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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Board of Health
Virginia Administrative Code (VAC) Chapter citation(s)	12VAC5-372 12VAC5-371
VAC Chapter title(s)	Regulations for the Licensure of Nursing Facilities
Action title	Repeal Regulation and Replace Following Assessment and Receipt of Public Comment
Date this document prepared	October 4, 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 the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

This regulatory action seeks to repeal the chapter governing the regulations for the licensure of nursing facilities and replace it with a new chapter due to the current chapter being outdated and in need of significant style and structure changes so extensive that promulgation of a new chapter would be more appropriate than amending the current chapter. This repeal-and-replace will conform the regulatory language to the Code of Virginia, "Form, Style and Procedure Manual for Publication of Virginia Regulations" published by *The Virginia Register of Regulations*, and changes in the regulated industry. The goal of this regulatory action will be to protect the health, safety, and welfare of the public with a regulation that is clear and easy to understand and implement by both regulants and the Virginia Department of Health. A periodic review will be conducted simultaneously to evaluate the extent of revisions appropriate for this chapter.

Public comment is sought on any issue relating to this regulation. This action may address comments received during the public comment period for this NOIRA and subsequent stages of this action.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

“Board” means the State Board of Health.

“CMS” means Centers for Medicare and Medicaid Services.

“Nursing facility” has the same meaning as “nursing home” in § 32.1-123 of the Code of Virginia.

“VDH” means the Virginia Department of Health.

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.”

Executive Order 19 (2022) requires state regulations to undergo a periodic review every four years. This action serves as the periodic review of Chapter 371. The resulting amendments to the regulation will be promulgated into the new Chapter 372.

Section 32.1-127 of the Code of Virginia requires the Board to adopt regulations that govern the licensure of nursing facilities.

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.

Section 32.1-12 of the Code of Virginia gives the Board the responsibility to make, adopt, promulgate, and enforce such regulations as may be necessary to carry out the provisions of Title 32.1 of the Code of Virginia. Section 32.1-127 of the Code of Virginia requires the Board to adopt regulations that include minimum standards for (i) the construction and maintenance of nursing homes and certified nursing facilities to ensure the environmental protection and the life safety of its patients, employees, and the public; (ii) the operation, staffing and equipping of nursing homes and certified nursing facilities; (iii) qualifications and training of staff of nursing homes and certified nursing facilities, except those professionals licensed or certified by the Department of Health Professions; (iv) conditions under which a nursing home may provide medical and nursing services to patients in their places of residence; and (v) policies related to infection prevention, disaster preparedness, and facility security of nursing homes and certified nursing facilities.

Article 2 (§ 32.1-138 *et seq.*) of Chapter 5 of Title 32.1 of the Code of Virginia addresses the rights and responsibilities of patients in facilities licensed pursuant to Article 2 (§ 32.1-123 *et seq.*) of Chapter 5 of Title 32.1 of the Code of Virginia.

The periodic review of Chapter 371 is mandated by Executive Order 19 (2022), which is authorized by § 2.2-4017 of the Code of Virginia.

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

The rationale or justification for this regulatory change is that regulations should be clearly written, up to date, conform to the law, and should be the least burdensome means of protecting the health, safety, and welfare of citizens. The regulatory change is essential to protect the health, safety, and welfare of citizens because unclear regulations hamper licensees' ability to comply and out of date regulations may reference standards and practices that are not consistent with current clinical practices. The goals of this regulatory change are to improve consistency across the sections of this regulatory text, bring the regulatory text into alignment with the statutes, and update references to current clinical guidelines, and align with the standards of health, hygiene, construction, and safety established by CMS and other specialists in matters of public health and safety.

Substance

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

This regulation contains requirements for the licensure of nursing facilities, including provisions regarding design, construction, and maintenance of such facilities, operation, equipping, staffing and staffing qualifications, service standards, infection prevention, disaster preparedness, facility security, and matters of administration. The intention of the Board is to review and assess all regulatory language to ensure that it meets all mandates under Articles 1 (§ 32.1-123 *et seq.*) and 2 (§ 32.1-138 *et seq.*) of Chapter 5 of Title 32.1 of the Code of Virginia. Revisions to the regulation content may be proposed based on public comments received, including comments received during the periodic review.

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.

No alternative was considered because the General Assembly required the Board to adopt regulations governing the licensure of nursing homes and certified nursing facilities, and a repeal and replace of the current regulation is the least burdensome method to accomplish the purpose of this action.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and the ORM procedures), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify it as necessary for your agency. Otherwise, delete the paragraph below and insert "This NOIRA is not being used to announce a periodic review or a small business impact review."

In addition, pursuant to the ORM procedures and § 2.2-4007.1 of the *Code of Virginia*, the Board is conducting a periodic review and small business impact review of Chapter 371 to determine the full extent of the revisions necessary to update the regulation. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare; (ii) minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

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. In addition, as required by § 2.2-4007.02 of the Code of Virginia, describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The 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, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

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 Rebekah Allen, Senior Policy Analyst, Virginia Department of Health, Office of Licensure and Certification, 9960 Mayland Drive, Suite 401, Henrico, VA 23233; email: regulatorycomments@vdh.virginia.gov; fax: (804) 527-4502. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.