



# VIRGINIA

## REGISTER OF REGULATIONS

VOL. 36 ISS. 2

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SEPTEMBER 16, 2019

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Virginia Code Commission

<http://register.dls.virginia.gov>

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# VIRGINIA REGISTER INFORMATION PAGE

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

## **ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS**

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

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

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

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

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

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

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

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

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

## **FAST-TRACK RULEMAKING PROCESS**

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

## **EMERGENCY REGULATIONS**

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

## **STATEMENT**

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

## **CITATION TO THE VIRGINIA REGISTER**

The *Virginia Register* is cited by volume, issue, page number, and date. **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.

Members of the Virginia Code Commission: **John S. Edwards**, Chair; **James A. "Jay" Leftwich**, Vice Chair; **Ryan T. McDougle**; **Nicole Cheuk**; **Rita Davis**; **Leslie L. Lilley**; **Thomas M. Moncure, Jr.**; **Christopher R. Nolen**; **Charles S. Sharp**; **Samuel T. Towell**; **Malfourd W. Trumbo**; **Mark J. Vucci**.

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

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## PUBLICATION SCHEDULE AND DEADLINES

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

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### September 2019 through August 2020

<u>Volume: Issue</u>	<u>Material Submitted By Noon*</u>	<u>Will Be Published On</u>
36:4	September 25, 2019	October 14, 2019
36:5	October 9, 2019	October 28, 2019
36:6	October 23, 2019	November 11, 2019
36:7	November 6, 2019	November 25, 2019
36:8	November 18, 2019 ( <b>Monday</b> )	December 9, 2019
36:9	December 4, 2019	December 23, 2019
36:10	December 18, 2019	January 6, 2020
36:11	January 1, 2020	January 20, 2020
36:12	January 15, 2020	February 3, 2020
36:13	January 29, 2020	February 17, 2020
36:14	February 12, 2020	March 2, 2020
36:15	February 26, 2020	March 16, 2020
36:16	March 11, 2020	March 30, 2020
36:17	March 25, 2020	April 13, 2020
36:18	April 8, 2020	April 27, 2020
36:19	April 22, 2020	May 11, 2020
36:20	May 6, 2020	May 25, 2020
36:21	May 20, 2020	June 8, 2020
36:22	June 3, 2020	June 22, 2020
36:23	June 17, 2020	July 6, 2020
36:24	July 1, 2020	July 20, 2020
36:25	July 15, 2020	August 3, 2020
36:26	July 29, 2020	August 17, 2020

\*Filing deadlines are Wednesdays unless otherwise specified.

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# PETITIONS FOR RULEMAKING

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## TITLE 3. ALCOHOLIC BEVERAGES

### ALCOHOLIC BEVERAGE CONTROL AUTHORITY

#### Initial Agency Notice

Title of Regulation: **3VAC5-50. Retail Operations.**

Statutory Authority: § 4.1-103 of the Code of Virginia.

Name of Petitioner: Tom Stein, Deputy General Counsel for CLEAR.

Nature of Petitioner's Request: "CLEAR asks the Authority to consider amending 3VAC5-50-20 (proposed amendment below) of the Regulations of the Authority to recognize that licensed retailers of alcoholic beverages may utilize biometric identification, and specifically the patented processes of CLEAR, to make a determination of the legal age of a purchaser of alcoholic beverages. In addition to being far more reliable than human checking of identification, use of biometric verification processes is consistent with both the plain language and the spirit of the Virginia Alcoholic Beverage Control Act (the "Act") in ensuring that individuals under the legal age do not purchase alcohol.

3VAC5-50-20. Determination of Legal Age of Purchaser.

A. In determining whether a licensee, or his employee or agent, has reason to believe that a purchaser is not of legal age, the board will consider, but is not limited to, the following factors: (1) Whether an ordinary and prudent person would have reason to doubt that the purchaser is of legal age based on the general appearance, facial characteristics, behavior and manner of the purchaser; and (2) Whether the seller demanded, was shown and acted in good faith in reliance upon bona fide evidence of legal age, as defined herein, and that evidence contained a photograph and physical description consistent with the appearance of the purchaser; and (3) Whether the seller verified the age of the purchaser through the use of a biometric identity verification device approved by the Authority where the biometric is referenced against a record described in paragraph B.

B. Such bona fide evidence of legal age shall include a valid motor vehicle driver's license issued by any state of the United States or the District of Columbia, armed forces identification card, United States passport or foreign government visa, valid special identification card issued by the Virginia Department of Motor Vehicles, or any valid identification issued by any other federal or state government agency, excluding student university and college identification cards, provided such identification shall contain a photograph and signature of the subject, with the subject's height and date of birth.

C. It shall be incumbent upon the licensee, or his employee or agent, to scrutinize carefully the identification, if presented, and determine it to be authentic and in proper order.

Identification which has been altered so as to be apparent to observation or has expired shall be deemed not in proper order."

Agency Plan for Disposition of Request: In accordance with § 2.2-4007 B of the Code of Virginia, the petition has been filed with the Virginia Registrar of Regulations. The petition will be published in Volume 36 Issue 2 of the Virginia Register of Regulations on September 16, 2019. Public comment will be requested until October 8, 2019. Comment on the petition may be sent by email or postal mail or posted on the Virginia Regulatory Townhall at [www.townhall.virginia.gov](http://www.townhall.virginia.gov). Following receipt of all comments on the petition to amend the regulation, the Alcoholic Beverage Control Authority Board will decide whether to make any changes to the regulatory language. This matter will be considered by the board when it next convenes following the end of the comment period (October 15, 2019). The board will issue a written decision on the petition within 90 days of the close of the comment period.

Public Comment Deadline: October 8, 2019.

Agency Contact: Latonya D. Hucks-Watkins, Legal Liaison, Alcoholic Beverage Control Authority, 2901 Hermitage Road, Richmond, VA 23220, telephone (804) 213-4698, or email [latonya.hucks-watkins@abc.virginia.gov](mailto:latonya.hucks-watkins@abc.virginia.gov).

VA.R. Doc. No. R20-03; Filed August 21, 2019, 11:45 a.m.

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## TITLE 12. HEALTH

### STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

#### Initial Agency Notice

Title of Regulation: **12VAC35-105. Rules and Regulations for Licensing Providers by the Department of Behavioral Health and Developmental Services.**

Statutory Authority: § 37.2-203 of the Code of Virginia.

Name of Petitioner: R.C. Carter.

Nature of Petitioner's Request: To amend 12VAC35-105-520 (Risk management) in accordance with the Virginia Court of Appeals in Gregory Allen Moyer v. Commonwealth of Virginia (2000), "when interpreting the law one must consider other sections of law in determining legislative intent," in order that the new Office of Licensing Associate Director of State Operations develop and coordinate the oversight of the interpretation and implementation of the additional 42 policies and procedures that providers are required to have in writing in accordance with the HIPAA Act under Risk Analysis and Risk Management which can be found under the following sections 45 CFR 164.306, 45 CFR 164.308, 45 CFR 164.310, 45 CFR 164.312, 45 CFR 164.314, and 45 CFR 164.316.

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# Petitions for Rulemaking

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Agency Plan for Disposition of Request: The State Board of Behavioral Health and Developmental Services will consider this petition at the next scheduled meeting after the close of the public comment period on October 9, 2019, at Western State Hospital, Staunton, Virginia.

Public Comment Deadline: October 6, 2019.

Agency Contact: Ruth Anne Walker, Director of Regulatory Affairs, Department of Behavioral Health and Developmental Services, 1220 Bank Street, 11th Floor, Richmond, VA 23219, telephone (804) 225-2252, or email [ruthanne.walker@dbhds.virginia.gov](mailto:ruthanne.walker@dbhds.virginia.gov).

VA.R. Doc. No. R20-05; Filed August 27, 2019, 9:44 a.m.

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## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD OF DENTISTRY

#### Initial Agency Notice

Title of Regulation: **18VAC60-21. Regulations Governing the Practice of Dentistry.**

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

Name of Petitioner: Deborah Blanchard, DDS.

Nature of Petitioner's Request: To delete the requirements for the dentist to be present in the facility and to examine a patient during the time services are being provided (18VAC60-21-120 D).

Agency Plan for Disposition of Request: The petition will be published on September 16, 2019, in the Virginia Register of Regulations and also posted on the Virginia Regulatory Townhall at [www.townhall.virginia.gov](http://www.townhall.virginia.gov) to receive public comment, ending October 15, 2019. The request to amend regulations and any comments for or against the petition will be considered by the board at the first scheduled meeting after close of comment, which will be December 13, 2019. The petitioner will receive information on the board's decision after that date.

Public Comment Deadline: October 15, 2019.

Agency Contact: Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4437, or email [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov).

VA.R. Doc. No. R20-04; Filed August 16, 2019, 3:22 p.m.

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# PERIODIC REVIEWS AND SMALL BUSINESS IMPACT REVIEWS

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## TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS

### BOARD OF JUVENILE JUSTICE

#### Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Board of Juvenile Justice conducted a small business impact review of **6VAC35-11, Public Participation Guidelines**, and determined that this regulation should be amended.

The fast-track regulatory action to amend 6VAC35-11, which is published in this issue of the Virginia Register, serves as the report of the findings.

Contact Information: Kristen Peterson, Regulatory Coordinator, Department of Juvenile Justice, 600 East Main Street, 20th Floor, Richmond, VA 23219, telephone (804) 588-3902, FAX (804) 371-6490, or email [kristen.peterson@djj.virginia.gov](mailto:kristen.peterson@djj.virginia.gov).



## TITLE 8. EDUCATION

### STATE BOARD OF EDUCATION

#### Agency Notice

Pursuant to § 2.2-4007.1 of the Code of Virginia, the State Board of Education is conducting a periodic review and a small business impact review of **8VAC20-40, Regulations Governing Educational Services for Gifted Students**. The review of this regulation will be guided by the principles in Executive Order 14 (as amended, July 16, 2018).

The Notice of Intended Regulatory Action for 8VAC20-40, which is published in this issue of the Virginia Register, serves as the announcement of the periodic review.

Contact Information: Dr. Donna Poland, Specialist, Governor's Schools and Gifted Education, Department of Education, 101 North 14th Street, Richmond, VA 23219, telephone (804) 225-2884, or email [donna.poland@doe.virginia.gov](mailto:donna.poland@doe.virginia.gov).

#### Agency Notice

Pursuant to § 2.2-4007.1 of the Code of Virginia, the State Board of Education is conducting a periodic review and a small business impact review of **8VAC20-160, Regulations Governing Secondary School Transcripts**. The review of this regulation will be guided by the principles in Executive Order 14 (as amended, July 16, 2018).

The Notice of Intended Regulatory Action for 8VAC20-160, which is published in this issue of the Virginia Register, serves as the announcement of the periodic review.

Contact Information: Joseph Wharff, Associate Director, Office of Student Services, Department of Education, 101 North 14th Street, Richmond, VA 23219, telephone (804) 225-3370, or email [joseph.wharff@doe.virginia.gov](mailto:joseph.wharff@doe.virginia.gov).



## TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

### BOARD FOR ASBESTOS, LEAD, AND HOME INSPECTORS

#### Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Board for Asbestos, Lead, and Home Inspectors conducted a small business impact review of **18VAC15-20, Virginia Asbestos Licensing Regulations**, and determined that this regulation should be retained in its current form. The Board for Asbestos, Lead, and Home Inspectors is publishing its report of findings dated August 21, 2019, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

Section 54.1-201.5 of the Code of Virginia mandates the Board for Asbestos, Lead, and Home Inspectors 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 for Asbestos, Lead, and Home Inspectors provides protection to the safety and welfare of the citizens of the Commonwealth by ensuring that only those individuals and firms that meet specific criteria set forth in the statutes and regulations are eligible to receive a license or training program accreditation. The board is also tasked with ensuring that its regulants meet standards of practice that are set forth in the regulations.

No comments or complaints were received during the public comment period. The regulation is clearly written, easily understandable, and does not overlap, duplicate, or conflict with federal or state law or regulation.

The most recent periodic review of the regulation occurred in 2015. On August 15, 2019, the board discussed the regulation and, for the reasons stated, determined that the regulation should not be amended or repealed, but should be retained in its current form.

Contact Information: Trisha Henshaw, Executive Director, Board for Asbestos, Lead, and Home Inspectors, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email [alhi@dpor.virginia.gov](mailto:alhi@dpor.virginia.gov).

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# Periodic Reviews and Small Business Impact Reviews

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## DEPARTMENT OF HEALTH PROFESSIONS

### Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the Department of Health Professions conducted a small business impact review of **18VAC76-40, Regulations Governing Emergency Contact Information**, and determined that this regulation should be amended.

The fast-track regulatory action to amend 18VAC76-40, which is published in this issue of the Virginia Register, serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Contact Information: Elaine J. Yeatts, Senior Policy Analyst, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4688, FAX (804) 527-4475, or email [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov).

## BOARD FOR PROFESSIONAL SOIL SCIENTISTS, WETLAND PROFESSIONALS, AND GEOLOGISTS

### Agency Notice

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board for Professional Soil Scientists, Wetland Professionals, and Geologists is conducting a periodic review and small business impact review of each listed regulation. The review of each regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

### 18VAC145-11, Public Participation Guidelines

### 18VAC145-20, Professional Soil Scientists Regulations

### 18VAC145-30, Regulations Governing Certified Professional Wetland Delineators

### 18VAC145-40, Regulations for the Geology Certification Program

The purpose of this review is to determine whether each regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins September 16, 2019, and ends October 7, 2019.

Comments may be submitted online to the Virginia Regulatory Town Hall at <http://www.townhall.virginia.gov/L/Forums.cfm>. Comments

may also be sent to Kathleen R. Nosbisch, Executive Director, Board for Professional Soil Scientists, Wetland Professionals, and Geologists, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8514, FAX (866) 465-6206, or email [soilscientist@dpor.virginia.gov](mailto:soilscientist@dpor.virginia.gov).

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of the review will be posted on the Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

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# NOTICES OF INTENDED REGULATORY ACTION

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## TITLE 8. EDUCATION

### STATE BOARD OF EDUCATION

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Education intends to consider amending **8VAC20-40, Regulations Governing Educational Services for Gifted Students**. The purpose of the proposed action is 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 under-represented 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.

In addition, this regulation will undergo a periodic review pursuant to Executive Order 14 (2018) and a small business impact review pursuant to § 2.2-4007.1 of the Code of Virginia to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

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

Statutory Authority: § 22.1-16 of the Code of Virginia.

Public Comment Deadline: October 16, 2019.

Agency Contact: Dr. Donna Poland, Specialist, Governor's Schools and Gifted Education, Department of Education, 101 North 14th Street, Richmond, VA 23219, telephone (804) 225-2884, or email donna.poland@doe.virginia.gov.

VA.R. Doc. No. R20-6142; Filed August 26, 2019, 4:42 p.m.

#### Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Education intends to consider amending **8VAC20-160, Regulations Governing Secondary School Transcripts**. The purpose of the proposed action is to reflect changes in professional practice and postsecondary expectations and align the regulation with the needs of students, parents, and postsecondary stakeholders.

In addition, this regulation will undergo a periodic review pursuant to Executive Order 14 (2018) and a small business impact review pursuant to § 2.2-4007.1 of the Code of Virginia to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

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

Statutory Authority: §§ 22.1-16 and 22.1-253.13:3 of the Code of Virginia.

Public Comment Deadline: October 16, 2019.

Agency Contact: Joseph Wharff, Associate Director, Office of Student Services, Department of Education, 101 North 14th Street, Richmond, VA 23219, telephone (804) 225-3370, or email joseph.wharff@doe.virginia.gov.

VA.R. Doc. No. R20-6103; Filed August 26, 2019, 3:50 p.m.

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## TITLE 12. HEALTH

### DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

#### 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 Medical Assistance Services intends to consider amending **12VAC30-30, Groups Covered and Agencies Responsible for Eligibility Determination**. The purpose of the proposed action is to add the new adult expansion coverage group to the listing of hospital presumptive eligibility (HPE) covered groups. The amendments expand mandatory eligibility categories to add a new adult coverage group to implement Medicaid expansion. The new adult expansion group includes adults 19 to 65 years of age who have household incomes below 138% of the federal poverty level in accordance with federal requirements, which stipulate that this covered group must be considered for possible HPE-covered groups. The intended changes have already been reviewed and approved by the Centers for Medicare and Medicaid Services.

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

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## Notices of Intended Regulatory Action

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Statutory Authority: § 32.1-325 of the Code of Virginia;  
42 USC § 1396 et seq.

Public Comment Deadline: October 16, 2019.

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VA.R. Doc. No. R20-5789; Filed August 27, 2019, 9:53 a.m.

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# REGULATIONS

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

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## Symbol Key

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

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## TITLE 1. ADMINISTRATION

### DEPARTMENT OF GENERAL SERVICES

#### Final Regulation

**REGISTRAR'S NOTICE:** The Department of General Services is claiming an exemption pursuant to Item 74 C 3 a of Chapter 854 of the 2019 Acts of Assembly, the Appropriation Act, which provides that a revision to certain fees is exempt from the requirements of the Administrative Process Act provided that the department provides notice and opportunity to submit written comments on the revised fees.

**Titles of Regulations:** **1VAC30-45. Certification for Noncommercial Environmental Laboratories (amending 1VAC30-45-130).**

**1VAC30-46. Accreditation for Commercial Environmental Laboratories (amending 1VAC30-46-150).**

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

**Effective Date:** September 1, 2019.

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

#### Summary:

*The amendments increase fees related to certification for noncommercial environmental laboratories and accreditation for commercial environmental laboratories.*

#### 1VAC30-45-130. Fees.

##### A. General.

1. Environmental laboratories shall pay a fee with all applications, including reapplications, for certification. DCLS shall not designate an application as complete until it receives payment of the fee.
2. Each certified environmental laboratory shall pay an annual fee to maintain its certification. DCLS shall send an invoice to the certified environmental laboratory.
3. Fees shall be nonrefundable.

B. Environmental laboratories performing only simple test procedures shall pay an annual fee of ~~\$600~~ \$690.

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

1. Fees shall be applied on an annual basis.
2. Environmental laboratories shall pay the total of the base fee and the test category fees set out in subsections D and E of this section.

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

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

2. DCLS shall charge the base fees set out in Table 1. The base fee for a laboratory is located by first finding the row for the total number of methods to be certified and then finding the box on that row located in the column headed by the total number of matrices to be certified. For example, DCLS charges a base fee of ~~\$1300~~ \$1495 to a laboratory performing a total of eight methods for one matrix.

Number of Methods	1 Matrix	2 Matrices
1 - 9	<del>\$1300</del> <u>\$1495</u>	<del>\$1430</del> <u>\$1645</u>
10 - 29	<del>\$1400</del> <u>\$1610</u>	<del>\$1575</del> <u>\$1811</u>
30 - 99	<del>\$1550</del> <u>\$1783</u>	<del>\$1825</del> <u>\$2099</u>

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

1. The test category fees cover the types of testing for which a laboratory may be certified as specified in the laboratory's application or as certified at the time of annual billing.
2. Fees shall be charged for each category of tests to be certified.
3. Fees shall be charged for the total number of field of certification matrices to be certified under the specific test category. For example, if a laboratory is performing inorganic chemistry for both nonpotable water and solid and chemical materials matrices, the fee for this test category would be found in the column for two matrices.
4. The fee for each category includes one or more analytical methods unless otherwise specified.
5. DCLS shall charge the test category fees set out in Table 2. The test category fees for a laboratory are located by

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first finding the row with the total number of test methods for the test category to be certified. The fee to be charged for the test category will be found on that row in the column headed by the total number of matrices to be certified. A laboratory performing four test methods for inorganic chemistry in nonpotable water and solid and chemical materials (two matrices) would be charged a test category fee of ~~\$375~~ \$431.

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

Test Category	Fees by Number of Matrices	
	One	Two
Oxygen demand	<del>\$225</del> <u>\$259</u>	<del>\$335</del> <u>\$385</u>
Bacteriology, 1 - 3 total methods	<del>\$175</del> <u>\$201</u>	<del>\$265</del> <u>\$305</u>
Bacteriology, 4 or more total methods	<del>\$220</del> <u>\$253</u>	<del>\$330</del> <u>\$380</u>
Physical, 1 - 5 total methods	<del>\$175</del> <u>\$201</u>	<del>\$265</del> <u>\$305</u>
Physical, 6 - 10 total methods	<del>\$220</del> <u>\$253</u>	<del>\$330</del> <u>\$380</u>
Inorganic chemistry, 1 - 10 total methods	<del>\$250</del> <u>\$288</u>	<del>\$375</del> <u>\$431</u>
Inorganic chemistry, 11 - 20 total methods	<del>\$315</del> <u>\$362</u>	<del>\$475</del> <u>\$546</u>
Inorganic chemistry, 21 - 49 total methods	<del>\$394</del> <u>\$453</u>	<del>\$590</del> <u>\$679</u>
Chemistry metals, 1 - 5 total methods	<del>\$325</del> <u>\$374</u>	<del>\$490</del> <u>\$564</u>
Chemistry metals, 6 - 20 total methods	<del>\$410</del> <u>\$472</u>	<del>\$615</del> <u>\$707</u>
Organic chemistry, 1 - 5 total methods	<del>\$400</del> <u>\$460</u>	<del>\$600</del> <u>\$690</u>
Organic chemistry, 6 - 20 total methods	<del>\$500</del> <u>\$575</u>	<del>\$750</del> <u>\$863</u>

7. Fee examples. Three examples are provided.

a. Example 1:

Base Fee	One matrix and four test methods	<del>\$1300</del> <u>\$1495</u>
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (2 methods)	<del>\$175</del> <u>\$201</u>
Nonpotable Water	Oxygen demand (1 method)	<del>\$225</del> <u>\$259</u>
Nonpotable Water	Physical (1)	<del>\$175</del> <u>\$201</u>
TOTAL		<del>\$1875</del> <u>\$2156</u>

b. Example 2:

Base Fee	One matrix and 15 test methods	<del>\$1400</del> <u>\$1610</u>
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (2 methods)	<del>\$175</del> <u>\$201</u>
Nonpotable Water	Inorganic chemistry (9 methods)	<del>\$250</del> <u>\$288</u>
Nonpotable Water	Chemistry metals (2 methods)	<del>\$325</del> <u>\$374</u>
Nonpotable Water	Oxygen demand (1 method)	<del>\$225</del> <u>\$259</u>
Nonpotable Water	Physical (1)	<del>\$175</del> <u>\$201</u>
TOTAL		<del>\$2550</del> <u>\$2933</u>

c. Example 3:

Base Fee	Two matrices and 27 test methods	<del>\$1575</del> <u>\$1811</u>
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (4 methods)	<del>\$220</del> <u>\$253</u>
Nonpotable Water	Oxygen demand (1 method)	<del>\$225</del> <u>\$259</u>

Solid and Chemical Materials	Chemistry metals (1 method)	<del>\$325</del> <u>\$374</u>
Two Matrices		
Nonpotable Water and Solid and Chemical Materials	Inorganic chemistry (13 methods)	<del>\$475</del> <u>\$546</u>
Nonpotable Water and Solid and Chemical Materials	Physical (7 methods)	<del>\$330</del> <u>\$380</u>
TOTAL		<del>\$3150</del> <u>\$3623</u>

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

- For any certified environmental laboratory that applies to modify its scope of certification as specified under 1VAC30-45-90 B, DCLS shall assess a fee determined by the method in subsection G of this section.
- Under 1VAC30-45-90 C, DCLS may charge a transfer fee to a certified laboratory that transfers ownership. A fee shall be charged if DCLS (i) needs to review documentation sent by the laboratory about the transfer of ownership or (ii) determines that an on-site assessment is necessary to evaluate the effect of the transfer of ownership. DCLS shall assess a fee determined by the method in subsection G of this section. If, under 1VAC30-45-90 C, DCLS determines that the change of ownership or location of laboratory requires recertification of or reapplication by the laboratory, the laboratory shall pay the application fees required under this section.
- General environmental laboratories applying for an exemption under 1VAC30-45-120 shall pay an initial application fee of \$700 plus an additional fee based on the actual time needed for DCLS to assess the exemption request. The total fee shall not exceed the actual time DCLS takes to assess the exemption request. Laboratories performing only simple test procedures applying for an exemption under 1VAC30-45-120 shall pay an initial application fee of \$300 plus an additional fee based on the actual time needed for DCLS to assess the exemption request. The total fee shall not exceed the actual time DCLS takes to assess the exemption request. The fee assessed shall be calculated using the method in subsection G of this section.

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

G. Fee determination.

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

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

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

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

A. General.

- Environmental laboratories shall pay a fee with all applications, including reapplications, for accreditation. DCLS shall not designate an application as complete until it receives payment of the fee.
- Each accredited environmental laboratory shall pay an annual fee to maintain its accreditation. DCLS shall send an invoice to the accredited environmental laboratory.
- An environmental laboratory applying for secondary accreditation under 1VAC30-46-140 shall pay the same fee as other laboratories subject to this chapter.

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4. Fees shall be nonrefundable.

B. Fee computation.

1. Fees shall be applied on an annual basis.
2. Environmental laboratories shall pay the total of the base fee and the test category fees set out in subsections C and D of this section.

C. Base fee.

1. DCLS determines the base fee for a laboratory by taking into account both the total number of methods and the total number of field of accreditation matrices for which the laboratory would be accredited.
2. DCLS shall charge the base fees set out in Table 1. The base fee for a laboratory is located by first finding the row for the total number of methods to be accredited and then finding the box on that row located in the column headed by the total number of matrices to be accredited. For example, DCLS charges a base fee of ~~\$1300~~ \$1625 to a laboratory performing a total of eight methods for one matrix.

Number of Methods	One Matrix	Two Matrices	Three Matrices	Four or more Matrices
1 - 9	<del>\$1300</del> <u>\$1625</u>	<del>\$1430</del> <u>\$1788</u>	<del>\$1575</del> <u>\$1969</u>	<del>\$1730</del> <u>\$2163</u>
10 - 29	<del>\$1400</del> <u>\$1750</u>	<del>\$1575</del> <u>\$1969</u>	<del>\$1750</del> <u>\$2188</u>	<del>\$1950</del> <u>\$2438</u>
30 - 99	<del>\$1550</del> <u>\$1938</u>	<del>\$1825</del> <u>\$2281</u>	<del>\$2150</del> <u>\$2688</u>	<del>\$2550</del> <u>\$3188</u>
100 - 149	<del>\$1650</del> <u>\$2063</u>	<del>\$1980</del> <u>\$2475</u>	<del>\$2375</del> <u>\$2969</u>	<del>\$2850</del> <u>\$3563</u>
150+	<del>\$1800</del> <u>\$2250</u>	<del>\$2250</del> <u>\$2813</u>	<del>\$2825</del> <u>\$3531</u>	<del>\$3525</del> <u>\$4406</u>

D. Test category fees.

1. The test category fees cover the types of testing for which a laboratory may be accredited as specified in the laboratory's application or as accredited at the time of annual billing.
2. Fees shall be charged for each category of tests to be accredited.
3. Fees shall be charged for the total number of field of accreditation matrices to be accredited under the specific test category. For example, if a laboratory is performing inorganic chemistry for both nonpotable water and solid and chemical matrices, the fee for this test category would be found in the column for two matrices.

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

5. Test category fees. DCLS shall charge the test category fees set out in Table 2. The test category fees for a laboratory are located by first finding the row with the total number of test methods for the test category to be accredited. The fee to be charged for the test category will be found on that row in the column headed by the total number of matrices to be accredited. A laboratory performing four test methods for bacteriology in both nonpotable and drinking water (two matrices) would be charged a test category fee of ~~\$330~~ \$413.

Test Category	Fees by Number of Matrices		
	One	Two	Three or More
Aquatic toxicity, acute methods only	<del>\$400</del> <u>\$740</u>	N/A	N/A
Aquatic toxicity, acute and chronic methods	<del>\$600</del> <u>\$990</u>	N/A	N/A
Oxygen demand	<del>\$225</del> <u>\$281</u>	<del>\$335</del> <u>\$419</u>	<del>\$435</del> <u>\$544</u>
Bacteriology, 1 - 3 total methods	<del>\$175</del> <u>\$219</u>	<del>\$265</del> <u>\$331</u>	<del>\$345</del> <u>\$431</u>
Bacteriology, 4 or more total methods	<del>\$220</del> <u>\$275</u>	<del>\$330</del> <u>\$413</u>	<del>\$430</del> <u>\$538</u>
Physical, 1 - 5 total methods	<del>\$175</del> <u>\$219</u>	<del>\$265</del> <u>\$331</u>	<del>\$345</del> <u>\$431</u>
Physical, 6 - 10 total methods	<del>\$220</del> <u>\$275</u>	<del>\$330</del> <u>\$413</u>	<del>\$430</del> <u>\$538</u>
Physical, 11 or more total methods	<del>\$275</del> <u>\$344</u>	<del>\$415</del> <u>\$519</u>	<del>\$540</del> <u>\$675</u>
Inorganic chemistry, 1 - 10 total methods	<del>\$250</del> <u>\$313</u>	<del>\$375</del> <u>\$469</u>	<del>\$490</del> <u>\$613</u>
Inorganic chemistry, 11 - 20 total methods	<del>\$315</del> <u>\$394</u>	<del>\$475</del> <u>\$594</u>	<del>\$620</del> <u>\$775</u>
Inorganic chemistry, 21 - 49 total methods	<del>\$394</del> <u>\$493</u>	<del>\$590</del> <u>\$738</u>	<del>\$767</del> <u>\$959</u>
Inorganic chemistry, 50 or more total methods	<del>\$492</del> <u>\$615</u>	<del>\$740</del> <u>\$925</u>	<del>\$962</del> <u>\$1203</u>
Chemistry metals, 1 - 5 total methods	<del>\$325</del> <u>\$406</u>	<del>\$490</del> <u>\$613</u>	<del>\$637</del> <u>\$796</u>
Chemistry metals, 6 - 20 total methods	<del>\$410</del> <u>\$513</u>	<del>\$615</del> <u>\$769</u>	<del>\$800</del> <u>\$1000</u>
Chemistry metals, 21 or more total methods	<del>\$512</del> <u>\$640</u>	<del>\$770</del> <u>\$963</u>	<del>\$1000</del> <u>\$1250</u>

Organic chemistry, 1 - 5 total methods	<del>\$400</del> <u>\$1020</u>	<del>\$600</del> <u>\$1270</u>	<del>\$780</del> <u>\$1495</u>
Organic chemistry, 6 - 20 total methods	<del>\$500</del> <u>\$1145</u>	<del>\$750</del> <u>\$1458</u>	<del>\$975</del> <u>\$1739</u>
Organic chemistry, 21 - 40 total methods	<del>\$625</del> <u>\$1301</u>	<del>\$940</del> <u>\$1695</u>	<del>\$1222</del> <u>\$2048</u>
Organic chemistry, 41 or more total methods	<del>\$780</del> <u>\$1495</u>	<del>\$1170</del> <u>\$1983</u>	<del>\$1520</del> <u>\$2420</u>
Radiochemical, 1 - 10 total methods	<del>\$600</del> <u>\$990</u>	<del>\$900</del> <u>\$1365</u>	<del>\$1170</del> <u>\$1703</u>
Radiochemical, 11 or more total methods	<del>\$725</del> <u>\$1146</u>	<del>\$1090</del> <u>\$1603</u>	<del>\$1420</del> <u>\$2015</u>
Asbestos	<del>\$725</del> <u>\$1146</u>	<del>\$1090</del> <u>\$1603</u>	<del>\$1420</del> <u>\$2015</u>

6. Fee examples. Three examples are provided.

a. Example 1:

Base Fee	One matrix and four test methods	<del>\$1300</del> <u>\$1625</u>
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (2 methods)	<del>\$175</del> <u>\$219</u>
Nonpotable Water	Oxygen demand (1 method)	<del>\$225</del> <u>\$281</u>
Nonpotable Water	Physical (1 method)	<del>\$175</del> <u>\$219</u>
<b>TOTAL</b>		<del>\$1875</del> <u>\$2344</u>

b. Example 2:

Base Fee	One matrix and 15 test methods	<del>\$1400</del> <u>\$1750</u>
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (2 methods)	<del>\$175</del> <u>\$219</u>
Nonpotable Water	Inorganic chemistry (9 methods)	<del>\$250</del> <u>\$313</u>
Nonpotable Water	Metals (2 methods)	<del>\$325</del> <u>\$406</u>
Nonpotable Water	Oxygen demand (1 method)	<del>\$225</del> <u>\$281</u>
Nonpotable Water	Physical (1 method)	<del>\$175</del> <u>\$219</u>
<b>TOTAL</b>		<del>\$2550</del> <u>\$3188</u>

c. Example 3:

Base Fee	Two matrices and 27 test methods	<del>\$1575</del> <u>\$1969</u>
Test Category Fees		
One Matrix		
Nonpotable Water	Bacteriology (4 methods)	<del>\$220</del> <u>\$275</u>
Nonpotable Water	Oxygen demand (1 method)	<del>\$225</del> <u>\$281</u>
Solid and Chemical Materials	Metals (1 method)	<del>\$325</del> <u>\$406</u>
Two Matrices		
Nonpotable Water and Solid and Chemical Materials	Inorganic chemistry (13 methods)	<del>\$475</del> <u>\$594</u>
Nonpotable Water and Solid and Chemical Materials	Physical (7 methods)	<del>\$330</del> <u>\$413</u>
<b>TOTAL</b>		<del>\$3150</del> <u>\$3938</u>

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

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

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

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

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## F. Additional fees determination.

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

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

1. The owner of an environmental laboratory located in another state who applies for primary accreditation under this chapter shall pay a surcharge of \$5000 plus the labor costs of the on-site assessment and reasonable travel costs associated with conducting an on-site assessment at the laboratory. Reasonable travel costs include transportation, lodging, per diem, and telephone and duplication charges. These charges shall be in addition to the fees charged under subdivision A 1 and subsections B through D of this section.
2. Once the laboratory is accredited, DCLS shall charge the annual fee specified in subdivision A 2 and subsections B through D of this section, the labor costs for the on-site assessment, and reasonable travel costs associated with conducting the on-site assessment.

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

VA.R. Doc. No. R19-6058; Filed August 29, 2019, 12:38 p.m.



## TITLE 4. CONSERVATION AND NATURAL RESOURCES

### BOARD OF GAME AND INLAND FISHERIES

#### Final Regulation

**REGISTRAR'S NOTICE:** The Board of Game and Inland Fisheries is claiming an exemption from the Administrative Process Act pursuant to § 29.1-701 E of the Code of Virginia,

which provides that the board shall promulgate regulations to supplement Chapter 7 (§ 29.1-700 et seq.) of Title 29.1 of the Code of Virginia as prescribed in Article 1 (§ 29.1-500 et seq.) of Chapter 5 of Title 29.1 of the Code of Virginia.

**Title of Regulation:** **4VAC15-380. Watercraft: Motorboat Numbering (amending 4VAC15-380-110).**

**Statutory Authority:** §§ 29.1-701 and 29.1-710 of the Code of Virginia.

**Effective Date:** October 1, 2019.

**Agency Contact:** Aaron Proctor, Regulations Coordinator, Department of Game and Inland Fisheries, 7870 Villa Park Drive, Suite 400, Henrico, VA 23228, telephone (804) 367-8341, or email aaron.proctor@dgif.virginia.gov.

#### **Summary:**

*The amendments add the definition and requirements of a tender vessel.*

#### **4VAC15-380-110. Lifeboats and tender vessels defined.**

The term "lifeboat" as used in § 29.1-710 of the Code of Virginia shall mean a boat used exclusively as a lifesaving device during times of emergency.

The term "tender vessel" as authorized under § 29.1-710 of the Code of Virginia shall mean a vessel equipped with propulsion machinery of less than 10 horsepower that:

1. Is owned by the owner of a vessel for which a valid certificate of number has been issued;
2. Displays the number of the owner's vessel as prescribed in 4VAC15-380-30 followed by the suffix "1"; and
3. Is used as a tender for direct transportation between that vessel and the shore and for no other purpose.

VA.R. Doc. No. R19-6051; Filed August 23, 2019, 4:07 p.m.

#### **Final Regulation**

**REGISTRAR'S NOTICE:** The Board of Game and Inland Fisheries is claiming an exemption from the Administrative Process Act pursuant to § 29.1-701 E of the Code of Virginia, which provides that the board shall promulgate regulations to supplement Chapter 7 (§ 29.1-700 et seq.) of Title 29.1 of the Code of Virginia as prescribed in Article 1 (§ 29.1-500 et seq.) of Chapter 5 of Title 29.1 of the Code of Virginia.

**Title of Regulation:** **4VAC15-430. Watercraft: Safety Equipment Requirements (amending 4VAC15-430-20 through 4VAC15-430-50).**

**Statutory Authority:** §§ 29.1-701 and 29.1-735 of the Code of Virginia.

**Effective Date:** October 1, 2019.

**Agency Contact:** Aaron Proctor, Regulations Coordinator, Department of Game and Inland Fisheries, 7870 Villa Park

Drive, Suite 400, Henrico, VA 23228, telephone (804) 367-8341, or email aaron.proctor@dgif.virginia.gov.

**Summary:**

*The amendments update the requirements for use of personal flotation devices to align the regulation with the current requirements in the Code of Federal Regulation.*

**4VAC15-430-20. Definitions.**

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

"Coastal waters" means the territorial seas of the United States, and those waters directly connected to the territorial seas (i.e., bays, sounds, harbors, rivers, inlets, etc.) where any entrance exceeds two nautical miles between opposite shorelines to the first point where the largest distance between shorelines narrows to two miles, as shown on the current edition of the appropriate National Ocean Service chart used for navigation. Shorelines of islands or points of land present within a waterway are considered when determining the distance between opposite shorelines.

"Passenger" means every person carried on board a vessel other than:

1. The owner or his representative;
2. The operator;
3. Bona fide members of the crew engaged in the business of the vessel who have contributed no consideration for their carriage and who are paid for their services; or
4. Any guest on board a vessel that is being used exclusively for pleasure purposes who has not contributed any consideration, directly or indirectly, for his carriage.

"Personal flotation device" or "PFD" means a device that is approved by the U.S. Coast Guard.

"Racing shell, rowing scull, racing canoe, and racing kayak" means a manually propelled vessel that is recognized by national or international racing associations for use in competitive racing and one in which all occupants row, scull, or paddle, with the exception of a coxswain, if one is provided, and is not designed to carry and does not carry any equipment not solely for competitive racing.

"Recreational vessel" means any vessel being manufactured or operated primarily for pleasure, or leased, rented, or chartered to another for the latter's pleasure. It does not include any vessel engaged in the carrying of any passengers for consideration.

"Sailboard" means a sail-propelled vessel with no freeboard and equipped with a swivel-mounted mast not secured to a hull by guys or stays.

"Throwable PFD" means a PFD that is intended to be thrown to a person in the water. A PFD marked as Type IV or

Type V with Type IV performance is considered a throwable PFD unless specifically marked otherwise. A wearable PFD is not a throwable PFD.

"Use" means operate, navigate, or employ.

"Vessel" means every description of watercraft, other than a seaplane on the water, used or capable of being used as a means of transportation on water, but does not include surfboards, tubes, swimming rafts, inflatable toys and similar devices routinely used as water toys or swimming aids.

"Visual distress signal" means a device that is approved by the U.S. Coast Guard or certified by the manufacturer.

"Wearable PFD" means a PFD that is intended to be worn or otherwise attached to the body. A PFD marked as Type I, Type II, Type III, or Type V with Type I, II, or III performance is considered a wearable PFD.

**4VAC15-430-30. Personal flotation devices required.**

A. Except as provided in 4VAC15-430-40, it shall be unlawful to use a recreational vessel unless ~~at least one PFD of the following types is on board for each person:~~

1. ~~Type I PFD~~ At least one wearable PFD is on board for each person;
2. ~~Type II PFD~~ Each PFD is used in accordance with any requirements on the approval label; ~~or~~ and
3. ~~Type III PFD~~ Each PFD is used in accordance with any requirements in its owner's manual if the approval label makes reference to such a manual.

B. Except as provided in 4VAC15-430-40, it shall be unlawful to use a recreational vessel of 16 feet or greater unless one ~~Type IV~~ throwable PFD is on board in addition to the total number of PFDs required in subsection A of this section.

C. Notwithstanding the provisions of § 29.1-742 of the Code of Virginia, it shall be unlawful to operate a personal watercraft unless each person riding on the personal watercraft or being towed by it is wearing a ~~Type I, Type II, Type III or Type V PFD~~ wearable PFD that is approved for such activity.

**4VAC15-430-40. Personal flotation device exemptions.**

A. ~~A Type V PFD may be used in lieu of any PFD required under 4VAC15-430-30, provided:~~

1. ~~The approval label on the Type V PFD indicates that the device is approved:~~
  - a. ~~For the activity in which the vessel is being used; or~~
  - b. ~~As a substitute for a PFD of the type required on the vessel in use;~~
2. ~~The PFD is used in accordance with any requirements on the approval label;~~

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3. The PFD is used in accordance with requirements in its owner's manual, if the approval label makes reference to such a manual; and

4. The PFD is being worn.

~~B. A. The following vessels are exempted from the requirements for carriage of the additional Type IV required by 4VAC15-430-30 not required to carry an additional throwable PFD.~~

1. Personal watercraft.

2. Nonmotorized canoes and kayaks 16 feet in length and over.

~~3. Racing shells, rowing sculls, racing canoes, and racing kayaks.~~

~~4. Sailboards.~~

~~5. Vessels of the United States used by foreign competitors while practicing for or racing in competition.~~

B. The following vessels are not required to carry any PFD:

1. Racing shells, rowing sculls, racing canoes, and racing kayaks while participating in or preparing and practicing for a race.

2. Sailboards.

C. Vessels of the United States used by foreign competitors while practicing for or racing in competition are not required to carry any PFD, provided the vessel carries one of the sponsoring foreign country's acceptable flotation devices for each foreign competitor onboard.

## **4VAC15-430-50. Personal flotation device stowage.**

A. It shall be unlawful to use a recreational vessel unless each ~~Type I, II, or III~~ wearable PFD required by 4VAC15-430-30, or equivalent type allowed by 4VAC15-430-40, is readily accessible. "Readily accessible" means that PFDs are stowed where they can be easily reached, or are out in the open ready for wear. A readily accessible PFD cannot be in a protective covering or under lock and key.

B. It shall be unlawful to use a recreational vessel unless each ~~Type IV~~ throwable PFD required by 4VAC15-430-30 of this chapter is immediately available. "Immediately available" means the PFD shall be quickly reachable in an emergency situation. An immediately available PFD cannot be in a protective covering, in a closed compartment or under other equipment.

VA.R. Doc. No. R19-6052; Filed August 23, 2019, 4:09 p.m.

## **MARINE RESOURCES COMMISSION**

### **Emergency Regulation**

Title of Regulation: **4VAC20-252. Pertaining to the Taking of Striped Bass (amending 4VAC20-252-80 through 4VAC20-252-110, 4VAC20-252-135).**

Statutory Authority: §§ 28.2-201 and 28.2-210 of the Code of Virginia.

Effective Dates: August 27, 2019, through September 26, 2019.

Agency Contact: Jennifer Farmer, Regulatory Coordinator, Marine Resources Commission, 380 Fenwick Road, Fort Monroe, VA 23651, telephone (757) 247-2248, or email [jennifer.farmer@mrc.virginia.gov](mailto:jennifer.farmer@mrc.virginia.gov).

#### Preamble:

*The amendments (i) lower the recreational striped bass possession limits and change the recreational striped bass size limits in the Chesapeake Bay area and (ii) establish maximum gill net mesh size requirements for commercial striped bass in the Chesapeake Bay and coastal areas.*

#### **4VAC20-252-80. Bay spring/summer striped bass recreational fishery.**

A. The open season for the Bay spring/summer striped bass recreational fishery shall be May 16 through June 15 inclusive.

B. The area open for this fishery shall be the Chesapeake Bay and its tributaries.

C. The minimum size limit for this fishery shall be 20 inches total length, and the maximum size limit for this fishery shall be 28 inches total length.

D. The possession limit for this fishery shall be ~~two~~ one fish per person.

#### **4VAC20-252-90. Bay fall striped bass recreational fishery.**

A. The open season for the bay fall striped bass recreational fishery shall be October 4 through December 31, inclusive.

B. The area open for this fishery shall be the Chesapeake Bay and its tributaries.

C. The minimum size limit for this fishery shall be 20 inches total length.

D. The maximum size limit for this fishery shall be ~~28~~ 36 inches total length; ~~however, the maximum size limit shall only apply to one fish of the possession limit.~~

E. The possession limit for this fishery shall be ~~two~~ one fish per person.

**4VAC20-252-100. Potomac River tributaries summer/fall striped bass recreational fishery.**

A. The open season for the Potomac River tributaries summer/fall striped bass fishery shall correspond to the open summer/fall season as established by the Potomac River Fisheries Commission for the mainstem Potomac River, ~~except as provided in subsection D of this section.~~

B. The area open for this fishery shall be the Potomac River tributaries.

C. The minimum size limit for this fishery shall be 20 inches total length.

~~D. The maximum size limit for this fishery shall be 28 inches total length from~~ From May 16 through June 15 the maximum size limit for this fishery shall be 28 inches total length.

E. From June 16 through December 31 the maximum size limit for this fishery shall be 36 inches total length.

~~F.~~ The possession limit for this fishery shall be ~~two~~ one fish per person.

**4VAC20-252-110. Coastal striped bass recreational fishery.**

A. The open seasons for the coastal striped bass recreational fishery shall be January 1 through March 31 and May 16 through December 31, inclusive.

B. The area open for this fishery shall be the coastal area as defined in this chapter.

C. The minimum size limit for this fishery shall be 28 inches total length.

~~D. The maximum size limit for this fishery shall be 36 inches total length.~~

~~E.~~ The possession limit for this fishery shall be one fish per person per day.

**4VAC20-252-135. Gill net mesh size and tending restrictions: exemptions.**

A. Any registered commercial fisherman who is permitted to harvest striped bass from the coastal area in accordance with 4VAC20-252-130 A and C and sets or fishes any gill net in the coastal area shall be prohibited from using a gill net mesh size greater than nine inches in stretched mesh.

B. Any registered commercial fisherman who is permitted to harvest striped bass from the coastal area in accordance with 4VAC20-252-130 A and C and sets or fishes any gill net in the coastal area shall be exempt from the maximum gill net mesh size requirements during November and December as described in 4VAC20-430-65 A and B.

~~B.~~ C. Any registered commercial fisherman who is permitted to harvest striped bass from the coastal area in

accordance with 4VAC20-252-130 A and C and sets or fishes any gill net seven inches or greater in stretched mesh in the coastal area shall be exempt from the tending requirements described in 4VAC20-430-65 E and F during the months of November and December.

~~C.~~ D. Any registered commercial fisherman who is permitted to harvest striped bass from the coastal area in accordance with 4VAC20-252-130 A and C shall display an optic yellow flag issued by the commission while fishing for striped bass in the coastal area and while transiting the coastal area before and after a striped bass fishing trip. This flag shall be prominently displayed on the starboard side of the vessel.

E. Any registered commercial fisherman who is permitted to harvest striped bass from the Chesapeake Bay area in accordance with 4VAC20-252-130 A and C and sets or fishes any gill net in the Chesapeake Bay area shall be prohibited from using a gill net greater than seven inches in stretched mesh with the exception of restricted areas as defined in 4VAC20-751-20.

VA.R. Doc. No. R20-6144; Filed August 27, 2019, 4:21 p.m.

**TITLE 6. CRIMINAL JUSTICE AND CORRECTIONS**

**BOARD OF JUVENILE JUSTICE**

**Fast-Track Regulation**

Title of Regulation: **6VAC35-11. Public Participation Guidelines (amending 6VAC35-11-50).**

Statutory Authority: §§ 2.2-4007.02 and 66-10 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: October 16, 2019.

Effective Date: October 31, 2019.

Agency Contact: Kristen Peterson, Regulatory Coordinator, Department of Juvenile Justice, 600 East Main Street, 20th Floor, Richmond, VA 23219, telephone (804) 588-3902, FAX (804) 371-6490, or email kristen.peterson@djj.virginia.gov.

Basis: Section 2.2-4007.02 of the Code of Virginia requires state agencies to develop, adopt, and use public participation guidelines in order to ensure the involvement of interested persons in the formation and development of the agency's regulations. Among other requirements, § 2.2-4007.02 B directs agencies, pursuant to such guidelines, to provide interested persons with the opportunity to be accompanied and represented by counsel or other representatives.

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Additionally, § 66-10 of the Code of Virginia authorizes the board to promulgate such regulations as may be necessary to carry out the provisions of Title 66 of the Code of Virginia and other laws of the Commonwealth.

Purpose: This regulatory action is necessary to comply with Chapter 795 of the 2012 Acts of Assembly. The amendment was recommended by the Department of Planning and Budget (DPB) and will conform the board's public participation guidelines with DPB's model guidelines. Participation by the public in the regulatory process is essential to assist the board in the promulgation of regulations that will protect the public health and safety.

Rationale for Using Fast-Track Rulemaking Process: Chapter 795 of the 2012 Acts of Assembly requires nonexempt rulemaking agencies to afford interested parties, pursuant to the agency's public participation guidelines, with the opportunity to be accompanied and represented by counsel or other representatives with respect to the formation of regulations. This is in addition to the current requirements in the public participation guidelines, which direct the department, in considering nonemergency, nonexempt regulatory action, to afford interested parties the opportunity to submit data, views, and arguments to the agency.

Pursuant to the statutory mandate in § 2.2-4007.1 of the Code of Virginia, the department conducted a periodic review of the Public Participation Guidelines in 2018 and discovered this omission. The department asked the board to approve an amendment to 6VAC35-11-50 to incorporate this requirement.

The proposed amendment is mandated by statute and will ensure the department's compliance with the statutory provision. Therefore, the amendment is not expected to be controversial.

Substance: The amendment adds language to 6VAC35-11-50 requiring the department, in formulating regulations, to afford interested parties an opportunity to be accompanied and represented by counsel or other representatives as part of the regulation formation process.

Issues: There are no disadvantages associated with the regulatory change. The advantage for the agency is that the amendment will bring the department into compliance with § 2.2-4007.02 of the Code of Virginia. In addition, the amendment will benefit the general public as well as the department by ensuring that, with respect to regulatory development, repeal, and amendment, interested persons are able to have adequate representation throughout the regulatory formation process.

Small Business Impact Review Report of Findings: This fast-track regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

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

Summary of the Proposed Amendments to Regulation. Pursuant to Chapter 795 of the 2012 Acts of Assembly,<sup>1</sup> the Board of Juvenile Justice (Board) proposes to specify in this regulation that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative when submitting data, views, and arguments, either orally or in writing, to the agency.

Background. Chapter 795 of the 2012 Acts of Assembly added to the Code of Virginia § 2.2-4007.02 "Public participation guidelines" that persons interested in submitting data, views, and arguments, either orally or in writing, to the agency also be afforded an opportunity to be accompanied by and represented by counsel or other representative.

Estimated Benefits and Costs. The current Public Participation Guidelines state that: "In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency." The Board proposes to append "and (ii) be accompanied by and represented by counsel or other representative." Since the Code of Virginia already specifies that interested persons shall be afforded an opportunity to be accompanied by and represented by counsel or other representative, the Board's proposal to add this language to the regulation will not change the law in effect, but will be beneficial in that it will inform interested parties who read this regulation but not the statute of their legal rights concerning representation.

Businesses and Other Entities Affected. The proposed amendment potentially affects all individuals who comment on pending regulatory changes. It would particularly affect those who are interested in being accompanied by and represented by counsel or other representative, and were not previously aware of this right. The proposal does not produce cost.

Localities<sup>2</sup> Affected.<sup>3</sup> The proposed amendment applies statewide. No locality would be particularly affected.

Projected Impact on Employment. The proposed amendment is unlikely to 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. The proposed amendment does not affect real estate development costs.

Adverse Effect on Small Businesses:<sup>4</sup> The proposed amendment does not adversely affect small businesses.

Types and Estimated Number of Small Businesses Affected. The proposed amendment does not directly affect small businesses.

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

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

<sup>1</sup>See <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+CHAP0795+hil>

<sup>2</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>3</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

<sup>4</sup>Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Agency's Response to Economic Impact Analysis: The responsible Virginia Board of Juvenile Justice has reviewed the Department of Planning and Budget's (DPB's) economic impact analysis and concurs with DPB's analysis.

Summary:

*Pursuant to § 2.2-4007.02 of the Code of Virginia, the amendment provides that interested persons submitting data, views, and arguments on a regulatory action may be accompanied by and represented by counsel or another representative.*

Part III  
Public Participation Procedures

**6VAC35-11-50. Public comment.**

A. In considering any nonemergency, nonexempt regulatory action, the agency shall afford interested persons an opportunity to (i) submit data, views, and arguments, either orally or in writing, to the agency; and (ii) be accompanied by and represented by counsel or other representative. Such opportunity to comment shall include an online public comment forum on the Town Hall.

1. To any requesting person, the agency shall provide copies of the statement of basis, purpose, substance, and issues; the economic impact analysis of the proposed or fast-track regulatory action; and the agency's response to public comments received.

2. The agency may begin crafting a regulatory action prior to or during any opportunities it provides to the public to submit comments.

B. The agency shall accept public comments in writing after the publication of a regulatory action in the Virginia Register as follows:

1. For a minimum of 30 calendar days following the publication of the notice of intended regulatory action (NOIRA).
2. For a minimum of 60 calendar days following the publication of a proposed regulation.
3. For a minimum of 30 calendar days following the publication of a repropoed regulation.
4. For a minimum of 30 calendar days following the publication of a final adopted regulation.
5. For a minimum of 30 calendar days following the publication of a fast-track regulation.
6. For a minimum of 21 calendar days following the publication of a notice of periodic review.
7. Not later than 21 calendar days following the publication of a petition for rulemaking.

C. The agency may determine if any of the comment periods listed in subsection B of this section shall be extended.

D. If the Governor finds that one or more changes with substantial impact have been made to a proposed regulation, he may require the agency to provide an additional 30 calendar days to solicit additional public comment on the changes in accordance with § 2.2-4013 C of the Code of Virginia.

E. The agency shall send a draft of the agency's summary description of public comment to all public commenters on the proposed regulation at least five days before final adoption of the regulation pursuant to § 2.2-4012 E of the Code of Virginia.

VA.R. Doc. No. R20-5827; Filed August 27, 2019, 6:50 a.m.



**TITLE 9. ENVIRONMENT**

**STATE WATER CONTROL BOARD**

**Final Regulation**

**REGISTRAR'S NOTICE:** When this regulatory action becomes effective, upon notice to the Registrar's Office by the State Water Control Board of U.S. Environmental Protection Agency approval, a Notice of Effective Date will be published in the Virginia Register of Regulations.

Title of Regulation: **9VAC25-260. Water Quality Standards (amending 9VAC25-260-310).**

Statutory Authority: § 62.1-44.15 of the Code of Virginia; 33 USC § 1251 et seq.; 40 CFR 131.

Effective Date: Effective upon filing by the State Water Control Board of notice of approval by the U.S.

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Environmental Protection Agency with the Registrar of Regulations.

Agency Contact: Tish Robertson, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4309, FAX (804) 698-4116, or email tish.robertson@deq.virginia.gov.

Summary:

*The amendments modify and add site-specific chlorophyll a criteria applicable to the tidal James River to enable watershed management of nitrogen and phosphorus, nutrients that drive algal blooms in the tidal James River. The amendments are the result of a comprehensive scientific study overseen by the Department of Environmental Quality that focused on chlorophyll a dynamics and linkages to aquatic life effects in the James River and include (i) modifying seasonal mean criteria, of which eight are lower than the existing criteria and two are higher; (ii) adding a new short-duration criteria intended to protect aquatic life from the effects of toxic algae; and (iii) inserting two new sets of criteria: a description of how data should be analyzed and the allowable exceedance frequencies.*

*Since publication of the proposed regulation, the only substantive change is the addition of language that gives the department the flexibility to review additional lines of evidence in determining the appropriate water quality assessment category when consecutive exceedances of a seasonal mean criterion occur in a waterbody segment.*

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

## Part VII

### Special Standards and Scenic Rivers Listings

#### **9VAC25-260-310. Special standards and requirements.**

The special standards are shown in small letters to correspond to lettering in the basin tables. The special standards are as follows:

a. Shellfish waters. In all open ocean or estuarine waters capable of propagating shellfish or in specific areas where public or leased private shellfish beds are present, including those waters on which condemnation classifications are established by the Virginia Department of Health, the following criteria for fecal coliform bacteria will apply:

The geometric mean fecal coliform value for a sampling station shall not exceed an MPN (most probable number) or MF (membrane filtration using mTEC culture media) of 14 per 100 milliliters (ml) of sample and the estimated 90th

percentile shall not exceed an MPN of 43 per 100 ml for a 5-tube decimal dilution test or an MPN of 49 per 100 ml for a 3-tube decimal dilution test or MF test of 31 CFU (colony forming units) per 100 ml.

The shellfish area is not to be so contaminated by radionuclides, pesticides, herbicides, or fecal material that the consumption of shellfish might be hazardous.

b. Policy for the Potomac Embayments. At its meeting on September 12, 1996, the board adopted a policy (9VAC25-415. Policy for the Potomac Embayments) to control point source discharges of conventional pollutants into the Virginia embayment waters of the Potomac River, and their tributaries, from the fall line at Chain Bridge in Arlington County to the Route 301 bridge in King George County. The policy sets effluent limits for BOD<sub>5</sub>, total suspended solids, phosphorus, and ammonia, to protect the water quality of these high profile waterbodies.

c. Canceled.

d. Canceled.

e. Canceled.

f. Canceled.

g. Occoquan watershed policy. At its meeting on July 26, 1971 (Minute 10), the board adopted a comprehensive pollution abatement and water quality management policy for the Occoquan watershed. The policy set stringent treatment and discharge requirements in order to improve and protect water quality, particularly since the waters are an important water supply for Northern Virginia. Following a public hearing on November 20, 1980, the board, at its December 10-12, 1980 meeting, adopted as of February 1, 1981, revisions to this policy (Minute 20). These revisions became effective March 4, 1981. Additional amendments were made following a public hearing on August 22, 1990, and adopted by the board at its September 24, 1990, meeting (Minute 24) and became effective on December 5, 1990. Copies are available upon request from the Department of Environmental Quality.

h. Canceled.

i. Canceled.

j. Canceled.

k. Canceled.

l. Canceled.

m. The following effluent limitations apply to wastewater treatment facilities treating an organic nutrient source in the entire Chickahominy watershed above Walker's Dam (this excludes discharges consisting solely of stormwater):

CONSTITUENT	CONCENTRATION
1. Biochemical oxygen demand 5-day	6 mg/l monthly average, with not more than 5% of individual samples to exceed 8 mg/l.
2. Settleable solids	Not to exceed 0.1 ml/l monthly average.
3. Suspended solids	5.0 mg/l monthly average, with not more than 5% of individual samples to exceed 7.5 mg/l.
4. Ammonia nitrogen	Not to exceed 2.0 mg/l monthly average as N.
5. Total phosphorus	Not to exceed 0.10 mg/l monthly average for all discharges with the exception of Tyson Foods, Inc., which shall meet 0.30 mg/l monthly average and 0.50 mg/l daily maximum.
6. Other physical and chemical constituents	Other physical or chemical constituents not specifically mentioned will be covered by additional specifications as conditions detrimental to the stream arise. The specific mention of items 1 through 5 does not necessarily mean that the addition of other physical or chemical constituents will be condoned.

n. No sewage discharges, regardless of degree of treatment, should be allowed into the James River between Boshier and Williams Island Dams.

o. The concentration and total amount of impurities in Tuckahoe Creek and its tributaries of sewage origin shall be limited to those amounts from sewage, industrial wastes, and other wastes ~~which that~~ are now present in the stream from natural sources and from existing discharges in the watershed.

p. Canceled.

q. Canceled.

r. Canceled.

s. Canceled.

t. Canceled.

u. Maximum temperature for the New River Basin from the Virginia-West Virginia state line upstream to the Giles-Montgomery County line:

The maximum temperature shall be 27°C (81°F) unless caused by natural conditions; the maximum rise above natural temperatures shall not exceed 2.8°C (5°F).

This maximum temperature limit of 81°F was established in the 1970 water quality standards amendments so that Virginia temperature criteria for the New River would be consistent with those of West Virginia, since the stream flows into that state.

v. The maximum temperature of the New River and its tributaries (except trout waters) from the Montgomery-Giles County line upstream to the Virginia-North Carolina state line shall be 29°C (84°F).

w. Canceled.

x. Clinch River from the confluence of Dumps Creek at river mile 268 at Carbo downstream to river mile 255.4. The special water quality criteria for copper (measured as total recoverable) in this section of the Clinch River are 12.4 µg/l for protection from chronic effects and 19.5 µg/l for protection from acute effects. These site-specific criteria are needed to provide protection to several endangered species of freshwater mussels.

y. Tidal freshwater Potomac River and tidal tributaries that enter the tidal freshwater Potomac River from Cockpit Point (below Occoquan Bay) to the fall line at Chain Bridge. During November 1 through February 14 of each year the 30-day average concentration of total ammonia nitrogen (in mg N/L) shall not exceed, more than once every three years on the average, the following chronic ammonia criterion:

$$\left( \frac{0.0577}{1 + 10^{7.688 - \text{pH}}} + \frac{2.487}{1 + 10^{\frac{\text{pH} - 7.688}{7.688}}} \right) \times 1.45(10^{0.028(25 - \text{MAX})})$$

MAX = temperature in °C or 7, whichever is greater.

The default design flow for calculating steady state wasteload allocations for this chronic ammonia criterion is the 30Q10, unless statistically valid methods are employed which demonstrate compliance with the duration and return frequency of this water quality criterion.

z. A site specific dissolved copper aquatic life criterion of 16.3 µg/l for protection from acute effects and 10.5 µg/l for protection from chronic effects applies in the following area:

Little Creek to the Route 60 (Shore Drive) bridge including Little Channel, Desert Cove, Fishermans Cove, and Little Creek Cove.

Hampton Roads Harbor including the waters within the boundary lines formed by I-664 (Monitor-Merrimac Memorial Bridge Tunnel) and I-64 (Hampton Roads

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Bridge Tunnel), Willoughby Bay, and the Elizabeth River and its tidal tributaries.

This criterion reflects the acute and chronic copper aquatic life criterion for saltwater in 9VAC25-260-140 B X a water effect ratio. The water effect ratio was derived in accordance with 9VAC25-260-140 F.

aa. The following site-specific dissolved oxygen criteria apply to the tidal Mattaponi and Pamunkey Rivers and their tidal tributaries because of seasonal lower dissolved oxygen concentration due to the natural oxygen depleting processes present in the extensive surrounding tidal wetlands. These criteria apply June 1 through September 30 to Chesapeake Bay segments MPNTF, MPNOH, PMKTF, PMKOH and are implemented in accordance with subsection D of 9VAC25-260-185. These criteria supersede the open water criteria listed in subsection A of 9VAC25-260-185.

Designated use	Criteria Concentration/Duration	Temporal Application
Open water	30 day mean $\geq$ 4.0 mg/l	June 1 - September 30
	Instantaneous minimum $\geq$ 3.2 mg/l at temperatures $<$ 29°C	
	Instantaneous minimum $\geq$ 4.3 mg/l at temperatures $\geq$ 29°C	

A site-specific pH criterion of 5.0-8.0 applies to the tidal freshwater Mattaponi Chesapeake Bay segment MPNTF to reflect natural conditions.

bb. The following site-specific seasonal mean criteria should not be exceeded in the specified tidal James River segment more than twice [over in] six [consecutive spring or summer seasons] years. [Should consecutive exceedances of the same seasonal mean criterion occur in a waterbody segment after the effective date of these chlorophyll a criteria, the department will examine additional lines of evidence, including the occurrence of harmful algae blooms, physicochemical monitoring and phytoplankton datasets, and fish kill reports in the evaluation of the appropriate assessment category for the waterbody segment. The department will develop guidance for inclusion in the Water Quality Assessment Guidance Manual to address evaluating the appropriate assessment category when consecutive exceedances of the same seasonal mean criterion occur. The department will determine if additional monitoring for harmful algal blooms is warranted.]

Designated Use	Chlorophyll a $\mu$ /l	Chesapeake Bay Program Segment	Temporal Application
Open water	8	JMSTF2	March 1 - May 31 (spring)
	10	JMSTF1	
	13	JMSOH	
	7	JMSMH	
	8	JMSPH	July 1 - September 30 (summer)
	21	JMSTF2	
	24	JMSTF1	
	11	JMSOH	
	7	JMSMH	
	7	JMSPH	

The following site-specific chlorophyll a concentrations at the specified duration should not [ ~~exceed~~ be exceeded ] more than 10% of the time over six [ ~~consecutive~~ ] summer seasons in the specified area of the tidal James River. These criteria protect against aquatic life effects due to harmful algal blooms. Such effects have not been documented in the upper portion of JMSTF2 or in JMSOH.

Chlorophyll a $\mu$ g/l	Chesapeake Bay Program Segment	Spatial Application	Duration
--	JMSTF2	Upstream boundary of JMSTF2 to river mile 95	--
52	JMSTF2	River mile 95 to downstream boundary of JMSTF2	1-month median
52	JMSTF1	Upstream boundary of JMSTF1 to river mile 67	1-month median
34	JMSTF1	River mile 67 to downstream boundary of JMSTF1	1-month median
--	JMSOH	Entire segment	--

59	JMSMH	Entire segment	1-day median
20	JMSPH	Entire segment	1-day median

(1) The following site-specific numerical chlorophyll a criteria apply ~~March 1 through May 31 and July 1 through September 30~~ as seasonal means to the tidal James River segments (excludes tributaries) ~~segments JMSTF2, JMSTF1, JMSOH, JMSMH, and JMSPH and are implemented in accordance with subsection D of 9VAC25-260-185, the boundaries of which are described in EPA 903-R-05-004.~~

Designated Use	Chlorophyll a $\mu\text{g/L}$	Chesapeake Bay Program Segment	Temporal Application
Open water	10	JMSTF2	March 1– May 31
	15	JMSTF1	
	15	JMSOH	
	12	JMSMH	
	12	JMSPH	
	15	JMSTF2	July 1– September 30
	23	JMSTF1	
	22	JMSOH	
	10	JMSMH	
	10	JMSPH	

(2) For segments JMSOH, JMSMH, and JMSPH, the median of same-day samples collected one meter or less in a segment should be calculated to represent the chlorophyll a expression of a segment over that day, and the median of same-month chlorophyll a values should be calculated to represent the chlorophyll a expression of a segment over that month. The seasonal geometric mean shall be calculated from the monthly chlorophyll a values for a segment.

(3) For segment JMSTF2, chlorophyll a data collected in the "upper zone" (from the upstream boundary at the fall line to approximately river mile 95 (N37° 23' 15.27" / W77° 18' 45.05" to N37° 23' 19.31" / W77° 18' 54.03")) should be pooled, in the manner described in subdivision bb (2) of this section, separately from chlorophyll a data collected in the "lower zone" (from river mile 95 to the downstream boundary of JMSTF2). The seasonal geometric mean for each of these zones should be calculated from their respective monthly chlorophyll a values. To calculate the seasonal segment-wide geometric mean, an area-weighted average of the zonal geometric means should be calculated using the following equation:

$$\text{Upper Zone Geometric Mean} \times 0.41 + \text{Lower Zone Geometric Mean} \times 0.59$$

(4) For segment JMSTF1, chlorophyll a data collected in the "upper zone" (from the upstream boundary of JMSTF1 to approximately river mile 67 (N37° 17' 46.21" / W77° 7' 9.55" to N37° 18' 58.94" / W77° 6' 57.14")) should be pooled, in the manner described in subdivision bb (2) of this section, separately from chlorophyll a data collected in the "lower zone" (between river mile 67 to the downstream boundary of JMSTF1). The seasonal geometric mean for each of these zones should be calculated from their respective monthly chlorophyll a values. To calculate the seasonal segment-wide geometric mean, an area-weighted average of the zonal geometric means should be calculated using the following equation:

$$\text{Upper Zone Geometric Mean} \times 0.49 + \text{Lower Zone Geometric Mean} \times 0.51$$

cc. For Mountain Lake in Giles County, chlorophyll a shall not exceed 6  $\mu\text{g/L}$  at a depth of six meters and orthophosphate-P shall not exceed 8  $\mu\text{g/L}$  at a depth of one meter or less.

dd. For Lake Drummond, located within the boundaries of Chesapeake and Suffolk in the Great Dismal Swamp, chlorophyll a shall not exceed 35  $\mu\text{g/L}$  and total phosphorus shall not exceed 40  $\mu\text{g/L}$  at a depth of one meter or less.

ee. Maximum temperature for these seasonally stockable trout waters is 26°C and applies May 1 through October 31.

ff. Maximum temperature for these seasonally stockable trout waters is 28°C and applies May 1 through October 31.

gg. Little Calfpasture River from the Goshen Dam to 0.76 miles above its confluence with the Calfpasture River has a stream condition index (A Stream Condition Index for Virginia Non-Coastal Streams, September 2003, Tetra Tech, Inc.) of at least 20.5 to protect the subcategory of aquatic life that exists in this river section as a result of the hydrologic modification. From 0.76 miles to 0.02 miles above its confluence with the Calfpasture River, aquatic life conditions are expected to gradually recover and meet the general aquatic life uses at 0.02 miles above its confluence with the Calfpasture River.

hh. Maximum temperature for these seasonally stockable trout waters is 31°C and applies May 1 through October 31.

VA.R. Doc. No. R12-2932; Filed August 28, 2019, 8:54 a.m.

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# Regulations

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## TITLE 12. HEALTH

### DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

#### Emergency Regulation

#### Title of Regulation: 12VAC30-30. Groups Covered and Agencies Responsible for Eligibility Determination (amending 12VAC30-30-70).

Statutory Authority: § 32.1-325 of the Code of Virginia; 42 USC § 1396 et seq.

Effective Dates: October 15, 2019, through April 14, 2021.

Agency Contact: Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

#### Preamble:

*Section 2.2-4011 B of the Code of Virginia states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of § 2.2-4006 A 4 of the Code of Virginia.*

*Chapter 2, Item 303 SS 4 a of the 2018 Acts of Assembly directs the Department of Medical Assistance Services (DMAS) to amend the State Plan for Medical Assistance to implement coverage for certain newly eligible individuals. Item 303 SS 4 f authorizes DMAS to promulgate emergency regulations to implement these changes.*

*The amendments expand mandatory eligibility categories by adding a new adult coverage group to implement Medicaid expansion. The new adult expansion group includes adults 19 years of age or older but younger than 65 years of age who have household incomes below 138% of the federal poverty level in accordance with federal requirements stipulating that this covered group must be considered for possible hospital presumptive eligibility covered groups. The changes included in this regulatory action have been approved by the Centers for Medicare and Medicaid Services.*

#### **12VAC30-30-70. Hospital presumptive eligibility.**

A. Qualified hospitals shall administer presumptive eligibility in accordance with the provisions of this section. A qualified hospital is a hospital that meets the requirements of 42 CFR 435.1110(b) and that:

1. Has entered into a valid provider agreement with ~~DMAS~~ the Department of Medical Assistance Services (DMAS), participates as a Virginia Medicaid provider, notifies

DMAS of its election to make presumptive eligibility determinations, and agrees to make presumptive eligibility determinations consistent with DMAS policies and procedures; and

2. Has not been disqualified by DMAS for failure to make presumptive eligibility determinations in accordance with applicable state policies and procedures as defined in subsections C, D, and E of this section or for failure to meet any standards established by the Medicaid agency.

B. The eligibility groups or populations for which hospitals determine eligibility presumptively are: (i) pregnant women; (ii) infants and children younger than age 19 years; (iii) parents and other caretaker relatives; (iv) individuals eligible for family planning services; (v) former foster care children; ~~and~~ (vi) individuals needing treatment for breast and cervical cancer; and (vii) adults 19 years of age or older but younger than 65 years of age.

C. The presumptive eligibility determination shall be based on:

1. The individual's categorical or nonfinancial eligibility for the group, as listed in subsection B of this section, for which the individual's presumptive eligibility is being determined;

2. Household income shall not exceed the applicable income standard for the group, as the groups are listed in subsection B of this section, for which the individual's presumptive eligibility is being determined if an income standard is applicable for this group;

3. Virginia residency; and

4. Satisfactory immigration status in accordance with 42 CFR 435.1102(d)(1) and as required in subdivision 3 of 12VAC30-40-10 and 42 CFR 435.406.

D. Qualified hospitals shall ensure that at least 85% of individuals deemed by the hospital to be presumptively eligible will file a full Medicaid application before the end of the presumptive eligibility period.

E. Qualified hospitals shall ensure that at least 70% of individuals deemed by the hospital to be presumptively eligible are determined eligible for Medicaid based on the full application that is submitted before the end of the presumptive eligibility period.

F. The presumptive eligibility period is determined in accordance with 42 CFR 435.1101 and shall begin on the date the presumptive eligibility determination is made. The presumptive eligibility period shall end on the earlier of:

1. The date the eligibility determination for regular Medicaid is made if an application for Medicaid is filed by the last day of the month following the month in which the determination of presumptive eligibility is made; or

2. The last day of the month following the month in which the determination of presumptive eligibility is made if no application for Medicaid is filed by last day of the month following the month in which the determination of presumptive eligibility is made.

G. Periods of presumptive eligibility are limited to one presumptive eligibility period per pregnancy and one per calendar year for all other covered groups.

VA.R. Doc. No. R20-5789; Filed August 27, 2019, 9:53 a.m.

**TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING**

**BOARD FOR CONTRACTORS**

**Final Regulation**

**REGISTRAR'S NOTICE:** The Board for Contractors is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The Board for Contractors will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** 18VAC50-22. Board for Contractors Regulations (amending 18VAC50-22-220).

**Statutory Authority:** § 54.1-201 of the Code of Virginia.

**Effective Date:** November 1, 2019.

**Agency Contact:** Eric L. Olson, Executive Director, Board for Contractors, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-2785, FAX (866) 430-1033, or email contractors@dpor.virginia.gov.

**Summary:**

*The amendments (i) allow a contractor to have more than one individual at a firm complete the business examination required to be eligible to be appointed the designated employee and (ii) increase to 120 days the timeframe within which a contractor must report a new designated employee or member of responsible management to the board.*

**18VAC50-22-220. Change of responsible management, designated employee, or qualified individual.**

A. Any change in the officers of a corporation, managers of a limited liability company, or officers or directors of an association shall be reported to the board in writing within 90 120 days of the change.

B. Any change of designated employee shall be reported on a form provided by the board within 90 120 days of the change. The new designated employee for a Class B licensee shall meet the requirements of 18VAC50-22-50 B. The new designated employee for a Class A licensee shall meet the requirements of 18VAC50-22-60 B. More than one individual associated with a single firm may complete the examination requirements necessary for eligibility as the designated employee.

C. Any change of qualified individual shall be reported on a form provided by the board within 45 days of the change. The new qualified individual for a Class C licensee shall meet the requirements of 18VAC50-22-40 B. The new qualified individual for a Class B licensee shall meet the requirements of 18VAC50-22-50 C. The new qualified individual for a Class A licensee shall meet the requirements of 18VAC50-22-60 C.

VA.R. Doc. No. R20-6106; Filed August 16, 2019, 4:29 p.m.

**BOARD OF DENTISTRY**

**Proposed Regulation**

**Titles of Regulations:** 18VAC60-21. Regulations Governing the Practice of Dentistry (amending 18VAC60-21-40, 18VAC60-21-240).

**18VAC60-25. Regulations Governing the Practice of Dental Hygiene (amending 18VAC60-25-30, 18VAC60-25-180).**

**18VAC60-30. Regulations Governing the Practice of Dental Assistants (amending 18VAC60-30-30, 18VAC60-30-150).**

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

**Public Hearing Information:**

October 18, 2019 - 9:05 a.m. - Department of Health Professions, Perimeter Center, 9960 Mayland Drive, 2nd Floor, Board Room 3, Henrico, VA 23233.

**Public Comment Deadline:** November 15, 2019.

**Agency Contact:** Sandra Reen, Executive Director, Board of Dentistry, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4437, FAX (804) 527-4428, or email sandra.reen@dhp.virginia.gov.

**Basis:** Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the Board of Dentistry the authority to levy fees sufficient to cover all expenses and to promulgate regulations to administer the regulatory system. In addition, the board is obligated by § 54.1-113 of the Code of Virginia to reduce fees if projections indicate that the board is continuing to collect fees in excess of expenditures.

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**Purpose:** The proposed regulatory action may make it easier for licensees to remember to renew licensure because renewal will coincide with each person's birth month and avoid late fees or practicing without a valid license. The birth month renewal schedule has been adopted by the Boards of Medicine and Nursing for many years. It alleviates the compressed workload associated with renewals and allows staff to be more responsive to other concerns. Renewal of licensure is essential to protect public health and safety. As a non-general-fund agency, the Board of Dentistry depends on a steady stream of revenue to offset expenditures associated with the regulation and discipline of these professions.

**Substance:** Sections in each chapter setting out the renewal of licensure for dentists, dental hygienists, and dental assistants II is amended to become effective in 2020. The revised renewal schedule by birth month would take effect in 2021, so in March of 2020, all persons with active licenses or registrations will renew with a proportionally reduced fee depending on each person's birth month. For example, a dentist with a January birth month would renew in March of 2020, and his license would expire in January of 2021. Therefore, he would pay a prorated renewal fee for 10 months of licensure. A dentist with a September birth month would pay a prorated renewal fee for 18 months.

**Issues:** There are no advantages or disadvantages to the public. The advantage to the board and the department is spreading the workload associated with licensure renewal throughout the year rather than having all renewals on a single date. There are no disadvantages to the agency or the Commonwealth.

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

Summary of the Proposed Amendments to Regulation. The Board of Dentistry (Board) proposes to change the renewal date for dentist, dental hygienist, and registered dental assistant II licenses from a set date of March 31st to the licensee's birth month, and to also reduce the license fees temporarily.

Result of Analysis. The benefits likely exceed the costs for all proposed changes. A slightly different design would likely yield greater benefits at about same the cost for at least one proposed change.

Estimated Economic Impact. Currently, the renewal date for annual dentist, dental hygienist, and registered dental assistant II licenses is March 31st of each year. The Board proposes to change the renewal date to the licensee's birthday, in order to distribute the Board's administrative workload more evenly throughout the year. This change is expected to result in the ongoing issuance of approximately 1,125 licenses in any given month rather than simultaneously issuing 13,499 licenses in March of each year. Under the proposal, the license renewals that occur in March 2020

would cover the period from March 31, 2020 to the licensee's birth month the following year at a prorated fee schedule. In other words, when a license is renewed in 2020, the expiration date will be set at the licensee's birth month in 2021.

The main economic effect of this change would accrue to the Board as it would have a more evenly distributed license renewal workload. According to the Board staff, the birth month renewal schedule has been used by the Boards of Medicine and Nursing for many years. The proposed approach alleviates the compressed workload associated with renewals and allows staff to be more responsive to other concerns. The proposed regulatory action may also make it easier for licensees to remember to renew if it coincides with their birth month and thus avoid late fees or practicing without a valid license.

The Board also has an excess cash balance it wishes to reduce in conjunction with the renewal date change. To accomplish that goal, the Board proposes a prorated renewal fee schedule at a discounted rate. For example, the current renewal fee for an active dental license is \$285 payable by March 31st each year, which equals \$23.75 for 12 months of licensure. The proposed fee would temporarily be \$15 per month for renewal. To illustrate: in 2020, a dentist with a January birth date would pay \$150 (\$15 X 10 months); a dentist with a December birth date would pay \$315 (\$15 X 21 months). For renewals in 2021, the fee would revert to the current amount of \$285 payable in one's birth month. Essentially, the prorated transition fee schedule would provide \$8.75 (i.e., \$23.75 - \$15) savings per month. Similarly, the prorated monthly fee for dental hygienists would be \$4 per month as opposed to current \$6.25 monthly rate, and for dental assistant IIs it would be \$3 instead of current \$4.16. The prorated transition fee schedule would benefit licensees in that they would experience a temporary relief in the amount of fees they pay to the Board. Assuming a uniform distribution of birth months, dentists, dental hygienists, and dental assistant IIs would realize \$1,012,169, \$209,598, and \$467 respectively from this total one-time fee relief.

This one time relief, however, would be uneven among the licensees depending on their birth month. Those who have a birth month in the early part of the year would receive a smaller savings compared to those with a birth month in the later part of the year. For example, a dentist with a January birth date would realize \$87.50 in savings (\$8.75 X 10) while a dentist with a December birth date would benefit \$183.75 (\$8.75 X 21). Similarly, the one time savings range for dental hygienists would be between \$22.50 (\$2.25 X 10) for January birth month and \$47.25 Economic impact of 18 VAC 60-21 3 (\$2.25 X 21) for December birth month, and for dental assistant IIs it would be between \$11.16 (\$1.16 X 10) and \$24.36 (\$1.16 X 21). While it would be possible to devise a prorated fee schedule that would more evenly distribute the excess fee revenues among the licensees, such a mechanism

would likely not be as administratively efficient as the scheme proposed.

Another unintended consequence of this regulatory change is the possible administrative inconvenience that would be imposed on some dental practices. As raised in public comments, group practices that manage renewals for their members simultaneously on March 31 would no longer have the ability to do so. Such practices would have to manage renewals on a monthly basis depending on the birth months of their member practitioners. This will require tracking all member birth months and the associated renewal schedules individually, and then cutting multiple checks instead of just one check. Though they will also avoid a large cash outlay at one time. According to a Virginia Dental Association executive, the number of group practices in Virginia is in the "hundreds" which suggests the impact of this change could be significant. Similarly and in addition to the group practices, the proposed renewal in the birth month could be inconvenient for single practitioners if their birth month happens to fall in a month they are particularly busy or have limited time. For example, someone with a birth month during holidays or tax filing season might have less time to renew their license simply because there are fewer business days or more things to do. The Board acknowledges that the change would require adjustment but believes birth month would be eventually be easier for dental practices rather than an arbitrary date. However, the ongoing nature of this particular unintended consequence and its likely prevalence demands consideration.

**Businesses and Entities Affected.** There are 7,463 licensed dentists, 6,010 dental hygienists, and 26 dental assistant IIs in Virginia.

**Localities Particularly Affected.** The proposed regulation would not affect any particular locality more than others.

**Projected Impact on Employment.** The proposed changes should not have a significant impact on employment.

**Effects on the Use and Value of Private Property.** No significant effect on the use and value of private property is expected.

**Real Estate Development Costs.** No impact on real estate development costs is expected.

**Small Businesses:**

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

**Costs and Other Effects.** The vast majority of dental practices are small businesses. As described, the proposed changes to license renewal dates would increase administrative costs for some dental practices.

Alternative Method that Minimizes Adverse Impact. As raised in public comments and discussed, the proposed regulation would likely have the unintended consequence of introducing an administrative inconvenience for a number of group practices and individual practitioners. Once the transition to birth month renewal is completed and the Board's administrative workload is spread more evenly throughout the year, the Board could eliminate this unintended consequence by

allowing the licensees to request a renewal month that better accommodates their busy schedules.

**Adverse Impacts:**

**Businesses:** As described, the proposed changes to license renewal dates would increase administrative costs for some dental practices.

**Localities:** The proposed amendments would not adversely affect localities.

**Other Entities:** The proposed amendments would not adversely affect other entities.

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<sup>1</sup>Adverse impact is indicated if there is any increase in net cost for any entity, even if the benefits exceed the costs for all entities combined.

**Agency's Response to Economic Impact Analysis:** The Board of Dentistry does not concur with some of the assertions of the economic impact analysis (EIA) on the proposed change in renewal schedule. The EIA asserts that the "one-time relief, however, would be uneven among the licensees depending on their birth month." The agency does not agree. A licensee pays the renewal fee prospectively. In the proposed action, the fee paid in March of 2020 will be based on the number of months a licensee will have before the next renewal date in 2021. Every licensee will pay exactly the same fee (\$15 per month for a dentist). The amount is prorated for the number of months of licensure (10 months X \$15 = \$150; 21 months X \$15 = \$315), so no licensee is disadvantaged. A person with a January birth month will only get 10 months of licensure before the person has to renew in January of 2021. However, a person with a December birth month will get 21 months of licensure before having to renew in 2021. The prorated fee treats every licensee the same.

The agency considered a variety of methods for converting to birth month renewal. Board members concluded that this proration based on the number of months renewal was the most equitable. The agency does not concur that another prorated fee schedule would more evenly distribute the excess revenue because some licensees would be disadvantaged by fewer months of licensure.

While the agency understands that the change will necessitate some adjustment for administrative in some dental practices, it notes that the two boards (Board of Medicine and Board of Nursing) with the largest number of licensees have had

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renewal by birth month for many years. Medical practices that employ large numbers of doctors and nurses have not had difficulty with birth month renewals. Additionally, the agency would note the relatively small number of comments in opposition to the change. Out of 7,463 dentists and 6,010 dental hygienists licensed in Virginia, only 10 dentists and five hygienists commented in opposition. The decision to amend regulations was made by the board, which is comprised of seven dentists and two hygienists, all of whom voted in favor of the change to birth month.

The EIA commented that a person with a birth date during holidays or tax filing season would have less time to renew. Renewal notices are sent 45 to 60 days in advance of the renewal month, so there is ample time for electronic renewal of one's license.

Finally, the EIA noted that "the board could eliminate this unintended consequence by allowing licenses to request a renewal month that better accommodates their busy schedules." The agency explained to the Department of Planning and Budget (DPB) that such a scheme would be chaotic, not only for board staff, but for the finance and IT divisions of the department, and ultimately for licensees themselves. To allow more than 300,000 licensees of the department to choose their own renewal date is not a viable option. To the board's knowledge, there is no licensing agency in Virginia or elsewhere that has adopted such a renewal schedule, and DPB provided no feasibility study or plan for implementation and impact.

## Summary:

*The proposed amendments change the license renewal schedule for a dentist or dental hygienist or registration renewal for a dental assistant II from a set date of March 31 to renewal in the birth month of the dentist, dental hygienist, or dental assistant II.*

## **18VAC60-21-40. Required fees.**

### A. Application/registration fees.

1. Dental license by examination	\$400
2. Dental license by credentials	\$500
3. Dental restricted teaching license	\$285
4. Dental faculty license	\$400
5. Dental temporary resident's license	\$60
6. Restricted volunteer license	\$25
7. Volunteer exemption registration	\$10
8. Oral maxillofacial surgeon registration	\$175
9. Cosmetic procedures certification	\$225

10. Mobile clinic/portable operation	\$250
11. Moderate sedation permit	\$100
12. Deep sedation/general anesthesia permit	\$100

### B. Renewal fees.

1. Dental license - active	\$285
2. Dental license - inactive	\$145
3. Dental temporary resident's license	\$35
4. Restricted volunteer license	\$15
5. Oral maxillofacial surgeon registration	\$175
6. Cosmetic procedures certification	\$100
7. Moderate sedation permit	\$100
8. Deep sedation/general anesthesia permit	\$100

### C. Late fees.

1. Dental license - active	\$100
2. Dental license - inactive	\$50
3. Dental temporary resident's license	\$15
4. Oral maxillofacial surgeon registration	\$55
5. Cosmetic procedures certification	\$35
6. Moderate sedation permit	\$35
7. Deep sedation/general anesthesia permit	\$35

### D. Reinstatement fees.

1. Dental license - expired	\$500
2. Dental license - suspended	\$750
3. Dental license - revoked	\$1000
4. Oral maxillofacial surgeon registration	\$350
5. Cosmetic procedures certification	\$225

### E. Document fees.

1. Duplicate wall certificate	\$60
2. Duplicate license	\$20
3. License certification	\$35

### F. Other fees.

1. Returned check fee	\$35
2. Practice inspection fee	\$350

G. No fee will be refunded or applied for any purpose other than the purpose for which the fee is submitted.

H. For the renewal of ~~licenses, registrations, certifications, and permits~~ an active dental license in 2018 2020, the following fees shall be in effect fees shall be prorated according to a licensee's birth month as follows:

<del>1. Dentist—active</del>	<del>\$142</del>
<del>2. Dentist—inactive</del>	<del>\$72</del>
<del>3. Dental full time faculty</del>	<del>\$142</del>
<del>4. Temporary resident</del>	<del>\$17</del>
<del>5. Dental restricted volunteer</del>	<del>\$7</del>
<del>6. Oral/maxillofacial surgeon registration</del>	<del>\$87</del>
<del>7. Cosmetic procedure certification</del>	<del>\$50</del>
<del>8. Moderate sedation certification</del>	<del>\$50</del>
<del>9. Deep sedation/general anesthesia</del>	<del>\$50</del>
<del>10. Mobile clinic/portable operation</del>	<del>\$75</del>
<u>January birth month</u>	<u>\$150</u>
<u>February birth month</u>	<u>\$165</u>
<u>March birth month</u>	<u>\$180</u>
<u>April birth month</u>	<u>\$195</u>
<u>May birth month</u>	<u>\$210</u>
<u>June birth month</u>	<u>\$225</u>
<u>July birth month</u>	<u>\$240</u>
<u>August birth month</u>	<u>\$255</u>
<u>September birth month</u>	<u>\$270</u>
<u>October birth month</u>	<u>\$285</u>
<u>November birth month</u>	<u>\$300</u>
<u>December birth month</u>	<u>\$315</u>

Part V  
Licensure Renewal

**18VAC60-21-240. License renewal and reinstatement.**

A. The license or permit of any person who does not return the completed renewal form and fees by the deadline shall automatically expire and become invalid, and his practice of dentistry shall be illegal. With the exception of practice with a current, restricted volunteer license as provided in § 54.1-2712.1 of the Code practicing in Virginia with an expired license or permit may subject the licensee to disciplinary action by the board.

B. ~~Every~~ Prior to 2021, every person holding an active or inactive license and those holding a permit to administer

moderate sedation, deep sedation, or general anesthesia shall annually, on or before March 31, renew his license or permit. Beginning in January 2021, every person holding an active or inactive license and those holding a permit to administer moderate sedation, deep sedation, or general anesthesia shall annually renew his license or permit in his birth month in accordance with fees set forth 18VAC60-21-40.

~~C.~~ C. Every person holding a faculty license, temporary resident's license, a restricted volunteer license, or a temporary permit shall, on or before June 30, request renewal of his license.

~~C. D.~~ D. Any person who does not return the completed form and fee by the deadline required in subsection B of this section shall be required to pay an additional late fee.

~~D. E.~~ E. The board shall renew a license or permit if the renewal form, renewal fee, and late fee are received within one year of the deadline required in subsection B of this section provided that no grounds exist to deny said renewal pursuant to § 54.1-2706 of the Code and Part II (18VAC60-21-50 et seq.) of this chapter.

~~E. F.~~ F. Reinstatement procedures.

1. Any person whose license or permit has expired for more than one year or whose license or permit has been revoked or suspended and who wishes to reinstate such license or permit shall submit a reinstatement application and the reinstatement fee. The application must include evidence of continuing competence.

2. To evaluate continuing competence, the board shall consider (i) hours of continuing education that meet the requirements of subsection H of 18VAC60-21-250; (ii) evidence of active practice in another state or in federal service; (iii) current specialty board certification; (iv) recent passage of a clinical competency examination accepted by the board; or (v) a refresher program offered by a program accredited by the Commission on Dental Accreditation of the American Dental Association.

3. The executive director may reinstate such expired license or permit provided that the applicant can demonstrate continuing competence, the applicant has paid the reinstatement fee and any fines or assessments, and no grounds exist to deny said reinstatement pursuant to § 54.1-2706 of the Code and Part II (18VAC60-21-50 et seq.) of this chapter.

**18VAC60-25-30. Required fees.**

A. Application fees.

1. License by examination	\$175
2. License by credentials	\$275
3. License to teach dental hygiene pursuant to § 54.1-2725 of the Code	\$175

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4. Temporary permit pursuant to § 54.1-2726 of the Code	\$175	<u>June birth month</u>	<u>\$60</u>
		<u>July birth month</u>	<u>\$64</u>
5. Restricted volunteer license	\$25	<u>August birth month</u>	<u>\$68</u>
6. Volunteer exemption registration	\$10	<u>September birth month</u>	<u>\$72</u>
B. Renewal fees.		<u>October birth month</u>	<u>\$76</u>
1. Active license	\$75	<u>November birth month</u>	<u>\$80</u>
2. Inactive license	\$40	<u>December birth month</u>	<u>\$84</u>
3. License to teach dental hygiene pursuant to § 54.1-2725	\$75		
4. Temporary permit pursuant to § 54.1-2726	\$75		
C. Late fees.			
1. Active license	\$25		
2. Inactive license	\$15		
3. License to teach dental hygiene pursuant to § 54.1-2725	\$25		
4. Temporary permit pursuant to § 54.1-2726	\$25		
D. Reinstatement fees.			
1. Expired license	\$200		
2. Suspended license	\$400		
3. Revoked license	\$500		
E. Administrative fees.			
1. Duplicate wall certificate	\$60		
2. Duplicate license	\$20		
3. Certification of licensure	\$35		
4. Returned check	\$35		
F. No fee shall be refunded or applied for any purpose other than the purpose for which the fee was submitted.			
G. For the renewal of licenses <u>an active dental hygienist license in 2018 2020, the following fees shall be in effect fees shall be prorated according to a licensee's birth month as follows:</u>			
<del>1. Dental hygienist—active</del>	<del>\$37</del>		
<del>2. Dental hygienist—inactive</del>	<del>\$20</del>		
<del>3. Dental hygienist restricted volunteer</del>	<del>\$7</del>		
<u>January birth month</u>	<u>\$40</u>		
<u>February birth month</u>	<u>\$44</u>		
<u>March birth month</u>	<u>\$48</u>		
<u>April birth month</u>	<u>\$52</u>		
<u>May birth month</u>	<u>\$56</u>		
		Part V Licensure Renewal and Reinstatement	
		<b>18VAC60-25-180. Requirements for licensure renewal.</b>	
		A. <del>An</del> <u>Prior to 2021, an active or inactive dental hygiene license shall be renewed on or before March 31 each year. Beginning in January 2021, an active or inactive dental hygiene license shall be renewed in the licensee's birth month each year.</u>	
		B. A faculty license, a restricted volunteer license, or a temporary permit shall be renewed on or before June 30 each year.	
		<del>B. C.</del> The license of any person who does not return the completed renewal form and fees by the deadline required in subsection A of this section shall automatically expire and become invalid and his practice of dental hygiene shall be illegal. With the exception of practice with a current, restricted volunteer license as provided in § 54.1-2726.1 of the Code, practicing in Virginia with an expired license may subject the licensee to disciplinary action by the board.	
		<del>C. D.</del> Any person who does not return the completed form and fee by the deadline required in subsection A of this section shall be required to pay an additional late fee. The board may renew a license if the renewal form, renewal fee, and late fee are received within one year of the deadline required in subsection A of this section.	
		<b>18VAC60-30-30. Required fees.</b>	
		A. Initial registration fee.	\$100
		B. Renewal fees.	
		1. Dental assistant II registration - active	\$50
		2. Dental assistant II registration - inactive	\$25
		C. Late fees.	
		1. Dental assistant II registration - active	\$20
		2. Dental assistant II registration - inactive	\$10
		D. Reinstatement fees.	
		1. Expired registration	\$125
		2. Suspended registration	\$250

3. Revoked registration	\$300
E. Administrative fees.	
1. Duplicate wall certificate	\$60
2. Duplicate registration	\$20
3. Registration verification	\$35
4. Returned check fee	\$35

F. No fee will be refunded or applied for any purpose other than the purpose for which the fee is submitted.

G. For the renewal of an active dental assistant II registration in 2018 2020, the fee shall be \$25. For the renewal of an inactive dental assistant II registration in 2018, the fee shall be \$13. fees for renewal of an active dental assistant II registration shall be prorated according to the registrant's birth month as follows:

<u>January birth month</u>	<u>\$30</u>
<u>February birth month</u>	<u>\$33</u>
<u>March birth month</u>	<u>\$36</u>
<u>April birth month</u>	<u>\$39</u>
<u>May birth month</u>	<u>\$42</u>
<u>June birth month</u>	<u>\$45</u>
<u>July birth month</u>	<u>\$48</u>
<u>August birth month</u>	<u>\$51</u>
<u>September birth month</u>	<u>\$54</u>
<u>October birth month</u>	<u>\$57</u>
<u>November birth month</u>	<u>\$60</u>
<u>December birth month</u>	<u>\$63</u>

Part V

Requirements for Renewal and Reinstatement

**18VAC60-30-150. Registration renewal requirements.**

A. ~~Every~~ Prior to 2021, every person holding an active or inactive registration shall annually, on or before March 31, renew his registration. Beginning in January of 2021, every person holding an active or inactive registration shall annually renew his registration in his birth month. Any person who does not return the completed form and fee by the deadline shall be required to pay an additional late fee.

B. The registration of any person who does not return the completed renewal form and fees by the deadline shall automatically expire and become invalid and his practice as a dental assistant II shall be illegal. Practicing in Virginia with an expired registration may subject the registrant to disciplinary action by the board.

C. In order to renew registration, a dental assistant II shall be required to maintain and attest to current certification from the Dental Assisting National Board or another national credentialing organization recognized by the American Dental Association.

D. A dental assistant II shall also be required to maintain evidence of successful completion of training in basic cardiopulmonary resuscitation.

E. Following the renewal period, the board may conduct an audit of registrants to verify compliance. Registrants selected for audit shall provide original documents certifying current certification.

VA.R. Doc. No. R18-5382; Filed August 28, 2019, 8:39 a.m.

**DEPARTMENT OF HEALTH PROFESSIONS**

**Forms**

**REGISTRAR'S NOTICE:** Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

**Title of Regulation: 18VAC76-20. Regulations Governing the Prescription Monitoring Program.**

**Contact Information:** Elaine J. Yeatts, Senior Policy Analyst, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4688, or email [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov).

FORMS (18VAC76-20)

[Request for a Waiver or an Exemption from Reporting \(rev. 5/2018\)](#)

[Request for a Waiver or an Exemption from Reporting: Veterinarian \(rev. 5/2018\)](#)

[Request to Register as an Authorized Agent to Receive Information from the Prescription Monitoring Program \(rev. 7/2017\)](#)

[Recipient Request for Discretionary Disclosure of Information from the Prescription Monitoring Program \(rev. 7/2017\)](#)

[Regulatory Authority Request for Discretionary Disclosure of Information from the Prescription Monitoring Program \(rev. 4/2018\)](#)

[Application to Register as a Virginia Medicaid Managed Care Authorized Agent to Receive Information from Prescription Monitoring Program \(rev. 4/2018\)](#)

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[Account Development Form for Reporting to Virginia's Prescription Monitoring Program \(rev. 7/2018\)](#)

[Request to Register as an Authorized Parole or Probation Officer to Receive Information from the Prescription Monitoring Program \(rev. 4/2018\)](#)

[Request to Register as an Authorized Drug Diversion Investigator to Receive Information from the Prescription Monitoring Program \(rev. 4/2018\)](#)

[Request to Register as an Authorized Investigator for the Department of Corrections to Receive Information from the Prescription Monitoring Program \(eff. 8/2019\)](#)

VA.R. Doc. No. R20-6133; Filed August 21, 2019, 1:53 p.m.

## **Fast-Track Regulation**

**Title of Regulation: 18VAC76-40. Regulations Governing Emergency Contact Information (amending 18VAC76-40-10, 18VAC76-40-20).**

Statutory Authority: § 54.1-2506.1 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: October 16, 2019.

Effective Date: November 1, 2019.

Agency Contact: Elaine J. Yeatts, Senior Policy Analyst, Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4688, FAX (804) 527-4475, or email [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov).

Basis: Regulations Governing Emergency Contact Information are promulgated under § 54.1-2506.1 of the Code of Virginia.

Purpose: The purpose of the regulatory change is to update the emergency contact information that licensees of health regulatory boards are required to provide so that the required information is more relevant and useful to the Virginia Department of Health (VDH) in the event of a public health emergency or for dissemination of important public health information. The amended regulation will delete data elements that VDH has never used and does not believe are practical in the rapid dissemination of information or request for assistance in a public health emergency.

Rationale for Using Fast-Track Rulemaking Process: The impetus of the regulatory action was the periodic review of regulation with comment requested from December 10, 2018, to January 9, 2019. There were no comments.

Substance: Amendments to 18VAC76-40-20 delete the requirement for telephone and fax numbers and add a requirement for a number at which a licensee can be contacted or sent information by text.

An amendment in 18VAC76-40-10 is necessary to correct "certified" massage therapists to "licensed massage therapists," since that profession is now licensed.

Issues: The primary advantage to the public is additional information for contact and assistance in case of a public health emergency or disaster. The advantage to licensees is simplification of the emergency contact information section of a renewal form. There are no disadvantages.

The advantage to the Department of Health and the Department of Emergency Management is better access to health care workers in case of a public health emergency or to disseminate information about an outbreak of a communicable disease. There are no disadvantages.

Small Business Impact Review Report of Findings: This fast-track regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Department of Health Professions (DHP) proposes to amend the types of contact information that health professionals are to provide for notification in the event of a public health emergency or for dissemination of public health information.

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

Estimated Economic Impact.

Code of Virginia § 54.1-2506.1 states that:

For the purpose of expediting the dissemination of public health information, including notice about a public health emergency, the Department is authorized to require certain licensed, certified or registered persons to report any email address, telephone number and facsimile number that may be used to contact such person in the event of a public health emergency or to provide information related to serving during a public health emergency.

The current regulation requires, upon a request from DHP, that specified persons or entities report the following contact information: 1) a telephone number at which he may be contacted during weekday business hours (8 a.m. to 5 p.m.), 2) a telephone number at which he may be contacted during nonbusiness hours (5 p.m. to 8 a.m. weekdays and on weekends or holidays), 3) a fax number at which he may be sent information concerning the emergency; and 4) an e-mail address at which he may be sent information concerning the emergency.

DHP proposes to no longer require the first three items listed above, continue to require the email address, and to newly require "a number at which he may be contacted or sent

information by text." According to DHP, the contact information is solely used by the Virginia Department of Health (VDH) in the event of a public health emergency or for dissemination of important public health information; and VDH has indicated that the proposed forms of contact information are more relevant and useful in the event of a public health emergency or for dissemination of important public health information than the contact information types currently listed in the regulation. Thus, the proposed amendments would be beneficial for VDH and for the public in that communication may be improved during public health emergencies and dissemination of important public health information may be improved. According to DHP, no one would be required to purchase a cell phone or submit his number if there is an objection. Thus, the proposed amendments do not introduce costs.

**Businesses and Entities Affected.** The proposed amendments affect the 650 assisted living facility administrators, 1,690 athletic trainers, 8,726 massage therapists, 3,541 clinical psychologists, 6,806 clinical social workers, 7,463 dentists, 6,010 dental hygienists, 1,543 funeral service licensees, 2 embalmers, 36 funeral directors, 542 licensed acupuncturists, 28,858 licensed practical nurses, 5,417 licensed professional counselors, 237 medical equipment suppliers, 911 nursing home administrators, 15,153 pharmacists, 14,213 pharmacy technicians, 8,925 physical therapists, 4,005 physician assistants, 4,432 radiologic technologists, 109,603 registered nurses, 4,018 respiratory care practitioners, 40 surface transportation and removal service registrants, 4,435 veterinarians, and 81 wholesaler distributors of pharmaceuticals regulated by DHP.<sup>2</sup>

**Localities Particularly Affected.** The proposed amendments do not disproportionately affect particular localities.

**Projected Impact on Employment.** The proposed amendments do not affect employment.

**Effects on the Use and Value of Private Property.** The proposed amendments are unlikely to significantly affect the use and value of private property.

**Real Estate Development Costs.** The proposed amendments do not affect real estate development costs.

**Small Businesses:**

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

**Costs and Other Effects.** The proposed amendments do not significantly affect costs for small businesses.

**Alternative Method that Minimizes Adverse Impact.** The proposed amendments do not adversely affect small businesses.

**Adverse Impacts:**

**Businesses.** The proposed amendments do not adversely affect businesses.

**Localities.** The proposed amendments do not adversely affect localities.

**Other Entities.** The proposed amendments do not adversely affect other entities.

<sup>1</sup>Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

<sup>2</sup>Data Source: the most recent available DHP Current Count of Licenses report. All figures are as of September 30, 2018. <http://www.dhp.virginia.gov/About/stats/2019Q1/04CurrentLicenseCountQ1FY2019.pdf>

**Agency's Response to Economic Impact Analysis:** The Department of Health Professions concurs with the analysis of the Department of Planning and Budget.

**Summary:**

*The amendments revise the types of emergency contact information health professionals must provide for notification in the event of a public health emergency or for dissemination of public health information if the Department of Health Professions requests such information.*

**18VAC76-40-10. Requirement to report.**

In accordance with provisions of § 54.1-2506.1 of the Code of Virginia, the following persons or entities who hold a license, certificate, registration, or permit issued by a board within the Department of Health Professions and whose address of record is in Virginia, a contiguous state, or the District of Columbia shall report emergency contact information as required by this chapter:

1. Assisted living facility administrators;
2. Athletic trainers;
3. ~~Certified~~ Licensed massage therapists;
4. Clinical psychologists;
5. Clinical social workers;
6. Dentists;
7. Dental hygienists;
8. Funeral service licensees, embalmers, and funeral directors;
9. Licensed acupuncturists;
10. Licensed practical nurses;
11. Licensed professional counselors;

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12. Medical equipment suppliers;
13. Nursing home administrators;
14. Pharmacists;
15. Pharmacy technicians;
16. Physical therapists;
17. Physician assistants;
18. Radiologic technologists;
19. Registered nurses;
20. Respiratory care practitioners;
21. Surface transportation and removal service registrants;
22. Veterinarians; and
23. Wholesaler distributors of pharmaceuticals.

## **18VAC76-40-20. Emergency contact information.**

A. Upon a request from the department, a person or entity listed in 18VAC76-40-10 shall be required to report the following information for contact in the event of a public health emergency or for dissemination of public health information:

- ~~1. A telephone number at which he may be contacted during weekday business hours (8 a.m. to 5 p.m.);~~
- ~~2. A telephone number at which he may be contacted during nonbusiness hours (5 p.m. to 8 a.m. weekdays and on weekends or holidays);~~
- ~~3. A fax number at which he may be sent information concerning the emergency; and~~
4. 1. An e-mail email address at which he the person or entity may be sent information concerning the emergency; and  
2. A number at which the person or entity may be contacted or sent information by text.

B. A person or entity shall only be required to report those ~~fax~~ numbers or ~~e-mail email~~ addresses to which he has direct access.

C. Information collected for the purpose of disseminating notification of a public health emergency or public health information or providing information related to serving during a public health emergency shall not be published or made available for any other purpose.

VA.R. Doc. No. R20-5937; Filed August 27, 2019, 8:42 a.m.

## **BOARD OF MEDICINE**

### **Fast-Track Regulation**

Title of Regulation: **18VAC85-20. Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry, and Chiropractic (amending 18VAC85-20-141, 18VAC85-20-350).**

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

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: October 16, 2019.

Effective Date: November 1, 2019.

Agency Contact: William L. Harp, M.D., Executive Director, Board of Medicine, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4621, FAX (804) 527-4429, or email [william.harp@dhp.virginia.gov](mailto:william.harp@dhp.virginia.gov).

Basis: Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the Board of Medicine the authority to promulgate regulations to administer the regulatory system.

Purpose: The amendments to 18VAC85-20-141 and 18VAC85-20-350 are responding to a petition for rulemaking. The board is acknowledging the acceptance of a board certification in podiatry that is already recognized by the American Podiatric Medical Association and the Council for Podiatric Medical Education. Its addition to regulation may facilitate licensure by endorsement for a few applicants and will allow those podiatrists who hold such certification to assure patient health and safety by their identification as board-certified practitioners.

Rationale for Using Fast-Track Rulemaking Process: The impetus for the change was a petition from rulemaking from Dr. Luke Vetti. The petition was supported by other podiatrists and has full support from the board, so the changes should be noncontroversial.

Substance: The amendments recognize the American Board of Podiatric Medicine (ABPM) as an approved entity to qualify an applicant for licensure in podiatry to be licensed by endorsement and allow a podiatrist with ABPM certification to identify himself as "board-certified" in informed consent documents for performance of surgery.

Issues: There is an advantage to the public if a patient is looking for a board-certified podiatrist. Inclusion of the ABPM would allow some podiatrists to identify themselves in informed consent documents as "board-certified." There are no disadvantages to the public. The certifying body is already recognized by leading professional organizations. There are no advantages or disadvantages to the agency or the Commonwealth.

Small Business Impact Review Report of Findings: This fast-track regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Medicine (Board) proposes to recognize the American Board of Podiatric Medicine (ABPM) as an approved entity to qualify an applicant for podiatry licensure by endorsement. The Board also proposes to allow a podiatrist with ABPM certification to identify himself as "board-certified" in informed consent documents for performance of surgery.

Background

The Board proposes these amendments in response to a petition for rulemaking.<sup>2</sup> The American Podiatric Medical Association and the Council for Podiatric Medical Education already recognize ABPM certification in podiatry.<sup>3</sup>

Estimated Benefits and Costs. Since regulations for licensure by endorsement became effective in September of 2018, approximately 100 doctors of medicine have been licensed by endorsement.<sup>4</sup> To date, there have been no podiatrists licensed by endorsement.<sup>5</sup> The proposal may facilitate podiatry licensure by endorsement for a few applicants and would allow those podiatrists who hold such certification to assure patient health and safety by their identification as board-certified practitioners. Given that the American Podiatric Medical Association and the Council for Podiatric Medical Education recognize ABPM certification in podiatry, it is beneficial that more podiatrists that are qualified would be able to become licensed by endorsement and be identified to interested patients as board-certified. Given their qualifications, there is no reason to believe this would put patients at risk. Thus, the proposal should produce a net benefit.

Businesses and Other Entities Affected. The proposed amendments potentially affect the 142 offices of podiatrists in the Commonwealth.<sup>6</sup> Offices that employ or may seek to employ podiatrists with ABPM certification would be particularly affected. The proposals do not introduce costs to implement or comply.

Localities<sup>7</sup> Affected<sup>8</sup>. The proposed amendments apply statewide and do not disproportionately affect particular localities. As the proposed amendments do not introduce costs for local governments, no additional funds would be required.

Projected Impact on Employment. The proposal to recognize the ABPM as an approved entity to qualify an applicant for podiatry licensure by endorsement may prompt a small

number of podiatrists to work in the Commonwealth who otherwise may not have.

Effects on the Use and Value of Private Property. To the extent that the proposal to recognize the ABPM as an approved entity to qualify an applicant for podiatry licensure by endorsement may prompt some podiatrists to work in the Commonwealth, it may become moderately easier for offices of podiatrists to find qualified staff. The proposed amendments do not affect real estate development costs.

Adverse Effect on Small Businesses<sup>9</sup>: The proposed amendments do not adversely affect small businesses.

<sup>1</sup>Adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined.

<sup>2</sup>See <https://townhall.virginia.gov/l/viewpetition.cfm?petitionid=295>

<sup>3</sup>Source: Department of Health Professions

<sup>4</sup>Ibid

<sup>5</sup>Ibid

<sup>6</sup>Data source: Virginia Employment Commission

<sup>7</sup>"Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>8</sup>§ 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

<sup>9</sup>Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

Agency's Response to Economic Impact Analysis: The Board of Medicine concurs with the analysis of the Department of Planning and Budget.

Summary:

*The amendments (i) recognize the American Board of Podiatric Medicine (ABPM) as an approved entity to qualify an applicant for podiatry licensure by endorsement and (ii) allow a podiatrist with ABPM certification to identify himself as "board-certified" in informed consent documents for performance of surgery. This action is in response to a petition for rulemaking.*

**18VAC85-20-141. Licensure by endorsement.**

To be licensed by endorsement, an applicant shall:

1. Hold at least one current, unrestricted license in a United States jurisdiction or Canada for the five years immediately preceding application to the board;
2. Have been engaged in active practice, defined as an average of 20 hours per week or 640 hours per year, for five years after postgraduate training and immediately preceding application;

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3. Verify that all licenses held in another United States jurisdiction or in Canada are in good standing, defined as current and unrestricted, or if lapsed, eligible for renewal or reinstatement;
4. Hold current certification by one of the following:
  - a. American Board of Medical Specialties;
  - b. Bureau of Osteopathic Specialists;
  - c. American Board of Foot and Ankle Surgery;
  - d. American Board of Podiatric Medicine;
  - e. Fellowship of Royal College of Physicians of Canada;
  - f. Fellowship of the Royal College of Surgeons of Canada; or
  - g. College of Family Physicians of Canada;
5. Submit a current report from the U.S. Department of Health and Human Services National Practitioner Data Bank; and
6. Have no grounds for denial based on provisions of § 54.1-2915 of the Code of Virginia or regulations of the board.

## **18VAC85-20-350. Informed consent.**

A. Prior to administration, the anesthesia plan shall be discussed with the patient or responsible party by the health care practitioner administering the anesthesia or supervising the administration of anesthesia. Informed consent for the nature and objectives of the anesthesia planned shall be in writing and obtained from the patient or responsible party before the procedure is performed. Such consent shall include a discussion of discharge planning and what care or assistance the patient is expected to require after discharge. Informed consent shall only be obtained after a discussion of the risks, benefits, and alternatives, contain the name of the anesthesia provider, and be documented in the medical record.

B. The surgical consent forms shall be executed by the patient or the responsible party and shall contain a statement that the doctor performing the surgery is board certified or board eligible by one of the American Board of Medical Specialties boards, the Bureau of Osteopathic Specialists of the American Osteopathic Association, the American Board of Podiatric Medicine, or the American Board of Foot and Ankle Surgery. The forms shall either list which board or contain a statement that doctor performing the surgery is not board certified or board eligible.

C. The surgical consent forms shall indicate whether the surgery is elective or medically necessary. If a consent is obtained in an emergency, the surgical consent form shall indicate the nature of the emergency.

VA.R. Doc. No. R19-30; Filed August 27, 2019, 8:44 a.m.

## **BOARD OF COUNSELING**

### **Final Regulation**

Title of Regulation: **18VAC115-20. Regulations Governing the Practice of Professional Counseling (amending 18VAC115-20-52).**

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

Effective Date: October 16, 2019.

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

Summary:

*In response to a petition for rulemaking, the amendments allow acceptance of supervised practicum and internship hours completed in a doctoral program accredited by the Council for Accreditation of Counseling and Related Educational Programs as meeting a portion of the hours of supervised practice required for licensure.*

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.

## **18VAC115-20-52. Residency requirements.**

A. Registration. Applicants who render counseling services shall:

1. With their supervisor, register their supervisory contract on the appropriate forms for board approval before starting to practice under supervision;
2. Have submitted an official transcript documenting a graduate degree as specified in 18VAC115-20-49 to include completion of the coursework and internship requirement specified in 18VAC115-20-51; and
3. Pay the registration fee.

B. Residency requirements.

1. The applicant for licensure shall have completed a 3,400-hour supervised residency in the role of a professional counselor working with various populations, clinical problems, and theoretical approaches in the following areas:
  - a. Assessment and diagnosis using psychotherapy techniques;
  - b. Appraisal, evaluation, and diagnostic procedures;
  - c. Treatment planning and implementation;
  - d. Case management and recordkeeping;
  - e. Professional counselor identity and function; and

f. Professional ethics and standards of practice.

2. The residency shall include a minimum of 200 hours of in-person supervision between supervisor and resident in the consultation and review of clinical counseling services provided by the resident. Supervision shall occur at a minimum of one hour and a maximum of four hours per 40 hours of work experience during the period of the residency. For the purpose of meeting the 200-hour supervision requirement, in-person may include the use of secured technology that maintains client confidentiality and provides real-time, visual contact between the supervisor and the resident. Up to 20 hours of the supervision received during the supervised internship may be counted towards the 200 hours of in-person supervision if the supervision was provided by a licensed professional counselor.

3. No more than half of the 200 hours may be satisfied with group supervision. One hour of group supervision will be deemed equivalent to one hour of individual supervision.

4. Supervision that is not concurrent with a residency will not be accepted, nor will residency hours be accrued in the absence of approved supervision.

5. The residency shall include at least 2,000 hours of face-to-face client contact in providing clinical counseling services. The remaining hours may be spent in the performance of ancillary counseling services.

6. A graduate-level internship in excess of 600 hours, which was completed in a program that meets the requirements set forth in 18VAC115-20-49, may count for up to an additional 300 hours towards the requirements of a residency.

7. Supervised practicum and internship hours in a CACREP-accredited doctoral counseling program may be accepted for up to 900 hours of the residency requirement and up to 100 of the required hours of supervision provided the supervisor holds a current, unrestricted license as a professional counselor.

8. The residency shall be completed in not less than 21 months or more than four years. Residents who began a residency before August 24, 2016, shall complete the residency by August 24, 2020. An individual who does not complete the residency after four years shall submit evidence to the board showing why the supervised experience should be allowed to continue.

~~8.~~ 9. The board may consider special requests in the event that the regulations create an undue burden in regard to geography or disability that limits the resident's access to qualified supervision.

~~9.~~ 10. Residents may not call themselves professional counselors, directly bill for services rendered, or in any

way represent themselves as independent, autonomous practitioners or professional counselors. During the residency, residents shall use their names and the initials of their degree, and the title "Resident in Counseling" in all written communications. Clients shall be informed in writing of the resident's status and the supervisor's name, professional address, and phone number.

~~10.~~ 11. Residents shall not engage in practice under supervision in any areas for which they have not had appropriate education.

~~11.~~ 12. Residency hours approved by the licensing board in another United States jurisdiction that meet the requirements of this section shall be accepted.

C. Supervisory qualifications. A person who provides supervision for a resident in professional counseling shall:

1. Document two years of post-licensure clinical experience;

2. Have received professional training in supervision, consisting of three credit hours or 4.0 quarter hours in graduate-level coursework in supervision or at least 20 hours of continuing education in supervision offered by a provider approved under 18VAC115-20-106; and

3. ~~Shall hold~~ Hold an active, unrestricted license as a professional counselor or a marriage and family therapist in the jurisdiction where the supervision is being provided. At least 100 hours of the supervision shall be rendered by a licensed professional counselor. Supervisors who are substance abuse treatment practitioners, school psychologists, clinical psychologists, clinical social workers, or psychiatrists and have been approved to provide supervision may continue to do so until August 24, 2017.

D. Supervisory responsibilities.

1. Supervision by any individual whose relationship to the resident compromises the objectivity of the supervisor is prohibited.

2. The supervisor of a resident shall assume full responsibility for the clinical activities of that resident specified within the supervisory contract for the duration of the residency.

3. The supervisor shall complete evaluation forms to be given to the resident at the end of each three-month period.

4. The supervisor shall report the total hours of residency and shall evaluate the applicant's competency in the six areas stated in subdivision B 1 of this section.

5. The supervisor shall provide supervision as defined in 18VAC115-20-10.

E. Applicants shall document successful completion of their residency on the Verification of Supervision Form at the time

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of application. Applicants must receive a satisfactory competency evaluation on each item on the evaluation sheet. Supervised experience obtained prior to April 12, 2000, may be accepted toward licensure if this supervised experience met the board's requirements which that were in effect at the time the supervision was rendered.

VA.R. Doc. No. R17-12; Filed August 26, 2019, 4:41 p.m.

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## TITLE 20. PUBLIC UTILITIES AND TELECOMMUNICATIONS

### STATE CORPORATION COMMISSION

#### Proposed Regulation

<p><b>REGISTRAR'S NOTICE:</b> 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.</p>
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**Title of Regulation:** 20VAC5-315. **Regulations Governing Net Energy Metering (amending 20VAC5-315-10 through 20VAC5-315-50; adding 20VAC5-315-77).**

**Statutory Authority:** §§ 12.1-13 and 56-594 of the Code of Virginia.

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

**Public Comment Deadline:** October 11, 2019.

**Agency Contact:** David Essah, Utilities Engineer, Division of Public Utilities Regulation, State Corporation Commission, P.O. Box 1197, Richmond, VA 23218, telephone (804) 371-9336, FAX (804) 371-9350, or email david.essah@scc.virginia.gov.

**Summary:**

*To implement the provisions of Chapter 763 of the 2019 Acts of Assembly, the proposed amendments (i) introduce new caps on participation in net metering by customers of electric cooperatives; (ii) authorize electric cooperatives to vote to increase these caps up to a cumulative total of 7.0% of their system peak; (iii) permit third-party partial requirements power purchase agreements for those retail customers and nonjurisdictional customers of an electric cooperative that are exempt from federal income taxation; (iv) establish registration requirements for third-party power purchase agreement providers, including a self-certification system whereby such providers would be added to a registry maintained by the Division of Public*

*Utility Regulation; and (v) make updates necessary for existing text to be consistent with those changes.*

AT RICHMOND, AUGUST 27, 2019

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. PUR-2019-00119

Ex Parte: In the matter of amending regulations governing net energy metering

#### ORDER ESTABLISHING PROCEEDING

The Regulations Governing Net Energy Metering, 20 VAC 5-315-10 et seq. ("Net Energy Metering Rules"), adopted by the State Corporation Commission ("Commission") pursuant to § 56-594 of the Virginia Electric Utility Regulation Act, Chapter 23 (§ 56-576 et seq.) of Title 56 of the Code of Virginia ("Code"), establish the requirements for participation by an eligible customer-generator in net energy metering in the Commonwealth. The Net Energy Metering Rules include conditions for interconnection and metering, billing, and contract requirements between net metering customers, electric distribution companies, and energy service providers.

Chapter 763 of the 2019 Acts of Assembly amended § 56-594 of the Code and added new Code §§ 56-585.4 and 56-594.01 to (1) introduce new caps on participation in net metering by customers of electric cooperatives; (2) authorize electric cooperatives to vote to increase these caps up to a cumulative total of seven percent of their system peak; (3) permit third-party partial requirements power purchase agreements for those retail customers and nonjurisdictional customers of an electric cooperative that are exempt from federal income taxation; and (4) establish registration requirements for third-party partial requirements power purchase agreements, including a self-certification system whereby such providers would be added to a registry maintained by the Commission's Division of Public Utility Regulation. The current Net Energy Metering Rules thus must be revised to reflect the changes set forth in Chapter 763.

Section 56-594.01 of the Code also modified the notification process for customer-generators seeking to interconnect facilities with an electric cooperative. The Commission has been made aware of deficiencies in the form used for such notification, and therefore will consider modification of the form for all providers, including investor-owned utilities.

NOW THE COMMISSION, upon consideration of the matter, is of the opinion and finds that a proceeding should be established to amend the Net Energy Metering Rules to provide for net metering by eligible customer-generators served by electric cooperatives and third-party partial power purchase agreements for eligible customers of such cooperatives, as defined in the Code. The amended rules also

modify the Net Metering Interconnection Notification Form prescribed by the Net Metering Rules and include a new form for self-registration of third-party power purchase agreement providers.

To initiate this proceeding, the Commission Staff has prepared proposed rules ("Proposed Rules") which are appended to this Order. We will direct that notice of the Proposed Rules be given to the public and that interested persons be provided an opportunity to file written comments on, propose modifications or supplements to, or request a hearing on the Proposed Rules. We further direct that each Virginia electric distribution company within the meaning of 20 VAC 5-315-20 serve a copy of this Order upon each of their respective net metering customers and file a certificate of service. Individuals' comments, proposals, or supplements should be specific to the Proposed Rules and address only those issues pertaining to the amendment of Code § 56-594 and the addition of §§ 56-585.4 and 56-594.01 to the Code pursuant to Chapter 763 of the 2019 Acts of Assembly. Issues outside the scope of implementing these amendments will not be open for consideration.

Accordingly, IT IS ORDERED THAT:

(1) This case is docketed and assigned Case No. PUR-2019-00119.

(2) The Commission's Division of Information Resources shall forward a copy of this Order Establishing Proceeding to the Registrar of Regulations for publication in the Virginia Register of Regulations.

(3) On or before September 13, 2019, each Virginia electric distribution company shall serve a copy of this Order upon each of their respective net metering customers and file a certificate of service no later than October 4, 2019, consistent with the findings above.

(4) On or before October 11, 2019, any interested person may comment on, propose modifications or supplements to, or request a hearing on the Proposed Rules by filing an original and fifteen (15) copies of such comments or requests with Joel H. Peck, Clerk, State Corporation Commission, c/o Document Control Center, P.O. Box 2118, Richmond, Virginia 23218. Individuals' comments, proposals, or supplements should be specific to the Proposed Rules and address only those issues pertaining to the amendment of Code § 56-594 and the addition of §§ 56-585.4 and 56-594.01 to the Code pursuant to Chapter 763 of the 2019 Acts of Assembly. Issues outside the scope of implementing this amendment will not be open for consideration. Any request for hearing shall state with specificity why the issues raised in the request for hearing cannot be adequately addressed in written comments. If a sufficient request for hearing is not received, the Commission may consider the matter and enter an order based upon the papers filed herein. Interested parties shall refer in their comments or requests to Case No. PUR-

2019-00119. Interested persons desiring to submit comments electronically may do so by following the instructions available at the Commission's website: <http://www.scc.virginia.gov/case>.

(5) This matter is continued for further orders of the Commission.

AN ATTESTED COPY hereof shall be sent by the Clerk of the Commission to all persons on the official Service List in this matter. The Service List is available from the Clerk of the State Corporation Commission, c/o Document Control Center, 1300 East Main Street, First Floor, Tyler Building, Richmond, Virginia 23219.

## **20VAC5-315-10. Applicability and scope.**

~~These regulations are~~ This regulation is promulgated pursuant to the provisions of §§ 56-594, 56-594.01, and 56-594.2 of the Virginia Electric Utility Regulation Act (§ 56-576 et seq. of the Code of Virginia). ~~They establish~~ This chapter establishes requirements intended to facilitate net energy metering for customers owning and operating, or contracting with persons to own or operate, or both, electrical generators that use specific types of renewable energy as the total fuel source. ~~These regulations~~ This chapter will standardize the interconnection requirements for such facilities and will govern the metering, billing, payment, and contract requirements between net metering customers, electric distribution companies, and energy service providers. Agricultural net metering customers are subject to the same provisions as nonagricultural net metering customers unless otherwise specified. On or after July 1, 2019, interconnection of eligible agricultural customer-generators shall cease for member-owned electric cooperatives only, and such facilities shall interconnect solely as small agricultural generators. For member-owned electric cooperatives, agricultural net metering customers whose agricultural renewable fuel generators were interconnected before July 1, 2019, may continue to participate in net energy metering for a period not to exceed 25 years from the date of their agricultural renewable fuel generator's original interconnection.

~~These regulations~~ This chapter also establish establishes requirements for the interconnection of small agricultural generators. Small agricultural generators or agricultural renewable fuel generators may elect to interconnect as a net metering customer or as small agricultural generators pursuant to 20VAC5-315-75, but not both. Existing eligible agricultural renewable fuel generators may elect to become small agricultural generators, but may not revert to being an agricultural renewable fuel generator after such election.

## **20VAC5-315-20. Definitions.**

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

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"Agricultural business" means any sole proprietorship, corporation, partnership, electing small business (Subchapter S) corporation, or limited liability company engaged primarily in the production and sale of plants and animals, products collected from plants and animals, or plant and animal services that are useful to the public.

"Agricultural net metering customer" means a customer that operates an electrical generating facility consisting of one or more agricultural renewable fuel generators having an aggregate generation capacity of not more than 500 kilowatts as part of an agricultural business under a net metering service arrangement. An agricultural net metering customer may be served by multiple meters of one utility that are located at separate but contiguous sites and that may be aggregated into one account. This account shall be served under the appropriate tariff.

"Agricultural renewable fuel generator" or "agricultural renewable fuel generating facility" means one or more electrical generators that:

1. Use as their sole energy source solar power, wind power, or aerobic or anaerobic digester gas;
2. The agricultural net metering customer owns and operates, or has contracted with other persons to own or operate, or both;
3. Are located on land owned or controlled by the agricultural business;
4. Are connected to the agricultural net metering customer's wiring on the agricultural net metering customer's side of the agricultural net metering customer's interconnection with the distributor;
5. Are interconnected and operated in parallel with an electric company's distribution facilities; and
6. Are used primarily to provide energy to metered accounts of the agricultural business.

"Billing period" means, as to a particular agricultural net metering customer or a net metering customer, the time period between the two meter readings upon which the electric distribution company and the energy service provider calculate the agricultural net metering customer's or net metering customer's bills.

"Billing period credit" means, for a nontime-of-use agricultural net metering customer or a nontime-of-use net metering customer, the quantity of electricity generated and fed back into the electric grid by the agricultural net metering customer's agricultural renewable fuel generator or generators or by the net metering customer's renewable fuel generator or generators in excess of the electricity supplied to the customer over the billing period. For time-of-use agricultural net metering customers or time-of-use net metering customers,

billing period credits are determined separately for each time-of-use tier.

"Competitive service provider" means a person, licensed by the State Corporation Commission, that sells or offers to sell a competitive energy service within the Commonwealth. This term includes affiliated competitive service providers but does not include a party that supplies electricity or natural gas, or both, exclusively for its own consumption or the consumption of one or more of its affiliates. For the purpose of this chapter, competitive service providers include aggregators.

"Contiguous sites" means a group of land parcels in which each parcel shares at least one boundary point with at least one other parcel in the group. Property whose surface is divided only by public right-of-way is considered contiguous.

"Customer" means a net metering customer or an agricultural net metering customer.

"Demand charge-based time-of-use tariff" means a retail tariff for electric supply service that has two or more time-of-use tiers for energy-based charges and an electricity supply demand (kilowatt) charge.

"Electric cooperative" means an electric distribution company organized pursuant to Chapter 9.1 (§ 56-231.15 et seq.) of Title 56 of the Code of Virginia, owned by its members.

"Electric distribution company" means the entity that owns or operates the distribution facilities delivering electricity to the premises of an agricultural net metering customer or a net metering customer.

"Energy service provider (supplier)" means the entity providing electricity supply service, either tariffed or competitive service, to an agricultural net metering customer or a net metering customer.

"Excess generation" means the amount of electrical energy generated in excess of the electrical energy consumed by the agricultural net metering customer or net metering customer over the course of the net metering period. For time-of-use agricultural net metering customers or net metering customers, excess generation is determined separately for each time-of-use tier.

"Generator" or "generating facility" means an electrical generating facility consisting of one or more renewable fuel generators or one or more agricultural renewable fuel generators that meet the criteria under the definition of "net metering customer" and "agricultural net metering customer," respectively.

"Net metering customer" means a customer owning and operating, or contracting with other persons to own or operate, or both, an electrical generating facility consisting of one or more renewable fuel generators having an aggregate

generation capacity of not more than 20 kilowatts for residential customers and not more than one megawatt for nonresidential customers. The generating facility shall be operated under a net metering service arrangement.

"Net metering period" means each successive 12-month period beginning with the first meter reading date following the final interconnection of an agricultural net metering customer or a net metering customer's generating facility consisting of one or more agricultural renewable fuel generators or one or more renewable fuel generators, respectively, with the electric distribution company's distribution facilities.

"Net metering service" means providing retail electric service to an agricultural net metering customer operating an agricultural renewable fuel generating facility or a net metering customer operating a renewable fuel generating facility and measuring the difference, over the net metering period, between the electricity supplied to the customer from the electric grid and the electricity generated and fed back to the electric grid by the customer.

"Nonprofit customer" or "not-for-profit customer" means a person that is exempt from federal income taxation, including (without limitation) schools, hospitals, institutions of higher education, public charities, and churches and other houses of religious worship, as determined by the Internal Revenue Service.

"Person" means any individual, sole proprietorship, corporation, limited liability company, partnership, association, company, business, trust, joint venture, or other private legal entity, the Commonwealth, or any city, county, town, authority, or other political subdivision of the Commonwealth.

"Purchase power agreement provider" or "PPA provider" means, in an electric cooperative service territory, a person registered with the commission's Division of Public Utility Regulation pursuant to 20VAC5-315-77 to offer third-party partial requirements power purchase agreements to customers.

"Registry" means, in reference to a PPA provider, the list of those persons registered with the commission's Division of Public Utility Regulation as PPA providers.

"Renewable Energy Certificate" or "REC" represents the renewable energy attributes associated with the production of one megawatt-hour (MWh) of electrical energy by a generator.

"Renewable fuel generator" or "renewable fuel generating facility" means one or more electrical generators that:

1. Use renewable energy, as defined by § 56-576 of the Code of Virginia, as their total fuel source;

2. The net metering customer owns and operates, or has contracted with other persons to own or operate, or both;

3. Are located on the net metering customer's premises and connected to the net metering customer's wiring on the net metering customer's side of its interconnection with the distributor;

4. Are interconnected pursuant to a net metering arrangement and operated in parallel with the electric distribution company's distribution facilities; and

5. Are intended primarily to offset all or part of the net metering customer's own electricity requirements. The capacity of any generating facility installed on or after July 1, 2015, shall not exceed the expected annual energy consumption based on the previous 12 months of billing history or an annualized calculation of billing history if 12 months of billing history is not available.

"Small agricultural generating facility" means an electrical generating facility that:

1. Has a capacity of not more than 1.5 megawatts and does not exceed 150% of the customer's expected annual energy consumption based on the previous 12 months of billing history or an annualized calculation of billing history if 12 months of billing history is not available;

2. Uses as its total source of fuel renewable energy;

3. Is located on the customer's premises and is interconnected with the utility's distribution system through a separate meter;

4. Is interconnected and operated in parallel with an electric utility's distribution system but not transmission facilities;

5. Is designed so that the electricity generated is expected to remain on the utility's distribution system; and

6. Is a qualifying small power production facility pursuant to the Public Utility Regulatory Policies Act of 1978 (P.L. 95-617).

"System peak" for an electric cooperative, means the highest peak, based on the noncoincident peak of the electric cooperative or the coincident peak of all of the electric cooperative's customers of the past three years listed in Part O, Line 20 of Form 7 (Financial And Operating Report - Electric Distribution) filed with the U.S. Department of Agriculture's Rural Utilities Service (RUS), or an equivalent form if a cooperative is not an RUS borrower, less any portion of the cooperative's total load that is served by a competitive service provider or by a market-based rate.

"Small agricultural generator" means a customer that:

1. Is not an eligible agricultural customer-generator pursuant to § 56-594 of the Code of Virginia;

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2. Operates a small agricultural generating facility as part of an agricultural business;
3. May be served by multiple meters that are located at separate but contiguous sites;
4. May aggregate the electricity consumption measured by the meters, solely for purposes of calculating 150% of the customer's expected annual energy consumption but not for billing or retail service purposes, provided that the same utility serves all of its meters;
5. Uses not more than 25% of the contiguous land owned or controlled by the agricultural business for purposes of the renewable energy generating facility; and
6. Provides the electric utility with a certification, attested under oath, as to the amount of land being used for renewable generation.

"Third-party partial requirements power purchase agreement" or "third-party PPA" means, for an electric cooperative, an agreement entered into pursuant to § 56-594.01 K of the Code of Virginia between a customer engaging in net energy metering and a registered PPA provider pursuant to 20VAC5-315-77.

"Time-of-use customer" means an agricultural net metering customer or net metering customer receiving retail electricity supply service under a demand charge-based time-of-use tariff.

"Time-of-use period" means an interval of time over which the energy (kilowatt-hour) rate charged to a time-of-use customer does not change.

"Time-of-use tier" or "tier" means all time-of-use periods given the same name (e.g., on-peak, off-peak, critical peak, etc.) for the purpose of time-differentiating energy (kilowatt-hour)-based charges. The rates associated with a particular tier may vary by day and by season.

## **20VAC5-315-30. Company notification.**

A. A prospective agricultural net metering customer, a prospective net metering customer, or a prospective small agricultural generator (hereinafter referred to as "customer") shall submit a completed commission-approved notification form to the electric distribution company and, if different from the electric distribution company, to the energy service provider, according to the time limits in this subsection. If the electric distribution company or energy service provider has an electronic notification submittal system in place that captures identical information and implements the same process flow as the commission-approved form then such electronic system shall be acceptable for use in place of the commission-approved form for the purposes of this section.

If the prospective customer has contracted with another person to own or operate, or both, the generator or generators, then the notice will include detailed, current, and accurate

~~contract~~ contact information for the owner or operator, or both, including without limitation, the name and title of one or more individuals responsible for the interconnection and operation of the generator or generators, a telephone number, a physical street address other than a post office box, a fax number, and an email address for each such person.

1. A residential customer shall notify its supplier ~~and prior to starting any construction or installation of an electrical generating facility, or adding capacity to an existing electrical generating facility.~~ The residential customer shall receive approval to interconnect from the electric distribution company prior to installation or adding capacity to an interconnecting the new or expanded electrical generating facility. The electric distribution company shall have 30 days from the date of notification to determine whether the requirements contained in 20VAC5-315-40 have been met. The date of notification shall be considered to be the third day following the mailing of the notification form by the prospective customer.

2. A nonresidential customer shall notify its supplier ~~and prior to starting any construction or installation of an electrical generating facility or adding capacity to an existing electrical generating facility.~~ The nonresidential customer shall receive approval to interconnect from the electric distribution company prior to installation or adding capacity to an interconnecting the new or expanded electrical generating facility. The electric distribution company shall have 60 days from the date of notification to determine whether the requirements contained in 20VAC5-315-40 have been met. The date of notification shall be considered to be the third day following the mailing of the notification form by the prospective customer.

B. Thirty-one days after the date of notification for a residential customer, and 61 days after the date of notification for a nonresidential customer, the prospective customer may interconnect and begin operation of the generating facility unless the electric distribution company or the energy service provider requests a waiver of this requirement under the provisions of 20VAC5-315-80 prior to the 31st or 61st day, respectively. In cases where the electric distribution company or energy service provider requests a waiver, a copy of the request for waiver must be mailed simultaneously by the requesting party to the prospective customer and to the commission's Division of Public Utility Regulation.

C. The electric distribution company shall file with the commission's Division of Public Utility Regulation a copy of each completed notification form within 30 days of final interconnection.

**20VAC5-315-40. Conditions of interconnection.**

A. A prospective customer may begin operation of the generating facility on an interconnected basis when:

1. The customer has properly notified both the electric distribution company and energy service provider (in accordance with 20VAC5-315-30) of the customer's intent to interconnect.
2. If required by the electric distribution company's tariff, the customer has installed a lockable, electric distribution company accessible, load breaking manual disconnect switch at each of the facility's generators.
3. The licensed electrician who installs the customer's generator ~~or generators~~ certifies, by signing the commission-approved notification form, that any required manual disconnect switch ~~or switches~~ are being installed properly and that the generator ~~or generators~~ have been installed in accordance with the manufacturer's specifications as well as all applicable provisions of the National Electrical Code. If the customer or licensed Virginia Class A or B general contractor installs the customer's generator ~~or generators~~, the signed final electrical inspection can be used in lieu of the licensed electrician's certification.
4. The vendor certifies, by signing the commission-approved notification form that the generator ~~or generators~~ being installed ~~are~~ is in compliance with the requirements established by Underwriters Laboratories or other national testing laboratories in accordance with IEEE Standard 1547, Standard for Interconnecting Distributed Resources with Electric Power Systems, July 2003.
5. In the case of static inverter-connected generators with an alternating current capacity in excess of 10 kilowatts, the customer has had the inverter settings inspected by the electric distribution company. The electric distribution company may impose a fee on the customer of no more than \$50 for each generator that requires this inspection.
6. In the case of nonstatic inverter-connected generators, the customer has interconnected according to the electric distribution company's interconnection guidelines and the electric distribution company has inspected all protective equipment settings. The electric distribution company may impose a fee on the customer of no more than \$50 for each generator that requires this inspection.
7. The following requirements shall be met before interconnection may occur:
  - a. Electric distribution facilities and customer impact limitations. A customer's generator shall not be permitted to interconnect to distribution facilities if the interconnection would reasonably lead to damage to any of the electric distribution company's facilities or would reasonably lead to voltage regulation or power quality

problems at other customer revenue meters due to the incremental effect of the generator on the performance of the electric distribution system, unless the customer reimburses the electric distribution company for its cost to accommodate the interconnection, including the reasonable cost of equipment required for the interconnection.

b. Secondary, service, and service entrance limitations. The capacity of the generators at any one service location shall be less than the capacity of the electric distribution company-owned secondary, service, and service entrance cable connected to the point of interconnection, unless the customer reimburses the electric distribution company for the reasonable cost of equipment required for the interconnection.

c. Transformer loading limitations. A customer's generator shall not have the ability to overload the electric distribution company's transformer, or any transformer winding, beyond manufacturer or nameplate ratings, unless the customer reimburses the electric distribution company for the reasonable cost of equipment required for the interconnection.

d. Integration with electric distribution company facilities grounding. The grounding scheme of each generator shall comply with IEEE 1547, Standard for Interconnecting Distributed Resources with Electric Power Systems, July 2003, and shall be consistent with the grounding scheme used by the electric distribution company. If requested by a prospective customer, the electric distribution company shall assist the prospective customer in selecting a grounding scheme that coordinates with its distribution system.

e. Balance limitation. The generator ~~or generators~~ shall not create a voltage imbalance of more than 3.0% at any other customer's revenue meter if the electric distribution company transformer, with the secondary connected to the point of interconnection, is a three-phase transformer, unless the customer reimburses the electric distribution company for the reasonable cost of equipment required for the interconnection.

B. A For an investor-owned electric distribution company, a prospective customer or small agricultural generator shall not be allowed to interconnect a generator to the distribution system if doing so will cause the total rated generating alternating current capacity of all interconnected net metered generators, as defined in 20VAC5-315-20, within that customer's electric distribution company's Virginia service territory to exceed 1.0% of that company's Virginia peak-load forecast for the previous year. In any case where a prospective customer has submitted a notification form required by 20VAC5-315-30 and that customer's interconnection would cause the total rated generating alternating current capacity of all interconnected net metered

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generators, as defined in 20VAC5-315-20, within that investor-owned electric distribution company's service territory to exceed 1.0% of that company's Virginia peak-load forecast for the previous year, the electric distribution company shall, at the time it becomes aware of the fact, send written notification to the prospective customer and to the commission's Division of Public Utility Regulation that the interconnection is not allowed. In addition, upon request from any customer, the electric distribution company shall provide to the customer the amount of capacity still available for interconnection pursuant to § 56-594 D of the Code of Virginia.

C. For an electric cooperative, a prospective customer shall not be allowed to interconnect a generator to the distribution system if doing so will cause the total rated generating alternating current capacity of all interconnected net metered generators, as defined in 20VAC5-315-20, within the cooperative's Virginia service territory to exceed the following percentages of system peak: (i) for nonjurisdictional and nonprofit customers, 2.0% of the cooperative's system peak; (ii) for residential customers, 2.0% of the cooperative's system peak; or (iii) for other nonresidential customers, 1.0% of the cooperative's system peak. Such caps shall not decrease but may increase if the system peak in any year exceeds the previous year's system peak. For purposes of calculating the caps established in this subsection, all net energy metering shall be counted, whenever interconnected, and shall include net energy metering interconnected pursuant to § 56-594 of the Code of Virginia, agricultural net energy metering, and any net energy metering entered into with a third-party PPA provider registered pursuant to § 56-594.01 K of the Code of Virginia. Net energy metering with nonjurisdictional customers entered into prior to July 1, 2019, may be counted toward the caps, in the discretion of the cooperative, as net energy metering if the nonjurisdictional customer takes service pursuant to a cooperative's net energy metering rider. Net energy metering with nonjurisdictional customers entered into on or after July 1, 2019, shall be counted toward the caps by default unless the cooperative has reason to exclude such net energy metering as subject to a separate contract or arrangement. Each electric cooperative governed by this section shall publish information regarding the calculation and status of its caps, or the electric cooperative's systemwide cap established via § 56-585.4 or 56-594.01 G of the Code of Virginia if applicable, on the electric cooperative's website. In any case where a prospective customer has submitted a notification form required by 20VAC5-315-30 and that customer's interconnection would cause the total rated generating alternating current nameplate capacity of all interconnected net metered generators to exceed the percentages stated in this subsection, the electric cooperative shall, at the time it becomes aware of the fact, send written notification to the prospective customer and to the commission's Division of Public Utility Regulation that the interconnection is not

allowed and shall update its website. In addition, upon request from any customer, the electric distribution company shall provide to the customer the amount of capacity still available for interconnection pursuant to § 56-594.01 F of the Code of Virginia.

~~€. D.~~ Neither the electric distribution company nor the energy service provider shall impose any charges upon a customer for any interconnection requirements specified by this chapter, except as provided under subdivisions A 5, A 6, and A 7 of this section, 20VAC5-315-50, and 20VAC5-315-70 as related to additional metering.

~~Đ. E.~~ A customer shall immediately notify the electric distribution company of any changes in the ownership of, operational responsibility for, or contact information for any of the customer's generators.

### **20VAC5-315-50. Metering, billing, payment and contract or tariff considerations.**

Net metered energy shall be measured in accordance with standard metering practices by metering equipment capable of measuring (but not necessarily displaying) power flow in both directions. Each contract or tariff governing the relationship between a customer, electric distribution company, or energy service provider shall be identical, with respect to the rate structure, all retail rate components, and monthly charges, to the contract or tariff under which the same customer would be served if such customer were not an agricultural net metering customer or a net metering customer with the exceptions that a residential net metering customer or an agricultural net metering customer whose generating facility has a capacity that exceeds 10 kilowatts shall pay any applicable tariffed monthly standby charges to the supplier, and that time-of-use metering under an electricity supply service tariff having no demand charges is not permitted. Said contract or tariff shall be applicable to both the electric energy supplied to, and consumed from, the grid by that customer.

In instances where a customer's metering equipment is of a type for which meter readings are made off site and where this equipment has, or will be, installed for the convenience of the electric distribution company, the electric distribution company shall provide the necessary additional metering equipment to enable net metering service at no charge to the customer. In instances where a customer has requested, and where the electric distribution company would not have otherwise installed, metering equipment that is intended to be read off site, the electric distribution company may charge the customer its actual cost of installing any additional equipment necessary to implement net metering service. A time-of-use customer shall bear the incremental metering costs associated with net metering. Any incremental metering costs associated with measuring the output of any generator ~~or generators~~ for the purposes of receiving renewable energy certificates shall be installed at the customer's expense unless otherwise negotiated between the customer and the REC purchaser.

Agricultural net metering customers may be responsible for the cost of additional metering equipment necessary to accomplish account aggregation.

The customer shall receive no compensation for excess generation unless the customer has entered into a power purchase agreement with its supplier.

Upon the written request of the customer, the customer's supplier shall enter into a power purchase agreement for the excess generation for one or more net metering periods, as requested by the customer. The written request of the customer shall be submitted prior to the beginning of the first net metering period covered by the power purchase agreement. The power purchase agreement shall be consistent with this chapter. If the customer's supplier is an investor-owned electric distribution company, the supplier shall be obligated by the power purchase agreement to purchase the excess generation for the requested net metering periods at a price equal to the PJM Interconnection, L.L.C. (PJM) zonal day-ahead annual, simple average LMP (locational marginal price) for the PJM load zone in which the electric distribution company's Virginia retail service territory resides (simple average of hourly LMPs, by tiers, for time-of-use customers), as published by the PJM Market Monitoring Unit, for the most recent calendar year ending on or before the end of each net metering period, unless the electric distribution company and the customer mutually agree to a higher price or unless, after notice and opportunity for hearing, the commission establishes a different price or pricing methodology. If the Virginia retail service territory of the investor-owned electric distribution company does not reside within a PJM load zone, the power purchase agreement shall obligate the electric distribution company to purchase excess generation for the requested net metering periods at a price equal to the systemwide PJM day-ahead annual, simple average LMP (simple average of hourly LMPs, by tiers, for time-of-use customers), as published by the PJM Market Monitoring Unit, for the most recent calendar year ending on or before the end of each net metering period, unless the electric distribution company and the customer mutually agree to a higher price or unless, after notice and opportunity for hearing, the commission establishes a different price or pricing methodology.

If the customer's supplier is a member-owned electric cooperative, the supplier shall be obligated by the power purchase agreement to purchase excess generation for the requested net metering periods at a price equal to the simple average (by tiers for time-of-use customers) of the electric cooperative's hourly avoidable cost of energy, including fuel, based on the energy and energy-related charges of its primary wholesale power supplier for the net metering period, unless the electric distribution company and the customer mutually agree to a higher price or unless, after notice and opportunity for hearing, the commission establishes a different price or pricing methodology.

If the customer's supplier is a competitive supplier service provider, the supplier shall be obligated by the power purchase agreement to purchase the excess generation for the requested net metering periods at a price equal to the systemwide PJM day-ahead annual, simple average LMP (simple average of hourly LMPs, by tiers, for time-of-use customers), as published by the PJM Market Monitoring Unit, for the most recent calendar year ending on or before the end of each net metering period, unless the supplier and the customer mutually agree to a higher price or unless, after notice and opportunity for hearing, the commission establishes a different price or pricing methodology.

The customer's supplier shall make full payment annually to the customer within 30 days following the latter of the end of the net metering period or, if applicable, the date of the PJM Market Monitoring Unit's publication of the previous calendar-year's applicable zonal or systemwide PJM day-ahead annual, simple average LMP, or hourly LMP, as appropriate. The supplier may offer the customer the choice of an account credit in lieu of a direct payment. The option of a customer to request payment from its supplier for excess generation and the price or pricing formula shall be clearly delineated in the net metering tariff of the electric distribution company or timely provided by the customer's competitive supplier, as applicable. A copy of such tariff, or an Internet link to such tariff, at the option of the customer, shall be provided to each prospective customer requesting interconnection of a generating facility. A competitive supplier service provider shall provide in its contract with the customer the price or pricing formula for excess generation.

For a nontime-of-use customer, in any billing period in which there is a billing period credit, the customer shall be required to pay only the nonusage sensitive charges, including any applicable standby charges, for that billing period. For a time-of-use customer, in any billing period for which there are billing period credits in all tiers, the customer shall be required to pay only the demand ~~charge or~~ charges, nonusage sensitive charges, and any applicable standby charges, for that billing period. Any billing period credits shall be accumulated, carried forward, and applied at the first opportunity to any billing periods having positive net consumptions (by tiers, in the case of time-of-use customers). However, any accumulated billing period credits remaining unused at the end of a net metering period shall be carried forward into the next net metering period only to the extent that such accumulated billing period credits carried forward do not exceed the customer's billed consumption for the current net metering period, adjusted to exclude accumulated billing period credits carried forward and applied from the previous net metering period (recognizing tiers for time-of-use customers).

A customer owns any renewable energy certificates (RECs) associated with the total output of its generating facility. A supplier is only obligated to purchase a customer's RECs if

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the customer has exercised its one-time option at the time of signing a power purchase agreement with its supplier to include a provision requiring the purchase by the supplier of all generated RECs over the duration of the power purchase agreement.

Payment for all whole RECs purchased by the supplier during a net metering period in accordance with the power purchase agreement shall be made at the same time as the payment for any excess generation. The supplier will post a credit to the customer's account, or the customer may elect a direct payment. Any fractional REC remaining shall not receive immediate payment, but may be carried forward to subsequent net metering periods for the duration of the power purchase agreement.

The rate of the payment by the supplier for a customer's RECs shall be the daily unweighted average of the "CR" component of Virginia Electric and Power Company's Virginia jurisdiction Rider G tariff in effect over the period for which the rate of payment for the excess generation is determined, unless the customer's supplier is not Virginia Electric and Power Company, and that supplier has an applicable Virginia retail renewable energy tariff containing a comparable REC commodity price component, in which case that price component shall be the basis of the rate of payment. The commission may, with notice and opportunity for hearing, set another rate of payment or methodology for setting the rate of payment for RECs.

To the extent that RECs are not sold to the customer's supplier, they may be sold to any willing buyer at any time at a mutually agreeable price.

## **20VAC5-315-77. Rules governing PPA providers and third-party partial requirements power purchase agreements in electric cooperative service territories**

A. The provisions of this section are promulgated pursuant to § 56-594.01 K and L of the Code of Virginia.

B. Pursuant to § 56-594.01 L of the Code of Virginia, the commission has no jurisdiction over civil contract disputes and claims for damages against PPA providers.

C. PPA providers shall only enter into third party partial requirements power purchase agreements with those retail customers and nonjurisdictional customers of the electric cooperative that are exempt from federal income taxation, unless otherwise permitted by § 56-585.4 of the Code of Virginia.

D. The commission's Division of Public Utility Regulation shall administer and maintain a registry of PPA providers eligible to offer third-party partial requirements power purchase agreements.

E. Prior to entering into a third-party partial requirements power purchase agreement with an eligible customer, a PPA provider shall submit a complete Form PPAR to the

commission's Division of Public Utility Regulation and be listed on the registry of eligible PPA providers.

F. PPA provider registration shall be of two classes: residential and nonresidential. A PPA provider shall submit a Form PPAR for each class of customers it desires to serve.

G. The PPA provider shall submit a \$250 registration fee payable to the State Corporation Commission. If the PPA provider intends to be registered to serve both residential and nonresidential customers, then a \$500 registration fee shall be paid.

H. In addition to a completed Form PPAR, a PPA provider shall provide to the Division of Public Utility Regulation, contemporaneously with submitting Form PPAR, demonstration of its financial ability by providing one of the following:

1. Evidence of an investment-grade credit rating of BBB+ or higher;

2. Liquid assets of at least \$150,000, as shown by the per books balance sheet, income statement, and statement of changes in financial position of the applicant or the entity responsible for the financing of the applicant, for the two most recent annual periods. Audited financial statements shall be provided, if available, including notes to the financial statements and auditor's letter. Published financial information that includes Securities and Exchange Commission forms 10K and 10Q shall be provided, if available; or

3. A continuous performance or surety bond in a minimum amount of \$50,000 in a form to be prescribed by the commission staff. The bond shall be provided to the Division of Public Utility Regulation simultaneously with the application.

I. Upon receipt of Form PPAR, which includes the certifications required by § 56-594.01 L 3 of the Code of Virginia, and the appropriate demonstration of financial ability pursuant to subsection H of this section, the Division of Public Utility Regulation staff shall review the application to ensure it is complete. Such review shall not take longer than 30 days from receipt of complete registration material. Upon completion of the review, the PPA provider shall be added to the registry. The commission staff shall not investigate the corporate structure, financing, bookkeeping, accounting practices, contracting practices, prices, or terms and conditions in a third-party partial requirements power purchase agreement.

J. PPA providers shall adhere to the following standards of conduct:

1. PPA providers offering solar third-party PPAs shall adhere to the Solar Energy Industry Association's Solar Business Code.

2. PPA providers offering wind third-party PPAs shall adhere to the Distributed Wind Energy Association's Code of Ethics.

3. PPA providers offering other types of third-party PPAs (falling water, biomass, waste energy, landfill gas, municipal solid waste, wave motion, tides, or geothermal power) shall adhere to the North American Board of Certified Energy Practitioners Code of Ethics and Standards of Conduct.

4. PPA provider contracts shall include a conspicuous notice that the PPA provider adheres to the relevant standards of conduct and the PPA provider shall include a copy of or link to the standards of conduct on its website.

K. PPA providers shall have and include in customer contracts and on their Internet websites, a customer dispute resolution procedure.

L. Should the commission staff have reason to doubt the veracity of any certifications of the provider made as part of an application, or, in any other case, if extenuating or extraordinary circumstances exist that warrant a proceeding, the staff may initiate a formal proceeding by motion.

M. The commission's jurisdiction over PPA providers shall be limited to the investigation, prosecution, and adjudication of complaints from any person as to the provider's adherence to a commission-approved standard of conduct, the behavior of a provider's employees, agents, representatives, or contractors, and the representations made to customers in reference to the provider's business as it relates to third-party partial power purchase agreements.

N. The commission's authority to impose remedies against PPA providers is limited to monetary penalties not to exceed \$30,000 per PPA provider registration; orders for PPA providers to cease or desist from a certain practice, act, or omission; removal from the registry; and the issuance of orders to show cause.

O. No PPA provider shall, by virtue of that status alone, be considered a public utility or competitive service provider for purposes of Title 56 of the Code of Virginia.

**NOTICE:** Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

FORMS (20VAC5-315)

[Agricultural Net Metering or Net Metering Interconnection Notification, Form NMIN \(eff. 12/2015\)](#)

[Agricultural Net Metering or Net Metering Interconnection Notification, Form NMIN \(eff. 1/2020\)](#)

[Self-Certification for Registration as a Third-Party Requirements Power Purchase Agreement Registered Provider, Form PPAR \(eff. 1/2020\)](#)

VA.R. Doc. No. R20-6101; Filed August 27, 2019, 5:55 p.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.

**Titles of Regulations:** 21VAC5-20. **Broker-Dealers, Broker-Dealer Agents and Agents of the Issuer (amending 21VAC5-20-280).**

21VAC5-30. **Securities Registration (amending 21VAC5-30-80).**

21VAC5-45. **Federal Covered Securities (amending 21VAC5-45-20).**

21VAC5-80. **Investment Advisors (amending 21VAC5-80-10, 21VAC5-80-160, 21VAC5-80-200; adding 21VAC5-80-260).**

**Statutory Authority:** §§ 12.1-13 and 13.1-523 of the Code of Virginia.

**Effective Date:** September 16, 2019.

**Agency Contact:** Hazel Stewart, Manager, Securities and Retail Franchising Division, State Corporation Commission, Tyler Building, 9th Floor, P.O. Box 1197, Richmond, VA 23218, telephone (804) 371-9685, FAX (804) 371-9911, or email hazel.stewart@scc.virginia.gov.

**Summary:**

*The amendments to 21VAC5-20 (i) allow broker-dealers to delay or refuse transactions and disbursements of funds from the accounts of vulnerable adults where the financial institution suspects financial exploitation and (ii) update three documents incorporated by reference that pertain to continuing education adopted by federal self-regulatory organizations.*

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*The amendments to 21VAC5-30 (i) update a number of the statements of policy that apply to the registration of securities, including underwriting expenses, unsound financial condition, corporate securities definitions, and loans and other material transactions and (ii) incorporate by reference all statements of policy previously adopted by the State Corporation Commission.*

*The amendments to 21VAC5-45 remove the date of adoption of Form D, which is the filing form for notices under federal Rule 506 of Regulation D.*

*The amendments to 21VAC5-80 (i) allow investment advisors to delay or refuse to place orders or disburse funds that may involve or result in financial exploitation of an individual; (ii) prohibit mandatory arbitration clauses in investment advisory contracts; (iii) based on the North American Securities Administrators Association May 18, 2019, Model Rule, add a new section that establishes the minimum policies and procedures to protect client information and privacy, including both physical and cybersecurity measures; (iv) add these information and cybersecurity policies and procedures to the list of required documents to be filed by investment advisor applicants and to the list of required records for investment advisors; (v) conform the regulation to the new model rule and remove the reference to the Securities and Exchange Commission and self-regulatory organizations; and (vi) make it a dishonest or unethical practice for an investment advisor or investment advisor representative to fail to report unauthorized access to a client's information to the commission and client within three business days of discovery.*

AT RICHMOND, AUGUST 21, 2019

COMMONWEALTH OF VIRGINIA, ex rel.

STATE CORPORATION COMMISSION

CASE NO. SEC-2019-00024

Ex Parte: In the matter of  
Adopting a Revision to the Rules  
Governing the Virginia Securities Act

## ORDER ADOPTING AMENDED RULES

By Order to Take Notice ("Order") entered on June 27, 2019,<sup>1</sup> all interested persons were ordered to take notice that the State Corporation Commission ("Commission") would consider the adoption of revisions to Chapters 20, 30, 45, and 80 of Title 21 of the Virginia Administrative Code. On July 9 and 10, 2019,<sup>2</sup> the Division of Securities and Retail Franchising ("Division") mailed and emailed the Order of the proposed rules to all interested persons pursuant to the Virginia Securities Act, § 13.1-501 *et seq.* of the Code of Virginia. The Order described the proposed revisions and afforded interested persons an opportunity to file comments and request a hearing on or before August 9, 2019, with the

Clerk of the Commission. The Order provided that requests for hearing shall state why a hearing is necessary and why the issues cannot be adequately addressed in written comments.

The Commission received four comments with regard to the proposed revisions. The first comment was filed by Derek Mohar, a state-covered registered investment advisor located in Virginia.<sup>3</sup> His comment was with regard to subsection C of Commission Rule 21 VAC5-80-160, which was not revised. Therefore, the Division is not making any changes to the proposed amendments based upon this comment.

The second comment was proposed by the Securities Industry and Financial Markets Association ("SIFMA").<sup>4</sup> In general the comment was supportive of the proposed amendments, but SIFMA requested that data breach reports be clarified to make sure that it was clear who was to make the report. After a discussion with SIFMA about their concern, the Division changed the requirement from "investment advisors **and** investment advisor representatives" to "investment advisor **or** investment advisor representatives." [Emphasis added.]

The third comment was offered by Gerald Barnard, a state-registered investment advisor located in Virginia.<sup>5</sup> Mr. Barnard's comment was generally supportive of the amendments and indicated that the changes were necessary to prevent fraud against investment advisor clients. However, he found them burdensome as they applied to him and requested that the Division find a way to exempt his business from these necessary rules. The Division declined to make an exception.

The North American Securities Administrators Association ("NASAA") filed the fourth comment on August 9, 2019.<sup>6</sup> NASAA supports the Commission's proposed amendments to the Division's rules, particularly noting the rule governing mandatory arbitration. NASAA stated in its comments that mandatory arbitration in investment advisor contracts is contrary to the extensive regulatory oversight of investment advisors who have a fiduciary duty to their clients.

No one requested a hearing on the proposed regulation revisions.

NOW THE COMMISSION, upon consideration of the proposed amendments to the proposed rules, the recommendation of the Division, and the record in this case, finds that the proposed amendments should be adopted.

Accordingly, IT IS ORDERED THAT:

(1) The proposed rules are attached hereto, made a part of hereof, and are hereby ADOPTED effective September 16, 2019.

(2) AN ATTESTED COPY hereof, together with a copy of the adopted rules, shall be sent by the Clerk of the Commission in care of Ronald W. Thomas, Director of the Division, who forthwith shall give further notice of the

adopted rules by mailing or emailing a copy of this Order to all interested persons.

(3) The Commission's Division of Information Resources forthwith shall cause a copy of this Order, together with the adopted rules, to be forwarded to the Virginia Registrar of Regulations for appropriate publication in the Virginia Register of Regulations.

(4) This case is dismissed from the Commission's docket, and the papers herein shall be placed in the file for ended causes.

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<sup>1</sup>Doc. Con. Cen. No. 190640066.

<sup>2</sup>The notice was published by the Virginia Registrar of Regulations on July 22, 2019. Doc. Con. Cen. No. 190820050.

<sup>3</sup>Doc. Con. Cen. No. 198719153, filed on July 9, 2019.

<sup>4</sup>Doc. Con. Cen. No. 190740124, filed on July 24, 2019.

<sup>5</sup>Doc. Con. Cen. No. 190810184, filed on August 3, 2019.

<sup>6</sup>Doc. Con. Cen. No. 190820081.

## **21VAC5-20-280. Prohibited business conduct.**

A. Every broker-dealer is required to observe high standards of commercial honor and just and equitable principles of trade in the conduct of its business. The acts and practices described in this subsection are considered contrary to such standards and may constitute grounds for denial, suspension, or revocation of registration or such other action authorized by the Act. No broker-dealer who is registered or required to be registered shall:

1. Engage in a pattern of unreasonable and unjustifiable delays in the delivery of securities purchased by any of its customers or in the payment upon request of free credit balances reflecting completed transactions of any of its customers, or take any action that directly or indirectly interferes with a customer's ability to transfer his account; provided that the account is not subject to any lien for moneys owed by the customer or other bona fide claim, including, ~~but not limited to~~, seeking a judicial order or decree that would bar or restrict the submission, delivery or acceptance of a written request from a customer to transfer his account;
2. Induce trading in a customer's account which is excessive in size or frequency in view of the financial resources and character of the account;
3. Recommend to a customer the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the customer. The reasonable basis to recommend any such transaction to a customer shall be based upon the risks associated with a particular security, and the information obtained through the diligence and inquiry of the broker-dealer to ascertain the customer's investment profile. A

customer's investment profile includes, ~~but is not limited to~~, the customer's investment objectives, financial situation, risk tolerance and needs, tax status, age, other investments, investment experience, investment time horizon, liquidity needs, and any other relevant information known by the broker-dealer or of which the broker-dealer is otherwise made aware in connection with such recommendation;

4. Execute a transaction on behalf of a customer without authority to do so or, when securities are held in a customer's account, fail to execute a sell transaction involving those securities as instructed by a customer, without reasonable cause;

5. Exercise any discretionary power in effecting a transaction for a customer's account without first obtaining written discretionary authority from the customer, unless the discretionary power relates solely to the time or price for the execution of orders;

6. Execute any transaction in a margin account without securing from the customer a properly executed written margin agreement promptly after the initial transaction in the account, or fail, prior to or at the opening of a margin account, to disclose to a noninstitutional customer the operation of a margin account and the risks associated with trading on margin at least as comprehensively as required by FINRA Rule 2264;

7. Fail to segregate customers' free securities or securities held in safekeeping;

8. Hypothecate a customer's securities without having a lien thereon unless the broker-dealer secures from the customer a properly executed written consent promptly after the initial transaction, except as permitted by Rules of the SEC;

9. Enter into a transaction with or for a customer at a price not reasonably related to the current market price of a security or receiving an unreasonable commission or profit;

10. Fail to furnish to a customer purchasing securities in an offering, no later than the date of confirmation of the transaction, either a final prospectus or a preliminary prospectus and an additional document, which together include all information set forth in the final prospectus, either by (i) hard copy prospectus delivery or (ii) electronic prospectus delivery;

11. Introduce customer transactions on a "fully disclosed" basis to another broker-dealer that is not exempt under § 13.1-514 B 6 of the Act;

12. a. Charge unreasonable and inequitable fees for services performed, including miscellaneous services such as collection of moneys due for principal, dividends or interest, exchange or transfer of securities, appraisals,

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safekeeping, or custody of securities and other services related to its securities business;

b. Charge a fee based on the activity, value or contents (or lack thereof) of a customer account unless written disclosure pertaining to the fee, which shall include information about the amount of the fee, how imposition of the fee can be avoided and any consequence of late payment or nonpayment of the fee, was provided no later than the date the account was established or, with respect to an existing account, at least 60 days prior to the effective date of the fee;

13. Offer to buy from or sell to any person any security at a stated price unless the broker-dealer is prepared to purchase or sell at the price and under such conditions as are stated at the time of the offer to buy or sell;

14. Represent that a security is being offered to a customer "at a market" or a price relevant to the market price unless the broker-dealer knows or has reasonable grounds to believe that a market for the security exists other than that made, created or controlled by the broker-dealer, or by any person for whom he is acting or with whom he is associated in the distribution, or any person controlled by, controlling or under common control with the broker-dealer;

15. Effect any transaction in, or induce the purchase or sale of, any security by means of any manipulative, deceptive or fraudulent device, practice, plan, program, design or contrivance, which may include ~~but not be limited to:~~

a. Effecting any transaction in a security which involves no change in the beneficial ownership thereof;

b. Entering an order ~~or orders~~ for the purchase or sale of any security with the knowledge that an order ~~or orders~~ of substantially the same size, at substantially the same time and substantially the same price, for the sale of any security, has been or will be entered by or for the same or different parties for the purpose of creating a false or misleading appearance of active trading in the security or a false or misleading appearance with respect to the market for the security; however, nothing in this subdivision shall prohibit a broker-dealer from entering bona fide agency cross transactions for its customers; or

c. Effecting, alone or with one or more other persons, a series of transactions in any security creating actual or apparent active trading in the security or raising or depressing the price of the security, for the purpose of inducing the purchase or sale of the security by others;

16. Guarantee a customer against loss in any securities account of the customer carried by the broker-dealer or in any securities transaction effected by the broker-dealer with or for the customer;

17. Publish or circulate, or cause to be published or circulated, any notice, circular, advertisement, newspaper article, investment service, or communication of any kind which purports to report any transaction as a purchase or sale of any security unless the broker-dealer believes that the transaction was a bona fide purchase or sale of the security; or which purports to quote the bid price or asked price for any security, unless the broker-dealer believes that the quotation represents a bona fide bid for, or offer of, the security;

18. Use any advertising or sales presentation in such a fashion as to be deceptive or misleading. An example of such practice would be a distribution of any nonfactual data, material or presentation based on conjecture, unfounded or unrealistic claims or assertions in any brochure, flyer, or display by words, pictures, graphs or otherwise designed to supplement, detract from, supersede or defeat the purpose or effect of any prospectus or disclosure;

19. Fail to make reasonably available upon request to any person expressing an interest in a solicited transaction in a security, not listed on a registered securities exchange or quoted on an automated quotation system operated by a national securities association approved by regulation of the commission, a balance sheet of the issuer as of a date within 18 months of the offer or sale of the issuer's securities and a profit and loss statement for either the fiscal year preceding that date or the most recent year of operations, the names of the issuer's proprietor, partners or officers, the nature of the enterprises of the issuer and any available information reasonably necessary for evaluating the desirability or lack of desirability of investing in the securities of an issuer. All transactions in securities described in this subdivision shall comply with the provisions of § 13.1-507 of the Act;

20. Fail to disclose that the broker-dealer is controlled by, controlling, affiliated with or under common control with the issuer of any security before entering into any contract with or for a customer for the purchase or sale of the security, the existence of control to the customer, and if disclosure is not made in writing, it shall be supplemented by the giving or sending of written disclosure at or before the completion of the transaction;

21. Fail to make a bona fide public offering of all of the securities allotted to a broker-dealer for distribution, whether acquired as an underwriter, a selling group member, or from a member participating in the distribution as an underwriter or selling group member;

22. Fail or refuse to furnish a customer, upon reasonable request, information to which the customer is entitled, or to respond to a formal written request or complaint;

23. Fail to clearly and separately disclose to its customer, prior to any security transaction, providing investment advice for compensation or any materially related transaction that the customer's funds or securities will be in the custody of an investment advisor or contracted custodian, in a manner that does not provide Securities Investor Protection Corporation protection, or equivalent third-party coverage over the customer's assets;

24. Market broker-dealer services that are associated with financial institutions in a manner that is misleading or confusing to customers as to the nature of securities products or risks;

25. In transactions subject to breakpoints, fail to:

- a. Utilize advantageous breakpoints without reasonable basis for their exclusion;
- b. Determine information that should be recorded on the books and records of a member or its clearing firm, which is necessary to determine the availability and appropriateness of breakpoint opportunities; or
- c. Inquire whether the customer has positions or transactions away from the member that should be considered in connection with the pending transaction and apprise the customer of the breakpoint opportunities;

26. Use a certification or professional designation in connection with the offer, sale, or purchase of securities that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees in such a way as to mislead any person.

- a. The use of such certification or professional designation includes, ~~but is not limited to~~, the following:
  - (1) Use of a certification or designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;
  - (2) Use of a nonexistent or self-conferred certification or professional designation;
  - (3) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; or
  - (4) Use of a certification or professional designation that was obtained from a designating or certifying organization that:
    - (a) Is primarily engaged in the business of instruction in sales or marketing;
    - (b) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(c) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(d) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

b. There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subdivision 26 a (4) of this subsection, when the organization has been accredited by:

- (1) The American National Standards Institute;
- (2) The Institute for Credentialing Excellence (formerly the National Commission for Certifying Agencies); or
- (3) An organization that is on the U.S. Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales or marketing.

c. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

- (1) Use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and
- (2) The manner in which those words are combined.

d. For purposes of this section, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency when that job title:

- (1) Indicates seniority within the organization; or
- (2) Specifies an individual's area of specialization within the organization.

For purposes of this subdivision d, "financial services regulatory agency" includes, ~~but is not limited to~~, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under § 3 (a)(1) of the Investment Company Act of 1940 (15 USC § 80a-3(a)(1)).

e. Nothing in this regulation shall limit the commission's authority to enforce existing provisions of law;

27. Represent that securities will be listed or that application for listing will be made on a securities

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exchange or the National Association of Securities Dealers Automated Quotations (NASDAQ) system or other quotation system without reasonable basis in fact for the representation;

28. Falsify or alter so as to make false or misleading any record or document or any information provided to the commission;

29. Negotiate, facilitate, or otherwise execute a transaction on behalf of an investor involving securities issued by a third party pursuant to a claim for exemption under subsection B of § 13.1-514 of the Act unless the broker-dealer intends to report the securities owned and the value of such securities on at least a quarterly basis to the investor;

30. Offer or sell securities pursuant to a claim for exemption under subsection B of § 13.1-514 of the Act without having first verified the information relating to the securities offered or sold, which shall include, ~~but not be limited to,~~ ascertaining the risks associated with investing in the respective security;

31. Allow any person to represent or utilize its name as a trading platform without conspicuously disclosing the name of the registered broker-dealer in effecting or attempting to effect purchases and sales of securities; or

32. Engage in any conduct that constitutes a dishonest or unethical practice including, ~~but not limited to,~~ forgery, embezzlement, nondisclosure, incomplete disclosure or material omissions or untrue statements of material facts, manipulative or deceptive practices, or fraudulent course of business.

B. Every agent is required to observe high standards of commercial honor and just and equitable principles of trade in the conduct of his business. The acts and practices described in this subsection are considered contrary to such standards and may constitute grounds for denial, suspension, or revocation of registration or such other action authorized by the Act. No agent who is registered or required to be registered shall:

1. Engage in the practice of lending or borrowing money or securities from a customer, or acting as a custodian for money, securities or an executed stock power of a customer;

2. Effect any securities transaction not recorded on the regular books or records of the broker-dealer which the agent represents, unless the transaction is authorized in writing by the broker-dealer prior to execution of the transaction;

3. Establish or maintain an account containing fictitious information in order to execute a transaction which would otherwise be unlawful or prohibited;

4. Share directly or indirectly in profits or losses in the account of any customer without the written authorization of the customer and the broker-dealer which the agent represents;

5. Divide or otherwise split the agent's commissions, profits or other compensation from the purchase or sale of securities in this Commonwealth with any person not also registered as an agent for the same broker-dealer, or for a broker-dealer under direct or indirect common control;

6. Engage in conduct specified in subdivision A 2, 3, 4, 5, 6, 10, 15, 16, 17, 18, 23, 24, 25, 26, 28, 30, 31, or 32 of this section;

7. Fail to comply with the continuing education requirements under 21VAC5-20-150 C; or

8. Hold oneself out as representing any person other than the broker-dealer with whom the agent is registered and, in the case of an agent whose normal place of business is not on the premises of the broker-dealer, failing to conspicuously disclose the name of the broker-dealer for whom the agent is registered when representing the dealer in effecting or attempting to effect the purchases or sales of securities.

C. No person shall publish, give publicity to, or circulate any notice, circular, advertisement, newspaper article, letter, investment service or communication which, though not purporting to offer a security for sale, describes the security, for a consideration received or to be received, directly or indirectly, from an issuer, underwriter, or dealer, without fully disclosing the receipt, whether past or prospective, of such consideration and the amount thereof.

D. The purpose of this subsection is to identify practices in the securities business that are generally associated with schemes to manipulate and to identify prohibited business conduct of broker-dealers or sales agents who are registered or required to be registered.

1. Entering into a transaction with a customer in any security at an unreasonable price or at a price not reasonably related to the current market price of the security or receiving an unreasonable commission or profit.

2. Contradicting or negating the importance of any information contained in a prospectus or other offering materials with intent to deceive or mislead or using any advertising or sales presentation in a deceptive or misleading manner.

3. In connection with the offer, sale, or purchase of a security, falsely leading a customer to believe that the broker-dealer or agent is in possession of material, nonpublic information that would affect the value of the security.

4. In connection with the solicitation of a sale or purchase of a security, engaging in a pattern or practice of making contradictory recommendations to different investors of similar investment objective for some to sell and others to purchase the same security, at or about the same time, when not justified by the particular circumstances of each investor.

5. Failing to make a bona fide public offering of all the securities allotted to a broker-dealer for distribution by, among other things, (i) transferring securities to a customer, another broker-dealer, or a fictitious account with the understanding that those securities will be returned to the broker-dealer or its nominees or (ii) parking or withholding securities.

6. a. In addition to the application of the general anti-fraud provisions against anyone in connection with practices similar in nature to the practices discussed in this subdivision 6, ~~[ the following ]~~ subdivisions (1) through (6) ~~[ of this subdivision 6 a ]~~ specifically apply only in connection with the solicitation of a purchase or sale of over the counter (OTC) unlisted non-NASDAQ equity securities except those exempt from registration under 21VAC5-40-50:

(1) Failing to advise the customer, both at the time of solicitation and on the confirmation, of any and all compensation related to a specific securities transaction to be paid to the agent including commissions, sales charges, or concessions.

(2) In connection with a principal transaction, failing to disclose, both at the time of solicitation and on the confirmation, a short inventory position in the firm's account of more than 3.0% of the issued and outstanding shares of that class of securities of the issuer; however, this subdivision 6 of this subsection shall apply only if the firm is a market maker at the time of the solicitation.

(3) Conducting sales contests in a particular security.

(4) After a solicited purchase by a customer, failing or refusing, in connection with a principal transaction, to promptly execute sell orders.

(5) Soliciting a secondary market transaction when there has not been a bona fide distribution in the primary market.

(6) Engaging in a pattern of compensating an agent in different amounts for effecting sales and purchases in the same security.

b. Although subdivisions D 6 a (1) through (6) of this section do not apply to OTC unlisted non-NASDAQ equity securities exempt from registration under 21VAC5-40-50, nothing in this subsection precludes application of the general anti-fraud provisions against anyone in connection with practices similar in nature to

the practices discussed in subdivisions D 6 a (1) through (6) of this section.

7. Effecting any transaction in, or inducing the purchase or sale of, any security by means of any manipulative, deceptive, or other fraudulent device or contrivance including ~~but not limited to~~ the use of boiler room tactics or use of fictitious or nominee accounts.

8. Failing to comply with any prospectus delivery requirements promulgated under federal law or the Act.

9. In connection with the solicitation of a sale or purchase of an OTC unlisted non-NASDAQ security, failing to promptly provide the most current prospectus or the most recently filed periodic report filed under § 13 of the Securities Exchange Act when requested to do so by a customer.

10. Marking any order tickets or confirmations as unsolicited when in fact the transaction was solicited.

11. For any month in which activity has occurred in a customer's account, but in no event less than every three months, failing to provide each customer with a statement of account with respect to all OTC non-NASDAQ equity securities in the account, containing a value for each such security based on the closing market bid on a date certain; however, this subdivision shall apply only if the firm has been a market maker in the security at any time during the month in which the monthly or quarterly statement is issued.

12. Failing to comply with any applicable provision of the FINRA Rules or any applicable fair practice, privacy, or ethical standard promulgated by the SEC or by a self-regulatory organization approved by the SEC.

13. In connection with the solicitation of a purchase or sale of a designated security:

a. Failing to disclose to the customer the bid and ask price, at which the broker-dealer effects transactions with individual, retail customers, of the designated security as well as its spread in both percentage and dollar amounts at the time of solicitation and on the trade confirmation documents; or

b. Failing to include with the confirmation, the notice disclosure contained under 21VAC5-20-285, except the following shall be exempt from this requirement:

(1) Transactions in which the price of the designated security is \$5.00 or more, exclusive of costs or charges; however, if the designated security is a unit composed of one or more securities, the unit price divided by the number of components of the unit other than warrants, options, rights, or similar securities must be \$5.00 or more, and any component of the unit that is a warrant, option, right, or similar securities, or a convertible

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security must have an exercise price or conversion price of \$5.00 or more.

(2) Transactions that are not recommended by the broker-dealer or agent.

(3) Transactions by a broker-dealer (i) whose commissions, commission equivalents, and mark-ups from transactions in designated securities during each of the preceding three months, and during 11 or more of the preceding 12 months, did not exceed 5.0% of its total commissions, commission-equivalents, and mark-ups from transactions in securities during those months; and (ii) who has not executed principal transactions in connection with the solicitation to purchase the designated security that is the subject of the transaction in the preceding 12 months.

(4) Any transaction [ ~~or transactions~~ ] that, upon prior written request or upon its own motion, the commission conditionally or unconditionally exempts as not encompassed within the purposes of this section.

c. For purposes of this section, the term "designated security" means any equity security other than a security:

(1) Registered, or approved for registration upon notice of issuance, on a national securities exchange and makes transaction reports available pursuant to 17 CFR 11Aa3-1 under the Securities Exchange Act of 1934;

(2) Authorized, or approved for authorization upon notice of issuance, for quotation in the NASDAQ system;

(3) Issued by an investment company registered under the Investment Company Act of 1940;

(4) That is a put option or call option issued by The Options Clearing Corporation; or

(5) Whose issuer has net tangible assets in excess of \$4 million as demonstrated by financial statements dated within no less than 15 months that the broker-dealer has reviewed and has a reasonable basis to believe are true and complete in relation to the date of the transaction with the person, and

(a) In the event the issuer is other than a foreign private issuer, are the most recent financial statements for the issuer that have been audited and reported on by an independent public accountant in accordance with the provisions of 17 CFR 210.2-02 under the Securities Exchange Act of 1934; or

(b) In the event the issuer is a foreign private issuer, are the most recent financial statements for the issuer that have been filed with the SEC; furnished to the SEC pursuant to 17 CFR 240.12g3-2(b) under the Securities Exchange Act of 1934; or prepared in accordance with generally accepted accounting principles in the country of incorporation, audited in compliance with the

requirements of that jurisdiction, and reported on by an accountant duly registered and in good standing in accordance with the regulations of that jurisdiction.

E. A broker-dealer or an agent may delay or refuse a transaction or a disbursement of funds that may involve or result in the financial exploitation of an individual pursuant to § 63.2-1606 L of the Code of Virginia.

DOCUMENTS INCORPORATED BY REFERENCE  
(21VAC5-20)

~~Rule 1250 of FINRA By-Laws, Continuing Education Requirements, amended by SR-FINRA 2011-013, eff. October 17, 2011, Financial Industry Regulatory Authority, Inc.~~

~~Rule 345 A of the New York Stock Exchange Rules, Continuing Education for Registered Persons, effective as existed July 1, 1995, New York Stock Exchange.~~

~~Rule G-3(h) of the Municipal Securities Rulemaking Board, Classification of Principals and Representatives; Numerical Requirements; Testing; Continuing Education Requirements, effective as existed July 1, 1995, Municipal Securities Rulemaking Board.~~

[Rule 1240 of FINRA By-Laws, Continuing Education Requirements, amended by SR-FINRA-2017-007, eff. October 1, 2018, Financial Industry Regulatory Authority, Inc.](#)

[Rule 345 A of the New York Stock Exchange Rules, Continuing Education for Registered Persons, effective as existed July 1, 1995, New York Stock Exchange, superseded by Financial Industry Regulation Authority, Inc. Rule 1200 Series - Rule, 1240, eff. October 1, 2018](#)

[Rule G-3\(i\) of the Municipal Securities Rulemaking Board, Classification of Principals and Representatives; Numerical Requirements; Testing; Continuing Education Requirements, effective as existed July 1, 1995, Municipal Securities Rulemaking Board](#)

Rule 341A of the New York Stock Exchange Market Rules, Continuing Education for Registered Persons, effective as existed May 14, 2012, New York Stock Exchange.

Rule 9.3A of the Chicago Board Options Exchange, Continuing Education for Registered Persons, effective as existed July 1, 1995, Chicago Board Options Exchange.

Article VI, Rule 11 of the Rules of the Chicago Stock Exchange, Inc., Continuing Education for Registered Persons, effective as existed July 1, 1995, Chicago Stock Exchange, Inc.

FINRA, Rule 2264, Margin Disclosure Statement, amended by SR-FINRA-2011-065, eff. December 5, 2011.

Article I, Paragraph u of FINRA By-Laws, amended by SR-FINRA-2008-0026, eff. December 15, 2008.

## **21VAC5-30-80. Adoption of North American Securities Administration Association, Inc. statements of policy.**

The commission adopts the following North American Securities Administration Association, Inc. (NASAA) statements of policy that shall apply to the registration of securities in the Commonwealth. It will be considered a basis for denial of an application if an offering fails to comply with an applicable statement of policy. While applications not conforming to a statement of policy shall be looked upon with disfavor, where good cause is shown, certain provisions may be modified or waived by the commission.

1. Options and Warrants, as amended March 31, 2008.
2. Underwriting Expenses, Underwriter's Warrants, Selling Expenses and Selling Security Holders, as amended ~~March 31, 2008~~ May 6, 2018.
3. Real Estate Programs, as amended May 7, 2007.
4. Oil and Gas Programs, as amended May 6, 2012.
5. Cattle-Feeding Programs, as adopted September 17, 1980.
6. Unsound Financial Condition, as amended ~~March 31, 2008~~ May 6, 2018.
7. Real Estate Investment Trusts, as amended May 7, 2007.
8. Church Bonds, as adopted April 29, 1981.
9. Small Company Offering Registrations, as adopted April 28, 1996.
10. NASAA Guidelines Regarding Viatical Investment, as adopted October 1, 2002.
11. Corporate Securities Definitions, as amended ~~March 31, 2008~~ May 6, 2018.
12. Church Extension Fund Securities, as amended April 18, 2004.
13. Promotional Shares, as amended March 31, 2008.
14. Loans and Other Material Transactions, as amended ~~March 31, 2008~~ May 6, 2018.
15. Impoundment of Proceeds, as amended March 31, 2008.
16. Electronic Offering Documents and Electronic Signatures, as adopted May 8, 2017.

## **DOCUMENTS INCORPORATED BY REFERENCE (21VAC5-30)**

~~Statement of Policy Regarding Church Extension Fund Securities, adopted April 17, 1994, amended April 18, 2004, North American Securities Administrators Association, Inc.~~

[Statement of Policy Regarding Church Extension Fund Securities as amended April 18, 2004, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Options and Warrants, as amended March 31, 2008, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Underwriting Expenses, Underwriter's Warrants, Selling Expenses and Selling Security Holders, as amended May 6, 2018, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Unsound Financial Condition, as amended May 6, 2018, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Real Estate Investment Trusts, as amended May 7, 2007, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Real Estate Programs, as amended May 7, 2007, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Oil and Gas Programs, as amended May 6, 2012, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Church Bonds, as adopted April 29, 1981, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Small Company Offering Registrations, as adopted April 28, 1996, North American Securities Administrators Association, Inc.](#)

[NASAA Guidelines Regarding Viatical Investment, as adopted October 1, 2002, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Corporate Securities Definitions, as amended May 6, 2018, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Promotional Shares, as amended March 31, 2008, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Loans and Other Material Transactions, as amended May 6, 2018, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Impoundment of Proceeds, as amended March 31, 2008, North American Securities Administrators Association, Inc.](#)

[Statement of Policy Regarding Electronic Offering Documents and Electronic Signatures, as adopted May 8, 2017, North American Securities Administrators Association, Inc.](#)

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[Statement of Policy Regarding Cattle-Feeding Programs, as adopted September 17, 1980, North American Securities Administrators Association, Inc.](#)

## **21VAC5-45-20. Offerings conducted pursuant to Rule 506 of federal Regulation ~~regulation~~ D (17 CFR 230.506): Filing filing requirements and issuer-agent exemption.**

A. An issuer offering a security that is a covered security under § 18 (b)(4)(D) of the Securities Act of 1933 (15 USC § 77r(b)(4)(D)) shall file with the commission no later than 15 days after the first sale of such federal covered security in this Commonwealth:

1. A notice on SEC Form D (17 CFR 239.500), as filed with the SEC.
2. A filing fee of \$250 payable to the Treasurer of Virginia.

B. An amendment filing shall contain a copy of the amended SEC Form D. No fee is required for an amendment.

C. For the purpose of this chapter, SEC "Form D" is the document, as adopted by the SEC, ~~and in effect on September 23, 2013,~~ entitled "Form D, Notice of Exempt Offering of Securities."

D. Pursuant to § 13.1-514 B 13 of the Act, an agent of an issuer who effects transactions in a security exempt from registration under the Securities Act of 1933 pursuant to rules and regulations promulgated under § 4(2) thereof (15 USC § 77d(2)) is exempt from the agent registration requirements of the Act.

**NOTICE:** Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

### FORMS (21VAC5-45)

~~Form D, Notice of Exempt Offering of Securities, U.S. Securities and Exchange Commission, SEC1972 (rev. 2/2012)~~

[Form D, Notice of Exempt Offering of Securities, U.S. Securities and Exchange Commission, SEC1972 \(rev. 5/2017\)](#)

[Uniform Consent to Service of Process, Form U-2 \(rev. 7/2017\)](#)

[Uniform Notice of Regulation A - Tier 2 Offering \(undated, filed 10/2016\)](#)

[Form NF - Uniform Investment Company Notice Filing \(4/1997\)](#)

[Uniform Notice of Federal Crowdfunding Offering, Form U-CF \(undated, filed 9/2017\)](#)

### Part I

Investment Advisor Registration, Notice Filing for Federal Covered Advisors, Expiration, Renewal, Updates and Amendments, Terminations and Merger or Consolidation

## **21VAC5-80-10. Application for registration as an investment advisor and notice filing as a federal covered advisor.**

A. Application for registration as an investment advisor shall be filed in compliance with all requirements of IARD and in full compliance with forms and regulations prescribed by the commission and shall include all information required by such forms.

B. An application shall be deemed incomplete for registration as an investment advisor unless the applicant submits the following executed forms, fee, and information:

1. Form ADV Parts 1 and 2 submitted to IARD.
2. The statutory fee made payable to FINRA in the amount of \$200 submitted to IARD pursuant to § 13.1-505 F of the Act.
3. A copy of the client agreement.
4. A copy of the firm's supervisory and procedures manual as required by 21VAC5-80-170.
5. Copies of all advertising materials.
6. Copies of all stationery and business cards.
7. A signed affidavit stating that an investment advisor domiciled in Virginia has not conducted investment advisory business prior to registration, and for investment advisors domiciled outside of Virginia an affidavit stating that the advisor has fewer than six clients in the prior 12-month period.
8. An audited or certified balance sheet prepared in accordance with generally accepted accounting practices reflecting the financial condition of the investment advisor not more than 90 days prior to the date of such filing.
9. A copy of the firm's disaster recovery plan as required by 21VAC5-80-160 F.
10. Evidence of at least one qualified individual with an investment advisor representative registration pending on IARD on behalf of the investment advisor.
11. A copy of the firm's physical security and cybersecurity policies and procedures as required by 21VAC5-80-260 A.
12. A copy of the firm's privacy policy as required by 21VAC5-80-260 B.
13. Any other information the commission may require.

For purposes of this section, the term "net worth" means an excess of assets over liabilities, as determined by generally accepted accounting principles. Net worth shall not include: prepaid expenses (except as to items properly classified as assets under generally accepted accounting principles), deferred charges such as deferred income tax charges, goodwill, franchise rights, organizational expenses, patents, copyrights, marketing rights, unamortized debt discount and expense, all other assets of intangible nature, home furnishings, automobiles, and any other personal items not readily marketable in the case of an individual; advances or loans to stockholders and officers in the case of a corporation; and advances or loans to partners in the case of a partnership.

C. The commission shall either grant or deny each application for registration within 30 days after it is filed. However, if additional time is needed to obtain or verify information regarding the application, the commission may extend such period as much as 90 days by giving written notice to the applicant. No more than three such extensions may be made by the commission on any one application. An extension of the initial 30-day period, not to exceed 90 days, shall be granted upon written request of the applicant.

D. Every person who transacts business in this Commonwealth as a federal covered advisor shall file a notice as prescribed in subsection E of this section in compliance with all requirements of the IARD.

E. A notice filing for a federal covered advisor shall be deemed incomplete unless the federal covered advisor submits the following executed forms, fee, and information:

1. Form ADV Parts 1 and 2.
2. A fee made payable to FINRA in the amount of \$200.

**21VAC5-80-160. Recordkeeping requirements for investment advisors.**

A. Every investment advisor registered or required to be registered under the Act shall make and keep true, accurate and current the following books, ledgers and records, except an investment advisor having its principal place of business outside this Commonwealth and registered or licensed, and in compliance with the applicable books and records requirements, in the state where its principal place of business is located, shall only be required to make, keep current, maintain and preserve such of the following required books, ledgers and records as are not in addition to those required under the laws of the state in which it maintains its principal place of business:

1. A journal ~~or journals~~, including cash receipts and disbursements records, and any other records of original entry forming the basis of entries in any ledger.
2. General and auxiliary ledgers (or other comparable records) reflecting asset, liability, reserve, capital, income and expense accounts.

3. A memorandum of each order given by the investment advisor for the purchase or sale of any security, of any instruction received by the investment advisor from the client concerning the purchase, sale, receipt or delivery of a particular security, and of any modification or cancellation of any such order or instruction. The memoranda shall show the terms and conditions of the order, instruction, modification or cancellation; shall identify the person connected with the investment advisor who recommended the transaction to the client and the person who placed the order; and shall show the account for which entered, the date of entry, and the bank, broker or dealer by or through whom executed where appropriate. Orders entered pursuant to the exercise of discretionary power shall be so designated.

4. All check books, bank statements, canceled checks and cash reconciliations of the investment advisor.

5. All bills or statements (or copies of), paid or unpaid, relating to the business as an investment advisor.

6. All trial balances, financial statements prepared in accordance with generally accepted accounting principles which shall include a balance sheet, income statement and such other statements as may be required pursuant to 21VAC5-80-180, and internal audit working papers relating to the investment advisor's business as an investment advisor.

7. Originals of all written communications received and copies of all written communications sent by the investment advisor relating to (i) any recommendation made or proposed to be made and any advice given or proposed to be given; (ii) any receipt, disbursement or delivery of funds or securities; and (iii) the placing or execution of any order to purchase or sell any security; however, (a) the investment advisor shall not be required to keep any unsolicited market letters and other similar communications of general public distribution not prepared by or for the investment advisor, and (b) if the investment advisor sends any notice, circular or other advertisement offering any report, analysis, publication or other investment advisory service to more than 10 persons, the investment advisor shall not be required to keep a record of the names and addresses of the persons to whom it was sent; except that if the notice, circular or advertisement is distributed to persons named on any list, the investment advisor shall retain with a copy of the notice, circular or advertisement a memorandum describing the list and the source thereof.

8. A list or other record of all accounts which list identifies the accounts in which the investment advisor is vested with any discretionary power with respect to the funds, securities or transactions of any client.

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9. All powers of attorney and other evidences of the granting of any discretionary authority by any client to the investment advisor, or copies thereof.

10. All written agreements (or copies thereof) entered into by the investment advisor with any client, and all other written agreements otherwise related to the investment advisor's business as an investment advisor.

11. A file containing a copy of each notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media that the investment advisor circulates or distributes, directly or indirectly, to two or more persons (other than persons connected with the investment advisor), and if the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media recommends the purchase or sale of a specific security and does not state the reasons for the recommendation, a memorandum of the investment adviser indicating the reasons for the recommendation.

12. a. A record of every transaction in a security in which the investment advisor or any investment advisory representative of the investment advisor has, or by reason of any transaction acquires, any direct or indirect beneficial ownership, except (i) transactions effected in any account over which neither the investment advisor nor any investment advisory representative of the investment advisor has any direct or indirect influence or control; and (ii) transactions in securities which are direct obligations of the United States. The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment advisor or investment advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

b. For purposes of this subdivision 12, the following definitions will apply. The term "advisory representative" means any partner, officer or director of the investment advisor; any employee who participates in any way in the determination of which recommendations shall be made; any employee who, in connection with his duties, obtains any information concerning which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons who obtain information concerning securities recommendations being made by the investment advisor

prior to the effective dissemination of the recommendations:

- (1) Any person in a control relationship to the investment adviser;
- (2) Any affiliated person of a controlling person; and
- (3) Any affiliated person of an affiliated person.

"Control" means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with the company. Any person who owns beneficially, either directly or through one or more controlled companies, more than 25% of the ownership interest of a company shall be presumed to control the company.

c. An investment advisor shall not be deemed to have violated the provisions of this subdivision 12 because of his failure to record securities transactions of any investment advisor representative if the investment advisor establishes that it instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

13. a. Notwithstanding the provisions of subdivision 12 of this subsection, where the investment advisor is primarily engaged in a business ~~or businesses~~ other than advising investment advisory clients, a record must be maintained of every transaction in a security in which the investment advisor or any investment advisory representative of such investment advisor has, or by reason of such transaction acquires, any direct or indirect beneficial ownership, except (i) transactions effected in any account over which neither the investment advisor nor any investment advisory representative of the investment advisor has any direct or indirect influence or control; and (ii) transactions in securities which are direct obligations of the United States. The record shall state the title and amount of the security involved; the date and nature of the transaction (i.e., purchase, sale or other acquisition or disposition); the price at which it was effected; and the name of the broker, dealer or bank with or through whom the transaction was effected. The record may also contain a statement declaring that the reporting or recording of any such transaction shall not be construed as an admission that the investment advisor or investment advisory representative has any direct or indirect beneficial ownership in the security. A transaction shall be recorded not later than 10 days after the end of the calendar quarter in which the transaction was effected.

b. An investment advisor is "primarily engaged in a business [ ~~or businesses~~ ] other than advising investment advisory clients" when, for each of its most recent three fiscal years or for the period of time since organization, whichever is less, the investment advisor derived, on an

unconsolidated basis, more than 50% of (i) its total sales and revenues, and (ii) its income (or loss) before income taxes and extraordinary items, from such other business [~~or businesses~~].

c. For purposes of this subdivision 13, the following definitions will apply. The term "advisory representative," when used in connection with a company primarily engaged in a business [~~or businesses~~] other than advising investment advisory clients, means any partner, officer, director or employee of the investment advisor who participates in any way in the determination of which recommendation shall be made, or whose functions or duties relate to the determination of which securities are being recommended prior to the effective dissemination of the recommendations; and any of the following persons, who obtain information concerning securities recommendations being made by the investment advisor prior to the effective dissemination of the recommendations or of the information concerning the recommendations:

- (1) Any person in a control relationship to the investment advisor;
- (2) Any affiliated person of a controlling person; and
- (3) Any affiliated person of an affiliated person.

d. An investment advisor shall not be deemed to have violated the provisions of this subdivision 13 because of his failure to record securities transactions of any investment advisor representative if he establishes that he instituted adequate procedures and used reasonable diligence to obtain promptly reports of all transactions required to be recorded.

14. A copy of each written statement and each amendment or revision, given or sent to any client or prospective client of such investment advisor in accordance with the provisions of 21VAC5-80-190 and a record of the dates that each written statement, and each amendment or revision, was given, or offered to be given, to any client or prospective client who subsequently becomes a client.

15. For each client that was obtained by the advisor by means of a solicitor to whom a cash fee was paid by the advisor, the following:

- a. Evidence of a written agreement to which the advisor is a party related to the payment of such fee;
- b. A signed and dated acknowledgement of receipt from the client evidencing the client's receipt of the investment advisor's disclosure statement and a written disclosure statement of the solicitor; and
- c. A copy of the solicitor's written disclosure statement. The written agreement, acknowledgement and solicitor disclosure statement will be considered to be in

compliance if such documents are in compliance with Rule 275.206(4)-3 of the Investment Advisers Act of 1940.

For purposes of this regulation, the term "solicitor" means any person or entity who, for compensation, acts as an agent of an investment advisor in referring potential clients.

16. All accounts, books, internal working papers, and any other records or documents that are necessary to form the basis for or demonstrate the calculation of the performance or rate of return of all managed accounts or securities recommendations in any notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including ~~but not limited to~~ electronic media that the investment advisor circulates or distributes directly or indirectly, to two or more persons (other than persons connected with the investment advisor); however, with respect to the performance of managed accounts, the retention of all account statements, if they reflect all debits, credits, and other transactions in a client's account for the period of the statement, and all worksheets necessary to demonstrate the calculation of the performance or rate of return of all managed accounts shall be deemed to satisfy the requirements of this subdivision.

17. A file containing a copy of all written communications received or sent regarding any litigation involving the investment advisor or any investment advisor representative or employee, and regarding any written customer or client complaint.

18. Written information about each investment advisory client that is the basis for making any recommendation or providing any investment advice to the client.

19. Written procedures to supervise the activities of employees and investment advisor representatives that are reasonably designed to achieve compliance with applicable securities laws and regulations.

20. A file containing a copy of each document (other than any notices of general dissemination) that was filed with or received from any state or federal agency or self regulatory organization and that pertains to the registrant or its investment advisor representatives, which file should contain, but is not limited to, all applications, amendments, renewal filings, and correspondence.

21. Any records documenting dates, locations and findings of the investment advisor's annual review of these policies and procedures conducted pursuant to subdivision F of 21VAC5-80-170.

22. Copies, with original signatures of the investment advisor's appropriate signatory and the investment advisor representative, of each initial Form U4 and each amendment to Disclosure Reporting Pages (DRPs U4)

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must be retained by the investment advisor (filing on behalf of the investment advisor representative) and must be made available for inspection upon regulatory request.

23. Where the advisor inadvertently held or obtained a client's securities or funds and returned them to the client within three business days or has forwarded third party checks within three business days of receipt, the advisor will be considered as not having custody but shall keep the following record to identify all securities or funds held or obtained relating to the inadvertent custody:

A ledger or other listing of all securities or funds held or obtained, including the following information:

- a. Issuer;
- b. Type of security and series;
- c. Date of issue;
- d. For debt instruments, the denomination, interest rate and maturity date;
- e. Certificate number, including alphabetical prefix or suffix;
- f. Name in which registered;
- g. Date given to the advisor;
- h. Date sent to client or sender;
- i. Form of delivery to client or sender, or copy of the form of delivery to client or sender; and
- j. Mail confirmation number, if applicable, or confirmation by client or sender of the fund's or security's return.

24. If an investment advisor obtains possession of securities that are acquired from the issuer in a transaction or chain of transactions not involving any public offering that comply with the exception from custody under subdivision C 2 of 21VAC5-80-146, the advisor shall keep the following records:

- a. A record showing the issuer or current transfer agent's name address, phone number, and other applicable contract information pertaining to the party responsible for recording client interests in the securities; and
- b. A copy of any legend, shareholder agreement, or other agreement showing that those securities that are transferable only with prior consent of the issuer or holders of the outstanding securities of the issuer.

25. Any records required pursuant to 21VAC5-80-260.

B. 1. If an investment advisor subject to subsection A of this section has custody or possession of securities or funds of any client, the records required to be made and kept under subsection A of this section shall also include:

a. A journal or other record showing all purchases, sales, receipts and deliveries of securities (including certificate numbers) for such accounts and all other debits and credits to the accounts.

b. A separate ledger account for each client showing all purchases, sales, receipts and deliveries of securities, the date and price of each purchase and sale, and all debits and credits.

c. Copies of confirmations of all transactions effected by or for the account of any client.

d. A record for each security in which any client has a position, which record shall show the name of each client having any interest in each security, the amount or interest of each client, and the location of each security.

e. A copy of any records required to be made and kept under 21VAC5-80-146.

f. A copy of any and all documents executed by the client (including a limited power of attorney) under which the advisor is authorized or permitted to withdraw a client's funds or securities maintained with a custodian upon the advisor's instruction to the custodian.

g. A copy of each of the client's quarterly account statements as generated and delivered by the qualified custodian. If the advisor also generates a statement that is delivered to the client, the advisor shall also maintain copies of such statements along with the date such statements were sent to the clients.

h. If applicable to the advisor's situation, a copy of the special examination report verifying the completion of the examination by an independent certified public accountant and describing the nature and extent of the examination.

i. A record of any finding by the independent certified public accountant of any material discrepancies found during the examination.

j. If applicable, evidence of the client's designation of an independent representative.

2. If an investment advisor has custody because it advises a pooled investment vehicle, as defined in 21VAC5-80-146 A in the definition of custody in ~~clause~~ subdivision 1 c, the advisor shall also keep the following records:

a. True, accurate, and current account statements;

b. Where the advisor complies with 21VAC5-80-146 C 4, the records required to be made and kept shall include:

(1) The date ~~or dates~~ of the audit;

(2) A copy of the audited financial statements; and

(3) Evidence of the mailing of the audited financial to all limited partners, members, or other beneficial owners within 120 days of the end of its fiscal year.

c. Where the advisor complies with 21VAC5-80-146 B 5, the records required to be made and kept shall include:

(1) A copy of the written agreement with the independent party reviewing all fees and expenses, indicating the responsibilities of the independent third party.

(2) Copies of all invoices and receipts showing approval by the independent party for payment through the qualified custodian.

C. Every investment advisor subject to subsection A of this section who renders any investment advisory or management service to any client shall, with respect to the portfolio being supervised or managed and to the extent that the information is reasonably available to or obtainable by the investment advisor, make and keep true, accurate and current:

1. Records showing separately for each client the securities purchased and sold, and the date, amount and price of each purchase and sale.

2. For each security in which any client has a current position, information from which the investment advisor can promptly furnish the name of each client and the current amount or interest of the client.

D. Any books or records required by this section may be maintained by the investment advisor in such manner that the identity of any client to whom the investment advisor renders investment advisory services is indicated by numerical or alphabetical code or some similar designation.

E. Every investment advisor subject to subsection A of this section shall preserve the following records in the manner prescribed:

1. All books and records required to be made under the provisions of subsection A through subdivision C 1, inclusive, of this section, except for books and records required to be made under the provisions of subdivisions A 11 and A 16 of this section, shall be maintained in an easily accessible place for a period of not less than five years from the end of the fiscal year during which the last entry was made on record, the first two years of which shall be maintained in the principal office of the investment advisor.

2. Partnership articles and any amendments, articles of incorporation, charters, minute books, and stock certificate books of the investment advisor and of any predecessor, shall be maintained in the principal office of the investment advisor and preserved until at least three years after termination of the enterprise.

3. Books and records required to be made under the provisions of subdivisions A 11 and A 16 of this section

shall be maintained in an easily accessible place for a period of not less than five years, the first two years of which shall be maintained in the principal office of the investment advisor, from the end of the fiscal year during which the investment advisor last published or otherwise disseminated, directly or indirectly, the notice, circular, advertisement, newspaper article, investment letter, bulletin, or other communication including by electronic media.

4. Books and records required to be made under the provisions of subdivisions A 17 through A 22, inclusive, of this section shall be maintained and preserved in an easily accessible place for a period of not less than five years, from the end of the fiscal year during which the last entry was made on such record, the first two years in the principal office of the investment advisor, or for the time period during which the investment advisor was registered or required to be registered in the state, if less.

5. Notwithstanding other record preservation requirements of this subsection, the following records or copies shall be required to be maintained at the business location of the investment advisor from which the customer or client is being provided or has been provided with investment advisory services: (i) records required to be preserved under subdivisions A 3, A 7 through A 10, A 14 and A 15, A 17 through A 19, subsections B and C; and (ii) the records or copies required under the provision of subdivisions A 11 and A 16 of this section which records or related records identify the name of the investment advisor representative providing investment advice from that business location, or which identify the business locations' physical address, mailing address, electronic mailing address, or telephone number. The records will be maintained for the period described in this subsection.

F. Every investment advisor shall establish and maintain a written disaster recovery plan that shall address at a minimum:

1. The identity of individuals that will conduct or wind down business on behalf of the investment advisor in the event of death or incapacity of key persons;

2. Means to provide notification to clients of the investment advisor and to those states in which the advisor is registered of the death or incapacity of key persons;

a. Notification shall be provided to the Division of Securities and Retail Franchising via IARD/CRD within 24 hours of the death or incapacity of key persons.

b. Notification shall be given to clients within five business days from the death or incapacity of key persons.

3. Means for clients' accounts to continue to be monitored until an orderly liquidation, distribution or transfer of the

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clients' portfolio to another advisor can be achieved or until an actual notice to the client of investment advisor death or incapacity and client control of their assets occurs;

4. Means for the credit demands of the investment advisor to be met; and

5. Data backups sufficient to allow rapid resumption of the investment advisor's activities.

G. An investment advisor subject to subsection A of this section, before ceasing to conduct or discontinuing business as an investment advisor, shall arrange for and be responsible for the preservation of the books and records required to be maintained and preserved under this section for the remainder of the period specified in this section, and shall notify the commission in writing of the exact address where the books and records will be maintained during such period.

H. 1. The records required to be maintained pursuant to this section may be immediately produced or reproduced by photograph on film or, as provided in subdivision 2 of this subsection, on magnetic disk, tape or other computer storage medium, and be maintained for the required time in that form. If records are preserved or reproduced by photographic film or computer storage medium, the investment advisor shall:

a. Arrange the records and index the films or computer storage medium so as to permit the immediate location of any particular record;

b. Be ready at all times to promptly provide any facsimile enlargement of film or computer printout or copy of the computer storage medium which the commission by its examiners or other representatives may request;

c. Store separately from the original one other copy of the film or computer storage medium for the time required;

d. With respect to records stored on computer storage medium, maintain procedures for maintenance of, and access to, records so as to reasonably safeguard records from loss, alteration, or destruction; and

e. With respect to records stored on photographic film, at all times have available, for the commission's examination of its records, facilities for immediate, easily readable projection of the film and for producing easily readable facsimile enlargements.

2. Pursuant to subdivision 1 of this subsection, an advisor may maintain and preserve on computer tape or disk or other computer storage medium records which, in the ordinary course of the advisor's business, are created by the advisor on electronic media or are received by the advisor solely on electronic media or by electronic transmission.

I. Any book or record made, kept, maintained, and preserved in compliance with SEC Rules 17a-3 (17 CFR 240.17a-3) and 17a-4 (17 CFR 240.17a-4) under the Securities Exchange Act

of 1934, which is substantially the same as the book, or other record required to be made, kept, maintained, and preserved under this section shall be deemed to be made, kept, maintained, and preserved in compliance with this section.

J. For purposes of this section, "investment supervisory services" means the giving of continuous advice as to the investment of funds on the basis of the individual needs of each client; and "discretionary power" shall not include discretion as to the price at which or the time when a transaction is or is to be effected if, before the order is given by the investment advisor, the client has directed or approved the purchase or sale of a definite amount of the particular security.

K. For purposes of this section, "principal place of business" and "principal office" mean the executive office of the investment advisor from which the officers, partners, or managers of the investment advisor direct, control, and coordinate the activities of the investment advisor.

L. Every investment advisor registered or required to be registered in this Commonwealth and has its principal place of business in a state other than the Commonwealth shall be exempt from the requirements of this section to the extent provided by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290), provided the investment advisor is licensed in such state and is in compliance with such state's recordkeeping requirements.

## **21VAC5-80-200. Dishonest or unethical practices.**

A. An investment advisor or federal covered advisor is a fiduciary and has a duty to act primarily for the benefit of his clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment advisor or federal covered advisor and his clients and the circumstances of each case, an investment advisor or federal covered advisor who is registered or required to be registered shall not engage in unethical practices, including the following:

1. Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation, risk tolerance and needs, and any other information known or acquired by the investment advisor or federal covered advisor after reasonable examination of the client's financial records.

2. Placing an order to purchase or sell a security for the account of a client without written authority to do so.

3. Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without

first having obtained a written third-party authorization from the client.

4. Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within 10 business days after the date of the first transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

5. Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account.

6. Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment advisor or federal covered advisor, or a financial institution engaged in the business of loaning funds or securities.

7. Loaning money to a client unless the investment advisor or federal covered advisor is a financial institution engaged in the business of loaning funds or the client is an affiliate of the investment advisor or federal covered advisor.

8. Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment advisor or federal covered advisor, or misrepresenting the nature of the advisory services being offered or fees to be charged for the services, or omission to state a material fact necessary to make the statements made regarding qualifications services or fees, in light of the circumstances under which they are made, not misleading.

9. Providing a report or recommendation to any advisory client prepared by someone other than the investment advisor or federal covered advisor without disclosing that fact. This prohibition does not apply to a situation where the advisor uses published research reports or statistical analyses to render advice or where an advisor orders such a report in the normal course of providing service.

10. Charging a client an unreasonable advisory fee in light of the fees charged by other investment advisors or federal covered advisors providing essentially the same services.

11. Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment advisor or federal covered advisor or any of his employees which could reasonably be expected to impair the rendering of unbiased and objective advice including:

a. Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; or

b. Charging a client an advisory fee for rendering advice when a commission for executing securities transactions

pursuant to such advice will be received by the advisor or his employees.

12. Guaranteeing a client that a specific result will be achieved as a result of the advice which will be rendered.

13. Directly or indirectly using any advertisement that does any one of the following:

a. Refers to any testimonial of any kind concerning the investment advisor or investment advisor representative or concerning any advice, analysis, report, or other service rendered by the investment advisor or investment advisor representative;

b. Refers to past specific recommendations of the investment advisor or investment advisor representative that were or would have been profitable to any person; except that an investment advisor or investment advisor representative may furnish or offer to furnish a list of all recommendations made by the investment advisor or investment advisor representative within the immediately preceding period of not less than one year if the advertisement or list also includes both of the following:

(1) The name of each security recommended, the date and nature of each recommendation, the market price at that time, the price at which the recommendation was to be acted upon, and the most recently available market price of each security; and

(2) A legend on the first page in prominent print or type that states that the reader should not assume that recommendations made in the future will be profitable or will equal the performance of the securities in the list;

c. Represents that any graph, chart, formula, or other device being offered can be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or indirectly, that any graph, chart, formula, or other device being offered will assist any person in making that person's own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in the advertisement the limitations thereof and the risks associated to its use;

d. Represents that any report, analysis, or other service will be furnished for free or without charge, unless the report, analysis, or other service actually is or will be furnished entirely free and without any direct or indirect condition or obligation;

e. Represents that the commission has approved any advertisement; or

f. Contains any untrue statement of a material fact, or that is otherwise false or misleading.

For the purposes of this section, the term "advertisement" includes any notice, circular, letter, or other written

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communication addressed to more than one person, or any notice or other announcement in any electronic or paper publication, by radio or television, or by any medium, that offers any one of the following:

- (i) Any analysis, report, or publication concerning securities;
- (ii) Any analysis, report, or publication that is to be used in making any determination as to when to buy or sell any security or which security to buy or sell;
- (iii) Any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell; or
- (iv) Any other investment advisory service with regard to securities.

14. Disclosing the identity, affairs, or investments of any client to any third party unless required by law or an order of a court or a regulatory agency to do so, or unless consented to by the client, ~~or failing to comply with any applicable privacy provision or standard promulgated by the SEC or by a self-regulatory organization approved by the SEC.~~

15. Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment advisor has custody or possession of such securities or funds, when the investment advisor's action is subject to and does not comply with the safekeeping requirements of 21VAC5-80-146.

16. Entering into, extending or renewing any investment advisory contract unless the contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the investment advisor or federal covered advisor and that no assignment of such contract shall be made by the investment advisor or federal covered advisor without the consent of the other party to the contract.

17. Failing to clearly and separately disclose to its customer, prior to any security transaction, providing investment advice for compensation or any materially related transaction that the customer's funds or securities will be in the custody of an investment advisor or contracted custodian in a manner that does not provide Securities Investor Protection Corporation protection, or equivalent third-party coverage over the customer's assets.

18. Using a certification or professional designation in connection with the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through

publications or writings, or by issuing or promulgating analyses or reports relating to securities that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees in such a way as to mislead any person.

a. The use of such certification or professional designation includes, ~~but is not limited to,~~ the following:

(1) Use of a certification or designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) Use of a nonexistent or self-conferred certification or professional designation;

(3) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; or

(4) Use of a certification or professional designation that was obtained from a designating or certifying organization that:

(a) Is primarily engaged in the business of instruction in sales or marketing;

(b) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(c) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(d) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

b. There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subdivision 18 a (4) of this subsection, when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The Institute for Credentialing Excellence (formerly the National Commission for Certifying Agencies); or

(3) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales or marketing.

c. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

(1) Use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) The manner in which those words are combined.

d. For purposes of this section, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title:

(1) Indicates seniority within the organization; or

(2) Specifies an individual's area of specialization within the organization.

For purposes of this subdivision d, "financial services regulatory agency" includes, ~~but is not limited to~~, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under § 3 (a)(1) of the Investment Company Act of 1940 (15 USC § 80a-3(a)(1)).

e. Nothing in this regulation shall limit the commission's authority to enforce existing provisions of the law.

B. An investment advisor representative is a fiduciary and has a duty to act primarily for the benefit of his clients. While the extent and nature of this duty varies according to the nature of the relationship between an investment advisor representative and his clients and the circumstances of each case, an investment advisor representative who is registered or required to be registered shall not engage in unethical practices, including the following:

1. Recommending to a client to whom investment supervisory, management or consulting services are provided the purchase, sale or exchange of any security without reasonable grounds to believe that the recommendation is suitable for the client on the basis of information furnished by the client after reasonable inquiry concerning the client's investment objectives, financial situation and needs, and any other information known or acquired by the investment advisor representative after reasonable examination of the client's financial records.

2. Placing an order to purchase or sell a security for the account of a client without written authority to do so.

3. Placing an order to purchase or sell a security for the account of a client upon instruction of a third party without first having obtained a written third-party authorization from the client.

4. Exercising any discretionary power in placing an order for the purchase or sale of securities for a client without obtaining written discretionary authority from the client within 10 business days after the date of the first

transaction placed pursuant to oral discretionary authority, unless the discretionary power relates solely to the price at which, or the time when, an order involving a definite amount of a specified security shall be executed, or both.

5. Inducing trading in a client's account that is excessive in size or frequency in view of the financial resources, investment objectives and character of the account.

6. Borrowing money or securities from a client unless the client is a broker-dealer, an affiliate of the investment advisor representative, or a financial institution engaged in the business of loaning funds or securities.

7. Loaning money to a client unless the investment advisor representative is engaged in the business of loaning funds or the client is an affiliate of the investment advisor representative.

8. Misrepresenting to any advisory client, or prospective advisory client, the qualifications of the investment advisor representative, or misrepresenting the nature of the advisory services being offered or fees to be charged for the services, or omission to state a material fact necessary to make the statements made regarding qualifications, services or fees, in light of the circumstances under which they are made, not misleading.

9. Providing a report or recommendation to any advisory client prepared by someone other than the investment advisor or federal covered advisor who the investment advisor representative is employed by or associated with without disclosing that fact. This prohibition does not apply to a situation where the investment advisor or federal covered advisor uses published research reports or statistical analyses to render advice or where an investment advisor or federal covered advisor orders such a report in the normal course of providing service.

10. Charging a client an unreasonable advisory fee in light of the fees charged by other investment advisor representatives providing essentially the same services.

11. Failing to disclose to clients in writing before any advice is rendered any material conflict of interest relating to the investment advisor representative which could reasonably be expected to impair the rendering of unbiased and objective advice including:

a. Compensation arrangements connected with advisory services to clients which are in addition to compensation from such clients for such services; or

b. Charging a client an advisory fee for rendering advice when a commission for executing securities transactions pursuant to such advice will be received by the investment advisor representative.

12. Guaranteeing a client that a specific result will be achieved as a result of the advice which will be rendered.

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13. Directly or indirectly using any advertisement that does any one of the following:

a. Refers to any testimonial of any kind concerning the investment advisor or investment advisor representative or concerning any advice, analysis, report, or other service rendered by the investment advisor or investment advisor representative;

b. Refers to past specific recommendations of the investment advisor or investment advisor representative that were or would have been profitable to any person; except that an investment advisor or investment advisor representative may furnish or offer to furnish a list of all recommendations made by the investment advisor or investment advisor representative within the immediately preceding period of not less than one year if the advertisement or list also includes both of the following:

(1) The name of each security recommended, the date and nature of each recommendation, the market price at that time, the price at which the recommendation was to be acted upon, and the most recently available market price of each security; and

(2) A legend on the first page in prominent print or type that states that the reader should not assume that recommendations made in the future will be profitable or will equal the performance of the securities in the list;

c. Represents that any graph, chart, formula, or other device being offered can be used to determine which securities to buy or sell, or when to buy or sell them; or which represents, directly or indirectly, that any graph, chart, formula, or other device being offered will assist any person in making that person's own decisions as to which securities to buy or sell, or when to buy or sell them, without prominently disclosing in the advertisement the limitations thereof and the risks associated with its use;

d. Represents that any report, analysis, or other service will be furnished for free or without charge, unless the report, analysis, or other service actually is or will be furnished entirely free and without any direct or indirect condition or obligation;

e. Represents that the commission has approved any advertisement; or

f. Contains any untrue statement of a material fact, or that is otherwise false or misleading.

For the purposes of this section, the term "advertisement" includes any notice, circular, letter, or other written communication addressed to more than one person, or any notice or other announcement in any electronic or paper publication, by radio or television, or by any medium, that offers any one of the following:

(i) Any analysis, report, or publication concerning securities;

(ii) Any analysis, report, or publication that is to be used in making any determination as to when to buy or sell any security or which security to buy or sell;

(iii) Any graph, chart, formula, or other device to be used in making any determination as to when to buy or sell any security, or which security to buy or sell; or

(iv) Any other investment advisory service with regard to securities.

14. Disclosing the identity, affairs, or investments of any client to any third party unless required by law or an order of a court or a regulatory agency to do so, or unless consented to by the client.

15. Taking any action, directly or indirectly, with respect to those securities or funds in which any client has any beneficial interest, where the investment advisor representative other than a person associated with a federal covered advisor has custody or possession of such securities or funds, when the investment advisor representative's action is subject to and does not comply with the safekeeping requirements of 21 VAC5-80-146.

16. Entering into, extending or renewing any investment advisory or federal covered advisory contract unless such contract is in writing and discloses, in substance, the services to be provided, the term of the contract, the advisory fee, the formula for computing the fee, the amount of prepaid fee to be returned in the event of contract termination or nonperformance, whether the contract grants discretionary power to the investment advisor representative and that no assignment of such contract shall be made by the investment advisor representative without the consent of the other party to the contract.

17. Failing to clearly and separately disclose to its customer, prior to any security transaction, providing investment advice for compensation or any materially related transaction that the customer's funds or securities will be in the custody of an investment advisor or contracted custodian in a manner that does not provide Securities Investor Protection Corporation protection, or equivalent third-party coverage over the customer's assets.

18. Using a certification or professional designation in connection with the provision of advice as to the value of or the advisability of investing in, purchasing, or selling securities, either directly or indirectly or through publications or writings, or by issuing or promulgating analyses or reports relating to securities that indicates or implies that the user has special certification or training in advising or servicing senior citizens or retirees in such a way as to mislead any person.

a. The use of such certification or professional designation includes, ~~but is not limited to~~, the following:

(1) Use of a certification or designation by a person who has not actually earned or is otherwise ineligible to use such certification or designation;

(2) Use of a nonexistent or self-conferred certification or professional designation;

(3) Use of a certification or professional designation that indicates or implies a level of occupational qualifications obtained through education, training, or experience that the person using the certification or professional designation does not have; or

(4) Use of a certification or professional designation that was obtained from a designating or certifying organization that:

(a) Is primarily engaged in the business of instruction in sales or marketing;

(b) Does not have reasonable standards or procedures for assuring the competency of its designees or certificants;

(c) Does not have reasonable standards or procedures for monitoring and disciplining its designees or certificants for improper or unethical conduct; or

(d) Does not have reasonable continuing education requirements for its designees or certificants in order to maintain the designation or certificate.

b. There is a rebuttable presumption that a designating or certifying organization is not disqualified solely for purposes of subdivision 18 a (4) of this subsection, when the organization has been accredited by:

(1) The American National Standards Institute;

(2) The Institute for Credentialing Excellence (formerly the National Commission for Certifying Agencies); or

(3) An organization that is on the United States Department of Education's list entitled "Accrediting Agencies Recognized for Title IV Purposes" and the designation or credential issued therefrom does not primarily apply to sales or marketing.

c. In determining whether a combination of words (or an acronym standing for a combination of words) constitutes a certification or professional designation indicating or implying that a person has special certification or training in advising or servicing senior citizens or retirees, factors to be considered shall include:

(1) Use of one or more words such as "senior," "retirement," "elder," or like words, combined with one or more words such as "certified," "chartered," "adviser," "specialist," "consultant," "planner," or like words, in the name of the certification or professional designation; and

(2) The manner in which those words are combined.

d. For purposes of this section, a certification or professional designation does not include a job title within an organization that is licensed or registered by a state or federal financial services regulatory agency, when that job title:

(1) Indicates seniority within the organization; or

(2) Specifies an individual's area of specialization within the organization.

For purposes of this subdivision d, "financial services regulatory agency" includes, ~~but is not limited to~~, an agency that regulates broker-dealers, investment advisers, or investment companies as defined under § 3(a)(1) of the Investment Company Act of 1940 (15 USC § 80a-3(a)(1)).

e. Nothing in this regulation shall limit the commission's authority to enforce existing provisions of law.

C. The conduct set forth in subsections A and B of this section is not all inclusive. Engaging in other conduct such as nondisclosure, incomplete disclosure, or deceptive practices may be deemed an unethical business practice except to the extent permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290 (96)).

D. The provisions of this section shall apply to federal covered advisors to the extent that fraud or deceit is involved, or as otherwise permitted by the National Securities Markets Improvement Act of 1996 (Pub. L. No. 104-290 (96)).

E. An investment advisor or investment advisor representative may delay or refuse to place an order or to disburse funds that may involve or result in the financial exploitation of an individual pursuant to § 63.2-1606 L of the Code of Virginia.

F. For purposes of [ ~~the~~ this ] section, any mandatory arbitration provision in an advisory contract shall be prohibited.

G. The investment advisor [ ~~and~~ or ] investment advisor representative shall notify the Division of Securities and Retail Franchising, State Corporation Commission and the client of an unauthorized access to records that may expose a client's identity or investments to a third party within three business days of the discovery of the unauthorized access.

**21VAC5-80-260. Information security and privacy.**

A. Every investment advisor registered or required to be registered shall establish, implement, update, and enforce written physical security and cybersecurity policies and procedures reasonably designed to ensure the confidentiality, integrity, and availability of physical and electronic records and information. The policies and procedures shall be tailored to the investment advisor's business model, taking into

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account the size of the firm, type of services provided, and the number of locations of the investment advisor.

1. The physical security and cybersecurity policies and procedures shall:

a. Protect against reasonably anticipated threats or hazards to the security or integrity of client records and information;

b. Ensure that the investment advisor safeguards confidential client records and information; and

c. Protect any records and information the release of which could result in harm or inconvenience to any client.

2. The physical security and cybersecurity policies and procedures shall cover at least five functions:

a. The organizational understanding to manage information security risk to systems, assets, data, and capabilities;

b. The appropriate safeguards to ensure delivery of critical infrastructure services;

c. The appropriate activities to identify the occurrence of an information security event;

d. The appropriate activities to take action regarding a detected information security event; and

e. The appropriate activities to maintain plans for resilience and to restore any capabilities or services that were impaired due to an information security event.

3. The investment advisor shall review, no less frequently than annually, and modify, as needed, these policies and procedures to ensure the adequacy of the security measures and the effectiveness of their implementation.

B. The investment advisor shall deliver upon the investment advisor's engagement by a client, and on an annual basis thereafter, a privacy policy to each client that is reasonably designed to aid in the client's understanding of how the investment advisor collects and shares, to the extent permitted by state and federal law, nonpublic personal information. The investment advisor shall promptly update and deliver to each client an amended privacy policy if any of the information in the policy becomes inaccurate.

VA.R. Doc. No. R19-5907; Filed August 21, 2019, 1:32 p.m.



## TITLE 22. SOCIAL SERVICES

### STATE BOARD OF SOCIAL SERVICES

#### Final Regulation

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with (i) § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law where no agency discretion is involved and (ii) § 2.2-4006 A 3 of the Code of Virginia, which excludes regulations that consist only of changes in style or form or corrections of technical errors.

**Title of Regulation:** **22VAC40-73. Standards for Licensed Assisted Living Facilities (amending 22VAC40-73-50, 22VAC40-73-150, 22VAC40-73-950, 22VAC40-73-980, 22VAC40-73-1130).**

**Statutory Authority:** §§ 63.2-217, 63.2-1732, 63.2-1802, 63.2-1805, and 63.2-1808 of the Code of Virginia.

**Effective Date:** October 17, 2019.

**Agency Contact:** Judith McGreal, Program Consultant, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 663-5535, FAX (804) 819-7093, or email [judith.mcgregal@dss.virginia.gov](mailto:judith.mcgregal@dss.virginia.gov).

**Summary:**

*The amendments conform the regulation to the following legislation adopted during the 2019 Session of the General Assembly:*

*Chapter 91 of the 2019 Acts of Assembly by requiring (i) assisted living facilities to have either an onsite emergency generator or agreements with a primary vendor and a secondary vendor to provide the facility with an emergency generator for the provision of electricity during an interruption of the normal electric power supply; (ii) a facility with an onsite generator to include in its emergency preparedness and response plan a description of the generator's capacity to provide sufficient power for the operation of lighting, ventilation, temperature control, supplied oxygen, and refrigeration; and (iii) periodic testing of the generators and connections. Facilities are granted one year to comply with generator requirements.*

*Chapters 97 and 294 of the 2019 Acts of Assembly by establishing the night hours staff-resident ratio in special care units at 22 or fewer residents to at least two staff, 23 to 32 residents to at least three staff, and 33 to 40 residents to at least four staff.*

*Chapter 448 of the 2019 Acts of Assembly by (i) requiring notification to the Board of Long-Term Care Administrators and the regional licensing office of the Department of Social Services when a licensed*

*administrator dies, resigns, is discharged, or becomes unable to perform his duties and (ii) increasing to two the number of times a facility may operate under the supervision of an acting administrator during a two-year period, unless the facility is authorized by the Department of Social Services.*

*Chapter 602 of the 2019 Acts of Assembly by requiring the assisted living facility disclosure statement provided to prospective residents and legal representatives include information regarding emergency electrical power sources for the provision of electricity during an interruption of the normal electric power supply.*

*For clarity, the amendments also (i) integrate exceptions to regulatory text into text and (ii) add a current Code of Virginia requirement that limits the length of time an acting administrator may operate a facility.*

**22VAC40-73-50. Disclosure.**

A. The assisted living facility shall prepare and provide a statement to the prospective resident and his legal representative, if any, that discloses information about the facility. The statement shall be on a form developed by the department and shall:

1. Disclose information fully and accurately in plain language;
2. Be provided in advance of admission and prior to signing an admission agreement or contract;
3. Be provided upon request; and
4. Disclose the following information, which shall be kept current:
  - a. Name of the facility;
  - b. Name of the licensee;
  - c. Ownership structure of the facility (e.g., individual, partnership, corporation, limited liability company, unincorporated association, or public agency);
  - d. Description of all accommodations, services, and care that the facility offers;
  - e. Fees charged for accommodations, services, and care, including clear information about what is included in the base fee and all fees for additional accommodations, services, and care;
  - f. Criteria for admission to the facility and restrictions on admission;
  - g. Criteria for transfer to a different living area within the same facility, including transfer to another level or type of care within the same facility or complex;
  - h. Criteria for discharge;

i. Categories, frequency, and number of activities provided for residents;

j. General number, position types, and qualifications of staff on each shift;

k. Whether or not the facility maintains liability insurance that provides at least the minimum amount of coverage established by the board for disclosure purposes set forth in 22VAC40-73-45 to compensate residents or other individuals for injuries and losses from negligent acts of the facility. The facility shall state in the disclosure statement the minimum amount of coverage established by the board in 22VAC40-73-45;

l. Whether or not the facility has an onsite emergency electrical power source for the provision of electricity during an interruption of the normal electric power supply. If the facility does have an onsite emergency electrical power source, the statement must include (i) the items for which the source will supply power and (ii) whether or not staff of the the facility have been trained to maintain and operate the power source. For the purposes of this subdivision, an onsite emergency electrical power supply shall include both permanent emergency electrical power sources and portable emergency electrical power sources, provided that such temporary electrical power supply source remains on the premises of the facility at all times. Written acknowledgment of the disclosure shall be evidenced by the signature or initials of the resident or his legal representative immediately following the onsite emergency electrical power source disclosure statement;

m. Notation that additional information about the facility that is included in the resident agreement is available upon request; and

~~n.~~ n. The department's website address, with a note that additional information about the facility may be obtained from the website.

B. Written acknowledgment of the receipt of the disclosure by the resident or his legal representative shall be retained in the resident's record.

C. The disclosure statement shall also be available to the general public, upon request.

**22VAC40-73-150. Administrator provisions and responsibilities.**

- A. Each facility shall have an administrator of record.
- B. If an administrator dies, resigns, is discharged, or becomes unable to perform his duties, the facility shall immediately employ a new administrator or appoint a qualified acting administrator so that no lapse in administrator coverage occurs.

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1. The facility shall notify the department's regional licensing office in writing within 14 days of a change in a facility's administrator, including the resignation of an administrator, appointment of an acting administrator, and appointment of a new administrator, except that the time period for notification may differ as specified in subdivision 2 of this subsection.

2. For a facility licensed for both residential and assisted living care, the facility shall immediately notify the Virginia Board of Long-Term Care Administrators and the department's regional licensing office that the licensed administrator died, resigned, was discharged, or became unable to perform his duties and that a new licensed administrator has been employed or that the facility is operating without an administrator licensed by the Virginia Board of Long-Term Administrators, whichever is the case, and provide the last date of employment of the previous licensed administrator.

3. For a facility licensed for both residential and assisted living care, when an acting administrator is named, he shall notify the department's regional licensing office of his employment, and if he is intending to assume the position permanently, submit a completed application for an approved administrator-in-training program to the Virginia Board of Long-Term Care Administrators within 10 days of employment.

4. For a facility licensed for both residential and assisted living care, the acting administrator shall be qualified by education for an approved administrator-in-training program and have a minimum of one year of administrative or supervisory experience in a health care or long-term care facility or have completed such a program and be awaiting licensure.

5. A facility licensed only for residential living care may be operated by an acting administrator for no more than 90 days from the last date of employment of the administrator.

6. A facility licensed for both residential and assisted living care may be operated by an acting administrator for no more than 150 days, or not more than 90 days if the acting administrator has not applied for licensure, from the last date of employment of the licensed administrator.

~~Exception:~~ 7. An acting administrator may be granted one extension of up to 30 days in addition to the 150 days, as specified in ~~this~~ subdivision 6 of this subsection, upon written request to the department's regional licensing office. An extension may only be granted if the acting administrator (i) has applied for licensure as a long-term care administrator pursuant to Chapter 31 (§ 54.1-3100 et seq.) of Title 54.1 of the Code of Virginia, (ii) has completed the administrator-in-training program, and (iii) is awaiting the results of the national examination. If a 30-day extension is granted, the acting administrator shall

immediately submit written notice of such to the Virginia Board of Long-Term Care Administrators.

~~7.~~ 8. A person may not become an acting administrator at any assisted living facility if the Virginia Board of Long-Term Care Administrators has refused to issue or renew, suspended, or revoked his assisted living facility or nursing home administrator license.

~~8.~~ 9. No assisted living facility shall operate under the supervision of an acting administrator pursuant to §§ 54.1-3103.1 and 63.2-1803 of the Code of Virginia more than ~~one time~~ two times during any two-year period unless authorized to do so by the department.

C. The administrator shall be responsible for the general administration and management of the facility and shall oversee the day-to-day operation of the facility. This shall include responsibility for:

1. Ensuring that care is provided to residents in a manner that protects their health, safety, and well-being;
2. Maintaining compliance with applicable laws and regulations;
3. Developing and implementing all policies, procedures, and services as required by this chapter;
4. Ensuring staff and volunteers comply with residents' rights;
5. Maintaining buildings and grounds;
6. Recruiting, hiring, training, and supervising staff; and
7. Ensuring the development, implementation, and monitoring of an individualized service plan for each resident, except that a plan is not required for a resident with independent living status.

D. The administrator shall report to the Director of the Department of Health Professions information required by and in accordance with § 54.1-2400.6 of the Code of Virginia regarding any person (i) licensed, certified, or registered by a health regulatory board or (ii) holding a multistate licensure privilege to practice nursing or an applicant for licensure, certification, or registration. Information required to be reported, under specified circumstances includes substance abuse and unethical or fraudulent conduct.

E. For a facility licensed only for residential living care, either the administrator or a designated assistant who meets the qualifications of the administrator shall be awake and on duty on the premises at least 40 hours per week with no fewer than 24 of those hours being during the day shift on weekdays. ~~Exceptions:~~ unless at least one of the following applies:

1. 22VAC40-73-170 allows a shared administrator for smaller facilities.

2. If the administrator is licensed as an assisted living facility administrator or nursing home administrator by the Virginia Board of Long-Term Care Administrators, the provisions regarding the administrator in subsection F of this section apply. When such is the case, there is no requirement for a designated assistant.

F. For a facility licensed for both residential and assisted living care, the administrator shall serve on a full-time basis as the ~~on-site~~ onsite agent of the licensee and shall be responsible for the day-to-day administration and management of the facility, except as provided in 22VAC40-73-170.

G. The administrator, acting administrator, or as allowed in subsection E of this section, designated assistant administrator, shall not be a resident of the facility.

Part IX  
Emergency Preparedness

**22VAC40-73-950. Emergency preparedness and response plan.**

A. The facility shall develop a written emergency preparedness and response plan that shall address:

1. Documentation of initial and annual contact with the local emergency coordinator to determine (i) local disaster risks, (ii) communitywide plans to address different disasters and emergency situations, and (iii) assistance, if any, that the local emergency management office will provide to the facility in an emergency.

2. Analysis of the facility's potential hazards, including severe weather, biohazard events, fire, loss of utilities, flooding, work place violence or terrorism, severe injuries, or other emergencies that would disrupt normal operation of the facility.

3. Written emergency management policies and procedures for provision of:

- a. Administrative direction and management of response activities;
- b. Coordination of logistics during the emergency;
- c. Communications;
- d. Life safety of residents, staff, volunteers, and visitors;
- e. Property protection;
- f. Continued services to residents;
- g. Community resource accessibility; and
- h. Recovery and restoration.

4. Written emergency response procedures for assessing the situation; protecting residents, staff, volunteers, visitors, equipment, medications, and vital records; and restoring services. Emergency procedures shall address:

- a. Alerting emergency personnel and facility staff;
- b. Warning and notification of residents, including sounding of alarms when appropriate;
- c. Providing emergency access to secure areas and opening locked doors;
- d. Conducting evacuations and sheltering in place, as appropriate, and accounting for all residents;
- e. Locating and shutting off utilities when necessary;
- f. Maintaining and operating emergency equipment effectively and safely;
- g. Communicating with staff and community emergency responders during the emergency; and
- h. Conducting relocations to emergency shelters or alternative sites when necessary and accounting for all residents.

5. Supporting documents that would be needed in an emergency, including emergency call lists, building and site maps necessary to shut off utilities, memoranda of understanding with relocation sites, and list of major resources such as suppliers of emergency equipment.

B. By December 1, 2020, an assisted living facility that is equipped with an onsite emergency generator shall include in its emergency preparedness and response plan a description of the generator's capacity to provide sufficient power for the operation of lighting, ventilation, temperature control, supplied oxygen, and refrigeration.

C. By December 1, 2020, an assisted living facility that is not equipped with an onsite emergency generator shall:

1. Enter into an agreement with a vendor capable of providing the facility with an emergency generator for the provision of electricity during an interruption of the normal electric power supply; and

2. Enter into at least one agreement with a separate vendor capable of providing an emergency generator in the event that the primary vendor is unable to comply with its agreement with the facility during an emergency.

D. Staff and volunteers shall be knowledgeable in and prepared to implement the emergency preparedness plan in the event of an emergency.

~~E.~~ E. The facility shall develop and implement an orientation and semi-annual review on the emergency preparedness and response plan for all staff, residents, and volunteers, with emphasis placed on an individual's respective responsibilities. The review shall be documented by signing and dating. The orientation and review shall cover responsibilities for:

- 1. Alerting emergency personnel and sounding alarms;

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2. Implementing evacuation, shelter in place, and relocation procedures;
3. Using, maintaining, and operating emergency equipment;
4. Accessing emergency medical information, equipment, and medications for residents;
5. Locating and shutting off utilities; and
6. Utilizing community support services.

~~D.~~ F. The facility shall review the emergency preparedness plan annually or more often as needed, document the review by signing and dating the plan, and make necessary plan revisions. Such revisions shall be communicated to staff, residents, and volunteers and incorporated into the orientation and semi-annual review for staff, residents, and volunteers.

~~E.~~ G. In the event of a disaster, fire, emergency, or any other condition that may jeopardize the health, safety, and welfare of residents, the facility shall take appropriate action to protect the health, safety, and welfare of the residents and take appropriate actions to remedy the conditions as soon as possible.

~~F.~~ H. After the disaster or emergency is stabilized, the facility shall:

1. Notify family members and legal representatives; and
2. Report the disaster or emergency to the regional licensing office by the next day as specified in 22VAC40-73-70.

## **22VAC40-73-980. Emergency equipment and supplies.**

A. A complete first aid kit shall be on hand in each building at the facility, located in a designated place that is easily accessible to staff but not to residents. Items with expiration dates must not have dates that have already passed. The kit shall include the following items:

1. Adhesive tape;
2. Antiseptic wipes or ointment;
3. Band-aids, in assorted sizes;
4. Blankets, either disposable or other;
5. Disposable single-use breathing barriers or shields for use with rescue breathing or CPR (e.g., CPR mask or other type);
6. Cold pack;
7. Disposable single-use waterproof gloves;
8. Gauze pads and roller gauze, in assorted sizes;
9. Hand cleaner (e.g., waterless hand sanitizer or antiseptic towelettes);
10. Plastic bags;

11. Scissors;
12. Small flashlight and extra batteries;
13. Thermometer;
14. Triangular bandages;
15. Tweezers; and
16. The first aid instructional manual.

B. In facilities that have a motor vehicle that is used to transport residents and in a motor vehicle used for a field trip, there shall be a first aid kit on the vehicle, located in a designated place that is accessible to staff but not residents that includes items as specified in subsection A of this section.

C. First aid kits shall be checked at least monthly to ensure that all items are present and items with expiration dates are not past their expiration date.

D. Each facility with six or more residents shall be equipped with a permanent connection able to connect to a temporary emergency electrical power source for the provision of electricity during an interruption of the normal electric power supply. The connection shall be of the size that is capable of providing power to required circuits when connected and that is sufficient to implement the emergency preparedness and response plan. The installation of a connection for temporary electric power shall be in compliance with the Virginia Uniform Statewide Building Code (13VAC5-63) and approved by the local building official. Permanent installations of emergency power systems shall be acceptable when installed in accordance with the Uniform Statewide Building Code and approved by the local building official.

E. By December 1, 2020, the following provisions shall be met:

1. A facility that is equipped with an onsite emergency generator shall test the generator monthly and maintain records of the tests.
2. A facility that is not equipped with an onsite emergency generator shall have a temporary emergency electrical power source connection that is tested at the time of installation and every two years thereafter by a contracted vendor and maintain records of the tests.

F. The following emergency lighting shall be available:

1. Flashlights or battery lanterns for general use.
2. One flashlight or battery lantern for each employee directly responsible for resident care who is on duty between 5 p.m. and 7 a.m.
3. One flashlight or battery lantern for each bedroom used by residents and for the living and dining area unless there is a provision for emergency lighting in the adjoining hallways.

4. The use of open flame lighting is prohibited.

~~F. G.~~ There shall be two forms of communication for use in an emergency.

~~G. H.~~ The facility shall ensure the availability of a 96-hour supply of emergency food and drinking water. At least 48 hours of the supply must be on site at any given time, of which the facility's rotating stock may be used.

**22VAC40-73-1130. Staffing.**

A. ~~When~~ Except during night hours, when 20 or fewer residents are present, at least two direct care staff members shall be awake and on duty at all times in each special care unit who shall be responsible for the care and supervision of the residents, ~~except as noted in subsection B of this section.~~ For every additional 10 residents, or portion thereof, at least one more direct care staff member shall be awake and on duty in the unit.

B. ~~Only~~ Except during night hours, only one direct care staff member has to be awake and on duty in the unit if sufficient to meet the needs of the residents, if (i) there are no more than five residents present in the unit and (ii) there are at least two other direct care staff members in the building, one of whom is readily available to assist with emergencies in the special care unit, provided that supervision necessary to ensure the health, safety, and welfare of residents throughout the building is not compromised.

C. During night hours, the following number of direct care staff members shall be awake and on duty at all times in each special care unit and shall be responsible for the care and supervision of the residents:

1. When 22 or fewer residents are present, at least two direct care staff members;
2. When 23 to 32 residents are present, at least three direct care staff members;
3. When 33 to 40 residents are present, at least four direct care staff members; and
4. When more than 40 residents are present, at least four direct care staff members plus at least one more direct care staff member for every additional 10 residents, or portion thereof.

The requirements in subsections A ~~and~~, B, and C of this section are independent of 22VAC40-73-280 D and 22VAC40-73-1020 A and B.

~~E. D.~~ During trips away from the facility, there shall be sufficient direct care staff to provide sight and sound supervision to residents.

VA.R. Doc. No. R20-6006; Filed August 22, 2019, 2:16 p.m.

**Final Regulation**

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Social Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **22VAC40-80. General Procedures and Information for Licensure (amending 22VAC40-80-60, 22VAC40-80-120, 22VAC40-80-340, 22VAC40-80-345, 22VAC40-80-370, 22VAC40-80-375).**

Statutory Authority: §§ 63.2-217, 63.2-1732, 63.2-1733, and 63.2-1734 of the Code of Virginia.

Effective Date: October 17, 2019.

Agency Contact: Deborah Eves, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7506, or email [deborah.eves@dss.virginia.gov](mailto:deborah.eves@dss.virginia.gov).

Summary:

*The amendments (i) conform the regulation to Chapter 449 of the 2019 Acts of Assembly to allow the Commissioner of the Department of Social Services to issue a notice of summary suspension of the license of a child welfare agency and (ii) adjust procedures for issuing the notice and for completing a hearing.*

Part III  
The License

**22VAC40-80-60. General.**

A. A license to operate a facility or agency is issued to a specific person or organization to provide out-of-home care to children or adults. An organization may be a partnership, association, corporation, limited liability company, or public entity.

B. Pursuant to § 63.2-1712 of the Code of Virginia, any person, officer, or member of a governing board of any association or corporation that operates an assisted living facility, adult day care center, or child welfare agency shall be guilty of a Class 1 misdemeanor if he:

1. Interferes with any representative of the commissioner in the discharge of his licensing duties;
2. Makes to the commissioner or any representative of the commissioner any report or statement with respect to the operation of any assisted living facility, adult day care center, or child welfare agency that is known by such person to be false or untrue;

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3. Operates or engages in the conduct of these facilities without first obtaining a license as required or after such license has been revoked, suspended, or has expired and not been renewed; or

4. Operates or engages in the conduct of one of these facilities serving more persons than the maximum stipulated in the license.

C. When a licensee plans to close or sell a facility, the licensee shall notify the appropriate licensing office at least 60 days prior to the anticipated closure or sale date. When the facility closes or the sale is finalized, the license shall be returned to the appropriate licensing office.

## **22VAC40-80-120. Terms of the license.**

A. A facility or agency shall operate within the terms of its license, which are:

1. The operating name of the facility or agency;
2. The name of the individual, partnership, association, corporation, limited liability company, or public entity sponsoring the facility or agency;
3. The physical location of the facility or agency;
4. The maximum number of children or adults who may be in care at any time;
5. The period of time for which the license is effective;
6. For child care facilities or agencies, the age range of children for whom care may be provided; and
7. Any other limitations that the department may prescribe within the context of the regulations for any facility or agency.

B. The provisional license cites the standards with which the licensee is not in compliance.

C. The conditional license cites the standards with which the licensee must demonstrate compliance when operation begins, and also any standards with which the licensee is not in compliance.

D. Prior to changes in operation that would affect the terms of the license, the licensee shall secure a modification to the terms of the license from the department. (See 22VAC40-80-190.)

E. Certain documents related to the terms of the license are required to be posted on the premises of each facility. These are:

1. The most recently issued license. Any provisional license shall be posted at each public entrance of the facility and a notice shall be prominently displayed next to the license that states that a description of specific violations of licensing standards to be corrected and the deadline for completion of such corrections is available for

inspection at the facility or on the facility's website, if applicable;

2. The findings of the most recent inspection of the facility;

3. Notice of the commissioner's intent to revoke or deny renewal of the license of an assisted living facility. Such notice will be provided by the department and shall be posted in a prominent place at each public entrance of the facility to advise consumers of serious or persistent violations.

4. A copy of any final order of summary suspension of all or part of a license for an assisted living facility's license facility, a child welfare agency, and an assisted living facility operated by an agency of the Commonwealth, or child welfare agency operated by an agency of the Commonwealth shall be prominently displayed by the provider at each public entrance of the facility, or the provider may display a written statement summarizing the terms of the order, printed in clear and legible size and typeface, in a prominent location and identifying the location within the facility where the final order of summary suspension may be reviewed.

5. Notice of the commissioner's intent to take any of the actions enumerated in subdivisions B 1 through B 6 7 of § 63.2-1709.2 of the Code of Virginia. Such notice will be provided by the department, and a copy of the notice shall be posted in a prominent place at each public entrance of the facility to advise consumers of serious or persistent violations.

6. A copy of any special order issued by the department shall be posted in a prominent place at each public entrance of the licensed premises to advise consumers of serious or persistent violations.

7. Any other documents required by the commissioner.

## **22VAC40-80-340. Administrative sanctions.**

The commissioner may impose administrative sanctions or initiate court proceedings, severally or jointly, when appropriate in order to ensure prompt correction of violations involving noncompliance with state law or regulation in assisted living facilities, adult day care centers, and child welfare agencies as discovered through any inspection or investigation conducted by the Department of Social Services, the Virginia Department of Health, the Virginia Department of Behavioral Health and Developmental Services, or by state and local building or fire prevention officials. These administrative sanctions include:

1. Petitioning the court to appoint a receiver for any assisted living facility or adult day care center;
2. Revoking or denying renewal of a license for any assisted living facility or adult day care center that fails to comply with the limitations and standards set forth in its

license for violation that adversely affects, or is an ~~imminent~~ immediate and substantial threat to, the health, safety, or welfare of residents, or for permitting, aiding, or abetting the commission of any illegal act in an adult care facility;

3. Revoking or denying renewal of a license for any child welfare agency that fails to comply with the limitations and standards set forth in its license;

4. Requiring an assisted living facility to contract with an individual licensed by the Board of Long-Term Care Administrators to administer, manage, or operate the facility on an interim basis if the commissioner receives information from any source indicating ~~imminent~~ immediate and substantial risk of harm to residents. This action shall be an attempt to bring the facility into compliance with all relevant requirements of law, regulation, or any plan of correction approved by the commissioner. The contract shall be negotiated in accordance with the provisions of § 63.2-1709 of the Code of Virginia;

5. Issuing a notice of summary ~~order of~~ suspension of the license to operate an assisted living facility pursuant to proceedings set forth in § 63.2-1709 C of the Code of Virginia or pursuant to proceedings set forth in § 63.2-1710.1 of the Code of Virginia for assisted living facilities operated by agencies of the Commonwealth in conjunction with any proceedings for revocation, denial, or other action when conditions or practices exist that pose an ~~imminent~~ immediate and substantial threat to the health, safety, and welfare of residents; ~~and~~

6. Issuing a notice of summary suspension of the license to operate a child welfare agency pursuant to proceedings set forth in § 63.2-1709.1 C of the Code of Virginia or pursuant to proceedings set forth in § 63.2-1710.1 for child welfare agencies operated by an agency of the Commonwealth in conjunction with any proceedings for revocation, denial, or other action, when conditions or practices exist in the child welfare agency that pose an immediate and substantial threat to the health, safety, and welfare of children receiving care; and

7. Imposing administrative sanctions through the issuance of a special order as provided in § 63.2-1709.2 of the Code of Virginia. These include:

- a. Placing a licensee on probation upon finding that the licensee is substantially out of compliance with the terms of the license and that the health and safety of residents, participants, or children are at risk;
- b. Reducing the licensed capacity or prohibiting new admissions when the commissioner has determined that the licensee cannot make necessary corrections to achieve compliance with the regulations except by a temporary restriction of its scope of service;

c. Mandating training for the licensee or licensee's employees, with any costs to be borne by the licensee, when the commissioner has determined that the lack of such training has led directly to violations of regulations;

d. Assessing civil penalties of not more than \$500 per inspection upon finding that the licensee of an adult day care center or child welfare agency is substantially out of compliance with the terms of its license and the health and safety of residents, participants, or children are at risk;

e. Assessing a civil penalty for each day an assisted living facility is or was out of compliance with the terms of its license and the health, safety, and welfare of residents are at risk. The aggregate amount of such civil penalties shall not exceed \$10,000 in any 12-month period. Criteria for imposition of civil penalties and amounts, expressed in ranges, are developed by the board and are based upon the severity, pervasiveness, duration, and degree of risk to the health, safety, or welfare of residents. Such civil penalties shall be applied by the commissioner in a consistent manner;

f. Requiring licensees to contact parents, guardians, or other responsible persons in writing regarding health and safety violations; and

g. Preventing licensees who are substantially out of compliance with the licensure terms or in violation of the regulations from receiving public funds.

## 22VAC40-80-345. Summary suspension procedures.

A. In conjunction with any proceeding for revocation, denial, or other action when conditions or practices exist that pose an ~~imminent~~ immediate and substantial threat to the health, safety and welfare of the residents, the commissioner may issue a notice of summary suspension of the license to operate an assisted living facility or a child welfare agency or of certain authority of the licensee to provide certain services or perform certain functions.

B. ~~Upon determining that summary suspension is appropriate, the~~ The hearing coordinator will select a hearing officer from a list prepared by the Executive Secretary of the Supreme Court of Virginia and will schedule the time, date, and location of the hearing to determine whether the suspension is appropriate as required by § 63.2-1709 C or 63.2-1709.1 C of the Code of Virginia.

C. Simultaneously with the issuance of a notice of revocation, denial or other action, the commissioner will issue to the licensee a notice of summary ~~order of~~ suspension setting forth the following:

1. The procedures for the summary ~~order of~~ suspension;
2. The hearing and appeal rights as set forth ~~below~~ in this subsection;

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3. Facts and evidence that formed the basis for which the summary order of suspension is sought; and

4. The time, date, and location of the hearing.

D. Notice of the summary ~~order~~ of suspension ~~will~~ shall be served on the licensee or his designee by personal service or by certified mail, return receipt requested, to the address of record of the licensee as soon as practicable after issuance thereof.

E. The hearing shall take place in the locality where the assisted living facility or child welfare agency operates unless the licensee or his designee expressly waives this venue provision.

1. The hearing shall be held no later than 15 business days after service of notice on the licensee. The hearing officer may grant a continuance upon written request and for good cause shown. In no event shall any continuance exceed 10 business days after the initial hearing date.

2. The hearing coordinator will forward a copy of the relevant licensing standards to the hearing officer.

3. The hearing will be conducted in accordance with the procedures set forth in 22VAC40-80-480 through 22VAC40-80-500.

4. The department may be represented either by counsel or by agency staff authorized by § 2.2-509 of the Code of Virginia.

F. Within 10 days of the conclusion of the hearing, the hearing officer shall provide to the commissioner written findings and conclusions, together with a recommendation as to whether the license should be summarily suspended. The department shall have the burden of proof in any summary suspension hearing. The decision of the hearing officer shall be based on the preponderance of the evidence presented by the record and relevant to the basic law under which the agency is operating.

G. Within 10 business days of receipt of the hearing officer's ~~report and recommendation~~ findings, conclusions, and recommendation, the commissioner shall either (i) ~~adopt the hearing officer's recommendation or~~ (ii) ~~reject the hearing officer's recommendation if it would be an error of law or department policy to accept it~~ may issue a final order of summary suspension or an order that such summary suspension is not warranted by the facts and circumstances presented.

H. ~~The commissioner shall issue and shall serve on the licensee or his designee by personal service or by certified mail, return receipt requested either~~ In issuing a final order of summary suspension, the commissioner may:

1. ~~A final order of summary suspension including (i) a detailed statement of the basis for rejecting the hearing officer's recommendation, if applicable, and (ii) notice that~~

~~the licensee may appeal the commissioner's decision to the appropriate circuit court no later than 10 days following service of the order~~ Suspend the license of the assisted living facility or child welfare agency; or

2. ~~A final order that summary suspension is not warranted by the facts and circumstances presented~~ Suspend only certain authority of the assisted living facility or child welfare agency to provide certain services or perform certain functions that the commissioner determines should be restricted or modified in order to protect the health, safety, and welfare of the individuals receiving care.

I. ~~A copy of any final order of suspension shall be prominently displayed at each public entrance of the facility as required in 22VAC40-80-120~~ The commissioner shall adopt the hearing officer's recommended decision unless to do so would be an error of law or department policy.

J. In the event the commissioner rejects a hearing officer's findings, conclusions, or recommended decision, the commissioner shall state with particularity the basis for rejection.

K. A copy of any final order of summary suspension shall be prominently displayed at each public entrance of the facility as required in 22VAC40-80-120.

L. The signed, original case decision shall remain in the custody of the agency as a public record, subject to the agency's records retention policy.

## **22VAC40-80-370. Appeal process.**

A. The applicant or licensee will receive a notice of the department's intent to impose an administrative sanction. This notice will describe the ~~sanction or~~ sanctions and the reasons for the imposition. Service of the notice of adverse action is achieved by certified mailing of the notice to the applicant or licensee, unless service is made by other means and acknowledged by the applicant or licensee. If the applicant or licensee wishes to appeal the notice of adverse action, he shall have 15 days after receipt of the notice to note his appeal.

B. Upon receipt of the notice to impose an administrative sanction, the applicant or licensee has the right to appeal the decision in accordance with the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia). The procedures for filing an appeal will be outlined in the notice. The applicant or licensee shall submit any appeal of imposition of an administrative sanction in writing within 15 days of receipt of the notice.

C. If the applicant or licensee fails to appeal the notice of adverse action within 15 days of receipt of the notice, the final order will be entered. The decision will take effect 30 days after receipt of the notice.

D. The appeal process available is governed by law. Where the sanction is imposed by means of a special order as

provided in ~~§ 63.2-1709~~ § 63.2-1709.2 of the Code of Virginia, the case decision is issued by the commissioner following findings and conclusions resulting from the informal conference. Other sanctions include a provision for an administrative hearing, which is described in § 2.2-4020 of

the Code of Virginia, prior to the issuance of the case decision. For ease of reference, the process steps are displayed in the following chart:

List of Sanctions with Appeal Provisions			
	Informal Conference	Administrative Hearing	Circuit Court Review of Case Decision
<b>ADMINISTRATIVE SANCTION</b>			
Place licensee on probation	X		X
Reduce licensed capacity	X		X
Restrict admissions	X		X
Mandate training for licensee or staff	X		X
Assess civil penalty	X		X
Require written contact with responsible persons	X		X
Prevent receipt of public funds	X		X
Deny application for new or renewal license	X	X	X
Revoke license	X	X	X
File petition for appointment of a receiver			X
Require assisted living facility to contract with administrator	X	X	X

E. A final order of summary suspension for an assisted living facility or child welfare agency not operated by an agency of the Commonwealth shall include notice that the licensee may appeal the commissioner's decision to the appropriate circuit court no later than 10 days following service of the order.

1. The sole issue before the court shall be whether the commissioner had reasonable grounds to require the licensee to cease operations during the pendency of the concurrent revocation, denial, or other proceedings.

2. The concurrent revocation, denial, or other proceedings shall not be affected by the outcome of any hearing on the appropriateness of the summary suspension.

**22VAC40-80-375. Failure to pay civil penalty.**

A. If an outstanding civil penalty assessed after a case decision is not paid as required, the commissioner shall have the authority to:

1. Assess a late fee if the civil penalty payment is 60 days overdue, provided the total of the civil penalty and late fee do not exceed the penalty set forth in ~~§ 63.2-1709~~ § 63.2-1709.2 of the Code of Virginia;

2. Reduce the duration of the licensure period if the civil penalty payment is 60 days overdue; and

3. Deny renewal or revoke the license if the civil penalty payment is 90 days overdue.

B. The department will also institute legal collection procedures to collect unpaid penalties.

C. If a licensee appeals the imposition of a civil penalty, the provisions of this section shall not apply until the appeal is complete.

VA.R. Doc. No. R20-6019; Filed August 22, 2019, 2:18 p.m.

**Final Regulation**

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Social Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

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# Regulations

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**Title of Regulation:** 22VAC40-131. Standards for Licensed Child-Placing Agencies (amending 22VAC40-131-80, 22VAC40-131-250, 22VAC40-131-490; adding 22VAC40-131-495).

**Statutory Authority:** §§ 63.2-217, 63.2-1701, and 63.2-1734 of the Code of Virginia.

**Effective Date:** October 17, 2019.

**Agency Contact:** Deborah Eves, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7506, or email [deborah.eves@dss.virginia.gov](mailto:deborah.eves@dss.virginia.gov).

**Summary:**

*Pursuant to Chapters 65 and 84 of the 2019 Acts of Assembly, the amendments add notification to birth parents, adoptive parents, and an adopted child age 14 or older about post-adoptive contact and communication agreements as well as notification to the child age 14 or older that he may consent to such an agreement. Pursuant to Chapter 446 of the 2019 Acts of Assembly, the amendments include (i) requiring an annual review and an update, if necessary, of foster care caseworker caseloads; (ii) authorizing the commissioner to place, remove, or direct the placement or removal of a child under the supervision and control of a local board or licensed child placing-agency; and (iii) requiring the commissioner to remove or direct the removal of a child placed by a local board or licensed child-placing agency in a foster home or children's residential facility that fails to comply with state or federal requirements intended to protect the child's health, safety, or well-being.*

**22VAC40-131-80. Licensed capacity and maximum caseload numbers.**

A. The licensee shall include in the child-placing agency's caseload and capacity count all children to whom supervision is provided. The supervised children may be placed directly by the licensee or through arrangement or negotiation with another licensed child-placing agency in one of the following settings:

1. A resource home;
2. A foster home;
3. An adoptive home prior to the final order of adoption;
4. A treatment foster home;
5. A short-term foster home;
6. An independent living arrangement; or
7. ~~Licensed~~ A licensed children's residential facility.

B. The total approved caseload numbers served by the licensee at any given time shall not exceed the following:

1. Except for licensees that provide treatment foster care, the maximum caseload restrictions shall apply:

a. A full-time caseworker shall serve no more than 25 children at any one time.

b. Trainees:

(1) A beginning trainee shall serve no more than 10 children at any one time until such time that he has reached his first year anniversary with the licensee; and

(2) A one year experienced trainee shall serve no more than 15 children at any one time until such time that he has reached his second year anniversary with the licensee.

c. The caseload of a less than full-time caseworker shall be proportional to the time spent providing casework services to the licensee.

2. For treatment foster care, the total caseload shall be the sum of the following:

a. A ~~full-time~~ full-time caseworker shall have a maximum caseload of 12 children. However, the caseload shall be adjusted downward if:

(1) The caseworker's job responsibilities exceed those listed in caseworker's job description; or

(2) The difficulty of the children served requires more intensive supervision and training of the treatment foster parents.

b. The caseload of a less than full-time caseworker shall be proportional to the time spent providing casework services to the licensee.

c. Trainees:

(1) A beginning trainee shall serve no more than six children at any one time until such time that he has reached his first year anniversary with the licensee;

(2) A one year experienced trainee shall serve no more than nine children at any one time until such time that he has reached his second year anniversary with the licensee.

3. Student ~~Interns~~ interns: There shall be a maximum of three children in a caseload for a student intern, if any student intern works with the licensee.

C. For licensees that serve both foster care and treatment foster care populations, the licensee shall first consider caseload downward adjustment criteria as specified in subdivisions B 2 a (1) and (2) of this section, and; if the criteria does not apply to the caseworker's caseload under consideration, then; the licensee shall ensure that the caseworker serving the mixed populations provide services to a maximum of 15 total children; and no more than 10 of those 15 children are served in treatment foster care.

D. The licensee shall include the following children in the capacity count:

1. A child in the custody of the licensee;
2. A child for whom an interlocutory order has been entered and still awaits a final order of adoption to be entered; and
3. A child not in the licensee's custody whose placement is supervised by the licensee.

E. Caseloads shall be reviewed and updated, as appropriate, annually to reflect the time and work necessary to effectively manage each foster or treatment foster care case.

Part VI  
Children's Services

**22VAC40-131-250. Intake, acceptance, and placement.**

A. Prior to any placement of a child the licensee shall secure written authority to make the placement. The written authority for placement shall be maintained in the child's file. The written authority to make placements includes one of the following:

1. A court order, issued by any court of competent jurisdiction, that commits the child to the care of the licensee;
2. A permanent entrustment by the parent ~~or parents~~ or other person having legal custody of the child;
3. A temporary entrustment by the parent ~~or parents~~ or other person having legal custody of the child;
4. A placement agreement from a licensed or authorized child-placing agency having legal custody of the child;
5. A placement agreement signed by the local department of social services having jurisdiction when a noncustodial agreement has been signed between a parent or legal guardian and the local department or another public agency; or
6. A parental agreement whereby for the purpose of placement in suitable family homes, child-caring institutions, residential facilities, or independent living arrangements, the child's parents or guardians have entrusted the child to the local department.

B. Prior to any placement of a child in an independent living arrangement, the licensee shall secure written authority to make the placement. The written authority to place includes one of the following:

1. A court order, issued by any court of competent jurisdiction, that commits the child to the care of the licensee;
2. A permanent entrustment by the parent ~~or parents~~ or other person having legal custody of the child;

3. A temporary entrustment by the parent ~~or parents~~ or other person having legal custody of the child;

4. A placement agreement from a child-placing agency or person having legal custody of the child; or

5. A placement agreement signed by the local department of social services having jurisdiction when a noncustodial agreement has been signed between a parent or legal guardian and the local department or another public agency.

C. Prior to the provision of independent living services to any person who was in foster care on his 18th birthday and has not yet reached 21 years of age, the licensee shall enter into a written contractual agreement with the person 18 years of age to 21 years of age, and such contractual agreement shall specify the terms and conditions of the person's receipt of independent living services.

D. Prior to placement of a child for adoption, the licensee shall secure written authority to make the placement. The written authority shall be in the form of one of the following:

1. An order issued by a court of competent jurisdiction documenting the termination of parental rights and responsibilities of each parent;
2. A notarized entrustment agreement signed by the parent ~~or parents~~ or other person having legal custody of the child; or
3. An order issued by a court of competent jurisdiction approving the transfer of the child's custody from one agency to another.

E. The licensee shall petition the court for approval of a temporary entrustment agreement.

1. For a temporary entrustment written for ~~less~~ fewer than 90 days, the licensee shall file the petition with the court within a reasonable period of time and not to exceed 89 days after the execution of the agreement if the child is not returned to his home within that 90-day period.

2. For a temporary entrustment written for 90 days or ~~longer~~ more or for an unspecified period of time, the licensee shall file the petition with the court within a reasonable period of time and not to exceed 30 days after execution of the agreement if the agreement does not provide for termination of all parental rights with respect to the child.

F. A licensee certified by the Department of Education as a school for children with disabilities shall for the purpose of placement of the child in its special education program enter into a placement agreement, signed by the parent or other person having legal custody of the child. The placement agreement shall meet the requirements of this section. The licensee is not required to take custody of the child placed in its special education program.

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G. Prior to accepting a child for placement in a foster care home, treatment foster care home, short-term foster care home, or an independent living arrangement, the licensee shall gather, review, and document the following information in the child's file:

1. The reason the placement is requested, and if the child coming into placement is ~~less~~ younger than one year old, a brief report on his living situation unless this placement directly follows his discharge from the hospital;

2. A list of services requested by the placing agency, parent, or other individual having legal custody of the child;

3. Current information on the child's:

a. Health:

(1) For a newborn child coming into foster care directly following hospital discharge, the discharge summary shall be accepted as the admission examination; or

(2) For a child ~~under~~ younger than one year old, the admission examination shall consist of a hospital summary and a physician-signed report of interim care no older than 30 days that documents the absence of abnormalities or if abnormalities are present, the report shall contain an explanation of abnormalities observed;

b. Behavior in the home or other previous living situation;

c. Current school grade level, as appropriate;

d. Day care or nursery school, as appropriate;

e. Adjustment to school, day care, or nursery school;

f. Current medication, prescription and nonprescription, including the names, dosages, and instructions for all medication being taken by the child, and reasons for taking each medication;

g. Emotional and psychological needs and problems of the child, if any, including information concerning professional treatment needed or received to meet the needs or problems;

h. Strengths, skills, interests, and talents;

i. Permanency planning goal including the date of planned achievement; and

j. Emergency contact supports including the names, addresses, and telephone numbers for designated emergency contacts; parents, if appropriate, or other person having legal custody of the child; and the agency placing the child with the licensee;

4. For treatment foster care placements, a list of the strengths and needs of the child's birth family;

5. The dates and names of persons involved in making preplacement visits;

6. The dates and names of persons involved in staffing the child's case;

7. The reason the child was accepted for placement; and

8. The date the acceptance decision was made.

H. The licensee shall review and consider all information collected on the child prior to recommending the type of home best suited to the child. The recommendation and rationale shall be documented in the child's file.

I. The licensee shall consider the following when making the decision whether to place a child in a foster home, treatment foster care home, or short-term foster care home:

1. The prospective foster family's specific skills, abilities, and attitudes necessary to (i) effectively work with the child; (ii) ensure implementation of the child's service plan; and (iii) provide effective behavior support techniques, crisis intervention, crisis stabilization, and supportive counseling;

2. The prospective foster family's ability to meet the needs and preferences of the child;

3. The prospective foster family's willingness to access resources required to meet the needs of the child; and

4. The prospective foster family's willingness and ability to work with the child's family.

J. Prior to placement of a child in a family home, the licensee shall assist the prospective foster family with making an informed decision as to whether that particular child is appropriate for them.

K. The licensee shall document in the child's file the reasons a particular home was selected for the child, including the matching factors considered for the selection decision.

L. Except when the placement of the child is an emergency placement, the licensee shall interview the child and his parent or legal guardian prior to the child's placement. If, for valid reasons, the interview was not completed prior to placement, the licensee shall document in the child's file the reasons why the interview was not completed within the required ~~time frame~~ timeframe.

M. Except when the placement of the child is an emergency placement, the licensee shall prepare the child for placement and arrange a preplacement visit for the child in the prospective home. If a preplacement visit did not take place prior to the child's placement, the reasons why it did not occur shall be documented in the child's file.

N. A summary of the preplacement interview and results of the preplacement visit shall be documented in the child's file.

O. Within 30 days of the placement of the child in a foster care home, treatment foster care home, short-term foster care home, or an independent living arrangement, or prior to the completion of the adoptive placement agreement, the licensee shall place in the file of the child a written assessment that contains all required elements specified in 22VAC40-131-250 G.

P. The licensee shall place siblings together in the same foster home whenever possible unless placement together is clearly not in the best interest of each child.

Q. When the licensee accepts a child for placement from another child-placing agency that retains custody of the child, the licensee shall, before placing the child:

1. Sign the placement agreement as the recipient of the child; and
2. Ensure that the placement agreement has been signed by the representatives from each child-placing agency who ~~has~~ have the authority to commit the child-placing agency to the provisions contained in the agreement.

R. When the licensee accepts a child for placement from a parent or other individual having legal custody of the child, the licensee shall:

1. Obtain an entrustment agreement and follow the requirements as set forth in §§ 63.2-903 and 63.2-1817 of the Code of Virginia;
2. Explain the licensee's foster care program;
3. Collect information for the intake and social history and document the information obtained under each respective heading;
4. Provide the parent or other individual having legal custody of the child or youth with information about the licensee's services;
5. Provide an explanation of the service planning process and the licensee's case work responsibilities;
6. Discuss with the parent or other individual having legal custody of the child:
  - a. Long-term and short-term goals for the child, including estimated dates of accomplishment for each goal;
  - b. Objectives for each goal;
  - c. Responsibilities of all parties for accomplishing the goals and objectives for the child;
  - d. Involvement in service planning for the child;
  - e. Plans for visitation with the child; and
  - f. Plans for financial support for the child; and
7. Document in the child's file the reactions of the parents or other persons to each topic discussed with them.

S. The licensee shall cooperate with the placing agency and custodian to ensure that the placing agency and custodian have access to the child at all times.

T. The licensee shall develop a system of support for foster parents and assign designated staff to be on call to foster parents on a 24-hour, seven day a week basis.

U. The commissioner shall have the authority to place, remove, or direct the placement or removal of any child who is under the supervision and control of a local board or licensed child-placing agency. Pursuant to such authority, the commissioner shall remove or direct the removal of any child placed by a local board or licensed child-placing agency in a foster home or children's residential facility that fails to comply with any state or federal requirements intended to protect the child's health, safety, or well-being.

**22VAC40-131-490. Adoption counseling and services for birth parents.**

A. Except in the case of intercountry adoption, the licensee who holds custody of a child shall offer counseling services to the birth mother, or if reasonably available, to both birth parents contemplating the placement of their child for adoption. The counseling services shall include a discussion about:

1. The parent's decision to place the child was not made under duress and to ensure the decision to place the child is a firm decision;
2. The impact of such a decision;
3. The reasons for contemplating the decision to place the child for adoption; and
4. Alternatives to adoption including:
  - a. Services available to assist the family in staying together, if staying together is in the best interests of both the child and family;
  - b. Foster care for the child; and
  - c. The child's placement with relatives.

B. Except in the case of intercountry adoption, the licensee shall offer additional counseling sessions as needed by the birth parents.

C. Except in the case of intercountry adoption and prior to accepting a child for adoption placement, the licensee shall provide the birth parents with an explanation of:

1. Adoption services provided;
2. Adoption policies and procedures, including the adoption process; and
3. The rights and responsibilities of all parties in the adoption process.

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D. The licensee shall document in the record of the birth mother or child to whom the counseling services were provided if:

1. The licensee did not provide counseling services as required, the reason shall be documented.
2. Counseling was provided to the birth father, such counseling services shall be documented.

~~E. When a child's birth parents and the prospective adoptive parents have entered into a written post-adoption contact and communication agreement, the licensee sponsoring the adoption shall:~~

- ~~1. Review the written post-adoption contact and communication agreement; and~~
- ~~2. Provide to the court the licensee's written recommendation indicating whether:~~
  - ~~a. The post-adoption contact and communication agreement represents the best interests of the child; and~~
  - ~~b. The licensee recommends approval of the agreement.~~

## **22VAC40-131-495. Post-adoption contact and communication agreement.**

A. Unless parental rights of the birth parents have been terminated, the licensee may inform the birth parents and shall inform the adoptive parents that they may enter into a written post-adoption contact and communication agreement as described in § 63.2-1220.2 of the Code of Virginia.

B. The licensee shall inform the child if the child is 14 years of age or older, that he may consent to a post-adoption contact and communication agreement as described in § 63.2-1220.2 of the Code of Virginia.

C. When a child's birth parents and the prospective adoptive parents have entered into a written post-adoption contact and communication agreement, and the child age 14 years or older has given consent, the licensee shall:

1. Review the written post-adoption contact and communication agreement; and
2. Provide to the court the licensee's written recommendation indicating whether:
  - a. The post-adoption contact and communication agreement represents the best interests of the child; and
  - b. The licensee recommends approval of the agreement.

VA.R. Doc. No. R20-6005; Filed August 22, 2019, 2:18 p.m.

## **Final Regulation**

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Social Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** **22VAC40-141. Licensing Standards for Independent Foster Homes (amending 22VAC40-141-10).**

**Statutory Authority:** §§ 63.2-217 and 63.2-1734 of the Code of Virginia.

**Effective Date:** October 17, 2019.

**Agency Contact:** Cynthia Carneal Heflin, Division of Licensing Programs, Department of Social Services, 801 East Main Street, 9th Floor, Richmond, VA 23219, telephone (804) 726-7140, FAX (804) 726-7132, TTY (800) 828-1120, or email [cynthia.carneal@dss.virginia.gov](mailto:cynthia.carneal@dss.virginia.gov).

### **Summary:**

*The amendment conforms the definition of "independent foster home" to the definition in Chapter 297 of the 2019 Acts of Assembly.*

### **Part I**

#### **Definitions and Authority**

### **22VAC40-141-10. Definitions.**

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

"Assistant" means an individual 18 years of age or older who is selected by the independent foster parent to assist the provider in the care and supervision of the children in the home.

"Child" means any individual less than 18 years of age.

"Child with special needs" means a child with diagnosed physical, mental, or emotional disabilities such as, but not limited to, cerebral palsy, sensory impairment, learning disabilities, behavior disorders, chronic illnesses, a deficit in social functioning, mental retardation or emotional disturbance and who may require special monitoring or specialized programs, interventions or facilities.

"Commissioner" means the Commissioner of the Department of Social Services, his designee, or authorized representative.

"Department" means the Virginia Department of Social Services.

"Good character and reputation" means findings have been established and knowledgeable and objective people agree that the individual (i) maintains business, professional, family, and community relationships which are characterized by honesty, fairness, truthfulness and dependability and (ii) has a history or pattern of behavior that demonstrates that the individual is suitable and able to care for, guide, supervise, and protect children. Relatives by blood or marriage, and persons who are not knowledgeable of the individual, such as recent acquaintances, shall not be considered objective character and reputation references.

"Independent foster home" means a private family home in which any child, other than a child by birth or adoption of such person, resides as a member of the household and has been placed therein independently of a child-placing agency except (i) a home in which are received only children related by birth or adoption of the person who maintains such home and children of personal friends of such person ~~and~~; (ii) a home in which ~~is~~ are received ~~a child or~~ children committed under the provisions of subdivision A 4 of § 16.1-278.2, subdivision 6 of § 16.1-278.4, or subdivision A 13 of § 16.1-278.8 of the Code of Virginia; and (iii) a home in which are received only children who are the subject of a properly executed power of attorney pursuant to Chapter 10 (§ 20-166 et seq.) of Title 20 of the Code of Virginia.

"Infant" means any child from birth up to 16 months of age.

"Major injuries, illnesses and accidents" means injuries, illnesses or accidents that require emergency medical care or treatment.

"Parent" means the legal ~~parent or~~ parents or legal guardians of the child.

"Placing agreement" means the written agreement signed by the child's parents or guardians and the independent foster home parents in which the parents or guardians authorize the child's placement in the independent foster home for a period of 180 days or fewer. The placing agreement specifies the rights and responsibilities of each party but does not transfer legal custody to the independent foster home parent. The agreement addresses acquisition of, and consent for, any medical treatment needed by the child; financial responsibility for the placement; visitation with the child's family; and if appropriate to the child's age, unauthorized absences from the home. The parents or guardians may withdraw the placing agreement at any time during the placement period.

"Provider" means independent foster parents who give 24-hour substitute family care, room and board, and services for up to eight children who reside in the provider's home as members of the household. A provider may be a husband and wife.

"Temporary entrustment agreement" means the agreement signed by the child's parents or guardians and the licensed

independent foster parent in which the parents or guardians temporarily confer physical and legal custody of their child to the licensed provider for less than 180 days. The temporary entrustment agreement specifies the rights and obligations of the child, the parents or guardians and the provider, includes the responsibilities of the parents for financial support, and grants authority for medical care of the child. Temporary entrustment agreements may be withdrawn by the parents or guardians at any time during the 180-day period. Placements for longer than 90 days must be approved by the local juvenile and domestic relations court.

"Time-out" means a discipline technique in which a child is moved for a brief time away from the stimulation and reinforcement of ongoing activities and other children to allow the child to regain composure when losing self-control.

VA.R. Doc. No. R20-6004; Filed August 22, 2019, 2:19 p.m.

**Final Regulation**

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Social Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** **22VAC40-151. Standards for Licensed Children's Residential Facilities (amending 22VAC40-151-170; repealing 22VAC40-151-90).**

**Statutory Authority:** §§ 63.2-217 and 63.2-1737 of the Code of Virginia.

**Effective Date:** October 17, 2019.

**Agency Contact:** Janice Sigler, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7901, FAX (804) 726-7132, or email jan.sigler@dss.virginia.gov.

**Summary:**

*The amendments conform the regulation to (i) Chapter 446 of the 2019 Acts of Assembly by authorizing the commissioner to place, remove, or direct the placement or removal of a child under the supervision and control of a local board or licensed child-placing agency and by requiring the commissioner to remove or direct the removal of a child placed by a local board or licensed child-placing agency in a children's residential facility that fails to comply with state or federal requirements intended to protect the child's health, safety, or well-being and (ii) Chapter 449 of the 2019 Acts of Assembly, which made summary suspension procedures applicable to all child welfare agencies, by repealing provisions regarding*

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*summary suspension procedures for children's residential facilities because such provisions are located in 22VAC40-80, General Procedures and Information for Licensure.*

## **22VAC40-151-90. Summary suspension. (Repealed.)**

~~A. In conjunction with any proceeding for revocation, denial, or other action, when conditions or practices exist that pose an immediate and substantial threat to the health, safety, and welfare of the residents, the commissioner may issue an order of summary suspension of the license to operate a children's residential facility when he believes the operation of the facility should be suspended during the pendency of such proceeding.~~

~~B. Prior to the issuance of an order of summary suspension, the department shall contact the Executive Secretary of the Supreme Court of Virginia to obtain the name of a hearing officer. The department shall schedule the time, date, and location of the administrative hearing with the hearing officer.~~

~~C. The order of summary suspension shall take effect upon its issuance. It shall be delivered by personal service and certified mail, return receipt requested, to the address of record of the facility as soon as practicable. The order shall set forth:~~

- ~~1. The time, date, and location of the hearing;~~
- ~~2. The procedures for the hearing;~~
- ~~3. The hearing and appeal rights; and~~
- ~~4. Facts and evidence that formed the basis for the order of summary suspension.~~

~~D. The hearing shall take place within three business days of the issuance of the order of summary suspension.~~

~~E. The department shall have the burden of proving in any summary suspension hearing that it had reasonable grounds to require the facility to cease operations during the pendency of the concurrent revocation, denial, or other proceeding.~~

~~F. The administrative hearing officer shall provide written findings and conclusions, together with a recommendation as to whether the license or certificate should be summarily suspended, to the commissioner within five business days of the hearing.~~

~~G. The commissioner shall issue a final order of summary suspension or make a determination that the summary suspension is not warranted based on the facts presented and the recommendation of the hearing officer within seven business days of receiving the recommendation of the hearing officer.~~

~~H. The commissioner shall issue and serve on the children's residential facility or its designee by personal service or by certified mail, return receipt requested, either:~~

~~1. A final order of summary suspension including (i) the basis for accepting or rejecting the hearing officer's recommendations and (ii) notice that the children's residential facility may appeal the commissioner's decision to the appropriate circuit court no later than 10 days following issuance of the order; or~~

~~2. Notification that the summary suspension is not warranted by the facts and circumstances presented and that the order of summary suspension is rescinded.~~

~~I. The facility may appeal the commissioner's decision on the summary suspension to the appropriate circuit court no more than 10 days after issuance of the final order.~~

~~J. The outcome of concurrent revocation, denial, and other proceedings shall not be affected by the outcome of any hearing pertaining to the appropriateness of the order of summary suspension.~~

~~K. At the time of the issuance of the order of summary suspension, the department shall contact the appropriate agencies to inform them of the action and the need to develop relocation plans for residents, and ensure that parents and guardians are informed of the pending action.~~

## **22VAC40-151-170. Relationship to regulatory authority.**

~~A. The governing body or its official representative shall notify the department within five working days of any change in administrative structure or newly hired chief administrative officer or program director.~~

~~B. Notwithstanding any other provision of law, the commissioner shall have the authority to place, remove, or direct the placement or removal of any child who is under the supervision and control of a local board or licensed child-placing agency.~~

~~C. Pursuant to such authority, the commissioner shall remove or direct the removal of any child placed by a local board or licensed child-placing agency in a children's residential facility that fails to comply with any state or federal requirements intended to protect the child's health, safety, or well-being.~~

VA.R. Doc. No. R20-6003; Filed August 22, 2019, 2:19 p.m.

## **Final Regulation**

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Social Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation: 22VAC40-185. Standards for Licensed Child Day Centers (amending 22VAC40-185-10, 22VAC40-185-240).**

**Statutory Authority:** §§ 63.2-217 and 63.2-1734 of the Code of Virginia.

**Effective Date:** October 17, 2019.

**Agency Contact:** Tatanishia Armstrong, Licensing Consultant, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7152, FAX (804) 726-7132, or email tatanishia.armstrong@dss.virginia.gov.

**Summary:**

*The amendments (i) remove exemptions to the definition of "child day center" (Chapter 810 of the 2018 Acts of Assembly (delayed effective date of July 1, 2019)) and (ii) add an exception from orientation and training requirements applicable to staff of child day programs for parents or other persons who act in the capacity of a teacher and count in the mandated staff-to-child ratio in a cooperative preschool center (Chapter 604 of the 2019 Acts of Assembly).*

Part I  
Introduction

**22VAC40-185-10. Definitions.**

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

"Adult" means any individual 18 years of age or older.

"Age and stage appropriate" means the curriculum, environment, equipment, and adult-child interactions are suitable for the ages of the children within a group and the individual needs of any child.

"Age groups":

1. "Infant" means children from birth to 16 months.
2. "Toddler" means children from 16 months up to two years.
3. "Preschool" means children from two years up to the age of eligibility to attend public school, five years by September 30.
4. "School age" means children eligible to attend public school, age five or older by September 30 of that same year. Four-year-old or five-year-old children included in a group of school age children may be considered school age during the summer months if the children will be entering kindergarten that year.

"Attendance" means the actual presence of an enrolled child.

"Balanced mixed-age grouping" means a program using a curriculum designed to meet the needs and interests of children in the group and is planned for children who enter the program at three through five years of age. The enrollment in the balance mixed-age grouping comprises a relatively even allocation of children in each of three ages (three to six years) and is designed for children and staff to remain together with turnover planned only for the replacement of exiting students with children of ages that maintain the class balance.

"Body fluids" means urine, feces, saliva, blood, nasal discharge, eye discharge, and injury or tissue discharge.

"Camp" means a child day camp that is a child day center for school age children that operates during the summer vacation months only. Four-year-old children who will be five by September 30 of the same year may be included in a camp for school age children.

"Center" means a child day center.

"Child" means any individual under 18 years of age.

"Child day center" means a child day program offered to (i) two or more children under the age of younger than 13 years of age in a facility that is not the residence of the provider or of any of the children in care or (ii) 13 or more children at any location.

**Exemptions (§ 63.2-1715 of the Code of Virginia):**

- ~~1. A child day center that has obtained an exemption pursuant to § 63.2-1716 of the Code of Virginia;~~
- ~~2. A program where, by written policy given to and signed by a parent or guardian, children are free to enter and leave the premises without permission or supervision regardless of (i) such program's location or the number of days per week of its operation; (ii) the provision of transportation services, including drop off and pick up times; or (iii) the scheduling of breaks for snacks, homework, or other activities. A program that would qualify for this exemption except that it assumes responsibility for the supervision, protection and well-being of several children with disabilities who are mainstreamed shall not be subject to licensure;~~
- ~~3. A program of instructional experience in a single focus, such as, but not limited to, computer science, archaeology, sport clinics, or music, if children under the age of six do not attend at all and if no child is allowed to attend for more than 25 days in any three month period commencing with enrollment. This exemption does not apply if children merely change their enrollment to a different focus area at a site offering a variety of activities and such children's attendance exceeds 25 days in a three month period;~~
- ~~4. Programs of instructional or recreational activities wherein no child under age six attends for more than six~~

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hours weekly with no class or activity period to exceed 1-1/2 hours, and no child six years of age or above attends for more than six hours weekly when school is in session or 12 hours weekly when school is not in session. Competition, performances and exhibitions related to the instructional or recreational activity shall be excluded when determining the hours of program operation;

5. A program that operates no more than a total of 20 program days in the course of a calendar year provided that programs serving children under age six operate no more than two consecutive weeks without a break of at least a week;

6. Instructional programs offered by public and private schools that satisfy compulsory attendance laws or the Individuals with Disabilities Education Act, as amended (20 USC § 1400 et seq.), and programs of school-sponsored extracurricular activities that are focused on single interests such as, but not limited to, music, sports, drama, civic service, or foreign language;

7. Education and care programs provided by public schools that are not exempt pursuant to subdivision 6 of this definition shall be regulated by the State Board of Education using regulations that incorporate, but may exceed, the regulations for child day centers licensed by the commissioner;

8. Early intervention programs for children eligible under Part C of the Individuals with Disabilities Education Act, as amended (20 USC § 1400 et seq.), wherein no child attends for more than a total of six hours per week;

9. Practice or competition in organized competitive sports leagues;

10. Programs of religious instruction, such as Sunday schools, vacation Bible schools, and Bar Mitzvah or Bat Mitzvah classes, and child minding services provided to allow parents or guardians who are on site to attend religious worship or instructional services;

11. Child minding services which are not available for more than three hours per day for any individual child offered on site in commercial or recreational establishments if the parent or guardian (i) is not an on-duty employee, except for part time employees working less than two hours per day; (ii) can be contacted and can resume responsibility for the child's supervision within 30 minutes; and (iii) is receiving or providing services or participating in activities offered by the establishment;

12. A certified preschool or nursery school program operated by a private school that is accredited by a statewide accrediting organization recognized by the State Board of Education or accredited by the National Association for the Education of Young Children's National Academy of Early Childhood Programs; the

Association of Christian Schools International; the American Association of Christian Schools; the National Early Childhood Program Accreditation; the National Accreditation Council for Early Childhood Professional Personnel and Programs; the International Academy for Private Education; the American Montessori Society; the International Accreditation and Certification of Childhood Educators, Programs, and Trainers; or the National Accreditation Commission that complies with the provisions of § 63.2-1717 of the Code of Virginia;

13. A program of recreational activities offered by local governments, staffed by local government employees, and attended by school-age children. Such programs shall be subject to safety and supervisory standards established by local governments; or

14. By policy, a child day center that is required to be programmatically licensed by another state agency for that service.

"Child day program" means a regularly operating service arrangement for children where, during the absence of a parent or guardian, a person or organization has agreed to assume responsibility for the supervision, protection, and well-being of a child under the age of younger than 13 years of age for less than a 24-hour period.

Note: This does not include programs such as drop-in playgrounds or clubs for children when there is no service arrangement with the child's parent.

"Children with special needs" means children with developmental disabilities, mental retardation, emotional disturbance, sensory or motor impairment, or significant chronic illness who require special health surveillance or specialized programs, interventions, technologies, or facilities.

"Cleaned" means treated in such a way to reduce the amount of filth through the use of water with soap or detergent or the use of an abrasive cleaner on inanimate surfaces.

"Commissioner" means the Commissioner of the Virginia Department of Social Services.

"Communicable disease" means a disease caused by a microorganism (bacterium, virus, fungus, or parasite) that can be transmitted from person to person via an infected body fluid or respiratory spray, with or without an intermediary agent (such as a louse, mosquito) or environmental object (such as a table surface). Some communicable diseases are reportable to the local health authority.

"Department" means the Virginia Department of Social Services.

"Department's representative" means an employee or designee of the Virginia Department of Social Services, acting as the authorized agent of the commissioner.

"Evening care" means care provided after 7 p.m. but not through the night.

"Good character and reputation" means knowledgeable and objective people agree that the individual (i) maintains business, professional, family, and community relationships which are characterized by honesty, fairness, and truthfulness and (ii) demonstrates a concern for the well-being of others to the extent that the individual is considered suitable to be entrusted with the care, guidance, and protection of children. Relatives by blood or marriage and people who are not knowledgeable of the individual, such as recent acquaintances, shall not be considered objective references.

"Group of children" means the children assigned to a staff member or team of staff members.

"High school program completion or the equivalent" means an individual has earned a high school diploma or General Education Development (G.E.D.) certificate, or has completed a program of home instruction equivalent to high school completion.

"Independent contractor" means an entity that enters into an agreement to provide specialized services or staff for a specified period of time.

"Individual service, education or treatment plan" means a plan identifying the child's strengths, needs, general functioning and plan for providing services to the child. The service plan includes specific goals and objectives for services, accommodations, and intervention strategies. The service, education or treatment plan clearly shows documentation and ~~reassessment/evaluation~~ reassessment or evaluation strategies.

"Intervention strategies" means a plan for staff action that outlines methods, techniques, cues, programs, or tasks that enable the child to successfully complete a specific goal.

"Licensee" means any individual, partnership, association, public agency, or corporation to whom the license is issued.

"Minor injury" means a wound or other specific damage to the body such as, but not limited to, abrasions, splinters, bites that do not break the skin, and bruises.

"Overnight care" means care provided after 7 p.m. and through the night.

"Parent" means the biological or adoptive parent ~~or parents~~ or legal guardian ~~or guardians~~ of a child enrolled in or in the process of being admitted to a center.

"Physician" means an individual licensed to practice medicine in any of the 50 states or the District of Columbia.

"Physician's designee" means a physician, licensed nurse practitioner, licensed physician assistant, licensed nurse (R.N. or L.P.N.), or health assistant acting under the supervision of a physician.

"Primitive camp" means a camp where places of abode, water supply system, or permanent toilet and cooking facilities are not usually provided.

"Programmatic experience" means time spent working directly with children in a group that is located away from the child's home. Work time shall be computed on the basis of full-time work experience during the period prescribed or equivalent work time over a longer period. Experience settings may include ~~but not be limited to~~ a child day program, family day home, child day center, boys and girls club, field placement, elementary school, or a faith-based organization.

"Resilient surfacing" means:

1. For indoor and outdoor use underneath and surrounding equipment, impact absorbing surfacing materials that comply with minimum safety standards when tested in accordance with the procedures described in the American Society for Testing and Materials' standard F1292-99 as shown in Figures 2 (Compressed Loose Fill Synthetic Materials Depth Chart) and 3 (Use Zones for Equipment) on pages 6-7 of the National Program for Playground Safety's "Selecting Playground Surface Materials: Selecting the Best Surface Material for Your Playground," February 2004.

2. Hard surfaces such as asphalt, concrete, dirt, grass or flooring covered by carpet or gym mats do not qualify as resilient surfacing.

"Sanitized" means treated in such a way to remove bacteria and viruses from inanimate surfaces through using a disinfectant solution (i.e., bleach solution or commercial chemical disinfectant) or physical agent (e.g., heat). The surface of item is sprayed or dipped into the disinfectant solution and allowed to air dry after use of the disinfectant solution.

"Serious injury" means a wound or other specific damage to the body such as, but not limited to, unconsciousness; broken bones; dislocation; deep cut requiring stitches; concussion; or foreign object lodged in eye, nose, ear, or other body orifice.

"Shelter-in-place" means the facility or building in which a child day center is located.

"Short-term program" means a child day center that operates less than 12 weeks a year.

"Special needs child day program" means a program exclusively serving children with special needs.

"Specialty camps" means those centers that have an educational or recreational focus on one subject such as dance, drama, music, or sports.

"Sponsor" means an individual, partnership, association, public agency, corporation, or other legal entity in whom the

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ultimate authority and legal responsibility is vested for the administration and operation of a center subject to licensure.

"Staff" means administrative, activity, and service personnel including the licensee when the licensee is an individual who works in the center, and any persons counted in the staff-to-children ratios or any persons working with a child without sight and sound supervision of a staff member.

"Staff positions" are defined as follows:

1. "Aide" means the individual designated to be responsible for helping the program leader in supervising children and in implementing the activities and services for children. Aides may also be referred to as assistant teachers or child care assistants.
2. "Program leader" means the individual designated to be responsible for the direct supervision of children and for implementation of the activities and services for a group of children. Program leaders may also be referred to as child care supervisors or teachers.
3. "Program director" means the primary, ~~on-site~~ onsite director or coordinator designated to be responsible for developing and implementing the activities and services offered to children, including the supervision, orientation, training, and scheduling of staff who work directly with children, whether or not personally performing these functions.
4. "Administrator" means a manager or coordinator designated to be in charge of the total operation and management of one or more centers. The administrator may be responsible for supervising the program director or, if appropriately qualified, may concurrently serve as the program director. The administrator may perform staff orientation or training or program development functions if the administrator meets the qualifications of 22VAC40-185-190 and a written delegation of responsibility specifies the duties of the program director.

"Therapeutic child day program" means a specialized program, including ~~but not limited to~~ therapeutic recreation programs, exclusively serving children with special needs when an individual service, education or treatment plan is developed and implemented with the goal of improving the functional abilities of the children in care.

"Universal precautions" means an approach to infection control. According to the concept of universal precautions, all human blood and certain human body fluids are treated as if known to be infectious for human immunodeficiency virus (HIV), hepatitis B virus (HBV), and other bloodborne pathogens.

"Volunteer" means a person who works at the center and:

1. Is not paid;
2. Is not counted in the staff-to-children ratios; and

3. Is in sight and sound supervision of a staff member when working with a child.

Any unpaid person not meeting this definition shall be considered "staff" and shall meet staff requirements.

## **22VAC40-185-240. Staff training and development.**

A. Staff shall receive the following training by the end of their first day of assuming job responsibilities:

1. Job responsibilities and to whom they report;
2. The policies and procedures listed in subsection B of this section and 22VAC40-185-420 A that relate to the staff member's responsibilities;
3. The center's playground safety procedures unless the staff member will have no responsibility for playground activities or equipment;
4. Recognizing child abuse and neglect and the legal requirements for reporting suspected child abuse as required by § 63.2-1509 of the Code of Virginia;
5. Confidential treatment of personal information about children in care and their families; and
6. The standards in this chapter that relate to the staff member's responsibilities.

B. By the end of the first day of supervising children, staff shall be provided in writing with the information listed in 22VAC40-185-420 A and the following:

1. Procedures for supervising a child who may arrive after scheduled classes or activities including field trips have begun;
2. Procedures to confirm absence of a child when the child is scheduled to arrive from another program or from an agency responsible for transporting the child to the center;
3. Procedures for identifying where attending children are at all times, including procedures to ensure that all children are accounted for before leaving a field trip site and upon return to the center;
4. Procedures for action in case of lost or missing children, ill or injured children, medical emergencies and general emergencies;
5. Policy for any administration of medication; and
6. Procedures for response to natural and man-made disasters.

C. Program directors and staff who work directly with children shall annually attend 10 hours of staff development activities that shall be related to child safety and development and the function of the center. Such training hours shall increase according to the following:

1. June 1, 2006 - 12 hours

2. June 1, 2007 - 14 hours

3. June 1, 2008 - 16 hours

4. Staff development activities to meet this subsection may include up to two hours of training in first aid or cardiopulmonary resuscitation. Staff development activities to meet this subsection may not include rescue breathing and first responder as required by 22VAC40-185-530 and training in medication administration and daily health observation of children as required by subsection D of this section.

5. ~~Exception (a):~~ Exceptions to training requirements are as follows:

a. Staff who drive a vehicle transporting children and do not work with a group of children at the center do not need to meet the annual training requirement.

~~Exception (b): Parents who participate in cooperative preschool centers shall complete four hours of orientation training per year~~

b. In a cooperative preschool center that is organized, administered, and maintained by parents of children in care, parent volunteers, or other persons who participate and volunteer in a cooperative preschool center on behalf of a child attending such cooperative preschool center, including such volunteers who are counted in the staff-to-child ratios required in 22VAC40-185-340, shall complete four hours of training per year and shall be exempt from orientation and training requirements applicable to staff of child day programs. This orientation and training exemption shall not apply to any parent volunteer or other person as referred to in this subdivision if the cooperative preschool center has entered into a contract with the department or a local department to provide child care services funded by the Child Care and Development Block Grant.

~~Exception (c):~~ c. Staff who are employed at a short-term program shall obtain 10 hours of staff training per year.

D. 1. To safely perform medication administration practices listed in 22VAC40-185-510, whenever the center has agreed to administer prescribed medications, the administration shall be performed by a staff member or independent contractor who has satisfactorily completed a training program for this purpose approved by the Board of Nursing and taught by a registered nurse, licensed practical nurse, doctor of medicine or osteopathic medicine, or pharmacist; or administration shall be performed by a staff member or independent contractor who is licensed by the Commonwealth of Virginia to administer medications.

a. The approved training curriculum and materials shall be reviewed by the department at least every three years and revised as necessary.

b. Staff required to have the training shall be retrained at three-year intervals.

2. The decision to administer medicines at a facility may be limited by center policy to:

a. Prescribed medications;

b. Over-the-counter or nonprescription medications; or

c. No medications except those required for emergencies or by law.

3. To safely perform medication administration practices listed in 22VAC40-185-510, whenever the center has agreed to administer over-the-counter medications other than topical skin gel, cream, or ointment, the administration must be performed by a staff member or independent contractor who has satisfactorily completed a training course developed or approved by the Department of Social Services in consultation with the Department of Health and the Board of Nursing and taught by an R.N., L.P.N., physician, or pharmacist; or performed by a staff member or independent contractor who is licensed by the Commonwealth of Virginia to administer medications.

a. The course, which shall include competency guidelines, shall reflect currently accepted safe medication administration practices, including instruction and practice in topics such as, but not limited to, reading and following manufacturer's instructions; observing relevant laws, policies and regulations; and demonstrating knowledge of safe practices for medication storage and disposal, recording and reporting responsibilities, and side effects and emergency recognition and response.

b. The approved training curriculum and materials shall be reviewed by the department at least every three years and revised as necessary.

c. Staff required to have the training shall be retrained at three-year intervals.

4. Any child for whom emergency medications (such as but not limited to albuterol, glucagon, and epipen) have been prescribed shall always be in the care of a staff member or independent contractor who meets the requirements in subdivision 1 of this subsection.

5. There shall always be at least one staff member on duty who has obtained within the last three years instruction in performing the daily health observation of children.

6. Daily health observation training shall include:

a. Components of daily health check for children;

b. Inclusion and exclusion of the child from the class when the child is exhibiting physical symptoms that indicate possible illness;

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- c. Descriptions of how diseases are spread and the procedures or methods for reducing the spread of disease;
- d. Information concerning the Virginia Department of Health Notification of Reportable Diseases pursuant to 12VAC5-90-80 and 12VAC5-90-90, also available from the local health department and the website of the Virginia Department of Health; and
- e. Staff occupational health and safety practices in accordance with Occupational Safety and Health Administration's (OSHA) Bloodborne Pathogens regulation.

E. Before assuming job responsibilities, staff who work with children in therapeutic child day programs and special needs child day programs shall receive training in:

- 1. Universal precautions procedures;
- 2. Activity adaptations;
- 3. Medication administration;
- 4. Disabilities precautions and health issues; and
- 5. Appropriate intervention strategies.

F. For therapeutic child day programs and special needs child day programs, staff who work directly with children shall annually attend 24 hours of staff development activities. At least eight hours of this training shall be on topics related to the care of children with special needs.

VA.R. Doc. No. R20-6002; Filed August 22, 2019, 2:20 p.m.

## Final Regulation

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Social Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** 22VAC40-665. Child Care Program (amending 22VAC40-665-30).

**Statutory Authority:** §§ 63.2-217 and 63.2-611 of the Code of Virginia.

**Effective Date:** October 17, 2019.

**Agency Contact:** Barbara Newlin, Director, Division of Child Care and Early Childhood, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7398, or email barbara.newlin@dss.virginia.gov.

## Summary:

*The amendments conform the regulation with Chapters 166 and 218 of the 2019 Acts of Assembly to make transitional child care available to former Virginia Initiative for Education and Work program participants enrolled in education and training programs.*

## 22VAC40-665-30. Child care subsidy program categories.

Assistance under the Child Care Subsidy Program is provided through the following program categories, to the extent that funding is available:

1. TANF. Child care subsidy and services are made available to recipients of TANF. TANF child care includes needed child care for:

- a. A TANF-capped child;
- b. A child who receives Supplemental Security Income (SSI) if the parent is on the TANF grant and if the child would have been in the public assistance unit were it not for the receipt of SSI; and
- c. Children who are not in the TANF assistance unit but who are financially dependent upon the parent who is in the TANF assistance unit.

2. Income eligible programs.

a. Transitional child care. Child care subsidy and services are made available to eligible children of ~~former~~

(1) Former TANF recipients for up to the 12 months following TANF case closure to support parental employment, if and

(2) Former VIEW participants when the individual is enrolled in an accredited public institution of higher learning or other postsecondary school licensed or certified by the State Board of Education or the State Council of Higher Education for Virginia and is taking courses as part of a curriculum that leads to a postsecondary credential, such as a degree or an industry-recognized certification, or license, and

If the family is found income eligible, and there is a need for child care.

b. Head Start wrap-around child care. Head Start wrap-around child care subsidy and services are made available to eligible Head Start enrolled children. The program is for extended day and extended year child care beyond times covered by federally funded Head Start programs.

c. SNAP child care. Child care subsidy and services are made available to children of parents in Virginia's SNAP Education and Training (SNAPET) program to allow participation in an approved activity.

d. Fee Program child care. Fee child care subsidy and services are made available to children in eligible low-income families who are not receiving TANF or SNAPET and who meet the eligibility criteria for child care.

VA.R. Doc. No. R20-5867; Filed August 22, 2019, 2:21 p.m.

**Final Regulation**

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Social Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** 22VAC40-665. Child Care Program (amending 22VAC40-665-650).

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

**Effective Date:** October 17, 2019.

**Agency Contact:** T. Sherri Dorsey, Subsidy Program Manager, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7638, or email sherri.dorsey@dss.virginia.gov.

**Summary:**

*In accordance with Chapter 810 of the 2018 Acts of Assembly, the amendments modify the staff ratios for religious-exempt child day care centers participating in the Child Care Subsidy Program.*

**22VAC40-665-650. Supervision, ratio, and group size requirements.**

A. The vendor, except those exempt from licensure operated by or under the auspices of a religious institution, shall ensure that the following ratio requirements are maintained:

1. For children from birth to the age of 16 months: one staff member for every four children;
2. For children 16 months to two years: one staff member for every five children;
3. For two-year-old children: one staff member for every eight children;
4. For children from three years to the age of eligibility to attend public school, five years by September 30: one staff member for every 10 children;
5. For children from age of eligibility to attend public school through eight years: one staff member for every 18 children; and

6. For children from nine years through 12 years of age: one staff member for every 20 children.

B. Except during meals or snacks, the designated rest period, evening and overnight sleep time, outdoor play, field trips, special group activities, or during the first and last hour of operation when the vendor operates more than six hours per day, the vendor, except those exempt from licensure operated by or under the auspices of a religious institution, shall ensure that the following group size requirements are maintained at all times:

1. For children from birth to the age of 16 months: the maximum group size is 12 children;
2. For children 16 months to two years: the maximum group size is 15 children;
3. For two-year-old children: the maximum group size is 24 children; and
4. For children from three years to the age of eligibility to attend public school, five years by September 30: the maximum group size is 30 children.

Group size requirements in this section do not apply to children school age eligible through 12 years of age or when a variance has been granted by the Division of Licensing Programs.

C. Facilities operated by, or under the auspices of, a religious institution and exempt from licensure shall employ supervisory personnel as set forth in § 63.2-1716 of the Code of Virginia and shall ensure the following ratio requirements are maintained:

1. ~~For children from birth to two years: one staff member for every four children~~ One staff member to four children from ages zero to 16 months;
2. ~~For children from two years to six years: one staff member for every 10 children; and~~ One staff member to five children from ages 16 months to 24 months;
3. ~~For children from six years up to 12 years: one staff member for every 25 children.~~ One staff member to eight children from ages 24 months to 36 months;
4. One staff member to 10 children from ages 36 months to five years;
5. One staff member to 20 children from ages five years to nine years; and
6. One staff member to 25 children from ages nine years to 12 years.

D. With the exception of when meals or snacks are served, the designated rest period, evening and overnight sleep time, outdoor play, and field trips, special group activities, or during the first and last hour of operation when the vendor operates more than six hours per day, facilities operated by,

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or under the auspices, of a religious institution and are exempt from licensure shall ensure the following group size requirements are maintained at all times:

1. For children from birth to two years of age: the maximum group size is 12 children;
2. For children from two years to six years of age: the maximum group size is 30 children; and
3. For children who are six years up to 12 years of age: group size requirements in this section do not apply.

Vendors operated by, or under the auspices, of a religious institution must have a staff member present for each age group of children as defined in § 63.2-1716 of the Code of Virginia. Example: one staff must be present for any of the children age birth to 24 months, an additional staff member must be present if any of the children are ages two to six years, and a third staff member must be present if any children are ages six to 12 years.

E. The vendor shall develop and implement a written policy and procedure that describes how the vendor will ensure that each group of children receives care by consistent staff or team of staff members.

F. Staff shall be counted in the required staff-to-children ratios only when they are directly supervising children.

G. When children are in ongoing mixed age groups, the staff-to-children ratio and group size applicable to the youngest child in the group shall apply to the entire group.

H. Children less than 10 years of age shall always be within actual sight and sound supervision of staff, except that staff need only be able to hear a child who is using the restroom provided that:

1. There is a system to ensure that individuals who are not staff members or persons allowed to pick up a child in care do not enter the restroom area while in use by children; and
2. Staff checks on a child who has not returned from the restroom after five minutes. Depending on the location and layout of the restroom, staff may need to provide intermittent sight supervision of the children in the restroom area during this five-minute period to assure the safety of children and to provide assistance to children as needed.

I. Children 10 years of age and older shall be within actual sight and sound supervision of staff except when the following requirements are met:

1. Staff can hear or see the children (video equipment, intercom systems, or other technological devices shall not substitute for staff being able to directly see or hear children);
2. Staff are nearby so that they can provide immediate intervention if needed;

3. There is a system to ensure that staff know where the children are and what they are doing;

4. There is a system to ensure that individuals who are not staff members or persons allowed to pick up children in care do not enter the areas where children are not under sight supervision; and

5. Staff provides sight and sound supervision of the children at variable and unpredictable intervals not to exceed 15 minutes.

J. When the outdoor activity area is not adjacent to the center, there shall be at least two staff members in the outdoor activity area whenever one or more children are present.

K. Staff shall not allow a child to leave the center unsupervised.

L. For vendors operated by, or under the auspices of, a religious institution and exempt from licensure, during designated rest periods and the designated sleep period of evening and overnight care programs, the ratio of staff to children over ~~24~~ 16 months of age may be double the number of children to each staff required by subsection C of this section if:

1. The staff person shall be present in the same space as sleeping children;
2. Staff counted in the overall rest period ratio are on the same floor as the sleeping or resting children and available in case of emergency; and
3. An additional person is present to help.

Once at least half of the children in the resting room or area are awake and off their mats or cots, the staff-to-child ratio shall meet the ratios as required in subsection C of this section.

M. For vendors not operated by, or under the auspices of, a religious institution, during designated rest periods and the designated sleep period of evening and overnight care programs, the ratio of staff to children over 16 months of age may be double the number of children to each staff required by subsection A of this section if:

1. The staff person shall be present in the same space as sleeping children;
2. Staff counted in the overall rest period ratio are on the same floor as the sleeping or resting children and available in case of emergency; and
3. An additional person is present to help.

Once at least half of the children in the resting room or area are awake and off their mats or cots, the staff-to-child ratio shall meet the ratios as required in subsection A of this section.

VA.R. Doc. No. R20-6082; Filed August 22, 2019; 2:21 p.m.

**Final Regulation**

**REGISTRAR'S NOTICE:** The State Board of Social Services is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The State Board of Social Services will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

**Title of Regulation:** **22VAC40-705. Child Protective Services (amending 22VAC40-705-10, 22VAC40-705-40 through 22VAC40-705-80, 22VAC40-705-150, 22VAC40-705-190).**

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

**Effective Date:** October 17, 2019.

**Agency Contact:** Shannon Hartung, Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7554, FAX (804) 726-7499, or email shannon.hartung1@dss.virginia.gov.

**Summary:**

*The amendments conform regulation to the following legislation adopted during the 2019 Session of the General Assembly:*

*Chapters 12 and 296 of the 2019 Acts of Assembly by allowing local departments of social services (LDSS) to stay the administrative appeal process for up to 180 days when a criminal investigation has been commenced against the appellant for the same conduct involving the same victim as investigated by LDSS and expanding LDSS' ability to stay administrative appeals for misdemeanor charges that are adjudicated in the district court.*

*Chapter 98 of the 2019 Acts of Assembly by clarifying that a health care provider's suspicion that a child is abused or neglected based on the mother's in utero substance exposure does not constitute a finding per se of child abuse or neglect and establishing a licensed hospital's responsibility to develop a written discharge plan and referral to the local community services board when a provider makes certain medical findings.*

*Chapter 276 of the 2019 Acts of Assembly by requiring LDSS to (i) obtain and consider statewide child abuse and neglect registry records of any individual who is the subject of a Child Protective Services (CPS) investigation or family assessment, (ii) determine if the subject of the investigation or family assessment has resided in another state within the last five years, and (iii) request a search of the child abuse or neglect registry in that state.*

*Pursuant to Chapters 381 and 687 of the 2019 Acts of Assembly by requiring LDSS to (i) conduct a human*

*trafficking assessment for all complaints involving the sex or labor trafficking of a child, (ii) expand the definition of caretaker in cases of child trafficking, and (iii) allow a CPS worker responding to a complaint involving the human trafficking of a child to take custody of the child for up to 72 hours without the prior approval of the parent or guardian in order to protect the child.*

**22VAC40-705-10. Definitions.**

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

"Abuser or neglector" means any person who is found to have committed the abuse or neglect of a child pursuant to Chapter 15 (§ 63.2-1500 et seq.) of Title 63.2 of the Code of Virginia.

"Administrative appeal rights" means the child protective services appeals procedures for a local level informal conference and a state level hearing pursuant to § 63.2-1526 of the Code of Virginia, under which an individual who is found to have committed abuse or neglect may request that the local department's records be amended.

"Alternative treatment options" means treatments used to prevent or treat illnesses or promote health and well-being outside the realm of modern conventional medicine.

"Appellant" means anyone who has been found to be an abuser or neglector and appeals the founded disposition to the director of the local department of social services, an administrative hearing officer, or to circuit court.

"Assessment" means the process by which child protective services workers determine a child's and family's needs.

"Caretaker" means any individual having the responsibility of providing care and supervision of a child and includes the following: (i) a parent or other person legally responsible for the child's care; (ii) an individual who by law, social custom, expressed or implied acquiescence, collective consensus, agreement, or any other legally recognizable basis has an obligation to look after a child left in his care; and (iii) persons responsible by virtue of their positions of conferred authority.

"Case record" means a collection of information maintained by a local department, including written material, letters, documents, tapes, photographs, film or other materials regardless of physical form about a specific child protective services investigation, family or individual.

"Central Registry" means a subset of the child abuse and neglect information system and is the name index with identifying information of individuals named as an abuser or neglector in founded child abuse or neglect complaints or reports not currently under administrative appeal, maintained by the department.

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"Certified substance abuse counselor" means a person certified to provide substance abuse counseling in a state-approved public or private substance abuse program or facility.

"Child abuse and neglect information system" means the computer system that collects and maintains information regarding incidents of child abuse and neglect involving parents or other caretakers. The computer system is composed of three parts: the statistical information system with nonidentifying information, the Central Registry of founded complaints not on appeal, and a database that can be accessed only by the department and local departments that contains all nonpurged child protective services reports. This system is the official state automated system.

"Child protective services" means the identification, receipt, and immediate response to complaints and reports of alleged child abuse or neglect for children under 18 years of age. It also includes assessment, and arranging for and providing necessary protective and rehabilitative services for a child and his family when the child has been found to have been abused or neglected or is at risk of being abused or neglected.

"Child protective services worker" means one who is qualified by virtue of education, training, and supervision and is employed by the local department to respond to child protective services complaints and reports of alleged child abuse or neglect.

"Chronically and irreversibly comatose" means a condition caused by injury, disease, or illness in which a patient has suffered a loss of consciousness with no behavioral evidence of self-awareness or awareness of surroundings in a learned manner other than reflexive activity of muscles and nerves for low-level conditioned response and from which to a reasonable degree of medical probability there can be no recovery.

"Collateral" means a person whose personal or professional knowledge may help confirm or rebut the allegations of child abuse or neglect or whose involvement may help ensure the safety of the child.

"Complaint" means any information or allegation of child abuse or neglect made orally or in writing pursuant to § 63.2-100 of the Code of Virginia.

"Consultation" means the process by which the alleged abuser or neglector may request an informal meeting to discuss the investigative findings with the local department prior to the local department rendering a founded disposition of abuse or neglect against that person pursuant to § 63.2-1526 A of the Code of Virginia.

"Controlled substance" means a drug, substance, or marijuana as defined in § 18.2-247 of the Code of Virginia including those terms as they are used or defined in the Drug Control Act, Chapter 34 (§ 54.1-3400 et seq.) of Title 54.1 of

the Code of Virginia. The term does not include alcoholic beverages or tobacco as those terms are defined or used in Title 3.2 or Title 4.1 of the Code of Virginia.

"Department" means the Virginia Department of Social Services.

"Differential response system" means that local departments of social services may respond to valid reports or complaints of child abuse or neglect by conducting either a family assessment or an investigation.

"Disposition" means the determination of whether or not child abuse or neglect has occurred.

"Documentation" means information and materials, written or otherwise, concerning allegations, facts and evidence.

"Family Advocacy Program representative" means the professional employed by the United States Armed Forces who has responsibility for the program designed to address prevention, identification, evaluation, treatment, rehabilitation, follow-up and reporting of family violence, pursuant to 22VAC40-705-140.

"Family assessment" means the collection of information necessary to determine:

1. The immediate safety needs of the child;
2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect;
3. Risk of future harm to the child; and
4. Alternative plans for the child's safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services. These arrangements may be made in consultation with the caretaker of the child.

"First source" means any direct evidence establishing or helping to establish the existence or nonexistence of a fact. Indirect evidence and anonymous complaints do not constitute first source evidence.

"Founded" means that a review of the facts shows by a preponderance of the evidence that child abuse or neglect has occurred. A determination that a case is founded shall be based primarily on first source evidence; in no instance shall a determination that a case is founded be based solely on indirect evidence or an anonymous complaint.

"Human trafficking assessment" means the collection of information necessary to determine:

1. The immediate safety needs of the child;
2. The protective and rehabilitative services needs of the child and the child's family that will deter abuse and neglect; and
3. Risk of future harm to the child.

"Identifying information" means name, social security number, address, race, sex, and date of birth.

"Indirect evidence" means any statement made outside the presence of the child protective services worker and relayed to the child protective services worker as proof of the contents of the statement.

"Informed opinion" means that the child has been informed and understands the benefits and risks, to the extent known, of the treatment recommended by conventional medical providers for his condition and the alternative treatment being considered as well as the basis of efficacy for each, or lack thereof.

"Investigation" means the collection of information to determine:

1. The immediate safety needs of the child;
2. The protective and rehabilitative services needs of the child and family that will deter abuse or neglect;
3. Risk of future harm to the child;
4. Alternative plans for the child's safety if protective and rehabilitative services are indicated and the family is unable or unwilling to participate in services;
5. Whether or not abuse or neglect has occurred;
6. If abuse or neglect has occurred, who abused or neglected the child; and
7. A finding of either founded or unfounded based on the facts collected during the investigation.

"Investigative narrative" means the written account of the investigation contained in the child protective services case record.

"Legitimate interest" means a lawful, demonstrated privilege to access the information as defined in § 63.2-105 of the Code of Virginia.

"Licensed substance abuse treatment practitioner" means a person who (i) is trained in and engages in the practice of substance abuse treatment with individuals or groups of individuals suffering from the effects of substance abuse or dependence, and in the prevention of substance abuse or dependence, and (ii) is licensed to provide advanced substance abuse treatment and independent, direct, and unsupervised treatment to such individuals or groups of individuals, and to plan, evaluate, supervise, and direct substance abuse treatment provided by others.

"Life-threatening condition" means a condition that if left untreated more likely than not will result in death and for which the recommended medical treatments carry a probable chance of impairing the health of the individual or a risk of terminating the life of the individual.

"Local department" means the city or county local agency of social services or department of public welfare in the Commonwealth of Virginia responsible for conducting investigations or family assessments of child abuse or neglect complaints or reports pursuant to § 63.2-1503 of the Code of Virginia.

"Local department of jurisdiction" means the local department in the city or county in Virginia where the alleged victim child resides or in which the alleged abuse or neglect is believed to have occurred. If neither of these is known, then the local department of jurisdiction shall be the local department in the county or city where the abuse or neglect was discovered.

"Mandated reporters" means those persons who are required to report suspicions of child abuse or neglect pursuant to § 63.2-1509 of the Code of Virginia.

"Monitoring" means contacts with the child, family, and collaterals which provide information about the child's safety and the family's compliance with the service plan.

"Multidisciplinary teams" means any organized group of individuals representing, but not limited to, medical, mental health, social work, education, legal and law enforcement, which will assist local departments in the protection and prevention of child abuse and neglect pursuant to § 63.2-1503 K of the Code of Virginia. Citizen representatives may also be included.

"Near fatality" means an act that, as certified by a physician, places the child in serious or critical condition. Serious or critical condition is a life-threatening condition or injury.

"Notification" means informing designated and appropriate individuals of the local department's actions and the individual's rights.

"Particular medical treatment" means a process or procedure that is recommended by conventional medical providers and accepted by the conventional medical community.

"Preponderance of evidence" means just enough evidence to make it more likely than not that the asserted facts are true. It is evidence which is of greater weight or more convincing than the evidence offered in opposition.

"Purge" means to delete or destroy any reference data and materials specific to subject identification contained in records maintained by the department and the local department pursuant to §§ 63.2-1513 and 63.2-1514 of the Code of Virginia.

"Reasonable diligence" means the exercise of justifiable and appropriate persistent effort.

"Report" means either a complaint as defined in this section or an official document on which information is given concerning abuse or neglect. Pursuant to § 63.2-1509 of the Code of Virginia, a report is required to be made by persons

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designated herein and by local departments in those situations in which a response to a complaint from the general public reveals suspected child abuse or neglect pursuant to the definition of abused or neglected child in § 63.2-100 of the Code of Virginia.

"Response time" means a reasonable time for the local department to initiate a valid report of suspected child abuse or neglect based upon the facts and circumstances presented at the time the complaint or report is received.

"Safety plan" means an immediate course of action designed to protect a child from abuse or neglect.

"Service plan" means a plan of action to address the service needs of a child or his family in order to protect a child and his siblings, to prevent future abuse and neglect, and to preserve the family life of the parents and children whenever possible.

"Sex trafficking" means the recruitment, harboring, transportation, provision, obtaining, patronizing, or soliciting of a person for the purpose of a commercial sex act as defined in § 18.2-357.1 of the Code of Virginia.

"State automated system" means the "child abuse and neglect information system" as previously defined.

"Sufficiently mature" is determined on a case-by-case basis and means that a child has no impairment of his cognitive ability and is of a maturity level capable of having intelligent views on the subject of his health condition and medical care.

"Terminal condition" means a condition caused by injury, disease, or illness from which to a reasonable degree of medical probability a patient cannot recover and (i) the patient's death is imminent or (ii) the patient is chronically and irreversibly comatose.

"Unfounded" means that a review of the facts does not show by a preponderance of the evidence that child abuse or neglect occurred.

"Valid report or complaint" means the local department of social services has evaluated the information and allegations of the report or complaint and determined that the local department shall conduct an investigation or family assessment because the following elements are present:

1. The alleged victim child ~~or children are under the age of~~ is younger than 18 years of age at the time of the complaint or report;
2. The alleged abuser is the alleged victim child's parent or other caretaker;
3. The local department receiving the complaint or report is a local department of jurisdiction; and
4. The circumstances described allege suspected child abuse or neglect.

"Withholding of medically indicated treatment" means the failure to respond to the infant's life-threatening condition by providing treatment (including appropriate nutrition, hydration, and medication) which in the treating physician's or physicians' reasonable medical judgment will most likely be effective in ameliorating or correcting all such conditions.

## **22VAC40-705-40. Complaints and reports of suspected child abuse or neglect.**

A. Persons who are mandated to report are those individuals defined in § 63.2-1509 of the Code of Virginia.

1. Mandated reporters shall report immediately any suspected abuse or neglect that they learn of in their professional or official capacity unless the person has actual knowledge that the same matter has already been reported to the local department or the department's toll-free child abuse and neglect hotline.

2. Pursuant to § 63.2-1509 of the Code of Virginia, if information is received by a teacher, staff member, resident, intern, or nurse in the course of his professional services in a hospital, school, or other similar institution, such person may make reports of suspected abuse or neglect immediately to the person in charge of the institution or department, or his designee, who shall then make such report forthwith. If the initial report of suspected abuse or neglect is made to the person in charge of the institution or department, or his designee, such person shall (i) notify the teacher, staff member, resident, intern, or nurse who made the initial report when the report of suspected child abuse or neglect is made to the local department or to the department's toll-free child abuse and neglect hotline; (ii) provide the name of the individual receiving the report; and (iii) forward any communication resulting from the report, including any information about any actions taken regarding the report, to the person who made the initial report.

3. Mandated reporters shall disclose all information that is the basis for the suspicion of child abuse or neglect and shall make available, upon request, to the local department any records and reports that document the basis for the complaint or report.

4. Pursuant to § 63.2-1509 D of the Code of Virginia, a mandated reporter's failure to report as soon as possible, but no longer than 24 hours after having reason to suspect a reportable offense of child abuse or neglect, shall result in a fine.

5. In cases evidencing acts of rape, sodomy, or object sexual penetration as defined in Article 7 (§ 18.2-61 et seq.) of Chapter 4 of Title 18.2 of the Code of Virginia, a person who knowingly and intentionally fails to make the report required pursuant to § 63.2-1509 of the Code of Virginia shall be guilty of a Class 1 misdemeanor.

6. Pursuant to § 63.2-1509 B of the Code of Virginia, certain ~~specified~~ medical facts indicating that a newborn may have been exposed to a controlled substance prior to birth constitute a reason to suspect that a child is abused or neglected. Such facts shall include (i) a finding made by a health care provider within six weeks of the birth of a child that the results of toxicology studies of the child indicate the presence of a controlled substance that was not prescribed for the mother by a physician; (ii) a finding made by a health care provider within six weeks of the birth of a child that the child was born dependent on a controlled substance that was not prescribed by a physician for the mother and has demonstrated withdrawal symptoms; (iii) a diagnosis made by a health care provider at any time following a child's birth that the child has an illness, disease, or condition ~~which that~~, to a reasonable degree of medical certainty, is attributable to in utero exposure to a controlled substance that was not prescribed by a physician for the mother or the child; or (iv) a diagnosis made by a health care provider at any time following a child's birth that the child has a fetal alcohol spectrum disorder attributable to in utero exposure to alcohol. When "reason to suspect" is based upon this subsection, such fact shall be included in the report along with the facts relied upon by the person making the report. Such reports shall not constitute a per se finding of child abuse or neglect. If a health care provider in a licensed hospital makes any medical finding or diagnosis set forth in clause (i), (ii), or (iii) of this subdivision, the hospital shall be responsible for the development of a written discharge plan pursuant to § 32.1-127 B of the Code of Virginia.

- a. Pursuant to § 63.2-1509 B of the Code of Virginia, whenever a health care provider makes a finding or diagnosis, then the health care provider or his designee must make a report to child protective services immediately.
- b. When a valid report or complaint alleging abuse or neglect is made pursuant to § 63.2-1509 B of the Code of Virginia, then the local department must immediately assess the child's circumstances and any threat to the child's health and safety. Pursuant to 22VAC40-705-110 A, the local department must conduct an initial safety assessment.
- c. When a valid report or complaint alleging abuse or neglect is made pursuant to § 63.2-1509 B of the Code of Virginia, then the local department must immediately determine whether to petition a juvenile and domestic relations district court for any necessary services or court orders needed to ensure the safety and health of the child.
- d. Following the receipt of a report made pursuant to § 63.2-1509 B of the Code of Virginia, the local department may determine that no further action is

required pursuant to § 63.2-1505 B of the Code of Virginia if the mother of the infant sought or received substance abuse counseling or treatment.

(1) The local department must notify the mother immediately upon receipt of a complaint made pursuant to § 63.2-1509 B of the Code of Virginia. This notification must include a statement informing the mother that, if the mother fails to present evidence that she sought or received substance abuse counseling or treatment during the pregnancy, then the local department shall conduct an investigation or family assessment.

(2) If the mother sought counseling or treatment but did not receive such services, then the local department must determine whether the mother made a good faith effort to receive substance abuse treatment before the child's birth. If the mother made a good faith effort to receive treatment or counseling prior to the child's birth, but did not receive such services due to no fault of her own, then the local department may determine no further action is required.

(3) If the mother sought or received substance abuse counseling or treatment, but there is evidence, other than exposure to a controlled substance, that the child may be abused or neglected, then the local department shall conduct an investigation or family assessment.

e. For purposes of this chapter, substance abuse counseling or treatment includes, ~~but is not limited to~~, education about the impact of alcohol, controlled substances, and other drugs on the fetus and on the maternal relationship; education about relapse prevention to recognize personal and environmental cues that may trigger a return to the use of alcohol or other drugs.

f. The substance abuse counseling or treatment should attempt to serve the purposes of improving the pregnancy outcome, treating the substance abuse disorder, strengthening the maternal relationship with existing children and the infant, and achieving and maintaining a sober and drug-free lifestyle.

g. The substance abuse counseling or treatment services must be provided by a professional. Professional substance abuse treatment or counseling may be provided by a certified substance abuse counselor or a licensed substance abuse treatment practitioner.

h. Facts solely indicating that the infant may have been exposed to controlled substances prior to birth are not sufficient to render a founded disposition of abuse or neglect in an investigation.

i. The local department may provide assistance to the mother in locating and receiving substance abuse counseling or treatment.

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B. Persons who may report child abuse or neglect include any individual who suspects that a child is being abused or neglected pursuant to § 63.2-1510 of the Code of Virginia.

C. Complaints and reports of child abuse or neglect may be made anonymously.

D. Any person making a complaint or report of child abuse or neglect shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent pursuant to § 63.2-1512 of the Code of Virginia.

E. When the identity of the reporter is known to the department or local department, these agencies shall not disclose the reporter's identity unless court ordered or required under § 63.2-1503 D of the Code of Virginia. Upon request, the local department shall advise the person who was the subject of an unfounded investigation if the complaint or report was made anonymously.

F. If a person suspects that he is the subject of a report or complaint of child abuse or neglect made in bad faith or with malicious intent, that person may petition the court for access to the record including the identity of the reporter or complainant pursuant to § 63.2-1514 of the Code of Virginia.

G. Any person age 14 years or older who makes or causes to be made a knowingly false complaint or report of child abuse or neglect and is convicted shall be guilty of a Class 1 misdemeanor for a first offense pursuant to § 63.2-1513 of the Code of Virginia.

1. A subsequent conviction results in a Class 6 felony.
2. Upon receipt of notification of such conviction, the department will retain a list of convicted reporters.
3. The subject of the records may have the records purged upon presentation of a certified copy of such conviction.
4. The subject of the records shall be notified in writing that the records have been purged.

H. To make a complaint or report of child abuse or neglect, a person may telephone the department's toll-free child abuse and neglect hotline or contact a local department of jurisdiction pursuant to § 63.2-1510 of the Code of Virginia.

1. The local department of jurisdiction that first receives a complaint or report of child abuse or neglect shall assume responsibility to ensure that a family assessment or an investigation is conducted.
2. A local department may ask another local department that is a local department of jurisdiction to assist in conducting the family assessment or investigation. If assistance is requested, the local department shall comply.
3. A local department may ask another local department through a cooperative agreement to assist in conducting the family assessment or investigation.

4. If a local department employee is suspected of abusing or neglecting a child, the complaint or report of child abuse or neglect shall be made to the juvenile and domestic relations district court of the county or city where the alleged abuse or neglect was discovered. The judge shall assign the report to a local department that is not the employer of the subject of the report, or, if the judge believes that no local department in a reasonable geographic distance can be impartial in responding to the reported case, the judge shall assign the report to the court service unit of his court for evaluation pursuant to §§ 63.2-1509 and 63.2-1510 of the Code of Virginia. The judge may consult with the department in selecting a local department to respond.

5. In cases where an employee at a private or state-operated hospital, institution, or other facility or an employee of a school board is suspected of abusing or neglecting a child in such hospital, institution, or other facility or public school, the local department shall request the department and the relevant private or state-operated hospital, institution, or other facility or school board to assist in conducting a joint investigation in accordance with regulations adopted in 22VAC40-730, in consultation with the Departments of Education, Health, Medical Assistance Services, Behavioral Health and Developmental Services, Juvenile Justice, and Corrections.

### **22VAC40-705-50. Actions to be taken upon receipt of a complaint or report.**

A. All complaints and reports of suspected child abuse or neglect shall be recorded in the child abuse and neglect information system and either screened out or determined to be valid upon receipt and if valid, acted on within the determined response time. A record of all reports and complaints made to a local department or to the department, regardless of whether the report or complaint was found to be a valid complaint of abuse or neglect, shall be purged one year after the date of the report or complaint unless a subsequent report or complaint is made.

B. Pursuant to § 63.2-1506.1 A of the Code of Virginia, the local department shall conduct a human trafficking assessment when a report or complaint alleges that a child is a victim of sex trafficking or severe forms of trafficking, which is defined in § 63.2-100 of the Code of Virginia; the federal Trafficking Victims Protection Act of 2000 (22 USC § 7102 et seq.); and the federal Justice for Victims of Trafficking Act of 2015 (42 USC § 5101 et seq.) as a commercial sex act that is induced by force, fraud, or coercion, or in which the person induced to perform such an act has not attained 18 years of age or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery, unless at any time during the human trafficking assessment

the local department determines that an investigation or family assessment is required pursuant to § 63.2-1505 or 63.2-1506 of the Code of Virginia.

C. In all valid complaints or reports of child abuse or neglect, the local department of social services shall determine whether to conduct an investigation or a family assessment. A valid complaint or report is one in which:

1. The alleged victim child ~~or children are under the age of~~ is younger than 18 years of age at the time of the complaint or report;
2. The alleged abuser is the alleged victim child's parent or other caretaker; Pursuant to § 63.2-1508 of the Code of Virginia, a valid report or complaint regarding a child who has been identified as a victim of sex trafficking or severe forms of trafficking as defined in § 63.2-100 of the Code of Virginia; the federal Trafficking Victims Protection Act of 2000 (22 USC § 7102 et seq.); and the federal Justice for Victims of Trafficking Act of 2015 (42 USC § 5101 et seq.) may be established if the alleged abuser is the alleged victim child's parent, other caretaker, or any other person suspected to have caused such abuse or neglect.
3. The local department receiving the complaint or report has jurisdiction; and
4. The circumstances described allege suspected child abuse or neglect as defined in § 63.2-100 of the Code of Virginia.

~~C.~~ D. The local department shall not conduct a family assessment or investigate complaints or reports of child abuse or neglect that fail to meet all of the criteria in subsection ~~B~~ C of this section.

~~D.~~ E. The local department shall report certain cases of suspected child abuse or neglect to the local attorney for the Commonwealth and the local law-enforcement agency pursuant to § 63.2-1503 D of the Code of Virginia.

~~E.~~ F. Pursuant to § 63.2-1503 D of the Code of Virginia, the local department shall develop, where practical, a memoranda of understanding for responding to reports of child abuse and neglect with local law enforcement and the local office of the commonwealth's attorney.

~~F.~~ G. The local department shall report to the following when the death of a child is involved:

1. When abuse or neglect is suspected in any case involving the death of a child, the local department shall report the case immediately to the regional medical examiner and the local law-enforcement agency pursuant to § 63.2-1503 E of the Code of Virginia.
2. When abuse or neglect is suspected in any case involving the death of a child, the local department shall report the case immediately to the attorney for the

Commonwealth and the local law-enforcement agency pursuant to § 63.2-1503 D of the Code of Virginia.

3. The local department shall contact the department immediately upon receiving a complaint involving the death of a child and at the conclusion of the investigation.

4. The department shall immediately, upon receipt of information, report on all child fatalities to the state board in a manner consistent with department policy and procedures approved by the board. At a minimum, the report shall contain information regarding any prior statewide child protective services involvement of the family, alleged perpetrator, or victim.

~~G.~~ H. Valid complaints or reports shall be screened for high priority based on the following:

1. The immediate danger to the child;
2. The severity of the type of abuse or neglect alleged;
3. The age of the child;
4. The circumstances surrounding the alleged abuse or neglect;
5. The physical and mental condition of the child; and
6. Reports made by mandated reporters.

~~H.~~ I. The local department shall respond within the determined response time. The response shall be a family assessment or an investigation. Any valid report may be investigated, but in accordance with § 63.2-1506 C of the Code of Virginia, those cases shall be investigated that involve (i) sexual abuse, (ii) a child fatality, (iii) abuse or neglect resulting in a serious injury as defined in § 18.2-371.1 of the Code of Virginia, (iv) a child having been taken into the custody of the local department of social services, or (v) a caretaker at a state-licensed child day care center, religiously exempt child day center, regulated family day home, private or public school, or hospital or any institution.

1. The purpose of an investigation is to collect the information necessary to determine or assess the following:
  - a. ~~Immediate~~ The immediate safety needs of the child;
  - b. Whether or not abuse or neglect has occurred;
  - c. Who abused or neglected the child;
  - d. To what extent the child is at risk of future harm;
  - e. What types of services can meet the needs of this child or family; and
  - f. If services are indicated and the family appears to be unable or unwilling to participate in services, what alternate plans will provide for the child's safety.

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2. The purpose of a family assessment is to engage the family in a process to collect the information necessary to determine or assess the following:

- a. ~~Immediate~~ The immediate safety needs of the child;
- b. The extent to which the child is at risk of future harm;
- c. The types of services that can meet the needs of this child or family; and
- d. If services are indicated and the family appears to be unable or unwilling to participate in services, the plans that will be developed in consultation with the family to provide for the child's safety. These arrangements may be made in consultation with the caretaker of the child.

3. The local department shall use reasonable diligence to locate any child for whom a report or complaint of suspected child abuse or neglect has been received and determined valid and persons who are the subject of a valid report if the whereabouts of such persons are unknown to the local department pursuant to § 63.2-1503 F of the Code of Virginia.

4. The local department shall document its attempts to locate the child and family.

5. In the event the alleged victim child ~~or children~~ cannot be found after the local department has exercised reasonable diligence, the time the child cannot be found shall not be computed as part of the timeframe to complete the investigation, pursuant to subdivision B 5 of § 63.2-1505 of the Code of Virginia.

### **22VAC40-705-60. Authorities of local departments.**

A. When responding to valid complaints or reports, local departments have the following authorities:

1. To talk to any child suspected of being abused or neglected, or child's siblings, without the consent of and outside the presence of the parent or other caretaker, as set forth by § 63.2-1518 of the Code of Virginia.
2. To take or arrange for photographs and x-rays of a child who is the subject of a complaint without the consent of and outside the presence of the parent or other caretaker, as set forth in § 63.2-1520 of the Code of Virginia.
3. To take a child into custody on an emergency removal under such circumstances as set forth in § 63.2-1517 of the Code of Virginia.
  - a. A child protective services worker planning to take a child into emergency custody shall first consult with a supervisor. However, this requirement shall not delay action on the child protective services worker's part if a supervisor cannot be contacted and the situation requires immediate action.

b. When circumstances warrant that a child be taken into emergency custody during a family assessment, the report shall be reassigned immediately as an investigation.

c. Any person who takes a child into custody pursuant to § 63.2-1517 of the Code of Virginia shall be immune from any civil or criminal liability in connection therewith, unless it is proven that such person acted in bad faith or with malicious intent.

d. The local department shall have the authority to have a complete medical examination made of the child including a written medical report and, when appropriate, photographs and x-rays pursuant to § 63.2-1520 of the Code of Virginia.

e. When a child in emergency custody is in need of immediate medical or surgical treatment, the local director of social services or his designee may consent to such treatment when the parent does not provide consent and a court order is not immediately obtainable.

f. When a child is not in the local department's custody, the local department cannot consent to medical or surgical treatment of the child.

g. When a child is removed, every effort must be made to obtain an emergency removal order within four hours. Reasons for not doing so shall be stated in the petition for an emergency removal order.

h. Every effort shall be made to provide notice of the removal in person to the parent or guardian as soon as practicable.

i. Within 30 days of removing a child from the custody of the parents or legal guardians, the local department shall exercise due diligence to identify and notify in writing all maternal and paternal grandparents and other adult relatives of the child (including any other adult relatives suggested by the parents) and all parents who have legal custody of any siblings of the child being removed and explain the options they have to participate in the care and placement of the child, subject to exceptions due to family or domestic violence. These notifications shall be documented in the state automated system. When notification to any of these relatives is not made, the local department shall document the reasons in the state automated system.

B. When responding to a complaint or report of abuse or neglect involving the human trafficking of a child, local departments may take a child into custody and maintain custody of the child for up to 72 hours without prior approval of a parent or guardian, provided that the alleged victim child has been identified as a victim of human trafficking as defined in § 63.2-100 of the Code of Virginia; the federal Trafficking Victims Protection Act of 2000 (22 USC § 7102

et seq.); and the federal Justice for Victims of Trafficking Act of 2015 (42 USC § 5101 et seq.) and pursuant to § 63.2-1517 of the Code of Virginia.

1. After taking the child into custody, the local department shall notify the parent or guardian of such child as soon as practicable. Every effort shall be made to provide such notice in person.

2. The local department shall also notify the Child-Protective Services Unit within the department whenever a child is taken into custody.

3. When a child is taken into custody by a child-protective services worker of a local department pursuant to this subsection, that child shall be returned as soon as practicable to the custody of his parent or guardian. However, the local department shall not be required to return the child to his parent or guardian if the circumstances are such that continuing in his place of residence or in the care or custody of such parent or guardian, or custodian or other person responsible for the child's care, presents an imminent danger to the child's life or health to the extent that severe or irreparable injury would be likely to result or if the evidence of abuse is perishable or subject to deterioration before a hearing can be held.

4. If the local department cannot return the child to the custody of his parents or guardians within 72 hours, the local department shall obtain an emergency removal order pursuant to § 16.1-251 of the Code of Virginia.

**22VAC40-705-70. Collection of information.**

A. When conducting an investigation, the local department shall seek first-source information about the allegation of child abuse or neglect. When applicable, the local department shall include in the case record: police reports; depositions; photographs; physical, medical, and psychological reports; and any electronic recordings of interviews.

B. When completing a human trafficking assessment or family assessment, the local department shall gather all relevant information in collaboration with the family, to the degree possible, in order to determine the child and family services needs related to current safety or future risk of harm to the child.

C. All information collected for a human trafficking assessment, family assessment, or an investigation must be entered in the state automated system and maintained according to § 63.2-1514 for unfounded investigations ~~or~~, family assessments, or invalid reports, or according to 22VAC40-705-130 for founded investigations. The automated record entered in the state automated system is the official record. When documentation is not available in electronic form, it must be maintained in the hard copy portion of the record. Any hard copy information, including

photographs and recordings, shall be noted as an addendum to the official record.

**22VAC40-705-80. Family assessment and investigation contacts.**

A. During the course of the family assessment, the child protective services worker shall document in writing in the state automated system the following contacts and observations. When any of these contacts or observations is not made, the child protective services worker shall document in writing why the specific contact or observation was not made.

1. The child protective services worker shall conduct a face-to-face interview with and observe the alleged victim child within the determined response time.
2. The child protective services worker shall conduct a face-to-face interview with and observe all minor siblings residing in the home.
3. The child protective services worker shall conduct a face-to-face interview with and observe all other children residing in the home with parental permission.
4. The child protective services worker shall conduct a face-to-face interview with the alleged victim child's parents or guardians or any caretaker named in the report.
5. The child protective services worker shall observe the family environment, contact pertinent collaterals, and review pertinent records in consultation with the family.

B. During the course of the investigation, the child protective services worker shall document in writing in the state automated system the following contacts and observations. When any of these contacts or observations is not made, the child protective services worker shall document in writing why the specific contact or observation was not made.

1. The child protective services worker shall conduct a face-to-face interview with and observation of the alleged victim child within the determined response time. All interviews with alleged victim children must be electronically recorded except when the child protective services worker determines that:
  - a. The child's safety may be endangered by electronically recording his statement;
  - b. The age or developmental capacity of the child makes electronic recording impractical;
  - c. ~~A~~ The child refuses to participate in the interview if electronic recording occurs;
  - d. In the context of a team investigation with law-enforcement personnel, the team or team leader determines that electronic recording is not appropriate; or

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e. The victim provided new information as part of a family assessment and it would be detrimental to reinterview the victim and the child protective services worker provides a detailed narrative of the interview in the investigation record.

In the case of an interview conducted with a nonverbal child where none of the ~~above~~ exceptions in this subdivision apply, it is appropriate to electronically record the questions being asked by the child protective services worker and to describe, either verbally or in writing, the child's responses. A child protective services worker shall document in detail in the record and discuss with supervisory personnel the basis for a decision not to electronically record an interview with the alleged victim child.

A child protective services finding may be based on the written narrative of the child protective services worker in cases where an electronic recording is unavailable due to equipment failure or the ~~above~~ exceptions in this subdivision 1.

2. The child protective services worker shall conduct a face-to-face interview and observe all minor siblings residing in the home.

3. The child protective services worker shall conduct a face-to-face interview with and observe all other children residing in the home with parental permission.

4. The child protective services worker shall conduct a face-to-face interview with the alleged abuser or neglector.

a. The child protective services worker shall inform the alleged abuser or neglector of his right to electronically record any communication pursuant to § 63.2-1516 of the Code of Virginia.

b. If requested by the alleged abuser or neglector, the local department shall provide the necessary equipment in order to electronically record the interview and retain a copy of the electronic recording.

5. The child protective services worker shall conduct a face-to-face interview with the alleged victim child's parents or guardians.

6. The child protective services worker shall observe the environment where the alleged victim child lives. This requirement may be waived in complaints or reports of child abuse and neglect that took place in state licensed and religiously exempted child day centers, regulated and unregulated family day homes, private and public schools, group residential facilities, hospitals, or institutions where the alleged abuser or neglector is an employee or volunteer at such facility.

7. The child protective services worker shall observe the site where the alleged incident took place.

8. The child protective services worker shall conduct interviews with collaterals who have pertinent information relevant to the investigation and the safety of the child.

9. C. Pursuant to §§ 63.2-1505 and 63.2-1506 of the Code of Virginia, local departments may obtain and consider statewide criminal history record information from the Central Criminal Records Exchange and shall obtain and consider results of a search of the Central Registry on any individual who is the subject of a child abuse and neglect investigation or family assessment where there is evidence of child abuse or neglect and the local department is evaluating the safety of the home and whether removal is necessary to ensure the child's safety. The local department may also obtain a criminal record check and a Central Registry check on all adult household members residing in the home of the alleged abuser or neglector and where the child visits. Pursuant to § 19.2-389 of the Code of Virginia, local departments are authorized to receive criminal history information on the person who is the subject of the investigation as well as other adult members of the household for the purposes in § 63.2-1505 of the Code of Virginia. The results of the criminal record history search may be admitted into evidence if a child abuse or neglect petition is filed in connection with the child's removal. Local departments are prohibited from dissemination of this information except as authorized by the Code of Virginia.

D. Pursuant to §§ 63.2-1505 and 63.2-1506 of the Code of Virginia, local departments must determine whether the subject of an investigation or family assessment has resided in another state within the last five years, and, if he has resided in another state, shall request a search of the child abuse and neglect registry or equivalent registry maintained by such state.

## **22VAC40-705-150. Services.**

A. At the completion of a human trafficking assessment, the local department may consult with the family to arrange for necessary protective and rehabilitative services to be provided to the child and his family pursuant to subdivision B 2 of § 63.2-1506.1 of the Code of Virginia.

B. At the completion of a family assessment or investigation, the local department shall consult with the family to provide or arrange for necessary protective and rehabilitative services to be provided to the child and his family to the extent funding is available pursuant to subdivision A 2 of § 63.2-1505 or § 63.2-1506 of the Code of Virginia.

~~B. C.~~ Families may decline services offered as a result of a human trafficking assessment, family assessment, or an investigation. If the family declines services, the case shall be closed unless there is an existing court order or the local department determines that sufficient cause exists due to threat of harm or actual harm to the child to redetermine the

case as one that needs to be brought to the attention of the court. In no instance shall these actions be taken solely because the family declines services.

~~C. D.~~ At the completion of a human trafficking assessment, family assessment, or investigation, local departments of social services may petition the court for services deemed necessary.

~~D. E.~~ Protective services also includes preventive services to children about whom no formal complaint of abuse or neglect has been made, but for whom potential harm or threat of harm exists, to be consistent with §§ 16.1-251, 16.1-252, 16.1-279.1, 63.2-1503 J, and 63.2-1502 of the Code of Virginia.

~~E. F.~~ Local departments shall support the establishment and functioning of multidisciplinary teams pursuant to § 63.2-1503 J of the Code of Virginia.

~~F. G.~~ The local department must use reasonable diligence to locate any child for whom a founded disposition of abuse or neglect has been made ~~and/or~~ or a child protective services case has been opened pursuant to § 63.2-1503 F of the Code of Virginia. The local department shall document its attempts to locate the child and family.

~~G. H.~~ When an abused or neglected child and persons who are the subject of an open child abuse services case have relocated out of the jurisdiction of the local department, the local department shall notify the child protective services agency in the jurisdiction to which such persons have relocated, whether inside or outside of the Commonwealth of Virginia, and forward to such agency relevant portions of the case records pursuant to § 63.2-1503 G of the Code of Virginia.

~~H. I.~~ The receiving local department shall arrange necessary protective and rehabilitative services pursuant to § 63.2-1503 G of the Code of Virginia.

**22VAC40-705-190. Appeals.**

A. Appeal is the process by which the abuser or neglector may request amendment of the record when the investigation into the complaint has resulted in a founded disposition of child abuse or neglect.

B. If the alleged abuser or neglector is found to have committed abuse or neglect, that alleged abuser or neglector may, within 30 days of being notified of that determination, submit a written request for an amendment of the determination and the local department's related records, pursuant to § 63.2-1526 A of the Code of Virginia. The local department shall conduct an informal conference in an effort to examine the local department's disposition and reasons for it and consider additional information about the investigation and disposition presented by the alleged abuser or neglector. The local department shall notify the child abuse and neglect information system that an appeal is pending.

C. Whenever an appeal is requested and a criminal charge or investigation is also filed or commenced against the appellant for the same conduct involving the same victim child as investigated by the local department, the appeal process shall be stayed until the criminal prosecution in ~~either~~ the trial court is completed, until the criminal investigation is closed, or in the case of a criminal investigation, 180 days have passed since the appellant's request for an appeal, pursuant to § 63.2-1526 C of the Code of Virginia. During such stay, the appellant's right of access to the records of the local department regarding the matter being appealed shall also be stayed. Once the criminal prosecution in ~~either~~ trial court has been completed, the criminal investigation has been completed, or in the case of a criminal investigation, 180 days have passed since the appellant's request for an appeal, the local department shall advise the appellant in writing of his right to resume his appeal within the timeframe provided by law and regulation pursuant to § 63.2-1526 C of the Code of Virginia.

D. The local department shall conduct an informal, local conference and render a decision on the appellant's request to amend the record within 45 days of receiving the request. If the local department either refuses the appellant's request for amendment of the record as a result of the local conference, or if the local department fails to act within 45 days of receiving such request, the appellant may, within 30 days thereafter and in writing, request the commissioner for an administrative hearing pursuant to § 63.2-1526 A of the Code of Virginia.

E. The appellant may request, in writing, an extension of the 45-day requirement for a specified period of time, not to exceed an additional 60 days. When there is an extension period, the 30-day timeframe to request an administrative hearing from the Commissioner of the Department of Social Services shall begin on the termination of the extension period pursuant to § 63.2-1526 A of the Code of Virginia.

F. Upon written request, the local department shall provide the appellant all information used in making its determination. Disclosure of the reporter's name or information ~~which~~ that may endanger the well-being of a child shall not be released. The identity of any collateral ~~witnesses~~ witness or any other person shall not be released if disclosure may endanger ~~their~~ that witness's or person's life or safety. Information prohibited from being disclosed by state or federal law or regulation shall not be released. In case of any information withheld, the appellant shall be advised of the general nature of the information and the reasons, of privacy or otherwise, that it is being withheld, pursuant to § 63.2-1526 A of the Code of Virginia.

G. The director of the local department, or a designee of the director, shall preside over the local conference. With the exception of the director of the local department, no person whose regular duties include substantial involvement with

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child abuse and neglect cases shall preside over the local conference pursuant to § 63.2-1526 A of the Code of Virginia.

1. The appellant may be represented by counsel pursuant to § 63.2-1526 A of the Code of Virginia.
2. The appellant shall be entitled to present the testimony of witnesses, documents, factual data, arguments, or other submissions of proof pursuant to § 63.2-1526 A of the Code of Virginia.
3. The director of the local department, or a designee of the director, shall notify the appellant, in writing, of the results of the local conference within 45 days of receipt of the written request from the appellant unless the timeframe has been extended as described in subsection E of this section. The director of the local department, or the designee of the director, shall have the authority to sustain, amend, or reverse the local department's findings. Notification of the results of the local conference shall be mailed, certified with return receipt, to the appellant. The local department shall notify the child abuse and neglect information system of the results of the local conference.

H. If the appellant is unsatisfied with the results of the local conference, the appellant may, within 30 days of receiving notice of the results of the local conference, submit a written request to the commissioner for an administrative hearing pursuant to § 63.2-1526 B of the Code of Virginia.

1. The commissioner shall designate a member of his staff to conduct the proceeding pursuant to § 63.2-1526 B of the Code of Virginia.
2. A hearing officer shall schedule a hearing date within 45 days of the receipt of the appeal request unless there are delays due to subpoena requests, depositions, or scheduling problems.
3. After a party's written motion and showing good cause, the hearing officer may issue subpoenas for the production of documents or to compel the attendance of witnesses at the hearing. The victim child and that child's siblings shall not be subpoenaed, deposed, or required to testify, pursuant to § 63.2-1526 B of the Code of Virginia.
4. Upon petition, the juvenile and domestic relations district court shall have the power to enforce any subpoena that is not complied with or to review any refusal to issue a subpoena. Such decisions may not be further appealed except as part of a final decision that is subject to judicial review pursuant to § 63.2-1526 B of the Code of Virginia.
5. Upon providing reasonable notice to the other party and the hearing officer, a party may, at his own expense, depose a nonparty and submit that deposition at, or prior to, the hearing. The victim child and the child's siblings shall not be deposed. The hearing officer is authorized to

determine the number of depositions that will be allowed pursuant to § 63.2-1526 B of the Code of Virginia.

6. The local department shall provide the hearing officer a copy of the investigation record prior to the administrative hearing. By making a written request to the local department, the appellant may obtain a copy of the investigation record. The appellant shall be informed of the procedure by which information will be made available or withheld from him.

In any case of information withheld, the appellant shall be advised of the general nature of the information and the reasons that it is being withheld pursuant to § 63.2-1526 B of the Code of Virginia.

7. The appellant and the local department may be represented by counsel at the administrative hearing.
8. The hearing officer shall administer an oath or affirmation to all parties and witnesses planning to testify at the hearing pursuant to § 63.2-1526 B of the Code of Virginia.
9. The local department shall have the burden to show that the preponderance of the evidence supports the founded disposition. The local department shall be entitled to present the testimony of witnesses, documents, factual data, arguments or other submissions of proof.
10. The appellant shall be entitled to present the testimony of witnesses, documents, factual data, arguments, or other submissions of proof.
11. The hearing officer may allow either party to submit new or additional evidence at the administrative hearing if it is relevant to the matter being appealed.
12. The hearing officer shall not be bound by the strict rules of evidence. However, the hearing officer shall only consider that evidence, presented by either party, which is substantially credible or reliable.
13. The hearing officer may allow the record to remain open for a specified period of time, not to exceed 14 days, to allow either party to submit additional evidence unavailable for the administrative hearing.
14. In the event that new or additional evidence is presented at the administrative hearing, the hearing officer may remand the case to the local department for reconsideration of the findings. If the local department fails to act within 14 days or fails to amend the findings to the satisfaction of the appellant, then the hearing officer shall render a decision, pursuant to § 63.2-1526 B of the Code of Virginia.

I. Within 60 days of the close of receiving evidence, the hearing officer shall render a written decision. The hearing officer shall have the authority to sustain, amend, or reverse the local department's findings. The written decision of the

hearing officer shall state the findings of fact, conclusions based on regulation and policy, and the final disposition. The decision will be sent to the appellant by certified mail, return receipt requested. Copies of the decision shall be mailed to the appellant's counsel, the local department and the local department's counsel. The hearing officer shall notify the child abuse and neglect information system of the hearing decision. The local department shall notify all other prior recipients of the record of the findings of the hearing officer's decision.

J. The hearing officer shall notify the appellant of the appellant's further right of review in circuit court in the event that the appellant is not satisfied with the written decision of the hearing officer. Appeals are governed by Part 2A of the Rules of the Supreme Court of Virginia. The local department shall have no further right of review pursuant to § 63.2-1526 B of the Code of Virginia.

K. In the event that the hearing officer's decision is appealed to circuit court, the department shall prepare a transcript for that proceeding. That transcript or narrative of the evidence shall be provided to the circuit court along with the complete hearing record. If a court reporter was hired by the appellant, the court reporter shall prepare the transcript and provide the court with a transcript.

VA.R. Doc. No. R20-6027; Filed August 22, 2019, 2:22 p.m.

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# GOVERNOR

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## EXECUTIVE ORDER NUMBER THIRTY-NINE (2019)

### **Establishment of the Commission on African American History Education in the Commonwealth**

#### Importance of the Issue

The history of African Americans in Virginia, and our nation, is difficult, complex, and often untold. A robust understanding of this important history and its continuous influence on our communities today should be an essential component of the knowledge gained by every Virginia student. The Commonwealth has long been known for its rigorous academic standards, including its history and social science standards of learning, first established in 1995. Since that time, the standards have been routinely updated based on feedback from practitioners, historians, and stakeholders. Virginia's standards must be inclusive of African American history and provide opportunities for students to engage deeply, drawing connections to its relevance in our contemporary communities. A review of this content, instructional practices, and resources currently used to teach African American history in the Commonwealth will help ensure all Virginia students develop a comprehensive understanding of the African American voices that contribute to Virginia's story.

#### Establishment of the Commission

Accordingly, by virtue of the authority vested in me as Governor under Article V of the Constitution of Virginia and §§ 2.2-134 and 2.2-135 of the Code of Virginia, and subject to my continuing and ultimate authority and responsibility to act in such matters, I hereby establish the Commission on African American History Education in the Commonwealth (Commission). The Commission will examine the current ways that African American history is described in the standards of learning and curriculum framework, and how that content is taught in classrooms.

#### Composition and Support of the Commission

The Commission's chair(s) and members will be appointed by the Governor. The Governor will select historians, teachers, school administrators, experts and community leaders with experience and expertise in African American history, policy, and civil rights. The Governor may appoint other members as necessary to carry out the functions of the Commission.

Staff support for the Commission will be provided by the Office of the Secretary of Education, the Virginia Department of Education, and external partners as requested. An estimated 200 hours of staff time will be required to support the work of the Commission. The Commission will serve in an advisory role and the members will serve without compensation, in accordance with § 2.2-2100 of the Code of Virginia. The Commission will meet upon the call of the chair(s) at least quarterly over the coming year, and the

meetings should be held in different regions of the state, providing robust opportunity for public feedback and input.

#### Duties of the Commission

The Commission will issue a report with its findings and recommendations no later than July 1, 2020, and issue any additional reports and recommendations as necessary or as requested by the Governor.

The Commission will make recommendations for improving the student experience, including but not limited to:

1. Technical edits to and recommendations for enriched standards related to African American history;
2. Broader considerations for the full history and social studies standards review process; and
3. Necessary professional development and instructional supports for teachers to ensure culturally competent instruction.

#### Effective Date of the Executive Order

This Executive Order shall be effective upon its signing and shall remain in full force and effect for a year from its signing.

Given under my hand and under the Seal of the Commonwealth of Virginia, this 24th day of August, 2019.

/s/ Ralph S. Northam  
Governor

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# GUIDANCE DOCUMENTS

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## PUBLIC COMMENT OPPORTUNITY

Pursuant to § 2.2-4002.1 of the Code of Virginia, a certified guidance document is subject to a 30-day public comment period after publication in the Virginia Register of Regulations and prior to the guidance document's effective date. During the public comment period, comments may be made through the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) or sent to the agency contact. Under subsection C of § 2.2-4002.1, the effective date of the guidance document may be delayed for an additional period. The guidance document may also be withdrawn.

The following guidance documents have been submitted for publication by the listed agencies for a public comment period. Online users of this issue of the Virginia Register of Regulations may click on the name of a guidance document to access it. Guidance documents are also available on the Virginia Regulatory Town Hall (<http://www.townhall.virginia.gov>) or from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, Richmond, Virginia 23219.

### ALCOHOLIC BEVERAGE CONTROL AUTHORITY

Title of Document: [Shared Equipment and Alternation of Premises Between Manufacturing Types.](#)

Public Comment Deadline: October 16, 2019.

Effective Date: October 17, 2019.

Agency Contact: Latonya D. Hucks-Watkins, Legal Liaison, Alcoholic Beverage Control Authority, 2901 Hermitage Road, Richmond, VA 23220, telephone (804) 213-4698, or email [latonya.hucks-watkins@abc.virginia.gov](mailto:latonya.hucks-watkins@abc.virginia.gov).

### BOARD FOR ASBESTOS, LEAD, AND HOME INSPECTORS

Title of Document: [Proposed Guidance Document: CPE for Home Inspectors with the New Residential Structure Specialty.](#)

Public Comment Deadline: October 16, 2019.

Effective Date: October 17, 2019.

Agency Contact: Trisha L. Henshaw, Executive Director, Board for Asbestos, Lead, and Home Inspectors, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, or email [alhi@dpor.virginia.gov](mailto:alhi@dpor.virginia.gov).

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# GENERAL NOTICES/ERRATA

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## DEPARTMENT OF AGRICULTURE AND CONSUMER SERVICES

### 2019 Annual Report on the Agricultural Stewardship Act

The Commissioner of Agriculture and Consumer Services announces the availability of the annual report on the Agricultural Stewardship Act for the program year April 1, 2018, through March 31, 2019. Copies of the report can be obtained by contacting Katherine Coates by telephone at (804) 786-3538 or via email at [katherine.coates@vdacs.virginia.gov](mailto:katherine.coates@vdacs.virginia.gov). The report can also be obtained by accessing the department's website at <http://www.vdacs.virginia.gov/conservation-and-environmental-agricultural-stewardship.shtml>. A written request for copies may be sent to: Virginia Department of Agriculture and Consumer Services, Office of Policy, Planning, and Research, P.O. Box 1163, Richmond, VA 23218. Copies of the report are available without charge.

## STATE BOARD OF BEHAVIORAL HEALTH AND DEVELOPMENTAL SERVICES

### Proposed Variances to the Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded, or Operated by the Department of Behavioral Health and Developmental Services

Notice of action: The Department of Behavioral Health and Developmental Services (DBHDS), in accordance with Part VI, Variances (12VAC35-115-220), of the Regulations to Assure the Rights of Individuals Receiving Services from Providers Licensed, Funded, or Operated by the Department of Behavioral Health and Developmental Services (12VAC35-115), hereafter referred to as the "Human Rights Regulations," is announcing an opportunity for public comment on an application for proposed variances to the Human Rights Regulations submitted to the State Human Rights Committee (SHRC). The purpose of the regulations is to ensure and protect the legal and human rights of individuals receiving services in facilities or programs operated, licensed, or funded by DBHDS.

Each variance application references the specific part of these regulations to which a variance is needed, the proposed wording of the substitute rule or procedure, and the justification for a variance. Such application also describes time limits and other conditions for duration and the circumstances that will end the applicability of the variance. After considering all available information including comments, the SHRC intends to submit a written decision deferring, disapproving, modifying, or approving each variance application. All variances shall be approved for a specific time period. The decision and reasons for variance

will be published in a later issue of the Virginia Register of Regulations.

Purpose of notice: The SHRC is seeking comment on the application for proposed new variances to the Human Rights Regulations for DBHDS' Central State Hospital (CSH). The request is itemized according to four distinct CSH policies.

#### Variance is requested to the following sections:

12VAC35-115-150: General provisions

12VAC35-115-175: Human rights complaint process

12VAC35-115-180: Local human rights committee hearing and review procedures

12VAC35-115-190: Special procedures for emergency hearings by the LHRC

12VAC35-115-200: Special Procedures for LHRC reviews involving consent and authorization

12VAC35-115-210: State Human Rights Committee appeals procedures

Explanation: CSH requests variances to the listed sections to create alternative procedures for addressing complaints by individuals in maximum security when the individual is not satisfied with the director's response so that the individual may appeal to the CSH Maximum Security Appeals Committee.

#### Variance is requested to the following section:

12VAC35-115-100, Restrictions on freedoms of everyday life, A 1 c, "freedom to have and spend personal money."

Explanation: Individuals who are receiving hospitalization under the civil admissions process in the maximum security perimeter may not keep any form of money on their person. The CSH variance to this provision allows nonforensic patients to purchase items in a canteen and from external providers; however, individuals may not have money on their person.

#### Variance is requested to the following sections:

12VAC35-115-20 A 2, Policy, "Each individual who receives services shall be assured respect for basic human dignity."

12VAC35-115-50 C 3 a, Dignity, "each individual has the right to ... reasonable privacy...."

Explanation: CSH cannot fulfill its duty to provide a safe environment for individuals who are high-risk in a secure forensic program through less intrusive means than routine "pat downs" of fully clothed individuals and proactive searches of individual bedroom areas. The CSH variance to these provisions allows for routine pat downs of nonforensic individuals before and after group movement; within a secure perimeter; any time an individual leaves the secure perimeter; and any time an individual has physical access to a visitor

who is not an employee of CSH and allows proactive routine searches of individual bedrooms to identify contraband or breaches of safety and security.

Variance is requested to the following section:

12VAC35-115-50, Dignity:

C 6, "each individual has the right to... communicate privately with any person by mail and have help in writing and reading mail, as needed."

C 6 a, "An individual's access to mail may be limited only if the provider has reasonable cause to believe that the mail contains illegal material or anything dangerous. If so, the director or his designee may open the mail, but not read it, in the presence of the individual."

C 7, "each individual has the right to... communicate privately with any person by telephone and have help in doing so."

C 7 a, "An individual's access to the telephone may be limited only if, in the judgment of a licensed professional, communication with another person will result in demonstrable harm to the individual or significantly affect his treatment."

Explanation: The CSH variance to these provisions allows for staff to open but not read mail and packages in the presence of the individual in the maximum security program. CSH also seeks to restrict individuals in the maximum security forensic program from communicating with each other by mail or telephone.

Any variances to these regulations by the state facility listed (CSH) are reviewed by the SHRC at least annually, with reports going to the SHRC regarding the variances as requested.

Public comment period: September 16, 2019, through October 16, 2018.

How to comment: The SHRC accepts written comments by email, fax, and postal mail. In order to be considered, comments must include the full name, address, and telephone number of the person commenting and be received by DBHDS, which will provide them to the SHRC, by the last day of the comment period. All information received is part of the public record.

To review a proposal: Variance applications and any supporting documentation may be obtained by contacting the listed DBHDS representative.

Contact Information: Deborah Lochart, Director, Office of Human Rights, Department of Behavioral Health and Developmental Services, 1220 East Bank Street, P.O. Box 1797, Richmond, VA 23218-1797, telephone (804) 786-0032, FAX (804) 804-371-2308, or email [deb.lochart@dbhds.virginia.gov](mailto:deb.lochart@dbhds.virginia.gov).

## DEPARTMENT OF ENVIRONMENTAL QUALITY

### **Bedford Solar Center LLC Withdrawal of Notice of Intent for Small Renewable Energy Project (Solar) - City of Chesapeake**

Bedford Solar Center LLC has withdrawn its notice of intent to submit the necessary documentation for a permit by rule for a small renewable energy project (solar) in the City of Chesapeake to be sited on approximately 475 acres adjacent to Blue Ridge Road near the Naval Auxiliary Landing Field Fentress. The notice of intent was published in the Virginia Register of Regulations on October 15, 2018.

Agency Contact: Mary E. Major, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4423, or email [mary.major@deq.virginia.gov](mailto:mary.major@deq.virginia.gov).

### **Tradewind Energy Inc. (TWE) and Centerville Pike Solar Project LLC Withdrawal of Notice of Intent for Small Renewable Energy Project (Solar) - City of Chesapeake**

The Department of Environmental Quality has received a withdrawal of a notice of intent to submit the necessary documentation for a permit by rule for a small renewable energy solar project from TWE Centerville Pike Solar Project LLC for a 15-megawatt project within the City of Chesapeake. The notice of intent was published in the Virginia Register of Regulations on May 2, 2016.

Agency Contact: Mary E. Major, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4423, or email [mary.major@deq.virginia.gov](mailto:mary.major@deq.virginia.gov).

### **Tradewind Energy Inc. (TWE) and TWE Chesapeake Solar Project LLC Withdrawal of Notice of Intent for Small Renewable Energy Project (Solar) Permit by Rule - City of Chesapeake**

The Department of Environmental Quality has received a withdrawal of a notice of intent to submit the necessary documentation for a permit by rule for a small renewable energy solar project located within the City of Chesapeake. The notice of intent was published in the Virginia Register of Regulations on May 2, 2016.

Agency Contact: Mary E. Major, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4423, or email [mary.major@deq.virginia.gov](mailto:mary.major@deq.virginia.gov).

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## General Notices/Errata

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### DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

#### Draft CCC Plus Waiver Provider Manual (Appendix D)

The draft Appendix D of the new CCC Plus Waiver Provider Manual (formerly the Elderly or Disabled with Consumer Direction and Technology Assisted Waivers Provider Manual) is now available on the Department of Medical Assistance Services (DMAS) website at <http://www.dmas.virginia.gov/#/manualdraft>.

Agency Contact: 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, TDD (800) 343-0634, or email [emily.mcclellan@dmas.virginia.gov](mailto:emily.mcclellan@dmas.virginia.gov).

#### Draft Chapter 1 (General Information) for All DMAS Provider Manuals Is Available for Stakeholder Input

Public comment period: August 23, 2019, to September 22, 2019.

The draft Chapter I (General Information) for all DMAS provider manuals is now available on the DMAS website at <http://www.dmas.virginia.gov/#/manualdraft> for public comment. This chapter has been updated to reflect current DMAS requirements.

Agency Contact: 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, TDD (800) 343-0634, or email [emily.mcclellan@dmas.virginia.gov](mailto:emily.mcclellan@dmas.virginia.gov).

#### Draft Local Education Agency Provider Manual Is Available for Stakeholder Input

Public comment period: August 23, 2019, to September 22, 2019.

The draft Local Education Agency Provider Manual (Chapters II, IV, V, and VI) is now available on the DMAS website at <http://www.dmas.virginia.gov/#/manualdraft> for public comment. The updates clarify requirements associated with DMAS local education agency provider enrollment and screening requirements and claims submission requirements.

Agency Contact: 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, TDD (800) 343-0634, or email [emily.mcclellan@dmas.virginia.gov](mailto:emily.mcclellan@dmas.virginia.gov).

### Intent to Amend the Virginia State Plan for Medical Assistance (pursuant to § 1902(a)(13) of the Social Security Act (USC § 1396a(a)(13)))

The Virginia Department of Medical Assistance Services (DMAS) hereby affords the public notice of its intention to amend the Virginia State Plan for Medical Assistance to provide for changes to the Methods and Standards for Establishing Payment Rates-Other Types of Care (12VAC30-80).

This notice is intended to satisfy the requirements of 42 CFR 447.205 and § 1902(a)(13) of the Social Security Act, 42 USC § 1396a(a)(13). A copy of this notice is available for public review from Emily McClellan, Policy and Research Division, Department of Medical Assistance Services, 600 Broad Street, Suite 1300, Richmond, VA 23219, or via email at [emily.mcclellan@dmas.virginia.gov](mailto:emily.mcclellan@dmas.virginia.gov).

This notice is available for public review on the Virginia Regulatory Town Hall at [www.townhall.virginia.gov](http://www.townhall.virginia.gov).

The state plan is being revised, effective January 1, 2020, to remove the statement that reimbursement for incontinence supplies shall be by selective contract.

There is no expected increase or decrease in annual aggregate expenditures.

Agency Contact: 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, TDD (800) 343-0634, or email [emily.mcclellan@dmas.virginia.gov](mailto:emily.mcclellan@dmas.virginia.gov).

### STATE WATER CONTROL BOARD

#### Proposed Consent Order for Mountain View Brewery LLC

The State Water Control Board proposes to issue a consent order with penalty and injunctive relief to Mountain View Brewery LLC to address noncompliance with State Water Control Law at the Devil's Backbone Outpost Brewery located in Lexington, Virginia. A description of the proposed action is available at the Department of Environmental Quality office listed or online at [www.deq.virginia.gov](http://www.deq.virginia.gov). Tiffany Severs will accept comments by email at [tiffany.severs@deq.virginia.gov](mailto:tiffany.severs@deq.virginia.gov), FAX at (540) 574-7878, or postal mail at Department of Environmental Quality, Valley Regional Office, P.O. Box 3000, Harrisonburg, VA 22801, from September 16, 2019, to October 16, 2019.

#### Proposed Consent Order for Nelson County Service Authority

An enforcement action has been proposed for Nelson County Service Authority (NCSA) for violations at the Wintergreen wastewater treatment plant. The State Water Control Board

proposes to issue a consent order with injunctive relief to NCSA to address noncompliance with State Water Control Law. A description of the proposed action is available at the Department of Environmental Quality office listed or online at [www.deq.virginia.gov](http://www.deq.virginia.gov). Tiffany Severs will accept comments by email at [tiffany.severs@deq.virginia.gov](mailto:tiffany.severs@deq.virginia.gov), FAX at (540) 574-7878, or postal mail at Department of Environmental Quality, Valley Regional Office, 4411 Early Road, P.O. Box 3000, Harrisonburg, VA 22801, from September 16, 2019, to October 16, 2019.

### **Proposed Consent Special Order for Nutri-Blend Inc.**

An enforcement action has been proposed for Nutri-Blend Inc. for violations in Goochland and Cumberland, Virginia. The State Water Control Board proposes to issue a special order by consent to Nutri-Blend Inc. to address noncompliance with the State Water Control Law and regulations. A description of the proposed action is available at the Department of Environmental Quality office listed or online at [www.deq.virginia.gov](http://www.deq.virginia.gov). Kristen Sadtler will accept comments by email at [kristen.sadtler@deq.virginia.gov](mailto:kristen.sadtler@deq.virginia.gov) or postal mail at Department of Environmental Quality, Central Office, P.O. Box 1105, Richmond, VA 23218, from September 16, 2019, to October 16, 2019.

### **Total Maximum Daily Loads for Buffalo River, Long Branch, Rutledge Creek, Mill Creek and Turner Creek Watersheds in Amherst County**

The Department of Environmental Quality (DEQ) seeks oral and written comments from interested persons on the development of a TMDL Implementation Plan (IP) for bacteria and sediment total maximum daily loads (TMDLs) for Buffalo River, Long Branch, Rutledge Creek, Mill Creek, and Turner Creek Watersheds in Amherst County. These streams were listed as impaired on Virginia's § 303(d) TMDL Priority List and Report due to violations of the state's water quality standard for bacteria. The following are the names of each bacteria "impaired" stream, the length of the impaired segment, and the reason for the impairment: Buffalo River, 23.48 miles, bacteria; Buffalo River, 2.09 miles, sediment; Long Branch, 3.59 miles, sediment; Mill Creek, 4.15 miles, bacteria; Rutledge Creek, 7.48 miles, bacteria; Turner Creek, 4.49 miles, bacteria.

The TMDL studies for these stream impairments were completed in June 2013 and July 2013 and can be found, respectively, in the bacteria TMDL development for Hat Creek, Piney River, Rucker Run, Mill Creek, Rutledge Creek, Turner Creek, Buffalo River, and Tye River in Nelson County and Amherst County, Virginia report is available at [https://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/apptmdls/VRO\\_TMDL\\_Access.pdf](https://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/apptmdls/VRO_TMDL_Access.pdf). The Sediment TMDL Development Report for Benthic Impairments in Long Branch and Buffalo River Amherst County, Virginia report is

available at [https://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/apptmdls/BRRO\\_TMDL\\_Access.pdf](https://www.deq.virginia.gov/Portals/0/DEQ/Water/TMDL/apptmdls/BRRO_TMDL_Access.pdf).

Section 62.1-44.19:7 C of the Code of Virginia requires the development of an IP for approved TMDLs. The IP should provide measurable goals and the date of expected achievement of water quality objectives. The IP should also include the corrective actions needed and their associated costs, benefits, and environmental impacts.

This will be the first public meeting to discuss the development of the IP for the bacteria and sediment TMDLs. At this meeting, development of the implementation plan to restore water quality in the Buffalo River Watershed will be discussed, and citizens will learn how they can be part of the water quality improvement process.

The public meeting will be held from 6 p.m. to 8 p.m. on Tuesday, October 8, 2019, at the Amherst County Administration Building, Admin Conference Room, 153 Washington Street, Amherst, VA 24521. In the event of severe weather, the public meeting will occur on October 10, 2019, at the same time and location.

DEQ accepts written comments by email, fax, or postal mail. The 30-day public comment period on the information presented at the meeting will begin October 8, 2019, and end November 8, 2019. Written comments and inquiries should include the name, address, and telephone number of the person submitting the comments and should be sent to James Moneymaker, Blue Ridge Regional Office, Department of Environmental Quality, 901 Russell Drive, Salem, VA 24153, telephone (540) 562-6738, FAX (540) 562-6725, or email [james.moneymaker@deq.virginia.gov](mailto:james.moneymaker@deq.virginia.gov).

## **VIRGINIA CODE COMMISSION**

### **Notice to State Agencies**

**Contact Information:** *Mailing Address:* Virginia Code Commission, Pocahontas Building, 900 East Main Street, 8th Floor, Richmond, VA 23219; *Telephone:* (804) 698-1810; *Email:* [varegs@dls.virginia.gov](mailto:varegs@dls.virginia.gov).

**Meeting Notices:** Section 2.2-3707 C of the Code of Virginia requires state agencies to post meeting notices on their websites and on the Commonwealth Calendar at <https://commonwealthcalendar.virginia.gov>.

**Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed:** A table listing regulation sections that have been amended, added, or repealed in the *Virginia Register of Regulations* since the regulations were originally published or last supplemented in the print version of the Virginia Administrative Code is available at <http://register.dls.virginia.gov/documents/cumultab.pdf>.

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## General Notices/Errata

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**Filing Material for Publication in the *Virginia Register of Regulations*:** Agencies use the Regulation Information System (RIS) to file regulations and related items for publication in the *Virginia Register of Regulations*. The Registrar's office works closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.