



Final Regulation Agency Background Document

Agency name	Virginia Department of Labor and Industry/Safety and Health Codes Board
Virginia Administrative Code (VAC) citation	16VAC25-60-240; 16VAC25-60-245; also 16VAC-25-60-10, -20, -90, -100, -130, -140, -210, -220, 260, -270, -280, -310, -320, -330, -340
Regulation title	Administrative Regulations Manual (ARM) for the Virginia Occupational Safety and Health (VOSH)
Action title	Amendments to the Administrative Regulations Manual (ARM) for the Virginia Occupational Safety and Health (VOSH), 16VAC25-60-240; 16VAC25-60-245, Take and Preserve Testimony, Examine Witnesses and Administer Oaths. Amendment establishes procedures for the Commissioner or his appointed representatives under VA. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10. Also, renumbering, cross-referencing and clarification changes to 16VAC-25-60-10, -20, -90, -100, -130, -140, -210, -220, 260, -270, -280, -310, -320, -330, and -340.
Date this document prepared	August 31, 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 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary (no more than 2 short paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The VOSH Program seeks the amendment of the Administrative Regulation for the VOSH Program to establish procedures for the Commissioner or his appointed representatives under VA. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10.

Following are the requirements of Va. Code §§40.1-6(4) and 40.1-10:

Va. Code §40.1-6(4), Powers and duties of the Commissioner.

“The Commissioner shall:

(4) In the discharge of his duties, have power to take and preserve testimony, examine witnesses and administer oaths and to file a written or printed list of relevant interrogatories and require full and complete answers to the same to be returned under oath within thirty days of the receipt of such list of questions. “ (Emphasis added).

Va. Code §40.1-10, Offenses in regard to examinations, inspections, etc.

“If any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of such examination as indicated in §§ 40.1-6, or if any person to whom a written or printed list of such interrogatories has been furnished by the Commissioner shall neglect or refuse to answer fully and return the same under oath, or if any person in charge of any business establishment shall refuse admission to, or obstruct in any manner the inspection or investigation of such establishment or the proper performance of the authorized duties of the Commissioner or any of his representatives, he shall be guilty of a misdemeanor. **Such person, upon conviction thereof, shall be fined not exceeding \$100 nor less than \$25 or imprisoned in jail not exceeding 90 days, or both.”** (Emphasis added).

The final regulation:

- Specifies the wording of the oath to be administered and the manner in which it would be administered;
- Explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and having the authority to examine witnesses in accordance with the procedures outlined in the regulation;
- Specifies that testimony preserved under the regulation would be recorded by a court reporter;
- Specifies the level of confidentiality that would attach to any testimony preserved under the statute;
- Establishes a procedure for the Commissioner or his authorized representatives to follow in

the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code 40.1-6(4). The final regulation provides that an application for an inspection warrant under Va. Code §§40.1-49.8 through 40.1-49.12 for VOSH investigations/inspections will be submitted to the local General District or Circuit Court with jurisdiction over the employer.

- Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth's Attorney for prosecution of the individual involved.
- Recommended housekeeping changes to the final regulation are primarily in response to a request from the Registrar of Regulations to correct sections which do not comply with Virginia Administrative Code (VAC) formatting requirements:
 - Section 10, Definitions, definitions are put in alphabetical order.
 - Section 20, Jurisdiction, sections are renumbered, and cross-references to other sections in the regulation are put in proper VAC format.
 - Section 90, Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.

The Department recommended the a change in 16VAC25-60-90.B.as a result of several enforcement cases over the last two years where attorneys for employers have independently identified employees that were interviewed during the VOSH inspection and begun having the employees request copies of their confidential interview statements so the employer could then review the statements. This practice could compromise an employee's willingness in future accident investigations to provide a statement to VOSH, or to be completely forthcoming with regards to safe working conditions on the job site, if they know their employer can gain access to the interview statement; and runs contrary to the legal principal in the Labor Laws of Virginia that provides that witness statements taken by VOSH inspectors are to remain private/confidential. Va. Code §40.1-49.8(2) provides that our inspectors are permitted to "question privately any such employer, owner, operator, agent or employee."

The Board adopted final regulatory language for 16VAC25-60-90.B. on August 13, 2009:

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed [~~for any purpose, except to the individual giving the statement~~].

The final regulation was submitted to the Department of Planning and Budget (DPB) for Executive Branch review on September 11, 2009. DPB completed its review on

September 23, 2009. Although DPB's policy memo is considered Governor's Confidential Working Papers, Department staff were informed that DPB had recommended the final regulation "with reservations."

DPB's reservations involved the change to 16VAC25-60-90.B, concerning a witnesses' ability to obtain a copy of their interview statement, and was based on the following factors:

- it is a significant change with the potential to impact numerous employees;
- this change is being added at the final stage without the opportunity for extensive analysis and public comment; and
- it is unclear whether a change to a substantive right exceeds the scope of the NOIRA.

DPB had suggested to Department staff that the Board either: (1) consider withdrawing the package and submitting it as a revised proposed regulation, or (2) removing the change to §90.B. and submitting it later as a separate action.

Department staff recommended pursuing option (1) by re-submitting the regulation as a revised proposed regulation and requesting the Board's approval to publish it subject to a comment period of at least 30 days, pursuant to Va. Code §2.2-4007.03, which provides:

"If an agency wishes to change a proposed regulation before adopting it as a final regulation, it may choose to publish a revised proposed regulation, provided the latter is subject to a public comment period of at least 30 additional days and the agency complies in all other respects with this section."

As discussed further below, Department staff also recommended changing the language in the interview statement section, 16VAC25-60-90.B. The language below in brackets is the language deleted in the original final regulation. Department staff recommended reinserting the original language and adding the phrase "pursuant to §40.1-11 of the Code of Virginia":

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § [40.1-49.8](#) of the Code of Virginia shall not be disclosed [for any purpose, except to the individual giving the statement] in accordance with the provisions of §40.1-11 of the Code of Virginia.

The Board adopted revised proposed regulatory language on January 14, 2010, including the above change to 16VAC25-60-90.B. An additional 30-day comment was published in the Virginia Register on April 12, 2010, and ending on May 12, 2010. No comments were received.

Further review by DPB of the Board's January 14, 2010, change to 16VAC25-60-90.B resulted in the following suggested change to that section by DPB:

B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner ~~in confidence~~ pursuant to § 40.1-49.8 of the Code of Virginia ~~shall not be disclosed [for any purpose, except to the individual giving the statement [in accordance with the provisions of §40.1-11 of the Code of Virginia]. [are confidential. Pursuant to the requirements set forth in §40.1-11 of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.]~~

The revised language in this section will retain the basic right of a witness to a copy of his/her interview statement but will make it clear that release of the statement must be in keeping with the purposes of the Labor Laws of Virginia, as required by Va. Code §40.1-11, which provides that:

“Neither the Commissioner nor any employee of the Department shall make use of or reveal any information or statistics gathered from any person, company or corporation for any purposes other than those of this title.”

- Section 100, Complaints, cross-references to other sections in the regulation were put in proper VAC format.
- Section 130, Construction industry standards, sections renumbered.
- Cross-references to other sections in the regulation were put in proper Virginia Administrative Code format for the following sections:
 - 140, Agricultural standards
 - 190, General provisions
 - 210, Permanent variances
 - 220, Interim order
 - 260, Issuance of citation and proposed penalty
 - 270, Contest of citation or proposed penalty
 - 280, General contest proceedings applicable to the public sector
 - 310, Contest of abatement period
 - 320, Extension of abatement time
 - 330, Informal Conference
 - 340, Settlement

Statement of final agency action

Please 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 or board taking the action, and (3) the title of the regulation.

On August 16, 2010, the Safety and Health Codes Board adopted as a final regulation amendments to the Administrative Regulations Manual (ARM) for the Virginia Occupational Safety and Health (VOSH), 16VAC25-60-240; 16VAC25-60-245, Take and Preserve Testimony, Examine Witnesses and Administer Oaths. The amendments establish procedures for the Commissioner or his appointed representatives under VA. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10. The amendments also make renumbering, cross-referencing and clarification changes to 16VAC-25-60-10, -20, -90, -100, -130, -140, -210, -220, 260, -270, -280, -310, -320, -330, and -340.

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., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The Safety and Health Codes Board is authorized by Title 40.1-22(5) to:

“... adopt, alter, amend, or repeal rules and regulations to further, protect and promote the safety and health of employees in places of employment over which it has jurisdiction and to effect compliance with the federal OSH Act of 1970...as may be necessary to carry out its functions established under this title.

....

In making such rules and regulations to protect the occupational safety and health of employees, the Board shall adopt the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence that no employee will suffer material impairment of health or functional capacity. However, such standards shall be at least as stringent as the standards promulgated by the federal OSH Act of 1970 (P.L.91-596). In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experiences gained under this and other health and safety laws.”

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

In fatal and non-fatal accident investigations particularly and more routine inspections as well, VOSH inspectors are required to interview one or more employees and supervisors. VOSH personnel sometimes encounter witnesses/employees/supervisors who refuse to talk with our inspectors or avoid answering specific questions for a variety of reasons. Some employees and supervisors have refused to talk with our inspectors after talking with either the company attorney or a private attorney hired by the individual. Although such refusals are rare, they can have a significant impact on the promptness, thoroughness and quality of the investigation.

It is a generally accepted investigative principle that the closer in time to an event that information about the event is obtained from witnesses, the better the chance is that the information will be accurate. Refusals can result in delays in obtaining witness statements immediately after the accident occurs, potentially resulting in altered memories and less accurate information concerning the cause of the accident.

In addition, the investigative process is often a very fluid one, where statements made by one witness can lead to additional questions being asked of other witnesses, or previously undisclosed documents being obtained from the employer. Such refusals can not only result in the loss of the individuals' testimony, but can also result in the loss of other potential leads in the investigation. Early access to such information will result in higher quality investigations, and better and more accurate outcomes.

When such refusals do occur, the inability to gather crucial information from eyewitnesses and sometimes the testimony of the injured employee greatly hampers the VOSH program's ability to complete a full and fair investigation of the accident in a timely manner - Va. Code §40.1-49.4.A.3 requires VOSH to issue citations within six months following the occurrence of any alleged violation. The Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, if implemented through regulation, could be used to obtain necessary testimony very early in the investigative process, avoiding delays and potentially altered memories.

Recommended housekeeping changes to the final regulation are primarily in response to a request from the Registrar of Regulations to correct sections which do not comply with Virginia Administrative Code (VAC) formatting requirements. The amendments make renumbering, cross-referencing and clarification changes to 16VAC-25-60-10, -20, -90, -100, -130, -140, -210, -220, 260, -270, -280, -310, -320, -330, and -340.

The Department recommended the change in 16VAC25-60-90.B.as a result of several enforcement cases over the last two years where attorneys for employers have independently identified employees that were interviewed during the VOSH inspection and begun having the employees request copies of their confidential interview statements so the employer could then review the statements. This practice could compromise an employee's willingness in future accident investigations to provide a statement to VOSH, or to be completely forthcoming with regards to safe working conditions on the job site, if they know their employer can gain access to the interview statement; and runs contrary to the legal principal in the Labor Laws of Virginia that provides that witness statements taken by VOSH inspectors are to remain

private/confidential. Va. Code §40.1-49.8(2) provides that our inspectors are permitted to "question privately any such employer, owner, operator, agent or employee."

The revised language in this section will retain the basic right of a witness to a copy of his/her interview statement but will make it clear that release of the statement must be in keeping with the purposes of the Labor Laws of Virginia, as required by Va. Code §40.1-11, which provides that:

“Neither the Commissioner nor any employee of the Department shall make use of or reveal any information or statistics gathered from any person, company or corporation for any purposes other than those of this title.”

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the “All changes made in this regulatory action” section.

The amendment of the Administrative Regulations of the VOSH Program establishes procedures for the Commissioner or his appointed representatives under Va. Code §40.1-6(5) to take and preserve testimony, examine witnesses and administer oaths under Va. Code §§40.1-6(4) and 40.1-10.

The final regulation:

- * Specifies the wording of the oath to be administered and the manner in which it would be administered;
- * Explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and having the authority to examine witnesses in accordance with the procedures outlined in the regulation;
- * Specifies that testimony preserved under the regulation would be recorded by a court reporter;
- * Specifies the level of confidentiality that would attach to any testimony preserved under the statute;
- * Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code 40.1-6(4). The final regulation provides that an application for an inspection warrant under Va. Code §§40.1-49.8 through 40.1-49.12 for VOSH investigations/inspections will be submitted to the local General District

or Circuit Court with jurisdiction over the employer.

- * Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth's Attorney for prosecution of the individual involved.

The Department recommended the change in 16VAC25-60-90.B.as a result of several enforcement cases over the last two years where attorneys for employers have independently identified employees that were interviewed during the VOSH inspection and begun having the employees request copies of their confidential interview statements so the employer could then review the statements. This practice could compromise an employee's willingness in future accident investigations to provide a statement to VOSH, or to be completely forthcoming with regards to safe working conditions on the job site, if they know their employer can gain access to the interview statement; and runs contrary to the legal principal in the Labor Laws of Virginia that provides that witness statements taken by VOSH inspectors are to remain private/confidential. Va. Code §40.1-49.8(2) provides that our inspectors are permitted to "question privately any such employer, owner, operator, agent or employee."

The revised language in this section will retain the basic right of a witness to a copy of his/her interview statement but will make it clear that release of the statement must be in keeping with the purposes of the Labor Laws of Virginia, as required by Va. Code §40.1-11, which provides that:

“Neither the Commissioner nor any employee of the Department shall make use of or reveal any information or statistics gathered from any person, company or corporation for any purposes other than those of this title.”

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 there are no disadvantages to the public or the Commonwealth, please indicate.*

In fatal and non-fatal accident investigations particularly and more routine inspections as well, VOSH inspectors are required to interview one or more employees and supervisors. VOSH personnel sometimes encounter witnesses/employees/supervisors that refuse to talk with our inspectors or avoid answering specific questions for a variety of reasons. Although such refusals are rare, they can have a significant impact on the promptness, thoroughness and quality of the investigation.

It is a generally accepted investigative principle that the closer in time to an event that information about the event is obtained from witnesses, the better the chance is that the information will be accurate. Refusals can result in delays in obtaining witness statements immediately after the accident occurs, potentially resulting in altered memories and less accurate information concerning the cause of the accident.

In addition, the investigative process is often a very fluid one, where statements made by one witness can lead to additional questions being asked of other witnesses, or previously undisclosed documents being obtained from the employer. Such refusals can not only result in the loss of the individuals' testimony, but can also result in the loss of other potential leads in the investigation. Early access to such information will result in higher quality investigations, and better and more accurate outcomes.

When such refusals do occur, the inability to gather crucial information from eyewitnesses and sometimes the testimony of the injured employee greatly hampers the VOSH program's ability to complete a full and fair investigation of the accident in a timely manner - Va. Code §40.1-49.4.A.3 requires VOSH to issue citations within six months following the occurrence of any alleged violation. The Commissioner's statutory authority to take and preserve testimony, examine witnesses and administer oaths, if implemented through regulation, could be used to obtain necessary testimony very early in the investigative process, avoiding delays and potentially altered memories.

Employers would have to make employees available for private interview as identified by the Commissioner or his representative, in accordance with procedures in the proposed regulation, implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10.

The Commissioner currently has the statutory authority to "question privately any such employer, owner, operator, agent or employee" during a VOSH inspection in accordance with Va. Code §40.1-49.8(2). As noted previously, VOSH investigation procedures provide for employee interviews on all inspections, and employers, as a regular course of business, make their employees available for such interviews without limitation. VOSH does not believe the proposed regulation will have a significant cost impact on employers for the following reasons:

- VOSH estimates that it will seek to use the new procedures in the proposed regulation to require an employer to make an employee available for an interview on an average of five or fewer cases per year.
- The average length of a VOSH interview is normally 15 minutes or less; however, in accident cases an interview may last up to 60-90 minutes. Significant down time for employers or employees is not anticipated.
- Interview locations would normally be at the employer's worksite, an agreed to alternate site, or at the local VOSH Office. Significant travel costs are not anticipated.
- VOSH will assume the cost of transcription services.

Employees would have to provide testimony, in accordance with any procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10. As noted previously, VOSH

investigation procedures provide for employee interviews on all inspections, and employees and supervisory personnel regularly agree, without limitation, to be interviewed. VOSH does not believe the proposed regulation will have a significant cost impact on employees for the reasons listed in C. above.

The Department would have to designate and train personnel on the procedures implementing the statutory requirements in Va. Code §§40.1-6(4) and 40.1-10. The average cost of transcriptions services ranges for a one hour interview is approximately \$200. The VOSH Program estimates that annual costs for interviews under the proposed regulations would be \$1,000 or less.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
16 VAC25-60-10	<p>The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:</p> <p>"Abatement period" means the period of time defined or set out in the citation for correction of a violation.</p> <p>"Bureau of Labor Statistics" means the Bureau of Labor Statistics of the United States Department of Labor.</p> <p>"Citation" means the notice to an employer that the commissioner has found a condition or conditions that violate</p>	<p>The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:</p> <p>"Abatement period" means the period of time defined or set out in the citation for correction of a violation.</p> <p><u>["Board" means the Safety and Health Codes Board.]</u></p> <p>"Bureau of Labor Statistics" means the Bureau of Labor Statistics of the United States Department of Labor.</p> <p>"Citation" means the notice to an employer that the commissioner has found a condition or conditions that violate Title 40.1 of the Code of Virginia or the standards, rules</p>	<p>Rationale: Definitions were placed in alphabetical order.</p>

<p>16 VAC 25-60- 20</p>	<p>Title 40.1 of the Code of Virginia or the standards, rules or regulations established by the commissioner or the board.</p> <p>"Board" means the Safety and Health Codes Board.</p> <p>"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any such reference shall include his authorized representatives.</p> <p>All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:</p> <p>A. The United States is the employer or exercises exclusive jurisdiction;</p> <p>B. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider Federal OSHA case law in determining</p>	<p>or regulations established by the commissioner or the board.</p> <p>["Board" means the Safety and Health Codes Board.]</p> <p>"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any such reference shall include his authorized representatives.</p> <p>....</p> <p>All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:</p> <p>A. 1. The United States is the employer or exercises exclusive jurisdiction;</p> <p>B. 2. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider F federal OSHA case law in determining where jurisdiction over specific working conditions has been preempted by the</p>	<p>Rationale: Sections were renumbered and cross-references to other sections in the regulation were placed in proper VAC format.</p>
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<p>16 VAC 25-60- 90</p>	<p>where jurisdiction over specific working conditions has been preempted by the regulations of a federal agency; or</p> <p>C. The employer is a public employer, as that term is defined in this chapter. In such cases, the Virginia laws, standards and regulations governing occupational safety and health are applicable as stated including §§ 10, 30, 280, 290 and 300 of these regulations.</p> <p>....</p> <p>16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.</p> <p>....</p> <p>B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed for any purpose, except to the individual giving the statement.</p> <p>....</p>	<p>regulations of a federal agency; or</p> <p>C. 3. The employer is a public employer, as that term is defined in this chapter. In such cases, the Virginia laws, standards and regulations governing occupational safety and health are applicable as stated including §§ 10, 30, 280, 290 and 300 of these regulations <u>16VAC25-60-10, 16VAC25-60-30, 16VAC25-60-280, 16VAC25-60-290, and 16VAC25-60-300.</u></p> <p>....</p> <p>16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.</p> <p>....</p> <p>....</p> <p>*</p> <p>B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed [for any purpose, except to the individual giving the statement]. <u>[are confidential. Pursuant to the requirements set forth in §40.1-11 of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.]</u></p>	<p>Rationale: Language changed as a result of several enforcement cases over the last two years where attorneys for employers have independently identified employees that were interviewed during the VOSH inspection and begun having the employees request copies of their confidential interview statements so the employer could then review the statements. The recommended changed is related to the purpose of the original proposed regulation because the practice could place at risk an employee's</p>
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<p>16 VAC 25-60- 100</p>	<p>..... F. ... 2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in §100.F.1 above. 3. The commissioner reserves the right, for good cause shown, to initiate an inspection</p>	<p>..... F. ... 2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in [§100.F.1 above <u>subdivision 1 of this subsection.</u>] 3. The commissioner reserves the right, for good cause shown, to initiate an inspection with regard to certain complaints that</p>	<p>willingness in future accident investigations to provide a statement to VOSH, or to be completely forthcoming with regards to safe working conditions on the job site, if they know their employer is going to be able to review the interview statement.</p> <p>Language change from proposed to final based on agreement with Department of Planning and Budget (see discussion above).</p> <p>Rationale: Cross-references to other sections in the regulation were placed in proper VAC format.</p>
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<p>16 VAC 25-60- 130</p>	<p>with regard to certain complaints that do not meet the criteria listed in §100.F.1 above; as well as to decline to conduct an inspection and instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in subdivision 1 of this subsection. Part III Occupational Safety and Health Standards 16VAC25-60-130. Construction industry standards. A. For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation,</p>	<p>do not meet the criteria listed in <u>§100.F.1 above; subdivision 1 of this subsection;</u> as well as to decline to conduct an inspection and instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in subdivision 1 of this subsection. Part III Occupational Safety and Health Standards 16VAC25-60-130. Construction industry standards. <u>[A-1.]</u> For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades</p>	<p>Rationale: Sections were renumbered.</p>
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	<p>grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.</p> <p>B. Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.</p> <p>C. The standards adopted from 29 CFR Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.</p>	<p>such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.</p> <p>[B. 2.] Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.</p> <p>[C. 3.] The standards adopted from 29 CFR Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.</p>	
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<p>16 VAC 25-60- 140</p>	<p>16VAC25-60-140. Agriculture standards. For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in §130.1 of this regulation, nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.</p>	<p>16VAC25-60-140. Agriculture standards. For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in <u>§130.1 of this regulation subdivision 1 of 16VAC25-60-130</u>, nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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<p>16 VAC 25-60- 190</p>	<p>Part IV Variances 16VAC25-60-190. General provisions. B. In addition to the information specified in §§200.A and 210.A of this regulation, every variance application shall contain the following: 1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with §40 of these regulations, a summary of the application which indicates where a full copy of the application may be examined; F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either §200.B.4. or §210.B.4. of these regulations. 2. The employer shall post a copy of the commissioner's decision</p>	<p>Part IV Variances 16VAC25-60-190. General provisions. B. In addition to the information specified in [§§200.A and 210.A of this regulation 16VAC25-60-200 A and 16VAC25-60-210 A], every variance application shall contain the following: 1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with [§40 of these regulations-16VAC25-60-40], a summary of the application which indicates where a full copy of the application may be examined; F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either [§200.B.4. or §210.B.4. of these regulations 16VAC25-60-200 B 4 or 16VAC25-60-210 B 4]. 2. The employer shall post a copy of the commissioner's decision in accordance with</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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	<p>in accordance with §40 of these regulations.</p> <p>G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of §40 of these regulations.</p>	<p>§40 of these regulations 16VAC25-60-40.</p> <p>G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of §40 of these regulations-16VAC25-60-40.</p>	
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<p>16 VAC 25-60- 210</p>	<p>16VAC25-60-210. Permanent variances. A. Applications filed with the commissioner for a permanent variance from a standard or regulation shall be subject to the requirements of §190 of these regulations and the following additional requirements.</p>	<p>16VAC25-60-210. Permanent variances. A. Applications filed with the commissioner for a permanent variance from a standard or regulation shall be subject to the requirements of §190 of these regulations-16VAC25-60-190 and the following additional requirements.</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
<p>16 VAC 25-60- 220</p>	<p>16VAC25-60-220. Interim order. B. A letter of application for an interim order shall include statements as to why the interim order should be granted and shall include a statement that it has been posted in accordance with §40 of these regulations. The provisions contained in §§190.A, 190.B.1. and 190.B.3. of these regulations shall apply to applications for interim orders in the same manner as they do to variances.</p>	<p>16VAC25-60-220. Interim order. B. A letter of application for an interim order shall include statements as to why the interim order should be granted and shall include a statement that it has been posted in accordance with §40 of these regulations 16VAC25-60-40. The provisions contained in §§190.A, 190.B.1. and 190.B.3. of these regulations 16VAC25-60-190 A, B 1 and B 3 shall apply to applications for interim orders in the same manner as they do to variances.</p>	<p>Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
<p>16 VAC 25-60- 260</p>	<p>Part VI Citation and Penalty 16VAC25-60-260. Issuance of citation and proposed penalty. A.</p>	<p>Part VI Citation and Penalty 16VAC25-60-260. Issuance of citation and proposed penalty. A.</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>

<p>16 VAC 25-60-270</p>	<p>1. e. Notwithstanding subdivision 1 b of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with §100 of these regulations, or referral, the six-month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral. 16VAC25-60-270. Contest of citation or proposed penalty; general proceedings. C. The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of §40 of these regulations unless and until the court ruling on the contest vacates the citation. D. When the commissioner has received written notification of a contest of citation or proposed penalty, he will attempt to resolve the matter by settlement, using the procedures of §§330 and 340 of these regulations.</p>	<p>1. e. Notwithstanding subdivision 1 b of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with §100 of these regulations, 16VAC25-60-100 or referral, the six-month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral. 16VAC25-60-270. Contest of citation or proposed penalty; general proceedings. C. The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of §40 of these regulations 16VAC25-60-40 unless and until the court ruling on the contest vacates the citation. D. When the commissioner has received written notification of a contest of citation or proposed penalty, he will attempt to resolve the matter by settlement, using the procedures of §§330 and 340 of these regulations 16VAC25-60-330 and 16VAC25-60-340.</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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<p>16 VAC 25-60- 280</p>	<p>....</p> <p>16VAC25-60-280. General contest proceedings applicable to the public sector.</p> <p>....</p> <p>E. The commissioner shall seek to resolve any controversies or issues rising from a citation issued to any public employer in an informal conference as described in §330 of these regulations.</p> <p>F. The contest by a public employer shall not affect the requirements to post the citation as required at §40 of these regulations unless and until the commissioner's or the court ruling on the contest vacates the citation. A contest of a citation may stay the time permitted for abatement pursuant to § 40.1-49.4 C of the Code of Virginia.</p> <p>....</p>	<p>16VAC25-60-280. General contest proceedings applicable to the public sector.</p> <p>....</p> <p>E. The commissioner shall seek to resolve any controversies or issues rising from a citation issued to any public employer in an informal conference as described in §330 of these regulations 16VAC25-60-330.</p> <p>F. The contest by a public employer shall not affect the requirements to post the citation as required at §40 of these regulations 16VAC25-60-40 unless and until the commissioner's or the court ruling on the contest vacates the citation. A contest of a citation may stay the time permitted for abatement pursuant to § 40.1-49.4 C of the Code of Virginia.</p> <p>....</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
<p>16 VAC 25-60- 310</p>	<p>Part VII Abatement 16VAC25-60-310. Contest of abatement period.</p> <p>....</p> <p>C. The same procedures and requirements used for contest of citation and penalty, set forth at §§270, 280, 290, and</p>	<p>Part VII Abatement 16VAC25-60-310. Contest of abatement period.</p> <p>....</p> <p>C. The same procedures and requirements used for contest of citation and penalty, set forth at §§270, 280, 290, and 300, of these regulations 16VAC25-60-270, 16VAC25-60-280,</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>

<p>16 VAC 25-60- 320</p>	<p>300, of these regulations, shall apply to contests of abatement period.</p> <p>16VAC25-60-320. Extension of abatement time. C.</p> <p>5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with §40 of these regulations, and a certification of the date upon which such posting and service was made.</p> <p>G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with §330 of these regulations. If the matter is not settled or settlement does not appear probable, objections will be heard in the manner set forth in subsection I of this section.</p>	<p><u>16VAC25-60-290, and 16VAC25-60-300</u>], shall apply to contests of abatement period.</p> <p>16VAC25-60-320. Extension of abatement time. C.</p> <p>5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with §40 of these regulations-16VAC25-60-40], and a certification of the date upon which such posting and service was made.</p> <p>G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with §330 of these regulations-16VAC25-60-330]. If the matter is not settled or settlement does not appear probable, objections will be heard in the manner set forth in subsection I of this section.</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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<p>16 VAC 25-60- 330</p>	<p>Part VIII Review and Settlement</p> <p>16VAC25-60-330. Informal conference.</p> <p>....</p> <p>E. An employee representative shall be given the opportunity to participate in a conference requested by the employer. This same right will be extended to the employer when an informal conference is requested by employees. It is the duty of the employer, if he has requested a conference, to notify the employees by the means described in §40 of these regulations as soon as the time and place of the conference have been established. Upon granting an employee request for a conference, the commissioner is responsible for notifying the employer. The commissioner, at his discretion, may conduct separate portions of the conference with the employer and employee representative.</p> <p>F. During or following the conference the commissioner may affirm or amend the citations, penalties, or abatement period if the order has not become</p>	<p>Part VIII Review and Settlement</p> <p>16VAC25-60-330. Informal conference.</p> <p>....</p> <p>E. An employee representative shall be given the opportunity to participate in a conference requested by the employer. This same right will be extended to the employer when an informal conference is requested by employees. It is the duty of the employer, if he has requested a conference, to notify the employees by the means described in §40 of these regulations-16VAC25-60-40 as soon as the time and place of the conference have been established. Upon granting an employee request for a conference, the commissioner is responsible for notifying the employer. The commissioner, at his discretion, may conduct separate portions of the conference with the employer and employee representative.</p> <p>F. During or following the conference the commissioner may affirm or amend the citations, penalties, or abatement period if the order has not become final. The commissioner shall notify the employer in writing of his decision. The employer shall notify employees of this decision in the manner set forth in §40 of these regulations-16VAC25-60-40.</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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<p>16 VAC 25-60- 340</p>	<p>final. The commissioner shall notify the employer in writing of his decision. The employer shall notify employees of this decision in the manner set forth in §40 of these regulations.</p> <p>....</p> <p>16VAC25-60-340. Settlement.</p> <p>....</p> <p>B. Settlement negotiations will ordinarily take place in the medium of an informal conference. Employees shall be given notice of scheduled settlement discussions and shall be given opportunity to participate in the manner provided for in §330.E. of these</p>	<p>....</p> <p>16VAC25-60-340. Settlement.</p> <p>....</p> <p>B. Settlement negotiations will ordinarily take place in the medium of an informal conference. Employees shall be given notice of scheduled settlement discussions and shall be given opportunity to participate in the manner provided for in §330.E. of these regulations <u>16VAC25-60-330 E</u>.</p>	<p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response

No public comments were received.

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
16 VAC25-60-10		<p>The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:</p> <p>"Abatement period" means the period of time defined or set out in the citation for correction of a violation.</p> <p>"Bureau of Labor Statistics" means the Bureau of Labor Statistics of the United States Department of Labor.</p> <p>"Citation" means the notice to an employer that the commissioner has found a condition or conditions that violate Title 40.1 of the Code of Virginia or the standards, rules or regulations established by the commissioner or the board.</p> <p>"Board" means the Safety and Health Codes Board.</p>	<p>The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:</p> <p>"Abatement period" means the period of time defined or set out in the citation for correction of a violation.</p> <p><u>["Board" means the Safety and Health Codes Board.]</u></p> <p>"Bureau of Labor Statistics" means the Bureau of Labor Statistics of the United States Department of Labor.</p> <p>"Citation" means the notice to an employer that the commissioner has found a condition or conditions that violate Title 40.1 of the Code of Virginia or the standards, rules or regulations established by the commissioner or the board.</p> <p><u>["Board" means the Safety and Health Codes Board.]</u></p>

<p>16 VAC25- 60-20</p>		<p>"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any such reference shall include his authorized representatives.</p> <p>Part II</p> <p>General Provisions</p> <p>16 VAC25-60-20. Jurisdiction.</p> <p>All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:</p> <p>A. The United States is the employer or exercises exclusive jurisdiction;</p> <p>B. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider Federal OSHA case law in determining where jurisdiction over specific working</p>	<p>"Commissioner" means the Commissioner of Labor and Industry. Except where the context clearly indicates the contrary, any such reference shall include his authorized representatives.</p> <p><u>Rationale:</u> Definitions were placed in alphabetical order.</p> <p>Part II</p> <p>General Provisions</p> <p>16 VAC25-60-20. Jurisdiction.</p> <p>All Virginia statutes, standards, and regulations pertaining to occupational safety and health shall apply to every employer, employee and place of employment in the Commonwealth of Virginia except where:</p> <p>A. 1. The United States is the employer or exercises exclusive jurisdiction;</p> <p>B. 2. The federal Occupational Safety and Health Act of 1970 does not apply by virtue of § 4(b)(1) of that Act. The commissioner shall consider F f federal OSHA case law in determining where jurisdiction over specific working conditions has been preempted by the regulations of a federal agency; or</p>
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<p>16 VAC25- 60-90</p>		<p>conditions has been preempted by the regulations of a federal agency; or</p> <p>C. The employer is a public employer, as that term is defined in this chapter. In such cases, the Virginia laws, standards and regulations governing occupational safety and health are applicable as stated including §§ 10, 30, 280, 290 and 300 of these regulations.</p> <p>....</p> <p>16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.</p> <p>....</p> <p>B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed for any purpose, except to the individual giving the statement.</p> <p>....</p>	<p>[C. 3.] The employer is a public employer, as that term is defined in this chapter. In such cases, the Virginia laws, standards and regulations governing occupational safety and health are applicable as stated including [§§ 10, 30, 280, 290 and 300 of these regulations-16VAC25-60-10, 16VAC25-60-30, 16VAC25-60-280, 16VAC25-60-290, and 16VAC25-60-300.]</p> <p>....</p> <p><u>Rationale: Sections were renumbered and cross-references to other sections in the regulation were placed in proper VAC format.</u></p> <p>16VAC25-60-90. Release of information and disclosure pursuant to requests under the Virginia Freedom of Information Act and subpoenas.</p> <p>....</p> <p>B. Interview statements of employers, owners, operators, agents, or employees given to the commissioner in confidence pursuant to § 40.1-49.8 of the Code of Virginia shall not be disclosed [for any purpose, except to the individual giving the statement]. <u>[are confidential. Pursuant to the requirements set forth in §40.1-11 of the Code of Virginia, individuals shall have the right to request a copy of their own interview statements.]</u></p> <p>....</p>
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<p>16VAC 25-60-100</p>		<p>16 VAC 25-60-100. Complaints F. ... 2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in §100.F.1 above. 3. The commissioner reserves the right, for good cause shown, to initiate an inspection with regard to certain</p>	<p><u>Rationale:</u> Language changed as a result of several enforcement cases over the last two years where attorneys for employers have independently identified employees that were interviewed during the VOSH inspection and begun having the employees request copies of their confidential interview statements so the employer could then review the statements. The recommended changed is related to the purpose of the original proposed regulation because the practice could place at risk an employee’s willingness in future accident investigations to provide a statement to VOSH, or to be completely forthcoming with regards to safe working conditions on the job site, if they know their employer is going to be able to review the interview statement.</p> <p>16 VAC 25-60-100. Complaints F. ... 2. A complaint investigation, which does not involve onsite activity, shall normally be conducted for all complaints that do not meet the criteria listed in <u>[\$100.F.1 above subdivision 1 of this subsection.]</u> 3. The commissioner reserves the right, for good cause shown, to initiate an inspection with regard to certain complaints that do not meet the criteria listed in <u>[\$100.F.1 above; subdivision 1 of this subsection;]</u> as well as to decline to conduct an inspection and</p>
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<p>16 VAC 25-60-130</p>		<p>complaints that do not meet the criteria listed in §100.F.1 above; as well as to decline to conduct an inspection and instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in subdivision 1 of this subsection.</p> <p>....</p> <p>Part III</p> <p>Occupational Safety and Health Standards</p> <p>....</p> <p>16VAC25-60-130. Construction industry standards.</p> <p>....</p> <p>A. For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property.</p>	<p>instead conduct an investigation, for good cause shown, when certain complaints are found to otherwise meet the criteria listed in subdivision 1 of this subsection.</p> <p>....</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper VAC format.</p> <p>Part III</p> <p>Occupational Safety and Health Standards</p> <p>....</p> <p>16VAC25-60-130. Construction industry standards.</p> <p>....</p> <p>A.1. For the purposes of the applicability of such Part 1926 standards, the key criteria utilized to make such a decision shall be the activities taking place at the worksite, not the primary business of the employer. Construction work shall generally include any building, altering, repairing, improving, demolishing, painting or decorating any structure, building, highway, or roadway; and any draining, dredging, excavation, grading or similar work upon real property. Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or</p>
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		<p>Construction also generally includes work performed in traditional construction trades such as carpentry, roofing, masonry work, plumbing, trenching and excavating, tunneling, and electrical work. Construction does not include maintenance, alteration or repair of mechanical devices, machinery, or equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.</p> <p>B. Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.</p> <p>C. The standards adopted from 29 CFR Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.</p>	<p>equipment, even when the mechanical device, machinery or equipment is part of a pre-existing structure.</p> <p>[B. 2.] Certain standards of 29 CFR Part 1910 have been determined by federal OSHA to be applicable to construction and have been adopted for this application by the board.</p> <p>[C. 3.] The standards adopted from 29 CFR Part 1910.19 and 29 CFR Part 1910.20 containing respectively, special provisions regarding air contaminants and requirements concerning access to employee exposure and medical records shall apply to construction work as well as general industry.</p> <p><u>Rationale:</u> Sections were renumbered.</p>
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<p>16VAC25-60-140</p>		<p>16VAC25-60-140. Agriculture standards. For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in §130.1 of this regulation, nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture.</p>	<p>16VAC25-60-140. Agriculture standards. For the purposes of applicability of such Part 1910 and Part 1928 standards, the key criteria utilized to make a decision shall be the activities taking place at the worksite, not the primary business of the employer. Agricultural operations shall generally include any operation involved in the growing or harvesting of crops or the raising of livestock or poultry, or activities integrally related to agriculture, conducted by a farmer or agricultural employer on sites such as farms, ranches, orchards, dairy farms or similar establishments. Agricultural operations do not include construction work as described in §130.1 of this regulation subdivision 1 of 16VAC25-60-130, nor does it include operations or activities substantially similar to those that occur in a general industry setting and are therefore not unique and integrally related to agriculture. <u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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<p>16VAC25-60-190</p>		<p>Part IV Variances</p> <p>16VAC25-60-190. General provisions.</p> <p>B. In addition to the information specified in §§200.A and 210.A of this regulation, every variance application shall contain the following:</p> <p>1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with §40 of these regulations, a summary of the application which indicates where a full copy of the application may be examined;</p> <p>F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either §200.B.4. or §210.B.4. of these regulations.</p> <p>2. The employer shall post a copy of the commissioner's decision</p>	<p>Part IV Variances</p> <p>16VAC25-60-190. General provisions.</p> <p>B. In addition to the information specified in §§200.A and 210.A of this regulation <u>16VAC25-60-200 A and 16VAC25-60-210 A</u>, every variance application shall contain the following:</p> <p>1. A statement that the applicant has informed affected employees of the application by delivering a copy of the application to their authorized representative, if there is one, as well as having posted, in accordance with §40 of these regulations <u>16VAC25-60-40</u>, a summary of the application which indicates where a full copy of the application may be examined;</p> <p>F. The commissioner will grant a variance request only if it is found that the employer has met by a preponderance of the evidence, the requirements of either §200.B.4. or §210.B.4. of these regulations <u>16VAC25-60-200 B 4 or 16VAC25-60-210 B 4</u>.</p> <p>2. The employer shall post a copy of the commissioner's decision in accordance with §40 of these regulations</p>
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		<p>in accordance with §40 of these regulations.</p> <p>G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of §40 of these regulations.</p>	<p>16VAC25-60-40.</p> <p>G. Any party may within 15 days of the commissioner's decision file a notice of appeal to the board. Such appeal shall be in writing, addressed to the board, and include a statement of how other affected parties have been notified of the appeal. Upon notice of a proper appeal, the commissioner shall advise the board of the appeal and arrange a date for the board to consider the appeal. The commissioner shall advise the employer and employee representative of the time and place that the board will consider the appeal. Any party that submitted written or oral views or participated in the hearing concerning the original application for the variance shall be invited to attend the appeal hearing. If there is no employee representative, a copy of the commissioner's letter to the employer shall be posted by the employer in accordance with the requirements of [§40 of these regulations-16VAC25-60-40].</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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<p>16VAC25-60-210</p>		<p>16VAC25-60-210. Permanent variances.</p> <p>A. Applications filed with the commissioner for a permanent variance from a standard or regulation shall be subject to the requirements of §190 of these regulations and the following additional requirements.</p> <p>....</p>	<p>16VAC25-60-210. Permanent variances.</p> <p>A. Applications filed with the commissioner for a permanent variance from a standard or regulation shall be subject to the requirements of §190 of these regulations <u>16VAC25-60-190</u> and the following additional requirements.</p> <p>....</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
<p>16VAC25-60-220</p>		<p>16VAC25-60-220. Interim order.</p> <p>....</p> <p>B. A letter of application for an interim order shall include statements as to why the interim order should be granted and shall include a statement that it has been posted in accordance with §40 of these regulations. The provisions contained in §§190.A, 190.B.1. and 190.B.3. of these regulations shall apply to applications for interim orders in the same manner as they do to variances.</p> <p>....</p>	<p>16VAC25-60-220. Interim order.</p> <p>....</p> <p>B. A letter of application for an interim order shall include statements as to why the interim order should be granted and shall include a statement that it has been posted in accordance with §40 of these regulations <u>16VAC25-60-40</u>. The provisions contained in §§190.A, 190.B.1. and 190.B.3. of these regulations <u>16VAC25-60-190 A, B 1 and B 3</u> shall apply to applications for interim orders in the same manner as they do to variances.</p> <p>....</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>

<p>16VAC25-60-240</p>	<p>16VAC 25-60-245</p>	<p>16 VAC 25-60-240.</p> <p>Walkthrough</p> <p>Walkthrough by the commissioner for the inspection of any workplace includes the following privileges.</p> <p>1. The commissioner shall be in charge of the inspection and, as part of an inspection, may question privately any employer, owner, operator, agent, or employee. The commissioner shall conduct the interviews of persons during the inspection or at other convenient times.</p>	<p>* 16 VAC 25-60-240. Walkthrough</p> <p>Walkthrough by the commissioner for the inspection of any workplace includes the following privileges.</p> <p>*</p> <p>1. The commissioner shall be in charge of the inspection and, as part of an inspection, may question privately any employer, owner, operator, agent, or employee. The commissioner shall conduct the interviews of persons during the inspection or at other convenient times. <u>[The commissioner may take and preserve testimony, examine witnesses and administer oaths as provided for in [§24516 VAC 25-60-245 of these regulations.]</u></p> <p><u>Rationale:</u> Language provides a reference for powers of the commissioner which appear in new section 16 VAC 25-60-245.</p> <p>*</p> <p><u>[16 VAC 25-60-245</u> <u>Take and Preserve Testimony,</u> <u>Examine Witnesses and Administer Oaths</u> <u>1. Section 40.1-6(4) of the Code of Virginia authorizes the commissioner, in the discharge of his duties, to take and preserve testimony, examine witnesses and administer oaths. In accordance with §40.1-6(5) of the Code of Virginia, the Commissioner of Labor and Industry may appoint such representatives as are necessary to carry out the functions outlined in §40.1-6(4) of the Code of Virginia. Such appointments shall be made in writing, identify the individual being</u></p>
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			<p><u>appointed, the length of appointment, the method of withdrawal of such appointment, and specify what duties are being prescribed.</u></p> <p><u>2. The oath shall be administered by the commissioner’s appointed representative to the witness as follows: “Do you swear or affirm to tell the truth”.</u></p> <p><u>3. Testimony given under oath shall be recorded by a court reporter.</u></p> <p><u>4. Questioning of employers, owners, operators, agents or employees under oath shall be in private in accordance with §40.1-49.8(2) of the Code of Virginia.</u></p> <p><u>5. An employer’s refusal to make an owner, operator, agent or employee available to the commissioner for examination under this section shall be considered a refusal to consent to the commissioner’s inspection authority under §40.1-49.8 of the Code of Virginia. Upon such refusal the commissioner may seek an administrative search warrant in accordance with the provisions contained in §§40.1-49.9 to -49.12 of the Code of Virginia, and obtain an order from the appropriate judge commanding the employer to make the subject owner, operator, agent or employee available for examination at a specified location by a date and time certain.</u></p> <p><u>6. In accordance with §40.1-10 of the Code of Virginia, if any person who may be sworn to give testimony shall willfully fail or refuse to answer any legal and proper question propounded to him concerning the subject of the examination under §40.1-6 of the Code of Virginia, he shall be guilty of a misdemeanor. Such person, upon conviction thereof, shall be fined not exceeding \$100 nor</u></p>
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			<p><u>less than \$25 or imprisoned in jail not exceeding 90 days or both. Any such refusal on the part of any person to comply with this section may be referred by the Commissioner of Labor and Industry to the appropriate Commonwealth's Attorney for prosecution.]</u></p> <p>....</p> <p><u>Rationale:</u> This language:</p> <p>Specifies the wording of the oath to be administered and the manner in which it would be administered;</p> <p>Explains the manner in which the Commissioner would appoint in writing Department personnel as his representatives having the authority to administer such oaths and having the authority to examine witnesses in accordance with the procedures outlined in the regulation;</p> <p>Specifies that testimony preserved under the regulation would be recorded by a court reporter;</p> <p>Specifies the level of confidentiality that would attach to any testimony preserved under the statute;</p> <p>Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any employer refuses to make an employee or supervisor available to provide testimony in accordance with Va. Code 40.1-6(4). The final regulation provides that an application for an inspection warrant under Va. Code §§40.1-49.8 through 40.1-49.12 for VOSH investigations/inspections will be submitted to the local General District or Circuit Court with</p>
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<p>16VAC 25-60-260</p>		<p>Part VI Citation and Penalty 16VAC25-60-260. Issuance of citation and proposed penalty. A. 1.</p> <p>e. Notwithstanding subdivision 1 b of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with §100 of these regulations, or referral, the six-month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral.</p>	<p>jurisdiction over the employer.</p> <p>Establishes a procedure for the Commissioner or his authorized representatives to follow in the event that any person who has sworn to give testimony willfully refuses or fails to answer any legal and proper question in accordance with Va. Code §§40.1-10 and 40.1-6(4), up to and including referring such refusal to the appropriate Commonwealth’s Attorney for prosecution of the individual involved.</p> <p>Part VI Citation and Penalty 16VAC25-60-260. Issuance of citation and proposed penalty. A. 1.</p> <p>e. Notwithstanding subdivision 1 b of this subsection, if the commissioner is first notified of a work-related hazard, or incident resulting in an injury or illness to an employee(s), through receipt of a complaint in accordance with [§100 of these regulations, 16VAC25-60-100] or referral, the six-month time frame shall not be deemed to commence until the commissioner actually receives the complaint or referral.</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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<p>16VAC25-60-270</p>		<p>....</p> <p>16VAC25-60-270. Contest of citation or proposed penalty; general proceedings.</p> <p>....</p> <p>C. The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of §40 of these regulations unless and until the court ruling on the contest vacates the citation.</p> <p>D. When the commissioner has received written notification of a contest of citation or proposed penalty, he will attempt to resolve the matter by settlement, using the procedures of §§330 and 340 of these regulations.</p> <p>....</p>	<p>16VAC25-60-270. Contest of citation or proposed penalty; general proceedings.</p> <p>....</p> <p>C. The employer's contest of a citation or proposed penalty shall not affect the citation posting requirements of §40 of these regulations <u>16VAC25-60-40</u> unless and until the court ruling on the contest vacates the citation.</p> <p>D. When the commissioner has received written notification of a contest of citation or proposed penalty, he will attempt to resolve the matter by settlement, using the procedures of §§330 and 340 of these regulations <u>16VAC25-60-330 and 16VAC25-60-340</u>.</p> <p>Rationale: Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
<p>16VAC25-60-280</p>		<p>16VAC25-60-280. General contest proceedings applicable to the public sector.</p> <p>....</p> <p>E. The commissioner shall seek to resolve any controversies or issues rising from a citation issued to any public</p>	<p>16VAC25-60-280. General contest proceedings applicable to the public sector.</p> <p>....</p> <p>E. The commissioner shall seek to resolve any controversies or issues rising from a citation issued to any public employer in an informal conference as described in §330 of</p>

<p>16VAC25-60-310</p>		<p>employer in an informal conference as described in §330 of these regulations.</p> <p>F. The contest by a public employer shall not affect the requirements to post the citation as required at §40 of these regulations unless and until the commissioner's or the court ruling on the contest vacates the citation. A contest of a citation may stay the time permitted for abatement pursuant to § 40.1-49.4 C of the Code of Virginia.</p> <p>....</p> <p>Part VII Abatement 16VAC25-60-310. Contest of abatement period.</p> <p>....</p> <p>C. The same procedures and requirements used for contest of citation and penalty, set forth at §§270, 280, 290, and 300, of these regulations, shall apply to contests of abatement period.</p> <p>....</p>	<p>these regulations 16VAC25-60-330].</p> <p>F. The contest by a public employer shall not affect the requirements to post the citation as required at §40 of these regulations-16VAC25-60-40] unless and until the commissioner's or the court ruling on the contest vacates the citation. A contest of a citation may stay the time permitted for abatement pursuant to § 40.1-49.4 C of the Code of Virginia.</p> <p>....</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p> <p>Part VII Abatement 16VAC25-60-310. Contest of abatement period.</p> <p>....</p> <p>C. The same procedures and requirements used for contest of citation and penalty, set forth at §§270, 280, 290, and 300, of these regulations 16VAC25-60-270, 16VAC25-60-280, 16VAC25-60-290, and 16VAC25-60-300], shall apply to contests of abatement period.</p> <p>....</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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<p>16VAC25-60-320</p>		<p>16VAC25-60-320. Extension of abatement time. C.</p> <p>5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with §40 of these regulations, and a certification of the date upon which such posting and service was made.</p> <p>G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with §330 of these regulations. If the matter is not settled or settlement does not appear probable, objections will be heard in the manner set forth in subsection I of this section.</p>	<p>16VAC25-60-320. Extension of abatement time. C.</p> <p>5. A certification that a copy of the petition has been posted and served on the authorized representative of affected employees, if there is one, in accordance with §40 of these regulations <u>16VAC25-60-40</u>, and a certification of the date upon which such posting and service was made.</p> <p>G. When affected employees, or their representatives object to the petition, the commissioner will attempt to resolve the issue in accordance with §330 of these regulations <u>16VAC25-60-330</u>. If the matter is not settled or settlement does not appear probable, objections will be heard in the manner set forth in subsection I of this section.</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
<p>16VAC25-60-330</p>		<p>Part VIII Review and Settlement</p> <p>16VAC25-60-330. Informal conference.</p>	<p>Part VIII Review and Settlement</p> <p>16VAC25-60-330. Informal conference.</p>

		<p>....</p> <p>E. An employee representative shall be given the opportunity to participate in a conference requested by the employer. This same right will be extended to the employer when an informal conference is requested by employees. It is the duty of the employer, if he has requested a conference, to notify the employees by the means described in §40 of these regulations as soon as the time and place of the conference have been established. Upon granting an employee request for a conference, the commissioner is responsible for notifying the employer. The commissioner, at his discretion, may conduct separate portions of the conference with the employer and employee representative.</p> <p>F. During or following the conference the commissioner may affirm or amend the citations, penalties, or abatement period if the order has not become final. The commissioner shall notify the employer in writing of his decision. The employer</p>	<p>E. An employee representative shall be given the opportunity to participate in a conference requested by the employer. This same right will be extended to the employer when an informal conference is requested by employees. It is the duty of the employer, if he has requested a conference, to notify the employees by the means described in §40 of these regulations <u>16VAC25-60-40</u> as soon as the time and place of the conference have been established. Upon granting an employee request for a conference, the commissioner is responsible for notifying the employer. The commissioner, at his discretion, may conduct separate portions of the conference with the employer and employee representative.</p> <p>F. During or following the conference the commissioner may affirm or amend the citations, penalties, or abatement period if the order has not become final. The commissioner shall notify the employer in writing of his decision. The employer shall notify employees of this decision in the manner set forth in §40 of these regulations <u>16VAC25-60-40</u>.</p> <p>....</p>
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<p>16VAC25-60-340</p>		<p>shall notify employees of this decision in the manner set forth in §40 of these regulations.</p> <p>....</p> <p>16VAC25-60-340. Settlement.</p> <p>....</p> <p>B. Settlement negotiations will ordinarily take place in the medium of an informal conference. Employees shall be given notice of scheduled settlement discussions and shall be given opportunity to participate in the manner provided for in §330.E. of these regulations.</p>	<p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p> <p>16VAC25-60-340. Settlement.</p> <p>....</p> <p>B. Settlement negotiations will ordinarily take place in the medium of an informal conference. Employees shall be given notice of scheduled settlement discussions and shall be given opportunity to participate in the manner provided for in §330.E. of these regulations 16VAC25-60-330 E.</p> <p><u>Rationale:</u> Cross-references to other sections in the regulation were placed in proper Virginia Administrative Code format.</p>
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Enter any other statement here

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.

The VOSH Program considered the adoption of written guidelines in lieu of a regulatory approach. Written guidelines do not have the force and effect of law, nor are they subject to notice and

comment procedures required by the Virginia Administrative Process Act. It has been the experience of the VOSH Program that the regulated community prefers the opportunity to officially comment on procedures that could impact how VOSH inspections are conducted, and prefers a regulatory approach that cannot be changed at the whim of the agency, but would be subject to additional notice and comment procedures if the agency desired to change the procedures in the future.

The regulatory change lays out a framework of procedures for complying with current statutory powers and duties of the Commissioner in Va. Code §40.1-6(4) and 40.1-10, so the establishment of less stringent compliance requirements is not feasible without a change to statutory provisions.

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.

No impact on the family is anticipated as a result of this proposed regulatory action.