



Fast Track Proposed Regulation Agency Background Document

Agency name	Department of Forensic Science
Virginia Administrative Code (VAC) citation	6 VAC 40-20
Regulation title	Regulations for Breath Alcohol Testing
Action title	Amendment to Change Certain Mail Delivery Methods and Forms
Date this document prepared	April 25, 2013

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*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes.

The proposed amendments to 6 VAC 40-20 make two minor changes to the existing regulations. First, the amendments add the term "or equivalent delivery method" to 6 VAC 40-20-140. This amendment allows the Department of Forensic Science (DFS or the Department) to deliver notice of the revocation of breath instrument instructor or operator licenses or certificates via certified U.S. mail as well as other equivalent delivery methods, such as signature required Federal Express or UPS delivery. The use of private carriers for mail delivery is, at times, more cost effective than U.S. mail. This change will allow DFS to utilize the least expensive mail delivery option. Second, the proposed amendments to 6 VAC 40-20-160 strike language about the preventive maintenance checklist, which was applicable to a breath instrument which is no longer used in the Commonwealth. The amendments add language regarding the availability of breath test worksheets relevant to the instruments currently in use.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

The Department of Forensic Science's Forensic Science Board voted to adopt these amendments to the Regulations for Breath Alcohol Testing on January 3, 2013.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

Virginia Code § 18.2-267(B) requires the Department of Forensic Science to "determine the proper method and equipment to be used in analyzing breath samples taken pursuant to this section and shall advise the respective police and sheriff's departments of the same." Additionally, Virginia Code § 18.2-268.9 requires the Department to "establish a training program for all individuals who are to administer the breath tests" and "upon a person's successful completion of the training program, the Department may license him to conduct breath-test analyses." This regulation describes the process for approval of breath test devices, general methods of conducting breath tests, training and licensing procedures for operators, and the use of preliminary breath test devices. The proposed amendments to the Regulations for Breath Alcohol Testing were adopted by the Department's Forensic Science Board pursuant to Virginia Code §§9.1-1101 and 9.1-1110(A)(1).

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The proposed amendments to 6 VAC 40-20 make two minor changes to the existing regulations. First, the amendments add the term "or equivalent delivery method" to 6 VAC 40-20-140. This amendment allows the Department of Forensic Science to deliver notice of the revocation of certain licenses or certificates via certified U.S. mail as well as other equivalent delivery methods such as signature required Federal Express or UPS delivery. The use of the private carriers for mail delivery is, at times, more cost effective than U.S. mail. This change will allow DFS to utilize the least expensive mail delivery option. Second, the proposed amendments to 6 VAC 40-20-160 strike language about the preventive maintenance checklist, which was applicable to a breath instrument no longer used in the Commonwealth, and replaces this language with information about the availability of breath test worksheets relevant to the instruments currently in use.

The regulations, which describe the process for approval of breath test devices, general methods of conducting breath tests, training and licensing procedures for operators, and the use of preliminary breath test devices, facilitate the protection of the health and safety of the public from the perils of individuals who drive while under the influence of alcohol or other drugs.

Rationale for using fast track process

Please explain the rationale for using the fast track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

Please note: If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall (i) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

The proposed amendments to 6 VAC 40-20, involving a mail delivery method, striking language regarding a checklist that is no longer applicable to the instruments used the Commonwealth and updating information about the availability of a form relevant to the current breath instrumentation, are minor and do not change any existing, substantive procedures. In September 2012, the Department conducted a periodic review of this regulation and received no public comment. Likewise, the Forensic Science Board discussed and voted to adopt these proposed amendments at its January 2013 public meeting and no member of the public offered a comment. Given these facts, the Department does not expect the proposed amendments to be controversial.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.) Please be sure to define any acronyms.

The proposed amendments to 6 VAC 40-20 make two minor changes to the existing regulations. First, the amendments add the term "or equivalent delivery method" to 6 VAC 40-20-140. This amendment allows the Department of Forensic Science to deliver notices of the revocation of breath instrument instructor or operator licenses or certificates via certified U.S. mail as well as other equivalent delivery methods such as signature required Federal Express or UPS delivery. The use of private carriers for mail delivery is, at times, more cost effective than U.S. mail. This change will allow DFS the option to utilize the least expensive mail delivery option. Second, the proposed amendments to 6 VAC 40-20-160 strike language about the preventive maintenance checklist, which was applicable to a breath instrument which is no longer used in the Commonwealth, and replaces this language with information about the availability of breath test worksheets relevant to the instruments currently in use.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If there are no disadvantages to the public or the Commonwealth, please indicate.

The proposed amendments to 6 VAC 40-20-140 advantage the Department of Forensic Science and the Commonwealth to the extent that multiple mail delivery options allow the Department to choose the most cost effective delivery method for certain mailings. Furthermore, the amendments to 6 VAC 40-20-160 clarify the current availability of the breath test worksheet to law enforcement agencies and eliminate verbiage related to a worksheet that is no longer in use. The Department expects these changes will enhance its user agencies' understanding of the regulations. There is no other anticipated public impact and no known disadvantage.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities particularly affected by the proposed amendments.

Regulatory flexibility analysis

Please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

Because there is no apparent adverse impact on small business, the Department is unaware of the existence of any alternative regulatory methods applicable to the proposed amendments.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

<p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</p>	<p>None</p>
<p>Projected cost of the <i>new regulations or changes to existing regulations</i> on localities.</p>	<p>None</p>
<p>Description of the individuals, businesses or other entities likely to be affected by the <i>new regulations or changes to existing regulations</i>.</p>	<p>Law enforcement agencies or individual law enforcement officers, who are breath instrument operators or instructors, may benefit from the proposed clarifying amendments to 6 VAC 40-20-160.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means 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.</p>	<p>There are approximately 5000 breath instrument operators and 35 instructors. There are approximately 168 instruments in 165 locations in the Commonwealth. There are no known small businesses impacted by these amendments.</p>
<p>All projected costs of the <i>new regulations or changes to existing regulations</i> for affected individuals, businesses, or other entities. Please be specific and include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. Specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>None.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>The proposed amendments are designed to allow cost effective options for certain mailings, delete a reference to a checklist that is no longer applicable to the current instruments used in the Commonwealth and clarify the availability of a worksheet relevant to the instrumentation currently in use.</p>

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in §2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulation.

Because the proposed amendments are relatively minor, housekeeping changes, the Department considers these amendments to be the least burdensome/intrusive and is unaware of any viable alternative. There is no known impact on small business.

Periodic review/small business impact review result

If this fast-track regulation is not the result of a periodic review/small business of the regulation, please delete this entire section.

If this fast-track regulation is the result of a periodic review/small business impact review, please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and (2) indicate whether the regulation meets the criteria set out in Executive Order 14 (2010), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, please include, pursuant to § 2.2-4007.1 E and F, a discussion of the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

Commenter	Comment	Agency response
N/A	N/A	N/A

1. **DFS did not receive any public comment during the periodic review of this regulation.**
2. **The regulation is both required by statute and necessary to protect the public’s safety. It is clearly written and understandable.**
3. **After a periodic review process in 2012, which was noticed on both Virginia Regulatory Town Hall and with the Register of Regulations and included a public comment period that closed on September 4, 2012 with no public comment, DFS concluded there is a continued need for the regulation, there are no known complaints or comments relevant to the regulation, the regulation is not complex, and the regulation does not overlap, duplicate, or conflict with any other law or regulation. The proposed amendments reflect the degree to which the instrumentation utilized in the Commonwealth has changed since the regulation was last reviewed.**

Family impact

Please assess the 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.

The proposed amendments have no impact on the institution of the family or family stability.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the pre-emergency regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulation(s), use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
6 VAC 40-20-140		Notices of revocation are sent via registered or certified mail.	With the proposed amendments, notices of revocation could be sent via registered or certified mail or equivalent deliver method. This change would allow DFS the option of utilizing the least expensive mail delivery option between the U.S. Postal Service and various private carriers.
6 VAC 40-20-160		There is no current requirement. This section discusses a "preventive maintenance checklist," which is to be used "if applicable." Because the instrument requiring preventive maintenance were phased out of use in 2009, the checklist is no longer applicable.	The proposed amendments strike this language and add text referencing the "breath test worksheets" currently in use. DFS anticipates this change will clarify the regulations for its user agencies.

If a new regulation is being promulgated, use this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements

Enter any other statement here