



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

Agency Name:	Virginia Department of Health
VAC Chapter Number:	12 VAC 5-371 and 12 VAC 5-410
Regulation Title:	Regulations for the Licensure of Nursing Facilities Regulations for the Licensure of Hospitals
Action Title:	Promulgating final permanent regulations from an emergency action
Date:	December 10, 2001

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package .

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

Section 32.1-102.2 of the Code of Virginia (Code) requires the State Health Commissioner, through regulation, to condition a nursing facility or hospital license on whether the applicant has complied with any agreement as a result of the granting of a Certificate of Public Need (COPN) or upon the up-to-date payment of any civil penalties owed as a result of the willful failure to honor the condition of a COPN. This action is to finalize the emergency regulatory action that became effective on December 31, 1999. Currently, the nursing facility and hospital licensure regulations address the initial and renewal application process for licensure.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

No changes were made to the text of the proposed regulation since its publication.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On December 7, 2001, the Board of Health adopted the amendments to the “Regulations for the Licensure of Nursing Facilities” (12 VAC 5-371) and the “Regulations for the Licensure of Hospitals” (12 VAC 5-410) requiring nursing facilities and hospitals to attest that they have complied with the COPN conditioning agreement and that the granting of a renewal license is contingent upon the up-to-date payment of any civil penalties owed.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law.

The second enactment clause of Senate Bill 1282 (SB1282) and House Bill 2369 (HB2369) of the 1999 session of the General Assembly mandated the implementing of the “Provisions of [each] act within 280 days of the date of enactment,” which occurred on March 29, 1999. The Department responded to this directive by promulgating emergency regulations that became effective December 31, 1999. The Administrative Process Act, specifically Section 2.2-4011 A of the Code, states that an emergency regulation may not exceed 12 months in duration. If any agency determines to continue regulating the subject matter governed by the emergency regulation, a regulation to replace the emergency regulation shall be promulgated. Because Section 32.1-102.2 of the Code requires the conditioning of initial and renewal licenses for nursing facilities and hospitals, the Department must now take action to convert the emergency regulations to permanent regulations.

In addition, the Board of Health has the authority to promulgate regulations granted under Section 32.1-12 of Title 32.1 of the Code.

Sections 2.2-4011 A, 32.1-12, and 32.1-102.2 of the Code are available through the Virginia Department of Legislative Services LIS web site (<http://leg1.state.va.us/lis.htm>)

The proposed amendments do not exceed federal minimum requirements. The Office of the Attorney General has certified that the department has the statutory authority to promulgate the proposed amendments and that the amendments comport with applicable law.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

An amendment to Section 32.1-102.2 of the Code requires the State Health Commissioner to “condition” the initial or renewal of a nursing facility or hospital license on whether the applicant has complied with any agreement to provide a level of care at a reduced rate to indigents or accepted patients requiring specialized care as a result of the granting of a Certificate of Public Need (COPN). In addition, renewal licenses shall be conditioned on the up-to-date payment of any civil penalties owed resulting from a willful failure to honor conditions of a COPN. Since the amendments to the Code affects the licensure of nursing facilities and hospitals, amendments to the licensure regulations is required, specifically 12 VAC 5-371-40 and 12 VAC 5-410-70 respectively. Amending the regulations ensures that nursing facilities and hospitals are held accountable for meeting the conditions of an issued COPN and are providing the additional services as agreed upon by the provider when accepting the COPN.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action’s detail.

Specifically, nursing facilities and hospitals must attest in the licensure application that they have complied with the COPN conditioning agreement. In addition, the granting of a renewal license is contingent upon the up-to-date payment of any civil penalties owed as a result of the willful refusal, failure, or neglect to honor the conditions established by the issued COPN.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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 include a sentence to that effect.

Prior to the 1999 legislative action, there had been no accountability to assure that medical care facilities were complying with the conditions of the agreed upon issued COPNs or that civil penalties resulting from failure to honor conditions of a COPN were imposed or paid. Specifically, nursing facilities and hospital must attest in the licensure application that they have complied with the COPN conditioning agreement. In addition, the granting of the renewal license is contingent upon the up-to-date payment of any civil penalties owed as a result of the willful refusal, failure or neglect to honor the conditions established by the issued COPN. The authority to promulgate the amendments to the regulations is mandated in Section 32.1-102.2 of the Code, a result of the passage of SB 1282 and HB 2369 of the 1999 session of the General Assembly. As expected, there were no additional issues identified related to the conditioning of the licensure application that needed to be addressed as the amended regulations are formally promulgated. There are no disadvantages to the public or the Commonwealth as a result of these amendments.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

A 60-day public comment period was conducted from August 13, 2001 through October 12, 2001. Three letters were received regarding the proposed amendments:

1. We feel that we have provided the requisite level of *indigent care*, as defined in the *Code of Virginia*. However, we were subsequently informed that *charity care* was the standard to which we were held which is a more stringent requirement. We have encountered several obstacles in attempting to meet the charity care condition...the number of surgical cases referred has been insufficient to fulfill our charity care requirement...55% of our patient population is on Medicare...[this facility] does not have an emergency room which is a primary source of access for charity care patients...The level of care initially assigned to a facility is based upon the average level of charity care provided in the community at the time the COPN is issued. The level remains fixed throughout the life of the facility although the level of charity care in the community may fluctuate...[some] facilities may [also] be required to pay into the Indigent Care Trust fund . . . however, [those facilities] are not entitled to draw from the fund...we feel to condition the renewal of a hospital license on the provision of charity care, ... is unfair and would impair the free or reduced rate care that is presently being provided in the community.

2. We believe the regulations fairly and accurately implement the related statutory provisions concerning COPN conditions and licensure. However there are steps that need to be taken to offer consistent guidance to providers on the methods available to the m to fulfill the condition... We believe that the department and providers would both be best served if greater clarity and consistency were provided on the alternatives available to providers to fulfill the obligations. . . We believe there are three reasonable alternatives that licensees could and should have available to meet COPN conditions:

a) Licensees should pursue all reasonable and available mechanisms to fulfill COPN conditions through direct provision of reduced rate or free care to indigent and uninsured patients in the conditioned service...;

b) In the event these good faith efforts do not result in a level of reduced rate or uncompensated care in the conditioned service..., but the overall facility or system of which the COPN-condition service is a part does provide charity care at or above the regional standard, then the service condition will be deemed to have been met;

c) The licensee may document the direct provision of health care services or other support to community groups or programs ... with a value at least equal to the differential between the COPN condition and the level of charity care provided for the service in question... The licensee should demonstrate that the service provision or support provided to meet the COPN condition is over and above prior efforts or support for the indigent or uninsured provided by the licensee.

3. We concur with the proposed amendments to Sections 12 VAC 5-371-40 and 12 VAC 5-410-70 of the Virginia Administrative Code.

An amendment to Section 32.1-102.2 of the Code requires the State Health Commissioner, through regulation, to condition a nursing facility or hospital license on whether the applicant has complied with any agreement as a result of the granting of a COPN. Since the amendment affects the licensure of nursing facilities and hospitals, amendment to the licensure regulations is required by law. There is no alternative method available for complying with a clear directive of the law. However, the department is aware of the potential problem facing providers trying to comply with COPN charity care conditions and is open to seeking equitable solutions proposed by affected stakeholders. Currently, we, in consultation with interested stakeholders, are reviewing the Statewide Medical Facilities Plan for possible revision. As a goal of the revision, we are considering inclusion of possible alternatives to meeting agreed upon conditions related to COPN. The concerns and alternatives contained in the comment letters will be included in that discussion.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

In both 12 VAC 5-371 (for nursing facilities) and 12 VAC 5-410 (for hospitals) regulations, two additional standards were added to the existing sections regarding the licensure process. These additional standards, 12 VAC 5-371-40 E and F (for nursing facilities) and 12 VAC 5-410-70 A6 and B (for hospitals) are identical and mirror the text contained in Section 32.1-102.2 of the Code addressing the conditioning of these licenses under the agreed upon terms of the COPN.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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.

Neither amendment directly impacts the family unit in Virginia. However, the results of the amendments will assure that nursing facilities and hospitals are providing the indigent care that may be utilized by financially burdened families. Therefore, the amendments will promote the health of Virginia's indigent population by assuring that necessary health care services are available in their communities. The amendments do not erode the authority and rights of families in the education, nurturing, and supervision of their children; they do not discourage economic self-sufficiency, self-pride, and the assumption of responsibilities for oneself, one's spouse, one's children and one's parents; the amendments do not erode the marital commitment and do not adversely affect the family's disposable income.