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Proposed Regulation Agency Background Document

Agency name	Department of Professional and Occupational Regulation
Virginia Administrative Code (VAC) Chapter citation(s)	18 VAC 120-30
VAC Chapter title(s)	Regulations Governing Polygraph Examiners
Action title	Review of Standards of Practice and Conduct
Date this document prepared	August 24, 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 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 Regulations Governing Polygraph Examiners provide for the licensure of polygraph examiners, the registration of polygraph examiner interns, and approval of polygraph schools. The regulation provides for renewal and reinstatement of licenses. The regulation also provides for the standards of practice and conduct for regulants and approved schools.

This action amends the Standards of Practice and Conduct in the regulation. The provisions for polygraph examination procedures are amended to require a polygraph examiner to disclose to an examinee that the polygraph examination is subject to disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the “Definitions” section of the regulation.

“DPOR” means Department of Professional and Occupational Regulation.

“FOIA” means Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

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.”

In the past, law enforcement agencies were able to withhold polygraph reports from FOIA requests because some case files were exempt from FOIA and not accessible to the public. Amendments to the Virginia Freedom of Information Act in 2021 provided access to some closed law enforcement cases to the public. Comment was received indicating that provisions in the Standards of Practice and Conduct may be inconsistent with FOIA, and may require amendments to the regulation with regards to copies of polygraph reports being made available to the public.

After consultation with DPOR counsel, DPOR initiated this action to review and amend the Standards of Practice and Conduct to align with FOIA.

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.

The promulgating agency is the Department of Professional and Occupational Regulation.

Section 54.1-1802.1 of the Code of Virginia states, in part:

The Department shall administer and enforce the provisions of this chapter. In addition to the powers and duties otherwise conferred by the law, the Director shall have the powers and duties of a regulatory board as contained in §§ 54.1-201 and 54.1-202 and shall have the power and duty to:

1. Promulgate regulations necessary for the reasonable administration of this chapter in accordance with the Administrative Process Act (§ 2.2-4000 et seq.). Such regulations shall include, but not be limited to, the establishment of minimum qualifications for the operators of polygraphs and other detection devices;

Section 54.1-201 of the Code of Virginia states, in part:

A. The powers and duties of regulatory boards shall be as follows:

5. To promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board.

Purpose

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 is intended to solve.

This regulatory change is needed to ensure that the regulation is consistent with applicable statute in FOIA. The goal of the regulatory change is to amend the regulation so as to be consistent with previously amended provisions of FOIA.

Substance

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 18VAC120-30-200 is amended to require that an examiner disclose to an examinee that the polygraph examination is subject to disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

Issues

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) There are no advantages or disadvantages to the public.
- (2) There are no advantages or disadvantages to the agency or the Commonwealth
- (3) Individuals who are subject to a polygraph examination will be informed and aware that their results is subject to disclosure under the FOIA law.

Requirements More Restrictive than Federal

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 applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "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

No other state agencies are particularly affected.

Localities Particularly Affected

No localities are particularly affected.

Other Entities Particularly Affected

No other entities are particularly affected.

Economic Impact

Consistent with § 2.2-4007.04 of the Code of Virginia, 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. Keep in mind that this is the proposed change versus the status quo.

Summary:

The Polygraph Examiners Advisory Board is amending the Governing Polygraph Examiners regulations. The revised regulations propose to amend the standards of practice and conduct to align with FOIA. Licensed polygraph examiners and polygraph interns will be required to inform polygraph examinees that their exam results are subject to disclosure under the Chapter 37 of Title 2.2 of the Code of Virginia. The amend change will follow the amendments of the Code of Virginia that is essential to comply with the applicable statutes. Thus, ensuring that all polygraph examinees are aware of the FOIA law changes and who may have access to their polygraph exam results. Licensed polygraph examiners and polygraph interns will be affected by this change and no small businesses are affected. There is no direct economic or fiscal impact to other state agencies.

All costs incurred in support of board activities and regulatory operations are paid by the Department of Professional and Occupational Regulation (DPOR) and funded through fees paid by applicants and regulants. All boards within DPOR must operate within the Code provisions of the Callahan Act (54.1-113), and the general provisions of 54.1-201. Each regulatory program's revenues must be adequate to support both its direct costs and a proportional share of agency operating costs. DPOR allocates costs to its regulatory programs based on consistent, equitable, and cost-effective methodologies. The Board has no other source of income.

Impact on State Agencies

<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>There are no savings and no changes to costs, fees, or revenues of DPOR resulting from this regulatory change.</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>There are no savings and no changes to costs, fees, or revenues of other state agencies resulting from this regulatory change.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>A benefit of this action is that polygraph examinees are aware that their exam results are subject to disclosure through FOIA and who may have access to their polygraph exam results.</p>

Impact on Localities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a or 2) on which it was reported. Information provided on that form need not be repeated here.

<p>Projected costs, savings, fees, or revenues resulting from the regulatory change.</p>	<p>There are no savings and no changes to costs, fees, or revenues of localities resulting from this regulatory change.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>None</p>

Impact on Other Entities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a, 3, or 4) on which it was reported. Information provided on that form need not be repeated here.

<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 polygraph interns will be affected by the change. No other entities are anticipated to be affected by the change.</p>
<p>Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business 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>As of April 1, 2023, there are 312 licensed polygraph examiners and 28 polygraph interns. All applicants and licensees are individuals, and no small businesses are affected by this change.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:</p>	<p>a) No cost will be incurred by individuals as each licensed polygraph examiner and intern will be required to inform polygraph examinees that their exam results are subject to disclosure under the Code of Virginia and FOIA law changes. b) There</p>

<p>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>are no real estate development costs resulting from the change, c) There are no fees related to the change, d) No equipment or services are needed to be purchased from this change, and e) None.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>The regulatory change will benefit the public by requiring licensed polygraph examiners and polygraph interns to make all polygraph examinees aware that their exam results will be subject to disclosure under the Chapter 37 of Title 2.2 of the Code of Virginia and through FOIA. Thus, ensuring that all polygraph examinees are aware of the FOIA law changes and who may have access to their polygraph exam results while protecting the health, safety, and welfare of citizens.</p>

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 viable alternatives have been identified, as even without this regulatory change polygraph examination results are still subject to disclosure.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, 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.

This amendment does not provide for or establish less stringent compliance or reporting requirements. It requires polygraph examiners to make examinees aware that their examination results are subject to disclosure under FOIA.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Periodic Review and Small Business Impact Review Report of Findings

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in EO 19 and the ORM procedures, e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable. In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency’s decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

This action is not being used to conduct a periodic review or small business impact review.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency’s response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

No comments were received during the public comment period following publication of the previous stage.

Commenter	Comment	Agency response
N/A	N/A	N/A

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.

The Department of Professional and Occupational Regulation 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, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of this background document.

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:

Marjorie King
 Executive Director
 9960 Mayland Drive, Suite 400
 Richmond, VA 23233
 Polygraph@dpor.virginia.gov
 (866) 430-1033 (fax)

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

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. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between the existing VAC Chapter(s) and the proposed regulation. If the existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
30-200	N/A	<p>This section provides for polygraph examination procedures.</p> <p>Polygraph examiners and registered polygraph examiner interns must place their license or registration, or legible copy, in a conspicuous place.</p> <p>An examiner must provide an examinee with a written explanation of the provisions detailed in sections -200, -210, and -220 of the regulation at the beginning of each polygraph examination.</p>	<p>Subsection F will be added to the section to require that an examiner disclose to an examinee that their polygraph examination is subject to disclosure under the Virginia Freedom of Information Act, Chapter 37 of Title 2.2 of the Code of Virginia.</p>

		<p>The section provides that an examinee may request a recording of the polygraph examination. An examiner must maintain recording equipment and media adequate to make a recording. An examiner is required to safeguard all examination recordings as part of the records the examiner is required to keep in accordance with -230 of the regulation.</p> <p>An examiner may charge an examinee a fee not to exceed \$35 if the examinee requests and receives a copy of an examination. All recordings are required to be made available to DPOR, the examinee, or the examinee's attorney upon request.</p> <p>The section provides that an examinee is entitled to a copy of all portions of any written report pertaining to the examinee's examination that is prepared by the examiner and provided to any person or organization. An examinee is required to make a written request to the examiner for such copy. The examiner must provide the copy to the examinee within 10 business days of providing the written report to the another person or organization, or within 10 business days of receiving the request from the examinee, whichever occurs later. The examiner may not collect more than \$1.00 per page from the examinee for any copy that is provided.</p> <p>Examinations that are conducted by or on behalf of the Commonwealth or any of its political subdivisions when done for the purpose of</p>	
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		preventing or detecting crime or enforcing penal laws are exempt from certain requirements in the section.	
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