



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

Agency Name:	Department of Social Services
VAC Chapter Number:	22 VAC 40-325
Regulation Title:	Fraud Reduction/Elimination Effort
Action Title:	Proposed Permanent Regulation
Date:	June 14, 2000

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

This regulation describes the requirements for local administration, and state requirements for local reimbursement, of the statewide fraud program, named Fraud Reduction/Elimination Effort, or Fraud FREE. Local departments of social services must operate the Fraud FREE program, submit for approval a local plan of operation, and comply with program regulations and policy in order to receive state reimbursement for the local share of costs of fraud investigators. The regulation also describes the method by which the state will approve requests for staffing for first year and subsequent years of program operation.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

Part I, 22 VAC 40-325-10 Definitions: "Collections means all overpayment moneys collected or recovered (recouped) by local departments of social services related to food stamp, TANF, and other federal benefit programs administered by the Department net any refunds due to the federal government." In this change, the Department added the definition of the term "collections", in the regulation. This term has specific meaning to the regulation and was determined to be necessary to eliminate any confusion.

Also added to Definitions: "Workload Measures means those validated measures, adopted and implemented by the Department, used to determine necessary appropriations for personnel and operating costs for mandated programs and services." This definition has been included because "workload measures" have been added to Part II, A., 2., as one of a number of criteria by which local allocation of fraud positions may be evaluated.

Part II, 22 VAC 40-325-20 Fraud Reduction/Elimination Effort, Section A: This section has been reworded to more clearly define the responsibilities of the Department of Social Services. "Workload measures" has been added to the list of criteria by which local allocation of fraud position may be evaluated

Section B: This section has been reworded to more clearly state that local departments of social services must conduct fraud prevention and investigation activities as required by federal regulations, the Code of Virginia, and the Fraud FREE regulations.

Section C: "To the extent that funding is available in the Fraud Recovery Special Fund, any general fund appropriation for this activity and any federal funds available for this purpose, local departments which are in compliance with Section 63.1-58.2 of the Code of Virginia, the regulations contained herein, and Department of Social Services FREE Program policy, shall be reimbursed for the direct costs of approved Fraud FREE Programs." In this change, the Department identified the three funding sources for the FREE program, and clarified that local departments of social services are required to staff separate fraud units only insofar as funding is available through any of those sources.

Part II, 22 VAC 40-325-20 Fraud Reduction/Elimination Effort, Section C, 2.: "Requests in funding in subsequent years shall be evaluated based upon one or more of the following criteria:" This change was made to clarify the criteria which the Department may use to determine future funding for local agencies.

Part II, 22 VAC 40-325-20 Fraud Reduction/Elimination Effort, Section C, 2: "In order to receive full reimbursement in subsequent years, the state retained portion of a local agency's

combined collections must equal or exceed the local share of the reimbursed cost of its positions dedicated to FREE. This change was made to clarify the amount of overpayment collections for which the local department is responsible, to receive full reimbursement.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

The final regulation was approved by the State Board on June 14, 2000.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law

The State Board of Social Services is mandated by Section 63.1-58.2 of the Code of Virginia to promulgate regulations for implementation of a statewide fraud control and prevention program.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

This regulation defines state requirements for local operation of the Fraud FREE Program, and describes the methodology by which local departments of social services may receive reimbursement for costs associated with program operation. Fraud FREE will ensure a uniform approach to welfare fraud control, prevention and investigation through state supervision of the program, provision of a manual of policy and procedures, statewide training, and development of a database which will be used for tracking case information. Fraud FREE also requires the investigation of all questionable applications for public assistance prior to approval of benefits. These combined efforts will result in a savings of taxpayer dollars by providing tools and training to identify and investigate questionable or fraudulent public assistance cases, and assuring that benefits are received only by those eligible to receive them.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

This regulation will replace the Emergency Regulation signed by the Governor on January 19, 1999, which allowed operation of the Fraud FREE Program. Fraud FREE became effective April 1, 1999. This regulation names the statewide fraud program as Fraud FREE, requires each local department of social services to operate Fraud FREE, and requires local departments of social services to submit to the state, for approval, a local plan of program operation. It also defines how requests for staffing will be approved, as well as the specifics of local reimbursement. In order to receive full reimbursement of local costs of operation, the state-retained portion of a local agency's combined collections must equal or exceed the reimbursed cost of its positions dedicated to Fraud FREE.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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, please include a sentence to that effect.

The primary advantage to the public for implementing these regulations will be the establishment of a comprehensive welfare fraud control and prevention program to identify, investigate, and prevent fraud by public assistance recipients. Since the program will be funded through collection of overpayments, there should be no disadvantages to the public associated with program operation.

The primary advantages to the Department will be realization of a greater degree of program integrity, and increased emphasis on collection of overpayments. A disadvantage to the Department may be the belief of some local directors that allocation of program funding is insufficient, fueling further debate regarding "unfunded mandates" to local agencies. Start up funding of FREE is not intended to cover the total local cost of operation, but is intended to help local agencies establish their programs, hire investigators and strengthen their collection efforts.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

Public Comment was received for the period December 20, 1999 through February 18, 2000. The Department received comments from 20 entities on the proposed regulations. These comments have been categorized into common issues. The Department has responded to the issues that were specific to the proposed regulation.

Public Comment Issues and Department Response:

Fraud FREE is the statewide welfare fraud program, which evolved from the 1998 amendment to the Code of Virginia, §63.1-58.2. This statute has three basic requirements:

1. To establish a statewide fraud control program to ensure that fraud prevention and investigation are aggressively pursued;
2. To establish fraud prevention and investigation units in each local department;
3. To promulgate regulations to implement the provisions of the act.

In reviewing the issues outlined by the Virginia League of Social Services Executives and other agencies, it is clear that much of the concern appears to be related to the overpayment collection and local agency reimbursement processes. The development of these processes has been in phases. It is important to realize that these processes, when originally considered, included placing federal dollars, state general fund and local agency overpayment collection monies into the Fraud Recovery Special Fund (the Fund). The Department's Division of Finance and Budget Office have learned that, for accounting reasons, the federal match money and any general fund money cannot be placed into the Fund. Although these monies cannot be co-mingled, all of the funds iterated are used to reimburse local agencies for their allowable program costs. Based upon several comments related to this process, technical amendments to the regulation have been proposed by the Department. These changes have been reviewed by the Office of Attorney General.

1. The proposed regulation provides a major loophole for the VaDSS to not reimburse localities from the Fraud Recovery Special Fund, by stating that "To the extent that state funding is available in the Fraud Recovery Special Fund, local departments which are in compliance with §63.1-58.2 of the Code of Virginia, this chapter, and Department of Social Services FREE program policy shall be reimbursed for the local share of direct costs of approved Fraud FREE programs."

The proposed regulation unintentionally did not fully clarify the funding. The Department has proposed clarification to address this concern:

"To the extent that state funding is available in the Fraud Recovery Special Fund, any general fund appropriation for this activity, and any federal funds available for this purpose, local departments which are in compliance with §63.1-58.2 of the Code of Virginia, this chapter, and Department of Social Services FREE program policy shall be reimbursed for the direct costs of approved Fraud FREE programs."

2. The proposed regulations state that "In order to receive full reimbursement in subsequent years, the state retained portion of a local agency's combined collections must equal or exceed the reimbursed cost of its positions dedicated to FREE." Again, this is overly restrictive and inconsistent with the legislative intent of the statute.

The proposed regulation unintentionally did not fully clarify the funding. The Department has proposed clarification to address this concern:

"In order to receive full reimbursement in subsequent years, the state retained portion of a local agency's combined collections must equal or exceed the local share of the reimbursed cost of its positions dedicated to FREE."

3. Collections are not defined.

The term "collections" is not defined in the regulation because it is defined in the Code of Virginia. Consistent with §63.1-58.2 of the Code of Virginia, the term collections includes, "all overpayment moneys collected or recovered by local departments related to food stamp, TANF, and other federal benefit programs net of any refunds due to the federal government." The Department will seek to include this in the definition section of the regulation to eliminate any confusion.

4. The proposed regulation states, "Each local department of social services shall operate FREE." The statute mandates FREE but include the phrase "only insofar as money is appropriated therefor, which shall be staffed with sufficient qualified personnel to fulfill regulations promulgated by the State Board. Therefore, Fraud FREE is an unfunded mandate.

The complete cite from the applicable section of the statute is, "Each local department shall establish fraud prevention and investigation units only insofar as money is appropriated therefor, which shall be staffed with sufficient qualified personnel to fulfill the regulations promulgated by the State Board." This segment of the Code addresses establishment of (separate) units and funding for those units, not FREE (pursuit of fraud). The Department must follow the specific Code section, not a paraphrase of it.

If funds were insufficient to support the dedicated Fraud FREE Unit, fraud control activity would still be required by federal regulation and state code. Regulations for federal assistance programs are specific in requiring the conduct of fraud control activity. The Code of Virginia continues to require local departments of services to initiate investigations into questionable applications (in §63.1-108) and to investigate active or closed cases in which fraud may exist (in §63.1-124). The only portion of Fraud FREE that the Code of Virginia stipulates, which is contingent upon reimbursement, is the establishment of fraud and investigation units (i.e. separate and distinct units, in which fraud prevention and control efforts are the primary function).

5. The Fraud FREE program does not reimburse for clerical and collection support?

The Fraud FREE program does not reimburse for clerical and collection support. It should be noted that these tasks existed before implementation of Fraud FREE. Federal reimbursement includes these functions as part of the administration of benefit programs.

The Virginia Food Stamp Certification Manual, Volume V, Part VII, page 4, Collecting Nonfraud Claims, states that "Local agencies must initiate collection action on all nonfraud claims..." Intentional Program Violation Claims are also addressed in Volume V, Part VII, page

9, which states, "When a household member is found to have committed IPV by a court of appropriate jurisdiction, the local agency must request the matter of restitution be brought before the court. If the court mandates restitution, the amount of the claim against the household will be established by the court, even if the amount of restitution ordered is less than the amount of the original claim. If the court does not rule on restitution, or the IPV was established by an ADH or the household member waived his/her right to an ADH, the local agency must initiate collection action..."

Similarly, the TANF Manual, in Section 503.8, page 2c, Recoupment and Recovery of Overpayments, states, "State Board policy, adopted in accordance with federal regulations, requires the local department to promptly recoup or recover any overpayments, including overpayments resulting from assistance paid pending hearing decisions. Repayment by either a former or current recipient of the overpayment can occur through recoupment or recovery or both. The agency should discuss voluntary repayment with the client prior to initiating a recoupment."

Of significant interest is a recent letter from the USDA, Mid-Atlantic Regional Office, which reported the results of a claims review that they conducted in Virginia. The letter indicated that Virginia has the lowest rate of establishment of claims of any State in the Mid-Atlantic region. In addition, the Regional Office showed that collections as compared to dollar loss as reported by QC, are at 11% This is below the regional average of 22%. Also the Food Stamp Claims Tracking System showed that as of March 1, 1999, that there were 4,149 outstanding claims with a balance due of \$1.1 million which may be appropriate for recoupment, which were not being recouped at that time. These factors indicate that Virginia is significantly behind other Mid-Atlantic region states in collection effectiveness and that significant improvement in collections is possible.

6. The funding for Fraud FREE does not include all federal funds available for this program.

Available federal funds include administrative funds as well as any funds received from federal agencies specifically for fraud control programs.

Local agencies have an option to participate in the reimbursement component of the Fraud FREE Program. Those participating in this component submit a proposed annual Fraud FREE budget for approval by the Department of Social Services' Fraud Program staff. The agency is then provided with a Fraud FREE Program allotment. Local agencies meeting the requirements of the Program are reimbursed on a monthly basis, for Program-related expenditures.

Reimbursement of local expenditures may be paid through the non-reverting Fraud Recovery Special Fund, a special account authorized by §63.1-58.2 of the Code of Virginia. The Fraud Recovery Special Fund consists of the state share of overpayment monies collected by the local agencies.

Reimbursement will also be paid from monies allocated from the State general fund for fraud control activities and any federal funds available for fraud control purposes. At the present time, there are no state general funds in the budget.

7. There is conflict between the intent of the Code section and the regulation.

The language of both the enabling statute, §63.1-58.2 and the resulting Emergency Regulation, 22 VAC 40-325-10 et seq. has been reviewed by the Attorney General's Office prior to presentation to the General Assembly and the State Board of Social Services. No conflict is deemed to exist.

8. There is no incentive given to local agencies for preventing fraud.

It has long been a requirement of the Code of Virginia for all local agencies to conduct fraud prevention investigations (fraud prevention, §63.1-108). The Code of Virginia, §63.1-58.2 and the present funding structure do not provide resources with which to afford local agencies with any additional funds over and above normal administrative costs for benefit program plus the enhancement of the reimbursement of fraud investigator salaries and fringe benefits. More importantly, the amended statute requires that "fraud prevention and investigation (be) aggressively pursued..." and that the "State Board of Social Services shall promulgate regulations to implement the provisions of this act." It is a requirement of the Code of Virginia, and therefore these regulations, to pursue a comprehensive fraud program.

At this time, no monetary incentive is given to local agencies for fraud prevention activities. It is, however, an historic required element of benefit program administration (required by both federal and state code and regulation). The state does recognize the essential nature of front end fraud. A goal of the fraud database is to be able to run a cost benefit analysis for an agency's prevention effort. Fraud prevention activities should lower the number of applications approved in error.

An effective fraud prevention effort will reduce the state's error rate and help avoid sanctions, such as those in the food stamp program. Any monetary incentives for fraud prevention would require additional general funds.

9. Fraud FREE does not include the federal match in the allocation.

The 50% federal match is actually the 50% federal administrative funding provided by the U. S. Department of Agriculture and the U.S. Department of Health and Human Services to administer federally mandated assistance programs. Therefore, under current Fraud FREE policy, local departments of social services expenses are reimbursed with money from the Fraud Recovery Special Fund (approximately 50%) and the federal match (approximately 50%). The Fraud Recovery Special Fund consists of local agency collections of fraud and non-fraud related overpayment recoveries.

10. Overpayments recovered by local departments of social services will not support the Fraud FREE Program. A general fund allocation is needed to support the program.

Since the statewide fraud program has just been implemented, we do not have sufficient data on collections to prove one way or another that Fraud FREE can be supported solely by collections and the federal match. It was our projection, based upon available data when the amendment to §63.1-58.2 was proposed, that the one time allocation of \$750,000 in general funds, collections

(along with federal matching funds) had the potential to support the salaries of fraud investigators.

There are several issues which impact the ability of the Special Fund to solely support the Program. A large percentage of outstanding overpayments involve the AFDC (Aid to Family with Dependent Children Program) and the Food Stamp Program. Portions of grants in the AFDC Program and Food Stamp benefits contain federal dollars. For example, 50% of an AFDC grant is federal. The same issue occurs with food stamp coupons, which are funded with 100% federal dollars. The Food and Nutrition Service permits states to retain only 35% of fraud related over issuance recoveries and 20% of non-fraud related over issuance recoveries. When recovering overpayments, the federal share is returned to the federal government. The state, therefore, does not retain the full amount of recoveries.

Also, courts may sentence individuals convicted of welfare fraud to make relatively small restitution payment amounts on a monthly basis over a period of many years. Such scheduling, coupled with the repayment to the federal government, limits the amount retained by the state (As an example, a recent case required only \$40 a month payments for a \$42,000 overpayment).

11. Staffing for many local fraud units is inadequate.

A formula was derived using historical data reported by satisfactorily performing Enhanced Fraud Control and Collections (EFCC) Program agencies. It was decided that in those agencies, the total number of TANF (Temporary Assistance to Needy Families) and Food Stamp active cases, divided by the number of fraud investigators, would result in a workload standard to apply statewide. The results indicated that, on average, there should be one fraud investigator for every 1,800 TANF and Food Stamp active cases. This number provided a basis for the staffing allocation formula.

12. Fraud investigators are prohibited from performing collection activities.

The fraud investigator in many local departments of social services monitors the collection of overpayments. The clerical staff posts payments and sends out notices of payment due. Collection and Clerical functions are not funded through the Fraud FREE program. It is incumbent upon the local department of social service to provide clerical support.

13. The department incorrectly confuses the ongoing eligibility determination process with the knowledge, skills, and abilities required to do front-end fraud prevention and investigation. The local departments take exception this unfortunate misunderstanding between front-end fraud prevention and on-going responsibilities.

The fraud function is inherent in the administration of the eligibility process. The Code of Virginia, §63.1-108 requires local agencies to investigate questionable applications for assistance. The requirement of the Code to investigate a questionable application is a higher standard than eligibility verification. The eligibility process, which provides routine information verification, does not rise to the investigation standard as required by the Code. Specifically, the Code states, "Upon receipt of the application for assistance, the local superintendent shall make or cause to be made promptly such investigation as he deems necessary to determine the

completeness and correctness of the statements contained in the application and to ascertain the facts supporting the application and such other information as the local board or the Commissioner may require, and shall submit his recommendations in writing to the local board."

The Code of Virginia, §63.1-124 requires the investigation of on-going fraud, and states, "Whoever obtains, or attempts to obtain or aids or abets any person in obtaining, by means of a willful false statement or representation, or by impersonations, or other fraudulent device, assistance or benefits from other programs designated under rules and regulations of the State Board of Social Services or Health of the Board of Medical Assistance Services to which he is not entitled or who fails to comply with the provisions of §63.1-112, shall be deemed guilty of larceny, and upon conviction, shall be punished as specified in Article 3 of Chapter 5 of Title 18.2."

Additionally, the state reiterated in September, 1992, that "fraud detection and investigation are essential and integral components" of all programs and is part of administration of benefit programs (Information Bulletin #92-75). Prevention and investigation of welfare fraud are not new mandates. The only new requirement by the Code is the establishment of a separate fraud unit, in which fraud prevention and control are the primary function

The statement is made that most workers do follow-up and verification of questionable information and refer cases to the fraud investigator to pursue. While this may be true in some agencies, the Department's experience with the front-end pilot indicated that this is not accurate for all agencies. The greatest challenge with the front end pilot was in getting eligibility workers to make referrals to the fraud investigator. At most pilot sites, eligibility workers would make one referral a month, or less. Fraud investigators require different skills than eligibility workers, and the fraud function is not a primary function of the eligibility worker.

14. Local departments of social services will be required to operate Fraud FREE, even if there is inadequate funding.

If funds were insufficient to support the dedicated Fraud FREE Unit, fraud control activity would still be required by federal regulation and state code. Regulations for federal assistance programs are specific in requiring the conduct of fraud control activity. The Code of Virginia continues to require local departments of social services to initiate investigations into questionable applications (front end investigations) and to investigate active or closed cases in which fraud may exist. This is not a new requirement and is not optional. The only portion of Fraud FREE that the code stipulates is contingent upon reimbursement is the establishment of fraud and investigations units (i.e. separate and distinct units).

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the

proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

There are no substantial changes to the regulation. Four technical amendments have been made, based upon comments received during the public comment period.

Part I, 22 VAC 40-325-10 Definitions: "Collections means all overpayment moneys collected or recovered (recouped) by local departments of social services related to food stamp, TANF, and other federal benefit programs administered by the Department net any refunds due to the federal government." In this change, the Department added the definition of the term "collections", in the regulation. This term has specific meaning to the regulation and was determined to be necessary to eliminate any confusion.

Part II, 22 VAC 40-325-20 Fraud Reduction/Elimination Effort, Section C: "To the extent that funding is available in the Fraud Recovery Special Fund, any general fund appropriation for this activity and any federal funds available for this purpose, local departments which are in compliance with Section 63.1-58.2 of the Code of Virginia, the regulations contained herein, and Department of Social Services FREE Program policy, shall be reimbursed for the direct costs of approved Fraud FREE Programs." In this change, the Department identified the three funding sources for the FREE program.

Part II, 22 VAC 40-325-20 Fraud Reduction/Elimination Effort, Section C, 2.: "Requests in funding in subsequent years shall be evaluated based upon one or more of the following criteria:" This change was made to clarify the criteria which the Department may use to determine future funding for local agencies.

Part II, 22 VAC 40-325-20 Fraud Reduction/Elimination Effort, Section C, 2: "In order to receive full reimbursement in subsequent years, the state retained portion of a local agency's combined collections must equal or exceed the local share of the reimbursed cost of its positions dedicated to FREE. This change was made to clarify the amount of overpayment collections for which the local department is responsible, to receive full reimbursement.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

The regulation would have no impact on parental authority and rights in education, nurturing or supervision of their children;

The regulation would promote self-sufficiency for citizens of the Commonwealth by ensuring that money targeted to assist families is not diverted to individuals obtaining social services benefits fraudulently;

The regulation would have no impact on marital commitment;

The regulation would cause local agencies to actively pursue individuals who commit intentional program violations, recoup social services monies fraudulently obtained, and instill personal responsibility by denying such individuals future benefits as provided by law; therefore, it would help to ensure that public assistance benefits are received only by those eligible to receive benefits and that the benefits are received in the correct amounts.