



Virginia  
Regulatory  
Town Hall

## Proposed Regulation Agency Background Document

<b>Agency Name:</b>	Virginia Department of Health
<b>VAC Chapter Number:</b>	12 VAC 5-371 and 12 VAC 5-410
<b>Regulation Title:</b>	Regulations for the Licensure of Nursing Facilities Regulations for the Licensure of Hospitals in Virginia
<b>Action Title:</b>	Promulgating permanent regulations from an emergency action
<b>Date:</b>	April 2001

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summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed.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.*

Section 32.1-102.2 of the Code of Virginia (Code) requires the State Health Commissioner, through regulation, to condition a nursing facility or hospital license on whether the applicant has complied with any agreement as a result of the granting of a Certificate of Public Need (COPN) or upon the up-to-date payment of any civil penalties owed as a result of the willful failure to honor the condition of a COPN. This action is to finalize the emergency regulatory action that became effective on December 31, 1999. Currently, the nursing facility and hospital licensure regulations address the initial and renewal application process for licensure.

## 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.*

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The second enactment clause of Senate Bill 1282 (SB1282) and House Bill 2369 (HB2369) of the 1999 session of the General Assembly mandated the implementation of the “Provisions of [each] act within 280 days of the date of enactment,” which occurred on March 29, 1999. The Department responded to this directive by promulgating emergency regulations that became effective December 31, 1999. The Administrative Process Act, specifically section 9-6.14:4.1 C 5 of the Code, states that an emergency regulation may not exceed 12 months in duration. If any agency determines to continue regulating the subject matter governed by the emergency regulation, a regulation to replace the emergency regulation shall be promulgated. Because section 32.1-102.2 of the Code requires the conditioning of initial and renewal licenses for nursing facilities and hospitals, the Department must now take action to convert the emergency regulations to permanent regulations.

In addition, the Board of Health has the authority to promulgate regulations granted under section 32.1-12 of Title 32.1 of the Code.

Sections 9-6.14:4.1 C 5, 32.1-12, and 32.1-102.2 of the Code are available through the Virginia Department of Legislative Services LIS website (<http://leg1.state.va.us/lis.htm>).

The proposed amendments do not exceed federal minimum requirements. The Office of the Attorney General has certified that the department has the statutory authority to promulgate the proposed amendments and they comport with applicable state 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.*

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An amendment to section 32.1-102.2 of the Code requires the State Health Commissioner to “condition” the initial or renewal of a nursing facility or hospital license on whether the applicant has complied with any agreement to provide a level of care at a reduced rate to

indigents or accepted patients requiring specialized care as a result of the granting of a Certificate of Public Need (COPN). In addition, renewal licenses shall be conditioned on the up-to-date payment of any civil penalties owed resulting from a willful failure to honor conditions of a COPN. Since the amendment to the Code affects the licensure of nursing facilities and hospitals, amendment to the licensure regulations is required, specifically 12 VAC 5-371-40 and 12 VAC 5-410-70 respectively. Amendments to the regulations ensure that nursing facilities and hospitals are held accountable for meeting the conditions of an issued COPN and are providing the additional services as agreed upon by the provider when accepting the COPN.

## 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.*

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Specifically, nursing facilities and hospitals must attest in the licensure application that they have complied with the COPN conditioning agreement. In addition, the granting of a renewal license is contingent upon the up-to-date payment of any civil penalties owed as a result of the willful refusal, failure, or neglect to honor the conditions established by the issued COPN.

## 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.*

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Prior to the 1999 legislative action, there had been no accountability to assure that medical care facilities were complying with the conditions of the agreed upon issued COPNs or that civil penalties resulting from failure to honor conditions of a COPN were imposed or paid. Specifically, nursing facilities and hospitals must attest in the licensure application that they have complied with the COPN conditioning agreement. In addition, the granting of the renewal license is contingent upon the up-to-date payment of any civil penalties owed as a result of the willful refusal, failure, or neglect to honor the conditions established by the issued COPN. The authority to promulgate the amendments to the regulations is mandated in section 32.1-102.2 of the Code, a result of the passage of SB1282 and HB2369 of the 1999 session of the General Assembly. The Department does not expect there to be any additional issues related to the conditioning of the license application that will need to be addressed as the amended regulation is formally promulgated. There are no disadvantages to the public or the Commonwealth as a result of these amendments.

## 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.*

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Since the attestation now required as a result of the 1999 legislative action has become a part of the licensure application process, it does not add to the current costs of applying for or issuing nursing facility and hospital licenses. State General Funds (0100) and licensure service fees fund the annual nursing facility and hospital licensure program. Licensure service fees average \$125,000 annually. As prescribed by law, licensure service fees for nursing facilities and hospitals shall not be less than \$75 nor more than \$500. In 1999, the cost of the licensure program was \$1,153,764: Program/subprogram: 561/03. These amendments to the regulation will affect 265 licensed nursing facilities and 123 licensed hospitals. There is no direct cost to localities.

## 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.*

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In both 12 VAC 5-371 (for nursing facilities) and 12 VAC 5-540 (for hospitals) regulations, two additional standards were added to the existing sections regarding the licensure process. These additional standards, 12 VAC 5-371-40 E and F (for nursing facilities) and 12 VAC 5-410-70 A6 and B (for hospitals) are identical and mirror the text contained in section 32.1-102.2 of the Code addressing the conditioning of these licenses under the agreed upon terms of the COPN.

## 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.*

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As stated previously, the authority to promulgate the amendments to the regulations is mandated in section 32.1-102.2 of the Code as a result of the passage of SB1282 and HB2369 of the 1999 session of the General Assembly. Promulgation of the amendments is the only means available for the Board of Health to comply with the clear directive of the law. The proposed

amendments honor the Department's statutory charge and are the least burdensome alternative available for adequately addressing the mandate of the law.

### Public Comment

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

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A 30-day Notice of Intended Regulatory Action period was conducted from July 31, 2000 through August 31, 2000. Three letters were received regarding the proposed amendments:

Two letters stated that "it was not appropriate to link the initial or renewal of a nursing facility or hospital license to the condition of providing care at a reduced rate to indigents or accepting patients requiring specialized care as a result of a Certificate of Public Need."

The third letter "questioned the inclusion of the provision in paragraph B, which conditions license renewal on the payment of civil penalties assessed as a result of noncompliance with COPN conditions. The 1999 legislation does not authorize the imposition of this condition, and we therefore believe that its inclusion is inappropriate."

As stated previously, the amendments to the regulation are a result of changes to the law and help ensure facilities are held accountable for meeting the conditions of an issued COPN. Agency counsel was sought to determine the appropriateness of including payment of civil penalties assessed as a condition for licensure. Counsel responded that the "Board of Health has authority under section 32.1-102.4 (F) to promulgate regulations related to the Commissioner's assessment of civil penalties for failure of a person to honor an agreement as a condition of receipt of a certificate of public need to provide indigent or specialized care. The Board also has the authority under section 32.1-102.2 to promulgate regulations to condition the issuance or renewal of a license on the license's compliance with a condition agreed to for receipt of a COPN to provide indigent or specialized care. Conditioning issuance or renewal of a license on payment of any such penalty is a reasonable mechanism to enforce payment of civil penalties that the Board has the authority to promulgate. The Board has the legal authority to include provisions related to two separate code sections in one regulation."

### 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.*

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The amendments to the regulations are clearly written and understandable.

### 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.*

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Following adoption of the proposed amendments, they will be re-evaluated in conjunction with the entire Regulations for the Licensure of Nursing Facilities (12 VAC 5-371) and the Regulations for the Licensure of Hospitals (12 VAC 5-410). Mechanisms used for determining the continued effectiveness of the amendments will include: (i) any complaints received, (ii) variances requested by licensed providers, and (iii) the Department's public participation process.

### 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.*

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Neither amendment directly impacts the family unit in Virginia. However, the results of the amendments will assure that hospitals and nursing facilities are providing the indigent care that may be utilized by financially burdened families. Therefore, the amendments will promote the health of Virginia's indigent population by assuring that necessary health care services are available in their communities. The amendments do not erode the authority and rights of families in the education, nurturing, and supervision of their children; they do not discourage economic self-sufficiency, self pride, and the assumption of responsibility for oneself, one's spouse, one's children and one's parents; the amendments do not erode the marital commitment and do not adversely affect the family's disposable income.