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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of Forensic Science
Virginia Administrative Code (VAC) citation(s)	_6__ VAC_40__-__30__
Regulation 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	February 14, 2018

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action.

The purpose of this regulatory action is to consider broadening the regulations so that “field test” would include presumptive mobile instruments. Virginia Code § 19.2-188.1 permits any law enforcement officer to testify 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. However, 6VAC40-30-10 currently restricts the definition of “field test” to include only “any presumptive chemical test unit used outside of a chemical laboratory environment to detect the presence of a drug.” In response to the lethal opioids that are currently being encountered, law enforcement agencies have requested that the Forensic Science Board consider the approval of presumptive mobile instruments as field tests.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and(2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity 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 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

Please describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.

In response to recent submissions of fentanyl, carfentanil and other powerful synthetic opioids, the Department has advised that special precautions should be taken to minimize exposure when handling, sampling, and field testing powders. The Drug Enforcement Administration does not recommend field testing of powders without taking proper precautions. Given these risks, many law enforcement agencies have decided to forego the use of presumptive chemical field tests by their officers.

Technology has advanced to permit the use of presumptive mobile instruments, mobile devices that use an instrumental testing method, to detect the presence of a drug in these unknown substances. In many instances, these instruments can test through clear plastic and glass packaging so that officers could field test these potentially lethal compounds without having to handle them directly. 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. While the instruments are currently significantly expensive (ranging from \$15,000 to \$20,000), they offer a non-destructive method of drug detection while greatly reducing the risk of exposure to law enforcement officers. Law enforcement agencies would not be required to purchase these instruments. However, when approved by the Department, they would be available as an alternative presumptive testing methodology for law enforcement agencies to utilize at their own discretion. The presumptive chemical tests will also remain as an option. As new instruments will continue to be developed, the regulation amendments will be drafted to address mobile instrumentation generically to allow for evolving technology.

Substance

Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

The proposed changes include:

- amendments to 6VAC40-30-10 to the definitions of “field test” and “field test kit” to include presumptive mobile instruments,
- amendments to 6VAC40-30-30 to establish a separate evaluation process for presumptive mobile instruments,
- amendments to 6VAC40-30-50 to establish a separate set of requirements for maintenance of approved status for presumptive mobile instruments, and
- amendments to 6VAC40-30-80 to establish a separate fee schedule for approval of presumptive mobile instruments.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

No viable alternatives to this proposal have been identified. The proposed amendments to the regulations would permit the approval of presumptive mobile instruments as field tests, in addition to the presumptive chemical tests currently in use. This proposal would give law enforcement agencies the option to utilize this alternative technology for the detection of drugs, but does not make it a requirement. All manufacturers, including small businesses, will be able to submit their presumptive mobile instruments to the Department for evaluation. Given the expense of the instruments, the Department intends to utilize a small number of them for the evaluation process, and then return them to the submitting manufacturer upon completion of the evaluation. While there will be a fee charged for such an evaluation, the fee established will consider only the costs incurred by the Department in evaluating the presumptive mobile instrument and the costs of any street drug preparations utilized in the evaluation.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The Forensic Science Board is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal; any alternatives to this proposal and the costs and benefits of such alternatives; and the potential impacts of the regulation.

The Forensic Science Board is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to Amy M. Curtis, Department Counsel, 700 N. 5th Street, Richmond, Virginia 23219, amy.curtis@dfs.virginia.gov, (804) 786-6848 (phone), (804) 786-6857 (fax). Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

Public hearings will be held following the publication of the Notice of Intended Regulatory Action and the proposed stage of this regulatory action and notice of those hearings will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at those times. A panel will not be used.