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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Virginia Board of Health
Virginia Administrative Code (VAC) citation(s)	12VAC5-412
Regulation title(s)	Regulations for Licensure of Abortion Facilities
Action title	Amend the Regulation after Assessment and Receipt of Public Comment
Date this document prepared	April 18, 2019

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 (1 VAC 7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

This regulation governs the licensure of facilities that perform five or more first trimester abortions per month. This regulatory action seeks to assess all current regulation content and determine whether it should be amended or retained in its current form. This action may address comments received during the public comment period for this NOIRA and subsequent stages of this action, as well as comments received during the public hearing.

In addition, a periodic/small business impact review of this regulation will be conducted as part of this regulatory action. Public comment is sought on any issue relating to this regulation. Amendments may be made by the Board after review of submitted comments.

Acronyms and Definitions

Please define all acronyms or technical definitions used in the Agency Background Document. .

“APA” means the Virginia Administrative Process Act, § 2.2-4000 *et seq.* of the Code of Virginia.

“Board” means Virginia Board of Health.

Mandate and Impetus

Please 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, board decision, etc.). 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.”

Section 32.1-127(B)(1) of the Code of Virginia requires the Board to adopt regulations that include minimum standards for (i) the construction and maintenance of hospitals, nursing homes and certified nursing facilities to ensure the environmental protection and the life safety of its patients, employees, and the public; (ii) the operation, staffing and equipping of hospitals, nursing homes and certified nursing facilities; (iii) qualifications and training of staff of hospitals, nursing homes and certified nursing facilities, except those professionals licensed or certified by the Department of Health Professions; (iv) conditions under which a hospital or nursing home may provide medical and nursing services to patients in their places of residence; and (v) policies related to infection prevention, disaster preparedness, and facility security of hospitals, nursing homes, and certified nursing facilities. For purposes of this requirement, facilities in which five or more first trimester abortions per month are performed shall be classified as a category of "hospital"..

On February 21, 2019, by order entered in *Melendez v. Virginia State Board of Health* (Case No. CL17-1164), the Circuit Court of Henrico County remanded several sections of the regulation to the Board. On [DATE], the Board, after considering the order of the Henrico County Circuit Court, decided to assess all regulation content and approved the issuance of this NOIRA.

The periodic review of this regulation is mandated by Executive Order 14 (as amended July 16, 2018).

Legal Basis

Please identify (1) the agency or other promulgating entity, 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 entity to regulate this specific subject or program, as well as a reference to the agency or promulgating entity’s overall regulatory authority.

Section 32.1-12 of the Code of Virginia gives the Board the responsibility to make, adopt, promulgate, and enforce such regulations as may be necessary to carry out the provisions of Title 32.1 of the Code of Virginia. Section 32.1-127 of the Code of Virginia requires the Board to adopt regulations that include minimum standards for (i) the construction and maintenance of hospitals, nursing homes and certified nursing facilities to ensure the environmental protection and the life safety of its patients, employees, and the public; (ii) the operation, staffing and equipping of hospitals, nursing homes and certified nursing facilities; (iii) qualifications and training of staff of hospitals, nursing homes and certified nursing facilities, except those professionals licensed or certified by the Department of Health Professions; (iv) conditions under which a hospital or nursing home may provide medical and nursing services to patients in their places of residence; and (v) policies related to infection prevention, disaster preparedness, and facility security of hospitals, nursing homes, and certified nursing facilities. For purposes of this requirement, facilities in which

five or more first trimester abortions per month are performed shall be classified as a category of "hospital". (§ 32.1-127(B)(1))

Purpose

Please describe the specific reasons why the agency has determined that this regulation 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.

By enacting § 32.1-127(B)(1), the General Assembly required the Board to adopt regulations governing the licensure of facilities in which five or more first trimester abortions per month are performed. Section 32.1-127(A) requires such regulations to be in substantial conformity to the standards of health, hygiene, sanitation, construction and safety as established and recognized by medical and health care professionals and by specialists in matters of public health and safety. In order to ensure that such regulations remain essential to protecting the health, safety, and welfare of citizens in accordance with § 32.1-127, it is necessary to assess all current regulation content and determine whether it should be amended or retained in its current form. The Board may also address other issues that arise as a result of this Notice, including those that arise during the periodic review.

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.

This regulation contains requirements for the licensure of facilities that perform five or more first trimester abortions per month, including provisions regarding design and construction of such facilities, staffing, service standards, and matters of administration. The intention of the Board is to review and assess all regulatory language to ensure that it meets its responsibilities under § 32.1-127. Revisions to the regulation content may be proposed based on public comments received.

Alternatives

Please 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.

No alternative was considered because the General Assembly required the Board to adopt regulations governing the licensure of facilities in which five or more first trimester abortions per month are performed and amending the regulation is the least burdensome method to accomplish the purpose of this action.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and Executive Order 14 (as amended, July 16, 2018)), and a small

business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify as necessary for your agency. Otherwise, delete the paragraph below and insert “This NOIRA is not being used to announce a periodic review or a small business impact review.”

In addition, pursuant to Executive Order 14 (as amended, July 16, 2018) and § 2.2-4007.1 of the *Code of Virginia*, the agency is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare; (ii) minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public Participation

Please indicate how the public should contact the agency to submit comments on this regulation, including ideas to assist the agency in the development of the regulation 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 regulation.

The Board is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation. The agency/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: 1) projected reporting, recordkeeping, and other administrative costs; 2) the probable effect of the regulation on affected small businesses; and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so through the Public Comment Forum feature of the Virginia Regulatory Town Hall web site at <https://www.townhall.virginia.gov>. Comments may also be submitted by mail, email, or fax to **Rebekah E. Allen, Senior Policy Analyst, Virginia Department of Health, Office of Licensure and Certification, 9960 Mayland Drive, Suite 401, Henrico, VA 23233; email: regulatorycomment@vdh.virginia.gov; fax: (804) 527-4502**. Written comments must include the name and address of the commenter. In order to be considered, comments must be received before midnight on the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage of this regulatory action, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>).

A panel will not be used.