS to all foster families who have children placed in their home will have a financial impact on the LDSS that do not currently offer this to their non-therapeutic foster care families. However, the proposed change to regulation will ensure that all foster families are treated equally and are properly supported to ensure the safety and well-being of every child placed in a foster home in Virginia. This will likely lead to an increase in the number of foster families across the Commonwealth. The amendments to the Additional Daily Supervision Rate Structure regulation will extend the amount of time that the uniform rate assessment tool is readministered from three months to six months prior to establishing adoption assistance. The primary advantage to the Commonwealth and LDSS is that this c will decrease the timeframe of finalizing adoption assistance for eligible foster care children because the uniform assessment tool will not have to be readministered until six months instead of the previous timeframe of three months.

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 1) require all local departments of social services (LDSS) to offer additional daily supervision (ADS) payments, 2) extend the amount of time that the uniform rate assessment tool is re-administered from three months to six months prior to establishing adoption assistance, 3) add language to incorporate Virginia's kinship guardianship assistance program, and 4) to make numerous other changes to simplify, clarify, and update regulatory language.

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

Estimated Economic Impact.

Changes in Standards for Additional Daily Supervision Payments. This regulation establishes standards for LDSS to use when determining the amounts of ADS payments for foster and adoptive parents as well as prospective relative custodians who meet the criteria for kinship guardianship assistance. The purpose of the ADS payments is to cover higher than normal supervision and support needs of children who have special needs. Currently, ADS payments are offered in certain localities, but 29 localities do not offer this financial assistance to their non-therapeutic-foster-care families.

The Board proposes to require that ADS payments be offered to all foster parents based on the needs of the child across all localities regardless of the status of being therapeutic or non-therapeutic. The Board estimates that there are approximately 123 additional children who would be eligible for additional

daily supervision in the 29 localities that do not offer this payment currently. Based on the average ages of children in the LDSS homes that do not currently provide an ADS payment and the average payments across the state, it is estimated that the localities affected would be responsible for an additional combined \$130,129 a month (\$74,824 from state funds/\$32,532 from federal funds/\$22,773 from local funds). This amount is the total amount that would be distributed among the 29 localities affected depending on the number of children they have in foster care. It is estimated that half of the children in foster care are eligible for federal funding through title IV-E and the other half will be reimbursed with Comprehensive Services Act general funds and local funds.

The main benefits of this change include ensuring that all foster families are treated equally across all localities and are properly supported to maintain the safety and well-being of every child placed in a foster home in Virginia. With this change, ADS payments would be established based on the needs of the child throughout the state. This change should also incentivize families to foster children with special needs across the Commonwealth.

Extension of Time for Administering Uniform Rate Assessment Tool. The Board also proposes to extend the amount of time that the uniform rate assessment tool is re-administered from three months to six months prior to establishing adoption assistance. The uniform assessment tool is used to determine payments that are available for a child that has a clearly-defined need that requires a parent to provide increased support and supervision based on the child's needs. Currently, some of the adoptions may be delayed if the uniform rate assessment has not been re-administered in the last three months.

The main benefits of this change include extending the timeframe that the assessment should be re-administered, which would allow LDSS to use an existing assessment from the last six months and expedite the adoption process as well as establishment of the payments for adoption assistance. As a result, timeliness of adoptions is expected to improve. The Board staff estimates that approximately 12 adoptions have been delayed in the past six months due to needing a new assessment completed under the current rules. Additionally, the use of an existing assessment does not result in any increase in adoption payments whereas a new assessment may result in higher payments. Under federal rules, an adoption assistance may be increased based on a new assessment, but may not be reduced even if the new assessment indicates a lower amount. Thus, there would also be some fiscal savings from the use of an existing assessment. Those savings would likely be limited to some extent because an adoptive parent may request a new assessment done anytime and would likely do so if he or she thinks it would increase the assistance amount. Finally, this change would reduce the number of times the uniform rate assessment tool needs to be re-administered and provide some staff-time savings to the LDSS.

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Additional Changes that Are Not Expected to Have Significant Impacts. The proposed changes also add language to incorporate Virginia's kinship guardianship assistance program. This is a program that facilitates child placements with relatives and ensures permanency for children for whom adoption or being returned home are not appropriate permanency options. The program has been enacted by the 2018 General Assembly and payments have been made under that statutory authority.<sup>1</sup> This regulation will incorporate language to reflect the operations of the program as currently followed in practice.

Since the proposed changes will not affect the current operations of the program, no significant economic effect is expected upon promulgation of the proposed amendments beyond providing the details of the rules and procedures that must be followed by LDSS as they apply to the kinship guardianship assistance program.

The Board also proposes to revise the stated ADS payment amount for emergency placements in the regulation from \$1,600 to \$1,120 monthly as that is the current payment made for emergency placements by LDSS. According to the Board staff, this amount was reduced by the Commissioner in 2012, but the regulatory language has not been updated until now to reflect that change. This change too is not expected to have a significant impact other than improving the accuracy of the language to reflect the correct amount that is paid.

Other nonsubstantive changes include removing all references to the Child and Family Services Manual to make this chapter consistent with other chapters of regulation and numerous changes to simplify, clarify, and update language to ensure the standards provide appropriate direction to the LDSS.

Businesses and Entities Affected. This regulation applies to 120 LDSS, prospective foster parents, prospective adoptive parents, prospective kinship guardianship assistance parents, children that are being adopted, and children who are discharged from foster care to the custody of a relative. The Board staff estimates that ADS payments would be provided to additional 123 children. The Board staff also estimates that the use of existing assessments would expedite approximately 12 adoptions per six-month period.

Localities Particularly Affected. This regulation would particularly affect the following LDSS that do not currently offer ADS to their nontherapeutic foster care homes: Fluvanna, Goochland, Lunenburg, Middlesex, Richmond County, Cumberland, Powhatan, King and Queen, Alleghany, Craig, Halifax, Mecklenburg, Nelson, Pittsylvania, Rockbridge, Shenandoah Valley, Bland, Floyd, Grayson, Giles, Radford, Washington, Gloucester, Clarke, Frederick, Rappahannock, Spotsylvania, Warren, and Winchester.

Projected Impact on Employment. The proposed extension of the time to re-administer the uniform assessment tool would provide some staff-time savings to the LDSS.

Effects on the Use and Value of Private Property. The proposed amendments would not affect the use and value of private property.

Real Estate Development Costs. The proposed amendments would 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 would not have costs or other effects on small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendments would not have adverse impacts on small businesses.

Adverse Impacts:

Businesses. The proposed amendments would not have adverse impacts on businesses.

Localities. The proposed amendments would adversely affect following localities by increasing their share of costs to provide ADS payments to additional 123 cases across the Commonwealth: Fluvanna, Goochland, Lunenburg, Middlesex, Richmond County, Cumberland, Powhatan, King and Queen, Alleghany, Craig, Halifax, Mecklenburg, Nelson, Pittsylvania, Rockbridge, Shenandoah Valley, Bland, Floyd, Grayson, Giles, Radford, Washington, Gloucester, Clarke, Frederick, Rappahannock, Spotsylvania, Warren, and Winchester.

Other Entities. The proposed amendments would increase the share of state funds to cover ADS payments to additional 123 children.

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<sup>1</sup><http://lis.virginia.gov/cgi-bin/legp604.exe?181+ful+CHAP0769>

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

Summary:

*The proposed amendments (i) require that additional daily supervision (ADS) payments be offered to all foster parents based on the needs of the child, regardless of whether the foster family is approved through a therapeutic foster care agency or local department of social services (LDSS); (ii) extend the amount of time permitted for the uniform rate assessment tool to be readministered to six months prior to the establishment of adoption assistance; (iii) change the ADS payment amount for emergency placements to \$1,120 monthly; (iv) incorporate the kinship guardianship assistance program; and (v) simplify, clarify, and update language to ensure the standards provide appropriate direction to the LDSS.*

**22VAC40-221-10. Definitions.**

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

"Additional daily supervision" or "ADS" means a child's need for increased supervision and support based on the identified needs of the child. ~~ADS is the basis for determining if an enhanced maintenance payment to a foster parent or an adoptive parent entering into an adoption assistance agreement is needed. The need for ADS is also the basis for increased expectations for the child placing agency and the foster parent or the adoptive parent prior to the finalization of the adoption in meeting the needs of the child.~~

"Adoption assistance" means a money payment or services provided to adoptive parents on behalf of a child with special needs.

"Additional daily supervision payment" or "ADS payment" means a money payment included as part of a foster care maintenance payment, adoption assistance payment, or kinship guardianship assistance payment for the child's need for increased supervision and support.

"Adoption assistance agreement" means a written agreement, binding on the parties to the agreement, the department, and other relative agencies, between the local department of social services (LDSS) and the adoptive parent that is binding on both parties and includes maintenance and, when applicable, additional daily supervision, Medicaid, services and nonrecurring fees of a minor child that specifies the nature and the amount of any payments, services, and assistance to be provided under such agreement and stipulates that the agreement shall remain in effect regardless of the state in which the adoptive parents reside.

"Adoptive placement" means the placement of a child for the purposes of adoption in a home with a signed adoptive placement agreement.

"ADS emergency placement" means the sudden, unplanned, or unexpected placement of a child who needs immediate care in a foster home and the placement occurs prior to the agency obtaining adequate information regarding the child's needs. ADS emergency placements require the foster parent to provide increased supervision and support to ensure the child's safety.

"Child-placing agency" means any person who places children in foster homes, adoptive homes, or independent living arrangements pursuant to § 63.2-1819 of the Code of Virginia or a local board that places children in foster homes or adoptive homes pursuant to § 63.2-900, 63.2-903, or 63.2-1221 of the Code of Virginia. Officers, employees, or agents of the Commonwealth, or any locality, acting within the scope of their authority as such, who serve as or maintain a child-placing agency, shall not be required to be licensed.

"CRAFFT" means Community Resource, Adoptive, and Foster Family Training. CRAFFT specialists are available to local departments of social services to provide assistance regarding training for foster families.

"Department" means the Virginia Department of Social Services.

~~"Enhanced maintenance payment" means the payment made to a foster parent over and above the basic foster care maintenance payment or to an adoptive parent when the adoption assistance agreement is negotiated. It is based on the needs of the child for additional daily supervision as identified by the uniform rate assessment tool.~~

"Foster care maintenance payment" means payments to cover the cost of food, clothing, shelter, daily supervision, school supplies, a child's personal incidentals, liability insurance with respect to a child, reasonable travel to the child's home for visitation, and reasonable travel for the child to remain in the school in which the child was enrolled at the time of placement. Additional daily supervision is included when supported by the identified and documented needs of the child.

"Kinship guardianship assistance agreement" means a written agreement, binding on the parties to the agreement, between the agency and the prospective relative custodian of the minor child that specifies the nature and the amount of any payments and assistance to be provided under such agreement and stipulates that the agreement shall remain in effect regardless of the state in which the relative custodian resides.

"Kinship guardianship assistance payment" means a money payment provided to a relative custodian on behalf of a child that was discharged from foster care to the relative's custody in accordance with the requirements of § 63.2-1305 of the Code of Virginia.

"LDSS" means the local department of social services.

"Licensed" means licensed child-placing agencies; entities licensed by the Department of Behavioral Health and Developmental Services; licensed behavioral health professionals, or behavioral health professionals working under the direct supervision of a licensed behavioral health professional.

"Treatment foster care" or "TFC" means a community-based program where services are designed to address the special needs of children and families. Services to children and youth are delivered primarily by treatment foster parents who are trained, supervised, and supported by agency staff. Treatment is primarily foster family based.

"Uniform rate assessment tool" means a department-approved web-based tool to assess the child's behavioral, emotional, physical, and personal care needs to determine if an additional daily supervision payment is necessary to ensure the safety and well-being of the child.

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## 22VAC40-221-20. ~~Administration~~ Utilization of the uniform rate assessment tool.

A. A department approved uniform rate assessment tool shall be used to determine the additional daily supervision component, if any, of the foster care maintenance payment ~~or~~, the adoption assistance payment, or the kinship guardianship assistance payment. Use of the rate assessment tool to assess the documented needs of the child shall be applied consistently consistent regardless of the ~~child's maintenance~~ funding source.

1. The LDSS having care and responsibility for the child is responsible to ensure the assessment is completed for every child placed in a foster home, including both TFC homes and non-TFC homes.

2. The LDSS having care and responsibility for the child is responsible to ensure the ~~tool~~ assessment is completed with input from a child-specific team of individuals who are knowledgeable about the child's characteristics.

~~2.~~ 3. The child-specific team shall include (i) the caseworker, (ii) foster ~~or~~ parent, adoptive ~~parents~~ parent, or relative custodian, and (iii) an individual trained to ~~administer~~ use the uniform rate assessment tool. Other individuals with knowledge of the child shall be invited to participate in the meeting or provide input about the child's needs. This ~~shall~~ may include family members ~~and~~, the child ~~as~~, if appropriate, other significant individuals in the child's social support network, the private child-placing agency staff involved in the care of the child, and other ~~providers~~ individuals providing care to the child.

~~3.~~ 4. LDSS staff ~~or other public child serving agency individuals~~ shall be trained in accordance with the department's Child and Family Services Manual, Chapter E Foster Care, Section 14, July 2011 to ~~administer~~ use the uniform rate assessment tool in assessing the child's documented needs.

4. ~~The child's assigned caseworker, foster or adoptive parents, or private agency staff shall not administer the tool~~

5. Only trained LDSS staff who are not associated with the case shall use the uniform rate assessment tool to assess the child's documented needs.

5. ~~The rate assessment tool shall be administered according to the following criteria and in accordance with the department's Child and Family Services Manual, Chapter E Foster Care, Section 14, July 2011:~~

- a. ~~If the child is to be placed in a TFC home;~~
- b. ~~If the LDSS chooses to make enhanced maintenance payments for children in non-TFC homes;~~
- e. ~~At the time an adoption assistance agreement is negotiated when the child's needs prior to negotiating and signing the agreement indicate a need for ADS. A re-administration of the tool is not required if the adoption~~

~~assistance agreement is signed within three months of a prior ADS assessment.~~

6. ~~The rate assessment tool shall be re-administered:~~

a. ~~When requested and there is evidence of significant behavioral, emotional, or medical changes and four or more weeks of additional support have become necessary to maintain the child in the home.~~

(1) ~~Once requested, the rate assessment tool must be administered within 14 calendar days.~~

(2) ~~If the rate assessment tool indicates a need for an increase or decrease in ADS, the increase or decrease takes effect on the first day of the subsequent month.~~

b. ~~No more often than quarterly for any child unless the previously stated criteria apply.~~

e. ~~A minimum of once per year.~~

B. The child's need for additional daily supervision shall be assessed when:

1. The child is placed in a TFC home;

2. The child is placed in a non-TFC home; or

3. An adoption assistance agreement or kinship guardianship assistance agreement is negotiated and the child's needs indicate a need for ADS prior to the negotiating and signing of the agreement. An assessment of the child's needs, through the use of the uniform rate assessment tool, is not required if the adoption assistance agreement or kinship guardianship assistance agreement is signed within the six months after the child's last assessment.

C. A child's needs shall be re-assessed through the use of the uniform rate assessment tool for additional daily supervision payments for children in foster care, as follows:

1. When requested by the foster parent and there is evidence of significant behavioral, emotional, or medical changes and four or more weeks of additional support have become necessary to maintain the child in the home.

a. Once requested, the child's needs must be assessed through the use of the uniform rate assessment tool within 14 calendar days.

b. If the uniform rate assessment tool indicates a need for an increase or decrease in ADS, the increase or decrease takes effect on the first day of the subsequent month.

2. At least annually, but no more often than once per quarter for any child unless the provisions of subdivision 1 of this subsection apply.

D. The individual ~~administering~~ using the rate assessment tool shall:

1. Consider all input from all sources regarding the emotional, behavioral, and medical characteristics of the child and will rate each item on the tool;

2. Make the final decision as to how to rate a child's characteristics based on the evidence as presented;
3. Issue a final score on the tool within five business days of the meeting; ~~and~~
4. Share a copy of the scored tool with the foster ~~or parent,~~ adoptive ~~parents parent,~~ or relative custodian, and, if requested, review the ~~tool~~ assessment with them; ~~and~~
5. Inform the foster parent, adoptive parent, or relative custodian in writing of the right to appeal decisions relating to the ADS payments and the applicable appeal process.

**22VAC40-221-25. ~~Determining the enhanced maintenance rate. (Repealed.)~~**

~~The child specific team shall consider the services provided to the child that reduce or eliminate any direct additional supervision or support provided to the child by the foster parent and reduce the enhanced maintenance payment based on these services.~~

**22VAC40-221-30. Child-placing agency requirements for children in foster care.**

A. The child-placing agency that approved the foster care home shall have face-to-face contacts with the foster parents at least monthly. Child-placing agencies may contract with licensed providers to conduct the in-home contacts with the foster parent.

B. Child-placing agencies shall have an appointed case worker on call and available to make face-to-face contact if necessary to provide services to the child and the foster family 24 hours per day, seven days per week.

1. Child-placing agencies may contract with licensed providers to perform this service.
2. Supervisory consultation to the on-call worker shall be available 24 hours per day, seven days per week and may be a service obtained through a contract with a licensed provider.

C. The child-placing agency shall monitor and document the contractor's performance if ~~they choose~~ it chooses to contract out the activities in subsections A and B of this section ~~in accordance with the department's Child and Family Services Manual, Chapter E Foster Care, Section 14, July 2011.~~

D. Additional training shall be provided to the foster parents receiving an ~~enhanced maintenance~~ additional daily supervision payment based on the needs of the foster parent and the children in care. Foster parents ~~and,~~ adoptive parents ~~prior to finalization of the adoption, and prospective relative custodians~~ receiving ~~enhanced maintenance~~ payments that include additional daily supervision shall be consulted on their training needs. Adoptive parents and prospective relative custodians shall be consulted on their training needs prior to finalization of the adoption or kinship guardianship.

E. Foster parents receiving ADS payments shall be required to:

1. Participate in and cooperate with the LDSS in developing the foster care plan;
2. Participate in family partnership meetings and child and family team meetings;
3. Participate in meetings as requested by the school or other service providers;
4. Discuss with the agency and follow through on all services provided or expected of them to ensure the child's well-being and progress;
5. Assume responsibility for managing the daily supervision and supportive tasks a child may need, including transportation to the child's appointments, visitation, school, and extra-curricular activities;
6. Attend and participate in court hearings, therapy, or other appointments; and
7. Accurately and consistently monitor and document the child's behaviors in the manner in which the LDSS has requested.

F. Failure of the foster parent receiving ADS payments to comply with the requirements of this section may result in termination of the ADS payments, removal of the child from the foster care placement, or other action by the LDSS pursuant to federal and state law unless the foster parent is able to provide good cause as to why the foster parent is unable to perform any of these duties.

~~E. G.~~ The foster care service plans developed for a child for whom ~~enhanced maintenance~~ is additional daily supervision payments are paid shall include ~~but not be limited to:~~

1. Measurable goals, objectives, and strategies for the foster ~~or parent,~~ adoptive parent, or prospective relative custodian, and the child-placing agency in addressing the identified needs of the child;
2. Provisions for providing training for the foster ~~or parent,~~ adoptive ~~parents parent,~~ or prospective relative custodian consistent with the identified needs of the child;
3. Provisions for services to prevent placement disruption and maintain a stable placement; and
4. The method developed jointly by the child-placing agency and the foster ~~or parent,~~ adoptive parent, or prospective relative custodian to document the child's progress.

~~F. H.~~ This section is ~~does~~ not applicable in cases where a ~~apply after entry of the~~ final order of adoption ~~has been issued~~ or final order from the court awarding custody to the relative custodian for kinship guardianship.

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## **22VAC40-221-50. ADS payments for emergency placement foster care placements.**

~~Enhanced maintenance payments~~ A. The additional daily supervision portion of the foster care maintenance payment for the initial emergency foster care placement of a child shall be based on a per diem not to exceed \$1,600 \$1,120 per month.

~~1. B.~~ The department may change the maximum per diem for initial emergency foster care placements upon approval from the State Board of Social Services.

~~2. The enhanced maintenance payment per diem for the initial emergency placement includes the day the uniform rate assessment tool is administered to determine the on-going enhanced maintenance rate.~~

~~3. C.~~ The uniform rate assessment tool shall be administered utilized to assess the child's needs within 60 calendar days of the initial emergency foster care placement of a child.

## **22VAC40-221-70. Post-finalized adoptions.**

~~Enhanced maintenance~~ Adoption assistance payments based in whole or in part on a child's need for additional daily supervision shall be made available to adoptive parents after the adoption has been finalized pursuant to the department's Child and Family Services Manual, Chapter E Foster Care, Section 17, April 2013. entry of the final order of adoption if the following criteria are met:

~~1. The adoptive parent shall be required to either submit an application for renegotiation of their adoption assistance agreement.~~ adoption assistance if there is not an adoption assistance agreement or submit a request to amend the existing adoption assistance agreement;

~~2. The documented needs of the child shall be the basis for a decision to provide an enhanced maintenance payment or a services payment.~~ All requests for adoption assistance shall be supported with documentation from a licensed professional. Failure to provide written supporting documentation from a licensed professional will result in denial of a request for adoption assistance or an amendment to an adoption assistance agreement;

~~3. The uniform rate assessment tool shall be administered pursuant to 22VAC40-221-20; and~~

~~3. Enhanced maintenance payments shall be documented in an~~ 4. The adoption assistance payment is documented in an adoption assistance agreement or an adoption assistance agreement addendum if an adoption assistance agreement existed at the time of the request for an assessment of the child's need for additional daily supervision.

## **22VAC40-221-80. Post-finalized kinship guardianship.**

Kinship guardianship assistance payments that are based in whole or in part on a child's need for additional daily supervision shall be made available to a relative custodian after

custody is awarded by the court to the relative custodian if all of the following criteria are met:

1. A valid kinship guardianship agreement that complies with the requirements of § 63.2-1305 of the Code of Virginia exists;

2. The relative custodian has submitted a written request to amend the kinship guardianship assistance agreement;

3. The documented needs of the child have been assessed using the uniform rate assessment tool, and based on that assessment, it is necessary to amend the kinship guardianship assistance agreement concerning additional daily supervision; and

4. Any change to the kinship guardianship assistance agreement has been documented in a kinship guardianship assistance agreement addendum.

VA.R. Doc. No. R18-5241; Filed April 13, 2021, 12:52 p.m.

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# GUIDANCE DOCUMENTS

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## PUBLIC COMMENT OPPORTUNITY

Pursuant to § 2.2-4002.1 of the Code of Virginia, a certified guidance document is subject to a 30-day public comment period after publication in the Virginia Register of Regulations and prior to the guidance document's effective date. During the public comment period, comments may be made through the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) or sent to the agency contact. Under subsection C of § 2.2-4002.1, the effective date of the guidance document may be delayed for an additional period. The guidance document may also be withdrawn.

The following guidance documents have been submitted for publication by the listed agencies for a public comment period. Online users of this issue of the Virginia Register of Regulations may click on the name of a guidance document to access it. Guidance documents are also available on the Virginia Regulatory Town Hall (<http://www.townhall.virginia.gov>) or from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, Richmond, Virginia 23219.

### STATE AIR POLLUTION CONTROL BOARD

Title of Document: [Air Permit Guidance for Air Curtain Incinerators](#).

Public Comment Deadline: June 9, 2021.

Effective Date: June 10, 2021.

Agency Contact: Patrick Corbett, Department of Environmental Quality, 1111 East Main Street, Suite 1400, Richmond, VA 23219, telephone (804) 698-4016, or email [patrick.corbett@deq.virginia.gov](mailto:patrick.corbett@deq.virginia.gov).

### STATE BOARD OF EDUCATION

Title of Document: [Guidelines for the Neighborhood Assistance Act Tax Credit Program for Education](#).

Public Comment Deadline: June 9, 2021.

Effective Date: June 10, 2021.

Agency Contact: Alex Mattera, Tax Credit Programs Coordinator, Department of Education, 101 North 14th Street, Richmond, VA 23219, telephone (804) 225-3375, or email [alex.mattera@doe.virginia.gov](mailto:alex.mattera@doe.virginia.gov).

### DEPARTMENT OF ENVIRONMENTAL QUALITY

Title of Document: [Guidelines for the Virginia Litter Prevention and Recycling Grants](#).

Public Comment Deadline: June 9, 2021.

Effective Date: June 10, 2021.

Agency Contact: Sanjay Thirunagari, Program Manager, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4193, or email [sanjay.thirunagari@deq.virginia.gov](mailto:sanjay.thirunagari@deq.virginia.gov).

### STATE BOARD OF HEALTH

Title of Document: [Triennial Audit Requirement for Hospices and Home Care Organizations](#).

Public Comment Deadline: June 9, 2021.

Effective Date: June 10, 2021.

Agency Contact: Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, 9960 Mayland Drive, Suite 401, Richmond, VA 23233, telephone (804) 367-2102, or email [regulatorycomment@vdh.virginia.gov](mailto:regulatorycomment@vdh.virginia.gov).

### DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Title of Document: [Dental Coverage for Medicaid Enrolled Adults \(21 years of age and older\)](#).

Public Comment Deadline: June 9, 2021.

Effective Date: June 10, 2021.

Agency Contact: Emily McClellan, Policy and Research, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-6043, or email [emily.mcclellan@dmass.virginia.gov](mailto:emily.mcclellan@dmass.virginia.gov).

### DEPARTMENT OF MOTOR VEHICLES

Title of Document: [Home-Schooled In-Car Driver Education Information Sheet](#).

Public Comment Deadline: June 9, 2021.

Effective Date: June 10, 2021.

Agency Contact: Melissa K. Velazquez, Legislative Manager, Department of Motor Vehicles, 2300 West Broad Street, Richmond, VA 23220, telephone (804) 367-1844, or email [melissa.velazquez@dmv.virginia.gov](mailto:melissa.velazquez@dmv.virginia.gov).

### SAFETY AND HEALTH CODES BOARD

Title of Document: [Consultation Policies and Procedures Manual](#).

Public Comment Deadline: June 9, 2021.

Effective Date: June 10, 2021.

Agency Contact: Holly Trice, Attorney, Department of Labor and Industry, Main Street Centre, 600 East Main Street, Richmond, VA 23219, telephone (804) 786-2641, or email [holly.trice@doli.virginia.gov](mailto:holly.trice@doli.virginia.gov).

# GENERAL NOTICES

## COMMISSION ON LOCAL GOVERNMENT

### Schedule for the Assessment of State and Federal Mandates on Local Governments

Pursuant to the provisions of §§ 2.2-613 and 15.2-2903 of the Code of Virginia, the following schedule, established by the Commission on Local Government and approved by Secretary of Commerce and Trade R. Brian Ball and Governor Ralph S. Northam, represents the timetable that the listed executive agencies will follow in conducting assessments of certain state and federal mandates that they administer that are imposed on local governments. Such mandates are new (in effect for at least 24 months), newly identified, or have been significantly altered as to warrant a reassessment of the mandate (and have

been in effect for 24 months). In conducting these assessments, agencies will follow the process established by Executive Order 58, which became effective October 11, 2007. These mandates are abstracted in the Catalog of State and Federal Mandates on Local Governments published by the Commission on Local Government.

For further information contact Cody Anderson, Legislative Affairs and Boards Coordinator, Commission on Local Government, email [cody.anderson@dhcd.virginia.gov](mailto:cody.anderson@dhcd.virginia.gov), or telephone (804) 371-7054 or visit the commission's website at [www.dhcd.virginia.gov](http://www.dhcd.virginia.gov).

Approved by the Commission on March 25, 2021

#### STATE AND FEDERAL MANDATES ON LOCAL GOVERNMENTS

Approved Schedule of Assessment Periods – July 2021 through June 2022

For Executive Agency Assessment of Cataloged Mandates

AGENCY Mandate Short Title	CATALOG NUMBER	ASSESSMENT PERIOD
AUDITOR OF PUBLIC ACCOUNTS		
Annual Audit	LEG.APA002	03/01/22 to 05/31/22
TAXATION, DEPARTMENT OF		
Real Property Tax Exemption or Deferrals for the Elderly and Disabled	SFIN.TAX020	08/01/21 to 10/31/21
Mobile Food Unit License Tax Exemption	SFIN.TAX022	08/01/21 to 10/31/21
BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES, DEPARTMENT OF		
Data Collection on Children and Adolescents	SHHR.DBHDS016	07/01/21 to 08/31/21
SOCIAL SERVICES, DEPARTMENT OF		
Annual Credit Checks and Security Freeze for Children in Foster Care	SHHR.DSS075	09/01/21 to 11/30/21
EDUCATION, DEPARTMENT OF		
Minimum Standards for New Construction and Renovation of School Facilities	SOE.DOE032	03/01/22 to 05/31/22
School Crisis, Emergency Management, and Medical Emergency Response Plan	SOE.DOE090	03/01/22 to 05/31/22
Parents' Right to Review Anti-Bullying or Suicide Prevention AV Materials	SOE.DOE161	03/01/22 to 05/31/22
Electronic Room Partitions	SOE.DOE162	03/01/22 to 05/31/22
Modernization of Public School Buildings	SOE.DOE163	03/01/22 to 05/31/22
Safety Training for School Administrator	SOE.DOE164	03/01/22 to 05/31/22

JUVENILE JUSTICE, DEPARTMENT OF		
Intake Officer Information Actions on Complaints	SPSHS.DJJ011	07/01/21 to 09/30/21
Intake Officer Action on Complaint Alleging Child in Need of Supervision	SPSHS.DJJ012	09/01/21 to 11/30/21
Intake Officer Notification to Commonwealth's Attorney	SPSHS.DJJ013	11/01/21 to 12/31/21
Intake Officer Report to School Superintendents	SPSHS.DJJ014	01/01/22 to 03/31/22
Intake Officer Response Regarding Detention Orders	SPSHS.DJJ016	03/01/22 to 05/31/22

**DEPARTMENT OF MEDICAL ASSISTANCE SERVICES**

**Intent to Amend the Virginia State Plan for Medical Assistance Pursuant to § 1902(a)(13) of the Social Security Act (USC § 1396a(a)(13)) - Create Additional Hospital Supplemental Payments**

The Virginia Department of Medical Assistance Services (DMAS) hereby affords the public notice of its intention to amend the Virginia State Plan for Medical Assistance to provide for changes to the Methods and Standards for Establishing Payment Rates — Inpatient Hospital, 12VAC30-70.

This notice is intended to satisfy the requirements of 42 CFR 447.205 and of § 1902(a)(13) of the Social Security Act, 42 USC § 1396a(a)(13). A copy of this notice is available for public review from Emily McClellan at the contact information provided at the end of this notice.

DMAS is specifically soliciting input from stakeholders, providers, and beneficiaries on the potential impact of the proposed changes discussed in this notice. Comments or inquiries may be submitted, in writing, within 30 days of this notice publication to Emily McClellan and such comments are available for review at the same address. Comments may also be submitted, in writing, on the Virginia Regulatory Town Hall public comment forum at <https://townhall.virginia.gov/L/generalnotice.cfm>.

In accordance with the 2021 Appropriations Act, Item 313 ZZ, DMAS will be making the following changes:

Methods and Standards for Establishing Payment Rates-Inpatient Hospital (12VAC30-70)

The state plan is being revised to create additional hospital supplemental payments for freestanding children's hospitals with greater than 50% Medicaid utilization in 2009 to replace payments that have been reduced due to the federal regulation on the definition of uncompensated care costs effective June 2, 2017. These new payments shall equal what would have been paid to the freestanding children's hospitals under the current disproportionate share hospital (DSH) formula without regard to the uncompensated care cost limit. These additional hospital

supplemental payments shall take precedence over supplemental payments for private acute care hospitals. If the federal regulation is voided, DMAS shall continue DSH payments to the impacted hospitals and adjust the additional hospital supplemental payments authorized in this paragraph accordingly.

There is no expected increase or decrease in annual aggregate expenditures related to this change.

Contact Information: Emily McClellan, Regulatory Manager, Division of Policy and Research, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680.

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**Intent to Amend the Virginia State Plan for Medical Assistance Pursuant to § 1902(a)(13) of the Social Security Act (USC §1396a(a)(13)) - Remove Prohibition on Consumer-Directed Overtime**

The Virginia Department of Medical Assistance Services (DMAS) hereby affords the public notice of its intention to amend the Virginia State Plan for Medical Assistance to provide for changes to the Methods and Standards for Establishing Payment Rates — Other Types of Care (12VAC30-80).

This notice is intended to satisfy the requirements of 42 CFR 447.205 and of § 1902(a)(13) of the Social Security Act, 42 USC § 1396a(a)(13). A copy of this notice is available for public review from Emily McClellan at the contact information provided at the end of this notice.

This notice is available for public review on the Virginia Regulatory Town Hall public comment forum at <https://townhall.virginia.gov/L/generalnotice.cfm>.

In accordance with the 2020 Special Session, Item 313 ZZZZ, DMAS will be removing the prohibition on overtime in consumer-directed services provided under the Early and Periodic Diagnostic and Treatment (EPSDT) Program.

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## General Notices

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The total cost to remove the prohibition on overtime in the Commonwealth Coordinated Care Plus (CCC+) Waiver, the home and community based waivers, and EPSDT is \$5,213,801 in state general funds and \$6,009,750 in federal funds in federal fiscal year 2021.

**Contact Information:** Emily McClellan, Regulatory Manager, Division of Policy and Research, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680.

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### **Draft Community Mental Health Services Provider Manual Available for Review**

The draft Community Mental Health Services Manual Chapters II, IV, V, and VI and Appendices C, D, and E are now available on the Magellan website at <https://www.magellanoofvirginia.com/for-providers/provider-tools/dmas-manuals-posted-for-public-comment/> for public comment until May 16, 2021.

**Contact Information:** Emily McClellan, Regulatory Manager, Division of Policy and Research, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680.

### **BOARD OF PHARMACY**

#### **Notice on Scheduling Chemicals in Schedule I**

Pursuant to § 54.1-3443 D of the Code of Virginia, the Board of Pharmacy is giving notice of a public hearing to consider placement of chemical substances in Schedule I of the Drug Control Act. The virtual public hearing will be conducted at 9:05 a.m. on June 4, 2021. Instructions will be included in the agenda for the board meeting, also on June 4. Public comment may also be submitted electronically or in writing prior to June 4 to Caroline Juran, Executive Director, Board of Pharmacy via email at [caroline.juran@dhp.virginia.gov](mailto:caroline.juran@dhp.virginia.gov).

Pursuant to article § 54.1-3443 D of the Code of Virginia, The Department of Forensic Science (DFS) has identified three compounds for recommended inclusion into Schedule I of the Drug Control Act.

Based on its chemical structure, the following compound is expected to have hallucinogenic properties. Compounds of this type have been placed in Schedule I (subdivision 3 of § 54.1-3446 of the Code of Virginia) in previous legislative sessions.

1. 4-chloro-alpha-methylaminobutiophenone (other name: 4-chloro Buphedrone), its salts, isomers (optical, position, and geometric), and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

The following compounds are classified as cannabimimetic agents. Compounds of this type have been placed in Schedule I (subdivision 6 of § 54.1-3446 of the Code of Virginia) in previous legislative sessions.

1. ethyl-2-[1-(5-fluoropentyl)-1H-indazole-3-carboxamido]-3-methylbutanoate (other names: 5-fluoro-EMB-PINACA, 5F-AEB), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

2. N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(pent-4-enyl)indazole-3-carboxamide (other name: ADB-4en-PINACA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

**Contact Information:** Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4456, FAX (804) 527-4472.

### **STATE WATER CONTROL BOARD**

#### **Proposed Enforcement Action for Empire Services Inc.**

An enforcement action has been proposed for Empire Services Inc. locations in Chesapeake, James City County (Toano), Isle of Wight County (Carrollton), Norfolk, Portsmouth, and Suffolk for violations of State Water Control Law. A description of the proposed action is available at the Department of Environmental Quality office listed or online at [www.deq.virginia.gov](http://www.deq.virginia.gov). The staff contact person will accept comments by email, fax, or postal mail from May 10, 2021, to June 9, 2021.

**Contact Information:** John Brandt, Department of Environmental Quality, Tidewater Regional Office, 5636 Southern Boulevard, Virginia Beach, VA 23462, FAX (804) 698-4178, or email [john.brandt@deq.virginia.gov](mailto:john.brandt@deq.virginia.gov).

#### **Proposed Enforcement Action for MetroDuct Systems VA LLC**

An enforcement action has been proposed for MetroDuct Systems VA LLC for violations of the State Water Control Law and regulations at various linear construction project locations along University Boulevard, Hornbaker Road, and Nokesville Road, near the intersection of Prince William County Parkway (Route 234), in Manassas and Prince William County, Virginia. A description of the proposed action is available at the Department of Environmental Quality office listed or at <https://www.deq.virginia.gov/permits-regulations/public-notices/enforcement-orders>. The staff contact person will accept comments by email or postal mail from May 11, 2021, through June 10, 2021.

Contact Information: Jim Datko, Regional Enforcement Specialist Senior, Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193, or email [james.datko@deq.virginia.gov](mailto:james.datko@deq.virginia.gov).

### **Public Comment Opportunity and Public Meeting for a TMDL Implementation Plan for Peak Creek watersheds in Pulaski County**

The Department of Environmental Quality (DEQ) seeks oral and written comments from interested persons on the development of a total maximum daily load (TMDL) implementation plan (IP) for bacteria TMDLs for the Peak Creek watersheds in Pulaski County. Peak Creek flows into Claytor Lake, a reservoir on the New River. These streams were listed as impaired on the Virginia's § 303(d) TMDL Priority List and Report due to violations of the state's water quality standard for bacteria. The following are the names of the bacteria "impaired" streams, the length of the impaired segment, and the reason for the impairment: Peak Creek, 1.83 miles, bacteria; Peak Creek, 1.66 miles, bacteria; Peak Creek, 0.51 miles, bacteria; Peak Creek, 0.39 miles, bacteria; Peak Creek, 2.10 miles, bacteria; Peak Creek, 2.10 miles, bacteria; Tract Fork, 1.24 miles, bacteria. The TMDL study for these stream impairments was completed in April 2004 and revised in August 2004 and can be found in the Fecal Bacteria and General Standard Total Maximum Daily Load Development for Peak Creek report. The report is available on request by contacting James MoneyMaker at [james.moneymaker@deq.virginia.gov](mailto:james.moneymaker@deq.virginia.gov).

Section 62.1-44.19:7 C of the Code of Virginia requires the development of an IP for approved TMDLs. The IP should provide measurable goals and the date of expected achievement of water quality objectives. The IP should also include the corrective actions needed and their associated costs, benefits, and environmental impacts.

Given the existing State of Emergency related to the COVID-19 pandemic, this meeting will be held entirely virtually. The URL to register for the virtual meeting is provided at the end of this notice. At this meeting, development of the IP to restore water quality in the Peak Creek watershed will be discussed, and citizens will learn how they can be part of the water quality improvement process.

Peak Creek TMDL Implementation Plan First Public Meeting: Tuesday, May 11, 2021, from 6 p.m. to 8 p.m.

This meeting will be held virtually. Please register in advance using the link:

Registration URL: <https://attendee.gotowebinar.com/register/3935635215561379343>

Webinar ID: 860-228-419

For technical assistance during the meeting call or email Lucy Smith, telephone (540) 562-6718, or email [lucy.smith@deq.virginia.gov](mailto:lucy.smith@deq.virginia.gov).

Written comments are accepted by email, fax, or postal mail. The 30-day public comment period on the information presented at the meeting will begin on May 11, 2021, and end June 11, 2021. Questions or information requests should be addressed to Karen Kline with Virginia Tech Biological Systems Engineering. Written comments and inquiries should include the name, address, and telephone number of the person submitting the comments and should be sent to Karen Kline, Virginia Tech Biological Systems Engineering, 400 Seitz Hall, Virginia Tech 155 Ag Quad Lane, Blacksburg, VA 24061, telephone (540) 231-0094, or email [klinek@vt.edu](mailto:klinek@vt.edu).

In the event that the Governor's State of Emergency is lifted, the meeting will be held on the same date and time at Pulaski Municipal Building, 42 1st Street, NW, Second Floor, Pulaski, VA.

Contact Information: Karen Kline, Virginia Tech Biological Systems Engineering, 400 Seitz Hall, Virginia Tech 155 Ag Quad Lane, Blacksburg, Virginia 24061, telephone (540) 231-0094, or email [klinek@vt.edu](mailto:klinek@vt.edu).

### **Public Comment Opportunity and Public Meeting for Sand Branch TMDL Development in Loudoun and Fairfax Counties**

The Department of Environmental Quality (DEQ) seeks written and oral comments from interested persons on the benthic stressor analysis report and the pollutants for which total maximum daily loads (TMDLs) will be developed to address an aquatic life use impairment for Sand Branch in Loudoun and Fairfax Counties. Biological monitoring data collected by the Virginia Department of Environmental Quality (DEQ) have shown that Sand Branch does not meet Virginia's water quality standard for aquatic life use due to poor health in the benthic biological communities. The report identifies the most probable stressor contributing to the poor health of the benthic community and which of those pollutants are considered for TMDL development.

Section 303(d) of the Clean Water Act and § 62.1-44.19:7 C of the State Water Control Law require DEQ to develop TMDLs for pollutants responsible for each impaired water contained in Virginia's § 303(d) TMDL Priority List and Report. A component of a TMDL is the wasteload allocation (WLA); therefore, this notice is provided pursuant to § 2.2-4006 A 14 of the Administrative Process Act for any future adoption of the TMDL WLAs.

Given the existing State of Emergency related to the COVID-19 pandemic, this meeting will be held entirely virtually. A computer or a telephone are necessary to participate virtually. All meeting attendees are encouraged to access the meeting using a computer to view the meeting visuals. Attendees may

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## General Notices

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also use a telephone for audio and a computer for visual to avoid possible interruptions in computer audio. Although the use of a telephone for audio only participation is possible, since the meeting will rely on visuals, audio only participation is discouraged. The webinar link to register for the virtual meeting is provided at the end of this notice. Once registered for the meeting, registrants will receive an email with the URL and telephone information to participate in the meeting. If meeting attendees experience any interruption in the meeting broadcast, they should call the technical support line that is also provided at the end of this notice.

The second public meeting on the development of the TMDL to address the General Standard (Benthics) for this segment will be held on Wednesday, May 26, 2021, from 4:30 p.m. to 6 p.m. To register for this virtual meeting and to receive access information, use this link:

<https://attendee.gotowebinar.com/register/1950914473035055886>

For technical assistance during the meeting call (703) 583-3906

In the event that the Governor's State of Emergency is lifted, the meeting will be held on the same date and time at DEQ Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193.

The public comment period will begin May 27, 2021, and end June 28, 2021.

Information on the development of the TMDLs for the impairments is available upon request. Questions or information requests should be addressed to the DEQ contact person listed. Please note, all written comments should include the name, address, and telephone number of the person submitting the comments and should be sent to the DEQ contact person listed.

**Contact Information:** Sarah Sivers, Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193, telephone (703) 583-3898, FAX (804) 698-4178, or email [sarah.sivers@deq.virginia.gov](mailto:sarah.sivers@deq.virginia.gov).

### VIRGINIA CODE COMMISSION

#### Notice to State Agencies

**Contact Information:** *Mailing Address:* Virginia Code Commission, Pocahontas Building, 900 East Main Street, 8th Floor, Richmond, VA 23219; *Telephone:* (804) 698-1810; *Email:* [varegs@dls.virginia.gov](mailto: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 <https://commonwealthcalendar.virginia.gov>.

**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/cumultab.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.

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# ERRATA

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## BOARD OF HOUSING AND COMMUNITY DEVELOPMENT

Title of Regulation: **13VAC5-51. Virginia Statewide Fire Prevention Code.**

Publication: 37:14 VA.R. 1718-1880 March 1, 2021.

Correction to Final Regulation:

Page 1853, 13VAC5-51-150 P, 5605.5,

line 5, after "section" insert " [ ¸"

line 6, beginning of line, before "~~Exception:~~" delete " [ "

Page 1876, 13VAC5-51-154.8, catchline, after **13VAC5-51-154.8.** delete "8."

Page 1877, 13VAC5-51-154.9, catchline, after **13VAC5-51-154.9.** delete "9."

VA.R. Doc. No. R19-5886; Filed April 27, 2021, 3:05 p.m.

## STATE BOARD OF SOCIAL SERVICES

Title of Regulation: **22VAC40-185. Standards for Licensed Child Day Centers.**

Publication: 37:17 VA.R. 2457-2480 April 12, 2021.

Correction to Final Regulation:

Page 2471, 22VAC40-185-320 A, line 1, after "shall" strike "be"

VA.R. Doc. No. R16-4596; Filed April 21, 2021, 9:07 a.m.

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# Errata

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