



Virginia Department of Planning and Budget Economic Impact Analysis

12 VAC 5-125 Regulations for Bedding and Upholstered Furniture Inspection Program
Virginia Department of Health
Town Hall Action/Stage: 5115/8753
December 10, 2019

Summary of the Proposed Amendments to Regulation

The State Board of Health (Board) proposes to amend 12 VAC 5-125 *Regulations for Bedding and Upholstered Furniture Inspection Program* in order to implement the results of a periodic review. Accordingly, the Board proposes to make a number of changes to the regulation. These changes are intended to reduce conflicts with other states' bedding and upholstered furniture (BUF) regulations, clarify the existing requirements for use of animal hair, feathers, or down, and clarify license and permit requirements and operating standards. More substantively, the proposed changes would establish new law labels for items containing reclaimed and reprocessed materials, repeal an existing exemption for antiques from statutory requirements for secondhand furniture, and update the fee schedule.

Background

Title 32.1, Chapter 6, Article 7 (§§ 32.1-212 through 32.1-226) of the Code of Virginia lays out the legal requirements for the production, sale and resale of BUF items. As a category, BUF includes a wide variety of consumer goods such as mattresses and box-springs, pillows, comforters, cushions, as well as couches, chairs and other upholstered furniture that contains filling, regardless of the material. Thus, BUF not only includes common household furniture, but also office chairs, beds in recreational vehicles and boats, as well as cribs and car seats designed for infants and children. Many of these items are durable and can be bought and sold secondhand. The primary objective of the BUF inspection program is to safeguard the health and safety of consumers in Virginia. Hence, the statute and the regulation seek to ensure that (i) appropriate and safe materials are being used in new BUF items, (ii) secondhand BUF items do not harbor bedbugs, other common pests, or disease-causing pathogens, and (iii) both new and

used BUF items have labels that clearly inform consumers about all the materials used, including concealed filling materials, in case they contain potential allergens.

The BUF program was established through statute in 1946,¹ and continues to maintain many of the original definitions, rules, and procedures. Accordingly, these statutory provisions may be considered outdated as compared to current industry practices.

Significant changes to this statute and the BUF program were made by Chapter 1003 of the 2003 Acts of Assembly, which required the Board to promulgate regulations for the BUF inspection program and changed a key part of the inspection process. In response to this legislation, the Board adopted the first permanent BUF regulations in 2007. The legislation also required that a complaint be received by the Department of Health (VDH) prior to inspection of licensed entities.² As a result, VDH inspectors can only inspect a licensee and enforce the statute if they receive a complaint. In practice, VDH inspectors also visit former licensees if they did not renew the license on time or to follow up on violations from a prior complaint. In the course of such visits, they also canvas other entities nearby that may require a license or permit.

The proposed amendments were developed as part of a periodic review completed in 2017, and thus affect almost all aspects of the BUF industry in Virginia. However, given the evolution of the BUF statute, these changes may not actually affect regulants if they do not expect to be the subject of a complaint or receive a visit for any of the reasons mentioned above.

The most substantive changes are summarized as follows:

(i) Replacing the current law labels: As mentioned previously, the BUF statute requires that all BUF items have an affixed label (law label) that contains specific information for consumers, with minimum requirements for the size and color of the label and the size of the lettering in which the information is printed on the label. Templates for law labels are included in the text of the regulation, meaning all manufacturers and importers must affix labels that adhere to the template to each item of BUF. The current law label requirements in Virginia conflict with other states' standards, which creates an unnecessary burden for manufacturers and importers. The proposed law label templates would resolve all existing conflicts with other states' labels while also meeting all statutory requirements.

¹ Chapter 263 of the 1946 Acts of Assembly.

² See <http://lis.virginia.gov/cgi-bin/legp604.exe?031+ful+CHAP1003>

(ii) Reclaimed and reprocessed filling materials: Regulators in Virginia and representatives of BUF regulatory bodies from other states requested that Virginia address standards for reclaimed and reprocessed filling materials, since items containing such materials are gaining consumer demand. In response, the Board proposes to add a definition of “reclaimed and reprocessed,” specifying that the reclaimed material be “reprocessed using a manufacturing process identical to the processing of like virgin material to quality and cleanliness standards comparable to non-reclaimed material. Reclaimed and reprocessed filling materials are considered new.”

Manufacturers and importers could use the proposed law label templates for new items and add the statement, “New filling material is composed (entirely, partially, or %) reclaimed and reprocessed materials.” Alternatively, the proposed amendments include a new set of law label templates: these labels would necessarily contain the statement above, and would be printed in green ink instead of black (against a white background) to make them more easily recognizable.

(iii) Implementing a single-license regime: Importers and distributors who contract with multiple manufacturers are currently required to have a license for each manufacturer and pay a \$100 fee for each license, regardless of the total number of manufacturers from whom they source their products. The proposed amendments would repeal these requirements and instead offer a single license per importer or distributor, with a sliding-scale fee structure. In particular, it uses intervals where more than 4 manufacturers are involved (for e.g. 5-9, 10-14, and so on) which reduces the burden on importers who contract with many manufacturers and may change the composition of their contracted manufacturers throughout the year. The Board anticipates that the proposed fee structure would be revenue neutral.

(iv) Repealing the unauthorized exemption for antiques: As mentioned previously, the 2003 Acts of Assembly required the Board to promulgate regulations regarding BUF and inspections thereof. Although not specifically addressed in the legislation or earlier statute, this affected all BUF items, including quilts and upholstered furniture considered to be antiques. The 2004 BUF emergency regulation was drawn largely from the BUF statute, and hence did not contain any exemptions for antiques in particular.³

³ See <https://townhall.virginia.gov/L/ViewAction.cfm?actionid=1419>. The emergency regulation became effective June 1, 2004.

However, the permanent regulation was amended through the standard regulatory process, and one of the changes made between the emergency and final regulations was to add an exemption for antiques. Specifically, antiques were defined as being more than 75 years old and were exempt from the sanitizing and labeling requirements for secondhand furniture. This exemption was added “to help clarify parts of the regulations” although the exemption was not expressly authorized by statute.⁴

During the certification process for the 2017 periodic review, the Office of the Attorney General pointed out that the Code does not allow exemptions for antiques and that the Board had exceeded its authority in that instance.⁵ Although the Board’s general authority under § 32.1-12 allows exemptions from its regulations, it does not allow the Board to provide any exemptions from statute.⁶ In other words, because the BUF statute defines “secondhand” in a manner that would include antiques, antiques cannot be exempt from the regulation.⁷ Hence, under the regulations the Board is now proposing, antique dealers would be required to either acquire a sanitizing permit or contract with a permitted sanitizer to treat all BUF items, regardless of age or condition.

(v) Establishing new methods for sanitizing: In order to reduce the risk of damage to antiques, while maintaining compliance with statute, the Board proposes to allow the use of heat and/or steam treatments in lieu of the chemicals typically used in sanitizing processes. By adding a section explicitly addressing reasonable variances, the proposed changes also create a pathway for new products and processes to be approved through policy. Thus, any antique dealers who may be in possession of items too fragile to sanitize using the existing methods may contact the Board and propose a reasonable alternative.

The proposed amendments also include a number of other changes that are intended to align the regulatory language with current practice. For example, boats and automobiles would be removed from the regulation’s definition of upholstered furniture; the statutory definition does

⁴ See pages 5 and 6 of the Agency Background Document (ABD) at the second proposed stage for the promulgating action at https://townhall.virginia.gov/l/GetFile.cfm?File=58\1419\3318\AgencyStatement_VDH_3318_v1.pdf.

⁵ See

https://townhall.virginia.gov/l/GetFile.cfm?File=C:\TownHall\docroot\Review\1591\AGMemo_VDH_1591_v1.pdf

⁶ Virginia Code § 32.1-12 allows the board to “...make, adopt, promulgate and enforce such regulations and provide for reasonable variances and exemptions therefrom [its regulations] as may be necessary to carry out the provisions of this title and other laws of the Commonwealth administered by it, the Commissioner or the Department.”

⁷ Virginia Code § 32.1-212 defines “secondhand” as “having been made prior use of or containing any filling material of which prior use has been made.” See <https://law.lis.virginia.gov/vacodefull/title32.1/chapter6/article7/>.

not explicitly include these and the Board has not been regulating secondhand dealers of boats or automobiles.⁸ As a result, secondhand BUF items on boats and automobiles have a *de facto* exemption.

Estimated Benefits and Costs

Antique BUF

The main source of potential costs are to antique dealers in possession of antique BUF items that are more than seventy-five years old and are no longer exempt from the sanitizing requirements. These antique dealers risk lowering or losing the resale value of antique BUF items to the extent that they may be damaged if they are sanitized. Even if no actual damage occurs to an antique BUF item, antique dealers would likely be negatively impacted by the direct costs of the sanitizing requirement. These antique dealers face direct costs in terms of the \$60 sanitizer permit and the cost of spray chemicals and/or hand-operated steamers.

The extent to which antiques are directly at risk of damage is somewhat curtailed by (i) exemptions provided in the Code and (ii) the proposed amendment to the regulation that adds a section allowing for variances. The Code exempts estate sales, individuals selling their personal possessions, and individuals selling handmade antique BUF items on a consignment basis with annual revenues less than \$2,000 from having to sanitize any secondhand BUF items.⁹ Thus, antique dealers may find themselves adopting a “consignment” model where they do not own the BUF items outright but merely represent an estate or a private seller for pieces that are most at risk of damage from sanitizing. Further, as mentioned previously, the proposed amendments expand the acceptable sanitizing techniques, adding heat and steam as alternatives to existing methods that involve isopropyl alcohol-based solutions. If none of the sanitizing methods covered in the regulation is appropriate for a particular item, antique dealers may request a variance by proposing alternative methods. More generally, VDH is asking for feedback for additional methods that could be incorporated in the regulation by the final stage.

While the measures discussed above would help antique dealers maintain the value of their current inventory, removing the exemption for antiques could have far-reaching

⁸ § 32.1-212 defined upholstered furniture as “any article of furniture designed to be used for sitting, resting, or reclining that is wholly or partly stuffed or filled with any filling material.”

⁹ See <https://law.lis.virginia.gov/vacode/title32.1/chapter6/section32.1-225/>

consequences if antique dealers had been using it to avoid sanitizing *all* secondhand BUF items of unverified age, including those that are *less* than 75 years old. If a significant share of the market for antique BUF items transitioned to a consignment model, antique dealers would only earn a fixed commission or receive a fraction of the profits they currently make. Further, antique dealers in general may respond by refusing to purchase antique BUF items, choosing instead to specialize in antiques that did not include bedding or upholstery. This could restrict the pool of potential buyers for estate sale or private seller antique BUF items, thereby reducing the value of those goods even though they are already exempt from any sanitizing requirements.

Non-antique BUF

The proposed amendments include changes that could be highly beneficial to BUF manufacturers, importers, distributors and consumers in Virginia. In particular, the proposed amendments include two measures that could potentially place Virginia at the forefront for national best practices in this field.

- 1. Development of an optional white label with green font for reclaimed and reprocessed materials*

As demand for reclaimed and reprocessed materials increase (for e.g. polyester filling made from recycled plastic bottles) an easily identifiable label would draw consumer attention, serving to attract those who wish to make more environmentally conscious choices and warn those who seek to avoid items using reclaimed materials. The transparency provided by such a label could pave the way for national acceptance of reclaimed and reprocessed materials in BUF products. VDH reports that several states have expressed an interest in adopting the reclaimed and reprocessed standards and templates based on how it is received in Virginia.

- 2. Development of the sliding scale fee structure for importer and distributor fees based on the number of unique manufacturers*

Importers are currently charged \$100 annually for every manufacturer from whom they import BUF goods. Each manufacturer has a unique Uniform Registry Number (URN) and importers are currently required to report all the URNs they work with every time they renew their license. If the importer switches manufacturers during the year, they are currently required to report these changes and pay mid-year fees for adding a new URN. This creates a significant regulatory

compliance burden on large furniture retailers who import most of the products they sell, and who may contract with hundreds of individual manufacturers all over the world.

VDH has received significant positive feedback on the proposed fee changes, including from the largest account holder who would likely experience the most significant increase in fees, simply because the new fee structure would allow them some mid-year URN additions without having to report these changes and pay an additional fee each time.

Lastly, renovators and reupholsterers who are self-employed and do not have any other employees will benefit from no longer having to pay a license fee.

Businesses and Other Entities Affected

Due to the antiques exemption, the Board does not have an estimate for the total number of unique businesses that would be affected. There does not appear to be a Virginia chapter of any trade or professional organization representing antique dealers. An online search of antique vendors with addresses in Virginia suggests there may be approximately 400 such entities. All of these would be affected if antiques cease to be exempt from sanitizing requirements, although to varying degrees.

For the 2018 license year, there were 690 discrete entities with Importer or Distributor licenses. They would be affected by the change in the license fee structure depending on the number of manufacturers from whom they typically source their goods.

VDH does not have any information on the number of manufacturers who use reclaimed materials and who would adopt the “green” labels.

Small Businesses¹⁰ Affected

Types and Estimated Number of Small Businesses Affected

As mentioned above, an online search of antique vendors with addresses in Virginia suggests there may be approximately 400 such entities. All of these would be affected if antiques cease to be exempt from sanitizing requirements, although to varying degrees. Although VDH does not collect information on the size of businesses, they expect that all of these entities will qualify as small businesses.

¹⁰ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

For the 2018 license year, there were 690 discrete entities with Importer or Distributor licenses. VDH expects that majority of these may be small businesses, but does not collect this data.

Costs and Other Effects

All the costs and benefits detailed above would apply to antique dealers and importers or distributors, respectively. These entities are unlikely to be particularly affected due to being classified as small businesses.

As mentioned previously, antique dealers face an adverse impact in terms of both direct and indirect costs arising from the sanitizing requirements. Although there are no reporting requirements to VDH, dealers would need to maintain records about when each item had been sanitized and label the item with this information. The impact on antique dealers would be limited to the extent that they have already been sanitizing their products. VDH reports that a number of antique dealers may already be sanitizing antiques if they also sell items less than 75 years old, which have never been exempt, and do not have the space to store sanitized and non-sanitized items separately.

Alternative Method that Minimizes Adverse Impact

There are no alternative regulatory measures that would meet policy goals and have lower adverse impact.

Localities¹¹ Affected¹²

The proposed amendments do not introduce new costs for local governments.

Projected Impact on Employment

The proposed amendments are unlikely to affect total employment in the industry.

Effects on the Use and Value of Private Property

The value of antiques may be diminished to the extent that damage is incurred in the sanitizing process. On the other hand, antiques that have been sanitized without damage may

¹¹ "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

¹² § 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

increase in value. On the whole antique dealers' businesses may lose value to the extent that their inventory contains antique BUF items.

Real estate development costs do not appear to be affected.

Legal Mandates

General: The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

Adverse impacts: Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.