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## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Board of Funeral Directors and Embalmers, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation(s)</b>	18VAC65-20-10 et seq.
<b>Regulation title(s)</b>	Regulations of the Board of Funeral Directors and Embalmers
<b>Action title</b>	Permission to embalm and refrigeration of dead human bodies
<b>Date this document prepared</b>	2/20/17

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Subject matter and intent

*Please describe briefly the subject matter, intent, and goals of the planned regulatory action.*

At its meeting on January 10, 2017, the Board of Funeral Directors and Embalmers adopted guidance documents on its interpretation of the statutory requirements for express permission to embalm a body and for refrigeration of a dead human body. The intent of this regulatory action is to incorporate the board's guidance on those requirements into its regulations so if necessary, compliance can be enforced through a disciplinary proceeding.

### Legal basis

*Please identify the (1) the agency (includes any type of promulgating entity) and(2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific*

provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

**18VAC65-20-10 et seq. Regulations of the Board of Funeral Directors and Embalmers** are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6) provides the Board with authority to promulgate regulations to administer the regulatory system:

**§ 54.1-2400 -General powers and duties of health regulatory boards**

*The general powers and duties of health regulatory boards shall be:*

...  
6. To promulgate regulations in accordance with the Administrative Process Act (§ [2.2-4000](#) 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 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title.

Authority for the Board to take disciplinary action for failure to obtain permission to embalm and for refrigeration of human remains is found in:

**§ 54.1-2806. Refusal, suspension, or revocation of license.**

*The Board may refuse to admit a candidate to any examination, refuse to issue a license to any applicant and may suspend a license for a stated period or indefinitely, or revoke any license or censure or reprimand any licensee or place him on probation for such time as it may designate for any of the following causes:*

1. Conviction of any felony or any crime involving moral turpitude;
2. Unprofessional conduct that is likely to defraud or to deceive the public or clients;
3. Misrepresentation or fraud in the conduct of the funeral service profession, or in obtaining or renewing a license;
4. False or misleading advertising or solicitation;
5. Solicitation at-need or any preneed solicitation using in-person communication by the licensee, his agents, assistants or employees; however, general advertising and preneed solicitation, other than in-person communication, shall be allowed;
6. Employment by the licensee of persons known as "cappers" or "steerers," or "solicitors," or other such persons to obtain the services of a holder of a license for the practice of funeral service;
7. Employment directly or indirectly of any agent, employee or other person, on part or full time, or on a commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular funeral establishment;
8. Direct or indirect payment or offer of payment of a commission to others by the licensee, his agents, or employees for the purpose of securing business;
9. Use of alcohol or drugs to the extent that such use renders him unsafe to practice his licensed activity;
10. Aiding or abetting an unlicensed person to practice within the funeral service profession;
11. Using profane, indecent, or obscene language within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of;

12. *Solicitation or acceptance by a licensee of any commission or bonus or rebate in consideration of recommending or causing a dead human body to be disposed of in any crematory, mausoleum, or cemetery;*
13. ***Violation of any statute, ordinance, or regulation affecting the handling, custody, care, or transportation of dead human bodies;***
14. *Refusing to surrender promptly the custody of a dead human body upon the express order of the person lawfully entitled to custody;*
15. *Knowingly making any false statement on a certificate of death;*
16. *Violation of any provisions of Chapter 7 (§ 32.1-249 et seq.) of Title 32.1;*
17. *Failure to comply with § 54.1-2812, and to keep on file an itemized statement of funeral expenses in accordance with Board regulations;*
18. *Knowingly disposing of parts of human remains, including viscera, that are received with the body by the funeral establishment, in a manner different from that used for final disposition of the body, unless the persons authorizing the method of final disposition give written permission that the body parts may be disposed of in a manner different from that used to dispose of the body;*
19. *Violating or failing to comply with Federal Trade Commission rules regulating funeral industry practices;*
20. *Violating or cooperating with others to violate any provision of Chapter 1 (§ 54.1-100 et seq.), Chapter 24 (§ 54.1-2400 et seq.), this chapter, or the regulations of the Board of Funeral Directors and Embalmers or the Board of Health;*
21. *Failure to comply with the reporting requirements as set forth in § 54.1-2817 for registered funeral service interns;*
22. *Failure to provide proper and adequate supervision and training instruction to registered funeral service interns as required by regulations of the Board;*
23. *Violating any statute or regulation of the Board regarding the confidentiality of information pertaining to the deceased or the family of the deceased or permitting access to the body in a manner that is contrary to the lawful instructions of the next-of-kin of the deceased;*
24. *Failure to include, as part of the general price list for funeral services, a disclosure statement notifying the next of kin that certain funeral services may be provided off-premises by other funeral service providers;*
25. *Disciplinary action against a license, certificate, or registration issued by another state, the District of Columbia, or territory or possession of the United States;*
26. ***Failure to ensure that a dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed if it is to be stored for more than 48 hours prior to disposition. A dead human body shall be maintained in refrigeration and shall not be embalmed in the absence of express permission by a next of kin of the deceased or a court order; and***
27. *Mental or physical incapacity to practice his profession with safety to the public.*

**§ 54.1-2811.1. Handling and storage of human remains.**

*A. Upon taking custody of a dead human body, a funeral service establishment shall maintain such body in a manner that provides complete coverage of the body and that is resistant to leakage or spillage, except during embalming or preparation of an unembalmed body for final disposition; restoration and dressing of a body in preparation for final disposition; and viewing during any visitation and funeral service.*

*B. If a dead human body is to be stored for more than 48 hours prior to disposition, a funeral services establishment having custody of such body shall ensure that the dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed. A dead human body shall be maintained in refrigeration and shall not be embalmed in the absence of express permission by a next of kin of the deceased or a court order.*

*C. If a dead human body is to be stored for more than 10 days prior to disposition at a location other than a funeral service establishment, the funeral service establishment shall disclose to the contract buyer the location where the body is to be stored and the method of storage.*

*D. Funeral services establishments, crematories, or transportation services shall not transport animal remains together with dead human bodies. Further, animal remains shall not be refrigerated in a unit where dead human bodies are being stored.*

### Purpose

*Please describe 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, please explain any potential issues that may need to be addressed as the regulation is developed.*

The purpose of this regulatory action is to provide clear, enforceable regulations on the meaning of the statutory requirement for “express” permission to embalm and on the requirement to maintain a body in refrigeration at no more than approximately 40 degrees. The Board has received complaints and noted deficiencies on compliance with these requirements. Both the licensees and the public need clarity on these matters so public health and safety is not jeopardized.

### Substance

*Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.*

Guidance document 65-8 specifies that: Virginia Code §54.1-2806 (26) and §54.1-2811.1 (B) state that a dead human body “shall not be embalmed in the absence of express permission by a next of kin of the deceased or a court order.” The Board interprets “*express permission by a next of kin*” to mean written authorization *to embalm* as a specific and separate statement on a document or contract provided by the facility. Express permission may include direct, verbal authorization *to embalm*, provided it is followed as soon as possible by a written document signed by the next of kin confirming the verbal authorization to embalm and including the time, date, and name of the person who gave verbal authorization.

Guidance document 65-18 specifies that: Virginia Code §54.1-2811.1 (B) states, “if a dead human body is to be stored for more than 48 hours prior to disposition, a funeral services establishment having custody of such body shall ensure that the dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed.” The Board

of Funeral Directors and Embalmers interprets this provision as meaning that if a body is to be in the possession of the funeral home or crematory for more than 48 hours from the time the funeral establishment or crematory takes physical possession of the body until embalming, cremation, or burial, the body is to be placed in a mechanical refrigeration unit suitable for storing human remains. The Board does not interpret lowering the air conditioning in a storage room to 40 degrees or packing the body in ice or dry ice as meeting the statutory requirement.

The Board would view evidence of compliance with Virginia Code §54.1-2811.1 (B) as a working refrigeration unit in the funeral home or crematory or a letter of agreement/contract with another funeral establishment, hospital, or morgue to allow the funeral home or crematory to refrigerate in its refrigeration unit. The Board would view evidence of the body being “maintained in refrigeration” as log entries indicating times of placement and removal of a body in refrigeration.

In order to enforce its interpretative statements on permission to embalm and refrigeration of human remains, the Board intends to incorporate the guidance into its regulations.

### 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.*

The Board has utilized the alternative of offering its interpretation of how a licensee can comply with statutory requirements for embalming and refrigeration in guidance documents previously adopted and revised on January 10, 2017. However, on advice from counsel, its interpretative documents cannot be cited in a disciplinary notice, and a licensee could not be held accountable for failure to follow the Board’s guidance. Therefore, promulgation of a regulation is the only alternative to achieve enforceability.

### Public participation

*Please indicate whether the agency is seeking comments on the intended regulatory action, including 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 hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is \_\_\_\_\_; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.*

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to Elaine Yeatts at Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov) 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 midnight on the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

The Board will not convene a regulatory advisory panel but will hear and consider comment at any meeting at which this subject matter will be discussed.