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Proposed Regulation Agency Background Document

Agency name	Board of Agriculture and Consumer Services
Virginia Administrative Code (VAC) Chapter citation(s)	2 VAC 5 - 390
VAC Chapter title(s)	Rules and Regulations for the Enforcement of the Virginia Seed Law
Action title	Amendments to Establish a Minimum Germination Rate for Cotton Seed
Date this document prepared	August 16, 2023

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

Brief Summary

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

Section 3.2-4001 of the Virginia Seed Law authorizes the Board of Agriculture and Consumer Services to adopt regulations governing: (i) methods of sampling; (ii) methods of inspection; (iii) methods of testing in the laboratory and in the field; (iv) the establishment of standards; (v) the establishment of code designations; and (vi) the establishment of tolerances for agricultural, vegetable, flower, tree and shrub, and lawn and turf seeds; mixtures of such seeds; and screenings.

Rules and Regulations for the Enforcement of the Virginia Seed Law (2 VAC 5-390 et seq.) provides specific requirements for seeds sold in Virginia, including minimum germination rates for vegetable, flower, and peanut seeds. Currently, cotton seed sold in Virginia has no minimum standard for germination rate. The proposed action seeks to establish a minimum germination rate, in *Rules and Regulations for the Enforcement of the Virginia Seed Law*, of 60 percent for cotton seed sold in Virginia.

Acronyms and Definitions

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

“Board” means the Board of Agriculture and Consumer Services.

“Germination” means the percentage, by count, of seed under consideration capable of producing normal seedlings in a given period of time and under conditions specified by regulations.

“Law” means the Virginia Seed Law (Va. Code § 3.2-4000 et seq.).

“VDACS” means the Virginia Department of Agriculture and Consumer Services.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in the ORM procedures, “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

This regulatory action was not prompted by a mandate but was initiated in response to stakeholder feedback.

Virginia cotton growers voiced concerns to VDACS that they believe that the cotton seed that they are buying and planting is germinating at a substandard rate or that it is germinating at a rate below that which is labeled on the seed packaging. Virginia cotton growers also expressed their concern that most other cotton-growing states in the Southeastern United States require minimum germination rates for cotton, which may result in the offering for sale in Virginia of cotton seed that failed to meet the minimum germination requirements in those other states. In most of these states, the minimum germination rate for cotton seed is 60 to 70 percent. VDACS determined that the most appropriate means of addressing these concerns is utilizing the regulatory process to establish a minimum germination rate for cotton seed sold in Virginia.

Legal Basis

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

Section 3.2-109 of the Code of Virginia (Code) establishes the Board as a policy board with the authority to adopt regulations in accordance with the provisions of Title 3.2 of the Code.

Section 3.2-4001 of the Law authorizes the Board to establish standards, such as minimum germination rates, for agricultural, vegetable, flower, tree and shrub, and lawn and turf seeds; mixtures of such seeds; and screenings sold in the Commonwealth.

Purpose

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

The proposed regulatory action protects the economic welfare of Virginia’s cotton farmers by ensuring that they are purchasing cotton seed that meets or exceeds an established minimum germination rate. The Law currently requires the germination rate of each seed product sold in Virginia to be listed on the product’s label; however, not all seed products have a minimum germination rate established in *Rules and Regulations for the Enforcement of the Virginia Seed Law*. Thus, cotton seed can currently be sold in Virginia at any germination rate, so long as that rate appears on the product’s label and is accurate.

Over the past several years, Virginia’s cotton growers have reported that planted cotton seed has had low germination rates. Low germination can negatively impact plant density and lead to a reduction in the yield of harvested cotton. The establishment of a minimum germination rate ensures that cotton seed meets or exceeds a minimum germination standard so that proper plant population density in the field can be achieved and maximum production realized. Without an established minimum cotton seed germination rate, cotton seed with substandard germination rates can be sold in the Commonwealth, thereby negatively impacting Virginia’s cotton producers. Cotton seed sold in many cotton producing states in the Southeastern United States currently have regulations establishing a minimum germination rate. In most of these states, the minimum germination rate for cotton seed is 60 to 70 percent.

Establishing a minimum germination rate for cotton seed will ensure that the cotton seed offered for sale in Virginia meets or exceeds 60 percent, thereby enabling Virginia’s cotton growers to maximize cotton yield and profit.

Substance

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

Through this regulatory action, the Board is establishing a minimum germination rate of 60 percent for cotton seed sold in Virginia. In addition, the amendments to the regulation allow cotton seed that does not meet the labeled germination rate for that seed to be relabeled and sold with the correct germination rate, as determined by germination tests conducted by VDACS’s Seed Laboratory, provided such germination rate is 60 percent or higher.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

The primary advantages of the proposed amendment will be for Virginia cotton growers, most if not all of whom are small businesses, as it will ensure that the cotton seeds that they purchase will meet or exceed a minimum germination standard, which will increase the growers' plant population density and production. The proposed amendment would only disadvantage cotton seed sellers that offer for sale cotton seeds that fall below the minimum germination rate. VDACS does not expect requiring a minimum germination rate of 60 percent to appreciably change cotton seed sellers' business operations or production costs. Under the proposed amendments to the regulations, cotton seed with mislabeled germination rates above 60 percent may be relabeled and sold with the correct germination rate, which would advantage both sellers and buyers.

The proposed regulations have no disadvantages to the Commonwealth as VDACS already has the capacity to sample and conduct germination tests on agricultural seed sold in Virginia.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There is no federal minimum germination rate for cotton seed. Thus, there are no requirements more restrictive than applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Consistent with § 2.2-4007.04 of the Code of Virginia, identify any other state agencies, localities, or other entities particularly affected by the regulatory change. Other entities could include local partners such as tribal governments, school boards, community services boards, and similar regional organizations. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

No other agency, locality, or entity is particularly affected by the proposed amendments to this regulation.

Economic Impact

Consistent with § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits) anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is the proposed change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees, or revenues resulting from the regulatory change, including:</p> <ul style="list-style-type: none"> a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources. 	<p>There are no anticipated savings, fees, or revenues resulting from the proposed amendments. The cost to VDACS is expected to be minimal since staff currently inspect agricultural seed products sold in the Commonwealth for compliance with the Virginia Seed Law (Va. Code § 3.2-4000 et seq.) and the Rules and Regulations for the Enforcement of the Virginia Seed Law (2 VAC 5-390).</p>
<p><i>For other state agencies:</i> projected costs, savings, fees, or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>There are no anticipated costs, savings, fees, or revenue for other state agencies resulting from the proposed amendments.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>There are no anticipated benefits to other agencies from this regulatory action.</p>

Impact on Localities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a or 2) on which it was reported. Information provided on that form need not be repeated here.

<p>Projected costs, savings, fees, or revenues resulting from the regulatory change.</p>	<p>There are no anticipated costs, savings, fees, or revenues for localities resulting from this regulatory action.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>There are no anticipated benefits for localities resulting from this regulatory action.</p>

Impact on Other Entities

If this analysis has been reported on the ORM Economic Impact form, indicate the tables (1a, 3, or 4) on which it was reported. Information provided on that form need not be repeated here.

<p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>	<p>This regulatory action will affect Virginia’s cotton producers and cotton seed companies, as indicated in the ORM Economic Impact Form, Table 1a.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:</p> <ul style="list-style-type: none"> a) is independently owned and operated, and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million. 	<p>The number of cotton producers in Virginia is estimated to be approximately 245. The agency estimates that all Virginia cotton producers are small businesses.</p> <p>The number of cotton seed companies selling cotton seed in Virginia is approximately five. The agency is unable to determine if these cotton seed companies are small businesses.</p>
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; 	<p>The agency is unable to determine the costs to affected individuals or businesses of the proposed regulatory action, but the costs are believed to be negligible</p>

b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	
Benefits the regulatory change is designed to produce.	The regulatory action is intended to ensure that substandard cotton seed is not sold to Virginia's cotton producers, thereby increasing cotton yield and profits.

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

The agency has determined that this regulatory action strikes the most appropriate balance between alleviating cotton growers' concerns of purchasing low-germinating cotton seed and providing the ability for seed sellers to continue selling cotton seed in Virginia as long as that seed meets a minimum standard and is accurately labeled. The regulatory action will prevent the sale of substandard cotton seed that has a germination rate below 60 percent, while allowing the sale of cotton seed with germination rates between 60 percent and 80 percent, which is the labeled germination rate of most cotton seed currently sold in Virginia, provided that cotton seed determined to have a germination rate lower than that stated on its label is accurately re-labeled with this lower rate so that the cotton farmers are aware of the lower germination rate and can adjust planting densities accordingly. The proposed amendments will benefit these cotton producers, who are small businesses, and, therefore, no less-intrusive or less-costly alternative is appropriate.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

Regulatory Flexibility Analysis

Consistent with § 2.2-4007.1 B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.

The proposed amendments will establish a minimum germination rate for cotton seed sold in Virginia, which will benefit farmers who rely on adequate germination rates to prevent yield loss. Virginia's cotton producers are considered to be small businesses. VDACS believes that a 60 percent germination rate is the least stringent rate with which seed sellers can comply while still achieving the regulatory action's

objectives. Additionally, most states in the Southeast have established a minimum germination rate for cotton seed between 60 and 70 percent.

If this analysis has been reported on the ORM Economic Impact form, indicate the tables on which it was reported. Information provided on that form need not be repeated here.

**Periodic Review and
Small Business Impact Review Report of Findings**

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in EO 19 and the ORM procedures, e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable. In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (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, discuss why the agency’s decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

The agency has determined that *Rules and Regulations for the Enforcement of the Virginia Seed Law* supports the economic welfare of farmers, many of whom are small businesses, as well as consumers by ensuring that seed products they purchase meet stated label claims. The regulation is clearly written and easily understandable. The regulation has no impact on public health or safety.

The provisions of this regulation ensure that seeds continue to be tested to determine the accuracy of the labels on seeds offered for sale in the Commonwealth as to seed purity, germination, trueness to variety, and absence of noxious weed seeds. The regulation provides for testing for farmers, seed producers, and consumers. In carrying out its seed testing responsibilities, the VDACS’s Seed Laboratory works with the Virginia Crop Improvement Association and the Federal Seed Laboratory for the enforcement of the Federal Seed Act.

The agency has determined that this regulation should be retained in order to continue to protect and support the economic welfare of farmers, many of whom are small business owners, as well as consumers. There have been no complaints from the public concerning the regulation. The regulation is not unnecessarily complex. There is no overlap with federal or state law or regulations. The agency has determined that the current version of the regulation is consistent with current industry practices and is the least burdensome and least intrusive alternative.

Public Comment

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

Commenter	Comment	Agency response
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Virginia Cotton Growers Association	Support amending <i>Rules and Regulations for the Enforcement of the Virginia Seed Law</i> to include a 60 percent minimum germination for cotton seed and support allowing cotton seed to be relabeled and sold when the germination rate tests below the labeled rate but above 60 percent.	The agency concurs with the comment received from the Virginia Cotton Growers Association.
Virginia Farm Bureau Federation	Support amending <i>Rules and Regulations for the Enforcement of the Virginia Seed Law</i> to include a 60 percent minimum germination for cotton seed and support allowing cotton seed to be relabeled and sold when the germination rate tests below the labeled rate but above 60 percent.	The agency concurs with the comment received from the Virginia Farm Bureau Federation.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

The Board is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to:

David Gianino
 Virginia Department of Agriculture and Consumer Services
 102 Governor Street, Room LL54
 Richmond, VA 23219
 Fax: (804) 371-7793
 Email: David.Gianino@vdacs.virginia.gov

In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of this stage of this regulatory action.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or

agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between the existing VAC Chapter(s) and the proposed regulation. If the existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
	2 VAC 5-390-190 A	Not applicable	Establishes minimum germination rate of 60 percent for cotton seed sold in Virginia. The regulatory action will ensure that Virginia's farmers are planting cotton seed that has a germination rate of at least 60 percent and aligns Virginia's minimum with that of other cotton producing states.
	2 VAC 5-390-190 B	Not applicable	Allows for the sale of cotton seed that tests below the germination rate stated on the label of the cotton seed, provided the tested germination rate is at least 60 percent and the seed is relabeled.