



Virginia  
Regulatory  
Town Hall

## Emergency Regulation Agency Background Document

|                            |   |
|----------------------------|---|
| <b>Agency Name:</b>        | Virginia Department of Social Services                            |
| <b>VAC Chapter Number:</b> | 22 VAC 40-71-10 et seq.   |
| <b>Regulation Title:</b>   | Standards and Regulations for Licensed Assisted Living Facilities |
| <b>Action Title:</b>       | Name Change, Shared Administrator and Secure Environment          |
| <b>Date:</b>               | April 18, 2001  |

Section 9-6.14:4.1(C)(5) of the Administrative Process Act allows for the adoption of emergency regulations. Please refer to the APA, Executive Order Twenty-Four (98), and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the emergency regulation submission package.

### Emergency Preamble

*Please provide a statement that the emergency regulation is necessary and provide detail of the nature of the emergency. Section 9-6.14:4.1(C)(5) of the Administrative Process Act states that an "emergency situation" means: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date. The statement should also identify that the regulation is not otherwise exempt under the provisions of § 9-6.14:4.1(C)(4).*

*Please include a brief summary of the emergency action. There is no need to state each provision or amendment.*

Chapters 808 and 845 of the 2000 Acts of Assembly made changes to Article 1 (§ 63.1-172 et seq.) of Chapter 9 of the Code of Virginia and required that regulations be promulgated within 280 days of enactment. House Bill 2490 from the 2001 General Assembly session made additional changes to § 63.1-174 of the Code of Virginia. Because these changes revised Chapter 845, the proposed emergency regulation for assisted living facilities had to be revised accordingly. This regulation is not otherwise exempt under the provisions of § 9-6.14:4.1 C 4.

These emergency regulations change the name of homes for aged, infirm or disabled adults from "adult care residence" to "assisted living facility." These regulations make an allowance for a shared administrator when an assisted living facility and a nursing home are located in the same building. The regulations provide programmatic requirements for secure environments for residents with serious cognitive impairments due to a primary psychiatric diagnosis of dementia. Cost constraints of small facilities in complying with the assisted living facility regulations were reviewed.

## Basis

*Please identify the state and/or federal source of legal authority to promulgate the emergency regulation. The discussion of this emergency statutory authority should: 1) describe its scope; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. Full citations of legal authority and web site addresses, if available for locating the text of the cited authority, should be provided.*

*Please provide a statement that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the emergency regulation and that it comports with applicable state and/or federal law.*

The state source of legal authority to promulgate this emergency regulation is Chapters 808 and 845 of the 2000 Acts of Assembly. These chapters specify that any regulations necessary to implement the provisions of the chapters be promulgated by the State Board of Social Services to be effective within 280 days of enactment. Sections 63.1-172 and 63.1-174 of the Code of Virginia contain requirements found in Chapters 808 and 845. House Bill 2490 of the 2001 General Assembly modified certain requirements found in § 63.1-174 of the Code of Virginia. Sections 63.1-25 and 63.1-174 of the Code of Virginia place general authority with the State Board of Social Services to make rules and regulations to carry out the purposes of Title 63.1 and Title 63.1, Chapter 9, Article 1 respectively.

## Substance

*Please detail any changes, other than strictly editorial changes, that would be implemented. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Please provide a cross-walk which includes citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes. The statement should set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of Virginians. The statement should also delineate any potential issues that may need to be addressed as a permanent final regulation is developed.*

22 VAC 40-71-10: In this section, which includes definitions, the name of a home for aged, infirm or disabled adults is changed from "adult care residence" to "assisted living facility" and the definition of such a facility is clarified. (The name change occurs throughout the regulation.) An exception is added for housing projects for seniors or disabled adults that provide no more than basic coordination of care services when

funded by the U.S. Department of Housing and Urban Development, the U.S. Department of Agriculture, or the Virginia Housing Development Authority.

22 VAC 40-71-10: In this section, which includes definitions, there is the addition of a definition of "safe, secure environment" for individuals with serious cognitive impairments due to a primary psychiatric diagnosis of dementia who cannot recognize danger or protect their own safety and welfare. A definition of "serious cognitive impairment" has also been added.

22 VAC 40-71-20: The language regarding the definition of assisted living facility and the exceptions is revised to reflect the changes made in 22 VAC 40-71-10.

22 VAC 40-71-60 B 5: An allowance is added for a licensed nursing home administrator to serve as an administrator of an assisted living facility and to serve as the administrator of both an assisted living facility and a licensed nursing home when they are located in the same building.

22 VAC 40-71-60 I: A provision is added for a management plan when an assisted living facility and a nursing home have a single administrator.

22 VAC 40-71-275: A provision is added that residents who do not have a need for close oversight may freely leave the facility. A prohibition on the facility locking doors from the inside that lead to the outside has been added, with an exception for special care units for residents with serious cognitive impairments due to dementia. There is also the addition of a provision ensuring that residents have freedom of movement within the facility.

22 VAC 40-71-700: This section, which has requirements to protect residents with serious cognitive impairments who cannot recognize danger and protect their own safety and welfare, is reorganized. Subsection A now applies to mixed populations, i.e., (i) residents with serious cognitive impairments who cannot recognize danger or protect their own safety and welfare and (ii) other residents. Subsection B now applies to secure environments only for residents with serious cognitive impairments due to a primary psychiatric diagnosis of dementia who cannot recognize danger or protect their own safety and welfare.

22 VAC 40-71-700 A: In this subsection, which relates to mixed populations, there is clarification of language relating to cognitive impairments so that it is clear they are not limited to Alzheimers and related disorders. The following are other changes in this subsection.

22 VAC 40-71-700 A 5 f: Adds safety considerations to cognitive impairment training curriculum.

22 VAC 40-71-700 A 12: Adds a requirement protecting seriously cognitively impaired residents from potentially harmful materials and objects.

22 VAC 40-71-700 B: This subsection now relates to secure environments only for residents with serious cognitive impairments due to a primary psychiatric diagnosis of dementia who cannot recognize danger or protect their own safety and welfare. The exception to the subsection for facilities licensed for ten or fewer residents no longer applies to secure environments. In addition to these revisions, the following are the requirements that are changed.

22 VAC 40-71-700 B 1: Adds a requirement for a physician assessment that shows that a resident has a serious cognitive impairment due to a primary psychiatric diagnosis of dementia and is unable to recognize danger or protect his own safety and welfare.

22 VAC 40-71-700 B 2: Requires that the facility obtain written approval to place a resident in a secure environment from a certain person in a specified order of priority.

22 VAC 40-71-700 B 3: Requires a periodic resident progress review.

22 VAC 40-71-700 B 4: Provides for the establishment of therapeutic goals for each resident.

22 VAC 40-71-700 B 5: Provides for the design of activities.

22 VAC 40-71-700 B 6, 7, and 8: Outlines types of activities to be available and a provision for encouragement and assistance regarding resident participation in activities.

22 VAC 40-71-700 B 9: Specifies that there must be unscheduled staff and resident interaction in addition to scheduled activities.

22 VAC 40-71-700 B 10: Specifies that residents are to be given the opportunity daily to be outdoors, weather permitting.

22 VAC 40-71-700 B 11: Provides that, as appropriate, residents are to be encouraged to participate in supervised activities outside the secure unit.

22 VAC 40-71-700 B 12: Requires that there be a person responsible for management of the activities program.

22 VAC 40-71-700 B 15, 16, and 17: Revises the cognitive impairment training requirements for the first year of employment of administrators and direct care staff. The time periods for receiving the training and the amount of training are changed, and

the curriculum is more extensive and detailed. The qualifications of the trainer are clarified.

22 VAC 40-71-700 B 18: Increases by four hours the first year training requirement for direct care staff.

22 VAC 40-71-700 B 20: Adds a specification that secure units may be locked if there is conformance with applicable building and fire codes.

22 VAC 40-71-700 B 24: Requires that buildings that are new or have a change in use group have a window in at least one of the common rooms.

22 VAC 40-71-700 B 26: Adds a requirement protecting residents from potentially harmful materials and objects.

22 VAC 40-71-700 B 27: Provides for environmental enhancements to promote the residents' independence and dignity.

This regulatory action is essential to protect the health, safety, and welfare of the residents of assisted living facilities. When there is an administrator shared by an assisted living facility and a nursing home, it is critical that there is a management plan to assure the care and supervision of residents is not compromised and adequate attention is paid to the day-to-day operation of the facility. When an assisted living facility has a secure environment, it is most important that there be requirements that ensure that only those residents who meet certain criteria are placed in these secure units and that activities, staff, and environmental precautions/enhancements are sufficient to meet the needs of the residents.

The emergency regulation has only those minimal changes necessary based on the requirements of the legislation. The permanent final regulation may need to be more specific and provide more details.

Chapter 808 of the 2000 Acts of Assembly mandated that the regulations take into consideration cost constraints of smaller operations. The Virginia Department of Social Services (DSS) carefully reconsidered these cost constraints. Cost impacts, including differential impacts according to facility size, types, locations, etc., are routinely and carefully considered during the promulgation process. It was determined that in order to adequately protect the health and safety of residents, no changes could be made to the regulation, which already offers only minimal protection to an increasingly vulnerable population. Residents are equally at risk in smaller homes and larger homes and deserve the same protection. The allowable variance process already exists as a means for considering special circumstances and hardships. A facility may request an allowable variance if it believes that a regulation poses a special hardship and that an alternative method of compliance or suspension of a regulation would not endanger the

safety and well-being of residents. DSS considers the request and the specific circumstances involved and may grant an allowable variance.

The issue regarding cost constraints of smaller operations remains controversial among some assisted living providers. This is a potential issue that may need to be addressed in the permanent final regulation based on public comment.

## Alternatives

*Please describe the specific alternatives that were considered and the rationale used by the agency to select the least burdensome or intrusive method to meet the essential purpose of the action.*

The legislation mandated that regulations be developed to carry out the purposes of the act. DSS has developed the least intrusive and least burdensome methods to accomplish this end. Regulations from several other states were examined and conditions in the assisted living industry in Virginia were carefully considered. DSS consulted with providers, advocates for residents and other agency staff through the Assisted Living Facility Advisory Committee. Input was also sought and received from certain state agencies through an interagency meeting and subsequent contacts. All of this was considered in order to develop the least intrusive and least burdensome regulations. Because of changes made by House Bill 2490 in the 2001 General Assembly session, the proposed emergency regulation had to be modified.

## Family Impact Statement

*Please provide a preliminary analysis of the potential impact of the emergency action on the institution of the family and family stability including to what extent the 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.*

This emergency action is not expected to significantly impact the institution of the family and family stability.