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Periodic Review and Small Business Impact Findings Where Result is "Retain the Regulation As Is"

Agency name	Forensic Science Board
Virginia Administrative Code (VAC) citation	6 VAC 40-20
Regulation title	Regulations for Breath Alcohol Testing
Date	May 30, 2017

This information is required pursuant to Executive Order 17 (2014).

Legal basis

Please identify the state and/or federal legal authority for the regulation, including: 1) the most relevant law and/or regulation; and 2) promulgating entity, i.e., agency, board, or person.

Virginia Code §§ 18.2-267, 29.1-738.1, and 46.2-341.25 provide that any person suspected of operating a motor vehicle, watercraft or boat, or commercial motor vehicle while under the influence is entitled, if such equipment is available, to have his breath analyzed to determine the probable alcoholic content of his blood. Virginia Code §§ 18.2-267 and 46.2-341.25 direct the Department of Forensic Science to "determine the proper method and equipment to be used in analyzing breath samples taken" pursuant to those sections and "advise the respective police and sheriff's departments of the same." The same procedures and requirements set forth in Virginia Code § 18.2-267 are applied to those suspected of operating a watercraft or boat while impaired under subsection B of § 29.1-738 or § 29.1-738.02. Virginia Code §§ 18.2-268.9 and 46.2-341.26:9 direct the Department to select the type of equipment, to develop the methods, and to establish a training program for individuals to administer evidential breath test analyses for prosecutions under §§ 18.2-266, 18.2-266.1, subsection B of 18.2-272, 46.2-341.24 and 46.2-341.31. Virginia Code § 29.1-738.2(D) applies the procedures and requirements of § 18.2-268.9 to offenses involving watercraft or motorboats. Virginia Code § 9.1-1110 grants the Forensic Science Board the power and duty to adopt regulations for the administration of § 18.2-268.9 and "for any provisions of the Code as they relate to the responsibilities of the Department."

Alternatives

Please describe all viable alternatives for achieving the purpose of the existing regulation that have been considered as part of the periodic review process. Include an explanation of why such alternatives were rejected and why this regulation is the least burdensome alternative available for achieving the purpose of the regulation.

6 VAC 40-20 sets out how the Department will evaluate the breath test instrument utilized for evidential breath tests pursuant to Virginia Code §§ 18.2-268.9, 29.1-738.2 and 46.2-341.26:9. The regulation provides simple guidelines for the use, care, maintenance and storage of those instruments as purchased and deployed by the Department with law enforcement agencies around the Commonwealth. The regulation establishes the general methods for conducting breath tests and licensing procedures for operators. For preliminary breath tests provided for in Virginia Code §§ 18.2-267, 29.1-738.1 and 46.2-341.25, the regulation establishes the Department’s requirements for such equipment, and provides for the notification of approved devices by periodic publication in the Virginia Register of Regulations. The regulation is the least burdensome method of accomplishing the Department’s Code-mandated oversight of preliminary breath test devices, evidential breath test instruments, and the licensing of breath test operators.

Public comment

Please summarize all comments received during the public comment period following the publication of the Notice of Periodic Review, and provide the agency response. Please indicate if an informal advisory group was formed for purposes of assisting in the periodic review.

Commenter	Comment	Agency response
	None received.	

Effectiveness

Please indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable.

The regulation is necessary for the protection of public health, safety, and welfare, as it provides the mechanisms for a breath test to be utilized in prosecutions for driving under the influence, boating under the influence, and operating a commercial motor vehicle under the influence. The regulation fulfills a mandate imposed on the Department by the Code of Virginia. It is clearly written, and no stakeholders have indicated difficulty in understanding its requirements.

Result

Please state that the reason why the agency is recommending that the regulation should stay in effect without change.

Having reviewed 6 VAC 40-20 and received no public comment objecting to the regulation, the Forensic Science Board has recommended that the regulation be retained without any amendment.

Small business impact

In order to minimize the economic impact of regulations on small business, please include, pursuant to § 2.2-4007.1 E and F, a discussion of the agency's consideration of: 1) the continued need for the regulation; 2) the nature of complaints or comments received concerning the regulation from the public; 3) the complexity of the regulation; 4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and 5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, include a discussion of the basis for the agency's determination to retain the regulation as is, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.

This regulation does not have an economic impact on small businesses. Small businesses are eligible to submit their preliminary breath test devices for evaluation by the Department of Forensic Science. The criteria for approval of preliminary breath devices are set forth in 6 VAC 40-20-170. No fees are solicited by the Department for this approval process, and devices that are approved are periodically published in the Virginia Register of Regulations. Because it is implementing Code-mandated requirements imposed on the Department, there is a continued need for the regulation. No complaints have been received concerning this regulation. While future changes in technology may require amendments to this regulation, it currently meets Code requirements and user agencies' needs.