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Periodic Review and Small Business Impact Review Report of Findings

Agency name	Department of Forensic Science
Virginia Administrative Code (VAC) Chapter citation(s)	6 VAC 40-20
VAC Chapter title(s)	Regulations for Breath Alcohol Testing
Date this document prepared	May 24, 2021

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**.

Acronyms and Definitions

Define all acronyms used in this Report, and any technical terms that are not also 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.

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 or 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 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.”

Alternatives to Regulation

Describe any viable alternatives for achieving the purpose of the regulation that were considered as part of the periodic review. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving its purpose.

6 VAC 40-20 sets out how the Department will evaluate 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.

Public Comment

Summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Be sure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. Indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response
	None received.	

Effectiveness

Pursuant to § 2.2-4017 of the Code of Virginia, indicate whether the regulation meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), including why the regulation is (a) necessary for the protection of public health, safety, and welfare, and (b) is clearly written and easily understandable.

The regulation is 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. It is clearly written, and no stakeholders have indicated difficulty in understanding its requirements.

Decision

Explain the basis for the promulgating agency's decision (retain the regulation as is without making changes, amend the regulation, or repeal the regulation).

Having reviewed 6 VAC 40-20 and received no public comment objecting to the regulation, the regulation will be retained as is without making changes.

Small Business Impact

As required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

This regulation does not have an economic impact on small businesses. Small businesses are eligible to submit their preliminary breath test devices for evaluation by the Department of Forensic Science. The criteria for approval of preliminary breath devices are set forth in 6 VAC 40-20-170. No fees are solicited by the Department for this approval process, and devices that are approved are periodically published in the Virginia Register of Regulations. Because it is implementing Code-mandated requirements imposed on the Department, there is a continued need for the regulation. No comments or complaints have been received concerning this regulation. The regulation does not overlap, duplicate or conflict with any other federal or state law or regulation. This regulation was last reviewed in 2017, and no technology, economic conditions, or other factors have changed in this area since that time. It currently meets Code requirements and user agencies' needs.