



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Board of Funeral Directors and Embalmers/Department of Health Professions
VAC Chapter Number:	18 VAC 65-20-10 et seq.
Regulation Title:	Regulations for Funeral Directors and Embalmers
Action Title:	Periodic review – clarification
Date:	9/19/02

This information is required pursuant 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*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

NOTE: The NOIRA stage for this action is found under the action title – Periodic review; continuing education (936/1447). Pursuant to a periodic review of regulations, the Board recommended promulgation of regulations to establish requirements for continuing education and included the issue in its NOIRA. However, those amendments are being promulgated under the same NOIRA but in a separate action following passage of HB 837 of the 2002 General Assembly.

Regulations 18 VAC 65-20-10 et seq. provide requirements for the licensure of funeral service personnel and funeral establishments, as well as for registration of crematories and transportation services and the issuance of courtesy cards to out-of-state licensees. Provisions also establish requirements for renewal or reinstatement of a license and set fees to support the regulatory and disciplinary activities of the board. Regulations set forth standards for an embalming room and preparation room in an establishment and for the retention of documents and disclosures to

consumers. Finally, grounds for unprofessional conduct of a licensee and for standards of practice are established, including restrictions on advertising.

Amendments are proposed to establish criteria for locating a branch establishment, to update requirements for a preparation room, and to provide greater assurance that all state and federal rules related to provision of funeral services are being followed.

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 must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations, levy fees, administer a licensure and renewal program, and discipline regulated professionals.

§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*
- 4. To establish schedules for renewals of registration, certification and licensure.*
- 5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
- 6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.*

7. *To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations.*
8. *To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.*
9. *To take appropriate disciplinary action for violations of applicable law and regulations.*
10. *To appoint a special conference committee, composed of not less than two members of a health regulatory board, to act in accordance with § 9-6.14:11 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final thirty days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the thirty-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 9-6.14:12, and the action of the committee shall be vacated. This subdivision shall not be construed to affect the authority or procedures of the Boards of Medicine and Nursing pursuant to §§ 54.1-2919 and 54.1-3010.*
11. *To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to conduct formal proceedings pursuant to § 9-6.14:12, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 9-6.14:11 shall serve on a panel conducting formal proceedings pursuant to § 9-6.14:12 to consider the same matter.*
12. *To issue inactive licenses and certificates and promulgate regulations to carry out such purpose. Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for reactivation of such licenses or certificates.*

The legal authority to promulgate regulations is found in Chapter 28 of Title 54.1, which sets forth statutory provisions for the licensure and practice of funeral establishments and funeral service licensees.

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+TOC5401000002800000000000>

The Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed 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.

Amendments to regulation are necessary to address several problems identified during regulatory review. For several years, the Board has been concerned that consumers were often unaware that they were dealing with a branch establishment in making funeral arrangements. There have been no criteria for establishing a branch and no requirements for disclosure or identification to the public. The Board has also been concerned that the public was often unaware that the establishment with which they were dealing was in fact a branch of a main establishment and that certain services, such as embalming, had to be performed at another location. There were also concerns that if a problem arose requiring the use of a preparation room, there may not be a plan in place to address the need. In developing regulations, the Board considered the need for disclosure and identification of a branch or chapel as a part of another establishment and also adopted amendments to require a plan for transporting dead human bodies for embalming and disclosure to the consumer of such transportation for services not available at the branch. Such requirements will protect the public by giving the consumer more information and some assurance that services not available at a branch will be performed according to a written plan.

Other amendments or additions to regulation are proposed to provide greater protection to the public health, safety and welfare in guarding against the spread of infectious disease and in assuring the waste materials are disposed of in accordance with local, state and federal law. An amendment to require courtesy card holders to practice in Virginia in accordance with the license held in another state will provide some assurance that funeral directors or embalmers are not practicing outside their expertise. An amendment to require re-inspection of a facility after it has been purchased from a previous owner will also give greater protection to employees and members of the public who come into the establishment as consumers or guests. Finally, an addition to the grounds for unprofessional conduct will make it clear that the Board can take disciplinary action against a license for any violation of law or regulation.

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 providing detail of the regulatory action's changes.

The Board of Funeral Directors and Embalmers has proposed amendments to 18 VAC 65-20-10 et seq. to add a definition and requirements for a branch establishment, modify the requirements for a change of ownership, provide additional access to licensure by endorsement, clarify the scope of practice for courtesy card holders, and require persons who handle remains with a surface transportation and removal service registration to have OSHA training. Other

recommendations for the preparation room and its equipment and for documentation of embalming came from a task force on the inspection process.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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, please include a sentence to that effect.

Advantages or disadvantages to the public:

The intent of the amended regulations is to better inform and protect consumers of funeral services. Requirements for a branch are intended to ensure that the public dealing with such an entity is aware that it is a branch of another establishment and that the deceased may be transported to another facility for purposes of embalming or other services not available at the branch. Requirements for courtesy card holders and for surface removal and transportation companies will provide some assurance that the public is protected by adherence to OSHA standards and by having qualified professionals handling some aspect of the disposition of remains.

There are no disadvantages of these amendments to the public who is better protected and informed by the amendments.

Advantages or disadvantages to the agency or the Commonwealth:

Clarification of certain rules may result in fewer calls to the Board office. Modifications to regulation that responded to the recommendations of the Inspection Task Force may result in fewer citations on inspection for such things as the location of the embalming report or the eye wash station and the storage of embalming and preparation materials. Fewer inspection violations could result in fewer disciplinary cases being opened for the Board.

There are no disadvantages to the agency or the Commonwealth.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

Projected cost to the state to implement and enforce:

(i) Fund source: As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation.

(ii) Budget activity by program or subprogram: There is no change required in the budget of the Commonwealth as a result of this program.

(iii) One-time versus ongoing expenditures: The agency will incur some one-time costs (less than \$1,000) for mailings to the Public Participation Guidelines mailing lists, conducting a public hearing, and sending copies of final regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and Board meetings already scheduled.

Projected cost on localities:

There are no projected costs to localities.

Description of entities that are likely to be affected by regulation:

The entities that are likely to be affected by these regulations would be licensed funeral directors, embalmers or licensed funeral service providers and the funeral establishments in which they work. In addition, there may be some effect on surface removal and transportation firms and courtesy card holders.

Estimate of number of entities to be affected:

Funeral service providers	1446
Funeral directors	163
Embalmers	8
Courtesy card holders	88
Crematories	53
Surface transportation and removal services	34
Funeral establishments	495

Projected costs to the affected entities:

There should be no additional cost to most licensees; the requirements for a “branch” or “chapel” will impose no new costs on licensees. The required identification and disclosures can be added to existing forms or set out separately.

There will be a new fee for approximately 20 funeral establishments that are seeking or have been granted a waiver for a full-time manager. The fee of \$100 may be shared by the establishments sharing a manager. Initial approval or renewal of the waiver is not automatic and must be handled individually by staff, who must verify with the office of Vital Statistics that the funeral homes continue to qualify. Board approval of a waiver has typically been delegated to

the Executive Director, but the Board retains authority to approve or disapprove so it considers the waivers at each of its meetings.

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 cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

18 VAC 65-20-10. Definitions.

The Board has defined a “branch” of a main establishment as a secondary location where the practice of funeral services occurs which is owned and operated by a main establishment.

18 VAC 65-20-50. Posting of license.

Amendments will clarify that any location within the establishment where the license would be conspicuous to the consumers of funeral services is an acceptable location. It is not necessary for licenses to be conspicuous to the “public” attending a funeral or visitation, but it is important to have them available to persons making at-need or preneed arrangements.

18 VAC 65-20-70. Required fees.

Since these regulations were last modified, the Department has adopted “Principles for Fee Development” to establish guidelines for some consistency among fees and professions. In light of the Principles, the Board examines its fees to determine if they are consistent and equitable relative to the actual cost of certain activities. As a result, two fees have been lowered – the fee for a duplicate license or certification is reduced from \$25 to \$15 and the fee for a duplicate wall certificate is reduced from \$50 to \$25. A fee of \$100 is added to offset the cost involved in granting a waiver for the required full-time manager.

18 VAC 65-20-170. Requirements of an establishment license.

Subsection D sets the requirements for a change of ownership; the Board has amended this section to require submission of documentation to determine ownership and to allow the re-inspection to occur on a schedule determined by the Board, but not less than one year after the change. Typically, a change of ownership does not result in immediate changes in the facility, but over time, the new owners may not maintain the standards of the previous owners. Therefore, a delayed inspection might be more useful in detecting possible deficiencies.

A new subsection E is added to state the identification requirements for a branch establishment, which include identifying the main establishment on the license, general price list, itemized statement, and all public informational materials or advertisements.

A new subsection F is added to ensure that the consumer is informed if transportation of the deceased is necessary for preparation or embalming and that a written plan be maintained detailing the method and approximate time for transporting.

18 VAC 65-20-350. Requirements for licensure by reciprocity or endorsement.

Regulations have been amended to provide greater access to those who were licensed out-of-state and now wish to practice in Virginia. Currently, this regulation has been interpreted to require passage of the national examination for licensure by endorsement. Prior to 1972, there was no national exam, so it was not required in Virginia or any other state. Amendments would clarify that there be comparability of examinations, so if a state examination was the standard in Virginia in the year an applicant was initially licensed in another state, the state examination from that state would be the standard for licensure by endorsement.

18 VAC 65-20-400. Registration of surface transportation and removal services.

The Board has added a requirement that anyone planning to operate such a service verify that he has been trained in the requirements of OSHA (Occupational Safety and Health Administration) for this own protection and that of the public who may be exposed to the remains.

18 VAC 65-20-440. Courtesy cards.

This section has been clarified to ensure that a courtesy card holder only practices in Virginia to the extent of his license in another state. For example, if someone holds only an embalmers license in Maryland, the Virginia courtesy card would allow him to embalm a body in this state but would not entitle them to make funeral arrangements. Also, the license held by the courtesy card holder in another state should be annually verified to the Board.

18 VAC 65-20-500. Disciplinary action.

A general provision stating that failure to comply with applicable federal and state laws and regulations may constitute grounds for disciplinary action has been added.

18 VAC 65-20-570. Condition of preparation room.

Rather than a strict prohibition on storing inventories on the floor of the preparation room, the regulation has been modified to require that materials be stored in a container impervious to water or in a manner that protects them from contamination.

18 VAC 65-20-580. Preparation room equipment.

- The requirement for a metal or porcelain table has been expanded to require the table to be made of material impervious to water, such as fiberglass.
- The requirement for a hydroaspirator is amended to require either an electric aspirator or hydroaspirator equipped with a vacuum breaker.

- Rather than requiring for an eye wash station in the prep room, the rule is modified to require “a readily-accessible” station.

18 VAC 65-20-590. Disposal of waste materials.

To ensure compliance with section 590, an amendment is necessary to require the establishment to provide the Board or its inspectors with evidence of a contract with a medical waste disposal company.

18 VAC 65-20-700. Retention of documents.

While some lists and documents may be maintained for all branches at the main establishment, the regulation was clarified to ensure that embalming reports be retained at the site of the embalming.

Appendix I. General Price List.

- Under the price list for embalming, two prices are currently required – one for embalming of normal remains and one for autopsied remains. Many establishments have a single price, so a notation is added that if the charges are identical, only a single charge for embalming may be listed on the GPL.
- Under the category for immediate burial, the price range for “immediate burial with alternative container” should be listed as “immediate burial with the lowest price container”. Then a new section “C” is added to list the cost for “immediate burial with the lowest price casket.” There have been various interpretations of this subsection, so it needs to be clarified.
- Under the category of direct cremation, the price range listed needs to be clarified; it should indicate the lowest price of cremation with a container provided by the purchaser to the highest price for a casket acceptable for cremation. In the costs for services listed, the direct cremation with alternative container is amended to show the costs with the “lowest price” alternative container. Then a new section “C” is added to list the cost for “cremation with the lowest price casket.”

Appendix III. Itemized Statement of Funeral Goods and Services Selected.

The disclosure under the embalming section needs to be corrected to state that you do not have to pay for embalming you did **not** approve if you selected arrangements such as direct cremation or immediate burial.

Appendix IV. Embalming Record.

- The instruction to place an “N/A” in any blank that does not apply needs to be amended to make it clear that it is acceptable to draw a line through the section or provide some other indication that a section is not applicable to that embalming. It is not acceptable to simply leave the section blank.
- Under “Aspiration” there needs to be an indication for “yes or no.”

- It is unnecessary to require the signature of the receiving funeral director on this form, so it has been eliminated.

Alternatives

Please describe the specific 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.

To address individual differences and disparities in interpretations, the Board involved all the inspectors and the Deputy Director for Enforcement in a workshop in September, 2000. From that evolved a Task Force on the Inspection Process to review each regulation as it related to an item on the inspection checklist. From that effort, the Board developed an Inspection Guidance Document to offer licensees and inspectors its interpretation of how each regulation is to be enforced. For example, regulation 18 VAC 65-20-540 requires that “the floor and wall surfaces shall be of a material or covered by a material impervious to water;” the guidance on that regulation is that enamel-based paint is an acceptable surface. That guidance has alleviated a lot of confusion among licensees and inspectors, some of whom understood the regulation in that manner and others who did not. In offering guidance, the Board was careful to interpret the regulation rather than alter it, but did use the work of the Task Force in making several recommendations for amendments during its regulatory review.

During its review of regulations, the Board identified the following issues and discussed various alternatives for addressing them:

1) Definition and requirements for a “Branch establishment”

Since branch establishments are not required to meet the same standards as a main funeral establishment (primarily, no preparation room is required for embalming), many facilities are licensed as branches of another. The problem lies in the lack of definition or requirement for a branch, so the Board has no basis on which to deny licensure to a facility that applies. The intent of establishing a branch is have different secondary locations of the “parent” establishment, but the result has sometimes been a nebulous connection which is not apparent to the consumer. For example, the majority of branches carry the name of the main establishment and identify the geographic location of the branch, but there is no requirement that a branch be so identified, that it be located within the same community or that it even have the same ownership.

To address this long-standing concern, the Board considered two alternatives – define “branch” in the Code of Virginia through the introduction of legislation or in its regulations through a regulatory action. In either alternative, the challenge has been to develop a definition that is reasonable, effective and not overly burdensome. During the review of its regulations, the Board was advised by counsel that it could address the issue through regulation. The Board has studied definitions from a number of other states and finds that a branch is usually defined in terms of common ownership and/or specific, limited functions and/or distance between establishments.

Another option to defining a branch is to eliminate the concept of a “branch” and issue limited licenses to establishments that wish to be exempt from certain requirements of regulation – such

as the preparation room. Similar to those issued to some pharmacies, a limited license would identify and limit the purpose and function of the facility based on the application presented to the Board. The Board considered this option and did not choose to pursue a legislative change to implement limited licenses.

However, there was concern that a branch located some distance from a main establishment may not adequately provide such services as embalming without risking the condition of the remains. In developing regulations, the Board considered the issue of distance and looked for an appropriate standard to adopt. According to law, two funeral establishments located no more than 35 miles apart are allowed to share a manager provided they have a limited number of funerals per year. So the Board initially adopted the 35-mile limit for the distance between a branch and a main establishment. Concerns were expressed by the agency's Director that the mileage standard was arbitrary, restrictive and not responsive to the issues being addressed. Therefore, the Board amended its initial proposal to delete the mileage limitation and instead adopt standards for disclosure and identification of the relationship between a branch and a main establishment and for the need to transport the remains for embalming or preparation. Amendments also require a written plan outlining the method and approximate time required to transport remains for embalming or any service for which a preparation room is required.

2) Recommendations of the Task Force on the Inspection Process

Many of the proposed changes to these regulations result from recommendations of the Task Force on Inspections that looked at the process and deficiencies and identified improvements. For example, the requirement for an inspection at the time ownership has changed is unnecessary – often there is no change in the facility at that time, but changes made by the new owner may need to be inspected at a later date. Rules for the preparation room equipment and condition have not always been consistently enforced, and in some cases are unnecessary, so several amendments are suggested. The inspectors have sometimes found it difficult to confirm compliance with the requirement for waste materials to be disposed of in conformity with local, state, and federal law; the proposed amendment would clarify that a record of a contractual agreement with a licensed medical waste disposal provider is necessary.

The regulations also clarify that embalming documents must be stored at the establishment where the embalming occurred and that licenses must be posted in a place conspicuous to the consumers of funeral services.

Finally, amendments to the price lists are necessary to clearly communicate with and disclose to the consumer; in doing so, the inspectors will be able to inspect more consistently and equitably.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

An announcement of the board's intent to amend its regulations was posted on the Virginia Regulatory Townhall, sent to the Registrar of Regulations, and sent to persons on the PPG

mailing list for the board. Public comment was received until December 5, 2001. During the 30-day comment period, no comments were received from members of the public. However, the Regulatory Review Committee specifically consulted with others who have particular expertise in certain aspects of practice, reviewed comments regarding regulations received in previous months, reviewed recommendations resulting from a Board workshop in 2000 on issues in the funeral industry, and considered recommendations from a Task force on the Inspection Process. During its meetings, the Committee invited and received full participation by parties interested in the regulations of the Board.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

The Legislative/Regulatory Committee of the Board has carefully reviewed existing regulations and worked with interested parties to address any clarifications or amendments necessary. The regulatory review report was reviewed and approved by the Department of Planning & Budget, the Secretary of Health and Human Resources and the Office of the Governor. The Assistant Attorney General who provides counsel to the Board has been involved during the development and adoption of proposed regulations to ensure clarity and compliance with law and regulation.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

Public participation guidelines require the Board to review regulations each biennium or as required by Executive Order. Regulations will be reviewed again during the 2004-05 fiscal year.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential 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.

In its preliminary analysis of the proposed regulatory action, the agency has determined that there is no potential impact on the institution of the family and family stability. Likewise, there will be no increase or decrease in disposable family income.