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Final Regulation Agency Background Document

Agency name	Department of Professional and Occupational Regulation
Virginia Administrative Code (VAC) Chapter citation(s)	18VAC120-30
VAC Chapter title(s)	Regulations Governing Polygraph Examiners
Action title	Review of Standards of Practice and Conduct
Date this document prepared	July 8, 2024

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The Regulations Governing Polygraph Examiners provide for the licensure of polygraph examiners, the registration of polygraph examiner interns, and approval of polygraph schools. The regulation provides for renewal and reinstatement of licenses. The regulation also provides for the standards of practice and conduct for regulants and approved schools.

Historically, the release of criminal investigative records has been discretionary, allowing law enforcement agencies to determine whether to release information contained in criminal case files. Often, such case files might have included polygraph examination reports. Due to the discretionary element, many criminal investigative records were never made available to the public. Amendments to the Virginia Freedom of Information Act, that became effective July 1, 2021, require that investigative records meeting certain criteria be made available to the public when such records were requested pursuant to the Virginia Freedom of Information Act.

This action amends the Standards of Practice and Conduct in the regulation. The provisions for polygraph examination procedures are amended to require a polygraph examiner to disclose to an examinee that the polygraph examination is subject to disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the “Definitions” section of the regulation.

“DPOR” means the Department of Professional and Occupational Regulation.

“FOIA” means the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

Pursuant to 18VAC120-30-30, the Polygraph Examiners Advisory Board (“the Board”) advises DPOR on any matters relating to the practice of polygraphy and the licensure of polygraph examiners in Virginia.

On April 18, 2024, the Board voted to recommend adoption of the final regulation.

On July 8, 2024, the Director of DPOR approved amending the Regulations Governing Polygraph Examiners.

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

There are no changes to the information reported on the previous Agency Background Document.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

The promulgating agency is the Department of Professional and Occupational Regulation.

Section 54.1-1802.1 of the Code of Virginia states, in part:

The Department shall administer and enforce the provisions of this chapter. In addition to the powers and duties otherwise conferred by the law, the Director shall have the powers and duties of a regulatory board as contained in §§ 54.1-201 and 54.1-202 and shall have the power and duty to:

- 1. Promulgate regulations necessary for the reasonable administration of this chapter in accordance with the Administrative Process Act (§ 2.2-4000 et seq.). Such regulations shall include, but not be limited to, the establishment of minimum qualifications for the operators of polygraphs and other detection devices;

Section 54.1-201 of the Code of Virginia states, in part:

A. The powers and duties of regulatory boards shall be as follows:

- 5. To promulgate regulations in accordance with the Administrative Process Act (§ 2.2- 4000 et seq.) necessary to assure continued competency, to prevent deceptive or misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety, or welfare of citizens, and (3) the goals of the regulatory change and the problems it is intended to solve.

Amending the regulation to reflect amendments made to the Code of Virginia, specifically FOIA, is necessary to ensure compliance with applicable statutes.

Recent changes to the FOIA law expanded the scope of access to investigative records which may include polygraph examination results. With the amendment, regulants are required to inform examinees that the results of a polygraph examination may become accessible to the public pursuant to a FOIA request. In making this amendment, each examinee is provided with disclosure related to their individual examination results.

The goal of the regulatory change is to amend the regulation so as to be consistent with previously amended provisions of FOIA.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

Section 18VAC120-30-200 is amended to require that an examiner disclose to an examinee that the polygraph examination is subject to disclosure under the Virginia Freedom of Information Act (§ 2.2-3700 et seq. of the Code of Virginia).

Issues

Identify the issues associated with the regulatory change, 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 there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

- (1) There are no advantages or disadvantages to the public.
- (2) There are no advantages or disadvantages to the agency or the Commonwealth.
- (3) Individuals who are subject to a polygraph examination will be informed and aware that their results are subject to disclosure under the FOIA law.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

There are no changes to previously reported information.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

There are no changes to previously reported information.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency's response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

No public comments were received in response the proposed amendment.

Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

No changes were made since publication of the proposed stage.

Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this action and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of updated requirements
30-200	N/A	<p>This section provides for polygraph examination procedures.</p> <p>Polygraph examiners and registered polygraph examiner interns must place their license or registration, or legible copy, in a conspicuous place.</p> <p>An examiner must provide an examinee with a written explanation of the provisions detailed in sections -200, - 210, and -220 of the regulation at the beginning of each polygraph examination.</p> <p>The section provides that an examinee may request a recording of the polygraph examination. An examiner must maintain recording equipment and media adequate to make a recording. An examiner is required to safeguard all examination recordings as part of the records the examiner is required to keep in accordance with -230 of the regulation.</p> <p>An examiner may charge an examinee a fee not to exceed \$35 if the examinee requests and receives a copy of an examination. All recordings are required to made available to DPOR, the examinee, or the examinee’s attorney upon request.</p>	<p>*Subsection F will be added to the section to require that an examiner disclose to an examinee that their polygraph examination is subject to disclosure under the Virginia Freedom of Information Act, Chapter 37 of Title 2.2 of the Code of Virginia.</p> <p>A stylistic change is made.</p>

		<p>The section provides that an examinee is entitled to a copy of all portions of any written report pertaining to the examinee's examination that is prepared by the examiner and provided to any person or organization. An examinee is required to make a written request to the examiner for such copy. The examiner must provide the copy to the examinee within 10 business days of providing the written report to the another person or organization, or within 10 business days of receiving the request from the examinee, whichever occurs later. The examiner may not collect more than \$1.00 per page from the examinee for any copy that is provided.</p> <p>Examinations that are conducted by or on behalf of the Commonwealth or any of its political subdivisions when done for the purpose of preventing or detecting crime or enforcing penal laws are exempt from certain requirements in the section.</p>	
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