



Proposed Regulation Agency Background Document

Agency name	State Board of Social Services
Virginia Administrative Code (VAC) citation	22VAC40-72
Regulation title	Standards for Licensed Assisted Living Facilities
Action title	Assisted Living Facility Liability Insurance Disclosure
Date this document prepared	June 19, 2014

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) 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.

This regulatory action establishes a minimum amount of liability insurance coverage of \$500,000 per occurrence and \$500,000 aggregate to be maintained by an ALF for purposes of disclosure. It does not require an ALF to maintain coverage, but rather to disclose to residents, prospective residents, and legal representatives, if any, whether or not the facility has the minimum as established by the State Board of Social Services (Board). The action also includes changes to the disclosure statement and the resident agreement to include whether or not the ALF maintains at least \$500,000 per occurrence and \$500,000 aggregate of liability insurance coverage.

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.

ALF means assisted living facility.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.

Section 63.2-217 of the Code of Virginia (Code) provides Board the general authority for the development of regulations to carry out the purposes of Title 63.2. Section 63.2-1732 gives the Board the authority to adopt regulations to carry out provisions related to licensed ALFs and to protect the health, safety and welfare of residents. This regulatory action will implement amendments by the 2013 Session of the General Assembly related to liability insurance disclosure in §§ 63.2-1805 and 63.2-1808 of the Code.

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.

The purpose of this action is to implement Chapter 320 of the 2013 Acts of Assembly, which amended §§ 63.2-1805 and 63.2-1808 of the Code relating to ALF liability insurance disclosure. The regulatory action establishes the minimum amount of liability insurance coverage to be maintained by an ALF for purposes of disclosure. The action also includes changes to the regulations to require an ALF to disclose to any resident, prospective resident, and his legal representative, if any, whether or not it maintains the minimum amount of liability insurance coverage. Knowing whether or not a facility maintains at least the minimum amount of coverage will allow potential residents and residents to make more informed decisions regarding residence in assisted living facilities and possible compensation for injuries and losses from negligent acts of a facility.

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.)

Proposed changes to the regulations add an item to the disclosure statement and the resident agreement that requires an ALF to state whether or not it maintains at least the minimum amount of liability insurance coverage, established by the State Board of Social Services, to compensate residents or others for injuries and losses from negligent acts of the facility. The proposed minimum amount is \$500,000 per occurrence and \$500,000 aggregate. An additional change ensures that the information regarding liability insurance coverage is kept current.

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 indicate.

The advantage of the proposed regulatory action to the public and to the agency is that it makes the requirements of the regulation consistent with the requirements of state law and establishes a minimum amount of liability insurance coverage for purposes of disclosure. Disclosure of the information to a prospective resident of an ALF allows the person to make a more informed decision regarding residence in the facility. Disclosure of the information to ALF residents or appropriate legal representatives helps keep them aware of whether or not the facility has this insurance in case possible compensation for injury or losses becomes a matter of concern. There are no disadvantages to the public, the agency or the Commonwealth.

An issue that has been identified in the past by some people in the insurance industry and others is that the minimum amount of liability insurance for disclosure purposes in this proposal is inadequate. These people vary in the amounts recommended to compensate for injuries and losses from negligent acts of an ALF, but the least amount recommended for disclosure purposes is \$1,000,000 per occurrence and \$2,000,000 aggregate. The \$500,000 amount is supported by several ALF provider associations.

Requirements more restrictive than federal

Please identify and describe any requirements of the proposal, which are more restrictive than applicable federal requirements. Include a rationale 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.

To our knowledge, there are no applicable federal requirements.

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.

No locality is particularly affected by the proposed changes.

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.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board 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 via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email or fax to Judith McGreal, Virginia Department of Social Services, Division of Licensing Programs, 801 East Main Street, Richmond, VA 23219, telephone: (804) 726-7157, fax: (804) 726-7132, email: judith.mcgreal@dss.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last date of the public comment period.

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. Please keep in mind that we are looking at the impact of the proposed changes to the status quo.

<p>Description of the individuals, businesses or other entities likely to be affected (positively or negatively) by this regulatory proposal. Think broadly, e.g., these entities may or may not be regulated by this board</p>	<p>This regulatory proposal will affect licensed assisted living facilities.</p>
<p>Agency’s best estimate of the number of (1) entities that will be affected, including (2) small businesses affected. Small business means a business, including affiliates, that is independently owned and operated, employs fewer than 500 full-time employees, or has gross annual sales of less than \$6 million.</p>	<p>There are 544 ALFs and all will be affected. It is estimated that most are small businesses.</p>
<p>Benefits expected as a result of this regulatory proposal.</p>	<p>Increased disclosure of information regarding ALFs is expected to benefit potential residents, residents’ legal representatives, and others, consistent with the requirements of state law.</p>
<p>Projected cost to the <u>state</u> to implement and enforce this regulatory proposal.</p>	<p>Implementation and enforcement of this regulatory proposal will not result in any increased cost to the state. Licensing staff with responsibility for implementation and enforcement are currently in place.</p>
<p>Projected cost to <u>localities</u> to implement and enforce this regulatory proposal.</p>	<p>None.</p>
<p>All projected costs of this regulatory proposal for <u>affected individuals, businesses, or other entities</u>. Please be specific and include all costs, including projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses, and costs related to real estate development.</p>	<p>Because the regulatory proposal only requires disclosure of whether or not an ALF maintains the minimum amount of liability insurance coverage established by the Board and the disclosure is incorporated into already existing standards, there is no associated cost. However, in order to provide some idea of what the cost would be if an ALF chose to purchase the minimum amount of \$500,000 per occurrence and \$500,000 aggregate, the following information is provided. It is noted that many ALFs already have liability insurance and most that have it probably have insurance in</p>

	<p>excess of the established minimum for disclosure purposes.</p> <p>One insurance agent noted the following: The annual premium for liability insurance coverage of \$500,000 per occurrence/\$500,000 aggregate is usually between \$125 - \$175 per bed. However, the annual premium for some ALFs could be less and for other ALFs could be more. Factors that influence the cost of the insurance include level and quality of care provided, degree of compliance with regulations, age and condition of building, life-safety systems in place, and size of facility.</p> <p>Another insurance agent noted the following: The annual premium for liability insurance coverage of \$500,000 per occurrence/\$500,000 aggregate is usually between \$150 - \$250 per bed. Factors that influence the cost of the insurance include claims history, type of staffing, number of employees, facility size, non-profit/profit status, building construction, condition of residents, life-safety systems in place, extent and type of violations of standards, and facility location.</p> <p>The above annual premium ranges are based on current costs for the insurance. Costs may vary in the future, as they have in the past.</p>
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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.

Including the requirements for liability insurance disclosure in already existing standards i.e., disclosure and resident agreement with the facility, is the least burdensome and least intrusive method to incorporate the mandates of state statutes. There is no less intrusive or less costly alternative for small businesses for achieving the purpose of the regulation.

Regulatory flexibility analysis

Pursuant to §2.2-4007.1B of the Code of Virginia, 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.

There is no viable alternative to amending the regulation to include requirements of state law regarding whether or not an ALF maintains at least the minimum amount of liability insurance coverage for the purposes of disclosure. The proposed amendments to the regulation are not expected to have any adverse impact on small businesses.

Public comment

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

Commenter	Comment	Agency response
Virginia Assisted Living Association (VALA)	VALA supports \$300,000 (original amount proposed by VDSS) as the minimum amount of liability insurance required for the purpose of disclosure by ALFs. A minimum coverage higher than \$300,000 could potentially be difficult for small ALF providers to obtain, and would be even more difficult for ALF providers who primarily serve residents receiving the auxiliary grant. Right now, the insurance marketplace has rates that are similar for \$300,000 policies as they are for higher value policies. However, insurance brokers are forecasting the market to harden, making the higher valued policies financially unaffordable for ALFs accepting mostly residents receiving the auxiliary grant.	This proposed regulatory action specifies that the minimum amount of liability insurance coverage for disclosure purposes is \$500,000. It is our understanding that VALA is now supportive of this amount.
Virginia Association of Nonprofit Homes for the Aging (VANHA)	During the State Board of Social Services meeting on October 16, 2013, policy staff recommended establishing a minimum level of coverage by ALFs of \$300,000 for disclosure purposes. VANHA supports the staff recommendation of \$300,000, but would also support establishing an amount up to but no greater than \$500,000. A requirement for coverage higher than \$500,000 could potentially be difficult for small ALF providers to afford to purchase. The disclosure requirement will enable residents and prospective	The minimum amount of liability insurance coverage proposed in this regulatory action is \$500,000.

	<p>residents to be informed if the ALF meets the suggested coverage and allow them to make an informed choice about whether to reside in the ALF.</p>	
<p>Virginia Health Care Association (VHCA)</p>	<p>During the State Board of Social Services meeting on October 16, 2013, policy staff recommended establishing a minimum level of coverage by ALFs of \$300,000 for disclosure purposes. VHCA supports the staff recommendation of \$300,000, but would also support establishing an amount up to but no greater than \$500,000. A requirement for coverage higher than \$500,000 could potentially be difficult for small ALF providers to afford to purchase.</p> <p>The disclosure requirement will enable residents and prospective residents to be informed if the ALF meets the suggested coverage and allow them to make an informed choice about whether to reside in the ALF.</p>	<p>The minimum amount of liability insurance coverage proposed in this regulatory action is \$500,000.</p>
<p>Virginia Adult Care Residence Association</p>	<p>The Virginia Adult Care Residence Association would like to address the cost impact of the disclosure insurance regulation. When the Assisted Living Facility took over the Home for Adults, the insurance companies became confused about our identity. Many of the new regulations were borrowed from the nursing home industry and the perception was that we were taking care of the elderly, a higher risk population. Therefore, our premiums increased drastically. The State of Virginia auxiliary grant program should create a fund that will take on an additional \$150 per client to include the increased cost of insurance.</p> <p>The ALF regulations have moved from a social model to medical model and the state has not addressed the burden it has put on the smaller businesses. The state has not matched the funding to meet the minimum standards. The medical mode regulations make it very difficult for clients with mental</p>	<p>The \$500,000 minimum amount for liability insurance disclosure purposes, which is proposed in this regulatory action, is significantly less than what some persons have recommended in the past. The commenter did not suggest any specific amount.</p>

	health issues to find supervisory affordable housing.	
Independent Home for Adults	<p>The Virginia Independent Home for Adults would like to address the cost impact of the disclosure insurance regulation. When the Assisted Living Facility took over the Home for Adults, the insurance companies became confused about our identity. Many of the new regulations were borrowed from the nursing home industry and the perception was that we were taking care of the elderly, a higher risk population. Therefore, our premiums increased drastically. The State of Virginia auxiliary grant program should create a fund that will take on an additional \$150 per client to include the increased cost of insurance.</p> <p>The ALF regulations have moved from a social model to medical model and the state has not addressed the burden it has put on the smaller businesses. The state has not matched the funding to meet the minimum standards. The medical mode regulations make it very difficult for clients with mental health issues to find supervisory affordable housing.</p>	The \$500,000 minimum amount for liability insurance disclosure purposes, which is proposed in this regulatory action, is significantly less than what some persons have recommended in the past. The commenter did not suggest any specific amount.
Kerry Smith, administrator/owner, Smith's Adult Care Facility and Branches of Hope Assisted Living Facility	We are covered with liability insurance coverage and we believe and have been advised by our carrier that the amount is substantial coverage for our business. We are in need of your support at keeping the minimum coverage to an affordable amount for small business owners who are trying to provide a service to our clients and family. With the increase of our coverage to a higher liability limit that is more than the minimum, this will cause a hardship for small business owners.	The \$500,000 minimum amount for liability insurance disclosure purposes, which is proposed in this regulatory action, is significantly less than what some persons have recommended in the past. The commenter did not suggest any specific amount.

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.

The proposed changes will not have any impact on the institution of the family and family stability.

Detail of changes

Please list 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. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the **pre-emergency** regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulation(s) or regulations that are being repealed and replaced, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
10		Defines words and terms used in the chapter.	Adds a definition of “Board” to mean the State Board of Social Services. This was done because the term “Board” is used in other changes made in this proposed regulatory action.
60		Describes requirements for a statement disclosing information about an ALF to be provided to prospective residents and legal representatives, if any.	Adds to the items to be disclosed whether or not the ALF maintains at least the minimum amount of liability insurance coverage of \$500,000 per occurrence and \$500,000 aggregate. This means that prospective residents and legal representatives, if any, will know if the ALF has the minimum amount of liability insurance established by the Board for disclosure purposes and thus provide additional information in making a decision regarding residence in the ALF. The insurance would compensate residents and others for injuries and losses from negligent acts of the facility. Disclosing this information on liability insurance was added to the Code at § 63.2-1805 A 9 and 10.
390		Identifies requirements regarding the agreement between a resident or appropriate legal representative and an ALF.	Adds to the items to be included in the agreement a statement specifying whether or not an ALF maintains at least the minimum amount of liability insurance coverage of \$500,000 per occurrence and

			<p>\$500,000 aggregate. This means that residents or appropriate legal representatives will be kept informed of whether the ALF has at least the minimum amount of coverage established by the Board for disclosure purposes in case compensation for injuries or losses from negligent acts of the facility becomes an issue. Also adds a requirement to update the agreement if there is a change. Disclosing this information on liability insurance was added to the Code at § 63.2-1805 A 9 and 10.</p>
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The necessity for disclosure in respect to the minimum liability coverage has also been added to resident rights and responsibilities in the Code at § 63.2-1808 A 20.