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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Commission on Virginia Alcohol Safety Action Program (VASAP)
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	24VAC35-70
<b>VAC Chapter title(s)</b>	Remote Alcohol Monitoring Device Regulations
<b>Action title</b>	New regulations covering remote alcohol monitoring devices
<b>Date this document prepared</b>	September 17, 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 is a new regulation covering remote alcohol monitoring devices required by court order.

### 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.*

"VASAP" means the Commission on Virginia Alcohol Safety Action Program.

"ASAP" means one of the 24 local Alcohol Safety Action Programs in the VASAP system located throughout the Commonwealth of Virginia.

**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 Executive Order 14 (as amended, July 16, 2018), "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the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."*

Senate Bill 439 (2020 General Assembly Session). See "Legal Basis" below.

**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.*

Senate Bill 439 was passed by the 2020 general assembly and signed by the governor. This bill incorporated SB 154 and SB 520 and made changes and additions to §§ 18.2-270.1, 18.2-270.2, 18.2-271.1 and 18.2-272 of the Code of Virginia. Section 18.2-270.2 directs the Executive Director of the Commission on VASAP or his designee, pursuant to approval by the commission, to certify remote alcohol monitoring devices for use in the Commonwealth and adopt regulations and forms for the installation, maintenance, and certification of such remote alcohol monitoring devices.

**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.*

Offenders who are eligible for an ignition interlock are usually subject to a number of additional driving restrictions such as limiting the permissible purposes for which they can drive. A new law will permit courts, upon request of offenders, to eliminate these additional driving restrictions when remote alcohol monitoring devices are used in combination with an ignition interlock. Unlike ignition interlock devices, which are designed to prevent attempts to drive under the influence, remote alcohol monitoring devices only provide a notification that someone has a prohibited alcohol concentration at a certain time and location. Remote alcohol monitoring devices do not prevent someone from driving under the influence.

New legislation requires the Commission on VASAP to develop regulations regarding remote alcohol monitoring devices. These proposed regulations are similar in content to Virginia's ignition interlock regulations, but include language to encompass the wide variety of remote alcohol monitoring devices on the market that use varying technology.

**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 proposed regulation includes sections addressing the qualifications of remote alcohol monitoring device manufacturers and service providers; training and certification of remote alcohol monitoring technicians and state directors; remote alcohol monitoring device specifications and calibration; program participation fees; customer orientation training; and record keeping.

**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.*

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Remote alcohol monitoring devices protect the public by ensuring that persons prohibited from drinking by court order adhere to their probationary requirements. Courts and probationary agencies will have the benefit of receiving real-time information about offenders they are supervising.

A new law, effective July 1, 2021, permits convicted DUI offenders to drive with the sole driving restriction being the installation of an ignition interlock, provided they agree to remote alcohol monitoring as well. This provides drivers who opt to submit to remote alcohol monitoring, in combination with an ignition interlock device, the freedom to drive at any time to any location.

The manufacturers and service providers of remote alcohol monitoring devices will have an opportunity to conduct business in Virginia by providing requested services to this offender population.

**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.*

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There are no applicable federal requirements.

**Agencies, Localities, and Other Entities Particularly Affected**

*Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "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.*

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Local courts, that incorporate remote alcohol monitoring devices into their sentencing and probation options, may experience increased activity due to noncompliance hearings. It is anticipated, however, that there will not be many DUI offenders who opt to submit to remote alcohol monitoring to eliminate

other driving restrictions due to the expense involved. Even if desired, many offenders may not be able to afford the combined cost of a remote alcohol monitoring device and an ignition interlock device.

Alcohol Safety Action Programs may provide remote alcohol monitoring services if they choose to do so, but this is not required. Other business entities may qualify to become service providers of remote alcohol monitoring devices.

**Economic Impact**

*Pursuant to § 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 change versus the status quo.*

**Impact on State Agencies**

<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	The Commission on VASAP will receive \$30 per month for each remote alcohol monitoring device in service, paid to the commission by the service provider from fees charged to the offender.
<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.	n/a
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	Improved probationary supervision of offenders.

**Impact on Localities**

Projected costs, savings, fees or revenues resulting from the regulatory change.	n/a
Benefits the regulatory change is designed to produce.	Improved monitoring of offenders, enabling more informed decisions by local courts. When combined with an ignition interlock, the remote alcohol monitoring device permits convicted DUI offenders more freedom to drive when and where they desire.

**Impact on Other Entities**

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.	Any businesses that qualify to provide remote alcohol device monitoring services may profit.
Agency's best estimate of the number of such entities that will be affected. Include an estimate	Manufacturers of the devices are permitted to subcontract with service providers. It is

<p>of the number of small businesses affected. Small business means a business entity, including its affiliates, that:</p> <ul style="list-style-type: none"> <li>a) is independently owned and operated and;</li> <li>b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</li> </ul>	<p>estimated that each manufacturer will need 20 to 25 service centers to provide adequate statewide coverage.</p>
<p>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:</p> <ul style="list-style-type: none"> <li>a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses;</li> <li>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change;</li> <li>c) fees;</li> <li>d) purchases of equipment or services; and</li> <li>e) time required to comply with the requirements.</li> </ul>	<p>Manufacturers desiring to conduct business in the Commonwealth would be required to pay the following proposed fees to the Commission on VASAP:</p> <ul style="list-style-type: none"> <li>\$250 nonrefundable application fee.</li> <li>\$50 annual review fee for each remote alcohol monitoring service location.</li> <li>\$30 monthly administrative fee for each offender.</li> <li>\$250 retest fee for service provider employees who have to retake the required certification test.</li> <li>\$250 for each new remote alcohol monitoring device proposed for use in the Commonwealth.</li> </ul> <p>Service providers may charge monitored offenders up to:</p> <ul style="list-style-type: none"> <li>\$80 for initial remote alcohol monitoring enrollment and offender orientation.</li> <li>\$330 per month for device calibration and monitoring (includes monthly administrative fee).</li> <li>\$10 per month for optional device insurance.</li> <li>\$50 plus mileage for service calls, not to exceed 100 miles.</li> <li>\$35 for missed appointments.</li> <li>10% over the actual replacement cost of units that are stolen or damaged when the offender did not purchase the optional insurance.</li> </ul> <p>Service providers are required to maintain an indigency fund to assist offenders who are declared to be indigent by the court.</p> <p>Service providers will need to have a service center where orientation can occur. The service center must be capable of securing all client files (e.g., locked file cabinets) to ensure the maintenance of customer confidentiality.</p> <p>A service center must be in place and all applicable fees paid prior to conducting business.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>Improved public safety and reduced driving restrictions for persons opting to be monitored by a remote alcohol monitoring device in conjunction with an ignition interlock device.</p>

**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.*

Creation of these regulations is required by the Code of Virginia.

**Regulatory Flexibility Analysis**

*Pursuant to § 2.2-4007.1B 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.*

The creation of these regulations will provide opportunities for small businesses to become service providers for remote alcohol monitoring device manufacturers. The courts rely on the remote alcohol monitoring devices to function reliably and for offenders to be monitored properly. To ensure the integrity of the remote alcohol monitoring program, the compliance and reporting requirements established in these regulations are purposely strict.

**Periodic Review and Small Business Impact Review Report of Findings**

*If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable.*

*In addition, 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.*

Little impact is anticipated on small business since the remote alcohol monitoring manufacturers already have service providers in the state. The service providers, employees and devices will now be regulated.

**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.*

<b>Commenter</b>	<b>Comment</b>	<b>Agency response</b>
Kari Mahoney	Opposes the SCRAM transdermal remote alcohol monitoring device due to it detecting other forms of alcohol, not ethanol exclusively. Objected to comments from Toby Taylor, a representative of Smart Start, who cited specific administrative code sections not yet published for viewing and comment by the public.	<p>The electrochemical fuel cells used in remote alcohol monitoring devices are designed to have a high specificity for detecting ethanol, while minimizing effects from other substances. In addition, ASAP monitoring is designed to identify events that are, or are not, due to consumed ethanol.</p> <p>Creation of the remote alcohol monitoring device regulations by the Commission on VASAP was mandated by the general assembly. The agency relies on assistance from many other states, businesses and individuals with industry experience and expertise to advise us in creating drafts of the regulations. Smart Start was one such organization. The document has been revised multiple times since their input. No draft of the regulations is required to be made public at the NOIRA stage. A final draft is being made public at the Proposed stage of the regulatory process for public comment. There will be a public hearing scheduled as well.</p>
Toby Taylor	Supports implementation of the regulations.	
Matt C	Opposes SCRAM	
Chandra Dickie	Opposes SCRAM	
Talbert Dunn	Opposes SCRAM	
David Hites	Opposes SCRAM, ignition interlock and electrochemical fuel cells since they detect other forms of alcohol besides ethanol.	
Kevin Lyman	Opposes SCRAM technology	
Cynthia Hites	Opposes SCRAM and ignition interlock since its fuel cell detects other types of alcohol besides ethanol. Views SCRAM as being pseudoscience, unethical, fallible, and unconstitutional.	

**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.*

The Commission on Virginia Alcohol Safety Action Program is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of 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 Christopher Morris, Commission on VASAP, 1111 E. Main Street, Suite 801, Richmond, VA 23219, (804) 786-5895, (804) 786-6286 (fax), or [cmorris@vasap.virginia.gov](mailto:cmorris@vasap.virginia.gov). In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

**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.*

**Table 2: Promulgating New VAC Chapter(s) without Repeal and Replace**

<b>New chapter-section number</b>	<b>New requirements to be added to VAC</b>	<b>Other regulations and laws that apply</b>	<b>Change, intent, rationale, and likely impact of new requirements</b>
24VAC35-70-10	Definitions		Provides relevant definitions for clarifying the contents of the regulations.
24VAC35-70-20	Explains when remote alcohol monitoring devices are required.		Clarifies that remote alcohol monitoring is only required when ordered by a court.
24VAC35-70-30	Approval of remote alcohol monitoring device manufacturers.		Explains the requirements manufacturers of remote alcohol monitoring devices have to meet in order to



			contract for the provision of services in Virginia.
24VAC35-70-40	Remote alcohol monitoring service facility certification.		Outlines the requirements remote alcohol monitoring service facilities must meet in order to open and remain in business.
24VAC35-70-50	Remote alcohol monitoring device specifications and certification.		Explains what hardware and software specifications must be met for a remote alcohol monitoring device to be certified for use in Virginia.
24VAC35-70-60	Fees		Establishes the fees manufacturers must pay if they desire to conduct remote alcohol monitoring business in the state. Outlines the fees that service providers may charge offenders.
24VAC35-70-70	Suspension/revocation		Lists the reasons a remote alcohol monitoring device or service facility may lose its certification to conduct business in Virginia.
24VAC35-70-80	Orientation		Requires that offender be provided orientation and training in the proper use of the remote alcohol monitoring device.
24VAC35-70-90	Calibration		Addresses the requirement for remote alcohol monitoring devices to be calibrated and the associated procedures.
24VAC35-70-100	Remote alcohol monitoring device retrieval		Explains the process and procedures for removal and retrieval of the remote alcohol monitoring device.
24VAC35-70-110	Records and reporting		Lists the information and offender records that must be maintained. Outlines the requirements for reporting information from the device dataloggers and providing security of confidential information.
24VAC35-70-120	General manufacturer requirements		Lists general requirements for manufacturers to follow.
24VAC35-70-130	Service provider technician certification		Explains the prerequisites for qualifying to be a remote alcohol monitoring service provider technician, to include the certification testing process.
24VAC35-70-140	Emergency Declarations		Provides for flexibility in the regulatory requirements in the

			event of a declared state of emergency.
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