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Exempt Action Final Regulation Agency Background Document

Agency name	Virginia Board for Asbestos, Lead, and Home Inspectors
Virginia Administrative Code (VAC) citation(s)	18 VAC 15-40
Regulation title(s)	Certified Home Inspector Regulations
Action title	Home Inspector Training Program Amendments
Final agency action date	February 9, 2017
Date this document prepared	February 14, 2017

When a regulatory action is exempt from executive branch review pursuant to § 2.2-4002 or § 2.2-4006 of the Virginia Administrative Process Act (APA) or an agency's basic statute, the agency is not required, however, is encouraged to provide information to the public on the Regulatory Town Hall using this form. Note: While posting this form on the Town Hall is optional, the agency must comply with requirements of the Virginia Register Act, Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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. If applicable, generally describe the existing regulation.

This regulatory action serves as the first phase of a two-part sequence of amendments to the home inspector regulatory program. Currently, home inspectors are regulated through a voluntary certification program. In March 2016, the Governor approved Chapter 436 (2016) and Chapter 161 (2016) of the 2016 Acts of Assembly, which mandated that home inspectors be licensed by the Virginia Board for Asbestos, Lead, and Home Inspectors ("the Board") by July 1, 2017.

In addition to the transition from certification to licensure, the 2016 Acts incorporate a requirement that any home inspector conducting an inspection of a new residential structure ("NRS") must have an endorsement on his Board-issued license indicating completion of a required training module developed by the Board. Pursuant to the fourth enactment clause of both Acts, the Board must publish regulations through exempt action, after providing opportunity for public comment, by July 1, 2017.

On November 15, 2016, the Board approved implementing the licensure program through two separate exempt actions. This, the first action, implements a home inspector training program by adding a new part (Part VI, 18 VAC 15-40-200 et seq.) to the existing “certification” regulations, along with amendments to regulatory definitions (18 VAC 15-40-10) and fee regulations (18 VAC 15-40-50 and 18 VAC 15-40-52). These amendments are expected to become effective on or before May 1, 2017.

The second exempt action will amend the existing home inspector certification regulations to create the licensure program. That regulatory action is expected to become effective on July 1, 2017. By implementing the training program requirements in advance of the licensure regulations, the Board will create a window for training providers to obtain approval for courses prior to July 1, 2017.

Part VI prescribes an approval process for training providers to obtain pre-license education courses, NRS training module, and NRS continuing professional education (“CPE”). Training providers must provide information pertaining to each course, including the number of contact hours in the course, method of delivery, fees, instructor information, materials to be provided to students, and a course syllabus. Training providers are required to furnish to students a certificate of completion or other documentation that may be used by students as proof of completion; must retain records for a minimum for five years; and must notify the Board of any changes to an approved course within 30 days. Part IV further outlines the bases upon which the Board may withdraw approval from a course; and establishes that the Board may conduct an audit of any course provider to ensure compliance with the regulations.

Finally, this regulatory action amends the Board’s definitions associated with the home inspector training program; establishes new fee schedules; and repeals Regulation 18 VAC 15-40-52.

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.

On February 9, 2017, the Virginia Board for Asbestos, Lead, and Home Inspectors adopted the final regulations under 18 VAC 15-40 to create the home inspector training program.

Family impact

Please assess the impact of this 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.

No impact on families or family stability is anticipated in relation to this regulatory action.

Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate. Please distinguish between comments received on Town Hall versus those made in a public hearing or submitted directly to the agency or board.

Pursuant to the fourth enactment clause of both Acts, the General Assembly directed the Board to adopt home inspector licensing and training program regulations through exempt action, but only after providing opportunity for public comment. The Board published the proposed amendments to the home inspector regulations and provided a public comment period from December 1, 2016, to January 15, 2017, with a public hearing held on January 11, 2017.

Although the Board received several comments during the comment period, none were specific to the proposed training program provisions that are the subject of this regulatory action. Rather, comments reflected responses to the proposed amendments for implementation of home inspector licensure, the second phase of the two-part sequence of amendments.

	Regulation #	Summary of Comment(s)	Agency response
	Commenter		
1	15-40-32 and 15-40-34 (Qualifications for licensure)	<p><i>Received via Town Hall.</i></p> <p>The commenter inquired about the experience qualifications for licensure. The commenter asked whether an out-of-state licensee, with less than 10 years' experience, would be required to complete 25 home inspections under direct supervision of a Virginia licensed home inspector; if so, what mandatory mentorship hours would be required of currently licensed Virginia home inspectors.</p>	<p>The Board thanks the commenter for submitting his questions. First, staff would determine what, if any, equivalency exists in the other state in terms of whether licensing is required, entry standards comparable to Virginia, and other factors, as needed, on a case-by-case basis.</p> <p>18 VAC 15-40-34 of the draft regulations has been revised to clarify that experience may be considered that was gained under a home inspector licensed in another jurisdiction. There is no home inspector mentorship requirement in Virginia.</p>
	Chris Beard (Out-of-State Licensees)		
2	15-40	<p><i>Received via Town Hall.</i></p> <p>The commenter offered comments regarding the Board's proposed amendment of regulations for asbestos analytical laboratory licensing, and project monitoring reporting.</p>	<p>The comments are not germane to the proposed regulations for home inspector licensure. The commenter is encouraged to submit his comments during the public comment period for the proposed asbestos analytical laboratory and project monitor regulation amendments.</p>
	David E. Harvey, Planet Protection Services		
3	15-40-20 and 15-40-32	<p><i>Received at public hearing.</i></p> <p>The commenter participated at the public hearing held on January 11, 2017, and</p>	<p>The Board thanks the commenter for giving his comments and questions at the public hearing. The home inspector licensure requirement, including the requirement to take and pass the</p>
	Joe Myers		

		expressed his concerns about being required to pass an examination. The commenter explained that he is not certified as a home inspector, is 60 years old, and has not taken a test in 35 years. He is concerned that if he does not pass the examination before July 2017, he would be “basically out of business,” which poses a hardship. The commenter asked whether there was any provision for an “extension” if one could provide proof of taking the test, but not passing.	examination as a condition of licensure, is mandated by an Act of the General Assembly approved in March 2016. As a result of the statutory directive, those who perform home inspections are required to be licensed as of July 1, 2017. The General Assembly did not grant the Board the authority to waive or postpone the examination requirement for individuals. However, the law allows for any person who holds an unexpired home inspector certificate issued prior to June 30, 2017, to receive a license from the Board.
4	15-40-10 (Definitions)	<i>All comments from Masters submitted directly to Board.</i>	The Board thanks the commenter for providing his comments. The commenter is correct that the term CPE is not included in the definitions section of the proposed regulations. However, the acronym CPE is defined in proposed regulation 18 VAC 15-40-72.
	Donald A. Masters, Master Home Building Inspections LLC	The commenter noted that the term CPE (Continuing Professional Education) is not defined in the proposed regulations.	
5	15-40-10 (Definitions)	<p>The commenter expressed his concerns that the proposed regulations violate the Equal Protection Clause of the United States Constitution because it creates two classes of home inspectors (those with the NRS specialty and those without it), to the detriment of buyers. Those purchasing new construction will only be able to have their home inspections performed by those with the NRS specialty. Assuming there will be fewer inspectors with the NRS specialty, fees for new residential construction inspections will be higher.</p> <p>The commenter also expressed his concern that homeowners who have homes under new construction warranties provided by builders will be denied the protection of having a home inspector with</p>	The requirement that home inspectors conducting inspections of new residential structures possess the NRS designation was mandated by an Act of the General Assembly. Accordingly, the requirement must be reflected in the proposed regulations. The precise basis of the commenter’s claim that the new requirement violates the Equal Protection Clause of the 14th Amendment is not clear. The commenter’s objection appears to be that imposition of the NRS designation requirement will limit consumers’ choices of service providers in the home inspection market for new residential construction—as the pool of available service providers may be smaller—and thereby drive up prices for this service. This is a plausible effect that could occur as the result of any licensing mandate; however, every home inspector has an equal opportunity to meet the requirements to obtain the NRS specialty, and the requirements are the same for every applicant. It is also plausible that the imposition of this requirement may

		<p>the NRS specialty to conduct inspections during the warranty period. Doing so benefits the home builder over the home buyer. Commenter believes the requirement for NRS specialty should apply to homes under new construction warranty.</p>	<p>provide an incentive for home inspectors to obtain the NRS designation, in order to compete for the business of new home buyers, which would be beneficial to new home buyers. It should also be noted that the Office of Attorney General reviews proposed legislation during the development stage to ensure it is consistent with existing law and is constitutional.</p> <p>Section 54.1-503 of the Code of Virginia (effective July 1, 2017) defines “new residential structure” as “a residential structure for which the first conveyance of record title to a purchaser has not occurred, or of which a purchaser has not taken possession, whichever occurs later.” The definition of “new residential structure” in the proposed regulations reflects the language in the statute. Based on this definition, a home in the possession of its first purchaser would no longer be classified as a new residential structure.</p> <p>Changing the definition of “new residential structure” in the proposed regulations would place the regulatory definition in conflict with the statutory definition. To the extent the commenter seeks to expand the definition of “new residential structure” to include homes under new construction warranty, a legislative change would be required.</p> <p>It is not clear that the proposed regulations would “deny” homeowners from having a home inspection conducted by an inspector with an NRS specialty during a warranty period. Homebuyers and homebuilders would be free to stipulate this as a condition of a private-party contractual warranty if so desired. In addition, if it is a home inspection in accordance with Chapter 5 of Title 54.1 of the Code of Virginia, the person performing the home inspection would be licensed, he just would not be required to have the NRS specialty.</p>
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<p>6</p>	<p>15-40-10 (Definitions)</p>	<p>Commenter cites the definition of “outbuilding” in the proposed regulations, inquiring about the status of structures fewer than three feet from a residential building, or which would not affect the residential building. Commenter asks who determines what “may affect” a residential structure. Commenter contends this creates a “gray area.”</p>	<p>Structures fewer than three feet from a residential structure and/or which would not affect the residential structure would not meet the definition of an outbuilding for the purposes of the regulations. The context in which the term is used in the regulations is as an exclusion to the home inspection contract if it is not going to be covered during the inspection. Thus, if a home inspector uses his professional judgment to determine if the burning, destruction, damage, or other condition of an outbuilding would affect the residence more than three feet away, and such outbuilding is not going to be inspected, it would need to be listed as an exclusion in the contract. The only change in the definition is to the specific references to “burn or collapse” as there may be other conditions of the outbuilding that are unintentionally excluded (and, therefore, cannot be included due to their omission) by citing those two specific conditions. Any further interpretation would come from the Board through a case decision or guidance document if the facts so warranted.</p>
<p>7</p>	<p>15-40-10 (Definitions)</p>	<p>Commenter suggests adding language to the definition of “Virginia Residential Code” to specify that the definition refers to the currently adopted code, regardless of whether the code has been adopted and implemented at a local level.</p>	<p>The definition of “Virginia Residential Code” in the proposed regulations is based on the Virginia Construction Code as amended by the Department of Housing and Community Development (DHCD). DHCD establishes the minimum building code requirements in Virginia. For purposes of these regulations, this is the current Virginia Residential Code from the Virginia Uniform Statewide Building Code as adopted by DHCD.</p>
<p>8</p>	<p>15-40-30, 15-40-80, and 15-40-160 (Addresses)</p>	<p>The commenter notes that requirements for submission and maintenance of addresses occur multiple times in the regulations, and that requirements are varied. Commenter suggests the Board’s regulations pertaining to addresses should match requirements of DMV and State Corporation</p>	<p>The Board concurs that additional clarification would be beneficial to the regulations. Consistent with other Department regulations, the Board adds a definition of “address of record” and makes additional amendments as necessary to ensure consistent use of address of record and physical address.</p>

		Commission.	
9	15-40-32 and 15-40-34 (Qualifications for licensure)	<p>The commenter indicates the proposed requirements of 15-40-32.C are “extremely limiting.” Commenter explains that as a relatively new inspector, it is extremely difficult for him to find a home inspector in Virginia to “mentor” him in order to meet experience requirements for certified home inspections. In addition, it will be difficult for those in the State of Maryland, which has less restrictive requirements, to obtain licensure in Virginia. He notes that although Virginia and Maryland chapters of ASHI have mentoring programs, participation in these programs is largely non-existent. Unlike other professions, such as CPAs, home inspectors learn their trade either through a friend who is a home inspector, or by working for a home inspection company. However, inspection companies employing multiple inspectors typically hire experienced professionals, and do not provide or want to provide ground-up training for new inspectors. Commenter contends that the requirement is destined to “eliminate all but a few new Virginia home inspectors.”</p>	<p>The Board has amended 18VAC15-40-34 of the draft regulations to clarify that an individual licensed in another state under which a Virginia applicant has gained experience may be considered when reviewing qualifications pursuant to 18VAC15-40-32.</p>
10	15-40-34 (Out-of-state licensees)	<p>Commenter notes that the requirements of 18 VAC 15-40-34 pertaining to individuals licensed in other jurisdictions are less restrictive than current licensure requirements. Commenter indicates that since he would not be able to meet Virginia licensure requirements, he would be able to qualify for licensure in Virginia on the</p>	<p>The proposed regulation allows the Board to waive entry requirements of 18 VAC 15-40-32 provided the licensure standards under which an out-of-state applicant received his license are substantially equivalent to those in Virginia. It does not automatically grant licensure to those who are licensed in another state. Since a previous comment noted that Maryland’s standards are less restrictive than Virginia’s, it is likely that</p>

		basis of his being licensed in Maryland.	equivalency could not be established.
11	15-40-72 and 15-40-75 (License renewal)	Commenter notes that the proposed regulations only require renewal applicants who have an NRS specialty to provide proof of completing NRS CPE to the Board; renewal applicants are otherwise not required to furnish proof of completing CPE. Commenter asks whether “an inspector [can] run afoul of the regulations if they are at some point in the future challenged by the Board for documentation or verification of their right to stand for license renewal based on some issue which may include CPE training?”	<p>The commenter is correct that the proposed regulations only require those with NRS specialty to furnish proof of completing NRS CPE, as only NRS CPE must be pre-approved by the Board.</p> <p>Proposed regulation 18 VAC 15-40-78 requires licensees to maintain documentation of completing CPE for three years following the end of the license renewal cycle for which the CPE was taken. Records must be provided to the Board upon request. Further, the Board is authorized to conduct an audit of its licensees to verify compliance with CPE requirements. Licensees who fail to comply with CPE requirements, and/or fail to comply with recordkeeping requirements are subject to discipline by the Board—which can include license suspension or revocation.</p>
12	15-40-105 (Status of licensee prior to reinstatement)	Commenter expresses confusion regarding the language in the proposed regulation, in particular with language regarding licensees’ actions during the period prior to reinstatement and whether such actions would violate the Board’s regulations.	<p>Under the proposed regulations, a licensee who has allowed his license to expire has up to two years following the date of license expiration to reinstate his license. An individual without a valid home inspector license is not subject to the Board’s authority. As the individual no longer holds a valid license, if such individual were to engage in activity requiring a home inspector license, he would be engaging in unlicensed activity, which is a violation of criminal law. However, should the individual elect to reinstate his license during the two year reinstatement period, he would be deemed by the Board’s regulations as having been continuously licensed for the period between the license expiration and reinstatement. Likewise, the individual would be retroactively liable for any actions during the period when he did not have a valid license. The Board has the authority to impose regulatory discipline against the individual for his actions during this period should the Board determine he violated any of the Board’s regulations.</p>

<p>13</p>	<p>15-40-120 and 15-40-130 (Home inspection contract and home inspection report standards)</p>	<p>Commenter objects to the home inspection contract and inspection report requirements as “overwhelming” and “seemingly an attempt at contract law in the attempt to design contract terms.” Commenter indicates that keeping contract requirements up to date with changing market conditions is challenging. Commenter notes that the State of Texas, which highly regulates home inspections, adopts a template inspection contract and inspection report which it revises every few years as market conditions change. Commenter states the requirements “overshadow” the oath inspectors who are members of home inspection organizations are required to honor in their transactions. Commenter indicates that at the very least, the Board should provide a contract that will be required for all home inspections.</p> <p>Commenter also objects to specific requirement that home inspection reports include the client’s address and telephone number, which he contends is unnecessary and dangerous.</p> <p>Commenter objects to requirement that home inspection reports be required to note the inspection end time. Commenter indicates he does not know any inspectors who do this, and that time stamps on photographs would be plausible proof of completion time.</p> <p>Commenter further notes that inspection report standards seem “detailed beyond the norm.” Some items that are</p>	<p>The Board appreciates the comments. The Board provides the minimum requirements for contracts and inspection reports as part of its duty to protect the health, safety, and welfare of the public. The contract and report provisions in the draft regulations contain very few amendments from what is currently in place for certified home inspectors, and such provisions have not been presented as problematic or burdensome since their original adoption in 2003 (with amendment in 2011).</p> <p>Regarding a sample contract or report, the boards with the Department are required to establish minimum requirements through its regulations. Because an individual home inspector or home inspection may warrant including additional items not contained in the regulations—for legal or civil liability reasons as opposed to regulatory compliance—the Department’s boards do not provide sample contracts.</p>
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		excluded are considered safety items, and ought not to be excluded.	
14	15-40-10 and 15-40-130 (NRS and residential building)	Commenter states that the separation of an NRS property from an already defined residential building seems unnecessary. A one- or two-unit structure is a subset of a four or fewer structure.	The General Assembly established this distinction in the amended statute. Prior to this legislation, § 54.1-500 defined "residential building" as it is applicable to home inspections. The 2016 legislative amendment established the separated term "new residential structure" with "residential structure" being derived from the Virginia Uniform Statewide Building Code. The draft regulations were reviewed to ensure the proper term was used in each instance; however, after further review in conjunction with your comments, one correction was made in 18VAC15-40-220 to include the proper term.
15	15-40 (Terminology/Style)	<p>Commenter objects to the use of the pronoun "his" in the regulations to refer to individuals, rather than a more gender-neutral term.</p> <p>Commenter notes that in regulation 18 VAC 15-40-140, in subsections B, C, and D, the regulations use the verbs "will" and "shall" interchangeably.</p>	<p>Section 1-216 of the Code of Virginia's Common Law and Rules of Construction states that a word used in the masculine includes feminine and neuter. This requirement is mirrored in the Virginia Form, Style, and Procedure Manual for Publication of Virginia Regulations. The use of the pronouns "he" and "his" are a stylistic requirement for regulations in Virginia.</p> <p>The Board concurs and amends 18VAC15-40-140.C to replace "will" with "shall." In accordance with the Regulatory Style Manual, "shall" is the appropriate term as it expresses a duty or obligation to act and is generally used in connection with mandates.</p>
16	15-40-140 (Conflicts of interest)	Commenter suggests adding language to 18 VAC 15-40-140 that would prohibit licensees from providing a client's personal information to third parties without obtaining written consent from the client.	While the Board does not disagree that this is a good business practice and would be beneficial for a consumer to require, establishing such a regulatory requirement appears to go beyond the scope of the Board's regulations, specifically as it relates to conflict of interest in the provision of home inspection services.
17	15-40-152 (Notice of adverse action)	Commenter suggests adding language to 18 VAC 15-40-152 to require licensees to notify the Board if the licensee loses and does not maintain	A proposed amendment to 18 VAC 15-40-160 would add a reporting requirement of the type the commenter suggests. In addition, failure to maintain required insurance policy

		required insurance coverage as the result of policy cancellation or non-renewal by insurance provider.	would be a violation under proposed regulation 18 VAC 15-40-155.
18	15-40-155 (Prohibited acts)	<p>Commenter contends that subdivision 4 of 18 VAC 15-40-155 (being convicted of criminal offense) “does not seem fit” as a prohibited act in light of the language in 18 VAC 15-40-152.</p> <p>Regarding subdivision 8 of 15-40-155, the commenter questions how a properly licensed home inspector could not be qualified by training or experience, and also fail to competently perform part of a home inspection.</p> <p>Regarding subdivision 13 of 15-40-155, commenter expresses concern that the prohibition on citing, stating, or representing the existence of a USBC violation in an inspection report could have “serious repercussions for a home inspector who makes the mistake of citing a commonly known ‘code’ or inferred ‘requirement.’”</p>	<p>Proposed regulation 18 VAC 15-40-152 only establishes a reporting requirement that licensees report specified criminal convictions to the Board within 30 days. Under subdivision 4 of 18 VAC 15-40-155, it is a prohibited act for a licensee to be convicted of a criminal offense outlined in 15-40-152. Similarly, under subdivision 5 of 15-40-155, it is a prohibited act to fail to report a criminal conviction.</p> <p>Being deemed qualified to perform a task is different than being competent to perform a task. An individual may meet the minimum standards to qualify for licensure, but exceed the scope of the minimum requirements of a home inspection and provide reports, recommendations, or guidance for which he is not competent. While the scope of a home inspection contract must meet the minimum requirements of the regulations, as discussed previously, some home inspections may warrant additional provisions that go beyond the minimum requirements of the regulations. While this is permissible from a regulatory standpoint, the home inspector must still be competent to perform those tasks in connection with the home inspections, and, if not, may be subject to disciplinary action by the Board.</p> <p>Commenter’s comment regarding subdivision 13 is noted. The inclusion of this prohibited act stems in part from publicly raised concerns regarding the legality of home inspectors citing violations of the VUSBC. Under Virginia law, only a building official (or designee) may lawfully cite a violation of the VUSBC.</p>
19	15-40-160 (Maintenance of license)	Commenter questions whether the Board should also require licensees to report a change of business	Home inspector licenses are issued to individuals, and not to business entities. The Board does not have the authority to require home inspector

		<p>name as part of 18 VAC 15-40-160; and, with respect to the subsection D, what type of amendment to an insurance policy would trigger the reporting requirement.</p>	<p>business entities to register with the Board.</p> <p>Subsection D of 18 VAC 15-40-160 is broadly written to require the amendment or any change to the required insurance policy be reported to the Board. It is the obligation of a licensee to obtain and maintain minimum insurance coverage required by the Board's regulations. Amendment to a policy would certainly include, but is not limited to, a change in the level of insurance coverage. This insurance requirement is a condition of licensure. In order for the Board to better ensure regulatory compliance, it places the responsibility on the licensee to inform the Board of any changes to the policy. The Board, in turn, would evaluate the amended or revised policy to determine whether the policy meets the requirements established by the regulations.</p>
20	<p>15-40-180 (Response to board inquires)</p>	<p>Commenter expresses that the 10-day time limit for responding to an inquiry from the Board is restrictive, and is not clear whether the time limit is 10 calendar days or 10 business days, and when the "clock" begins. Commenter notes that in other areas of law, response timeframes are usually not shorter than 21 or 30 days.</p>	<p>Commenter's comments regarding proposed regulation 18 VAC 15-40-180 are noted. The proposed regulation requires a response to a complaint filed with the Board within 10 days. Unless otherwise specified, regulatory timeframes are calendar days. The requirement to respond to a complaint is shorter because immediate attention is required in the event there is an imminent threat to the health, safety, or welfare of the public. As noted in subsection B, the obligation to produce records (as opposed to the obligation to respond per subsection A), includes discretionary language in the event a licensee needs additional time to produce records. However, it is critical that investigative staff are able to get receive a rapid response from the licensee (whether by phone, email, or other contact) during the course of the investigation.</p>
21	<p>15-40</p>	<p>Commenter provided numerous suggested edits for style.</p>	<p>The commenter's suggestions were reviewed and additional amendments were made, as appropriate and consistent with the Regulatory Style Manual.</p>

