



Virginia Department of Planning and Budget **Economic Impact Analysis**

18 VAC 120-30 Regulations Governing Polygraph Examiners
Department of Professional and Occupational Regulation
Town Hall Action/Stage: 5918 / 10100
October 18, 2023

The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 19. The analysis presented below represents DPB's best estimate of the potential economic impacts as of the date of this analysis.¹

Summary of the Proposed Amendments to Regulation

The Department of Professional and Occupational Regulation (DPOR), based upon the recommendation of the Polygraph Examiners Advisory Board (Board), proposes to update the regulatory text to require a polygraph examiner to disclose to an examinee that the polygraph examination is now subject to disclosure under the Virginia Freedom of Information Act (FOIA) following a legislative change in 2021.

Background

This regulation applies to polygraph examiners, interns, and training. According to DPOR, prior to 2021, law enforcement agencies were able to withhold polygraph reports which were requested pursuant to FOIA (§ 2.2-3700 et seq. of the Code of Virginia) because some case files were exempt from disclosure under FOIA. Chapter 483 of the 2021 Special Session I Acts of General Assembly,² expanded the public's access via FOIA requests to some closed law

¹ Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

² <https://lis.virginia.gov/cgi-bin/legp604.exe?212+ful+CHAP0483>

enforcement cases. DPOR received a comment indicating that current provisions in the standards of practice and conduct in this regulation may be inconsistent with FOIA after the 2021 legislative change and that amendments to the regulation may be required with regards to provision of copies of polygraph examination to the public. DPOR consulted with its counsel and now proposes to amend the language to require a polygraph examiner to disclose to an examinee that the polygraph examination is subject to disclosure under FOIA.

Estimated Benefits and Costs

DPOR reports that following the 2021 legislative change, law enforcement agencies began providing polygraph exam reports for closed cases when requested under FOIA. However, the current regulatory language is silent about whether polygraph examinations are subject to FOIA. The Board is proposing to add to the text a requirement that a polygraph examiner disclose to an examinee that the polygraph examination is now subject to disclosure.

The proposed text does not provide specific information on what exactly is subject to disclosure (i.e. only exam results, exam questions, etc.) or in which cases disclosure applies (i.e. active or closed cases), effectively leaving such questions to the interpretation of FOIA. Additionally, administration of all polygraph examinations regardless of type (e.g. criminal investigations or pre-employment check, etc.) require the examinee's consent. Thus, the possibility of disclosure under FOIA may dissuade some individuals from subjecting themselves to an exam; however, this effect would be a consequence of the legislative change and not this regulatory change. Instead, the regulation would only require the examiner to disclose to the examinee that the exam may be publicly accessible, thereby alerting the examinee to that potential.

Since polygraph exams have been subject to disclosure under FOIA since 2021, and the potential impact upon consent derives from the legislative change, the proposed regulatory text would not have a significant economic impact other than clarifying for the examiner and examinee that the exam can become public information.

Businesses and Other Entities Affected

This regulation applies to all licensed polygraph examiners and polygraph interns. As of April 1, 2023, there were 312 licensed polygraph examiners and 28 polygraph interns.³ No regulants appear to be disproportionately affected.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.⁴ An adverse impact is indicated if there is any increase in net cost or reduction in net revenue for any entity, even if the benefits exceed the costs for all entities combined. As noted above, the proposed language would incorporate practices into the regulation that have already been in effect since 2021 under Virginia law, and thus the main effect is clarification. Therefore, no adverse impact is indicated.

Small Businesses⁵ Affected:⁶

The proposed amendment does not appear to adversely affect small businesses.

Localities⁷ Affected⁸

The proposed amendment does not introduce costs for local governments nor affect any locality more than others.

Projected Impact on Employment

The proposed amendment does not appear to affect employment.

³ Source: Department of Professional and Occupational Regulation

⁴ Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance. Statute does not define “adverse impact,” state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation.

⁵ Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.”

⁶ If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

⁷ “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

⁸ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.

Effects on the Use and Value of Private Property

No impact on the use and value of private property nor real estate development costs is expected.