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## Fast Track Proposed Regulation Agency Background Document

<b>Agency name</b>	Virginia Department of Health
<b>Virginia Administrative Code (VAC) citation</b>	12 VAC 5-371
<b>Regulation title</b>	Regulations for the Licensure of Nursing Facilities
<b>Action title</b>	This action will create a section in the regulation pertaining to electronic monitoring of nursing facility residents.
<b>Date this document prepared</b>	April 18, 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.*

In response to the passage of HB2130/SB974 (2013), VDH/OLC intends to create a new section 191 in 12VAC5-371 (Regulations for Licensure of Nursing Facilities) pertaining to electronic monitoring in resident rooms. The proposed action codifies a 2007 guideline the department developed to assist facilities with the privacy intricacies related to installing electronic monitoring equipment. Installing such equipment is not mandatory; however, if installed, facilities must safeguard resident's autonomy and rights according to current federal and state privacy laws and regulations. Subsequently, the guideline and proposed section provide the framework to address policies and procedures, informed consent, admission, discharge or transfer. The regulation includes the equipment request process and notice procedures, retention and ownership of tapes or recordings, and reporting suspected abuse, neglect, accident or injury discovered through electronic monitoring.

### Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.*

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The acronyms that appear in this document are as follow:

VDH/OLC means the Department of Health/Office of Licensure and Certification

### 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.*

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The State Board of Health approved this action to create 12VAC5-371-191 Electronic monitoring in resident rooms on September 12, 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.*

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House Bill 2130/SB974 (2013) requires the Board of Health to promulgate regulations governing the implementation of electronic monitoring in resident rooms. Per the legislation, the VDH/OLC's current guidance document (Electronic Monitoring in Residents' Rooms, July 2007) is the template for the regulation. Therefore, the promulgation of the regulation and the authority to promulgate such regulation is mandated.

### 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.*

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The regulation protects and promotes public health, safety and welfare through the establishment of a framework regulation that sets standards regarding electronic monitoring in nursing facility resident rooms. Since the promulgation of the current chapter in 1997, interest in electronic monitoring of resident rooms has grown. Family members, seeking to monitor the quality of care their loved ones receive, have expressed interest in placing video cameras or other means of electronic surveillance in the rooms of their family member in a nursing facility. Advocacy groups have joined in this effort to propose federal laws that would explicitly permit a nursing facility resident and/or family member to install electronic monitoring equipment with a facility's knowledge. Direction is needed to assure resident privacy and autonomy supersedes the utilization of electronic monitoring regardless of the family member or advocate demand.

HB2130/SB974 requires the Board of Health to promulgate regulations that provide a framework for nursing facilities for implementing electronic monitoring or permitting electronic monitoring when requested by a resident or a resident's legal representative.

### 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.*

As per HB2130/SB974, the content of the proposed section in the regulation is to be based upon and "include existing policies and procedures set forth in the Board's guidelines governing electronic monitoring of nursing home residents' rooms and described in the publication "Electronic Monitoring of Residents' Rooms." The 2007 VDH/OLC guidance was developed with the assistance and input of the Virginia State Police to accurately reflect state and federal privacy laws. As a result, the guideline has been widely utilized without further need for revision since its inception. Therefore, the department believes the proposed regulation will be noncontroversial, allowing use of the fast-track promulgation process.

### 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.*

As directed in HB2130/SB974, the department intends to create a section pertaining to electronic monitoring in nursing facility resident rooms. The proposed action will provide facilities the framework to assure a resident's right to personal privacy and personal autonomy is not violated or that the facility does not violate current federal and state privacy laws regarding filming and electronic monitoring. The proposed regulation addresses policies and procedures, informed consent, resident's right to implement or refuse electronic monitoring, including admission, discharge or transfer. In addition, the regulation outlines request and notice procedures, retention of tapes or recordings, and reporting suspected abuse, neglect, accident or injury discovered through electronic monitoring.

### 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.*

Family members, having concern for the care and safety of their loved one in a nursing facility, have expressed interest in utilizing electronic equipment in a resident's room. The proposed new section of the regulation clarifies issues related to electronic monitoring and ensures nursing facilities have policies and procedures in place for such activities. Federal and state laws and regulations stipulate that a resident of a nursing facility has the right to privacy and confidentiality of his or her person, including the privacy of their bodies. HB2130/SB974 does not mandate that nursing facilities provide electronic monitoring of its residents; rather the legislation provides the direction that facilities can follow when residents or resident family members request electronic monitoring. However, such monitoring cannot be conducted without the authorized written consent of the resident, regardless of the wishes of the family.

There are no known disadvantages to the public. The primary advantages to the Agency and the Commonwealth are increased care and safety for citizens throughout the Commonwealth who chose to utilize electronic monitoring. There are no known disadvantages to the Commonwealth.

### 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.*

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There are no applicable federal requirements specific to electronic monitoring in nursing facility resident rooms; therefore this regulation does not exceed any federal requirements. In addition, the department worked closely with the Virginia Bureau of State Police to assure that the guideline from which this proposed section was drafted did not violate federal and state electronic surveillance laws.

### 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.*

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No locality is disproportionately affected by this required action.

### Regulatory flexibility analysis

*Pursuant to §2.2-4007.1B of the Code of Virginia, 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.*

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Since 2007, the VDH/OLC has had in place guidance on electronic monitoring in nursing facilities. However, the General Assembly thought regulation, based on the guidance from the VDH/OLC, was needed. This regulation is clearly mandated by law; there are no other available alternatives to comply with the law.

**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. Please keep in mind that we are looking at the impact of the proposed changes to the status quo.*

<p><b>Description of the individuals, businesses or other entities likely to be affected (positively or negatively) by this regulatory proposal.</b> Think broadly, e.g., these entities may or may not be regulated by this board</p>	<p>None, promulgation of the proposed regulation is mandated. Since the regulation does not require that a facility implement electronic monitoring; enforcement will be based on receipt of any consumer allegations of possible violations, which are expected to be rare.</p>
<p><b>Agency’s best estimate of the number of (1) entities that will be affected, including (2) small businesses affected.</b> Small business means a business, including affiliates, that is independently owned and operated, employs fewer than 500 full-time employees, or has gross annual sales of less than \$6 million.</p>	<p>None, unless the locality operates a nursing facility in which electronic monitoring is requested. However, all costs of the equipment installation and monitoring can be charged to the resident or family seeking the monitoring.</p>
<p><b>Benefits expected as a result of this regulatory proposal.</b></p>	<p>Small electronics suppliers and electrical contractors would profit from the selling and installing the equipment or electrical connections necessary.</p>
<p><b>Projected cost to the <u>state</u> to implement and enforce this regulatory proposal.</b></p>	<p>The legislation does not require that nursing facilities install or implement an electronic monitoring equipment program. In addition, any cost associated with installation can be charged to the resident or resident family. Based on feedback regarding the referenced guideline in the legislation, families did not proceed with the monitoring once they learn they can be charged for the total costs of implementation.</p>
<p><b>Projected cost to <u>localities</u> to implement and enforce this regulatory proposal.</b></p>	<p>None, there are no costs unless the facility receives a request to install equipment. The regulation provides that such costs can be charged to the family seeking implementation of the electronic monitoring.</p>
<p><b>All projected costs of this regulatory proposal for <u>affected individuals, businesses, or other entities</u>.</b> Please be specific and include all costs, including projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses, and costs related to real estate development.</p>	<p>Provides the controls necessary to assure that resident autonomy and rights to personal privacy are not violated.</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.*

There are no alternatives that meet the intent of the law.

**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.*

There is no direct 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) or regulations that are being repealed and replaced, use this chart:

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change, intent, rationale, and likely impact of proposed requirements</b>
191	Provides the framework for policies and procedures, informed consent, right of implementation/refusal, retention of tapes and recordings, and reporting of abuse, neglect, accident or injury discovered via electronic monitoring.	§§ 18.2-386.1 and 32.1-138 of the Code of Virginia; § 483.10(e) of the Code of Federal regulations, 12VAC5-371-150	Provides the assurance that a resident's dignity and right to personal, bodily privacy and autonomy are not violated.