VIRGINIA REGISTER OF REGULATIONS

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THE VIRGINIA REGISTER INFORMATION PAGE

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

ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS

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 inconsequen111tial 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 https://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.

PUBLICATION SCHEDULE AND DEADLINES

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

January 2025 through January 2026

Volume: Issue	Material Submitted By Noon*	Will Be Published On
41:11	December 23, 2024 **(Monday)**	January 13, 2025
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42:12	January 6, 2026 **(Tuesday)**	January 26, 2026

*Filing deadlines are Wednesdays unless otherwise specified.

TITLE 4. CONSERVATION AND NATURAL RESOURCES

MARINE RESOURCES COMMISSION

Agency Decision

Title of Regulation: **4VAC20-1260. Pertaining to River Herring.**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Name of Petitioner: Robert Allen, Coastal Conservation Association Virginia.

Nature of Petitioner's Request: The petitioner's request is as follows: "This petition requests rulemaking by the Virginia Marine Resources Commission (VMRC) for a managed recreational Hickory Shad fishery in Chesapeake Bay waters and coastal rivers and their tributaries within Virginia with a daily creel limit informed by and adjusted based on best available data. The requested regulation would be part of existing VMRC fisheries management for Alosine species and is needed to conserve the Hickory Shad stock by replacing unrestricted recreational harvesting with a controlled fishery. Unrestricted take exposes this species to overharvesting and diminishes the contribution of Virginia coastal river spawners to species abundance.

Petition objectives are to conserve the Hickory Shad species in Virginia's Chesapeake Bay waters and tributaries, sustain its contribution to species abundance of the East Coast stock, maintain a quality recreational fishery, and support shad and herring restoration plans.

The proposed fishery management action is for nonindigenous recreational fishing only. It would not alter commercial fishing regulations or the fishing rights of Native Americans who habitually reside on an Indian reservation or are members of a Virginia-recognized tribe who reside in the Commonwealth."

Agency Decision: Request denied.

Statement of Reason for Decision:

Environmental Impact:

1. There is no evidence of a need for fisheries management measures at this time.

2. Hickory shad differ from American shad in life history traits, which means their populations are not subject to the same pressures.

3. Anecdotal data from the Virginia Institute of Marine Science Alosine Monitoring Program suggests a relatively consistent run of hickory shad through time.

4. Beginning in 2025, biological data for all individual hickory shad encountered in the Alosine Monitoring Program will be collected to develop a time series for an index of abundance. If this index shows negative trends on the spawning stock, appropriate management measures could be implemented at that time.

Economic Considerations:

1. The petition has the potential to create unintended economic and social consequences for the end user of these fisheries products.

2. A comprehensive economic impact assessment would need to be considered to determine the impact of management measures to the communities that harvest hickory shad.

Agency Contact: Zachary Widgeon, Regulatory Coordinator, Marine Resources Commission, 380 Fenwick Road, Building 96, Fort Monroe, VA 23651, telephone (757) 414-0713, or email zachary.widgeon@mrc.virginia.gov.

VA.R. Doc. No. PFR25-02; Filed July 29, 2024, 9:54 a.m.

TITLE 9. ENVIRONMENT

STATE WATER CONTROL BOARD

Agency Decision

Title of Regulation: **9VAC25. None specified.**

Statutory Authority: §§ 2.2-4007.02 and 2.1-44.33 of the Code of Virginia.

Name of Petitioner: Robert Hodson.

Nature of Petitioner's Request: On September 30, 2024, the Department of Environmental Quality (DEQ) received Robert Hodson's petition to initiate a new regulation governing ocean-class passenger cruise ships. Specifically, this petition requests that DEQ and the Commonwealth develop a regulation for cruise ships in Virginia waters as follows: (i) mandate the use of low-sulfur fuel; (ii) ban the use of exhaust gas cleaning systems (open-loop scrubbers); (iii) require the use of shore power; (iv) restrict the dumping of graywater, blackwater, and other environmentally detrimental waste products; and (v) require incident reporting and independent monitoring to ensure compliance.

A copy of the full petition is available from the agency contact.

Agency Decision: Request denied.

Statement of Reason for Decision: At the December 4, 2024, meeting of the State Water Control Board, staff presented the board with information on the petition and a summary of the comments received on the petition during the public comment period. The board voted to not initiate a rulemaking in response to the petition. The rationale for denying the petition is as follows:

Sewage discharges from cruise ships are currently regulated by federal and state regulation under the U.S. Environmental Protection Agency (EPA) Vessel General Permit (VGP), 40 CFR 140, and Regulations Governing the Discharge of Sewage and Other Wastes from Boats (9VAC25-71). The state regulation includes applicable monitoring and reporting requirements, and entities are subject to federal enforcement actions for noncompliance. EPA has adopted additional requirements, effective October 2024, pursuant to the Vessel Incidental Discharge Act (VIDA) (40 CFR Part 139), which, when implemented by the United States Coast Guard (USCG), will limit the board's ability to adopt more stringent requirements.

State regulation prohibits the discharge of untreated sewage from vessels with installed toilets and marine sanitation devices and requires that sewage and other wastes from self-contained portable toilets or other containment devices be removed at pump-out facilities or treated at Virginia Department of Health-approved facilities. In addition, state regulation prohibits the discharge of "other wastes" from any vessel into state water and designates and sets requirements for No Discharge Zones (NDZs), including five established in regulation. The USCG, the Virginia Marine Police, and the Virginia Department of Wildlife Resources are the state enforcing authorities for Virginia's NDZs; however, any law-enforcement officer in Virginia has the authority to enforce an NDZ.

At the national level, EPA's VGP, which regulates incidental discharges from cruise ships and other vessels, remains enacted while EPA's superseding VIDA regulations are being developed for implementation in two years. For example, EPA sets effluent limits and analytical monitoring for discharge categories, including exhaust gas scrubber wastewater discharges, under the VGP for pollutants such as pH, polycyclic aromatic hydrocarbons, turbidity, oils, nitrates and nitrites, and metals. Additionally, EPA and the USCG regulate the discharge of sewage from vessels.

Furthermore, cruise ships are subject to national and international law and treaty, and changes to pollution controls are continually being pursued through those venues. EPA participates on the United States delegation to the International Maritime Organization (IMO), which is part of the United Nations. The Marine Environment Protection Committee is a group of member states within IMO that works on the prevention of marine pollution.

The board has limited ability to go beyond these existing national and international legal requirements apart from applying to EPA for additional NDZs for waters requiring greater environmental protection. The International Convention for the Prevention of Pollution from Ships and EPA's VGP, as well as the forthcoming VIDA regulations, preempt state laws and regulations, but provide for a state to apply for NDZs.

The federal Clean Water Act (33 USC § 1251 et seq.) and the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia) provide for a process to establish an NDZ if certain criteria are met. However, the State Water Control Law limits the board's authority to adopt regulations to establish NDZs unless "premised on the improvement of impaired tidal creeks" (§ 62.1-44.33 B of the Code of Virginia).

Agency Contact: William K. Norris, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 350-2743, or email william.norris@deq.virginia.gov.

VA.R. Doc. No. PFR25-11; Filed October 01, 2024, 3:44 p.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF PSYCHOLOGY

Agency Decision

Title of Regulation: **18VAC125-20. Regulations Governing the Practice of Psychology.**

Statutory Authority: §§ 54.1-2400 and 54.1-3605 of the Code of Virginia.

Name of Petitioner: Tisha N. Juggins.

Nature of Petitioner's Request: The petitioner requests that the Board of Psychology amend 18VAC125-20-80 to eliminate the requirement to pass the national examination within two years immediately preceding application for licensure and to place the score of 400 in regulation as a passing score.

Agency Decision: Request denied.

Statement of Reason for Decision: At its meeting on December 3, 2024, the board voted to deny the petition. The board does not currently list a specific passing score in regulation and declined to add such a score to regulatory language given the difficulty of changing regulations. The board also expressed concerns related to the mobility of psychologists licensed in Virginia should a passing score of 400 be used or placed in regulation. The board additionally was not aware of any evidence on which to base a passing score of 400. The board did not know whether removing the requirement to take the exam within two years of application would affect other portions of regulations or the application process in a negative way. Although the board denied the petition, the board recognized the concerns that led to the petition and will review the request at a future regulatory committee meeting to determine the bases for the existing passing score and the requirement to take the exam within two years. Should the regulatory committee determine that a regulatory change may be needed, it will recommend that action to the board.

Agency Contact: Jaime Hoyle, Executive Director, Board of Psychology, 9960 Mayland Drive, Suite 300, Henrico, VA 23233, telephone (804) 367-4406, or email jaime.hoyle@dhp.virginia.gov.

VA.R. Doc. No. PFR24-42; Filed July 18, 2024, 9:59 a.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Education conducted a periodic review and a small business impact review of **8VAC20-40, Regulations Governing Educational Services for Gifted Students**, and determined that this regulation should be retained as is. The board is publishing its report of findings dated December 3, 2024, to support this decision.

This regulation is necessary for the protection of public health, safety, and welfare. The regulation outlines the gifted education components required by the Standards of Quality and § 22.1-18.1 of the Code of Virginia. The regulation is clearly written and easily understandable.

There is a continued need for this regulation. The Department of Education received multiple comments asking the board to retain the regulation as is and other comments asking the board to make future amendments. The complexity of the regulation may call for amendments in the future. Derived from VR270-01-0002, the regulation became effective June 25, 1986. Amendments to this regulation were made in 1995, 2010, and 2012. The board withdrew a Notice of Intended Regulatory Action from 2019, which resulted from the 2019 periodic review, but may consider future amendments or revisions to the regulation. Department staff expect that retaining the regulation as is will have no impact on small businesses.

Contact Information: Jim Chapman, Director of Board Relations, Department of Education, James Monroe Building, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 750-8750, or email jim.chapman@doe.virginia.gov.

Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Education conducted a periodic review and a small business impact review of **8VAC20-70, Regulations Governing Pupil Transportation**, and determined that this regulation should be amended. The board is publishing its report of findings dated December 3, 2024, to support this decision.

This regulation seeks to ensure that pupils are safely transported to and from school and school sponsored activities. It is necessary for the protection of public health, safety, and welfare and it is clearly written and easily understandable. The regulation will be amended to include minor updates.

Ensuring the safe transportation of pupils is essential and there is a continued need for this regulation. No comments have been received at this time and the department is unaware of any complaints concerning the chapter. The regulation is not overly complicated. There is not significant overlap between this chapter and state or federal law, and state law requires that the board promulgate regulations regarding the transportation of students. The regulation was derived from VR270-01-0006 and became effective February 18, 1987. This regulation was amended in 1988, 1990, 1994, 2004, and 2012. The regulation does not regulate or have any economic impact on small business.

Contact Information: Jim Chapman, Director of Board Relations, Department of Education, James Monroe Building, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 750-8750, or email jim.chapman@doe.virginia.gov.

Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Education conducted a periodic review and a small business impact review of **8VAC20-100, Regulations Governing Literary Loan Applications in Virginia**, and determined that this regulation should be repealed. The board is publishing its report of findings dated December 3, 2024, to support this decision.

This regulation is not necessary for the protection of public health, safety, and welfare, nor is it required to maintain regulatory language pursuant to § 2.2-4002 B 4 of the Code of Virginia. The periodic review found that there is no longer a need for this regulation as the department is not required to maintain regulatory language pursuant to § 2.2-4002 B 4.

There is no longer a continued need for this regulation. No comment was received during the periodic review. The regulation is not overly complex. The regulation was derived from VR270-01-0009 and became effective March 30, 1988; it was last amended in 1995. It is not expected that the department's decision to repeal the chapter will have an impact on small businesses.

Contact Information: Jim Chapman, Director of Board Relations, Department of Education, James Monroe Building, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 750-8750, or email jim.chapman@doe.virginia.gov.

Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Education conducted a periodic review and a small business impact review of **8VAC20-120, Regulations Governing Career and Technical Education**, and determined that this regulation should be retained as is. The board is publishing its report of findings dated December 3, 2024, to support this decision.

The regulation is necessary for the protection of public health, safety, and welfare. Career and technical education builds

necessary life skills and is required by both state and federal law. The regulation is clearly written and easily understandable.

There is a continuing need for this regulation. The department has not received any comments and is not aware of any complaints concerning this regulation. The regulation is not overly complex and can be understood by regulants. There is not excessive overlap between this regulation and state or federal law. On August 19, 1987, the regulation was derived from VR270-01-0011, and later amended in 2002 and 2012. The regulation is consistent with applicable law and will have no economic impact on small businesses.

Contact Information: Jim Chapman, Director of Board Relations, Department of Education, James Monroe Building, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 750-8750, or email jim.chapman@doe.virginia.gov.

Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Education conducted a periodic review and a small business impact review of **8VAC20-281, Regulations Governing Jointly Owned and Operated Schools and Jointly Operated Programs**, and determined that this regulation should be retained as is. The board is publishing its report of findings dated December 3, 2024, to support this decision.

The regulation is necessary for the protection of public health, safety, and welfare. The regulation is required by § 22.1-26 of the Code of Virginia and seeks to outline requirements for the operation of joint and regional schools. The regulation is clearly written and understandable.

There is a continued need for the regulation due to programs that are in current operation. All comments received during the review were in full support of retaining the regulation as is. Chapter 4 (§ 22.1-25 et seq.) of Title 22.1 of the Code of Virginia mandates the board to promulgate regulations concerning school divisions, joint schools, and contracts between school divisions. The statutory requirements establish the continued need for the regulation. The board provides protection to the safety and welfare of the citizens of the Commonwealth by ensuring that two or more school boards may, with the consent of the board, establish joint or regional schools, including regional public charter schools as defined in § 22.1-212.5 of the Code of Virginia, comprehensive schools offering all-day academic programs and career and technical education, and regional residential charter schools for at-risk pupils, for the use of their respective school divisions and may jointly purchase, take, hold, lease, convey, and condemn both real and personal property for such joint, regional, or regional public charter schools. Based upon the comments received during the public comment periods, there does not appear to be a reason to repeal or amend the regulatory chapter. The regulation is clearly written, easy to understand, and does not overlap, duplicate, or conflict with federal or state law.

The regulation was enacted October 19, 2009, and since that time, the regulation has not been evaluated on the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. The decision by the board to retain this regulation as is is consistent with applicable law and will minimize the economic impact of the regulation on small businesses.

Contact Information: Jim Chapman, Director of Board Relations, Department of Education, James Monroe Building, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 750-8750, or email jim.chapman@doe.virginia.gov.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF NURSING

Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board of Nursing conducted a periodic review and a small business impact review of **18VAC90-27, Regulations for Nursing Education Programs,** and determined that this regulation should be amended. The Notice of Intended Regulatory Action, which is published in this issue of the Virginia Register, serves as the reports of findings.

Contact Information: Claire Morris, RN, Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300, Henrico, VA 23233, telephone (804) 367-4665, or email claire.morris@dhp.virginia.gov.

BOARD FOR WATERWORKS AND WASTEWATER WORKS OPERATORS AND ONSITE SEWAGE SYSTEM PROFESSIONALS

Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals conducted a periodic review and a small business impact review of **18VAC160-30, Waterworks and Wastewater Works Operators Licensing Regulations**, and determined that this regulation should be retained as is. The board is publishing its report of findings dated October 25, 2024, to support this decision.

The regulation contains the requirements for (i) obtaining a license or training provider or course approval, (ii) renewal and

reinstatement of licenses, (iii) standards of practice and conduct, and (iv) prelicense education to ensure competence and integrity of all licensees and to administer the regulatory program in accordance with Chapters 2 (§ 54.1-200 et seq.) and 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia. The regulation is necessary for the protection of public health, safety, and welfare and is clearly written and understandable.

On October 24, 2024, the board voted to retain the regulation as is. In accordance with Executive Directive Number One (2022), the board is currently undertaking a separate action to perform a comprehensive line-by-line review of this regulation.

Sections 54.1-201 and 54.1-2301 of the Code of Virginia mandate the board to promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The board provides protection to the public welfare of the citizens of the Commonwealth by ensuring that those who receive a license from the board meet minimum requirements for education, experience, and competency in order to engage in professions related to the operation and supervision of waterworks or wastewater works.

The most recent periodic review was completed in 2021.There were no comments or complaints received during the public comment period. In the current form, the regulation is understandable and does not overlap, duplicate, or conflict with federal or state law or regulation.

Waterworks and wastewater works operator licenses are issued to individuals. These individuals do not fall within the meaning of the term small business as defined in § 2.2-4007.1 of the Code of Virginia.

Contact Information: Marjorie King, Executive Director, Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-0362, FAX (866) 350-5354, or email wastewateroper@dpor.virginia.gov.

Report of Findings

Pursuant to §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals conducted a periodic review and a small business impact review of **18VAC160-40, Onsite Sewage System Professionals Licensing Regulations**, and determined that this regulation should be retained as is. The board is publishing its report of findings dated October 25, 2024, to support this decision.

The regulation contains the requirements for (i) obtaining a license or training provider or course approval, (ii) renewal and reinstatement of licenses, (iii) standards of practice and conduct, and (iv) prelicense education to ensure competence and integrity of all licensees and to administer the regulatory program in accordance with Chapters 2 (§ 54.1-200 et seq.) and 23 (§ 54.1-2300 et seq.) of Title 54.1 of the Code of Virginia. The regulation is necessary for the protection of public health, safety, and welfare and is clearly written and understandable.

On October 24, 2024, the board voted to retain the regulation as is. In accordance with Executive Directive Number One (2022), the board is currently undertaking a separate action to perform a comprehensive line-by-line review of this regulation.

Sections 54.1-201 and 54.1-2301 of the Code of Virginia mandate the board to promulgate regulations. The continued need for the regulation is established in statute. Repeal of the regulation would remove the current public protections provided by the regulation. The board provides protection to the public welfare of the citizens of the Commonwealth by ensuring that those who receive a license from the board meet minimum requirements for education, experience, and competency in order to engage in professions related to the operation and supervision of waterworks or wastewater works.

The most recent periodic review was completed in 2021.There were no comments or complaints received during the public comment period. In the current form, the regulation is understandable and does not overlap, duplicate, or conflict with federal or state law or regulation.

Business entities that perform installation, repair, improvement, or removal of septic tanks, septic systems, and other onsite sewage disposal systems annexed to real property are subject to regulations established by the Board for Contractors as a contractor license is required to perform those functions.

The Board for Contractors requires contractors that offer and engage in this type of contracting work to have a specialty designation on the contractor license for sewage disposal systems contracting and also requires certain personnel of the contractor to be licensed as an onsite sewage system installer. Some of these business entities described may fall within the meaning of the term "small business."

Contact Information: Marjorie King, Executive Director, Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-0362, FAX (866) 350-5354, or email wastewateroper@dpor.virginia.gov.

TITLE 22. SOCIAL SERVICES

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 **22VAC40-41, Neighborhood Assistance Tax Credit Program**, and determined that this regulation should be retained as is. The board is publishing its report of findings dated November 12, 2024, to support this decision.

The purpose of the Neighborhood Assistance Tax Credit Program (NAP) is to encourage businesses, trusts, and individuals to make donations to approved § 501(c)(3) organizations for the benefit of low-income persons. In return for contributions, donors may receive tax credits equal to 65% of the donation that may be applied against a donor's state income tax liability. The benefits provided to low-income persons are necessary to protect public health and welfare. The existing regulation remains clearly and concisely written and easily understandable. The board recommends that the regulation stay in effect without change.

The regulation is necessary to ensure effective operation of the NAP, as authorized by the Code of Virginia. The regulation does not overlap or conflict with federal or state law or regulation. The use of NAP is voluntary for the neighborhood organization and business and does not have a negative impact on small business. A business can receive a state tax credit for donating to approved NAP organizations.

Contact Information: Wanda Stevenson, Neighborhood Assistance Tax Credit Program Manager, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7924, or email wanda.stevenson@dss.virginia.gov.

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 **22VAC40-901, Community Services Block Grant Program**, and determined that this regulation should be amended. The board is publishing its report of findings dated November 26, 2024, to support this decision.

This regulation is necessary in that it provides the administrative framework for the Community Services Block Grant program, which is wholly focused on the identification of community needs of individuals in poverty, and the development and delivery of programs, services, or partnerships to address those serious community and individual needs. The regulation is clearly written and understandable.

The board's recommendation is to amend the regulation to update federal Code references. The regulation is required to provide the administrative structure for the Virginia Community Action Act, which is required to receive Community Service Block Grant funds under the Community Service Block Grant Act. No comments were received during the public comment period. The regulation does not duplicate or conflict with any federal or state law. No changes in technology or economic conditions would be hindered by maintaining the current regulation. The current regulation contains no language that would create economic impact on small businesses, and no amendment that the board is considering would create economic impact on small businesses.

Contact Information: Matt Fitzgerald, Community Service Program Manager, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7088, FAX (800) 726-7088, or email matt.fitzgerald@dss.virginia.gov.

NOTICES OF INTENDED REGULATORY ACTION

TITLE 1. ADMINISTRATION

COMMISSION ON LOCAL GOVERNMENT

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Commission on Local Government intends to consider promulgating **1VAC50-30, Regulation of Procedures Concerning Fiscally Distressed Localities**. The purpose of the proposed action is to create a new chapter to implement procedures required by Chapter 426 of the 2024 Acts of Assembly, which creates new remedies to help resolve fiscal issues in localities that the Auditor of Public Accounts has identified as fiscally distressed and requires the Commission on Local Government to issue reports on any locality with fiscal distress and, in certain geographic regions, help steer localities through fiscal remediation plans with the help of an appointed emergency fiscal manager. The new regulation will establish rules for procedures before the commission and standards to guide commission reports, appointments, and decisions that are required by § 15.2-2512.1 of the Code of Virginia, including (i) setting rules for proceedings before the commission generally, (ii) establishing standards for the commission's initial report on fiscal distress in a locality, (iii) creating a process for appointing an emergency fiscal manager and approving the manager's remediation plan, and (iv) establishing requirements for implementing the remediation plan and ending commission oversight.

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

Statutory Authority: §§ 15.2-2512.1 and 15.2-2903 of the Code of Virginia.

Public Comment Deadline: March 2, 2025.

Agency Contact: LeGrand Northcutt, Senior Policy Analyst, Department of Housing and Community Development, Main Street Center, 600 East Main Street, Richmond, VA 23219, telephone (804) 310-7151, FAX (804) 371-7090, or email legrand.northcutt@dhcd.virginia.gov.

VA.R. Doc. No. R25-8048; Filed December 10, 2024, 12:08 p.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF NURSING

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Nursing intends to consider amending **18VAC90-27, Regulations for Nursing Education Programs**. The board conducted a periodic review of the regulation and held a regulatory advisory panel of stakeholders to identify needed changes in the nursing education regulation. The purpose of the proposed action is to make the changes recommended by the regulatory advisory panel, including (i) updating terminology for nurse education programs; (ii) streamlining and reorganizing requirements for faculty; (iii) clarifying the duties of faculty and staff positions; (iv) eliminating duplicative requirements; (v) eliminating overly prescriptive yet vague requirements concerning the physical environment of the nursing education program; (vi) updating curriculum requirements to reflect comments received by the board and further promote readiness for entry to practice; (vii) making general changes to reflect the use of telehealth in the provision of modern health care and the use of simulation in clinical training; (viii) updating the clinical practice of students, including supervision requirements; (ix) updating requirements regarding recordkeeping and documentation; and (x) making other clarifying changes.

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

Statutory Authority: §§ 54.1-2400 and 54.1-3005 of the Code of Virginia.

Public Comment Deadline: January 29, 2025.

Agency Contact: Claire Morris, RN, Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300, Henrico, VA 23233, telephone (804) 367-4665, or email claire.morris@dhp.virginia.gov.

VA.R. Doc. No. R24-7651; Filed December 6, 2024, 9:46 a.m.

TITLE 1. ADMINISTRATION

COMMISSION ON LOCAL GOVERNMENT

Proposed Regulation

Title of Regulation: **1VAC50-20. Organization and Regulations of Procedure (amending 1VAC50-20-40, 1VAC50-20-142 through 1VAC50-20-382, 1VAC50-20-390 through 1VAC50-20-612, 1VAC50-20-616 through 1VAC50-20-650).**

Statutory Authority: § 15.2-2903 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: February 28, 2025.

Agency Contact: LeGrand Northcutt, Senior Policy Analyst, Department of Housing and Community Development, Main Street Center, 600 East Main Street, Richmond, VA 23219, telephone (804) 310-7151, FAX (804) 371-7090, or email legrand.northcutt@dhcd.virginia.gov.

Basis: The Commission on Local Government is authorized by § 15.2-2903 of the Code of Virginia to promulgate regulations regarding the commission's proceedings.

Purpose: While this regulatory change is not essential to protect the health, safety, or welfare of the citizens of the Commonwealth, the regulation is essential to the functioning of the commission. The commission has noticed that filings and notices for cases before it are filled with information that is not relevant to its review, and that its regulations require many filings that are not required by Virginia law. This places a cost and time burden on the local governments preparing these documents. Therefore, the primary goals of this regulatory change are to reduce the cost and time spent by local governments preparing filings for cases before the commission and reduce the cost and time spent by citizens, localities, and other parties reading the documents and preparing responses.

Substance: The proposed amendments specifically focus on reducing (i) the amount of information that must be provided in a filing before the commission, (ii) the number of parties that must be notified of a filing before the commission, (iii) the length and timing of notifications to the commission and other parties, and (iv) the process for requesting filings and other documents from the commission. Other substantive changes to existing sections are related to how the commission interacts with the public, including updates to special meeting and closed meeting policies, clarifying that records for all cases can be requested through commission staff, and updating requirements that pertain to Freedom of Information Act (FOIA) to reflect current practices.

Issues: The primary advantage to the public and the Commonwealth is that these changes will reduce the amount of information needed in a filing and the length of notifications to other parties, which will result in cost and time savings for local governments and other private parties. The current regulation may cause disadvantages to the Commonwealth or the public in instances where the regulation requires a party to be notified of a filing, but statute does not; the amendments eliminate this. The primary disadvantage to the agency is that the changes explicitly encourage members of the public and other parties who receive notices to contact the commission's staff for documents and additional information instead of requesting such information from the local government that filed the notice or requiring the local government to send the information to other parties. However, this is no more onerous than current FOIA requirements, and it may lead to no change in work for the commission, as members of the public already regularly ask the commission for documents.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The Commission on Local Government (commission) proposes regulatory changes with the aim of reducing the administrative burden imposed by the filing required to be submitted in the cases it hears by reducing notification and filing requirements.

Background. The commission, which is housed within the Department of Housing and Community Development, was created to help the Commonwealth ensure that all of its localities are maintained as viable communities in which citizens can live (§ 15.2-2900 et seq. of the Code of Virginia). One of the commission's chief duties is to provide technical assistance to localities and state agencies on the boundary changes between localities, including annexation, and governmental transition processes.[2] This regulation establishes a procedure for meetings and hearings, and the administrative rules for notice and content of the related filings. The commission states that most of the cases before it are prompted by development. For example, in a recent case, a developer wanted to build houses on the county side of the border of a

county and a town, and the localities had different rules for the development: in the town, the development would be on sewer and a maximum of 250 homes with a commercial parcel could be built, whereas in the county the development would be on septic and only 200 homes were allowed with no commercial space. The developer, the town, and the county reached an agreement on the size and scope of the development and brought it before the commission for the town to annex the part of the development on the county side. Pursuant to Executive Directive 1 (2022) and Executive Order 19 (2022), the commission investigated ways to reduce regulatory requirements and determined that the filings and notices for cases before it contain information that are required by commission regulations but that are not relevant to its review. Moreover, its regulations require filings that are not required by Virginia law, but that impose costs and time burden on the local governments preparing these documents. Consequently, the commission seeks to reduce administrative burdens on localities and third parties. More specifically, the proposal would: (i) no longer require a fax number to be included in the notice of a proposed action to the commission; (ii) reduce, and in most cases eliminate, the discretionary requirements for notification of other local governments in certain types of cases and rely on statutory notification requirements throughout the regulation; (iii) reduce the amount of material that must be included in notifications to the commission and other parties; and (iv) eliminate the current process for requesting filings and other documents from the other parties or the commission that is allowed under commission discretion and instead utilize the process under the Freedom of Information Act (FOIA).

Estimated Benefits and Costs: With the proposed changes, affected towns, counties, other political subdivisions, and third parties are expected to save costs because of the following: a reduction in some required information (e.g., fax number), a reduction in required notifications, a reduced volume of filings (e.g., savings in paper, printing, postage), and the elimination of the requirement to follow a separate process other than FOIA for information requests. The commission estimates a reduction of approximately $500 (from $2,000 to $1,500) in administrative costs for each party per case on average. Over the past four years, between one and two cases have been filed with the commission each calendar year; this equates to an annual overall savings of $500 to $1,000. Furthermore, the commission believes these proposed changes would not adversely affect its ability to discharge its powers and duties regarding ensuring due process in the cases before it. Additionally, the commission notes the possibility of a small increase in its administrative costs because the changes explicitly encourage members of the public and other parties that receive notices to contact commission staff for documents and additional information, instead of requesting it from the local government that filed the notice or requiring the local government to send the information to other parties. However, the commission also notes the proposed changes are no more onerous than what is already required under FOIA, and they may lead to no change in work for the commission because members of the public already ask the commission for documents with some regularity. The remaining proposed changes are clarifications of the existing language and current practices and are not expected to generate any other significant economic impact.

Businesses and Other Entities Affected. This regulation applies to all localities. However, most of commission cases involve counties and towns and law firms representing them. Rarely, specific citizens with discrete property interests would be involved in proceedings before the commission. Over the past four years, between one and two cases have been filed with the commission each calendar year. No entity appears to be disproportionately affected. The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[3] An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.[4] The proposal would provide administrative cost savings to the localities and third parties involved in cases before the commission. Thus, no adverse impact is indicated.

Small Businesses[5] Affected.[6] The proposed amendments do not appear to adversely affect small businesses.

Localities[7] Affected.[8] The proposed amendments apply to all localities. Over the past four years, between one and two cases have been filed with the commission each calendar year. The proposal does not introduce costs for local governments. No locality appears to be disproportionately affected.

Projected Impact on Employment. The proposed amendments do not appear to significantly affect employment.

Effects on the Use and Value of Private Property. No significant effect on the use and value of private property is expected. The proposed changes, however, may produce cost savings (i.e., $500 per party per case) for development projects involved in cases within the purview of the commission.

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[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] See https://law.lis.virginia.gov/vacode/title15.2/chapter29/section15.2-2903/.

[3] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[4] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[5] Pursuant to § 2.2-4007.04, 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."

[6] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[7] "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.

[8] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Commission on Local Government staff concurs with the analysis and findings in the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

In response to Executive Directive One (2022) and Executive Order 19 (2022), the proposed amendments (i) remove the requirement that a fax number be included in the notice of a proposed action to the commission; (ii) reduce, and in most cases eliminate, the discretionary requirements for notification of other local governments in certain types of cases and instead rely on statutory notification requirements throughout the regulation; (iii) reduce the amount of material that must be included in notifications to the commission and other parties; and (iv) eliminate the current process for requesting filings and other documents from the other parties or the commission that is allowed under commission discretion and instead utilize the process described under the Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

1VAC50-20-40. Officers.

The commission shall elect from its membership at the end of its regular ~~January~~ November meeting, or as soon thereafter as possible, a chair and a vice chair, who shall serve terms of one year~~,~~ or until ~~their~~ successors are elected. In the event of a vacancy occurring in the office of chair or vice chair, for any cause, the commission shall fill the ~~same~~ vacancy by election for the unexpired term. The chair shall preside at all meetings, presentations, and public hearings held by the commission unless absent. In the absence of the chair, the vice chair shall preside at any meeting or other assembly of the commission and shall exercise all powers and duties of the chair. In the event that the chair and vice chair are absent for a meeting or other assembly of the commission, the remaining members of the commission shall elect a temporary chair who shall exercise all powers and duties of the chair for the duration of the meeting or assembly.

1VAC50-20-142. Special meetings.

Special meetings of the commission may be called by any member on such occasions as may be reasonably necessary to carry out the duties of the commission. Except in instances where a special meeting is scheduled at a regular meeting, the chair shall ~~cause to be mailed - including by electronic means -~~ send by electronic means to all members, at least five days in advance of a special meeting, a written notice specifying the time, place, and purpose of the special meeting. Notice of special meetings shall be announced appropriately on the Virginia Regulatory Town Hall and on a calendar maintained by the Commonwealth.

1VAC50-20-150. Minutes of meetings and hearings.

Minutes shall be recorded for each public meeting held by the commission. The minutes shall include a brief summary of comments on major issues under consideration and concise and specific statements of all action taken by the commission. The minutes shall be provided to each commission member for reading and editing prior to approval at a subsequent commission meeting. There need be no actual reading of the minutes at the meeting, but a vote shall be taken for the formal approval of the minutes as written or amended. Copies of the minutes of public meetings shall be made available to any interested party ~~at a price sufficient to cover the expense incurred or on the Virginia Regulatory Town Hall and the commission's Internet webpage~~ in accordance with the Department of Housing and Community Development's Virginia Freedom of Information Act policies.

1VAC50-20-160. ~~Executive sessions or meetings~~ Closed statutorily mandated proceedings exempt from the Virginia Freedom of Information Act.

A. The commission, along with its panels, ~~or its~~ committees, subcommittees, members, and staff, may hold and conduct ~~executive sessions or meetings~~ closed statutorily mandated proceedings as may be necessary for mediation and negotiations, for deliberations, for meeting with local governing bodies or members thereof, or for other lawful and appropriate purposes allowed by § 15.2-2907 D of the Code of Virginia. Closed statutorily mandated proceedings shall be exempt from the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia) in accordance with § 15.2-2907 D of the Code of Virginia.

B. The following rules shall apply to closed statutorily mandated proceedings:

1. Closed statutorily mandated proceedings may be called with notice given by the chair at the chair's discretion and held in any location, in person or virtually.

2. A quorum of commissioners must be present to conduct a closed statutorily mandated proceeding.

3. No action of the commission taken during a closed statutorily mandated proceeding that would be considered at a regular meeting or would otherwise require a public vote shall be binding unless the commission takes a vote on such action at a subsequent regular meeting of the commission.

4. The commission may permit a nonmember to attend a closed statutorily mandated proceeding if such person is deemed necessary by the commission, if the person's presence will reasonably aid the commission in its consideration of a topic that is a subject of the proceeding, or as required by law.

5. Minutes and recordings may be taken during a closed statutorily mandated proceeding but shall not be required. Pursuant to 1VAC50-20-170 and other applicable laws, such minutes and recordings shall be confidential.

C. The commission reserves the right to meet in a closed meeting as allowed by §§ 2.2-3711 and 2.2-3712 of the Code of Virginia.

1VAC50-20-170. Confidentiality of proceedings and submissions.

All testimony, statements, exhibits, documents, or other evidence submitted to the commission by the parties in conjunction with ~~its~~ the commission's legally prescribed public meetings, presentations, or hearings shall be subject to disclosure by the commission under the provisions of the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia). All other materials, including the testimony, statements, exhibits, documents, or other evidence submitted to the commission ~~pursuant to executive~~ during closed statutorily mandated proceedings allowed under 1VAC50-20-160, along with other deliberations, negotiations, or mediation ~~which~~ that the commission is authorized by law to conduct~~,~~ under § 15.2-2907 D of the Code of Virginia shall be treated as confidential and shall ~~not~~ neither be subject to disclosure by the commission nor by the parties involved in ~~executive proceedings~~ closed statutorily mandated proceedings, except by agreement of the commission and all parties to the proceedings.

1VAC50-20-180. Notice to commission of proposed action as required by § 15.2-2907 of the Code of Virginia.

A. Notice of a proposed action to the commission as required by § 15.2-2907 of the Code of Virginia ~~to the commission~~ shall be accompanied by resolution of the governing body of the locality providing the notice evidencing its support of such action. Notice to the commission shall indicate the name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address of the individual who shall serve as designated contact with the commission regarding the issue presented. ~~All notices required to be given the commission under the provisions of § 15.2-2907 of the Code of Virginia shall also indicate the other local governments given notice of the proposed action pursuant to subsection C of this section.~~

1. Notice of a proposed annexation initiated by voters or property owners shall be accompanied by the original or certified petition signed by 51% of the voters of any territory adjacent to any municipality or 51% of the owners of real estate in number and land area in a designated area. Notice to the commission shall indicate the name, title, ~~address, and phone~~ telephone number, ~~and, where available, fax number~~ and email address of the individual who shall serve as designated contact with the commission regarding the issue presented. ~~All notices required to be given to the commission under the provisions of § 15.2-2907 of the Code of Virginia shall also indicate the other local governments given notice of the proposed action pursuant to subsection C of this section.~~

2. Notice of a petition for the proposed transition of a city to town status that has been referred to the commission pursuant to § 15.2-4102 of the Code of Virginia shall indicate the name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address of the individual who shall serve as designated contact with the commission regarding the issue referred. ~~All notices required to be given the commission under the provisions of § 15.2-2907 of the Code of Virginia shall also indicate the other local governments given notice of the proposed action pursuant to subsection C of this section.~~

3. Notice to the commission by a committee of citizens that has been appointed by the circuit court to act for and in lieu of a governing body to perfect a consolidation agreement pursuant to § 15.2-3531 of the Code of Virginia shall indicate the name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address of the individual who shall serve as designated contact with the commission regarding the proposed consolidation. ~~All notices required to be given to the commission under the provisions of § 15.2-2907 of the Code of Virginia shall also indicate the other local governments given notice of the proposed action pursuant to subsection C of this section.~~

B. Any party giving notice to the commission of a proposed action pursuant to § 15.2-2907 of the Code of Virginia may submit with the notice as much data, exhibits, documents, or other supporting materials as it deems appropriate; however, the submissions should be fully responsive to all relevant elements of the applicable section of Part IV (1VAC50-20-540 et seq.) of this chapter.

C. Any party giving notice to the commission of a proposed action as required by § 15.2-2907 of the Code of Virginia shall also give notice to each Virginia local government located

within or contiguous to~~,~~ or sharing functions, revenue, or tax sources with the local government proposing the action. All notices to the local governments shall include ~~an annotated listing of all documents, exhibits, and other material submitted to the commission in support of the proposed action~~ contact information for the commission's staff with instructions to contact the commission or the locality's Freedom of Information Act (FOIA) officer, as applicable, for copies of additional documents and exhibits submitted to the commission.

1. Any voters or property owners giving notice to the commission of a proposed annexation as required by § 15.2-2907 of the Code of Virginia shall also give notice to each Virginia local government located within or contiguous to~~,~~ or sharing functions, revenue, or tax sources with the municipality to which annexation is sought. All notices to the immediately affected local governments shall include contact information for the commission's staff with instructions to contact the commission for copies of ~~all~~ additional documents~~,~~ and exhibits~~, and other material~~ submitted to the commission ~~in support of the proposed action, and notice to other localities may include, in lieu of copies of the submissions, an annotated listing of the material~~.

2. Any voters whose petition for the proposed transition of a city to town status that has been referred to the commission pursuant to § 15.2-4102 of the Code of Virginia shall also give notice to each Virginia local government located within or contiguous to~~,~~ or sharing functions, revenue, or tax sources with the city proposed for town status. All notices to the immediately affected local governments shall include contact information for the commission's staff with instructions to contact the commission for copies of ~~all~~ additional documents~~,~~ and exhibits~~, and other material~~ submitted to the commission ~~in support of the proposed action, and notice to other localities may include, in lieu of copies of the submissions, an annotated listing of the material~~.

3. A committee of citizens that has been appointed by the circuit court to act for and in lieu of a governing body to perfect a consolidation agreement pursuant to § 15.2-3531 of the Code of Virginia shall also give notice to each Virginia local government located within or contiguous to~~,~~ or sharing functions, revenue, or tax sources with the local governments that are proposed to be consolidated. All notices to the immediately affected local governments shall include contact information for the commission's staff with instructions to contact the commission for copies of ~~all~~ additional documents~~,~~ and exhibits~~, and other material~~ submitted to the commission ~~in support of the proposed action, and notice to other localities may include, in lieu of copies of the submissions, an annotated listing of the material~~.

D. Any local government receiving notice pursuant to subsection C of this section or any other affected party may submit data, exhibits, documents, or other material for commission review and consideration as it deems appropriate. The submissions should, however, be responsive to all relevant elements of the applicable section of Part IV (1VAC50-20-540 et seq.) of this chapter. Any party submitting material to the commission for review pursuant to this section shall also designate an individual as principal contact for the commission and shall furnish the individual's name, title~~, address, phone~~ telephone number, ~~and, where available, fax number~~ and email address. ~~An annotated listing of all documents, exhibits, or other material submitted to the commission pursuant to this section~~ The submitting party shall ~~be provided to~~ notify the party initiating the proceeding before the commission. Such notification shall include contact information for the commission's staff with instructions to contact the commission for copies of the documents submitted to the commission. The commission may establish a time by which all submissions by respondent parties must be received.

E. Upon its receipt of notice of a proposed action pursuant to subsection A of this section, the commission shall, subsequent to discussion with representatives of the party submitting the notice and other appropriate parties, schedule a review of the proposed action. The commission shall also concurrently extend the services of its office to the parties in an endeavor to promote a negotiated settlement of the issue and, further, may designate, with the agreement of the parties, an independent mediator to assist in the negotiations.

The commission's review of a notice of a proposed annexation as required by § 15.2-2907 of the Code of Virginia filed by voters or property owners shall be terminated upon receipt of an ordinance, duly adopted by a majority of the elected members of the governing body of the affected city or town, rejecting the annexation proposed by the notice.

1VAC50-20-230. Referral to commission of proposed voluntary settlement agreements.

A. Referral of a proposed voluntary settlement agreement to the commission under the provisions of § 15.2-3400 of the Code of Virginia shall be accompanied by resolutions, joint or separate, of the governing bodies of the localities that are parties to the proposed agreement requesting the commission to review the agreement. The resolutions shall also state the intention of the governing bodies to adopt the agreement subsequent to the commission's review and shall indicate the name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address of the individual who shall serve as each locality's principal contact with the commission during the period of ~~its~~ the commission's review. ~~Referrals to the commission pursuant to § 15.2-3400 of the Code of Virginia shall also be accompanied by a listing of local governments receiving notice of the referral under subsection C of this section.~~

B. Any party referring a proposed voluntary settlement agreement to the commission for review pursuant to § 15.2-3400 of the Code of Virginia may submit with the proposed agreement as much data, exhibits, documents, or other supporting materials as deemed appropriate; however, the submissions should be fully responsive to all relevant elements of 1VAC50-20-610.

C. Whenever a proposed voluntary settlement agreement is referred to the commission for review pursuant to subsection A of this section, the parties to the proposed agreement shall concurrently give notice of the referral to each Virginia local government with which any of the parties is contiguous~~,~~ or with which any of the parties shares any function, revenue, or tax source. All such notices of referral shall be accompanied by ~~a copy of the proposed voluntary settlement agreement, or a descriptive summary thereof, and an annotated listing of all~~ contact information for the commission's staff with instructions to contact the commission for copies of the documents~~, exhibits, and other materials~~ submitted to the commission ~~in support of the proposed agreement~~.

D. Any local government receiving notice of referral pursuant to subsection C of this section~~,~~ or any other party~~,~~ may submit data, exhibits, documents, or other supporting materials relevant to the commission's review as it deems appropriate; however, the submissions should be responsive to all relevant elements of 1VAC50-20-610. Any party submitting materials to the commission pursuant to this chapter shall also designate an individual who shall serve as principal contact with the commission during the period of ~~its~~ the commission's review and shall furnish the individual's name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address. The commission may establish a time by which all submissions by respondent parties must be received. Any party submitting materials to the commission pursuant to this chapter shall also ~~provide an annotated listing of the material to the parties to the proposed voluntary settlement agreement~~ notify the parties to the voluntary settlement agreement of the submission. Such notification shall include contact information for the commission's staff with instructions to contact the commission for copies of the documents submitted to the commission.

1VAC50-20-270. Referral to commission of proposed town-county agreement defining annexation rights.

A. Referral to the commission of a proposed town-county agreement defining annexation rights pursuant to § 15.2-3231 of the Code of Virginia shall be accompanied by resolutions, joint or separate, of the governing bodies of the town and county requesting the commission to review the agreement. The resolutions shall also state the intention of the governing bodies to adopt the agreement subsequent to the commission's review and shall indicate the name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address of the individual who shall serve as each locality's principal contact with the commission during the period of its review. ~~Referrals to the commission pursuant to § 15.2-3231 of the Code of Virginia shall also be accompanied by a listing of local governments receiving notice of such referral under subsection C of this section.~~

B. Any affidavit made pursuant to § 15.2-3232 B of the Code of Virginia shall be filed with the commission within five business days of execution.

C. Any notice given under § 15.2-3232 B of the Code of Virginia shall include contact information for the commission's staff with instructions to contact the commission for copies of the documents submitted to the commission.

D. Any party referring a proposed agreement to the commission for review pursuant to § 15.2-3231 of the Code of Virginia may submit with the proposed agreement as much data, exhibits, documents, or other supporting materials as deemed appropriate; however, submissions should be fully responsive to all relevant elements of 1VAC50-20-560.

~~C. Whenever a proposed agreement is referred to the commission for review pursuant to subsection A of this section, the parties to the proposed agreement shall concurrently give notice of the referral to each Virginia local government with which either party is contiguous or with which either party shares any function, revenue, or tax source. All notices of referral shall be accompanied by a copy of the proposed agreement, or a descriptive summary thereof, and an annotated listing of all documents, exhibits, and other materials submitted to the commission in support of the proposed agreement.~~

~~D.~~ E. Any person or local government ~~receiving notice of referral pursuant to subsection C of this section, or any other party,~~ may submit data, exhibits, documents, or other supporting materials relevant to the commission's review as ~~they deem~~ the person or local government deems appropriate; however, the submissions should be responsive to all relevant elements of 1VAC50-20-560. Any party submitting materials to the commission pursuant to this chapter shall also designate an individual who shall serve as principal contact with the commission during the period of ~~its~~ the commission's review and shall furnish the individual's name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address. The commission may establish a time by which all submissions by respondent parties must be received. Any party submitting materials to the commission pursuant to this chapter shall also ~~provide an annotated listing of the material to the parties to the proposed agreement~~ notify the parties to the agreement defining annexation rights of the submission. Such notification shall include contact information for the commission's staff with instructions to contact the commission for copies of the documents submitted to the commission.

1VAC50-20-310. Referral to commission of town petition for order establishing annexation rights.

A. Any town unable to reach an agreement with its county as to future annexation rights may, pursuant to § 15.2-3234 of the Code of Virginia, adopt an ordinance petitioning the commission for an order establishing its rights to annex territory in such county. The petition to the commission shall include the terms of a proposed order establishing the town's annexation rights and shall indicate the name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address of the individual who shall serve as the town's principal contact with the commission. Petitions to the commission pursuant to § 15.2-3234 of the Code of Virginia shall also be accompanied by a copy of the ordinance ~~and by a listing of all local governments being served or receiving notice of the town's petition pursuant to subsection C of this section~~.

B. Any town petitioning the commission under the authority of § 15.2-3234 of the Code of Virginia may submit with the petition as much data, exhibits, documents, or other supporting materials as deemed appropriate; however, the submissions should be fully responsive to all relevant elements of 1VAC50-20-616.

C. Any town petitioning for an order establishing its annexation rights under the authority of § 15.2-3234 of the Code of Virginia shall serve a copy of the petition and ordinance on the Commonwealth's attorney, or the county attorney if there ~~be~~ is one, and on the ~~chairman~~ chair of the board of supervisors of the county whose territory would be affected by the town's proposed annexation order. ~~The town shall also give notice of its petition to all other towns located within the affected county and to each Virginia local government adjoining such county.~~ The service ~~in the county and the notice to other localities shall be accompanied by an annotated listing of all materials~~ must include contact information for the commission's staff with instructions to contact the commission for copies of additional documents and exhibits submitted to the commission ~~pursuant to subsection B of this section~~.

D. A county served with a copy of a town's petition pursuant to subsection C of this section shall file its response to such petition with the commission within 60 days after receipt of the service. Any other party ~~receiving notice pursuant to subsection C of this section,~~ with an interest in the proceedings may also submit materials to the commission for consideration with respect to the town's petition ~~within 60 days of their receipt of the notice~~. The commission may establish a time by which all submissions by respondent parties must be received, so long as the time is no earlier than the county's response date. Responses and submissions to the commission pursuant to this chapter may include data, exhibits, documents, or other materials as the submitting party deems appropriate; however, such responses and submissions should be responsive to all relevant elements of 1VAC50-20-616. Any party submitting materials to the commission for review pursuant to this chapter shall also designate an individual who shall serve as principal contact with the commission and shall furnish the individual's name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address. Any party submitting materials to the commission pursuant to this chapter shall also ~~provide an annotated listing of the material to the town petitioning the commission~~ notify the town that they have submitted materials to the commission.

1VAC50-20-350. Referral to commission of boundary line adjustment.

A. Whenever a court refers a proposed boundary line adjustment to the commission pursuant to § 15.2-3109 of the Code of Virginia, the localities proposing the boundary line adjustment shall, upon receipt of notification of the referral, provide the commission with a copy of ~~their~~ the petition to the court and shall designate an individual for each locality who shall serve as principal contact with the commission and shall furnish the individual's name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address. ~~Referrals to the commission pursuant to § 15.2-3109 of the Code of Virginia shall also be accompanied by a listing of local governments receiving notice of the referral under subsection C of this section.~~

B. The two localities proposing a boundary line adjustment pursuant to § 15.2-3109 of the Code of Virginia may, jointly or independently, submit to the commission with ~~their~~ the petition as much data, exhibits, documents, or other supporting materials as ~~they~~ the localities deem appropriate; however, such submissions should be fully responsive to all relevant elements of 1VAC50-20-600.

~~C. Whenever a proposed boundary line adjustment is referred to the commission for review pursuant to § 15.2-3109 of the Code of Virginia, the localities proposing the adjustment shall concurrently give notice of the proposed adjustment as well as notice of the referral of the issue to the commission to each Virginia local government with which either party is contiguous and to any other Virginia local government deemed by the localities proposing the adjustment to be potentially affected by the proposed adjustment. The notice shall include a copy of the petition requesting the boundary line adjustment, or an informative summary thereof, and an annotated listing of all documents, exhibits, and other materials submitted to the commission for review pursuant to subsection B of this section.~~

~~D.~~ C. Any person or local government ~~receiving notice of a proposed boundary line adjustment pursuant to subsection C of this section, or any other party,~~ may submit data, exhibits, documents, or other supporting materials relevant to the commission's review as ~~they deem~~ the person or local government deems appropriate; however, such submissions should be responsive to all relevant elements of 1VAC50-20-600. Any party submitting materials to the commission

pursuant to this chapter shall also designate an individual who shall serve as principal contact with the commission during the period of ~~its~~ the commission's review and shall furnish the individual's name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address. The commission may establish a time by which all submissions by respondent parties must be received. Any party submitting materials to the commission pursuant to this chapter shall also ~~provide an annotated listing of the materials to the localities proposing the boundary line adjustment~~ notify the localities proposing the boundary line adjustment that the party has submitted evidence to the commission.

1VAC50-20-382. Referral to commission of proposed economic growth-sharing agreements.

A. Referral of a proposed economic growth-sharing agreement to the commission under the provisions of § 15.2-1301 of the Code of Virginia shall be accompanied by resolution, joint or separate, of the governing bodies of the localities that are parties to the proposed agreement requesting the commission to review the agreement. The resolutions shall also state the intention of the governing bodies to adopt the agreement subsequent to the commission's review and shall indicate the name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address of the individual who shall serve as each locality's principal contact with the commission during the period of ~~its~~ the commission's review. ~~Referrals to the commission pursuant to § 15.2-1301 of the Code of Virginia shall also be accompanied by a listing of local governments receiving notice of the referral under subsection C of this section.~~

B. Any party referring a proposed economic growth-sharing agreement to the commission for review pursuant to § 15.2-1301 of the Code of Virginia may submit with the proposed agreement as much data, exhibits, documents, or other supporting materials as deemed appropriate; however, the submissions should be fully responsive to all relevant elements of 1VAC50-20-612.

C. Whenever a proposed economic growth-sharing agreement is referred to the commission for review pursuant to subsection A of this section, the parties to the proposed agreement shall concurrently give notice of the referral to each Virginia local government with which any of the parties ~~is contiguous, or with which any of the parties~~ shares any function, revenue, or tax source. All notices of referral shall ~~be accompanied by a copy of the proposed agreement, or a descriptive summary thereof, and an annotated listing of all documents, exhibits, and other materials submitted to the commission in support of the proposed agreement~~ include contact information for the commission's staff with instructions to contact the commission for copies of the additional documents and exhibits submitted to the commission.

D. Any local government receiving notice of referral pursuant to subsection C of this section~~,~~ or any other party~~,~~ may submit data, exhibits, documents, or other supporting materials relevant to the commission's review as it deems appropriate; however, the submissions should be responsive to all relevant elements of 1VAC50-20-612. Any party submitting materials to the commission pursuant to this chapter shall also designate an individual who shall serve as principal contact with the commission during the period of ~~its~~ the commission's review~~,~~ and shall furnish the individual's name, title, ~~address, phone~~ telephone number, ~~and, where available, fax number~~ and email address. Any party submitting materials to the commission pursuant to this chapter shall ~~also provide an annotated listing of the material to the parties to the proposed agreement~~ notify the parties to the economic growth-sharing agreement that they have submitted materials to the commission. The commission may establish a time by which all submissions by respondent parties must be received.

1VAC50-20-390. General provisions applicable to mandatory commission reviews.

A. Any local government or other party appearing before the commission relative to any mandatory review may be represented by counsel.

B. The commission shall generally schedule for consideration issues in the order in which received; however, the commission reserves the right to consider issues in other sequence where it deems appropriate. Where notices are received of related or competitive actions affecting the same localities, the commission may, where appropriate, consider the issues and render the reports or a consolidated report concurrently.

C. Subsequent to its receipt of an issue for a mandatory review, the commission or the commission's staff shall meet, or otherwise converse, with representatives of the principally affected parties for purposes of establishing a schedule for its review of the issue. The schedule shall include dates for (i) ~~for~~ the submission of responsive materials from affected jurisdictions, (ii) ~~for~~ tours of affected areas and oral presentations if any are desired by the commission, (iii) ~~for~~ a public hearing, and (iv) ~~for~~ the issuance of the commission's report, as well as other dates the commission deems appropriate.

D. The commission may continue or defer its proceedings with respect to an issue at any time it deems appropriate; however, no continuance or deferral shall result in an extension of the commission's reporting deadline beyond any time limit imposed by law, except by agreement of the parties or in accordance with other statutory procedures. The commission shall also accept requests for continuances or deferrals from any party at any time during its proceedings but shall not grant or deny any such requests until all parties have had an opportunity to comment on the requests. In any instance where the commission grants a continuance or a deferral, the continuance or deferral may be conditioned upon an

appropriate extension of the commission's reporting deadline with respect to the issue under review.

E. The commission may confront the necessity of continuing or deferring its proceedings as a result of statutory requirement or court order. In such instances, the commission shall reschedule its proceedings, upon consultation with the parties, in a manner that permits an expeditious conclusion of its review. The parties should anticipate, however, that the duration of the continuance or stay shall result in a commensurate delay in the issuance of the commission's report.

F. In addition to any meeting, presentation, public hearing, or other gathering of the parties specified by this chapter, the commission may, where it deems necessary for an analysis of material or for a discussion or clarification of the issues before it, schedule other meetings of appropriate parties.

G. No party to a proceeding before the commission for mandatory review shall communicate in any manner with any member of the commission with respect to the merits of the issue under review except as is authorized by this chapter~~,~~ or as may be otherwise authorized by the commission or its chair.

H. In addition to the submissions authorized by 1VAC50-20-180 through 1VAC50-20-384, the commission may allow supplemental submissions deemed necessary or appropriate by the commission for the provision of current and complete data. Where supplemental submissions are authorized pursuant to this subsection, copies of all submissions shall be provided by the submitting party to all principal parties. The commission shall endeavor to establish dates for the filing of all supplemental submissions ~~which~~ that will allow an opportunity for ~~their~~ review and critical analysis by other affected parties. However, the commission may accept supplemental submissions filed after any established dates if, in the commission's judgment, the submissions assist the commission in the discharge of its statutory responsibilities.

I. Any material submitted to the commission by the parties in conjunction with or relative to any notice filed pursuant to any mandatory review covered by 1VAC50-20-180 through 1VAC50-20-384, except materials presented in the context of negotiations or mediation of a confidential nature as authorized by law, shall be considered public documents and made available by the ~~submitting party~~ commission for review by any other interested party or by the public. Any interested party or member of the public may request copies of any such material ~~which shall be provided promptly by the party submitting the material to the commission at a price sufficient to cover the expense incurred~~ from the commission or its staff in accordance with the Department of Housing and Community Development's Freedom of Information Act policies. In addition, the commission will post all public documents, as defined in this subsection, on its website.

J. Each document, exhibit, or other material submitted to the commission shall bear a title, the date of preparation, a detailed citation of the sources from which all data are obtained, and the name of the entity ~~which~~ that submitted the document, exhibit, or other material. All material submitted to the commission by a local government shall be, as nearly as practicable, in the same form as the material would subsequently be submitted to the courts. The commission may refuse to accept for review and consideration any exhibit, document, or other material unless the person preparing it~~,~~ or a representative of the entity responsible for its submission~~,~~ ~~shall be~~ is willing to appear before the commission for purposes of answering questions concerning the material.

K. Unless otherwise requested, wherever the regulations of the commission call for the projection of data, the projections should be made for a 10-year period. In each instance where projections are given, the method and bases of the projections should be indicated.

L. All data, exhibits, documents, or other material submitted to the commission on the initiative of a party or pursuant to a request from the commission shall be certified by the submitting party as to (i) ~~as to~~ source and (ii) ~~as to~~ the fact that the material is correct within the knowledge of the submitting party.

M. Any party filing notice or making submissions to the commission shall provide at least eight copies of all submissions, unless the commission agrees that a lesser number would be sufficient for its review and analysis. The commission may make provisions for the electronic filing of submissions, including facsimile.

N. At any time during the course of the commission's review of any issue, the commission's staff may solicit additional data, documents, records, or other materials from the parties as is deemed necessary for proper analysis of any issue. Where such materials are solicited from a party, the commission's staff, where practicable, shall make the request in writing, with copies of the request being provided to other principal parties. Copies of all materials submitted to the commission pursuant to this chapter shall concurrently be provided to each principal party or shall be made available to the parties in a manner acceptable to the commission. ~~The commission shall be given written notification by the submitting party of each principal party provided a copy of the material or of arrangements proposed for making the material available to the principal parties.~~

O. The commission shall not be limited in its analysis of any issue to the materials submitted by the parties but shall undertake independent research as it deems appropriate in order to ~~assure~~ ensure a full and complete investigation of each issue.

P. The commission shall request all parties to cooperate fully in the development and timely sharing of data relative to the

issue under review. The commission considers the cooperation among parties vital to the discharge of its responsibilities.

Q. The commission may allow the parties to correct the data, exhibits, documents, or other material submitted to the commission prior to the date established for the closing of the record pursuant to 1VAC50-20-640 B. Where corrections are authorized pursuant to this chapter, copies of all corrections shall be provided by the submitting party to all principal parties. If, in the commission's judgment, the corrections are of a substantive nature as to significantly alter the scope or character of the issue under review, the commission may delay its proceedings for an appropriate amount of time to provide an opportunity for other parties to respond to the corrected data, exhibits, documents, or other material.

R. Following the receipt of a notice, the commission may request the party initiating the proposed action to prepare and file testimony in support of the proposed action. The testimony of the party initiating the proposed action may refer to all data, exhibits, documents, or other material previously submitted to the commission or filed with the testimony. In all proceedings in which the initiating party files testimony, the affected party shall be permitted and may be requested by the commission to file, on or before a date established by the commission, testimony in response to the proposed action. The testimony of the affected party may refer to all data, exhibits, documents, or other material previously submitted to the commission or filed with the testimony. Any affected party ~~who~~ that chooses not to file testimony by the date established by the commission may not thereafter present testimony except by permission of the commission, but may otherwise fully participate in the proceeding and engage only in cross-examination of the testimony of other parties. Failure to comply with the directions of the commission~~,~~ without good cause shown~~,~~ may result in rejection of the testimony by the commission. The commission may permit the parties to correct or supplement any prepared testimony before or during the oral presentations as called for in 1VAC50-20-620. Eight copies of prepared testimony shall be filed unless otherwise specified by the commission.

1VAC50-20-540. Annexation.

In developing its findings of fact and recommendations with respect to a proposed annexation, the commission shall consider the relevant information, data, and factors listed in this section. Any city or town filing notice with the commission that it proposes to annex territory shall submit with the notice data and other evidence responsive to each element listed in this section that ~~it~~ the city or town deems relevant to the proposed annexation. Any voters or property owners filing notice pursuant to § 15.2-2907 of the Code of Virginia with the commission seeking annexation to a municipality shall submit with the notice data and other evidence responsive to each element listed in this section that ~~they~~ those parties deem relevant to the proposed annexation, except that subdivision 1 of this section is required to be included in the notice filed with the commission.

1. A written metes and bounds description of the boundaries of the area proposed for annexation having, as a minimum, sufficient certainty to enable a ~~layman~~ layperson to identify the proposed new boundary. The description may make reference to readily identifiable monuments, such as public roads, rivers, streams, railroad rights of way, and similar discernible physical features.

2. A map showing (i) the boundaries of the area proposed for annexation and their geographic relationship to existing political boundaries; (ii) identifiable unincorporated communities; (iii) major streets, highways, schools, and other major public facilities; (iv) significant geographic features, including mountains and bodies of water; (v) existing uses of the land, including residential, commercial, industrial, and agricultural; and (vi) information deemed relevant as to the possible future use of the property within the area sought for annexation.

3. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in the municipality, the county, and the area proposed for annexation.

4. The past, the estimated current, and the projected population of the municipality, the county affected by the proposed annexation, and the area of the county proposed for annexation.

5. The past, the estimated current, and the projected future number of public school students enrolled in the public schools and the number of school-age children living in the municipality, the county affected by the proposed annexation, and the area of the county proposed for annexation.

6. The assessed property values, by major classification, and if appropriate, the ratios of assessed values to true values for real property, personal property, machinery and tools, merchants' capital, and public service corporation property for the current year and the preceding 10 years for the municipality and the county affected by the proposed annexation, and similar data for the current year for the area of the county proposed for annexation.

7. The current local property and nonproperty tax rates and the tax rates for the preceding 10 years, applicable within the municipality, the county affected by the proposed annexation, and the area of the county proposed for annexation.

8. The estimated current local revenue collections and intergovernmental aid, the collections and aid for the previous 10 years, and projections of the collections and aid (including tax receipts from real property, personal property, machinery and tools, merchants' capital, business and

professional license, consumer utility, and sales taxes) within the municipality~~,~~ and the county affected by the proposed annexation, and similar data for the past year for the area of the county proposed for annexation.

9. The amount of long-term indebtedness and the purposes for which all long-term debt has been incurred by the municipality and the county affected by the proposed annexation.

10. The need in the area proposed for annexation for urban services, including those listed in this subdivision, the level of services provided by the municipality and by the county affected by the proposed annexation, and the ability of the municipality and the county to provide the services in the area proposed for annexation:

a. Sewage treatment;

b. Water;

c. Solid waste collection and disposal;

d. Public planning;

e. Subdivision regulation and zoning;

f. Crime prevention and detection;

g. Fire prevention and protection;

h. Public recreational facilities;

i. Library facilities;

j. Curbs, gutters, and sidewalks;

k. Storm drains;

l. Street lighting;

m. Snow removal;

n. Street maintenance;

o. Schools;

p. Housing; and

q. Public transportation.

11. Efforts made by the municipality and the county affected by the proposed annexation to comply with applicable state policies with respect to environmental protection, public planning, education, public transportation, housing, and other state service policies promulgated by the General Assembly.

12. The community of interest ~~which~~ that may exist (i) ~~may exist~~ between the municipality and the area proposed for annexation and its citizens ~~and~~ or (ii) ~~may exist~~ between that area and its citizens and the rest of the county~~; the~~. The term "community of interest" may include consideration of natural neighborhoods, natural and manmade boundaries, the similarity of service needs, and economic and social bonds.

13. Any arbitrary prior refusal to cooperate by the governing body of the municipality or of the county affected by the proposed annexation, if such has occurred, to enter into cooperative agreements providing for joint activities that would have benefited citizens of both localities.

14. The need for the municipality to expand its tax resources, including its real estate and personal property tax base.

15. The need of the municipality to obtain land for industrial, commercial, and residential development.

16. The adverse effect on the county affected by the proposed annexation resulting from the loss of areas suitable and developable for industrial, commercial, or residential use.

17. The adverse effect on the county of the loss of tax resources and public facilities necessary to provide services to those persons in the remaining areas of the county after the proposed annexation.

18. The adverse impact of the proposed annexation on agricultural operations located in the area proposed for annexation.

19. The terms and conditions upon which the municipality proposes to annex, its plans for the improvement of the annexed territory during the 10-year period following annexation, including the extension of public utilities and other services, and the means by which the municipality shall finance the improvements and extension of services.

20. Data pertinent to a determination of the appropriate financial settlement between the municipality and the affected county as required by § 15.2-3211 of the Code of Virginia and other applicable provisions of the Code of Virginia.

21. The commission's staff shall endeavor to assist parties contemplating or involved in annexation proceedings by identifying additional data elements considered by the commission to be relevant in the disposition of annexation issues.

1VAC50-20-550. Partial county immunity.

In developing its findings of fact and recommendations with respect to a proposed petition for partial immunity, the commission shall consider the relevant information, data, and factors listed in this section. Any county filing notice with the commission that it proposes to seek immunity for a portion of its territory shall submit with the notice data and other evidence responsive to each element listed in this section that ~~it~~ the county deems relevant to the proposed petition for partial immunity.

1. A written metes and bounds description of the area for which immunity is sought having, as a minimum, sufficient certainty to enable a ~~layman~~ layperson to identify the proposed immunity areas. The description may make reference to readily identifiable monuments, such as public roads, rivers, streams, railroad rights of way, and similar discernible physical features.

2. A map ~~or maps~~ showing: (i) the boundaries of the area proposed for immunity and their geographic relationship to existing political boundaries; (ii) identifiable unincorporated communities; (iii) major streets, highways, schools, and other major public facilities; (iv) significant geographic features, including mountains and bodies of water; (v) existing uses of the land, including residential, commercial, industrial, and agricultural; and (vi) information deemed relevant as to the possible future use of the property within the area for which immunity is sought.

3. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in the county, the affected city, and the area proposed for immunity.

4. The estimated current and projected population and population density of the areas for which immunity is sought.

5. The urban services, including ~~but not limited to~~ those listed ~~below~~ in this subdivision, provided in the area for which immunity is sought and the type and level of services in relation to those furnished by the city from which immunity is sought:

a. Sewage treatment;

b. Water;

c. Solid waste collection and disposal;

d. Public planning;

e. Subdivision regulation and zoning;

f. Crime prevention and detection;

g. Fire prevention and protection;

h. Public recreational facilities;

i. Library facilities;

j. Curbs, gutters, sidewalks;

k. Storm drains;

l. Street lighting;

m. Snow removal;

n. Street maintenance;

o. Schools;

p. Housing; and

q. Public transportation.

6. Efforts made by the county to comply with applicable state policies with respect to environmental protection, public planning, education, public transportation, housing, and other state service policies promulgated by the General Assembly.

7. The community of interest that~~:~~ (i) may exist between the area for which immunity is sought and the remainder of the county; (ii) the community of interest ~~which~~ that may exist between that area and the city from which immunity is sought; and (iii) the relative strength of the community of interests.

8. Any instance in which either the county or the affected city has arbitrarily refused to cooperate in the joint provision of services.

9. Whether the proposed grant of immunity would substantially foreclose a city of 100,000 population or less from expanding its boundaries by annexation.

10. The commission's staff shall endeavor to assist localities contemplating or involved in partial immunity proceedings by identifying the additional data elements considered by the commission to be relevant in the disposition of partial immunity issues.

1VAC50-20-560. Town-county agreements defining annexation rights.

In developing its findings of fact and recommendations with respect to a proposed town-county annexation agreement, the commission shall consider the relevant information, data, and factors listed in this section. Any town or county presenting proposed annexation agreements to the commission under the provisions of § 15.2-3231 of the Code of Virginia shall submit with the proposed agreement data and other evidence responsive to each element listed in this section that ~~it~~ the town or county deems relevant.

1. A written metes and bounds description of those areas of the county made eligible for annexation under the proposed agreement having as a minimum, sufficient certainty to enable a ~~layman~~ layperson to identify those areas. The description may make reference to readily identifiable monuments such as public roads, rivers, streams, railroad rights of way, and similar discernible physical features.

2. A map showing (i) the boundaries of the various areas eligible for annexation under the proposed agreement and their relationship to existing political boundaries; (ii) identifiable unincorporated communities; (iii) major streets, highways, schools, and other major public facilities; (iv) significant geographic features, including mountains and bodies of water; (v) existing uses of the land, including residential, commercial, industrial, and agricultural; and (vi) information deemed relevant as to the possible future use of the property in the areas affected by the proposed agreement.

3. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in the town, the county, and the areas of the county affected by the agreement.

4. The past, the estimated current, and the projected population of the town, the county, and those areas of the county affected by the proposed agreement.

5. The past, the estimated current, and the projected number of public school students enrolled in the public schools and

the number of school-age children living in the town, the county, and those areas of the county affected by the proposed agreement.

6. The assessed property values~~,~~ by major classification and, if appropriate, the ratios of assessed values to true values for real property, personal property, machinery and tools, merchants' capital, and public service corporation property for the current and preceding 10 years for the town, and the county, and similar data for the current year in those areas of the county affected by the proposed agreement.

7. The need of the municipality to expand its tax resources, including its real estate and personal property tax base.

8. The need of the municipality to obtain land for industrial, commercial, and residential development.

9. The current and prospective need for additional urban services in the areas of its county subject to annexation under the agreement.

10. Plans for the immediate and future improvement of areas annexed under the terms of the agreement, including the extension of public utilities and other services.

11. The commission's staff shall endeavor to assist localities contemplating or involved in town-county agreements defining annexation rights by identifying additional data elements considered by the commission to be relevant in the disposition of the issues.

1VAC50-20-570. Town incorporation.

In developing its findings of fact and recommendations with respect to a proposed town incorporation, the commission shall consider the relevant information, data, and factors listed in this section. ~~Parties~~ Any party filing notice with the commission that ~~they propose~~ the party proposes to have a community incorporated as a town, or whose petition for incorporation has been referred to the commission by the court pursuant to § 15.2-3601 of the Code of Virginia, shall submit with such notice or subsequent to the court referral data and other evidence responsive to each element listed in this section that ~~they deem~~ the party deems relevant to the proposed incorporation.

1. A petition signed by not fewer than 100 duly qualified voters residing within the boundaries of the proposed town supporting the proposed incorporation.

2. A written metes and bounds description of the area proposed for incorporation as a town having, as a minimum, sufficient certainty to enable a ~~layman~~ layperson to identify the proposed town boundary. The description may make reference to readily identifiable monuments, such as public roads, rivers, streams, railroad rights of way, and similar discernible physical features.

3. A map showing (i) the boundaries of the proposed town and their relationship to existing political boundaries; (ii) identifiable unincorporated communities; (iii) major streets, highways, schools, and other major public facilities; (iv) significant geographic features, including mountains and bodies of water; and (v) existing uses of the land, including residential, commercial, industrial, and agricultural.

4. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in the area proposed for incorporation.

5. The past, the estimated current, and the projected population of the area proposed for incorporation and the county within which the town would be situated.

6. Information indicating (i) why the proposed incorporation is desired and in the interest of the inhabitants; (ii) how the general good of the community is served by the incorporation; and (iii) why the services needed within the proposed town cannot be provided by the establishment of a sanitary district, through the extension of existing county services, or by other arrangements provided by law.

7. The commission shall endeavor to assist communities contemplating or involved in proposed town incorporations by identifying additional data elements considered by the commission to be relevant in the disposition of incorporation issues.

1VAC50-20-580. Town-city transitions.

In developing its findings of fact and recommendations with respect to a proposed town to city transition, the commission shall consider the relevant information, data, and factors listed in this section. Any town filing notice with the commission that it proposes to become a city shall submit with the notice data and other evidence responsive to each element listed in this section that ~~it~~ the town deems relevant to the proposed transition.

1. A written metes and bounds description of the boundaries of the proposed city having, as a minimum, sufficient certainty to enable a ~~layman~~ layperson to identify the proposed city boundary. The description may make reference to readily identifiable monuments, such as public roads, rivers, streams, railroad rights of way, and similar discernible physical features.

2. A map ~~or maps~~ showing: (i) the boundaries of the proposed city and their geographic relationship to existing political boundaries; (ii) identifiable unincorporated communities; (iii) major streets, highways, schools, and other major public facilities; (iv) significant geographic features, including mountains and bodies of water; (v) existing uses of the land, including residential, commercial, industrial, and agricultural; and (vi) information deemed relevant as to the possible future use of the property within the proposed city.

3. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in the proposed city.

4. The past, the estimated current, and the projected population of the proposed city and the county affected by the proposed transition.

5. The past, the estimated current, and the projected future number of public school students enrolled in the public schools and the number of school-age children living in the proposed city and the county affected by the proposed transition.

6. The assessed values~~,~~ by major classification and, if appropriate, the ratios of assessed values to true values for real property, personal property, machinery and tools, merchants' capital, and public service corporation property for the current year and the preceding 10 years for the county and within the proposed city.

7. The current local property and nonproperty tax rates~~,~~ and the tax rates for the preceding 10 years~~,~~ applicable within the county and the proposed city.

8. The estimated current local revenue collections and intergovernmental aid, the collections and aid for the previous 10 years, and projections of the collections and aid, including tax receipts from real property, personal property, machinery and tools, merchants' capital, business and professional license, consumer utility, and sales taxes, within the county and the proposed city.

9. The amount of long-term indebtedness and the purposes for which that long-term debt has been incurred by the municipality and the county affected by the proposed transition.

10. The current type and level of urban services provided by the town, the additional services to be provided and the additional costs to be borne by the proposed city, and the means by which the proposed city shall finance the additional services and costs.

11. The fiscal capacity of the town to function as an independent city and to provide appropriate urban services.

12. The effect and impact of the proposed transition on the ability of the county to meet the service needs of its remaining population and the means by which any substantial impairment of the county's ability to meet those needs shall be offset.

13. The effect of the proposed transition on compliance with and the promotion of applicable state policies with respect to environmental protection, public planning, education, public transportation, housing, and other state service policies declared by the General Assembly.

14. Data pertinent to a determination of the appropriate financial settlement as required by § 15.2-3829 and other applicable provisions of the Code of Virginia.

15. The commission's staff shall endeavor to assist localities contemplating or involved in town-city transition proceedings by identifying additional data elements considered by the commission to be relevant in disposition of town to city transition issues.

1VAC50-20-590. County-city transitions.

In developing its findings of fact and recommendations with respect to a proposed county to city transition, the commission shall consider the relevant information, data, and factors listed in this section. Any county filing notice with the commission that it proposes to become a city shall submit with the notice data and other evidence responsive to each element listed in this section that ~~it~~ the county deems relevant to the proposed transition.

1. A map showing (i) the location of all towns situated within the county; (ii) all adjoining and adjacent localities; (iii) identifiable unincorporated communities within the county; (iv) the population density of the various areas of the county; (v) the areas of the county served by urban services; (vi) major streets, highways, schools, and other major public facilities; (vii) significant geographic features, including mountains and bodies of water; (viii) existing uses of the land, including residential, commercial, industrial, and agricultural; and (ix) information deemed relevant as to the possible future use of the property within the county.

2. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in the county.

3. The past, the estimated current, and the projected future population of the county, each town within the county, and of the major densely populated unincorporated communities within the county.

4. The past, the estimated current, and the projected future number of public school students enrolled in the public schools and the number of school-age children living in the county and in each town within the county.

5. The assessed values~~,~~ by major classification and, if appropriate, the ratios of assessed values to true values for real property, personal property, machinery and tools, merchants' capital, and public service corporation property for the current year and the preceding 10 years for the county and each town within the county.

6. The current local property and nonproperty tax rates~~,~~ and the tax rates for the preceding 10 years~~,~~ within the county and all towns within the county.

7. The estimated current local revenue collections and intergovernmental aid, the collections and aid for the

previous 10 years, and projections of the collections and aid (including tax receipts from real property, personal property, machinery and tools, merchants' capital, business and professional license, consumer utility, and sales taxes) within the county and within each town within the county.

8. The amount of long-term indebtedness of the county and each town within the county and the amount and purpose for which that debt has been incurred.

9. Data regarding (i) the urban-type services presently provided by the county; (ii) the level of those services; (iii) the areas of the county served by those services; (iv) the additional services to be provided and the additional cost to be borne by the proposed city; and (v) the means by which the proposed city shall finance the additional services and costs.

10. The fiscal capacity of the county to function as an independent city and to provide appropriate services.

11. The impact of the proposed transition on compliance with and the promotion of applicable state policies with respect to environmental protection, public planning, education, public transportation, housing, and other state service policies declared by the General Assembly.

12. The commission's staff shall endeavor to assist localities contemplating or involved in proposed county-city transitions by identifying additional data elements considered by the commission to be relevant in the disposition of county to city transition issues.

1VAC50-20-600. Boundary line adjustment.

In developing its findings of fact and recommendations with respect to a proposed boundary line adjustment, the commission shall consider the relevant information, data, and factors listed in this section. The localities petitioning for a boundary line adjustment under the provisions of § 15.2-3109 of the Code of Virginia shall, separately or jointly, at the time ~~they~~ the localities initiate such petition to the court, submit to the commission data and other evidence responsive to each element listed in this section that is relevant to the boundary line adjustment.

1. A written metes and bounds description of the precise segment of the boundary for which an adjustment is sought having, as a minimum, sufficient certainty to enable a ~~layman~~ layperson to identify the boundary segment in question. The description may make reference to readily identifiable monuments, such as public roads, rivers, streams, railroad rights of way, and similar discernible physical features.

2. A map ~~or maps~~ showing~~:~~ (i) the precise segment of the boundary that the parties agree should be adjusted; (ii) identifiable unincorporated communities; (iii) major streets, highways, schools, and other major public facilities; (iv) significant geographic features, including mountains and bodies of water; (v) existing uses of the land, including residential, commercial, industrial, and agricultural; and (vi) information deemed relevant as to the possible future use of the land.

3. The estimated past, the estimated current, and the projected future population and population density of all areas adjacent to the segment of the boundary proposed for adjustment and of other areas possibly affected by the proposed boundary line adjustment.

4. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in all areas adjacent to the segment of the boundary proposed for adjustment and in other areas possibly affected by the proposed boundary line adjustment.

5. The past, the estimated current, and the projected future number of public school students enrolled in the public schools and the number of school-age children living in all areas adjacent to the segment of the boundary proposed for adjustment and in other areas possibly affected by the proposed boundary line adjustment.

6. The assessed and true real property values, by major classification of those areas adjacent to the segment of the boundary proposed for adjustment and of any other area possibly affected by the proposed adjustment and other fiscal data relative to the issue.

7. Maps indicating the principal alternative boundary line adjustments ~~which~~ that have been considered by the parties and a brief statement as to how each alternative adjustment would promote the effective and efficient provision of public services.

8. Information as to why the proposed boundary line adjustment is sought by the parties.

9. The commission's staff shall endeavor to assist localities contemplating or involved in proposed boundary line adjustments by identifying additional data elements considered by the commission to be relevant in the disposition of boundary line adjustment issues.

1VAC50-20-601. City-town transitions.

In developing its findings of fact and recommendations with respect to a proposed transition of a city to town status, the commission shall consider the relevant information, data, and factors listed in this section. Any city filing notice with the commission that it proposes to become a town or any petition for the transition of a city to town status that has been referred to the commission by the court pursuant to § 15.2-4104 of the Code of Virginia should be accompanied by data and other evidence responsive to each element listed in this section that is relevant to the proposed transition.

1. ~~Map or maps~~ A map showing (i) the boundaries of the city proposed for transition and their geographic relationship to

other political boundaries; (ii) identifiable unincorporated communities; (iii) major streets, highways, schools, and other major public facilities; (iv) significant geographic features, including mountains and bodies of water; (v) existing uses of the land within the city, including residential, commercial, industrial, and agricultural; and (vi) information deemed relevant as to the possible future use of the land within the city.

2. The past, the estimated current, and the projected future population and population of the city and the county affected by the proposed transition, and the estimated density of the city and the affected county.

3. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in the city and the county affected by the proposed transition.

4. The past, the estimated current, and a five-year projection of the future number of public school students enrolled in the public schools and the number of school-age children living in the city and the county affected by the proposed transition.

5. The assessed values~~,~~ by major classification for real property, personal property, machinery and tools, merchants' capital, and public service corporation property for the current year and the preceding 10 years for the city and for the county affected by the proposed transition.

6. The current local property and nonproperty tax rates~~,~~ and the rates for the preceding 10 years~~,~~ applicable within the city and the county affected by the proposed transition.

7. The estimated current local revenue collections (including receipts from real property, personal property, machinery and tools, consumer utility, sales taxes, etc., and receipts from nontax sources) and intergovernmental aid, and the collections and aid for the preceding 10 years, for the city and the county affected by the proposed transition.

8. The identification of those services performed by the city that are proposed for assumption by the county as a result of the proposed transition, the number of customers or recipients of each service within the city that would be served by the county subsequent to the transition, and the aggregate annual cost to the county for the provision of services within the city.

9. The identification of those services that would be provided by the town subsequent to the proposed reversion, the number of recipients of each service within the municipality, and the aggregate annual cost to the proposed town for the provision of services.

10. The identification of those city-owned facilities that are proposed for transfer to the county, the identification of those that would be retained by the proposed town, and the current fair market value and the outstanding city debt attributable to each facility.

11. The current outstanding debt of the city, the applicable portion of debt stated as a percentage of the city's constitutional debt limit, and the current schedule for the retirement of all municipal debt.

12. The identification of that portion of the city's indebtedness that is proposed for transfer to the county and the purposes for which the debt has been incurred.

13. Estimates of the annual amount of tax and nontax revenues to be collected by the county within the municipality subsequent to the proposed transition.

14. Estimates of the annual additional amount of intergovernmental aid to be received by the county as a result of the proposed transition.

15. An estimate of the net aggregate fiscal impact of the proposed transition on the county during the initial year subsequent to the transition and during each of the ensuing five years.

16. An estimate of the adjustment required in the county's real property tax rate, assuming that the net aggregate fiscal impact on the county resulting from the transition is addressed solely by an adjustment in the rate.

17. An estimate of the net aggregate fiscal impact of the proposed transition on the city during the initial year subsequent to the transition and during each of the ensuing five years.

18. An estimate of the adjustment required in the municipality's real property tax rate, assuming that the net aggregate fiscal impact on the city resulting from the transition is addressed solely by an adjustment in the rate.

19. The effect of the proposed transition on compliance with and the promotion of applicable state policies with respect to environmental protection, public planning, education, public transportation, housing, and other state service policies declared by the General Assembly.

20. Specification of the terms and conditions that should be established by the court to balance the equities between the city and the county; protect the best interests of the affected localities, their residents, and the Commonwealth; and ensure an orderly transition of the city to town status.

21. The commission's staff shall endeavor to assist the parties involved in proceedings for the transition of a city to town status by identifying additional data elements considered by the commission to be relevant in the disposition of city to town transition issues.

1VAC50-20-605. County-city consolidations.

In developing its findings of fact and recommendations with respect to a proposed consolidation of a county and a city that would establish an independent city, the commission shall consider the relevant information, data, and factors listed in

this section. ~~Local governments~~ Any local government filing notice proposing the consolidation of a city and a county to establish an independent city, or any committee of citizens that has been appointed by the circuit court to act for and in lieu of a governing body to perfect a consolidation agreement pursuant to § 15.2-3531 of the Code of Virginia shall, separately or jointly, submit to the commission data and other evidence responsive to each element listed in this section that ~~they deem~~ the local government or committee deems relevant to the proposed consolidation.

1. Copy of the consolidation agreement.

2. A map showing (i) the location of all municipalities situated within the proposed consolidated city; (ii) all adjoining and adjacent localities; (iii) identifiable unincorporated communities within the proposed consolidated city; (iv) major streets, highways, schools, and other major public facilities; (v) significant geographic features, including mountains and bodies of water; (vi) existing uses of the land, including residential, commercial, industrial, and agricultural; and (vii) information deemed relevant as to the possible future use of the property within the proposed consolidated city and as to its future viability.

3. The past, the estimated current, and the projected population of each locality proposing to consolidate.

4. The population density of the proposed consolidated city based on the most recent United States decennial census or as estimated by the Weldon Cooper Center for Public Service at the University of Virginia.

5. A land-use table showing both the acreage and percentage of land currently devoted to the various categories of land use in the proposed consolidated city.

6. The estimated current and a five-year projection of the future number of public school students enrolled in the public schools in each locality proposing to consolidate and the number of school-age children living in the proposed consolidated city.

7. The assessed values~~,~~ by major classification for real property, personal property, machinery and tools, merchants' capital, and public service corporation property for the current year and the preceding 10 years for the county and the city proposing to consolidate and the proposed consolidated city.

8. The estimated local property and nonproperty tax rates that will be applicable within the proposed consolidated city.

9. The estimated local revenue collections, including tax receipts from real property, personal property, machinery and tools, merchants' capital, business and professional license, consumer utility, and sales taxes and intergovernmental aid, such collections and aid for the preceding 10 years, and projections of the collections and aid within each of the localities proposing to consolidate.

10. The amount of long-term indebtedness of each of the localities proposing to consolidate and the amount and purpose for which that debt has been incurred.

11. Data regarding (i) the urban-type services presently provided by each of the localities proposing to consolidate, (ii) the level of those services to be provided in the proposed consolidated city, (iii) the additional services to be provided and the additional cost to be borne by the proposed consolidated city, and (iv) the means by which the proposed consolidated city shall finance the additional services and costs.

12. The fiscal capacity of the proposed consolidated city to function as an independent city and to provide appropriate services.

13. The impact of the proposed consolidation on compliance with and the promotion of applicable state policies with respect to environmental protection, public planning, education, public transportation, housing, and other state service policies declared by the General Assembly.

14. The impact of the proposed consolidation on the interest of the Commonwealth in promoting strong and viable units of government in the area.

15. The commission's staff shall endeavor to assist the parties involved in proceedings for the consolidation of a county and a city that would establish an independent city by identifying additional data elements considered by the commission to be relevant in the disposition of city-county consolidation issues.

1VAC50-20-610. Voluntary settlement agreements.

In developing its findings of fact and recommendations with respect to a proposed agreement developed under the authority of § 15.2-3400 of the Code of Virginia, the commission shall consider the relevant information, data, and factors listed in this section. Local governments submitting a proposed agreement for review shall, separately or jointly, submit to the commission data and other evidence responsive to each element listed in this section that ~~they~~ the local governments deem relevant to the proposed voluntary settlement agreement.

1. If the agreement proposes a municipal boundary expansion, submissions should include data and evidence responsive to the relevant provisions of 1VAC50-20-540.

2. If the agreement proposes the immunization of areas of a county from annexation or the incorporation of new cities, submissions should include data and evidence responsive to the relevant provisions of 1VAC50-20-550.

3. If the agreement proposes the incorporation of a town, submissions should include data and evidence responsive to the relevant provisions of 1VAC50-20-570.

4. If the agreement proposes the transition of a town to city status, submissions should include data and evidence responsive to the relevant provisions of 1VAC50-20-580.

5. If the agreement proposes the transition of a county to city status, submissions should include data and evidence responsive to the relevant provisions of 1VAC50-20-590.

6. If the agreement proposes the transition of a city to town status, submissions should include data and evidence responsive to the relevant provisions of 1VAC50-20-601.

7. If the agreement proposes a revenue-sharing plan or similar arrangement by which jurisdictions will share the tax or revenue sources of an area, submissions should include:

a. A description of the plan;

b. Calculations indicating for each locality the projected future contributions to the plan for the next five-year period;

c. Each locality's projected net annual receipts or net annual contributions to the plan for the next five-year period;

d. Each locality's annual expenditures for the past five years and its projected annual expenditures for the next five years by general operating, school, and debt service categories;

e. Each locality's real estate and public service corporation property assessed values for the past five years and projected for the next five-year period;

f. Each locality's annual revenue for the past five years and projected for the next five-year period (exclusive of receipts from or payments to the economic growth sharing plan) by source and type;

g. Each locality's anticipated major capital needs for the next five-year period; and

h. Other information indicating the general equity of the proposed plan for each participating locality.

8. The commission's staff shall endeavor to assist localities contemplating or involved in the development of voluntary settlement agreements under the authority of § 15.2-3400 of the Code of Virginia by identifying additional data elements considered by the commission to be relevant to the commission's review of such agreements.

1VAC50-20-612. Voluntary economic growth-sharing agreements.

In developing its findings of fact and recommendations with respect to a proposed voluntary economic growth-sharing agreement developed under the authority of § 15.2-1301 of the Code of Virginia, the commission shall consider the relevant information, data, and factors listed in this section. Local governments submitting such a proposed agreement for review shall, separately or jointly, submit to the commission data and other evidence responsive to each element listed in this section that ~~they~~ the local governments deem relevant to the proposed agreement.

1. A copy of the proposed agreement and a description of the economic growth-sharing plan.

2. A description of the financial investment or other contributions ~~which~~ that each participating locality will make to the ~~project(s)~~ project envisaged under the agreement.

3. Projections of each participating locality's net annual receipts or net annual contributions to the ~~project(s)~~ project specified in the agreement for the next 10-year period, or for a lesser or greater period as deemed appropriate.

4. A description of any dedication or restriction on the use of funds generated by the ~~project(s)~~ project specified in the agreement for the participating localities.

5. Calculations indicating the estimated impact of the ~~project(s)~~ project proposed in the agreement on the annual operating expenditures of each participating jurisdiction for the next 10-year period, or for a lesser or greater period as deemed appropriate.

6. Calculations indicating the estimated impact of the ~~project(s)~~ project proposed in the agreement on the current and prospective capital expenditures of each participating jurisdiction over the course of the next 10-year period, or over a lesser or greater period as deemed appropriate.

7. Calculations indicating the estimated impact of the ~~project(s)~~ project proposed in the agreement on the debt and annual debt service of each participating jurisdiction over the course of the next ~~ten~~ 10-year period, or over the course of a lesser or greater period as deemed appropriate.

8. Information indicating the general equity of the proposed plan for each participating locality.

9. Other information ~~which~~ that would assist the commission in analyzing the "probable effect on the people" in the participating jurisdictions of the proposed agreement.

10. The commission's staff shall endeavor to assist localities contemplating or involved in the development of voluntary economic growth-sharing agreements under the authority of § 15.2-1301 of the Code of Virginia by identifying additional data elements considered by the commission to be relevant to the commission's review of such agreements.

1VAC50-20-616. Order defining a town's future annexation rights.

In developing its order defining the future annexation rights of a town pursuant to § 15.2-3234 of the Code of Virginia, the commission shall consider the relevant information, data, and factors listed in this section. Any petition referred to the commission requesting an order establishing a town's future annexation rights should be accompanied by data and other

evidence responsive to each element listed in this section that the town deems relevant to the issue.

1. Information regarding the inability of the town and the county to reach a voluntary agreement as to the future annexation rights of the town.

2. Terms and conditions of a proposed order establishing the town's future annexation rights.

3. Data and evidence responsive to the relevant provisions of 1VAC50-20-540.

4. The commission's staff shall endeavor to assist localities involved in proceedings concerning an order defining a town's future annexation rights by identifying additional data elements considered by the commission to be relevant in the disposition of such issues.

1VAC50-20-620. Oral presentations by parties.

A. In the course of its analysis of any issue, the commission may schedule oral presentations for purposes of permitting the parties to amplify ~~their~~ submissions, to critique and to offer comment upon the submissions and evidence offered by other parties, and to respond to questions relative to the issue from the commission. The presentations, if scheduled, shall extend for a period of time as the commission may deem appropriate.

B. If oral presentations are scheduled by the commission, the chair shall select, subsequent to the receipt of recommendations from the parties, an appropriate site for the presentations. Recommendations by the parties regarding the sites should be based upon the adequacy of space for the display and movement of exhibits; the adequacy of seating arrangements for the commission, ~~its~~ the commission's staff, representatives of the parties, a court reporter, and the public; the adequacy of security at the site to permit materials to be left unattended during recesses; and the adequacy of the ~~acoustical~~ acoustic characteristics of the site to facilitate communications or the availability of a public address system.

C. Local governments or other parties desiring to present exhibits or data requiring special equipment should be prepared to provide such special equipment.

D. The commission may, where it deems appropriate, consolidate two or more interlocal issues before it for purpose of oral presentations.

E. The commission shall, within the requirements of law, conduct the oral presentations in the manner it considers best suited for reaching a decision in the best interest of the parties and in the best interest of the Commonwealth.

F. The chair~~,~~ or other member the commission designated to preside during any oral presentations~~,~~ may allocate time to the various parties as the chair or presiding member deems appropriate. The allocation of time shall be based upon the needs of the commission to review data, ~~to~~ examine witnesses, and ~~to~~ obtain an understanding of the relevant factors affecting the issue under review.

G. The sequence in which testimony will be received by the commission during any oral presentations shall be established by the chair or presiding member, but shall generally be as follows:

1. A brief opening statement by each party, if desired;

2. Presentation by the party initiating the issue before the commission;

3. Presentations by the local governments immediately affected by the action proposed by the initiating party, in an order established by the chair or presiding member;

4. Presentations by other parties~~,~~ in an order established by the chair or presiding member;

5. Rebuttal where requested by a party and agreed to by the chair or presiding member.

H. The chair or presiding member may, to the extent the chair or presiding member deems appropriate, permit parties to question witnesses regarding submissions, ~~their~~ testimony, or other facts relevant to the issues before the commission. Where a party is represented by counsel, such questioning may be conducted by counsel.

Where the parties have prefiled testimony at the commission's request pursuant to 1VAC50-20-390 R, the questioning of individuals whose testimony has been prefiled shall be limited to a cross-examination of such testimony. The commission may accept additional oral testimony from individuals whose testimony has been prefiled during the presentations where good cause is shown. Where additional oral testimony is accepted by the commission, the commission shall provide an opportunity for other parties to respond to the testimony and to cross-examine the individual offering such testimony.

I. The chair or presiding member may, during or at the conclusion of the oral presentations, permit or request oral argument on the issues before the commission.

J. The commission~~,~~ and its staff~~,~~ may question any witness or representative of any party during the oral presentations regarding any submission, testimony, or other fact ~~which~~ that the commission considers relevant to the issues before it. The chair or presiding member shall endeavor to call for commission questioning in a manner designed to expedite the presentations.

K. The commission may accept depositions from persons unable to attend an oral presentation. Depositions shall only be accepted under conditions deemed acceptable by the commission, including conditions ~~assuring~~ ensuring an opportunity for all affected local governments to be present and to ~~examine~~ adequately examine the witness during the taking of depositions.

L. The parties or their counsel shall be expected to confer in advance of the time and date set for presentations in order to inform one another of ~~their~~ prospective witnesses and the order of ~~their~~ the anticipated appearance of the witnesses. All material, data, or exhibits proposed for presentation to the commission during the oral presentations ~~and not previously~~ will be made available to the other parties ~~shall be exchanged or made available to the parties prior to presentation to the commission, subject to the qualifications in subsection M of this section~~ and the public and on the commission's website whenever possible.

M. The commission requires that all materials, data, and exhibits be presented to it and made available to other parties in advance of the commencement of the onsite component of the commission's review. The commission may accept additional materials, data, and exhibits during the onsite component of its review upon unanimous consent of the members present. Where late submissions are accepted by the commission, the commission shall provide an opportunity for other parties to respond to the filings.

N. The commission may record by mechanical device, unless other recording arrangements are made by the parties, all testimony given during the oral presentations, but shall prepare a transcript of the recording only when deemed appropriate. The commission shall provide, upon request, any party a duplicate copy of the transcript or recording, if made, ~~at a price sufficient to cover the expense incurred~~ in accordance with the Department of Housing and Community Development's Freedom of Information Act policies. In lieu of recording by the commission, the parties may arrange to provide a court reporter at ~~their~~ the expense of the parties. Where a court reporter is utilized, the commission shall receive one copy of the transcript.

1VAC50-20-630. Public hearing.

A. In all cases where a public hearing is required by law, the commission shall conduct the public hearing at which any interested person or party may testify. The commission shall generally schedule the public hearing in conjunction with the oral presentations held, if any, with respect to the issue; however, public hearings regarding proposed town incorporations required pursuant to § 15.2-3601 of the Code of Virginia shall be held no sooner than 30 days after receipt of the court request for commission review.

B. Prior to holding the public hearing, the commission shall publish notice of the pending hearing as required by law.

In addition to the notice of public hearing required by this subsection, a town that is a party to an agreement defining annexation rights negotiated pursuant to § 15.2-3231 of the Code of Virginia shall give written notice of the commission's hearing at least 10 days before the hearing to the ~~owners~~ owner or ~~their~~ the owner's agent of each parcel of land included in the area proposed for annexation under the terms of the agreement. One notice sent by first-class mail to the last known address of the ~~owners~~ owner or ~~their~~ the owner's agent as shown on the current county real estate tax assessment books or current county real estate tax assessment records shall be deemed adequate compliance with this requirement, provided that the clerk of the town shall make an affidavit that the mailings have been made and file the affidavit with the commission.

C. The commission shall request the party initiating the issue before it and the other principally affected parties to place on public display in or adjacent to the office of the chief administrative officer of each principally affected local government copies of all materials ~~which~~ that are available to ~~them~~ the party and ~~which~~ that have been submitted to the commission for consideration with respect to the issue. The material should be made conveniently available to the public during normal working hours. The commission also encourages the parties to make ~~available to the public other~~ copies of the material ~~at libraries, educational facilities, or~~ available on their websites or at other public places in order that the public might have ample opportunity to study the material prior to the public hearing. The commission's advertisements published under subsection B of this section shall announce the availability of the material at the offices of the administrators ~~and at other facilities as may be selected by the parties for display purposes~~.

D. The commission shall request the chief administrative officer ~~(~~or other official~~)~~ of each jurisdiction principally affected by the issue before the commission to make suitable arrangements in or adjacent to ~~their offices~~ the official's office for the registration of speakers at the public hearing. The commission shall furnish appropriate registration forms for that purpose. The commission's advertisements under subsection B of this section shall advise the public that registration to speak at the public hearing may be accomplished at the offices of the local administrators or, alternatively, through the offices of the commission in Richmond. The commission may also permit speakers to register at the site and at the time of the public hearing and shall request the assistance of the local administrative officers in making suitable arrangements for such registration.

E. The chair or other member of the commission designated to preside over the proceedings shall select the site for the public hearing subsequent to the receipt of recommendations from the parties. Recommendations from the parties should be based upon a site's accessibility to residents of the areas and jurisdictions principally affected, its seating capacity, the adequacy of parking facilities, the availability of a public address system, and seating arrangements permitting the commission to have proper visual contact with the public.

F. The commission shall request the parties to cooperate in the preparation of the site for the public hearing and shall request that a minimum number of maps and exhibits be placed on display at the site in order that ~~persons~~ any person testifying

may identify ~~their~~ that person's residences, property, businesses, or other concerns in relation to the proposed issue.

G. The commission shall request the local jurisdiction within which the site for the public hearing is situated to make appropriate arrangements in order to ~~assure~~ ensure the security and the orderliness of the proceedings.

H. The chair or the presiding member shall determine the sequence of speakers at a public hearing, but the sequence shall ordinarily conform to the sequence of ~~their~~ the registration of speakers. The chair or presiding member may, however, vary the sequence of speakers in order that persons from all affected jurisdictions and areas, and those representing different perspectives, might have equal opportunity for the timely presentation of ~~their~~ comments.

I. The commission shall endeavor to allow any person or party wishing to speak at a public hearing an opportunity to do so. The chair or presiding member may establish time limits for the presentation of testimony as the chair or presiding member deems appropriate. The chair or presiding member may also rule testimony irrelevant, immaterial, or unduly repetitious. Proponents and opponents of a proposed action are encouraged to designate a chief spokesman for economy of time and for the avoidance of repetitious comment.

J. Any person or party testifying before the commission at the public hearing may extend their remarks in written form for subsequent submission. During the course of the public hearing, the commission shall establish a date by which the extended written comment must be received for consideration.

K. The commission may record by mechanical device, unless other arrangements are made, all testimony given during the public hearing but shall prepare a transcript of the recording only when it deems appropriate. The commission shall provide any person or party with a copy of the transcript or recording, if made, ~~at a price sufficient to cover the expense incurred~~ in accordance with the Department of Housing and Community Development's Freedom of Information Act policies. The parties may arrange to provide a court reporter, at their expense. Where a court reporter is utilized, the commission shall receive one copy of the transcript.

L. The commission may, where it deems appropriate, consolidate two or more interlocal issues for purposes of a public hearing.

1VAC50-20-640. Conclusion of mandatory reviews.

A. The commission may request or authorize the parties to an issue to submit, at a time established by the commission, a written concluding argument with proposed findings and recommendations.

B. The commission shall not accept for consideration or for inclusion in the record of a case any document, exhibit, or other material submitted after the date established by it for the close of the record. This regulation shall not preclude the commission's acceptance of data or information from any party at any time ~~which~~ that has been solicited by the commission or its staff.

~~C. The commission shall prepare an official record of all proceedings before it of such a nature and in such a manner as it deems appropriate.~~

~~D.~~ C. The commission shall submit a written report on the issues presented to it in the manner and at such time as provided by law. The reports shall set forth findings of fact and recommendations on both the merits of a proposed action and, where appropriate and feasible, the financial aspects thereof. Copies of reports shall be made available to the parties and to members of the public ~~requesting such~~ that request a copy. The commission may charge a fee for copies of its reports in ~~an amount sufficient to cover the cost of duplication, shipping, and handling~~ accordance with the Department of Housing and Community Development's Freedom of Information Act policies and applicable law.

~~E.~~ D. Subsequent to its review of a petition submitted by a town under the authority of § 15.2-3234 of the Code of Virginia, and based upon the applicable statutory standards, the commission shall enter an order granting annexation rights to the town. The order may grant the town annexation rights upon the terms proposed by the town in its petition or upon some other basis as the commission deems appropriate and consistent with law. The order shall in no event grant the town the right to annex county territory by ordinance more frequently than once every five years.

1VAC50-20-650. Statutorily invoked mediation in annexation immunity issues.

A. For purposes of this section, as the requirements in this section pertain to § 15.2-2907 E of the Code of Virginia, the following definitions shall apply:

"Initial notice" means the notice sent to the commission by a locality proposing an action pursuant to § 15.2-2907 A of the Code of Virginia.

"Annexation or partial immunity suit" or "suit" means a court proceeding intended to resolve an annexation or partial immunity dispute that is filed after the commission has issued its advisory report pursuant to § 15.2-2907 of the Code of Virginia.

B. When any county, city, or town seeks to negotiate an agreement with one or more localities relative to annexation or partial immunity under the authority granted by § 15.2-2907 E of the Code of Virginia, it shall notify the commission, and copies of the notice shall be served on all adjacent localities. The notice to the commission shall be accompanied by satisfactory evidence that the governing body of the locality giving notice supports the negotiation. Local governments negotiating under ~~the above referenced provision of law~~ § 15.2-2907 E of the Code of Virginia shall keep the

commission advised of progress in the negotiations. If, after a hearing, the commission finds that none of the parties is willing to continue to negotiate, or if it finds, based on progress reports and with or without a hearing, that three months have elapsed with no substantial progress, it shall declare the negotiations to be terminated. Unless the parties agree otherwise, negotiations shall in any event terminate 12 months from the date the initial notice was ~~first~~ given to the commission ~~of the desire to negotiate~~. Once the commission has declared negotiations terminated, or ~~upon the expiration of the 12-month negotiating term or any agreed extension thereof~~ 12 months after the commission's receipt of the initial notice, or upon any extension of the 12-month deadline agreed to by both parties, whichever comes first, no new notice to negotiate shall be filed by any party. Upon the request of the local governments negotiating under the authority of § 15.2-2907 E of the Code of Virginia, the commission~~,~~ or its designee~~,~~ may be requested to serve as mediator, and, in addition, the commission's staff and resources shall be available to assist the negotiating local governments. All expenses incurred by the commission and its staff in assisting with negotiations shall be borne by the parties initiating the negotiations unless otherwise agreed.

C. The commission will neither accept a notice filed under the authority granted by § 15.2-2907 E of the Code of Virginia before the initial notice is filed nor accept a notice after 12 months has passed since receipt of the initial notice, unless both parties agree to an extension.

VA.R. Doc. No. R24-7771; Filed November 22, 2024, 4:49 p.m.

Emergency Regulation

Titles of Regulations: **1VAC50-30. Regulation of Procedures Concerning Fiscally Distressed Localities (adding 1VAC50-30-10 through 1VAC50-30-190).**

Statutory Authority: §§ 15.2-2512.1 and 15.2-2903 of the Code of Virginia.

Effective Dates: December 30, 2024, through June 29, 2026.

Agency Contact: LeGrand Northcutt, Senior Policy Analyst, Department of Housing and Community Development, Main Street Center, 600 East Main Street, Richmond, VA 23219, telephone (804) 310-7151, FAX (804) 371-7090, or email legrand.northcutt@dhcd.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, whose 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.

The amendments implement the provisions of Chapter 426 of the 2024 Acts of Assembly, which creates new remedies to help resolve fiscal issues in localities that the Auditor of Public Accounts has identified as fiscally distressed and requires the Commission on Local Government to issue reports on any locality with fiscal distress and, in certain geographic regions, help steer localities through fiscal remediation plans with the help of an appointed emergency fiscal manager. The new regulation will establish rules for procedures before the commission and standards to guide commission reports, appointments, and decisions that are required by § 15.2-2512.1 of the Code of Virginia, including (i) setting rules for proceedings before the commission generally, (ii) establishing standards for the commission's initial report on fiscal distress in a locality, (iii) creating a process for appointing an emergency fiscal manager and approving the manager's remediation plan, and (iv) establishing requirements for implementing the remediation plan and ending commission oversight.

Chapter 30

Regulation of Procedures Concerning Fiscally Distressed Localities

Part I

General

1VAC50-30-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless a different meaning is provided or the context clearly indicates otherwise:

"Auditor" means the Auditor of Public Accounts.

"Auditor's notification" or "notification" means the written notification indicating the existence of fiscal distress in a specific locality issued by the auditor pursuant to § 15.2-2512.1 of the Code of Virginia. The auditor's notification contains the following elements:

1. The auditor's conclusion that a locality meets the criteria for fiscal distress and that such fiscal distress exists based on the auditor's completion of a follow-up review of the locality pursuant to § 15.2-2512.1 D of the Code of Virginia;

2. A statement that either the local governing body or chief executive officer requests assistance or the auditor is of the opinion that state assistance, oversight, or targeted intervention is needed, either to further assess, help stabilize, or remediate the situation; and

3. Specific issues or actions that need to be addressed by state assistance, oversight, or intervention.

"Chair" means the Chair of the Commission on Local Government.

"Commission" means the Commission on Local Government.

"Commission hearing" means a proceeding where any party or witness may present evidence, either orally or in writing, as allowed by this chapter to the commission to amplify the

party's submissions, to critique, and to offer comment upon the submissions and evidence offered by other parties and witnesses and to respond to questions relative to the issue from the commission. Commission hearings may extend for a period of time that the commission deems appropriate.

"Emergency fiscal manager" means an official appointed by the Commission on Local Government to implement a remediation plan approved by the commission under § 15.2-2512.1 H of the Code of Virginia to restore fiscal health for a locality in the Commonwealth. The "emergency fiscal manager" has all authority granted to the emergency fiscal manager by law and this chapter.

"Executive director" means the Executive Director of the Commission on Local Government pursuant to § 15.2-2901 of the Code of Virginia.

"Fiscal distress" means a situation whereby the provision and sustainability of public services in a locality or a locality's ability to appropriately fund financial liabilities is threatened by various administrative and financial shortcomings, including cash flow issues; inability to pay expenses; revenue shortfalls; deficit spending; structurally imbalanced budgets; billing and revenue collection inadequacies and discrepancies; debt overload; failure to meet obligations to authorities, school divisions, or political subdivisions of the Commonwealth; lack of trained and qualified staff to process administrative and financial transactions; or the inability to timely produce an audited financial report. Fiscal distress may be caused by factors internal to the locality or external to the locality, and in various degrees such conditions may or may not be controllable by management or the local governing body or its constitutional officers.

"Locality" means a city, county, or town in the Commonwealth that is determined to be in fiscal distress by the auditor after a review under the procedures created by § 15.2-2512.1 of the Code of Virginia or § 4-8.03 of any appropriations act signed into law.

"Oversight authority" means the authority granted to the commission by § 15.2-2512.1 of the Code of Virginia. "Oversight authority" includes the ability to act in an oversight capacity, obtain technical assistance from the Auditor of Public Accounts, and exercise all authority to investigate, make and issue decisions, promulgate and issue procedural rules and orders, hold hearings, write reports, and otherwise execute the powers and authority granted to the commission by § 15.2-2512.1 and subdivision 9 of § 15.2-2903 of the Code of Virginia.

"Party" means any entity, person, or group of persons that the commission has oversight authority over pursuant to § 15.2-2512.1 of the Code of Virginia. It may include localities, the state-appointed intervention staff, and the emergency fiscal manager.

"Planning District 19" means the planning district organized under the Regional Cooperation Act (§ 15.2-4200 et seq. of the Code of Virginia) that, as of July 1, 2024, is known as Planning District 19. The boundaries of Planning District 19 are the boundaries established by the Department of Housing and Community Development as of July 1, 2024. All localities within those boundaries as of July 1, 2024, are considered part of Planning District 19 for the purposes of this chapter.

"Proceeding" means any process or proceeding governed by this chapter, including commission hearings.

"Public hearing" means an opportunity for input from the public on an issue before the commission.

"State-appointed intervention staff" means public employees or private contractors hired or procured by the governor under the authority provided pursuant to § 15.2-2512.1 of the Code of Virginia. It does not include the commission, commission staff, or the emergency fiscal manager.

1VAC50-30-20. Scope of commission oversight of fiscally distressed localities generally.

A. The commission's oversight authority shall begin when the executive director receives notice from the Governor that the auditor has issued a notification indicating the existence of fiscal distress in a specific locality pursuant to § 15.2-2512.1 of the Code of Virginia. The Governor's notice will request that the commission assume oversight authority pursuant to the notification.

B. Upon the executive director's receipt of notice from the Governor under subsection A of this section and before taking any actions related to the auditor's notification, the commission will send an initial notice to the Governor, the auditor, and the chief executive officer of the locality stating that the commission has initiated its oversight authority pursuant to § 15.2-2512.1 of the Code of Virginia and this chapter. The notice will (i) provide an overview of the commission's oversight authority that indicates the potential resolutions, reports, decisions, or other orders that might be issued under § 15.2-2512.1 of the Code of Virginia and this chapter; (ii) contain contact information consisting of the name, telephone number, and government email address of the commission staff assigned to answer questions or otherwise assist the locality; and (iii) state that the locality shall enjoy the rights and privileges described in § 15.2-2512.1 of the Code of Virginia and this chapter in proceedings governed by this chapter, including:

1. To appear in person or by counsel or other qualified representative before the commission;

2. To have notice of any contrary fact basis or information in the possession of the commission that can be relied upon in the writing of any report or the making of any decision against the locality; and

3. To be informed, briefly and generally in writing, of the factual or procedural basis for a decision against the locality to the extent such information is not included in a commission report.

C. For localities not located in Planning District 19, the commission's oversight authority ends upon the issuance of a report of its findings and conclusions to the Governor and the Chairs of the House Committees on Appropriations and Counties, Cities, and Towns and the Senate Committees on Finance and Appropriations and Local Government in accordance with § 15.2-2512.1 G of the Code of Virginia and 1VAC50-30-100.

D. For localities located in Planning District 19, the commission's oversight authority will end when the locality has either (i) met the benchmarks and criteria of and has otherwise satisfied and completed an approved remediation plan, whether in fact or through consent, to the commission's satisfaction or (ii) taken appropriate action to address the issues raised by the auditor in its notification to the Governor under § 15.2-2512.1 D of the Code of Virginia.

E. The commission will determine whether a locality has taken appropriate action to address the issues in subsection D of this section either (i) by issuing a report under 1VAC50-30-110 concluding that the locality has taken appropriate action or (ii) through the terms of a consent decree with the locality.

F. If the commission determines that the terms of any consent decree entered into under this chapter have not been met or will not be met by the locality, it may hold and issue additional proceedings and reports under Part II (1VAC50-30-90 et seq.) of this chapter and exercise all other authority granted by § 15.2-2512.1 of the Code of Virginia and this chapter regardless of whether such authority has been exercised previously.

G. The commission may amend its reports, resolutions, decisions, or orders for any reason within 60 days of issuance or at any time for good cause shown.

H. The commission may rescind or amend its appointment of the emergency fiscal manager if the person being appointed declines the appointment, dies, resigns, or is otherwise unable to perform the duties of the appointment.

1VAC50-30-30. Commission not to reject oversight authority in certain circumstances.

A. The commission will not reject oversight authority on the grounds that the auditor's review that led to its notification occurred before July 1, 2024, or because the factual basis for the notification is based on events that occurred before July 1, 2024.

B. The commission has oversight authority in all cases where the auditor has issued a notification, initiated a review of a locality, and made conclusions or determinations based on that review under authority granted by § 4-8.03 of any appropriations act signed into law so long as the resulting notification otherwise fulfills the requirements of § 15.2-2512.1 of the Code of Virginia and this chapter.

1VAC50-30-40. General provisions regarding commission oversight of fiscally distressed localities.

A. In addition to complying with the State and Local Government Conflict of Interests Act (§ 2.2-3100 et seq. of the Code of Virginia) and all other applicable laws and regulations, each commissioner has a duty to self-recuse from any commission hearing or other proceeding as well as the discussion, deliberation, drafting, or approval of any resolution, report, decision, or other order when any of the parties is a locality where such commissioner is employed, presently resides, or owns an interest in real property.

B. If, due to the number of recusals that occur pursuant to subsection A of this section that are not required by the State and Local Government Conflict of Interests Act, there are not enough commissioners to establish a quorum, then the chair of the commission, in accordance with commission policies and in consultation with any recusing commissioners who do not have conflicts under the State and Local Government Conflict of Interests Act, may require enough commissioners to participate in the commission hearing, other proceeding, or decision to establish a quorum regardless of each individual commissioner's duty to recuse.

C. The commission will generally schedule for consideration issues in the order in which received; however, the commission reserves the right to consider issues in another sequence where it deems appropriate.

D. Parties may participate in proceedings governed by this chapter in the manner described in this chapter. The commission may allow submissions from any interested person or entity. Such submissions must be provided by the submitting party to all parties and must be filed by any dates established by the commission, as applicable. The commission may waive the submission date at its discretion when it determines such submission will assist in fulfilling its responsibilities under this chapter.

E. All testimony, statements, exhibits, documents, evidence, or other materials submitted to the commission by the parties in conjunction with commission hearings or other proceedings required by § 15.2-2512.1 of the Code of Virginia are considered public documents and will be made available by the commission for review by any other interested party or by the public under the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia). In accordance with 1VAC50-20-170, all other materials, including the testimony, statements, exhibits, documents, or other evidence submitted to the commission during an executive session or pursuant to negotiations or mediation that the commission is authorized by this chapter to conduct, shall be treated as confidential and shall neither be subject to disclosure by the commission nor by

the parties involved, except by agreement of the commission and all parties to the proceedings. The commission will post all public documents on its website.

F. Each document, exhibit, report, or other material submitted to the commission should contain a title, the date of preparation, a detailed citation of the sources from which all data are obtained, and the name of the entity that submitted the document, exhibit, report, or other material.

G. In each instance where projections are given, projections should be made for a period to be set by the commission, and the method and bases of the projections should be indicated.

H. Any party making submissions to the commission must provide at least eight copies of all submissions, unless the commission or the commission's staff indicates that a lesser number would be sufficient for the commission's review and analysis. The commission may make provisions for the electronic filing of submissions.

I. At any time during the course of the commission's oversight, the commission may solicit additional data, documents, records, or other materials from the parties as is deemed necessary for proper analysis of any issue.

J. The commission may undertake independent research as it deems appropriate to ensure a full and complete investigation of each issue. If the commission considers or relies upon any publicly available data in a report or decision, the commission will provide all parties with advance notice of its intent to use such data. This requirement shall not apply to the commission's use of case law, administrative precedent, or commission reports.

K. The commission considers the cooperation among parties vital to the discharge of its responsibilities; therefore, all parties should cooperate fully in the development and timely sharing of data throughout the commission's oversight.

L. Parties may submit testimony, evidence, and submissions to the commission. The commission may allow the parties to supplement and correct data, exhibits, documents, testimony, or other material submitted to the commission. Where corrections are authorized, copies of all corrections must be provided by the submitting party to all other parties. If, in the commission's judgment, the corrections are of a substantive nature so as to significantly alter the scope or character of the issue under review, the commission may delay its proceedings as allowed by applicable law and this chapter for a reasonable amount of time to provide an opportunity for other parties to respond to the corrected data, exhibits, documents, testimony, or other material.

1VAC50-30-50. Proceedings conducted by the commission related to fiscally distressed localities.

A. The commission may identify the parties and witnesses from whom it wishes to hear testimony, provide evidence, or accept submissions. The locality made the subject of proceedings governed by this chapter shall be among such parties and witnesses. All agencies of the Commonwealth shall provide the commission with necessary information for the performance of its duties upon request. Any party appearing before the commission may be represented by counsel or other qualified representative.

B. The chair of the commission or the presiding officer in the chair's absence will generally have all powers and authority granted to the chair pursuant to Organization and Regulations of Procedure (1VAC50-20) as may be applicable to proceedings under this chapter.

C. The chair of the commission or other member of the commission in the chair's absence will preside over all proceedings conducted in accordance with this chapter. In the chair's absence, the presiding officer will be selected in the same manner as prescribed by 1VAC50-20-40.

D. All proceedings before the commission will take place in Richmond, Virginia, unless the commission selects an alternative location.

E. The commission may conduct any proceedings under this chapter virtually in accordance with § 2.2-3708.3 of the Code of Virginia and the commission's electronic meetings policy.

F. Commissioners may attend any proceedings under this chapter using electronic participation in accordance with § 2.2-3708.3 of the Code of Virginia and the commission's electronic meetings policy.

G. No party before the commission will communicate in any manner with any member of the commission with respect to the merits of the issue under review except as is authorized by this chapter or as may be otherwise authorized by the commission or the chair.

H. No proceeding will take place without a quorum of the commission present.

I. The commission may examine parties and witnesses and may permit a locality to ask questions of parties and witnesses.

J. The commission may allow any interested person or entity to testify, either orally or in writing, at a proceeding. Where supplemental testimony is authorized pursuant to this subsection, copies of all written testimony and exhibits will be provided by the testifying person or entity to all parties.

K. Any party making written testimony to the commission must provide at least eight copies of all testimony, unless the commission or commission staff indicates that a lesser number would be sufficient for its review and analysis. The commission may make provisions for the electronic filing of written testimony.

1VAC50-30-60. Resolutions, reports, decisions, and other orders of the commission.

A. The commission will issue such resolutions, reports, decisions, and other orders as needed to effectuate the purposes of § 15.2-2512.1 of the Code of Virginia and this chapter.

B. All resolutions, reports, decisions, and orders will be issued in writing.

C. All resolutions, reports, decisions, and orders issued by the commission will be signed by the chair.

D. The commission's resolutions, reports, decisions, and orders will be based on the conclusions of a majority of the commissioners. Dissenting commissioners will note disagreement with the resolution, report, decision, or order and may write separately as the commissioners deem appropriate.

1VAC50-30-70. Default and other limitations on testimony.

A. Unless otherwise provided by law, if a locality without good cause fails to attend or participate in a commission hearing or other proceeding before the commission, the commission may proceed without the locality's attendance.

B. In all instances where good cause must be shown, the decision to accept such cause is at the discretion of the chair but may be appealed by the locality to the full commission.

C. A locality that chooses not to present or file testimony by the date established by the commission may not thereafter present its own testimony, except by permission of the commission, but may otherwise fully participate in the commission hearing or other proceeding and respond to the testimony of other witnesses.

D. Failure to comply with the directions of the commission for any written or oral testimony, without good cause shown, may result in rejection of the testimony by the commission.

1VAC50-30-80. Additional powers of the commission.

A. The commission may create and promulgate procedural rules, forms, schedules and scheduling orders, briefing schedules, or guidance documents necessary to carry out the provisions of § 15.2-2512.1 of the Code of Virginia and this chapter.

B. Except as required by law, the commission may, in its reasonable discretion, waive any of the procedural rules, forms, schedules and scheduling orders, briefing schedules, guidance documents, or other requirements of this chapter when, in its judgment, it finds that the waiver in no way lessens its responsibilities pursuant to § 15.2-2512.1 of the Code of Virginia and this chapter.

C. The commission may, on its own motion, adjust all dates and deadlines required by this chapter but not otherwise required by law to facilitate the resolution of issues before it.

D. In addition to any proceeding, meeting, hearing, or other gathering of the parties specified by law or this chapter, the commission may, where it deems necessary for an analysis of material, facilitation of a negotiated settlement, or discussion or clarification of the issues before it, schedule other meetings. Such meetings may be held in executive session as allowed by § 15.2-2907 D of the Code of Virginia as well as 1VAC50-20-160 and 1VAC50-20-170.

E. The commission may extend the services of its office to the parties in an endeavor to promote a consent decree or other negotiated settlement of the issues and may designate, with the agreement of the parties, an independent mediator to assist in the negotiations.

F. The commission may, at its discretion, accept for mediation issues presented to it by mutual agreement of the parties if the purpose of the mediation is to reach a full or partial settlement of the issues through a consent decree or other negotiated settlement. Requests for commission mediation under this subsection should be made to the commission through the executive director or the executive director's designee and should be accompanied by satisfactory evidence that the parties agree to the request for mediation assistance. The requests should include a statement indicating the issue for which mediation is sought and any other information to allow the commission to determine whether its mediation effort would be timely and appropriate. If the commission agrees to mediate any issues under this subsection, the parties will assist the commission by providing data, material, and other information as the commission or other parties deem necessary.

G. All expenses incurred by the commission and commission staff in assisting with negotiations or mediations, including the cost of an independent mediator, will be borne by the locality unless otherwise agreed to by the other parties and the commission.

H. In accordance with § 15.2-2901 of the Code of Virginia, the executive director may enter into and administer any contracts to procure additional resources to assist the commission in carrying out the provisions of § 15.2-2512.1 of the Code of Virginia and this chapter.

Part II

Report of Findings and Conclusions to the Governor and Specified Legislative Committees

1VAC50-30-90. Proceedings with the state-appointed intervention staff.

A. Upon the executive director's receipt of a plan for state assistance, oversight, or intervention approved by the Governor, the commission or executive director will provide notice to the locality of receipt of the plan and request the locality attend a meeting with the commission and the state-appointed intervention staff to develop and approve a schedule for review of the issues. The schedule will take into account

the due dates of any periodic reports by the state-appointed intervention staff required by § 15.2-2512.1 F of the Code of Virginia. The schedule will include, at a minimum, dates for (i) the submission of evidence collected by the state-appointed intervention staff, (ii) the submission of responsive materials from the locality, (iii) a commission hearing where the locality may present and rebut any evidence or testimony, (iv) a public hearing if desired by the commission, (v) the issuance of the commission's report, and (vi) dates for other proceedings or deadlines the commission deems appropriate. The commission will consider input from the locality when developing the schedule, as appropriate.

B. If the locality does not participate in the meeting described in subsection A of this section, the commission will send the locality notice of the approved schedule, including the dates, times, and locations of the commission hearing and any public hearing.

C. The commission's report under subsection A of this section will be issued within 90 days of the commission hearing.

D. The commission may request the state-appointed intervention staff to present, either orally or in writing, testimony to assist the commission with writing its report and reaching a decision. The commission may also utilize data or testimony from the auditor, the House Committee on Appropriations, or the Senate Committee on Finance and Appropriations and may request that those entities present either orally or in writing.

E. The locality is permitted and may be requested by the commission to present, either orally or in writing, testimony at a commission hearing. The testimony of the locality may refer to all data, exhibits, documents, or other material previously submitted to the commission and may respond to any testimony presented by other parties or witnesses.

F. Any public hearing will be advertised in accordance with 1VAC50-30-150 E.

1VAC50-30-100. Reports and other decisions for localities not located in Planning District 19.

A. For any locality not located in Planning District 19, the commission will issue a report to the locality, the auditor, the Governor, and the Chairs of the House Committees on Appropriations and Counties, Cities, and Towns and the Senate Committees on Finance and Appropriations and Local Government on or before the date established under 1VAC50-30-90. The report will be advisory only.

B. The commission's report will state its findings and conclusions.

C. The commission's report will explicitly respond to the following:

1. Whether the locality has taken appropriate action to address the issues raised by the auditor in the auditor's notification, the state-appointed intervention staff, and the locality;

2. Whether the locality appears to be on track to resolve its fiscal distress; and

3. The extent the locality is willing and able to comply with the conditions necessary to address its fiscal distress.

D. In its report, the commission will consider, as appropriate, whether any issues have been resolved through mediation or negotiation, whether the locality has consented to comply with the conditions necessary to address its fiscal distress, and whether the locality has fulfilled the requirements of the Governor's plan for state assistance, oversight, or intervention to the commission's satisfaction.

1VAC50-30-110. Decisions, orders, and reports for localities located in Planning District 19.

A. For any locality located in Planning District 19, the commission will issue a report to the locality, the auditor, the Governor, and the Chairs of the House Committees on Appropriations and Counties, Cities, and Towns and the Senate Committees on Finance and Appropriations and Local Government on or before the date established under 1VAC50-30-90.

B. The commission's report will state its findings and conclusions.

C. The commission's report will explicitly respond to the following:

1. Whether the locality has taken appropriate action to address the issues raised by the auditor in the auditor's notification, the state-appointed intervention staff, and the locality;

2. Whether the locality appears to be on track to resolve its fiscal distress; and

3. The extent the locality is willing and able to comply with the conditions necessary to address its fiscal distress.

D. In its report, the commission may consider, as appropriate, whether any issues have been resolved through mediation or negotiation, whether the locality in Planning District 19 has consented to comply with the conditions necessary to address its fiscal distress, and whether the locality in Planning District 19 has fulfilled the requirements of the Governor's plan for state assistance, oversight, or intervention to the commission's satisfaction.

E. If the commission concludes that a locality in Planning District 19 is either unwilling or unable to comply with the conditions necessary to address its fiscal distress, the commission will issue such decision and order for the appointment of an emergency fiscal manager in accordance with § 15.2-2512.1 of the Code of Virginia.

F. The commission's report and any accompanying order will comply with the provisions of 1VAC50-30-60.

Part III

Emergency Fiscal Manager

1VAC50-30-120. Powers of the emergency fiscal manager.

A. Upon appointment, the emergency fiscal manager has all powers and responsibilities provided in § 15.2-2512.1 of the Code of Virginia.

B. The emergency fiscal manager will develop a proposed remediation plan to restore the fiscal health of the locality in Planning District 19 and present that plan to the commission for approval. The plan must contain the following elements:

1. A summary of the issues identified by the auditor in the auditor's notification, the state-appointed intervention team, and the locality that have not been resolved;

2. The purpose of each specified remediation effort;

3. The roles and responsibilities of the local governing body and the chief executive officer, directly or indirectly, relating to the locality's finances; and

4. The benchmarks and criteria that will allow a locality to exit the approved remediation plan upon meeting such benchmarks and criteria.

C. Once the proposed remediation plan has been approved by the commission in accordance with 1VAC50-30-160, the emergency fiscal manager will implement the approved remediation plan and send periodic progress reports in accordance with 1VAC50-30-180.

1VAC50-30-130. Procedures for appointing an emergency fiscal manager.

A. The selection of the emergency fiscal manager will be conducted in compliance with the Virginia Public Procurement Act (§ 2.2-4300 et seq. of the Code of Virginia) and all other applicable laws.

B. In accordance with § 15.2-2901 of the Code of Virginia, the executive director or the executive director's designee will enter into and administer any contracts to procure the emergency fiscal manager. The executive director or the executive director's designee retains the right to terminate the appointment of the emergency fiscal manager, including any contracts with the emergency fiscal manager, in accordance with agreed upon contract terms.

C. The executive director will notify the Governor of any expenses incurred by the commission related to any contracts entered into under this chapter, such as costs incidental to procuring the emergency fiscal manager, and any remuneration due to the emergency fiscal manager.

D. Any funds the commission receives from the component of fund balance established by the Governor pursuant to § 15.2-2512.1 E 3 of the Code of Virginia will be paid first to the remuneration due to the emergency fiscal manager, then toward other costs incurred by the commission in the furtherance of its responsibilities under § 15.2-2512.1 of the Code of Virginia and this chapter.

1VAC50-30-140. Notice of appointment of emergency fiscal manager.

Upon appointment of the emergency fiscal manager, the commission or executive director will notify the Governor, the auditor, and the chief executive officer of the locality in Planning District 19 that the commission has appointed an emergency fiscal manager, will be reviewing a proposed remediation plan at a public hearing, and will issue a decision related to the plan that will affect the locality. The notice will invite the locality to attend the commission meeting with the emergency fiscal manager described in 1VAC50-30-150 A and provide contact information consisting of the name, telephone number, and government email address of the commission staff assigned to answer questions or otherwise assist the locality.

1VAC50-30-150. Development of the emergency fiscal manager's proposed remediation plan.

A. The emergency fiscal manager will meet with the commission during a regular meeting or a special meeting to develop and approve a schedule for drafting and adopting a proposed remediation plan to resolve the fiscal distress of the locality in Planning District 19. The schedule will include dates for (i) the emergency fiscal manager to submit a proposed remediation plan to the commission, (ii) the commission to publish a proposed remediation plan, (iii) a public hearing on the proposed remediation plan, (iv) a commission hearing where the locality may present and rebut any evidence or testimony regarding the proposed remediation plan, (v) a decision adopting a proposed remediation plan, and (vi) other proceedings or deadlines the commission deems appropriate. The commission will consider input from the locality when developing the schedule as appropriate. The emergency fiscal manager will conduct activities in consultation with the commission and receive technical assistance from the auditor as appropriate.

B. When the commission publishes a proposed remediation plan, the commission will also include its recommendation as to whether the proposed plan should be approved or if further revisions are needed.

C. The commission's decision adopting a proposed remediation plan under subsection A of this section will be issued through a decision and order within 90 days of the commission hearing.

D. If the locality in Planning District 19 does not participate in the meeting referenced in subsection A of this section, the commission will send the locality notice of the approved schedule, including the dates, times, and locations of the commission hearing and the public hearing.

E. A public hearing on the proposed remediation plan will be held within 45 days of the publication of the proposed plan. Prior to the public hearing, a notice of the hearing will be published once a week for two successive weeks in a newspaper of general circulation in the locality in Planning District 19. The second advertisement will appear not less than six days nor more than 21 days prior to the hearing.

F. The commission may hold the commission hearing on the same day as the public hearing, but in no event will the commission hearing be held more than 30 days after the public hearing required by subsection E of this section.

G. At any commission hearing, the commission may request the emergency fiscal manager to present, either orally or in writing, testimony to assist the commission. The commission may also utilize data or testimony from the auditor, the House Committee on Appropriations, or the Senate Committee on Finance and Appropriations and may request that those entities present either orally or in writing. The locality in Planning District 19 is permitted and may be requested by the commission to present, either orally or in writing, testimony at the commission hearing. The testimony of the locality may refer to all data, exhibits, documents, or other material previously submitted to the commission and may respond to any testimony presented by the emergency fiscal manager or other witnesses.

H. An approved remediation plan will be actionable and binding on the subject locality in Planning District 19 and the emergency fiscal manager upon the plan's adoption by the commission.

1VAC50-30-160. Adoption of the emergency fiscal manager's proposed remediation plan.

A. The commission will consider all evidence presented at the commission hearing and the public hearing and adopt an approved remediation plan by decision and order within 90 days of the commission hearing in accordance with 1VAC50-30-150 C.

B. When reviewing the emergency fiscal manager's proposed remediation plan, the commission will consider whether the proposed remediation plan is in the best interest of the locality in Planning District 19, citizens of the locality, and the Commonwealth and will note, as appropriate, any issues or portions of the plan that have been resolved through mediation, negotiation, or other agreement.

Part IV

Implementation of the Remediation Plan

1VAC50-30-170. Notice of adoption of approved remediation plan.

A. Upon the adoption of an approved remediation plan, the commission or executive director will send the Governor, the auditor, and the chief executive officer of the locality in Planning District 19 a notice containing (i) a copy of the decision and order adopting the approved remediation plan, (ii) a copy of the approved remediation plan, (iii) a brief explanation of how the locality may exit the approved remediation plan under the commission's continued oversight authority, (iv) the current schedule of regular meetings for the commission, and (v) contact information consisting of the name, telephone number, and government email address of the commission staff assigned to answer questions or otherwise assist the locality.

B. The executive director will ensure that all parties who receive the notice are properly notified of all changes to the commission's regular meeting schedule and future regular meetings of the commission that are not included in the initial notice provided under subsection A of this section.

1VAC50-30-180. Regular progress reports to the commission.

While implementing the approved remediation plan, the emergency fiscal manager will send reports regarding progress on implementation of the approved remediation plan to the locality in Planning District 19, the commission, the auditor, the Governor, and the Chairs of the House Committees on Appropriations and Counties, Cities, and Towns and the Senate Committees on Finance and Appropriations and Local Government two weeks before each regular commission meeting that is held in accordance with § 15.2-2904 of the Code of Virginia. All reports by the emergency fiscal manager shall be in writing and shall include a brief and succinct statement of the grounds for any recommendations and the facts underlying the report.

1VAC50-30-190. Procedures for exiting fiscal distress.

A. At each regular meeting where the commission receives a report from the emergency fiscal manager, the commission will concurrently hold a commission hearing to determine whether the locality in Planning District 19 has met the benchmarks and criteria in the approved remediation plan to the commission's satisfaction based on the report from the emergency fiscal manager and any other relevant evidence.

B. The commission's determination will take the form of a report indicating whether the benchmarks and criteria in the approved remediation plan have been met. The decision may be announced at the regular meeting or taken under advisement for up to 14 days. In its report, the commission must consider, as appropriate, whether any issues have been resolved through a consent decree or other mediation or negotiation, whether the locality in Planning District 19 has consented to comply with the conditions necessary to address its fiscal distress, and whether the locality in Planning District 19 has fulfilled the requirements of the approved remediation plan to the commission's satisfaction.

C. The commission must send all reports issued under subsection B of this section to the locality in Planning District 19, the Governor, and the Chairs of the House Committees on

Appropriations and Counties, Cities, and Towns and the Senate Committees on Finance and Appropriations and Local Government.

D. At each commission hearing, the commission may request the emergency fiscal manager or other witnesses to present, either orally or in writing, testimony to support or explain the emergency fiscal manager's report. The commission may also utilize data or testimony from the auditor, the House Committee on Appropriations, or the Senate Committee on Finance and Appropriations and may request that they present either orally or in writing.

E. The locality in Planning District 19 is permitted and may be requested by the commission to present, either orally or in writing, testimony at each commission hearing. The testimony of the locality will respond to the emergency fiscal manager's most recent report; may refer to all data, exhibits, documents, or other material previously submitted to the commission; and may respond to any testimony presented by other witnesses.

VA.R. Doc. No. R25-8048; Filed December 10, 2024, 12:08 p.m.

TITLE 2. AGRICULTURE

BOARD OF AGRICULTURE AND CONSUMER SERVICES

Fast-Track Regulation

Title of Regulation: **2VAC5-510. Rules and Regulations Governing the Production, Processing, and Sale of Ice Cream, Frozen Desserts, and Similar Products (amending 2VAC5-510-10, 2VAC5-510-20, 2VAC5-510-30, 2VAC5-510-90, 2VAC5-510-110, 2VAC5-510-210 through 2VAC5-510-350, 2VAC5-510-390, 2VAC5-510-420 through 2VAC5-510-470, 2VAC5-510-490, 2VAC5-510-500, 2VAC5-510-510, 2VAC5-510-520, 2VAC5-510-540 through 2VAC5-510-570, 2VAC5-510-600 through 2VAC5-510-630, 2VAC5-510-650; adding 2VAC5-510-415, 2VAC5-510-505; repealing 2VAC5-510-40, 2VAC5-510-50, 2VAC5-510-130 through 2VAC5-510-190, 2VAC5-510-370, 2VAC5-510-380, 2VAC5-510-530, 2VAC5-510-640, 2VAC5-510-660).**

Statutory Authority: §§ 3.2-5201 and 3.2-5212 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: January 29, 2025.

Effective Date: February 13, 2025.

Agency Contact: Pamela Miles, Program Manager, Office of Dairy and Foods, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-8899, FAX (804) 371-7792, TDD (800) 828-1120, or email pamela.miles@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 3.2-5212 of the Code of Virginia authorizes the board to establish definitions and standards of quality and identity and to adopt and enforce regulations dealing with the issuance of permits, labeling, and sanitary standards for ice cream, ice milk, frozen custards, sherbets, water ices, related foods, other similar products, and products manufactured or sold in semblance to or as substitutes for those products.

Purpose: The proposed amendments are essential to the protection of the public health and welfare because they set the necessary standards of operation for the production of Virginia-made frozen desserts to (i) provide a system of prevention and overlapping safeguards designed to minimize foodborne illness; (ii) ensure that employees are healthy, food is safe, equipment used is easily cleaned and kept in a sanitary condition, and acceptable levels of sanitation are maintained in manufacturing facilities; and (iii) promote Virginia's dairy and frozen dessert industry. The amendments are necessary to ensure that appropriate measures are in place to address emerging and ongoing food safety concerns that exist within an evolving food industry.

Rationale for Using Fast-Track Rulemaking Process: The board expects the proposed amendments to be noncontroversial because the changes (i) include the elimination of the requirement that out-of-state importers of frozen desserts obtain a permit to operate a frozen dessert plant from the Commissioner of Agriculture and Consumer Services and add provisions for use of a less costly electronic recordkeeping methods and (ii) do not create new requirements for existing permit holders.

Substance: The proposed amendments include (i) removing standards of identity that have a counterpart in the Code of Federal Regulations (CFR) and instead incorporating the CFR standards of identity by reference; (ii) removing the requirement that out-of-state importers obtain a permit from the Commissioner of Agriculture and Consumer Services to operate a frozen dessert plant; (iii) adding a requirement for recall plans, which aligns the regulation with requirements set forth in other dairy-related regulations; (iv) clarifying language regarding whether frozen desserts must be repasteurized at a receiving plant prior to further sale or distribution, which allows the department the flexibility to evaluate, on a case-by-case basis, manufacturer processing steps and practices to ensure that finished products are safe to consume while relaxing the requirement to repasteurize certain products; and (v) making several sections more easily readable and understood by all relevant stakeholders.

Issues: The primary advantage to the public is the reduction of the risk of foodborne illnesses within frozen dessert

establishments, which protects consumers and industry from potentially devastating health consequences and financial losses. The proposed amendments will also result in additional flexibility in determining required processing steps and the removal of duplicative permitting and inspection requirements. The primary advantage to the agency is the alignment of the regulations with current food science and the clarification of ambiguous areas relating to enforcement and inspection standards. There are no known disadvantages to the public or the Commonwealth.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The Board of Agriculture and Consumer Services (board) seeks to update the regulation to align with the United States Department of Agriculture's (USDA) current General Specifications for Dairy Plants Approved for USDA Inspection and Grading Service (USDA Specifications). The proposed changes would (i) condense the text of the regulation by replacing the current text for standards of identities for frozen dessert products with references to the standards of identities promulgated in the Code of Federal Regulations (21 CFR Part 135); (ii) remove a requirement for out-of-state importers to obtain a permit to operate a frozen dessert plant from the Commissioner; (iii) provide flexibility in determining the required processing steps to ensure consumer safety; (iv) remove all references to retail sale; (v) allow the use of electronic recordkeeping systems; (vi) align requirements in the regulation with other existing dairy-related regulations; (vii) enhance recordkeeping procedures to further protect public health through lot traceability; and (viii) update the referenced version of documents incorporated by reference.

Background. This regulatory action would update the existing Rules and Regulations Governing the Production, Processing, and Sale of Ice Cream, Frozen Desserts, and Similar Products (regulation), which are based on federal USDA Specifications. The regulation currently includes requirements pertaining to the safe and sanitary maintenance, storage, operation, and use of equipment; the safe handling, protection, and preservation of frozen dessert products; the proper pasteurization techniques used to ensure dairy ingredients in frozen desserts are safe for consumers; proper lighting and ventilation; proper equipment design and cleanability; proper facility construction; and personal hygiene for employees. The board reports that the proposed amendments are necessary to remain current with federal laws and reflect current practice, which are based on the latest scientific knowledge and technological advancements, and thus to protect public health.

The most substantive changes are summarized below:

The definition of "frozen dessert retail establishment" would be struck from 2VAC5-510-10 (Definitions) and all references to retail establishments would be removed throughout the regulation, as requirements that are specific to retail establishments are already included in the board's retail food establishment regulation (2VAC5-585).[2]

2VAC5-510-30, 2VAC5-510-40, and 2VAC5-510-50 currently contain the definitions or standards of identity (SOI) for ice cream; ice cream mix; and frozen custard, french ice cream, french custard ice cream, respectively. These sections would be combined to mirror the structure of the federal regulation. The state-specific SOIs would be replaced with references to SOIs in the CFR because the existing state-specific SOIs are nearly identical to those in the CFR.

Similarly, 2VAC5-510-90 and 2VAC5-510-130, which currently pertain to fruit sherbet and non-fruit sherbet, would be consolidated into 2VAC5-510-90, which would be renamed "Sherbets." 2VAC5-510-110 and 2VAC5-510-150, which pertain to water ice and nonfruit water ice, would also be consolidated. Again, the state-specific SOIs would be replaced with references to SOIs in the CFR.

2VAC5-510-170 pertains to artificially sweetened ice cream or frozen dietary dairy dessert. This section would be repealed in its entirety as these desserts are included under "ice cream" and covered in 2VAC5-510-30.

2VAC5-510-415 (Recall Plans) would be added, requiring recall plans to be included in applications for permits. According to Virginia Department of Agriculture and Consumer Services (VDACS) staff, this amendment would codify an existing practice as all plants already do this, as required by 21 CFR Part 117.[3] The recall plan requirements are identical to those in the regulation governing milk for manufacturing (2VAC5-531).[4]

2VAC5-510-420 (Issuing, suspension, and revocation of permits) currently requires manufacturers as well as importers (from out-of-state) to obtain a permit. VDACS reports that it is impractical and unrealistic for the agency to permit and track the numerous frozen dessert products coming into Virginia and that manufacturers in other states are already permitted and inspected in their own state. Thus, the permit requirement for importers would be repealed.

2VAC5-510-550 (Pasteurization of frozen dessert mix) would be amended to clarify that frozen dessert mixes must be repasteurized at the receiving plant before being offered for sale, unless VDACS grants permission for the frozen dairy dessert mix to be sold without repasteurization. VDACS explained that the current language has caused confusion in the past and that the proposed language is intended to ensure that VDACS has "the flexibility to evaluate, on a case-by-case basis, manufacturer processing steps and practices to ensure that finished products are safe to consume, while relaxing the requirement to re-pasteurize certain products."[5]

2VAC5-510-620 (Health) currently requires employees to undergo a medical and physical examination before beginning employment; this requirement would be struck. VDACS reports that the primary purpose of this section is to prevent employees sick with communicable diseases from coming into work and that the other requirements in this section address this concern. Additionally, VDACS expressed concern that the requirement to receive a medical exam before beginning work could create an unnecessary barrier to employment.

Additional amendments would align the structure and content of the regulation with other Virginia dairy regulations. For example, language outlining the actions that would warrant the cancellation, suspension, or denial of a permit would be added to 2VAC5-510-420[6] and the requirement that employee facilities include "conveniently located sanitary drinking water" would be removed from Section 500.[7]

Estimated Benefits and Costs. The proposed amendments would benefit current and prospective manufacturers of ice cream and frozen desserts by providing clear, concise, and updated requirements that conform to current USDA specifications. VDACS reports that the proposed amendments reflect current federal requirements and current practice, and that manufacturers of ice cream and frozen desserts are not expected to incur any new costs as a result. The proposed amendments would benefit consumers of ice cream and frozen desserts manufactured in Virginia by ensuring that these products continue to be produced in a manner that makes them safe for consumption.

Businesses and Other Entities Affected. VDACS reports that there are currently 41 manufacturers in Virginia, some of which may also have retail establishments on their premises. VDACS also reports that there are 20 permitted importers who would no longer be required to renew or maintain this permit; however, this is likely an undercount of all the businesses importing ice cream and frozen desserts from other states.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[8] An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.[9] Since the proposed amendments largely serve to clarify the requirements and conform the regulation to federal regulations, there is not anticipated to be an increase in net costs or decrease in net benefits for any entity. For example, although recall policies would be newly added in the regulation, they are already required by federal regulation. Further, some manufacturers may benefit from increased flexibility with respect to repasteurization or hiring workers without requiring an initial health and physical examination. However, to the extent that these provisions have already been implemented in practice, any associated benefits have likely already accrued. Thus, an adverse impact is not indicated.

Small Businesses[10] Affected.[11] Manufacturers of ice cream or frozen desserts that are small businesses would not be expected to face any new costs.

Localities[12] Affected.[13] The proposed amendments do not appear to disproportionally affect any locality in particular or affect costs for local governments.

Projected Impact on Employment. The proposed amendments would not be expected to affect employment by manufacturers of ice cream or frozen desserts.

Effects on the Use and Value of Private Property. The proposed amendments are not expected to affect the value of private businesses that manufacture ice cream or frozen desserts. The proposed amendments do not affect real estate development costs.

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[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] See https://law.lis.virginia.gov/admincode/title2/agency5/chapter585/.

[3] See https://www.ecfr.gov/current/title-21/section-117.139. See also the Agency Background Document (ABD), page 4: https://townhall.virginia.gov/L/GetFile.cfm?File=48\6530\10418\AgencyStatement_VDACS_10418_v1.pdf.

[4] See item K: https://law.lis.virginia.gov/admincode/title2/agency5/chapter531/section50/.

[5] ABD, page 4.

[6] This would align the regulation with Chapters 490 and 531. ABD, page 15.

[7] VDACS staff explained that this requirement is not present in the other dairy regulations. VDACS staff also confirmed with the Department of Labor and Industry that the Occupational Safety and Health Administration's Sanitation Standard for General Industry (29 CFR 1910.121(b)(1)), which requires employers to provide potable drinking water, would apply to frozen dessert manufacturing facilities. 16VAC25-60-120 incorporates 29 CFR 1910.

[8] Pursuant to § 2.2-4007.04 D of the Code of Virginia: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance.

[9] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[10] 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."

[11] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to

comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[12] "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.

[13] Section 2.2-4007.04 of the Code of Virginia defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Board of Agriculture and Consumer Services concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

The amendments update Rules and Regulations Governing the Production, Processing, and Sale of Ice Cream, Frozen Desserts, and Similar Products (2VAC5-510), which is based on the U.S. Department of Agriculture's (USDA) General Specifications for Dairy Plants Approved for USDA Inspection and Grading Service. The amendments (i) replace the current text for standards of identities for frozen dessert products with references to the standards of identities provided in 21 CFR Part 135; (ii) remove the requirement for out-of-state importers to obtain a permit to operate a frozen dessert plant from the Commissioner of Agriculture and Consumer Services; (iii) provide flexibility in determining required processing steps to ensure consumer safety; (iv) remove all references to retail sale; (v) allow the use of electronic recordkeeping systems; (vi) align requirements with other existing dairy-related regulations; (vii) enhance recordkeeping procedures to further protect public health through lot traceability; and (viii) update documents incorporated by reference.

Chapter 510

~~Rules and~~ Regulations Governing the Production, Processing, and Sale of Ice Cream, Frozen Desserts, and Similar Products

2VAC5-510-10. Definitions.

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

"3-A Accepted Practices" means the accepted practices published by 3-A Sanitary Standards, Incorporated and indexed in the 3-A Sanitary Standards and 3-A Accepted Practices, effective March 1, 2024.

"3-A Sanitary Standards" means the standards for dairy equipment published by 3-A Sanitary Standards, Incorporated and indexed in the 3-A Sanitary Standards and 3-A Accepted Practices, effective March 1, 2024.

"Adulterated milk, milk products, and frozen desserts" means any milk, milk products, other frozen dessert ingredient, frozen desserts, or frozen desserts mix ~~which:~~

~~1. Bears or contains any poisonous or deleterious substance in a quantity which may render it injurious to health;~~

~~2. Bears or contains any added poisonous or deleterious substance for which no safe tolerance has been established by state or federal regulation, or in excess of such tolerance if one has been established;~~

~~3. Consists, in whole or in part, of any substance unfit for human consumption;~~

~~4. Has been produced, processed, prepared, packed, or held under insanitary conditions;~~

~~5. Container is composed, in whole or in part, of any poisonous or deleterious substance which may render the contents injurious to health; or~~

~~6. Any substance has been added thereto or mixed or packed therewith so as to increase its bulk or weight, or reduce its quality or strength, or make it appear better or of greater value than it is~~ that meets one or more of the conditions specified in 21 USC § 342.

~~"Commissary or depot" means any place, premise, or establishment in which pasteurized mix, ingredients, containers, or supplies are prepared or stored for the servicing of one or more mobile units, and where facilities are provided for cleaning the vehicle and the cleaning and bactericidal treatment of equipment and utensils.~~

~~"Frozen desserts manufacturer" means any person who manufactures, processes, converts, partially freezes, or freezes any mix or frozen desserts for distribution or sale.~~

"Cleaned in place" or "CIP" means the procedure by which equipment is mechanically cleaned in place by circulation of wash, rinse, and sanitizer solutions.

"Frozen dessert" means any of the following: ice cream, frozen custard, french ice cream, french custard ice cream, ice milk, fruit sherbet, water ice, nonfruit sherbet, nonfruit water ice, artificially sweetened ice cream or frozen dietary dairy dessert, artificially sweetened ice milk, frozen yogurt, quiescently frozen confection, quiescently frozen dairy confection, mellorine, parevine, lowfat parevine, freezer made milk shake, freezer made shake, those products manufactured or sold in semblance to or as substitutes for the foregoing frozen desserts, and any mix used in the freezing of the foregoing frozen desserts."Frozen desserts plant" means any place or premises where frozen desserts or mix are manufactured, processed, pasteurized, or frozen for distribution or sale ~~at wholesale~~.

"Frozen desserts plant" means any place or premises where frozen desserts or mix are manufactured, processed, pasteurized, or frozen for distribution or sale ~~at wholesale.~~

~~"Frozen desserts retail establishment" means any place or premises including retail stores, stands, hotels, restaurants, and vehicles or mobile units where frozen desserts are frozen or partially frozen or dispensed for sale at retail.~~

"Harmless" means that a food or substance is generally recognized as safe, as prescribed in 21 CFR Parts 181 through 186.

"Misbranded" means a milk, milk ~~products~~ product, other frozen ~~desserts ingredients~~ dessert ingredient, frozen ~~desserts and~~ dessert, or frozen ~~desserts~~ dessert mix ~~are misbranded when~~ that:

1. ~~Their containers bear~~ Bears on its container or ~~accompany~~ is accompanied by any false or misleading written, printed, or graphic matter;

2. ~~Such milk and products do~~ Does not conform to ~~their definitions as contained~~ the product's definition established in this chapter; ~~and~~ or

3. ~~Such products are~~ Is not labeled in accordance with ~~Part VI (2VAC5-510-430 et seq.) of this chapter~~ 2VAC5-510-430.

~~"Mobile unit" means any vehicle or temporary establishment that shall travel from place to place in which a frozen desserts processor freezes, partially freezes, or dispenses frozen desserts for sale.~~

"Official methods" means Official Methods of Analysis of ~~the Association of Official Analytical Chemists~~ AOAC International, a publication of the Association of Official Analytical ~~Chemists~~ Collaboration International. ~~A modified Roese-Gottlieb test, such as the Mojonnier' or Dietert, may be used in making official determination of the butterfat and total solids content of frozen dairy food products.~~

"Pasteurization" or "pasteurized" means the process of heating, in approved and properly operated equipment, every particle of mix to any one of the following temperatures and holding at the temperature for the specified time:

1. Vat Pasteurization: 155°F (68.3°C) and holding at such temperature for at least 30 minutes.

2. HTST (high-temperature short-time) Pasteurization: 175°F (79.4°C) and holding at such temperature for at least 25 seconds.

Nothing contained in this definition shall be construed as barring any other method of process, or combination of times and temperatures, as may be demonstrated to be equally efficient.

"Permit" means ~~authority issued under the Act by the regulatory agency~~ the document issued by the Commissioner of Agriculture and Consumer Services pursuant to § 3.2-5214 of the Code of Virginia that authorizes a person to operate a frozen desserts plant.

"Permit holder" means the entity that is legally responsible for the operation of the frozen desserts plant, such as the owner, the owner's agent, or other person, and that possesses a valid permit to operate a frozen desserts plant.

"Person" means any individual, partnership, corporation, company, firm, trustee, or association.

"Plant" means any place, premise, or establishment where milk or dairy products are received or handled for processing or manufacturing the products defined ~~herein~~ in this chapter.

"Powder" or "dry frozen desserts mix" means a frozen desserts mix in a dry form.

"Standard methods" means Standard Methods for the Examination of Dairy Products, a publication of the American Public Health Association.

~~"3-A Sanitary standards and accepted practices" means the standards for dairy equipment and accepted practices formulated by the 3-A Sanitary Standards Committees representing the International Association for Food Protection, the United States Public Health Service, and the Dairy Industry Committee, Published by the 3-A Sanitary Standards, Incorporated.~~

"State Regulatory Agency" means the Commissioner of Agriculture and Consumer Services or the commissioner's agent or the State Health Commissioner or the commissioner's agent when such person is carrying out any duty assigned to such commissioner in the Milk, Milk Products, and Dairies Law (§ 3.2-5200 et seq. of the Code of Virginia).

"Summarily suspend" means the immediate suspension of a permit issued by the State Regulatory Agency without the opportunity for the permit holder to contest the suspension prior to the effective date and time of the suspension.

"VDACS" means the Virginia Department of Agriculture and Consumer Services.

2VAC5-510-20. Uniformity of enforcement.

A. The Virginia Board of Agriculture and Consumer Services hereby finds and declares that a uniform regulation is needed to govern the production, processing, labeling, and distribution of ice cream and similar products within the Commonwealth of Virginia. This chapter relating to ice cream and similar products shall be applicable throughout the Commonwealth of Virginia and shall be enforced on a statewide basis. Products produced, processed, or manufactured under the provisions of this chapter ~~may~~ can be sold in all counties, cities, and towns in this state. ~~They~~ The products shall not be subject to regulations by ordinance or otherwise to supervision, or to inspection by any political subdivision.

B. No regulation shall be construed to prohibit the sale of any imported dairy product within ~~this state,~~ the Commonwealth if the laws and regulations of the exporting state or political subdivision thereof are substantially the same as this chapter,

and if ~~they~~ the laws and regulations are enforced with equal effectiveness as determined by ~~Virginia Department of Agriculture and Consumer Services~~ VDACS or ~~State Health~~ the Virginia Department of Health.

C. Unless otherwise provided by state law or by regulation of the Virginia Board of Agriculture and Consumer Services, this chapter shall be interpreted and enforced where applicable with administrative procedures and recommended regulations of the ~~United States~~ U.S. Department of Health and Human Resources and the ~~United States~~ U.S. Department of Agriculture.

Part III

~~Standards of Identity~~ Standardized Frozen Desserts and Related Products

2VAC5-510-30. ~~Ice cream; identity; label statement of optional ingredients~~ Ice cream and frozen custard.

~~A. Ice cream is the food prepared by freezing, while stirring, a pasteurized mix composed of one or more of the optional ingredients specified in subsection C of this section, sweetened with one or more of the optional sweetening ingredients specified in subsection D of this section. One or more of the optional characterizing ingredients specified in subsection B of this section and one or more of the optional ingredients specified in subdivisions 5 to 10 of subsection D may be used to characterize the ice cream. One or more of the optional caseinates specified in subsection E and one or more of the optional ingredients specified in subsection F of this section may be used, subject to the conditions hereinafter set forth. The mix may be seasoned with salt, and may be homogenized. The kind and quantity of optional dairy ingredients used, as specified in subsection C of this section, and the content of milk fat and nonfat milk solids therein, are such that the weights of milkfat and total milk solids are not less than 10% and 20%, respectively, of the weight of the finished ice cream; but in no case shall the content of milk solids not fat be less than 6.0%, except that when one or more of the bulky optional ingredients as specified in subdivisions 3 to 8 of subsection B, inclusive, of this section, are used, the weights of milkfat and total milk solids (exclusive of such fat and solids in any malted milk used) are not less than 10% and 20%, respectively, of the remainder obtained by subtracting the weight of such optional ingredients, modified as prescribed in this subsection, from the weight of the finished ice cream; but in no case is the weight of milkfat or total milk solids less than 8.0% and 16%, respectively, of the weight of the finished ice cream. The optional caseinates specified in subsection E of this section are not deemed to be milk solids. In calculating the reduction of milkfat and total milk solids from the use of bulky optional ingredients, chocolate and cocoa solids used shall be considered the bulky ingredients of subdivision 3 of subsection B of this section. In order to make allowance for additional sweetening ingredients needed when bulky ingredients are used, the weight of chocolate or cocoa solids may be multiplied by 2.5; the weight of fruit or nuts used may be multiplied by 1.4; and the weight of partially or wholly dried fruits or fruit juices may be multiplied by appropriate factors to obtain the original weights before drying and this weight multiplied by 1.4. The finished ice cream contains not less than 1.6 pounds of total solids to the gallon and weighs not less than 4.5 pounds to the gallon; except that when the optional ingredient microcrystalline cellulose specified in subdivision 6 of subsection F of this section is used, the finished ice cream contains not less than 1.6 pounds of total solids to the gallon and weighs not less than 4.5 pounds to the gallon exclusive, in both cases, of the weight of the microcrystalline cellulose. Artificial flavoring in any chocolate, cocoa, confectionary, or other ingredient used is an optional ingredient of the finished ice cream. Coloring, including artificial coloring, may be added.~~

~~B. The optional characterizing ingredients referred to in subsection A. of this section are:~~

~~1. Ground spice, ground vanilla beans, infusion of coffee or tea, or any natural food flavoring.~~

~~2. Artificial food flavoring.~~

~~3. Chocolate or cocoa, which may be added as such or as a suspension in sirup, and which may contain disodium phosphate or sodium citrate in such quantity that the finished ice cream contains not more than 0.2% by weight of disodium phosphate or sodium citrate. For the purposes of this section, the term "cocoa" means one or any combination of two or more of the following: Cocoa, breakfast cocoa, lowfat cocoa, and the unpulverized residual material prepared by removing part of the fat from ground cacao nibs.~~

~~4. Mature fruit or the juice of mature fruit, either of which may be fresh, frozen, canned, concentrated, or partially or wholly dried. The fruit may be whole, shredded, or comminuted; it may be sweetened, thickened with pectin or with one or more of the ingredients named in subdivision 2 of subsection F of this section, subject to the restriction on the total quantity of such substances in ice cream prescribed in that subdivision, and it may be acidulated with citric acid, ascorbic acid, or phosphoric acid. The fruit is prepared by the removal of pits, seeds, skins, and cores, where such removal is used in preparing that kind of fruit for consumption as fresh fruit. In the case of fruit or fruit juice from which part of the water is removed, the substances contributing flavor volatilized during water removal may be condensed and reincorporated in the concentrated fruit or fruit juice. In the case of the citrus fruits the whole fruit, including the peel but excluding the seeds, may be used, and in the case of citrus juice or concentrated citrus juice, cold-pressed citrus oil may be added in an amount not exceeding that which would have been obtained if the peel from the whole fruit had been used. For the purposes of this section the flesh of the coconut shall be considered a fruit.~~

5. Nut meats, which may be roasted, cooked in an edible fat or oil, or preserved in sirup, and which may be salted.

6. Malted milk.

7. Confectionary. For the purposes of this section, the term "confectionery" means candy, cakes, cookies, and glaced fruits.

8. Properly prepared and cooked cereal.

9. Distilled alcoholic beverage, including liqueurs or wine, in an amount not to exceed that required for flavoring the ice cream.

C. The optional dairy ingredients referred to in subsection A of this section are: cream, dried cream, plastic cream (sometimes known as concentrated milkfat), butter, butter oil, milk, concentrated milk, evaporated skim milk, condensed skim milk, superheated condensed skim milk, sweetened condensed skim milk, sweetened condensed part skim milk, nonfat dry milk, sweet cream buttermilk, condensed sweet cream buttermilk, dried sweet cream buttermilk, skim milk that has been concentrated and from which part of the lactose has been removed by crystallization, skim milk in concentrated or dried form which has been modified by treating the concentrated skim milk with calcium hydroxide and disodium phosphate, concentrated cheese whey, and dried cheese whey. Water may be added, or water may be evaporated from the mix. The sweet cream buttermilk and the concentrated sweet cream buttermilk or dried sweet cream buttermilk, when adjusted with water to a total solids content of 8.5%, has a titratable acidity of not more than 0.17%, calculated as lactic acid. The term "milk" as used in this section means cow's milk. Any concentrated cheese whey and dried cheese whey used contribute not more than 25% by weight of the total nonfat milk solids content of the finished food. Dried cheese whey is uniformly light in color, free from brown and black scorched particles, and has an alkalinity of ash, not more than 225 milliliters 0.1N HC1 per 100 grams, a bacterial count of not more than 50,000 per gram, and, as adjusted with water to a total solids content of 6.5%, a titratable acidity of not more than 0.16%, calculated as lactic acid. Concentrated cheese whey has an alkalinity of ash, not more than 115 milliliters 0.1N HC1 per 100 grams, a bacterial count of not more than 50,000 per gram, and as adjusted with water to a total solids content of 6.5%, calculated as lactic acid. The modified skim milk, when adjusted with water to a total solids content of 9%, is substantially free of lactic acid as determined by titration with 0.1N NaOH and it has a pH value in the range of 8.0 to 8.3.

D. The optional sweetening ingredients referred to in subsection A of this section are:

1. Sugar (sucrose) or sugar sirup.

2. Dextrose.

3. Invert sugar (in paste or sirup form).

4. Corn sirup, dried corn sirup, glucose sirup, dried glucose sirup.

5. Maple sirup, maple sugar.

6. Honey.

7. Brown sugar.

8. Malt sirup, maltose sirup, malt extract.

9. Dried malt sirup, dried maltose sirup, dried malt extract.

10. Refiner's sirup.

11. Molasses (other than black strap).

12. Lactose.

13. Fructose.

E. The optional caseinates referred to in subsection A of this section which may be added to ice cream mix containing not less than 20% total milk solids are: casein prepared by precipitation with gums, ammonium caseinate, calcium caseinate, potassium caseinate, and sodium caseinate. Caseinates may be added in liquid or dry form, but must be free of excess alkali.

F. Other optional ingredients referred to in subsection A of this section are:

1. Liquid eggs, frozen eggs, dried eggs, egg yolks, frozen egg yolks, and dried egg yolks. Any egg ingredient used is added to the mix before it is pasteurized. The total weight of egg yolk solids in the finished ice cream from one or a combination of two or more such ingredients is less than the minimum prescribed for frozen custard by 2VAC5-510-50 (1.4%).

2. Agar agar, algin (sodium alginate), calcium sulfate, gelatin, gum acacia, guar seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, carrageenan, salts of carrageenan, furcelleran, salts of furcelleran, lecithin, psyllium seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredient used singly or of any combination of two of more such ingredients used (including any such ingredient and pectin added separately to the fruit ingredient) is not more than 0.5% of the weight of the finished ice cream. Such ingredients may be added in admixture with dextrin, propylene glycol, or glycerin.

3. Monoglycerides or diglycerides or both of fat forming fatty acids. The total weight of such ingredients is not more than 0.2% of the weight of the finished ice cream. If the preparation used is one having a high proportion of monoglycerides (over 90%), it may be preblended with edible fat, but the amount of such fat does not exceed 20% by weight of the blend, and the total amount of the blend used does not exceed 0.2% of the weight of the finished ice cream.

4. Polysorabate 65, polysorbate 80, or both may be used, with a limit on either, used separately or both used in combination, of not more than 0.1% by weight of the finished frozen dessert.

5. Propylene glycol alginate limit of not more than 0.5% by weight of the finished frozen dessert.

6. Microcrystalline cellulose, in a quantity not to exceed 1.5% by weight of the finished frozen dessert.

7. When one or more of the optional thickening ingredients in subdivision 2 or 5 of this subsection are used, dioctyl sodium sulfosuccinate may be used in a quantity not in excess of 0.5% by weight of such ingredients.

8. a. Sodium citrate, disodium phosphate, tetrasodium pyrophosphate, sodium hexametaphosphate, or any combination of two or more of these; but the total quantity of the solids of such ingredients (exclusive of any disodium phosphate or sodium citrate present in chocolate or cocoa, as permitted by subdivision 3 of subsection B of this section) is not more than 0.2% by weight of the finished ice cream.

b. Calcium oxide, magnesium oxide, calcium hydroxide, magnesium hydroxide, calcium carbonate, magnesium carbonate, or any combination of two or more of these; but the total quantity of the solids of such ingredients is not more than 0.04% of the weight of the finished ice cream.

G. 1. The name of the food is "ice cream."

2. a. If the food contains no artificial flavor, the name on the principal display panel or panels of the label shall be accompanied by the common or usual name of the characterizing flavor, e.g., "vanilla," in letters not less than one half the height of the letters used in the words "ice cream."

b. If the food contains both a natural characterizing flavor and an artificial flavor simulating it, and if the natural flavor predominates, the name on the principal display panel or panels of the label shall be accompanied by the common name of the characterizing flavor, in letters not less than one half the height of the letters used in the words "ice cream," followed by the word "flavored," in letters not less than one half the height of the letters in the name of the characterizing flavor, e.g., "VANILLA flavored," or "PEACH flavored," or "VANILLA flavored STRAWBERRY flavored."

c. If the food contains both a natural characterizing flavor and an artificial flavor simulating it, and if the artificial flavor predominates, or if artificial flavor is used alone, the name on the principal display panel or panels of the label shall be accompanied by the common name of the characterizing flavor, in letters not less than one half the height of the letters used in the words "ice cream," preceded by "artificial" or "artificially flavored," in letters not less than one half the height of the letters in the name of the characterizing flavor, e.g., "artificial VANILLA," or "artificially flavored STRAWBERRY" or "artificially flavored VANILLA and artificially flavored STRAWBERRY."

3. a. If the food is subject to the requirements of subdivision 2 b of this subsection or if it contains any artificial flavor not simulating the characterizing flavor, the label also shall bear the words "artificial flavor added" or "artificial _____ flavor added," the blank being filled with the common name of the flavor simulated by the artificial flavor in letters of the same size and prominence as the words that precede and follow it.

b. When the optional ingredient microcrystalline cellulose specified in subdivision 6 of subsection F of this section is used, the label shall bear the statement "microcrystalline cellulose added" or "with microcrystalline cellulose."

c. When two or more of the optional ingredients specified in subdivision 2 of subsection B and subdivision 6 of subsection F of this section are used, such words may be combined; for example, "microcrystalline cellulose and artificial flavor added."

d. Wherever the name of the characterizing flavor appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the words prescribed by this subparagraph shall immediately and conspicuously precede or follow such name, in a size reasonably related to the prominence of the name of the characterizing flavor and in any event the size of the type is not less than 6 point on packages containing less than one pint, not less than 8 point on packages containing at least one pint but less than one half gallon, but less than one gallon, and not less than 12 point on packages containing one gallon or over; however, that where the characterizing flavor and a trademark or brand are presented together, other written, printed, or graphic matter that is a part of or is associated with the trademark or brand, may intervene if the required words are in such relationship with the trademark or brand as to be clearly related to the characterizing flavor: And provided further, that if the finished product contains more than one flavor of ice cream subject to the requirements of this subparagraph, the statements required by this subparagraph need appear only once in each statement of characterizing flavors present in such ice cream, e.g., "VANILLA flavored, CHOCOLATE and STRAWBERRY flavored, artificial flavors added."

4. If the food contains both a natural characterizing flavor and an artificial flavor simulating the characterizing flavor, any reference to the natural characterizing flavor, except as otherwise authorized by this subsection, shall be accompanied by a reference to the artificial flavor, displayed with substantially equal prominence, e.g., "strawberry and artificial strawberry flavor."

5. An artificial flavor simulating the characterizing flavor shall be deemed to predominate:

~~a. In the case of vanilla beans or vanilla extract used in combination with vanillin if the amount of vanillin used is greater than one ounce per unit of vanilla constituent.~~

~~b. In the case of fruit or fruit juice used in combination with artificial fruit flavor, if the quantity of the fruit or fruit juice used is such that, in relation to the weight of the finished ice cream, the weight of the fruit or fruit juice, as the case may be (including water necessary to reconstitute partially or wholly dried fruits or fruit juices to their original moisture content) is less than 2.0% in the case of citrus ice cream, 6.0% in the case of berry or cherry ice cream, 10% in the case of ice cream prepared with other fruits.~~

~~c. In the case of nut meats used in combination with artificial nut flavor, if the quantity of nut meats used is such that, in relation to the finished ice cream, the weight of the nut meats is less than 2.0%.~~

~~d. In the case of two or more fruit or fruit juices, or nut meats, or both, used in combination with artificial flavors simulating the natural flavors and dispersed throughout the food, if the quantity of any fruit or fruit juice or nut meat is less than one-half the applicable percentage specified in subparagraphs b or c of this paragraph. For example, if a combination ice cream contains less than 5.0% of bananas and less than 1.0% of almonds it would be "Artificially flavored banana-almond ice cream." However, if it contains more than 5.0% of bananas and more than 1.0% of almonds it would be "Banana-almond flavored ice cream."~~

~~6. If two or more flavors of ice cream are distinctively combined in one package, e.g., "Neapolitan" ice cream, the applicable provisions of this subsection shall govern each flavor of ice cream comprising the combination.~~

~~H. Optional ingredients other than those included in subsections B, C, D and F may be used when permitted for use in ice cream by the Federal Food and Drug Administration.~~

A. Ice cream or frozen custard is the food prepared from the same ingredients and in the same manner, including labeling, as prescribed in 21 CFR 135.110 or 21 CFR 135.115.

B. Ice cream mix is the pasteurized, unfrozen combination of ingredients that, when frozen while stirring, produces a product conforming to the description of "ice cream" in 21 CFR 135.110 or "goat's milk ice cream" in 21 CFR 135.115.

C. Frozen custard mix, french ice cream mix, or french custard ice cream mix is the pasteurized unfrozen combination of ingredients that, when frozen while stirring, produces products conforming to the description of "frozen custard," "french ice cream," or "french custard ice cream" in 21 CFR 135.110 or "goat's milk frozen custard," "goat's milk french ice cream," or "goat's milk french custard ice cream" in 21 CFR 135.115.

2VAC5-510-40. ~~Ice cream mix.~~ (Repealed.)

~~Ice cream mix is the pasteurized unfrozen combination of ingredients which when frozen while stirring will produce a product conforming to the definition of ice cream.~~

2VAC5-510-50. ~~Frozen custard, french ice cream, french custard ice cream; identity; label statement of optional ingredients; frozen custard mix, french ice cream mix, and french custard ice cream mix.~~ (Repealed.)

~~A. Frozen custard, french ice cream, french custard ice cream conforms to the definition and standard of identity, and is subject to the requirements for label statement of optional ingredients, prescribed for ice cream by 2VAC5-510-30, except that one or more of the optional egg ingredients permitted by 2VAC5-510-30 F 1 are used in such quantity that the total weight of egg yolk solids therein is not less than 1.4% of the weight of the finished frozen custard; Provided, however, that when the ingredients named in subdivisions 3 through 8 of 2VAC5-510-30 B, inclusive, are used the content of egg yolk solids may be reduced in proportion to the bulky ingredient or ingredients added, under the conditions prescribed by 2VAC5-510-30 A for reduction in milkfat and total milk solids; but in no case is the content of egg yolk solids less than 1.12%.~~

~~B. Frozen custard mix, french ice cream mix, and french custard ice cream mix are the pasteurized unfrozen combinations of ingredients that when frozen while stirring will produce products conforming to the definition of frozen custard, french ice cream, and french custard ice cream.~~

2VAC5-510-90. ~~Fruit sherbets; identity; label statement of optional ingredients; fruit sherbet mix~~ Sherbets.

~~A. Fruit sherbets are the foods each of which is prepared by freezing, while stirring, a mix composed of one or more of the optional characterizing fruit ingredients specified in subsection B of this section and one or more to the optional ingredients specified in subsection C of this section, sweetened with one or more of the optional sweetening ingredients specified in subsection D of this section. One or more of the optional ingredients specified in subsection E of this section may be used, subject to the conditions hereinafter set forth. The mix of combined dairy ingredients, with or without other ingredients, is pasteurized. The titratable acidity of the finished fruit sherbet, calculated as lactic acid, is not less than 0.35%. The mix with or without added water may be seasoned with salt, and may be homogenized. The optional dairy ingredients used and the content of milkfat and nonfat milk solids therein are such that the weight of milkfat is not less than 1.0% and not more than 2.0%, and the weight of total milk solids is not less than 2.0% and not more than 5.0% of the weight of the finished fruit sherbet. The optional caseinates specified in subdivision 7 of subsection E of this section are not deemed to be milk solids. The finished fruit sherbet weights not less than six pounds to the gallon; except that when the optional ingredient~~

~~microcrystalline cellulose specified in subdivision 11 of subsection E of this section is used, the finished fruit sherbet weighs not less than six pounds to the gallon, exclusive of the weight of the microcrystalline cellulose.~~

~~B. The optional fruit characterizing ingredients referred to in subsection A of this section are any mature fruit or the juice of any mature fruit. The fruit or fruit juice used may be fresh, frozen canned, concentrated, or partially or wholly dried. The fruit may be thickened with pectin or other of the optional ingredients named in subdivision 2 of subsection E of this section, subject to the restriction on the total quantity of such substances in fruit sherbets prescribed in that subsection. The fruit is prepared by the removal of pits, seeds, skins, and cores, where such removal is usual in preparing that kind of fruit for consumption as fresh fruit. The fruit may be screened, crushed, or otherwise comminuted. It may be acidulated with citric acid, ascorbic acid, or phosphoric acid. In the case of concentrated fruit or fruit juices from which part of the water is removed, substances contributing flavor volatilized during water removal may be condensed and reincorporated in the concentrated fruit or fruit juice. In the case of citrus fruits, the whole fruit, including the peel but excluding the seeds, may be used, and in the case of citrus juice or concentrated citrus juices, cold-pressed citrus oil may be added thereto in an amount not exceeding that which would have been obtained if the whole fruit had been used. The quantity of fruit ingredients used is such that, in relation to the weight of the finished sherbet, the weight of fruit or fruit juice, as the case may be, including water necessary to reconstitute partially or wholly dried fruits or fruit juices to their original moisture content, is not less than 2.0% in the case of citrus sherbets, 6.0% in the case of berry sherbets, and 10% in the case of sherbets prepared with other fruits. For the purposes of this section, tomatoes and rhubarb are considered as kinds of fruit.~~

~~C. The optional dairy ingredients referred to in subsection A of this section are: cream, dried cream, plastic cream, (sometimes known as concentrated milkfat), butter, butter oil, milk, concentrated milk, evaporated milk, superheated condensed milk, sweetened condensed milk, dried milk, skim milk, concentrated skim milk, evaporated skim milk, condensed skim milk, superheated condensed skim milk, sweetened condensed skim milk, sweetened condensed part-skim milk, nonfat dry milk, sweet cream buttermilk, condensed sweet cream buttermilk, dried sweet cream buttermilk, skim milk that has been concentrated and from which part of the lactose has been removed by crystallization, concentrated cheese whey, and dried cheese whey. Water may be added, or water may be evaporated from the mix. The sweet cream buttermilk and the concentrated sweet cream buttermilk or dried sweet cream buttermilk, when adjusted with water to a total solids content of 8.5% has a titratable acidity of not more than 0.17%, calculated as lactic acid. The term "milk" as used in this section means cow's milk. Dried cheese whey is uniformly light in color, free from brown and black scorched particles, and has an alkalinity of ash, not more than 225 milliliters 0.1 N HC1 per 100 grams, a bacterial count of not more than 50,000 per gram, and, as adjusted with water to a total solids content of 6.5%, a titratable acidity of not more than 0.16% calculated as lactic acid. Concentrated cheese whey has an alkalinity of ash, not more than 115 milliliters 0.1 N HC1 per 100 grams, a bacterial count of not more than 50,000 per gram, and, as adjusted with water to a total solids content of 6.5%, a titratable acidity of not more than 0.18%, calculated as lactic acid.~~

~~D. The optional sweetening ingredients referred to in subsection A of this section are: sugar (sucrose), dextrose, invert sugar (paste or sirup), glucose sirup, dried glucose sirup, corn sirup, dried corn sirup, malt sirup, malt extract, dried malt sirup, dried malt extract, maltose sirup, dried maltose sirup.~~

~~E. Other optional ingredients referred to in subsection A of this section are:~~

~~1. Liquid eggs, frozen eggs, dried eggs, egg yolks, frozen yolks; dried yolks; but the weight of the egg yolk solids therein is less than 0.5% of the weight of the finished fruit sherbet.~~

~~2. Agar-agar, algin (sodium alginate), calcium sulfate, egg white, gelatin, gum acacia, guar seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, hydroxypropyl methylcellulose, carrageenan, salts of carrageenan, furcelleran, salts of furcelleran, lecithin, pectin, psyllium seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredient used singly or of any combination of two or more such ingredients used (including any such ingredient added separately to the fruit ingredient) is not more than 0.5% of the weight of the finished fruit sherbet. Such ingredients may be added in admixture with dextrin, propylene glycol, or glycerin.~~

~~3. Monoglycerides or diglycerides or both of fat forming fatty acids. The total weight of such ingredients is not more than 0.2% of the weight of the finished fruit sherbet. If the preparation used is one of having a high proportion of monoglycerides (over 90%), it may be preblended with edible fat, but the amount of such fat does not exceed 20% by weight of the blend, and the total amount of the blend used does not exceed 0.2% of the weight of the finished fruit sherbet.~~

~~4. Polysorbate 65, polysorbate 80, or both (the limit on either used separately or both used in combination of not more than 0.1% by weight of the finished frozen dessert).~~

~~5. Propylene glycol alginate (limit of not more than 0.5% by weight of the finished frozen dessert).~~

~~6. Citric acid, tartaric acid, malic acid, lactic acid, ascorbic acid, phosphoric acid, or any combination of two or more of these in such quantity as seasons the finished food.~~

~~7. Casein prepared by precipitation with gums, ammonium caseinate, calcium caseinate, potassium caseinate, sodium caseinate.~~

~~8. Any natural food flavoring.~~

~~9. Any artificial flavoring.~~

~~10. Coloring, including artificial coloring.~~

~~11. Microcrystalline cellulose, in a quantity not to exceed 0.5% of the weight of the finished fruit sherbet.~~

~~12. When one or more of the optional thickening ingredients in subdivision 2 or 5 of this subsection are used, dioctyl sodium sulfosuccinate may be used in a quantity not in excess of 0.5% by weight of such ingredients.~~

~~F. The name of each such fruit sherbet is "_____ sherbet," the blank being filled in with the common name of the fruit or fruits from which the fruit ingredients used are obtained. When the names of two or more fruits are included, such names shall be arranged in order of predominance, if any, by weight of the respective fruit ingredients used.~~

~~G. When the optional ingredients artificial coloring or artificial flavorings are used in fruit sherbet they shall be named on the labels as follows:~~

~~1. The label shall designate artificial coloring by the statement "artificially colored," "artificial coloring added," "with added artificial coloring," or "_____ an artificial color added," the blank being filled in with the name of the artificial coloring used.~~

~~2. The label shall designate artificial flavoring by the statement "artificially flavored," "artificial flavoring added," "with added artificial flavoring," or "_____ an artificial flavor added," the blank being filled in with the name of the artificial flavoring used.~~

~~3. Whenever artificial flavoring is not added as such but as a component of some other ingredient, the label shall include the statement "_____ artificially flavored," the blank being filled in with the name of such other ingredient.~~

~~4. When the optional ingredient microcrystalline cellulose specified in subdivision 11 of subsection E of this section is used, the label shall bear the statement "microcrystalline cellulose added" or "with added microcrystalline cellulose." Label statements may be combined, as for example, "with added artificial flavoring and artificial coloring."~~

~~H. Where one or more of the optional ingredients artificial coloring or artificial flavoring are used and there appears on the label any representation as to the fruit or fruits in the sherbet, such representation shall be immediately and conspicuously accompanied by appropriate label statements as prescribed in subsection G of this section, showing the optional ingredients used.~~

~~I. Wherever the name of the food appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the statements specified in this section, showing the optional ingredients used, shall immediately and conspicuously precede or follow such name without intervening written, printed, or graphic matter.~~

~~J. Fruit sherbet mix is the pasteurized unfrozen combination of ingredients that when frozen while stirring will produce a product conforming to the definition of fruit sherbet.~~

A. Sherbet is the food prepared from the same ingredients and in the same manner, including labeling, as prescribed in 21 CFR 135.140.

B. Sherbet mix is the pasteurized, unfrozen combination of ingredients that, when frozen while stirring, produces a product conforming to the description of "sherbet" in 21 CFR 135.140.

2VAC5-510-110. ~~Water ices; identity; label statement of optional ingredients; water ice mix~~ Water ices.

~~A. Water ices are the foods, each of which is prepared by freezing, while stirring, a mix composed of one or more of the optional characterizing fruit ingredients specified in subsection B of this section, sweetened with one or more of the optional sweetening ingredients specified in subsection C of this section. One or more of the optional ingredients specified in subsection D of this section may be used, subject to the conditions hereinafter set forth. The titratable acidity of the finished water ice, calculated as lactic acid, is not less than 0.35%. The mix, with or without added water, may be seasoned with salt, and may be homogenized. The finished water ice weighs not less than six pounds to the gallon.~~

~~B. The optional fruit ingredients referred to in subsection A of this section are any mature fruit or the juice of any mature fruit. The fruit or fruit juice used may be fresh, frozen, canned, concentrated, or partially or wholly dried. The fruit may be thickened with pectin or other of the optional ingredients named in subdivision 1 of subsection D of this section subject to the restriction on the total quantity of such substances in water ices prescribed in that subdivision. The fruit is prepared by the removal of pits, seeds, skins, and cores where such removal is usual in preparing that kind of fruit for consumption as fresh fruit. The fruit may be screened, crushed, or otherwise communited. It may be acidulated with citric acid, ascorbic acid, or phosphoric acid. In the case of fruit or fruit juices from which part of the water is removed, substances contributing flavor volatilized during water removal may be condensed and reincorporated in the concentrated fruit or fruit juice. In the case of citrus fruits, the whole fruit, including the peel but excluding the seeds, may be used, and in the case of citrus juice or concentrated citrus juices, cold pressed citrus oil may be added thereto in an amount not exceeding that which would have been obtained if the whole fruit had been used. The quantity of fruit ingredients used is such that in relation to the weight of the finished water ice, the weight of fruit or fruit juice~~

~~as the case may be, including water necessary to reconstitute partially or wholly dried fruits or fruit juices to their original moisture content, is not less than 2.0% in the case of citrus ices, 6.0% in the case of berry ices, and 10% in the case of ices prepared with other fruits.~~

~~C. The optional sweetening ingredients referred to in subsection A of this section are: Sugar (sucrose), dextrose, invert sugar (paste or sirup), glucose sirup, dried glucose sirup, corn sirup, dried corn sirup, malt sirup, malt extract, dried malt sirup, dried malt extract, maltose sirup, dried maltose sirup.~~

~~D. Other optional ingredients referred to in subsection A of this section are:~~

~~1. a. Agar agar, algin (sodium alginate), egg white, gelatin, gum acacia, guar seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, hydroxypropyl methyl cellulose, carrageenan, salts of carrageenan, furcelleran, salts of furcelleran, propylene glycol alginate, pectin, psyllium seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredient used singly, or of any combination of two or more such ingredients used, including any such ingredient added separately to the fruit ingredient, is not more than 0.5% of the weight of the finished water ice. Such ingredients may be added in admixture with dextrin, propylene glycol, or glycerin.~~

~~b. When one or more of the optional thickening ingredients in subdivision a of this subdivision are used, dioctyl sodium sulfosuccinate may be used in a quantity not in excess of 0.5% of weight of such ingredients.~~

~~2. Citric acid, tartaric acid, malic acid, lactic acid, ascorbic acid, phosphoric acid, or any combination of two or more of these in such quantity as seasons the finished food.~~

~~3. Any natural flavoring.~~

~~4. Any artificial flavoring.~~

~~5. Coloring, including artificial coloring.~~

~~E. The name of each such water ice is "_____ ice," the blank being filled with the common name of the fruit or fruits from which the fruit ingredient used is obtained. When the names of two or more fruits are included such names shall appear in the order of predominance, if any, by weight of the respective fruit ingredients used.~~

~~F. When the optional ingredients artificial coloring and artificial flavoring are used in water ices they shall be named on the labels as follows:~~

~~1. The label shall designate artificial flavoring by the statement "artificially flavored," "artificial flavoring added," "with added artificial flavoring," or "_____, an artificial flavor added," the blank being filled in with the name of the artificial flavoring used.~~

~~Label statements may be combined, as for example, "flavoring and artificial coloring added."~~

~~G. Where one or more of the optional ingredients artificial coloring or artificial flavoring are used and there appears on the labeling any representation as to the fruit or fruits in the ice, such representation shall be immediately and conspicuously accompanied by appropriate label statements as prescribed in subsection F of this section, showing the optional ingredients used.~~

~~H. Wherever the name of the food appears on the label so conspicuously as to be easily seen under customary conditions of purchase, the statements set out in this section showing the optional ingredients used shall immediately and conspicuously precede or follow such name, without intervening written, printed, or graphic matter.~~

~~I. Water ice mix is the unfrozen combination of ingredients that when frozen while stirring will produce a product conforming to the definition of water ice.~~

A. Water ices are the foods that are prepared from the same ingredients and in the same manner, including labeling, as prescribed in 21 CFR 135.160.

B. Water ice mix is the unfrozen combination of ingredients that, when frozen while stirring, produces a product conforming to the description of "water ices" in 21 CFR 135.160.

2VAC5-510-130. ~~Nonfruit sherbets; identity; label statement of optional ingredients; nonfruit sherbet mix.~~ (Repealed.)

~~A. Nonfruit sherbets are the foods each of which is prepared by freezing, while stirring, a mix composed of one or more of the optional characterizing ingredients specified in subsection B of this section and one or more of the optional dairy ingredients specified in subsection C of this section, sweetened with one or more of the optional sweetening ingredients specified in subsection D of this section. One or more of the optional ingredients specified in subsection E of this section may be used, subject to the conditions hereinafter set forth. The mix of combined dairy ingredients, with or without other ingredients, is pasteurized. The mix, with or without added water, may be seasoned with salt and may be homogenized. The optional dairy ingredients used and the content of milkfat and nonfat milk solids therein are such that the weight of milkfat is not less than 1.0% and not more than 2.0% and their weight of total milk solids is not less than 2.0% and not more than 5.0% of the weight of the finished nonfruit sherbets. The optional caseinates specified in subdivision 7 of subsection E of this section are not deemed to be milk solids. The finished nonfruit sherbet weighs not less than six pounds to the gallon; except that when the optional ingredients microcrystalline cellulose specified in subdivision 9 of subsection E of this section is used, the finished nonfruit sherbet weighs not less than six pounds to the gallon, exclusive of the weight of the microcrystalline cellulose.~~

B. The optional characterizing ingredients referred to in subsection A of this section are:

1. Ground spice or infusion of coffee or tea.

2. Chocolate or cocoa, including sirup.

3. Confectionery.

4. Distilled alcoholic beverage, including liqueurs or wine, in an amount not to exceed that required for flavoring the sherbet.

5. Any natural or artificial food flavoring, except any having a characteristic fruit or fruit-like flavor.

C. The optional dairy ingredients referred to in subsection A of this section are: cream, dried cream, plastic cream (sometimes known as concentrated milkfat), butter, butter oil, milk, concentrated milk, evaporated milk, super-heated condensed milk, sweetened condensed milk, dried milk, skim milk, concentrated skim milk, evaporated skim milk, condensed skim milk, superheated condensed skim milk, sweetened condensed skim milk, sweetened condensed part-skim milk, nonfat dry milk, sweet cream buttermilk, condensed sweet cream buttermilk, dried sweet cream buttermilk, skim milk that has been concentrated and from which part of the lactose has been removed by crystallization, concentrated cheese whey, and dried cheese whey. Water may be added or water may be evaporated from the mix. The sweet cream buttermilk and the concentrated sweet cream buttermilk or dried sweet cream buttermilk, when adjusted with water to a total solids content of 8.5%, has a titratable acidity of not more than 0.17% calculated as lactic acid. The term "milk" as used in this section means cow's milk. Dried cheese whey is uniformly light in color, free from brown and black scorched particles, and has an alkalinity of ash not more than 225 milliliters 0.1 N HC1 per 100 grams, a bacterial count of not more than 50,000 per gram, and, as adjusted with water to a total solids content of 6.5%, a titratable acidity of not more than 0.16% calculated as lactic acid. Concentrated cheese whey has an alkalinity of ash not more than 115 milliliters of 0.1 N HC1 per 100 grams, a bacterial count of not more than 50,000 per gram, and, as adjusted with water to a total solids content of 6.5%, a titratable acidity of not more than 0.18% calculated as lactic acid.

D. The optional sweetening ingredients referred to in subsection A of this section are: sugar (sucrose), dextrose, invert sugar (paste or sirup), glucose sirup, dried glucose sirup, corn sirup, dried corn sirup, malt sirup, malt extract, dried malt sirup, dried malt extract, maltose sirup, dried maltose sirup.

E. Other optional ingredients referred to in subsection A of this section are:

1. Liquid eggs, frozen eggs, dried eggs, egg yolks, frozen yolks, dried yolks; but the weight of egg yolk solids therein is less than 0.5% of the weight of the finished nonfruit sherbet.

2. Agar-agar, algin (sodium alginate), calcium sulfate, egg white, gelatin, gum acacia, guar seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, hydroxypropyl methylcellulose, carrageenan, salts of carrageenan, furcelleran, salts of furcelleran, lecithin, pectin, psyllium seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredient used singly or of any combination of two or more such ingredients used is not more than 0.5% of the weight of the finished nonfruit sherbet. Such ingredients may be added in admixture with dextrin, propylene glycol, or glycerin.

3. Monoglycerides or diglycerides or both of fat-forming fatty acids. The total weight of such ingredients is not more than 0.2% of the weight of the finished nonfruit sherbet. If the preparation used is one having a high proportion of monoglycerides (over 90%), it may be preblended with edible fat, but the amount of such fat does not exceed 20% by weight of the blend and the total amount of the blend used does not exceed 0.2% of the weight of the finished nonfruit sherbet.

4. Polysorbate 65, polysorbate 80, or both (limit on either used separately or both used in combination of not more than 0.1% by weight of the finished frozen dessert).

5. Propylene glycol alginate (limit of not more than 0.5% by weight of the finished frozen dessert).

6. Citric acid, tartaric acid, malic acid, lactic acid, ascorbic acid, phosphoric acid, or any combinations of two or more of these in such quantity as seasons the finished food.

7. Casein prepared by precipitation with gums, ammonium caseinate, calcium caseinate, potassium caseinate, sodium caseinate.

8. Coloring, including artificial color.

9. Microcrystalline cellulose, in a quantity not to exceed 0.5% of the weight of the finished nonfruit sherbet.

10. When one or more of the optional thickening ingredients in subdivision 2 or 5 of this subsection are used, dioctyl sodium sulfosuccinate may be used in a quantity not in excess of 0.5% by weight of such ingredients.

F. Except as provided for in subsection G of this section, the name of each such nonfruit sherbet is ".... sherbet," the blank being filled in with the common or usual name or names of the characterizing flavor or flavors; for example, "peppermint."

G. If the characterizing flavor is vanilla, the name of the food is ".... sherbet," the blank being filled in as specified by 2VAC5-510-30 G 2 and 5 a.

H. When the optional ingredients artificial flavoring, artificial coloring, or microcrystalline cellulose are used in nonfruit sherbet, they shall be named on the label as follows:

1. If the flavoring ingredient or ingredients consists exclusively of artificial flavoring, the label designation shall be "artificially flavored."

2. If the flavoring ingredients are a combination of natural and artificial flavors, the label designation shall be "artificial and natural flavoring added."

3. The label shall designate artificial coloring by the statement "artificially colored," "artificial coloring added," "with added artificial coloring," or "...., an artificial color added," the blank being filled in with the name of the artificial coloring used.

4. When the optional ingredient microcrystalline cellulose is used, the label shall bear the statement "microcrystalline cellulose added" or "with added microcrystalline cellulose."

I. Wherever there appears on the label any representation as to the characterizing flavor or flavors of the food and such flavor or flavors consist in whole or in part of artificial flavoring, the statement required by subdivision 1 or 2 of subsection H of this section, as appropriate, shall immediately and conspicuously precede or follow such representation, without intervening written, printed, or graphic matter, except that the word "sherbet" may intervene, in a size reasonably related to the prominence of the name of the characterizing flavor and in any event the size of the type is not less than 6-point on packages containing less than one pint, not less than 8-point on packages containing at least one pint but less than one-half gallon, not less than 10-point on packages containing at least one-half gallon but less than one gallon, and not less than 12-point on packages containing one gallon or over.

J. Except as specified in subsection I of this section, the statements required by subsection H of this section shall be set forth on the principal display panel or panels of the label with such prominence and conspicuousness as to render them likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

K. Nonfruit sherbet mix is the unfrozen combination of ingredients that when frozen while stirring will produce a product conforming to the definition of nonfruit sherbet.

2VAC5-510-150. Nonfruit water ices; identity; label statement of optional ingredients; nonfruit water ice mix. (Repealed.)

A. Nonfruit water ices are the foods each of which is prepared by freezing, while stirring, a mix composed of one or more of the optional characterizing ingredients specified in subsection B of this section, sweetened with one or more of the optional sweetening ingredients specified in subsection C of this section. One or more of the optional ingredients specified in subsection D of this section may be used, subject to the conditions hereinafter set forth. The mix, with or without added water, may be seasoned with salt and may be homogenized. The finished nonfruit water ice weighs not less than six pounds to the gallon.

B. The optional characterizing ingredients referred to in subsection A of this section are:

1. Ground spice or infusion of coffee or tea.

2. Chocolate or cocoa, including sirup.

3. Confectionery.

4. Distilled alcoholic beverage, including liqueurs or wine, in an amount not to exceed that required for flavoring the water ice.

5. Any natural or artificial food flavoring, except any having a characteristic fruit or fruit-like flavor.

C. The optional sweetening ingredients referred to in subsection A of this section are: Sugar (sucrose), dextrose, invert sugar (paste or sirup), glucose sirup, dried glucose sirup, corn sirup, dried corn sirup, malt sirup, malt extract, dried malt sirup, dried malt extract, maltose sirup, dried maltose sirup.

D. Other optional ingredients referred to in subsection A of this section are:

1. Agar-agar, algin (sodium alginate), egg white, gelatin, gum acacia, guar seed gum, gum karaya, locust bean gum, oat gum, gum tragacanth, hydroxypropyl methylcellulose, carrageenan, salts of carrageenan, furcelleran, salts of furcelleran, propylene glycol alginate, pectin, psyllium seed husk, sodium carboxymethylcellulose. The total weight of the solids of any such ingredient used singly, or of any combination of two or more such ingredients used, is not more than 0.5% of the weight of the finished nonfruit water ice. Such ingredients may be added in admixture with dextrin, propylene glycol, or glycerin.

When one or more of the optional thickening ingredients in this subdivision are used, dioctyl sodium sulfosuccinate may be used in a quantity not in excess of 0.5% by weight of such ingredients.

2. Citric acid, tartaric acid, malic acid, lactic acid, ascorbic acid, phosphoric acid, or any combination of two or more of these in such quantity as seasons the finished food.

3. Coloring, including artificial coloring.

E. Except as provided for in subsection F of this section, the name of each such nonfruit water ice is ".... ice," the blank being filled in with the common or usual name or names of the characterizing flavor or flavors; for example, "peppermint."

F. If the characterizing flavor used is vanilla, the name of the food is ".... ice," the blank being filled in as specified by 2VAC5-510-30 G 2 and 5.

G. When the optional ingredients artificial flavoring or artificial coloring are used in nonfruit water ice, they shall be named on the label as follows:

1. If the flavoring ingredient or ingredients consist exclusively of artificial flavoring, the label designation shall be "artificially flavored."

2. If the flavoring ingredients used are a combination of natural and artificial flavors, the label designation shall be "artificial and natural flavoring added."

3. The label shall designate artificial coloring by the statement "artificially colored," "artificial coloring added," "with added artificial coloring," or "...., an artificial color added," the blank being filled in with the name of the artificial coloring used.

H. Wherever there appears on the label any representation as to the characterizing flavor or flavors of the food and such flavor or flavors consist in whole or in part of artificial flavoring, the statement required by subdivision 1 or 2 of subsection G of this section, as appropriate, shall immediately and conspicuously precede or follow such representation, without intervening written, printed, or graphic matter, except that the word "ice" may intervene, in a size reasonably related to the prominence of the name of the characterizing flavor and in any event the size of the type is not less than 6 point on packages containing less than one pint, not less than 8 point on packages containing at least one pint but less than one-half gallon, not less than 10 point on packages containing at least one half gallon but less than one gallon and not less than 12 point on packages containing one gallon or over.

I. Except as specified in subsection H of this section, the statements required by subsection G of this section shall be set forth on the principal display panel or panels of the label with such prominence and conspicuousness as to render them likely to be read and understood by the ordinary individual under customary conditions of purchase and use.

J. Nonfruit water ice mix is the unfrozen combination of ingredients that when frozen while stirring will produce a product conforming to the definition of nonfruit water ice.

2VAC5-510-170. ~~Artificially sweetened ice cream or frozen dietary dairy dessert; identity; label statement of optional ingredients; artificially sweetened ice e cream mix or frozen dietary dairy dessert mix.~~ (Repealed.)

A. Artificially sweetened ice cream or frozen dietary dairy dessert means ice cream manufactured, prepared, or processed for consumption by persons who wish to restrict their intake of ordinary sweetening ingredients and shall conform to the definition and standard of identity prescribed for ice cream in 2VAC5-510-30, except that it shall be sweetened with an artificial sweetening agent and contains edible carbohydrates other than sugar. The artificial sweetening agent and the edible carbohydrates shall be approved by the Federal Food and Drug Administration and no sugars other than those naturally present in the milk solids or flavoring agent shall be added thereto.

B. The manufacturer shall place the product in packages or containers which shall be conspicuously labeled either "artificially sweetened" immediately preceding the words "ice cream" in similar type at least one half the size of the type used for the words "ice cream" and on the same contrasting background, or "frozen dietary dairy dessert."

C. The label shall also contain a statement in terms of percentage by weight of protein, fat, and carbohydrates, the total number of calories per ounce, the number of calories contributed by carbohydrates and any carbohydrates other than lactose, and the name of each ingredient entering into the composition other than flavors.

D. The following statement shall appear conspicuously following the declaration of the artificial sweetener used, such as "Contains.... % saccharine, (or sodium salt of saccharine, as the case may be), a non-nutritive artificial sweetener which should be used only by persons who must restrict their intake of ordinary sweets." The blank is to be filled in with the percent by weight of saccharine or other artificial sweetener in said product.

E. The product shall not be sold in any manner other than in sealed or unbroken packages or containers from one or more separate compartments of a refrigerated container or cabinet.

F. Artificially sweetened ice cream mix or frozen dietary dairy dessert mix is the pasteurized unfrozen combination of ingredients that when frozen while stirring will produce a product conforming to the definition of artificially sweetened ice cream or frozen dietary dairy dessert.

2VAC5-510-190. ~~Artificially sweetened ice milk; identity; label statement of optional ingredients; artificially sweetened ice milk mix.~~ (Repealed.)

A. Artificially sweetened ice milk means ice milk manufactured, prepared, or processed for consumption by persons who wish to restrict their intake of ordinary sweetening ingredients and shall conform to the definition and standard of identity prescribed for ice milk in 2VAC5-510-70 , except that it shall be sweetened with an artificial sweetening agent and contains edible carbohydrates other than sugar. The artificial sweetening agent and the edible carbohydrates must be approved by the Federal Food and Drug Administration and no sugars other than those naturally present in the milk solids or flavoring agent shall be added thereto.

B. The manufacturer shall place the product in packages or containers which shall be conspicuously labeled "artificially sweetened" immediately preceding the words "ice milk" in similar type at least one half the size of the type used for the words "ice milk" and on the same contrasting background.

C. The label shall also contain a statement in terms of percentage by weight of protein, fat, and carbohydrates, the total number of calories per ounce, the number of calories contributed by carbohydrates and any carbohydrates other than

~~lactose, and the name of each ingredient entering into the composition other than flavors.~~

~~D. The following statement shall appear conspicuously following the declaration of the artificial sweetener used, such as "contains.... % saccharine, (or sodium salt of saccharine, or other artificial sweetener, as the case may be), a nonnutritive artificial sweetener which should only be used by persons who must restrict their intake of ordinary sweets." The blank is to be filled in with the percent by weight of saccharine or other artificial sweetener in said product.~~

~~E. The product shall not be sold in any manner other than in sealed or unbroken packages or containers from one or more separate compartments of a refrigerated container or cabinet.~~

~~F. Artificially sweetened ice milk mix is the pasteurized unfrozen combination of ingredients that when frozen while stirring will produce a product conforming to the definition of artificially sweetened ice milk.~~

2VAC5-510-210. Frozen yogurt~~; identity; label statement of optional ingredients; frozen yogurt mix; shipping frozen yogurt mix~~.

A. Frozen yogurt is a food ~~which~~ that is prepared by freezing while stirring a pasteurized mix~~,~~ containing ~~one or more of the following ingredients,~~ whole milk, partially defatted milk, skim milk, or other milk products~~,~~ and with or without fruits, nuts, flavoring materials, sweeteners, stabilizers, emulsifiers, and any other safe and suitable approved ingredient ~~which~~ that is cultured after pasteurization by one or more strains of Lactobacillus delbrueckii subsp. bulgaricus and Streptcoccus thermophilus; provided, however, that fruits, nuts, or other flavoring materials may be added before or after the mix is pasteurized and cultured. The standard plate count requirement for frozen desserts shall apply only to the mix prior to culturing. The finished frozen yogurt shall weigh not less than ~~5~~ five pounds per gallon. The name of the product is "frozen yogurt." The label on a package of frozen yogurt, in addition to other required information, shall include a complete list of all ingredients in descending order or predominance; for the purposes of Part III (2VAC5-510-30 et seq.) of this chapter, the strains of bacteria may be collectively referred to as yogurt culture.

B. Frozen yogurt mix is the pasteurized, unfrozen combination of ingredients that, when frozen while stirring, will produce a product conforming to the definition of frozen yogurt.

C. Frozen yogurt mix may be shipped in a frozen state ~~to plants and frozen desserts retail establishments~~.

2VAC5-510-240. Quiescently frozen confection~~; identity; label statement of optional ingredients; quiescently frozen confection mix~~.

A. Quiescently frozen confection means the frozen, sweetened, flavored product in the manufacture of which freezing has not been accompanied by stirring or agitation, generally known as quiescent freezing. This confection may be acidulated with harmless organic acid, may contain milk products, may be made with or without added harmless natural or artificial flavoring, with or without added harmless coloring. The finished product ~~may contain~~ shall not contain more than one-half of 1.0% by weight of stabilizing agents. The finished product shall contain not less than 17% by weight of total food solids. This confection must be manufactured in the form of servings, individually packaged, bagged, or otherwise wrapped, properly labeled and purveyed to the consumer in its original factory-filled package. In the production of this quiescently frozen confection, no processing or mixing prior to quiescent freezing shall be used that develops in the finished confection mix any physical expansion in excess of 10%.

B. Quiescently frozen confection mix is the unfrozen combination of ingredients that, when frozen, will produce a product conforming to the definition of quiescently frozen confection.

2VAC5-510-260. Quiescently frozen dairy confection~~; identity; label statement of optional ingredients; quiescently frozen dairy confection mix~~.

A. Quiescently frozen dairy confection means the frozen product made from water, pasteurized milk products, and sweetening agents, with added harmless coloring, with or without added stabilizing and emulsifying ingredients, and in the manufacture of which freezing has not been accompanied by stirring or agitation, generally known as quiescent freezing. It contains not less than 13% by weight of total milk solids, not less than 33% by weight of total food solids, not more than one-half of 1.0% by weight of stabilizing agents, not more than one-fifth of 1.0% by weight of monoglycerides or diglycerides or a combination of both, not more than one-tenth of 1.0% by weight of polysorbate 65 or polysorbate 80 or a combination of both. This confection must be manufactured in the form of servings individually packaged, bagged, or otherwise wrapped, properly labeled and purveyed to the consumer in its original factory-filled package. In the production of this quiescently frozen dairy confection, no processing or mixing prior to quiescent freezing shall be used that develops in the finished confection mix any physical expansion in excess of 10%.

B. Quiescently frozen dairy confection mix is the pasteurized, unfrozen combination of ingredients that, when frozen, will produce a product conforming to the definition of quiescently frozen dairy confection.

2VAC5-510-280. Manufactured desserts mix~~; identity; label statement of optional ingredients~~.

Manufactured desserts mix, whipped cream confection, or bisque tortoni means a pasteurized frozen dessert made with milk products, sweetening agents, flavoring agents, stabilizing agents, and emulsifying agents, with or without harmless coloring. It contains not less than 18% by weight of milkfat,

not more than one-half of 1.0% by weight of stabilizing agents, not more than two-tenths of 1.0% by weight of monoglycerides or diglycerides of fat forming fatty acids or a combination of both, not more than one-tenth of 1.0% by weight of polyoxyethylene (20) sorbitan tristearate or polysorbate ~~eighty~~ 80 (polyoxyethelene (20) sorbitan monooleate) or a combination of both, not more than 12% of milk solids not fat, and may be packaged with ~~harmless~~ gas, as prescribed in 21 CFR Part 184, causing it to fluff upon ejection from the package or container.

2VAC5-510-290. Mellorine~~; identity; label statement of ingredients; mellorine mix~~.

A. Mellorine ~~conforms to the definition and standard of identity, and is subject to the requirements for optional ingredients, prescribed for ice cream by 2VAC5-510-30, except that in place of optional dairy ingredients containing butterfat as permitted pursuant to 2VAC5-510-30 C, edible fats or oils other than milkfat are used, and provided further that the weight of edible fats or oils other than milkfat, is not less than 10% of the weight of the finished mellorine and the weight of the milk solids not fat is not less than 10% of the weight of the finished mellorine, except that when one or more of the bulky optional ingredients as specified in 2VAC5-510-30 B 3, 4, 5, 6, 7, or 8 are used, the weight of the edible fats or oils other than milkfat and the combined weight of edible fats or oils other than milkfat and milk solids not fat, exclusive of any fat and milk solids not fat in any malted milk used, are not less than 10% and 20% respectively, of the remainder obtained by subtracting the weight of such optional ingredients as provided in 2VAC5-510-30 A, from the weight of the finished mellorine, but in no case is the weight of edible fats or oils other than milkfat, or the combined weight of edible fats and oils other than milkfat and milk solids not fat to be less than 8.0% and 16% respectively of the weight of the finished mellorine, and that whenever provisions appear in 2VAC5-510-30 referring to milkfat, it shall be understood to be edible fats or oils other than milkfat in the case of mellorine~~ is the food prepared from the same ingredients and in the same manner, including labeling, as prescribed in 21 CFR 135.130.

~~B. The name of the product is "mellorine."~~

~~C. When any artificial color is used in mellorine, directly or as a component of any other ingredient, the label shall bear the statement, "artificially colored," "artificial coloring added," "with added artificial color," or "...., an artificial color added," the blank to be filled in with the common or usual name of the artificial color; or in lieu thereof, in case the artificial color is a component of another ingredient, "...., artificially colored."~~

~~D. If both artificial color and artificial flavoring are used, the label statements may be combined.~~

~~E. Mellorine shall be manufactured in the form of servings individually packaged, bagged, or otherwise wrapped, properly labeled and purveyed to the consumer in its original plant sealed container.~~

~~F. The label on a package of mellorine shall conform to the provisions of 2VAC5-510-30 G and in addition to other required information shall include the name "Mellorine" in a conspicuous manner. Mellorine may not be designated by the use of the word "cream" or its phonetic equivalent.~~

~~G.~~ B. Mellorine mix is the pasteurized, unfrozen combination of ingredients that, when frozen while stirring, will produce a product conforming to the ~~definition~~ description of mellorine in 21 CFR 135.130.

2VAC5-510-310. Parevine~~; parevine mix~~.

A. Parevine is the food prepared by freezing~~,~~ while stirring~~,~~ a pasteurized mix composed of~~:~~ (i) one or more edible vegetable fats; (ii) any optional sweetening ingredient except lactose; and (iii) protein or any other source of carbohydrate food solids. Parevine shall not contain any milk or meat products or any derivatives of such products.

B. ~~Its~~ The fat content of parevine shall not be less than 10%, except that when bulky optional characterizing ingredients are used, the fat content may be reduced~~,~~ as a result of the addition of such ingredients, but shall in no case be less than 8.0%.

C. ~~Its~~ The content of food solids in parevine shall not be less than 1.3 pounds per gallon of the finished product.

D. The weight of the finished product shall not be less than 4.5 pounds per gallon.

E. Parevine shall be offered in the form of servings individually packaged, bagged, or wrapped and properly labeled and purveyed to the consumer in original ~~plant sealed~~ plant-sealed container. When any artificial color or flavor is used in parevine directly or indirectly as a component of any other ingredient, then ~~it must be declared in~~ the label must bear the statement~~,~~ "Artificial color and flavor added," or similar words ~~of like import~~.

F. Parevine mix is the pasteurized, unfrozen combination of ingredients that, when frozen while stirring, will produce a product conforming to the ~~definition~~ description of parevine in this section.

2VAC5-510-330. Lowfat parevine~~; lowfat parevine mix~~.

A. Lowfat parevine is the food prepared by freezing~~,~~ while stirring~~,~~ a pasteurized mix composed of~~:~~ (i) one or more edible vegetable fats; (ii) any optional sweetening ingredient except lactose; and (iii) protein or any other source of carbohydrate food solids. Lowfat parevine shall not contain any milk or meat products nor any derivatives of such products.

B. ~~Its~~ The fat content of lowfat parevine shall not be more than 6.0%.

C. ~~Its~~ The content of food solids in lowfat parevine shall not be less than 1.3 pounds per gallon of the finished product.

D. The weight of the finished product shall not be less than 4.5 pounds per gallon.

E. Lowfat parevine shall be offered in the form of servings individually packaged, bagged, or wrapped and properly labeled and purveyed to the consumer in original ~~plant-sealed~~ plant-sealed container. When any artificial color or flavor is used in lowfat parevine directly or indirectly as a component of any other ingredient, then ~~it must be declared in~~ the label must bear the statement~~,~~ "Artificial color and flavor added," or similar words ~~of like import~~.

F. Lowfat parevine mix is the pasteurized, unfrozen combination of ingredients that, when frozen while stirring, will produce a product conforming to the ~~definition~~ description of lowfat parevine in this section.

2VAC5-510-350. Freezer made milk shake~~; identity; label statement of optional ingredients; freezer made milk shake mix~~.

A. Freezer made milk shake means a pure, clean, wholesome semi-viscous drink prepared by stirring while freezing in a dispensing freezer a pasteurized mix obtained from an approved source consisting of milkfat, milk solids not fat, water, optional sweetening ingredients, with or without egg or egg products, with harmless flavoring, with or without harmless coloring, and with or without approved stabilizer or approved emulsifier. It shall contain not less than ~~three and one-fourth percent~~ 3.25% milkfat. It shall contain not less than 10% milk solids not fat, it shall contain not more than ~~one-half percent~~ 0.5% by weight of stabilizer and not more than one-fifth of 1.0% of emulsifier. ~~Freezer made milk shakes may only be sold or served from a dispensing freezer and may not be sold hard frozen.~~

B. Other freezer made shakes including jumbo shake, thick shake, T.V. shake, or any coined or trade name containing the word "shake" shall meet the requirements of subsection A of this section, except that the minimum percent of milkfat may be less than ~~three and one-fourth percent~~ 3.25%.

C. "Shakes" not meeting the requirement for "milk" shakes shall not be advertised, sold, or served as a milk shake.

D. Freezer made milk shake mix is the pasteurized, unfrozen combination of ingredients that, when frozen while stirring, will produce a product conforming to the ~~definition~~ description of freezer made milk shake in this section.

2VAC5-510-370. ~~Freezer made shake mix.~~ (Repealed.)

~~Freezer made shake mix is the pasteurized unfrozen combination of ingredients which when frozen while stirring will produce a product conforming to the definition of freezer made shake.~~

2VAC5-510-380. ~~Frozen desserts; identity.~~ (Repealed.)

~~Frozen desserts mean any or all of the following: Ice Cream, Frozen Custard, French Ice Cream, French Custard Ice Cream, Ice Milk, Fruit Sherbets, Water Ices, Non-Fruit Sherbets, Non-Fruit Water Ices, Artificially Sweetened Ice Cream or Frozen Dietary Dairy Dessert, Artificially Sweetened Ice Milk, Frozen Yogurt, Quiescently Frozen Confection, Quiescently Frozen Dairy Confection, Mellorine, Parevine, Lowfat Parevine, Freezer Made Milk Shakes and Freezer Made Shakes. Frozen desserts shall also mean the mix used in the freezing of the preceding list of frozen desserts. Powder or dry frozen dessert mixes are not required to be repasteurized when reconstituted with water as described in 2VAC5-510-540 A.~~

2VAC5-510-390. Imitation frozen desserts~~; identity; prohibitions, exceptions, filings confidential~~.

A. Imitation frozen dessert is any frozen substance, mixture, or compound, regardless of the name under which it is represented, ~~which~~ that is made in imitation or semblance of ice cream~~,~~ or is prepared or frozen as ice cream is customarily prepared or frozen~~,~~ and ~~which~~ that is not ~~Ice Cream; Frozen Custard; French Ice Cream; and French Custard Ice Cream; Ice Milk; Fruit Sherbets; Water Ices; Non-Fruit Sherbets; Non-Fruit Water Ices; Artificially Sweetened Ice Cream or Frozen Dietary Dessert; Artificially Sweetened Ice Milk; Frozen Yogurt; Quiescently Frozen Confection; Quiescently Frozen Dairy Confection; Mellorine; Parevine; Lowfat Parevine; Freezer Made Milk Shakes; and Freezer Made Shakes~~ ice cream, frozen custard, french ice cream, french custard ice cream, ice milk, fruit sherbet, water ice, nonfruit sherbet, nonfruit water ice, artificially sweetened ice cream or frozen dietary dessert, artificially sweetened ice milk, frozen yogurt, quiescently frozen confection, quiescently frozen dairy confection, mellorine, parevine, lowfat parevine, or freezer made milk shake, as established by definitions and standards of identity in Part III (2VAC5-510-30 et seq.) of this chapter.

B. Powder or dry imitation frozen desserts mixes ~~which~~ that contain no milk or other dairy product ingredients but contain dry whey, reduced minerals whey, whey protein concentrate, reduced lactose whey ~~and/or~~, or optional caseinates specified in 2VAC5-510-30 ~~E~~ are exempted from the pasteurization requirements of Part XII (2VAC5-510-550 et seq.) of this chapter. The wheys, caseinates, or egg ingredients used in the formulation of these mixes shall have been pasteurized or subjected to any other method of process demonstrated to be equally efficient. Powder or dry imitation frozen dessert mixes shall contain no ingredients except those ~~which~~ that are generally recognized as safe by the ~~Federal~~ U.S. Food and Drug Administration or those ~~which~~ that are permitted by this chapter in a frozen dessert.

~~C. Imitation frozen desserts sold at the retail level may be drawn from a dispensing freezer and a sign must be plainly marked "Imitation...," the blank being filled in with the name of the frozen dessert imitated, in a manner conspicuous to the public in letters at least three inches in height. Imitation frozen desserts shall not be dispensed for sale from packages or~~

~~containers. "Dispensed" shall mean dipping and scooping from packages or containers.~~

~~D.~~ C. No imitation frozen desserts shall be manufactured, sold, advertised, offered, or exposed for sale in ~~this~~ the Commonwealth unless 30 days prior to such manufacture, advertisement, offer, exposure for sale, or sale, the manufacturer, offeror, or dealer ~~shall file~~ files with the commissioner such intent. The filing ~~herein~~ required by this subsection shall be on forms supplied by the commissioner and shall include such information as the name under which the imitation frozen dessert is to be advertised or offered for sale, ingredients including any optional ingredients, proportion of ingredients expressed in a percentage, method of preparation, and any other relevant information the commissioner may require.

~~E.~~ D. Information filed pursuant to this section shall be confidential and used solely for administration and enforcement of this chapter.

~~F.~~ E. Imitation frozen desserts shall be considered as frozen desserts in the enforcement of Parts IV (2VAC5-510-410 et seq.) through XIV (2VAC5-510-630 et seq.) of this chapter.

2VAC5-510-415. Recall plan.

A. Each permit holder shall develop a recall plan that, when implemented, will effectively protect the public from frozen dessert products that present a risk of illness, injury, or gross deception, or are otherwise defective. Each permit holder shall submit a recall plan to VDACS prior to the issuance of any frozen desserts plant permit. VDACS shall review the recall plan or require the recall plan to be modified by the permit holder. A permit holder shall review the permit holder's recall plan annually and each time the permit holder introduces a new product. Within the 60 days following a recall plan review, if the permit holder determines that modifications to the recall plan are necessary, the permit holder shall revise the recall plan and submit the revised plan to VDACS for approval.

B. A recall plan shall include provisions to provide the following information to VDACS:

1. Identity of the product involved in the recall;

2. Reason for the recall and the date and circumstances under which the product deficiency or possible deficiency was discovered;

3. Evaluation of the risk associated with the deficiency or possible deficiency;

4. Total amount of identified products produced and the time span of the production;

5. Total amount of identified products estimated to be in distribution channels;

6. Distribution information, including the identity of each person to which the identified product was sold and the number of identified products sold to each person;

7. Draft copy of the permit holder's proposed recall communication;

8. Proposed strategy for conducting the recall; and

9. Name and telephone number of the permit holder's representative who should be contacted concerning the recall.

C. Each permit holder shall promptly notify each of its affected direct accounts about a recall and shall prepare a recall communication to:

1. Clearly identify the product, size, lot number, code or serial number, and any other descriptive information to enable accurate and immediate identification of the recalled product;

2. Explain concisely the reason for the recall and the hazard involved, if any;

3. Provide specific instructions on what should be done with respect to the recalled product;

4. Require the affected direct account to report to the recalling firm the quantity of the recalled product that the affected direct account has in its possession;

5. State that further distribution or use of any remaining product should cease immediately; and

6. Where appropriate, state that the affected direct account should notify its customers who received the recalled product.

D. Each permit holder shall provide recall status reports to VDACS as requested by the VDACS until the recall is terminated. Each permit holder shall include in each recall status report the following information:

1. The number of affected direct accounts notified of the recall and the date and method of notification;

2. The number of affected direct accounts responding to the recall communication and the quantity of products in the affected direct account's possession at the time the recall communication was received;

3. The number and identity of the affected direct accounts that did not respond to the recall communication;

4. The number of products returned or corrected by each affected direct account that was contacted and the quantity of products that are accounted for;

5. The number of effectiveness checks that were made and the results of those checks; and

6. The estimated timeframe for completion of the recall.

E. Each permit holder shall implement its recall plan within eight hours after receipt of written notification to do so by VDACS. If the permit holder fails to implement its recall plan within the eight hours, VDACS may prepare and issue the recall communication.

2VAC5-510-420. Issuing, suspension, and revocation of permits.

A. It shall be unlawful for any person who does not possess a permit from the ~~Virginia Department~~ Commissioner of Agriculture and Consumer Services to ~~bring into, send into, or receive into the Commonwealth of Virginia for sale, or to sell, or offer for sale therein, or to have in storage with intent to offer for sale or sell frozen desserts or frozen desserts mix identified in this chapter: Provided, that grocery stores, restaurants, soda fountains, and similar establishments where frozen desserts or frozen desserts mix are regularly served or sold at retail, but not processed, may be exempt from the requirements of this chapter~~ manufacture in the Commonwealth any food listed in § 3.2-5212 of the Code of Virginia.

B. Only a person who complies with the requirements of this chapter shall be entitled to receive and retain such a permit. Permits shall not be transferable with respect to persons or locations.

C. The State Regulatory ~~Authority~~ Agency may immediately temporarily suspend such permit, without notice of hearing, whenever it has reason to believe that a public health hazard exists or is imminent, or in case of willful refusal to permit authorized inspection~~;~~, provided that a formal notice and hearing shall be afforded such suspended permit holder within 72 hours of such suspension. In all other cases of violation of this chapter, the State Regulatory ~~Authority~~ Agency may serve upon the holder a written notice of intent to suspend the permit. This notice shall specify the violations in question and may afford the holder a reasonable opportunity to correct the violations~~;~~ or the State Regulatory ~~Authority~~ Agency shall afford the permit holder the opportunity for a formal hearing pursuant to § 2.2-4020 of the Code of Virginia before taking action to suspend or revoke a permit. A suspension of permit shall remain in effect until the violation has been corrected to the satisfaction of the State Regulatory ~~Authority~~ Agency.

D. Upon gross or repeated violations, the State Regulatory ~~Authority~~ Agency may revoke the permit following reasonable notice to the permit holder and an opportunity for a hearing. ~~Part V (2VAC5-510-420 et seq.) of this chapter~~ Nothing in this section is ~~not~~ intended to preclude the institution of court action.

E. The State Regulatory Agency may cancel, suspend, revoke, or deny the permit of any person if:

1. The permit holder does not daily or on a regular basis produce, provide, manufacture, sell, offer for sale, or store in the Commonwealth of Virginia ice cream, frozen desserts, or similar products;

2. The permit holder fails to provide at no cost to the State Regulatory Agency samples of ice cream, frozen desserts, or similar products in the permit holder's possession for testing by the State Regulatory Agency;

3. A public hazard exists that affects the permit holder's ice cream, frozen dessert, or similar products;

4. The permit holder or any agent of the permit holder has obstructed or interfered with the State Regulatory Agency in the performance of the State Regulatory Agency's duties;

5. The permit holder or any agent of the permit holder knowingly supplies false or misleading information to the State Regulatory Agency (i) in the person's application for a permit, (ii) concerning the identity of the person who will control the facility that is the subject of the permit, (iii) concerning any investigation conducted by the State Regulatory Agency, or (iv) concerning the location of any part of the permit holder's operation that is subject to a permit;

6. The permit holder fails to correct any deficiency that the State Regulatory Agency has cited in a written notice of intent to suspend the permit holder's permit, as a violation of this chapter;

7. The permit holder sells or offers to sell ice cream, frozen desserts, or similar products that violate any requirement of this chapter;

8. The most recent phosphate test on the permit holder's ice cream, frozen desserts, or similar products containing dairy violates the standard specified in this chapter;

9. The person manufactures, freezes, sells, offers or exposes for sale, or has in possession with the intent to sell any milk product, frozen dessert ingredients, or frozen dessert mix that is adulterated or misbranded or that does not conform to the product definition or of any requirement made and promulgated under this chapter; or

10. The State Regulatory Agency determines that conditions exist in a frozen desserts plant that would render such entity significantly out of compliance with an applicable provision of this chapter.

The State Regulatory Agency may summarily suspend a permit for violation of subdivision 4, 6, 7, 8, or 9 of this subsection.

F. The Commissioner of Agriculture and Consumer Services may suspend from sale or seize any frozen dessert product in violation of this chapter that is processed by any frozen desserts plant permit holder in lieu of suspending the frozen desserts plant permit holder's permit.

G. The Commissioner of Agriculture and Consumer Services may exempt a person who makes a frozen dessert and sells that frozen dessert directly to the consumer from the requirement to obtain a permit issued pursuant to § 3.2-5214 of the Code of Virginia. However, a person who pasteurizes the milk, milk products, or eggs used as ingredients in the frozen dessert is not eligible for this exemption.

2VAC5-510-430. Name and address of manufacturer, statement of quantity, and product identity ~~and optional ingredients~~.

A. Any frozen dessert or frozen dessert mix in which a standard of identity has been established under Part III (2VAC5-510-30 et seq.) of this chapter ~~(2VAC5-510-30 et seq.)~~ shall be deemed to be misbranded if in container or package form unless it bears a label containing:

1. The name and address of the frozen desserts plant or retail establishment in which the frozen dessert or frozen dessert mix is manufactured~~,~~ or the name and address of the manufacturer's principal office and a code designation approved by the Commissioner of Agriculture and Consumer Services identifying the plant or establishment in which the food was manufactured.

2. An accurate statement of the quantity of content in terms of liquid measure.

3. The name of the frozen dessert or frozen dessert mix defined under the standards of identity of Part III of this chapter ~~(2VAC5-510-30 et seq.), and~~

~~4. The label statement of optional ingredients as required under Part III of this chapter (2VAC5-510-30 et seq.)~~.

B. Where the frozen dessert or frozen dessert mix is not manufactured by the person whose name appears on the label, the label must identify the manufacturer by a code designation approved by the ~~Virginia~~ Commissioner of Agriculture and Consumer Services.

C. All labels must comply with the applicable requirements of 21 CFR Part 101 and any applicable requirements of 21 CFR Part 135.

Part VII

Inspection of Frozen Desserts Plants ~~and Frozen Desserts Retail Establishments~~

2VAC5-510-440. Frequency, filing of inspection reports and confidentiality.

A. Each frozen desserts plant ~~or frozen desserts establishment in this state whose products are intended for consumption within the Commonwealth of Virginia,~~ shall be inspected by the State Regulatory ~~Authority~~ Agency prior to the issuance of a permit. Following the issuance of a permit, each frozen desserts plant ~~or retail establishment~~ shall be inspected at least once every three months. Should the violation of any requirement set forth in Part VIII (2VAC5-510-450 et seq.) or Part X (2VAC5-510-480 et seq.) of this chapter be found on any inspection, a second inspection shall be required after the time deemed necessary to remedy the violation, but not before three days have passed. This second inspection shall determine compliance with the requirements of Part VIII ~~(2VAC5-510-450 et seq.)~~ and Part X ~~(2VAC5-510-480 et seq.)~~. Any violation of the same requirement of Part VIII ~~(2VAC5-510-450 et seq.)~~ or Part X ~~(2VAC5-510-480 et seq.)~~ on such second inspection shall be cause for permit suspension according to Part V (2VAC5-510-420 et seq.) of this chapter ~~(2VAC5-510-420 et seq.)~~, or court action, or both.

B. ~~One~~ A copy of each inspection report shall be ~~handed~~ provided to the operator or other responsible person~~,~~ or be posted in a conspicuous place ~~on an inside wall of~~ inside the establishment. This inspection report shall not be defaced~~,~~ and shall be made available to the State Regulatory ~~Authority~~ Agency upon request. ~~An identical copy of the inspection report shall be filed with the State Regulatory Authority.~~ Every plant or frozen desserts establishment operator shall, upon request of the State Regulatory ~~Authority~~ Agency, permit access of officially designated persons to all parts of ~~his~~ the operator's plant, establishment, or facilities at any reasonable time to determine compliance with the provisions of this chapter.

C. It shall be unlawful for any person who in an official capacity obtains any information under the provisions of this chapter to use such information to ~~his~~ that person's own advantage or to reveal it to any unauthorized person.

2VAC5-510-450. Product test procedures and the examination of frozen desserts and their ingredients.

A. At irregular intervals during any six month period, at least four samples of frozen desserts and pasteurized mix from each plant shall be taken and examined by the State Regulatory ~~Authority~~ Agency. Samples of the frozen desserts or mix may be taken at any time prior to final delivery.

~~B. Frozen desserts establishments operating seasonally shall be sampled once every six weeks.~~

~~C. Freezer-made milk shakes and freezer-made shakes shall be sampled once every three months, with check samples of violations to be taken promptly.~~

~~D.~~ B. Frozen desserts and mixes imported and offered for sale in the Commonwealth of Virginia ~~shall~~ may be sampled and tested as deemed necessary for the State Regulatory ~~Authority~~ Agency.

~~E.~~ C. The products shall be tested in accordance with tests and examinations contained in Standard Methods for the Examination of Dairy Products or Official Methods of Analysis of ~~the Association of Official Analytical Chemists~~ AOAC International. A modified Roese-Gottlieb test, such as the Mojonnier or Dietert, may be used in making an official

determination of the butterfat and total solids content of frozen dairy food products.

~~F.~~ D. The bacterial quality of commingled milk and cream, and other dairy products for use in the manufacture of frozen desserts and mix, shall comply with ~~the Commonwealth of Virginia regulations for Milk for Manufacturing Purposes and its Production and Processing~~ Regulations Governing Milk for Manufacturing Purposes (2VAC5-531).

2VAC5-510-460. ~~Quality standards~~ Maximum allowable microbiological and temperature limits for pasteurized dairy ingredients, pasteurized and unpasteurized mixes ~~or,~~ and frozen desserts.

Pasteurized[5] mix, dairy ingredients, frozen desserts, and unpasteurized[5] imitation mixes and imitation frozen desserts shall comply with the following standards:

Bacteria Count			
	Standard Plate Count Not More Than[1]	Coliform ~~Determ~~ Presence Not More Than[1]	Storage Temp.
Milk	50,000/ml	10/ml	45°F (7.2°C)
Cream	50,000/ml	10/ml	45°F (7.2°C)
Fluid Dairy Ingredient	50,000/ml	10/ml	45°F (7.2°C)
Mix	50,000/gr	10/gr	45°F (7.2°C)[2, 3, 6]
Frozen Dessert (plain)	50,000/gr	10/gr[4]	

[1]In three out of the last five consecutive samples taken by the State Regulatory Agency.

[2]This does not preclude holding mix at higher temperatures for a short period of time immediately prior to freezing where applicable to particular manufacturing or processing practices.

[3]This does not apply to sterilized mix in hermetically sealed containers.

[4]20/gr. for chocolate, fruit, nuts, or other bulky flavored frozen desserts.

[5]The phenol value shall be no greater than the minimum specified for the particular product, as determined by the phosphatase test of the latest edition of "Standard Methods."

[6]This does not apply to powder or dry frozen desserts mix.

~~[1]In three out of the last five consecutive samples taken by the Regulatory Agency.~~

~~[2]This does not preclude holding mix at higher temperatures for a short period of time immediately prior to freezing where applicable to particular manufacturing or processing practices.~~

~~[3]This does not apply to sterilized mix in hermetically sealed containers.~~

~~[4]20/gr. for chocolate, fruit, nuts, or other bulky flavored frozen desserts.~~

~~[5]The phenol value shall be no greater than the minimum specified for the particular product, as determined by the phosphatase test of the latest edition of "Standard Methods."~~

~~[6]This does not apply to powder or dry frozen desserts mix.~~

2VAC5-510-470. Written notices, removal of products from sale, and permit suspension.

A. Whenever two of the last four consecutive bacteria counts, coliform determinations, or cooling temperatures taken on separate days exceed the limit of the standard for milk, cream, fluid dairy ingredients, frozen dessert mix, or frozen desserts, the State Regulatory ~~Authority~~ Agency shall send a written notice ~~thereof~~ of the exceedance to the person concerned. This notice shall be in effect so long as two of the last four consecutive samples exceed the limit of the standard. An additional sample of the product in violation shall be taken within ~~14~~ 21 days of the sending of such notice, but not before the lapse of three days. Immediate suspension of permit or court action shall be instituted whenever the standard is violated by three of the last five bacteria counts, coliform determinations, or cooling temperatures.

B. The State Regulatory ~~Authority~~ Agency may ~~forego~~ forgo suspension of the permit, provided that the ~~product or~~ products in violation are not sold or offered for sale.

C. Whenever a phosphatase test is positive, the cause shall be determined. Where the cause is improper pasteurization, it shall be corrected, and any product involved shall not be offered for sale.

2VAC5-510-490. Building.

A. Construction, maintenance, and plants.

1. Buildings shall be of sound construction. The exterior and interior shall be kept clean and in good repair to protect against dust, dirt, and mold~~,~~ and to prevent the entrance or harboring of insects, rodents, vermin, and other animals.

2. In processing areas, outside doors, windows, skylights, and transoms shall be screened or otherwise covered. Such outside doors shall not open inward and shall be self-closing~~;~~, and doors leading to processing rooms shall be sound and tight fitting. Windowsills on new construction shall be sloping. Outside conveyor openings and other special type outside openings for sanitary pipelines shall be covered when not in use~~;~~, and service-pipe openings shall be completely cemented around the pipe opening or have tight metal collars.

3. All rooms, compartments, coolers, freezers, and dry storage space in which any raw material packaging, ingredient supplies, or finished products are handled, processed, manufactured, packaged, or stored shall be designed and constructed to ~~assure~~ ensure clean and orderly operations. Rooms for receiving milk shall be separated from the processing area by a partition or suitable arrangement of equipment or facilities to avoid contamination of milk or dairy products. Boiler and tool rooms shall be separated from other rooms. Toilet and dressing rooms shall be conveniently located and shall not open directly into any room in which milk, dairy products, or ingredients are handled, processed, packaged, or stored. Doors of all toilet rooms shall be self-closing~~;~~, and fixtures shall be kept clean and in good repair.

4. Plans for new plant construction or major remodeling of existing plants shall be submitted to the State Regulatory ~~Authority~~ Agency for approval prior to such new construction or remodeling.

B. Interior finishing.

1. In all rooms in which milk or dairy products are received and processed and where mix and frozen desserts are manufactured, packaged, or stored, (except dry storage of packaging materials), or in which equipment or utensils are washed, the walls, ceilings, partitions, and posts shall be smoothly finished with a washable material of light color that is substantially impervious to moisture. A wainscoting of a suitable material in a darker color may be used to a height not exceeding 60 inches from the floor.

2. The floors in these rooms shall be of concrete or other impervious material and shall be smooth, properly graded to drain, and have drains trapped~~;~~, except that freezers used for storing frozen desserts, frozen fruits, frozen eggs, and comparable ingredients need not be provided with floor drains~~;~~, but the floors shall be sloped to drain to one or more exits~~,~~ and shall be kept clean. The plumbing shall be installed to prevent backup of sewage into the plant. On new construction or extensive remodeling, the floors shall be joined and coved with the walls to form watertight joints. Sound, smooth, wood floors may be used in certain packaging rooms where the nature of the product permits. Toilet and dressing rooms shall have impervious floors and smooth walls.

C. Ventilation and lighting.

1. All rooms and compartments ~~(~~, including storage space and toilet and dressing rooms~~)~~, shall be ventilated to maintain sanitary conditions, prevent undue condensation of water vapor, and minimize or eliminate objectionable odors.

2. Lighting, whether natural or artificial, shall be of good quality and well distributed in all rooms and compartments. All rooms where milk, dairy products, or mix and frozen desserts are handled, processed, manufactured, or packaged, or where equipment or utensils are washed, shall have at least 30 foot-candles of light intensity on all working surfaces; areas where dairy products are examined for condition and quality, at least 50 foot-candles of light intensity; and all other rooms, at least five foot-candles or intensity measured 30 inches above the floor. Light bulbs and fluorescent tubes shall be protected against breakage.

2VAC5-510-500. Facilities.

A. Water supply.

1. Both hot and cold water of safe and sanitary quality shall be available in sufficient quantity for all plant operations and facilities. Water from other lines, when officially approved, may be used for boiler feed water and condenser water~~,~~ if such water lines are completely separated from the water lines carrying the sanitary water supply~~,~~ and if the equipment is constructed and controlled to prevent contamination of any product or product contact surface. There shall be no cross-connections between safe and unsafe water lines or between private and public supply.

2. Bacteriological examination shall be made of the plant ~~sanitary~~ private water supply at least once every six months by the appropriate State Regulatory ~~Authority~~ Agency to determine purity and safety for use in processing or manufacturing dairy products.

3. The results of all plant private water supply tests shall be kept on file at the plant for at least one year. Public water supply tests shall be made available to the State Regulatory Agency if requested.

B. Employee facilities.

1. In addition to toilet and dressing rooms, the plant shall provide the following employee facilities:

a. ~~Conveniently located sanitary drinking water;~~

~~b.~~ A locker or other suitable facility for each employee;

~~c.~~ b. Hand washing facilities, including hot and cold running water~~,~~ under pressure and connected to the sewage system; soap or other detergents ~~and sanitary rooms and at other places~~; and single service towels or an approved hand drying device where necessary for the cleanliness of all personnel handling products; and

~~d.~~ c. Self-closing containers for used towels and other wastes.

2. A durable, legible sign shall be posted conspicuously in each toilet and dressing room directing employees to wash their hands before returning to work.

C. Steam. Steam shall be supplied in sufficient volume and pressure for satisfactory operation of each applicable piece of equipment. Steam that may come into direct contact with milk or dairy products shall be culinary steam. Culinary steam shall comply with the 3-A Accepted Practices, "Method of Producing Steam of Culinary Quality," Number ~~609-02~~ 609-03 (3-A Sanitary Standards, Incorporated, adopted November 21, 2004).

D. Disposal of wastes. The plant sewage system shall have sufficient slope and capacity to remove readily all waste from processing operations. Where a public sewer is not available, wastes shall be disposed of by methods approved by the State Regulatory ~~Authority~~ Agency. Containers for the collection and holding of wastes ~~other than dry waste paper~~ shall be constructed of metal or other equally impervious material, kept covered with tight-fitting lids, and placed outside the plant on a concrete slab or on a rack raised at least 12 inches; however, waste containers may be kept inside a suitable enclosed, clean, and fly-proof room. Solid wastes shall be disposed of regularly in an approved manner, and the containers cleaned before reuse. ~~Dry waste paper shall be burned at the plant in an approved incinerator, or compressed or bagged and disposed of in an approved manner.~~

2VAC5-510-505. Rooms used for domestic purposes.

A. No facility, equipment, storage, or processing area that requires inspection may be accessed through any room used for domestic purposes or part of any room used for domestic purposes.

B. A toilet room used for domestic purposes shall be approved as complying with the requirements of this chapter only if (i) the toilet room is located within 300 feet of the processing facility and (ii) all labor utilized in the processing facility is provided by the permit holder's immediate family.

2VAC5-510-510. Equipment and utensils.

A. Construction and installation.

1. New equipment shall meet applicable 3-A Sanitary Standards. Equipment and utensils coming in contact with milk, dairy products, mix or frozen desserts, including sanitary pumps, piping, fittings, and connections, shall be constructed of stainless steel or other equally corrosion-resistant and easily cleanable material. Where the use of stainless steel is not practicable, or in old equipment, other properly coated or plated metals may be approved temporarily. Nonmetallic parts having product contact surfaces shall be of materials that meet 3-A Sanitary Standards, "Multiple-Use Rubber and Rubber-Like Materials Used as Product Contact Surfaces in Dairy Equipment," Number 18-03 (3-A Sanitary Standards, Incorporated, effective August 21, 1999), and "Multiple-Use Plastic Materials Used as Product Contact Surfaces for Dairy Equipment," Number ~~20-21~~ 20-27 (3-A Sanitary Standards, Incorporated, effective July 7, 2011).

2. Bulk storage and distribution equipment for handling liquid sweetening agents shall consist of suitable metals, alloys, or other materials ~~which~~ that will withstand corrosive action by the ingredient~~;~~, and the equipment and ingredients shall be protected from contamination.

3. All equipment and piping shall be designed and installed to be easily accessible for cleaning~~,~~ and shall be kept in good repair~~,~~ and free from cracks and corroded surfaces. Milk pumps shall be of a sanitary type and easily dismantled~~,~~ for cleaning or shall be of specifically approved construction to allow cleaning in place. New or rearranged equipment shall be set away from any wall or spaced in such a manner as to facilitate proper cleaning and to maintain good housekeeping. All parts or interior surfaces or equipment, pipes (except certain piping cleaned-in-place), or fittings, including valves and connections, shall be accessible for inspection. Cleaned-in-place sanitary piping and welded sanitary pipeline systems will be acceptable if properly engineered and installed according to 3-A Accepted Practices, "Permanently Installed Product and Solution Pipelines and Cleaning Systems Used in Milk and Milk Product Processing Plants," Number 605-04 (3-A Sanitary Standards, Incorporated, effective August 20, 1994).

B. Pasteurization equipment.

1. Pasteurization equipment shall comply with 3-A Accepted Practices, "Sanitary Construction, Installation, Testing, and Operation of High Temperature Short-Time and Higher-Heat Shorter-Time Pasteurizer Systems," Number ~~603-06~~ 603-07 (3-A Sanitary Standards, Incorporated, effective November 21, 2005) and 3-A Sanitary Standards, "Non-Coiled Type Batch Pasteurizers for Milk and Milk Products," Number ~~24-02~~ 24-03 (3-A Sanitary Standards, Incorporated, effective July 16, 2010).

2. Heat treatment equipment used to reach temperatures higher than commonly used for pasteurization shall comply with appropriate sanitary construction and operating procedures approved by the State Regulatory ~~Authority~~ Agency.

3. Whenever it is necessary to break a seal on ~~such~~ pasteurization equipment, this equipment shall be properly adjusted and placed in correct operation immediately. The breaking of the seal and the adjustment made shall be reported immediately to the State Regulatory ~~Authority~~ Agency in order that the equipment can be officially checked and resealed.

C. Cleaning and sanitizing.

1. Equipment, sanitary piping, and utensils used in receiving, storing, processing, manufacturing, packaging, and handling milk, dairy products, mix or frozen desserts, and all product contact surfaces of homogenizers, high-pressure pumps, and high-pressure lines shall be kept clean.

2. The packing glands on all agitators, pumps, and vats shall be inspected at regular intervals and kept clean.

3. After being cleaned~~,~~ and immediately before use, all equipment coming in contact with milk, dairy products, or mix or frozen desserts shall have an effective bactericidal or sanitizing treatment.

4. Before use, equipment not designed for ~~C I P~~ CIP cleaning shall have been disassembled and thoroughly cleaned and sanitized. Dairy cleaners, wetting agents, detergents, sanitizing agents, or other similar material may be used that will not contaminate or adversely affect dairy products. Steel wool or metal sponges shall not be used in the cleaning of any dairy equipment or utensils.

5. ~~C I P~~ CIP cleaning shall be used only on equipment and pipeline systems that are designed and engineered for that purpose. Installation and cleaning procedures shall comply with 3-A Accepted Practices, "Permanently Installed Product and Solution Pipelines and Cleaning Systems Used in Milk and Milk Processing Plants," Number 605-04 (3-A Sanitary Standards, Incorporated, effective August 20, 1994). An outline of the cleaning procedures to be followed shall be posted near the ~~C I P~~ CIP equipment.

6. Applicable equipment and areas in the plant shall be thoroughly vacuumed regularly with a heavy-duty industrial vacuum cleaner. The material picked up shall be disposed of ~~by burning or other means~~ in a manner to destroy any insects present.

7. Exhaust stacks, elevators, and conveyors shall be inspected at regular intervals and kept clean.

8. Storage or holding tanks used to store milk, milk products, frozen desserts, or frozen desserts mix shall be cleaned and sanitized when empty and shall be emptied at least every 72 hours.

Part XI

Vehicles; ~~Frozen Dessert Retail Establishments;~~ Reconstitution of Powder or Dry Frozen Desserts Mix

2VAC5-510-520. Vehicles.

A. ~~All vehicles~~ A vehicle used to transport mix, frozen desserts, cream, milk, ~~and~~ or dairy products shall be constructed and operated to protect ~~their~~ the vehicle's contents from heat, sun, and contamination. ~~Such vehicles~~ The vehicle shall be kept clean~~;~~, and no substance capable of contaminating mix, frozen desserts, cream, milk ~~and~~, or dairy products shall be transported in ~~them~~ the vehicle. ~~Vehicles~~ A vehicle transporting frozen desserts or mix to wholesale ~~or retail outlets~~ shall have the name of the distributor prominently displayed on ~~them~~ the vehicle.

B. A covered or enclosed dock for loading, unloading, and washing tank trucks, and other facilities shall be available at all plants that receive or ship milk, fluid dairy ingredients, or frozen desserts mix in tanks. A plant shall provide approved equipment when deemed necessary by the State Regulatory ~~Authority~~ Agency to prevent contamination of products while being loaded or unloaded in tank trucks.

C. Milk transport tanks, sanitary piping, fittings, and pumps shall be cleaned and sanitized after each use. Tanks and equipment shall be washed promptly after use and ~~given bactericidal treatment immediately~~ sanitized before use. After being washed and sanitized, each tank shall be identified by a tag that is attached to the outlet valve~~, having~~ and that states the following information: (i) plant and specific location where cleaned, (ii) date and time of day of washing and sanitizing, and (iii) name of persons who washed and sanitized the tank. The tag shall not be removed until the tank is again washed and sanitized.

2VAC5-510-530. ~~Frozen desserts retail establishments.~~ (Repealed.)

~~Frozen desserts retail establishments, including commissaries and depots, shall comply with applicable provisions of Part X of this chapter (2VAC5-510-480 et seq.).~~

2VAC5-510-540. Frozen desserts ~~retail establishments which~~ plants that reconstitute powder or dry frozen desserts mix.

A. Powder or dry frozen desserts mix shall be reconstituted with potable water in one of the following ways:

1. If the ~~retail establishment~~ frozen desserts plant possesses and uses a mechanical means capable of cooling the reconstituted mix to 45°F (7.2°C) within four hours, cold tap water may be used.

2. If the ~~retail establishment~~ frozen desserts plant does not possess or use a mechanical means capable of cooling the reconstituted mix to 45°F (7.2°C) within four hours, only potable water at a temperature of 40°F (4.4°C) or below shall be used.

B. Powder or dry frozen desserts mix is not required to be repasteurized after being reconstituted with water.

C. Powder or dry frozen desserts mix may be reconstituted with pasteurized milk at a temperature of 40°F (4.4°C) or below.

2VAC5-510-550. Pasteurization of frozen dessert mix.

A. Except for flavoring ingredients, the entire mix shall be pasteurized after formulation. A frozen dairy dessert mix must be repasteurized at the receiving plant before being offered for

sale, unless the State Regulatory Agency grants permission for the frozen dairy dessert mix to be sold without repasteurization. Pasteurized mix or frozen desserts shall not be permitted to come in contact with equipment or containers with which unpasteurized mix, frozen desserts, milk, or milk products have been in contact, unless such equipment has first been properly washed and ~~subjected to a satisfactory bactericidal treatment. Powdered or dry frozen dessert mixes are not required to be re-pasteurized after being reconstituted with water as described in 2VAC5-510-540 of this chapter~~ sanitized.

B. All milk, milk products, eggs, egg products, cocoa, cocoa products, emulsifiers, stabilizers, vitamins, and liquid sweeteners shall be added to the frozen dessert before it is pasteurized, except when:

1. The frozen desserts plant demonstrates to the State Regulatory Agency's satisfaction that the addition of these ingredients prior to pasteurization will negatively impact the ability to produce the product or the quality of the product;

2. The frozen desserts plant maintains records that demonstrate to the State Regulatory Agency's satisfaction the science proving that the ingredients that are added after pasteurization are safe and suitable; or

3. The ingredients are safely and sanitarily added to the frozen dessert product.

C. Flavoring and coloring ingredients may be added after pasteurization when:

1. The ingredient has been subjected to a prior heat treatment sufficient to destroy pathogenic microorganisms;

2. The ingredient has 0.85% water activity (a_w of 0.85) or less when the water activity is calculated by dividing the water vapor pressure of the ingredient by the vapor pressure of pure water when at the same temperature as the ingredient;

3. The ingredient has a high acid content (pH level of 4.6 or below when measured at 75°F (23.9°C)) or high alkalinity (pH level greater than 11 when measured at 75°F (23.9°C));

4. The ingredient's alcohol content is sufficient to ensure that pathogenic microorganisms will not be transferred to the final product;

5. The ingredient consists of safe and suitable bacterial cultures or enzymes;

6. The ingredient is dry sugar or salt; or

7. The ingredient is subjected to any process acceptable to the State Regulatory Agency that will ensure that the ingredient is free of pathogenic microorganisms.

2VAC5-510-560. Cooling.

After heat treatment or pasteurization, processed fluid milk products, including mix ~~(~~except for sterilized mix in hermetically sealed containers~~)~~, shall be cooled promptly to 45°F (7.2°C) or lower and maintained ~~there~~ at that temperature until used, provided that storage or holding tanks used to store milk, milk products, frozen desserts, or frozen desserts mix shall be cleaned and sanitized when empty and shall be emptied at least every 72 hours. Fluid milk products may be held at higher temperatures for a short time immediately prior to freezing when applicable to particular manufacturing or processing practices.

2VAC5-510-570. Storage.

A. Utensils and portable equipment used in processing operations shall be stored above the floor in clean, dry locations, and in self-draining positions on racks constructed of impervious, corrosion-resistant material.

B. Dripped or spilled products or ingredients shall not be sold for human consumption.

C. Dairy products, mix, or frozen dessert ingredients in dry storage shall be arranged in aisles, rows, sections, or lots, or in such other manner as to be orderly and easily accessible for inspection~~,~~ and to permit adequate cleaning of the room. Dunnage or pallets shall be used when appropriate. Dairy products, mix, or frozen dessert ingredients shall not be stored with any product that would damage ~~them~~ or impair ~~their~~ the quality of the product. Open containers shall be carefully protected from contamination.

D. All products requiring refrigeration, except where otherwise specified, shall be stored under optimum temperatures and humidity to maintain ~~their~~ quality and condition. Products shall not be placed directly on wet floors, ~~or be~~ exposed to foreign odors, or subjected to conditions, such as dripping or condensation, that might cause package or product damage.

E. Items in ~~supply~~ storage rooms shall be kept clean and protected~~,~~ and be arranged to permit inspection of supplies and cleaning and spraying of the room. Insecticides and rodenticides shall be properly labeled, segregated, and stored in a separate room or cabinet away from milk or dairy products or packaging supplies. Caps, parchment papers, wrappers, liners, gaskets, and single service sticks, spoons, covers, and containers for frozen desserts, mix or their ingredients shall (i) be purchased and stored only in sanitary tubes, wrappings, or cartons~~. These shall~~; (ii) be kept in a clean, dry place until used; and ~~shall~~ (iii) be handled in a sanitary manner.

2VAC5-510-600. Lubricants.

Lubricants approved for use on milk product contact surfaces that are applied to filling machine pistons, cylinders, pumps, and valves shall be ~~sterile,~~ approved for food-grade use and ~~shall be~~ applied in a sanitary manner.

2VAC5-510-610. Cleanliness.

A. Plant employees shall wash their hands before beginning work~~,~~ and upon returning to work after using toilet facilities, eating, smoking, or otherwise soiling their hands. ~~They~~ Plant employees shall keep their hands clean and follow good hygienic practices while on duty. Expectorating or use of tobacco in any form shall be prohibited in rooms and compartments where milk, dairy products, mix, or frozen desserts are unpacked or exposed. Clean white or light colored washable outer-garments and ~~caps (paper caps or hairnets are acceptable)~~ adequate hair restraints shall be worn by all persons engaged in processing milk, dairy products, mix, or frozen desserts.

B. ~~In addition, employees~~ Employees engaged in manual molding, wrapping, and touching any product contact surface shall ~~treat their clean hands with a bactericide of approved strength~~ wash their hands with hot, soapy water and dry their hands with single-use paper towels or an approved hand drying device before beginning such work and after each interruption. ~~Rubber~~ Disposable, single-use rubber or plastic gloves may be used ~~if sanitized as above~~.

2VAC5-510-620. Health.

A. No person ~~afflicted with a communicable disease shall be permitted in any room or compartment where milk, dairy products, mix or frozen desserts are prepared, processed, or otherwise handled~~ who is affected with any disease in a communicable form or who is a carrier of a communicable disease may work at any frozen desserts plant in any capacity that would bring the person in contact with the production, handling, storage, or transportation of milk, milk products, other frozen dessert ingredients, frozen desserts, or frozen desserts mix containers, equipment, or utensils. No person who has a discharging or infected wound, sore, or lesion on hands, arms, or other exposed portions of the body shall work in any plant processing or packaging rooms or in any other capacity resulting in contact with milk, dairy products, mix or frozen dessert.

B. ~~Each employee whose work brings him in contact with the processing or handling of milk, dairy products, mix or frozen desserts, containers or equipment shall have a medical and physical examination by a registered physician or by the local department of health, and shall furnish a satisfactory medical certificate prior to employment.~~ An employee returning to work following illness from a communicable disease shall have a certificate from ~~his~~ the employee's attending physician to establish proof of complete recovery.

2VAC5-510-630. Availability.

~~All records herein required to be kept by plants shall be available for examination by the State Regulatory Authority at reasonable times.~~ A plant shall, at reasonable times, make available for examination by the State Regulatory Agency all records that this chapter and 21 CFR Part 117 Subpart C, if applicable, require the plant to maintain.

2VAC5-510-640. ~~Water supply test records.~~ (Repealed.)

~~The results of all plant water supply tests shall be kept on file at the plant for at least one year.~~

2VAC5-510-650. Pasteurization, temperature, and ~~C I P~~ CIP recorder charts.

Recorder charts showing the pasteurization record for each day shall be appropriately marked with the name of the product for each batch, date, time, and signature of the operator, and the markings made by the recording device shall not overlap. Recorder charts showing the ~~C I P~~ CIP record for each day shall be appropriately marked, and the markings made by the recording device shall not overlap. Temperature recording charts shall be labeled with the name of the product for each batch, date, time, and signature of the operator, and the markings made by the recording device shall not overlap. ~~The charts~~ Charts shall be kept on file at the plant for at least six months. Electronic records or records in a format designated by the State Regulatory Agency may be used in lieu of recording charts with prior State Regulatory Agency approval.

2VAC5-510-660. ~~Employee medical certificates.~~ (Repealed.)

~~Current employee medical certificates shall be kept on file at the plant.~~

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, General Assembly Building, 201 North Ninth Street, Fourth Floor, Richmond, Virginia 23219.

FORMS (2VAC5-510)

~~Virginia Department of Agriculture and Consumer Services Permit Application.~~

Dairy Manufacturing Permit Application Part I (rev. 4/2022)

Dairy Manufacturing Permit Application Part II (rev. 4/2022)

Dairy Manufacturing Plant Inspection Report (rev. 2/2018)

Milk Plant Equipment Test Report (rev. 11/2023)

Vat Pasteurizer Equipment Test Report (rev. 2/2018)

Official Warning Notice (rev. 4/2022)

Official Suspension Notice (rev. 4/2022)

DOCUMENTS INCORPORATED BY REFERENCE (2VAC5-510)

~~3-A Accepted Practices, Method of Producing Steam of Culinary Quality, Number 609-02, 3-A Sanitary Standards, Inc.~~

3-A Accepted Practices for a Method of Producing Culinary Steam, Number 609-03, adopted November 21, 2004, 3-A Sanitary Standards Inc.

3-A Sanitary Standards~~,~~ for Multiple-Use Rubber and Rubber-Like Materials Used as Product Contact Surfaces in Dairy Equipment, Number 18–03, effective August 21, 1999, 3-A Sanitary Standards~~,~~ Inc.

~~3-A Sanitary Standards, Multiple-Use Plastic Materials Used as Product Contact Surfaces for Dairy Equipment, Number 20-21, 3-A Sanitary Standards, Inc.~~

3-A Sanitary Standards for Multiple-Use Plastic Materials, Number 20-27, effective July 7, 2011, 3-A Sanitary Standards Inc.

3-A Accepted Practices~~,~~ for Permanently Installed Product and Solution Pipelines and Cleaning Systems Used in Milk and Milk Product Processing Plants, Number 605-04, effective August 20, 1994, 3-A Sanitary Standards~~,~~ Inc.

~~3-A Accepted Practices, Sanitary Construction, Installation, Testing, and Operation of High Temperature Short Time and Higher Heat Shorter Time Pasteurizer Systems, Number 603-06, 3-A Sanitary Standards, Inc.~~

~~3-A Sanitary Standards, Non-Coiled Type Batch Pasteurizers for Milk and Milk Products, Number 24-02, 3-A Sanitary Standards, Inc.~~

3-A Accepted Practices for the Sanitary Construction, Installation, Testing, and Operation of High-Temperature Short-Time and Higher-Heat Shorter-Time Pasteurizer Systems, Number 603-07, effective November 21, 2005, 3-A Sanitary Standards Inc.

3-A Sanitary Standards for Non-Coiled Type Batch Pasteurizers for Milk and Milk Products, Number 24-03, effective July 16, 2010, 3-A Sanitary Standards Inc.

VA.R. Doc. No. R25-7817; Filed November 19, 2024, 12:33 p.m.

Fast-Track Regulation

Title of Regulation: **2VAC5-585. Retail Food Establishment Regulations (amending 2VAC5-585-40, 2VAC5-585-50, 2VAC5-585-65 through 2VAC5-585-80, 2VAC5-585-160, 2VAC5-585-220, 2VAC5-585-270, 2VAC5-585-400, 2VAC5-585-420, 2VAC5-585-430, 2VAC5-585-440, 2VAC5-585-450, 2VAC5-585-510, 2VAC5-585-620, 2VAC5-585-700, 2VAC5-585-725, 2VAC5-585-790, 2VAC5-585-830, 2VAC5-585-850, 2VAC5-585-870, 2VAC5-585-900, 2VAC5-585-910, 2VAC5-585-930, 2VAC5-585-950, 2VAC5-585-1300, 2VAC5-585-1460, 2VAC5-585-1540, 2VAC5-585-1700, 2VAC5-585-2010, 2VAC5-585-2100, 2VAC5-585-2190, 2VAC5-585-3140, 2VAC5-585-3150, 2VAC5-585-3310, 2VAC5-585-3360, 2VAC5-585-3370, 2VAC5-585-3510, 2VAC5-585-3520, 2VAC5-585-3542, 2VAC5-585-3600, 2VAC5-585-3620, 2VAC5-585-3630, 2VAC5-585-3740, 2VAC5-585-3750, 2VAC5-585-3860, 2VAC5-585-3890, 2VAC5-585-3910 through 2VAC5-585-3950, 2VAC5-585-4050, 2VAC5-585-4060; adding 2VAC5-585-445, 2VAC5-585-726, 2VAC5-585-3670 through 2VAC5-585-3720, 2VAC5-585-3760).**

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

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: January 29, 2025.

Effective Date: February 13, 2025.

Agency Contact: Pamela Miles, 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 pamela.miles@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 authorizes the board to promulgate and amend this regulation.

Purpose: The first goal of the 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 for a disease outbreak or 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 result in approximately 48 million people becoming ill, 128,000 hospitalizations, and 3,000 deaths in the United States each year. 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 for controlling risk factors and implementing appropriate intervention strategies. The third goal of the amendments is to ensure a regulatory approach that is uniform throughout the retail

segment of Virginia's food industry by establishing standards that are equivalent to those administered by the Virginia Department of Health in restaurants and food service establishments. This regulatory uniformity also extends throughout the nation, as most states have adopted versions of the Federal and Drug Administration (FDA) Food Code.

Rationale for Using Fast-Track Rulemaking Process: This regulatory action is expected to be noncontroversial because the proposed amendments were generated from the national Conference for Food Protection, which provides a formal process whereby members of industry, regulatory, academic, consumer, and professional organizations are afforded equal input in the modification of the FDA Food Code.

Substance: Amendments include (i) revising definitions to conform with the 2022 FDA Food Code, adding definitions for permit and permit holder, and adding sesame as a major food allergen; (ii) updating terminology, cross-references, and clarification of handling and tagging of shellfish products and adding clarification for manufacturer cooking instructions; (iii) decreasing the hot water temperature requirements at hand sinks; (iv) amending the regulation to conform with the 2022 FDA Food Code related to variances and food donation; and (v) adding and clarifying requirements for a permit application, permits, transferability of a permit, and posting a permit for public view. Chapter 204 of the 2022 Acts of Assembly directs the Commissioner of Agriculture and Consumer Services to issue a permit to any food manufacturer, food storage warehouse, or retail food establishment that is in compliance with the Food and Drink Law and regulations adopted pursuant to it. These amendments are necessary to reflect this permit requirement.

Issues: The primary advantage of the proposed amendments for the public is the reduction of the risk of foodborne illnesses within food establishments, thus protecting consumers and industry from potentially devastating health consequences and financial losses. The revisions will also make the regulation more understandable and align the regulation with best practices. The primary advantage to the agency is that the regulation will be based on current food science and clarify ambiguous areas relating to enforcement and inspection standards. Staff will have a better understanding of the improved regulatory scheme of food safety, thus providing enhanced communication to the public and retail food establishments on how to prevent foodborne illness. The primary advantage to the regulated community, particularly chains and franchises that operate in other states as well as in multiple jurisdictions across the Commonwealth that have adopted the current version of the FDA Food Code, will be more consistent regulatory application. There are no known disadvantages to the public or the Commonwealth with the adoption of the proposed amendments.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The Board of Agriculture and Consumer Services (board) proposes to amend the existing Retail Food Establishment Regulations to incorporate, in part, 2022 amendments to the Food and Drug Administration (FDA) Food Code. The current regulation is based on the 2017 Food Code and its 2019 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. Standards in the regulation are labelled as either priority, priority foundation, or core; these labels correspond to certain timeframes and other corrective action requirements for each affected item. The current and proposed regulation state that an operator or person in charge shall at the time of inspection correct a violation of a priority item or priority foundation item of this chapter and implement corrective actions for a HACCP (Hazard Analysis and Critical Control Point) plan provision that is not in compliance with its critical limit. Further, considering the nature of the potential hazard involved and the complexity of the corrective action needed, the department may agree to or specify a longer timeframe, not to exceed:

1. 72 hours after the inspection, for the operator to correct violations of a priority items; or

2. 10 calendar days after the inspection, for the operator to correct a priority foundation item or HACCP plan deviations.

For core items, the current and proposed regulation state that the operator or person in charge shall correct core items by a date and time agreed to or specified by the department but no later than 90 calendar days after the inspection.[2] The proposed amendments with a potential impact in each section are discussed below. Some of these items are labelled as priority, priority foundation, or core.

12VAC5-585-40, Definitions - There are several amendments to this section. Adding sesame to the definition of major food

allergen may have an impact as described below in the Estimated Benefits and Costs section.

12VAC5-585-70, Duties of person in charge - The board proposes to add the following to the list of items for which the person in charge is responsible to ensure: "Food employees are properly maintaining the temperature of time/temperature control for safety foods during thawing through daily oversight of the food employees' routine monitoring of food temperatures."

12VAC5-585-80, Responsibility of permit holder, person in charge, and conditional employees - Under the current regulation, food employees who are diagnosed with an infection from Salmonella (nontyphoidal) and are asymptomatic are to be prevented from working as an employee in the food establishment or entering the food establishment as an employee. The board proposes to amend the text to indicate that such individuals are to be restricted rather than be excluded from working. The current and proposed regulation define restrict as 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.

12VAC5-585-430, Molluscan shellfish; original container - The board proposes to add that Molluscan shellfish from one tagged or labeled container may not be commingled with molluscan shellfish from another container with different certification numbers, different harvest dates, or different harvest areas identified on the tag or label before being ordered by the consumer.

12VAC5-585-440, Molluscan shellfish; maintain identification - The current regulation requires specified recordkeeping information on the tag or label. The proposed regulation adds a third option, the invoice.

12VAC5-585-620, Food storage; prohibited areas - Currently, the prohibition on storing food in toilet rooms is a core standard. The board proposes to make it a priority foundation item.

12VAC5-585-726, Manufacturer cooking instructions - This section is new under the proposed regulation. In its entirety, it states that:

A. Commercially packaged food that bears a manufacturer's cooking instructions shall be cooked according to those instructions before use in ready-to-eat foods or offered in unpackaged form for human consumption, unless the manufacturer's instructions specify that the food may be consumed without cooking. [P]

B. Food for which the manufacturer has provided information that it has not been processed to control pathogens, when used in ready-to-eat foods or offered for human consumption, shall be cooked according to a time and temperature appropriate for the food. [P]

The P superscripts indicate that the proposed new standards are priority items.

12VAC5-585-870, Reduced oxygen packaging without a variance, criteria - The board proposes to include an additional option to package and seal food products by a cooling or sous-vide process so long as the food meets certain refrigeration requirements.

12VAC5-585-900, Food labels - The board proposes to require food establishments to notify consumers (through card, sign, or other method) regarding potential allergens in bulk food that is available for consumer self-dispensing.

12VAC5-585-910, Other forms of information - The board proposes to require food establishments to notify consumers in writing of the presence of major food allergens as an ingredient in unpackaged food items that are served or sold to the consumer.

12VAC5-585-1540, Equipment, clothes washers and dryers, and storage cabinets, contamination prevention - Currently, the prohibition on locating equipment, cabinets used for the storage of food, or cabinets used to store cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use article in toilet rooms is a core standard item. The board proposes to make it a priority foundation item.

12VAC5-585-2010, Prohibitions - Currently, the prohibition on storing cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles in toilet rooms is a core standard. The board proposes to make it a priority foundation item.

12VAC5-585-2190, Handwashing sink, installation - The board proposes to reduce the minimum hot water temperature at a handwashing sink from 100°F to 85°F.[3]

12VAC5-585-3370, Poisonous or toxic material containers - The current section in its entirety is the following sentence: A container previously used to store poisonous or toxic materials shall not be used to store, transport, or dispense food.[P] The board proposes to add ", equipment, utensils, linens, single-service, or single-use articles" after food and before the period.

Estimated Benefits and Costs. Alignment of the Virginia Food Regulations to the 2022 FDA Food Code may benefit chain food establishments that operate in other states and localities that also use the most recent version of the Food Code. Many large chain operations use the most recent edition of the Food Code as an operational standard to ensure they reduce liability and operate consistently throughout their operational region.[4] By adopting current changes to the FDA Food Code, there is also consistency with the Virginia Department of Health Food Regulations.

12VAC5-585-10, Definitions - The current regulation (12VAC5-585-900) requires that labels on food packaged in a food establishment include the name of the food source for each major food allergen contained in the food unless the food source is already part of the common or usual name of the respective ingredient. In the proposed regulation (12VAC5-

585-900), bulk food that is available for consumer self-dispensing must also be prominently labeled with each major food allergen contained in the food unless the food source is already part of the common or usual name of the respective ingredient. The board also proposes to state (12VAC5-585-910) that, "The permit holder shall notify consumers by written notification of the presence of major food allergens as an ingredient in unpackaged food items that are served or sold to the consumer." Given the current and proposed notification requirements, adding sesame to the definition of major food allergen would make it substantively more likely that individuals allergic to sesame would be aware that food that they may consider obtaining and eating from a food establishment contains sesame. According to the U.S. Department of Health and Human Services, National Institutes of Health, the sesame allergy is one of the 10 most common childhood food allergies, and reactions can be severe.[5] Sesame allergies can cause anaphylaxis, a serious and potentially life-threatening reaction.[6] Thus, adding sesame to the definition of major food allergen would likely be substantively beneficial for public health. There would be cost to food establishments of providing this information on menus, packages, bulk food containers, etc., but it would likely be small, particularly compared to the potential benefit.

12VAC5-585-70, Duties of person in charge - As mentioned, the board proposes to add the following to the list of items for which the person in charge is responsible to ensure: "Food employees are properly maintaining the temperature of time/temperature control for safety foods during thawing through daily oversight of the food employees' routine monitoring of food temperatures." The regulation already contains specific time/temperature control requirements for thawing. Adding this to the list of items for which the person in charge is responsible to ensure would put a greater emphasis on the importance of following safe thawing methods, but it would not likely produce a large change on what occurs in practice. The person in charge may remind the employees more often on what the safe thawing methods are.

12VAC5-585-80, Responsibility of permit holder, person in charge, and conditional employees - As described, under the current regulation food employees who are diagnosed with an infection from Salmonella (nontyphoidal) and are asymptomatic, are to be prevented from working as an employee in the food establishment. The board proposes to amend the text to allow such individuals to work in a capacity where their activities are limited to where there is no risk of transmitting the disease and the food employee does not work with exposed food, clean equipment, utensils, linens, or unwrapped single-service or single-use articles. This proposed amendment would be beneficial for both employees with such infections in that they can earn income, and for the food establishment in staffing.

12VAC5-585-430, Molluscan shellfish; original container - The board proposes to add that Molluscan shellfish from one tagged or labeled container may not be commingled with molluscan shellfish from another container with different certification numbers, different harvest dates, or different harvest areas identified on the tag or label before being ordered by the consumer. Proper identification is vital for tracing the origin of shellfish in the event of a foodborne outbreak. Prohibiting the comingling may make it more likely that tracing the origin of shellfish in the event of a foodborne outbreak can be done accurately. This is beneficial in that it may reduce the likelihood that people consume unsafe molluscan shellfish. It could also potentially be beneficial for the food establishment and providers of the molluscan shellfish in that recalls of the product could be narrower and the area of growing waters closed to harvesting could be smaller when identification is more precise.

12VAC5-585-440, Molluscan shellfish; maintain identification - Adding a third option (invoices) for recordkeeping could be beneficial for food establishments that would prefer that option over the existing two (tag or label).

12VAC5-585-620, Food storage; prohibited areas - Currently, the prohibition on storing food in toilet rooms is a core standard item. The board proposes to make it a priority foundation item. This would reduce the maximum number of days that the food establishment could be given to correct this violation from 90 to 10.

12VAC5-585-726, Manufacturer cooking instructions - This section is new under the proposed regulation. In its entirety, it states that:

A. Commercially packaged food that bears a manufacturer's cooking instructions shall be cooked according to those instructions before use in ready-to-eat foods or offered in unpackaged form for human consumption, unless the manufacturer's instructions specify that the food may be consumed without cooking.[P]

B. Food for which the manufacturer has provided information that it has not been processed to control pathogens, when used in ready-to-eat foods or offered for human consumption, shall be cooked according to a time and temperature appropriate for the food.[P]

The [P] superscripts indicate that the proposed new standards are priority items.

The proposed new standards may be beneficial for food safety, but may also limit a food preparer's creativity if he wishes to cook the commercially packaged food in a different way than is described in the manufacturer's instructions.

12VAC5-585-870, Reduced oxygen packaging without a variance, criteria - The board proposes to include an additional option to package and seal food products by a cooling or sous-vide process so long as the food meets certain refrigeration requirements. The additional option could be beneficial for food establishments that wish to use it.

12VAC5-585-900, Food labels - The board proposes to require food establishments to notify consumers (through a card, sign, or other method) regarding potential allergens in bulk food that

is available for consumer self-dispensing. This would make it substantively more likely that individuals with food allergies would be aware that the bulk food contains the food to which they are allergic. As described, food allergies can potentially be life threatening. Thus, this proposal would likely be substantively beneficial for public health. The cost to the food establishment of providing this information on menus, packages, bulk food containers, etc., would likely be small, particularly compared to the potential benefit.

12VAC5-585-910, Other forms of information - The board proposes to require food establishments to notify consumers in writing of the presence of major food allergens as an ingredient in unpackaged food items that are served or sold to the consumer. This would make it substantively more likely that individuals with food allergies would be aware that the unpackaged food, including meals at restaurants, contains the food to which they are allergic. As described, food allergies can potentially be life threatening. Thus, this proposal would likely be substantively beneficial for public health. The cost to the food establishment of providing this information on menus, packages, bulk food containers, etc., would likely be small, particularly compared to the potential benefit.

12VAC5-585-1540, Equipment, clothes washers and dryers, and storage cabinets, contamination prevention - Currently, the prohibition on locating equipment, cabinets used for the storage of food, or cabinets used to store cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use article in toilet rooms or their vestibules is a core standard item. The board proposes to make it a priority foundation item. This would reduce the maximum number of days that the food establishment could be given to correct this violation from 90 to 10.

12VAC5-585-2010, Prohibitions - Currently, the prohibition on storing cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles in toilet rooms or their vestibules is a core standard item. The board proposes to make it a priority foundation item. This would reduce the maximum number of days that the food establishment could be given to correct this violation from 90 to 10.

12VAC5-585-2190, Handwashing sinks, water temperature, and flow - The board proposes to reduce the minimum hot water temperature at a handwashing sink from 100°F to 85°F. This could result in energy cost savings for food establishments.

12VAC5-585-3370, Poisonous or toxic material containers - The current section in its entirety is the following sentence: "A container previously used to store poisonous or toxic materials shall not be used to store, transport, or dispense food."[P] The board proposes to amend the sentence as follows, to expand this prohibition beyond just food, "A container previously used to store poisonous or toxic materials shall not be used to store, transport, or dispense food[P], equipment, utensils, linens, single-service, or single-use articles." (emphasis added) To the extent that containers previously used to store poisonous or toxic materials are actually used to store, transport, or dispense equipment, utensils, linens, single-service, or single-use articles, and the poisonous or toxic materials are not consistently 100% removed from the containers, this proposed amendment could improve public health. There is no information to indicate that finding containers that were not previously used to store poisonous or toxic materials would be costly.

Businesses and Other Entities Affected. The proposed amendments affect the 9,907 active retail food establishments and an additional 30 with plans approved and waiting for the firm to open. The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[7] An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.[8] Some of the proposed amendments likely produce a net benefit for society overall, but still do increase costs for some individual entities. For example, though the proposed required notifications for the presence of allergens potentially have large benefits for people with food allergies, they do (moderately) increase costs for food establishments. Thus, an adverse impact is indicated for food establishments.

Small Businesses[9] Affected.[10] Types and Estimated Number of Small Businesses Affected. VDACS states that it does not track the number of retail food establishments that qualify as small businesses, but notes that 4,946 of the retail establishments are independently owned and operated, and are not corporations.

Costs and Other Effects. The proposal to require labeling and notifications for sesame and other allergens would moderately increase costs for small retail food establishments that are not already doing so.

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

Localities[11] Affected.[12] The proposed amendments neither disproportionally affect any particular localities, nor directly affect costs for local governments.

Projected Impact on Employment. The proposed amendments do not appear to substantively affect total employment.

Effects on the Use and Value of Private Property. The proposal to reduce the minimum hot water temperature at a handwashing sink from 100°F to 85°F may result in reduced energy costs for some food establishments. These reduced costs could increase the value of these businesses. The proposed required notifications for the presence of allergens moderately increase costs for food establishments, potentially moderately reducing value. The proposed amendments do not affect real estate development costs.

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[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] The regulation also states that the department may approve a compliance schedule that extends beyond the time limits specified under subsection A of this section if a written schedule of compliance is submitted by the operator and no health hazard exists or will result from allowing an extended schedule for compliance.

[3] The 2022 Edition of the FDA Food Code and the International Plumbing Code define tempered water as having a temperature range between 29.4°C (85°F) and 43°C (110°F). The current regulation states that A handwashing sink shall be equipped to provide water at a temperature of at least 100°F (38°C). The proposal is to replace 100°F (38°C) with 85°F (29.4°C).

[4] Source: VDACS (see page three of Office of Regulatory Management Economic Review Form: https://townhall.virginia.gov/L/GetFile.cfm?File=48\6484\10354\ORM_EconomicImpact_VDACS_10354_v2.pdf.

[5] See https://www.nih.gov/news-events/nih-research-matters/sesame-allergy-common-among-children-food-allergies.

[6] See https://www.healthline.com/health/allergies/understanding-sesame-allergies.

[7] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[8] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[9] Pursuant to § 2.2-4007.04, 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."

[10] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[11] "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.

[12] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Department of Agriculture and Consumer Services concurs with the analysis prepared by the Department of Planning and Budget.

Summary:

The amendments update Retail Food Establishment Regulations (2VAC5-585), which is based on the 2017 Food and Drug Administration (FDA) Food Code and its 2019 supplement, to make the regulation consistent with the 2022 FDA Food Code and 12VAC5-421. The amendments (i) incorporate the 2022 amendments to the FDA Food Code, (ii) add and revise definitions, (iii) update cross-references, (iv) add sesame as an allergen, (v) change standards related to temperatures, (vi) add provisions for food donations, and (vii) update references to permit holders.

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_w" 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_w.

"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.

"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~~ the unique ~~combination of letters and numbers assigned~~ identification number issued by a shellfish control authority to ~~a molluscan shellfish dealer according to the provisions of the National Shellfish Sanitation Program~~ each dealer for each location. Each certification number shall consist of a one-digit to five-digit Arabic numeral preceded by the two-letter state abbreviation and followed by a two-letter abbreviation for each type of activity the dealer is qualified to perform in accordance with the provisions of the National Shellfish Sanitation Program using the terms in Tables A and B:

Table A. Certifications	
Acronym	Term
SP	Shucker-packer
RP	Repacker
SS	Shellstock shipper
RS	Reshipper
DP	Depuration processor

Table B. Permits	
Acronym	Term
PHP	Post-harvest processing
AQ	Aquaculture
WS	Wet storage

"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~~ the act of combining different lots of shellfish.

"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~~ a permit holder or an operator of a 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.

"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~~ permit holder, 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, 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 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) 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, 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 that are referred to as "injecting," "pump marinating," or "stitch pumping."

"In-shell product" means nonliving, processed shellfish with one or both shells present.

"Intact meat" means a cut of whole muscle meat that has not undergone comminution, vacuum tumbling with solutions, mechanical tenderization, ~~or~~ reconstruction, cubing, or pounding.

"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 walnuts), wheat, peanuts, ~~and~~ soybeans, and sesame; 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 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).

"Mobile food establishment" means a food establishment mounted on wheels, excluding boats in the water, that is readily movable from place to place at all times during operation and includes pushcarts, trailers, trucks, or vans. The unit, all operations, and all equipment must be integral to and be within or attached to the unit.

"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. Molluscan shellfish includes shellstock, shucked shellfish, and in-shell products.

"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.

"Permit" means the document issued by the department that authorizes a person to operate a food establishment.

"Permit holder" means the entity that:

1. Is legally responsible for the operation of the food establishment, such as the owner, the owner's agent, or other person; and

2. Possesses a valid permit to operate a food establishment.

"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~~ five 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; and

5. Restricted-use pesticides.

"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~~ permit holder 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~~ permit holder 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: ^{Pf}.

"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: ^{P}.

"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.

"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. Plant food that 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 as specified in 21 CFR Part 113.

"Ready-to-eat food" does not include:

1. Commercially packaged food that bears a manufacturer's cooking instructions; or

2. Food for which the manufacturer has provided information that the food has not been processed to control for pathogens.

"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 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 ~~psychotrophic~~ psychrotrophic 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 ~~psychotrophic~~ psychrotrophic 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~~ live molluscan shellfish in the shell.

"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:

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.

"Tobacco product" has the meaning stated in the Federal Food, Drug, and Cosmetic Act, 21 USC § 321(rr).

"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, 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 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~~ permit holder 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.[Pf]

B. In a food establishment with two or more separately ~~inspected~~ permitted departments that are the legal responsibility of the same ~~operator~~ permit holder and that are located on the same premises, the ~~operator~~ permit holder 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~~ permitted food establishment on the premises.[Pf]

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.[Pf]

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 department to pose minimal risk of causing, or contributing to, foodborne illness based on the nature of the operation and extent of food preparation.

2VAC5-585-67. Food protection manager certification.

A. A person in charge who demonstrates knowledge by being a food protection manager 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 Standard~~s~~ for Accreditation of Food Protection Manager Certification Programs, April ~~2018~~ 2023, (Conference for Food Protection) is deemed to comply with subdivision 2 of 2VAC5-585-60.

B. A food establishment that has 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 Standard~~s~~ for Accreditation of Food Protection Manager Certification Programs, April ~~2018~~ 2023, (Conference for Food Protection) is deemed to comply with 2VAC5-585-65.

2VAC5-585-70. Duties of person in charge.

The person in charge shall ensure that:

1. Food establishment operations are not conducted in a private home or in a room used as living or sleeping quarters as specified under 2VAC5-585-2990;[Pf]

2. Persons unnecessary to the food establishment operation are not allowed in the food preparation, food storage, or warewashing areas, except that brief visits and tours may be authorized by the person in charge if steps are taken to ensure that exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles are protected from contamination;[Pf]

3. Employees and other persons such as delivery and maintenance persons and pesticide applicators entering the food preparation, food storage, and warewashing areas comply with this chapter;[Pf]

4. Employees are effectively cleaning their hands, by routinely monitoring the employees' handwashing;[Pf]

5. Employees are visibly observing foods as they are received to determine that they are from approved sources, delivered at the required temperatures, protected from contamination, unadulterated, and accurately presented, by routinely monitoring the employees' observations and periodically evaluating foods upon their receipt;[Pf]

6. Employees are verifying that foods delivered to the food establishment during nonoperating hours are from approved sources and are placed into appropriate storage locations such that they are maintained at the required temperatures, protected from contamination, unadulterated, and accurately presented;[Pf]

7. Employees are properly cooking time/temperature control for safety food, being particularly careful in cooking those foods known to cause severe foodborne illness and death, such as eggs and comminuted meats, through daily oversight of the employees' routine monitoring of the cooking temperatures using appropriate temperature measuring devices properly scaled and calibrated as specified under 2VAC5-585-1180 and 2VAC5-585-1730 B;[Pf]

8. Employees are using proper methods to rapidly cool time/temperature control for safety foods that are not held hot or are not for consumption within four hours, through daily oversight of the employees' routine monitoring of food temperatures during cooling;[Pf]

9. Employees are properly maintaining the temperatures of time/temperature control for safety food during hot and cold holding through daily oversight of the employees' routine monitoring of food temperatures;[Pf]

10. Food employees are properly maintaining the temperature of time/temperature control for safety foods during thawing through daily oversight of the food employee's routine monitoring of food temperatures;[Pf]

11. Consumers who order raw or partially cooked ready-to-eat foods of animal origin are informed as specified under 2VAC5-585-930 that the food is not cooked sufficiently to ensure its safety;[Pf]

~~11.~~ 12. Employees are properly sanitizing cleaned multiuse equipment and utensils before they are reused, through routine monitoring of solution temperature and exposure time for hot water sanitizing, and chemical concentration, pH, temperature, and exposure time for chemical sanitizing;[Pf]

~~12.~~ 13. Consumers are notified that clean tableware is to be used when they return to self-service areas such as salad bars and buffets as specified under 2VAC5-585-590;[Pf]

~~13.~~ 14. Except when approval is obtained from the department as specified in 2VAC5-585-450 E, employees are preventing cross-contamination of ready-to-eat food with bare hands by properly using suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment;[Pf]

~~14.~~ 15. Employees are properly trained in food safety, including food allergy awareness, as it relates to their assigned duties. Food allergy awareness includes describing foods identified as major food allergens and the symptoms that a major food allergen could cause in a sensitive individual who has an allergic reaction; [Pf]

~~15.~~ 16. Food employees and conditional employees are informed in a verifiable manner of their responsibility to report in accordance with law, to the person in charge, information about their health and activities as they relate to diseases that are transmissible through food, as specified under 2VAC5-585-80 A;[Pf] and

~~16.~~ 17. Written procedures and plans where specified by this chapter and as developed by the food establishment are maintained and implemented as required.[Pf]

2VAC5-585-80. Responsibility of ~~operator~~ permit holder, person in charge, and conditional employees.

A. The ~~operator~~ permit holder 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;[P]

b. Diarrhea;[P]

c. Jaundice;[P]

d. Sore throat with fever;[P] 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;[P]

(2) On exposed portions of the arms, unless the lesion is protected by an impermeable cover;[P] or

(3) On other parts of the body, unless the lesion is covered by a dry, durable, tight-fitting bandage;[P]

2. Has an illness diagnosed by a health practitioner due to:

a. Norovirus;[P]

b. Hepatitis A virus;[P]

c. Shigella spp.;[P]

d. Shiga toxin-producing Escherichia coli; [P]

e. Typhoid fever (caused by Salmonella typhi);[P] or

f. Salmonella (nontyphoidal);[P]

3. Had typhoid fever, diagnosed by a health practitioner, within the past three months , without having received antibiotic therapy, as determined by a health practitioner;[P]

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;[P]

b. Shiga toxin-producing Escherichia coli, or Shigella spp. within the past three days of the last exposure;[P]

c. Typhoid fever within the past 14 days of the last exposure;[P] or

d. Hepatitis A virus within the past 30 days of the last exposure;[P] 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;[P]

b. Shiga toxin-producing Escherichia coli or Shigella spp. within the past three days of the last exposure;[P]

c. Typhoid fever (caused by Salmonella typhi) within the past 14 days of the last exposure;[P] or

d. Hepatitis A virus within the past 30 days of the last exposure.[P]

B. The person in charge shall notify the department when a food employee is:

1. Jaundiced;[Pf] or

2. Diagnosed with an illness due to a pathogen as specified under subdivisions A 2 a through f of this section.[Pf]

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 for the specific symptoms or diagnosed illness as specified under 2VAC5-585-100;[P] 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.[P]

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;[P] or

2. Restricted as specified under subdivision 4 b, 5 b, 6 b, 7, 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.[P]

E. A food employee or conditional employee shall report to the person in charge the information as specified under subsection A of this section.[Pf]

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;[P] 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.[P]

2VAC5-585-160. When to wash.

Food employees shall clean their hands and exposed portions of their arms as specified under 2VAC5-585-140 immediately before engaging in food preparation including working with exposed food, clean equipment and utensils, and unwrapped single-service and single-use articles[P] and:

1. After touching bare human body parts other than clean hands and clean, exposed portions of arms;[P]

2. After using the toilet room;[P]

3. After caring for or handling service animals or aquatic animals as allowed under 2VAC5-585-250 B;[P]

4. Except as specified in 2VAC5-585-220 B, after coughing, sneezing, using a handkerchief or disposable tissue, using a tobacco product, eating, or drinking;[P]

5. After handling soiled equipment or utensils;[P]

6. During food preparation, as often as necessary to remove soil and contamination and to prevent cross contamination when changing tasks;[P]

7. When switching between working with raw food and working with ready-to-eat food;[P]

8. Before donning gloves to initiate a task that involves working with food;[P] and

9. After engaging in other activities that contaminate the hands.[P]

2VAC5-585-220. Eating, drinking, or using tobacco products.

A. Except as specified in subsection B of this section, an employee shall eat, drink, or use any form of tobacco product only in designated areas where the contamination of exposed food; clean equipment, utensils, and linens; unwrapped single-service and single-use articles; or other items needing protection cannot result.

B. A food employee may drink from a closed beverage container if the container is handled to prevent contamination of:

1. The employee's hands;

2. The container; and

3. Exposed food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles.

2VAC5-585-270. Compliance with food law.

A. Food shall be obtained from sources that comply with law.[P]

B. Food prepared in a private home may not be used or offered for human consumption in a food establishment unless the home kitchen is inspected and regulated by the food

regulatory authority that has jurisdiction over the private home.[P]

C. Packaged food shall be labeled as specified in law, including 21 CFR Part 101; 9 CFR Part 317; and 9 CFR Part 381, Subpart N; and as specified under ~~2VAC5-585-400 and~~ 2VAC5-585-410.[Pf]

D. Fish, other than those specified in 2VAC5-585-730 B, that are intended for consumption in raw or undercooked form and allowed as specified in 2VAC5-585-700 D, may be offered for sale or service if they are obtained from a supplier that freezes fish as specified under 2VAC5-585-730 A, or if they are frozen on the premises as specified under 2VAC5-585-730 A and records are retained as specified under 2VAC5-585-740.

E. Whole-muscle, intact beef steaks that are intended for consumption in an undercooked form without a consumer advisory as specified in 2VAC5-585-700 C shall be:

1. Obtained from a food processing plant that~~, upon request by the purchaser, packages the steaks and labels them to indicate that the steaks meet the definition of~~ does not mechanically tenderize, vacuum tumble with solutions, reconstruct, cube, or pound those whole-muscle, intact beef steaks;[Pf] or

2. Deemed acceptable by the department based on other evidence, such as written buyer specifications or invoices, that indicates that the steaks meet the definition of whole-muscle, intact beef;[Pf] and

3. If individually cut in a food establishment:

a. Cut from whole-muscle, intact beef that is ~~labeled by~~ received from a food processing plant as specified in subdivision 1 of this subsection or identified as specified in subdivision 2 of this subsection;~~[Pf P]~~ and

b. Prepared so they remain intact~~;~~.[Pf] ~~and~~

~~c. If packaged for undercooking in a food establishment, labeled as specified in subdivision 1 of this subsection or identified as specified in subdivision 2 of this subsection.[Pf]~~

F. Meat and poultry that are not ready-to-eat foods and are in a packaged form when offered for sale or otherwise offered for consumption shall be labeled to include safe handling instructions as specified in law, including 9 CFR 317.2(l) and 9 CFR 381.125(b).

G. Eggs that have not been specifically treated to destroy all viable Salmonellae shall be labeled to include safe handling instructions as specified in law, including 21 CFR 101.17(h).

2VAC5-585-400. ~~Shucked~~ Molluscan shellfish, packaging and identification.

A. ~~Raw shucked~~ Molluscan shellfish shall be obtained in nonreturnable packages or containers that bear a legible tag or label that identifies the:[Pf]

1. ~~Name, address, and certification number of the shucker-packer or repacker of~~ Source and is affixed by a dealer that depurates, packs, ships, or reships the molluscan shellfish, as specified in the National Shellfish Sanitation Program Guide for Control of Molluscan Shellfish;[Pf] and

2. ~~The "sell~~ "Sell by" or "best if used by" date for shucked shellfish packages with a capacity of less than 64 fluid ounces (1.89 L) or the date shucked for packages with a capacity of 64 fluid ounces (1.89 L) or more.[Pf]

B. A ~~package~~ container of raw ~~shucked~~ molluscan shellfish 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).

2VAC5-585-420. Shellstock; condition.

When received by a food establishment, shellstock shall be reasonably free of mud, dead ~~shellfish~~ shellstock, and ~~shellfish~~ shellstock with broken shells. Dead ~~shellfish or~~ shellstock and shellstock with badly broken shells shall be discarded.

2VAC5-585-430. Molluscan shellfish; original container.

A. Except as specified in subsections ~~B through~~ C, D, and E of this section, molluscan shellfish may not be removed from the container in which they are received other than immediately before sale or preparation for service.

B. Molluscan shellfish from one tagged or labeled container shall not be commingled with molluscan shellfish from another container with different certification numbers, different harvest dates, or different growing areas identified on the tag or label before being ordered by the consumer.[Pf]

C. For display purposes, shellstock or in-shell product may be removed from the container in which they are received, displayed on drained ice, or held in a display container, and a quantity specified by a consumer may be removed from the display or display container and provided to the consumer if:

1. The source of the shellstock or in-shell product on display is identified as specified under ~~2VAC5-585-410~~ 2VAC5-585-400 and recorded as specified under 2VAC5-585-440; and

2. The shellstock or in-shell product are protected from contamination.

~~C.~~ D. Shucked shellfish may be removed from the container in which they were received and held in a display container from which individual servings are dispensed upon a consumer's request if:

1. The labeling information for the shellfish on display as specified under 2VAC5-585-400 is retained and correlated to the date when, or dates during which, the shellfish are sold or served; and

2. The shellfish are protected from contamination.

~~D.~~ E. Shucked shellfish may be removed from the container in which they were received and repacked in consumer self-service containers where allowed by law if:

1. The labeling information for the shellfish is on each consumer self-service container as specified under 2VAC5-585-400 and 2VAC5-585-900 A and B 1 through 5;

2. The labeling information as specified under 2VAC5-585-400 is retained and correlated with the date when, or dates during which, the shellfish are sold or served;

3. The labeling information and dates specified under subdivision 2 of this subsection are maintained for 90 days; and

4. The shellfish are protected from contamination.

2VAC5-585-440. ~~Shellstock;~~ Molluscan shellfish, maintaining identification.

A. Except as specified under subdivision C 2 of this section, ~~shellstock~~ molluscan shellfish tags or labels shall remain attached to the container in which the shellstock are received until the container is empty.[Pf]

B. The date when the last ~~shellstock~~ molluscan shellfish from the container is sold or served shall be recorded on the tag ~~or,~~ label, or invoice.[Pf]

C. The identity of the source of ~~shellstock~~ molluscan shellfish that are sold or served shall be maintained by retaining ~~shellstock~~ product tags ~~or,~~ labels, or invoices for 90 calendar days from the date that is recorded on the tag ~~or,~~ label, or invoice as specified in subsection B of this section by:[Pf]

1. Using an approved recordkeeping system that keeps the tags ~~or,~~ labels, or invoices in chronological order correlated to the date that is recorded on the tag ~~or,~~ label, or invoice as specified under subsection B of this section;[Pf] and

2. If shellstock, shucked shellfish, or in-shell product 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;[Pf] and

b. Ensuring that shellstock ~~or,~~ shucked shellfish, or in-shell product from one tagged or labeled container are not commingled with shellstock ~~or,~~ shucked shellfish, or in-shell product 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.[Pf]

2VAC5-585-445. Food donation.

Food stored, prepared, packaged, displayed, and labeled in accordance with the law and this chapter may be offered for donation.

2VAC5-585-450. Preventing contamination from hands.

A. Food employees shall wash their hands as specified under 2VAC5-585-140.

B. Except when washing fruits and vegetables as specified under 2VAC5-585-510 or as specified in subsections D and E of this section, food employees may not contact exposed, ready-to-eat food with their bare hands and shall use suitable utensils such as deli tissue, spatulas, tongs, single-use gloves, or dispensing equipment.[P]

C. Food employees shall minimize bare hand and arm contact with exposed food that is not in a ready-to-eat form. [Pf]

D. Subsection B of this section does not apply to a food employee who contacts exposed, ready-to-eat food with bare hands at the time the ready-to-eat food is being added as an ingredient to food that:

1. Contains a raw animal food and is to be cooked in the food establishment to heat all parts of the food to the minimum temperatures specified in 2VAC5-585-700 A and B or 2VAC5-585-710; or

2. Does not contain a raw animal food but is to be cooked in the food establishment to heat all parts of the food to a temperature of at least 145°F (63°C).

E. Food employees not serving a highly susceptible population may contact exposed, ready-to-eat food with their bare hands if:

1. The ~~operator~~ permit holder obtains prior approval from the department;

2. Written procedures are maintained in the food establishment and made available to the department upon request that include:

a. For each bare hand contact procedure, a listing of the specific ready-to-eat foods that are touched by bare hands; and

b. Diagrams and other information showing that handwashing facilities, installed, located, equipped, and maintained as specified under 2VAC5-585-2230, 2VAC5-585-2280, 2VAC5-585-2310, 2VAC5-585-3020, 2VAC5-585-3030, and 2VAC5-585-3045, are in an easily accessible location and in close proximity to the work station where the bare hand contact procedure is conducted;

3. A written employee health policy that details how the food establishment complies with 2VAC5-585-80, 2VAC5-585-90, and 2VAC5-585-100 including:

a. Documentation that the food employees and conditional employees acknowledge that they are informed to report information about their health and activities as they relate to gastrointestinal symptoms and diseases that are transmittable through food as specified under 2VAC5-585-80 A;

b. Documentation that food employees and conditional employees acknowledge their responsibilities as specified under 2VAC5-585-80 E and F; and

c. Documentation that the person in charge acknowledges the responsibilities as specified under 2VAC5-585-80 B, C, and D, 2VAC5-585-90, and 2VAC5-585-100;

4. Documentation that the food employees acknowledge that they have received training in:

a. The risks of contacting the specific ready-to-eat foods with their bare hands,

b. Proper handwashing as specified under 2VAC5-585-140,

c. When to wash their hands as specified under 2VAC5-585-160,

d. Where to wash their hands as specified under 2VAC5-585-170,

e. Proper fingernail maintenance as specified under 2VAC5-585-190,

f. Prohibition of jewelry as specified under 2VAC5-585-200, and

g. Good hygienic practices as specified under 2VAC5-585-220 and 2VAC5-585-230;

5. Documentation that hands are washed before food preparation and as necessary to prevent cross-contamination by food employees as specified under 2VAC5-585-130, 2VAC5-585-140, 2VAC5-585-160, and 2VAC5-585-170 during all hours of operation when the specific ready-to-eat foods are prepared;

6. Documentation that food employees contacting ready-to-eat food with bare hands use two or more of the following control measures to provide additional safeguards to hazards associated with bare hand contact:

a. Double handwashing,

b. Nail brushes,

c. A hand antiseptic after handwashing as specified under 2VAC5-585-180,

d. Incentive programs such as paid sick leave that assist or encourage food employees not to work when they are ill, or

e. Other control measures approved by the department; and

7. Documentation that corrective action is taken when subdivisions 1 through 6 of this subsection are not followed.

2VAC5-585-510. Washing fruits and vegetables.

A. Except as specified in subsection B of this section and except for whole, raw fruits and vegetables that are intended for washing by the consumer before consumption, raw fruits and vegetables shall be thoroughly washed in water to remove soil and other contaminants before being cut, combined with other ingredients, cooked, served, or offered for human consumption in ready-to-eat form.

B. Fruits and vegetables may be washed by using chemicals as specified under 2VAC5-585-3390, and a test kit or other device that accurately measures the active ingredient concentration of the fruit and vegetable wash solution may be provided by the manufacturer of the wash solution.

C. Devices used for onsite generation of chemicals meeting the requirements specified in 21 CFR 173.315 for the washing of raw, whole fruits and vegetables shall be used in accordance with the manufacturer's instructions.[Pf]

2VAC5-585-620. Food storage; prohibited areas.

Food may not be stored:

1. In locker rooms;

2. In toilet rooms;[Pf]

3. In dressing rooms;

4. In garbage rooms;

5. In mechanical rooms;

6. Under sewer lines that are not shielded to intercept potential drips;

7. Under leaking water lines, including leaking automatic fire sprinkler heads, or under lines on which water has condensed;

8. Under open stairwells; or

9. Under other sources of contamination.

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:[P]

a. Raw eggs that are broken and prepared in response to a consumer's order and for immediate service;[P] 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;[P]

2. 155°F (68°C) for 17 seconds or the temperature specified in the following chart that corresponds to the holding time for ratites~~, mechanically tenderized, and injected meats~~ and nonintact meats; the following if they are comminuted: fish~~,~~ ~~meat,~~ and 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:[P]

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 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.[P]

B. Whole meat roasts including beef, corned beef, lamb, pork, and cured pork roasts such as ham shall be cooked:

1. 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; [P] and

Temperature °F (°C)	Time[1] in Minutes	Temperature °F (°C)	Time[1] in Seconds
130 (54.4)	112	147 (63.9)	134
131 (55.0)	89	149 (65.0)	85
133 (56.1)	56	151 (66.1)	54
135 (57.2)	36	153 (67.2)	34
136 (57.8)	28	155 (68.3)	22
138 (58.9)	18	157 (69.4)	14
140 (60.0)	12	158 (70.0)	0
142 (61.1)	8		
144 (62.2)	5		
145 (62.8)	4		
[1]Holding time may include postoven heat rise.			

2. 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;[Pf]

Oven Type	Oven Temperature Based on Roast Weight	
	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[1]	250°F (121°C) or less	250°F (121°C) or less
[1]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		

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, intact beef~~ prepared so that it remains intact; 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;[Pf] 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~~ permit holder 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.

2VAC5-585-725. Noncontinuous cooking of raw animal foods.

Raw animal foods that are cooked using a noncontinuous cooking process shall be:

1. Subject to an initial heating process that is no longer than 60 minutes in duration;[P]

2. Immediately after initial heating, cooled according to the time and temperature parameters specified for cooked time/temperature control for safety food under 2VAC5-585-800 A;[P]

3. After cooling, held frozen or cold as specified for time/temperature control for safety food under 2VAC5-585-820 A 2;[P]

4. Prior to sale or service, cooked using a process that heats all parts of the food to a temperature and for a time as designated in 2VAC5-585-700 A through C;[P]

5. Cooled according to the time and temperature parameters specified for cooked time/temperature control for safety food under 2VAC5-585-800 A if not either hot held as specified under 2VAC5-585-820 A 1, served immediately, or held using time as a public health control as specified under 2VAC5-585-850 after complete cooking;[P] and

6. Prepared and stored according to written procedures that:

a. Have obtained prior approval from the department;[Pf]

b. Are maintained in the food establishment and are available to the department upon request;[Pf]

c. Describe how the requirements specified under subdivisions 1 through 5 of this section are to be monitored and documented by the ~~operator~~ permit holder and the corrective actions to be taken if the requirements are not met;[Pf]

d. Describe how the foods, after initial heating but prior to complete cooking, are to be marked or otherwise identified as foods that must be cooked as specified under subdivision 4 of this section prior to being offered for sale or service;[Pf] and

e. Describe how the foods, after initial heating but prior to cooking as specified in subdivision 4 of this section, are to be separated from ready-to-eat foods as specified under 2VAC5-585-470 A.[Pf]

2VAC5-585-726. Manufacturer cooking instructions.

A. Commercially packaged food that bears a manufacturer's cooking instructions shall be cooked according to those instructions before it is used in ready-to-eat foods or offered in unpackaged form for human consumption, unless the manufacturer's instructions specify that the food may be consumed without cooking.[P]

B. Food for which the manufacturer has provided information that the food has not been processed to control pathogens, when used in ready-to-eat foods or offered for human consumption, shall be cooked according to a time and temperature appropriate for the food.[P]

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;[Pf]

2. Completely submerged under running water:

a. At a water temperature of 70°F (21°C) or below;[Pf]

b. With sufficient water velocity to agitate and float off loose particles in an overflow;[Pf] 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);[Pf] 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;[Pf] or

(2) The time it takes under refrigeration to lower the food temperature to 41°F (5°C);[Pf]

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, or 2VAC5-585-726;[Pf] or

b. Thawed in a microwave oven and immediately transferred to conventional cooking equipment, with no interruption in the process;[Pf] 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.

2VAC5-585-830. Ready-to-eat, time/temperature control for safety food; date marking.

A. Except when packaging food using a reduced oxygen packaging method as specified under 2VAC5-585-870 and except as specified in subsections E and F of this section, refrigerated, ready-to-eat, time/temperature control for safety food prepared and held in a food establishment for more than 24 hours shall be clearly marked to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded when held at a temperature of 41°F (5°C) or less for

a maximum of seven days. The day of preparation shall be counted as day one.[Pf]

B. Except as specified in subsections E, F, and G of this section, refrigerated, ready-to-eat, time/temperature control for safety food prepared and packaged by a food processing plant shall be clearly marked, at the time the original container is opened in a food establishment and if the food is held for more than 24 hours, to indicate the date or day by which the food shall be consumed on the premises, sold, or discarded, based on the temperature and time combinations specified in subsection A of this section and:[Pf]

1. The day the original container is opened in the food establishment shall be counted as day one;[Pf] and

2. The day or date marked by the food establishment may not exceed a manufacturer's use-by date if the manufacturer determined the use-by date based on food safety.[Pf]

C. A refrigerated, ready-to-eat, time/temperature control for safety food ingredient or a portion of a refrigerated, ready-to-eat, time/temperature control for safety food that is subsequently combined with additional ingredients or portions of food shall retain the date marking of the earliest-prepared or first-prepared ingredient.[Pf]

D. A date marking system that meets the criteria stated in subsections A and B of this section may include:

1. Using a method approved by the department for refrigerated, ready-to-eat, time/temperature control for safety food that is frequently rewrapped, such as lunchmeat or a roast, or for which date marking is impractical, such as soft-serve mix or milk in a dispensing machine;

2. Marking the date or day of preparation, with a procedure to discard the food on or before the last date or day by which the food must be consumed on the premises, sold, or discarded as specified in subsection A of this section;

3. Marking the date or day the original container is opened in a food establishment, with a procedure to discard the food on or before the last date or day by which the food must be consumed on the premises, sold, or discarded as specified under subsection B of this section; or

4. Using calendar dates, days of the week, color-coded marks, or other effective marking methods, provided that the marking system is disclosed to the department upon request.

E. Subsections A and B of this section do not apply to individual meal portions served or repackaged for sale from a bulk container upon a consumer's request.

F. Subsections A and B of this section do not apply to shellstock.

G. Subsection B of this section does not apply to the following foods prepared and packaged by a food processing plant inspected by a regulatory authority:

1. Deli salads, such as ham salad, seafood salad, chicken salad, egg salad, pasta salad, potato salad, and macaroni salad, manufactured in accordance with 21 CFR Part ~~110~~ 117;

2. Hard cheeses containing not more than 39% moisture as defined in 21 CFR Part 133, such as cheddar, gruyere, parmesan and reggiano, and romano;

3. Semi-soft cheese containing more than 39% moisture, but not more than 50% moisture, as defined in 21 CFR Part 133, such as blue, edam, gorgonzola, gouda, and Monterey Jack;

4. Cultured dairy products as defined in 21 CFR Part 131, such as yogurt, sour cream, and buttermilk;

5. Preserved fish products, such as pickled herring and dried or salted cod, and other acidified fish products as defined in 21 CFR Part 114;

6. Shelf stable, dry fermented sausages, such as pepperoni and Genoa; and

7. Shelf stable salt-cured products such as prosciutto and Parma (ham).

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 procedures shall be prepared in advance, maintained in the food establishment, and made available to the department upon request that specify:[Pf]

1. Methods of compliance with subsection B or C of this section;[Pf] 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.[Pf]

B. If time without temperature control is used as the public health control up to a maximum of four hours:

1. 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, 135°F (57°C) or greater when removed from hot-holding temperature control;[P]

2. The food 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 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 ~~or (ii) the time that the food becomes a time/temperature control for safety food~~;[Pf]

4. The food 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;[P] and

5. The food in unmarked containers or packages or marked to exceed a four-hour limit shall be discarded.[P]

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;[P]

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;[Pf]

3. The food shall be marked or otherwise identified to indicate:[Pf]

a. The time when the food is removed from 41°F (5°C) or less cold holding temperature control;[Pf] 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;[Pf]

4. The food shall be:

a. Discarded if the temperature of the foods exceeds 70°F (21°C);[P] 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;[P] and

5. The food in unmarked containers or packages, or marked with a time that exceeds the six-hour limit shall be discarded.[P]

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.[P]

B. Except as specified in subsection 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 2VAC5-585-3630 and that:[Pf]

1. Identifies the food to be packaged;[Pf]

2. Except as specified in subsections C and 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:[Pf]

a. Has an A_w of 0.91 or less,[Pf]

b. Has a pH of 4.6 or less,[Pf]

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,[Pf]

d. Is a food with a high level of competing organisms such as raw meat, raw poultry, or raw vegetables;[Pf] 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;[P]

3. Describes how the package shall be prominently and conspicuously labeled on the principal display panel in bold type on a contrasting background, with instruction to:[Pf]

a. Maintain the food at 41°F (5°C) or below;[Pf] 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;[Pf]

~~2.~~ 4. 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;[P]

~~3.~~ 5. Includes operational procedures that:

a. Prohibit contacting ready-to-eat food with bare hands as specified under 2VAC5-585-450 B;[Pf]

b. Identify a designated work area and the method by which:[Pf]

(1) Physical barriers or methods of separation of raw foods and ready-to-eat foods minimize cross contamination~~;~~[Pf] and

(2) Access to the processing equipment is limited to responsible trained personnel familiar with the potential hazards of the operation;[Pf] and

c. Delineate cleaning and sanitization procedures for food-contact surfaces;[Pf] ~~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:[Pf]~~

~~(1) Maintain the food at 41°F (5°C) or below,[Pf] 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;[Pf]~~

~~4.~~ 6. Describes the training program that ensures that the individual responsible for the reduced oxygen packaging operation understands the:[Pf]

a. Concepts required for safe operation;[Pf]

b. Equipment and facilities;[Pf] and

c. Procedures specified under subdivision 3 of this subsection and 2VAC5-585-3630;[Pf] and

~~5.~~ 7. 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.[P]

D. Except as specified in subsections C and ~~E~~ F 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 2VAC5-585-3630;[Pf]

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;[Pf]

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;[P]

c. Protected from contamination before and after cooking as specified in 2VAC5-585-450 through 2VAC5-585-765;[P]

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);[P]

e. Cooled to 41°F (5°C) in the sealed package or bag as specified under 2VAC5-585-800 and [P]

(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;[P]

(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;[P]

(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;[P] or

(4) Held frozen with no shelf-life restriction while frozen until consumed or used;[P]

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;[Pf]

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;[Pf] and

h. Labeled with the product name and the date packaged;[Pf] 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;[Pf] and

b. Hold such records for at least six months;[Pf] and

4. Implement written operational procedures as specified under subdivision B 3 of this section and a training program as specified under subdivision B 4 of this section.[Pf]

E. Except as specified in 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 (i) are commercially manufactured in a food processing plant; (ii) contain no ingredients added in the food establishment; and (iii) meet the Standards of Identity as specified in 21 CFR 133.150, 21 CFR 133.169, or 21 CFR 133.187;[P]

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;[Pf]

3. Label the package on the principal display panel with a "use by" date that does not exceed (i) 30 days from its packaging or (ii) the original manufacturer's "sell by" or "use by" date, whichever occurs first;[Pf] 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.[Pf]

F. 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.

2VAC5-585-900. Food labels.

A. Food packaged in a food establishment shall be labeled as specified in law, including 21 CFR Part 101 and 9 CFR Part 317.

B. Label information shall include:

1. The common name of the food, or absent a common name, an adequately descriptive identity statement;

2. If made from two or more ingredients, a list of ingredients and subingredients in descending order of predominance by weight, including a declaration of artificial colors, artificial flavors, and chemical preservatives, if contained in the food;

3. An accurate declaration of the net quantity of contents;

4. The name and place of business of the manufacturer, packer, or distributor;

5. The name of the food source for each major food allergen contained in the food unless the food source is already part of the common or usual name of the respective ingredient;[Pf]

6. Except as exempted in the Federal Food, Drug, and Cosmetic Act 21 USC § 403(g)(3) through (5), nutrition labeling as specified in 21 CFR Part 101 and 9 CFR Part 317, Subpart B; and

7. For any salmonid fish containing canthaxanthin or astaxanthin as a color additive, the labeling of the bulk fish container, including a list of ingredients, displayed on the retail container or by other written means, such as a counter card, that discloses the use of canthaxanthin or astaxanthin.

C. Bulk food that is available for consumer self-dispensing shall be prominently labeled with the following information in plain view of the consumer:

1. The manufacturer's or processor's label that was provided with the food; or

2. A card, sign, or other method of notification that includes the information specified under subdivisions B 1, 2, 5, and 6 of this section.

D. Bulk, unpackaged foods such as bakery products and unpackaged foods that are portioned to consumer specification need not be labeled if:

1. A health, nutrient content, or other claim is not made;

2. There are no state or local laws requiring labeling; and

3. The food is manufactured or prepared on the premises of the food establishment or at another food establishment or a food processing plant that is owned by the same person and is regulated by the food regulatory agency that has jurisdiction.

2VAC5-585-910. Other forms of information.

A. If required by law, consumer warnings shall be provided.

B. Food establishment or manufacturers' dating information on foods may not be concealed or altered.

C. The permit holder shall notify consumers by written notification of the presence of major allergens as an ingredient in unpackaged food items that are served or sold to the consumer.

2VAC5-585-930. Consumer advisory; consumption of animal foods that are raw, undercooked, or not otherwise processed to eliminate pathogens.

A. Except as specified in 2VAC5-585-700 C and 2VAC5-585-700 D 4 and under subdivision 3 of 2VAC5-585-950, if an animal food such as beef, eggs, fish, lamb, milk, pork, poultry, or shellfish is served or sold raw, undercooked, or without otherwise being processed to eliminate pathogens, either in ready-to-eat form or as an ingredient in another ready-to-eat food, the ~~operator~~ permit holder shall inform consumers of the significantly increased risk of consuming such foods by way of a disclosure and reminder, as specified in subsections B and C of this section, using brochures, deli case or menu advisories, label statements, table tents, placards, or other effective written means.[Pf]

B. Disclosure shall include:

1. A description of the animal-derived foods, such as "oysters on the half shell (raw oysters)," "raw-egg Caesar salad," and "hamburgers (can be cooked to order)";[Pf] or

2. Identification of the animal-derived foods by asterisking them to a footnote that states that the items are served raw or undercooked, or contain (or may contain) raw or undercooked ingredients.[Pf]

C. Reminder shall include asterisking the animal-derived foods requiring disclosure to a footnote that states:

1. Regarding the safety of these items, written information is available upon request;[Pf]

2. Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness;[Pf] or

3. Consuming raw or undercooked meats, poultry, seafood, shellfish, or eggs may increase your risk of foodborne illness, especially if you have certain medical conditions.[Pf]

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;[P] 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 2VAC5-585-3630 and as specified in 21 CFR 120.24.[P]

2. Pasteurized eggs or egg products shall be substituted for raw eggs in the preparation of:[P]

a. Foods such as Caesar salad, hollandaise or béarnaise sauce, mayonnaise, meringue, eggnog, ice cream, and egg-fortified beverages;[P] 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.[P]

3. The following foods may not be served or offered for sale in a ready-to-eat form:[P]

a. Raw animal foods such as raw fish, raw-marinated fish, raw molluscan shellfish, and steak tartare;[P]

b. A partially cooked animal food such as lightly cooked fish, rare meat, soft-cooked eggs that are made from raw eggs, and meringue;[P] ~~and~~

c. Raw seed sprouts~~.~~;[P] and

d. Packaged foods subject to 2VAC5-585-726 that are not cooked in accordance with that section.

4. Food employees may not contact ready-to-eat food as specified in 2VAC5-585-450 B and E.[P]

5. Time only, as the public health control as specified under 2VAC5-585-850 D, may not be used for raw eggs.[P]

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) Contains the information specified under subdivision 5 of 2VAC5-585-3630 including procedures that:

(a) Control cross contamination of ready-to-eat food with raw eggs; and

(b) Delineate cleaning and sanitization procedures for food-contact surfaces; and

(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. 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.

2VAC5-585-1300. 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.[P]

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:[Pf]

1. Is submitted by the ~~operator~~ permit holder and approved as specified under 2VAC5-585-3541;[Pf] and

2. Ensures that:

a. Water used with fish other than molluscan shellfish does not flow into the molluscan tank;[Pf]

b. The safety and quality of the shellfish as they were received are not compromised by the use of the tank;[Pf] and

c. The identity of the source of the shellstock is retained as specified under 2VAC5-585-440.[Pf]

2VAC5-585-1460. Manual warewashing, sink compartment requirements.

A. Except as specified in subsection C of this section, a sink with at least three compartments shall be provided for manually washing, rinsing, and sanitizing equipment and utensils.[Pf]

B. Sink compartments shall be large enough to accommodate immersion of the largest equipment and utensils. If equipment or utensils are too large for the warewashing sink, a warewashing machine or alternative equipment as specified in subsection C of this section shall be used.[Pf]

C. Alternative manual warewashing equipment may be used when there are special cleaning needs or constraints and its use is approved. Alternative manual warewashing equipment may include:

1. High-pressure detergent sprayers;

2. Low-pressure or line-pressure spray detergent foamers;

3. Other task-specific cleaning equipment;

4. Brushes or other implements;

5. Two-compartment sinks as specified under subsections D and E of this section; or

6. Receptacles that substitute for the compartments of a multicompartment sink.

D. Before a two-compartment sink is used:

1. The ~~operator~~ permit holder shall have its use approved; and

2. The ~~operator~~ permit holder shall limit the number of kitchenware items cleaned and sanitized in the two-compartment sink, shall limit warewashing to batch operations for cleaning kitchenware such as between cutting one type of raw meat and another or cleanup at the end of a shift, and shall:

a. Make up the cleaning and sanitizing solutions immediately before use and drain them immediately after use; and

b. Use a detergent-sanitizer to sanitize and apply the detergent-sanitizer in accordance with the manufacturer's label instructions and as specified under 2VAC5-585-1710; or

c. Use a hot water sanitization immersion step as specified under subdivision 3 of 2VAC5-585-1860.

E. A two-compartment sink may not be used for warewashing operations where cleaning and sanitizing solutions are used for a continuous or intermittent flow of kitchenware or tableware in an ongoing warewashing process.

2VAC5-585-1540. Equipment, clothes washers and dryers, and storage cabinets, contamination prevention.

A. Except as specified in subsection B of this section, equipment, a cabinet used for the storage of food, or a cabinet used to store cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles may not be located:

1. In locker rooms;

2. In toilet rooms;[Pf]

3. In garbage rooms;

4. In mechanical rooms;

5. Under sewer lines that are not shielded to intercept potential drips;

6. Under leaking water lines including leaking automatic fire sprinkler heads or under lines on which water has condensed;

7. Under open stairwells; or

8. Under other sources of contamination.

B. A storage cabinet used for linens or single-service or single-use articles may be stored in a locker room.

C. If a mechanical clothes washer or dryer is provided, it shall be located (i) so that the washer or dryer is protected from contamination and (ii) only where there is no exposed food; clean equipment, utensils, and linens; or unwrapped single-service and single-use articles.

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,[P] 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;[P]

Minimum Concentration	Minimum Temperature	
mg/L (ppm)	pH 10 or less °F (°C)	pH 8.0 or less °F (°C)
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);[P]

b. pH of 5.0 or less or a pH no higher than the level for which the manufacturer specifies the solution is effective;[P] and

c. Concentration between 12.5 mg/L (ppm) and 25 mg/L (ppm);[P]

3. A quaternary ammonium compound solution shall:

a. Have a minimum temperature of 75°F (24°C);[P]

b. Have a concentration as specified under 2VAC5-585-3380 and as indicated by the manufacturer's use directions included in the labeling;[P] 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;[P]

4. If another solution of a chemical specified under subdivisions 1 ~~through~~, 2, and 3 of this section is used, the ~~operator~~ permit holder shall demonstrate to the department that the solution achieves sanitization and the use of the solution shall be approved;[P] 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;[P] 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:

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);[P]

b. Complies with 40 CFR 152.500 and 40 CFR 156.10;[P]

c. Displays the EPA device manufacturing facility registration number on the device;[Pf] and

d. Is operated and maintained in accordance with manufacturer's instructions.[Pf]

2VAC5-585-2010. Prohibitions.

A. Except as specified in subsection B of this section, cleaned and sanitized equipment, utensils, laundered linens, and single-service and single-use articles may not be stored:

1. In locker rooms;

2. In toilet rooms;[Pf]

3. In garbage rooms;

4. In mechanical rooms;

5. Under sewer lines that are not shielded to intercept potential drips;

6. Under leaking water lines including leaking automatic fire sprinkler heads or under lines on which water has condensed;

7. Under open stairwells; or

8. Under other sources of contamination.

B. Laundered linens and single-service and single-use articles that are packaged or in a facility such as a cabinet may be stored in a locker room.

2VAC5-585-2100. Sampling.

A. Water from a private well shall be sampled and tested at least annually for nitrate and total coliform.[Pf]

B. If nitrate, which is reported as "N" on the test results, exceeds 10 mg/L (ppm), the ~~operator~~ permit holder shall notify the department within 24 hours from when the ~~operator~~ permit holder is notified of the nitrate positive test result.[Pf]

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~~ permit holder shall notify the department within two calendar days from when the ~~operator~~ permit holder is notified of the coliform-positive test result. [Pf]

D. If E. coli is present, the ~~operator~~ permit holder shall notify the department within 24 hours from when the ~~operator~~ permit holder is notified of the E. coli positive test result.[Pf]

2VAC5-585-2190. Handwashing sink, ~~water temperature, and flow~~ installation.

A. A handwashing sink shall be equipped to provide water at a temperature of at least ~~100°F (38°C)~~ 85°F (29.4°C) through a mixing valve or combination faucet.[Pf]

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. An automatic handwashing facility shall be installed in accordance with manufacturer's instructions.

2VAC5-585-3140. Employee accommodations, designated areas.

A. Areas designated for employees to eat, drink, and use tobacco products shall be located so that food, equipment, linens, and single-service and single-use articles are protected from contamination.

B. Lockers or other suitable facilities shall be located in a designated room or area where contamination of food, equipment, utensils, linens, and single-service and single-use articles cannot occur.

2VAC5-585-3150. Distressed merchandise, segregation and location.

Products that are held by the ~~operator~~ permit holder for credit, redemption, or return to the distributor, such as damaged, spoiled, or recalled products, shall be segregated and held in designated areas that are separated from food, equipment, utensils, linens, and single-service and single-use articles.[Pf]

2VAC5-585-3310. Prohibiting animals.

A. Except as specified in subsections B, C, and D of this section, live animals may not be allowed on the premises of a food establishment.[Pf]

B. Live animals may be allowed in the following situations if the contamination of food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles cannot result:

1. Edible fish or decorative fish in aquariums, shellfish or crustacea on ice or under refrigeration, and shellfish and crustacea in display tank systems;

2. Patrol dogs accompanying police or security officers in offices and dining, sales, and storage areas, and sentry dogs running loose in outside fenced areas;

3. In areas that are not used for food preparation and that are usually open for customers, such as dining and sales areas, service animals that are controlled by the disabled employee or person, if a health or safety hazard will not result from the presence or activities of the service animal;

4. Pets in the common dining areas of institutional care facilities such as nursing homes, assisted living facilities, group homes, or residential care facilities at times other than during meals if:

a. Effective partitioning and self-closing doors separate the common dining areas from food storage or food preparation areas;

b. Condiments, equipment, and utensils are stored in enclosed cabinets or removed from the common dining areas when pets are present; and

c. Dining areas including tables, countertops, and similar surfaces are effectively cleaned before the next meal service;

5. In areas that are not used for food preparation, storage, sales, display, or dining, in which there are caged animals or animals that are similarly confined, such as in a variety store that sells pets or a tourist park that displays animals; and

6. Dogs in outdoor dining areas if:

a. The outdoor dining area is not fully enclosed with floor to ceiling walls and is not considered a part of the interior physical facility.

b. The outdoor dining area is equipped with an entrance that is separate from the main entrance to the food establishment, and the separate entrance serves as the sole means of entry for patrons accompanied by dogs.

c. A sign stating that dogs are allowed in the outdoor dining area is posted at each entrance to the outdoor dining area in such a manner as to be clearly observable by the public.

d. A sign within the outdoor dining area stating the requirements as specified in subdivisions 6 e, f, and g of this subsection is provided in such a manner as to be clearly observable by the public.

e. Food and water provided to dogs is served using equipment that is not used for the service of food to a person or is served in single-use articles.

f. Dogs are not allowed on chairs, seats, benches, or tables.

g. Dogs are kept on a leash or within a pet carrier and under the control of an adult at all times.

h. The establishment provides effective means for cleaning up dog vomitus and fecal matter.

C. A dog may be allowed within a designated area inside or on the premises of, except in any area used for the manufacture of food products, a distillery, winery, farm winery, brewery, or limited brewery licensed pursuant to ~~§ 4.1-206~~ § 4.1-206.1 of the Code of Virginia~~, a winery or farm winery licensed pursuant to § 4.1-207 of the Code of Virginia, or a brewery or farm brewery licensed pursuant to § 4.1-208 of the Code of Virginia~~.

D. Live or dead fish bait may be stored if contamination of food; clean equipment, utensils, and linens; and unwrapped single-service and single-use articles cannot result.

2VAC5-585-3360. Conditions of use.

A. Poisonous or toxic materials shall be:

1. Used according to:

a. Law and this chapter;

b. Manufacturer's use directions included in labeling, and, for a pesticide, manufacturer's label instructions that state that use is allowed in a food establishment;[P]

c. The conditions of certification, if certification is required, for use of the pest control materials;[P] and

d. Additional conditions that may be established by the department; and

2. Applied so that:

a. A hazard to employees or other persons is not constituted;[P] and

b. Contamination including toxic residues due to drip, drain, fog, splash, or spray on food, equipment, utensils, linens, and single-service and single-use articles is prevented~~, and for a restricted use pesticide, this is achieved~~. Contamination shall be prevented by:[P]

(1) Removing the items;[P]

(2) Covering the items with impermeable covers~~;~~[P] or ~~(3) Taking~~ taking other appropriate preventive actions;[P] and

~~(4)~~ (3) Cleaning and sanitizing equipment and utensils after the application.[P]

B. A restricted use pesticide shall be applied only by an applicator certified as defined in 7 USC § 136(e); §§ 3.2-3929, 3.2-3930, and 3.2-3931 of the Code of Virginia (Virginia Pesticide Control Act); or a person under the direct supervision of a certified applicator.[Pf]

2VAC5-585-3370. Poisonous or toxic material containers.

A container previously used to store poisonous or toxic materials may not be used to store, transport, or dispense food, equipment, utensils, linens, or single-service or single-use articles.[P]

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 or donated.

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~~ permit holder that the facilities or equipment will be replaced as specified in subdivision ~~6~~ 7 of 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 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~~ permit applicant, permit holder, or person in charge and a copy shall be maintained in the department's file for the food establishment.

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~~ permit holder shall:

1. Maintain the approved variance at the food establishment;[Pf]

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;[P] and

3. Maintain and provide to the department, upon request, records specified under subdivisions 5 and 6 c of 2VAC5-585-3630 that demonstrate that the following are routinely employed:

a. Procedures for monitoring critical control points;[Pf]

b. Monitoring of the critical control points;[Pf]

c. Verification of the effectiveness of the operation or process;[Pf] and

d. Necessary corrective actions if there is failure at a critical control point.[Pf]

2VAC5-585-3600. Facility and operating plans - when plans are required.

~~An operator~~ A permit applicant or permit holder shall submit to the department properly prepared plans and specifications for review and approval before:

1. The construction of a food establishment;[Pf]

2. The conversion of an existing structure for use as a food establishment;[Pf] or

3. The remodeling of a food establishment or a change of type of food establishment or food operation if the department determines that plans and specifications are necessary to ensure compliance with this chapter.[Pf]

2VAC5-585-3620. When a HACCP plan is required.

A. Before engaging in an activity that requires a HACCP plan, ~~an operator~~ a permit applicant or permit holder shall submit to the department for approval a properly prepared HACCP plan as specified under 2VAC5-585-3630 and the relevant provisions of this chapter if:

1. Submission of a HACCP plan is required according to law;

2. A variance is required as specified under 2VAC5-585-700 D 4, 2VAC5-585-860, or 2VAC5-585-1300 B; or

3. The department determines that a food preparation or processing method requires a variance based on a plan submittal specified under 2VAC5-585-3610, an inspectional finding, or a variance request.

B. Before engaging in reduced oxygen packaging without a variance as specified under 2VAC5-585-870, ~~an operator~~ a permit applicant or permit holder shall submit a properly prepared HACCP plan to the department.

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~~ permit applicant or permit holder shall submit to the department a properly prepared HACCP plan that includes:

1. General information such as the name of the ~~operator~~ permit applicant or permit holder, 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;[Pf]

3. A flow diagram or chart for each specific food or category type that identifies:

a. Each step in the process;[Pf] and

b. The steps that are critical control points;[Pf]

4. The ingredients, recipes, or formulations; 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;[Pf]

5. A critical control points summary for each specific food category type that clearly identifies:

a. Each critical control point;[Pf]

b. The significant hazards for each critical control point;[Pf]

c. The critical limits for each critical control point;[Pf]

d. The method and frequency for monitoring and controlling each critical control point by the designated food employee or the person in charge;[Pf]

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;[Pf]

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;[Pf] and

g. Records to be maintained by the person in charge to demonstrate that the HACCP plan is properly operated and managed;[Pf]

6. Supporting documents such as:

a. Food employee and supervisory training plan and operating procedures that address the food safety issues of concern;[Pf]

b. Copies of blank record forms that are necessary to implement the HACCP plan;[Pf]

c. Additional scientific data or other information, as required by the department, supporting the determination that food safety is not compromised by the proposal;[Pf] and

7. Any other information required by the department.

2VAC5-585-3670. Submission 30 calendar days before proposed opening.

A person seeking to operate a food establishment shall submit an application for a permit at least 30 calendar days before the date planned for opening the food establishment.

2VAC5-585-3680. Form of submission.

A person seeking to operate a food establishment shall submit to the department a written application for a permit on a form provided by the department.

2VAC5-585-3690. Qualifications and responsibilities of applicants.

To qualify for a permit, an applicant shall:

1. Be an owner of the food establishment or an officer of the establishment's legal ownership;

2. Comply with the requirements of this chapter; and

3. As specified under 2VAC5-585-3820, allow the department access to the food establishment and provide the department with required information and records.

2VAC5-585-3700. Contents of the application.

The application for a permit shall include:

1. The name, mailing address, telephone number, and signature of the person applying for the permit;

2. The name, mailing address, and location of the food establishment; and

3. Other information required by the department.

2VAC5-585-3710. New, converted, or remodeled establishments.

The department shall issue a permit to an applicant that is required to submit plans as specified in 2VAC5-585-3600 after:

1. The applicant submits a properly completed application;

2. The department reviews and approves the required plans, specifications, and information; and

3. A preoperational inspection required by 2VAC5-585-3650 shows that the establishment is built or remodeled in accordance with the approved plans and specifications and that the establishment is in compliance with this chapter.

2VAC5-585-3720. Existing establishments, change of ownership, or termination.

A. The department may issue a permit to a new owner of an existing food establishment after a properly completed application is submitted, reviewed, and approved and an inspection shows that the establishment is in compliance with this chapter.

B. An existing food establishment shall notify the department in writing of a transfer of legal ownership or termination of business operations. Such notice shall be submitted in writing to the department at least 30 days prior to the transfer of legal ownership or termination of business operation.

2VAC5-585-3740. Responsibilities of the department.

A. At the time of the initial inspection, the department shall provide to the ~~operator~~ permit holder a copy of this chapter so that the ~~operator~~ permit holder 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~~ permit holder fails to comply with this chapter or an order, warning, or directive of the department.

2VAC5-585-3750. Responsibilities of the ~~operator~~ permit holder.

The ~~operator~~ permit holder shall:

1. Post the permit in a location in the food establishment that is conspicuous to consumers;

2. 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.~~ 3. 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.~~ 4. Immediately contact the department to report an illness of a food employee or conditional employee as specified under 2VAC5-585-80 B;

~~4.~~ 5. Immediately discontinue operations and notify the department if an imminent health hazard may exist as specified under 2VAC5-585-3910;

~~5.~~ 6. Allow authorized representatives of the commissioner access to the food establishment as specified under 2VAC5-585-3820;

~~6.~~ 7. 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.~~ 8. 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~~ permit holder's food establishment or in response to community emergencies;

~~8.~~ 9. Accept notices issued and served by the department according to law;

~~9.~~ 10. 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.~~ 11. 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.

2VAC5-585-3760. Permits not transferable.

A permit shall not be transferred from:

1. One person to another person;

2. One food establishment to another food establishment; or

3. One type of food operation to another type of food operation if the food operation changes from the type of operation specified in the application as specified under 2VAC5-585-3700 and the change in operation is not approved.

2VAC5-585-3860. Documenting information and observations.

The authorized representative of the commissioner shall document:

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~~ permit holder, 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 5 g of 2VAC5-585-3630; and

f. Nonconformance with critical limits of a HACCP plan.

2VAC5-585-3890. Refusal to sign acknowledgment.

The authorized representative of the commissioner shall:

1. Inform a person who declines to sign an acknowledgment of receipt of inspectional findings as specified in 2VAC5-585-3880 that:

a. An acknowledgment of receipt is not an agreement with findings;

b. Refusal to sign an acknowledgment of receipt will not affect the ~~operator's~~ permit holder's obligation to correct the violations noted in the inspection report within the time frames specified; and

c. A refusal to sign an acknowledgment of receipt is noted in the inspection report and conveyed to the department's historical record for the food establishment; and

2. Make a final request that the person in charge sign an acknowledgment receipt of inspectional findings.

2VAC5-585-3910. Imminent health hazard, ceasing operations and reporting.

A. Except as specified in subsections B and C of this section, ~~an operator~~ a permit holder 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.[P]

B. ~~An operator~~ A permit holder 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.

2VAC5-585-3920. Resumption of operations.

If operations are discontinued as specified under 2VAC5-585-3910 or otherwise according to law, the ~~operator~~ permit holder shall obtain approval from the department before resuming operations.

2VAC5-585-3930. Priority or priority foundation item, timely correction.

A. Except as specified in subsection B of this section, ~~an operator~~ a permit holder or person in charge shall at the time of inspection correct a violation of a priority item or priority foundation item of this chapter and implement corrective actions for a HACCP plan provision that is not in compliance with its critical limit.[Pf]

B. Considering the nature of the potential hazard involved and the complexity of the corrective action needed, the department may agree to or specify a longer timeframe, not to exceed:

1. 72 hours after the inspection, for the ~~operator~~ permit holder to correct violations of a priority item; or

2. 10 calendar days after the inspection, for the ~~operator~~ permit holder to correct violations of a priority foundation item or HACCP plan deviations.

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~~ permit holder 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 inspection of the establishment and shall document the information on an inspection report, and enter the report in the department's records.

2VAC5-585-3950. Core items, timely correction.

A. Except as specified in subsection B of this section, the ~~operator~~ permit holder or person in charge shall correct core items by a date and time agreed to or specified by the department but no later than 90 calendar days after the inspection.

B. The department may approve a compliance schedule that extends beyond the time limits specified under subsection A of this section if a written schedule of compliance is submitted by the ~~operator~~ permit holder and no health hazard exists or will result from allowing an extended schedule for compliance.

2VAC5-585-4050. Restriction or exclusion of food employee or closure of food establishment.

Based on the findings of an investigation related to a food employee or conditional employee who is suspected of being infected or diseased, the department may issue an order to the suspected food employee, conditional employee, or ~~operator~~ permit holder instituting one or more of the following control measures:

1. Restricting the food employee or conditional employee;

2. Excluding the food employee or conditional employee; or

3. Closing the food establishment in accordance with law.

2VAC5-585-4060. Restriction or exclusion order: warning or hearing not required, information required in order.

Based on the findings of the investigation as specified in 2VAC5-585-4040 and to control disease transmission, the department may issue an order of restriction or exclusion to the suspected food employee or the ~~operator~~ permit holder without prior warning, notice of hearing, or a hearing if the order:

1. States the reasons for the restriction or exclusion that is ordered;

2. States the evidence that the food employee or ~~operator~~ permit holder shall provide in order to demonstrate that the reasons for the restriction or exclusion are eliminated;

3. States that the suspected food employee or the ~~operator~~ permit holder may request an appeal hearing by submitting a timely request as provided in law; and

4. Provides the name and address of the authorized representative of the commissioner to whom a request for appeal hearing be made.

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, General Assembly Building, 201 North Ninth Street, Fourth Floor, Richmond, Virginia 23219.

FORMS (2VAC5-585)

Permit Application for Retail Food Establishment, VDACS-FSP-APPRE (rev. 6/23)

Retail Inspection Report, ODF-FSP-10001 (rev. 7/2018)

DOCUMENTS INCORPORATED BY REFERENCE (2VAC5-585)

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~~

Conference for Food Protection Standard for Accreditation of Food Protection Manager Certification Programs, April 2023, 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, 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 18-2016 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

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. R25-7696; Filed November 19, 2024, 12:41 p.m.

TITLE 3. ALCOHOLIC BEVERAGE AND CANNABIS CONTROL

VIRGINIA ALCOHOLIC BEVERAGE CONTROL AUTHORITY

Final Regulation

Title of Regulation: **3VAC5-10. Procedural Rules for the Conduct of Hearings Before the Board and Its Hearing Officers (amending 3VAC5-10-10 through 3VAC5-10-130, 3VAC5-10-150 through 3VAC5-10-450; adding 3VAC5-10-490; repealing 3VAC5-10-340).**

Statutory Authority: §§ 4.1-103 and 4.1-111 of the Code of Virginia.

Effective Date: January 29, 2025.

Agency Contact: LaTonya D. Hucks-Watkins, Senior Legal Counsel, Virginia Alcoholic Beverage Control Authority, 7450 Freight Way, Mechanicsville, VA 23116, telephone (804) 213-4698, FAX (804) 213-4574, or email latonya.hucks-watkins@virginiaabc.com.

Summary:

The amendments (i) specify that only an interested party or the interested party's legal counsel can exercise the right of cross-examination; (ii) extend the timeframe in which an offer in compromise may be submitted; (iii) align the regulation with current procedures, authority, and terminology; and (iv) eliminate obsolete text. A change to the proposed regulation updates a cross-reference to the Code of Virginia.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

Chapter 10

Procedural Rules for the Conduct of Hearings ~~Before~~ before the ~~Board~~ Virginia Alcoholic Beverage Control Authority and Its ~~Hearing Officers~~ Administrative Law Judges

Part I

Hearings ~~Before Hearing Officers~~ before Administrative Law Judges

3VAC5-10-10. Appearance.

A. Any interested party who would be aggrieved by a decision of the ~~board~~ Virginia Alcoholic Beverage Control Authority upon any application or in a disciplinary proceeding may appear and be heard in person, or by duly authorized representative, and produce under oath evidence relevant and material to the matters in issue. Upon due notice a hearing may be conducted by telephone as provided in Part IV (3VAC5-10-410 through 3VAC5-10-470) of this chapter. Hearings may also be conducted virtually.

B. The interested parties will be expected to appear or be represented at the place and on the date of hearing or on the dates to which the hearing may be continued.

C. If an interested party fails to appear at a hearing, the ~~hearing officer~~ administrative law judge may proceed in ~~his~~ the interested party's absence and render a decision.

3VAC5-10-20. Argument.

Oral ~~or~~ argument, written argument, or both~~,~~ may be submitted to and limited by the ~~hearing officer~~ administrative law judge. Oral argument is to be included in the stenographic report of the hearing.

3VAC5-10-30. Attorneys; representation.

Any individual, partnership, association, or corporation ~~who~~ that is a licensee or applicant for any license or any interested party shall have the right to be represented by counsel at any ~~board~~ Virginia Alcoholic Beverage Control Authority hearing for which ~~he~~ the licensee or applicant has received notice. The licensee, applicant, or interested party shall not be required to be represented by counsel during such hearing. Any officer or director of a corporation may examine, cross-examine, and question witnesses, present evidence on behalf of the corporation, draw conclusions, and make arguments before the ~~hearing officers~~ administrative law judges.

3VAC5-10-40. Communications.

Communications regarding hearings before ~~hearing officers~~ administrative law judges upon licenses and applications for licenses should be addressed to the Chief ~~Hearing Officer~~ Clerk, Hearings ~~and~~, Appeals, and Judicial Services Division.

3VAC5-10-50. Complaints.

The ~~board~~ Virginia Alcoholic Beverage Control Authority, in its discretion and for good cause shown, may arrange a hearing upon the complaint of any aggrieved ~~party(s)~~ party against the continuation of a license. The complaint shall be in writing directed to the ~~Director,~~ Chief of the Bureau of Law Enforcement ~~Operations~~, setting forth the name and post office address of the ~~person(s)~~ person against whom the complaint is filed, together with a concise statement of all the facts necessary to an understanding of the grievance and a statement of the relief desired.

3VAC5-10-60. Continuances.

Motions to continue a hearing will be granted as in actions at law. Requests for continuances should be addressed to the

Chief ~~Hearing Officer~~ Administrative Law Judge, Hearings ~~and~~, Appeals, and Judicial Services Division~~,~~ or the ~~hearing officer~~ administrative law judge who will preside over the hearing.

3VAC5-10-70. Decisions.

A. Initial decisions. The decision of the ~~hearing officer~~ administrative law judge shall be deemed the initial decision, shall be a part of the record, and shall include:

1. A statement of the ~~hearing officer's~~ administrative law judge's findings of fact and conclusions, as well as the reasons or bases ~~therefor~~ for the findings, upon all the material issues of fact, law, or discretion presented on the record; and

2. The appropriate rule, order, sanction, relief, or denial thereof as to each such issue.

B. Summary decisions. At the conclusion of a hearing, the ~~hearing officer~~ administrative law judge, in ~~his~~ the administrative law judge's discretion, may announce the initial decision to the interested parties.

C. Notice. At the conclusion of any hearing, the ~~hearing officer~~ administrative law judge shall advise interested parties that the initial decision will be reduced to writing and the notice of such decision, along with notice of the right to appeal to the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority), will be mailed to ~~them~~ the interested party or ~~their~~ the interested party's representative and filed with the ~~board~~ authority in due course. (See 3VAC5-10-240 for Appeals).

D. Prompt filing. The initial decision shall be reduced to writing~~,~~; mailed to interested parties at the address on record with the ~~board~~ authority by certified mail, return receipt requested, and by regular mail~~,~~; and filed with the ~~board~~ authority as promptly as possible after the conclusion of the hearing or the expiration of the time allowed for the receipt of additional evidence.

E. Request for early or immediate decision. Where the initial decision is deemed to be acceptable, an interested party may file, either orally before the ~~hearing officer~~ administrative law judge or in writing, a waiver of ~~his~~ the interested party's right of appeal to the ~~board~~ authority and request early or immediate implementation of the initial decision. The ~~board~~ authority or ~~hearing officer~~ administrative law judge may grant the request for early or immediate implementation of the decision by causing issuance or surrender of the license and prompt entry of the appropriate order.

F. Timely review. The ~~board~~ authority shall review the initial decision and may render a proposed decision, which may adopt, modify, or reject the initial decision unless immediate implementation is ordered. In any event, the ~~board~~ authority shall issue notice of any proposed decision, along with notice of right to appeal, within the time provided for appeals as stated in 3VAC5-10-240.

3VAC5-10-80. Docket.

Cases will be placed upon the docket in the order in which they mature except that, for good cause shown or for reasons appearing to the ~~board~~ Virginia Alcoholic Beverage Control Authority or to the ~~chief hearing officer~~ chief administrative law judge, the order may be varied.

3VAC5-10-90. Evidence.

A. Generally. All relevant and material evidence shall be received, except that:

1. The rules relating to privileged communications and privileged topics shall be observed; and

2. Secondary evidence of the contents of a document shall be received only if the original is not readily available. In deciding whether a document is readily available, the ~~hearing officer~~ administrative law judge shall balance the importance of the evidence against the difficulty of obtaining it, and the more important the evidence, the more effort should be made to have the original document produced.

B. Cross-examination. Subject to the provisions of subsection A of this section, any interested party shall have the right to cross-examine adverse witnesses and any agent or subordinate of the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority) whose report is in evidence and to submit rebuttal evidence, except that:

1. Where the interested party is represented by counsel, only counsel shall exercise the right of cross-examination;

2. Where there is more than one interested party, only counsel or ~~other representatives of such parties~~ the other interested parties shall exercise the right of cross-examination; and

3. Where there is more than one group of interested parties present for the same purpose, only counsel or ~~other representative of such groups~~ the interested party designated to represent each group shall exercise the right of cross-examination. If the ~~hearing officer~~ administrative law judge deems it necessary, in order to expedite the proceedings, a merger of such groups shall be arranged.

C. Cumulative testimony. The introduction of ~~evidence which is~~ cumulative, corroborative, or collateral evidence shall be avoided. The ~~hearing officer~~ administrative law judge may limit the testimony of any witness ~~which~~ that is judged to be cumulative, corroborative, or collateral; however, the interested party offering such testimony may make a short avowal of the testimony ~~which~~ that would be given and, if the witness asserts that such avowal is true, this avowal shall be made a part of the stenographic report.

D. Subpoenas, depositions, and request for admissions. Subpoenas, depositions de bene esse, and requests for admissions may be taken, directed, and issued in accordance

with ~~§§~~ § 2.2-4022 and subdivision [~~10~~ 21] of § 4.1-103 ~~10 and 9-6.14:13~~ of the Code of Virginia.

E. Stenographic report. All evidence, stipulations, and argument in the stenographic report ~~which~~ that are relevant to the matters in issue shall be deemed to have been introduced for the consideration of the ~~board~~ administrative law judge or the authority.

F. Stipulations. Insofar as possible, interested parties will be expected to stipulate as to any facts involved. Such stipulations shall be made a part of the stenographic report.

3VAC5-10-100. Hearings; penalty.

A. Hearings before the ~~hearing officer~~ administrative law judge shall be held, insofar as practicable, at the county seat of the county in which the establishment of the applicant or licensee is located, or, if the establishment is located within the corporate limits of any city, then in such city. However, if it is located in a county or city within a metropolitan area in which the ~~board~~ Virginia Alcoholic Beverage Control Authority maintains a hearing room in a district office, such hearings may be held in such hearing room. Notwithstanding ~~the above~~ this subsection, ~~hearing officers~~ administrative law judges may conduct hearings at locations convenient to the greatest numbers of persons in order to expedite the hearing process. Hearings may also be held via telephone or virtually.

B. At any hearing held by ~~a hearing officer~~ an administrative law judge, any person hindering the orderly conduct or decorum of the hearing shall be guilty of a violation of this regulation and shall be subject to the penalty prescribed by § 4.1-349 of the Code of Virginia.

3VAC5-10-110. ~~Hearing officers~~ Administrative law judges.

A. ~~Hearing officers~~ Administrative law judges are charged with the duty of conducting fair and impartial hearings and of maintaining order in a form and manner consistent with the dignity of the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority).

B. Each ~~hearing officer~~ administrative law judge shall have authority, subject to the published rules of the ~~board~~ authority and within its powers, to:

1. Administer oaths and affirmations;

2. Issue subpoenas as authorized by law;

3. Rule upon offers of proof and receive relevant and material evidence;

4. Take or cause depositions and interrogatories to be taken, directed, and issued;

5. Examine witnesses and otherwise regulate the course of the hearing;

6. Hold conferences for the settlement or simplification of issues by consent of interested parties;

7. Dispose of procedural requests and similar matters;

8. Amend the issues or add new issues, provided the applicant or licensee expressly waives notice thereof. The waiver shall be made a part of the stenographic report of the hearing;

9. Submit initial decisions to the ~~board~~ authority and to other interested parties or ~~their~~ representatives; ~~and~~

10. Take any other action authorized by the rules of the ~~board~~ authority;

11. Conduct mediation between interested parties; and

12. Require the designation of an interested person to act as a representative for proceedings involving groups of individuals present for the same purpose.

3VAC5-10-120. Interested parties.

As used in this chapter, "interested parties" shall mean the following persons:

1. The applicant;

2. The licensee;

3. Persons who would be aggrieved by a decision of the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority); and

4. For purposes of appeal pursuant to 3VAC5-10-240, interested parties shall be only those persons who appeared at and asserted an interest in the hearing before ~~a hearing officer~~ an administrative law judge.

Where in this chapter reference is made to "licensee," the term likewise shall be applicable to a permittee (i.e., a person that holds or held a permit issued by the authority) or a designated manager to the extent that this chapter ~~are~~ is not inconsistent with the statutes and regulations relating to such persons.

3VAC5-10-130. Motions or requests.

Motions or requests for ruling made prior to the hearing before ~~a hearing officer~~ an administrative law judge shall be in writing~~,~~; addressed to the Chief ~~Hearing Officer~~ Administrative Law Judge, Hearings ~~and~~, Appeals, and Judicial Services Division~~,~~; and shall state with reasonable certainty the ~~ground therefor~~ grounds for the motion or request for ruling. Argument upon such motions or requests will not be heard without special leave granted by the ~~hearing officer~~ administrative law judge who will preside over the hearing.

3VAC5-10-150. Consent settlement.

A. Generally. The ~~board,~~ Virginia Alcoholic Beverage Control Authority (authority) or ~~its~~ the authority's designee~~,~~ may offer to resolve disciplinary cases when the nature of the proceeding and public interest permit. In appropriate cases, the

~~board~~ authority or ~~its~~ the authority's designee will extend an offer for a consent settlement to the licensee.

B. Who may accept. The licensee or ~~his~~ the licensee's attorney may accept an offer of consent settlement. If the licensee is a corporation, only an attorney or an officer, director, or majority stockholder of the corporation may accept an offer of consent settlement.

C. How to accept. The licensee shall return the properly executed consent order along with the payment in full of any monetary penalty no later than 21 calendar days from the date of mailing by the ~~board~~ authority. Failure to respond within the time period will result in a withdrawal of the offer by the agency and a formal hearing will be held on the date specified in the notice of hearing.

D. Effect of acceptance. Acceptance of the consent settlement offer shall constitute an admission of the alleged violation of the ~~A.B.C. laws~~ Alcoholic Beverage Control Act (§ 4.1-100 et seq. of the Code of Virginia) or authority regulations and will result in a waiver of the right to a formal hearing and the right to appeal or otherwise contest the charges. The offer of consent settlement is not negotiable; however, the licensee is not precluded from submitting an offer in compromise under 3VAC5-10-160.

E. ~~Board~~ Authority review. Prior to extending an offer of consent settlement to the licensee, the ~~board~~ authority or ~~its~~ the authority's designee may reject any proposed settlement ~~which~~ that is contrary to law or policy or ~~which~~ that, in ~~its~~ the authority's sole discretion, is not appropriate.

F. Record. Unaccepted offers of consent settlement will become a part of the record only after completion of the hearing process.

3VAC5-10-160. Offers in compromise and negotiations.

A. Following notice of a disciplinary proceeding, a licensee may be afforded opportunity for the submission of an offer in compromise in lieu of suspension or in addition thereto, or in lieu of revocation of ~~his~~ the license, where, in the discretion of the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority), the nature of the proceeding and the public interest permit. Such offer should be addressed to the chief ~~hearing officer~~ administrative law judge. Acceptance of the offer in compromise shall constitute an admission of the alleged violation of the ~~A.B.C. laws~~ Alcoholic Beverage Control Act (§ 4.1-100 et seq. of the Code of Virginia) or authority regulations~~,~~ and shall result in a waiver of the right to a formal hearing and the right to appeal or otherwise contest the charges. The reason for the acceptance of such an offer shall be made a part of the record of the proceeding. Unless good cause ~~be~~ is shown, continuances for purposes of considering an offer in compromise will not be granted. Offers in compromise may be submitted anytime following notice of a disciplinary proceeding and before the ~~conclusion of an appeal hearing~~ authority issues a final decision in an appeal. ~~Any such offer may not be accepted at the informal conference and no offer shall be submitted after the conclusion of the appeal hearing.~~ The ~~board~~ authority may waive any provision of this section for good cause shown.

B. Following notice of a disciplinary proceeding or objection from the authority to the issuance of a license, a licensee or applicant in conjunction with the authority may agree to a negotiated resolution in lieu of a suspension or in addition thereto, in lieu of revocation of the license, or in lieu of a denial of the application where, in the discretion of the authority, the nature of the proceeding and the public interest permit. Such negotiation shall be handled by the interested party and the authority. Acceptance of a negotiated resolution may constitute an admission of the alleged violation of the Alcoholic Beverage Control Act or authority regulations and shall result in a waiver of the right to a formal hearing and the right to appeal or otherwise contest the charges or objections. Unless good cause is shown, continuances for purposes of finalizing a negotiated resolution will not be granted. Negotiated resolutions may be submitted anytime following notice of a disciplinary proceeding or objections hearing and before the authority issues a final decision in an appeal.

3VAC5-10-170. Record.

A. The certified transcript of testimony, argument, and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record of the initial decision.

B. Upon due application made to the chief ~~hearing officer~~ administrative law judge, copies of the record of a hearing shall be made available to parties entitled thereto at a fee established by the ~~board~~ Virginia Alcoholic Beverage Control Authority.

3VAC5-10-180. Rehearings.

~~A~~ No rehearing before ~~a hearing officer~~ an administrative law judge shall ~~not~~ be held in any matter unless it ~~be~~ is affirmatively shown that relevant and material evidence, which ought to produce an opposite result on rehearing, is available~~,~~; is not merely cumulative, corroborative, or collateral~~,~~; and could not have been discovered before the original hearing by the use of ordinary diligence~~,~~; provided~~,~~ that the ~~board~~ Virginia Alcoholic Beverage Control Authority, in its discretion, may cause a rehearing to be held before ~~a hearing officer~~ an administrative law judge in the absence of the foregoing conditions, as provided in 3VAC5-10-290.

3VAC5-10-190. Self-incrimination.

If any witness subpoenaed to appear on behalf of the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority) shall testify in a hearing before ~~a hearing officer~~ an administrative law judge on complaints against a licensee as to any violation in which the witness, as a licensee or an applicant, has participated, such testimony shall not be used against ~~him nor shall the board~~ the witness. The authority shall

take ~~any~~ no administrative action against ~~him~~ the witness for the offense to which ~~he~~ the witness testifies.

3VAC5-10-200. Subpoenas.

Upon request of any interested party, the chief ~~hearing officer,~~ administrative law judge or ~~a hearing officer~~ an administrative law judge is authorized to issue subpoenas requiring the attendance of witnesses and the production of records, memoranda, papers, and other documents at a hearing before ~~a hearing officer~~ an administrative law judge.

3VAC5-10-210. Witnesses.

A. Interested parties shall arrange to have their witnesses present at the time and place designated for the hearing.

B. Upon request of any party entitled to cross-examine witnesses, as set forth in 3VAC5-10-90 B, the ~~hearing officer~~ administrative law judge may separate the witnesses, including agents of the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority).

C. A person subpoenaed as a witness to appear on behalf of the ~~board~~ authority shall be entitled to the same allowance for expenses as witnesses for the Commonwealth in criminal cases.

3VAC5-10-220. Pre-hearing conferences.

A. A pre-hearing conference will be conducted when an applicant for a license or a licensee who is the subject of a disciplinary proceeding does not waive ~~its~~ the right to such a conference. A waiver may be verbal or in writing. Unless the parties are advised otherwise, the ~~agency~~ Virginia Alcoholic Beverage Control Authority (authority) will automatically waive the pre-hearing conference when the applicant or licensee does so. When the applicant or licensee is offered a pre-hearing conference and fails to respond within 10 calendar days after the date of such offer, the pre-hearing conference will be deemed to be waived.

B. The pre-hearing conference will serve as a vehicle to acquaint the interested party, in a general way, with the nature of the charges or objections~~,~~ and the evidence in support ~~thereof and~~ of the charges or objections, to hear any matters relevant thereto presented by the interested parties, and to explore whether (i) administrative proceedings or objections should be terminated or (ii) the case should proceed to formal hearing and stipulations can be reached. The conference will be open to the public, but participation will be limited to the interested parties, ~~their~~ the interested parties' attorneys-at-law or other qualified representatives, and designated ~~board~~ authority representatives. The pre-hearing conference may be held virtually or ~~telephonically,~~ by telephone and at least five days prior to the formal hearing. The conference may be held, when practical, at the county or city in which the establishment of the applicant or licensee is located. Reasonable notice of administrative charges or objections and the date, time, and place of the conference shall be given to the participants. The failure of the applicant or licensee to appear at a scheduled conference will be deemed a waiver of the pre-hearing conference. The pre-hearing conference will not be recorded. Sworn testimony will not be taken, nor will subpoenas be issued. Any initial decision will include a summary of the pre-hearing conference.

3VAC5-10-230. ~~Agency~~ Virginia Alcoholic Beverage Control Authority representation.

The ~~Director,~~ Chief of the Bureau of Law Enforcement Operations or ~~his~~ a designee may (i) represent the Bureau of Law Enforcement ~~Operations~~ before the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority) or any ~~hearing officer~~ administrative law judge; (ii) petition the ~~board~~ authority for modification of the ~~hearing officer's~~ administrative law judge's decision; or (iii) request a ruling on other motions as may be necessary. This authority does not extend to complaints under the Franchise Acts.

Part II

Hearings ~~Before~~ before the ~~Board~~ Virginia Alcoholic Beverage Control Authority

3VAC5-10-240. Appeals.

A. An interested party may appeal to the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority) an adverse initial decision, including the findings of fact and the conclusions, of ~~a hearing officer~~ an administrative law judge or a proposed decision, or any portion ~~thereof~~ of a proposed decision, of the ~~board~~ authority, provided a request ~~therefor~~ in writing identifying any alleged errors in the decision is received within 30 days after the date of mailing of the initial decision or the proposed decision, whichever is later.

B. ~~At his option, an~~ An interested party may submit written exceptions to the initial or proposed decision within the 30-day period and waive further hearing proceedings.

C. If an interested party fails to appear at a hearing, the ~~board~~ authority may proceed in ~~his~~ the interested party's absence and render a decision.

3VAC5-10-250. Attorneys; representation.

Any individual, partnership, association, or corporation ~~who~~ that is a licensee or applicant for any license or any interested party shall have the right to be represented by counsel at any ~~board~~ Virginia Alcoholic Beverage Control Authority (authority) hearing for which ~~he~~ the licensee, applicant, or interested party has received notice. The licensee, applicant, or interested party shall not be required to be represented by counsel during such hearing. Any officer or director of a corporation may examine, cross-examine, and question witnesses~~,~~; present evidence on behalf of the corporation~~,~~; draw conclusions; and make arguments before the ~~board~~ authority.

3VAC5-10-260. Communications.

Communications regarding appeal hearings upon licenses and applications for licenses should be addressed to the ~~secretary to the board~~ Chief Clerk of the Hearing, Appeals, and Judicial Services Division.

3VAC5-10-270. Continuances.

Continuances will be granted as in actions at law. Requests for continuances of appeal hearings should be addressed to the ~~secretary to the board~~ Chief Clerk of the Hearings, Appeals, and Judicial Services Division.

3VAC5-10-280. Decision of the ~~board~~ Virginia Alcoholic Beverage Control Authority.

The final decision of the ~~board~~ Virginia Alcoholic Beverage Control Authority, together with any written opinion, should be transmitted to each interested party or to ~~his~~ the interested party's representative.

3VAC5-10-290. Evidence.

A. Generally. Subject to the exceptions permitted in this section, and to any stipulations agreed to by all interested parties, all evidence should be introduced at hearings before ~~hearing officers~~ administrative law judges.

B. Additional evidence. Should the appeal panel or Virginia Alcoholic Beverage Control Authority (authority) determine at an appeal hearing, either upon motion or otherwise, that it is necessary or desirable that additional evidence be taken, the appeal panel may:

1. Direct ~~that a hearing officer~~ an administrative law judge to fix a time and place for the taking of such evidence within the limits prescribed by the ~~board~~ authority and in accordance with 3VAC5-10-180; and

2. Upon unanimous consent of the appeal panel, permit the introduction of after-discovered or new evidence at the appeal hearing.

If the initial decision indicates that the qualifications of the establishment of an applicant or licensee are such as to cast substantial doubt upon the eligibility of the place for a license, evidence may be received at the appeal hearing limited to the issue involved and to the period of time subsequent to the date of the hearing before the ~~hearing officer~~ administrative law judge.

C. Examination. Any appeal panel member may examine a witness upon any question relevant to the matters in issue.

D. Cross-examination. The right to cross-examine and the submission of rebuttal evidence as provided in 3VAC5-10-90 shall be allowed in any appeal hearing where the introduction of additional evidence is permitted.

3VAC5-10-300. Hearings.

Hearings before the ~~board~~ Virginia Alcoholic Beverage Control Authority or appeal panel in the absence of notice to the contrary will be held in the office of the ~~board~~ Virginia Alcoholic Beverage Control Authority, Virginia A.B.C. Building, 7450 Freight Way, Mechanicsville, Virginia 23116.

3VAC5-10-310. Motions or requests.

Motions or requests for rulings~~,~~ made after a hearing before ~~a hearing officer~~ an administrative law judge and prior to an appeal hearing before the ~~board,~~ Virginia Alcoholic Beverage Control Authority (authority) shall be in writing, addressed to the ~~secretary to the board,~~ Chief Clerk of the Hearings, Appeals, and Judicial Services Division, and shall state with reasonable certainty the grounds ~~therefor~~ for the motion or request for ruling. Argument upon such motions or requests will not be heard without special leave granted by the ~~board~~ authority.

3VAC5-10-320. Notice of hearing.

Reasonable notice of the time and place of an appeal hearing shall be given to each interested party who appeared at the initial hearing or ~~his~~ the interested party's representative.

3VAC5-10-330. Record.

A. The record of the hearing before the ~~hearing officer~~ administrative law judge, including the initial decision, and the transcript of testimony, argument, and exhibits together with all papers and requests filed in the proceeding before the ~~board,~~ Virginia Alcoholic Beverage Control Authority (authority) shall constitute the exclusive record for the final decision of the ~~board~~ authority.

B. Upon due application made to the ~~secretary to the board~~ Chief Clerk of the Hearings, Appeals, and Judicial Services Division, copies of the record, including the decision of the ~~board~~ authority and any opinion setting forth the reasons for the decision, shall be made available to parties entitled thereto at a rate established by the ~~board~~ authority.

3VAC5-10-340. ~~Rehearings and reconsideration.~~ (Repealed.)

~~The board may, in its discretion for good cause shown, grant a rehearing or reconsideration on written petition of an interested party addressed to the Secretary to the Board and received within 30 days after the date of the final decision of the board. The petition shall contain a full and clear statement of the facts pertaining to the grievance, the grounds in support thereof, and a statement of the relief desired. The board may grant such at any time on its own initiative for good cause shown.~~

3VAC5-10-350. Scope of hearing.

A. Except as provided in 3VAC5-10-290, the appeal hearing shall be limited to the record made before the ~~hearing officer~~ administrative law judge.

B. The provisions of Part I (3VAC5-10-10 through 3VAC5-10-230) of this chapter shall be applicable to proceedings held under this part except to the extent such provisions are inconsistent ~~herewith~~ with this part.

3VAC5-10-360. Complaints.

Complaints shall be referred in writing to the ~~secretary to the board~~ Chief Clerk of the Hearings, Appeals, and Judicial Services Division.

3VAC5-10-370. Hearings.

Hearings will be conducted in accordance with the provisions of Part I (3VAC5-10-10 through 3VAC5-10-230) of this chapter ~~(3VAC5-10-10 et seq.)~~. Further, the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority) and the ~~hearing officers~~ administrative law judges designated by ~~it~~ the authority may require an accounting to be submitted by each party in determining an award of costs and ~~attorneys'~~ attorney fees.

3VAC5-10-380. Appeals.

The decision of the ~~hearing officer~~ administrative law judge may be appealed to the ~~board~~ Virginia Alcoholic Beverage Control Authority as provided in 3VAC5-10-240. Appeals shall be conducted in accordance with the provisions of Part II (3VAC5-10-240 through 3VAC5-10-350) of this chapter ~~(3VAC5-10-240 et seq.)~~.

3VAC5-10-390. Hearings on notification of price increases.

Upon receipt from a winery, brewery, or wine or beer importer of a request for notice of a price increase less than 30 days in advance, a hearing will be scheduled before the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority), not ~~a hearing officer~~ an administrative law judge, as soon as practicable with five ~~days~~ days' notice to all parties, which include, at a minimum, all the wholesalers selling the winery or brewery's product. There will be no continuances granted and the ~~board~~ authority must rule within 24 hours of the hearing.

3VAC5-10-400. Discovery, prehearing procedures and production at hearings; definitions.

The Rules of the Supreme Court of Virginia Parts One, One A, Two, Two A, Three, and Four shall apply in all proceedings under the Wine and Beer Franchise Acts, Chapters 4 (§ 4.1-400 et seq.) and 5 (§ 4.1-500 et seq.) of Title 4.1 of the Code of Virginia, including mediation and arbitration proceedings when necessary pursuant to §§ 4.1-409 and 4.1-508 of the Code of Virginia. Any references to a "court" contained in the rules shall be deemed to mean the ~~hearing officer~~ administrative law judge or officers of the ~~board~~ Virginia Alcoholic Beverage Control Authority conducting the proceeding.

No provision of this section shall affect the practice of taking evidence at a hearing, but such practice, including that of generally taking evidence ore tenus only at hearings before ~~hearing officers~~ administrative law judges, shall continue unaffected hereby.

3VAC5-10-410. Applicability.

The ~~board~~ Virginia Alcoholic Beverage Control Authority (authority) and its ~~hearing officers~~ administrative law judges may conduct hearings by telephone only when the ~~applicant/licensee~~ applicant or licensee expressly waives the in-person hearing. The ~~board~~ authority will determine whether or not certain hearings might practically be conducted by telephone. The provisions of Part I (3VAC5-10-10 ~~et seq.~~ through 3VAC5-10-230) of this chapter shall apply only to Part IV (3VAC5-10-410 ~~et seq.~~ through 3VAC5-10-470) of this chapter where applicable.

3VAC5-10-420. Appearance.

The interested parties will be expected to be available by telephone at the time set for the hearing and may produce, under oath, evidence relevant and material to the matters in issue. The ~~board~~ Virginia Alcoholic Beverage Control Authority will arrange for telephone conference calls at its expense.

3VAC5-10-430. Argument.

Oral or written argument may be submitted to and limited by the ~~hearing officer~~ administrative law judge. Oral argument is to be included in the stenographic report of the hearing. Written argument, if any, must be submitted to the ~~hearing officer~~ administrative law judge and other interested parties in advance of the hearing.

3VAC5-10-440. Documentary evidence.

Documentary evidence~~, which~~ that an interested party desires to be considered by the ~~hearing officer,~~ administrative law judge must be submitted to the ~~hearing officer~~ administrative law judge and other interested parties in advance of the hearing.

3VAC5-10-450. Hearings.

A. Telephone hearings will usually originate from the central office of the ~~board~~ Virginia Alcoholic Beverage Control Authority in ~~Richmond~~ Mechanicsville, Virginia, but may originate from other locations. ~~Interested parties~~ An interested party may participate from the location of ~~their~~ the interested party's choice where a telephone is available. If an interested party is not available by telephone at the time set for the hearing, the hearing may be conducted in ~~his~~ the interested party's absence.

B. If at any time during a telephone hearing, the ~~hearing officer~~ administrative law judge determines that the issues are so complex that a fair and impartial hearing cannot be accomplished, the ~~hearing officer~~ administrative law judge shall adjourn the telephone hearing and reconvene an in-person hearing as soon as practicable.

3VAC5-10-490. Mediation.

A. Upon consent of all interested parties, the Virginia Alcoholic Beverage Control Authority (authority) may afford the parties an opportunity to resolve appropriate cases through mediation.

B. The mediations may be conducted by an administrative law judge of the authority.

C. If the mediation is unsuccessful, the matter may proceed to a formal hearing. The administrative law judge who conducted the mediation shall not preside over the formal hearing.

VA.R. Doc. No. R23-7490; Filed December 10, 2024, 2:53 p.m.

Final Regulation

Title of Regulation: **3VAC5-20. Advertising (amending 3VAC5-20-10, 3VAC5-20-30, 3VAC5-20-90, 3VAC5-20-100; repealing 3VAC5-20-20, 3VAC5-20-60).**

Statutory Authority: §§ 4.1-103, 4.1-111, and 4.1-320 of the Code of Virginia.

Effective Date: January 29, 2025.

Agency Contact: LaTonya D. Hucks-Watkins, Senior Legal Counsel, Virginia Alcoholic Beverage Control Authority, 7450 Freight Way, Mechanicsville, VA 23116, telephone (804) 213-4698, FAX (804) 213-4574, or email latonya.hucks-watkins@virginiaabc.com.

Summary:

The amendments revise provisions regarding outdoor advertising of alcoholic beverages, remove language that is duplicative or redundant, and align the regulation with current industry practices. Changes to the proposed regulation include (i) clarifying that athletes used in advertising must be at least 21 years of age and (ii) clarifying language regarding the prohibition on false or misleading advertising.

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.

3VAC5-20-10. Advertising; generally; cooperative advertising; federal laws~~; cider~~; restrictions.

A. All alcoholic beverage advertising is permitted in ~~this~~ the Commonwealth except that which is prohibited or otherwise limited or restricted by regulation of the ~~board~~ Virginia Alcoholic Beverage Control Authority (authority). Any editorial or other reading matter in any periodical, publication, or newspaper for the publication of which no money or other valuable consideration is paid or promised, directly or indirectly, by or for the benefits of any permittee or licensee does not constitute advertising.

~~B. Advertising of cider, as defined in § 4.1-213 of the Code of Virginia, shall conform to the requirements for advertising beer.~~

~~C.~~ B. The ~~board~~ authority may ~~issue a~~ permit ~~authorizing~~ a variance from any of its advertising regulations for good cause shown.

~~D.~~ C. No advertising shall contain any statement, symbol, depiction, or reference that:

1. Would tend to induce ~~minors~~ persons younger than 21 years of age to drink~~,~~ or would tend to induce persons to consume to excess;

2. Is obscene or is suggestive of any illegal activity;

3. ~~Incorporates the use of any present or former athlete or athletic team or implies that the product enhances athletic prowess; except that, persons granted a license to sell wine or beer may display within their licensed premises point-of-sale advertising materials that incorporate the use of any present or former professional athlete or athletic team, provided that such advertising materials: (i) otherwise comply with the applicable regulations of the appropriate federal agency and (ii) do not depict any athlete consuming or about to consume alcohol prior to or while engaged in an athletic activity, do not depict an athlete consuming alcohol while the athlete is operating or about to operate a motor vehicle or other machinery, and do not imply that the alcoholic beverage so advertised enhances athletic prowess~~ Implies that the product enhances athletic prowess, [uses the name, image, or likeness of an athlete younger than 21 years of age], depicts any athlete consuming or about to consume alcohol prior to or while engaged in an athletic activity, or depicts an athlete consuming alcohol while the athlete is operating or about to operate a motor vehicle or other machinery;

4. [~~Is false or misleading in any material respect~~ Contains any statement that is false or untrue in any material respect, or that, irrespective of falsity, directly or by ambiguity, omission, or inference, or by the addition of irrelevant, scientific, or technical matter tends to create a misleading impression];

5. Implies or indicates, directly or indirectly, that the product is government endorsed by the use of flags, seals, or other insignia or otherwise;

6. Makes any reference to the intoxicating effect of any alcoholic beverages;

7. Constitutes or contains a contest or sweepstakes where a purchase of alcoholic beverages is required for participation; or

8. Constitutes or contains an offer to pay or provide anything of value conditioned on the purchase of alcoholic beverages, except for (i) a combination of food and alcoholic beverages offered at a discounted price by an on-premises licensee during the permitted hours for a happy hour pursuant to 3VAC5-50-160 or (ii) refund coupons and combination packaging. Any such combination packaging shall be limited to packaging provided by the manufacturer that is designed to be delivered intact to the consumer.

~~E.~~ D. The ~~board~~ authority shall not regulate advertising of nonalcoholic beer or nonalcoholic wine so long as (i) a reasonable person by common observation would conclude that the advertising clearly does not represent any advertisement for alcoholic beverages and (ii) the advertising prominently states that the product is nonalcoholic.

E. Interior advertising materials may not be illuminated, except for back bar pedestals upon which advertising regarding spirits may appear.

3VAC5-20-20. ~~Advertising; interior; retail licensees.~~ (Repealed.)

~~A. As used in this section, the term "advertising materials" means any tangible property of any kind which utilizes words or symbols making reference to any brand or manufacturer of alcoholic beverages; except when used in the advertisement of nonalcoholic beer or nonalcoholic wine in accordance with 3VAC5-20-10 E.~~

~~B. Retail licensees may use any advertising materials having a wholesale value of not more than $250 per item that comply with 3VAC5-20-10 inside licensed retail establishments. Advertising materials may not be illuminated, except for back bar pedestals upon which advertising matter regarding spirits may appear.~~

3VAC5-20-30. Advertising; exterior.

Outdoor alcoholic beverage advertising shall comply with 3VAC5-20-10 and shall be limited as follows:

1. No outdoor alcoholic beverage advertising shall depict persons consuming alcoholic beverages, use cartoon characters in any way, or use persons who ~~have not attained the minimum drinking age~~ are younger than 21 years of age as models or actors.

~~2. No outdoor alcoholic beverage advertising shall be placed in violation of § 4.1-112.2 of the Code of Virginia.~~

~~3. No outdoor alcoholic beverage advertising shall be placed on property zoned exclusively for agricultural or residential uses, or on unzoned property.~~

~~4. All outdoor alcoholic beverage advertising must also comply with the provisions of Chapter 12 (§ 33.2-1200 et seq.) of Title 33.2 of the Code of Virginia and the regulations of the Virginia Department of Transportation promulgated pursuant thereto.~~

~~5.~~ 2. No alcoholic beverage manufacturer, importer, or wholesale licensee may sell, rent, lend, buy for, or give to any retail licensee any outdoor alcoholic beverage advertising~~, any billboard placements for such advertising, or in any other way confer on any retail licensee anything of value that constitutes outdoor alcoholic beverage advertising~~ materials, except for items permitted by 3VAC5-30-60 and 3VAC5-30-80.

~~6. No alcoholic beverage manufacturer, importer, or wholesale licensee may engage in cooperative advertising, as defined in 3VAC5-30-80, on behalf of any retail licensee.~~

~~7.~~ 3. No alcoholic beverage manufacturer or importer may require a wholesale licensee to place outdoor alcoholic beverage advertising or exercise control over the funds of a wholesale licensee for any purpose, including ~~but not limited to~~ the purchase of outdoor alcoholic beverage advertising.

3VAC5-20-60. ~~Advertising; novelties and specialties.~~ (Repealed.)

~~Distribution of novelty and specialty items, including wearing apparel, bearing alcoholic beverage advertising, shall be subject to the following limitations and conditions:~~

~~1. Items not in excess of $10 in wholesale value may be given away;~~

~~2. Manufacturers, importers, bottlers, brokers, wholesalers or their representatives may give licensed retailers items not in excess of $10 in wholesale value in quantities equal to the number of employees of the retail establishment present at the time the items are delivered. Thereafter, such employees may wear or display the items on the licensed premises. Neither manufacturers, importers, bottlers, brokers, wholesalers or their representatives may give such items to patrons on the premises of retail licensees; however, manufacturers or their authorized representatives other than wholesalers conducting tastings pursuant to the provisions of § 4.1-201.1 of the Code of Virginia may give no more than one such item to each consumer provided a sample of alcoholic beverages during the tasting event; and such items bearing moderation and responsible drinking messages may be displayed by the licensee and his employees on the licensed premises and given to patrons on such premises as long as any references to any alcoholic beverage manufacturer or its brands are subordinate in type size and quantity of text to such moderation message;~~

~~3. Items in excess of $10 in wholesale value may be donated by distilleries, wineries and breweries only to participants or entrants in connection with the sponsorship of conservation and environmental programs, professional, semi-professional or amateur athletic and sporting events subject to the limitations of 3VAC5-20-100, and for events of a charitable or cultural nature;~~

~~4. Items may be sold by mail upon request or over the counter at retail establishments customarily engaged in the sale of novelties and specialties, provided they are sold at the reasonable open market price in the localities where sold;~~

~~5. Wearing apparel shall be in adult sizes;~~

~~6. Point of sale order blanks, relating to novelty and specialty items, may be provided by beer and wine wholesalers to retail licensees for use on their premises, if done for all retail licensees equally and after obtaining the consent, which may be a continuing consent, of each retailer or his representative. Wholesalers may not be involved in the redemption process; and~~

~~7. Novelty and specialty items bearing alcoholic beverage advertising may not be distributed to persons younger than the legal drinking age.~~

3VAC5-20-90. Advertising; coupons.

A. "Normal retail price" shall mean the average retail price of the brand and size of the product in a given market and not a reduced or discounted price.

B. Coupons may be advertised in accordance with the following conditions and restrictions:

1. Manufacturers or importers of spirits, wine, and beer may use only consumer submitted refund, not instantly redeemable discount, coupons. The coupons may not exceed 50% of the normal retail price and may not be honored for on-premises consumption at a retail outlet or state government store but shall be submitted directly to the manufacturer or importer or its designated agent. Such agent may not be a wholesaler or retailer of alcoholic beverages. Consumer proof of purchase ~~(~~, such as a dated, ~~retail-specific~~ retail-specific receipt~~)~~, is required for redemption of all consumer coupons. Coupons are permitted in the print media, via the Internet, by direct mail or ~~electronic mail~~ email to consumers, or as part of, or attached to, the package. Manufacturers, importers, bottlers, brokers, wholesalers, and their representatives may provide coupon pads to retailers for use by retailers on their premises if done for all retail licensees equally and after obtaining the consent, which may be a continuing consent, of each retailer or retailer's representative. Wholesale licensees may attach refund coupons to the package if done for all retail licensees equally and after obtaining the consent, which may be a continuing consent, for each retailer or retailer's representative.

2. Manufacturers or importers offering refund coupons on spirits and wine sold in state government stores shall notify the board at least 15 days in advance of the issuance of the coupons of its amount, its expiration date, and the area of the Commonwealth in which it will be primarily used if not used statewide.

3. Wholesale licensees are not permitted to offer coupons.

4. Retail licensees may offer coupons, including their own discount or refund coupons, on wine and beer sold for off-premises consumption only. Retail licensees may offer their own coupons in the print media, at the ~~point of sale~~ point of sale, or by direct mail to consumers.

5. No retailer may be paid a fee by manufacturers or wholesalers of alcoholic beverages for display or use of coupons, and the name of the retail establishment may not appear on any refund coupons offered by manufacturers. No manufacturer or wholesaler may furnish any coupons or materials regarding coupons to retailers that are customized or designed for discount or refund by the retailer.

6. Retail licensees or employees thereof may not receive refunds on coupons obtained from the packages before sale at retail.

7. No coupons may be honored for any individual younger than the legal age for purchase.

3VAC5-20-100. Advertising; sponsorship of public events; restrictions and conditions.

A. Generally. Alcoholic beverage advertising in connection with the sponsorship of public events shall be limited to sponsorship of conservation and environmental programs~~,~~; professional, semi-professional, or amateur athletic and sporting events; and events of a charitable or cultural nature by distilleries, wineries, breweries, importers, and bottlers.

B. Restrictions and conditions.

1. Any sponsorship on a college, high school, or younger age level is prohibited;

2. Cooperative advertising, as defined in 3VAC5-30-80, is prohibited;

3. Awards or contributions of alcoholic beverages are prohibited;

4. Advertising of alcoholic beverages shall conform in size and content to the other advertising concerning the event and advertising regarding charitable events shall place primary emphasis on the charitable ~~fund-raising~~ fundraising nature of the event;

5. A charitable event is one held for the specific purpose of raising funds for a charitable organization ~~which~~ that is exempt from federal and state taxes;

6. Advertising in connection with the sponsorship of an event may be in any media, such as print media, the Internet or other electronic means, television, or radio; by direct mail or [flyers ~~fliers~~] to consumers; on programs, tickets, and schedules for the event; on the inside of licensed or unlicensed retail establishments; and at the site of the event;

7. Advertising materials as defined in ~~3VAC5-30-60 G~~ 3VAC5-30-80 M, table tents as defined in 3VAC5-30-60 ~~H~~ A, and canisters are permitted;

8. Prior written notice shall be submitted to the ~~board~~ Virginia Alcoholic Beverage Control Authority describing

the nature of the sponsorship and giving the date, time, and place of it; ~~and~~

9. Manufacturers may sponsor public events ~~and wholesalers may only cosponsor charitable events~~; and

10. Wholesalers may only cosponsor charitable events with manufacturers.

VA.R. Doc. No. R23-7508; Filed December 10, 2024, 2:53 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 Atlantic Striped Bass (amending 4VAC20-252-150, 4VAC20-252-160).**

Statutory Authority: § 28.2-201 of the Code of Virginia.

Effective Date: January 1, 2025.

Agency Contact: Zachary Widgeon, Director of Communications, Marine Resources Commission, 380 Fenwick Road, Building 96, Fort Monroe, VA 23651, telephone (757) 414-0713, FAX (757) 247-2002, or email zachary.widgeon@mrc.virginia.gov.

Summary:

The amendments (i) adjust the commercial Chesapeake Bay area striped bass quota to 914,555 pounds and (ii) allow commercial striped bass harvesters to obtain both Chesapeake Bay area and coastal area tags at the same time.

4VAC20-252-150. Individual commercial harvest quota.

A. The commercial harvest quota for the Chesapeake Bay area shall be determined annually by the Marine Resources Commission in compliance with the Atlantic States Marine Fisheries Commission. The total allowable level of all commercial harvest of striped bass from the Chesapeake Bay and its tributaries and the Potomac River tributaries of Virginia for all open seasons and for all legal gear shall be ~~983,393~~ 914,555 pounds of whole fish. At such time as the total commercial harvest of striped bass from the Chesapeake Bay area is projected to reach ~~983,393~~ 914,555 pounds and announced as such, it shall be unlawful for any person to land or possess striped bass caught for commercial purposes from the Chesapeake Bay area.

B. The commercial harvest quota for the coastal area of Virginia shall be determined annually by the Marine Resources Commission in compliance with the Atlantic States Marine Fisheries Commission. The total allowable level of all commercial harvest of striped bass from the coastal area for all open seasons and for all legal gear shall be 116,282 pounds of whole fish. At such time as the total commercial harvest of striped bass from the coastal area is projected to reach 116,282 pounds and announced as such, it shall be unlawful for any person to land or possess striped bass caught for commercial purposes from the coastal area.

C. For the purposes of assigning tags to a person for commercial harvests in the Chesapeake Bay area as described in 4VAC20-252-160, the individual commercial harvest quota of striped bass in pounds shall be converted to an estimate in numbers of fish per individual harvest quota based on the average weight of striped bass harvested by the permitted person during the previous fishing year. The number of striped bass tags issued to each person will equal the estimated number of fish to be landed by that individual harvest quota, plus a number of striped bass tags equal to 10% of the total allotment determined for each person.

D. For the purposes of assigning tags to a person for commercial harvests in the coastal area of Virginia as described in 4VAC20-252-160, the individual commercial harvest quota of striped bass in pounds shall be converted to a quota in numbers of fish per individual commercial harvest quota based on the reported average coastal area harvest weight of striped bass harvested by the permitted person during the previous fishing year, except as described in subsection E of this section. The number of striped bass tags issued to each person will equal the estimated number of fish to be landed by that individual harvest quota, plus a number of striped bass tags equal to 10% of the total allotment determined for each person.

E. For any person whose reported average coastal area harvest weight of striped bass in the previous fishing year was less than 12 pounds, a 12-pound minimum weight shall be used to convert that person's harvest quota of striped bass, in pounds of fish, to harvest quota in number of fish.

4VAC20-252-160. Individual transferable shares; tagging.

A. For each person permitted under the provisions of 4VAC20-252-130 to harvest striped bass commercially, a weight quota shall be issued to permitted fishermen in amounts equal to the percentage share of the Chesapeake Bay area and coastal area striped bass harvest quota they hold. Tags issued for Chesapeake Bay area harvest quota shall only be used for striped bass harvests in the Chesapeake Bay area, and tags issued for the coastal area harvest quota shall only be used for striped bass harvests in the coastal area.

B. It shall be unlawful for any person ~~onboard~~ on board any vessel to possess any striped bass tags in Virginia waters, according to the following provisions:

1. It shall be unlawful for any person ~~onboard~~ on board any vessel to set, place, or fish any gear that can harvest striped bass in the Chesapeake Bay area when in possession of coastal area striped bass tags issued by the Virginia Marine Resources Commission or striped bass tagged with coastal area tags.

2. It shall be unlawful for any person to possess Virginia coastal area striped bass tags in the Chesapeake Bay area or striped bass tagged with coastal area tags, except when transiting the Chesapeake Bay area.

3. It shall be unlawful for any person to possess striped bass tags issued for previous years for the Chesapeake Bay area, coastal area, or any other jurisdiction.

4. It shall be unlawful for any person to possess Potomac River Fisheries Commission striped bass tags in Virginia waters, except when transiting the Virginia tributaries of the Potomac River to land in Virginia and as provided by subsection C of this section.

5. It shall be unlawful for any person to possess any non-Virginia jurisdictional striped bass tags in Virginia waters or striped bass tagged with any non-Virginia jurisdictional striped bass tags, except as provided by subdivision 4 of this subsection and subsection C of this section.

6. Any violation of this subsection shall result in the confiscation and impoundment of all striped bass tags or striped bass on the vessel.

C. It shall be unlawful for any person ~~onboard~~ on board any vessel to possess any striped bass tags in the Great Wicomico-Tangier Striped Bass Management Area, except current year striped bass tags issued by the jurisdictions of the Virginia Marine Resources Commission, State of Maryland, or Potomac River Fisheries Commission and according to the following provisions:

1. It shall be unlawful for any person ~~onboard~~ on board any vessel to possess more than one jurisdiction's tags or more than one jurisdiction's tagged striped bass in the Great Wicomico-Tangier Striped Bass Management Area.

2. It shall be unlawful for any person ~~onboard~~ on board any vessel to place, set, or fish any gear that can harvest striped bass in the Great Wicomico-Tangier Striped Bass Management Area when in possession of any striped bass tags not issued by the Virginia Marine Resources Commission.

3. Any violation of this subsection shall result in the confiscation and impoundment of all striped bass tags or striped bass on the vessel.

D. Shares of the commercial striped bass quota held by any permitted fisherman may be transferred to any other person who is a licensed registered commercial fisherman; such transfer shall allow the transferee to harvest striped bass in a quantity equal to the share transferred. Any transfer of striped bass commercial shares shall be limited by the following conditions:

1. Shares of commercial striped bass quota shall not be permanently transferred in any quantity less than 500 pounds, or 100% of unused permanent shares, in any year from February 1 through October 31. Permanent transfers of shares of commercial striped bass quota shall be prohibited from November 1 through January 31.

2. Shares of commercial striped bass quota shall not be temporarily transferred in any quantity less than 500 pounds from February 1 through October 31 or less than 200 pounds from November 1 through December 15. Temporary transfers of shares of commercial striped bass quota shall be prohibited from December 16 through January 31.

3. No licensed registered commercial fisherman shall hold more than 2.0% of the total annual Chesapeake Bay area commercial striped bass harvest quota or more than 11% of the total annual coastal area commercial striped bass harvest quota.

4. No transfer of striped bass commercial harvest quota shall be authorized by the Virginia Marine Resources Commission (commission) unless transferor and transferee provide up-to-date records of all commercial landings of striped bass and striped bass tag use to the commission prior to such transfer.

5. No transfer of striped bass commercial harvest quota shall be authorized unless such transfer is documented on a form provided by the Virginia Marine Resources Commission, notarized by a lawful ~~Notary Public~~ notary public, and approved by the ~~commissioner~~ Commissioner of Marine Resources.

E. Transfers of Chesapeake Bay area or coastal area striped bass commercial quota from one person to another may be permanent or temporary. Transferred quota from the Chesapeake Bay area striped bass commercial quota shall only be used by the transferee for striped bass harvested from the Chesapeake Bay area, and transferred quota from the coastal area striped bass commercial quota shall only be used by the transferee for striped bass harvested from the coastal area. Permanent transfers of commercial quota shall grant to the transferee that transferred percentage of the quota for future years, and the transferor loses that same transferred percentage of the quota in future years. Temporary transfers of individual striped bass commercial harvest quota shall allow the transferee to harvest only that transferred percentage of the quota during the year in which the transfer is approved. Transferors are solely responsible for any overage of the

transferred percentage of the quota by the transferee. Thereafter, any percentage of the transferred striped bass commercial quota, less any overage incurred by the transferee, reverts back to the transferor.

~~F. The commission will issue striped bass tags to permitted striped bass commercial fishermen as follows: those fishermen permitted only for Chesapeake Bay area or coastal area harvests of striped bass will receive their allotment of tags prior to the start of the fishing season. Any permitted fisherman eligible for both Chesapeake Bay area and coastal area tags shall receive only one type of area-specific tag allotment, of his choosing, prior to the start of the fishing season, and his other type of area-specific tags will be distributed when it has been determined from the commission's mandatory harvest reporting program that the fisherman has used all of his first allotment of tags and has not exceeded his individual harvest quota. The commissioner may authorize the distribution of the second allotment of area-specific tags to a fisherman eligible for both Chesapeake Bay area and Coastal area tags prior to that fisherman's complete use of his first allotment of tags provided that fisherman surrenders any remaining tags of his first allotment of tags.~~

~~G.~~ F. Striped bass tags are valid only for use by the permittee to whom the tags were allotted. The permittee shall be on board the boat or vessel when striped bass are harvested and tags are applied. Nothing in this subsection shall prevent a permitted commercial hook-and-line fisherman from using three crew members who are not registered commercial fishermen to assist in the harvest of his allotment of striped bass.

~~H.~~ G. At the place of capture, and before leaving that place of capture, tags shall be passed through the mouth of the fish and one gill opening, and interlocking ends of the tag shall then be connected such that the tag may only be removed by breaking. Failure to comply with these provisions shall be a violation of this chapter.

~~I.~~ H. It shall be unlawful to bring to shore any commercially caught striped bass that has not been tagged at the place of capture by the fisherman with a ~~tamper evident~~ tamper-evident, numbered tag provided by the commission. It shall be unlawful to possess striped bass in a quantity greater than the number of tags in possession. If a permittee violates this section, the entire amount of untagged striped bass, as well as the number of tags equal to the amount of striped bass in his possession, shall be confiscated. Any confiscated striped bass shall be considered as a removal from that permittee's harvest quota. Any confiscated striped bass tags shall be impounded by the commission. Upon confiscation, the marine police officer shall inventory the confiscated striped bass and may redistribute the catch by one or a combination of the following methods:

1. The marine police officer shall secure a minimum of two bids for purchase of the confiscated striped bass from approved and licensed seafood buyers. The confiscated fish will be sold to the highest bidder, and all funds derived from such sale shall be deposited to the Commonwealth pending court resolution of the charge of violating the possession limits established in this chapter. All of the collected funds and confiscated tags will be returned to the accused upon a finding of innocence or forfeited to the Commonwealth upon a finding of guilt.

2. The marine police officer shall provide the confiscated striped bass to commission staff for biological sampling of the catch. Upon receipt of confiscated striped bass, commission staff will secure a minimum of two estimates of value per pound for striped bass from approved and licensed seafood buyers. The confiscated tags and the estimated value of confiscated striped bass provided for biological sampling will be reimbursed to the accused upon a finding of innocence or retained by the commission upon a finding of guilt.

~~J.~~ I. Altering or attempting to alter any tag for the purpose of reuse shall constitute a violation of this chapter.

~~K.~~ J. Prior to receiving any commercial season's allotment of striped bass tags, a permitted commercial harvester shall be required to have returned all unused tags from the previous commercial season to the commission within 30 days of harvesting their individual harvest quota, or by the second Thursday in January, whichever comes first. Any unused tags that cannot be turned in to the commission shall be accounted for by the harvester submitting an affidavit to the commission that explains the disposition of the unused tags that are not able to be turned into the commission. Each person shall be required to pay a processing fee of $25, plus $0.13 per tag, for any unused tags that are not turned in to the commission.

~~L.~~ K. Any person with remaining unused striped bass commercial quota in the current year requesting additional commercial season striped bass tags shall provide up-to-date records of landings and account for all previously issued tags prior to receiving an additional allotment of tags. The harvester shall submit an affidavit to the commission that explains the disposition of the tags that are not accounted for and shall be required to pay a processing fee of $25, plus $0.13 per tag, for such tags to the commission.

~~M.~~ L. For the commercial fishing season, one type of tag shall be distributed to Chesapeake Bay area permittees and one type of tag shall be distributed to coastal area permittees. For the Chesapeake Bay area, the tag shall only be used on striped bass 18 inches or greater in total length. For the coastal area, the tag shall only be used on striped bass 28 inches or greater in total length. The possession of any improperly tagged striped bass by any permitted striped bass fisherman shall be a violation of this chapter.

VA.R. Doc. No. R25-8093; Filed December 3, 2024, 11:54 a.m.

TITLE 8. EDUCATION

STATE BOARD OF EDUCATION

Action Withdrawn

Title of Regulation: **8VAC20-40. Regulations Governing Educational Services for Gifted Students (amending 8VAC20-40-20, 8VAC20-40-40, 8VAC20-40-55, 8VAC20-40-60).**

Statutory Authority: § 22.1-16 of the Code of Virginia.

The State Board of Education has WITHDRAWN the regulatory action for **8VAC20-40, Regulations Governing Educational Services for Gifted Students**, which was published as a Notice of Intended Regulatory Action in 36:2 VA.R. 89 September 16, 2019. The purpose of the proposed action was to review the regulation for potential changes in keeping with the current best practices in the field of gifted education, including integrating findings from relevant research regarding the identification of gifted students, equitable access for underrepresented populations of students to effective program options, appropriate curricular designs and instructional strategies, delivery of services, and teacher professional development in providing appropriate instruction for gifted students; however, the board has recently changed its advisory committee structure. A regulatory revision of the regulation will likely be revisited in the future; therefore, this action is being withdrawn by the board.

Agency Contact: Jim Chapman, Director of Board Relations, Department of Education, James Monroe Building, 101 North 14th Street, 25th Floor, Richmond, VA 23219, telephone (804) 750-8750, or email jim.chapman@doe.virginia.gov.

VA.R. Doc. No. R20-6142; Filed December 3, 2024, 1:43 p.m.

TITLE 9. ENVIRONMENT

STATE WATER CONTROL BOARD

Fast-Track Regulation

Title of Regulation: **9VAC25-875. Virginia Erosion and Stormwater Management Regulation (amending 9VAC25-875-580, 9VAC25-875-590).**

Statutory Authority: §§ 62.1-44.15:28 and 62.1-44.52 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: January 29, 2025.

Effective Date: July 1, 2025.

Agency Contact: Rebeccah W. Rochet, Deputy Director, Division of Water Permitting, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 801-2950, or email rebeccah.rochet@deq.virginia.gov.

Basis: Section 62.1-44.15 of the Code of Virginia requires the State Water Control Board to establish such standards of quality and policies for any state waters consistent with the general policy set forth in the State Water Control Law (§ 62.1-44.2 et seq. of the Code of Virginia). Section 62.1-44.15:28 of the Code of Virginia authorizes the board to adopt and amend regulations for erosion control and stormwater management.

Purpose: The proposed changes protect water quality in the Commonwealth, which is essential to the health, safety, and welfare of Virginia's citizens, and the changes are needed to establish appropriate and necessary permitting requirements for discharges of stormwater. The changes are essential because current regulatory requirements are based on data and information that is over 15 years old and not reflective of current conditions or based on current understanding of conditions in the state's watersheds. The goal of this regulatory action is to update sections and requirements that are out of date and burdensome to the regulated community because they do not reflect current practices, technology, or data about climate, land use, and nutrient loading.

Rationale for Using Fast-Track Rulemaking Process: This rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process because the regulated community and other stakeholders who have been involved in the process to update the Virginia Erosion and Stormwater Management Regulation (9VAC25-875) and develop the Virginia Stormwater Management Handbook have requested the proposed changes to reflect current practices, technology, and engineering methods.

Substance: The proposed changes include updating compliance alternatives used to meet and demonstrate water quality and water quantity requirements, which account for improvements in best management practice methods and technology and better information about land use patterns and water quality in the Chesapeake Bay Watershed. The proposed changes reflect the application of data and information in the models that the U.S. Environmental Protection Agency and other researchers use to study, monitor, and predict conditions in the Chesapeake Bay and other watersheds in Virginia. The fast-track rulemaking action will have an effective date of July 1, 2025.

Issues: The primary advantage to the public is that using methods that better reflect current conditions produces more predictable, effective results, which in turn contributes to the efficient and effective functioning of government. There are no disadvantages to the public. The advantage to the agency and the Commonwealth is that the proposed changes will allow the Department of Environmental Quality and localities that implement erosion and stormwater management programs to have standards that are consistent with practices and equipment that planners, designers, and engineers are currently using without having to evaluate proposals on a case-by-case basis,

since the standards are not incorporated in the current regulations. There are no disadvantages to the agency or the Commonwealth.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The State Water Control Board (board) proposes to amend the regulatory text to align it with updates made to two guidance documents: the Virginia Runoff Reduction Method and the Virginia Stormwater Management Handbook.

Background. Per the Virginia Erosion and Stormwater Management Act (§ 62.1-44.15:24 et seq. of the Code of Virginia),[2] this regulation contains requirements for the effective control of soil erosion, sediment deposition, and stormwater, including nonagricultural runoff, that shall be met in any Virginia Erosion and Stormwater Management Program (VESMP) to prevent the unreasonable degradation of properties, stream channels, waters, and other natural resources. Subsection 3 of § 62.1-44.15:28 requires the board's regulations to be based upon relevant physical and developmental information concerning the watersheds and drainage basins of the Commonwealth, including data relating to land use, soils, hydrology, geology, size of land area being disturbed, proximate water bodies and their characteristics, transportation, and public facilities and services; subsection 6 of § 62.1-44.15:28 requires the regulations to establish water quality and water quantity technical criteria that shall be periodically modified as required in order to reflect current engineering methods. The regulation being amended does not itself contain detailed technical criteria and methods. Instead it requires use of a guidance document, the Virginia Runoff Reduction Method (VRRM), or another equivalent methodology approved by the Department of Environmental Quality (DEQ) for compliance with the water quality criteria in Article 3, Part V (9VAC25-875-570 et seq.). It also refers to a second guidance document, the Virginia Stormwater Management Handbook (Handbook), and also to the Virginia Stormwater Best Management Practice (BMP) Clearinghouse for the use of BMPs. According to DEQ, the last substantive amendments to the water quality and water quantity technical requirements contained in the VRRM were in 2011, but relevant requirements outside of the document have changed significantly since then. One of the significant changes that occurred is the decrease in the amount of phosphorus that can be used following the 2011 ban on phosphorus in lawn fertilizer (Chapter 341 of the 2011 Acts of Assembly.)[3] Another significant change is the completion of the 2017 Chesapeake Bay Phase III Watershed Implementation Plan. In order to update the standards by this action as required by law, DEQ has relied on modeling performed by Virginia Tech. The results of the modeling have been incorporated in the VRRM, and updates to this guidance document were published in Virginia Register on 2/26/2024 with a delayed effective date of 4/27/2024.[4] The first of the proposed changes would align the regulatory text with this updated VRRM guidance by updating the date of that document (which is incorporated by reference into the regulation) from 2011 to 2024. A second proposed change would amend the language to state that the total phosphorus load of new development projects shall not exceed 0.26 pounds per acre per year rather than 0.41 pounds per acre per year, and that the new standard would apply to plans submitted on or after July 1, 2025. A third substantive change would remove 15 BMPs from the regulatory text. According to DEQ, these BMPs have been added to the Handbook, which became effective July 1, 2024.[5]

Estimated Benefits and Costs: The first and the second proposed changes to the text are intertwined in that the incorporation of the updated VRRM guidance in this regulation (stating that the total phosphorus load of new development projects shall not exceed 0.26 pounds per acre per year instead of the current 0.41 pounds per acre per year standard) is the impetus rather than the other way around. In other words, the change in the regulatory phosphorus standard is driven by the guidance document that reflects recent Virginia Tech modeling, rather than the regulatory text itself driving that change. Similarly, the recent VRRM guidance document allows the use of the earlier guidance document until July 1, 2025, and therefore the regulatory text is being amended to reflect that fact. The proposed change in the allowable amount of total phosphorus load from the current 0.41 pounds per acre per year to 0.26 pounds for new development projects is more restrictive than the status quo. As mentioned above, the proposed standard reflects new modeling results performed by Virginia Tech using the latest phosphorus loading rates. However, in the new modeling, phosphorus loading rates were also updated for each land cover type for consistency with the Chesapeake Bay Model loading rates. The updated loading rates for several landcovers are lower than before, implying a decrease in the amount of phosphorus being transported to the Bay. This results from the continuing trend whereby an increasing percentage of forested/natural land (81%) is being converted for development relative to the percentage of additional agricultural land (19%) that is being converted. In addition to newer landcover loading rates, there have been reductions in fertilizer application rates due to the 2011 ban on fertilizers that contain phosphorus. Similarly, the third substantive change to the regulatory text reflects the changes that occurred in the Handbook that became effective July1, 2024. According to DEQ, the 15 BMPs listed in the regulation have been added to the new Handbook with updated specifications. Also, the new Handbook contains additional BMPs as follows:

Section 7.4 of the handbook contains the following BMPs: Straw Wattles (C-ECM-01), Impermeable Diversion Fence (C-ECM-02), Slope Interruption Device (C-ECM-03), Waterbars and Sheet Flow Breakers (C-ECM-08), Flexible Transition Mat (C-ECM-16), Cofferdam Crossing (C-ENV-05), Stable Wetland Crossing (C-ENV-06), Gabions (C-ENV-07), Pump Around Diversion (C-ENV-08), Overnight Channel Protection (C-ENV-09), Trenchless Silt Fence (C-ENV-10), Wetland Berm (C-ENV-11), Wetland Weir Outlet (C-ENV-12), Wetland Cell Sediment Trap (C-ENV-13), Modified Turbidity Curtain for Stream (C-ENV-14), Seeding, Mulching, and Soil Stabilization (Wetlands/Streams) (C-ENV-15), Compost Filter Sock (C-PCM-05), Wood Chip Filter Berm (C-SCM-06), Rock Filter Outlet (C-SCM-08), Concrete Washout Pit (C-SCM-13), and Compost Blankets (C-SSM-04).

Section 8.5 of the handbook contains the following BMPs: Regenerative Stormwater Conveyance (P-CNV-04), Tree Planting (P-FIL-09), Quantity Only Approach to BMPs (P-SUP-07), and Permanent Level Spreader (P-SUP-08).

According to DEQ, the updates to the VRRM guidance, total phosphorus load of new development projects, and BMPs for water quality compliance are expected to result in direct benefits to stakeholders and the Commonwealth. DEQ reports that these benefits have been addressed in the ORM Economic Review Forms for the Handbook and VRRM guidance. In addition to significant time savings for planners, applicants, and reviewers, the benefits include the following when used in conjunction with amendments to this regulation: Allows stakeholders to use new post-development BMPs set out in the new Handbook, for meeting water quality criteria requirements. Allows stakeholders to use expanded and updated BMP specifications that are in the Handbook. Provides stakeholders the option of using a fourth land-cover criteria, mixed open, which offers a lower-cost alternative to achieve restoration of ground cover (as compared to re-establishing forest conditions). Reduces the total phosphorus load for new development so that it more accurately reflects (i) the projected mix of land to be developed in Virginia's Chesapeake Bay watershed and accounts for reduced phosphorus loading that has resulted from the 2011 ban on phosphorus in lawn fertilizer; and (ii) less phosphate runoff leaving construction sites and entering state waters, particularly the Chesapeake Bay and its watershed. In addition, the Handbook provides up-to-date specifications for BMPs which would allow more efficient review of plans and permit applications since users and regulators would both have the same information and expectations.

In summary, the updates to the two guidance documents account for improvements in BMP methods and technology, and in information about land use patterns and water quality in the Chesapeake Bay Watershed. They also reflect application of data and information in the models that the U.S. Environmental Protection Agency and other researchers use to study, monitor, and predict conditions in the Chesapeake Bay and other watersheds in Virginia. Better information and updated techniques/BMPs allow the regulated community to use more effective, lower cost alternatives than the outdated requirements and specifications. More specifically, the VRRM guidance version 1.0 and the newer version (VRRM 3.0) are both based on older, more limited selections of BMPs and a phosphorus load of 0.41 pounds/acre/year. While this level is higher than the load in the proposed VRRM version 4.1 (0.26 pounds/acre/year), modeling by DEQ and the agency contractor (Virginia Tech) show that the total phosphorus reduction for projects with moderate or higher levels of impervious cover is actually lower at the loading rate in VRRM 4.1, thus reducing the cost of typical multifamily and affordable housing projects. In addition, VRRM 4.1 provides additional lower cost options for complying with the water quality technical criteria outlined in the regulation, thereby, lowering costs for site plan preparation, construction, and maintenance. DEQ is unable to precisely quantify these benefits because the benefits are site specific as they depend on the soil type, land-use plan, and type of vegetative cover. However, modeling by Virginia Tech indicates requirements for onsite best management practices can be reduced by approximately 5.0% and the amount of offsite nutrient credits required may fall by as much as 50% or about 1,000 pounds of total phosphorus per year. As noted in the ORM Economic Review Form for the VRRM 4.1, the current average market cost for a one-pound total phosphorus credit is $15,000, resulting in an estimated cost savings of $15 million per year. Similarly, the new BMP specifications are now included in the Handbook. Although some of the BMPs are already allowed under variance procedures, DEQ believes that the new handbook would reduce confusion and uncertainty for stakeholders, agency staff, and local erosion and stormwater management program authorities about the specifications for multiple types of best management practices (i.e., their design, use, and maintenance), thereby lowering costs for site plans, plan review, and implementation. This would also allow faster plan development and review. DEQ estimates this could result in at least a 30-day time savings, decreasing the current average permit review and approval process, which includes time for the applicant to make revisions and resubmit plans, from 155 days to 125 days. According to DEQ, faster plan development and review is expected to provide $233 million/year savings to the $28 billion/year construction activity in Virginia. The $233 million/year savings is the difference between the present value of $28 billion assuming 10% interest rate for the cost of debt and equity over an 11-month period versus over a 12-month period. The calculated present value is $233 million higher when a project reaches completion in a shorter timeframe. Moreover, updating the VRRM allows users and communities to benefit from reduced and more accurate levels of phosphorus runoff. DEQ is also unable to quantify these benefits because the benefits are site specific since they depend on the soil type, land-use plan, and type of vegetative cover. However, because the new VRRM 4.1 indirectly encourages meadows or re-forestation instead of managed turf, maintenance costs may be reduced at a project site and

environmental benefits (cleaner air and water) result from increased meadow and forest cover. In addition, moving to a single source (the handbook for erosion and stormwater BMPs) for implementation of the new laws would allow projects to go to construction sooner and take advantage of a wider selection of BMPs.

Businesses and Other Entities Affected. This regulation applies to owners and operators who submit plans, obtain permits, and maintain compliance with requirements to control erosion and stormwater runoff from land-disturbing activities. No entity is disproportionately affected. The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[6] An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.[7] The proposals are mainly expected to reduce phosphorus nutrient credits as much as 50% worth $15 million a year. Similarly, faster plan review is expected to speed up the pace of construction by at least 30 days, which is estimated to be worth $233 million/year in savings to the $28 billion/year construction activity in Virginia. Thus, no adverse impact is indicated.

Small Businesses[8] Affected.[9] The proposed amendments do not appear to adversely affect small businesses.

Localities[10] Affected.[11] The proposed regulations apply throughout the Commonwealth. However, it is likely that the localities in the Chesapeake Bay Watershed (roughly east of Interstate 95) are more susceptible to the proposed changes. DEQ believes that localities may need additional staff time to attend training associated with the updated VRRM, BMP design specifications, and Handbook; enjoy benefits from up-to-date specifications, which would result in less staff time in reviewing, inspecting, and working through issues before and during construction; and enjoy benefits of completing construction projects faster and with fewer delays, thus supporting economic growth within the locality.

Projected Impact on Employment. There is no available data to estimate the impact on employment.

Effects on the Use and Value of Private Property. The new BMP specifications in the Handbook are expected to speed up real estate development time frames by approximately 30-days and provide $233 million/year savings to the $28 billion/year construction activity in Virginia. In addition, the proposed changes are expected to reduce compliance costs with meeting the erosion and stormwater runoff rules. Thus, effected point and non-point sources may see a positive impact of their asset values. In addition, to the extent proposed changes improve water quality and the environment, real estate values in affected areas may be positively affected.

[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] https://law.lis.virginia.gov/vacode/title62.1/chapter3.1/section62.1-44.15:28/.

[3] https://lis.virginia.gov/cgi-bin/legp604.exe?111+ful+CHAP0341.

[4] https://townhall.virginia.gov/L/GDocForum.cfm?GDocForumID=2385.

[5] https://townhall.virginia.gov/L/GDocForum.cfm?GDocForumID=2494.

[6] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[7] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[8] Pursuant to § 2.2-4007.04, 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."

[9] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[10] "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.

[11] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

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

Summary:

The amendments (i) remove March 1, 2011, specifications for 15 best management practices (BMPs); (ii) expand and update options for BMPs for water quality compliance that are included the Virginia Stormwater Management Handbook; (iii) update the effective version of the Virginia Runoff Reduction Method based on current water quality models and nutrient loading data; and (iv) update the total phosphorus load of new development projects to account for decreased phosphorus use following the 2011 ban on phosphorus in lawn fertilizer.

9VAC25-875-580. Water quality design criteria requirements.

A. In order to protect the quality of state waters and to control the discharge of stormwater pollutants from regulated activities, the following minimum design criteria and statewide standards for stormwater management shall be applied to the site.

1. New development. ~~The~~ For plans submitted on or after July 1, 2025, the total phosphorus load of new development projects shall not exceed ~~0.41~~ 0.26 pounds per acre per year, as calculated pursuant to 9VAC25-875-590.

2. Development on prior developed lands.

a. For land-disturbing activities disturbing greater than or equal to one acre that result in no net increase in impervious cover from the predevelopment condition, the total phosphorus load shall be reduced at least 20% below the predevelopment total phosphorus load.

b. For regulated land-disturbing activities disturbing less than one acre that result in no net increase in impervious cover from the predevelopment condition, the total phosphorus load shall be reduced at least 10% below the predevelopment total phosphorus load.

c. For land-disturbing activities that result in a net increase in impervious cover over the predevelopment condition, the design criteria for new development shall be applied to the increased impervious area. Depending on the area of disturbance, the criteria of subdivision 2 a or 2 b of this subsection shall be applied to the remainder of the site.

d. In lieu of subdivision 2 c of this subsection, the total phosphorus load of a linear development project occurring on prior developed lands shall be reduced 20% below the predevelopment total phosphorus load.

e. The total phosphorus load shall not be required to be reduced to below the applicable standard for new development unless a more stringent standard has been established by a locality.

B. Compliance with subsection A of this section shall be determined in accordance with 9VAC25-875-590.

C. Nothing in this section shall prohibit a VESMP authority from establishing more stringent water quality design criteria requirements in accordance with § 62.1-44.15:33 of the Code of Virginia.

9VAC25-875-590. Water quality compliance.

A. Compliance with the water quality design criteria set out in subdivisions A 1 and A 2 of 9VAC25-875-580 shall be determined by utilizing the Virginia Runoff Reduction Method, effective April 27, 2024, which is hereby incorporated by reference or another equivalent methodology that is approved by the department.

B. The BMPs listed in ~~this subsection~~ the Virginia Stormwater Management Handbook (https://online.encodeplus.com/regs/deq-va/index.aspx) are approved for use as necessary to effectively reduce the phosphorus load and runoff volume in accordance with the Virginia Runoff Reduction Method, April 27, 2024. Other approved BMPs found through the Virginia Stormwater BMP Clearinghouse (https://www.deq.virginia.gov/our-programs/water/stormwater/stormwater-construction/bmp-clearinghouse) may also be utilized. Design specifications and the pollutant removal efficiencies for all approved BMPs are found through the Virginia Stormwater Management Handbook and the Virginia Stormwater BMP Clearinghouse.

~~1. Vegetated Roof (Version 2.3, March 1, 2011);~~

~~2. Rooftop Disconnection (Version 1.9, March 1, 2011);~~

~~3. Rainwater Harvesting (Version 1.9.5, March 1, 2011);~~

~~4. Soil Amendments (Version 1.8, March 1, 2011);~~

~~5. Permeable Pavement (Version 1.8, March 1, 2011);~~

~~6. Grass Channel (Version 1.9, March 1, 2011);~~

~~7. Bioretention (Version 1.9, March 1, 2011);~~

~~8. Infiltration (Version 1.9, March 1, 2011);~~

~~9. Dry Swale (Version 1.9, March 1, 2011);~~

~~10. Wet Swale (Version 1.9, March 1, 2011);~~

~~11. Sheet Flow to Filter/Open Space (Version 1.9, March 1, 2011);~~

~~12. Extended Detention Pond (Version 1.9, March 1, 2011);~~

~~13. Filtering Practice (Version 1.8, March 1, 2011);~~

~~14. Constructed Wetland (Version 1.9, March 1, 2011); and~~

~~15. Wet Pond (Version 1.9, March 1, 2011).~~

C. Nonproprietary BMPs differing from those ~~listed~~ referenced in subsection B of this section shall be reviewed and approved by the director in accordance with procedures established by the department.

D. Proprietary BMPs listed through the Virginia Stormwater BMP Clearinghouse are approved for use in accordance with the Virginia Runoff Reduction Method, April 27, 2024. Any proprietary BMP approved for use after July 1, 2020, must meet the requirements of § 62.1-44.15:28 A 9 of the Code of Virginia.

E. A VESMP authority may establish limitations on the use of specific BMPs in accordance with § 62.1-44.15:33 of the Code of Virginia.

F. The VESMP authority or department as the VSMP authority shall have the discretion to allow for application of the design criteria to each drainage area of the site. However, where a site drains to more than one HUC, the pollutant load

reduction requirements shall be applied independently within each HUC unless reductions are achieved in accordance with a comprehensive watershed stormwater management plan in accordance with 9VAC25-875-660.

G. Offsite alternatives where allowed in accordance with 9VAC25-875-610 may be utilized to meet the design criteria of subsection A of 9VAC25-875-580.

H. Any publicly owned treatment works that is permitted under the watershed general VPDES permit pursuant to § 62.1-44.19:14 of the Code of Virginia and is constructing or expanding the treatment works, wastewater collection system, or other facility used for public wastewater utility operations may, in accordance with § 62.1-44.19:21.2 C of the Code of Virginia, permanently retire a portion of the publicly owned treatment ~~works'~~ work's wasteload allocation to meet the design criteria of subsection A of 9VAC25-875-580. Notice shall be given by such applicant to the VESMP authority and to the department.

DOCUMENTS INCORPORATED BY REFERENCE (9VAC25-875)

~~Virginia Runoff Reduction Method: Instructions and Documentation, March 28, 2011~~

Virginia Runoff Reduction Method: Instructions and Documentation, effective April 27, 2024

Virginia Erosion and Sediment Control Regulation Minimum Standard 19 in effect prior to July 1, 2014

VA.R. Doc. No. R25-7962; Filed December 6, 2024, 9:31 a.m.

TITLE 12. HEALTH

STATE BOARD OF HEALTH

Fast-Track Regulation

Title of Regulation: **12VAC5-450. Rules and Regulations Governing Campgrounds (amending 12VAC5-450-187).**

Statutory Authority: §§ 35.1-11 and 35.1-17 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: January 29, 2025.

Effective Date: February 13, 2025.

Agency Contact: Julie Henderson, Director of Food and General Environmental Services, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7455, FAX (804) 864-7475, TDD (800) 828-1120, or email julie.henderson@vdh.virginia.gov.

Basis: Section 35.1-11 of the Code of Virginia authorizes the State Board of Health to promulgate and enforce regulations, including the use of precautions to prevent the transmission of communicable diseases, hygiene, sanitation, safety, and physical plant management. Section 35.1-17 of the Code of Virginia authorizes the board to regulate campgrounds.

Purpose: The purpose of the amendments is to clarify standards for material used in the conveyance and storage of hand washing water at temporary campgrounds. Currently, the regulation requires any tanks, hoses, or appurtenances used to store or distribute water to be of "food-grade" construction. However, most portable hand washing sinks used by industry do not meet this standard. In traditional plumbed settings, hand washing water is considered potable water and is required to meet the standard of water provided for drinking. In the settings of temporary campgrounds, temporary hand washing sinks, when used, provide extra sanitation for campers using portable toilets, but are not used as drinking water fountains.

The proposed amendments exempt portable hand washing sinks from meeting the full requirements applied to other water provided for drinking or showering in temporary campgrounds. To ensure the amendments have no adverse impact on public health, any portable hand washing sink that does not meet food-grade standards will be required to post a sign notifying campers not to drink the water.

Rationale for Using Fast-Track Rulemaking Process: The amendments are expected to be noncontroversial and appropriate for the fast-track rulemaking process because the amendments relax the requirements related to water in portable handwashing sinks and are anticipated to be welcomed by the regulated industry.

Substance: The proposed amendments exempt portable hand washing sinks at temporary campgrounds from meeting the existing construction requirement for water distribution or storage tanks, while displaying a sign stating, "Hand washing water is not for drinking."

Issues: The primary advantage of the amendments is additional flexibility provided to campground operators and companies that supply portable sanitation facilities. The amendments align requirements to current industry standards, while still protecting public health through other existing provisions and the requirement for signage. The primary advantage to the agency is that the changes provide clearer and more practical standards for portable hand washing sinks. There are no known or anticipated disadvantages to the public or the Commonwealth associated with the proposed changes or pertinent matters of interest to the regulated community, government officials, or the public.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The State Board of Health (board) proposes to exempt portable hand washing sinks at temporary campgrounds from the requirement in the current regulation that tanks, hoses, or appurtenances used to distribute water be of food-grade construction, disinfected between uses, and protected from contamination and backflow. Additionally, the board proposes to require that the portable hand washing sinks maintain a one-part-per million chlorine residual and display a sign stating, "Hand washing water is not for drinking."

Background. Temporary campgrounds are those associated with temporary events, such as fairs, festivals, or music concerts. These events often do not have permanent infrastructure, and thus basic sanitation needs are met through the use of portable toilets and, often, portable hand washing sinks.[2] In traditional plumbed settings, hand washing water is considered potable water, and thus is required to meet the standard of water provided for drinking. In the settings of temporary campgrounds, temporary hand washing sinks, when used, provide extra sanitation for campers using portable toilets, but are not used as drinking water fountains. The current regulation provides that any tanks, hoses, or appurtenances that are used to distribute water shall be of food-grade construction. This requirement extends to any tanks or appurtenances providing water, including those associated with portable hand washing sinks. According to the Virginia Department of Health (VDH), current industry design of the majority of portable hand washing sinks do not meet this requirement through standard materials and design. As a result, the current regulation may discourage the use of portable hand washing sinks, and thus hand washing, at temporary campgrounds.

Estimated Benefits and Costs: By examining the prices of portable sinks in the market, VDH determined that non-food-grade portable hand washing sinks on average cost $488 less than food-grade portable hand washing sinks. As it is optional to have portable hand washing sinks at temporary campgrounds, lowering the effective cost of providing hand washing stations at temporary events, such as fairs, festivals, or music concerts may increase the likelihood that they are provided. Thus, the proposal to eliminate the requirement that portable hand washing sinks at temporary campgrounds be of food-grade construction may result in more hand washing at events at temporary campgrounds. This may help reduce the spread of communicable diseases.[3] The current regulation already states that the source water transported to the temporary campground have a one-part-per-million chlorine residual. That, combined with the proposed requirement that the water in the portable hand washing sinks maintain a one-part-per million chlorine residual, should help ensure that the water is disinfected to the extent that it is safe for hand washing.[4] Dropper bottles of chlorine can be purchased for $15 or less.[5] Further, the proposed requirement that there be a sign stating "Hand washing water is not for drinking" should help ensure that people do not drink the water that may or may not be safe to drink. The cost of such a sign could be minimal if written on, say, scrap cardboard.

Businesses and Other Entities Affected. The proposed amendments affect temporary campground operators and portable hand washing sink distributors and service providers.[6] VDH reports that there were approximately 45 temporary campground applications processed in calendar year 2021. The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[7] An 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. The proposal does not create an adverse impact.

Small Businesses[8] Affected.[9] The proposed amendments would not adversely affect small businesses.

Localities[10] Affected.[11] The proposed amendments may disproportionally affect localities that tend to host temporary events, such as fairs, festivals, or music concerts. The proposal does not introduce costs to local governments.

Projected Impact on Employment. The proposal may moderately increase business for firms that sell or rent non-food-grade portable hand washing sinks, but not likely enough to substantially affect total employment.

Effects on the Use and Value of Private Property. The proposal may moderately increase business for firms that sell or rent non-food-grade portable hand washing sinks. Their value may commensurately increase. The proposed amendments do not affect real estate development costs.

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[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] Source: Virginia Department of Health.

[3] See U.S. Centers for Disease Control and Prevention article: https://www.cdc.gov/handwashing/why-handwashing.html.

[4] Source: VDH.

[5] Available on Amazon.com as of February 3, 2023.

[6] VDH does not have data on the number of temporary campground operators and portable hand washing sink distributors and service providers.

[7] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[8] Pursuant to § 2.2-4007.04, 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."

[9] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[10] "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.

[11] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The State Board of Health concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

The amendments clarify standards for water storage and distribution at temporary campgrounds, allowing for the use of equipment that is more in line with industry standards and less burdensome to regulated entities and requiring signage stating that water in portable handwashing sinks is not for human consumption.

12VAC5-450-187. Temporary campgrounds.

~~Temporary campgrounds,~~ A temporary campground, as permitted ~~under~~ pursuant to 12VAC5-450-40 F, shall be exempt from the following requirements ~~of this chapter~~:

1. ~~Density~~ The density, size, and designation requirements of 12VAC5-450-70 B ~~through~~, C, and D. ~~However, temporary campgrounds~~ A permit holder shall establish a maximum number of campsites and campers~~. Temporary campground permit holders shall~~; ensure that the size, location, and orientation of campsites do not prohibit the safe and timely evacuation of campsites in the event of an emergency~~;~~ and ensure that vehicular traffic routes and parking are located where they do not ~~pose a safety risk to~~ endanger campers.

2. ~~Permanent~~ The permanent water supply requirements of 12VAC5-450-80.

a. If the permit holder provides potable water ~~is provided~~ in the form of a waterworks or private well, ~~then it must~~ the potable water shall comply with 12VAC5-450-80 A, B, and D through I. If no piped water source is provided, ~~then~~ the permit holder shall make available bottled water that complies with 21 CFR Part 129 ~~shall be available,~~ and shall advertise the unavailability of piped water ~~must be advertised~~ to campers prior to the ~~time of the~~ temporary camping event.

b. ~~Water may be transported in from a source that meets~~ If the permit holder provides water that is transported to a temporary campground, the source of the water shall meet the requirements of 12VAC5-450-80 A. ~~Water shall be~~ The permit holder shall ensure that water is transported in tanks of food-grade construction and ~~maintain~~ maintains a ~~one-parts-per-million~~ one-part-per-million chlorine residual. ~~Any~~ With the exception of portable hand washing sinks, the permit holder shall ensure that tanks, hoses, or appurtenances that are used to distribute water ~~shall be~~ are of food-grade construction, ~~be~~ disinfected between uses, and ~~be~~ protected from contamination and backflow.

c. If the permit holder provides portable hand washing sinks, the permit holder shall ensure that the sink water maintains a one-part-per-million chlorine residual and shall display a sign stating, "Hand washing water is not for drinking."

3. The dump station and slop sink requirements of 12VAC5-450-90 D, E, and G.

~~a. Greywater disposal barrels or approved equivalents shall be provided and serviced during the event unless all of the following conditions apply: (i) piped water is not available, (ii) portable showers and handwashing sinks are provided, and (iii) cooking and campfires are prohibited. Only water from cooking, washing, or bathing shall be disposed of in greywater barrels.~~

~~b.~~ a. If self-contained camping units are present at the campground, the permit holder shall ensure that a sewage handler ~~shall be~~ who possesses a valid sewage handling permit as required by 12VAC5-610 and any license required by the Onsite Sewage System Professionals Licensing Regulations (18VAC160-40) and Title 54.1 of the Code of Virginia is available to pump holding tanks as appropriate during the event. ~~Sewage handlers must possess a valid sewage handling permit as required by 12VAC5-610 and any licensure required by the Board for Waterworks and Wastewater Works Operators and Onsite Sewage Professionals in accordance with that board's regulations (18VAC160-30 and 18VAC160-40) and Title 54.1 of the Code of Virginia.~~

b. The permit holder shall service and provide graywater slop sinks or disposal barrels at least daily during an event held at a temporary campgrounds, except if:

(1) Piped water is not available;

(2) Portable showers and hand washing sinks are provided; and

(3) Cooking and campfires are prohibited.

The permit holder shall ensure that water from cooking, washing, or bathing is disposed of in graywater barrels.

4. ~~Permanent~~ The permanent sanitary facility requirements in 12VAC5-450-100 A, B, and I. ~~However,~~ The permit holder shall provide portable toilet facilities ~~shall be provided~~ at the ratio of at least one toilet for every 75 campers~~,~~ and shall ensure that at least one toilet ~~shall comply~~ complies with the Americans with Disabilities Act (42 USC § 12101 et seq.). No campsite ~~shall~~ may be farther than 500 feet from ~~any~~ a portable

toilet. ~~Portable sinks and showers are not required, although~~ The permit holder shall provide hand sanitizer ~~must be provided~~ in all portable toilets ~~where~~ if portable sinks are not provided. ~~All portable units shall be serviced~~ The permit holder shall ensure that the portable sanitary facilities are serviced at least daily during the event unless the applicant or permit holder can demonstrate that ~~they are provided in numbers significant~~ there are enough portable sanitary facilities to warrant a reduced-maintenance service schedule. If the temporary campground has permanent bathroom facilities, the facilities may count ~~towards~~ toward the required number of portable toilets. ~~Campers~~ The permit holder may exclude campers who will be camping in self-contained camping units ~~shall not be counted toward~~ from the total number of campers ~~in~~ for the purposes of calculating the required number of portable toilets.

VA.R. Doc. No. R25-7315; Filed December 9, 2024, 10:35 a.m.

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Fast-Track Regulation

Title of Regulation: **12VAC30-50. Amount, Duration, and Scope of Medical and Remedial Care Services (amending 12VAC30-50-165).**

Statutory Authority: §§ 32.1-324 and 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: January 29, 2025.

Effective Date: February 13, 2025.

Agency Contact: Meredith Lee, Policy, Regulations, and Manuals Supervisor, Department of Medical Assistance Services, 600 East Broad Street, Richmond, VA 23219, telephone (804) 371-0552, FAX (804) 786-1680, or email meredith.lee@dmas.virginia.gov.

Basis: Section 32.1-325 of the Code of Virginia grants the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. Section 32.1-324 of the Code of Virginia authorizes the director of the Department of Medical Assistance Services (DMAS) to administer and amend the Plan for Medical Assistance according to the board's requirements. Chapter 266 of the 2023 Acts of Assembly requires the board to establish a provision for payment of medical assistance for the initial purchase or replacement of complex rehabilitative technology (CRT) manual and power wheelchair bases and related accessories, as defined by the department's durable medical equipment program policy, for patients who reside in nursing facilities.

Purpose: The proposed changes protect the health, safety, and welfare of citizens because adding coverage for CRT for nursing facility (NF) members through the DMAS durable medical equipment (DME) program helps ensure that the mobility needs of individuals with complex medical conditions are met and enables these members to maintain a higher level of independence. Adding coverage also allows individuals with complex medical conditions access to the same equipment that is available to those in the community. CRTs have been shown to increase continuity of care and prevent complications like bedsores or falls.

Rationale for Using Fast-Track Rulemaking Process: This action is expected to be noncontroversial and appropriate for the fast-track rulemaking process because coverage of CRT for NF members through the DMAS DME program helps ensure the mobility needs of those who have complex medical conditions are met, allows members to maintain a higher level of independence, and provides them with access to the same equipment available to those Medicaid members cared for in the community settings. CRTs have also been shown to increase continuity of care and prevent complications like bedsores or falls.

Substance: This regulatory action allows DME providers to bill Medicaid directly for CRT. Medicaid currently reimburses nursing facilities a per diem rate that covers care for Medicaid members enrolled in a nursing facility. The majority of the member's DME needs must be provided by the facility under this per diem. There are a few exceptions to this rule because of the high costs associated with certain types of equipment, including CRT. Consequently, nursing facilities are not required to pay for CRT items, but members can use patient pay, which refers to the member's obligation to pay toward the cost of long-term care if the member's income exceeds certain thresholds, to cover these costs.

Many DME providers are not willing to accept patient pay because the DME provider has to recoup the cost of the item via the patient pay each month until the item has been paid in full, which can sometimes take years. If a DME company does not accept the patient pay adjustment, or if the Medicaid member does not have a patient pay amount, the member must pay out of pocket for the needed equipment, which has created access issues for some members who reside in nursing facilities. Chapter 266 of the 2023 Acts of Assembly provides a means for members residing in nursing facilities to obtain CRT by allowing DME providers to bill Medicaid directly for the items instead of using the patient pay adjustment process.

Issues: The primary advantage to the public is that the mobility needs of those who have complex medical conditions are met, thus allowing members to maintain a higher level of independence. It also provides members residing in NFs with access to the same equipment that is available to those in the community. CRTs have also been shown to increase continuity of care and prevent complications like bedsores or falls. The primary advantage to the agency and to the Commonwealth is that the mobility needs of those who have complex medical conditions are met, thus allowing members to maintain a higher level of independence. This also provides members residing in NFs with access to the same equipment that is available to those in the community. CRTs have also been shown to increase continuity of care and prevent complications

like bedsores or falls. There are no disadvantages to the public, the agency, or the Commonwealth. There are no disadvantages to the public, the agency, or the Commonwealth.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 266 of the 2023 Acts of General Assembly,[2] the Director of the Department of Medical Assistance Services (DMAS), acting on behalf of the Board of Medical Assistance Services, proposes to update the regulation to add authorization for payments for the initial purchase or replacement of complex rehabilitative technology manual and power wheelchair bases and related accessories for patients who reside in nursing facilities.

Background. The Medicaid reimbursement of manual and power wheelchair bases and related accessories for patients in nursing homes has been allowed since July 1, 2023, under the legislation. This regulatory action updates the regulatory language for the provision of such durable medical equipment by Medicaid, and as such the regulation itself is not changing the status quo. DMAS reports that prior to the enactment of Chapter 266 in 2023, many DME providers were not willing to accept members patient pay for wheelchair bases and related accessories because the DME provider had to recoup the cost of the item via the patient pay each month until the item has been paid in full, which sometimes took years. (Patient pay refers to the member obligation to pay toward the cost of long-term care if the member income exceeds certain thresholds). If a DME company did not accept the patient pay adjustment, or if the Medicaid member did not have the patient pay amount, the member had to pay out of pocket for the needed equipment if they were able. This has created access issues for some members who resided in nursing facilities. To address such access issues, Chapter 266 authorized Medicaid to pay for initial purchase or replacement of CRT manual and power wheelchair bases and related accessories for patients who reside in nursing facilities allowing DME providers to bill Medicaid directly for the items instead of using the patient pay adjustment process. This action would update the regulatory language to incorporate the provision of this new benefit.

Estimated Benefits and Costs: According to DMAS, the legislative coverage for the initial purchase or replacement of CRT manual and power wheelchair bases and related accessories for nursing facility members through the DME program ensures the mobility needs of those who have complex medical conditions are met, allows members to maintain a higher level of independence, and provides them with access to the same equipment available to those Medicaid members cared for in the community settings. CRTs have also been shown to increase continuity of care and prevent complications like bedsores or falls. The fiscal impact statement for the legislation[3] estimated that annually $1,272,060 in state general funds and $1,335,690 in federal matching funds (i.e., $2.6 million total funds) would be needed to purchase approximately 379 wheelchairs at an expected average cost of $6,884.46 per wheelchair across 250 nursing facilities based on a survey conducted by a workgroup (HB 241) originating from the 2022 General Assembly. A more recent estimate from DMAS, as of April 16, 2024, indicates the total annual cost to be $2.4 million (i.e., $1,147,888 in general funds, and $1.242,549 in federal matching funds). Approximately, one half of the total costs of this benefit is absorbed by the state general funds and the remaining half is provided by the federal government. While general fund dollars represent an expenditure of state funds, which could potentially be used for other purposes, the federal funds are a net injection into the Commonwealth economy. In other words, if it was not for this purpose, the federal funds would not be available. Thus, the additional federal funds should help expand Virginia's economy. However, since this benefit has already been provided under the legislation, the only impact of this regulatory action is to update the regulatory text to reflect the provision of this benefit to Medicaid members residing in nursing facilities.

Businesses and Other Entities Affected. The proposed changes incorporate in the regulation reimbursement authorization of an estimated 379 wheelchairs per year for Medicaid members residing in nursing facilities. No entity appears to be disproportionately affected. The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[4] An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.[5] The proposal simply updates the regulation to incorporate a new benefit provided by legislation. Thus, no adverse impact is indicated on account of this regulatory action.

Small Businesses[6] Affected.[7] The proposed amendments do not appear to adversely affect small businesses.

Localities[8] Affected.[9] The proposed amendments do not introduce costs for localities.

Projected Impact on Employment. This regulatory action by itself does not affect total employment.

Effects on the Use and Value of Private Property. No impact on the use and value of private property nor on real estate development costs is expected on account of this regulatory action.

[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of

businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] https://lis.virginia.gov/cgi-bin/legp604.exe?231+ful+CHAP0266.

[3] https://lis.virginia.gov/cgi-bin/legp604.exe?231+oth+HB1512FER122+PDF.

[4] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[5] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[6] Pursuant to § 2.2-4007.04, 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."

[7] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[8] "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.

[9] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Department of Medical Assistance Services has reviewed the economic impact analysis prepared by the Department of Planning and Budget and raises no issues with this analysis.

Summary:

Pursuant to Chapter 266 of the 2023 Acts of Assembly, the amendments (i) define "complex rehabilitation technology" and (ii) allow the Department of Medical Assistance Services to reimburse for the initial purchase or replacement of complex rehabilitative technology manual and power wheelchair bases and related accessories for patients who reside in nursing facilities.

12VAC30-50-165. Durable medical equipment suitable for use in the home.

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

"Affirmative contact" means speaking, either face-to-face or by phone, with either the individual or caregiver in order to ascertain that the DME is still needed and appropriate. Such contacts shall be documented in the individual's medical record.

"Certificate of Medical Necessity" or "CMN" means the DMAS-352 form required to be completed and submitted in order for DMAS to provide reimbursement.

"Complex rehabilitation technology" or "CRT" means manual and powered wheelchairs and their accessories that are customized and individually configured to meet the specific medical, physical, and functional needs of the individual who has a primary diagnosis resulting from a congenital disorder, progressive or degenerative neuromuscular disease, or from certain types of injury or trauma.

"Designated agent" means an entity with whom DMAS has contracted to perform functions such as provider audits and prior authorizations of services.

"DMAS" means the Department of Medical Assistance Services.

"DME provider" means those entities enrolled with DMAS to render DME services.

"Durable medical equipment" or "DME" means medical equipment, supplies, and appliances suitable for use in the home consistent with 42 CFR 440.70(b)(3) that treat a diagnosed condition or assist the individual with functional limitations.

"Enteral nutrition" refers to any method of feeding that uses the gastrointestinal tract to deliver part or all of an individual's caloric requirements. "Enteral nutrition" may include a routine oral diet, the use of liquid supplements, or delivery of part or all of the daily requirements by use of a tube, which is called tube feeding.

"Expendable supply" means an item that is used and then disposed of.

"Frequency of use" means the rate of use by the individual as documented by the number of times per day, week, or month, as appropriate, a supply is used by the individual. Frequency of use must be recorded on the face of the CMN in such a way that reflects whether a supply is used by the individual on a daily, weekly, or monthly basis. Frequency of use may be documented on the CMN as a range of the rate of use. By way of example and not limitation, the frequency of use of a supply may be expressed as a range, such as four to six adult diapers per day. However, large ranges shall not be acceptable documentation of frequency of use, for example, the range of one to six adult diapers per day shall not be acceptable. The frequency of use provides the justification for the total quantity of supplies ordered on the CMN.

"Functional limitation" means the inability to perform a normal activity.

"Practitioner" means a licensed provider of physician services as defined in 42 CFR 440.50.

"Prior authorization" or "PA" means the process of approving either by DMAS or its prior authorization contractor for the purposes of DMAS reimbursement for the service for the individual before it is rendered or reimbursed.

"Quantity" means the total number of supplies ordered on a monthly basis as reflected on the CMN. The monthly quantity of supplies ordered for the individual shall be dependent upon the individual's frequency of use.

B. General requirements and conditions.

1. a. All medically necessary supplies and equipment shall be covered. Unusual amounts, types, and duration of usage must be authorized by DMAS in accordance with published policies and procedures. When determined to be cost effective by DMAS, payment may be made for rental of the equipment in lieu of purchase.

b. No provider shall have a claim of ownership on DME reimbursed by Virginia Medicaid once it has been delivered to the Medicaid individual. Providers shall only be permitted to recover DME, for example, when DMAS determines that it does not fulfill the required medically necessary purpose as set out in the Certificate of Medical Necessity, when there is an error in the ordering practitioner's CMN, or when the equipment was rented.

2. DME providers shall adhere to all applicable federal and state laws and regulations and DMAS policies for DME. DME providers shall comply with all other applicable Virginia laws and regulations requiring licensing, registration, or permitting. Failure to comply with such laws and regulations that are required by a licensing agency shall result in denial of coverage for DME.

3. DME must be furnished pursuant to a properly completed Certificate of Medical Necessity (CMN) (DMAS-352). In order to obtain Medicaid reimbursement, specific fields of the DMAS-352 form shall be completed as specified in 12VAC30-60-75.

4. DME shall be ordered by the licensed practitioner and shall be related to medical treatment of the Medicaid individual. The complete DME order shall be recorded on the CMN for Medicaid individuals to receive such services. In the absence of a different effective period determined by DMAS or its designated agent, the CMN shall be valid for a maximum period of six months for Medicaid individuals younger than 21 years of age. In the absence of a different effective period determined by DMAS or its designated agent, the maximum valid time period for CMNs for Medicaid individuals 21 years of age and older shall be 12 months. The validity of the CMN shall terminate when the individual's medical need for the prescribed DME no longer exists as determined by the licensed practitioner.

5. DME shall be furnished exactly as ordered by the licensed practitioner who signed the CMN. The CMN and any supporting verifiable documentation shall be fully completed, signed, and dated by the licensed practitioner, and in the DME provider's possession within 60 days from the time the ordered DME is initially furnished by the DME provider. Each component of the DME shall be specifically ordered on the CMN by the licensed practitioner.

6. The CMN shall not be changed, altered, or amended after the licensed practitioner has signed it. If the individual's condition indicates that changes in the ordered DME are necessary, the DME provider shall obtain a new CMN. All new CMNs shall be signed and dated by the licensed practitioner within 60 days from the time the ordered supplies are furnished by the DME provider.

7. DMAS or its designated agent shall have the authority to determine a different length of time from those specified in subdivisions 4, 5, and 6 of this subsection that a CMN may be valid based on medical documentation submitted on the CMN. The CMN may be completed by the DME provider or other appropriate health care professionals, but it shall be signed and dated by the licensed practitioner, as specified in subdivision 5 of this subsection. Supporting documentation may be attached to the CMN but the licensed practitioner's entire order for DME shall be on the CMN.

8. The DME provider shall retain a copy of the CMN and all supporting verifiable documentation on file for purposes of the DMAS post payment audit review. DME providers shall not create or revise CMNs or supporting documentation for this service after the initiation of the post payment review audit process. Licensed practitioners shall not complete, sign, or date CMNs once the post payment audit review has begun.

9. The DME provider shall be responsible for knowledge of items requiring prior authorization and the limitation on the provision of certain items as described in the Virginia Medicaid Durable Medical Equipment and Supplies Manual, Appendix B. Appendix B shall be the official listing of all items covered through the Virginia Medicaid DME program and list the service limits, items that require prior authorization, billing units, and reimbursement rates.

10. The DME provider shall be required to make affirmative contact with the individual or ~~his~~ the individual's caregiver and document the interaction prior to the next month's delivery and prior to the recertification CMN to ~~assure~~ ensure that the appropriate quantity, frequency, and product are provided to the individual.

11. Supporting documentation, added to a completed CMN, shall be allowed to further justify the medical need for DME. Supporting documentation shall not replace the requirement

for a properly completed CMN. The dates of the supporting documentation shall coincide with the dates of service on the CMN, and the supporting documentation shall be signed and dated by the licensed practitioner.

C. The billing unit for incontinence supplies (such as diapers, pull-ups, and panty liners) shall be by each product. For example, if the incontinence supply being provided is diapers, the billing unit would be by individual diaper, rather than a case of diapers. Prior authorization shall be required for incontinence supplies provided in quantities greater than the allowable service limit per month.

D. Supplies, equipment, or appliances that are not covered include the following:

1. Space conditioning equipment, such as room humidifiers, air cleaners, and air conditioners;

2. DME for any hospital or nursing facility resident~~, except~~. For nursing facility residents, an exception is made for (i) ventilators and associated supplies ~~or~~; (ii) specialty beds for the treatment of wounds ~~consistent with DME criteria for nursing facility residents~~; and (iii) complex rehabilitation technology manual and power wheelchair bases and related accessories that have been prior approved by DMAS or designated agent;

3. Furniture or appliances not defined as medical equipment (such as blenders, bedside tables, mattresses other than for a hospital bed, pillows, blankets or other bedding, special reading lamps, chairs with special lift seats, hand-held shower devices, exercise bicycles, and bathroom scales);

4. Items that are only for the individual's comfort and convenience or for the convenience of those caring for the individual (e.g., a hospital bed or mattress because the individual does not have a bed; wheelchair trays used as a desk surface); mobility items used in addition to primary assistive mobility aide for the convenience of the individual or ~~his~~ the individual's caregiver (e.g., an electric wheelchair plus a manual chair); and cleansing wipes;

5. Prosthesis, except for artificial arms, legs, and their supportive devices, which shall be prior authorized by DMAS or designated agent;

6. Items and services that are not reasonable and necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body member (e.g., dentifrices; toilet articles; shampoos that do not require a licensed practitioner's prescription; dental adhesives; electric toothbrushes; cosmetic items, soaps, and lotions that do not require a licensed practitioner's prescription; sugar and salt substitutes; and support stockings);

7. Orthotics, including braces, diabetic shoe inserts, splints, and supports;

8. Home or vehicle modifications;

9. Items not suitable for or not used primarily in the home setting (e.g., car seats, equipment to be used while at school, etc.);

10. Equipment for which the primary function is vocationally or educationally related (e.g., computers, environmental control devices, speech devices, etc.);

11. Diapers for routine use by children younger than three years of age who have not yet been toilet trained;

12. Equipment or items that are not suitable for use in the home; and

13. Equipment or items that the Medicaid individual or ~~his~~ the individual's caregiver is unwilling or unable to use in the home.

E. For coverage of blood glucose meters for pregnant women, refer to 12VAC30-50-510.

F. Coverage of home infusion therapy.

1. Home infusion therapy shall be defined as the administration of fluids, drugs, chemical agents, or nutritional substances to individuals through intravenous (I.V.) therapy or an implantable pump in the home setting. DMAS shall reimburse for these services, supplies, and drugs on a service day rate methodology established in 12VAC30-80-30. The therapies to be covered under this policy shall be: hydration therapy, chemotherapy, pain management therapy, drug therapy, and total parenteral nutrition (TPN). All the therapies that meet criteria shall be covered and do not require prior authorization. The established service day rate shall reimburse for all services delivered in a single day. There shall be no additional reimbursement for special or extraordinary services. In the event of incompatible drug administration, a separate HCPCS code shall be used to allow for rental of a second infusion pump and purchase of an extra administration tubing. When applicable, this code may be billed in addition to the other service day rate codes. There shall be documentation to support the use of this code on the I.V. Implementation Form. Proper documentation shall include the need for pump administration of the medications ordered, frequency of administration to support that they are ordered simultaneously, and indication of incompatibility.

2. The service day rate payment methodology shall be mandatory for reimbursement of all I.V. therapy services except for the individual who is enrolled in the Technology Assisted Waiver.

3. The following limitations shall apply to this service:

a. This service must be medically necessary to treat an individual's medical condition. The service must be ordered and provided in accordance with accepted medical practice. The service must not be desired solely for the convenience of the individual or the individual's caregiver.

b. In order for Medicaid to reimburse for this service, the individual shall:

(1) Reside in either a private home or a domiciliary care facility, such as an assisted living facility. Because the reimbursement for DME is already provided under institutional reimbursement, individuals in hospitals, nursing facilities, rehabilitation centers, and other institutional settings shall not be covered for this service;

(2) Be under the care of a licensed practitioner who prescribes the home infusion therapy and monitors the progress of the therapy;

(3) Have body sites available for peripheral intravenous catheter or needle placement or have a central venous access; and

(4) Be capable of either self-administering such therapy or have a caregiver who can be adequately trained, is capable of administering the therapy, and is willing to safely and efficiently administer and monitor the home infusion therapy. The caregiver must be willing to and be capable of following appropriate teaching and adequate monitoring. In cases where the individual is incapable of administering or monitoring the prescribed therapy and there is no adequate or trained caregiver, it may be appropriate for a home health agency to administer the therapy.

G. The DME vendor shall provide the equipment and supplies as prescribed by the licensed practitioner on the CMN. Orders shall not be changed unless the vendor obtains a new CMN, which includes the licensed practitioner's signature, prior to ordering the equipment or supplies or providing the equipment or supplies to the individual.

H. Medicaid shall not provide reimbursement to the DME vendor for services that are provided (i) prior to the date prescribed by the licensed practitioner; (ii) prior to the date of the delivery; or (iii) when services are not provided in accordance with DMAS published regulations and guidance documents. If reimbursement is denied for one or all of these reasons, the DME vendor shall not bill the Medicaid individual for the service that was provided.

I. The following criteria shall be satisfied through the submission of adequate and verifiable documentation on the CMN satisfactory to DMAS. Medically necessary DME shall be:

1. Ordered by the licensed practitioner on the CMN;

2. A reasonable and necessary part of the individual's treatment plan;

3. Consistent with the individual's diagnosis and medical condition, particularly the functional limitations and symptoms exhibited by the individual;

4. Not furnished solely for the convenience, safety, or restraint of the individual, the family or caregiver, the licensed practitioner, or other licensed practitioner or supplier;

5. Consistent with generally accepted professional medical standards (i.e., not experimental or investigational); and

6. Furnished at a safe, effective, and cost-effective level suitable for use in the individual's home environment.

J. Medical documentation shall provide DMAS or the designated agent with evidence of the individual's DME needs. Medical documentation may be recorded on the CMN or evidenced in the supporting documentation attached to the CMN. The following applies to the medical justification necessary for all DME services regardless of whether prior authorization is required. The documentation is necessary to identify:

1. The medical need for the requested DME;

2. The diagnosis related to the reason for the DME request;

3. The individual's functional limitation and its relationship to the requested DME;

4. How the DME service will treat the individual's medical condition;

5. For expendable supplies, the quantity needed and the medical reason the requested amount is needed;

6. The frequency of use to describe how often the DME is used by the individual;

7. The estimated duration of use of the equipment (rental and purchased);

8. Any other treatment being rendered to the individual relative to the use of DME;

9. How the needs were previously met, identifying changes that have occurred that necessitate the DME;

10. Other alternatives tried or explored and a description of the success or failure of these alternatives;

11. How the DME service is required in the individual's home environment; and

12. The individual's or ~~his~~ the individual's caregiver's ability, willingness, and motivation to use the DME.

K. DME provider responsibilities. To receive reimbursement, the DME provider shall, at a minimum, perform the following:

1. Verify the individual's current Medicaid eligibility;

2. Determine whether the ordered items are a covered service and require prior authorization;

3. Deliver all items ordered by the licensed practitioner;

4. Deliver only the quantities ordered by the licensed practitioner on the CMN and prior authorized by DMAS if required;

5. Deliver only the items for the periods of service covered by the licensed practitioner's order and prior authorized, if required, by DMAS;

6. Maintain a copy of the licensed practitioner's signed CMN and all verifiable supporting documentation for all DME ordered;

7. Document and justify the description of services (i.e., labor, repairs, maintenance of equipment);

8. Document and justify the medical necessity, frequency, and duration for all items and supplies as set out in the Medicaid DME guidance documents;

9. Document all DME provided to an individual in accordance with the licensed practitioner's orders. The delivery ticket or proof of delivery shall document the requirements as stated in subsection L of this section; and

10. Meet documentation requirements for the use of DME billing codes that have Individual Consideration (IC) indicated as the reimbursement fee to include a complete description of the items, a copy of the supplies invoices or the manufacturer's cost information, and all discounts that were received by the DME provider. Additional information regarding requirements for the IC reimbursement process can be found in the relevant agency guidance document.

L. Proof of delivery.

1. The delivery ticket shall contain the following information:

a. The Medicaid individual's name and Medicaid number or date of birth or a unique identifier (e.g., an individual's medical record number);

b. A detailed description of the items being delivered, including the product names and brands;

c. The serial numbers or the product numbers of the DME, if available;

d. The quantity delivered; and

e. The dated signature of either the individual or ~~his~~ the individual's caregiver.

2. If a commercial shipping service is used, the DME provider's records shall reference, in addition to the information required in subdivision 1 of this subsection, the delivery service's package identification numbers with a copy of the delivery service's delivery ticket, which may be printed from the online record on the delivery service's website.

a. The delivery service's ticket identification numbers shall be recorded on the DME provider's delivery documentation.

b. The service delivery documentation may be substituted for the individual's signature as proof of delivery.

c. In the absence of a delivery service's ticket, the DME provider shall obtain the individual's or ~~his~~ the individual's caregiver's dated signature on the DME provider's delivery ticket as proof of delivery.

3. Providers may use a postage-paid delivery invoice from the individual or ~~his~~ the individual's caregiver as a form of proof of delivery. The descriptive information concerning the items delivered, as described in subdivisions 1 and 2 of this subsection, as well as the required signature and date from either the individual or ~~his~~ the individual's caregiver, shall be included on this invoice.

4. DME providers shall make affirmative contact with the individual or ~~his~~ the individual's caregiver and document the interaction prior to dispensing repeat orders or refills to ensure that:

a. The item is needed;

b. The quantity, frequency, and product are appropriate; and

c. The individual resides at the address in the provider's records.

5. The DME provider shall contact the individual prior to each delivery. This contact shall not occur any sooner than seven days prior to the delivery or shipping date and shall be documented in the individual's record.

6. DME providers shall not deliver refill orders sooner than five days prior to the end of the usage period.

7. Providers shall not bill for dates of service prior to delivery. The provider shall confirm receipt of the DME via the shipping service record showing the item was delivered prior to billing. Claims for refill orders shall be the start of the new usage period and shall not overlap with the previous usage period.

8. The purchase prices listed in the Virginia Medicaid Durable Medical Equipment and Supplies Manual, Appendix B, represent the amount DMAS shall pay for newly purchased equipment. Unless otherwise approved by DMAS or its designated agent, documentation on the delivery ticket shall reflect that the purchased equipment is new upon the date of the service billed. Any warranties associated with new equipment shall be effective from the date of the service billed. Since Medicaid is the payer of last resort, the DME provider shall explore coverage available under the warranty prior to requesting coverage of repairs from DMAS.

9. DME for home use for an individual being discharged from a hospital or nursing facility may be delivered to the hospital or nursing facility one day prior to the discharge. However, the DME provider's claim date of service shall not begin prior to the date of the individual's discharge from the hospital or nursing facility.

M. Enteral nutrition products. Coverage of enteral nutrition (EN) that does not include a legend drug shall be limited to when the nutritional supplement is administered orally or through a nasogastric or gastrostomy tube and is necessary to treat a medical condition. DMAS shall provide coverage for nutritional supplements for enteral feeding only if the nutritional supplements are not available over the counter. Additionally, DMAS shall cover medical foods that are (i) specific to inherited diseases and metabolic disorders; (ii) not generally available in grocery stores, health food stores, or the retail section of a pharmacy; and (iii) not used as food by the general population. Coverage of EN shall not include the provision of routine infant formula or feedings as meal replacement only. Coverage of medical foods shall not extend to regular foods prepared to meet particular dietary restrictions, limitations, or needs, such as meals designed to address the situation of individuals with diabetes or heart disease. A nutritional assessment shall be required for all individuals for whom nutritional supplements are ordered.

1. General requirements and conditions.

a. Enteral nutrition products shall only be provided by enrolled DME providers.

b. DME providers shall adhere to all applicable DMAS policies, laws, and regulations. DME providers shall also comply with all other applicable Virginia laws and regulations requiring licensing, registration, or permitting. Failure to comply with such laws and regulations shall result in denial of coverage for enteral nutrition that is regulated by such licensing agency.

2. Service units and service limitations.

a. DME shall be furnished pursuant to the Certificate of Medical Necessity (DMAS-352).

b. The DME provider shall include documentation related to the nutritional evaluation findings on the CMN and may include supplemental information on any supportive documentation submitted with the CMN.

c. DMAS shall reimburse for medically necessary formulae and medical foods when used under a licensed practitioner's direction to augment dietary limitations or provide primary nutrition to individuals via enteral or oral feeding methods.

d. The CMN shall contain a licensed practitioner's order for the enteral nutrition products that are medically necessary to treat the diagnosed condition and the individual's functional limitation. The justification for enteral nutrition products shall be demonstrated in the written documentation either on the CMN or on the attached supporting documentation. The CMN shall be valid for a maximum period of six months.

e. Regardless of the amount of time that may be left on a six-month approval period, the validity of the CMN shall terminate when the individual's medical need for the prescribed enteral nutrition products ends, as determined by the licensed practitioner.

f. A face-to-face nutritional assessment completed by trained clinicians (e.g., physician, physician assistant, nurse practitioner, registered nurse, or a registered dietitian) shall be completed as required documentation of the need for enteral nutrition products.

g. Prior authorization of enteral nutrition products shall not be required. The DME provider shall ~~assure~~ ensure that there is a valid CMN (i) completed every six months in accordance with subsection B of this section and (ii) on file for all Medicaid individuals for whom enteral nutrition products are provided.

(1) The DME provider is further responsible for assuring that enteral nutrition products are provided in accordance with DMAS reimbursement criteria in 12VAC30-80-30 A 6.

(2) Upon post payment review, DMAS or its designated contractor may deny reimbursement for any enteral nutrition products that have not been provided and billed in accordance with this section and DMAS policies.

h. DMAS shall have the authority to determine that the CMN is valid for less than six months based on medical documentation submitted.

3. Provider responsibilities.

a. The DME provider shall provide the enteral nutrition products as prescribed by the licensed practitioner on the CMN. Physician orders shall not be changed unless the DME provider obtains a new CMN prior to ordering or providing the enteral nutrition products to the individual.

b. The licensed practitioner's order on the CMN shall specify either a brand name of the enteral nutrition product being ordered or the category of enteral nutrition products that must be provided. If a licensed practitioner orders a specific brand of enteral nutrition product, the DME provider shall supply the brand prescribed. The licensed practitioner order shall include the daily caloric intake and the route of administration for the enteral nutrition product. Supporting documentation may be attached to the CMN, but the entire licensed practitioner's order shall be on the CMN.

c. The CMN shall be signed and dated by the licensed practitioner within 60 days of the CMN begin service date. The order shall not be backdated to cover prior dispensing of enteral nutrition products. If the CMN is not signed and dated by the licensed practitioner within 60 days of the CMN begin service date, the CMN shall become valid on the date of the licensed practitioner's signature.

d. The CMN shall include all of the following elements:

(1) Height of individual (or length for pediatric patients);

(2) Weight of individual. For initial assessments, indicate the individual's weight loss over time;

(3) Tolerance of enteral nutrition product (e.g., is the individual experiencing diarrhea, vomiting, constipation). This element is only required if the individual is already receiving enteral nutrition products;

(4) Route of administration; and

(5) The daily caloric order and the number of calories per package or can.

e. Medicaid reimbursement shall be recovered when the enteral nutrition products have not been ordered on the CMN. Supporting documentation is allowed to justify the medical need for enteral nutrition products. Supporting documentation shall not replace the requirement for a properly completed CMN. The dates of the supporting documentation shall coincide with the dates of service on the CMN, and the supporting documentation shall be signed and dated by the licensed practitioner.

N. Reimbursement denials.

1. DMAS shall deny payment to the DME provider if any of the following occur:

a. Absence of a current, fully completed CMN appropriately signed and dated by the licensed practitioner;

b. Documentation does not verify that the item was provided to the individual;

c. Lack of medical documentation, signed by the licensed practitioner to justify the DME; or

d. Item is noncovered or does not meet DMAS criteria for reimbursement.

2. If reimbursement is denied by Medicaid, the DME provider shall not bill the Medicaid individual for the service that was provided.

O. Replacement DME following a disaster.

1. Medicaid individuals who (i) live in areas that have been declared by the Governor to be subject to a state of emergency in accordance with § 44-146.16 of the Code of Virginia, (ii) live in Virginia and were present in an area of the state that has been declared by the Governor to be subject to a state of emergency in accordance with § 44-146.16 of the Code of Virginia, or (iii) live in Virginia and can prove they were present in a state or federally declared disaster or emergency area in another state when the disaster occurred, and who need to replace DME previously approved by Medicaid that were damaged as a result of the disaster or emergency, may contact a DME provider (either enrolled in fee-for-service Medicaid or a Medicaid health plan) of their choice to obtain a replacement.

a. If the individual's DME provider has gone out of business or is unable to provide replacement DME, the individual may choose another provider who is enrolled as a DME provider with Medicaid or the Medicaid health plan. The original authorization will be canceled or amended and a new authorization will be provided to the new DME provider.

b. The DME provider shall submit a signed statement from the Medicaid individual requesting a change in DME provider in accordance with the declaration by the Governor as a state of emergency due to a disaster and giving the Medicaid individual's current place of residence.

c. The individual can contact the state Medicaid office or the Medicaid health plan to get help finding a new DME provider.

2. For Medicaid enrolled providers, the provider shall make a request to the service authorization contractor; however, a new CMN and medical documentation is not required unless the DME is beyond the service limit (e.g., the individual has a wheelchair that is older than five years). The provider shall keep documentation in the individual's record that includes the individual's current place of residence and states that the original DME was lost due to the disaster.

VA.R. Doc. No. R24-7738; Filed December 6, 2024, 9:42 a.m.

TITLE 13. HOUSING

VIRGINIA HOUSING DEVELOPMENT AUTHORITY

Final Regulation

REGISTRAR'S NOTICE: The Virginia Housing Development Authority is claiming an exemption from the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia) pursuant to § 2.2-4002 A 4 of the Code of Virginia.

Title of Regulation: **13VAC10-180. Rules and Regulations for Allocation of Low-Income Housing Tax Credits (amending 13VAC10-180-10, 13VAC10-180-20, 13VAC10-180-40 through 13VAC10-180-70).**

Statutory Authority: § 36-55.30:3 of the Code of Virginia.

Effective Date: January 1, 2025.

Agency Contact: Fred Bryant, Chief Counsel, Virginia Housing Development Authority, 601 South Belvidere Street, Richmond, VA 23220, telephone (804) 343-5837, or email fred.bryant@virginiahousing.com.

Summary:

The amendments (i) delete unnecessary text to clarify existing requirements; (ii) eliminate expired developer experience point incentives; (iii) require developers intending to put more than five local governments on notice of an intent to submit a Low-Income Housing Tax Credit (LIHTC) application to first meet with Virginia Housing Development Authority staff; (iv) add a new

option for revitalization area points to reduce the burden on developers and localities; (v) add a section to incentivize development on Tribal lands; (vi) revise existing incentives for subsidized funding by limiting the number of points awarded to applicants for obtaining project-based vouchers and by providing an alternative, less burdensome path to obtain the points; (vii) eliminate incentives for the provision of onsite childcare and other services; (viii) add new incentives for developments located within areas of the Commonwealth identified as possessing medium or high levels of economic development activity; (ix) eliminate incentives for submetering water; (x) add incentives for developments built in accordance with the design requirements established by the Virginia Department of Behavioral Health and Developmental Services; (xi) replace two separate requirements to provide Wi-Fi and broadband with a single requirement to provide free Internet to all units; (xii) eliminate incentives related to cooking surfaces and fire prevention features; (xiii) replace and simplify the renewable energy incentive; (xiv) eliminate the incentive to provide free on-call, telephonic, or virtual health care services to residents; (xv) expand the applicability of the transportation incentive by including transportation stations or stops to be built in accordance with existing proffers; (xvi) revise the Small, Women-Owned, and Minority-Owned (SWaM) and service-disabled veteran-owned certification incentive to disqualify contracts where spousal relationship exists between parties; (xvii) revise the socially disadvantaged ownership incentive to exclude spousal partners; (xviii) add a new incentive for nonprofits whose board or executive officer is filled by a socially disadvantaged individual; (xix) add an incentive to promote ownership by veteran-owned businesses; (xx) substantially reduce the efficient use of resources point category; (xxi) substantially reduce the minimum number of application points required to qualify for an allocation of tax credit; (xxii) revise text to enable developers to include an additional fee in basis on 4.0% transactions, provided that at least 30% of the fee is deferred; (xxiii) disqualify from consideration any application seeking more credits than are available within the credit pool in which it competes; (xxiv) clarify the minimum eligibility requirements to compete within the accessible supportive housing pool; (xxv) create a new affordable housing preservation pool; and (xxvi) replace the developer penalty for requesting an extension with an incentive to place in service by deadline.

13VAC10-180-10. Definitions.

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

"Applicant" means an applicant for credits under this chapter and also means the owner of the development to whom the credits are allocated.

"Authority" means the Virginia Housing Development Authority.

"Credits" means the low-income housing tax credits as described in § 42 of the IRC.

"Elderly housing" means any development intended to provide housing for elderly persons as an exemption to the provisions regarding familial status under the United States Fair Housing Act (42 USC § 3601 et seq.).

"IRC" means the Internal Revenue Code of 1986, as amended, and the rules, regulations, notices, and other official pronouncements promulgated thereunder.

"IRS" means the Internal Revenue Service.

"Low-income housing units" means those units that are defined as "low income units" under § 42 of the IRC.

"Low-income jurisdiction" means any city or county in the Commonwealth with an area median income at or below the Virginia nonmetro area median income established by the U.S. Department of Housing and Urban Development (HUD).

"Plan" means the provisions of this chapter governing the distribution, reservation, and allocation by the authority of federal low-income housing tax credits available under § 42 of the IRC for housing developments located throughout the Commonwealth of Virginia for occupancy by low-income persons and families, all in accordance with the requirements of the IRC.

"Principal" means any person (including any individual, joint venture, partnership, limited liability company, corporation, nonprofit organization, trust, or any other public or private entity) that (i) with respect to the proposed development will own or participate in the ownership of the proposed development or (ii) with respect to an existing multifamily rental project has owned or participated in the ownership of such project, all as more fully described ~~hereinbelow~~ in this chapter. The person who is the owner of the proposed development or multifamily rental project is considered a principal. In determining whether any other person is a principal, the following guidelines shall govern: (i) in the case of a partnership that is a principal (whether as the owner or otherwise), all general partners are also considered principals, regardless of the percentage interest of the general partner; (ii) in the case of a public or private corporation or organization or governmental entity that is a principal (whether as the owner or otherwise), principals also include the president, vice president, secretary, and treasurer and other officers who are directly responsible to the board of directors or any equivalent governing body, as well as all directors or other members of the governing body and any stockholder having a 25% or more interest; (iii) in the case of a limited liability company that is a

principal (whether as the owner or otherwise), all members are also considered principals, regardless of the percentage interest of the member; (iv) in the case of a trust that is a principal (whether as the owner or otherwise), all persons having a 25% or more beneficial ownership interest in the assets of such trust; (v) in the case of any other person that is a principal (whether as the owner or otherwise), all persons having a 25% or more ownership interest in such other person are also considered principals; and (vi) any person that directly or indirectly controls, or has the power to control, a principal shall also be considered a principal.

"Qualified application" means a written request for tax credits that is submitted on a form ~~or forms~~ prescribed or approved by the executive director together with all documents required by the authority for submission and meets all minimum scoring requirements.

"Qualified low-income buildings" or "qualified low-income development" means the buildings or development that meets the applicable requirements ~~in~~ to qualify for an allocation of credits under § 42 of the IRC ~~to qualify for an allocation of credits thereunder~~.

13VAC10-180-20. Purpose and applicability.

The following rules and regulations will govern the allocation by the authority of credits pursuant to § 42 of the IRC.

Notwithstanding anything to the contrary ~~herein~~ in this chapter, the executive director is authorized to waive or modify any provision ~~herein~~ of this chapter where deemed appropriate by ~~him~~ the executive director for good cause to promote the goals and interests of the Commonwealth in the federal low-income housing tax credit program, to the extent not inconsistent with the IRC.

The rules and regulations set forth ~~herein~~ in this chapter are intended to provide a general description of the authority's processing requirements and are not intended to include all actions involved or required in the processing and administration of the credits. This chapter is subject to change at any time by the authority and may be supplemented by policies, rules, and regulations adopted by the authority from time to time.

Any determination made by the authority pursuant to this chapter as to the financial feasibility of any development or its viability as a qualified low-income development shall not be construed to be a representation or warranty by the authority as to such feasibility or viability.

Notwithstanding anything to the contrary ~~herein~~ in this chapter, all procedures and requirements in the IRC must be complied with and satisfied.

13VAC10-180-40. Adoption of allocation plan; solicitations of applications.

The IRC requires that the authority adopt a qualified allocation plan ~~which~~ that shall set forth the selection criteria to be used to determine housing priorities of the authority ~~which~~ that are appropriate to local conditions and ~~which~~ that shall give certain priority to and preference among developments in accordance with the IRC. The executive director from time to time may cause housing needs studies to be performed in order to develop the qualified allocation plan and, based upon any such housing needs study and any other available information and data, may direct and supervise the preparation of and approve the qualified allocation plan and any revisions and amendments ~~thereof~~ to the qualified allocation plan in accordance with the IRC. The IRC requires that the qualified allocation plan be subject to public approval in accordance with rules similar to those in § 147(f)(2) of the IRC. The executive director may include all or any portion of this chapter in the qualified allocation plan. However, the authority may amend the qualified allocation plan without public approval if required to do so by changes to the IRC.

The executive director may from time to time take such action ~~as he may deem~~ the executive director deems necessary or proper ~~in order~~ to solicit applications for credits. Such actions may include advertising in newspapers and other media, mailing of information to prospective applicants and other members of the public, and any other methods of public announcement ~~which~~ that the executive director may select as appropriate under the circumstances. The executive director may impose requirements, limitations, and conditions with respect to the submission and selection of applications ~~and the selection thereof~~ as ~~he~~ the executive director shall consider necessary or appropriate.

No application for credits will be accepted for any building that has previously claimed credits and is still subject to the compliance period for such credits after the year such building is placed in service~~. Notwithstanding the limitation set forth in the previous sentence,~~; however, an applicant may submit an application for credits for a building in which an extended low-income housing commitment has been terminated by foreclosure, provided the applicant has no relationship with ~~the~~ any owner ~~or owners~~ of such building during its initial compliance period. No application will be accepted, and no reservation or allocation will be made, for credits available under § 42(h)(3)(C) of the IRC in the case of any buildings or development for which tax-exempt bonds of the authority, or an issuer other than the authority, have been issued and ~~which~~ that may receive credits without an allocation of credits under § 42(h)(3)(C).

13VAC10-180-50. Application.

A. Prior to submitting an application for reservation, applicants shall submit on such form as required by the executive director~~,~~ the letter for authority signature by which

the authority shall notify the chief executive officers (or the equivalent) of the local jurisdictions in which the developments are to be located to provide such officers a reasonable opportunity to comment on the developments.

B. Application for a reservation of credits:

1. Shall be commenced by filing with the authority an application, on such forms as the executive director may from time to time prescribe or approve, together with such documents and additional information ~~(~~, including~~, without limitation,~~ a market study that is prepared by a housing market analyst who meets the authority's requirements for an approved analyst, as set forth on the application form, instructions, or other communication available to the public, that shows adequate demand for the housing units to be produced by the applicant's proposed development~~)~~, as may be requested by the authority in order to comply with the IRC and this chapter and to make the reservation and allocation of the credits in accordance with this chapter. The executive director may reject any application from consideration for a reservation or allocation of credits if in such application the applicant does not provide the proper documentation or information on the forms prescribed by the executive director. In addition to the market study contained in the application, the authority may conduct its own analysis of the demand for the housing units to be produced by each applicant's proposed development.

All sites in an application for a scattered site development may only serve one primary market area. If the executive director determines that the sites subject to a scattered site development are served by different primary market areas, separate applications for credits must be filed for each primary market area in which scattered sites are located within the deadlines established by the executive director.

2. Should include a breakdown of sources and uses of funds sufficiently detailed to enable the authority to ascertain what costs will be incurred and what will comprise the total financing package, including the various subsidies and the anticipated syndication or placement proceeds that will be raised.

3. Shall include the following cost information, if applicable, to determine the feasible credit amount:

a. Site acquisition costs~~,~~;

b. Site preparation costs~~,~~;

c. Construction costs~~,~~;

d. Construction contingency~~,~~;

e. General contractor's overhead and profit~~,~~;

f. Architect and ~~engineer's~~ engineer fees~~,~~;

g. Permit and survey fees~~,~~;

h. Insurance premiums~~,~~;

i. Real estate taxes during construction~~,~~;

j. Title and recording fees~~,~~;

k. Construction period interest~~,~~;

l. Financing fees~~,~~;

m. Organizational costs~~,~~;

n. Rent-up and marketing costs~~,~~;

o. Accounting and auditing costs~~,~~;

p. Working capital and operating deficit reserves~~,~~;

q. Syndication and legal fees~~,~~;

r. Development fees~~,~~; and

s. Other costs and fees.

4. All applications seeking credits for rehabilitation of existing units must provide for contractor construction costs of at least $10,000 per unit for developments financed with tax-exempt bonds and $15,000 per unit for all other developments.

C. Any application that exceeds the cost limits described in ~~this~~ subsection B of this section shall be rejected from further consideration and shall not be eligible for any reservation or allocation of credits. The higher of the following two cost limit calculations: per-unit cost or per-square-foot cost may be utilized by an applicant.

The authority will at least annually establish per-unit and per-square-foot cost limits based upon historical cost data of tax credit developments in the Commonwealth. Such limits will be indicated on the application form, instructions, or other communication available to the public. The cost limits will be established for new construction, rehabilitation, and adaptive reuse development types. The authority will establish geographic limits. For the purpose of determining compliance with the cost limits, the value of a development's land and acquisition costs and such other expenses as the executive director determines are appropriate for the good of the plan will not be included in total development cost. Compliance with applicable cost limits will be determined both at the time of application and also at the time the authority issues the IRS Form 8609, with the higher of the two limits being applicable at the time of IRS Form 8609 issuance.

D. Each application shall include:

1. Plans and specifications in such form and from such person satisfactory to the executive director as to the completion of such plans or specifications.

2. In the case of rehabilitation, a physical needs assessment in such form and substance and prepared by such person satisfactory to the executive director pursuant to the authority's requirements as set forth on the application form, instructions, or other communication available to the public.

3. An environmental site assessment (Phase I) in such form and substance and prepared by such person satisfactory to the executive director pursuant to the authority's

requirements as set forth on the application form, instructions, or other communication available to the public.

4. Evidence of ~~a. Sole~~ (i) sole fee simple ownership of the site of the proposed development by the applicant~~, b. Lease~~; (ii) lease of such site by the applicant for a term exceeding the compliance period (as defined in the IRC) or for such longer period as the applicant represents in the application that the development will be held for occupancy by low-income persons or families~~,~~; or ~~c. Right~~ (iii) right to acquire or lease such site pursuant to a valid and binding written option or contract between the applicant and the fee simple owner of such site for a period extending at least four months beyond any application deadline established by the executive director, provided that such option or contract shall have no conditions within the discretion or control of such owner of such site.

Any contract for the acquisition of a site with existing residential property may not require an empty building as a condition of such contract, unless relocation assistance is provided to displaced households, if any, at such level required by the authority. A contract that permits the owner to continue to market the property, even if the applicant has a right of first refusal, does not constitute the requisite site control required in clause (iii) of this subdivision 4 ~~c of this subsection~~.

No application shall be considered for a reservation or allocation of credits unless such evidence is submitted with the application and the authority determines that the applicant owns, leases, or has the right to acquire or lease the site of the proposed development as described in this subsection.

In the case of acquisition and rehabilitation of developments funded by Rural Development of the U.S. Department of Agriculture (Rural Development), any site control document subject to approval of the partners of the seller does not need to be approved by all partners of the seller if the general partner of the seller executing the site control document provides ~~(i)~~ (a) an attorney's opinion that such general partner has the authority to enter into the site control document and such document is binding on the seller or ~~(ii)~~ (b) a letter from the existing syndicator indicating a willingness to secure the necessary partner approvals upon the reservation of credits.

5. Written evidence satisfactory to the authority (i) of proper zoning or special use permit for such site or (ii) that no zoning requirements or special use permits are applicable.

6. A certification, in a form required by the executive director, of previous participation listing all developments receiving an allocation of tax credits under § 42 of the IRC ~~in which~~ that shows:

a. The principals have or had an ownership or participation interest~~,~~;

b. The location of such developments~~,~~;

c. The number of residential units and low-income housing units in such developments~~,~~; and

d. Such other information as more fully specified by the executive director.

7. Furthermore, for any such development, the applicant must indicate whether the appropriate state housing credit agency has ever filed a Form 8823 with the IRS reporting noncompliance with the requirements of the IRC and that such noncompliance had not been corrected at the time of the filing of such Form 8823. The executive director may reject any application from consideration for a reservation or allocation of credits unless the ~~above~~ information described in subdivision 6 of this subsection is submitted with the application. If, after reviewing the information provided in this ~~subdivision~~ subsection or any other information available to the authority, the executive director determines that the principals do not have the experience, financial capacity, and predisposition to regulatory compliance necessary to carry out the responsibilities for the acquisition, construction, ownership, operation, marketing, maintenance, and management of the proposed development or the ability to fully perform all the duties and obligations relating to the proposed development under law, regulation, and the reservation and allocation documents of the authority or if an applicant is in substantial noncompliance with the requirements of the IRC, the executive director may reject applications by the applicant.

8. No application will be accepted from any applicant with a principal that has or had an ownership or participation interest in a development at the time the authority reported such development to the IRS as no longer in compliance and is no longer participating in the federal low-income housing tax credit program.

9. A certification, in a form required by the executive director, that the design of the proposed development meets all applicable amenity and design requirements required by the executive director for the type of housing to be provided by the proposed development.

E. The application:

1. Should include pro forma financial statements setting forth the anticipated cash flows during the credit period as defined in the IRC.

2. Shall include a certification by the applicant as to the full extent of all federal, state, and local subsidies that apply ~~(~~or that the applicant expects to apply~~)~~ with respect to each building or development.

3. May be required by the executive director to include the submission of a legal opinion or other assurances satisfactory to the executive director as to, among other things, compliance of the proposed development with the

IRC and a certification, together with an opinion of an independent certified public accountant or other assurances satisfactory to the executive director, setting forth the calculation of the amount of credits requested by the application and certifying, among other things, that under the existing facts and circumstances the applicant will be eligible for the amount of credits requested.

F. Each applicant shall commit in the application to provide:

1. Relocation assistance to displaced households, if any, at such level required by the executive director. Each applicant shall commit in the application to use a property management company certified by the executive director to manage the proposed development.

2. Unless prohibited by an applicable federal subsidy program, a leasing preference to individuals:

a. In a target population identified in a memorandum of understanding between the authority and one or more participating agencies of the Commonwealth~~,~~;

b. Having a voucher or other binding commitment for rental assistance from the Commonwealth~~,~~; and

c. Referred to the development by a referring agent approved by the authority. The leasing preference shall not be applied to more than 10% of the units in the development at any given time. The applicant may not impose tenant selection criteria or leasing terms with respect to individuals receiving this preference that are more restrictive than the applicant's tenant selection criteria or leasing terms applicable to prospective tenants in the development that do not receive this preference, the eligibility criteria for the rental assistance from the Commonwealth, or any eligibility criteria contained in a memorandum of understanding between the authority and one or more participating agencies of the Commonwealth.

3. Free Wi-Fi access in the community room of the development and such access shall be restricted to resident only usage.

4. A disclosure, to be acknowledged by tenant, of the availability of renter education from the authority.

G. Each applicant shall commit in the application:

1. Not to require an annual minimum income requirement that exceeds the greater of $3,600 or 2.5 times the portion of rent to be paid by tenants receiving rental assistance.

2. To waive its right to request to terminate the extended low-income housing commitment through the qualified contract process, as described in the IRC.

Further, any application submitted by an applicant containing a principal that was a principal in an owner that has previously requested, on or after January 1, 2019, a qualified contract in the Commonwealth (regardless of whether the extended low-income housing commitment was terminated through such process) shall be rejected from further consideration and shall not be eligible for any reservation or allocation of credits.

H. The authority is committed to the long-term affordability of developments for the benefit of tenants and full compliance by applicants and principals with the provisions of the IRC, the extended use agreement, and other program requirements. The authority similarly has an interest in preserving the right of first refusal by a qualified nonprofit organization at the close of the compliance period, as authorized in § 42(i)(7) of the IRC.

The executive director is hereby authorized to require any or all of the following with respect to applications:

1. Provisions to be included in the applicant's organizational documents limiting transfers of partnership or member interests or other actions detrimental to the continued provision of affordable housing;

2. A designated form of right of first refusal document;

3. Terms in the extended use agreement requiring notice and approval by the executive director of transfers of partnership or member interests;

4. Debarment from the program of principals having demonstrated a history of conduct detrimental to long-term compliance with extended use agreements, whether in Virginia or another state, and the provision of affordable tax credit units; and

5. Provisions to implement any amendment to the IRC or implementation of any future federal or state legislation, regulations, or administrative guidance.

The decision whether to institute~~,~~ and the terms of~~,~~ any such requirements shall be made by the executive director as reasonably determined to be necessary or appropriate to achieve the goals stated in this subsection and in the best interest of the plan. Any such requirements will be indicated on the application form, instructions, or other communication available to the public.

I. Any application submitted by an applicant containing a principal that was a principal in an owner that has, in the authority's determination, previously participated, on or after January 1, 2019, in a foreclosure in Virginia (or instrument in lieu of foreclosure) that was part of an arrangement a purpose of which was to terminate an extended low-income housing commitment (regardless of whether the extended low-income housing commitment was terminated through such foreclosure or instrument) shall be rejected from further consideration for low-income housing tax credits and shall not be eligible for any reservation or allocation of credits.

J. If an applicant submits an application for reservation or allocation of credits that contains a material misrepresentation or fails to include information regarding developments involving the applicant that have been determined to be out of compliance with the requirements of the IRC, the executive

director may reject the application or stop processing such application upon discovery of such misrepresentation or noncompliance and may prohibit such applicant from submitting applications for credits to the authority in the future.

K. In any situation in which the executive director deems it appropriate, the executive director may:

1. Treat two or more applications as a single application. Only one application may be submitted for each location.

2. Establish criteria and assumptions to be used by the applicant in the calculation of amounts in the application, and any such criteria and assumptions may be indicated on the application form, instructions, or other communication available to the public.

3. Prescribe such deadlines for submission of applications for reservation and allocation of credits for any calendar year as ~~he~~ the executive director shall deem necessary or desirable to allow sufficient processing time for the authority to make such reservations and allocations. If the executive director determines that an applicant for a reservation of credits has failed to submit one or more mandatory attachments to the application by the reservation application deadline, ~~he~~ the executive director may allow such applicant an opportunity to submit such attachments within a certain time established by the executive director with a 10-point scoring penalty per item.

L. After receipt of the local notification information data, if necessary, the authority shall notify the chief executive officers (or the equivalent) of the local jurisdictions in which the developments are to be located and shall provide such officers a reasonable opportunity to comment on the developments.

M. The development for which an application is submitted may be, but shall not be required to be, financed by the authority. If any such development is to be financed by the authority, the application for such financing shall be submitted to and received by the authority in accordance with its applicable rules and regulations.

N. The authority may consider and approve, in accordance ~~herewith~~ with this section, both the reservation and the allocation of credits to buildings or developments that the authority may own or may intend to acquire, construct, or rehabilitate.

O. Any application seeking an additional reservation of credits for a development in excess of 10% of an existing reservation of credits for such development shall be rejected from further consideration ~~hereunder~~ and shall not be eligible for any reservation or allocation of credits pursuant to such application. However, such applicant may execute a consent to cancellation for such existing reservation and submit a new application for the aggregate amount of the existing reservation and any desired increase.

13VAC10-180-60. Review and selection of applications; reservation of credits.

A. The executive director may divide the amount of credits into separate pools and each separate pool may be further divided into separate tiers. The division of such pools and tiers may be based upon one or more of the following factors: geographical areas of the state; types or characteristics of housing, construction, financing, owners, occupants, or source of credits; or any other factors ~~deemed~~ the executive director deems appropriate ~~by him~~ to best meet the housing needs of the Commonwealth.

B. An amount, as determined by the executive director, not less than 10% of the Commonwealth's annual state housing credit ceiling for credits, shall be available for reservation and allocation to buildings or developments with respect to which the following requirements are met:

1. A "qualified nonprofit organization" (as described in § 42(h)(5)(C) of the IRC) that is authorized to do business in Virginia and is determined by the executive director, on the basis of such relevant factors as ~~he~~ the executive director shall consider appropriate, to be substantially based or active in the community of the development and is to materially participate (regular, continuous, and substantial involvement as determined by the executive director) in the development and operation of the development throughout the "compliance period" (as defined in § 42(i)(1) of the IRC); and

2. a. The "qualified nonprofit organization" described in ~~the preceding~~ subdivision 1 of this subsection is to own (directly or through a partnership), prior to the reservation of credits to the buildings or development, all of the general partnership interests of the ownership entity ~~thereof~~;

b. The executive director of the authority shall have determined that such qualified nonprofit organization is not affiliated with or controlled by a for-profit organization;

c. The executive director of the authority shall have determined that the qualified nonprofit organization was not formed by one or more individuals or for-profit entities for the principal purpose of being included in any nonprofit pools ~~(~~as defined ~~below)~~ in subsection D of this section established by the executive director~~,~~; and

d. The executive director of the authority shall have determined that no staff member, officer, or member of the board of directors of such qualified nonprofit organization will materially participate, directly or indirectly, in the proposed development as a for-profit entity.

3. In making the determinations required by subdivisions 1 and 2 b, 2 c, and 2 d of this subsection, the executive director may apply such factors as the executive director deems relevant, including:

a. The past experience and anticipated future activities of the qualified nonprofit organization~~,~~;

b. The sources and manner of funding of the qualified nonprofit organization~~,~~;

c. The date of formation and expected life of the qualified nonprofit organization~~,~~;

d. The number of paid staff members and volunteers of the qualified nonprofit organization~~,~~;

e. The nature and extent of the qualified nonprofit organization's proposed involvement in the construction or rehabilitation and the operation of the proposed development~~,~~;

f. The relationship of the staff, directors, or other principals involved in the formation or operation of the qualified nonprofit organization with any persons or entities to be involved in the proposed development on a for-profit basis~~,~~; and

g. The proposed involvement in the construction or rehabilitation and operation of the proposed development by any persons or entities involved in the proposed development on a for-profit basis.

The executive director may include in the application of the factors described in this subdivision 3 any other nonprofit organizations that, in ~~his~~ the executive director's determination, are related (by shared directors, staff, or otherwise) to the qualified nonprofit organization for which such determination is to be made.

For purposes of the requirements of this subsection, a qualified nonprofit organization shall be treated as satisfying such requirements if any qualified corporation (as defined in § 42(h)(5)(D)(ii) of the IRC) in which such organization (by itself or in combination with one or more qualified nonprofit organizations) holds 100% of the stock satisfies such requirements.

C. The applications shall include such representations and warranties and such information as the executive director may require in order to determine that the requirements of this section have been satisfied. In no event shall more than 90% of the Commonwealth's annual state housing credit ceiling for credits be available for developments other than those satisfying the requirements of subsection B of this section.

D. The executive director may establish such pools (nonprofit pools) of credits as the executive director may deem appropriate to satisfy the requirements of this subsection. If any such nonprofit pools are so established, the executive director may rank the applications in each pool and reserve credits to such applications before ranking applications and reserving credits in other pools, and any such applications in such nonprofit pools not receiving any reservations of credits or receiving such reservations in amounts less than the full amount permissible in each pool described in this subsection (because there are not enough credits then available in such nonprofit pools to make such reservations) shall be assigned to such other pool as shall be appropriate; provided, however, that if credits are later made available (pursuant to the IRC or as a result of either a termination or reduction of a reservation of credits made from any nonprofit pools or a rescission in whole or in part of an allocation of credits made from such nonprofit pools or otherwise) for reservation and allocation by the authority during the same calendar year as that in which applications in the nonprofit pools have been so assigned to other pools, the executive director may, in such situations, designate all or any portion of such additional credits for the nonprofit pools (or for any other pools as ~~he~~ the executive director shall determine) and may, if additional credits have been so designated for the nonprofit pools, reassign such applications to such nonprofit pools, rank the applications for those nonprofit pools, and reserve credits to such applications in accordance with the IRC and this chapter. In the event that during any round of application review and ranking, the amount of credits reserved within such nonprofit pools is less than the total amount of credits made available in each nonprofit pool, the executive director may:

1. Leave such unreserved credits in such nonprofit pools for reservation and allocation in any subsequent rounds;

2. Redistribute, to the extent permissible under the IRC, such unreserved credits to such other pools for which the executive director shall designate reservations in the full amount permissible under this section. Applications redistributed to other pools under this subdivision shall be referred to as "excess qualified applications"~~)~~; or

3. Carry over such unreserved credits to the next succeeding calendar year for the inclusion in the state housing credit ceiling (as defined in § 42(h)(3)(C) of the IRC) for such year.

No reservation of credits shall be made from any nonprofit pools to any application with respect to which the qualified nonprofit organization has not yet been legally formed in accordance with the requirements of the IRC. In addition, no application for credits from any nonprofit pools or any combination of pools may receive a reservation or allocation of annual credits in an amount greater than $950,000 unless credits remain available in such nonprofit pools after all eligible applications for credits from such nonprofit pools receive a reservation of credits.

Applicants ~~relying on the experience of a local housing authority for developer experience points described in this subsection or~~ using Hope VI funds from U.S. Department of Housing and Urban Development (HUD) in connection with the proposed development shall not be eligible to receive a reservation of credits from any nonprofit pools.

E. The authority shall review each application, and, based on the application and other information available to the authority, shall assign points to each application as follows:

1. Readiness. ~~Effective January 1, 2023, written~~ Written evidence satisfactory to the authority of unconditional approval by local authorities of the plan of development or

site plan for the proposed development or that such approval is not required. (10 points)

2. Housing needs characteristics.

a. Submission of the form prescribed by the authority with any required attachments, providing such information necessary for the authority to send a letter addressed to the current chief executive officer (or the equivalent) of the locality in which the proposed development is located, soliciting input on the proposed development from the locality within the deadlines established by the executive director. Any principal intending to provide more than five such submissions for one or more total proposed developments must first schedule a meeting with authority staff, and authority staff may, for good cause to promote the goals and interests of the Commonwealth in the federal low-income housing tax credit program, request evidence of site control as a prerequisite to the authority sending the letter prescribed by this subdivision 2 for each respective proposed development. (minus 50 points for failure to make timely submission)

b. A letter in response to its notification to the chief executive officer of the locality in which the proposed development is to be located opposing the allocation of credits to the applicant for the development. In any such letter, the chief executive officer must certify that the proposed development is not consistent with current zoning or other applicable land use regulations. Any such letter must also be accompanied by a legal opinion of the locality's attorney opining that the locality's opposition to the proposed development does not have a discriminatory intent or a discriminatory effect (as defined in 24 CFR 100.500(a)) that is not supported by a legally sufficient justification (as defined in 24 CFR 100.500(b)) in violation of the Fair Housing Act (Title VIII of the Civil Rights Act of 1968, as amended) and the HUD implementing regulations. (minus 25 points)

c. Any proposed development that is to be located ~~in a revitalization area meeting the requirements of § 36-55.30:2 A of the Code of Virginia or within an opportunity zone designated by the Commonwealth pursuant to the Federal Tax Cuts and Jobs Act of 2017,~~ as follows:

(1) In a qualified census tract or federal targeted area, both as defined in the IRC, deemed under § 36-55.30:2 of the Code of Virginia to be designated as a revitalization area without adoption of a resolution (10 points);

(2) In any redevelopment area, conservation area, or rehabilitation area created or designated by the city or county pursuant to Chapter 1 (§ 36-1 et seq.) of Title 36 of the Code of Virginia and deemed under § 36-55.30:2 of the Code of Virginia to be designated as a revitalization area without adoption of a further resolution (10 points);

(3) In a revitalization area designated by resolution adopted pursuant to the terms of § 36-55.30:2 of the Code of Virginia (15 points);

(4) In a local housing rehabilitation zone created by an ordinance passed by the city, county, or town and deemed to meet the requirements of § 36-55.30:2 of the Code of Virginia pursuant to § 36-55.64 G of the Code of Virginia (15 points); ~~and~~

(5) In an opportunity zone designated by the Commonwealth pursuant to the Federal Tax Cuts and Jobs Act of 2017 (PL 115-97), and having a binding commitment of funding acceptable to the executive director pursuant to requirements as set forth on the application form, instructions, or other communication available to the public~~.~~ (15 points)~~.~~;

(6) In a locality that confirms, on a form prescribed by the authority, that the development as proposed to be constructed or rehabilitated will utilize new or existing housing as part of a community revitalization plan (15 points); or

(7) On land owned by federally recognized or Virginia-recognized Tribal Nations located within the present-day external boundaries of the Commonwealth (15 points). If the development is located in more than one such area, only the highest applicable points will be awarded, that is, points in this subdivision E 2 c are not cumulative.

d. Commitment by the applicant for any development without section 8 project-based assistance to give leasing preference to individuals and families (i) on public housing waiting lists maintained by the local housing authority operating in the locality in which the proposed development is to be located and notification of the availability of such units to the local housing authority by the applicant or (ii) on section 8 (as defined in 13VAC10-180-90) waiting lists maintained by the local or nearest section 8 administrator for the locality in which the proposed development is to be located and notification of the availability of such units to the local section 8 administrator by the applicant. (5 points)

e. Any (i) funding source, as evidenced by a binding commitment or letter of intent, that is used to reduce the credit request; (ii) commitment to donate land or buildings or tap fee waivers from the local government; or (iii) commitment to donate land ~~(~~, including a below market-rate land lease~~)~~, from an entity that is not a principal in the applicant (the donor being the grantee of a right of first refusal or purchase option with no ownership interest in the applicant shall not make the donor a principal in the applicant). Loans must be below market-rate (the one-year London Interbank Offered Rate (LIBOR) rate at the time of commitment) or cash-flow only to be eligible for points. Financing from the authority and market rate permanent financing sources are not eligible. (The amount of such funding, dollar value of local support, or value of donated

land (including a below market rate land lease) will be determined by the executive director and divided by the total development cost. The applicant receives two points for each percentage point up to a maximum of ~~40~~ 60 points.) The authority will confirm receipt of such subsidized funding prior to the issuance of IRS Form 8609.

f. Any development ~~subject to (i) HUD's Section 8 or Section 236 program or (ii) Rural Development's 515 program, at the time of application. (20 points, unless the applicant is or has any common interests with the current owner, directly or indirectly, the application will only qualify for these points if the applicant waives all rights to developer's fee on acquisition and any other fees associated with the acquisition of the development unless permitted by the executive director for good cause.)~~ receiving new project-based subsidy from HUD or Rural Development. For each project-based voucher up to a maximum of 40 points when competing in either the New Construction or Northern Virginia pool only (5 points); provided, however, that any points awarded under this subdivision 2 f will reduce, in equal measure, the maximum 60 points awarded within subdivision 2 e of this subsection.

g. Any development receiving a real estate tax abatement on the increase in the value of the development. (5 points)

h. Any development ~~receiving new project based subsidy from HUD or Rural Development for the greater of five units or 10% of the units of the proposed development. (10 points)~~ subject to (i) HUD's section 8 or section 236 program or (ii) Rural Development's 515 program at the time of application (20 points), unless the applicant is or has any common interests with the current owner, directly or indirectly. The application will only qualify for these points if the applicant waives all rights to developer's fee on acquisition and any other fees associated with the acquisition of the development, unless permitted by the executive director for good cause.

i. Any proposed elderly or family development located in a census tract that has less than a 3.0% poverty rate based upon Census Bureau data (30 points); less than a 10% poverty rate based upon Census Bureau data (25 points); or less than a 12% poverty rate based upon Census Bureau data. (20 points)

j. Any proposed development listed in the top 25 developments identified by Rural Development as high priority for rehabilitation at the time the application is submitted to the authority. (15 points)

k. Any proposed new construction development ~~(~~, including adaptive reuse and rehabilitation that creates additional rental space~~)~~, that is located in a pool identified by the authority as a pool with an increasing rent-burdened population~~. (Up to 20 points~~, depending upon the portion of the development that is additional rental space, in all pools except the at-large pool, 0 points in the at-large pool. (up to 20 points)

l. ~~Effective January 1, 2023, any proposed development (i) for which the applicant has entered into a memorandum of understanding approved by the Virginia Department of Behavioral Health and Developmental Services (DBHDS) with a resident service provider for the provision of resident services. Such resident services provider must have experience delivering direct, community based services to individuals, as evidenced by a triennial license, in good standing, with no outstanding corrective action plans from DBHDS, or an agency or program accreditation or certification such as Commission on Accreditation of Rehabilitation Facilities, Council on Accreditation, or Certified Organization for Resident Engagement & Services, Council on Quality and Leadership, or CSH Quality Supportive Housing accreditation or certification. Such resident service provider may, but is not required to, be the qualified nonprofit organization qualifying applicant to compete in the nonprofit pool or having the required ownership interest and holding an option or first right of refusal that qualified applicant for points under subsection 7 d of this subsection. Experience may also be evidenced by receipt of a grant or grants by the service provider for provision of direct services to the development's residents; or (ii) if the development provides licensed childcare on site with a preference and discount for residents or an equivalent subsidy for tenants, determined based on household income and household size, to utilize a licensed childcare facility of tenant's choice. (15 points)~~ Any proposed development located within an area identified by the executive director as possessing either medium or high levels of economic development activity. In determining such areas, the executive director will evaluate economic data, such as per capita job creation data from the Virginia Economic Development Partnership, and annually publish a guidance document available to the public establishing such areas. (5 points)

3. Development characteristics.

a. Evidence satisfactory to the authority documenting the quality of the proposed development's amenities as determined by the following:

(1) The following points are available for any application:

(a) If a community or meeting room with a minimum of 749 square feet is provided. (5 points) Community rooms receiving points under this subdivision 3 a (1) (a) may not be used for commercial purposes. Provided that the cost of the community room is not included in eligible basis, the owner may conduct, or contract with a nonprofit provider to conduct, programs or classes for tenants and members of the community in the community room, so long as (i) tenants compose at least one-third of participants, with first preference given to tenants above the one-third

minimum; (ii) no program or class may be offered more than five days per week; (iii) no individual program or class may last more than eight hours per day, and all programs and class sessions may not last more than 10 hours per day in the aggregate; (iv) cost of attendance of the program or class must be below market rate with no profit from the operation of the class or program being generated for the owner (owner may also collect an amount for reimbursement of supplies and clean-up costs); (v) the community room must be available for use by tenants when programs and classes are not offered, subject to reasonable "quiet hours" established by owner; and (vi) any owner offering programs or classes must provide an annual certification to the authority that it is in compliance with such requirements, with failure to comply with these requirements resulting in a 10-point penalty for three years from the date of such noncompliance for principals in the owner.

(b) If the exterior walls are constructed using brick or other similar low-maintenance material approved by the authority ~~(~~as indicated on the application form, instructions, or other communication available to the public~~)~~ covering up to 50% of the exterior walls of the development. (20 points times the percentage of exterior walls covered by brick)

If the exterior walls are constructed using fiber cement board covering up to 50% of the exterior walls. (20 points times the percentage of exterior walls covered by fiber cement board)

Points for brick and fiber cement board are independent and can both be awarded.

For purposes of making such coverage calculation, the triangular gable end area, doors, windows, knee walls, columns, retaining walls, and any features that are not a part of the façade are excluded from the denominator. Community buildings are included in the foregoing coverage calculations.

(c) If the ~~water expense is submetered (the tenant will pay monthly or bimonthly bill). (5 points)~~ development is built in accordance with development design requirements established by the Virginia Department of Behavioral Health and Developmental Services. (10 points)

(d) If points are not awarded pursuant to subdivision 3 f of this section for optional certification, if each bathroom contains only WaterSense labeled toilets, faucets, and showerheads. (3 points)

(e) If each unit is provided with free individual high-speed Internet access. (~~10~~ 15 points~~, 12 points if such access is Wi Fi~~)

(f) If each full bathroom's bath fans are wired to the primary bathroom light with a delayed timer, or continuous exhaust by ERV/DOAS. (3 points) If each full bathroom's bath fans are equipped with a humidistat. (3 points)

(g) ~~If all cooking surfaces are equipped with fire prevention features that meet the authority's requirements as indicated on the application form, instructions, or other communication available to the public. (4 points)~~ If all cooking surfaces are equipped with fire suppression features that meet the authority's requirements ~~(~~as indicated on the application form, instructions, or other communication available to the public~~)~~. (2 points)

(h) For rehabilitations, ~~equipping all units~~ if each unit is equipped with dedicated space, drain, and electrical hook-ups for permanently installed dehumidification systems (2 points). For rehabilitations and new construction, providing permanently installed dehumidification systems in each unit. (5 points)

(i) If each interior door is solid core. (3 points)

(j) If each unit has at least one USB charging port in the kitchen, living room, and all bedrooms. (1 point)

(k) If each kitchen has LED lighting in all fixtures that meets the authority's minimum design and construction standards (2 points)

(l) For new construction only, if each unit has a balcony or patio with a minimum depth of five feet clear from face of building and a size of at least 30 square feet. (4 points)

(m) ~~Effective January 1, 2023, if~~ If construction or rehabilitation of the development ~~has~~ includes installation of a renewable energy electric system~~. (1 point for each 2% of the development's onsite electrical load that can be met by the renewable energy electric system for the benefit of the tenants, up to~~ in accordance with the manufacturer's specifications and all applicable provisions of the National Electrical Code. Qualifying installations must have either been performed by a licensed electrician or have passed a final inspection performed by a licensed electrician. (10 points)

~~(n) Effective January 1, 2023, if the development provides tenants with free on-call, telephonic, or virtual health care services with a licensed provider. (15 points)~~

~~(o)~~ (n) For rehabilitations, if each unit is provided with the necessary infrastructure for high-speed ~~Internet/broadband~~ Internet or broadband service. (~~1 point~~ 5 points)

(2) The following points are available to applications electing to serve elderly tenants:

(a) If all cooking ranges have front controls. (1 point)

(b) If all bathrooms have an independent or supplemental heat source. (1 point)

(c) If all entrance doors to each unit have two eye viewers, one at 42 inches and the other at standard height. (1 point)

(d) If each unit has a shelf or ledge outside the primary entry door in interior hallway. (2 points)

(3) The following points are available to all qualified applications:

a. If the structure is historic, by virtue of being listed individually in the National Register of Historic Places, or due to its location in a registered historic district and certified by the Secretary of the Interior as being of historical significance to the district, and the rehabilitation will be completed in such a manner as to be eligible for historic rehabilitation tax credits. (5 points)

~~b. Any development in which (i) the greater of five units or 10% of the units will be assisted by any form of documented and binding federal or state project-based rent subsidies in order to ensure occupancy by extremely low-income persons; and (ii) the greater of five units or 10% of the units will conform to HUD regulations interpreting the accessibility requirements of § 504 of the Rehabilitation Act and be actively marketed to persons with disabilities as defined in the Fair Housing Act in accordance with a plan submitted as part of the application for credits (all common space must also conform to HUD regulations interpreting the accessibility requirements of § 504 of the Rehabilitation Act, and all the units described in clause (ii) above must include roll-in showers and roll-under sinks and front control ranges, unless agreed to by the authority prior to the applicant's submission of its application). (50 points)~~

~~c.~~ b. Any development in which 10% of the units (i) conform to HUD regulations interpreting the accessibility requirements of § 504 of the Rehabilitation Act and (ii) are actively marketed to persons with disabilities as defined in the Fair Housing Act in accordance with a plan submitted as part of the application for credits. (20 points)

~~d.~~ c. Any development located within one-half mile of an existing commuter rail, light rail, or subway station or one-quarter mile of one or more ~~existing~~ public bus stops either existing or to be built in accordance with existing proffers. (10 points, unless the development is located within the geographical area established by the executive director for a pool of credits for Northern Virginia or Tidewater Metropolitan Statistical Area (MSA), in which case, the development will receive 20 points if the development is ranked against other developments in such Northern Virginia or Tidewater MSA pool, 10 points if the development is ranked against other developments in any other pool of credits established by the executive director)

~~e.~~ d. Each development must meet the following baseline energy performance standard applicable to the development's construction category. For new construction, the development must meet all requirements for EPA Energy Star certification. For rehabilitation, the proposed renovation of the development must result in at least a 30% post-rehabilitation decrease on the Home Energy Rating System Index (HERS Index) or score an 80 or lower on the HERS Index. For adaptive reuse, the proposed development must score a 95 or lower on the HERS Index. For mixed construction types, the applicable standard will apply to the development's various construction categories. The development's score on the HERS Index must be verified by a third-party, independent, nonaffiliated, certified Residential Energy Services Network (RESNET) home energy rater.

(1) Any development for which the applicant agrees to obtain (i) EarthCraft Gold or higher certification; (ii) U.S. Green Building Council LEED green-building certification; (iii) National Green Building Standard Certification of Silver or higher; or (iv) meet Enterprise Green Communities Criteria prior to the issuance of an IRS Form 8609 with the proposed development's architect certifying in the application that the development's design will meet the criteria for such certification, provided that the proposed development's RESNET rater is registered with a provider on the authority's approved RESNET provider list. (10 points, points in this ~~paragraph~~ subdivision d (1) are not cumulative)

(2) Additionally, points on future applications will be awarded to an applicant having a principal that is also a principal in a tax credit development in the Commonwealth meeting (i) the Zero Energy Ready Home Requirements as promulgated by the U.S. Department of Energy (DOE) and as evidenced by a DOE certificate~~;~~ or (ii) the Passive House Institute's Passive House standards as evidenced by a certificate from an accredited Passive House certifier. (10 points, points in this ~~paragraph~~ subdivision d (2) are cumulative)

The executive director may, if needed, designate a proposed development as requiring an increase in credit in order to be financially feasible and such development shall be treated as if in a difficult development area as provided in the IRC for any applicant receiving an additional 10 points under this subdivision d, provided, however, that any resulting increase in such development's eligible basis shall be limited to 10% of the development's eligible basis. Provided, however, the authority may remove such increase in the development's eligible basis if the authority determines that the development is financially feasible without such increase in basis.

~~f.~~ e. If units are constructed to include the authority's universal design features, provided that the proposed development's architect is on the authority's list of universal design certified architects. (15 points~~,~~ if all the units in an elderly development meet this requirement; 15 points multiplied by the percentage of units meeting this requirement for nonelderly developments)

~~g.~~ f. Any development in which the applicant proposes to produce less than 100 low-income housing units. (20 points for producing 50 low-income housing units or less, minus 0.4 points for each additional low-income housing

unit produced down to 0 points for any development that produces 100 or more low-income housing units.)

~~h.~~ g. Any applicant for a development that, pursuant to a common plan of development, is part of a larger development located on the same or contiguous sites, financed in part by tax-exempt bonds. Combination developments seeking both 9.0% and 4.0% credits must clearly be presented as two separately financed deals, including separate equity pricing that would support each respective deal in the event the other were no longer present. While deals are required to be on the same or a contiguous site they must be clearly identifiable as separate. The units financed by ~~tax-exempt~~ tax-exempt bonds may not be interspersed throughout the development. Additionally, if co-located within the same building footprint, the property must identify separate entrances. All applicants seeking points in this category must arrange a meeting with authority staff at the authority's offices prior to the deadline for submission of the application in order to review both the 9.0% and the tax-exempt bond financed portion of the project. Any applicant failing to meet with authority staff in advance of applying will not be allowed to compete in the current competitive round as a combination development. (10 points ~~for tax-exempt bond financing of at least 30% of~~ if the aggregate number of units~~, 20 points for~~ within the larger combined development totals more than 100 but fewer than 150 units and 30% or more of those units will be funded by tax-exempt ~~bond financing of at least 40% of~~ bonds; 15 points if the aggregate number of units~~, and 30 points for tax-exempt bond financing of~~ within the larger combined development totals at least ~~50%~~ 150 units and 30% of ~~aggregate~~ those units~~; such points being noncumulative; such points will be awarded in both the application and any application submitted for credits associated with the~~ will be funded by tax-exempt bonds)

4. Tenant population characteristics. Commitment by the applicant to give a leasing preference to individuals and families with children in developments that will have no more than 20% of its units with one bedroom or less. (15 points; plus 0.75 points for each percent of the low-income units in the development with three or more bedrooms up to an additional 15 points for a total of no more than 30 points)

5. Sponsor characteristics. ~~For application submitted in calendar year 2022 only, the sponsor may receive experienced sponsor points under either subdivision 5 a or 5 c of this subsection, but not both. Effective January 1, 2023, subdivision 5 a of this subsection shall no longer be applicable.~~

~~a. Evidence that the controlling general partner or managing member of the controlling general partner or managing member for the proposed development have developed:~~

~~(1) As controlling general partner or managing member, (i) at least three tax credit developments that contain at least three times the number of housing units in the proposed development or (ii) at least six tax credit developments. (25 points); or~~

~~(2) At least three deals as a principal and have at least $500,000 in liquid assets. "Liquid assets" means cash, cash equivalents, and investments held in the name of the entity or person, including cash in bank accounts, money market funds, U.S. Treasury bills, and equities traded on the New York Stock Exchange or NASDAQ. Certain cash and investments will not be considered liquid assets, including (i) stock held in the applicant's own company or any closely held entity, (ii) investments in retirement accounts, (iii) cash or investments pledged as collateral for any liability, and (iv) cash in property accounts, including reserves. The authority will assess the financial capacity of the applicant based on its financial statements. The authority will accept financial statements audited, reviewed, or compiled by an independent certified public accountant. Only a balance sheet dated on or after December 31 of the year prior to the application deadline is required. The authority will accept a compilation report with or without full note disclosures. Supplementary schedules for all significant assets and liabilities may be required. Financial statements prepared in accordance with accounting principles generally accepted in the United States (U.S. GAAP) are preferred. Statements prepared in the income tax basis or cash basis must disclose that basis in the report. The authority reserves the right to verify information in the financial statements. (25 points); or~~

~~(3) As controlling general partner or managing member, at least one tax credit development that contains at least the number of housing units in the proposed development. (10 points)~~

a. Points shall be awarded on a sliding scale to applicants that enter into at least one contract for services provided by a business certified as women-owned, minority-owned, or service disabled veteran-owned through the Commonwealth of Virginia's Small, Women-owned, and Minority-owned Business (SWaM) Certification Program; provided, however, that no points will be awarded for entering into contracts where a spousal relationship exists between any principal of the applicant and any principal of the service provider. The following services and roles qualify for points under this subdivision 5 a: (i) consulting services to complete the LIHTC application, (ii) ongoing development services through the placed-in-service date, (iii) general contractor, (iv) architect, (v) property manager, (vi) accounting services, or (vii) legal services. An applicant seeking points in this subdivision 5 a must provide in its application a certification, in a form to be developed by the executive director, certifying that a contract for services has been

executed between the applicant and the service provider, describing the scope of the services provided or to be provided, and certifying that no spousal relationship exists between any principal of the applicant and any principal of the service provider. The application must also include a copy of the service provider's certification from the Commonwealth of Virginia's SWaM Certification Program. (5 points for entering into one such contract; 7 points for entering into two such contracts; 10 points for entering into three or more such contracts)

b. ~~A maximum of 25 cumulative points in subdivision 5 c of this subsection will be awarded to applicants with an experienced sponsor (experienced sponsor). Experienced sponsors are those principals who meet the requirements of subdivision 5 c of this subsection and who have~~ Applicants with at least one principal having an ownership interest of at least 25% in the controlling general partner or managing member for the proposed development~~, subject to the following conditions:~~

~~(1) Experienced sponsors may be (i) individuals; (ii) duly formed limited liability companies, limited partnerships, and corporations, whether for profit or nonprofit, and which are in good standing in their respective state of formation and registered to do business in Virginia; (iii) local housing authorities; (iv) business trusts; and (v) trusts;~~

~~(2) Individual persons seeking points as an experienced sponsor shall not receive credit for prior participation in developments where such participation was in their capacity as either trustee or beneficiary of a trust or business trust; and~~

~~(3) Individuals and entities seeking points as an experienced sponsor may not combine ownership or prior experience with any other individual or entity to meet the requirements of this subdivision 5.~~

~~c. Points for experienced sponsor involvement shall be awarded as follows:~~

~~(1) Tier 1: Five points shall be awarded to those experienced sponsors that have placed at least one federal low income housing tax credit (LIHTC) development in service in Virginia within the past five years, as evidenced by an IRS Form 8609 having been issued for such development. The LIHTC development must be active with no reported compliance issues remaining uncured, as determined by the executive director.~~

~~(2) Tier 2: 15 points shall be awarded to those experienced sponsors that have placed at least three LIHTC developments in service (in addition to any deal for which points are awarded in Tier 1) in any state within the past six years, as evidenced by corresponding IRS Form 8609s. Experienced sponsors must certify with the application that each of said three developments is active with no reported compliance issues remaining uncured. The executive director may confirm the applicant's certification with each state in which the three developments are located.~~

~~(3) Tier 3: Any applicant competing in the local housing authority pool may receive an additional five points for partnering with an experienced sponsor, other than a local housing authority. Applicants seeking said points must provide in their application evidence that the experienced sponsor is a principal in the Applicant (while ownership is required, no minimum ownership percentage of the experience sponsor partner is specified for points in Tier 3) and must provide a description of the assistance rendered and to be rendered by the experienced sponsor partner. d. Applicants may receive negative points toward their application as follows: (1)~~ who is a socially disadvantaged individual. An applicant seeking points in this subdivision 5 b must provide in its application a certification in a form to be developed by the executive director, certifying that no spousal relationship exists between the socially disadvantaged principal and any other principal having an ownership interest in the development who is not also a socially disadvantaged principal. (30 points)

c. Applicants with at least one nonprofit principal that (i) either demonstrates that 51% or more of its board membership is held by socially disadvantaged individuals or demonstrates that its most senior full-time executive officer is a socially disadvantaged individual; (ii) has an express business purpose of serving socially or economically disadvantaged populations or both; and (iii) certifies that no spousal relationship exists between any executive officer or board member identified for the purpose of satisfying the requirements of this subsection and any other principal of the applicant who is not also a socially disadvantaged individual. (30 points) Applicants receiving points under subdivision 5 b of this subsection are ineligible for points in this subdivision 5 c.

d. For the purposes of subdivisions 5 b and 5 c of this subsection, socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans, Hispanic Americans, Native Americans, and Asian Americans and Pacific Islanders. This provision shall be interpreted in accordance with 13 CFR 124.103.

e. Points shall be awarded on a sliding scale to applicants that enter into at least one contract for services provided by (i) a veteran-owned small business (VOSB) as certified by the U.S. Department of Veterans Affairs, Office of Small and Disadvantaged Business Utilization, or the U.S. Small Business Administration, or (ii) a business certified as service-disabled veteran-owned through the

Commonwealth of Virginia's SWaM Certification Program; provided, however, that no points will be awarded for entering into contracts where a spousal relationship exists between any principal of the applicant and any principal of the service provider. The following services and roles qualify for points under this subdivision 5 e: (a) consulting services to complete the LIHTC application, (b) ongoing development services through the placed-in-service date, (c) general contractor, (d) architect, (e) property manager, (f) accounting services, or (g) legal services. An applicant seeking points in this subdivision 5 e must provide in its application a certification, in a form to be developed by the executive director, certifying that a contract for services has been executed between the applicant and the service provider, describing the scope of the services provided or to be provided, and certifying that no spousal relationship exists between any principal of the applicant and any principal of the service provider. The application must also include a copy of the service provider's certification issued by the applicable certifying entity listed within this subdivision 5 e. (5 points for entering into one such contract; 7 points for entering into two such contracts; 10 points for entering into three or more such contracts)

f. Applicants with at least one principal having an ownership interest of at least 25% in the controlling general partner or managing member for the proposed development that is an individual with a VOSB certification, as described in subdivision 5 e of this subsection. An applicant seeking points in this subdivision 5 f must provide in its application a certification, in a form to be developed by the executive director, certifying that no spousal relationship exists between the principal with a VOSB certification and any other principal having an ownership interest in the development who does not also possess a VOSB certification. (30 points)

g. Applicants may receive negative points toward their application as follows:

(1) Any applicant that includes a principal that was a principal in a development at the time the authority inspected such development and discovered a life-threatening hazard under HUD's Uniform Physical Condition Standards and such hazard was not corrected in the timeframe established by the authority. (minus 50 points for a period of three years after the violation has been corrected)

(2) Any applicant that includes a principal that was a principal in a development that either (i) at the time the authority reported such development to the IRS for noncompliance had not corrected such noncompliance by the time a Form 8823 was filed by the authority or (ii) remained out-of-compliance with the terms of its extended use commitment after notice and expiration of any cure period set by the authority. (minus 15 points for a period of three calendar years after the year the authority filed Form 8823 or expiration of such cure period, unless the executive director determines that such principal's attempts to correct such noncompliance was prohibited by a court, local government, or governmental agency, in which case, no negative points will be assessed to the applicant, or 0 points, if the appropriate individual connected to the principal attend compliance training as recommended by the authority)

(3) Any applicant that includes a principal that is or was a principal in a development that (i) did not build a development as represented in the application for credit (minus two times the number of points assigned to the items not built or minus 50 points per requirement for failing to provide a minimum building requirement, for a period of three years after the last Form 8609 is issued for the development, in addition to any other penalties the authority may elect to seek under its agreements with the applicant), or (ii) has a reservation of credits terminated by the authority. (minus 10 points a period of three years after the credits are returned to the authority)

(4) Any applicant that includes a management company in its application that is rated unsatisfactory by the executive director or if the ownership of any applicant includes a principal that is or was a principal in a development that hired a management company to manage a tax credit development after such management company received a rating of unsatisfactory from the executive director during the compliance period and extended use period of such development. (minus 25 points)

(5) Any applicant that includes a principal that was a principal in a development for which the actual cost of construction (as certified in the Independent Auditor's Report with attached Certification of Sources and Uses that is submitted in connection with the Owner's Application for IRS Form 8609) exceeded the applicable cost limit by 5.0% or more (minus 50 points for a period of three calendar years after December 31 of the year the cost certification is complete; provided, however, if the ~~Board of Commissioners~~ board of commissioners determines that such overage was outside of the applicant's control based upon documented extenuating circumstances, no negative points will be assessed~~.~~)

(6) Any applicant that includes a controlling general partner or managing member of the controlling general partner or managing member in the applicant that acted as a principal in a development receiving an allocation of credits from the authority where (i) such principal met the requirements to be eligible for points under subdivision 5 a or 5 c of this subsection and (ii) such principal made more than two requests for final inspection. (minus 5 points for two years)

~~e. In addition to the points for experienced sponsor involvement available in subdivisions 5 a and 5 c of this~~

~~subsection, points shall be awarded to applicants for contracting for services as follows:~~

~~Five points shall be awarded to applicants that enter into at least one contract for services provided by a business certified as Women-Owned, Minority-Owned or Service Disabled Veteran-owned through the Commonwealth of Virginia's Small, Women-owned, and Minority-owned Business (SWaM) certification program. The following services and roles qualify for points under this subdivision 5 e: (i) consulting services to complete the LIHTC application; (ii) ongoing development services through the placed in service date; (iii) general contractor; (iv) architect; (v) property manager; (vi) accounting services; or (vii) legal services. An applicant seeking points in this subdivision 5 e must provide in its application a certification, in a form to be developed by the executive director, certifying that a contract for services has been executed between the applicant and the service provider and describing the scope of the services provided or to be provided. The application must also include a copy of the service provider's certification from the Commonwealth of Virginia's Small, Women-owned, and Minority-owned Business certification program.~~

~~f. Applicants with at least one principal having an ownership interest of at least 25% in the controlling general partner or managing member for the proposed development that is a socially disadvantaged individual (5 points). Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities. The social disadvantage must stem from circumstances beyond their control. There is a rebuttable presumption that the following individuals are socially disadvantaged: Black Americans, Hispanic Americans, Native Americans, and Asian Americans and Pacific Islanders. This provision shall be interpreted in accordance with 13 CFR 124.103.~~

6. Efficient use of resources. ~~a.~~ The percentage by which the total of the amount of credits per low-income housing unit (the "per unit credit amount") of the proposed development is less than the standard per unit credit amounts established by the executive director for a given unit type, based upon the number of such unit types in the proposed development. (~~200~~ 100 points multiplied by the percentage by which the total amount of the per unit credit amount of the proposed development is less than the applicable standard per unit credit amount established by the executive director, negative points will be assessed using the percentage by which the total amount of the per unit credit amount of the proposed development exceeds the applicable standard per unit credit amount established by the executive director~~.~~)

~~b. The percentage by which the cost per low income housing unit (per unit cost), adjusted by the authority for location, of the proposed development is less than the standard per unit cost amounts established by the executive director for a given unit type, based upon the number of such unit types in the proposed development. (100 points multiplied by the percentage by which the total amount of the per unit cost of the proposed development is less than the applicable standard per unit cost amount established by the executive director; negative points will be assessed using the percentage by which the total amount of the per unit cost amount of the proposed development exceeds the applicable standard per unit cost amount established by the executive director.)~~

The executive director may use a standard per square foot credit amount and a standard per square foot cost amount in establishing the per unit credit ~~amount and the per unit cost~~ amount in this subdivision 6. For the purpose of calculating the points to be assigned pursuant to ~~such~~ this subdivision 6, all credit amounts shall include any credits previously allocated to the development.

7. Bonus points.

a. Commitment by the applicant to impose income limits on the low-income housing units throughout the extended use period (as defined in the IRC) below those required by the IRC in order for the development to be a qualified low-income development. Applicants receiving points under this subdivision 7 a may not receive points under subdivision 7 b of this subsection. (Up to 50 points, the product of (i) 100 multiplied by (ii) the percentage of housing units in the proposed development both rent restricted to and occupied by households at or below 50% of the area median gross income; plus one point for each percentage point of such housing units in the proposed development that are further restricted to rents at or below 30% ~~of~~ or 40% of the area median gross income up to an additional 10 points~~.~~) If the applicant commits to providing housing units in the proposed development both rent-restricted to and occupied by households at or below 30% of the area median gross income and that are not subsidized by project-based rental assistance. (plus 1 point for each percentage point of such housing units in the proposed development, up to an additional 10 points)

b. Commitment by the applicant to impose rent limits on the low-income housing units throughout the extended use period (as defined in the IRC) below those required by the IRC in order for the development to be a qualified low-income development. Applicants receiving points under this subdivision 7 b may not receive points under subdivision 7 a of this subsection. (Up to 25 points, the product of (i) 50 multiplied by (ii) the percentage of housing units in the proposed development rent restricted to households at or below 50% of the area median gross income; plus one point for each percentage point of such housing units in the proposed development that are further restricted to rents at or below 30% ~~of~~ or 40% of the area median gross income up to an additional 10 points. Points

for proposed developments in low-income jurisdictions shall be two times the points calculated in the preceding sentence, up to 50 points.)

c. Commitment by the applicant to maintain the low-income housing units in the development as a qualified low-income housing development beyond the 30-year extended use period (as defined in the IRC). Applicants receiving points under this subdivision 7 c may not receive bonus points under subdivision 7 d of this subsection. (40 points for a 10-year commitment beyond the 30-year extended use period or ~~50~~ 70 points for a 20-year commitment beyond the 30-year extended use period.)

d. Participation by a local housing authority or qualified nonprofit organization (substantially based or active in the community with at least a 10% ownership interest in the general partnership interest of the partnership) and a commitment by the applicant to sell the proposed development pursuant to an executed, recordable option or right of first refusal to such local housing authority or qualified nonprofit organization or to a wholly owned subsidiary of such organization or authority, at the end of the 15-year compliance period, as defined by IRC, for a price not to exceed the outstanding debt and exit taxes of the for-profit entity. The applicant must record such option or right of first refusal immediately after the low-income housing commitment described in 13VAC10-180-70. Applicants receiving points under this subdivision 7 d may not receive bonus points under subdivision 7 c of this subsection. (60 points; plus five points if the local housing authority or qualified nonprofit organization submits a homeownership plan satisfactory to the authority in which the local housing authority or qualified nonprofit organization commits to sell the units in the development to tenants.)

e. Any development participating in the Rental Assistance Demonstration (RAD) program, or other conversion to project-based vouchers or project-based rental assistance approved by the authority, competing in the local housing authority pool will receive an additional 10 points. Applicants must show proof of a commitment to enter into housing assistance payment (CHAP) or a RAD conversion commitment (RCC).

f. Any applicant that commits in the application to submit any payments due the authority, including reservation fees and monitoring fees, by electronic payment. (5 points)

In calculating the points for subdivisions 7 a and 7 b of this subsection, any units in the proposed development required by the locality to exceed 60% of the area median gross income will not be considered when calculating the percentage of low-income units of the proposed development with incomes below those required by the IRC in order for the development to be a qualified low-income development, provided that the locality submits evidence satisfactory to the authority of such requirement.

After points have been assigned to each application in the manner described in this subsection, the executive director shall compute the total number of points assigned to each such application. Any application that is assigned a total number of points less than a threshold amount of ~~400~~ 300 points (~~300~~ 200 points for developments financed with tax-exempt bonds in such amount so as not to require under the IRC an allocation of credits ~~hereunder~~ under this chapter) shall be rejected from further consideration ~~hereunder~~ under this chapter and shall not be eligible for any reservation or allocation of credits.

F. During its review of the submitted applications in all pools, the authority may conduct:

1. Its own analysis of the demand for the housing units to be produced by each applicant's proposed development. Notwithstanding any conclusion in the market study submitted with an application, if the authority determines that, based upon information from its own loan portfolio or its own market study, inadequate demand exists for the housing units to be produced by an applicant's proposed development, the authority may exclude and disregard the application for such proposed development.

2. A site visit to the applicant's proposed development. Notwithstanding any conclusion in any environmental site assessment submitted with an application, if the authority determines that the applicant's proposed development presents health or safety concerns for potential tenants of the development, the authority may exclude and disregard the application for such proposed development.

G. The executive director:

1. May exclude and disregard any application that the executive director determines is not submitted in good faith or that ~~he~~ the executive director determines would not be financially feasible.

2. May determine that an application is substantially incomplete and ineligible for further review.

3. May also choose to allow for the immediate correction of minor and immaterial defects affecting mandatory items (but not points items) in an application. Should the executive director choose to allow correction, applicants will be given 48 hours from the time of notification to cure defects with ~~their~~ the application. If the executive director allows an applicant to cure minor defects, that does not constitute approval or acceptance of the application and is not an assurance that the application, upon further review, will be deemed acceptable.

Examples of items that may be considered as "curable" include:

a. If the applicant has failed to include a required document, the applicant may supply the document~~,~~; provided, however, that the document existed on the application deadline date and, if the document is a legal

agreement or instrument, the document was legally effective on the application deadline date;

b. If statements or items in the application are contradictory or mutually inconsistent, the applicant may present information resolving the contradiction or inconsistency~~,~~; provided, however, that the information accurately reflects the state of affairs on the application deadline date;

c. The applicant may provide any required signature that has been omitted, except for applications that the executive director deems to be substantially incomplete; and

d. The applicant may cure any scrivener's error, missing or defective notarization, defective signature block, or defective legal name of an individual or entity.

4. Shall notify the applicant of any curable defects it discovers by telephone, and, simultaneously, in writing electronically (email). The applicant's corrective submission shall not be considered unless it is received by the executive director no later than 48 hours (excluding weekends and legal holidays) from the notification. If an applicant fails to respond to the notification of curable defects within the 48-hour cure period, or if an applicant's response ~~is nonresponsive to~~ fails to address the question asked, a negative conclusion shall be drawn. Failure to respond to an item in a cure notification will result in the denial of points in that category or the application may be deemed to not meet threshold. After the application deadline, telephone calls or other oral or written communications on behalf of a tax credit applicant (~~for example~~ e.g., from a project's development team, elected representatives~~, etc.~~) other than information submitted pursuant to this subdivision shall not be accepted or considered before preliminary reservation awards have been announced.

5. Upon assignment of points to all of the applications, shall rank the applications based on the number of points so assigned. If any pools shall have been established, each application shall be assigned to a pool and, if any, to the appropriate tier within such pool and shall be ranked within such pool or tier, if any. The amount of credits made available to each pool will be determined by the executive director. Available credits will include unreserved per capita dollar amount credits from the current calendar year under § 42(h)(3)(C)(i) of the IRC, any unreserved per capita credits from previous calendar years, and credits returned to the authority prior to the final ranking of the applications and may include up to 50% of the next calendar year's per capita credits as shall be determined by the executive director. Those applications assigned more points shall be ranked higher than those applications assigned fewer points. However, if any set-asides established by the executive director cannot be satisfied after ranking the applications based on the number of points, the executive director may rank as many applications as necessary to meet the requirements of such set-aside (selecting the highest ranked application, or applications, meeting the requirements of the set-aside) over applications with more points.

H. The authority shall, in the event of a tie in the number of points assigned to two or more applications within the same pool, or, if none, within the Commonwealth, and in the event that the amount of credits available for reservation to such applications is determined by the executive director to be insufficient for the financial feasibility of all of the developments described in that pool, to the extent necessary to fully utilize the amount of credits available for reservation within such pool or, if none, within the Commonwealth, select one or more of the applications with the highest combination of points from subdivision E 7 of this section~~.~~. Each application so selected shall receive ~~(~~, in order based upon the number of such points, beginning with the application with the highest number of such points~~)~~, a reservation of credits. If two or more of the tied applications receive the same number of points from subdivision E 7 of this section and if the amount of credits available for reservation to such tied applications is determined by the executive director to be insufficient for the financial feasibility of all the developments described in the tied for points applications, the executive director shall select one or more of such applications by lot, and each application so selected by lot shall receive ~~(~~in order of such selection by lot~~)~~ a reservation of credits.

I. The executive director:

1. For each application that may receive a reservation of credits, shall determine the amount, as of the date of the deadline for submission of applications for reservation of credits, to be necessary for the financial feasibility of the development and its viability as a qualified low-income development throughout the credit period under the IRC. In making this determination, the executive director shall consider:

a. The sources and uses of the funds~~,~~;

b. The available federal, state, and local subsidies committed to the development~~,~~;

c. The total financing planned for the development as well as the investment proceeds or receipts expected by the authority to be generated with respect to the development~~,~~; and

d. The percentage of the credit dollar amount used for development costs other than the costs of intermediaries.

2. Shall examine the development's costs, including developer's fees and other amounts in the application, for reasonableness, and if ~~he~~ the executive director determines that such costs or other amounts are unreasonably high, ~~he~~ the executive director shall reduce them to amounts that ~~he~~ the executive director determines to be reasonable.

3. Shall review the applicant's projected rental income, operating expenses, and debt service for the credit period.

4. May establish such criteria and assumptions as ~~he~~ the executive director shall deem reasonable for the purpose of making such determination, including:

a. Criteria as to the reasonableness of fees and profits and assumptions as to the amount of net syndication proceeds to be received ~~(~~based upon such percentage of the credit dollar amount used for development costs, other than the costs of intermediaries, as the executive director shall determine to be reasonable for the proposed development~~)~~;

b. Increases in the market value of the development~~,~~ and increases in operating expenses, rental income; and

c. In the case of applications without firm financing commitments at fixed interest rates, debt service on the proposed mortgage loan.

5. May, if ~~he~~ the executive director deems it appropriate, consider the development to be a part of a larger development. In such a case, the executive director may consider, examine, review, and establish any or all of the items described in this subsection as to the larger development in making such determination for the development.

J. Maximum ~~developer's~~ developer fee calculations will be indicated on the application form, instructions, or other communication available to the public. Notwithstanding such calculations of ~~developer's~~ developer fee, (i) no more than $3 million ~~developer's~~ developer fee may be included in the ~~development's~~ eligible basis~~, (ii)~~ of developments seeking 9.0% credits, (ii) no more than $3 million developer fee may be included in the eligible basis of developments seeking 4.0% credits, unless at least 30% of the developer fee is deferred, (iii) no ~~developer's~~ developer fee may exceed $5 million, and ~~(iii)~~ (iv) no ~~developer's~~ developer fee may exceed 15% of the development's total development cost, as determined by the authority.

K. The executive director:

1. Shall reserve credits to applications in descending order of ranking within each pool and tier, if applicable, until either substantially all credits ~~therein~~ in each pool and tier are reserved or all qualified applications ~~therein~~ in each pool and tier have received reservations at such time during each calendar year as the executive director shall designate. If there is not more than a de minimis amount, as determined by the executive director, of credits remaining in a pool after reservations have been made, "substantially all" of the credits in such pool shall be deemed to have been reserved.

2. May rank the applications within pools at different times for different pools and may reserve credits, based on such rankings, one or more times with respect to each pool.

3. May establish more than one round of review and ranking of applications and reservation of credits based on such rankings.

4. Shall designate the amount of credits to be made available for reservation within each pool during each such round. The amount reserved to each such application shall be equal to the lesser of (i) the amount requested in the application or (ii) an amount determined by the executive director, as of the date of application, to be necessary for the financial feasibility of the development and its viability as a qualified low-income development throughout the credit period under the IRC; provided, however, that in no event shall the amount of credits so reserved exceed the maximum amount permissible under the IRC.

5. ~~May move the proposed~~ Shall deem any development ~~and the~~ seeking more credits than are available ~~to another pool if the amount~~ within a credit pool in which it competes as financially infeasible and ineligible for any reservation or allocation of credits ~~available in~~ from any pool ~~is determined by the executive director to be insufficient for the financial feasibility of the proposed development to which such available credits are to be reserved~~.

6. If any credits remain in any pool after moving proposed developments and credits to another pool, may for developments that meet the requirements of § 42(h)(1)(E) of the IRC only, reserve the remaining credits to any proposed development scoring at or above the minimum point threshold established by this chapter without regard to the ranking of such application with additional credits from the Commonwealth's annual state housing credit ceiling for the following year in such an amount necessary for the financial feasibility of the proposed development. ~~However, the~~ The reservation of credits from the Commonwealth's annual state housing credit ceiling for the following year shall be in the reasonable discretion of the executive director if ~~he~~ the executive director determines it to be in the best interest of the plan. In the event a reservation or an allocation of credits from the current year or a prior year is reduced, terminated, or canceled, the executive director may substitute such credits for any credits reserved from the following year's annual state housing credit ceiling.

7. In the event that during any round of application review and ranking the amount of credits reserved within any pools is less than the total amount of credits made available therein during such round, may:

a. Leave such unreserved credits in such pools for reservation and allocation in any subsequent rounds~~,~~;

b. Redistribute such unreserved credits to such other pools as the executive director may designate~~,~~;

c. Supplement such unreserved credits in such pools with additional credits from the Commonwealth's annual state housing credit ceiling for the following year for reservation and allocation if in the reasonable discretion of the executive director, it serves the best interest of the plan~~,~~;

d. Carry over such unreserved credits to the next succeeding calendar year for inclusion in the state housing credit ceiling (as defined in § 42(h)(3)(C) of the IRC) for such year~~,~~; or

e. Move a development from the nonprofit or new construction pool to its ~~or their~~ appropriate geographic pool to more fully or fully utilize the total amount of credits made available ~~therein~~ during such round.

L. 1. The total amount of credits that may be awarded in any credit year after credit year 2001 to any applicant or to any related applicants for one or more developments shall not exceed 15% of Virginia's per capita dollar amount of credits for such credit year (credit cap).

2. However, if the amount of credits to be reserved in any such credit year to all applications assigned a total number of points at or above the threshold amount set forth in this section shall be less than Virginia's dollar amount of credits available for such credit year, then the authority's board of commissioners may waive the credit cap to the extent it deems necessary to reserve credits in an amount at least equal to such dollar amount of credits.

3. Applicants shall be deemed to be related if any principal in a proposed development or any person or entity related to the applicant or principal will be a principal in any other proposed development ~~or developments~~. For purposes of this subsection, a principal shall also include any person or entity who, in the determination of the executive director, has exercised or will exercise, directly or indirectly, substantial control over the applicant or has performed or will perform (or has assisted or will assist the applicant in the performance of), directly or indirectly, substantial responsibilities or functions customarily performed by applicants with respect to applications or developments.

4. For the purpose of determining whether any person or entity is related to the applicant or principal, persons or entities shall be deemed to be related if the executive director determines that any substantial relationship existed, either directly between them or indirectly through a series of one or more substantial relationships (e.g., if party A has a substantial relationship with party B and if party B has a substantial relationship with party C, then A has a substantial relationship with both party B and party C), at any time within three years of the filing of the application for the credits.

5. In determining in any credit year whether an applicant has a substantial relationship with another applicant with respect to any application for which credits were awarded in any prior credit year, the executive director shall determine whether the applicants were related as of the date of the filing of such prior credit year's application or within three years prior thereto and shall not consider any relationships or any changes in relationships subsequent to such date.

6. Substantial relationships shall include~~,~~ the following relationships (in each of the following relationships, the persons or entities involved in the relationship are deemed to be related to each other):

a. The persons are in the same immediate family (including a spouse, children, parents, grandparents, grandchildren, brothers, sisters, uncles, aunts, nieces, and nephews) and are living in the same household;

b. The entities have one or more common general partners or members (including related persons and entities), or the entities have one or more common owners that (by themselves or together with any other related persons and entities) have, in the aggregate, 5.0% or more ownership interest in each entity;

c. The entities are under the common control (e.g., the same person and any related persons serve as a majority of the voting members of the boards of such entities or as chief executive officers of such entities) of one or more persons or entities (including related persons and entities);

d. The person is a general partner, member, or employee in the entity or is an owner (~~by himself~~ solely or together with any other related persons and entities) of 5.0% or more ownership interest in the entity;

e. The entity is a general partner or member in the other entity or is an owner (by itself or together with any other related persons and entities) of 5.0% or more ownership interest in the other entity; or

f. The person or entity is otherwise controlled, in whole or in part, by the other person or entity.

7. In determining compliance with the credit cap with respect to any application, the executive director may exclude any person or entity related to the applicant or to any principal in such applicant if the executive director determines that:

a. Such person or entity will not participate, directly or indirectly, in matters relating to the applicant or the ownership of the development to be assisted by the credits for which the application is submitted~~,~~;

b. Such person or entity has no agreement or understanding relating to such application or the tax credits requested ~~therein~~ within the application~~,~~; and

c. Such person or entity will not receive a financial benefit from the tax credits requested in the application.

8. A limited partner or other similar investor shall not be determined to be a principal and shall be excluded from the determination of related persons or entities unless the executive director shall determine that such limited partner or investor will, directly or indirectly, exercise control over the applicant or participate in matters relating to the ownership of the development substantially beyond the degree of control or participation that is usual and customary

for limited partners or other similar investors with respect to developments assisted by the credits.

9. If the award of multiple applications of any applicant or related applicants in any credit year shall cause the credit cap to be exceeded, such applicant shall, upon notice from the authority, jointly designate those applications for which credits are not to be reserved so that such limitation shall not be exceeded. Such notice shall specify the date by which such designation shall be made. In the absence of any such designation by the date specified in such notice, the executive director shall make such designation as ~~he~~ the executive director shall determine to best serve the interests of the program.

10. Each applicant and each principal ~~therein~~ of the applicant shall make such certifications, shall disclose such facts, and shall submit such documents to the authority as the executive director may require to determine compliance with the credit cap. If an applicant or any principal ~~therein~~ of the applicant makes any misrepresentation to the authority concerning such applicant's or principal's relationship with any other person or entity, the executive director may reject any or all of such applicant's pending applications for reservation or allocation of credits, may terminate any or all reservations of credits to the applicant, and may prohibit such applicant, the principals ~~therein~~ of the applicant, and any persons and entities then or thereafter having a substantial relationship (in the determination of the executive director as described ~~above~~ in this subsection) with the applicant or any principal ~~therein~~ of the applicant from submitting applications for credits for such period of time as the executive director shall determine.

M. The executive director:

1. Shall notify each applicant for such reservations of credits within a reasonable time after credits are reserved to any ~~applicants'~~ applications either:

a. Of the amount of credits reserved to such applicant's application by issuing to such applicant a written binding commitment to allocate such reserved credits subject to such terms and conditions as may be imposed by the executive director ~~therein~~ in the application, by the IRC, and by this chapter; or

b. That the applicant's application has been rejected or excluded or has otherwise not been reserved credits in accordance ~~herewith~~ with this section.

The written binding commitment shall prohibit any transfer, direct or indirect, of partnership interests (except those involving the admission of limited partners) prior to the placed-in-service date of the proposed development unless the transfer is consented to by the executive director. The written binding commitment shall further limit ~~the developers'~~ developer fees to the amounts established during the review of the applications for reservation of credits and such amounts shall not be increased unless consented to by the executive director.

2. May reserve additional credits from the current year equal to the amount of credits allocated to such developments from prior years if credits are reserved to any applicants for developments that have also received an allocation of credits from prior years, provided such previously allocated credits are returned to the authority. Any previously allocated credits returned to the authority under such circumstances shall be placed into the credit pools from which the current year's credits are reserved to such applicants.

3. Shall make a written explanation available to the general public for any allocation of housing credit dollar amount that is not made in accordance with established priorities and selection criteria of the authority.

a. The authority's board shall review and consider the analysis and recommendation of the executive director for the reservation of credits to an applicant, and, if it concurs with such recommendation, it shall by resolution ratify the reservation by the executive director of the credits to the applicant, subject to such terms and conditions as it shall deem necessary or appropriate to ~~assure~~ ensure compliance with the ~~aforementioned~~ binding commitment issued or to be issued to the applicant, the IRC, and this chapter.

b. If the board determines not to ratify a reservation of credits or to establish any such terms and conditions, the executive director shall so notify the applicant.

4. May require the applicant to make a good faith deposit or to execute such contractual agreements providing for monetary or other remedies as it may require, or both, to ~~assure~~ ensure that the applicant will comply with all requirements under the IRC, this chapter, and the binding commitment (including any requirement to conform to all of the representations, commitments, and information contained in the application for which points were assigned pursuant to this section).

Upon satisfaction of all such requirements (including any post-allocation requirements), such deposit shall be refunded to the applicant or such contractual agreements shall terminate, or both, as applicable.

N. If, as of the date the application is approved by the executive director, the applicant is entitled to an allocation of the credits under the IRC, this chapter, and the terms of any binding commitment that the authority would have otherwise issued to such applicant, the executive director may at that time allocate the credits to such qualified low-income buildings or development without first providing a reservation of such credits. This provision in no way limits the authority of the executive director to require a good faith deposit or contractual agreement, or both, as described in ~~the preceding paragraph~~ subsection M of this section, nor to relieve the applicant from

any other requirements ~~hereunder~~ for eligibility for an allocation of credits. Any such allocation shall be subject to ratification by the board in the same manner as provided ~~above~~ in subsection M of this section with respect to reservations.

O. The executive director may:

1. Require that applicants to whom credits have been reserved shall submit from time to time or at such specified times as ~~he~~ the executive director shall require, written confirmation and documentation as to the status of the proposed development and its compliance with the application, the binding commitment, and any contractual agreements between the applicant and the authority.

2. If on the basis of such written confirmation and documentation as the executive director shall have received in response to such a request, or on the basis of such other available information, or both, the executive director determines any or all of the buildings in the development that were to become qualified low-income buildings will not do so within the time period required by the IRC or will not otherwise qualify for such credits under the IRC, this chapter or the binding commitment:

a. Terminate the reservation of such credits and draw on any good faith deposit~~;~~; or

b. Substitute the reservation of credits from the current credit year with a reservation of credits from a future credit year if the delay is caused by a lawsuit beyond the applicant's control that prevents the applicant from proceeding with the development.

If, in lieu of or in addition to ~~the foregoing~~ this determination, the executive director determines that any contractual agreements between the applicant and the authority have been breached by the applicant, whether before or after allocation of the credits, ~~he~~ the executive director may seek to enforce any and all remedies to which the authority may then be entitled under such contractual agreements.

3. Establish such deadlines for determining the ability of the applicant to qualify for an allocation of credits as ~~he~~ the executive director shall deem necessary or desirable to allow the authority sufficient time, in the event of a reduction or termination of the applicant's reservation, to reserve such credits to other eligible applications and to allocate such credits pursuant ~~thereto~~ to such applications.

P. Any material changes to the development, as proposed in the application, occurring subsequent to the submission of the application for the credits ~~therefor~~ as presented in the application shall be subject to the prior written approval of the executive director. As a condition to any such approval, the executive director may, as necessary to comply with this chapter, the IRC, the binding commitment, and any other contractual agreement between the authority and the applicant, reduce the amount of credits applied for or reserved or impose additional terms and conditions with respect ~~thereto~~ to such credits. If such changes are made without the prior written approval of the executive director, ~~he~~ the executive director may terminate or reduce the reservation of such credits, impose additional terms and conditions with respect ~~thereto~~ to such credits, seek to enforce any contractual remedies to which the authority may then be entitled, draw on any good faith deposit, or perform any combination of ~~the foregoing~~ such remedies.

In the event that any reservation of credits is terminated or reduced by the executive director under this section, ~~he~~ the executive director may reserve, allocate or carry over, as applicable, such credits in such manner as ~~he~~ the executive director shall determine consistent with the requirements of the IRC and this chapter.

Q. The executive director may make a reservation of credits:

1. In an accessible supportive housing pool (ASH pool) to any applicant that proposes a nonelderly development that (i) will be assisted by a documented and binding form of rental assistance in order to ensure occupancy by extremely low-income persons; (ii) conforms to HUD regulations interpreting the accessibility requirements of § 504 of the Rehabilitation Act; (iii) will be actively marketed to people with disabilities in accordance with a plan submitted as part of the application for credits and approved by the executive director for at least 15% of the units in the development; (iv) has budgeted for the ongoing provision of services; (v) maintains dedicated services staff; and (vi) has a principal with a demonstrated capacity for supportive housing evidenced by prior services funding contracts, a certification from a certifying body acceptable to the executive director or other preapproved source~~;~~, and ~~(v) for which~~ the ~~applicant has completed~~ applicant's completion on behalf of the principal of the authority's supportive housing certification form. ~~Any such~~ ASH pool reservations made in any calendar year may be up to 10% of the Commonwealth's annual state housing credit ceiling for the applicable credit year. However, such reservation will be for credits from the Commonwealth's annual state housing credit ceiling from the following calendar year. If the ASH pool application deadline is simultaneous with the deadline for the other pools, the unsuccessful applicants in the ASH pool will also compete in the applicable geographic pool.

2. To developments having unique and innovative development concepts, such as innovative construction methods or materials; unique or innovative tenant services, tenant selection criteria, or eviction policies; or otherwise innovatively contributing to the authority's identified mission and goals. The applications for such credits must meet all the requirements of the IRC and threshold score. The authority shall also establish a review committee comprised of external real estate professionals, academic leaders, and other individuals knowledgeable of real estate development, design, construction, accessibility, energy

efficiency, or management to assist the authority in determining and ranking the innovative nature of the development. Such reservations will be for credits from the next year's per capita credits and may not exceed 12.5% of the credits expected to be available for that following calendar year. Such reservations shall not be considered in the executive director's determination that no more than 50% of the next calendar year's per capita credits have been pre-reserved.

3. In a preservation pool to low-income housing tax credit developments seeking credit resyndication that are currently operating within an extended compliance period. Prior to application, applicants must have completed more than 20 years of compliance under the existing extended use agreement issued in connection with the respective development's most recent credit allocation, and the credit investor or syndicator in place at the time of the allocation must have transferred all of its ownership interest in the development. Applicants awarded credits from this pool shall be subject to additional rent increase limits, as determined by the authority in the best interest of the plan, for a period of five years beginning on the first day of the new credit period. Preservation pool reservations made in any calendar year may be up to 10% of the Commonwealth's annual state housing credit ceiling for the applicable credit year. However, such reservation will be for credits from the Commonwealth's annual state housing credit ceiling from the following calendar year. Unsuccessful applicants in the preservation pool will also compete in the applicable geographic pool.

13VAC10-180-70. Allocation of credits.

A. At such time as one or more of an applicant's buildings or an applicant's development ~~which~~ that has received a reservation of credits is (i) placed in service or satisfies the requirements of § 42(h)(1)(E) of the IRC and (ii) meets all of the preallocation requirements of this chapter, the binding commitment, and any other applicable contractual agreements between the applicant and the authority, the applicant shall so advise the authority, shall request the allocation of all of the credits so reserved or such portion ~~thereof~~ of the credits reserved to which the applicant's buildings or development is then entitled under the IRC, this chapter, the binding commitment, and the ~~aforementioned~~ contractual agreements, if any, and shall submit such application, certifications (including an independent certified public accountant's certification of applicant's actual cost, and an independent certified public accountant's certification of the general contractor's actual costs), legal and accounting opinions, evidence as to costs, a breakdown of sources and uses of funds, pro forma financial statements setting forth anticipated cash flows, and other documentation as the executive director shall require in order to determine that the applicant's buildings or development is entitled to such credits as described ~~above~~ in this subsection. The applicant shall certify to the authority the full extent of all federal, state, and local subsidies ~~which~~ that apply (or ~~which~~ that the applicant expects to apply) with respect to the buildings or the development.

B. As of the date of allocation of credits to any building or development and as of the date such building or such development is placed in service, the executive director shall determine the amount of credits to be necessary for the financial feasibility of the development and its viability as a qualified low-income housing development throughout the credit period under the IRC. In making such determinations, the executive director shall consider the sources and uses of the funds, the available federal, state, and local subsidies committed to the development, and the total financing planned for the development as well as the investment proceeds or receipts expected by the authority to be generated with respect to the development and the percentage of the credit dollar amount used for development costs other than the costs of intermediaries. ~~He~~ The executive director shall also examine the development's costs, including ~~developer's~~ developer fees and other amounts in the application, for reasonableness, and~~,~~ if ~~he~~ the executive director determines that such costs or other amounts are unreasonably high, ~~he~~ the executive director shall reduce ~~them~~ the costs to amounts that ~~he~~ the executive director determines to be reasonable. The executive director shall review the applicant's projected rental income, operating expenses, and debt service for the credit period. The executive director may establish such criteria and assumptions as ~~he~~ the executive director shall then deem reasonable (or ~~he~~ the executive director may apply the criteria and assumptions ~~he~~ the executive director established pursuant to 13VAC10-180-60) for the purpose of making such determinations, including criteria as to the reasonableness of fees and profits and assumptions as to the amount of net syndication proceeds to be received (based upon such percentage of the credit dollar amount used for development costs, other than the costs of intermediaries, as the executive director shall determine to be reasonable for the proposed development), increases in the market value of the development, and increases in operating expenses, rental income, and, in the case of applications without firm financing commitments (as defined in 13VAC10-180-60) at fixed interest rates, debt service on the proposed mortgage loan. The amount of credits allocated to the applicant shall in no event exceed such amount as ~~so~~ determined by the executive director by more than a de minimis amount of ~~not more than~~ $100.

C. Prior to allocating credits to an applicant, the executive director shall require the applicant to execute and deliver to the authority a valid IRS Form 8821, Tax Information Authorization, naming the authority as the appointee to receive tax information. The Forms 8821 of all applicants will be forwarded to the IRS, which will authorize the IRS to furnish the authority with all IRS information pertaining to the applicants' developments, including audit findings and assessments.

D. Prior to allocating the credits to an applicant, the executive director shall require the applicant to execute, deliver, and record among the land records of the appropriate jurisdiction ~~or jurisdictions~~ an extended low-income housing commitment in accordance with the requirements of the IRC. Such commitment shall require that the applicable fraction (as defined in the IRC) for the buildings for each taxable year in the extended use period (as defined in the IRC) will not be less than the applicable fraction specified in such commitment and ~~which~~ that prohibits both (i) the eviction or the termination of tenancy (other than for good cause) of an existing tenant of a low-income unit and (ii) any increase in the gross rent with respect to such unit not otherwise permitted under the IRC. The amount of credits allocated to any building shall not exceed the amount necessary to support such applicable fraction, including any increase ~~thereto~~ in credits pursuant to § 42(f)(3) of the IRC reflected in an amendment to such commitment. The commitment shall provide that the extended use period will end on the day 15 years after the close of the compliance period (as defined in the IRC) or on the last day of any longer period of time specified in the application during which low-income housing units in the development will be occupied by tenants with incomes not in excess of the applicable income limitations; provided, however, that the extended use period for any building shall be subject to termination, in accordance with the IRC, on the date the building is acquired by foreclosure or instrument in lieu ~~thereof~~ of foreclosure unless a determination is made pursuant to the IRC that such acquisition is part of an agreement with the current owner ~~thereof~~, a purpose of which is to terminate such period. In addition, such termination shall not be construed to permit, prior to close of the three-year period following such termination, the eviction or termination of tenancy of any existing tenant of any low-income housing unit other than for good cause or any increase in the gross rents over the maximum rent levels then permitted by the IRC with respect to such low-income housing units. Such commitment shall contain a waiver of the applicant's right to pursue a qualified contract. Such commitment shall also contain such other terms and conditions as the executive director may deem necessary or appropriate to ~~assure~~ ensure that the applicant and the development conform to the representations, commitments, and information in the application and comply with the requirements of the IRC and this chapter. Such commitment shall be a restrictive covenant on the buildings binding on all successors to the applicant and shall be enforceable in any state court of competent jurisdiction by individuals (whether prospective, present, or former occupants) who meet the applicable income limitations under the IRC.

E. In accordance with the IRC, the executive director may, for any calendar year during the project period (as defined in the IRC), allocate credits to a development, as a whole, ~~which~~ that contains more than one building. Such an allocation shall apply only to buildings placed in service during or prior to the end of the second calendar year after the calendar year in which such allocation is made, and the portion of such allocation allocated to any building shall be specified not later than the close of the calendar year in which such building is placed in service. Any such allocation shall be subject to satisfaction of all requirements under the IRC.

F. If the executive director determines that the buildings or development is so entitled to the credits, ~~he~~ the executive director shall allocate the credits (or such portion ~~thereof~~ of credits to which ~~he~~ the executive director deems the buildings or the development to be entitled) to the applicant's qualified low-income buildings or to the applicant's development in accordance with the requirements of the IRC. If the executive director shall determine that the applicant's buildings or development is not so entitled to the credits, ~~he~~ the executive director shall not allocate the credits and shall ~~so~~ notify the applicant within a reasonable time after such determination is made. In the event that any such applicant shall not request an allocation of all of its reserved credits or whose buildings or development shall be deemed by the executive director not to be entitled to any or all of its reserved credits, the executive director may reserve or allocate, as applicable, such unallocated credits to the buildings or developments of other qualified applicants at such time ~~or times~~ and in such manner as ~~he~~ the executive director shall determine consistent with the requirements of the IRC and this chapter.

G. The executive director may prescribe (i) such deadlines for submissions of requests for allocations of credits for any calendar year as ~~he~~ the executive director deems necessary or desirable to allow sufficient processing time for the authority to make such allocations within such calendar year and (ii) such deadlines for satisfaction of all preallocation requirements of the IRC the binding commitment, any contractual agreements between the authority and the applicant and this chapter as ~~he~~ the executive director deems necessary or desirable to allow the authority sufficient time to allocate to other eligible applicants any credits for which the applicants fail to satisfy such requirements.

H. The executive director may make the allocation of credits subject to such terms as ~~he~~ the executive director may deem necessary or appropriate to ~~assure~~ ensure that the applicant and the development comply with the requirements of the IRC.

I. The executive director may also ~~(~~, to the extent not already required under 13VAC10-180-60~~)~~, require that all applicants make such good faith deposits or execute such contractual agreements with the authority as the executive director may require with respect to the credits~~,~~ (i) to ensure that the buildings or development are completed in accordance with the binding commitment, including all of the representations made in the application for which points were assigned pursuant to 13VAC10-180-60, and (ii) only in the case of any buildings or development ~~which~~ that are to receive an allocation of credits ~~hereunder~~ and ~~which~~ are to be placed in service in any future year, to ~~assure~~ ensure that the buildings or the development will be placed in service as a qualified low-income housing project (as defined in

the IRC) in accordance with the IRC and that the applicant will otherwise comply with all of the requirements under the IRC.

J. In the event that the executive director determines that a development for which an allocation of credits is made shall not become a qualified low-income housing project (as defined in the IRC) within the time period required by the IRC or the terms of the allocation or any contractual agreements between the applicant and the authority, the executive director may terminate the allocation and rescind the credits in accordance with the IRC and, in addition, may draw on any good faith deposit and enforce any of the authority's rights and remedies under any contractual agreement. An allocation of credits to an applicant may also be ~~cancelled~~ canceled with the mutual consent of such applicant and the executive director. Upon the termination or cancellation of any credits, the executive director may reserve, allocate, or carry over, as applicable, such credits in such manner as ~~he~~ the executive director shall determine consistent with the requirements of the IRC and this chapter.

K. An applicant that demonstrates a legitimate change in circumstances or delay beyond ~~their~~ the applicant's reasonable control, as determined by the authority, may return a valid reservation of prior years' tax credits between ~~October~~ September 1 and ~~December 31~~ September 30 and receive ~~a reservation~~ an allocation of the same amount of current or future year tax credits. The authority must determine that the applicant is capable of completing and placing the development in service within the time required by the IRC for such current or future year tax credits. ~~However, none of the principals in the development for which credits are returned and refreshed may be a principal in an application the following calendar year and the applicant must waive the right to a qualified contract, if applicable. The executive director may waive the one year nonparticipation provision if the executive director determines that the delay in completing the development is materially due to the failure of a governmental entity or agency within a reasonable period of time to take an action necessary for the applicant to complete the development, despite the applicant's good faith best efforts to complete~~ An applicant with a principal that, within three years prior to the current application, received an IRS Form 8609 for placing a separate development in service without returning credits to or requesting additional credits from the issuing housing finance agency will be permitted to increase the amount of developer fee included in the ~~development~~ development's eligible basis by 10%.

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TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF AUDIOLOGY AND SPEECH-LANGUAGE PATHOLOGY

Fast-Track Regulation

Title of Regulation: **18VAC30-21. Regulations Governing Audiology and Speech-Language Pathology (amending 18VAC30-21-40 through 18VAC30-21-80, 18VAC30-21-100, 18VAC30-21-110, 18VAC30-21-141; repealing 18VAC30-21-120, 18VAC30-21-150).**

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

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: January 29, 2025.

Effective Date: February 13, 2025.

Agency Contact: Kelli Moss, Executive Director, Board of Audiology and Speech-Language Pathology, 9960 Mayland Drive, Suite 300, Henrico, VA 23233, telephone (804) 597-4132, FAX (804) 939-5238, or email kelli.moss@dhp.virginia.gov.

Basis: Regulations of the Board of Audiology and Speech-Language Pathology are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which states that the general powers and duties of health regulatory boards shall be to promulgate regulations that are reasonable and necessary to effectively administer the regulatory system.

Purpose: The amendments delete duplicative language, combine provisions for clarity, and reduce requirements to obtain licensure in Virginia. The regulation has been determined by the General Assembly to be essential to protect the health, safety, or welfare of citizens.

Rationale for Using Fast-Track Rulemaking Process: The impetus for this action is Executive Order 19 (2022), the board's 2021 periodic review, and a petition for rulemaking received in late 2022; therefore, the action is expected to be noncontroversial.

Substance: The amendments (i) remove unclear or passive language, (ii) remove outdated provisions, (iii) remove provisions duplicative of statutory language, (iv) remove unnecessary or internally duplicative provisions, (v) combine listed requirements for audiology and speech-language pathology where possible, (vi) reduce requirements to obtain a license to practice by initial application and endorsement, and (vii) remove nonregulatory language from the chapter.

Issues: The primary advantages to the public are potential increase in licensees available to provide audiology or speech-language pathology services to the public. There are no disadvantages to the public. There are no primary advantages or disadvantages to the agency or the Commonwealth.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The Board of Audiology and Speech-Language Pathology (board) proposes to lower the regulatory burden by expanding pathways and reducing the requirements involved in obtaining licensure in Virginia (i.e., initial and provisional licensure, and licensure by endorsement) as an audiologist or as a speech-language pathologist (SLP), while also clarifying the regulatory text.

Background. This action results from Executive Order 19, the board's 2021 periodic review, and partly from a petition for rulemaking received in late 2022.[2] The proposed changes would clarify the regulatory text by amending unclear or passive language, removing certain text (outdated provisions, provisions duplicative of statutory language, and unnecessary or internally duplicative provisions), combining listed requirements for audiology and speech-language pathology where possible, and removing non-regulatory language. The proposal would also expand the pathways and reduce the requirements involved in obtaining initial or provisional licensure as well as licensure by endorsement in Virginia as an audiologist or as a speech-language pathologist.

Estimated Benefits and Costs: One of the proposed changes would expand the pathways to initial licensure.[3] The proposal would allow initial licensure to those who submit evidence of the following:

a. Documentation of graduation from a program accredited by the Council on Academic Accreditation of ASHA or an equivalent accrediting body recognized by the board;

b. Passage of the qualifying examination from an accrediting body recognized by the board; and

c. Evidence of six months of practice pursuant to a provisional license as described in 18VAC30-21-70 and submission of recommendation for licensure from the applicant's supervisor during practice as a provisional licensee.

According to the board, each of the current pathways requires that the applicant hold a Certificate of Clinical Competency (CCC) issued by ASHA. The board has determined that this approach is overly burdensome because it imposes a burden on those licensees who wish to obtain an initial license in Virginia (e.g., a military spouse) but who have had a break in their practice for various reasons such as pregnancy, sickness, family leave, etc. The board states that such an individual has to regain current and unrestricted CCC status, often at a significant cost, in order to then obtain initial licensure in the Commonwealth. For example, for an applicant to access and provide their CCC, they must maintain a current membership with ASHA by paying renewal fees for annual dues and certification fees. The total cost for initial membership and certification fees currently ranges between $256 and $511.[4] The renewal dues or fees for 2025 range between $71 and $250.[5] Additionally, otherwise qualified applicants may be unable to access their test scores from more than 10 years ago if they do not maintain a membership with ASHA, as the testing administrator destroys the related documentation. As is, the current regulations do not provide a pathway for experienced applicants to obtain a license if they qualify to apply only by examination and cannot access their scores through ASHA. Moreover, there may be delays depending on how quickly ASHA receives and processes the application or fees and provides the certification information to the board. The proposal would allow for an additional pathway to initial licensure that does not require a CCC, thereby eliminating the fees that may be charged by ASHA as well as the potential delays. The second substantive proposed change would amend the requirements for provisional licensure. A provisional license is issued to allow a practitioner who does not meet the requirements of the initial license; this allows them to practice until they fully meet the requirements. For example, if a practitioner has a deficiency in one or more required areas for full licensure, a provisional license allows practice while the applicant is addressing the deficiency. Currently, a provisional license is issued only to allow the applicant to obtain a CCC because that is the only avenue to full licensure. Since there would be a new pathway for initial licensure as discussed above, the language would be amended to include the new pathway as well. In essence, the proposed language would broaden the language that currently restricts the pathway only to those applicants who can obtain current and unrestricted CCC status by accommodating the new pathway. A third change would extend the duration of a provisional license from 18 months to 24 months, extend the ability to renew a provisional license for a period of 12 months instead of the existing six months, and allow the possibility of renewing a provisional license after 36 months rather than 24 months. These extensions of time are intended to reduce the burden of completing practice requirements in order to obtain a full license. The fourth substantive change is related to licensure by endorsement and would repeal the 10 hours of continuing education required for each year in which the applicant has been licensed in another jurisdiction, not to exceed 30 hours. The board does not believe the continuing education requirement is necessary for an individual holding a license in another state because most states require continuing education. Moreover, the board believes that applicants are likely to have taken continuing education, although it does not have any data on this topic. The board states that, generally, other states maintain their own renewal requirements and it does not need to perform additional checks on such requirements. This change is expected to provide some administrative cost savings to the board as well as the applicant in terms of time that would have been expended on demonstrating compliance with the current continuing education requirement.

Businesses and Other Entities Affected. This regulation applies to audiologists and SLPs licensed in Virginia. As of March 2024, there were 601 audiologists, 362 school SLPs, and 5,318 SLPs. However, the substantive proposed changes primarily apply to initial and provisional licensure and licensure by endorsement. The board estimates that approximately 10% to 20% of future applicants for initial licensure in Virginia may qualify for licensure under the proposed new pathway to initial licensure. In fiscal year 2024, there were 987 initial licenses issued. Thus,

annually, approximately 99 to 198 initial licensees may benefit from that change. The number of provisional licenses issued in 2023 was 223, but the number of licenses issued by endorsement is not available. No licensure applicant appears to be disproportionally affected. The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[6] An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.[7] The proposal would primarily expand the pathways and reduce the requirements for licensure and reduce burdens. Thus, no adverse impact is indicated.

Small Businesses[8] Affected.[9] The proposed amendments do not appear to adversely affect small businesses directly as they apply to individual practitioner licenses.

Localities[10] Affected.[11] The proposed amendments do not introduce costs on localities.

Projected Impact on Employment. The proposed amendments would expand the pathways to licensure and reduce the requirements and burdens on audiologists and SLPs. Thus, a positive impact on the supply of such practitioners in Virginia may be expected.

Effects on the Use and Value of Private Property. With an increase in the supply of audiologists and SLPs, firms that employ audiologists or SLPs may find it easier and less costly to hire and employ such practitioners. This could moderately increase their value. No impact on real estate development costs is expected.

[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] https://townhall.virginia.gov/L/ViewPetition.cfm?petitionId=379.

[3] Relatedly, this change stems from a petition for rulemaking received by the board in late 2022, which requested that the board provide alternative pathways to licensure outside the Certificate of Clinical Competency requirement..

[4] https://www.asha.org/certification/slpcertification/.

[5] https://www.asha.org/renew/.

[6] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[7] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[8] Pursuant to § 2.2-4007.04, 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."

[9] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[10] "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.

[11] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Board of Audiology and Speech-Language Pathology concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

Pursuant to Executive Order 19 (2022), as a result of a periodic review, and in response to a petition for rulemaking, the amendments (i) remove unclear or passive language, outdated provisions, nonregulatory language, and provisions duplicative of statutory language; (ii) combine listed requirements for audiology and speech-language pathology where possible; (iii) reduce requirements to obtain a license to practice by initial application and endorsement; and (vii) extend by six months the effectiveness of a provisional license.

18VAC30-21-40. Fees required.

A. The following fees shall be paid as applicable for licensure:

1. Application for audiology or speech-language pathology license	$135
2. Application for school speech-language pathology license	$70
3. Verification of licensure requests from other states	$20
4. Annual renewal of audiology or speech-language pathology license	$75
5. Late renewal of audiology or speech-language pathology license	$25
6. Annual renewal of school speech-language pathology license	$40
7. Late renewal of school speech-language pathology license	$15

8. Reinstatement of audiology or speech-language pathology license	$135
9. Reinstatement of school speech-language pathology license	$70
10. Duplicate wall certificate	$25
11. Duplicate license	$5
12. Handling fee for returned check or dishonored credit card or debit card	$50
13. Inactive license renewal for audiology or speech-language pathology	$40
14. Inactive license renewal for school speech-language pathology	$20
15. Application for provisional license	$50
16. Renewal of provisional license	$25

B. Fees shall be ~~made payable to the Treasurer of Virginia and shall not be refunded once submitted~~ nonrefundable.

18VAC30-21-50. Application requirements.

A. A person seeking a provisional license or licensure as an audiologist, a speech-language pathologist, or a school speech-language pathologist shall submit:

1. A completed and signed application;

2. The applicable fee prescribed in 18VAC30-21-40, or in the case of an application for licensure as an audiologist, a speech-language pathologist, or a school speech-language pathologist issued a provisional license pursuant to 18VAC30-21-70 A, the difference between the provisional licensure fee and the application licensure fee;

~~3. Documentation as required by the board to determine if the applicant has met the qualifications for licensure;~~

~~4. An attestation that the applicant has read, understands, and will comply with the statutes and regulations governing the practice of audiology or speech-language pathology; and~~

~~5.~~ 3. Verification of the status of the license or certification from each United States jurisdiction in which licensure or certification is held or has ever been held; and

~~6.~~ 4. A current report from the U.S. Department of Health and Human Services National Practitioner Data Bank.

B. An incomplete application package shall be retained by the board for a period of one year ~~from the date the application is received by the board~~. If an application is not completed within the year, an applicant shall reapply and pay a new application fee.

18VAC30-21-60. Qualifications for initial licensure.

A. The board may grant an initial license to an applicant for licensure in audiology or speech-language pathology who:

1. Holds a current and unrestricted Certificate of Clinical Competence issued by ASHA; or

2. ~~Holds a current and unrestricted certification issued by the ABA or any other accrediting body recognized by the board and provides documentation of having passed the qualifying examination from an accrediting body recognized by the board; or 3. Provides documentation of (i) graduation from an audiology program accredited by the Council on Academic Accreditation of ASHA or an equivalent accrediting body as recognized by the board; and (ii) having passed the qualifying examination from an accrediting body recognized by the board.~~ Submits evidence of the following:

a. Documentation of graduation from a program accredited by the Council on Academic Accreditation of ASHA or an equivalent accrediting body recognized by the board;

b. Passage of the qualifying examination from an accrediting body recognized by the board; and

c. Evidence of six months of practice pursuant to a provisional license as described in 18VAC30-21-70 and submission of recommendation for licensure from the applicant's supervisor during practice as a provisional licensee.

~~B. The board may grant an initial license to an applicant for licensure in speech language pathology who holds a current and unrestricted Certificate of Clinical Competence issued by ASHA.~~

~~C.~~ B. The board may grant a license to an applicant as a school speech-language pathologist who holds a master's degree in speech-language-pathology.

~~D.~~ C. The board may refuse to issue a license to any applicant who has been determined to have committed an act in violation of 18VAC30-21-160.

18VAC30-21-70. Provisional licensure.

A. Provisional license to qualify for initial licensure. An applicant may be issued a provisional license in order to obtain clinical experience ~~required for certification by ASHA, ABA, or any other accrediting body recognized by the board. To obtain a provisional license in order to qualify for initial licensure, the~~ for initial licensure in Virginia. The applicant shall submit documentation that ~~he~~ the applicant has:

1. Passed the qualifying examination from an accrediting body recognized by the board; and

2. Either:

a. For provisional licensure in audiology, successfully completed all the didactic coursework required for the

doctoral degree as documented by a college or university whose audiology program is accredited by the Council on Academic Accreditation of ASHA or an equivalent accrediting body as recognized by the board; or

b. For provisional licensure in speech-language pathology, submission of documentation of graduation or evidence that the applicant successfully completed all the didactic coursework required for a graduate program in speech-language pathology as documented by a college or university whose program is accredited by the Council on Academic Accreditation of ASHA or an equivalent accrediting body as recognized by the board.

B. Provisional license to qualify for endorsement or reentry into practice. An applicant may be issued a provisional license in order to qualify for licensure by endorsement pursuant to 18VAC30-21-80, reactivation of an inactive license pursuant to subsection C of 18VAC30-21-110, or reinstatement of a lapsed license pursuant to subsection B of 18VAC30-21-120.

~~C.~~ All provisional licenses shall expire ~~18~~ 24 months from the date of issuance and may be renewed for an additional ~~six~~ 12 months by submission of a renewal form and payment of a renewal fee. Renewal of a provisional license beyond ~~24~~ 36 months shall be for good cause shown.

~~D.~~ C. The holder of a provisional license in audiology shall only practice under the supervision of a licensed audiologist, and the holder of a provisional license in speech-language pathology shall only practice under the supervision of a licensed speech-language pathologist. The provisional licensee shall be responsible and accountable for the safe performance of those direct client care tasks to which ~~he~~ the provisional licensee has been assigned.

~~E.~~ D. Licensed audiologists or speech-language pathologists providing supervision shall:

1. Have an active, current license and at least three years of active practice as an audiologist or speech-language pathologist prior to providing supervision;

2. Document the frequency and nature of the supervision of provisional licensees;

3. Be responsible and accountable for the assignment of clients and tasks based on ~~their~~ assessment and evaluation of the provisional licensee's knowledge and skills; and

4. Monitor clinical performance and intervene if necessary for the safety and protection of the clients.

~~F.~~ E. The identity of a provisional licensee shall be disclosed to the client prior to treatment and shall be made a part of the client's file.

18VAC30-21-80. Qualifications for licensure by endorsement.

A. An applicant for licensure in audiology or speech-language pathology who has been licensed in another United States jurisdiction ~~shall~~ may apply for licensure in Virginia in accordance with application requirements in 18VAC30-21-50 and shall submit documentation of current active and unrestricted licensure in another United States jurisdiction and either:

1. Evidence of one year of active practice ~~in another United States jurisdiction for at least one of~~ over the past three years; or ~~practice for six months with a provisional license in accordance with 18VAC30-21-70 and by providing evidence of a recommendation for licensure by the applicant's supervisor. An applicant who graduated from an accredited program in audiology or speech-language pathology within 24 months immediately preceding application may be issued a license without evidence of active practice if the applicant holds a current and unrestricted Certificate of Clinical Competence in the area in which the applicant seeks licensure issued by ASHA or certification issued by ABA or any other accrediting body recognized by the board; and~~

~~2. One of the following:~~

~~a. Ten continuing education hours for each year in which the applicant has been licensed in the other jurisdiction, not to exceed 30 hours, and passage of the qualifying examination from the accrediting body recognized by the board;~~

~~b. A current and unrestricted Certificate of Clinical Competence in the area in which the applicant seeks licensure issued by ASHA; or~~

~~c. A current and unrestricted certification issued by ABA and passage of the qualifying examination from the accrediting body recognized by the board.~~

2. Evidence of six months of practice pursuant to a provisional license as described in 18VAC30-21-70 and submission of recommendation for licensure from the applicant's supervisor during practice as a provisional licensee.

B. The board may refuse to issue a license to any applicant who has been determined to have committed an act in violation of 18VAC30-21-160.

18VAC30-21-100. Continuing education requirements for renewal of an active license.

A. In order to renew an active license, a licensee shall complete at least 10 hours of continuing education prior to the renewal date each year. One hour of the 10 hours required for annual renewal may be satisfied through delivery of professional services, without compensation, to low-income individuals receiving health services through a local health department or a free clinic organized in whole or primarily for the delivery of those services. One hour of continuing education may be credited for three hours of providing such volunteer services, as documented by the health department or free clinic.

B. Continuing education shall be activities, programs, or courses related to audiology or speech-language pathology, depending on the license held, and offered or approved by ~~one of the following~~ a board-recognized, accredited ~~sponsors~~ sponsor or ~~organizations sanctioned by the profession:~~ organization.

~~1. The Speech-Language-Hearing Association of Virginia or a similar state speech-language-hearing association of another state;~~

~~2. The American Academy of Audiology;~~

~~3. The American Speech-Language-Hearing Association;~~

~~4. The Accreditation Council on Continuing Medical Education of the American Medical Association offering Category I continuing medical education;~~

~~5. Local, state, or federal government agencies;~~

~~6. Colleges and universities;~~

~~7. International Association of Continuing Education and Training; or~~

~~8. Health care organizations accredited by The Joint Commission or DNV GL Healthcare.~~

C. If the licensee is dually licensed by ~~this~~ the board as an audiologist and speech-language pathologist, a total of no more than 15 hours of continuing education are required for renewal of both licenses with a minimum of 7.5 contact hours in each profession.

D. A licensee shall be exempt from the continuing education requirements for the first renewal following the date of initial licensure in Virginia under 18VAC30-21-60.

E. The licensee shall retain all continuing education documentation for a period of three years following the renewal of an active license. Documentation from the sponsor or organization shall include the title of the course, the name of the sponsoring organization, the date of the course, and the number of hours credited.

F. The board may grant an extension of the deadline for continuing education requirements~~,~~ for up to one year~~,~~ for good cause shown upon a written request from the licensee prior to the renewal date of each year.

G. The board may grant an exemption for all or part of the requirements for circumstances beyond the control of the licensee, such as temporary disability, mandatory military service, or officially declared disasters.

H. The board may periodically conduct an audit for compliance with continuing education requirements. Licensees selected for an audit conducted by the board shall provide all supporting documentation within 30 days of receiving notification of the audit.

I. Failure to comply with these requirements may subject the licensee to disciplinary action by the board.

18VAC30-21-110. Inactive licensure; reactivation and reinstatement for audiologists, speech-language pathologists, or school speech-language pathologists.

A. An audiologist, speech-language pathologist, or school speech-language pathologist who holds a current, unrestricted license in Virginia may, upon a request on the renewal application and submission of the required fee, be issued an inactive license. The holder of an inactive license shall not be required to maintain continuing education requirements and shall not be entitled to perform any act requiring a license to practice audiology or speech-language pathology in Virginia.

B. A licensee whose license has been inactive or has lapsed and who requests reactivation or reinstatement of an active license shall file an application, pay the prescribed fee, which, for reactivation of an inactive license, shall be the difference between the inactive and active renewal fees for the current year, and provide documentation of:

1. Either:

a. Current certification issued by ASHA or ABA; or

~~2.~~ b. Completion of 10 continuing education hours equal to the requirement for the number of years in which the license has been inactive, not to exceed 30 contact hours~~. C. A licensee who does not reactivate within five years shall meet the requirements of subsection B of this section and shall provide: 1.~~; and

2. A current report from the U.S. Department of Health and Human Services National Practitioner Data Bank~~; 2. Verification of the status of any license or certification from each United States jurisdiction in which licensure or certification is held or has ever been held; and 3. Evidence of either: a. Active practice for at least one of the past three years, or b. Practice in accordance with 18VAC30-21-70 with a provisional license for six months and a recommendation for licensure from one's supervisor~~.

~~D.~~ C. The board may deny a request for reactivation to any licensee who has been determined to have committed an act in violation of 18VAC30-21-160.

18VAC30-21-120. ~~Reinstatement of a lapsed license for audiologists, speech-language pathologists, or school speech-language pathologists.~~ (Repealed.)

~~A. A person may renew a lapsed license within one year of expiration by following the requirements for late renewal in subsection B of 18VAC30-21-90.~~

~~B. When a license has not been renewed within one year of the expiration date, a person may apply to reinstate his license by submission of reinstatement application, payment of the reinstatement fee, and submission of documentation of either:~~

~~1. A current Certificate of Clinical Competence issued by ASHA or certification issued by ABA or any other accrediting body recognized by the board; or~~

~~2. At least 10 continuing education hours for each year the license has been lapsed, not to exceed 30 contact hours, obtained during the time the license in Virginia was lapsed.~~

~~C. A licensee who does not reinstate within five years shall meet the requirements of subsection B of this section and shall provide:~~

~~1. A current report from the U.S. Department of Health and Human Services National Practitioner Data Bank (NPDB);~~

~~2. Verification of the status of any license or certification from each United States jurisdiction in which licensure or certification is or has ever been held; and~~

~~3. Evidence of either:~~

~~a. Active practice for at least one of the past three years; or~~

~~b. Practice in accordance with 18VAC30-21-70 with a provisional license for six months and a recommendation for licensure from one's supervisor.~~

~~D. The board may deny a request for reinstatement to any licensee who has been determined to have committed an act in violation of 18VAC30-21-160.~~

18VAC30-21-141. Recordkeeping.

A licensee shall~~: 1. Comply with provisions of § 32.1-127.1:03 of the Code of Virginia related to the confidentiality and disclosure of client records or related to provision of client records to another practitioner or to the client or the client's personal representative. 2. Properly~~ properly manage and keep timely, accurate, legible, and complete client records, to include the following:

~~a.~~ 1. For licensees who are employed by a health care institution, school system, or other entity~~,~~ in which the individual practitioner does not own or maintain the practitioner's own records, ~~failure to~~ maintain client records in accordance with the policies and procedures of the employing entity; or

~~b.~~ 2. For licensees who are self-employed or employed by an entity in which the individual practitioner does own and is responsible for client records, ~~failure to~~ maintain a client record for a minimum of six years following the last client encounter with the following exceptions:

~~(1)~~ a. For records of a minor child, the minimum time is six years from the last client encounter or until the child reaches ~~the age of~~ 18 years of age or becomes emancipated, whichever is longer; or

~~(2)~~ b. Records that have previously been transferred to another practitioner or health care provider or provided to the client or the client's personal representative as documented in a record or database maintained for a minimum of six years.

~~3. Comply with requirements of § 54.1-2405 of the Code of Virginia for notification and transfer of patient records in conjunction with closure, sale, or relocation of one's practice.~~

18VAC30-21-150. ~~Prohibited conduct.~~ (Repealed.)

~~A. No person, unless otherwise licensed to do so, shall prepare, order, dispense, alter, or repair hearing aids or parts of or attachments to hearing aids for consideration. However, audiologists licensed under this chapter may make earmold impressions and prepare and alter earmolds for clinical use and research.~~

~~B. No person licensed as a school speech-language pathologist shall conduct the practice of speech-language pathology outside of the public school setting.~~

VA.R. Doc. No. R19-29; Filed December 6, 2024, 10:10 a.m.

BOARD OF MEDICINE

Fast-Track Regulation

Title of Regulation: **18VAC85-40. Regulations Governing the Practice of Respiratory Therapists (amending 18VAC85-40-10, 18VAC85-40-55, 18VAC85-40-66, 18VAC85-40-70, 18VAC85-40-86; repealing 18VAC85-40-20, 18VAC85-40-30, 18VAC85-40-89).**

Statutory Authority: §§ 54.1-2400 and 54.1-2912.1 of the Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: January 29, 2025.

Effective Date: February 13, 2025.

Agency Contact: Erin Barrett, Director of Legislative and Regulatory Affairs, Department of Health Professions, Perimeter Center, 9960 Mayland Drive, Suite 300, Henrico, VA 23233, telephone (804) 750-3912, FAX (804) 915-0382, or email erin.barrett@dhp.virginia.gov.

Basis: Section 54.1-2400 of the Code of Virginia provides the Board of Medicine the authority to promulgate regulations to administer the regulatory system. Section 54.1-2954.1 of the Code of Virginia provides specific authority for the board to regulate respiratory care practitioners.

Purpose: The rationale for the amendments includes (i) the reduction of regulatory requirements; (ii) the elimination of provisions redundant of statutory language; and (iii) the elimination of provisions that are no longer needed. The elimination of redundant provisions generally protects the health, safety, and welfare of citizens by ensuring a sufficient workforce of respiratory therapists with a reduction of redundant or outdated requirements.

Rationale for Using Fast-Track Rulemaking Process: The impetus for these amendments was the board's 2022 periodic review of this chapter. This regulatory change is expected to be noncontroversial and is appropriate for the fast-track rulemaking process because these amendments delete outdated or redundant provisions and clarify others, and there is not expected to be any pushback to these changes.

Substance: The amendments delete redundant statutory provisions or useless directions in regulation, including provisions related to (i) an unused definition, (ii) public participation regulations, (iii) violations of Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1 of the Code of Virginia, (iv) fees related to voluntary practice by out-of-state licensees, (v) board audits of continuing education, (vi) posting requirements for destruction of records, (vii) the closing or selling of a practice, and (viii) solicitation or remuneration in exchange for referral. The amendments also clarify portions of the scope of practice of respiratory therapists.

Issues: There are no primary advantages or disadvantages to the public. There are no primary advantages or disadvantages to the agency or the Commonwealth.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. As the result of a periodic review,[2] the Board of Medicine (board) proposes to remove text from various portions of 18VAC85-40 Regulations Governing the Practice of Respiratory Therapists.

Background. The board relates that each portion of text proposed for removal qualifies as one of the following: (i) definition not used in the regulation, (ii) refers to another regulation that is not used in this regulation, (iii) redundant, (iv) imposes a $10 fee for an individual licensed out-of-state to register for voluntary practice in the Commonwealth, (v) requires the board to periodically conduct a random audit of its active licensees to determine compliance, (vi) limits licensees from performing actions that the board believes should be within their scope of practice, (vii) duplicative of Health Insurance Portability and Accountability Act (HIPAA) provisions, or (viii) duplicative of statute.

Estimated Benefits and Costs: According to DHP, the $10 fee for an individual licensed out-of-state to register for voluntary practice itself costs more administratively to collect than $10. Thus, eliminating the fee would be beneficial in that it would both reduce cost for respiratory therapists licensed out-of-state seeking to volunteer in Virginia and net costs for the board. In 18VAC85-40-66 D, the current regulation states that "The board shall periodically conduct a random audit of its active licensees to determine compliance. The practitioners selected for the audit shall provide all supporting documentation within 30 days of receiving notification of the audit." According to DHP, the board has only performed one or two of these audits in the last two decades, and only on two sets of its 18 types of licensees. DHP adds that the board does not have staff or the ability to conduct such audits and has not for years. Thus, the proposed repeal of the quoted sentence at the beginning of this paragraph would conform the regulation to practice. In setting forth the scope of practice for respiratory therapists, the current text 18VAC85-40-70 states that "This practice shall include, but not be limited to, ventilatory assistance and support; the insertion of artificial airways without cutting tissue and the maintenance of such airways; the administration of medical gases exclusive of general anesthesia; topical administration of pharmacological agents to the respiratory tract; humidification; and administration of aerosols." According to DHP, the board proposes to delete "without cutting tissue" and "exclusive of general anesthesia" to conform to current standard of care. The board notes that the amendments are needed because the regulation as currently written limits the scope of practice by not allowing respiratory therapists to perform, for example, emergency tracheotomies, which they are required to do at times. DHP believes that the limitation on the scope of practice caused by the current inclusion of "without cutting tissue" and "exclusive of general anesthesia" may have caused issues providing care. However, the agency has no direct information that this limitation occurred in actuality, but advisory board members had this concern. Thus, the proposed removal of these terms may be beneficial by increasing the scope of practice available to respiratory therapists. Removing the other instances of definitions that are not used in the regulation, text that refers to another regulation, or that is redundant or duplicative of HIPAA provisions or statute would have no impact on requirements for regulated entities or the public.

Businesses and Other Entities Affected. The proposed amendments affect the 4,724 respiratory therapists licensed in the Commonwealth,[3] as well as their patients and employers. According to survey data from the most recently published Virginia Healthcare Workforce Data Center report on respiratory therapists,[4] the primary type of employers of respiratory therapists in the Commonwealth are distributed as follows:

Establishment Type	Percentage
General Hospital, Inpatient Department	60%
Academic Institution	8%
General Hospital, Outpatient Department	6%
Home Health Care	5%
Children's Hospital	5%
Rehabilitation Facility, Residential/Inpatient	2%

Health Equipment Rental Company	2%
Physician Office	2%
Skilled Nursing Facility	2%
Sleep Center, Hospital Based	1%
Other	7%

The Code of Virginia requires the DPB to assess whether an adverse impact may result from the proposed regulation.[5] An 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. As no proposed amendment increases costs or reduces net revenue for any entity, no adverse impact is indicated.

Small Businesses[6] Affected.[7] The proposed amendments do not appear to adversely affect small businesses.

Localities[8] Affected.[9] The proposed amendments neither disproportionally affect any particular localities nor introduce costs for local governments.

Projected Impact on Employment. The proposed amendments do not appear to affect total employment.

Effects on the Use and Value of Private Property. To the extent that respiratory therapists who work for private entities may have refrained from performing emergency tracheotomies and other procedures due to the current text on the scope of practice in 18VAC85-40-70, the proposed amendments to this section as described above may lead to such respiratory therapists newly performing emergency tracheotomies and other procedures once the changes are in effect. This change could increase the value of those private entities; however, any such increase is expected to be minimal. The proposed amendments do not affect real estate development costs.

[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] See https://townhall.virginia.gov/l/ViewPReview.cfm?PRid=2148.

[3] Source: https://www.dhp.virginia.gov/about/stats/2023Q3/04CurrentLicenseCountQ3FY2023.pdf.

[4] See https://www.dhp.virginia.gov/media/dhpweb/docs/hwdc/medicine/0117RT2021.pdf.

[5] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[6] Pursuant to § 2.2-4007.04, 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."

[7] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[8] "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.

[9] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Board of Medicine concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

The amendments delete outdated or redundant provisions and clarify provisions to be consistent with current practice of respiratory therapists, including removing (i) an unused definition, public participation requirements, and a cross reference for a list of violations of Chapter 29 (§ 54.1-2900 et seq.) of Title 54.1 of the Code of Virginia; (ii) a fee related to voluntary practice by out-of-state licensees; (iii) a requirement for periodic board audits of continuing education; (iv) posting requirements for destruction of records and for the closing or selling of a practice; and (v) prohibition of solicitation or remuneration in exchange for referral.

18VAC85-40-10. Definitions.

A. The following words and terms when used in this chapter shall have the meanings ascribed to them in § 54.1-2900 of the Code of Virginia:

Board

Qualified medical direction

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

"AARC" means the American Association for Respiratory Care.

"Accredited educational program" means a program accredited by the Commission on Accreditation for Respiratory Care or any other agency approved by the NBRC for its entry level certification examination.

"Active practice" means a minimum of 160 hours of professional practice as a respiratory therapist within the 24-month period immediately preceding renewal or application for licensure if previously licensed or certified in another jurisdiction. The active practice of respiratory care may include supervisory, administrative, educational, or consultative activities or responsibilities for the delivery of such services.

~~"Advisory board" means the Advisory Board on Respiratory Care to the Board of Medicine as specified in § 54.1-2956 of the Code of Virginia.~~

"NBRC" means the National Board for Respiratory Care~~,~~ Inc.

"Respiratory therapist" means a person as specified in § 54.1-2954 of the Code of Virginia.

18VAC85-40-20. ~~Public participation.~~ (Repealed.)

~~A separate board regulation, 18VAC85-11, provides for involvement of the public in the development of all regulations of the Virginia Board of Medicine.~~

18VAC85-40-30. ~~Violations.~~ (Repealed.)

~~Any violation of Chapter 29 of Title 54.1 of the Code of Virginia shall be subject to the statutory sanctions as set forth in the Act.~~

18VAC85-40-55. Registration for voluntary practice by out-of-state licensees.

Any respiratory therapist who does not hold a license to practice in Virginia and who seeks registration to practice under subdivision 27 of § 54.1-2901 of the Code of Virginia on a voluntary basis under the auspices of a publicly supported, all volunteer, nonprofit organization that sponsors the provision of health care to populations of underserved people shall:

1. File a complete application for registration on a form provided by the board at least five business days prior to engaging in such practice. An incomplete application will not be considered;

2. Provide a complete record of professional licensure in each state in which ~~he~~ the respiratory therapist has held a license and a copy of any current license;

3. Provide the name of the nonprofit organization, the dates, and the location of the voluntary provision of services;

~~4. Pay a registration fee of $10;~~ and

~~5.~~ 4. Provide a notarized statement from a representative of the nonprofit organization attesting to its compliance with provisions of subdivision 27 of § 54.1-2901 of the Code of Virginia.

18VAC85-40-66. Continuing education requirements.

A. In order to renew an active license as a respiratory therapist, a licensee shall attest to having completed 20 hours of continuing education within the last biennium as follows:

1. Courses approved and documented by a sponsor recognized by the AARC;

2. Courses directly related to the practice of respiratory care as approved by the American Medical Association for Category 1 CME credit;

3. A credit course of post-licensure academic education relevant to respiratory care offered by a college or university accredited by an agency recognized by the U.S. Department of Education; or

4. Passage of a specialty examination of the National Board of Respiratory Care for 20 hours of credit in the biennium in which the examination was passed.

Up to two continuing education hours may be satisfied through delivery of respiratory therapy services, without compensation, to low-income individuals receiving services through a local health department or a free clinic organized in whole or primarily for the delivery of health services. One hour of continuing education may be credited for three hours of providing such volunteer services. For the purpose of continuing education credit for voluntary service, the hours shall be approved and documented by the health department or free clinic.

B. A practitioner shall be exempt from the continuing education requirements for the first biennial renewal following the date of initial licensure in Virginia.

C. The practitioner shall retain in ~~his~~ the practitioner's records the completed form with all supporting documentation for a period of four years following the renewal of an active license.

~~D. The board shall periodically conduct a random audit of its active licensees to determine compliance. The practitioners selected for the audit shall provide all supporting documentation within 30 days of receiving notification of the audit.~~

~~E.~~ D. Failure to comply with these requirements may subject the licensee to disciplinary action by the board.

~~F.~~ E. The board may grant an extension of the deadline for continuing competency requirements~~,~~ for up to one year~~,~~ for good cause shown upon a written request from the licensee prior to the renewal date.

~~G.~~ F. The board may grant an exemption for all or part of the requirements for circumstances beyond the control of the licensee, such as temporary disability, mandatory military service, or officially declared disasters.

18VAC85-40-70. Individual responsibilities.

Practice as a licensed respiratory therapist means, upon receipt of written or verbal orders from a qualified practitioner and under qualified medical direction, the evaluation, care, and treatment of patients with deficiencies and abnormalities associated with the cardiopulmonary system. This practice shall include~~, but not be limited to,~~ ventilatory assistance and support; the insertion of artificial airways ~~without cutting tissue~~ and the maintenance of such airways; the administration of medical gases ~~exclusive of general anesthesia~~; topical administration of pharmacological agents to the respiratory tract; humidification; and administration of aerosols. The practice of respiratory care shall include such functions shared with other health professionals as cardiopulmonary resuscitation; bronchopulmonary hygiene; respiratory rehabilitation; specific testing techniques required to assist in diagnosis, therapy, and research; and invasive and noninvasive cardiopulmonary monitoring.

18VAC85-40-86. Patient records.

A. Practitioners shall comply with the provisions of § 32.1-127.1:03 of the Code of Virginia related to the confidentiality and disclosure of patient records.

B. Practitioners shall provide patient records to another practitioner or to the patient or ~~his~~ the patient's personal representative in a timely manner in accordance with provisions of § 32.1-127.1:03 of the Code of Virginia.

C. Practitioners shall properly manage and keep timely, accurate, legible, and complete patient records.

D. Practitioners who are employed by a health care institution or other entity in which the individual practitioner does not own or maintain ~~his~~ the practitioner's own records shall maintain patient records in accordance with the policies and procedures of the employing entity.

E. Practitioners who are self-employed or employed by an entity in which the individual practitioner owns and is responsible for patient records shall~~: 1. Maintain~~ maintain a patient record for a minimum of six years following the last patient encounter with the following exceptions:

~~a.~~ 1. Records of a minor child, including immunizations, shall be maintained until the child reaches ~~the age of~~ 18 years of age or becomes emancipated, with a minimum time for record retention of six years from the last patient encounter regardless of the age of the child;

~~b.~~ 2. Records that have previously been transferred to another practitioner or health care provider or provided to the patient or ~~his~~ the patient's personal representative; or

~~c.~~ 3. Records that are required by contractual obligation or federal law may need to be maintained for a longer period of time.

~~2. From October 19, 2005, post information or in some manner inform all patients concerning the time frame for record retention and destruction. Patient records shall only be destroyed in a manner that protects patient confidentiality, such as by incineration or shredding.~~

~~3. When closing, selling or relocating his practice, meet the requirements of § 54.1-2405 of the Code of Virginia for giving notice that copies of records can be sent to any like-regulated provider of the patient's choice or provided to the patient.~~

18VAC85-40-89. ~~Solicitation or remuneration in exchange for referral.~~ (Repealed.)

~~A practitioner shall not knowingly and willfully solicit or receive any remuneration, directly or indirectly, in return for referring an individual to a facility or institution as defined in § 37.2-100 of the Code of Virginia or hospital as defined in § 32.1-123 of the Code of Virginia.~~

~~Remuneration shall be defined as compensation, received in cash or in kind, but shall not include any payments, business arrangements, or payment practices allowed by 42 USC § 1320a-7b(b), as amended, or any regulations promulgated thereto.~~

VA.R. Doc. No. R25-7378; Filed December 6, 2024, 10:26 a.m.

BOARD OF PHARMACY

Proposed Regulation

Title of Regulation: **18VAC110-21. Regulations Governing the Licensure of Pharmacists and Registration of Pharmacy Technicians (amending 18VAC110-21-46).**

Statutory Authority: §§ 54.1-2400 and 54.1-3303.1 of the Code of Virginia.

Public Hearing Information:

January 9, 2025 - 8:55 a.m. - Department of Health Professions, 9960 Mayland Drive, Suite 201, Board Room 2, Henrico, VA 23233.

Public Comment Deadline: February 28, 2025.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Henrico, VA 23233, telephone (804) 367-4456, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

Basis: Regulations of the Board of Pharmacy are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which states that the general powers and duties of health regulatory boards shall be to promulgate regulations that are reasonable and necessary to effectively administer the regulatory system. Section 54.1-3303.1 of the Code of Virginia authorizes pharmacists to initiate treatment for certain diseases and conditions in accordance with a statewide protocol developed by the board in collaboration with the Board of Medicine and the Virginia Department of Health.

Purpose: Chapters 171 and 172 of the 2023 Acts of Assembly require the board to amend this regulation. The proposed changes are essential to protect the health, safety, and welfare of citizens because they expand the provision of health care for certain diseases and conditions.

Substance: The proposed changes add group A streptococcus bacteria infections, influenza virus infections, COVID-19 infections, and urinary tract infections as diseases or conditions for which pharmacists can initiate treatment with controlled substances or devices for persons 18 years of age and older.

Issues: The primary advantage to the public is access to health care for certain diseases and conditions at more locations, including a patient's local pharmacy. There are no disadvantages to the public. There are no primary advantages or disadvantages to the agency or the Commonwealth.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The identical Chapters 171 and 172 of the 2023 Acts of Assembly[2] (legislation) expanded the conditions for which pharmacists can initiate treatment. The legislation additionally required that the Board of Pharmacy (board) promulgate emergency regulations to reflect the change to be effective within 280 days of enactment. The board did promulgate such emergency regulations,[3] and now proposes to make the amendment permanent.

Background. The proposed amendment to the regulation is essentially identical to the change made to the Code of Virginia by the legislation. Specifically, the following would be added to the list of drugs and devices that a pharmacist may initiate treatment with, dispense, or administer to persons 18 years of age or older:

Controlled substances or devices for the initiation of treatment of the following diseases or conditions for which clinical decision making can be guided by a clinical test that is classified as waived under the federal Clinical Laboratory Improvement Amendments of 1988, 42 USC § 263a:

a. Group A Streptococcus bacteria infection;

b. Influenza virus infection;

c. COVID-19 virus infection; and

d. Urinary tract infection.

Estimated Benefits and Costs: Since the proposed amendment to the regulation is essentially identical to the amendment to the Code of Virginia, amending the regulation would have no impact beyond better informing readers of the regulation of the additional items that statute already allows a pharmacist to initiate treatment with, dispense, or administer.

Businesses and Other Entities Affected. The 1,737 permitted pharmacies and the 16,357 licensed pharmacists in the Commonwealth, as well as patients with whom they may initiate treatment, are potentially affected by the legislation.[4] The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[5] An 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. As the proposed amendment neither increases costs nor reduces net revenue for any entity, no adverse impact is indicated.

Small Businesses[6] Affected.[7] The proposed amendment does not adversely affect small businesses.

Localities[8] Affected.[9] The proposed amendment neither disproportionally affect any particular localities nor introduce costs for local governments.

Projected Impact on Employment. The proposed amendment does not affect total employment.

Effects on the Use and Value of Private Property. The proposed amendment does not affect the use and value of private property nor real estate development costs.

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[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] See https://legacylis.virginia.gov/cgi-bin/legp604.exe?231+ful+CHAP0171+hil.

[3] See https://townhall.virginia.gov/L/ViewStage.cfm?stageid=9951.

[4] Data source: https://www.dhp.virginia.gov/about/stats/2024Q4/04CurrentLicenseCountQ4FY2024.pdf.

[5] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[5] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[6] Pursuant to § 2.2-4007.04, 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."

[7] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses

include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[8] "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.

[9] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Board of Pharmacy concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

Pursuant to Chapters 171 and 172 of the 2023 Acts of Assembly, the proposed amendments expand the conditions for which a pharmacist can initiate treatment. The proposed amendments add group A streptococcus bacteria infections, influenza virus infections, COVID-19 virus infections, and urinary tract infections as diseases and conditions for which pharmacists can initiate treatment with controlled substances or devices for persons 18 years of age and older, as clinical decision-making for these four diseases and conditions can be guided by a clinical test that is classified as waived under the federal Clinical Laboratory Improvement Amendments of 1988 (42 USC § 263a).

18VAC110-21-46. Initiation of treatment by a pharmacist.

A. Pursuant to § 54.1-3303.1 of the Code of Virginia, a pharmacist may initiate treatment with, dispense, or administer the following drugs and devices to persons 18 years of age or older with whom the pharmacist has a bona fide pharmacist-patient relationship:

1. Naloxone or other opioid antagonist, including such controlled paraphernalia as defined in § 54.1-3466 of the Code of Virginia as may be necessary to administer such naloxone or other opioid antagonist;

2. Epinephrine;

3. Injectable or self-administered hormonal contraceptives, provided the patient completes an assessment consistent with the United States Medical Eligibility Criteria for Contraceptive Use;

4. Prenatal vitamins for which a prescription is required;

5. Dietary fluoride supplements, in accordance with recommendations of the American Dental Association for prescribing of such supplements for persons whose drinking water has a fluoride content below the concentration recommended by the U.S. Department of Health and Human Services;

6. Drugs and devices as defined in § 54.1-3401 of the Code of Virginia, controlled paraphernalia as defined in § 54.1-3466 of the Code of Virginia, and other supplies and equipment available over the counter covered by the patient's health carrier when the patient's out-of-pocket cost is lower than the out-of-pocket cost to purchase an over-the-counter equivalent of the same drug, device, controlled paraphernalia, or other supplies or equipment;

7. Vaccines included on the Immunization Schedule published by the Centers for Disease Control and Prevention and vaccines for COVID-19;

8. Tuberculin purified protein derivative for tuberculosis testing;

9. Controlled substances for the prevention of human immunodeficiency virus, including controlled substances prescribed for pre-exposure and post-exposure prophylaxis pursuant to guidelines and recommendations of the Centers for Disease Control and Prevention;

10. Nicotine replacement and other tobacco-cessation therapies, including controlled substances as defined in the Drug Control Act (§ 54.1-3400 et seq. of the Code of Virginia), together with appropriate patient counseling; ~~and~~

11. Tests for COVID-19 and other coronaviruses;

12. Controlled substances or devices for the initiation of treatment of the following diseases or conditions for which clinical decision making can be guided by a clinical test that is classified as waived under the federal Clinical Laboratory Improvement Amendments of 1988, 42 USC § 263a:

a. Group A Streptococcus bacteria infection;

b. Influenza virus infection;

c. COVID-19 virus infection; and

d. Urinary tract infection.

B. Notwithstanding the provisions of § 54.1-3303 of the Code of Virginia, a pharmacist may initiate treatment with, dispense, or administer the following drugs and devices to persons three years of age or older:

1. Vaccines included on the Immunization Schedule published by the Centers for Disease Control and Prevention and vaccines for COVID-19; and

2. Tests for COVID-19 and other coronaviruses.

The provisions of this subsection will become effective upon expiration of the provisions of the federal Declaration Under the Public Readiness and Emergency Preparedness Act for Medical Countermeasures Against COVID-19 related to the vaccination and COVID-19 testing of minors.

C. Pharmacists who initiate treatment with, dispense, or administer a drug, device, controlled paraphernalia, or other supplies or equipment pursuant to subsections A and B of this section shall:

1. Follow the statewide protocol adopted by the board for each drug, device, controlled paraphernalia, or other supplies or equipment.

2. Notify the patient's primary health care provider that treatment has been initiated with such drug, device, controlled paraphernalia, or other supplies or equipment or that such drug, device, controlled paraphernalia, or other supplies or equipment have been dispensed or administered to the patient, provided that the patient consents to such notification. No pharmacist shall limit the ability of notification to be sent to the patient's primary care provider by requiring use of email that is secure or compliant with the federal Health Insurance Portability and Accountability Act (42 USC § 1320d et seq.) (HIPAA). If the patient does not have a primary health care provider, the pharmacist shall counsel the patient regarding the benefits of establishing a relationship with a primary health care provider and, upon request, provide information regarding primary health care providers, including federally qualified health centers, free clinics, or local health departments serving the area in which the patient is located. If the pharmacist is initiating treatment with, dispensing, or administering injectable or self-administered hormonal contraceptives, the pharmacist shall counsel the patient regarding seeking preventative care, including (i) routine well-woman visits, (ii) testing for sexually transmitted infections, and (iii) pap smears. If the pharmacist is administering a vaccine pursuant to this section, the pharmacist shall report such administration to the Virginia Immunization Information System in accordance with the requirements of § 32.1-46.01 of the Code of Virginia.

3. Maintain a patient record for a minimum of six years following the last patient encounter with the following exceptions:

a. Records that have previously been transferred to another practitioner or health care provider or provided to the patient or the patient's personal representative; or

b. Records that are required by contractual obligation or federal law to be maintained for a longer period of time.

4. Perform the activities in a manner that protects patient confidentiality and complies with HIPAA.

5. Obtain a history from the patient, including questioning the patient for any known allergies, adverse reactions, contraindications, or health diagnoses or conditions that would be adverse to the initiation of treatment, dispensing, or administration.

6. If administering a vaccination to a minor pursuant to subdivision B 1 of this section, provide written notice to the minor's parent or guardian that the minor should visit a pediatrician annually.

D. A pharmacist may initiate treatment with, dispense, or administer drugs, devices, controlled paraphernalia, and other supplies and equipment pursuant to this section through telemedicine services, as defined in § 38.2-3418.16 of the Code of Virginia, in compliance with requirements of § 54.1-3303 of the Code of Virginia and consistent with the applicable standard of care.

VA.R. Doc. No. R24-7530; Filed December 6, 2024, 9:19 a.m.

Proposed Regulation

Titles of Regulations: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-20).**

18VAC110-21. Regulations Governing the Licensure of Pharmacists and Registration of Pharmacy Technicians (amending 18VAC110-21-20).

18VAC110-30. Regulations for Practitioners of the Healing Arts to Sell Controlled Substances (amending 18VAC110-30-15).

18VAC110-50. Regulations Governing Wholesale Distributors, Manufacturers, Third-Party Logistics Providers, and Warehousers (amending 18VAC110-50-20).

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

Public Comment Deadline: February 28, 2025.

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.

Basis: Regulations of the Board of Pharmacy are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the board the authority to promulgate regulations in accordance with the Administrative Process Act (§ 2.2-400 et seq. of the Code of Virginia). In addition, the board is obligated by § 54.1-113 of the Code of Virginia to adjust fees to cover operating costs.

Purpose: The board last initiated a fee increase in 2017, which became effective in 2020. The previous fee increase prior to that was initiated in 2001 and became effective in 2002. The board instituted one-time fee reductions three times prior to the 2017 action. Salaries comprise the bulk of costs for any board within the Department of Health Professions. The five compounded state salary increases instituted since fiscal year (FY) 2020 have accelerated the need for a fee increase for the board. When the General Assembly enacts salary increases, general fund state agencies receive allocations through the budget process to cover the increase. The department, as a special fund agency, receives no such allocation and must ultimately increase fees on licensees to cover the difference.

Additional operational changes affecting available funds include an increase in licensee counts, regulated categories added to the board's jurisdiction, and an increase in disciplinary cases received by the board. Without adequate revenue to support inspections of pharmacy facilities, licensing, and disciplinary functions, work to protect the public by regulating, licensing, and disciplining the pharmacy workforce under the board will slow and deprive the citizens of the Commonwealth with needed and safe pharmacy services. Additionally, should inadequate revenue cause a backlog of disciplinary cases, public health and safety may be at risk by permitting practitioners actively committing drug diversion or unprofessional conduct to continue practicing unencumbered for months while awaiting review and adjudication of disciplinary matters. The board's actual cash balance for FY 2023 was $2,270,363. The estimated FY 2024 cash balance, reflecting a projected revenue of $4,953,312 and expenditures of $5,555,671, is $1,668,004. The estimated FY 2025 cash balance, reflecting a projected revenue of $4,983,032 and expenditures of $6,238,671, will be $412,365. The estimated FY 2026 cash balance, reflecting a projected revenue of $5,012,930 and expenditures of $6,523,498, will be -$1,098,203. To remain solvent, the board needs to obtain an approximate 45% to 50% increase in revenue. If the proposed fees in this action become final prior to the December 2025 renewal period, the estimated FY 2026 cash balance would be $1,355,977.

Substance: To address the deficit in funding, the board will increase fees for all categories of practitioners and facilities that the board regulates, with a concerted effort to ensure that the bulk of the increases needed are borne by entities and facilities rather than individual practitioners and to address the cost of facility inspections, which is currently high above initial permitting, renewal, or reinspection fees applied to those facilities. The board has compared Virginia fees to those of neighboring jurisdictions and proposed fees more in line with other jurisdictions.

Issues: The primary advantage to the public is the continued licensing and disciplining of health care professionals and establishments by the board. There are no disadvantages to the public because the board is a special fund agency that is not funded by the general public. The primary advantage to the agency and the Commonwealth is the continued licensing and disciplining of health care professionals and establishments by the board. There are no primary disadvantages to the agency or the Commonwealth.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The Board of Pharmacy (board) is proposing to amend six regulations to increase fees for its licensed professions in order to comply with § 54.1-113 B of the Code of Virginia (the Callahan Act).[2]

Background. The Callahan Act requires the Department of Health Professions (DHP) and its boards to revise fees in situations in which expenses allocated to the board for the past biennium are more than 10% greater or less than moneys collected on behalf of the board.[3] DHP reports that over the 2022-2024 biennium, the total board expenditures were $11,096,178 and total revenues were $10,016,277. Since the expenses exceed the revenues by 11%, these numbers would appear to satisfy the requirements of the Callahan Act, suggesting that a fee increase is necessary. DHP also reports that that the board is not currently in a deficit, with a cash balance of $1,714,255 at the end of fiscal year (FY) 2024. However, the board is projected to have a deficit of roughly $1.05 million by the end of FY 2026.[4] DHP reports that the fees for this Board were last increased in 2020[5] and that the board had instituted one-time fee reductions three times prior to the 2020 increase.[6] DHP reports that since the 2020 fee increase, the board has experienced several increases that drove up costs. Namely, increases in salaries (enacted by the General Assembly), the number of disciplinary cases and related workload, and the number of regulated entities. Regarding the latter, in 2019, the board began registering nonresident third-party logistics providers, nonresident warehousers, and limited-use physician selling drugs; and in 2021, the board began registering pharmacy technician trainees. To prevent the anticipated deficit, the board proposes to increase fees for most categories of practitioners and programs by 45% to 50%. DHP reports that although the bulk of board funding is provided by renewal fees of individual licensees, such as pharmacists, the board has made a concerted effort to ensure that the majority of the proposed increases are borne by entities and facilities rather than individual practitioners. This unequal application of the required fee increase is also intended to address the cost of facility inspections, which is currently higher than the initial permitting, renewal, or reinspection fees applied to those facilities. Lastly, the board proposes to add a new sterile compounding fee for pharmacies and nonresident pharmacies where sterile compounding is done. DHP reports that these inspections cost roughly $2,374 every two years and are essential to protect public safety because the process is inherently risky. The proposed fee increases, which are listed in the following table, are expected to generate approximately $2.4 million in additional revenue per year.[7] Lastly, fees associated with pharmacy technician training programs would be eliminated due to statutory changes that removed board authority to approve such programs.

FEE TYPE	CURRENT FEE	PROPOSED FEE	DOLLAR CHANGE	PERCENTAGE CHANGE
Pharmacy, 18VAC110-20				
Initial application fees:				
Pharmacy permit	$500	$700	$200	40.00 %
Physician licensed to dispense drugs	$500	$700	$200	40.00 %
Medical equipment supplier permit	$235	$350	$115	48.94 %
Outsourcing facility permit	$350	$900	$550	157.14 %
Nonresident pharmacy registration	$350	$700	$350	100.00 %
Nonresident outsourcing facility registration	$350	$900	$550	157.14 %
Controlled substances registration	$120	$180	$60	50.00 %
Pilot program approval	$325	$415	$90	27.69 %
Repackaging training program approval	$65	$85	$20	30.77 %
Sterile compounding	$0	$200	$200	N/A
Annual renewal fees:				
Pharmacy permit	$350	$490	$140	40.00 %
Physician licensed to dispense drugs	$350	$490	$140	40.00 %
Medical equipment supplier permit	$235	$350	$115	48.94 %
Outsourcing facility permit	$350	$1,100	$750	214.29%
Nonresident pharmacy registration	$350	$490	$140	40.00 %
Nonresident outsourcing facility registration	$350	$1,100	$750	214.29%
Controlled substances registration	$120	$180	$60	50.00 %
Innovative pilot program	$260	$375	$115	44.23 %
Repackaging training program	$20	$25	$5	25.00 %
Sterile compounding	$0	$400	$400	N/A
Reinstatement fees:				
Pharmacy permit	$315	$440	$125	39.68 %
Physician licensed to dispense drugs	$315	$440	$125	39.68 %
Medical equipment supplier permit	$275	$385	$110	40.00 %
Outsourcing facility permit	$315	$500	$185	58.73 %

Nonresident pharmacy registration	$150	$440	$290	193.33 %
Nonresident outsourcing facility registration	$315	$500	$185	58.73 %
Controlled substances registration	$235	$350	$115	48.94 %
Repackaging training program	$65	$85	$20	30.77 %
Other fees:				
Change of Pharmacist-in-Charge	$65	$125	$60	92.31 %
Change of ownership	$65	$125	$60	92.31 %
Inspection for remodeling or change of location for any facility	$300	$435	$135	45.00 %
Reinspection	$300	$435	$135	45.00 %
Inspection of pilot location	$300	$435	$135	45.00 %
Change of pharmacist responsible for approved pilot	$35	$150	$115	328.57 %
Duplicate permit or registration	$15	$20	$5	33.33 %
Licensure of Pharmacists and Registration of Pharmacy Technicians, 18VAC110-21				
Initial application fees:				
Pharmacist license	$235	$300	$65	27.66 %
Pharmacy intern registration	$20	$30	$10	50.00 %
Pharmacy technician trainee registration	$20	$30	$10	50.00 %
Pharmacy technician registration	$35	$40	$5	14.29 %
Approval of CE program	$130	$190	$60	46.15 %
Annual renewal fees:				
Pharmacist active license	$120	$175	$55	45.83 %
Pharmacist inactive license	$60	$95	$35	58.33 %
Pharmacy technician	$35	$45	$10	28.57 %
Reinstatement fees:				
Pharmacist	$275	$300	$25	9.09 %
Pharmacist after revocation/suspension	$650	$750	$100	15.38 %
Pharmacy technician registration	$45	$50	$5	11.11 %
Pharm tech trainee or pharm tech after revocation/suspension	$165	$200	$35	21.21 %
Pharmacy technician trainee registration	$0	$25	$25	N/A
Other fees:				

Duplicate license or registration	$15	$20	$5	33.33 %
Practitioners of the Healing Arts to Sell Controlled Substances, 18VAC110-30				
Initial application fees:				
Individual license	$235	$300	$65	27.66 %
Location permit	$315	$700	$385	122.22 %
Annual renewal fees:				
Individual license	$120	$175	$55	45.83 %
Location permit	$315	$490	$175	55.56 %
Late fees:				
Location permit	$50	$120	$70	140 %
Reinstatement fees:				
Individual license	$195	$300	$105	53.85 %
Location permit	$315	$415	$100	31.75 %
Individual license following revocation or suspension	$650	$750	$100	15.38 %
Facility reinspection	$300	$435	$135	45.00 %
Wholesale Distributors, Manufacturers and Warehousers, 18VAC110-50				
Initial application fees:				
Nonrestricted manufacturer permit	$350	$1,000	$650	185.71 %
Restricted manufacturer permit	$235	$850	$615	261.70 %
Wholesale distributor license	$350	$750	$400	114.29 %
Warehouser permit	$350	$510	$160	45.71 %
Nonresident wholesale distributor registration	$350	$750	$400	114.29 %
Controlled substances registration	$120	$180	$60	50.00 %
Third-party logistics provider permit	$350	$750	$400	114.29 %
Nonresident manufacturer registration	$350	$1,000	$650	185.71 %
Nonresident warehouser registration	$350	$510	$160	45.71 %
Nonresident third-party logistics provider	$350	$750	$400	114.29 %
Annual renewal fees:				
Nonrestricted manufacturer permit	$350	$1,000	$650	185.71 %
Restricted manufacturer permit	$235	$850	$615	261.70 %
Wholesale distributor license	$350	$1,000	$650	185.71 %

Warehouser permit	$350	$750	$400	114.29 %
Nonresident wholesale distributor registration	$350	$510	$160	45.71 %
Controlled substances registration	$350	$510	$160	45.71 %
Third-party logistics provider permit	$350	$750	$400	114.29 %
Nonresident manufacturer registration	$120	$180	$60	50.00 %
Nonresident warehouser registration	$350	$750	$400	114.29 %
Nonresident third-party logistics provider	$350	$750	$400	114.29 %
Reinstatement fees:				
Nonrestricted manufacturer permit	$315	$440	$125	39.68 %
Restricted manufacturer permit	$275	$385	$110	40.00 %
Wholesale distributor license	$315	$440	$125	39.68 %
Warehouser permit	$315	$440	$125	39.68 %
Nonresident wholesale distributor registration	$315	$440	$125	39.68 %
Controlled substances registration	$235	$300	$65	27.66 %
Third-party logistics provider permit	$315	$440	$125	39.68 %
Nonresident manufacturer registration	$315	$440	$125	39.68 %
Nonresident warehouser registration	$315	$440	$125	39.68 %
Nonresident third-party logistics provider	$315	$440	$125	39.68 %
Other fees:				
Reinspection	$300	$435	$135	45.00 %
Inspection for change of location, structural changes, security system changes	$300	$435	$135	45.00 %
Change of ownership	$65	$125	$60	92.31 %
Change of responsible party	$65	$125	$60	92.31 %

Estimated Benefits and Costs: The proposed fee increases would increase costs for pharmacists, pharmacy interns, pharmacy technicians, pharmacy technician trainees, and physicians selling controlled substances, as well as for owners of pharmacies, medical equipment suppliers, manufacturers, wholesalers, distributors, logistics providers, outsourcing facilities, and continuing education providers. The increased fees would allow the board to remain financially solvent and continue to provide oversight for pharmacy professionals and related facilities, including issuing licenses, conducting inspections, investigating complaints, and implementing any disciplinary actions. This in turn would maintain public confidence in these professionals and entities and protect

public safety from unscrupulous actors and inadvertent errors in the supply chain for regulated pharmaceutical products.

Businesses and Other Entities Affected. The proposed fee increases would increase costs for current and prospective pharmacists, pharmacy interns, pharmacy technicians, pharmacy technician trainees, and physicians selling controlled substances, as well as for owners of pharmacies, medical equipment suppliers, manufacturers, wholesalers, distributors, logistics providers, outsourcing facilities, and continuing education providers. The following table provides the numbers of each category of professionals and entities licensed or permitted by the board at the close of FY 2024.[8]

Individuals	Count
Pharmacist	16,357
Pharmacy intern	1,125
Pharmacy technician	12,807
Pharmacy technician trainee	8,014
Physician selling controlled substances	559
Entities/Programs	
Pharmacy	1,737
Non-resident pharmacy	962
Medical equipment supplier	212
Non-resident medical equipment supplier	367
Physician selling drugs location	129
Pilot programs	18
Repackaging training programs	1
Continuing education courses	9
Entities with controlled substances registration	1,498
Outsourcing facility	1
Non-resident outsourcing facility	33
Restricted manufacturer	32
Non-restricted manufacturer	34
Non-resident manufacturer	232
Third party logistics provider	5
Non-resident third party logistics provider	241
Warehouser	128
Non-resident warehouser	142
Wholesale distributor	62
Non-resident wholesale distributor	624

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[9] An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.[10] Since the proposed amendments would increase costs, an adverse impact is indicated for the various pharmacy professionals and entities listed that would face higher fees.

Small Businesses[11] Affected.[12] Types and Estimated Number of Small Businesses Affected. DHP does not collect data on the number of affected small businesses. However, some independent pharmacies that are not part of national retail pharmacy or grocery chains and continuing education providers are likely small businesses. Other business entities that are part of the supply chain may also meet the definition of a small business.

Costs and Other Effects. Small businesses affected by the proposed changes would face higher fees.

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

Localities[13] Affected.[14] The proposed amendments do not appear to disproportionally affect any locality in particular or affect costs for local governments.

Projected Impact on Employment. The proposed amendments would not be expected to affect employment prospects or entry into the profession for pharmacists or pharmacy technicians. Businesses impacted by the increased fees are unlikely to respond by reducing their staffing, so workers in manufacturing, warehousing, or distribution are unlikely to be affected either.

Effects on the Use and Value of Private Property. The proposed fee increases would increase costs for pharmacies, medical equipment suppliers, and other business entities that are part of the supply chain as listed above. Potentially, this may result in a modest decrease in their value. The proposed amendments do not affect real estate development costs.

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[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] See https://law.lis.virginia.gov/vacode/title54.1/chapter1/section54.1-113/.

[3] It should be noted that the Callahan Act does not specify whether moneys collected on behalf of the board refers only to the revenues in the immediately preceding biennium or if it also includes the cash balance from the biennium prior to that.

[4] See page 3 of the Agency Background Document (ABD) https://townhall.virginia.gov/L/GetFile.cfm?File=30\6327\10369\AgencyStatement_DHP_10369_v3.pdf.

[5] See https://townhall.virginia.gov/L/ViewAction.cfm?actionid=4938.

[6] See https://townhall.virginia.gov/L/ViewAction.cfm?actionid=4772.

[7] Pages 8-20 of the ABD contain detailed explanations for each fee change..

[8] Source: DHP. See https://www.dhp.virginia.gov/about/stats/2024Q4/04CurrentLicenseCountQ4FY2024.pdf.

[9] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[10] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[11] Pursuant to § 2.2-4007.04, 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."

[12] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[13] "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.

[14] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Board of Pharmacy concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

Pursuant to § 54.1-113 of the Code of Virginia, the proposed amendments raise fees charged by the Board of Pharmacy to ensure the board obtains sufficient operating funds for fiscal years 2025 and 2026.

18VAC110-20-20. Fees.

A. Unless otherwise provided, fees listed in this section shall not be refundable.

B. Initial application fees.

1. Pharmacy permit	~~$500~~ $700
2. Permitted physician licensed to dispense drugs	~~$500~~ $700
3. Medical equipment supplier permit	~~$235~~ $350
4. Outsourcing facility permit	~~$350~~ $900
5. Nonresident pharmacy registration	~~$350~~ $700
6. Nonresident outsourcing facility registration	~~$350~~ $900
7. Controlled substances registrations	~~$120~~ $180
8. Innovative program approval.	~~$325~~ $415
If the board determines that a technical consultant is required in order to make a decision on approval, any consultant fee, not to exceed the actual cost, shall also be paid by the applicant in addition to the application fee.	
9. Approval of a repackaging training program	~~$65~~ $85
10. Sterile compounding initial fee	$200

Applicants for a pharmacy permit or nonresident pharmacy registration that intend to perform sterile compounding shall submit a sterile compounding fee in addition to the pharmacy permit or nonresident pharmacy initial application fee.

C. Annual renewal fees.

1. Pharmacy permit – due no later than April 30	~~$350~~ $490
2. Physician permit to practice pharmacy – due no later than February 28	~~$350~~ $490
3. Medical equipment supplier permit – due no later than February 28	~~$235~~ $350
4. Outsourcing facility permit – due no later than April 30	~~$350~~ $1,100

5. Nonresident pharmacy registration – due no later than the date of initial registration	~~$350~~ $490
6. Nonresident outsourcing facility registration – due no later than the date of initial registration	~~$350~~ $1,100
7. Controlled substances registrations – due no later than February 28	~~$120~~ $180
8. Innovative program continued approval based on board order not to exceed ~~$260~~ $375 per approval period.	
9. Repackaging training program	~~$40~~ $50 every two years
10. Sterile compounding renewal fee	$400

Permitted pharmacies and registered nonresident pharmacies performing sterile compounding shall submit a sterile compounding renewal fee in addition to the pharmacy permit or nonresident pharmacy renewal fee.

D. Late fees. The following late fees shall be paid in addition to the current renewal fee to renew an expired permit or registration within one year of the expiration date. In addition, engaging in activities requiring a permit or registration after the expiration date of such permit or registration shall be grounds for disciplinary action by the board.

1. Pharmacy permit	$120
2. Physician permit to practice pharmacy	$120
3. Medical equipment supplier permit	$80
4. Outsourcing facility permit	$120
5. Nonresident pharmacy registration	$120
6. Nonresident outsourcing facility registration	$120
7. Controlled substances registrations	$40
8. Repackaging training program	$15

E. Reinstatement fees.

1. Any person or entity attempting to renew a permit or registration more than one year after the expiration date shall submit an application for reinstatement with any required fees. Reinstatement is at the discretion of the board and, except for reinstatement following revocation or suspension, may be granted by the executive director of the board upon completion of an application and payment of any required fees.

2. Facilities or entities that cease operation and wish to resume shall not be eligible for reinstatement but shall apply for a new permit or registration. Facilities or entities that failed to renew and continued to operate for more than one renewal cycle shall pay the current and all back renewal fees for the years in which they were operating plus the following reinstatement fees:

a. Pharmacy permit	~~$315~~ $440
b. Physician permit to practice pharmacy	~~$315~~ $440
c. Medical equipment supplier permit	~~$275~~ $385
d. Outsourcing facility permit	~~$315~~ $500
e. Nonresident pharmacy registration	~~$150~~ $440
f. Nonresident outsourcing facility registration	~~$315~~ $500
g. Controlled substances registration	~~$235~~ $350
h. Repackaging training program	~~$65~~ $85

F. Application for change or inspection fees for facilities or other entities.

1. Change of pharmacist-in-charge	~~$65~~ $125
2. Change of ownership for any facility	~~$65~~ $125
3. Inspection for remodeling or change of location for any facility	~~$300~~ $435
4. Reinspection of any facility	~~$300~~ $435
~~5. Board-required inspection for a robotic pharmacy system~~	~~$300~~
~~6.~~ 5. Board-required inspection of an innovative program location	~~$300~~ $435
~~7.~~ 6. Change of pharmacist responsible for an approved innovative program	~~$35~~ $150

G. Miscellaneous fees.

1. Handling fee for returned check or a dishonored credit card or debit card	$50
2. Duplicate permit or registration	~~$15~~ $20
3. Verification of permit or registration	$35

18VAC110-21-20. Fees.

A. Unless otherwise provided, fees listed in this section shall not be refundable.

B. Unless otherwise provided, any fees for taking required examinations shall be paid directly to the examination service as specified by the board.

C. Initial application fees.

1. Pharmacist license	~~$235~~ $300
2. Pharmacy intern registration	~~$20~~ $30
3. Pharmacy technician trainee registration	~~$20~~ $30
4. Pharmacy technician registration	~~$35~~ $40
~~5. Approval of a pharmacy technician training program~~	~~$200~~
~~6.~~ 5. Approval of a continuing education program	~~$130~~ $190

D. Annual renewal fees.

1. Pharmacist active license – due no later than December 31	~~$120~~ $175
2. Pharmacist inactive license – due no later than December 31	~~$60~~ $95
3. Pharmacy technician registration – due no later than December 31	~~$35~~ $45
~~4. Pharmacy technician training program~~	~~$100 every two years~~

E. Late fees. The following late fees shall be paid in addition to the current renewal fee to renew an expired license or registration within one year of the expiration date ~~or within two years in the case of a pharmacy technician training program~~. In addition, engaging in activities requiring a license or registration after the expiration date of such license or registration shall be grounds for disciplinary action by the board.

1. Pharmacist license	$40
2. Pharmacist inactive license	$20
3. Pharmacy technician registration	$15
~~4. Pharmacy technician training program~~	~~$20~~

F. Reinstatement fees. Any person or entity attempting to renew a license or registration more than one year after the expiration date~~, or more than two years after the expiration date in the case of a pharmacy technician training program,~~ shall submit an application for reinstatement with any required fees. Reinstatement is at the discretion of the board and, except for reinstatement following revocation or suspension, may be granted by the executive director of the board upon completion of an application and payment of any required fees.

1. Pharmacist license	~~$275~~ $300
2. Pharmacist license after revocation or suspension	~~$650~~ $750
3. Pharmacy technician registration	~~$45~~ $50
4. Pharmacy technician or pharmacy technician trainee registration after revocation or suspension	~~$165~~ $200
~~5. A pharmacy technician training program that failed to renew and continued to operate for more than one renewal cycle shall pay the current and all back renewal fees for the years in which they were operating plus a reinstatement fee of $75. A pharmacy technician training program that ceases operation and wishes to resume shall not be eligible for reinstatement but shall apply for a new registration.~~	
5. Pharmacy technician trainee	$25

G. Miscellaneous fees.

1. Duplicate wall certificate	$50
2. Handling fee for returned check or a dishonored credit card or debit card	$50
3. Duplicate license or registration	~~$15~~ $20
4. Verification of licensure or registration	$35

18VAC110-30-15. Fees.

A. Unless otherwise provided, fees listed in this section shall not be refundable.

B. Initial application fees.

1. License for practitioner of the healing arts to sell controlled substances: ~~$235~~ $300.

2. Permit for facility in which practitioners of the healing arts sell controlled substances: ~~$315~~ $700.

C. Annual renewal fees.

1. License for practitioner of the healing arts to sell controlled substances: ~~$120~~ $175.

2. Permit for facility in which practitioners of the healing arts sell controlled substances: ~~$315~~ $490.

D. Late fees. The following late fees shall be paid in addition to the current renewal fee to renew an expired license within one year of the expiration date.

1. License for practitioner of the healing arts to sell controlled substances: $40.

2. Permit for facility in which practitioners of the healing arts sell controlled substances: ~~$50~~ $120.

E. Reinstatement fees. Any person or entity attempting to renew a license or permit more than one year after the expiration date shall submit an application for reinstatement with any required fees.

1. License for practitioner of the healing arts to sell controlled substances: ~~$195~~ $300.

2. Permit for facility in which practitioners of the healing arts sell controlled substances: ~~$315~~ $415.

3. Application fee for reinstatement of a license or permit that has been revoked or suspended indefinitely: ~~$650~~ $750.

F. Facilities in which only one practitioner of the healing arts is licensed by the board to sell controlled substances shall be exempt from fees associated with obtaining and renewing a facility permit. Facilities that change from only one practitioner to more than one shall notify the board within 30 days of such change.

G. The fee for reinspection of any facility shall be ~~300~~ $435.

H. The handling fee for returned check or a dishonored credit card or debit card shall be $50.

18VAC110-50-20. Fees.

A. Unless otherwise provided, fees listed in this section shall not be refundable.

B. Initial application fees.

1. Nonrestricted manufacturer permit	~~$350~~ $1,000
2. Restricted manufacturer permit	$235 $850
3. Wholesale distributor license	~~$350~~ $750
4. Warehouser permit	~~$350~~ $510
5. Nonresident wholesale distributor registration	~~$350~~ $750
6. Controlled substances registration	~~$120~~ $180
7. Third-party logistics provider permit	~~$350~~ $750
8. Nonresident manufacturer registration	~~$350~~ $1,000
9. Nonresident warehouser registration	~~$350~~ $510
10. Nonresident third-party logistics provider registration	~~$350~~ $750

C. Annual renewal fees shall be due on February 28 of each year.

1. Nonrestricted manufacturer permit	~~$350~~ $1,000
2. Restricted manufacturer permit	~~$235~~ $850
3. Wholesale distributor license	~~$350~~ $750
4. Warehouser permit	~~$350~~ $510
5. Nonresident wholesale distributor registration	~~$350~~ $750
6. Controlled substances registration	~~$120~~ $180
7. Third-party logistics provider permit	~~$350~~ $750
8. Nonresident manufacturer registration	~~$350~~ $1,000
9. Nonresident warehouser registration	~~$350~~ $510
10. Nonresident third-party logistics provider registration	~~$350~~ $750

D. Late fees. The following late fees shall be paid in addition to the current renewal fee to renew an expired license within one year of the expiration date. In addition, engaging in activities requiring a license, permit, or registration after the expiration date of such license, permit, or registration shall be grounds for disciplinary action by the board.

1. Nonrestricted manufacturer permit	$120
2. Restricted manufacturer permit	$80
3. Wholesale distributor license	$120

4. Warehouser permit	$120
5. Nonresident wholesale distributor registration	$120
6. Controlled substances registration	$40
7. Third-party logistics provider permit	$120
8. Nonresident manufacturer registration	$120
9. Nonresident warehouser registration	$120
10. Nonresident third-party logistics provider registration	$120

E. Reinstatement fees.

1. Any entity attempting to renew a license, permit, or registration more than one year after the expiration date shall submit an application for reinstatement with any required fees. Reinstatement is at the discretion of the board and, except for reinstatement following license revocation or suspension, may be granted by the executive director of the board upon completion of an application and payment of any required fees.

2. Engaging in activities requiring a license, permit, or registration after the expiration date of such license, permit, or registration shall be grounds for disciplinary action by the board. Facilities or entities that cease operation and wish to resume shall not be eligible for reinstatement but shall apply for a new permit or registration.

3. Facilities or entities that failed to renew and continued to operate for more than one renewal cycle shall pay the current and all back renewal fees for the years in which they were operating plus the following reinstatement fees:

a. Nonrestricted manufacturer permit	~~$315~~ $440
b. Restricted manufacturer permit	~~$275~~ $385
c. Wholesale distributor license	~~$315~~ $440
d. Warehouser permit	~~$315~~ $440
e. Nonresident wholesale distributor registration	~~$315~~ $440
f. Controlled substances registration	~~$235~~ $350
g. Third-party logistics provider permit	~~$315~~ $440
h. Nonresident manufacturer registration	~~$315~~ $440
i. Nonresident warehouser registration	~~$315~~ $440
j. Nonresident third-party logistics provider registration	$315 $440

F. Application for change or inspection fees.

1. Reinspection fee	~~$300~~ $435
2. Inspection fee for change of location, structural changes, or security system changes	~~$300~~ $435
3. Change of ownership fee	~~$65~~ $125
4. Change of responsible party	~~$65~~ $125

G. The handling fee for a returned check or a dishonored credit card or debit card shall be $50.

H. The fee for verification of license, permit, or registration shall be $35.

VA.R. Doc. No. R24-7695; Filed December 2, 2024, 8:32 a.m.

BOARD FOR PROFESSIONAL SOIL SCIENTISTS, WETLAND PROFESSIONALS, AND GEOLOGISTS

Proposed Regulation

Title of Regulation: **18VAC145-30. Regulations Governing Certified Professional Wetland Delineators (amending 18VAC145-30-10 through 18VAC145-30-70, 18VAC145-30-120, 18VAC145-30-140, 18VAC145-30-160; repealing 18VAC145-30-80).**

Statutory Authority: §§ 54.1-201 and 54.1-2203 of the Code of Virginia.

Public Hearing Information:

January 22, 2025 - 10 a.m. - Department of Professional and Occupational Regulation, Training Room 1, 9960 Mayland Drive, Richmond, VA 23233.

Public Comment Deadline: February 28, 2025.

Agency Contact: Kathleen R. Nosbisch, Executive Director, Board for Professional Soil Scientists, Wetland Professionals, and Geologists, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (804) 527-4294, or email soilscientist@dpor.virginia.gov.

Basis: Section 54.1-201 of the Code of Virginia authorizes the board to promulgate regulations necessary to ensure continued competency and to effectively administer the regulatory system administered by the board.

Purpose: As mandated by the General Assembly, the board protects the public welfare, in part, by establishing through

regulation (i) the minimum qualifications of applicants for certification or licensure, provided that all qualifications are necessary to ensure either competence or integrity to engage in the profession or occupation; (ii) minimum standards to ensure continued competency and to prevent deceptive or misleading practices by practitioners; and (iii) requirements to effectively administer the regulatory system administered by the board.

As the proposed regulation was developed, the board reviewed discretionary requirements imposed on regulated parties and eliminated those requirements that are not necessary to protect the public health, safety, and welfare or to effectively administer the certification program.

Substance: The proposed amendments include:

1. Revising the definitions of "tidal wetlands" and "nontidal wetlands" in 18VAC145-30-10 to update and clarify the meaning of these terms.

2. Revising the provisions of 18VAC145-30-20 to specify that an applicant must pass the board-approved examination and to provide that the board will waive the examination requirement for those who meet the requirements of applicable statute.

3. Revising the provisions of 18VAC145-30-40 to (i) remove education and experience provisions that are currently provided for in statute and (ii) change provisions related to the submission of letters of reference for certification.

4. Revising the qualifying experience provisions in 18VAC145-30-50 to increase the minimum number of nontidal wetland delineations that an applicant must have inspected, reviewed, or confirmed if seeking to qualify based on experience in inspecting, reviewing, and confirming delineations.

5. Revising the qualifying education provisions in 18VAC145-30-60 to (i) provide that acceptable education may include a graduate degree and (ii) remove the minimum number of required semester hours in biology, physical, and quantitative sciences as criteria for acceptable degree coursework.

6. Revising the provisions of 18VAC145-30-70 to remove the requirement that an application for certification be received by the board at least 90 days prior to the certification examination.

7. Repealing the examination waiver provisions in 18VAC145-30-80, which are not necessary.

8. Revising the provisions of 18VAC145-30-120 to (i) increase the timeframe for reinstatement of an expired certificate from one year to two years and (ii) remove a provision that the board may require examination or reexamination of an individual who is reinstating a certificate.

9. Revising the standards of practice and conduct in 18VAC145-30-140 to remove standards that are not necessary to protect the public health, safety, and welfare.

Issues: The primary advantages to the public and regulated community include providing clarification to provisions of the regulation, ensuring the regulation complements Virginia law and reflects current agency procedures, and reducing regulatory burdens by removing requirements that are not necessary to protect the health, safety, and welfare of the public. There are no identifiable disadvantages to the public or the Commonwealth. The board does not anticipate that the regulatory change will create any substantial disadvantages to the regulated community.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. The Board for Professional Soil Scientists, Wetland Professionals, and Geologists (board) proposes to (i) revise the qualifying education for certification to include a graduate degree and remove the minimum number of required semester hours for certain coursework; (ii) increase the timeframe for reinstating an expired certificate from one year to two years and remove a provision that the board may require examination or reexamination of an individual who is reinstating a certificate; and (iii) make the experience requirement more stringent for those seeking to qualify for certification based on inspection, review, or confirmation of wetland delineations.

Background. The initial impetus for this action was Executive Directive Number One (2022), which directs Executive Branch entities under the authority of the Governor to initiate regulatory processes to reduce by at least 25% the number of regulations not mandated by federal or state statute, in consultation with the Office of the Attorney General, and in a manner consistent with the laws of the Commonwealth. This regulation establishes rules for individuals who practice or offer to practice as a wetland professional by providing that such individuals may voluntarily obtain certification from the board as a certified professional wetland delineator as evidence of qualification to engage in this occupation. Individuals that meet the requirements of certification are authorized to represent themselves to the public as certified professional wetland delineators. However, a lack of certification does not prohibit the practice of wetland delineation. The regulation ensures that individuals who are certified have met the minimum standards (including education, experience, and examination) that have been established by the General Assembly and the board to practice wetland delineation. In order to comply with Executive Directive Number One, the board primarily proposes changes that would repeal language that is duplicative of statute, is non-regulatory in nature, or contradicts current practice. Two other proposed changes aim to reduce regulatory burdens, and one proposed change would increase the stringency of the experience requirement for certification.

Estimated Benefits and Costs. As of July 1, 2024, there were 130 certified wetland delineators, and one to eight new applicants were certified annually between fiscal years 2020 and 2024. The number of entrants is relatively small compared to some of the other regulated occupations, and thus the magnitude of the expected impacts discussed below should be relatively limited. The board proposes to revise the qualifying education for certification to allow an applicant to have either a graduate degree or the currently required bachelor's degree and to remove the minimum number of required semester hours in biological, physical, and quantitative sciences. Under the proposed changes, an applicant could qualify if they possess either an undergraduate or graduate degree so long as it contains coursework in biological, physical, and quantitative sciences. With these two proposed changes, the board reports that more individuals would likely qualify for certification as the change would include those whose graduate degree is in biology, physical, and quantitative sciences even if their bachelor's degree lacks sufficient focus in those areas. The board also proposes to increase the timeframe for reinstating an expired certificate from one year to two years, and to remove a provision that the board may require examination or reexamination of an individual who is reinstating a certificate. These changes would allow more time to reinstate an expired certificate and eliminate the possibility of having to retake the exam. On the other hand, the board also proposes to make the experience requirement more stringent for those seeking to qualify based on inspection, review, or confirmation of delineations as an employee of a federal, state, or local governmental body that is authorized to review or approve such delineations. This would be made more stringent by increasing the minimum number of nontidal wetland delineations that an applicant must have inspected, reviewed, or confirmed from six out of 30 total delineations to 18 out of 30. In other words, under the proposal, 60% (i.e., 18 out of 30) of the required delineations must be for nontidal wetlands as opposed to the current 20% (i.e., six out of 30). This proposal results from board determination that the current requirement for experience in delineation of nontidal wetlands does not provide sufficient demonstration of competency. More specifically, individuals attempting to qualify based on experience on preparing (as opposed to inspection, review, or confirmation) delineations are required to have 60% of their experience based on delineations of nontidal wetlands. The proposal would bring the portion of nontidal wetland delineation experience gained from inspection, review, or confirmation to the same level expected from preparing delineations. According to the board, nontidal wetland delineations are generally more complicated and take longer to inspect, review, or confirm. Thus, the board believes this proposed change would increase the stringency of the experience requirement for those who are seeking to qualify based on inspection, review, or confirmation of delineations as an employee of a federal, state, or local governmental body that is authorized to review or approve such delineations. The remaining proposed changes are not expected to create any economic effects other than editorial improvements and clarity as they comprise the repeal of regulatory text that is redundant of statutory language, text that does not reflect current practices, or text that is not regulatory in nature.

Businesses and Other Entities Affected. As of July 1, 2024, there were 130 certified wetland delineators in Virginia and between one to eight new applicants were certified annually between fiscal years 2020 and 2024. No regulants appear to be disproportionately affected. The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[2] An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.[3] One of the proposals would increase the stringency of the experience requirement based on the inspection, review, or confirmation of delineations and would likely require more time and effort from such individuals to qualify for certification. Thus, an adverse impact is indicated.

Small Businesses[4] Affected.[5] The proposed amendments do not appear to directly adversely affect small businesses because certifications are issued to individuals, not to business entities. However, the board states that many certified wetland delineators are likely to be owners or employees of business entities that meet the definition of "small business" in § 2.2-4007.1 of the Code of Virginia.

Localities[6] Affected.[7] The proposed amendments do not introduce costs for local governments, nor do they disproportionately affect any locality more than others.

Projected Impact on Employment. One of the proposed changes may impose more time and effort for certification of those that qualify based on inspection, review, or confirmation experience. The new requirement to include a graduate degree as an option, combined with the removal of specific hours for certain coursework requirements, may increase the number of qualified applicants. However, the proposed changes do not appear to have the potential to significantly affect total employment because relatively few certifications are issued annually.

Effects on the Use and Value of Private Property. The potential net impact on asset values of wetland delineation businesses is unclear, but unlikely to be significant as two of the proposed changes are less stringent and may reduce compliance costs by small amount for a small number of applicants and one of the proposed changes is more stringent and may increase compliance costs also by a small amount for a small number of applicants. No direct impact on real estate development costs is expected.

[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to

affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[3] Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

[4] Pursuant to § 2.2-4007.04, 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."

[5] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[6] "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.

[7] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Board for Professional Soil Scientists, Wetland Professionals, and Geologists concurs with the economic impact analysis prepared by the Department of Planning and Budget.

Summary:

Pursuant to Executive Directive One (2022) and Executive Order 19 (2022), the proposed amendments (i) revise definitions; (ii) revise the qualifying education for certification to include a graduate degree and remove the minimum number of required semester hours for certain coursework; (iii) increase the timeframe for reinstating an expired certificate to two years and remove a provision that the board may require examination or reexamination of an individual who is reinstating a certificate; and (iv) make the experience requirement more stringent for those seeking to qualify for certification based on inspection, review, or confirmation of wetland delineations.

18VAC145-30-10. Definitions.

All terms defined in Chapter 22 (§ 54.1-2200 et seq.) of Title 54.1 of the Code of Virginia are incorporated in this chapter.

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

"Tidal wetlands" means those wetlands ~~defined by~~ subject to the jurisdiction of Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia.

"Nontidal wetlands" means all other wetlands, as that term is defined in § 62.1-44.3 of the Code of Virginia, except those ~~defined by~~ subject to the jurisdiction of Chapter 13 (§ 28.2-1300 et seq.) of Title 28.2 of the Code of Virginia.

18VAC145-30-20. Qualifications for certification.

Applicants for certification shall pass the board-approved exam and meet the requirements specified in Chapter 22 (§ 54.1-2200 et seq.) of Title 54.1 of the Code of Virginia~~, as amended,~~ and this chapter. The board will waive the examination requirement for applicants who meet the requirements of § 54.1-2206 B of the Code of Virginia.

18VAC145-30-30. Receipt of application.

The date the ~~completely documented~~ completed application and fee are received in the board's office shall determine if the application has been received by the established deadline.

18VAC145-30-40. Qualification for examination.

~~A.~~ In order to qualify for the examination, an applicant shall provide (i) documentation of meeting education and experience requirements and (ii) three written references ~~that comply with subsection B of this section and satisfy one of the following criteria:~~ as provided for in § 54.1-2206.2 of the Code of Virginia.

~~1. Hold a bachelor's degree from an accredited institution of higher education in a wetland science, biology, biological engineering, civil and environmental engineering, ecology, soil science, geology, hydrology, or any similar biological, physical, natural science, or environmental engineering curriculum that has been approved by the board; have successfully completed a course of instruction in state and federal wetland delineation methods that has been approved by the board; and have at least three years of experience in wetland delineation, which meets the requirements of subdivision 1 or 2 of 18VAC145-30-50, the quality of which demonstrates to the board that the applicant is competent to practice as a certified professional wetland delineator;~~

~~2. Have a record of at least six years of experience in wetland delineation, which meets the requirements of subdivision 1 or 2 of 18VAC145-30-50, the quality of which demonstrates to the board that the applicant is competent to practice as a certified professional wetland delineator; or~~

~~3. Have a record of at least three years of experience in wetland science research or as a teacher of wetlands curriculum in an accredited institution of higher education, which meets the requirements of subdivision 3 of~~

~~18VAC145-30-50, and the quality of which demonstrates to the board that the applicant is competent to practice as a certified professional wetland delineator.~~

~~B. Every applicant shall provide three written references, on a form provided by the board, from wetland professionals with at least one from a certified professional wetland delineator. Individuals who provide references~~ References shall not be related to the applicant and shall have known the applicant for at least one year. Individuals who provide references may not also verify experience, including research or teaching experience.

18VAC145-30-50. Qualifying experience in wetland delineation.

An applicant shall demonstrate experience in one of the following areas:

1. For those individuals ~~applying~~ seeking to qualify pursuant to the provisions of ~~18VAC145-30-40 A 1 or A 2~~ subdivision 1 or 2 of § 54.1-2206.2 of the Code of Virginia, the experience in wetland delineation must be as a wetland professional and include the preparation of no ~~less~~ fewer than 10 delineations, which must be no more than 10 years old at the time of receipt by the board office, delineating wetlands in accordance with applicable state and federal regulations that include the proper identification of vegetation, soil, and hydrology indicators. At least six of the 10 delineations must be for nontidal wetlands;

2. For those individuals ~~applying~~ seeking to qualify pursuant to the provisions of ~~18VAC145-30-40 A 1 or A 2~~ subdivision 1 or 2 of § 54.1-2206.2 of the Code of Virginia, the experience in wetland delineation must be as a wetland professional and include the inspection, review, or confirmation of no ~~less~~ fewer than 30 delineations as an employee of a federal, state, or local governmental body that is authorized to review or approve such delineations, which must be no more than 10 years old at the time of receipt by the board office, delineating wetlands in accordance with applicable state and federal regulations that include the proper identification of vegetation, soil, and hydrology indicators. Such experience must include the performance of field verifications of a portion of those wetland delineations that were inspected, reviewed, or confirmed. At least ~~six~~ 18 of the 30 delineations must be for nontidal wetlands; or

3. For those individuals ~~applying~~ seeking to qualify pursuant to the provisions of ~~18VAC145-30-40 A 3~~ subdivision 3 of § 54.1-2206.2 of the Code of Virginia, the experience as a wetland science researcher must include the preparation of a minimum of three field studies focused on wetland delineation practice and issues, which includes the proper identification of vegetation, soil, and hydrology indicators, and the experience as a teacher of wetlands curriculum must have been acquired in an accredited institution of higher education as a field or laboratory instructor of ~~quarter~~ quarter-length or ~~semester length~~ semester-length classes for a minimum of six semester hours, or equivalent, within the past 10 years prior to the receipt of the application by the board office, and the curriculum must have included the proper identification of vegetation, soil, and hydrology indicators.

18VAC145-30-60. Course requirements.

The education required pursuant to ~~18VAC145-30-40 A 1~~ subdivision 1 of § 54.1-2206.2 of the Code of Virginia must include the following:

1. For a ~~bachelors~~ bachelor's or graduate degree ~~in any similar biological, physical, natural science or environmental engineering curriculum~~ to be approved by the board, it shall, at a minimum, contain coursework in the following:

a. ~~Fifteen semester hours, or equivalent, in biological~~ Biological sciences, including courses such as general biology, botany, or zoology; general ecology; plant, animal, aquatic, or wetlands ecology; invertebrate zoology; taxonomy; marine science; fisheries biology; plant physiology, plant taxonomy, plant pathology, or plant morphology; relevant environmental sciences~~,~~; and similar courses;

b. ~~Fifteen semester hours, or equivalent, in physical~~ Physical sciences, including courses in soils, chemistry, hydrology, physics, geology, sedimentology, oceanography, coastal processes, environmental engineering, and similar courses; and

c. ~~Six semester hours, or equivalent, in quantitative~~ Quantitative sciences, including courses in math, computer sciences, basic statistics, population dynamics, experimental statistics, and similar courses.

2. The applicant must have successfully completed a course of instruction, of a minimum of 32 hours, in state and federal wetland delineation methods that includes the proper identification of vegetation, soil, and hydrology indicators and a field component.

18VAC145-30-70. Examination.

A. Once approved by the board, an applicant shall be eligible to sit for a board-approved examination.

B. An applicant must meet all eligibility requirements as of the date the ~~completely documented~~ completed application and fee is received by the board's office. ~~For examination candidates, the completely documented application and fee must be received by the board's office at least 90 days prior to the examination.~~

C. A candidate approved to take an examination shall do so within one year of the date of approval or submit a new application and fee in accordance with ~~these regulations~~ this chapter. ~~If an applicant should not~~ Applicants who fail to pass the board-approved examination within one year of being approved~~, the applicant~~ shall be required to submit a new

application and fee in accordance with this chapter in order to take the examination.

D. A candidate who is unable to take the examination at the time scheduled must notify the department in writing prior to the date of the examination~~; such a candidate~~ and will be rescheduled for the next examination without an additional fee. Failure to ~~so~~ notify the department will result in forfeiture of the examination or reexamination fee.

E. Candidates will be notified of passing or failing the examination.

18VAC145-30-80. ~~Waiver from examination.~~ (Repealed.)

~~An applicant shall be granted a Virginia certificate without examination, provided that:~~

~~1. The applicant holds an unexpired professional wetland delineator certificate or equivalent issued on the basis of equivalent requirements for certification in Virginia, by a regulatory body of another state, territory or possession of the United States or has been provisionally certified under the U.S. Army Corps of Engineers Wetland Delineator Certification Program of 1993 and is not, nor has been, the subject of any disciplinary proceeding before such regulatory body, and such other regulatory body recognizes the certificates issued by this board, provided all other requirements of Chapter 22 (§ 54.1-2200 et seq.) of Title 54.1 of the Code of Virginia and this chapter are satisfied; or~~

~~2. Applicants who submit a complete application so that it is received by the board on or before June 30, 2006, and are found to be qualified pursuant to § 54.1-2206 B of the Code of Virginia (effective July 1, 2004), provided all other requirements of Chapter 22 (§ 54.1-2200 et seq.) of Title 54.1 of the Code of Virginia and this chapter are satisfied.~~

18VAC145-30-120. Reinstatement.

A. If the renewal fee and late renewal fee are not received by the department within 180 days following the expiration date noted on the certificate, the certificate holder shall no longer be considered a certificate holder and will be required to apply for certificate reinstatement. The applicant shall meet the current eligibility standards for certification as a Virginia certified professional wetland delineator. ~~The board may require examination or reexamination.~~ The fee for reinstatement shall include the regular renewal fee plus the reinstatement fee.

B. If the reinstatement application and fee are not received by the department within ~~one year~~ two years following the expiration date noted on the certificate, the applicant shall apply as a new applicant and shall meet all current entry requirements as may be required by the board.

18VAC145-30-140. Standards of practice and conduct.

A Virginia certified professional wetland delineator:

1. Shall not submit any false statements, make any misrepresentations, or fail to disclose any facts requested concerning any application for certification or recertification.

2. Shall not engage in any fraud, deceit, or misrepresentation in advertising, ~~in~~ soliciting, or ~~in~~ providing professional services.

3. Shall not knowingly sign any plans, drawings, blueprints, surveys, reports, specifications, maps, or other documents not prepared or reviewed and approved by the certificate holder.

4. Shall not knowingly represent a client or employer on a project on which the certificate holder represents or has represented another client or employer without making full disclosure thereof.

5. Shall express a professional opinion only when ~~it~~ the professional opinion is founded on adequate knowledge of established facts at issue and based on a background of technical competence in the subject matter.

6. Shall not knowingly misrepresent factual information in expressing a professional opinion.

~~7. Shall immediately notify the client or employer and the appropriate regulatory agency if the certificate holder's professional judgment is overruled and not adhered to when advising appropriate parties of any circumstances of a substantial threat to the public health, safety, or welfare.~~

~~8.~~ 7. Shall exercise reasonable care when rendering professional services and shall apply the technical knowledge, skill, and terminology ordinarily applied by practicing wetland professionals.

~~9. Shall sign and date all plans, drawings, blueprints, surveys, reports, specifications, maps, or other documents prepared or reviewed and approved by the certificate holder. The certified professional wetland delineator shall also indicate that he is a Virginia certified professional wetland delineator on all plans, drawings, blueprints, surveys, reports, specifications, maps, or other documents prepared or reviewed and approved by the certificate holder and include his certificate number.~~

~~10.~~ 8. Shall not utilize the design, drawings, specifications, or work of another regulant to complete or to replicate any work without the written consent of the person who or organization that owns the design, drawings, specifications, or work.

18VAC145-30-160. Change of address.

A certificate holder shall keep the department informed of ~~his~~ the certificate holder's current mailing address. Change of address shall be reported to the department in writing within 30 calendar days of the change.

VA.R. Doc. No. R24-7618; Filed December 11, 2024, 11:14 a.m.

TITLE 21. SECURITIES AND RETAIL FRANCHISING

STATE CORPORATION COMMISSION

Final Regulation

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

Title of Regulation: **21VAC5-110. Retail Franchising Act Rules (amending 21VAC5-110-20 through 21VAC5-110-55, 21VAC5-110-65, 21VAC5-110-75).**

Statutory Authority: §§ 12.1-13 and 13.1-572 of the Code of Virginia.

Effective Date: January 1, 2025.

Agency Contact: Jude Richnafsky, Manager of Examinations and Securities and Retail Franchising, Division of Securities and Retail Franchising, State Corporation Commission, Tyler Building, Ninth Floor, P.O. Box 1197, Richmond, VA 23218, telephone (804) 371-9883, or email jude.richnafsky@scc.virginia.gov.

Summary:

The amendments (i) require the use of a new form titled "Certification of Deferred Franchise Fee" for applications for registration of a franchise; (ii) require that the submission of registration, amendment, and renewal applications shall only be tendered to the State Corporation Commission by the electronic delivery method provided by the Division of Securities and Retail Franchising, unless in the case of hardship or other good cause; (iii) provide clarification that an opening balance sheet provided by a start-up franchisor as part of its financial statements must be prepared in accordance with generally accepted accounting principles; and (iv) in lieu of escrow or deferral of initial franchising fees, allow acceptance of a surety bond as a form of financial assurance for franchisors that are insolvent as defined in § 13.1-562 of the Code of Virginia.

A change to the proposed regulation adds a provision that the franchisor may increase the amount of the surety bond during the registration period without filing an application to amend a registration by submitting a copy of a rider to the surety bond increasing its amount to the commission either electronically using a method specified by the commission or by delivering a copy of the surety bond rider on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising prior to the franchisor collecting any additional franchise fees if the existence of a surety bond is disclosed in the Franchise Disclosure Document.

AT RICHMOND, DECEMBER 9, 2024

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. SEC-2024-00032

Ex Parte: In the matter of

Adopting Revisions to the Rules

Governing the Virginia Retail Franchising Act

ORDER ADOPTING REGULATIONS

On September 3, 2024, the State Corporation Commission ("Commission") entered an Order Establishing Proceeding regarding a proposal by the Division of Securities and Retail Franchising ("Division") to revise Title 21, Chapter 110 of the Virginia Administrative Code ("Chapter 110"), which comprises the Commission's rules governing the Virginia Retail Franchising Act, § 13.1-557 et seq. of the Code of Virginia ("Franchising Act").

The Division recommended revisions to Chapter 110 that: (i) require the use of a new form titled "Certification of Deferred Franchise Fee" ("Form L"); (ii) require that the submission of registration, amendment and renewal applications shall only be tendered to the Commission by the electronic delivery method provided by the Division, unless in the case of hardship or other good cause, in which case the Commission may, at its discretion, allow for the submission of a registration, amendment or renewal application by a method other than electronic filing; (iii) provide clarification that an opening balance sheet provided by a start-up franchisor as part of its financial statements must be prepared in accordance with generally accepted accounting principles; and (iv) in lieu of escrow or deferral of initial franchising fees, allow acceptance of a surety bond as a form of financial assurance for franchisors that are insolvent as defined in § 13.1-562 A 2 of the Franchising Act. Collectively, these revisions are referred to in the Order Establishing Proceeding as the "Proposed Revisions."

The Order Establishing Proceeding, Proposed Revisions, and Form L were posted on the Commission's website and sent to interested persons, and the Order Establishing Proceeding and Proposed Revisions were published in the Virginia Register of Regulations on September 23, 2024.[1] The Order Establishing Proceeding invited any interested persons to participate and required that any comments or requests for a hearing on the Proposed Revisions or Form L be submitted in writing on or before October 15, 2024.

Comments on the Proposed Revisions were timely filed by Jonathan N. Barber, Esq. The Commission did not receive any requests for a hearing.

On November 12, 2024, the Division timely filed its Response to Comments ("Response"). In its Response, the Division responded to the filed comments and also recommended that the Commission further amend Rule 21VAC5-110-65 H (1) and H (2) (a) of the Proposed Revisions.

NOW THE COMMISSION, having considered this matter, finds that the Proposed Revisions should be amended to incorporate the specific changes the Division recommended in its Response. The Commission finds that the modified proposed regulations should be adopted effective January 1, 2025.

Accordingly, IT IS ORDERED THAT:

(1) The revisions to Chapter 110 and to Form L, as modified herein and attached hereto and made a part hereof, are adopted effective January 1, 2025.

(2) The Division shall provide notice of this Order Adopting Regulations ("Order"), and the adopted revisions to Chapter 110 and Form L, to every person who filed comments in this matter, and to such other interested persons as the Division's Director may designate.

(3) The Commission's Office of General Counsel shall provide a copy of this Order and the adopted revisions to Chapter 110 and Form L to the Virginia Registrar of Regulations for appropriate publication in the Virginia Register of Regulations.

(4) Interested persons may download unofficial copies of this Order and the adopted revisions to Chapter 110 and Form L from the Commission's website: scc.virginia.gov/pages/Case-Information.

(5) This case is dismissed.

A COPY hereof, along with the attached regulations and Form L, shall be sent by the Clerk of the Commission to: C. Meade Browder, Jr., Senior Assistant Attorney General, at MBrowder@oag.state.va.us, Office of the Attorney General, Division of Consumer Counsel, 202 N. 9th Street, 8th Floor, Richmond, Virginia 23219-3424; and the Commission's Office of General Counsel and the Director of the Division of Securities and Retail Franchising.

[1] Although the Virginia Registrar of Regulations does not publish forms in the Virginia Register of Regulations, Form L was available: (1) via an online link; (2) from the Division; and (3) at the Office of the Registrar of Regulations. See Division letter demonstrating compliance with the Order Establishing Proceeding, filed in this matter at Doc. Con. Cen. No. 241070051 (attachment at 476, relevant portion of the Virginia Register of Regulations - Volume 41, Issue 3, published September 23, 2024).

21VAC5-110-20. Preliminary statement.

Follow these rules for each item in franchise applications and disclosures in the FDD.

The following rules shall be adhered to with respect to applications for registration or exemption of a franchise~~,~~ and applications for renewal or amendment of a franchise registration or exemption~~,~~ filed pursuant to Chapter 8 (§ 13.1-557 et seq.) of Title 13.1 of the Code of Virginia. These applications shall be submitted to Virginia's state administrator either electronically or at the following address: State Corporation Commission, Division of Securities and Retail Franchising, ~~P.O. Box 1197,~~ 1300 East Main Street, ~~9th~~ Ninth Floor, Richmond, Virginia ~~23218~~ 23219.

21VAC5-110-30. Registration application; documents to file; interim financial statements.

A. An application for registration of a franchise is made by filing with the commission the following completed forms and other material:

1. Uniform Franchise Registration Application page, Form A;

2. Total Costs and Sources of Funds for Establishing New Franchises, Form B;

3. Uniform Consent to Service of Process, Form C;

4. If the applicant is a corporation or partnership, an authorizing resolution if the application is verified by a person other than the applicant's officer or general partner;

5. Franchise Disclosure Document;

6. Application fee ~~(~~payable to the "Treasurer of Virginia"~~)~~; ~~and~~

7. Auditor's consent ~~(~~or a photocopy of the consent~~)~~ to the use of the latest audited financial statements in the Franchise Disclosure Document; and

8. Certification of Deferred Franchise Fee, Form L, if applicable.

B. An application for registration shall ~~contain: 1. One copy of a complete franchise registration application, including the Franchise Disclosure Document, on paper; 2. One copy of a complete franchise registration application, including the Franchise Disclosure Document, on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising; and 3. A cover letter containing a representation that all of the information contained in the electronic file is identical to the paper documents~~ be submitted either electronically using a method specified by the commission, or by delivering a copy of the application on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising. Electronic versions of the application, including the Franchise Disclosure Document, shall be text searchable.

C. For good cause shown and at its discretion, the commission may allow for submission of an application for registration by a method of communication other than electronic filing or on electronic media as required in subsection B of this section. Such delivery may only occur after the applicant has received prior approval from the commission. The commission will determine the policy and procedure used to accept and process an application under such a request.

D. If the commission's review of the application results in any revision to the documents submitted, the franchisor shall file a complete clean copy of the revised Franchise Disclosure Document and any other revised documents~~,~~ and a black-lined copy of all revised pages, unless the commission directs

otherwise. ~~In addition to filing the complete clean Franchise Disclosure Document and black-lined pages on paper, a franchisor shall include copies on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising. The revised electronic file shall be accompanied by a transmittal letter as described in subdivision B 3 of this section~~ The filing shall be submitted in a manner as required by subsection B of this section.

~~D. The electronic version of the Franchise Disclosure Document shall be text searchable.~~

E. If the date of the most recent audited financial statements in the Franchise Disclosure Document precedes the date of the application by more than 120 days, the Franchise Disclosure Document shall also include the following financial statements prepared in accordance with generally accepted accounting principles:

1. An unaudited interim balance sheet as of a date within 120 days of the date of the application; and

2. An unaudited interim statement of income or operations for the period from the most recent audited financial statements to the date of the interim balance sheet.

F. The certifications made by or on behalf of the franchisor in Form A shall extend and apply to all documents and materials filed in connection with the registration application, including any documents or materials submitted to the commission subsequent to the initial filing that may be required to complete the registration application.

21VAC5-110-40. Pre-effective and post-effective amendments to the registration.

A. Within 30 days after the occurrence of a material change, the franchisor shall amend the effective registration filed at the commission. An amendment to an application filed either before or after the effective date of registration may include only the pages containing the information being amended if pagination is not disturbed. The amended pages must be black-lined to show all additions, deletions, and other changes from the franchisor's previous submission. The franchisor may not use margin balloons or color highlights to show changes.

B. An application to amend a franchise registration is made by submitting the following completed forms and other material:

1. Uniform Franchise Registration Application page, Form A;

2. One complete clean copy of the amended Franchise Disclosure Document;

3. One complete copy of the amended Franchise Disclosure Document black-lined to show all additions, deletions, and other changes; and

4. Application fee ~~(~~payable to the "Treasurer of Virginia."~~)~~. The fee shall accompany all post-effective amendments unless submitted in connection with an application for renewal.

C. An application to amend a registration shall ~~contain: 1. One copy of a complete franchise amendment application, including the amended Franchise Disclosure Document, on paper; 2. One copy of a complete franchise amendment application, including the amended Franchise Disclosure Document, on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising; and 3. A cover letter containing a representation that all of the information contained in the electronic file is identical to the paper documents~~ be submitted either electronically using a method specified by the commission or by delivering a copy of the application on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising. Electronic versions of the franchise amendment application, including the amended Franchise Disclosure Document, shall be text searchable.

D. For good cause shown and at its discretion, the commission may allow for submission of an application to amend a registration by a method of communication other than electronic filing or on electronic media as required in subsection C of this section. Such delivery may only occur after the applicant has received prior approval from the commission. The commission will determine the policy and procedure used to accept and process an application under such a request.

E. If the commission's review of the application results in any revision to the documents submitted, the franchisor shall file a complete clean copy of the revised Franchise Disclosure Document and any other revised documents~~,~~ and a black-lined copy of all revised pages, unless the commission directs otherwise. ~~In addition to filing the complete clean Franchise Disclosure Document and black-lined pages on paper, a franchisor shall include copies on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising. The revised electronic file shall be accompanied by a transmittal letter as described in subdivision C 3 of this section~~ The filing shall be submitted in a manner as required by subsection C of this section.

~~E. The electronic version of the Franchise Disclosure Document shall be text searchable.~~

F. The certifications made by or on behalf of the franchisor in Form A shall extend and apply to all documents and materials filed in connection with the amendment application, including any documents or materials submitted to the commission subsequent to the initial filing that may be required to complete the amendment application.

21VAC5-110-50. Expiration; application to renew the registration; interim financial statements.

A. A franchise registration expires at midnight on the annual date of the registration's effectiveness. An application to renew the franchise registration should be filed 30 days prior to the expiration date in order to prevent a lapse of registration under the Virginia statute.

B. An application for renewal of a franchise registration is made by submitting the following completed forms and other material:

1. Uniform Franchise Registration Application page, Form A;

2. Updated Franchise Disclosure Document;

3. One complete copy of the amended Franchise Disclosure Document black-lined to show all additions, deletions, and other changes, using no margin balloons or color highlights; ~~and~~

4. Application fee ~~(~~payable to the "Treasurer of Virginia"~~)~~; and

5. Certification of Deferred Franchise Fee, Form L, if applicable.

C. An application for renewal of a franchise registration shall ~~contain: 1. One copy of a complete franchise renewal application, including the updated Franchise Disclosure Document, on paper; 2. One copy of a complete franchise renewal application, including the updated Franchise Disclosure Document, on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising; and 3. A cover letter containing a representation that all of the information contained in the electronic file is identical to the paper documents~~ be submitted either electronically using a method specified by the commission or by delivering a copy of the application on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising. Electronic versions of the application for renewal, including the updated Franchise Disclosure Document, shall be text searchable.

D. For good cause shown and at its discretion, the commission may allow for submission of an application for renewal by a method of communication other than electronic filing or on electronic media as required in subsection C of this section. Such delivery may only occur after the applicant has received prior approval from the commission. The commission will determine the policy and procedure used to accept and process an application under such a request.

E. If the commission's review of the application results in any revision to the documents submitted, the franchisor shall file a complete clean copy of the revised Franchise Disclosure Document and any other revised documents~~,~~ and a black-lined copy of all revised pages, unless the commission directs otherwise. ~~In addition to filing the complete clean Franchise Disclosure Document and black-lined pages on paper, a franchisor shall include copies on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising. The revised electronic file shall be accompanied by a transmittal letter as described in subdivision C 3 of this section~~ The filing shall be submitted in a manner as required by subsection C of this section.

~~E. The electronic version of the Franchise Disclosure Document shall be text searchable.~~

F. If the date of the most recent audited financial statements in the Franchise Disclosure Document precedes the date of the application by more than 120 days, the Franchise Disclosure Document shall also include the following financial statements prepared in accordance with generally accepted accounting principles:

1. An unaudited interim balance sheet as of a date within 120 days of the date of the application; and

2. An unaudited interim statement of income or operations for the period from the most recent audited financial statements to the date of the interim balance sheet.

G. The certifications made by or on behalf of the franchisor in Form A shall extend and apply to all documents and materials filed in connection with the renewal application, including any documents or materials submitted to the commission subsequent to the initial filing that may be required to complete the renewal application.

21VAC5-110-55. The Franchise Disclosure Document.

A. Format. The Franchise Disclosure Document must be prepared in accordance with §§ 436.3 through 436.5 of the Federal Trade Commission Franchise Rule (16 CFR 436.3 through 436.5), subject to the modifications set forth in subsections B and C of this section.

B. Financial statements. Notwithstanding § 436.5(u)(2) of the Federal Trade Commission Franchise Rule (16 CFR 436.5), a start-up franchisor in its first partial or full fiscal year selling franchises shall provide an opening balance sheet, prepared in accordance with generally accepted accounting principles, that has been audited by an independent certified public accountant using generally accepted United States auditing standards.

C. State cover sheets and effective dates page. The Franchise Disclosure Document shall include the state cover sheets and state effective dates page prepared in accordance with the requirements set forth in Part III B of the 2008 Franchise Registration and Disclosure Guidelines, as adopted May 19, 2019, by the North American Securities Administrators Association, Inc.

21VAC5-110-65. Escrow ~~and~~, deferral, and surety bond.

A. Escrow requirement. The commission may require a franchisor to escrow franchise fees and other payments made

by a franchisee to the franchisor until the franchisor's pre-opening obligations under the franchise agreement have been satisfied. The commission may require escrow at any time after the submission of a registration or renewal application and upon a finding that the grounds enumerated in clause (i) of subdivision A 2 of § 13.1-562 of the Virginia Retail Franchising Act as provided in Chapter 668 of the 2007 Acts of Assembly exist.

B. Depository. Funds subject to an escrow condition shall be placed in a separate trust account with a national bank or a ~~state chartered~~ state-chartered bank or trust company transacting business in the Commonwealth of Virginia.

C. Compliance with escrow requirement. The franchisor shall file with the commission the following to comply with the commission's escrow requirement:

1. An original, fully executed copy of the Escrow Agreement, Form K;

2. A written consent from the depository agreeing to operate the escrow account under this ~~regulation~~ chapter;

3. The name and address of the depository and the account number of the escrow account;

4. The name, address, telephone number, and email address of an individual ~~or individuals~~ at the depository who may be contacted by the commission regarding the escrow account; and

5. An amended franchise application reflecting, in Item 5 of the Franchise Disclosure Document or in a Virginia Addendum to the Franchise Disclosure Document, that the commission has imposed the escrow requirement and the material terms of that escrow condition, including the name of the depository.

D. Operation of escrow account. After the commission imposes an escrow requirement upon the franchisor, the franchisor shall:

1. Make franchisee checks for franchise fees or other payments for the franchisor payable to the depository; and

2. Deposit with the depository, within two business days of the receipt, the funds described in subdivision 1 of this subsection.

Deposits made to the depository shall remain escrowed until the commission authorizes the release of the funds.

E. Release of escrowed funds.

1. A franchisor may apply to the commission for the release of escrowed funds together with any interest earned.

2. A franchisor's application to the commission to authorize the release of escrowed funds to the franchisor shall be in writing, verified by an authorized officer of the franchisor, and shall contain:

a. The franchisor's statement that all proceeds from the sale of franchises have been placed with the depository in accordance with the terms and conditions of the escrow requirement;

b. The depository's statement, signed by an appropriate officer, setting forth the aggregate amount of escrowed funds deposited with the depository and the franchisor's account number with the depository;

c. A list of the names and addresses of each franchisee and the amount held in the escrow account for the account of each franchisee;

d. The amount of funds sought to be released;

e. A written certification from the franchisee stating the amount of funds to be released that acknowledges that the franchisor has completely performed its pre-opening obligations under the franchise agreement, including providing real estate, improvements, equipment, inventory, training, or other items as required by the franchise agreement; and

f. Other information the commission may reasonably require.

3. If the commission finds that the franchisor has fulfilled its obligations under the franchise agreement for a specified franchisee, the commission shall authorize the depository to release to the franchisor the amount held in escrow for the account of the applicable franchisee.

F. Removal of escrow requirement. The commission may remove the escrow requirement at any time, if:

1. The franchisor agrees to defer franchise fees and other initial payments; or

2. Based upon new information, the commission finds that the escrow requirement is no longer necessary and appropriate for the protection of prospective franchisees.

G. Deferral of fees in place of escrow requirement.

1. In lieu of an escrow requirement, the commission may, under appropriate circumstances, accept a franchisor's agreement to defer franchise fees and other initial payments owed by franchisees to the franchisor until the franchisor has completed its pre-opening obligations under the franchise agreement.

2. The franchisor's agreement to defer franchise fees shall be reflected in Item 5 of the Franchise Disclosure Document or in a Virginia Addendum to the Franchise Disclosure Document.

3. For any deferral of franchise fees, the applicant must submit the Certification of Deferred Franchise Fee, Form L.

H. Surety bond.

1. In lieu of escrow or deferral of [~~initial~~] franchise fees, a franchisor may post, upon approval by the commission, a surety bond as required by this subsection.

2. The surety bond shall be:

a. Effective as of the date of the [~~initial~~] registration and in an amount not less than the initial franchise fee, as listed in Item 5 of the Franchise Disclosure Document filed with the commission, of one franchise unit. During the registration period, the franchisor must maintain a surety bond in an amount not less than the franchise fee multiplied by the number of franchises in the Commonwealth the franchisor has signed but the franchisee has not yet opened [. Provided that the existence of a surety bond is disclosed in the Franchise Disclosure Document, the franchisor may increase the amount of the surety bond during the registration period without filing an application to amend a registration by submitting a copy of a rider to the surety bond increasing its amount to the commission either electronically using a method specified by the commission or by delivering a copy of the surety bond rider on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising prior to the franchisor collecting any additional franchise fees];

b. Issued by a surety company authorized to transact business in Virginia;

c. Conditioned upon the completion by the franchisor of its obligations under the franchise agreement to provide real estate, improvements, equipment, inventory training, and other items; and

d. As of the date of a franchise registration renewal period, the amount of a surety bond must be at the greater amount of that imposed under subdivision 2 a of this subsection.

3. The franchisor's agreement to a surety bond and its conditions shall be disclosed in Item 5 of the Franchise Disclosure Document or in a Virginia Addendum to the Franchise Disclosure Document.

4. A copy of the effective surety bond shall be submitted to the commission.

21VAC5-110-75. Exemptions.

Any offer or sale of a franchise in a transaction that meets the requirements of this section is exempt from the registration requirement of § 13.1-560 of the Virginia Retail Franchising Act.

1. Sale or transfer by existing franchisee. The sale or transfer of a franchise located in the Commonwealth of Virginia by a franchisee who is not an affiliate of the franchisor for the franchisee's own account is exempt if:

a. The franchisee's entire franchise is sold or transferred, and the sale or transfer is not effected by or through the franchisor.

b. The sale or transfer is not effected by or through a franchisor merely because a franchisor has a right to approve or disapprove the sale or transfer or requires payment of a reasonable transfer fee.

2. Renewal or extension of existing franchise. The offer or sale of a franchise involving a renewal or extension of an existing franchise where there is no interruption in the operation of the franchised business, and there is no material change in the franchise relationship, is exempt. For purposes of this subdivision, an interruption in the franchised business solely for the purpose of renovating or relocating that business is not a material change in the franchise relationship or an interruption in the operation of the franchised business.

3. Offers and sales to existing franchisees. The offer or sale of an additional franchise to an existing franchisee of the franchisor for the franchisee's own account is exempt if the franchise being sold is substantially the same as the franchise that the franchisee has operated for at least two years at the time of the offer or sale of the franchise, provided the prior sale to the franchisee was pursuant to a franchise offering that was registered or exempt pursuant to the requirements of the Virginia Retail Franchising Act and is located in the Commonwealth of Virginia.

4. Seasoned franchisor.

a. The offer or sale of a franchise by a franchisor is exempt if:

(1) The franchisor has a net equity, according to its most recently audited financial statements, of not less than $15 million on a consolidated basis, or $1 million on an unaudited basis and is at least 80% owned by a corporation or entity that has a net equity, on a consolidated basis, according to its most recently audited financial statements, of not less than $15 million, and the 80% owner guarantees the performance of the franchisor's obligations;

(2) The auditor's report accompanying the audited financial statements described in subdivision 4 a (1) of this section does not contain an explanatory paragraph expressing doubt as to the entity's ability to continue as a going concern; and

(3) The franchisor or any 80% owner of the franchisor or the franchisor's predecessor, or any combination thereof, has had at least 25 franchisees conducting substantially the same franchise business to be offered or sold for the entire five-year period immediately preceding the offer or sale.

b. The exemption set forth in this subdivision 4 may be claimed only if the franchisor:

(1) Files a Form H Notice of Claim of Exemption and other material as set forth in subdivision 8 of this section no later than 10 business days before the offer or sale of any franchise; and

(2) Submits financial statements demonstrating compliance with the conditions set forth in subdivision 4 a (1) of this section.

c. An initial exemption filing and any renewal filing shall expire after a period of one year. The franchisor shall file for a renewal by making an exemption filing if it intends to offer or sell franchises for any additional period annually, at least 10 business days before the expiration of the previously filed Notice of Claim of Exemption.

5. Institutional franchisee.

a. The offer or sale of a franchise to a bank, savings bank, savings and loan association, trust company, insurance company, investment company, or other financial institution, or to a broker-dealer is exempt when ~~the~~:

(1) ~~Purchaser~~ The purchaser is acting for itself or in a fiduciary capacity; and

(2) ~~Franchise~~ The franchise is not being purchased for the purpose of resale to an individual not exempt under this regulation.

b. The exemption set forth in subdivision 5 a of this section may be claimed only if the franchisor files an initial filing Form H, Notice of Claim of Exemption, and other material as set forth in subdivision 8 a of this section, at least 10 business days before each offer or sale of each franchise.

6. Substantial investment.

a. The offer or sale of a franchise by a franchisor is exempt if:

(1) The offer or sale is of a single unit franchise in which the actual minimum initial investment is in excess of $3 million. This amount will be based on the Item 7 requirements of the Franchise Disclosure Document;

(2) The prospective franchisee is represented by legal counsel in the transaction; and

(3) The franchisor reasonably believes immediately before making the offer or sale that the prospective franchisee, either alone or with the prospective franchisee's representative or affiliates, has sufficient knowledge and experience such that the prospective franchisee is capable of evaluating the merits and risks of the prospective franchise investment.

b. The exemption set forth in subdivision 6 a of this section may be claimed only if the franchisor:

(1) Files a Form H, Notice of Claim of Exemption, and other materials as set forth in subdivision 8 of this section no later than 10 business days before the offer or sale of any franchise; and

(2) Obtains from the prospective franchisee a signed certification verifying the grounds for the exemption.

c. The exemption set forth in subdivision 6 a of this section applies only to the registration provisions, and not the disclosure provisions, of the Virginia Retail Franchising Act.

d. An initial exemption filing and any renewal filing shall expire after a period of one year. The franchisor shall file for a renewal by making an exemption filing if it intends to offer or sell franchises for any additional period annually at least 10 business days before the expiration of the previously filed Form H, Notice of Claim of Exemption.

7. Disclosure requirements. If a franchisor relies upon any of the exemptions set forth in subdivision 3, 4, 5, or 6 of this section, the franchisor shall provide a disclosure document complying with 21VAC5-110-55 and 21VAC5-110-95 together with all proposed agreements relating to the sale of the franchise to a prospective franchisee 14 calendar days before the signing of the agreement or the payment of any consideration.

8. Filing requirements for exemptions set forth in subdivisions 4, 5, and 6 of this section.

a. Initial exemption filing.

(1) The initial exemption period shall expire after a period of one year.

(2) The franchisor ~~files~~ shall file an application for exemption of a franchise by filing with the commission no later than 10 business days before the offer or sale of any franchise~~,~~ the following completed forms and other material:

(a) Notice of Claim of Exemption, Form H;

(b) Uniform Consent to Service of Process, Form C;

(c) If the applicant is a corporation or partnership, an authorizing resolution is required if the application is verified by a person other than applicant's officer or general partner;

(d) Franchise Disclosure Document on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising;

(e) An undertaking by which ~~it~~ the franchisor agrees to supply any additional information the commission may reasonably request; and

(f) Application fee of $500 ~~(~~payable to the Treasurer of Virginia~~)~~.

b. Amendment to exemption filing.

(1) Upon the occurrence of a material change, the franchisor shall amend the effective exemption filed at the commission.

(2) An application to amend a franchise exemption is made by submitting the following completed forms and other material:

(a) Notice of Claim of Exemption, Form H;

(b) One clean copy of the amended Franchise Disclosure Document on a CD-ROM in PDF format or on other

electronic media approved by the Division of Securities and Retail Franchising; and

(c) Application fee of $100 ~~(~~payable to the Treasurer of Virginia~~)~~.

c. Renewal exemption filing.

(1) A franchise exemption expires at midnight on the annual exemption effective date. An application to renew the franchise exemption shall be filed 10 days prior to the expiration date in order to prevent a lapse of exemption under the Virginia Retail Franchising Act.

(2) An application for renewal of a franchise exemption is made by submitting the following completed forms and other material:

(a) Notice of Claim of Exemption, Form H;

(b) One clean copy of the Franchise Disclosure Document on a CD-ROM in PDF format or on other electronic media approved by the Division of Securities and Retail Franchising; and

(c) Application fee of $250 ~~(~~payable to the Treasurer of Virginia~~)~~.

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, General Assembly Building, 201 North Ninth Street, Fourth Floor, Richmond, Virginia 23219.

FORMS (21VAC5-110)

FORM A, Uniform Franchise Registration Application (rev. 7/2008)

FORM B, Franchisor's Costs and Sources of Funds (rev. 7/2008)

FORM C, Uniform Consent to Service of Process (rev. 7/2008)

FORM E, Affidavit of Compliance -- Franchise ~~Amendment/Renewal~~ Amendment or Renewal (rev. 7/2008)

FORM F, Guarantee of Performance (rev. 3/2013)

FORM G, Franchisor's Surety Bond (rev. 7/1999)

FORM H, Notice of Claim of Exemption (rev. 3/2018)

FORM K, Escrow Agreement (eff. 7/2007)

FORM L, Certification of Deferred Franchise Fee (eff. 1/2025)

VA.R. Doc. No. R25-7836; Filed December 10, 2024, 3:42 p.m.

TITLE 22. SOCIAL SERVICES

STATE BOARD OF SOCIAL SERVICES

Fast-Track Regulation

Title of Regulation: **22VAC40-890. Human Subject Research Regulations (amending 22VAC40-890-10 through 22VAC40-890-90).**

Statutory Authority: §§ 63.2-217 and 63.2-218 Code of Virginia.

Public Hearing Information: No public hearing is currently scheduled.

Public Comment Deadline: January 29, 2025.

Effective Date: February 13, 2025.

Agency Contact: Gail Jennings, Policy and Planning Specialist, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7490, FAX (804) 726-7946, or email gail.jennings@dss.virginia.gov.

Basis: The State Board of Social Services is authorized by § 63.2-217 of the Code of Virginia to adopt regulations necessary to carry out Title 63.2 of the Code of Virginia. The board is authorized by § 63.2-218 of the Code of Virginia to adopt regulations related to human research in order to effectuate the provisions of Chapter 5.1 (§ 32.1-162.16 et seq.) of Title 32.1 of the Code of Virginia. 45 CFR 46, which sets the federal standard for regulations related to human research, governs requirements for Institutional Review Boards (IRBs).

Purpose: The amendments are needed to (i) provide congruence of language between § 63.2-218 Code of Virginia and the regulation; (ii) ensure that the provisions contained in the Code of Virginia for the health, safety, and welfare of citizens are aligned with those provisions in the regulation; and (iii) prevent any confusion in the execution of the regulations as they relate to statute.

Rationale for Using Fast-Track Rulemaking Process: This action aligns the regulation with federal regulation and state statute, updates citations, and makes technical changes for clarity. Those subject to the regulation will not be substantively impacted by the changes. The amendments are not expected to be controversial and are therefore appropriate for the fast-track rulemaking process.

Substance: The amendments include:

1. Clarifying definitions of local departments of social services, facilities, and contractors for congruence with language of the Code of Virginia. Definitions of "human research," "informed consent," and "legally authorized representative" are expanded to align with definitions of these key terms contained in § 32.1-162.19 of the Code of Virginia.

2. Revising 22VAC40-890-30 regarding categories of research that are exempt from review, as the section is outdated. In addition to categories listed in this section, 45 CFR 46.104(d)

adds to the list of categories of research that may be exempt from IRB review.

3. Revising 22VAC40-890-50 regarding informed consent to align with § 32.1-162.18 A of the Code of Virginia, which includes the requirement of a witness for signatures of informed consent by the research participant, or the participant's legally authorized representative. Exceptions to this chapter apply to provisions in both 22VAC40-890-50 B and C.

4. Revising 22VAC40-890-60 regarding the Human Research Review Committee (also known as IRB) to clarify the minimum number of members as stated in departmental guidance. The number is changed from seven to "at least five members" to be congruent with 45 CFR 46.107.

5. Revising 22VAC40-890-70 regarding the review and approval process that refers to annual review of ongoing research. Low-risk research that was eligible for expedited review pursuant to 22VAC40-890-80 no longer requires a continuing review.

6. Revising 22VAC40-890-80 regarding categories of research that are eligible for expedited review, as the provision is outdated. The proposed revision reflects the appropriate, current reference to 45 CFR 46.110. 45 CFR 46.110 currently expands the list of categories of research that may be eligible for expedited review. The list of exempt research categories is approved by the U.S. Secretary of Health and Human Resources and is subject to review and revision every eight years.

7. Revising 22VAC40-890-90 regarding annual reporting on IRB activities, which will now require additional information about IRB approvals of research conducted by local agencies, affiliated facilities, and contractors on behalf of the department, including the manner in which research findings will be disseminated.

Issues: The primary advantages to the public and the Commonwealth include greater clarity in the regulation to adhere to the language used in the Code of Virginia and, for researchers, congruence with updated federal regulations in regard to human subject research, which will prevent any confusion when executing the regulation or developing guidance. The primary advantage to the agency is that the changes will reduce the administrative burden for the department's IRB. There are no foreseen disadvantages to the public, the Commonwealth, or the agency.

Department of Planning and Budget Economic Impact Analysis:

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia and Executive Order 19. The analysis presented represents DPB's best estimate of the potential economic impacts as of the date of this analysis.[1]

Summary of the Proposed Amendments to Regulation. As the result of a periodic review,[2] the Board of Social Services (board) seeks to conform this regulation to the Code of Virginia and the Code of Federal Regulations (CFR), and to make clarifying changes.

Background. This regulation requires that the Department of Social Services (DSS) Institutional Review Board (IRB) reviews and approves any research sponsored by DSS, local departments of social services, DSS-licensed facilities, and DSS-authorized contractors.[3] According to the Code of Virginia, human research is "any systematic investigation, including research development, testing and evaluation, utilizing human subjects, that is designed to develop or contribute to generalized knowledge."[4] The objective of this regulation is to "ensure the protection of the rights, welfare, and wellbeing of clients, staff or others who volunteer to participate in research."[5] Federal regulations for the Protection of Human Subjects (45 CFR Part 46; also known as the Common Rule) were significantly revised in 2018.[6] The revised Common Rule expanded the types of research that qualify for either an exemption from IRB review or an expedited review, wherein only the IRB chair or one appointed member reviews the application, on the basis that the research poses minimal risk to human subjects. The revised Common Rule also eliminated the need for a continuing review for ongoing research initially approved under an expedited review process. Continuing review requirements were also waived for research that had progressed to the data analysis stage, where no further contact with human subjects would be necessary, or where any additional clinical follow-up data could be collected as part of patient routine follow-up care. Other changes affect IRB reporting requirements and the required minimum number of IRB members."[7] Besides clarifying changes, updating citations to the Code of Virginia and the CFR, and reorganizing some provisions, the most substantive proposed changes are summarized as follows:

22VAC40-890-10: Definitions that would be updated to be consistent with the Code of Virginia include "facility," "human research," "informed consent," and "legally authorized representative."

22VAC40-890-30: This section would be aligned with federal regulation in 45 CFR 46.104(d) that was updated in 2018 to broaden the categories of research that would be eligible for exemption from IRB review "because they pose no more than minimal risk to subjects" and reduce the burden on the IRB as well as researchers.

22VAC40-890-50: An amendment would newly require that the voluntary informed consent must be witnessed. This change would align the regulation with 45 CFR 46.117. The agency reports that in practice, the IRB and researchers have already been complying with this federal regulation for some time.

22VAC40-890-60: The committee composition would be changed to "consist of at least five members" in order to align

with 45 CFR 46.107. Currently, the regulation states the IRB must have at least seven members.[8]

22VAC40-890-70: A new provision would add to the regulation the circumstances in which continuing review of research is not required. This includes (i) research eligible for expedited review in accordance with 22VAC40-890-80 and (ii) research that has progressed to the point that it involves only one or both of the following, which are part of the IRB-approved study: (a) data analysis, including analysis of identifiable private information or identifiable biospecimens, or (b) accessing follow-up clinical data from procedures that subjects would undergo as part of clinical care.

22VAC40-890-80: New subsections that align with 45 CFR 46.110 have been added, resulting in the addition of new subsections B, C, D and F. Subsections B and C refer to a list of Department of Health and Human Services-approved categories of research that qualify for expedited review.[9] Subsection D states who may conduct the expedited review and what their authority is to disapprove research. Research may only be disapproved under a non-expedited (full board) review. (The IRB has already implemented this provision in practice.) Subsection F states that research where identification of subjects and/or their responses would potentially place them at risk or be damaging to their financial standing, employability, reputation, etc. would only qualify for expedited review if reasonable and appropriate measures are taken to minimize risk of invasion of privacy and breach of confidentiality of data.

22VAC40-890-90: More detail would be added about the content required to be in a report submitted by a local department, facility, or contractor participating in a human subject research project reviewed by another research review committee to the department research review committee by December 1 of each year.

Estimated Benefits and Costs: The proposed changes would primarily benefit the DSS IRB and researchers who conduct human subject research or program evaluations involving DSS clients or client data. In particular, research activities that fall under the now-broadened criteria for exemption and for expedited review could be started sooner. Secondly, research subject to expedited review, along with research that has progressed to the data analysis or follow-up data collection stages, would not be subject to annual (or more frequent) continuing review requirements. These changes would also reduce the administrative burden for the DSS IRB chair and IRB coordinator. The change reducing the number of required IRB members from seven to five could lower IRB administrative costs but may not have any practical effect since the IRB already has nine members when only seven are required.[10]

Businesses and Other Entities Affected. The proposed changes would primarily affect researchers at public and private universities and research institutions in the Commonwealth that conduct human subject research or program evaluations involving DSS clients or client data. DSS reports that there are roughly 10 research organizations per year that conduct human subject research, authorized by DSS, local departments, or their contractors. The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.[11] An 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. As noted above, the new requirements would reduce the requirements for some categories of low-risk research activities, and thus reduce the administrative burden for DSS IRB and researchers. Thus, an adverse impact is not indicated.

Small Businesses[12] Affected.[13] Some private universities or research institutions affected by the proposed changes may be small businesses. However, DSS does not collect information on whether the research entities that apply for IRB approval are small businesses.[14] Nonetheless, the proposed amendments would not create new costs for any entities, including any small businesses, and could reduce their costs depending on the type of research they conduct.

Localities[15] Affected.[16] The proposed amendments would not impact localities or local governments.

Projected Impact on Employment. The proposed amendments would not affect total employment.

Effects on the Use and Value of Private Property. The proposed amendment would not affect the value of any private property or real estate development costs.

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[1] Section 2.2-4007.04 of the Code of Virginia requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

[2] See https://townhall.virginia.gov/l/ViewPReview.cfm?PRid=1788.

[3] See https://www.dss.virginia.gov/about/irb.cgi.

[4] See https://law.lis.virginia.gov/vacode/32.1-162.16/.

[5] See https://www.dss.virginia.gov/about/irb.cgi.

[6] See https://www.ecfr.gov/current/title-45/subtitle-A/subchapter-A/part-46.

[7] See page 1 of the Agency Background Document (ABD) here: https://townhall.virginia.gov/l/GetFile.cfm?File=73\6126\9845\AgencyStatement_DSS_9845_v2.pdf.

[8] See https://www.dss.virginia.gov/files/about/irb/about/SFY_2022-2024_VDSS_IRB_Members_Roster.pdf. The current IRB has nine members.

[9] See https://www.hhs.gov/ohrp/regulations-and-policy/guidance/categories-of-research-expedited-review-procedure-1998/index.html.

[10] DSS may want to maintain more members than are strictly necessary in order to ensure that the IRB adequately represents the needs and interests of DSS clients.

[11] Pursuant to § 2.2-4007.04 D: In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the

House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define "adverse impact," state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

[12] Pursuant to § 2.2-4007.04, 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."

[13] If the proposed regulatory action may have an adverse effect on small businesses, § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to § 2.2-4007.1 of the Code of Virginia, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

[14] See ABD, page 6.

[15] "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.

[16] Section 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

Agency Response to Economic Impact Analysis: The Department of Social Services has reviewed the economic impact analysis prepared by the Department of Planning and Budget and concurs.

Summary:

Pursuant to a periodic review, the amendments (i) align the regulation to the 2018 Common Rule (45 CFR 46 Subpart A); (ii) expand the list of types of research posing minimal risk to human subjects that qualify for either an exemption from Institutional Review Board (IRB) review or an expedited review in which only the chair or one other IRB member conducts the review; (iii) eliminate the need for a continuing review for ongoing research initially approved under an expedited review process; (iv) revise IRB reporting requirements; and (v) revise the required number of IRB members.

22VAC40-890-10. Definitions.

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

"Affiliated with the department" means any individual employed, either on a paid or volunteer basis, by the Virginia Department of Social Services, by a local department of social services, or by ~~an agency~~ a facility licensed by the Virginia Department of Social Services.

"Authorized" means to permit the implementation or conducting of research.

~~"Board" means the Virginia State Board of Social Services.~~

"Commissioner" means the Commissioner of the Virginia Department of Social Services or ~~his~~ the commissioner's designee.

"Committee" means the human research review committee, also known as the Institutional Review Board (IRB), which reviews and approves human research activities related to this chapter.

"Contractor" means agencies, organizations, or individuals providing goods or services, receiving funds, or under contract with the department or a local ~~agency~~ department, including~~, but not limited to,~~ foster homes ~~and day-care homes~~.

"Department" means the Virginia Department of Social Services.

"Discomforts, risks, and benefits" means the expected advantages and disadvantages to the participant for participating in the research.

"Facility" means any ~~agency~~ person, as defined in § 63.2-1701 A of the Code of Virginia, licensed by the department ~~including, but not limited to, adult and child day and residential facilities~~.

"Human participant" or "participant" means any individual, customer, volunteer, or employee who is the subject of research conducted or authorized by the department, facility, local ~~agency~~ department, or contractor.

"Human research" ~~or "research"~~ means any ~~formal and structured evaluation involving individuals in a special project, program, or study~~ systematic investigation, including research development, testing, and evaluation, utilizing human subjects that is designed to develop or contribute to generalized knowledge. Human research does not include research exempt from federal research regulations in accordance with 45 CFR § 46.104(d), as determined by the U.S. Secretary of Health and Human Services (HHS) and published as a notice in the Federal Register.

"Informed consent" means the knowing and voluntary agreement ~~of the participant exercising free choice~~, without undue inducement or any element of force, fraud, deceit, duress, or other form of constraint or coercion, of a person who is capable of exercising free power of choice. For the purposes of human research, the basic elements of information necessary to such consent include:

1. A reasonable and comprehensible explanation to the person of the proposed procedures or protocols to be followed, the purpose of those procedures or protocols, including descriptions of any attendant discomforts, and the risks and benefits reasonably to be expected;

2. A disclosure of any appropriate alternative procedures or therapies that might be advantageous for the person;

3. An instruction that the person may withdraw consent and discontinue participation in the human research at any time without prejudice to the person;

4. An explanation of any costs or compensation that may accrue to the person and, if applicable, the availability of third-party reimbursement for the proposed procedures or protocols; and

5. An offer to answer and answers to any inquiries by the person concerning the procedures and protocols.

"Legally authorized representative" means ~~a person with authority to consent on behalf of a prospective participant to include~~, in the following specified order of priority, (i) the parent ~~or parents~~ having custody~~,~~ of a prospective subject who is a minor; (ii) the agent appointed under an advance directive, as defined in § 54.1-2982 of the Code of Virginia, executed by the prospective subject, provided the advance directive authorizes the agent to make decisions regarding the prospective subject's participation in human research; (iii) the legal guardian~~, or (iii)~~ of a prospective subject; (iv) the spouse of a prospective subject, except where a suit for divorce has been filed and the divorce decree is not yet final; (v) the adult child of a prospective subject; (vi) the parent of a prospective subject when the subject is an adult; (vii) the adult brother or sister of a prospective subject; or (viii) any person or judicial or other person or body authorized by law or regulation~~,~~ ~~including~~ to consent on behalf of a prospective subject to such subject's participation in the particular human research. For the purposes of this chapter, any person authorized by law or regulation to consent on behalf of a prospective subject to such subject's participation in the particular human research includes an attorney in fact appointed under a durable power of attorney, to the extent the power grants the authority to make a decision ~~related to human research~~. The attorney in fact shall not be employed by the ~~person or department~~ entity conducting the human research. No official or employee of the ~~department, facility or local agency~~ entity conducting or authorizing the research shall be qualified to act as a legally authorized representative.

"Local department" means the local department of social services of any county or city in ~~this~~ the Commonwealth.

"Minimal risk" means that the risks of harm to the prospective participant anticipated in the proposed research are not greater, considering probability and magnitude, than those ordinarily encountered in daily life or during the performance of routine physical or psychological examinations or tests.

22VAC40-890-20. Applicability.

This chapter shall apply to the Virginia Department of Social Services, ~~to~~ local departments of social services ~~or departments of welfare~~, ~~to~~ facilities licensed by the department, and ~~to~~ contractors that authorize, conduct, or propose to conduct or authorize any human research.

22VAC40-890-30. Research exempt from chapter.

Research activities in which the only involvement of human participants will be in one or more of the following categories are exempt from this chapter unless the research is covered by other sections of this chapter:

1. Human research ~~which~~ that is subject to policies and regulations for the protection of human subjects promulgated by any agency of the federal government, except for the provisions in 22VAC40-890-40 C and 22VAC40-890-90 B.

~~2. Research conducted in established or commonly accepted educational settings involving commonly used educational practices, provided that participants cannot be identified, directly or through identifiers, for:~~

~~a. Regular and special education instructional strategies;~~

~~b. The effectiveness of or the comparison among instructional techniques, curriculum or classroom management methods; or~~

~~c. Educational tests.~~

~~3.~~ 2. Research involving solely the observation of public behavior or survey or interview procedures, except when observations or responses are recorded in such a manner that participants can be identified directly or through identifiers linked to the participants, and when either (i) the participant's responses~~,~~ if ~~they~~ the responses became known outside the research, could reasonably place the participant at risk of criminal or civil liability or be damaging to the participant's financial standing or employability~~;~~ or (ii) the research deals with sensitive aspects of the participant's own behavior, such as sexual behavior, drug or alcohol use, or illegal conduct.

~~4. Research involving survey or interview procedures, when the respondents are elected or appointed public officials or candidates for public office.~~

~~5. Research involving solely the collection or study of existing data, documents, or records, if these sources are publicly available or if the information taken from these sources is recorded in such a manner that participants cannot be identified directly or through identifiers linked to the participants.~~

~~6. Research and demonstration projects covered under 45 CFR 46.101(b)(5) which are conducted by or subject to the approval of the commissioner, and which are designed to study, evaluate, or otherwise examine (i) public benefit or service programs; (ii) procedures for obtaining benefits or services under those programs; (iii) possible changes in or alternatives to those programs or procedures; or (iv) possible changes in methods or levels of payment for benefits or services under those programs.~~

3. Research that is exempt in accordance with 45 CFR § 46.104(d).

22VAC40-890-40. Policy.

A. Each human research activity, as well as significant changes to approved research proposals, shall be submitted to and approved by a committee composed of representatives of varied backgrounds prior to implementation of the research. The committee shall ensure the competent, complete, and professional review of human research activities conducted, authorized, or proposed to be conducted or authorized by the department, local ~~agencies~~ departments, facilities, or ~~contractor~~ contractors. The committee shall ensure the ~~participants'~~ participant's rights to privacy are maintained.

B. Every person engaged in the conduct of human research or proposing to conduct human research shall report to an agency having a research review committee, and the human research ~~which he~~ that the person conducts or proposes to conduct shall be subject to review and approval by such committee in the manner set forth in this chapter.

C. Every person or organization engaged in a human research project that requires an allowable variance or other approval related to department regulations must obtain approval for such from the department prior to requesting the committee's review and approval of the proposed research.

D. Prior to the initiation of any human research, each participant or legally authorized representative must be informed in writing of the following:

1. Procedure ~~or procedures~~ to be utilized, ~~their~~ the procedure's purposes, and any expected discomforts, risks, and benefits;

2. Instruction that the participant may withdraw ~~his~~ consent and discontinue participation in the human research at any time without loss of services or benefits to which the participant is otherwise entitled;

3. Explanation of any costs or benefits ~~which~~ that may accrue to the participant or the participant's family;

4. An offer to answer any inquiries by the participant concerning the procedures and use of the results;

5. Statement assuring confidentiality of records and describing the extent to which confidentiality of records identifying the participant will be maintained; and

6. Expected duration of participation.

E. Where the human research activity exposes to risk others not participating, all parties must give ~~their~~ signed voluntary informed consent.

F. The committee may suspend or terminate research that is in violation of the research protocol.

22VAC40-890-50. Informed consent.

A. No human research may be conducted without voluntary informed consent signed by the participant or by the participant's legally authorized representative and witnessed, except as provided for in ~~subsection~~ subsections B and C of this section. If the participant is a minor otherwise capable of rendering voluntary informed consent, the consent shall be signed by both the minor and ~~his~~ the minor's legally authorized representative. A researcher shall seek such consent only under circumstances that provide the prospective participant or the representative sufficient opportunity to consider whether or not to participate and that minimize the possibility of coercion or undue influence. The information that is given to the participant or the representative shall be in language understandable to the participant or the representative.

B. The committee may approve a consent procedure ~~which~~ that omits or alters basic elements of informed consent or may waive the requirements to obtain informed consent, provided the committee finds and documents that:

1. The research involves no more than minimal risk to the participants;

2. The waiver or alteration will not adversely affect the rights and welfare of the participants;

3. The research could not practicably be carried out without the waiver or alteration of the informed consent; and

4. Whenever appropriate, the participants will be provided with additional pertinent information after participation.

C. The committee may waive the requirement for the researcher to obtain a signed consent form for some or all participants if it finds that the only record linking the participant and the research would be the consent document and the principal risk would be potential harm resulting from a breach of confidentiality. The committee may require the investigator to provide participants with a written statement explaining the research. Each participant shall be asked whether ~~he~~ the participant wants documentation linking ~~him~~ the participant to the research and the subject's wishes shall govern.

22VAC40-890-60. Human research review committee.

A. The department shall establish a department committee, consisting of ~~seven~~ at least five members, appointed by the commissioner. The department committee is authorized to (i) ~~to~~ determine if a proposed project is human subject research~~;~~ and (ii) ~~to~~ review and approve any human research proposed, authorized, or conducted by the department~~,~~ or by any local ~~agency~~ department, ~~by any~~ facility, or ~~by any~~ contractor.

B. All human research conducted or authorized by the department~~,~~ or any local ~~agency~~ department, facility, or contractor must be reviewed and approved by the department committee, except local ~~agencies~~ departments, facilities, or contractors collaborating with another organization on a research project may instead elect to utilize that organization's research review committee.

C. Members of the committee will be appointed to ensure the competent, complete, and professional review of human research. No member of the committee shall be directly involved in the proposed human research project or have administrative approval authority over the proposed research, except in connection with ~~his~~ the member's responsibilities as a member of the committee. At least two members of the committee must be individuals whose primary concerns are in nonscientific or ethical areas (e.g., the clergy, lawyers).

D. The committee shall include at least two members who are not affiliated with and are not immediate family members of persons who are affiliated with the department.

E. No member of the committee shall participate in the committee's initial or continuing review of any project in which the member has a conflicting interest, except to provide information requested by the committee. The committee has responsibility for determining whether a member has a conflict of interest. If necessary, the committee size shall be maintained by the appointment of a substitute representative to review a project where a member has a conflicting interest.

F. A committee may, at its discretion, invite individuals with competence in special areas to assist in the review of complex issues ~~which~~ that require expertise beyond or in addition to that available on the committee. These individuals may not vote with the committee.

G. A quorum of the committee shall consist of a majority of its members.

H. The committee shall establish procedures and rules of operations necessary to fulfill the requirements of this chapter.

22VAC40-890-70. Review and approval process.

A. Prior to the initiation of a human research project, a description of the proposed human research project shall be submitted to the department committee for review and approval, except for projects ~~which~~ that are exempt or those reviewed by another organization's committee. The description shall include a statement of the purpose of the proposed project and justification of ~~it~~ the project, the criteria for inclusion of a participant in the research project, a description of what will be done to the participants, and the proposed informed consent statement.

B. No human research shall be conducted or authorized by the department unless the department committee has reviewed and approved the proposed human research project, giving consideration to:

1. The necessity and utility of the research;

2. The adequacy of the description of potential benefits and risks involved and the appropriateness of the research methodology;

3. Whether the research presents more than a minimal risk to the subject;

4. Whether the risks to the participants are outweighed by the potential benefits to ~~them~~ the participants;

5. Whether the rights and welfare of the participants involved are adequately protected;

6. Whether the voluntary informed consent is obtained by methods ~~(~~, including the written consent form~~)~~, that are adequate and appropriate considering the ~~participants'~~ participant's educational level and language of greatest fluency;

7. Whether the people proposing to supervise or conduct the research are competent and qualified; and

8. Whether the criteria for selection of participants ~~is~~ are equitable.

C. Except for the research referenced in 22VAC40-890-80, the committee shall consider research proposals within 30 days after submission to the committee. In order for the research to be approved, it shall receive the approval of a majority of those members present at a meeting in which a quorum exists. The committee shall notify investigators in writing of ~~its~~ the committee's decision to approve or disapprove the proposed research activity or of modifications required to secure committee approval.

D. During the committee review of research projects, no personal identifiers of present or potential participants shall be presented or discussed.

E. The committee shall require a written description of the procedure to be followed when a participant has a complaint about a research project in which ~~he~~ the complainant is participating or has participated. All complaints shall be referred to the committee to determine if there has been a violation of the established protocol.

F. The committee shall require reports from approved research projects at least annually to ensure conformity with the approved proposal. The frequency of such reports shall be consistent with the nature and degree of risk of each research project. The committee shall also require a report from the research project at the conclusion of the project. Continuing review of research is not required in the following circumstances:

1. Research eligible for expedited review in accordance with 22VAC40-890-80; or

2. Research that has progressed to the point that it involves only one or both of the following, which are part of the Institutional Review Board-approved study:

a. Data analysis, including analysis of identifiable private information or identifiable biospecimens; or

b. Accessing follow-up clinical data from procedures that subjects would undergo as part of clinical care.

22VAC40-890-80. Expedited review of human research participants.

A. The committee is authorized to conduct an expedited review of a human research project ~~which~~ that involves no more than minimal risk to the participants if~~: 1. The~~ the research review committee affiliated with another state department, local ~~agency~~ department, licensed facility, or institution has reviewed and approved the project~~; or~~

~~2. The review involves only minor changes in previously approved research and the changes occur during the approved project period~~.

B. In accordance with 45 CFR 46.110, as determined by the U.S. Secretary of Health and Human Services (HHS) and published as a notice in the Federal Register, certain categories of research may be reviewed by the Institutional Review Board (IRB) through an expedited review procedure. The Secretary of HHS will evaluate the list at least every eight years and amend the list, as appropriate. A copy of the list is available from the Office for Human Research Protections, HHS, or any successor office.

C. The IRB may use the expedited review procedure to review the following:

1. Some or all of the research appearing on the list described in subsection B of this section, unless the reviewer determines that the study involves more than minimal risk; or

2. Minor changes in previously approved research during the period for which approval is authorized.

D. Under an expedited review procedure, the review may be carried out by the IRB chairperson or by one or more experienced reviewers designated by the chairperson from among members of the IRB. In reviewing the research, the reviewers may exercise all of the authorities of the IRB, except that the reviewers may not disapprove the research. A research activity may be disapproved only after review in accordance with the nonexpedited procedure set forth in 22VAC40-890-70.

E. The committee shall adopt a method for keeping all members advised of research proposals ~~which~~ that have been approved under the procedure.

F. The expedited review procedure may not be used where identification of a subject or a subject's responses would reasonably place the subject at risk of criminal or civil liability or be damaging to the subject's financial standing, employability, insurability, reputation, or be stigmatizing, unless reasonable and appropriate protections will be implemented so that risks related to invasion of privacy and breach of confidentiality are no greater than minimal.

22VAC40-890-90. Reporting.

A. The department's research review committee shall report by December 15 of each year to the commissioner on activities of the committee during the year. The report shall include:

1. A description of each human research project reviewed and whether the project was approved or disapproved;

2. Any significant changes from research proposals as approved by the committee;

3. A list of committee members, their qualifications for service on the committee, and their affiliation with the department, local agency, or facility;

4. A copy of the minutes of each committee meeting; and

5. Results of the research after its conclusion.

B. A local ~~agency~~ department, facility, or contractor participating in a human subject research project reviewed by another ~~agency's~~ research review committee shall report to the department research review committee by December 1 of each year on such participation. The report shall include:

1. A description of each human research project in which the ~~agency~~ local department, facility, or contractor participated, including the name and contact information for the approving research review committee; and

2. Results of the research after its conclusion, including a description of how the research will be shared beyond the local department, facility, or contractor.

C. The chairperson of the department's committee shall report as soon as possible to the commissioner any violation of the research protocol that may lead the committee to either suspend or terminate the research.

D. The commissioner shall report at least annually to the Governor and General Assembly on the human research projects authorized or conducted by the department, local ~~agency~~ department, facility, or contractor.

E. Other reports may be required by the committee, as indicated in 22VAC40-890-70 F.

VA.R. Doc. No. R25-6069; Filed December 6, 2024, 11:05 a.m.

TITLE 24. TRANSPORTATION AND MOTOR VEHICLES

COMMONWEALTH TRANSPORTATION BOARD

Final Regulation

Title of Regulation: **24VAC30-73. Access Management Regulations (amending 24VAC30-73-10, 24VAC30-73-20, 24VAC30-73-30, 24VAC30-73-50 through 24VAC30-73-90, 24VAC30-73-120, 24VAC30-73-150, 24VAC30-73-160).**

Statutory Authority: § 33.2-245 of the Code of Virginia.

Effective Date: January 29, 2025.

Agency Contact: Jo Anne P. Maxwell, Agency Regulatory Coordinator, Governance and Legislative Affairs Division, Department of Transportation, 1401 East Broad Street, Richmond, VA 23219, telephone (804) 786-1830, FAX (804) 225-4700, or email joanne.maxwell@vdot.virginia.gov.

Summary:

After a comprehensive review of Access Management Regulations (24VAC30-73) and in accordance with Executive Order 19 (2022), the amendments (i) remove all documents incorporated by reference from the regulation and add the Virginia Department of Transportation (VDOT) land use permit; (ii) update administrative information, eliminate redundancy, clarify language, and align text with current practice; and (iii) add two new forms.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

24VAC30-73-10. Definitions.

"Access management" means the systematic control of the location, spacing, design, and operation of entrances, median ~~openings/crossovers~~ openings or crossovers, traffic signals, and interchanges for the purpose of providing vehicular access to land development in a manner that preserves the safety and efficiency of the systems of state highways.

"Collectors" means the functional classification of highways that provide land access service and traffic circulation within residential, commercial, and industrial areas. The collector system distributes trips from principal and minor arterials through the area to the ultimate destination. Conversely, collectors also collect traffic and channel it into the arterial system.

"Commissioner" means the individual who serves as the chief executive officer of the Department of Transportation or ~~his~~ that individual's designee.

"Commonwealth" means the Commonwealth of Virginia.

"Crossover" means an opening in a nontraversable median ~~(~~, such as a concrete barrier or raised island~~)~~, that provides for crossing movements and left turning movements.

"Design speed" means the selected speed used to determine the geometric design features of the highway.

"District" means each of the nine areas ~~in~~ into which VDOT is divided to oversee the maintenance and construction on the state highways, bridges, and tunnels within the boundaries of the area.

"District administrator" means the VDOT employee assigned to supervise the district.

"District administrator's designee" means the VDOT employee ~~or employees~~ designated by the district administrator.

"Entrance" means any driveway, street, or other means of providing for movement of vehicles to or from the highway.

"Entrance, commercial" means any entrance serving land uses that generate more than 50 vehicular trips per day or the trip generation equivalent of more than five individual private residences or lots for individual private residences using ~~the~~ VDOT-approved methodology ~~in the Institute of Transportation Engineers Trip Generation, 8th Edition, 2008~~.

"Entrance, low volume commercial" means any entrance, other than a private entrance, serving five or fewer individual residences or lots for individual residences on a privately owned and maintained road or land uses that generate 50 or fewer vehicular trips per day using ~~the~~ VDOT-approved methodology ~~in the Institute of Transportation Engineers Trip Generation 8th Edition, 2008~~.

"Entrance, private" means an entrance (i) that serves up to two private residences and is used for the exclusive benefit of the occupants ~~or an entrance~~; (ii) that allows agricultural operations to obtain access to fields; or ~~an entrance~~ (iii) to a civil ~~and~~ or communication infrastructure ~~facilities~~ facility that ~~generate~~ generates 10 or fewer trips per day, such as a cell ~~towers~~ tower, pump ~~stations~~ station, ~~and~~ or stormwater management ~~basins~~ basin.

"Frontage road" means a road that generally runs parallel to a highway between the highway right-of-way and the front building setback line of the abutting properties and provides access to the abutting properties for the purposes of reducing the number of entrances to the highway and separating the abutting property traffic from through traffic on the highway.

"Functional area" means the area of the physical highway feature, such as an intersection, roundabout, railroad grade crossing, or interchange, plus that portion of the highway that comprises the decision and maneuver distance and required vehicle storage length to serve that highway feature.

~~"Functional area of an intersection" means the physical area of an at-grade intersection plus all required storage lengths for separate turn lanes and for through traffic, including any maneuvering distance for separate turn lanes.~~

"Functional classification" means the federal system of classifying groups of highways according to the character of service they are intended to provide and classifications made by the commissioner based on the operational characteristics of a highway. Each highway is assigned a functional classification based on the highway's intended purpose of providing priority to through traffic movement or adjoining property access. The functional classification system groups highways into three basic categories identified as (i) arterial, with the function to provide through movement of traffic; (ii) collector, with the function of supplying a combination of through movement and access to property; and (iii) local, with the function of providing access to property and to other streets.

"Highway," "street," or "road" means a public way for purposes of vehicular travel, including the entire area within the right-of-way, that is part of the systems of state highways.

"Intersection" means (i) a crossing of two or more highways at grade, (ii) a crossover, or (iii) any at-grade connection with a highway such as a commercial entrance.

"Intersection sight distance" means the sight distance required at an intersection to allow the driver of a stopped vehicle a sufficient view of the intersecting highway to decide when to enter, or cross, the intersecting highway.

"Legal speed limit" means the speed limit set forth on signs lawfully posted on a highway or, in the absence of such signs, the speed limit established by Article 8 (§ 46.2-870 et seq.) of Chapter 8 of Title 46.2 of the Code of Virginia.

"Level of service" means a qualitative measure describing the operational conditions within a vehicular traffic stream, generally in terms of such service measures as speed, travel time, freedom to maneuver, traffic interruptions, and comfort and convenience. ~~"Level of service" is defined and procedures are presented for determining the level of service in the Highway Capacity Manual, 2010 (Transportation Research Board).~~

"Limited access highway" means ~~a highway especially designed for through traffic over which abutting properties have no easement or right of light, air, or access by reason of the fact that those properties abut upon the limited access highway~~ the same as that term is defined in § 33.2-400 of the Code of Virginia.

"Local streets" means the functional classification for highways that comprise all facilities that are not collectors or arterials. Local streets serve primarily to provide direct access to abutting land and to other streets.

"Median" means the portion of a divided highway that separates opposing traffic flows.

"Median opening" means a crossover or a directional opening in a nontraversable median, ~~(~~such as a concrete barrier or raised island~~)~~, that physically restricts movements to specific turns such as left turns and U-turns.

"Minor arterials" means the functional classification for highways that interconnect with and augment the principal arterial system. Minor arterials distribute traffic to smaller geographic areas providing service between and within communities.

"Operating speed" means the speed at which drivers are observed operating their vehicles during free-flow conditions with the 85th percentile of the distribution of observed speeds being the most frequently used measure of the operating speed of a particular location or geometric feature.

"Permit" or "entrance permit" means a document that sets the conditions under which VDOT allows a connection to a highway.

"Permit applicant" means the person ~~or persons~~, firm, corporation, government, or other entity that has applied for a permit.

"Permittee" means the person ~~or persons~~, firm, corporation, government, or other entity that has been issued a permit.

"Preliminary subdivision plat" means a plan of development as set forth in § 15.2-2260 of the Code of Virginia.

"Principal arterials" means the functional classification for major highways intended to serve through traffic where access is carefully controlled, generally highways of regional importance, with moderate to high volumes of traffic traveling relatively long distances and at higher speeds.

"Professional engineer" means a person who is qualified to practice engineering by reason of his special knowledge and use of mathematical, physical, and engineering sciences and the principles and methods of engineering analysis and design acquired by engineering education and experience, and whose competence has been attested by the Virginia Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects through licensure as a professional engineer.

"Reverse frontage road" means a road that is located to the rear of the properties fronting a highway and provides access to the abutting properties for the purpose of reducing the number of entrances to the highway and removing the abutting property traffic from through traffic on the highway.

"Right-of-way" means ~~that~~ property within the systems of state highways that is open or may be opened for public travel or use ~~or both~~ in the Commonwealth. This definition includes those public rights-of-way ~~in~~ for which the Commonwealth has a prescriptive easement for maintenance and public travel.

"Roundabout" means a circular intersection with yield control of all entering traffic to traffic within the circular intersection ~~and~~, channelized approaches, and a central island that ~~deflect~~ deflects entering traffic to the right.

"Shared entrance" means a single entrance serving two or more adjoining parcels.

"Sight distance" means the distance visible to the driver of a vehicle when the view is unobstructed by traffic.

"Site plan" and "subdivision plat" mean a plan of development approved in accordance with §§ ~~15.2-2286 and~~ 15.2-2241 through 15.2-2245 and 15.2-2286 of the Code of Virginia.

"Stopping sight distance" means the distance required by a driver of a vehicle, traveling at a given speed, to bring the vehicle to a stop after an object on the highway becomes visible, including the distance traveled during the driver's perception and reaction times and the vehicle's braking distance.

"Systems of state highways" means all highways, streets, and roads under the ownership, ~~the~~ control, or ~~the~~ jurisdiction of VDOT, including ~~but not limited to,~~ the primary, secondary, and interstate highways.

~~"Trip" means a single or one-directional vehicle movement either entering or exiting a property; a vehicle leaving the property is one trip and a vehicle returning to the property is one trip.~~

"Turn lane" means a separate lane for the purpose of enabling a vehicle that is entering or leaving a highway to increase or decrease its speed to a rate at which it can more safely merge or diverge with through traffic; an acceleration or deceleration lane; or a separate lane for the storage of vehicles that intend to enter or leave a highway.

"VDOT" means the Virginia Department of Transportation, its successor, the Commissioner of Highways, or ~~his~~ the commissioner's designees.

24VAC30-73-20. Authority to regulate entrances to systems of state highways.

A. VDOT's authority to regulate entrances and manage access to highways is provided in §§ 33.2-223, 33.2-240, 33.2-241, 33.2-242, and 33.2-245 of the Code of Virginia. Each proposed highway entrance creates a potential conflict point that impacts the safe and efficient flow of traffic on the highway; therefore, private property interests in access to the highway must be balanced with public interests of safety and mobility. ~~Managing access to highways can reduce traffic congestion, help maintain the levels of service, enhance public safety by decreasing traffic conflict points, support economic development by promoting the efficient movement of people and goods, reduce the need for new highways and road widening by improving the performance of existing highways, preserve the public investment in new highways by maximizing their efficient operation, and better coordinate transportation and land use decisions.~~

B. The Commonwealth Transportation Board has the authority to designate highways as limited access and to regulate access rights to those facilities as provided in § 33.2-401 of the Code of Virginia. No private or commercial entrances shall be permitted within limited access rights-of-way except as may be provided for by the regulation titled Change of Limited Access Control (24VAC30-401).

C. The district administrators or ~~their~~ the district administrators' designees are authorized to issue private entrance permits and commercial entrance permits in accordance with the provisions of this chapter.

24VAC30-73-30. Applicability.

A. This chapter shall apply to any highway ~~with a functional classification as a principal arterial, minor arterial, collector, or local street unless otherwise indicated herein. B. The commissioner shall publish maps of the Commonwealth on the VDOT website that show all highways with the above functional classifications and shall periodically update such maps~~ that is a part of the systems of state highways.

24VAC30-73-50. Appeal and sight distance exception procedure.

A. The permit applicant may appeal denial or revocation or conditions of a permit in writing to the district administrator with a copy to the district administrator's designee and the chief administrative officer of the locality where the entrance is proposed.

1. All appeals must be received within 30 calendar days of receipt of written notification of denial or revocation or issuance of a permit with contested conditions and must set forth the grounds for the appeal and include copies of all prior correspondence with any local government official and VDOT representatives regarding the issue ~~or issues~~. The permit applicant may request a meeting with the district administrator concerning the appeal and the district administrator will set a date, time, and location for such meeting.

2. After reviewing all pertinent information, the district administrator will advise the permit applicant in writing regarding the decision on the appeal within 60 calendar days of receipt of the written appeal request or such longer timeframe jointly agreed to by the parties, with a copy to the district administrator's designee and the chief administrative officer of the locality where the entrance is proposed.

3. The permit applicant may further appeal the district administrator's decision to the commissioner within 30 calendar days of receipt of written notification of the district administrator's decision. The commissioner will advise the permit applicant in writing regarding the decision on the appeal within 60 calendar days of receipt of the written appeal request, with a copy to the district administrator and

the chief administrative officer of the locality where the entrance is proposed.

B. The commissioner may grant an exception to the required sight distance after a traffic engineering investigation has been performed.

1. If a sight distance exception is requested, the permit applicant shall provide such request in writing to the commissioner with a copy to the district administrator's designee and the chief administrative officer of the locality where the entrance is proposed and shall furnish the commissioner with a traffic engineering investigation report, prepared by a professional engineer. ~~Refer to Instructional and Informational Memorandum IIM-LD-227.5, 2011 (VDOT), for requirements concerning approval of sight distance exceptions.~~

2. The commissioner will advise the permit applicant in writing regarding the decision on the sight distance exception request within 60 calendar days of receipt of the written exception request or such longer timeframe jointly agreed to by the parties, with a copy to the district administrator's designee and the chief administrative officer of the locality where the entrance is proposed.

24VAC30-73-60. General provisions governing entrances.

A. No entrance of any nature may be constructed within the right-of-way until the location has been approved by VDOT and an entrance permit has been issued. ~~The provisions of § 33.2-241 of the Code of Virginia shall govern any violation~~ VDOT may take any action within the right-of-way to block, obstruct, or remove an unpermitted entrance and may initiate civil action for damages, injunction, or other appropriate remedy.

B. VDOT will permit reasonably convenient access to a parcel of record. VDOT is not obligated to permit the most convenient access, nor is VDOT obligated to approve the permit applicant's preferred entrance location or entrance design. If a parcel is served by more than one road in the systems of state highways, the district administrator's designee shall determine upon which road ~~or roads~~ the proposed entrance ~~or entrances~~ is ~~or are~~ to be constructed.

C. Entrance standards established by localities that are stricter than those of VDOT shall govern.

24VAC30-73-70. Commercial entrance design.

A. Low volume commercial entrance design and construction shall comply with the private entrance design standards ~~in Appendix F of the Road Design Manual, 2011 (VDOT)~~ specified in the terms of the permit and the stopping or intersection sight distance provision in 24VAC30-73-80. Commercial entrance design and construction shall comply with the provisions of this chapter ~~and~~, the ~~standards in the Road Design Manual, 2011 (VDOT), the Road and Bridge Standards, 2008, revised 2011, the Road and Bridge Specifications, 2007, revised 2011 (VDOT), other VDOT~~ engineering and construction standards ~~as may be appropriate~~ specified in the terms of the permit, and any additional conditions, restrictions, or modifications deemed necessary by the district administrator's designee to preserve the safety, use, and maintenance of the systems of state highways. Entrance design and construction shall comply with applicable guidelines and requirements of the Americans with Disabilities Act of 1990 (42 USC § 12101 et seq.) and applicable VDOT standards specified in the terms of the permit. Ramps for curb sections shall be provided as required in § 15.2-2021 of the Code of Virginia. ~~The standard drawing for depressed curb ramp as shown in the Road and Bridge Standards, 2008, revised 2011, shall be utilized in the design.~~

1. In the event an entrance is proposed within the limits of a funded highway project that will ultimately change a highway, the permit applicant may be required to construct, to the extent possible, entrances compatible with the highway's ultimate design.

2. All entrance design and construction shall accommodate pedestrian and bicycle users of the abutting highway in accordance with the ~~Commonwealth Transportation Board's "Policy for Integrating Bicycle and Pedestrian Accommodations," 2004~~ terms of the permit.

3. All entrance design and construction shall accommodate transit users of the abutting highway where applicable and provide accommodations to the extent possible.

4. Based on the existing and planned developments, the district administrator's designee will determine the need for curb and gutter, sidewalks, or other features within the general area of the proposed entrance in accordance with the requirements of this chapter and the design standards ~~in Appendix F of the Road Design Manual, 2011 (VDOT)~~ specified in the terms of the permit.

~~5. Sites accessed by an entrance shall be designed so as to prevent unsafe and inefficient traffic movements from impacting travel on the abutting highway. At the request of the district administrator's designee, the permit applicant shall furnish a report that documents the impact of expected traffic movements upon the function of the abutting highway during the peak hours of the abutting highway or during the peak hours of the generator, whichever is appropriate as determined by the district administrator's designee.~~

~~6.~~ 5. The use of a shared entrance between adjacent property owners shall be the preferred method of access.

~~7. The construction of new crossovers, or the relocation, removal, or consolidation of existing crossovers shall be approved in accordance with the crossover location approval process specified in Appendix F of the Road Design Manual, 2011 (VDOT).~~

B. It is essential that entrance and site design allow safe and efficient movements of traffic using the entrance while minimizing the impact of such movements on the operation of the systems of state highways.

1. The permit applicant shall supply sufficient information to demonstrate to the satisfaction of the district administrator's designee that neither the entrance nor the proposed traffic circulation patterns within the parcel will compromise the safety, use, operation, or maintenance of the abutting highway. A rezoning traffic impact statement submitted for a proposed development of a parcel in accordance with the Traffic Impact Analysis Regulations (24VAC30-155) may be used for this purpose, provided that it adequately documents the effect of the proposed entrance and its related traffic on the operation of the highway to be accessed.

2. If the proposed entrance will cause the systems of state highways to experience degradation in safety or a significant increase in delay or a significant reduction in capacity beyond an acceptable level of service, the applicant shall be required to submit a plan to mitigate these impacts and to bear the costs of such mitigation measures.

3. Proposed mitigation measures must be approved by the district administrator's designee prior to permit approval. The district administrator's designee will consider what improvements will be needed to preserve the operational characteristics of the highway, accommodate the proposed traffic, and, if entrance design modifications are needed, incorporate them accordingly to protect the transportation corridor. ~~Mitigation~~ Example mitigation measures that may be considered include ~~but are not limited to~~:

a. Construction of auxiliary lanes or turning lanes~~,~~ or pavement ~~transitions/tapers~~ transitions or tapers;

b. Construction of new crossovers~~,~~ or the relocation, removal, or consolidation of existing crossovers;

c. Installation, modification, or removal of traffic signals and related traffic control equipment;

d. Provisions to limit the traffic generated by the development served by the proposed entrance;

e. Dedication of additional right-of-way or easement~~, or both,~~ for future highway improvements;

f. Reconstruction of existing highway to provide required vertical and horizontal sight distances;

g. Relocation or consolidation of existing entrances; or

h. Recommendations from adopted corridor studies, design studies, other access management practices and principles, or any combination of these, not otherwise mentioned in this chapter.

4. If an applicant is unwilling or unable to mitigate the impacts identified in the traffic impact analysis, the entrance shall be physically restricted to right-in or right-out movements ~~or both~~ or similar restrictions such that the public interests in a safe and efficient flow of traffic on the systems of state highways are protected.

24VAC30-73-80. Minimum sight distance for commercial entrances.

A. No less than minimum intersection sight distance shall be obtained for a commercial entrance and no less than minimum stopping or intersection sight distance shall be obtained for a low volume commercial entrance. Sight distances shall be measured in accordance with VDOT practices, and sight distance requirements shall conform to VDOT standards ~~as described in Appendix F of the Road Design Manual, 2011 (VDOT)~~ specified in the terms of the permit. The legal speed limit shall be used unless the design speed is available and approved for use by VDOT.

B. The operating speed may be used in lieu of the legal speed limit in cases where (i) the permit applicant furnishes the district administrator's designee with a speed study prepared in accordance with the ~~Manual on Uniform Traffic Control Devices, 2003, revised 2007 (FHWA),~~ Standards for Use of Traffic Control Devices to Classify, Designate, Regulate, and Mark State Highways (24VAC30-315); (ii) the methodology ~~that~~ demonstrates that the operating speed of the segment of highway is lower than the legal speed limit; and~~,~~ (iii) in the judgment of the district administrator's designee, use of the operating speed will not compromise safety for either a driver at an entrance or a driver on the abutting highway.

C. VDOT may require that the vertical or horizontal alignment of the existing highway be adjusted to accommodate certain design elements of a proposed commercial entrance including~~, but not limited to,~~ median openings, crossovers, roundabouts, and traffic signals, where adjustment is deemed necessary. The cost of any work performed to adjust the horizontal or vertical alignment of the highway to achieve required intersection sight distance at a proposed entrance shall be borne by the permit applicant.

24VAC30-73-90. Private entrances.

A. The property owner shall identify the desired location of the private entrance with the assistance of the district administrator's designee. If the minimum intersection sight distance standards specified in ~~Appendix F of the Road Design Manual, 2011 (VDOT),~~ the terms of the permit cannot be met, the entrance should be placed at the location with the best possible sight distance as determined by the district administrator's designee. The district administrator's designee may require the property owner to grade slopes, clear brush, remove trees, or conduct other similar efforts~~, or any combination of these,~~ necessary to provide the safest possible means of ingress and egress that can be reasonably achieved.

B. The property owner shall obtain an entrance permit and, on shoulder and ditch section roads, shall be responsible for installing the private entrance in accordance with VDOT

policies and engineering standards. The property owner may request VDOT to perform the stabilization of the shoulder and installation of the entrance pipe. In such cases, VDOT may install the private entrance pipe and will stabilize the shoulder at the property owner's expense. If VDOT installs these portions of the entrance, a cost estimate for the installation will be provided to the property owner; however, VDOT will bill the property owner the actual cost of installation. The property owner shall be responsible for all grading beyond the shoulder.

C. Grading and installation of a driveway from the edge of the pavement to the right-of-way line shall be the responsibility of the property owner.

D. Installation of a private entrance on a curb and gutter street shall be the responsibility of the property owner.

E. Maintenance of private entrances shall be by the owner of the entrance, except that VDOT shall ~~maintain~~:

1. On shoulder section highways, maintain that portion of the entrance within the normal shoulder portion of the highway.

2. On highways with ditches, clean the drainage pipe at the entrance and may replace the pipe if necessary to preserve the highway and protect the traveling public.

3. On highways with curb, gutter, and sidewalk belonging to VDOT, maintain that portion of the entrance that extends to the back of the sidewalk. If ~~a~~ no sidewalk is ~~not~~ present, VDOT shall maintain that portion of the entrance that extends to the back of the curb line.

4. On highways with curb, gutter, and sidewalk not belonging to VDOT, maintain only to the flow line of the gutter pan.

5. On highways with shoulders, ditches, and sidewalk belonging to VDOT, maintain that portion of the entrance that extends to the back of the sidewalk.

24VAC30-73-120. Commercial entrance access management.

A. As commercial entrance locations and designs are prepared and reviewed, appropriate access management regulations and standards shall be utilized to ensure that the safety, integrity, and operational characteristics of the systems of state highways are maintained. The proposed commercial entrance shall meet the VDOT access management standards ~~contained in Appendix F of the Road Design Manual, 2011 (VDOT),~~ specified in the terms of the permit and the regulations in this chapter to provide the users of such entrance with a safe means of ingress and egress while minimizing the impact of such ingress and egress on the operation of the highway.

B. A proposed development's compliance with the access management requirements specified below should be considered during the local government and VDOT's review of any rezoning, site plan, or subdivision plat for the development. VDOT's review of a rezoning traffic impact statement submitted for a development in accordance with the Traffic Impact Analysis Regulations (24VAC30-155) shall include comments on the development's compliance with the access management requirements specified ~~below~~ in subsection C of this section.

C. Access management requirements, in addition to other regulations in this chapter, include ~~but are not limited to~~:

1. Restricting commercial entrance locations. To prevent undue interference with free traffic movement and to preserve safety, entrances to the highways shall not be permitted within the functional areas of intersections, roundabouts, railroad grade crossings, interchanges, or similar areas with sensitive traffic operations. A request for an exception to this requirement submitted according to ~~24VAC30-73-120~~ subsection D of this section shall include a traffic engineering study that contains specific and documented reasons showing that highway operation and safety will not be adversely impacted.

2. Commercial entrances shared with adjoining properties. To reduce the number of entrances to state highways, ~~a condition of entrance permit issuance shall be that~~ entrances shall serve two or more parcels. A shared commercial entrance shall be created and designed to serve adjoining properties. A copy of the property owners' recorded agreement to share use of and maintain the entrance shall be included with the entrance permit application submitted to the district administrator's designee. The shared entrance shall be identified on any site plan or subdivision plat of the property. The district administrator's designee is authorized to approve an exception to this requirement upon submittal of a request according to ~~24VAC30-73-120~~ subsection D of this section that includes ~~the following~~:

a. Written evidence that a reasonable agreement to share an entrance cannot be reached with adjoining property owners~~;~~; or

b. Documentation that there are physical constraints, including ~~but not limited to~~ topography, environmentally sensitive areas, and hazardous uses, to creating a shared entrance.

3. Spacing of commercial entrances and intersections. The spacing of proposed entrances and intersections shall comply with the spacing standards for entrances and intersections ~~in Appendix F of the Road Design Manual, 2011 (VDOT)~~ specified in the terms of the permit, except as specified ~~below~~ in subdivisions C 3 a through f of this section.

a. Where a plan of development or a condition of development that identifies the specific location of an entrance ~~or entrances~~ was proffered pursuant to § 15.2-2297, 15.2-2298, or 15.2-2303 of the Code of Virginia as part of a rezoning approved by the locality prior to July 1,

2008, for principal arterials or October 14, 2009, for minor arterials, collectors, or local streets, such entrances shall be exempt from the applicable spacing standards for entrances and intersections, provided the requirements of § 15.2-2307 of the Code of Virginia have been met. Entrances shall be exempt from the applicable spacing standards for entrances and intersections when the location of such entrances are shown on a subdivision plat, site plan, preliminary subdivision plat, or a Secondary Street Acceptance Requirements (24VAC30-92) conceptual sketch that was submitted by the locality to VDOT for review and received by VDOT prior to July 1, 2008, for principal arterials or October 14, 2009, for minor arterials, collectors, or local streets, or is valid pursuant to §§ 15.2-2260 and 15.2-2261 of the Code of Virginia and was approved in accordance with §§ ~~15.2-2286 and~~ 15.2-2241 through 15.2-2245 and 15.2-2286 of the Code of Virginia prior to July 1, 2008, for principal arterials or October 14, 2009, for minor arterials, collectors, or local streets. The district administrator's designee ~~is authorized to~~ may exempt such entrances from the spacing standards upon submittal of a request according to ~~24VAC30-73-120~~ subsection D of this section that includes documentation of the ~~above~~ criteria in this subdivision a.

b. VDOT may work with a locality ~~or localities~~ on access management corridor plans. Such plans may allow for spacing standards that differ from and supersede the applicable spacing standards for entrances and intersections, subject to approval by the district administrator. Such plans may also identify the locations of any physical constraints to creating shared entrances or ~~vehicular/pedestrian~~ vehicular and pedestrian connections between adjoining properties (see ~~24VAC30-73-120~~ subdivisions C 2 and C 4 of this section). If the permit applicant submits a request according to ~~24VAC30-73-120~~ subsection D of this section for an exception to the spacing standards and provides documentation that the location of the proposed commercial entrance is within the limits of an access management plan approved by the local government and by VDOT, the plan should guide the district administrator's designee in approving the exception request and in determining the appropriate location of the entrance.

c. On older, established business corridors along a highway in a locality where existing entrances and intersections did not meet the spacing standards prior to July 1, 2008, for principal arterials or October 14, 2009, for minor arterials, collectors, or local streets, the district administrator's designee may allow spacing for new entrances and intersections ~~may be allowed by the district administrator's designee~~ that is consistent with the established spacing along the highway, provided that the permit applicant submits a request according to ~~24VAC30-73-120~~ subsection D of this section for an exception to the spacing standards that includes evidence that reasonable efforts were made to comply with the other access management requirements of this section, including restricting entrances within the functional areas of intersections, sharing entrances with and providing vehicular and pedestrian connections between adjoining properties, and physically restricting entrances to right-in or right-out ~~or both~~ movements.

d. Where a developer proposes a development within a designated urban development area as defined in § 15.2-2223.1 of the Code of Virginia or an area designated in the local comprehensive plan for higher density development that incorporates principles of new urbanism and traditional neighborhood development, which may include ~~but need not be limited to~~ (i) pedestrian-friendly road design, (ii) interconnection of new local streets with existing local streets and roads, (iii) connectivity of road and pedestrian networks, (iv) preservation of natural areas, (v) satisfaction of requirements for stormwater management, (vi) mixed-use neighborhoods, including mixed housing types, (vii) reduction of front and side yard building setbacks, and (viii) reduction of subdivision street widths and turning radii at subdivision street intersections, the district administrator's designee may approve spacing standards for entrances and intersections internal to the development that differ from the otherwise applicable spacing standards, provided that the developer submits a request according to ~~24VAC30-73-120~~ subsection D of this section for an exception to the spacing standards that includes information on the design of the development and on the conformance of such entrances and intersections with the intersection sight distance standards specified in ~~Appendix F of the Road Design Manual, 2011 (VDOT)~~ the terms of the permit.

e. Where a development's second or additional commercial ~~entrances are~~ entrance is necessary for the streets in the development to be eligible for acceptance into the secondary system of state highways in accordance with the Secondary Street Acceptance Requirements (24VAC30-92) and such commercial entrances cannot meet the spacing standards for highways, the developer may submit a request according to ~~24VAC30-73-120~~ subsection D of this section for an exception to the spacing standards that includes information on the design of the development. The following shall apply to the exception request:

(1) For highways with a functional classification as a collector or local street, the district administrator's designee may approve spacing standards that differ from the otherwise applicable spacing standards to allow the approval of the entrance ~~or entrances~~. Such commercial ~~entrances~~ entrance shall be required to meet the intersection sight distance standards specified in ~~Appendix F of the Road Design Manual, 2011 (VDOT)~~ the terms of the permit.

(2) For highways with a functional classification as a principal or minor arterial, the district administrator's designee shall, in consultation with the developer and the locality within which the development is proposed, either approve spacing standards that differ from the otherwise applicable spacing standards to allow the approval of the entrance ~~or entrances,~~ or waive such state requirements that necessitate a second or additional commercial ~~entrances~~ entrance. If approved, such commercial ~~entrances~~ entrance shall be required to meet the intersection sight distance standards specified in ~~Appendix F of the Road Design Manual, 2011 (VDOT)~~ the terms of the permit.

f. Where a parcel of record has insufficient frontage on a highway to meet the spacing standards because of the dimensions of the parcel or a physical constraint, such as topography or an environmentally sensitive area, the entrance shall be physically restricted to right-in or right-out movements ~~or both~~ or similar restrictions such that the public interests in a safe and efficient flow of traffic on the systems of state highways are protected and preserved. A request for an exception to this requirement submitted according to ~~24VAC30-73-120~~ subsection D of this section shall include a traffic engineering study that contains specific and documented reasons showing that highway operation and safety will not be adversely impacted.

4. ~~Vehicular/pedestrian~~ Vehicular and pedestrian circulation between adjoining undeveloped properties. To facilitate traffic circulation between adjacent properties, reduce the number of entrances to the highway, and maximize use of new signalized intersections, the permit applicant shall be required on a highway with a functional classification as a principal or minor arterial highway, and may be required by the district administrator's designee on a highway with a functional classification as a collector, as a condition of commercial entrance permit issuance, to record access easements and to construct vehicular connections to the boundaries of the adjoining undeveloped property, ~~(~~which may include frontage roads or reverse frontage roads~~)~~, in such a manner that affords safe and efficient future access between the permit applicant's property and adjoining undeveloped properties.

a. Where appropriate, the permit applicant also shall construct pedestrian connections to the boundary lines of adjoining undeveloped properties and adjoining developed properties with sidewalks that abut the property.

b. At such time that a commercial entrance permit application is submitted for the adjoining property, a condition of permit issuance shall be to extend such ~~vehicular/pedestrian~~ vehicular and pedestrian connections into the proposed development.

c. Development sites under the same ownership or consolidated for the purposes of development and comprised of more than one building site shall provide a unified vehicular and pedestrian access connection and circulation system between the sites.

d. Such connections shall not be required if the permit applicant submits a request for an exception according to ~~24VAC30-73-120~~ subsection D of this section and provides documentation that there are physical constraints to making such connections between properties, including ~~but not limited to~~ topography, environmentally sensitive areas, and hazardous uses, or provides documentation of other constraints to making such connections.

e. If a permit applicant does not wish to comply with this requirement, the permit applicant's entrance shall be physically restricted to right-in or right-out movements ~~or both~~ or similar restrictions such that the public interests in a safe and efficient flow of traffic on the systems of state highways are protected.

5. Traffic signal spacing. To promote the efficient progression of traffic on highways, commercial entrances that are expected to serve sufficient traffic volumes and movements to require signalization shall not be permitted if the spacing between the entrance and at least one adjacent signalized intersection is below signalized intersection spacing standards ~~in Appendix F of the Road Design Manual, 2011 (VDOT)~~ specified in the terms of the permit. If sufficient spacing between adjacent traffic signals is not available, the entrance shall be physically restricted to right-in or right-out movements ~~or both~~ or similar restrictions such that the public interests in a safe and efficient flow of traffic on the systems of state highways are protected and preserved. A request for an exception to this requirement submitted according to ~~24VAC30-73-120~~ subsection D of this section shall include a traffic engineering study that (i) evaluates the suitability of the entrance location for design as a roundabout and (ii) contains specific and documented reasons showing that highway operation and safety will not be adversely impacted.

6. Limiting entrance movements. To preserve the safety and function of certain highways, the district administrator's designee may require an entrance to be designed and constructed in such a manner as to physically prohibit certain traffic movements.

D. A request for an exception from the access management requirements in ~~24VAC30-73-120~~ subsection C of this section shall be submitted in writing to the district administrator's designee. The request shall identify the type of exception, describe the reasons for the request, and include all documentation specified in ~~24VAC30-73-120~~ subsection C of this section for the type of exception. After considering all pertinent information, including any improvements that will be needed to the entrance or intersection to protect the operational

characteristics of the highway, the district administrator's designee will advise the applicant in writing regarding the decision on the exception request within 30 calendar days of receipt of the written exception request, with a copy to the district administrator. ~~The applicant may appeal the decision of the district administrator's designee to the district administrator in accordance with the procedures for an appeal set forth in 24VAC30-73-50.~~

24VAC30-73-150. Temporary entrances (construction/logging entrances).

~~A.~~ Construction of temporary construction or logging entrances upon the systems of state highways shall be authorized in accordance with the provisions in the Land Use Permit Regulations (24VAC30-151). The permit applicant must contact the appropriate district administrator's designee to approve the location prior to installing an entrance or utilizing an existing entrance. ~~The district administrator's designee shall also be contacted to arrange and conduct a final inspection prior to closing a temporary construction or logging entrance. In the event that adequate sight distance is not achieved, additional signage that meets the Manual on Uniform Traffic Control Devices standards, 2003, revised 2007 (FHWA) and certified flaggers shall be used to ensure safe ingress and egress.~~

~~B. Entrances shall be designed and operated in such a manner as to prevent mud and debris from being tracked from the site onto the highway's paved surface. If debris is tracked onto the highway, it shall be removed by the permittee immediately as directed by the district administrator's designee.~~

~~C. The permittee must restore, at the permittee's cost, all disturbed highway rights-of-way, including, but not limited to, ditches, shoulders, and pavement, to their original condition when removing the entrance. All such restorations are subject to approval by the district administrator's designee.~~

24VAC30-73-160. Access to public waters.

VDOT may grant the use of portions of the highway right-of-way for access to public waters upon written request from the Executive Director of the Virginia Department of ~~Game and Inland Fisheries~~ Wildlife Resources to the commissioner. The district administrator's designee may require that a commercial entrance permit be obtained in accordance with the provisions of this chapter for entrances that will provide access to landings, wharves, and docks.

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, General Assembly Building, 201 North Ninth Street, Fourth Floor, Richmond, Virginia 23219.

FORMS (24VAC30-73)

~~LUP-A - Land Use Permit Application (rev. 03/10)~~

~~LUP-SP - Land Use Permit Special Provisions (Notice of Permittee Liability) (rev. 12/10)~~

~~LUP-CSB - Corporate Surety Bond (rev. 03/10)~~

~~LUP-LC - Letter of Credit Bank Agreement (rev. 03/10)~~

~~LUP-SB - Land Use Permit Surety Bond (rev. 03/10)~~

Letter of Credit Bank Agreement, LUP-LC (rev. 3/2016)

Land Use Permit Surety Bond, LUP-SB (rev. 3/2016)

Land Use Permit - Private Entrance Installation, LUP-PE (rev. 3/2024)

Land Use Permit - Commercial Entrance Installation, LUP-CEI (rev. 3/2024)

~~DOCUMENTS INCORPORATED BY REFERENCE (24VAC30-73)~~

~~Information pertaining to the availability and cost of any of these publications should be directed to the address indicated for the specific document. Requests for documents of the Virginia Department of Transportation (VDOT) may be obtained from the department at 1401 E. Broad St., Richmond, Virginia 23219; however, department documents may be available over the Internet at www.virginiadot.org.~~

~~VDOT Road Design Manual, 2011.~~

~~Note: Appendix F (Access Management Design Standards for Entrances and Intersections) contains the access management standards referenced in Chapters 863 and 928 of the 2007 Acts of Assembly and Chapters 274 and 454 of the 2008 Acts of Assembly.~~

~~VDOT Road and Bridge Specifications, 2007, revised 2011.~~

~~VDOT Road and Bridge Standards, 2008, revised 2011.~~

~~Manual on Uniform Traffic Control Devices for Streets and Highways, 2003, revised 2007, Federal Highway Administration, Superintendent of Documents, U.S. Government Printing Office, P.O. Box 371954, Pittsburgh, PA 15250-7954.7.~~

~~VDOT Policy for Integrating Bicycle and Pedestrian Accommodations, 2004.~~

~~Highway Capacity Manual, 2010, Transportation Research Board, 500 Fifth Street, NW, Washington, DC 20001.~~

~~VDOT Instructional and Informational Memorandum IIM-LD-227.5, 2011.~~

~~Trip Generation, 8th Edition, 2008, Institute of Transportation Engineers, 1099 14th Street, N.W., Suite 300 West, Washington, DC 20005.~~

VA.R. Doc. No. R24-7633; Filed December 6, 2024, 7:23 a.m.

GUIDANCE DOCUMENTS

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, General Assembly Building, 201 North Ninth Street, Fourth Floor, Richmond, Virginia 23219.

VIRGINIA INFORMATION TECHNOLOGIES AGENCY

Title of Document: Information Technology Investment Management Standard.

Public Comment Deadline: January 29, 2025.

Effective Date: January 30, 2025.

Agency Contact: Joshua Heslinga, Director, Legal and Legislative Services, Virginia Information Technologies Agency, 7325 Beaufont Springs Drive, Richmond, VA 23225, telephone (804) 551-2902, or email joshua.heslinga@vita.virginia.gov.

BOARD OF NURSING

Titles of Documents: Massage Therapy Practice and Use of Titles.

Medication Administration Training Curriculum.

Public Comment Deadline: January 29, 2025.

Effective Date: January 30, 2025.

Agency Contact: Erin Barrett, Director of Legislative and Regulatory Affairs, Department of Health Professions, Perimeter Center, 9960 Mayland Drive, Suite 300, Henrico, VA 23233, telephone (804) 750-3912, or email erin.barrett@dhp.virginia.gov.

STATE WATER CONTROL BOARD

Title of Document: Points Assessment for Alleged Violations of the Construction General Permit Criteria and Enforcement Referral Guidance - Amendment No. 1.

Public Comment Deadline: January 29, 2025.

Effective Date: January 30, 2025.

Agency Contact: Nyibe Smith, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23219, telephone (804) 971-3096, or email nyibe.smith@deq.virginia.gov.

The following guidance documents have been submitted for deletion and the listed agencies have opened up a 30-day public comment period. The listed agencies had previously identified these documents as certified guidance documents, pursuant to § 2.2-4002.1 of the Code of Virginia. Online users of this issue of the Virginia Register of Regulations may click on the name of a guidance document to view the deleted document and comment. This information is also available on the Virginia Regulatory Town Hall (http://www.townhall.virginia.gov) or from the agency contact.

BOARD OF ACCOUNTANCY

Titles of Documents: Board of Accountancy Rights and Responsibilities under FOIA.

Guidelines for Accreditation of Educational Institutions.

Public Comment Deadline: January 29, 2025.

Effective Date: January 30, 2025.

Agency Contact: Alessandra Gabriel, Information and Policy Advisor, Board of Accountancy, 9960 Mayland Drive, Suite 402, Henrico, VA 23233, telephone (804) 367-0728, or email alessandra.gabriel@boa.virginia.gov.

RADFORD UNIVERSITY

Title of Document: Radford University Guidance Documents.

Public Comment Deadline: January 29, 2025.

Effective Date: January 30, 2025.

Agency Contact: Karen Casteele, Secretary to the Board and Special Assistant to the President, Radford University, Martin Hall 309, P.O. Box 6890, Radford, VA 24142, telephone (540) 831-5426, or email kcasteel@radford.edu.

DEPARTMENT OF ENVIRONMENTAL QUALITY

Big Pine Solar LLC Notice of Intent for a Small Renewable Energy Project (Solar) – Sussex County

Big Pine Solar LLC has provided the Department of Environmental Quality (DEQ) a notice of intent to submit the necessary documentation for a permit by rule for a small renewable energy project (solar) in Sussex County, Virginia, pursuant to 9VAC15-60. The developer for the project is RWE Clean Energy. The DEQ project number is RE0000340.

The project is located at 5465 Newville Road, Waverly, Virginia, with a geographic information system (GIS) centroid of Latitude 37.031756, Longitude -77.219800. The project spans approximately 2,187 acres and will utilize 335,460 photovoltaic panels. The project will have a maximum rated capacity of 150 megawatts.

Contact Information: Melissa Porterfield, Regulatory Coordinator, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4238, or email melissa.porterfield@deq.virginia.gov.

Proposed Enforcement Action for Charles City County

The Virginia Department of Environmental Quality (DEQ) is proposing an amendment to a consent order for Charles City County for violations of State Water Control Law and regulations at the Ruthville wastewater treatment plant. The proposed amendment to the consent order is available from the DEQ contact or at https://www.deq.virginia.gov/permits/public-notices/enforcement-actions. The DEQ contact will accept written comments from December 30, 2024, to January 29, 2025.

Contact Information: Kristen Sadtler, Enforcement Coordinator, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, or email kristen.sadtler@deq.virginia.gov.

Proposed Enforcement Action for the Town of Luray

The Virginia Department of Environmental Quality (DEQ) is proposing an enforcement action for the Town of Luray for violations of State Water Control Law and regulations in Page County. The proposed order is available from the DEQ contact or at https://www.deq.virginia.gov/permits/public-notices/enforcement-actions. The DEQ contact will accept written comments from December 30, 2024, to January 29, 2025.

Contact Information: Francesca Wright, Senior Enforcement Specialist, Department of Environmental Quality, P.O. Box 3000, Harrisonburg, VA 22801, or email francesca.wright@deq.virginia.gov.

Proposed Enforcement Action for NCN III Solar LLC

The Virginia Department of Environmental Quality (DEQ) is proposing an enforcement action for NCN III Solar LLC for violations of the State Water Control Law and regulations in Buckingham County. The proposed order is available from the DEQ contact listed or at https://www.deq.virginia.gov/permits/public-notices/enforcement-actions. The DEQ contact will accept comments by email or postal mail from December 30, 2024, through January 29, 2024.

Contact Information: Matt Richardson, Enforcement Specialist, Department of Environmental Quality, Piedmont Regional Office, 4949A Cox Road, Glen Allen, VA 23060, telephone (804) 659-2696, or email matthew.richardson@deq.virginia.gov.

Proposed Enforcement Action for the Scott County Public Service Authority

The Virginia Department of Environmental Quality (DEQ) is proposing an enforcement action for the Scott County Public Service Authority for violations of the State Water Control Law and regulations at the Nickelsville wastewater treatment plant in Scott County. The proposed order is available from the DEQ contact listed or at https://www.deq.virginia.gov/permits/public-notices/enforcement-actions. The DEQ contact will accept comments by email or postal mail from December 30, 2024, through January 29, 2025.

Contact Information: Jonathan Chapman, Enforcement Specialist, Department of Environmental Quality, Southwest Regional Office, 355-A Deadmore Street, Abingdon, VA 24210, or email jonathan.chapman@deq.virginia.gov.

Public Meeting and Opportunity for Public Comment for a Cleanup Study of Horsepen Creek, Little Roanoke Creek, and an Unnamed Tributary to Spencer Creek in Charlotte County

Purpose of Notice: The Department of Environmental Quality (DEQ) seeks public comment on the development of a cleanup study, also known as a total maximum daily load (TDML) report, for Horsepen Creek, Little Roanoke Creek, and an unnamed tributary to Spencer Creek in Charlotte County.

These streams are listed as impaired waters and require a cleanup study since monitoring data indicates that the waters do not meet Virginia's water quality standards for aquatic life (benthics). Section 303(d) of the Clean Water Act and § 62.1-44.19:7 C of the State Water Control Law requires DEQ to develop cleanup studies to address pollutants responsible for causing waters to be on Virginia's § 303(d) list of impaired waters. A component of a cleanup study is the wasteload allocation (WLA); therefore, this notice is provided pursuant to § 2.2-4006 A 14 of the Code of Virginia for any future adoption of the WLA into the Water Quality Management

Planning Regulation (9VAC25-720) after completion of the study. The adoption of the WLA may require new or additional requirements for entities holding a Virginia Pollutant Discharge Elimination System (VPDES) permit in these watersheds.

At the meeting, DEQ will introduce the community to the process used in Virginia to improve stream water quality and invite the public to participate in the study by attending community engagement meetings or through a TMDL advisory group (TAG). A benthic stressor analysis has been conducted on these streams to help identify potential pollutants causing the impairments, and a draft of the analysis and its results will be presented at the meeting.

Cleanup Study Location: The cleanup study addresses the following impaired stream segments: Horsepen Creek, Little Roanoke Creek, and an unnamed tributary (UT) to Spencer Creek are all located in Charlotte County, Virginia. All three drainages eventually enter Roanoke Creek, which feeds into the Roanoke River. Approximately 5.32 miles of Horsepen Creek is considered impaired for the aquatic life use water quality standard. This impairment comes from various sampling events that have indicated the community of aquatic macroinvertebrates present in that segment of the creek is unhealthy and lacks the expected diversity and abundance. Horsepen Creek is impaired from Route 47 to its confluence with Little Horsepen Creek. Approximately 10.16 miles of Little Roanoke Creek and 2.9 miles of the UT to Spencer Creek are considered impaired for the aquatic life use water quality standard as well. Little Roanoke Creek is impaired from its headwaters to its confluence with Dunnavant Creek. The UT to Spencer Creek is impaired from its headwaters to its confluence with Spencer Creek.

TMDL Advisory Group: DEQ invites public comment on the establishment of a TAG to assist in development of this cleanup study. A TAG is a standing group of interested parties established by the department for the purpose of advising the department during developing of the cleanup study. Any member of the public may attend and observe proceedings. However, only group members who have been invited by the department to serve on the TAG may actively participate in the group's discussions. Persons requesting the department use a TAG and those interested in participating should notify the DEQ contact person by the end of the comment period and provide their name, address, telephone number, email address, and their organization (if any). If DEQ convenes a TAG, all individuals who wish to participate on the TAG will be considered on a case-by-case basis. TAG members will be expected to attend all TAG meetings. Notification of the composition of the panel will be sent to all individuals who requested participation.

If DEQ receives no requests to establish a TAG, the department will not establish a standing group but will still solicit public feedback by conducting community engagement meetings during cleanup study development. At these community meetings, which are open to the public and at which any person may participate, DEQ will present its progress on the cleanup study and solicit feedback.

Public Meeting: The first public meeting on the development of the cleanup study will be held at the Charlotte County Administrative Building, 250 LeGrande Avenue, Suite A, Charlotte Court House, VA 23923, on January 15, 2025, at 1 p.m. In the event of inclement weather, the meeting will be held on January 22, 2025, at the same time and location.

Public Comment Period: January 15, 2025, to February 14, 2025.

How to Comment: DEQ accepts written comments by email or postal mail. All comments must be received by DEQ during the comment period. Submittals must include the name, organization represented (if any), mailing address, and telephone number of the commenter or requester.

Contact Information: Aerin Doughty, Department of Environmental Quality, Blue Ridge Regional Office, 901 Russel Drive, Salem, VA 24153, telephone (540) 988-3684, or email erin.doughty@deq.virginia.gov.

BOARD OF MEDICAL ASSISTANCE SERVICES

Opportunity for Review of Eligibility Manual Draft Transmittal

A draft of Transmittal #DMAS-34, the Virginia Medical Assistance Eligibility Manual, is available at https://www.dmas.virginia.gov/media/yjrjvwdp/tn-dmas-34-eff-1-1-25-draft.pdf for public review.

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, or email emily.mclellan@dmas.virginia.gov.