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Proposed Regulation Agency Background Document

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| Agency name | Department of Professional and Occupational Regulation |
| Virginia Administrative Code (VAC) citation(s) | 18 VAC 120-30 |
| Regulation title(s) | Regulations Governing Polygraph Examiners |
| Action title | Amend Renewal and Reinstatement Requirements |
| Date this document prepared | November 1, 2019 |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please 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.

The intent of this regulatory action is to amend the regulations by extending the license term and reinstatement periods currently in place. These amendments will eliminate the requirement that licenses be renewed annually and, by extending the reinstatement period, provide a longer amount of time a licensee may be late with a renewal payment and not have the license terminated.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

"DPOR" means the Department of Professional and Occupational Regulation.

Mandate and Impetus

Please 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, board decision, etc.). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “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the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

DPOR initiated this action in order to decrease the regulatory burden on licensed polygraph examiners when complying with the renewal or reinstatement requirements, pursuant to the policies and principles enumerated in E.O. 14 (2018) as well as the Regulatory Reduction Pilot Program (Chapter 444 of the 2018 Acts of Assembly).

The NOIRA was published in the *Register of Regulations* on June 10, 2019.

Legal Basis

Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must 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 or promulgating entity’s overall regulatory authority.

Va. Code § 54.1-1802.1 grants the DPOR Director the “powers and duties of a regulatory board” and directs him to “[p]romulgate regulations necessary for the reasonable administration of [Chapter 18 of Title 54.1] in accordance with the Administrative Process Act (§ 2.2-4000 et seq.).”

Purpose

Please 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’s intended to solve.

The rationale for this regulatory action is that a two-year license term is aligned with the Commonwealth’s biennial budget cycle for purposes of fee-setting; it provides a reasonable, less restrictive timeframe for an individual to be licensed to work without re-qualifying with the credentialing source; and it brings renewal requirements in line with other regulatory programs in Virginia. Currently, the majority of regulatory boards at DPOR and its companion agency, the Department of Health Professions, issue licenses on a two-year cycle. Polygraph examiner licenses are one of the few exceptions that must renew on an annual basis, which can prove burdensome to some licensees.

The public’s health, safety, and welfare remains protected with this proposed regulatory change to the reinstatement regulations. In reviewing the instances where an individual lost their license simply for being late with a payment, staff conducted a review of other regulatory boards’ reinstatement regulations. This review found that most regulatory boards have a minimum of a one-year reinstatement period, double that currently in place for polygraph examiners.

Since 2014, there have been multiple instances in which a licensed polygraph examiner has had their license expire past the current six-month reinstatement period, which requires that they apply as a new examiner and complete all entry criteria again (including the examination) in order to become

“relicensed.” In one instance, the individual had been licensed for nearly 20 years without incident. In many of the examples there were mitigating circumstances, outside the control of the individual that resulted in the license not being reinstated during the six-month window.

Extending the reinstatement period to one year would have eliminated virtually all of the situations experienced since 2014 where an individual had to reapply for licensure, without presenting a risk to the public. The goal of this regulatory change is to reduce compliance costs on licensees.

Substance

Please 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.

Section 18 VAC 120-30-100. Fees. – DPOR will review current renewal and reinstatement fees to ensure compliance with § 54.1-113 of the Code of Virginia, and adjust as necessary.

Section 18 VAC 120-30-120. Renewal Required. – DPOR will amend this section to increase the license period to two years from the last day of the month in which the license was issued.

Section 18 VAC 120-30-140. Fees for renewal. – DPOR will repeal this section and move pertinent language to other sections

Section 18 VAC 120-30-150. Department discretion to deny renewal. DPOR will repeal this section and move pertinent language to other sections.

Section 18 VAC 120-30-160. Qualifications for renewal. This section is amended to incorporate provisions of Section 18 VAC 120-30-150.

Section 18 VAC 120-30-170. Reinstatement required. – DPOR will amend this section to increase the reinstatement period to 24 calendar months.

Section 18 VAC 120-30-180. Department discretion to deny reinstatement. This section is amended to change the name to Qualifications for reinstatement and to clarify language to include the same provisions as those in 18 VAC 120-30160.

Section 18 VAC 120-30-190. Status of a license during the period before reinstatement. This section is amended to increase the reinstatement period to two years.

Issues

Please 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.

1. The primary advantage to the public is increased clarity and ability to comply with regulatory requirements by implementing the proposed changes, which are the direct result of feedback received from licensees. Polygraph examiners will benefit from a less burdensome path to reinstate an expired license without needing to meet a re-examination requirement. There are no

identified disadvantages to the public.

2. The primary advantage to the agency and the Commonwealth is increased understanding and compliance by licensees with regulatory requirements, since the proposed changes resulted directly from input from the licensing staff because of interaction with licensees. There are no identified disadvantages to the agency or the Commonwealth.
3. During 2018, 21 polygraph examiner licensees entered into reinstatement (by failing to pay their renewal fee timely); however only five reinstated (paid the renewal and reinstatement fees within one year of expiration date). The other 16 individuals did not reinstate their license in the appropriate timeframe, resulting in these individuals having to reapply for their license by retaking the examination. At least occasionally, for polygraph examiners employed by local governments, the late renewal of their licenses resulted from payment processing delays by their employer to DPOR or similar administrative obstacles (based on anecdotal staff reports, approximately six times in the last two years).

Requirements More Restrictive than Federal

Please 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.

There are no requirements more restrictive than those currently in place at the federal level.

Agencies, Localities, and Other Entities Particularly Affected

Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "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

There are no other State Agencies particularly affected.

Localities Particularly Affected

There are no other Localities particularly affected.

Other Entities Particularly Affected

There are no other entities particularly affected.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, please 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. Please keep in mind that this is change versus the status quo.

Impact on State Agencies

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| <p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: 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> | <p>For the biennium, no change to the revenue or expenditures of the Polygraph Examiners Advisory Board is expected as a result of this regulatory change.</p> <p>Application, renewal, and reinstatement fees will double under the proposed regulations, only because the license term will be for two years instead of one year. This results in an increase in revenue in one fiscal year but a decrease in the second fiscal year of the biennium. No increase in costs or other impacts on expenditures are expected.</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>Other state agencies are only affected if paying license application, renewal, or reinstatement fees for their employees who are licensed polygraph examiners. There would be no net increase to the amount of the fee paid for those licensees over a two-year time period.</p> |
| <p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p> | <p>There is no benefit to other state agencies. The benefit to DPOR is that the agency will continue to have sufficient revenue to cover the Board expenses on a biennial basis.</p> |

Impact on Localities

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| <p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p> | <p>Localities are only affected when paying license application, renewal, or reinstatement fees for their licensed employees. There would be no net increase to the amount of the fee paid for those individuals over a two year time period.</p> |
| <p>Benefits the regulatory change is designed to produce.</p> | <p>There is no particular benefit to localities from this regulation change.</p> |

Impact on Other Entities

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| <p>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.</p> | <p>All licensed polygraph examiners and applicants are affected by the regulation change.</p> |
| <p>Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business</p> | <p>As of October 1, 2019, there are 296 licensed polygraph examiners. No small businesses are affected by this change.</p> |

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| <p>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.</p> | |
| <p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please 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.</p> | <p>There is no net increase in costs to applicants or licensees over a two year time period. The application fee is adjusted from \$45 to \$90, the renewal fee from \$55 to \$110 and the reinstatement fee (which includes the renewal fee) from \$75 to \$150. The fees will cover a two-year license period instead of one year.</p> |
| <p>Benefits the regulatory change is designed to produce.</p> | <p>The benefit to polygraph examiners is a reduction in the frequency to renew and reinstate licenses from annually to every two years. The extended renewal/reinstatement may reduce the likelihood of license termination by providing more time to comply with regulatory requirements.</p> |

Alternatives

Please 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.

These proposed regulations are an alternative to those already in place. The amendments to the current regulations decrease compliance burden and will not cost licensees additional funds.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please 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.

- 1) These amendments do not involve reporting requirements and actually establish a less stringent compliance requirement than those already in place.
- 2) These proposed amendments establish a less stringent deadline for compliance by extending the reinstatement period from six to 24 months.

- 3) There are no reporting requirements in these proposed amendments; the compliance requirement to renew is simplified by extending the timeframe.
- 4) These proposed amendments do not provide performance standards for small businesses.
- 5) These regulations provide for the licensure of individuals, not small businesses; subsequently, there would be no regulations that would be subject to a small business exemption.

Public Comment

There were no public comments received during the NOIRA comment period.

Public Participation

Please include a statement that in addition to any other comments on the regulatory change, the agency is seeking comments on the costs and benefits of the regulatory change and the impacts of the regulated community. Also, indicate whether a public hearing will be held to receive comments.

In addition to any other comments, the Polygraph Examiners Advisory Board is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: 1) projected reporting, recordkeeping and other administrative costs; 2) probable effect of the regulation on affected small businesses; and 3) description of less intrusive or costly alternative methods of achieving the purpose 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>. Written comments must include the name and address of the commenter. Comments may also be submitted by mail, email or fax to Marjorie King at 9960 Mayland Drive, Suite 400, Richmond, Virginia 23233, phone: 804-367-2962, fax: 1-866-430-1033, or email: Marjorie.King@dpor.virginia.gov. 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 this 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.

Detail of Changes

Please 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.

If the regulatory change will be a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory change. Delete inapplicable tables.

If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.

For changes to existing regulation(s), please use the following chart:

| Current section number | New section number, if applicable | Current requirement | Change, intent, rationale, and likely impact of new requirements |
|------------------------|-----------------------------------|--|--|
| 18 VAC 120-30-100 | | This section lists fees for application, examination, renewal, and reinstatement of polygraph examiner and intern license. The fees listed are for a license that is valid for one year. | <p>The proposed amendments will extend the licensure period from one year to two years, with the exception of the intern license, which will remain unchanged. The fee per year rate remains the same, amending the \$45 for a one year license to \$90 for two years, and so forth.</p> <p>18 VAC 120-30-50 addresses the registration of interns and will remain at one year. Generally, internship programs for polygraph examiners are six to twelve months long, depending on the number of supervised exams that must be completed by the intern to satisfy the intern supervisor that the individual is ready to sit for the licensing exam and to conduct unsupervised exams.</p> |
| 18 VAC 120-30-120 | | This section sets the licensing period of 12 months. | <p>The proposed amendments will extend the licensure period from one year to two years. This will bring the polygraph licensing program in line with the majority of other programs for boards housed at DPOR.</p> <p>Additionally, the requirement to renew a license on an annual basis can, at a minimum, be a nuisance or, in some instances, even rise to the level of being burdensome, especially in the polygraph industry. A large number of polygraph examiners are employed by local law enforcement agencies, meaning renewals and reinstatements are generally handled by the finance or procurement offices of those localities. By extending the licensing term, it will eliminate the need for those localities that process renewal payments to submit annual fees.</p> |
| 18 VAC 120-30-130 | | This section provides the procedures for renewal | The section was amended to add the requirement that licensees must submit a renewal payment on or prior to the expiration date or be required to apply for reinstatement. This requirement was amended and moved from section 18 VAC 120-30-140. |

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| <p>18 VAC 120-30- 160</p> | | <p>This section provides for the qualifications for license renewal.</p> | <p>The proposed amendments reformat the section for clarity and continuity.</p> |
| <p>18 VAC 120-30- 170</p> | | <p>This section currently lists the requirements for reinstatement of an expired license.</p> | <p>The proposed amendments remove the one-month grace period for the payment of the reinstatement fee and extend the reinstatement period to 24 months.</p> <p>The removal of the one-month grace period will actually make the regulations less burdensome to the average licensee. The grace period is nothing more than an extension of the time that a renewal payment may be submitted before license reinstatement is required. The “grace” is from having to submit the additional reinstatement fee. While, conceptually, it would appear to be advantageous to licensees, in reality it causes confusion and facilitates unlicensed activity. The majority of licensees that utilize the grace period are actually of the belief that it is an extension of the license expiration date, which would allow them to continue to practice without a valid license. This can be often be problematic, even though the reinstatement procedure essentially “backdates” the renewal and, from a regulatory standpoint, is as if there was never a gap in licensure. Even with the grace period there are many instances of licensees submitting payments that are not received by the agency prior to the expiration of the period, which then requires the submission of the reinstatement fee, delaying the renewal/reinstatement of the license.</p> <p>The current system requires the licensees to be aware of three dates, the expiration date, the month long grace period, and the date that reinstatement is required. This proposed amendment simplifies that by only having to remember one date, the expiration date. If the renewal payment is received by the agency before the expiration date, no reinstatement is required; after the expiration date, reinstatement would be required.</p> <p>The implementation of this proposal would also result in faster processing of reinstatement requests. Currently, because of the general misunderstanding of the grace period, licensing staff is required to submit payment adjustment</p> |

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| | | | requests to the agency's finance section in order to ensure that the monies received for renewal are categorized properly. These requests can delay the processing of a reinstatement by as much as two to three working days, which can be a burden to the licensees and, often, their employers. |
| 18 VAC 120-30-180 | | This section provides the authority of the Department to deny reinstatement under certain circumstances. | The section was renamed Qualifications for reinstatement and reformatted similar to 18 VAC 120-30-160. This clarifies the section and provides for continuity of the regulations. |
| 18 VAC 120-30-190 | | This section current provides that the reinstatement period is one year from the expiration date of the license. | The proposed amendments will extend the reinstatement period to two years. |

If an existing regulation or regulations (or parts thereof) are being repealed and replaced by one or more new regulations, please use the following chart:

| Current chapter-section number | New chapter-section number, if applicable | Current requirement | Change, intent, rationale, and likely impact of new requirements |
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| 18 VAC 120-30-140 | | This section currently lists the requirement of a license to be renewed and the establishment of a one-month grace period to submit payment before reinstatement is required. | This section has been repealed in in order to consolidate the regulations and make them easier to understand. The requirements for renewal are listed in 18 VAC 120-30-130 and the renewal fees, listed as part of the title of the current section, are listed in 18 VAC 120-30-100, making this section unnecessary. |
| 18 VAC 120-30-150 | | This section provides that the department may deny renewal of a license under certain circumstances and that failure to timely pay monies owed to the department may result in a delay or withholding of services. | This section has been repealed as it was repeated, almost in its entirety, in 18 VAC 120-30-160, making it unnecessary. |