



## Proposed Regulation Agency Background Document

<b>Agency name</b>	Department of Professional and Occupational Regulation
<b>Virginia Administrative Code (VAC) citation</b>	18 VAC 120-30-10 et seq.
<b>Regulation title</b>	Regulations Governing Polygraph Examiners
<b>Action title</b>	General Review
<b>Date this document prepared</b>	June 23, 2010

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.*

The Department of Professional and Occupational Regulation (Department) seeks to amend its current regulations to reflect and respond to statutory changes, clarify previous regulations, incorporate changes necessitated by technical and scientific advancements and respond to changes in the industry.

Substantive proposed amendments to these regulations include a change in the size of the Polygraph Examiners Advisory Board, allows an applicant to take portions of the examination at different dates within a one year period, clarifies renewal and reinstatement requirements and provides for a procedure to be used in the event that an examiner supervising an intern is unable to provide verification of experience.

### Acronyms and Definitions

*Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.*

There are no technical terms or acronyms in this document that are not defined in the regulations.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

§ 54.1-1802 requires that the Director of the Department of Professional and Occupational Regulation “promulgate regulations that are not inconsistent with the laws of Virginia necessary to carry out the provisions of [Chapter 18 of Title 54.1 of the Code of Virginia] and Chapter 1 (§ 54.1-100 et seq.).”

18 VAC 50-120-30-30 provides the authority of the Director of the Department of Professional and Occupational Regulation to appoint a Board to advise the Department on any matters relating to the practice or licensure of polygraph examiners.

### Purpose

*Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

1) These actions are essential to protect the health, safety and welfare of citizens by ensuring that those individuals licensed to perform polygraph examinations are adequately trained and have sufficient experience to ensure that those examinations are done properly and correctly. While polygraph examinations are not generally admissible in court proceedings, an incorrectly or improperly done examination may have serious consequences to the individual subject to the exam.

2) The proposed regulations solve a number of issues that have been brought to the attention of the Department. Polygraph examiner interns, and their sponsors, often government agencies, have expended resources to send the interns to school and maintain their employment while they are completing a training program. Under the current regulations some interns have been unable to complete a program when the sponsor has left the agency due to death or retirement. This is a burden on the agency and the citizens that fund that agency. This and other proposed amendments will help address similar situations.

### Substance

*Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the "Detail of changes" section.)*

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While the majority of the proposed amendments address clarifications and minor changes there are several that will affect the vast majority of licensees.

Changing the size of the advisory board has both fiscal and logistical benefits. Currently, the Polygraph Examiners Advisory Board is made up of eight members. Having an even number of members to vote on items to take to the Department can result in a sensitive issue for the Director in those cases of a tie. Having an odd number of members all but eliminates the possibility of a deadlocked vote. Additionally, with the decrease in the number of private polygraph examiners in the programs population, it has become extremely difficult to fill the position on the Board. Currently, the private sector polygraph examiners position on the Board has remained vacant for two years. The proposal would bring the Board to seven members, which would also have a small affect on the cost of meetings. The proposed change would alter the composition of the Board to include three law enforcement polygraph examiners, two private sector polygraph examiners and two citizen members.

The promulgation of these regulations would amend the current examination procedures by allowing an individual to take the exam over a multiday period and places a one year "expiration date" on examination results. This will allow an individual who was unable to schedule the entire examination in a single day, to take the written exam on one day and the practical on another while clarifying the limit on how long an applicant has to complete the entire examination.

The section of the regulations currently entitled "Grounds for fines, denial, suspension...etc." (18 VAC 120-30-240) will be entitled "Prohibited Acts" in order to become consistent with the regulations for other regulatory programs. Additionally, five acts were added that are also consistent with those of other regulatory boards.

## Issues

*Please identify the issues associated with the proposed regulatory action, 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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.*

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- 1) In amending these regulations the Department, with the technical expertise of the Polygraph Examiners Advisory Board, reviewed current regulations, amendments to the

statutes, current Federal polygraph law and weighed them along with the protection to the public and the burden to the regulant population. Many of these amendments were the direct result of feedback received from applicants as well as input from the licensing staff, which provided anecdotal data of difficulties in processing applications and interaction they may have had with applicants. As a result the Board clarified issues involving intern experience verification and examination difficulties. Other amendments clarify renewal and reinstatement requirements and add consistent language to examination standards. There is no perceived disadvantage to amending the regulations to make them easier to understand.

Expanding and clarifying the acts that can result in disciplinary action brings the regulations in line with other licensing programs and is advantageous to both the licensee and the public. These “prohibited acts” provide both the examiner and the public with a more clear set of guidelines as to what is allowed and what is prohibited. There is no perceived disadvantage to amending the regulations to make them easier to understand and to provide protection to both licensees and the public.

2) This program directly affects a small number of regulants (less than 300) and it is not anticipated that this population will change significantly as a result of these regulatory amendments. The anticipated changes should be an advantage to the licensing staff since the clarifications should lead to a decrease in telephone calls from applicants trying to understand the internship and examination criteria, resulting in more time to process applications, lowering the processing time.

3) There were no other items identified that would be considered pertinent matters of interest to the regulated community, government officials or the public.

**Requirements more restrictive than federal**

*Please identify and describe any requirement of the proposal, which are more restrictive than applicable federal requirements. Include 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 statement to that effect.*

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There are no requirements that are more restrictive than those currently in place on a federal level.

**Localities particularly affected**

*Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.*

There are no localities that will be particularly affected by these proposed amendments to the regulations.

### Public participation

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

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In addition to any other comments, the Department is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the Department is 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) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Adrienne Mayo, Regulatory Boards Administrator, c/o DPOR, 9960 Mayland Drive Ste 400, Richmond, Virginia, 23233, email: polygraph@dpor.virginia.gov or fax (866) 430-1033. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

Public hearings will be held and notice of those public hearings will appear on the Virginia Regulatory Town Hall website ([www.townhall.virginia.gov](http://www.townhall.virginia.gov)) and the Commonwealth Calendar. Both oral and written comments may be submitted at that time.

### Economic impact

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

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## **Polygraph Examiners Advisory Board** **Fiscal Impact of Proposed Regulation**

### **Summary:**

The current regulations are being revised with some changes and enhancements. This proposed regulation updates the examination requirement, allowing parts to be taken at different times within one year, clarifies the renewal and reinstatement requirements and provides a procedure for experience verification when the supervisor is unavailable. The Board size is changing from 8 members to 7 members.

All costs incurred in support of board activities and regulatory operations are paid by the department and funded through fees paid by applicants and licensees. All boards within the Department of Professional and Occupational Regulation must operate within the Code provisions of the Callahan Act (54.1-113), and the general provisions of 54.1-201. Each regulatory program's revenues must be adequate to support both its direct costs and a proportional share of agency operating costs. The department allocates costs to its regulatory programs based on consistent, equitable, and cost-effective methodologies. The board has no other source of income.

**Fiscal Impact:**

	FY 2010	FY 2011	FY2012	FY2013
Fund	NGF (0900)	NGF (0900)	NGF (0900)	NGF (0900)
Program/Service Area	560 46	560 46	560 46	560 46

Impact of Regulatory Changes:				
One-Time Costs	0	0	0	0
Ongoing Costs	0	0	0	0
Total Fiscal Impact	0	0	0	0
FTE	0.00	0.00	0.00	0.00

**Description of Costs:**

One-Time: No one-time costs are expected as a result of this regulatory change.

Ongoing: No ongoing costs are expected as a result of this regulatory change.

**Cost to Localities:** No change anticipated.

**Description of Individuals, Businesses, or Other Entities Impacted:** The revised regulations apply to Polygraph Examiner applicants and regulants.

**Estimated Number of Regulants:** There are approximately 275 licensed Polygraph Examiners.

**Projected Cost to Regulants:** There is no anticipated cost to the regulants.

## 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.*

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In reviewing the regulations, the Department considered whether there was a less burdensome alternative. Alternatives that failed to meet this consideration were rejected. The Department believes that failure to adopt these regulations will actually place an unnecessary burden on both the existing regulant population and future applicants for licensure.

Most of the proposed amendments to the regulations clarify existing language, modify definitions to meet changes in the industry or to address historical issues experienced by the Department since the last amendments were promulgated. For those changes that are more substantive the Department looked at methods used in other regulatory programs as well as those used by similar agencies in other states. The Department weighed those alternatives against the burden to its own regulant population, especially small businesses.

The Department will consider all comments received during the public comment period as to proposed alternatives.

## Regulatory flexibility analysis

*Please 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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.*

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1) There are three common methods for determining competency generally accepted in the licensing requirements for polygraph examiners: a) written examination; b) practical examination; and, c) a review of polygraph examination conducted by an intern under the supervision of a sponsor. The Department uses all three of these, in various combinations, throughout its licensing program and is always looking for a method to determine minimum competency that is the least burdensome to the regulant while, at the same time, affording the protection to the public expected of regulatory agencies. The Department believes that these amendments are the least stringent that can be promulgated that will still deliver that protection.

- 2) There are no deadlines or reporting requirements required by these proposed regulations.
- 3) There are no reporting requirements proposed by these regulations.
- 4) There are no performance standards proposed by these regulations.
- 5) The majority of polygraph examiners licensed by the Department are employed by law enforcement agencies throughout the Commonwealth, which would not be identified as small businesses. Private polygraph examiners would be employed by or own entities defined as small businesses. Since the Department finds the least burdensome alternative in the development of its regulations, it has taken into consideration the affect on small business, negating the need for an exemption.

**Public comment**

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

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There were no comments received during the public comment period following the publication of the NOIRA.

**Family impact**

*Please assess the impact of the proposed regulatory action on the institution of the family and family stability including to what extent 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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These proposed regulations would have no impact on the institution of the family or family stability.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact if implemented in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations between the pre-emergency regulation*



and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, rationale, and consequences
18 VAC 120-30-30		Advisory Board	Changes “eight” to “seven”. The proposed will change the size of the advisory board. Changing the size of the advisory board has both fiscal and logistical benefits. Currently, the Polygraph Examiners Advisory Board is made up of eight members. Having an even number of members to vote on items to take to the department can result in a sensitive issue for the Director in those cases of a tie. Having an odd number of members would alleviate the possibility of a deadlocked vote. In addition, with the decrease in the number of the private polygraph examiners in the programs population it has become extremely difficult to fill the position on the board. Currently the private sector position has remained vacant for two years. The proposed would bring the Board to seven members, which would also have a small affect of the cost of meetings. The proposed change would alter the composition of the Board to include three law enforcement polygraph examiners, two private sector polygraph examiners and two citizen members.
18 VAC 120-30-40		Basic qualifications for licensure and registration	Adds “within one year from examination approval”. This change is being proposed to allow applicants to take portions of the examination on different dates. This addition also clarifies how long the applicant has to complete the examination. The current language requires an individual to pass all parts of the examination at a single administration. This was burdensome for examination candidates because it did not allow them to split the examination by taking portions on separate dates. This change will allow an individual who was unable to schedule the entire examination in a single day, to take the written exam on one day and the practical on another while clarifying the limit on how long an individual has to complete the

			entire examination.
18 VAC 120-30-70		Procedures for licensed polygraph examiners to certify the procedures to be used to supervise an intern during an internship	<p>Adds “and duration” the amended language in paragraph A and item 1 clarifies the supervisor shall file a description to record and specify how long a period of time is spent with the intern.</p> <p>Paragraph B provides language that clarifies a supervisor’s review is required prior to an intern rendering an opinion or conclusion for any polygraph examination they have administered.</p> <p>Paragraph C is added to provide procedures for verification options at the discretion of the Board for all new applicants (i.e. polygraph interns) whose supervisor is no longer available to provide experience verification due to extenuating circumstances. Under the current regulations on any number of occasions an intern has been unable to complete a program when a supervisor has either left the agency or is no longer available due to illness, death or retirement. This has been a reoccurring issue that has been brought to the department’s attention. This proposal addresses that issue and will alleviate an intern having to repeat the period of internship previously served because their supervisor is no longer available. This proposal will also eliminate the burden placed on the sponsors of the interns who are generally agencies and citizens that fund the agency.</p>
18 VAC 120-30-100		Fees	The fee chart removes the duplicate wall certificate and certificate of licensure fee from the regulations. These fees are administrative fees set by the department for all other programs. Since this fee is an administration fee and not a licensing fee, to be consistent with other program within the department it should not be in the regulations of a specific Board.
18 VAC 120-30-110		Examinations	Removes “being administered the same day”. This change is being proposed to allow applicants to take portions of the examination on different dates. This addition also clarifies how long the applicant has to complete the examination. The current language requires an examination candidate to pass all parts of the examination at a single administration.

			<p>This was burdensome for examination candidates because it did not allow them to split the examination by taking different parts on separate dates. This change will allow an individual who was unable to schedule the entire examination in a single day, to take the written exam on one day and the practical on another while clarifying the limit on how long an applicant has to complete the entire examination. The change also makes it less burdensome for an individual by allowing split portions of the examination to be administered on over a multiday period and places a one year "expiration date" on examination results while having no effect in the competency of the examination candidate.</p>
18 VAC 120-30-160		Qualifications for renewal	<p>Paragraph A amends statutory references to the Administrative Process Act and allows an individual to appeal board action involving licensure renewal.</p> <p>Paragraph B adds proposed language that allows disciplinary sanctions by the board before granting renewal of a license. This amendment is added to incorporate language that is consistent with those of other programs within the department.</p>
18VAC 120-30-170		Reinstatement required	<p>Paragraph B amends language to clarify and specific the number of months an individual has to reinstate their license. This amendment clarifies when an individual who formerly held a license must apply as a new applicant for licensure and requires the individual to all meet the current entry requirements.</p>
18 VAC 120-30-180		Department discretion to deny reinstatement	<p>The proposed language amends statutory references to the Administrative Process Act and allows an individual to appeal board action involving licensure reinstatement.</p>
18 VAC 120-30-200		Polygraph examination procedures	<p>Paragraph C raises the fee cap that a polygraph examiner is allowed to charge for their services. The proposed change is in response to comments received by private polygraph examiners who state the increase is needed to cover their costs. This fee cap has not changed within the regulations in a decade and is not a licensing fee.</p>

<p>18 VAC 120-30-220</p>		<p>Examination standards of practice</p>	<p>Paragraph G changes “test” to “charts”. It was determined that “charts” is more appropriate terminology.</p> <p>Paragraph H removes “full-time” because it was determined not to be relevant. because it addresses employment not examination results.</p>
<p>18 VAC 120-30-230</p>		<p>Records</p>	<p>Item 4 adds “every” to clarify that all reports must be within the records retained by the polygraph examiner or intern.</p> <p>Item 5 amends “tape” to “electronic”. It was determined that “charts” is more appropriate terminology. .</p>
<p>18 VAC 120-30-240</p>		<p>Grounds for fines, denial, suspension or revocation of licenses or denial or withdrawal of school approval</p>	<p>Amends the section heading from “Grounds for fines, denial, suspension or revocation of licenses or denial or withdrawal of school approval” to “Prohibited Acts”. It was determined that this would be consistent with those of other board regulations housed within the department.</p> <p>Item 3 removes “directly related to the occupation”. It was determined that individuals in this profession are associated with law enforcement and therefore all misdemeanors and felony convictions not just convictions directly related to their professions should be disclosed and reviewed by the board. In addition, item 3 increases days from “10” to “30” for compilation of records to make an easy time frame. This change will make a more reasonable time frame. In addition this time frame is consistent with those of other boards housed within the department.</p> <p>Item 4 removes “or false promised” because a false promise is considered misrepresentation and would be redundant.</p> <p>Item 6 clarifies the number of days to respond to board requests. This change was determined to be a reasonable time frame that is consistent with those of other boards housed within the department.</p> <p>Adds item 9, 10, 11, 12 and 13 in order to make these items a violation of the regulations that are subject to sanction, if an intern, polygraph examiner, polygraph</p>

			school, school's owner or instructor fails to follow or comply. The proposed language is similar for education providers who hold providers accountable. In addition the proposed language is consistent with the other board regulations housed within the department.
18 VAC 120-30-260		Approval of polygraph school curriculum	Adds "in a format approved by the advisory board". This amendment makes reporting submissions consistent for all polygraph schools.
18 VAC 120-30-270		Minimum requirements for school curriculum	Paragraph A removes "accepted" because polygraph is a defined term within the statute and therefore, the language is not necessary.  Amends section B and item 13 to require polygraph schools to add a polygraphy ethics course to its curriculum. The proposed change is in response to comments received by public polygraph examiners who state that schools should include such a course in their curriculum.
18 VAC 120-30-300		Periodic requalification for continued course approval	This proposed amendment gives the board authority to randomly audit education providers.

For new chapters, use this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements

Enter any other statement here