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Fast-Track Regulation Agency Background Document

Agency name	Forensic Science Board/Department of Forensic Science
Virginia Administrative Code (VAC) Chapter citation(s)	6 VAC 40-60
VAC Chapter title(s)	DNA Data Bank Regulations
Action title	Regulatory Requirement Reduction Action for 6 VAC 40-60
Date this document prepared	November 16, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

This regulatory action includes both amendments to and the repeal of portions of 6 VAC 40-60 as part of the Forensic Science Board's effort to reduce regulatory requirements in response to Governor Youngkin's Executive Order No. 19 (2022). In reviewing the current regulation, the Board determined that there had been technological advances that could facilitate an easier way for law enforcement agencies to request information under 6 VAC 40-60-20. A submission form enabled on the Department's website would reduce the burden on the requesting agencies but still provide for the verification of a requester's identity and the required security for DNA Data Bank information. In addition, 6 VAC40-60-30 was seen as duplicative of processes already in place for disseminating and requesting the results of analyses under the Department's current procedures and Virginia Code § 9.1-1104. An additional change was made to 6 VAC 40-60-60 that would still comply with statutory requirements but reduce the administrative burden on the Department.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the “Definitions” section of the regulation.

No additional acronyms or technical terms, other than those defined in the “Definitions” section of the regulation, are utilized in this form.

Statement of Final Agency Action

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 Forensic Science Board approved this proposed Fast Track Action, entitled “Regulatory Requirement Reduction Action for 6 VAC 40-60,” at its October 12, 2023. In the process of its Review, DPB requested that the Board reconsider a complete repeal of 6 VAC 40-60-30. At its meeting on January 3, 2024, the Board approved this revision.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in the ORM procedures, “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

Consistent with Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process.

The Board undertook this action in response to Governor Youngkin’s Executive Order No.19 (2022), which encouraged the review of regulations with the focus on streamlining and reducing regulatory requirements and burdens. Because this action reduces the burden on law enforcement agencies and takes advantage of technological advances that permit an easier process with the appropriate procedural safeguards for requesting DNA Data Bank information, it should not be controversial.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

The Forensic Science Board has the authority to promulgate DNA Data Bank regulations under Virginia Code §§ 9.1-1110 and 19.2-310.5.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

This regulatory action reduces the burden on requesting law enforcement agencies and others while still protecting the security of Data Bank information. The goal is to reduce the burden of the regulation by taking advantage of secure web forms that will enable the same process.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

6 VAC 40-60-10 is amended to remove the term "subject" which will not appear in the amended regulation. 6VAC 40-60-20 is amended to remove the requirements that a requesting law enforcement agency submit a written request on official letterhead to confirm whether an individual's DNA profile is in the DNA Data Bank, when such information is needed for an official investigation. The Department will launch a submission form online for these requests, which will enable the removal of all the enumerated requirements from the regulation. 6 VAC 40-60-30 will be significantly revised so that only section B will remain, reflecting the current status of the Code. Procedures are already in place for a law enforcement agency or a prosecutor to receive and/or request a copy of the Certificates of Analysis for DNA examinations. 6 VAC 40-60 is amended to allow the Department to make available a list of employee positions that require regular access to the Data Bank and samples as a regular function of their job, rather than post a list on the website (and must routinely update).

Issues

Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.

The public is not given access to the Department's Data Bank information. The advantages to the Department and the law enforcement agencies requesting such information are that it reduces the burden of both making such a request and responding to such a request without any impact on the ability of the Department to verify the requester and provide a secure response. There are no disadvantages.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.

The Department is obligated under the Federal DNA Identification Act of 1994 and its participation in the National DNA Index System to safeguard the DNA records housed in the Data Bank (see 34 U.S. Code § 12592). Virginia Code §§ 19.2-310.5 and 19.2-310.6 provide for similar, but not less restrictive, requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected

Virginia State Police if they are submitting such inquiries to the Data Bank. The impact would be positive in that it would lessen the burden on investigators making such inquiries with the Data Bank.

Localities Particularly Affected

Local law enforcement agencies that are submitting such inquiries to the Data Bank. The impact would be positive in that it would lessen the burden on investigators making such inquiries with the Data Bank.

Other Entities Particularly Affected

None.

Economic Impact

Consistent with § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is the proposed change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:</p> <ul style="list-style-type: none"> a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources 	<p>Costs: \$2,000 (part of website upgrade currently underway) Savings: \$165 per year in wages for Data Bank analyst in preparing formal response on letterhead rather than encrypted email</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>VSP savings of \$86 /year with 5 such requests per year</p>

For all agencies: Benefits the regulatory change is designed to produce.	Increased efficiency.
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Impact on Localities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a or 2) on which it was reported. Information provided on that form need not be repeated here.

Projected costs, savings, fees or revenues resulting from the regulatory change.	\$378/year in wages for investigator preparing formal request on letterhead with 20 such requests per year
Benefits the regulatory change is designed to produce.	Increased efficiency.

Impact on Other Entities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a, 3, or 4) on which it was reported. Information provided on that form need not be repeated here.

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	No individuals, businesses, or other entities are likely to be affected.
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	
Benefits the regulatory change is designed to produce.	

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

This regulatory change is designed to reduce the burden both to law enforcement agencies and DFS. Because safeguards still must be maintained for Data Bank information, there must be some process for making such a request and receiving the information that requires verification of the requester and the security of the exchanged information. There was no other means to reduce the burden to the agencies other than the changes that have been made by these amendments.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

There is no impact on small businesses.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

Consistent with § 2.2-4011 of the Code of Virginia, 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: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The Forensic Science Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to Amy C. Jenkins, Department Counsel, 700 N. 5th Street, Richmond, Virginia 23219, (804) 786-2281, (804) 786-6857 (Facsimile), amy.jenkins@dfs.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
6VAC40-60-10		Definitions Section.	Removal of the term “subject” as it no longer appears in the Regulation.
6VAC40-70-20		Current requirements include the submission of a formal request in writing by the requesting law enforcement officer, on official letterhead, or requesting such information in person.	The changes will permit the requesting officer to submit a request via an online form available on the Department’s website.
6VAC40-60-30		This section requires a formal request from law enforcement, attorneys for the Commonwealth, attorneys for the U.S. Department of Justice, or an authorized staff member of the Office of the Chief Medical Examiner, to file a formal request for Certificates of Analysis for forensic biology examinations containing DNA information.	DFS is eliminating most of this section as, in practice, the Certificates of Analysis in such cases are provided either upon completion of the examination or upon request of the attorneys without the formality outlined in this section. Only Section B will remain, which reiterates that the accused and his attorney may request the Certificates of Analysis under Virginia Code § 9.1-1104.
6VAC40-60-60		This section currently requires the Department to post a list on its website of	This list can be made available upon request rather than posting the list and

		employees that regularly access the DNA Data Bank and samples submitted when it is a necessary function of their job.	having to continuously update it on the Department's website.
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If a new VAC Chapter(s) is being promulgated and is not replacing an existing Chapter(s), use Table 2.

Table 2: Promulgating New VAC Chapter(s) without Repeal and Replace

New chapter-section number	New requirements	Other regulations and law that apply	Intent and likely impact of new requirements

If the regulatory change is replacing an **emergency regulation**, and the proposed regulation is identical to the emergency regulation, complete Table 1 and/or Table 2, as described above.

If the regulatory change is replacing an **emergency regulation**, but changes have been made since the emergency regulation became effective, also complete Table 3 to describe the changes made since the emergency regulation.

Table 3: Changes to the Emergency Regulation

Emergency chapter-section number	New chapter-section number, if applicable	Current <u>emergency</u> requirement	Change, intent, rationale, and likely impact of new or changed requirements since emergency stage