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Fast-Track Regulation
Agency Background Document

Agency name	Forensic Science Board/Department of Forensic Science
Virginia Administrative Code (VAC) Chapter citation(s)	6VAC40-20
VAC Chapter title(s)	Regulations for Breath Alcohol Testing
Action title	Amendment to 6VAC40-20-150
Date this document prepared	November 19, 2026

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 17 (2026) (EO 17), any instructions or procedures issued by the Department of Planning and Budget (DPB) pursuant to EO 17, the *Regulations for Filing and Publishing Agency Regulations* (1 VAC 7-10), and the *Form, Style, and Procedure Manual for Publication of Virginia Regulations.*

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 action is an amendment to an existing regulation. This amendment was noted during a recent periodic review conducted by the Forensic Science Board and in anticipation of a new evidential breath instrument being deployed by the Department of Forensic Science. 6VAC40-20-150 indicates that "[t]he Department shall download by modem, at least once a month, data from each breath test device assigned to an agency." The new evidential breath instrument will no longer utilize a modem to download data. The Forensic Science Board has recommended an amendment to this section, striking the words "by modem" to avoid having to continue to respond to changing technologies moving forward.

Acronyms and Definitions

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

No acronyms or technical terms utilized that are not also defined in the "Definitions" section of the regulation.

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) that the agency has "adopted final amendments" to the regulation; 3) the name of the agency taking the action; and 4) the title of the regulation. A suggested statement is, "On [insert date] the Board/Department of [insert name] adopted final amendments to the [title of regulation(s)]."

At its October 7, 2026 meeting, the Forensic Science Board finalized its periodic review of this regulation. As part of its review, the Board recommended that the regulation be amended to strike the words "by modem" from 6VAC40-20-150. The Board approved a fast-track action for this purpose.

Mandate and Impetus

1) *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 EO 17, "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." For changes in response to federal mandates, indicate the extent of discretion related to the proposed regulatory changes, the rationale for the changes, and briefly indicate how the federal mandate aligns with the best interest of public welfare.*

2) *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.*

1) A periodic review of this regulation prompted the initiation of this fast-track action to eliminate the words "by modem."

2) This amendment simply strikes the language of the prior mechanism for downloading data which will be incorrect with the deployment of the new evidential breath instruments. By striking the words rather than replacing them, the amendment will avoid having to continue to revise the regulation in response to changing technologies in the future.

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 §§ 18.2-267, 29.1-738.1, and 46.2-341.25 provide that any person suspected of operating a motor vehicle, watercraft or boat, or commercial motor vehicle while under the influence is entitled, if such equipment is available, to have his breath preliminarily analyzed to

determine the probable alcoholic content of his blood. Virginia Code §§ 18.2-267 and 46.2-341.25 direct the Department of Forensic Science to "determine the proper method and equipment to be used in analyzing breath samples taken" pursuant to those sections and "advise the respective police and sheriff's departments of the same." The same procedures and requirements set forth in Virginia Code § 18.2-267 are applied to those suspected of operating a watercraft or boat while impaired under § 29.1-738.1 or § 29.1-738.02. Virginia Code §§ 18.2-268.9 and 46.2-341.26:9 direct the Department to select the type of equipment, to develop the methods, and to establish a training program for individuals to administer evidential breath test analyses for prosecutions under §§ 18.2-266, 18.2-266.1, subsection B of 18.2-272, 46.2-341.24 and 46.2-341.31. Virginia Code § 29.1-738.2(D) applies the procedures and requirements of §§ 18.2-268.1 through 18.2-268.11 to offenses involving watercraft or motorboats. Virginia Code § 9.1-1110 grants the Forensic Science Board the power and duty to adopt regulations for the administration of § 18.2-268.9 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 is intended to solve.

The amendment is a response to a periodic review of the regulation. The words "by modem" will no longer be accurate with the new evidential breath instrument. The amendment is intended to update the regulation, which is still necessary for the protection of public health, safety, and welfare, as it provides the mechanisms for a breath test to be utilized in prosecutions for driving under the influence, boating under the influence, and operating a commercial motor vehicle under the influence. The regulation fulfills a mandate imposed on the Department by the Code of Virginia.

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 amendment strikes by words "by modem" in 6VAC40-20-150.

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.

There are no disadvantages to the public or the Commonwealth in implementing the amended provision. The amendment benefits the public and the Commonwealth in that the regulation will not be inaccurate in how the data is downloaded from the new evidential breath instruments.

Removing the requirement for modems will be an advantage to law enforcement agencies, as the technology has now evolved beyond that form of data download.

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.

Identification of Affected Parties

Use the tables below to indicate all Individuals and Entities affected by this regulatory change, either directly or indirectly. The effect could be positive (benefit) or negative (cost). Complete each row:

- *If available information indicates that a party is not affected, report "**none**" in the appropriate row.*
- *If no information exists, report "**unknown**" in the appropriate row.*

For Table 3: Per § 2.2-4007.04, "particularly affected" means any party that bears an "identified disproportionate material impact" that would not be experienced by similar parties. For example, this could be an affected entity that is likely to have a substantially different impact than other affected entities.

Table 1: Directly Affected Parties	
Affected Parties	*Number and Description (Type or Name)*
Individuals	None. The data will still be downloaded by another mechanism.
Other State Agencies	None.
Entities:	
• Localities	Particularly affected. Local law enforcement agencies will benefit from having the modem language removed as this will no longer be the technology utilized. Prior to the purchase of the new evidential breath instrument, DFS had received complaints regarding localities having to maintain an analog telephone line for the current instrument. Technology has evolved so that law enforcement agencies are using newer forms of data exchange.
• Small Businesses	None.
• Other Businesses	None.
• Other Entities	None.

Table 2: Indirectly Affected Parties	
Affected Parties	*Number and Description (Type or Name)*
Individuals	None.
Other State Agencies	None.
Entities:	
• Localities	None.
• Small Businesses	None.
• Other Businesses	None.
• Other Entities	None.

Table 3: Particularly Affected Parties
Are any of the parties listed in Tables 1 or 2 "particularly affected" (**Yes, No, or Unknown**). If yes, describe all affected parties and why they are particularly affected: Local law enforcement agencies house the evidential breath instruments that are utilized in prosecutions for driving under the influence, boating under the influence, and operating a commercial motor vehicle under the influence. The Department provides the evidential breath instruments and maintains them at no cost to the locality. The amendment removes the former technology from the regulation ("by modem") for data downloads. DFS has confirmed via survey with affected law enforcement agencies that they have the appropriate communication technology to support the new instrument, and they would prefer to eliminate modem lines going forward. Some have indicated that the maintenance of a modem line is an additional cost to the agency.

Benefits and Costs

For Tables 4 and 5, complete each row:

- *If available information indicates that no benefits or costs are anticipated for a party, report "**none**" in the appropriate row.*
- *If no information exists, report "**unknown**" in the appropriate row.*

Benefits Resulting from Changes

Consistent with § 2.2-4007.04 of the Code of Virginia, use Table 4 to describe all regulatory changes that are anticipated to have benefits. Include benefits that apply to directly and indirectly affected parties, as reported in Tables 1 and 2.

When describing a particular benefit, specify which new or changed requirement creates the benefit. Keep in mind that this is a benefit from the proposed change versus the status quo. Exclude changes that merely improve clarity, formatting, or terminology.

Table 4: Benefits Resulting from Changes	
Affected Parties	*Description of Regulatory Change(s) and Resulting Additional Benefit(s)*
Individuals	None.
Other State Agencies	None.
Entities:	
• Localities	Local law enforcement agencies can utilize their existing technology and not maintain a modem line for data downloads.
• Small Businesses	None.
• Other Businesses	None.
• Other Entities	None.

Costs Resulting from Changes

Consistent with § 2.2-4007.04 of the Code of Virginia, use Table 5 to describe all regulatory changes that are anticipated to have costs. Include costs that apply to directly and indirectly affected parties, as reported in Tables 1 and 2.

When describing a particular cost, specify which new or changed requirement creates the cost. Keep in mind that this is a cost from the proposed change versus the status quo. Exclude changes that merely improve clarity, formatting, or terminology.

Table 5: Costs Resulting from Changes	
Affected Parties	*Description of Regulatory Change(s) and Resulting Additional Costs(s)*
Individuals	None.
Other State Agencies	None.
Entities:	
• Localities	None. Law enforcement agencies indicated that they already had newer technology available for data downloads from the new evidential breath instrument.
• Small Businesses	None.
• Other Businesses	None.
• Other Entities	None.

Impact on Your Agency

In Table 6, indicate the overall benefits and costs to your agency resulting from this regulatory action, compared to the status quo. Complete each row.

Table 6: Benefits and Costs for Your Agency
Projected benefits
Are changes expected in any savings or revenues (either one-time or on-going)? (**Yes, No, or Unknown**). If yes, provide a brief explanation: No.
Are changes expected in other (non-monetary) benefits? (**Yes, No, or Unknown**). If yes, describe any other (non-monetary) benefits: Yes, faster download of data from user agencies.
Projected costs
Are changes expected in any expenditures (either one-time or on-going)? (**Yes, No, or Unknown**). If yes, provide a brief explanation: No.
Can any costs or revenue loss be absorbed by existing resources? (**Yes, No, or Unknown**). N/A

Other Impacts per § 2.2-4007.04

In Table 7, report the specific benefits and costs expected to result from this regulatory change compared to the status quo. Complete each row.

Table 7: Other Impacts Addressed by § 2.2-4007.04
Are changes in the use & value of private property expected? (**Yes, No, or Unknown**). If yes, describe: the impact, any entities likely to be affected, and the change(s) causing the impact: No.

Are changes in the development of real estate for commercial or residential purposes expected? (**Yes, No, or Unknown**). If yes, describe: the impact, any entities likely to be affected, and the change(s) causing the impact: No.
Are changes in employment expected? (**Yes, No, or Unknown**). If yes, describe the expected change in the number of persons and the types of employment positions affected: No.
For changes affecting Localities only: for any affected Locality, are there sources of potential funds to comply with the changes? (**Yes, No, or Unknown**). If yes, describe the sources of potential funds: N/A
For changes affecting Small Businesses only: for any affected Small Business, are there projected reporting, recordkeeping, and other administrative costs, including any necessary professional skills to prepare documents? (**Yes, No, or Unknown**). If yes, describe these costs and skills: No.

Alternatives to Regulation

Consistent with EO 17, and §§ 2.2-4007.04 and 2.2-4007.1 B of the Code of Virginia, for any regulatory change describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome, less costly, and least intrusive alternative.

6VAC40-20 delineates that the Department will approve the breath test instrument utilized for evidential breath tests pursuant to Virginia Code §§ 18.2-268.9, 29.1-738.2 and 46.2-341.26:9. The regulation provides necessary guidance for the use, care, maintenance and storage of those instruments as purchased and deployed by the Department with law enforcement agencies around the Commonwealth. The regulation establishes the general methods for conducting breath tests and licensing procedures for operators. For preliminary breath tests provided for in Virginia Code §§ 18.2-267, 29.1-738.1 and 46.2-341.25, the regulation establishes the Department's requirements for such equipment and provides for the notification of approved devices by periodic publication in the Virginia Register of Regulations. The regulation is the least burdensome method of accomplishing the Department's Code-mandated oversight of preliminary breath test devices, evidential breath test instruments, and the licensing of breath test operators.

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.

Not applicable.

Public Participation

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.

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 Forensic Science Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal 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 or email to Amy C. Jenkins, Chief Deputy Director, Department of Forensic Science, 8850 Times Dispatch Boulevard, Suite 100, Mechanicsville, Virginia 23116, (804) 786-6848, or amy.jenkins@dfs.virginia.gov. In order to be considered, comments must be received by 11:59 p.m. on the last day of the public comment period.

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.

Detail of Changes

List all regulatory changes and the consequences of the changes. For any applicable table:

1) *Enter the current Chapter and Section number. If the existing VAC Chapter(s) or sections are being repealed and replaced, include both the current and the new number for each current and replacement section.*
2) *Provide a summary explanation of the current requirements and what they mean. **DO NOT** quote the text of the current regulation.*
3) *Provide a summary explanation of the new requirements and what they mean. 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. **DO NOT** quote the text of the new regulation.*

*Use all tables that apply **but delete tables that are not used.***

Table 8: Amending or Repealing Existing VAC Chapter(s)
If an existing VAC Chapter(s) is being amended or repealed, use Table 8 to describe the changes between the existing VAC Chapter(s) and the proposed regulation.

Current (and New) Chapter - Section number	SUMMARIZE (do not quote) current requirements in the VAC	Change, intent, rationale, and likely impact of new requirements
6 VAC 40-20-150	Specifies that DFS will download data by modem.	Striking of the words "by modem" allows for different mechanisms to be utilized to download the data

Table 9a: Promulgating New VAC Chapter(s) without Repeal and Replace
If a <u>new</u> VAC Chapter(s) is being promulgated and is <u>not</u> replacing an existing Chapter(s), use Table 9a. If any other regulations and laws apply to a given section, also include Table 9b (a range of sections can be reported on the same row if the same regulations or laws apply).

New Chapter-Section number	New requirements to be added to VAC	Change, intent, rationale, and likely impact of new requirements
N/A		

Table 9b: Promulgating New VAC Chapter(s) without Repeal and Replace (addendum)

New Chapter-Section number(s)	List any other regulations and laws that apply
N/A	

Table 10: Changes that Are Not in the Emergency Regulation
*If the regulatory change is replacing an **emergency regulation:***

- *If the proposed regulation is <u>identical</u> to the emergency regulation, complete Table 8 and/or Table 9, as applicable, but do not complete Table 10.*
- *If the proposed regulation is <u>not</u> identical to the emergency regulation, <u>also</u> complete Table 10 to describe the changes that are not in the emergency regulation.*

Current (and New) Chapter -Section number	SUMMARIZE (do not quote) current <u>emergency</u> requirements	Change, intent, rationale, and likely impact of new or changed requirements since emergency stage
N/A		