



Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Funeral Directors and Embalmers, Department of Health Professions
Virginia Administrative Code (VAC) citation	18VAC65-20-10 et seq.
Regulation title	Regulations of the Board of Funeral Directors and Embalmers
Action title	Identification of human remains
Date this document prepared	7/28/2010

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) 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 subdivision A. 4. of § 2.2-4006.

- 1) Please explain why this is an emergency situation as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

Chapter 377 of the 2010 Acts of the Assembly provided the specific mandate to adopt regulations for identification of human remains as a prerequisite for cremation. The second enactment requires that the Board promulgate regulations to implement the provisions of the act to be effective within 280 days of its enactment. Therefore, there is an “emergency situation” as defined in § 2.2-4011 of the Administrative Process Act.

The key provisions of the amended regulation are guidance on the identifiers that may be used for visual identification of the remains and the resources available to achieve positive identification if visual identification is not feasible.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary. Please include a citation to the emergency language.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility of the Board of Funeral Directors and Embalmers to promulgate regulations, administer a registration and renewal program, and discipline regulated professionals.

§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions...*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*
- 7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations...*

Chapter 377 of the 2010 Acts of the Assembly provided the specific mandate to adopt regulations for identification of human remains as a prerequisite for cremation.

§ [54.1-2818.1](#). Prerequisites for cremation.

No dead human body shall be cremated without (i) permission of the medical examiner as required by § [32.1-284](#) and either (ii) visual identification of the deceased by the next-of-kin or his representative, who may be any person designated to make arrangements for the decedent's burial or the disposition of his remains pursuant to § [54.1-2825](#) or an agent named in an advance directive pursuant to § [54.1-2984](#) or (iii) a twenty-four hour waiting period between the time of death and the cremation. ~~When visual identification is not feasible, other positive identification of the deceased may be used as a prerequisite for cremation.~~

2. That the Board of Funeral Directors and Embalmers shall promulgate regulations to implement the provisions of this act to be effective within 280 days of its enactment.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The intent of the regulatory action is compliance with the second enactment of Chapter 377 of the 2010 Acts of the Assembly have regulations in effect without 280 days of enactment. While the statute is fairly explicit about the prerequisites for cremation, the regulation further amplifies how visual identification can be done – through viewing the remains or a photograph or by use of unique identifiers and markings. If positive identification must be used, the regulations specify who may be consulted for that purpose.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

In order to ensure authorization for cremation can be obtained in accordance with § 54.1-2818.1 as amended in 2010 and in a timely manner, the proposed regulation expands on the statutory mandate for visual identification, or if that is not feasible, positive identification. Visual identification may be accomplished by viewing unique identifiers or markings (tattoos, birth marks, etc.). If positive identification must be used, a crematory may consult with law enforcement for fingerprints, DNA, etc., with the local medical examiner or with medical personnel at a hospital or other facility. With the amendments the Board has adopted, the statute can be more clearly implemented, and families or designated persons are able to achieve closure in a more humanely and timely manner. Proper identification of human remains prior to cremation is essential to the health, safety and welfare of the public because it is necessary to ensure that misidentified or unidentified persons are not cremated. Cremation eliminates the possibility that a lost loved one could later be identified or that the remains may provide evidence in a criminal investigation.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
436	n/a	Sets out the authorization requirements for	Subsection A is amended to provide regulatory guidance on the attestation of visual identification of human remains. The amended

		<p>cremation</p>	<p>language specifies that: 2. The cremation authorization form shall include an attestation of visual identification of the deceased from a viewing of the remains or a photograph signed by the person making the identification. <u>Visual identification may be made by viewing unique identifiers or markings on the remains.</u> If visual identification is not feasible, the law permits the funeral establishment to use positive identification of the remains. Regulatory guidance on positive identification is provided in the amendments to #3: 3. In the event visual identification is not made <u>feasible</u>, a crematory <u>may use positive identification of the deceased in consultation with the law enforcement, a medical examiner or medical personnel</u> pursuant to § 54.1-2818.1 of the Code of Virginia. Current language allows the body to be cremated after a 24-hour waiting period is overstruck, because it is now inconsistent with provisions of §54.1-2818.1.</p> <p><i>For visual identification of remains, there are recognizable features or markings that may be used by the next-of-kin or a representative of the deceased. For positive identification, if visual ID is not feasible, the funeral establishment may rely on positive identification – such a fingerprints, DNA, dental records, etc.</i></p>
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Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

There are no alternatives to the proposed regulatory action since it is mandated by Chapter 377 of the 2010 Acts of the Assembly. Individual questions and situations will arise about identification and the prerequisites for cremation. To the extent possible, the Board will offer guidance and assistance to aid funeral establishments in fulfilling the requirements of § 54.1-2818.1

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

The agency/board is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The agency/board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Elaine Yeatts, elaine.yeatts@dhp.virginia.gov; 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or by fax to (804) 527-4434. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public meeting will be held after publication of proposed regulations and notice of the meeting can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Participatory approach

Please indicate the extent to which an ad hoc advisory group or regulatory advisory panel will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The agency/board will use the participatory approach to develop a proposal if it receives at least 10 written requests to use the participatory approach prior to the end of the public comment period. Persons requesting the agency use the participatory approach and interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and their organization (if any). Notification of the composition of the advisory panel will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

There is no impact on the institution of the family and family stability.