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Final Regulation Agency Background Document

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| Agency name | Department of Forensic Science |
| Virginia Administrative Code (VAC) Chapter citation(s) | 6VAC40-30 |
| VAC Chapter title(s) | Regulations for the Approval of Field Tests for Detection of Drugs |
| Action title | Amendments to Permit Consideration and Approval of Presumptive Mobile Instruments |
| Date this document prepared | June 30, 2020 |

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 (1VAC7-10), 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.

This regulatory change involves proposed amendments to 6VAC40-30, the Regulations for the Approval of Field Tests for Detection of Drugs. Virginia Code § 19.2-188.1(A) permits any law enforcement officer to testify in any preliminary hearing as to the results of any field tests that have been approved by the Department of Forensic Science (DFS or the Department) pursuant to 6VAC40-30. "Field test" is not defined in the statute. 6VAC40-30-10 currently defines "field test" to include "any presumptive chemical test unit used outside of a chemical laboratory environment to detect the presence of a drug." The purpose of the proposed amendments is to expand the definition of "field test" to include presumptive mobile instruments, in addition to presumptive chemical tests. As a result of the expanded definition, the regulations will need to be amended to set forth a process for the evaluation, approval, and reevaluation of presumptive mobile instruments, as well as a fee schedule.

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.

There are no acronyms used in this document. A “presumptive chemical test” permits law enforcement officers to test a small portion of a suspected controlled substance utilizing a chemical reagent that may indicate the presence or absence of that substance, typically through a color change. Confirmatory testing must be conducted by a forensic laboratory. A “presumptive mobile instrument” permits law enforcement to either scan the suspected controlled substance or test a small portion of the suspected controlled substance, depending on the type of technology. The presumptive mobile instrument then provides law enforcement with a digital indicator of whether a controlled substance may be present. As with the presumptive chemical tests, confirmatory testing must be conducted by a forensic laboratory.

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.

On June 29, 2020, the Forensic Science Board met to consider the final action on the proposed amendments to 6VAC40-30, Regulations for the Approval of Field Tests for Detection of Drugs. As a result of the state of emergency declared by Gov. Northam due to COVID-19, the Board conducted the meeting by electronic communication means. The public was permitted to attend and participate via video or audio conference. Directions for public participation were provided on the meeting agenda and posted on Virginia’s Town Hall. There were no changes made to the proposed amendments during the regulatory process. There had been no public comment received by the Board or DFS since the previous stage. The Board unanimously approved the final amendments to the regulations.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

There was no mandate for this regulatory change. The Board had previously considered whether a process to approve presumptive mobile instruments should be added to the regulation, but had declined to act without a specific request for such a change from law enforcement. As law enforcement began to encounter increasingly lethal opioids, the Drug Enforcement Administration (DEA) advised law enforcement agencies of the dangers associated with presumptive chemical testing of suspected controlled substances. As a result, most law enforcement agencies no longer use the presumptive chemical field tests currently approved under 6VAC40-30. In October 2017, a local law enforcement agency advised the Department that it had ceased using the presumptive chemical field tests due to safety concerns for their officers. A representative of that agency specifically requested that DFS consider approving a presumptive mobile instrument that the agency had obtained for use. Because of

the current language of the regulation that is limited to presumptive chemical tests, the Department was unable to consider the approval of that presumptive mobile instrument. Accordingly, the Department requested that the Forensic Science Board consider amending the regulations to permit the approval of presumptive mobile instruments as field tests.

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.

Virginia Code § 19.2-188.1(A) provides that the Department of Forensic Science shall approve field tests for use by law enforcement officers to enable them to testify to the results obtained in any preliminary hearing regarding whether any substance, the identity of which is at issue in such hearing, is a controlled substance, imitation controlled substance, or marijuana, as defined in Virginia Code §18.2-247. The Forensic Science Board is granted the power to adopt regulations, pursuant to the Administrative Process Act, for the administration of (i) Chapter 11 of Title 9.1 of the Code of Virginia or (ii) §§ 18.2-268.6, 18.2- 268.9, 19.2-188.1, and 19.2-310.5 and for any provisions of the Code as they relate to the responsibilities of the Department.

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’s intended to solve.

The Forensic Science Board is aware of the significant concerns for the safety of law enforcement officers as they handle unknown substances that may contain extremely lethal synthetic opioids. As the Drug Enforcement Administration (DEA) advised, the use of presumptive chemical tests on suspected controlled substances creates a risk of potential lethal exposure to law enforcement. This risk has become so significant that many law enforcement agencies have decided to forego the use of the presumptive chemical tests by their officers. Presumptive mobile instruments are an alternative to presumptive chemical tests. Some presumptive mobile instruments can test through clear plastic and glass packaging, which greatly reduces the risk of exposure to law enforcement. As with chemical field tests, these presumptive mobile instruments could produce false positives and false negatives, and should only be utilized by law enforcement officers for the limited purpose outlined in Virginia Code § 19.2-188.1(A). Law enforcement agencies would not be required to purchase these instruments, but once approved by the Department, they would be an additional option available for law enforcement.

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.

The purpose of the proposed amendments is to expand the definition of “field test” to include presumptive mobile instruments, in addition to presumptive chemical tests. As a result of the expanded definition, the regulations are amended to set forth a process for the evaluation, approval, and reevaluation of presumptive mobile instruments, as well as a fee schedule. The proposed changes include:

- amendments to 6VAC40-30-10 to the definition of “field test” to include presumptive mobile instruments and the elimination of the term “field test kit,”
- amendments to 6VAC40-30-30 to establish two different procedures for evaluations and requirements for approval of presumptive chemical tests and presumptive mobile instruments,
- amendments to 6VAC40-30-40 to insert the term “field” before “test” as it occurs,
- amendments to 6VAC40-30-50 to establish a separate set of requirements for maintenance of approved status for presumptive mobile instruments,
- amendments to 6VAC40-30-70 to amend the term “presumptive chemical tests” to the broader term “field tests,” and
- amendments to 6VAC40-30-80 to establish a separate fee schedule for approval of presumptive mobile instruments.

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) The advantage to the public of this proposed regulatory change is that law enforcement has an increased ability to test suspected controlled substances in the field with a greatly reduced risk of exposure as compared to the currently approved presumptive chemical tests. This supports the goal of public safety. There are no disadvantages.

2) There are no advantages or disadvantages to DFS. As with the currently approved presumptive chemical tests, law enforcement officers would still be required to submit the suspected controlled substances to the Department of Forensic Science for laboratory analysis so that those confirmed results may be utilized at trial.

As for the Commonwealth, in addition to reducing the risk of exposure for law enforcement officers, the results obtained can be utilized by law enforcement officers for the purpose of obtaining criminal charges, and Virginia Code § 19.2-188.1(A) permits law enforcement officers to testify to those results at the preliminary hearing stage. With the confirmation of the

presumptive results by the Department through laboratory analysis, there are no disadvantages to the Commonwealth.

3) As with the presumptive chemical tests, there can be false positives and false negatives. Law enforcement officers and other officials have been and will continue to be advised of this potential. The Department will continue to provide laboratory analysis for these substances so that only confirmed results are utilized at trial.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

This proposal does not have any requirements that are more restrictive than federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

Other State Agencies Particularly Affected:

- Virginia State Police
- Other State Law Enforcement Agencies
- Indigent Defense Commission

Localities Particularly Affected:

- Local Law Enforcement Agencies
- Local Commonwealth’s Attorneys’ Offices

Other Entities Particularly Affected:

- Criminal Defense Bar

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency 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 public comments were received during this stage.

| Commenter | Comment | Agency response |
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Detail of Changes Made Since the Previous Stage

List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. 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. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. ** Put an asterisk next to any substantive changes.*

No changes have been made since the previous stage.

| Current chapter-section number | New chapter-section number, if applicable | New requirement from previous stage | Updated new requirement since previous stage | Change, intent, rationale, and likely impact of updated requirements |
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Detail of All Changes Proposed in this Regulatory Action

List all changes proposed in this action and the rationale for the changes. 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. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. ** Put an asterisk next to any substantive changes.*

| Current chapter-section number | New chapter-section number, if applicable | Current requirements in VAC | Change, intent, rationale, and likely impact of updated requirements |
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| 6VAC40-30-10 | | The definition of “field test” is limited to presumptive chemical tests. | <p>*Change: The definition of “field test” is expanded to include presumptive mobile instruments.</p> <p>The term “field test kits” is removed.</p> <p>Intent: To permit the Department to approve presumptive mobile instruments in addition to presumptive chemical tests.</p> <p>Rationale: The amendment permits the approval of an alternative to presumptive chemical tests with a reduced risk of exposure to law enforcement.</p> |

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| | | | <p>Likely impact: Manufacturers will submit their presumptive mobile instruments for consideration for approval by the Department. Law enforcement agencies will have additional alternatives for presumptive testing of potential controlled substances.</p> |
| 6VAC40-30-30 | | <p>The regulation currently sets out the approval process for presumptive chemical tests only.</p> | <p>*Change: A process is established for the initial approval of a presumptive mobile instrument.</p> <p>The process requires the submission of two non-sequentially manufactured instruments and supporting materials for each model for which approval is sought. The instruments are returned to the manufacturer upon completion of the evaluation.</p> <p>To be approved, the instrument must perform in accordance with the manufacturer’s instructions and advertised claims and be convenient and efficient for the law enforcement officers utilizing it.</p> <p>Intent: The Department will have a set process for the consideration of presumptive mobile instruments.</p> <p>Rationale: A set process will provide guidance to manufacturers and Department staff regarding what should be submitted and considered for the approval of a presumptive mobile instrument.</p> <p>Likely impact: Manufacturers and Department staff will have guidelines to follow for the approval process.</p> |
| 6VAC40-30-40 | | <p>The regulation establishes the process the Department utilizes for notifying a manufacturer of the approval or disapproval of a test.</p> | <p>Change: The term “test” is changed to “field test” for the clarification of the regulation.</p> |

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| | | | <p>Intent: This change was made to standardize the language in the regulation.</p> <p>Rationale: All language referencing a “field test” should be consistent to avoid confusion.</p> <p>Likely impact: Elimination of confusion regarding what constitutes a “test.”</p> |
| 6VAC40-30-50 | | <p>The current regulation permits the Department to require an annual reapproval process for presumptive chemical tests, whether routinely required or on discovery of an unreported modification.</p> | <p>*Change: The amendments set out the reevaluation requirements for both presumptive chemical tests and presumptive mobile instruments, whether routinely required by the Department or on discovery of any unreported modification.</p> <p>The amendments clarify that additions to the compounds in a presumptive mobile instrument’s library, which the Department anticipates would occur on a frequent basis, do not trigger the need for a reevaluation of a presumptive mobile instrument.</p> <p>Intent: The Department will have a set process for the reapproval of presumptive mobile instruments and when such reapproval is required.</p> <p>Rationale: The Department should be notified of substantial changes to presumptive mobile instruments and reapprove those instruments for use by law enforcement agencies.</p> <p>Likely impact: Manufacturers will have clear guidance regarding when the Department requires that any presumptive mobile instrument be reapproved.</p> |
| 6VAC40-30-70 | | <p>The Department assumes no liability for the safe use of any presumptive chemical test and assumes no liability for any</p> | <p>Change: The amendments include both presumptive chemical tests and presumptive mobile instruments by utilizing the term “field test,” which</p> |

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| | | <p>incorrect result or interpretation of a presumptive chemical test.</p> | <p>has been defined in 6VAC40-30-10 to include both.</p> <p>Intent: The amendment clarifies that Department assumes no liability for the use of or interpretation of results from a presumptive mobile instrument.</p> <p>Rationale: The change clarifies the Department’s position regarding assumption of liability.</p> <p>Likely impact: Law enforcement agencies and others are notified of the Department’s position on liability.</p> |
| <p>6VAC40-30-80</p> | | <p>The fees charged by the Department for the approval of presumptive chemical tests are established under this regulation.</p> | <p>*Change: The amendments establish that a manufacturer will be charged a fee of \$2,500, in addition to the actual cost of each street drug preparation utilized, for each model of the presumptive mobile instrument for which evaluation is requested.</p> <p>Intent: A fee structure must be established for the approval of presumptive mobile instruments.</p> <p>Rationale: Manufacturers that wish to submit their instruments for consideration for approval must compensate the Department for staff time time spent in the approval process and the costs of street drug preparations utilized in the approval process.</p> <p>Likely impact: Manufacturers are aware of the costs involved in the approval process of any presumptive mobile instruments.</p> |