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Fast-Track Regulation Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) Chapter citation(s)	22VAC40-73
VAC Chapter title(s)	Standards for Licensed Assisted Living Facilities
Action title	Amend sections to add appeal process for discharges.
Date this document prepared	December 14, 2022

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.

Standards for Licensed Assisted Living Facilities, 22VAC40-73, provide regulations for the Department of Social Services (DSS) to license, inspect and monitor assisted living facilities (ALF). This action will amend this regulation as required by Chapter 706 of the 2022 Acts of Assembly, which amended § 63.2-1805 of the Code of Virginia and requires DSS to adopt regulations regarding involuntary discharge of residents. The amendments in this action add a definition of involuntary discharge, terms and conditions for an involuntary discharge, and an appeal process for ALF residents to appeal certain discharge decisions should they choose to do so.

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.

DSS – Department of Social Services
VAC – Virginia Administrative Code
ALF – Assisted Living Facility

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

The State Board of Social Services approved the fast track action to amend 22VAC40-73: Standards for Licensed Assisted Living Facilities on December 14, 2022.

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.”

Consistent with Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track rulemaking process.

Pursuant to Chapter 706 of the 2022 Acts of Assembly, which amended § 63.2-1805 of the Code of Virginia, DSS is required to adopt regulations regarding involuntary discharge of residents in assisted living facilities. This rulemaking action is expected to be noncontroversial as it is required by § 63.2-1805 of the Code of Virginia and therefore appropriate for the fast-track process. This action provides ALF and residents requirements for involuntary discharge situations and creates a discharge appeal process to follow should one be needed. This action is intended to expand protections and offer clarification for facilities and residents.

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 State Board of Social Services has the legal authority to adopt regulations and requirements for licensing ALF in accordance with §§ 63.2-217, 63.2-217.1, 63.2-1732, 63.2-1805, and 63.2-1808. The Code mandates promulgation of regulations to address involuntary discharge of ALF residents, including time frames, notification requirements, conditions and the process for appeal. This regulatory action will provide direction for involuntary discharge, pursuant to § 63.2-1805.

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 action will amend this regulation as required by Chapter 706 of the 2022 Acts of Assembly, which amended § 63.2-1805 of the Code of Virginia and requires DSS to adopt regulations regarding involuntary discharge of residents. This regulatory change is essential to protect the health, safety, and welfare of residents residing in an ALF by clearly describing conditions for involuntary discharge from an ALF, and requirements to notify residents of their right to appeal an involuntary discharge. This action will add a definition of involuntary discharge, terms and conditions for an involuntary discharge, and an appeal process for ALF residents to appeal certain discharge decisions should they choose to do so. This action will ensure that ALF residents are not discharged inappropriately, and allow residents a legal remedy to appeal the discharge if discharge requirements are not followed.

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.

This amendment will add a definition of 'involuntary discharge' and clarify the terms and conditions for when and how this type of discharge is permitted, including time frames and the option for a resident to appeal the facility's decision to discharge.

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.

The primary advantage of this action for the public is allowing residents in an ALF to appeal an involuntary discharge, which has not previously been permitted. There are no disadvantages to the public from this action. There are no advantages or disadvantages to the agency or Commonwealth, as this action is required by state law, § 63.2-1805. There could be disadvantages to the regulated programs (ALFs) if the programs do not follow requirements when involuntarily discharging residents, as the residents can now appeal the discharge, and there is a legal remedy for residents that previously did not exist.

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.

No other state agencies are affected by this action. No localities are particularly affected by this action. No other entities are particularly affected by this action.

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.

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>DSS Office of Appeals and Fair Hearings will need two staff, a Senior Hearing Officer and an Administrative Technician, to process ALF involuntary discharge appeals. The cost for the staff is \$198,034 for FY23 and \$187,708 each year thereafter. Funds were provided in the state budget.</p> <p>DSS Licensing will need to upgrade the licensing information system to track and monitor ALF discharges and appeals. The estimated one-time cost is \$500,000 for FY23.</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 costs to other state agencies.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>This change will bring state agencies into compliance with state code, § 63.2-1805, and will allow DSS licensing to track discharge and appeals data to better understand the scope of the issue.</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.

Projected costs, savings, fees or revenues resulting from the regulatory change.	There are no direct or indirect costs and benefits to local partners.
Benefits the regulatory change is designed to produce.	

Pursuant to § 63.2-217, because there are no potential costs, savings, fees or revenues, copies of the fiscal analysis were not shared separately with local boards.

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.

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.	See ORM form table 4.
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.	
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: 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.	
Benefits the regulatory change is designed to produce.	

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.

There are no other alternatives since this regulatory action is required by § 63.2-1805 of the Code of Virginia.

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.

There are no other alternative regulatory methods, since this regulatory action is required by § 63.2-1805 of the Code of Virginia.

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.

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.

Consistent with § 2.2-4011 of the Code of Virginia, if an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The Department of Social Services is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in 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 Sharon Stroble, Operations Consultant, DSS Division of Licensing Programs, 801 E Main St, Richmond VA 23219, 804-726-7037, Sharon.stroble@dss.virginia.gov. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

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 existing VAC Chapter(s) and the proposed regulation. If 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
22VAC40-73-10		Definitions used in the regulation	<p>New definition added: involuntary discharge</p> <p>Intent, rationale, and impact is for ALF and the public to understand the meaning of this term.</p>
22VAC40-73-430		Section describes discharge requirements, including notice, assistance the ALF provides the resident who is being discharged, discharge statement, and situations permitting emergency discharge.	<p>The current subsections A-F are reorganized. The new subsection A is reworded requirements in the current subsection C. The new subsection B Describes general requirements for all discharges, rewording the current subsections A-D.</p> <p>Requirements in the current subsection D that indicate the resident or his legal representative are responsible for transporting the resident and his possessions are removed because resident responsibilities are generally not in the purview of this regulation. This regulation describes requirements for ALFs.</p> <p>The timeframe for a general notice about discharge, which gives the resident, legal representative, and contact person a heads up, is removed since the written notice requirements are now required at least 30 days prior to discharge. The general notice is a 'heads up' that a discharge written notice is coming.</p>

			<p>Written notice requirements are slightly revised, to align with § 63.2-1805 A 5. Written notice is required at least 30 days prior to discharge, and must include the decision to discharge, the reason for discharge, discharge date, and the place the resident will be discharged to.</p> <p>The new subsection C crosswalks with requirements in the last sentence of the current subsection B. The term 'eligibility worker' is revised to 'assigned staff at the local department of social services' because workers are no longer called 'eligibility workers' and their titles may vary depending on the locality.</p> <p>The new subsection D describes requirements for emergency discharges (subsection E and F in the current regulation).</p> <p>The timeframes for written notification are aligned with requirements in § 63.2-1805 A 5. Written notice is required no later than five days after the emergency discharge and must include information about the resident's right to appeal. A copy of the written notice must be sent to DSS licensing and the State Long-Term Ombudsman within five days of the discharge.</p> <p>The new subsection E includes provisions regarding involuntary discharge, from § 63.2-1805 A 5. Situations that allow involuntary discharge are described. Written notice requirements are described, including that a copy of the written notice must be sent to DSS licensing and the State Long-Term Ombudsman within five days of the discharge.</p> <p>Requirements in the new subsections F-I are the same as the current subsections G-J, but are re-lettered. The 'eligibility worker' edit described above is made in the new subsection F.</p> <p>Intent and rationale is to clearly describe all discharge requirements in one section, so that the ALF, residents, and the public understand the different</p>
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			<p>requirements for different types of discharges.</p> <p>The impact is clearer understanding and compliance with Code and regulation requirements for ALF discharges.</p>
	<p>22VAC40-73-435</p>		<p>A new subsection 435 was written to describe appeals of emergency and involuntary discharges. Requirements in this subsection are from § 63.2-1805 A 5. The requirements for the discharge notice about appeals are in this section, including a requirement to use the DSS discharge notice form which will have the information about where to send the appeal and a hearing request form. The facility must assist the resident in filing an appeal and provide a prepaid envelope if requested. Any appeal must be initiated within the 30 day discharge notice timeframe, or within 30 days from an emergency discharge date with an additional five days to allow time for the facility to provide the discharge notice pursuant to § 63.2-1805 A 5.</p>