



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	State Board of Social Services
VAC Chapter Number:	22 VAC 40-191-10 et seq.
Regulation Title:	Background Checks for Child Welfare Agencies
Action Title:	Repeal Regulation and Promulgate New Regulation
Date:	February 20, 2003

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

This action will repeal 22 VAC 40-190-10 et seq. and adopt 22 VAC 40-191-10 et seq. The current background checks regulations went back into effect on May 18, 2000, at the end of effective dates for an emergency regulation resulting from passage of SB 419 and HB 1388 during the 1998 session of the General Assembly. This proposed regulation incorporates relevant *Code of Virginia (Code)* changes from 1995 to the present time, including recodification of Title 63.1 of the *Code* during the 2002 session of the General Assembly. It adds sections, reorganizes content, uses more descriptive headings, and increases use of the active voice to increase clarity of the regulation. It responds to questions and comments about background checks and incorporates a response to questions raised during review of a previous proposed regulation, with the same VAC Chapter number, that was subsequently withdrawn.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The *Code*, at § 63.2-217, requires the State Board of Social Services (Board) to adopt regulations that are necessary or desirable to carry out Title 63.2. The Board has the statutory authority to promulgate this regulation based on these *Code* sections: 63.2-1704, 63.2-1719, 63.2-1720, 63.2-1721, 63.2-1722, 63.2-1723, 63.2-1724, and 63.2-1727. These *Code* sections establish background checks and set prohibitions if a person is found to have certain criminal convictions or has ever been the subject of a founded complaint of child abuse or neglect. The regulation is necessary to implement the required *Code* provisions.

Section 63.2-1704 applies to voluntary registration of family day homes. Section 63.2-1719 provides definitions for all entities covered by Chapter 17 – Licensure. Section 63.2-1720 applies to compensated employment and use of volunteers. Section 63.2-1721 applies to background checks upon application for licensure or registration and to background checks of foster or adoptive parents approved by child-placing agencies and family day homes approved by family day systems. Section 63.2-1722 applies to revocations and denial of renewal. Section 63.2-1723 applies to the waiver of certain criminal convictions. Section 63.2-1724 applies to record checks by unlicensed child day centers. Section 63.2-1727 applies to the prohibition of sex offenders or child abusers from operating or residing in family day homes.

The above *Code* citations can be accessed on the internet at:

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-217>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1704>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1719>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1720>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1721>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1722>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1723>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1724>

<http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+63.2-1727>

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is

essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The major purpose of the replacement regulation is to incorporate relevant changes in the *Code* since 1995. The other major purpose is to strengthen the regulation by addressing issues that have been raised during the past several years, and by reorganizing and adding sections to make it more functional.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The primary *Code* changes reflected in the proposed regulation are:

1. Expanding the list of crimes that are barriers to operating, working or volunteering at a child welfare agency;
2. Including prior adult convictions, and certain juvenile convictions and adjudications of delinquency as offenses;
3. Deleting §18.2-60 as a barrier crime and adding §18.2-59 as a barrier crime;
4. Making consistent for all child welfare agencies the disqualification for other felonies that are not barrier crimes, unless five years have elapsed since conviction;
5. Clarifying that manslaughter is a barrier crime;
6. Mandating the search of the child abuse central registry;
7. Adding a founded complaint of child abuse or neglect as a prohibition to: a) operating or residing in a family day home, b) licensure, c) registration, d) approval, e) employment, f) volunteering , or g) being an applicant or agent;
8. Requiring that a person denied approval or employment due to a founded complaint of child abuse or neglect be given a copy of the report;
9. Establishing a waiver of disqualification due to certain criminal convictions, as identified in Title 63.2 at 63.2-1723 [eligibility and application requirements, change in waiver application fee, review criteria, decision process, modification requirements, public notification requirements];
10. Introducing the phrase “background checks” to mean sworn statement or affirmation, criminal history record check, and search of the central registry;
11. Introducing and defining the term “offense”;
12. Clarifying that family day homes approved by family day systems and foster and adoptive homes approved by child-placing agencies, and religious exempt child day centers, are subject to the provisions of Title 63.2, Subtitle IV, Chapter 17, Article 3 – Background Checks;
13. Limiting volunteers required to obtain background checks to those who will be alone with any child in the performance of their duties;

14. Limiting employees required to obtain background checks to those involved in the day-to-day operation of such agency or who are alone with, in control of, or supervising one or more children;
15. Clarifying that background checks requirements of those children's residential facilities, previously referred to as child-caring institutions, are now found in another section of the *Code*;
16. Deleting the requirement that board members, upon application for licensure or registration, must obtain background checks unless the board member functions in another capacity that requires the checks;
17. Clarifying that only the applicants of child welfare agencies and those persons who are agents at the time of application must have the background checks completed prior to being involved in the day-to-day operations of the child welfare agency or being alone with, in control of, or supervising one or more of the children;
18. Changing the time period for obtaining criminal history record check records and central registry findings from 21 to within 30 days;
19. Clarifying that there is no penalty if the child welfare agency has applied for a background check timely and it has not been obtained due to administrative delay;

Other changes include additions that further explain the background checks process. Among these are:

1. Having a separate regulation for licensed child day centers;
2. Adding sections describing who isn't covered by the regulation; explaining requirements for satisfactory background checks; explaining the consequences of unsatisfactory background checks findings; describing the waiver of criminal conviction; identifying who may apply for a waiver; explaining how to apply for a waiver; describing the waiver evaluation criteria; describing the process for modifying, revoking, and terminating waivers; and explaining the waiver public notification requirements;
3. Requiring all adults residing in family day homes, licensed independent foster homes, foster homes approved by child-placing agencies, and homes of applicants to be adoptive parents approved by child-placing agencies (until the adoption is final) to furnish background checks; and
4. Requiring all persons 14 years of age and older to request a search of the central registry if residing in family day homes, licensed independent foster homes, foster homes approved by child-placing agencies, and homes of applicants to be adoptive parents approved by child-placing agencies (until the adoption is final) to furnish central registry findings.

There are also content changes that reflect current practice or are responsive to questions from the public and facilities. These include, but are not limited to:

1. Allowing satisfactory background checks for contract employees to be accepted if dated less than six months prior to when the contract agencies begin to provide services at facilities;
2. Accepting a copy of the central registry finding;
3. Providing that a background check remains valid at a facility as long as no more than 12 months have passed from when the person began a leave of absence, was terminated from employment from the facility, or was transferred to a center owned and operated by the same employer or entity;

4. Allowing a person who leaves a facility to take the criminal history record report or central registry finding, if the report or finding is less than 91 days old, and if the facility keeps a copy of any report that was taken and writes on the copy of the report that it is a copy;
5. Requiring background checks every three years for a volunteer, employee and person living in a regulated home. Exception: A volunteer, employee, or person living in a voluntarily registered family day home must obtain background checks every two years;
6. Clarifying that the Department, registering, approving, or other licensing authority has the right to revoke or deny licensure, registration, or approval based on background checks results or failure to obtain background checks;
7. Explaining that an employee or volunteer may continue to work or provide services if the criminal history record request or request for search of the central registry was submitted within seven calendar days of the person beginning employment or volunteer service, but the report is not returned within 30 calendar days;
8. Providing that the Department, registering, approving, or other licensing authority, may require a new background check relevant to a suspicion of a barrier crime conviction, a felony conviction, or a founded complaint of child abuse and neglect;
9. Allowing satisfactory background checks for contract employees and substitute staff from temporary agencies to be viewed, accepted, and copies maintained;
10. Permitting the Department to release information about disqualifying backgrounds to facilities that are covered by this regulation; and
11. Informing the person that a search of the central registry and criminal history record is being requested.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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 include a sentence to that effect.

The public is expected to benefit from this regulation. The requirements that reflect the *Code*, and the other requirements, offer protection for children who receive state regulated child day care during a portion of the day. The facilities covered by the regulation will have increased flexibility to shift staff and use contract staff without obtaining repeat background checks, but all persons will be required to resubmit checks every three years to assure availability of updated background information. Facilities and regulatory staff will benefit because the requirements are clearer and include all of the parties required to comply with the regulation.

The Department sees no disadvantage to the public or the Commonwealth.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget

activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

There are not projected additional costs to the state to implement and enforce the proposed regulation.

The regulation applies to licensed family day homes, licensed family day systems, family day homes approved by family day systems, licensed child-placing agencies, licensed independent foster homes, foster and adoptive homes approved by child-placing agencies, voluntarily registered family day homes, and religious exempt child day centers. In addition, the waiver of criminal convictions applies to licensed child day centers.

The \$5 cost for search of the central registry is required by law and has been in effect since July 1998. The costs of repeat checks for affected parties, the deletion of categories of people required to obtain checks, and the increased flexibility to accept existing satisfactory background checks results are anticipated to balance each other out, with no aggregate fiscal impact on facilities.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

Title is different

The title is changed from “Regulation for Criminal Record Checks for Child Welfare Agencies” to “Background Checks for Child Welfare Agencies.”

Consequence: The new title reflects the sworn statement or disclosure that was part of the current regulation, addition of Code-mandated searches of the central registry, and Title 63.2, Subtitle IV, Chapter 17, Article 3 “Background Checks.”

Table of Contents is changed and expanded

“Sworn Disclosure Statement” and “The Criminal Record Report” are deleted as major parts of the regulation. The proposed Table of Contents consists of: “Defining words and phrases; Describing background checks; Identifying who isn’t covered by this regulation; Identifying who is covered by this regulation; Explaining requirements for satisfactory background checks; Explaining consequences of unsatisfactory background checks findings; Keeping background checks records; Describing the waiver of criminal conviction; Identifying who may apply for a waiver; Explaining waiver application requirements; Describing the contents of a waiver application; Describing the waiver evaluation criteria; Describing the waiver decision

notification process; Modifying , revoking, and terminating waivers; and Explaining the waiver public notification requirements.

Consequence: The proposed Table of Contents is organized according to the process of background checks requirements and what is required at each stage in the process. It also adds the *Code* provision for waiver of criminal conviction provisions.

22 VAC 40-191-10 Definitions are deleted, changed, and added (Ref. 22 VAC 40-190-10)

Deleted definitions:

“Criminal history record request” is inadequate because it refers to only one of the options allowed for obtaining criminal information.

Consequence: The reader is not encumbered with a definition that is not referenced in the regulation.

“Officer of the board” is not needed because the *Code* no longer requires an officer to obtain background checks by virtue of being an officer of the board.

Consequence: The reader is not encumbered with a definition that is not referenced in the regulation.

Changed definitions:

“Applicant for licensure or registration” is changed to delete, and separately define the word “agent.” The definition also deletes officers of boards because they are no longer required to obtain background checks by virtue of their office. It adds applicant for approval as family day homes or approved foster or adoptive homes. It explains that, in the case of sole proprietorship, the applicant is the individual owner and, in the case of partnerships, all partners are applicants. It further explains that, in the case of a corporation, limited liability company, public agency, or similar entity, the applicant must designate at least one individual who must comply with the applicant’s obligation on its behalf.

Consequence: The definition complies with the *Code* and the definition is specific for the various categories of providers.

“Barrier crimes” is changed from a general description of barrier crimes, and the list in effect in 1995, to the current list of convictions identified in the *Code* that are barriers to licensure, registration, or approval. The crimes that are added to the current regulation as barrier crimes are: manslaughter, malicious wounding by mob, assault and bodily wounding, car jacking, extortion by threat, felony stalking, arson, burglary, any felony violation related to possession or distribution of drugs, drive by shooting, use of a machine gun in a crime of violence, aggressive use of a machine gun, use of a sawed-off shotgun in a crime of violence, possession of child pornography, electronic facilitation of pornography, employing or permitting a minor to assist in an act in the “obscenity and related offenses” Article 5 of Chapter 8 of Title 18.2 of the *Code*, delivery of drugs to prisoners, escape from jail, felonies by prisoners, and an equivalent offense in another state.

Consequence: The definition complies with the *Code*.

“Central Criminal Records Exchange” is changed to delete information about the Virginia State Police that appears in 22 VAC 40-191-20.

Consequence: The information deleted from the definition is more functional in the text of the regulation.

“Criminal record report” is changed to “criminal history record report” to conform to current *Code* language, and the information about the data provided is moved to 22 VAC 40-191-20.

Consequence: The new definition complies with the *Code* and the moved information is more functional in the text of the regulation.

“Employee” is simplified and details about which employees are covered in the regulation are moved to, and expanded in, the charts found in 22 VAC 40-191-40. Per new provisions in the *Code*, only an employee who is involved in the day-to-day operations or who is alone with, in control of, or supervising one or more children is required to obtain background checks.

Consequence: The definition complies with the *Code* and the moved information is more functional in the text of the regulation.

“Facility” is changed to specify what a child welfare agency is. In addition, the regulation mirrors the clarification in the *Code* that family day homes approved by family day systems and foster and adoptive homes approved by child-placing agencies are subject to the regulation. It also includes those seeking a waiver in order to be a facility.

Consequence: The expanded definition complies with the *Code* and is clearer.

“Parent-volunteer” is changed only by updating *Code* references.

Consequence: The change allows the reader to find the correct *Code* references.

“Sworn disclosure statement” is renamed sworn statement or affirmation to comply with current *Code* language, adds the founded complaint of child abuse or neglect, and – for family day homes – includes knowledge of a sex offense conviction. The *Code* references are also updated.

Consequence: The definition now complies with the *Code*.

“Volunteer” is changed. The current definition is “anyone who, without pay, at any time would be alone with, in control of, or supervising one or more children outside the physical presence of a paid facility staff member. This pertains to all activities occurring at the facility location or sponsored by the licensed facility. This also includes volunteer staff counted for purposes of maintaining required ratios for the program.” The new definition is “a person who provides services without pay and who is alone with a child or children in performance of his duties.” This mirrors the *Code* explanation of which volunteer is required to obtain background checks.

Consequence: The definition now mirrors *Code* language and clarifies that certain volunteers at all child welfare agencies are included.

Definitions added for readability:

“Board,” “Code,” “Commissioner,” “Department,” “Department representative,” “Local agency,” “May,” “Must not,” “Must,” and “22 VAC” are added definitions.

Consequence: Defining these terms make the document more readable for persons unfamiliar with state government. “May,” “must not,” and “must” are defined in precise terms and allow elimination of the term “shall” that is not used in everyday speech. The replacement of “shall” with “must” has been approved by the Office of the Registrar.

“Contract agency” and “contract employee” are added to provide a distinction between certain occasional employees and the “contracting organization” referenced in the *Code*.

Consequence: Readers will be less likely to confuse persons who come to a child care facility to provide services with the agencies designated by the Department to administer voluntary registration of family day homes.

“Criminal history record check” and “Criminal history record report” are added to explain how the Virginia State Police checks on crimes and what the agency does after checking the criminal history record.

Consequence: The definitions fill in information about the background checks process.

“Disqualifying background” is added to explain the consequence of an offense and to clarify at what point in the appeal process a person is considered to be the subject of a founded complaint of child abuse or neglect.

Consequence: The definition makes the link between an offense and the ability to own, operate, work at, or volunteer at a child welfare agency.

“Other felony” is defined to include the full explanation in the *Code*.

Consequence: The full explanation is not necessary every time the regulation means conviction for any felony in the last five years that is not a barrier crime felony.

Definitions added to reflect *Code* definitions:

“Child day program,” “Child-placing agency,” “Child welfare agency,” “Family day home,” “Family day system,” “Independent foster home,” “Offense,” “Registered,” and “Registered family day home” are added definitions.

Consequence: Adding these definitions makes the regulation more usable, and use of definitions from the *Code* reduces confusion of readers who compare the regulation to the *Code*.

Definitions added to reflect the background checks provisions in the *Code*:

“Approved” is added to indicate criteria for this status.

Consequence: Adding the definition lets the reader know who is referenced.

“Background checks” is added because it is the new title for Article 3.

Consequence: This establishes consistency in language between the regulation and the *Code*.

“Central registry” is added to explain the source of a central registry finding.

Consequence: Adding the definition introduces the reader to the Department of Social Services’ registry of founded complaints.

“Central registry finding” is added to help the reader understand what is done with the search of the central registry.

Consequence: Adding the definition provides an explanation of the *Code* phrase “information from the central registry.”

“Good moral character and reputation” is added to define what is meant by the *Code* phrase “good moral character and reputation.”

Consequence: A clear definition will allow a more consistent interpretation of the phrase.

“Involved in the day-to-day operations” is added to define what is meant by the *Code* phrase “good moral character and reputation.”

Consequence: Clarity provides a more consistent interpretation of the phrase.

“Licensed” is added to reference the various ways child care providers can be licensed.

Consequence: Readers will be aware of the categories of providers the *Code* is referencing when the word “licensed” is used.

“Religious exempt center” is defined to comply with the *Code* usage of the term.

Consequence: Clarity prevents subjective interpretation of what facilities are religious exempt.

“Search of central registry” is added to explain the process for obtaining a central registry finding.

Consequence: The reader will understand what “search of the central registry” means.

“Sex offense felony for family day homes” is defined because such a felony is a prohibition against operating or residing in a family day home.

Consequence: The addition makes the regulation comply with a *Code* requirement.

22 VAC 40-191-20 Deleted

This section in the current regulation is deleted. The current regulation summarizes background checks requirements required in 1995 and references the 1995 *Code*. The proposed regulation is reorganized by stage in the background checks process. Throughout the proposed regulation, reference is made to relevant *Code* sections.

Consequence: Current *Code* references are used. Explanations are provided, which will respond to questions that have been raised over the past seven years.

22 VAC 40-191-20 New Section

This section adds search of the central registry as a background check, as required by the *Code*. It also provides explanations of sworn statement or affirmation, criminal history record check, and search of the central registry. The current regulation, at 22 VAC 40-190-30 and 40, tells what must be submitted for sworn disclosures and criminal record reports, but does not describe what they are. Notes are added explaining how to obtain forms and who affirms the accuracy of the information.

Consequence: The addition is important because Title 63.2, Subtitle IV, chapter 17, Article 3 is entitled “Background Checks,” but neither the *Code* nor the current regulation explicitly lists what the checks are. This must be understood as an inference. Listing them in the regulation highlights the importance of all three.

22 VAC 40-191-30 New Section

This section is provided to facilitate use of the regulation. It explains that licensed child day centers, certified preschools or nursery schools operated by private schools that are accredited in accordance with the *Code* at § 63.2-1715, children’s residential facilities, and family day homes not required to be licensed, registered, or approved are not covered by this regulation. The section identifies where in the *Code* to find background checks requirements for these facilities. It also adds that the Code-mandated waiver requirements are applicable to licensed child day centers.

Consequence: The reader can quickly determine which facilities are not governed by this regulation. The reader also has a handy reference to the applicable *Code* references. This section makes clear that licensed child day centers must comply with the *Code* waiver requirements.

22 VAC 40-190-30 is reorganized; current regulation information is moved or deleted

In the current regulation, this section explains that a sworn disclosure shall be completed prior to employment or commencement of volunteer service. That requirement is moved to 22 VAC 40-191-40.A and uses the updated terminology “sworn statement or affirmation.” The current regulation requires that the statement or affirmation be attached and filed with the criminal record report. This requirement is deleted because it is unnecessary. The current regulation also includes the stipulation that making a false statement is a Class 1 misdemeanor. This stipulation is now in 22 VAC 40-191-10, in the definition of “sworn statement or affirmation,” to clarify that it applies to anyone required to submit a sworn statement or affirmation.

Consequence: The proposed regulation adds current terminology and includes sworn statement or affirmation requirements added to the *Code* since 1995. See the proposed regulation explanation at 22 VAC 40-191-40.

22 VAC 40-190-40 is reorganized and information is added

1. This section of the proposed regulation adds a list of the facilities covered by this regulation. It changes the term “family day home” to “licensed family day homes, family day homes approved by systems, and voluntarily registered family day homes.” It adds religious exempt child day centers. It deletes licensed child day center and child day center system because a separate regulation is being developed for licensed centers and the systems were deleted from the *Code*. It deletes child-caring institutions because the *Code* now requires them to comply with the background checks for children’s residential facilities.

Consequence: The listing makes it easy for the reader to understand who is covered by the regulation.

2. Parts “A” and “B” add the Code-mandated requirement for searches of the central registry for all persons required to submit the results of background checks.

Consequence: The regulation reflects *Code* requirements and provides greater protection to children.

3. Parts “A” and “B” also include and update the requirement for sworn statement or affirmation, found in the current regulation at 22 VAC 190-30, to correspond to current *Code* requirements. The change is that the sworn statement or affirmation now requires disclosure of **any** conviction or being the subject of **any** pending criminal charges.
Consequence: The requirements in the proposed regulation comply with the *Code*.
4. The requirement in part “A” that a criminal record report shall be made available to the Commissioner’s representative prior to issuance of an initial license or registration now is in a table in part “A.”
Consequence: The information is retained, but it is in a table format.
5. The requirement in part “B” that a criminal record report shall be provided prior to the 21st day of employment or volunteer service is now in a table in a table in part “B.” The day is changed to “within 30 days,” to comply with recodification language. The reference to approval of foster and adoptive homes in “B” is moved to “A” in the proposed regulation. This is because “A” includes requirements for all facilities at the time of application for licensure, registration, or approval.
Consequence: The timeline now complies with the *Code*. The other information is now placed with all the other requirements for specific stages in the background checks process.
6. The content of “C,” that a person is ineligible for employment, volunteer service or any facility related activity if the report contains convictions of the barrier crimes, is moved to 22 VAC 40-191-60. Language is changed from “any facility related activity” to persons who are “involved in the day-to-day operations of such agency or who are alone with, in control of, or supervising one or more children” to reflect current *Code* language.
Consequence: The proposed regulation complies with current *Code* language.
7. Part “D,” requiring the licensed or registered family day home provider to ensure that a person has not been convicted of a barrier crime, is deleted because a provider does not have access to sufficient information to ensure lack of conviction for a barrier crime. See the explanation for 22 VAC 40-191-50.B for additions that address what to do if there is a reason to suspect that a person has a barrier crime, or any other offense.
Consequence: An unreasonable requirement is deleted, and steps are added elsewhere to deal with suspicions that surface subsequent to submission of background checks.
8. The confidentiality requirements in part “E” are changed. The current requirement is that “reports on employees and volunteers be received only by the facility administrator, board president, licensee, registered provider, or their designee.” The proposed requirement, in 22 VAC 40-191-70.E, provides that “applicants and administrators, and their designees, are the only facility staff who may have access to these documents.” There is a note that the board president must have access to the documents.
Consequence: The change places the information with other content related to keeping background check records. The change reduces words by using the already-defined term “applicant” instead of listing all the entities that are considered applicants, and it gives applicants and administrators the discretion to designate those who may have access to confidential documents.

9. The whole section is restructured. Part “A” lists the background checks required for each type of facility at the time of application. The information is presented in two tables, one for application for licensure, registration, or approval and the other for initial application for religious exemption status. Part B lists the background checks required for each type of facility after initial licensure, registration, approval, or receipt of religious exemption status. This information is also presented in two tables: one pertaining to licensed, registered, or approved facilities and the other pertaining to religious exempt child day centers.
Consequence: The restructuring makes it easier for the reader to comply with requirements because they are listed by type of facility and the stage in the background checks process.

Additions found in the tables that are not already identified are:

1. 22 VAC 40-191-40.A.1 provides that background checks must be obtained for adults living in the home of an applicant for licensure or registration as a family day home at the time of application for licensure or registration and for any existing employee or volunteer.
Consequence: Although the current regulation, in 22 VAC 40-190-20, refers to the *Code* requirement, in § 63.1-198.1, for all adults living in the family day home to obtain a criminal record report and provide a sworn statement or affirmation, the other adult living in the home is not otherwise referenced in the regulation. This additional statement in the proposed regulation provides clarification that adults living in the home must obtain background checks at the time of application for licensure. The provision also avoids possible misinterpretation by making it clear that existing employees or volunteers are bound by the same background checks requirements as are applicants, at the time of application for licensure or registration.
2. Part “A.1” also provides that background checks must be obtained for adults living in the family day home requesting approval by a family day system.
Consequence: Although the current regulation, in 22 VAC 40-190-20, refers to the *Code* requirement, in § 63.1-198.1, for all adults living in the family day home to obtain a criminal record report and provide a sworn statement or affirmation, the other adult living in the home is not otherwise referenced in the regulation. This addition provides clarification that adults living in a home requesting approval by a family day system must obtain background checks at the time of application for approval.
3. “A.1” also provides that any agent at the time of application who is or will be involved in the day-to-day operations of the child welfare agency, or who is or will be alone with, in control of, or supervising one or more children must submit background checks upon application for licensure or registration.
Consequence: The proposed regulation complies with recodification of Title 63.1 of the *Code* as Title 63.2. Because “agent” is defined in the proposed regulation, the reader will know to whom the *Code* references regarding being along with, in control of, or supervising one or more children.
4. Another provision in “A.1” is that any operator of a family day home requesting approval by a family day system must submit background checks upon request for approval by a family day system.

Consequence: *Code* recodification language makes clear that approval organizations and approved providers must comply with background checks requirements. This provision provides regulatory language to support that requirement.

5. Part “A.2” provides that any person who will be expected to be alone with one or more children enrolled in a religious exempt child day center, except a parent-volunteer, must provide documentary evidence of sworn statement or affirmation, search of the central registry, and criminal history record check with the written request for religious exemption status.

Consequence: *Code* provisions for religious exempt centers are now in the regulation. This provision informs the reader of the *Code* caveat that only those persons expected to be alone with one or more children are required to obtain the background checks.

6. Part “B.1” provides that a sworn statement or affirmation must be submitted whenever a new person is designated as an applicant, licensee, registrant, approved individual, or agent who is or will be involved in the day-to-day operations of the facility or who is or will be alone with, in control of, or supervising one or more of the children. The search of the central registry and criminal history record check must be completed before the end of 30 days after the change.

Consequence: The reader is informed that the requirements for an applicant, licensee registrant, approved individual, and agent apply to anyone who fits any of those categories at any time. This provision will provide increased security because anyone who assumes one of the above-referenced roles must furnish background checks findings.

7. The current regulation contains no provisions for religious exempt centers. In addition, the current regulation has no provision for re-checking the background of anyone who retains the same status at the same facility. 22 VAC 40-191-40.B.2 provides that any employee, volunteer or any other person who is expected to be alone with one or more children enrolled in a religious exempt child day center, except a parent-volunteer, must provide new background checks before three years since the dates of the last sworn statement or affirmation, most recent central registry finding and most recent criminal history record check report.

Consequence: This provision will reduce the risk that an individual with a recent disqualifying background will continue to be in proximity to children in a regulated facility.

8. A provision is added in the content of “B.1” to require an additional search of the central registry for a foster parent or other adult member of the household, if child-placing agency staff believe it is necessary.

Consequence: Child-placing agencies will have the authority to request a repeat search of the central registry, thus affording additional protection to vulnerable children placed in foster or adoptive homes.

9. In “B.3” there is a requirement for independent contract employees, and contract employees hired by a contract agency, who will be involved in the day-to-day operations of the facility or will be alone with, in control of, or supervising one or more children to obtain background checks. The facility has a choice of two ways to fulfil this requirement. The facility **may**

obtain background checks according to the requirements for other employees of the various facilities. Alternatively, the center must: a) view the original required background checks maintained by the contract employee or contract agency; and b) accept all satisfactory background checks dated less than six months before independent contract employees or contract employees hired by contract agencies begin providing services at specific facilities; and c) make copies, and keep them at the licensed, registered, or approved facilities. Staff must write on the copies of the criminal record reports that they are photocopies of originals that facility staff verified.

Consequence: This provision recognizes the unique employment status of an independent contractor or contracted agency. It permits a facility to view original background checks results but maintain copies of originals in facility files. It allows facilities the choice of applying the same criteria for background checks that the regulation requires for all other employees. It also allows facilities the choice of accepting background checks results that are less than six months old, rather than requiring new checks if the current ones are more than 90 days old.

10. "B.1" provides that any applicant, licensee, approved individual, agent, employee, volunteer, and person living in the home who is required to have background checks must acquire the three record checks three years since the dates of the last sworn statement or affirmation, most recent central registry finding, and most recent criminal history record check report. Consequence: Protection for children is increased because persons covered by the regulation must re-submit the background checks every three years, except those who are covered by the voluntary registration two-year resubmission requirement. The rationale for requiring resubmission every two years for voluntary registration renewals is that these facilities are not monitored with any frequency by the contracting agency or the Department, meaning the likelihood of discovery of a recent problem would be further reduced.
11. Provisions at Part "B.4" explain that an 18-year-old living in the home of an applicant, a licensed or registered family day home provider, a foster home approved by a licensed child-placing agency, an independent foster home, or an adoptive home approved by a licensed child-placing agency, until the adoption is final, is an adult and must comply with background checks requirements. Specifically, when a person 18 years or older begins residing in the home or becomes 18 years old, the person must provide a sworn statement or affirmation. Within 30 days of an 18-year-old beginning to reside in the home or a person in the home becoming 18 years old, the search of the central registry and criminal history record check must be completed. Consequence: The reader will understand how to apply to 18-year-olds the *Code* requirement that adults obtain background checks.
12. To be consistent with the regulation Minimum Standards for Family Day Homes, a provision is added at "B.5" that a person 14 years of age and older must have a search of the central registry within 30 days of beginning to reside in the home or becoming 14 years old. This provision applies to a person 1) living in an applicant's home, 2) the home of a licensed or registered family day home provider, 3) a foster home approved by a licensed child-placing agency, 4) an independent foster home, or 5) an adoptive home approved by a licensed child-placing agency, until the adoption is final.

Consequence: There will be consistent application across regulated family day homes of the requirement for searches of the central registry of an individual 14 years of age and older.

13. Part “B.6” provides that: “a facility must not accept a required criminal history record report or a central registry finding from an applicant, licensee, registrant, or other person required to obtain background checks that is dated more than 90 days prior to the date of employment, volunteering, residing in the home, or approval of a family day home or foster or adoptive home.” The exception for contracting agencies, at 22 VAC 40-191-40.B.3, is noted
- Consequence: This requirement strengthens the ability of the facility and the Department to prevent a person required to have a background check who has a conviction or founded disposition of child abuse or neglect within the last three years from being associated with children in regulated facilities.

14. Similarly, “B.7 “ provides that: “the Department may not accept a required criminal history record report or a central registry finding from an applicant, licensee, registrant, or person who signs the statement of intent to operate a religious exempt center that is dated more than 90 days prior to date of licensure, registration, approval or exemption, or from the date when the person designated as the applicant or licensee changes.”
- Consequence: This requirement lessens the possibility that a person with a recent conviction or founded disposition of child abuse and neglect will be able to have authority over successive religious exempt centers with no recourse for the facility or the Department except the individual’s willingness to disclose the disqualifying background or information or the information inadvertently coming to the attention of the center or the Department.

Changes found in the tables that are not already identified are:

1. The current requirement in 22 VAC 40-190.40.B that prospective foster or adoptive parents must submit background checks prior to approval by a child-placing agency is changed in “A.1” to “upon request” for approval.
Consequence: The change avoids misunderstanding by making clear that background checks must be submitted at the beginning of the approval process.
2. The current requirement at 22 VAC 40-190-20.A that volunteers obtain background checks is changed. The change in the proposed regulation, at “A” and “B,” is to indicate that parent-volunteers are exempt from this requirement.
Consequence: The change makes the provision compliant with the *Code*.
3. There is a change to the current provision at 22 VAC 40-190-40.B that an employee shall obtain a criminal record check. The change, at 22 VAC 40-191-40.B.1 in the proposed regulation, is the requirement that a voluntary registration provider, provider assistant, substitute provider, if any, and any adult residing in the home must submit new criminal background checks 90 days before the date of application for renewal of the current certificate of registration.
Consequence: Providing this date ensures that the necessary information can be reviewed and a new certificate of registration provided in a timely manner.

4. The current regulation has no provision for re-checking backgrounds, as long as a person retains the same status at the same facility. One of the provisions, in the proposed regulation at “B.1,” is that any applicant, licensee, approved individual, agent, employee, volunteer, and person living in the home who is required to have background checks, must submit new background checks before three years since the dates of the previous sworn statement or affirmation, central registry finding and criminal history record check report.
Consequence: This provision will lessen the possibility that an individual with a recent disqualifying background will continue to be in proximity to children.

22 VAC 40-190-50 is reorganized; some information deleted, some moved, and some changed

The requirement in Part “A” that contract agencies and facilities staff shall accept only original criminal record reports is moved to 22 VAC 40-191-40.B.3. This is where satisfactory background check requirements are explained. A change is that facility staff must have viewed an original criminal history record report from a contract agency or contract employee and then make and keep a copy on record if they do not choose to keep the original on site. The title of the report is changed from “Criminal Record Report” to “Criminal History Record Check Report” to reflect current *Code* language.

Consequence: The description of all satisfactory background checks results is in one place in the regulation. Facility staff must still see an original criminal history record report, but there is a convenience for contract employee or contract agency, who may keep the original.

The exception in “A” of the current regulation for facilities using temporary agencies allowing a letter that verifies receipt of the criminal record report within 21 days of employment, requiring that the report is on file at the temporary agency, and requiring that the report does not contain barrier crimes is deleted. In the proposed regulation, at 22 VAC 40-191-40.B.3, temporary agencies are considered contract agencies and conform to contract agency provisions. Those provisions are described in the paragraph above.

Consequence: Safety of children is enhanced because a temporary agency, now included as a contract agency, must show facility staff original criminal history record reports. Copies are kept at facilities. This is a convenience for the contract agency because it may keep the originals.

Maintenance and retention requirements of the deleted letter in “A” are deleted.

Consequence: Unnecessary information is deleted.

The requirements in part “B” that contract agency or facility staff must match name, social security number and date of birth to some other form of identification, and that a new criminal history record request must be made if any information does not match, are deleted. The Virginia State Police has procedures for any individual who believes his criminal history record report is incorrect. 22 VAC 40-191-50.B.5 has provisions for instances in which there is a question about a satisfactory background check.

Consequence: Verification of satisfactory background checks is expanded by requiring any of the three background checks to be repeated if there is suspicion that someone has a barrier crime, any felony within the last five years, or a founded complaint of child abuse and neglect.

The requirement in “C” about validity of criminal record report, now called criminal history record report due to recodification language changes in the *Code*, is changed. The current regulation is “as long as the employee, volunteer, foster parents, or family day home provider remains in continuous service at the same facility.” The proposed regulation is “before three years since the dates of the last sworn statement or affirmation, most recent central registry finding and most recent criminal history record check report.” It expands the affected individuals to include any applicant, licensee, approved individual, agent, employee, volunteer, and person living in the home who is required to have background checks. These changes are in 22 VAC 40-191-40.B. The validity of all three record checks, now required by *Code*, is addressed at that location in the proposed regulation.

Consequence: The proposed regulation includes all background checks. The proposed regulation increases protection to a vulnerable population by requiring resubmission of background checks every three years, except that the two-year requirement for voluntarily registration program participants is retained.

The requirement in “D” that a new criminal record report and sworn disclosure statement are required when an individual terminates employment or ceases volunteer work at one facility and begins work at another facility is moved to 22 VAC 40-191-50.B.3. The requirement is changed to reflect the new *Code* terminology of “criminal history record report” and “sworn statement or affirmation.”

Consequence: The proposed regulation language is consistent with current *Code* terminology. The new placement reflects the current requirement for searches of the central registry.

Another change to “D” is that, at its new location at 22 VAC 40-191-50.B.3, the proposed regulation allows a person to take with him any criminal history record report, or central registry check finding less than 91 days old. In this case, 1) a copy of the report must be made and 2) a notation made that it is a copy and that the original of any criminal history record report was verified.

Consequence: The change is a cost-savings to anyone required to furnish background checks because the person may go to another location within 90 days without a new background clearance. The impact on child safety is minimal because the effective time period is only three months.

The first and second exceptions in part “D” are moved to 22 VAC 40-191-40.B.8. The exceptions are also changed and expanded. The current requirements are that: 1) “when an employee transfers to a facility owned and operated by the same entity, with a lapse in service of not more than 30 days, a new criminal record report shall not be required” and 2) “a criminal record report for an individual who takes a leave of absence will remain valid as long as the period of separation does not exceed six consecutive months.” These requirements are changed to provide that “the background checks remain valid at the facility if no more than 12 consecutive months have passed from when a person: a) began a leave of absence from that facility, was terminated from employment at that facility, or c) was transferred to a facility owned and operated by the same employer or entity unless there is a conviction or founded complaint of child abuse and neglect during that period.”

Consequence: The information in this part is now easier to find because it is located in the section describing when the three background checks are required. It will be a cost savings to

employers. They will be able to bring back former employees, or move them to other facilities they own and operate, within a year without having to obtain another set of background checks, unless there is knowledge of a conviction or founded complaint of child abuse and neglect during that period.

22 VAC 40-190-60 Information moved to new section, and expanded

The current 22 VAC 40-190-60 section is moved to 22 VAC 40-191-70 and is expanded.

Consequence: In the proposed regulation, information about maintenance of background checks records appears in the sequence in which it occurs in the background checks process.

The current regulation, at 22 VAC 40-190-60.A, that provides that “the original report shall be maintained at the facility where the person is employed, volunteers or is approved” is expanded at 22 VC 40-191-70.A. The proposed language explains that background checks records must be kept at the location where the person is an applicant, agent, employee, contract employee, volunteer, other adult in the home, or is any other adult who is involved in the day-to-day operations of the facility or who is alone with, in control of, or supervising one or more children. Consequence: Confusion is avoided by listing those affected by the requirement.

The current regulation at 22 VAC 40-190-60.A is clarified in 22 VAC 40-191.70.A.1 by providing a choice when a facility is among two or more owned by the same entity. The choice is that the background checks records may either be kept at corporate headquarters **or** at the facility where the person is working. In either case, they must be made available to the Department representative upon request.

Consequence: The Department representative has access to background checks records, but the owner can decide which is the best place to keep records.

22 VAC 40-190-70 Section is deleted

The board member criminal record check requirements are deleted from the proposed regulation because they are no longer relevant. One of the 2002 *Code* recodification changes was to eliminate background checks requirements for board members unless they are otherwise required to obtain the checks.

Consequence: The proposed regulation complies with *Code* recodification.

22 VAC 40-191-50 New Section

This new section identifies for affected parties requirements for satisfactory background checks results. The first note, in Part “A,” explains that a satisfactory sworn statement or affirmation is a fully completed original stating that the person does not have a criminal conviction that is a barrier crime or is any felony conviction within the last five years. It also includes a statement that the person is not the subject of a founded complaint of child abuse or neglect within or outside the Commonwealth. There is also a statement providing that there is no other knowledge of an unsatisfactory background. It includes two caveats from the *Code* definition of “offense.” The first is that criminal convictions include prior adult convictions and juvenile convictions or adjudications of delinquency based on a crime that would be a felony if committed by an adult

within or outside the Commonwealth. The second is that convictions also include equivalent convictions in other states.

Consequence: Providing this information lessens misinterpretation of background checks results.

The second note, in Part “A,” explains that a satisfactory central registry finding is one in which a copy of the Department’s child protective services form indicates that, as of the date on the reply, the individual whose name was searched was not identified in the Central Registry of Founded Child Abuse/Neglect Investigations as an involved caregiver with a founded disposition of child abuse/neglect, and there is no other knowledge that the individual has a founded disposition in Virginia or elsewhere.

Consequence: Providing this information lessens the opportunity for misinterpretation of a satisfactory finding.

The third note, in Part “A,” explains that a satisfactory criminal history record check report as one in which an original hard copy or internet inquiry reply from the Virginia State Police is returned with no convictions indicated, or convictions indicated, but no barrier crimes or no other felony convictions in the previous five years. In addition, there is no other knowledge that the individual has a barrier crime, or other felony conviction in the past five years, in Virginia or elsewhere.

Consequence: Providing this information lessens the opportunity for misinterpretation of a satisfactory report.

Part “A” also provides that a facility must view the original report maintained by a contract employee or contract agency that is dated less than six months before the independent contract employee or contract employee hired by a contract agency begins providing service at the facility.

Consequence: Providing this information lessens the opportunity for misinterpretation of a satisfactory report.

The last provision in Part “A” is that a child-placing agency may approve as an adoptive parent an applicant convicted of not more than one misdemeanor of assault and battery, not involving abuse, neglect or moral turpitude, provided ten years have elapsed following the conviction.

Consequence: This addition achieves compliance with § 63.2-1721.E, of the *Code*.

Part “B” spells out how long background checks are valid. It stipulates that when minors turn 18 they must comply with background checks requirements for adults.

Consequence: The provision provides clarity and is in conformance with the rest of the regulation.

In conformance with the Voluntary Registration of Family Day Homes regulation, Part “B.2” provides that operators must submit new background checks as part of the two-year renewal application packages for registered family day homes.

Consequence: The proposed regulation is compatible with the companion regulation for voluntarily registered family day homes.

Part “B.3” allows a person who leaves a facility to take the criminal history record report or central registry check finding with him, if the report or finding is less than 91 days old. In this case, the facility must keep a copy of any report a person takes and write on it that it is a copy, and that the original of any criminal history record report was verified.

Consequence: This provision provides a cost savings to individuals and facilities while ensuring that adequate documentation is maintained at all facilities.

Further, “B.4” provides that a background check remains valid at a facility as long as no more than 12 consecutive months have passed from when a person began a leave of absence from that facility, was terminated from employment at that facility, or was transferred to a center owned and operated by the same employer or entity.

Consequence: This allowance is convenient for facilities that use repeat seasonal volunteers and employees, or that want to shift staff from site to site. It is also a convenience to any individual who wants to return to a previous facility.

Another addition, at “B.5 and 6,” is the authority for the Department, or registering or approving authority covered under this regulation, to require a new background check if there is reason to suspect that a person who has submitted acceptable background checks has: a) a barrier crime conviction in Virginia or elsewhere, b) a felony conviction, that is not a barrier crime, within the last five years in Virginia or elsewhere, or c) has a founded complaint of child abuse and neglect in Virginia or elsewhere. In this situation, the facility, Department, or registering or approving authority has the choice of either: a) allowing the person to continue in the same relationship to the facility until receipt of new background check information, or b) requiring that the person not be alone with children.

Consequence: This provides an important safeguard in instances when new information becomes available about an individual who has current satisfactory background checks on file.

Part “C” references the later section describing waivers for some criminal convictions.

Consequence: This reference serves as a useful prompt for the later Code-mandated waiver section.

22 VAC 40-191-60 New Section

This new section describes the consequences of unsatisfactory background checks results. It is provided to facilitate use of the regulation. Part “A” spells out that applicants are denied licensure, registration or approval when there are unsatisfactory background checks results for: a) applicants as a child welfare agency; b) agents at the time of application who are or will be involved in the day-to-day operations of the child welfare agency or who are or will be alone with, in control of, or supervising one or more of the children; c) any other adult living in the home of an applicant for licensure or registration as a family day home; d) any other adult living in a foster home, or in the home of adoptive parents, until the adoption is final, or any child aged 14 or older with an unsatisfactory central registry finding, e) prospective foster or adoptive parents seeking approval by child-placing agencies; and f) prospective family day homes seeking approval by family day systems.

Consequence: There is regulatory language to back up denials by licensing, registration, and approval agencies.

A provision, in “B,” is that an employee or volunteer of a licensed or registered child welfare agency or of a family day home approved by a family day system must not be employed or provide volunteer service until the agency or home has the person’s completed sworn statement or affirmation.

Consequence: This will reduce the likelihood that facilities will allow people to work or volunteer before they have the completed sworn statement or affirmation.

Part “C” explains that an employee or volunteer of a licensed or registered child welfare agency, or of a family day home approved by a family day system must be denied continued employment or volunteer service if the licensed or registered child welfare agency or family day system does not have the original criminal history record report or central registry finding within 30 days of employment or volunteer service.

Consequence: Children’s safety will be enhanced because facilities are not allowed to delay requesting background checks.

The exception, at “D,” is that an employee may continue to work, or provide service, or live in a licensed, registered or approved family day home if the facility has documentation that the criminal history record request or the request for search of the central registry was submitted within seven calendar days of the person being employed or volunteering, or living in the regulated family day home, even if the report is not returned within 30 calendar days. Within five working days after the 30th day, the requestor must contact the Central Criminal Records Exchange of the Virginia State Police, or the Child Protective Services Unit of the Department to verify receipt of the request. If the request was not received, the requestor must submit another request within five working days after the contact.

Consequence: Facilities will understand that they have protection from administrative delay not of their making, but this is true only if they submit requests in a timely manner.

Part “E” specifies that, if the Department or a local agency becomes aware that a person covered by this regulation has a disqualifying background, the Department or local agency may release this information to facilities that are covered by this regulation.

Consequence: This addition increases the likelihood that facilities will know about a possible disqualifying background and have the opportunity to require another background check.

Part “F” requires licensed or registered child welfare agencies and family day systems to inform compensated employees and volunteers that the facilities are requesting child protective services registry checks and criminal history record reports for them.

Consequence: This is a courtesy to persons being checked. Neither the request forms nor the *Code* requires notification.

Part “G” allows a facility to obtain a national criminal background check, instead of the criminal history record check, for employees and volunteers. If a facility chooses this alternative, it must adhere to Virginia State Police requirements for obtaining fingerprints. In this case, a national criminal background check result of “qualified” from the Virginia State Police will suffice as a satisfactory result. If the result is “disqualified,” the facility must obtain a satisfactory criminal history record check through the Central Criminal Record Exchange for the person if: a) the

facility wishes the adult to continue to reside in a family day home, b) the facility wishes to employ the person or approve the person as a volunteer, c) the entity wishes the Department to issue a license or registration, or d) the facility wishes a family day system or child-placing agency to issue an approval.

Consequence: The proposed regulation acknowledges the provision in the *Code* allowing use of the national criminal background check for employees and volunteers. It explains the requirements for a satisfactory national criminal background check.

22 VAC 40-191-70 New Section

Refer to comments for 22 VAC 40-190-60.

In addition, Part “A” allows a facility to keep copies of background checks records on site if the facility is not the primary work place for a person. In this instance, the facility must keep documentation of the place where the original background check records are kept, and copies are kept with a statement that the facility designee has viewed and verified the original sworn statement or affirmation and criminal history record report. Note that the *Code* does not require an original central registry check finding.

Consequence: This provision gives access to background checks information by Department representatives, while allowing centralized record-keeping at an individual’s primary work site.

Part “B” includes provisions that are specific to contracting organizations and voluntarily registered family day homes certified eligible for registration by contracting organizations. The contracting organization must keep the original criminal history record report and sworn statement or affirmation for the voluntarily registered provider. The contracting organization keeps either the original or a copy of the central registry finding. The voluntarily registered family day home provider, on the other hand, must keep the original criminal history record report and sworn statement or affirmation for any provider assistant, substitute provider, and any adult residing in the home. The provider must keep either the original or a copy of a central registry finding for any provider assistant, substitute provider, and any person aged 14 and older residing in the home.

Consequence: These provisions clarify what information contracting organizations are supposed to keep and what information is the responsibility of registered family day home providers. This will avoid confusion for providers and contracting organization staff about who is to keep what information.

Part “C” presents the maintenance requirements for family day systems and family day homes approved by family day systems. The requestor keeps the original criminal history record check, and the original or copy of the child protective services central registry check. The other party keeps copies. The family day system always keeps the original sworn disclosure statement or affirmation.

Consequence: These provisions clarify what information family day systems must keep and what information is the responsibility of family day homes approved by family day systems. This will avoid confusion for providers and family day system staff about who is to keep what information.

The next part, “D,” specifies that a voluntarily registered family day home must keep all background checks information for two years after a person required to provide background checks terminates his duties with a facility or no longer resides in the home. All other facilities must keep all background check information for one year after a person required to provide background checks terminates his duties with a facility or no longer resides in the home. Consequence: There will be consistent interpretation of requirements for keeping background checks records. The requirements are consistent with the regulation for voluntarily registered family day homes.

Part “E” repeats the stipulation in the current regulation that a criminal record report must be maintained in locked files. Maintenance requirements for sworn statements or affirmations and central registry finding are additions to the current regulation. Consequence: Maintenance of all required background checks is addressed in the proposed regulation.

The provision in the current regulation, at 22 VAC 40-190-60.D, that the files are accessible only to the licensee, administrator, registered provider, board president, or their designee is changed. Part “E” stipulates that to applicants and agents, and their designees, are the only facility staff who may have access to these documents. There is an exception that the board president must have access to these documents. Consequence: The new terminology provides for applicants to maintain background checks records prior to being regulated. It identifies who has access to background checks documents.

Part “F” explains that people who are denied licensure, registration, approval, employment, or volunteer service because of a background check must be given the disqualifying documentation. It makes clear that people have the right to receive a copy of their background check information upon request. This part further provides that further dissemination of the background check information is prohibited other than to the Commissioner’s representative or a federal or state authority or court in order to comply with an express requirement in the law for that dissemination. The note refers the reader to related provisions at 22 VAC 40-191-90.H. Consequence: The addition mirrors *Code* recodification language. It also is consistent with legal interpretation from the Office of the Attorney General.

22 VAC 40-191-80 New Section

Criminal record review and waiver was added to the *Code* during the 1998 session of the General Assembly. The *Code* provides for the State Board of Social Services to promulgate regulations to implement the waiver. 22 VAC 40-191-80 defines the waiver of criminal conviction as the Department’s canceling the consequences of an unsatisfactory criminal history record check only for specific convictions. Consequence: The reader has an explanation of the term waiver.

22 VAC 40-191-90 New Section

This section provides that any person who wants to operate or to volunteer or work at a facility covered by this regulation, or at a licensed child care center, but who is disqualified because of a

criminal conviction or a criminal conviction in the background check of any other adult living in a family day home governed by this regulation, may apply in writing to the Commissioner of the Department for a waiver. It specifies that these waiver requirements apply to licensed child day care centers.

Consequence: The reader is informed that the waiver applies only to certain criminal convictions and applies only to regulated facilities.

Part “A” explains that a person may apply for a waiver if: a) a non barrier crime felony conviction occurred less than five years ago, and b) any other adult living in the home of a family day home applicant or provider has been convicted of not more than one misdemeanor offense of assault and battery or assault and battery against a family or household member. The other adult may not be an assistant or substitute provider. Note that there is a reference to the exception in 22 VAC 40-191-50.A that applies to prospective adoptive parents.

Consequence: The provision is consistent with the *Code*.

Part “B” states that, with the exception that applies to prospective adoptive parents, no person guilty of a barrier crime may operate or volunteer or work at a facility governed by this regulation.

Consequence: This part clarifies and emphasizes that barrier crimes disqualify a person from operating, volunteering at, or working at a child day center or any facility under the authority of this regulation.

22 VAC 40-191-100 New Section

This section is requires that a person must request a waiver application package from the Licensing Regional Office that serves the area where the person with the disqualifying background check lives or wants to operate or volunteer or work at a facility covered by this regulation. The exception is that a person wishing to operate a voluntarily registered family day home requests a waiver application from either the contracting organization or the voluntary registration consultant in the Division of Licensing Programs of the Department.

Consequence: The reader can quickly tell how to obtain a waiver application package.

This section includes a notification of a waiver application fee.

Consequence: The reader knows that there is a cost involved in applying for a waiver.

A provision is included that the Commissioner acknowledges, in writing, receipt of the application and notifies the requester and the sponsor whether the request appears to be complete.

Consequence: There is assurance for the requester that the Department got the application package and that it appears that the necessary information is included.

22 VAC 40-191-110 New Section

Part “A” specifies that the waiver application is personally prepared.

Consequence: The reader is informed that no one can prepare an application on behalf of someone else.

Part “B” explains that the application must be typewritten and must include a statement that the request was solely and personally prepared by the requester, or other adult living in a family day home, as applicable, and has not been edited or changed by anyone else, except that the document may be typed by another person.

Consequence: The requester is reminded that no one else can compose the information. The information will be legible because it will be typed.

Another requirement is that the application include a statement that the requester understands that the waiver will be available for inspection by the public, and the facility will provide a copy of the waiver to every current and future parent and guardian of children in care, if the waiver is granted.

Consequence: The requester will be aware of the *Code* requirement that waivers granted will be available for inspection by the public.

A related required application component is a statement that the requester understands that information in the waiver application package will be made available by the Commissioner to any person upon request, if the waiver is granted.

Consequence: The requester is forewarned about the public nature of the information submitted in the package.

Part “B” also explains that the application package must also include: a) personal and employment information; and b) if the request is for a family day home, all members of the household and their relationship to the requester.

Consequence: This information will be available to assist the Commissioner in determining the potential safety of children placed in the facility and whether the requester is now a person of good moral character and reputation, as required by the *Code*.

Other required waiver application components, found in “B,” are: a) a factual account of the crime of the person with the disqualifying conviction, b) the current status and history with justice systems of the person with the disqualifying conviction, c) other information the person with the disqualifying background wants the Commissioner to consider in evaluating the waiver request, and d) an explanation of why the waiver should be granted.

Consequence: The requester has the opportunity to provide any information he believes is pertinent. The Commissioner has appropriate justice system information from which to evaluate the request for a waiver.

The seven required attachments are identified. The first is a non-refundable check, made payable to the “Treasurer of Virginia,” for application processing. For the person with the disqualifying conviction, the required attachments are a) “Current Employment and Employment History Form,” b) copy of the current sworn statement or affirmation, c) a copy of the current criminal history record report, d) copy of all necessary documents verifying the person’s statements regarding past and current involvement with adult or juvenile justice systems within or outside the Commonwealth, e) at least four disinterested references who will vouch for the “good moral character and reputation” of the person with the disqualifying conviction, f) the Sponsoring Agency Statement, and g) a notarized signature page.

Consequence: The Commissioner will have sufficient information to determine if the person is of good moral character and reputation and the waiver would not adversely affect the safety and well-being of children.

Part “B” stipulates that, if the waiver application is for another adult living in a family day home, the Department must conduct a home study to assess the safety of children placed in the home, and determine that the offender is now a person of good moral character and reputation.

Consequence: *Code* requirements are included.

22 VAC 40-191-120 New Section

Part “A” provides that the Commissioner may delegate all aspects of processing and evaluating waiver requests, provided that responsibility for making the final decision may not be delegated below the level of a division director.

Consequence: This provision demonstrates the significance of waiver decisions and assures decision-making at a high level within the Department.

The rest of the section describes the criteria used to evaluate a waiver application. Part “A” has a note that the final decision is based on the: a) content of the waiver application package, b) nature of the conviction or convictions and relevance to decision criteria, c) extent and pattern of criminal history or child abuse and neglect, including the person’s age when the act occurred, and d) in the case of prospective foster parents for a licensed child-placing agency, a review of the criminal record requirements of the Safe Families and Adoption Act of 1997 to determine if the waiver would be permitted.

Consequence: Decisions will be made based on uniform criteria.

Part “B” states that the applicant may be required to provide additional information that is reasonable and necessary to evaluate the application.

Consequence: This provision allows a thorough investigation to be carried out and increases the likelihood that all relevant information will be reviewed.

The next section, “C,” continues the theme of thorough investigation by providing that the Commissioner may interview the applicant or other persons sufficient to verify and evaluate the information in the application package.

Consequence: This provision allows a thorough investigation to be carried out and increases the likelihood that all relevant information will be reviewed.

Part “D” explains that the Commissioner may grant a waiver if the Commissioner determines that: a) the person is now of good moral character and reputation, and b) the waiver would not adversely affect the safety and well-being of children in the person’s care.

Consequence: The reader is informed that there are consistent guidelines for making decisions about waiver applications.

Part “E” establishes that the Commissioner will consider a waiver application abandoned, and close the file, when: a) more than 60 days have passed since the Commissioner advised the

requester and the sponsoring agency that the waiver application was incomplete, or since the Commissioner requested additional information that was reasonably necessary to evaluate the application, and b) the Commissioner informs the requester by certified mail that the waiver application would be considered abandoned unless the requester provides the requested information within 15 days.

Consequence: There is no subjectivity about when an application is abandoned.

The final part of this section, “F,” specifies that waiver decisions are not appealable.

Consequence: The reader is informed of this interpretation of the *Code* by the Attorney General’s Office.

22 VAC 40-191-130 New Section

This section informs the reader that the Commissioner notifies the requester, other adult if applicable, and the sponsor of his decision in writing by certified mail.

Consequence: A consistent notification process is established.

It provides that an approved waiver is for a specific person and a specific facility and must include: 1) name of individual; 2) name of facility; 3) effective dates; 4) terms, conditions, and stipulations, if any; 5) criminal conviction for which the waiver was granted; 6) date of criminal conviction; 7) relevant court and location; 8) sentence served; and 9) signature of Commissioner, or designee, and 10) date.

Consequence: There will be a consistent approved waiver format.

22 VAC 40-191-140 New Section

Waivers are not static documents. Part “A” of this section indicates that the person and the sponsoring agency may request a modification of any of the terms, conditions, or stipulations of a waiver.

Consequence: This provision allows the Department to respond to changed circumstances.

Similarly, Part “B” allows the Commissioner to revoke a waiver if, after investigation, he determines that: a) the waiver application contained false, deceptive, or misleading information; b) the terms, conditions, or stipulations of a waiver have been violated; or c) new or expanded information becomes known about the person that would change the previous determination made about the person’s character, reputation, or suitability to work with or be in proximity to children. In the event that a waiver is revoked, Part “C” provides that the Commissioner will inform the person and the sponsoring agency, in writing by certified mail, of the reasons for the revocation.

Consequence: This provision allows the Department to respond to changed circumstances, while protecting the person by requiring an explanation in writing.

Part “C” provides that, if a waiver is revoked, the Commissioner informs the person and the sponsoring agency, in writing by certified mail, of the reasons for the revocation.

Consequence: This provision guards against capricious decision-making.

Expiration of waivers is explained in Part “D.” A waiver automatically expires when: a) the person terminates the approved arrangement with the sponsoring facility, b) five years have passed from the last date of a conviction for the felony or felonies for which the waiver was granted, or c) the other adult living in a family day home was the reason for the waiver and the other adult no longer lives in the home.

Consequence: Misunderstandings about expiration of waivers are avoided.

22 VAC 40-191-150 New Section

This section provides that a facility must post in a conspicuous place on the premises any waiver granted by the Department. In addition, it must notify in writing every parent and guardian of children in its care of any waiver granted for its operators, employees, volunteers, or adult family members living in the home. It clarifies that notification or parents and guardians includes those whose child is placed with a foster child or whose child is to be placed with an adoptive family. It also includes parents and guardians who, in the future, will enroll children.

Consequence: This section contains the regulation to comply with the *Code* requirement for public notification. Because of the detail provided, potential misunderstanding is avoided.

This section also provides that any facility employing staff, allowing volunteers, operated by a person, or a family day home with an other adult whose disqualification has been waived by the Commissioner must post a copy of the waiver in a conspicuous place on the premises.

Consequence: This provision complies with the *Code* requirement for public notification.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The Board is required to promulgate regulations necessary to carry out provisions in the *Code*. This regulation performs that function for Title 63.2, Subtitle IV (Licensure), Article 3 – Background Checks. The revisions required to comply with changes in the *Code* were so extensive that it was prudent to repeal the existing regulation and promulgate a new regulation.

The other alternative was to include provisions not explicitly referenced in the *Code* in a separate guidance document. That alternative would have required facilities to work from two documents simultaneously and would have likely resulted in misunderstandings and higher levels of noncompliance.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

Public Comments:

There were two public comments. The first expressed support for repealing and adopting the new regulations. The second recommended that barrier crimes regarding felony drug convictions be considered on a case by case basis.

Agency Response:

The agency does not have the authority to consider felony drug convictions on a case by case basis.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

Agency staff researched and incorporated approaches to regulation writing alleged to improve clarity. Staff also incorporated recommendations as approved by the Office of the Registrar. The document was also reviewed by a sample of regulatory staff who will use it as a reference when inspecting facilities for compliance.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

A review of the regulation will take place in accordance with the schedule for three-year periodic reviews.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which 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.

There will be minimal impact on the authority and rights of parents in the education, nurturing, and supervision of their children. Family day home providers will be required to obtain central

registry findings for any children, aged 14 and older, living in their homes. Similarly, background checks requirements might impact economic self-sufficiency, self-pride, and responsibility for oneself, one's spouse, and one's children and/or elderly parents, as well as disposable family income by requiring searches of the central registry for all persons in the household, aged 14 and older. The \$5.00 cost per person is minimal. There would be no impact on the marital commitment.