VIRGINIA REGISTER OF REGULATIONS

VOL. 35 ISS. 20 PUBLISHED EVERY OTHER WEEK BY THE VIRGINIA CODE COMMISSION MAY 27, 2019

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THE VIRGINIA REGISTER OF REGULATIONS (USPS 001-831) is published biweekly for $263.00 per year by Matthew Bender & Company, Inc., 3 Lear Jet Lane, Suite 102, P.O. Box 1710, Latham, NY 12110. Periodical postage is paid at Easton, MD and at additional mailing offices. POSTMASTER: Send address changes to The Virginia Register of Regulations, 4810 Williamsburg Road, Unit 2, Hurlock, MD 21643.

VIRGINIA REGISTER INFORMATION PAGE

THE VIRGINIA REGISTER OF REGULATIONS is an official state publication issued every other week throughout the year. Indexes are published quarterly, and are cumulative for the year. The *Virginia Register* has several functions. The new and amended sections of regulations, both as proposed and as finally adopted, are required by law to be published in the *Virginia Register*. In addition, the *Virginia Register* is a source of other information about state government, including petitions for rulemaking, emergency regulations, executive orders issued by the Governor, and notices of public hearings on regulations.

ADOPTION, AMENDMENT, AND REPEAL OF REGULATIONS

An agency wishing to adopt, amend, or repeal regulations must first publish in the *Virginia Register* a notice of intended regulatory action; a basis, purpose, substance and issues statement; an economic impact analysis prepared by the Department of Planning and Budget; the agency's response to the economic impact analysis; a summary; a notice giving the public an opportunity to comment on the proposal; and the text of the proposed regulation.

Following publication of the proposal in the Virginia Register, the promulgating agency receives public comments for a minimum of 60 days. The Governor reviews the proposed regulation to determine if it is necessary to protect the public health, safety and welfare, and if it is clearly written and easily understandable. If the Governor chooses to comment on the proposed regulation, his comments must be transmitted to the agency and the Registrar no later than 15 days following the completion of the 60-day public comment period. The Governor's comments, if any, will be published in the *Virginia Register*. Not less than 15 days following the completion of the 60-day public comment period, the agency may adopt the proposed regulation.

The Joint Commission on Administrative Rules (JCAR) or the appropriate standing committee of each house of the General Assembly may meet during the promulgation or final adoption process and file an objection with the Registrar and the promulgating agency. The objection will be published in the *Virginia Register*. Within 21 days after receipt by the agency of a legislative objection, the agency shall file a response with the Registrar, the objecting legislative body, and the Governor.

When final action is taken, the agency again publishes the text of the regulation as adopted, highlighting all changes made to the proposed regulation and explaining any substantial changes made since publication of the proposal. A 30-day final adoption period begins upon final publication in the *Virginia Register*.

The Governor may review the final regulation during this time and, if he objects, forward his objection to the Registrar and the agency. In addition to or in lieu of filing a formal objection, the Governor may suspend the effective date of a portion or all of a regulation until the end of the next regular General Assembly session by issuing a directive signed by a majority of the members of the appropriate legislative body and the Governor. The Governor's objection or suspension of the regulation, or both, will be published in the *Virginia Register*. If the Governor finds that changes made to the proposed regulation have substantial impact, he may require the agency to provide an additional 30-day public comment period on the changes. Notice of the additional public comment period required by the Governor will be published in the *Virginia Register*.

The agency shall suspend the regulatory process for 30 days when it receives requests from 25 or more individuals to solicit additional public comment, unless the agency determines that the changes have minor or inconsequential impact.

A regulation becomes effective at the conclusion of the 30-day final adoption period, or at any other later date specified by the promulgating agency, unless (i) a legislative objection has been filed, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 21-day objection period; (ii) the Governor exercises his authority to require the agency to provide for additional public comment, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the period for which the Governor has provided for additional public comment; (iii) the Governor and the General Assembly exercise their authority to suspend the effective date of a regulation until the end of the next regular legislative session; or (iv) the agency suspends the regulatory process, in which event the regulation, unless withdrawn, becomes effective on the date specified, which shall be after the expiration of the 30-day public comment period and no earlier than 15 days from publication of the readopted action.

A regulatory action may be withdrawn by the promulgating agency at any time before the regulation becomes final.

FAST-TRACK RULEMAKING PROCESS

Section 2.2-4012.1 of the Code of Virginia provides an exemption from certain provisions of the Administrative Process Act for agency regulations deemed by the Governor to be noncontroversial. To use this process, Governor's concurrence is required and advance notice must be provided to certain legislative committees. Fast-track regulations will become effective on the date noted in the regulatory action if no objections to using the process are filed in accordance with § 2.2-4012.1.

EMERGENCY REGULATIONS

Pursuant to § 2.2-4011 of the Code of Virginia, an agency, upon consultation with the Attorney General, and at the discretion of the Governor, may adopt emergency regulations that are necessitated by an emergency situation. An agency may also adopt an emergency regulation when Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment. The emergency regulation becomes operative upon its adoption and filing with the Registrar of Regulations, unless a later date is specified. Emergency regulations are limited to no more than 18 months in duration; however, may be extended for six months under certain circumstances as provided for in § 2.2-4011 D. Emergency regulations are published as soon as possible in the *Register*.

During the time the emergency status is in effect, the agency may proceed with the adoption of permanent regulations through the usual procedures. To begin promulgating the replacement regulation, the agency must (i) file the Notice of Intended Regulatory Action with the Registrar within 60 days of the effective date of the emergency regulation and (ii) file the proposed regulation with the Registrar within 180 days of the effective date of the emergency regulation. If the agency chooses not to adopt the regulations, the emergency status ends when the prescribed time limit expires.

STATEMENT

The foregoing constitutes a generalized statement of the procedures to be followed. For specific statutory language, it is suggested that Article 2 (§ 2.2-4006 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia be examined carefully.

CITATION TO THE *VIRGINIA REGISTER*

The *Virginia Register* is cited by volume, issue, page number, and date. **34:8 VA.R. 763-832 December 11, 2017,** refers to Volume 34, Issue 8, pages 763 through 832 of the *Virginia Register* issued on December 11, 2017.

The Virginia Register of Regulations is published pursuant to Article 6 (§ 2.2-4031 et seq.) of Chapter 40 of Title 2.2 of the Code of Virginia.

Members of the Virginia Code Commission: **John S. Edwards,** Chair; **James A. "Jay" Leftwich,** Vice Chair; **Ryan T. McDougle; Rita Davis; Leslie L. Lilley; E.M. Miller, Jr.; Thomas M. Moncure, Jr.; Christopher R. Nolen; Charles S. Sharp; Samuel T. Towell; Malfourd W. Trumbo; Mark J. Vucci.**

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PUBLICATION SCHEDULE AND DEADLINES

This schedule is available on the Virginia Register of Regulations website (http://register.dls.virginia.gov).

June 2019 through August 2020

Volume: Issue	Material Submitted By Noon*	Will Be Published On
35:22	June 5, 2019	June 24, 2019
35:23	June 19, 2019	July 8, 2019
35:24	July 3, 2019	July 22, 2019
35:25	July 17, 2019	August 5, 2019
35:26	July 31, 2019	August 19, 2019
36:1	August 14, 2019	September 2, 2019
36:2	August 28, 2019	September 16, 2019
36:3	September 11, 2019	September 30, 2019
36:4	September 25, 2019	October 14, 2019
36:5	October 9, 2019	October 28, 2019
36:6	October 23, 2019	November 11, 2019
36:7	November 6, 2019	November 25, 2019
36:8	November 18, 2019 **(Monday)**	December 9, 2019
36:9	December 4, 2019	December 23, 2019
36:10	December 18, 2019	January 6, 2020
36:11	January 1, 2020	January 20, 2020
36:12	January 15, 2020	February 3, 2020
36:13	January 29, 2020	February 17, 2020
36:14	February 12. 2020	March 2, 2020
36:15	February 26, 2020	March 16, 2020
36:16	March 11, 2020	March 30, 2020
36:17	March 25, 2020	April 13, 2020
36:18	April 8, 2020	April 27, 2020
36:19	April 22. 2020	May 11, 2020
36:20	May 6, 2020	May 25, 2020
36:21	May 20, 2020	June 8, 2020
36:22	June 3, 2020	June 22, 2020
36:23	June 17, 2020	July 6, 2020
36:24	July 1, 2020	July 20, 2020
36:25	July 15, 2020	August 3, 2020

*Filing deadlines are Wednesdays unless otherwise specified.

TITLE 9. ENVIRONMENT

DEPARTMENT OF ENVIRONMENTAL QUALITY

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Department of Environmental Quality (DEQ) intends to consider amending **9VAC15-60, Small Renewable Energy Projects (Solar) Permit Regulation by Rule**, which establishes criteria, procedures, and permit requirements as required by § 10.1-1197.5 et seq. of the Code of Virginia for solar energy projects of 150 megawatts or fewer. The purpose of the proposed action is to clarify specific definitions, establish clear timeframes for data submittals and recordkeeping activities, provide clarity for natural and cultural resource studies, clarify the public participation procedures, and address the fee structure to adequately fund the program. The goals of the proposed action are to clarify the requirements for applicants, operators, and permitted facilities; improve permitting procedures; and streamline the regulations for ease of use while still protecting natural resources and human health.

In addition, pursuant to Executive Order 14 (as amended July 16, 2018) and § 2.2-4007.1 of the Code of Virginia, DEQ is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; (iii) is designed to achieve its intended objective in the most efficient, cost-effective manner; (iv) is clearly written and easily understandable; (v) overlaps, duplicates, or conflicts with federal or state law or regulation; and (vi) is impacted by changes in technology, economic conditions, or other factors in the area affected by the regulation since the last review.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 10.1-1197.6 of the Code of Virginia.

Public Comment Deadline: June 26, 2019.

Agency Contact: Mary E. Major, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4423, FAX (804) 698-4510, or email mary.major@deq.virginia.gov.

VA.R. Doc. No. R19-5818; Filed May 6, 2019, 7:43 a.m.

VIRGINIA WASTE MANAGEMENT BOARD

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Virginia Waste Management Board intends to consider amending **9VAC20-120, Regulated Medical Waste Management Regulations**. The purpose of the proposed action is to modernize the standards for general handling and treatment of regulated medical waste based on current industry best management practices. The goals of the proposed action are to clarify the requirements for generators and permitted facilities, improve permitting procedures, and streamline the regulations for ease of use while still protecting natural resources and human health.

In addition, pursuant to Executive Order 17 (2014) and § 2.2-4007.1 of the Code of Virginia, the agency is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; (iii) is designed to achieve its intended objective in the most efficient, cost-effective manner; (iv) is clearly written and easily understandable; (v) overlaps, duplicates, or conflicts with federal or state law or regulation; and (vi) is impacted by changes in technology, economic conditions, or other factors in the area affected by the regulation since the last review.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 10.1-1402 of the Code of Virginia; 42 USC § 6941 et seq.; 40 CFR Part 257.

Public Comment Deadline: June 26, 2019.

Agency Contact: Debra A. Harris, Planning and Policy Specialist, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4209, FAX (804) 698-4019, or email debra.harris@deq.virginia.gov.

VA.R. Doc. No. R19-5395; Filed May 6, 2019, 7:49 a.m.

TITLE 12. HEALTH

STATE BOARD OF HEALTH

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Health intends to consider amending **12VAC5-71, Regulations Governing Virginia Newborn Screening Services**. The purpose of the proposed action is to amend the existing newborn screening regulation to add spinal muscular atrophy (SMA) and X-linked adrenoleukodystrophy (X-ALD) to the newborn screening panel. SMA is a genetic disorder that is estimated to occur in approximately 9.1 out of every 100,000 live births. X-ALD is a genetic disorder that is estimated to occur in approximately six out of every 100,000 live births. Treatment for both X-ALD and SMA is available if detected early. Screening is necessary as these disorders cannot be detected at birth through physical examinations. The addition of SMA and X-ALD to the newborn screening panel has been recommended by the Virginia Genetics Advisory Committee. On the national level, these disorders have been added to the core panel of 35 genetic disorders included in the Recommended Uniform Screening Panel of the U.S. Secretary of Health and Human Services Advisory Committee on Heritable Disorders in Newborns and Children.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 32.1-12 and 32.1-67 of the Code of Virginia.

Public Comment Deadline: June 27, 2019.

Agency Contact: Joseph Hilbert, Deputy Commissioner, Governmental and Regulatory Affairs, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7001, FAX (804) 864-7022, or email joe.hilbert@vdh.virginia.gov.

VA.R. Doc. No. R19-5996; Filed May 2, 2019, 4:49 p.m.

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the State Board of Health intends to consider amending **12VAC5-613, Regulations for Alternative Onsite Sewage Systems**. The purpose of the proposed action is to review the entire regulation for necessary modifications, clarifications, and updates to provisions, including provisions relating to the general approval process for manufacturers of alternative onsite sewage systems (AOSS), performance requirements of the AOSS, and sampling requirements for owners. Other amendments may be proposed based on comments from the periodic review conducted in 2016, on feedback from the technical advisory committees and from the general public, and as authorized by the Code of Virginia.

This Notice of Intended Regulatory Action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

The agency does not intend to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 32.1-12 and 32.1-164 of the Code of Virginia.

Public Comment Deadline: June 28, 2019.

Agency Contact: Lance Gregory, Director, Division of Onsite Sewage and Water Services, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7491, or email lance.gregory@vdh.virginia.gov.

VA.R. Doc. No. R19-5991; Filed April 30, 2019, 4:36 p.m.

TITLE 13. HOUSING

BOARD OF HOUSING AND COMMUNITY DEVELOPMENT

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Housing and Community Development intends to consider amending **13VAC5-21, Virginia Certification Standards**. The purpose of the proposed action is to update the regulation to coordinate with the building (13VAC5-63) and fire (13VAC5-51) regulations, which are being updated to reference the newest available nationally recognized model codes and standards. As the national codes are comprehensive in scope, the agency will accept comments on all provisions of the Virginia Certification Standards to ensure compatibility with the latest codes.

In addition, this regulation will undergo a periodic review pursuant to Executive Order 14 (as amended, July 16, 2018) and a small business impact review pursuant to § 2.2-4007.1 of the Code of Virginia to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 36-137 of the Code of Virginia.

Public Comment Deadline: June 26, 2019.

Agency Contact: Kyle Flanders, Senior Policy Analyst, Department of Housing and Community Development, Main Street Centre, 600 East Main Street, Suite 300, Richmond, VA 23219, telephone (804) 786-6761, FAX (804) 371-7090, TTY (804) 371-7089, or email kyle.flanders@dhcd.virginia.gov.

VA.R. Doc. No. R19-5980; Filed April 25, 2019, 8:30 a.m.

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Housing and Community Development intends to consider amending **13VAC5-63, Virginia Uniform Statewide Building Code**. The purpose of the proposed action is to lower to 77° Fahrenheit the required cooling temperature as provided in the Uniform Statewide Building Code (USBC). Currently, the Virginia Maintenance Code (VMC), a part of the USBC, requires that when cooling is provided to tenants of certain multifamily buildings, it must be provided to a temperature of at least 80° Fahrenheit. The current threshold has been identified as a public health concern in multiple localities that adopt the VMC.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 36-98 of the Code of Virginia.

Public Comment Deadline: July 10, 2019.

Agency Contact: Kyle Flanders, Senior Policy Analyst, Department of Housing and Community Development, Main Street Centre, 600 East Main Street, Suite 300, Richmond, VA 23219, telephone (804) 786-6761, FAX (804) 371-7090, TTY (804) 371-7089, or email kyle.flanders@dhcd.virginia.gov.

VA.R. Doc. No. R19-5869; Filed May 14, 2019, 4:47 p.m.

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Housing and Community Development intends to consider amending **13VAC5-95, Virginia Manufactured Home Safety Regulations**. The purpose of the proposed action is to update the regulations to include the most current federal installation standard based on current construction standards of the U.S. Department of Housing and Urban Development and to amend any administrative or enforcement provision of the regulation as determined necessary.

In addition, pursuant to Executive Order 14 (as amended, July 16, 2018) and § 2.2-4007.1 of the Code of Virginia, the Board of Housing and Community Development is conducting a periodic review and small business impact review of this regulation to determine whether this regulation should be terminated, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare; (ii) minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: § 36-85.7 of the Code of Virginia.

Public Comment Deadline: June 26, 2019.

Agency Contact: Kyle Flanders, Senior Policy Analyst, Department of Housing and Community Development, Main Street Centre, 600 East Main Street, Suite 300, Richmond, VA 23219, telephone (804) 786-6761, FAX (804) 371-7090, TTY (804) 371-7089, or email kyle.flanders@dhcd.virginia.gov.

VA.R. Doc. No. R19-5981; Filed April 25, 2019, 8:31 a.m.

TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

BOARD OF FUNERAL DIRECTORS AND EMBALMERS

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Funeral Directors and Embalmers intends to consider amending **18VAC65-20, Regulations of the Board of Funeral Directors and Embalmers**. The purpose of the proposed action is to amend the regulations governing the practice of funeral services to include clarifying certain provisions, updating the regulations, and strengthening the provisions for surface transportation, removal service, and courtesy cards.

This Notice of Intended Regulatory Action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 54.1-2400 and 54.1-2803 of the Code of Virginia.

Public Comment Deadline: June 26, 2019.

Agency Contact: Corie Tillman Wolf, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4479, FAX (804) 527-4471, or email fanbd@dhp.virginia.gov.

VA.R. Doc. No. R19-5988; Filed April 30, 2019, 1:06 p.m.

Notice of Intended Regulatory Action

Notice is hereby given in accordance with § 2.2-4007.01 of the Code of Virginia that the Board of Funeral Directors and Embalmers intends to consider amending **18VAC65-30, Regulations for Preneed Funeral Planning**. The purpose of the proposed action is to ensure greater protections for the public, including disclosures of information regarding the content of a contract, retention of documentation, and notification when a funeral home closes or changes ownership.

This Notice of Intended Regulatory Action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

The agency intends to hold a public hearing on the proposed action after publication in the Virginia Register.

Statutory Authority: §§ 54.1-2400 and 54.1-2803 of the Code of Virginia.

Public Comment Deadline: June 26, 2019.

Agency Contact: Corie Tillman Wolf, Executive Director, Board of Funeral Directors and Embalmers, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4546, FAX (804) 527-4637, or email corie.wolf@dhp.virginia.gov.

VA.R. Doc. No. R19-5826; Filed April 30, 2019, 1:07 p.m.

TITLE 1. ADMINISTRATION

OFFICE OF THE STATE INSPECTOR GENERAL

Final Regulation

Title of Regulation: **1VAC42-30. Fraud and Abuse Whistle Blower Reward Fund (adding 1VAC42-30-10 through 1VAC42-30-100).**

Statutory Authority: § 2.2-3014 of the Code of Virginia.

Effective Date: June 27, 2019.

Agency Contact: Mark Courtney, Regulatory Coordinator, Office of the State Inspector General, P.O. Box 1151, Richmond, VA 23218, telephone (804) 625-3255, FAX (804) 371-0165, or email mark.courtney@osig.virginia.gov.

Summary:

The regulation defines the Fraud and Abuse Whistle Blower Reward Fund and its administration by the Office of the State Inspector General, including (i) eligibility requirements, (ii) amount and distribution, (iii) process for leftover moneys at the end of the fiscal year, and (iv) the fund's establishment on the books of the Comptroller.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

CHAPTER 30
FRAUD AND ABUSE WHISTLE BLOWER REWARD FUND

1VAC42-30-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Abuse" means an employer's or employee's conduct or omissions that result in substantial misuse, destruction, waste, or loss of funds or resources belonging to or derived from federal, state, or local government sources.

"Commonwealth" means the Commonwealth of Virginia.

"Disclosure" means a voluntary formal or informal communication or transmission of (i) any violation of any law, rule, or regulation; (ii) gross mismanagement; (iii) a gross waste of funds; (iv) an abuse of authority; or (v) a substantial and specific danger to public health or safety.

"Employee" means any individual who is employed on either a salaried or wage basis, whose tenure is not restricted as to temporary or provisional appointment, in the service of and whose compensation is payable no more often than biweekly in whole or in part by a Virginia governmental agency.

"Employer" means a person supervising one or more employees, including the employee filing a good faith report, a superior of that supervisor, or an agent of the governmental agency.

"Executive branch agency" or "agency" means any agency, institution, board, bureau, commission, council, public institution of higher education, or instrumentality of state government in the executive department listed in the appropriation act.

"Fraud" means the intentional deception perpetrated by an individual or an organization, either internal or external to state government, that could result in a tangible or intangible benefit to themselves, others, or the Commonwealth, including local government, or could cause detriment to others or the Commonwealth. Fraud includes a false representation of the facts, whether by words or by conduct. Fraud also includes false or misleading statements, the concealment of essential information, or information or actions that deceive or are intended to deceive.

"Fraud and Abuse Whistle Blower Protection Act Program" or "WBPA Program" means the policy of the Commonwealth that Commonwealth citizens and employees of state government are freely able to report instances of wrongdoing or abuse committed by their employing agency, other state agencies, or independent contractors of state agencies.

"Fraud and Abuse Whistle Blower Reward Fund" or "fund" means the fund used solely to provide monetary rewards to Commonwealth citizens who have disclosed information of wrongdoing or abuse under the WBPA Program that results in a recovery of at least $5,000.

"Good faith report" means a reported incident of possible wrongdoing or abuse made without malice, for which the person reporting has reasonable cause to believe wrongdoing or abuse occurred.

"Governmental agency" means (i) any agency, institution, board, bureau, commission, council, or instrumentality of state government in the executive branch listed in the appropriation act and any independent agency; (ii) any county, city, town, or local or regional governmental authority; and (iii) any local school division as defined in § 22.1-280.2:2 of the Code of Virginia.

"Hotline coordinator" means a qualified employee, designated by a governmental agency director or chief administrator, responsible for conducting State Fraud, Waste and Abuse Hotline investigations referred to the agency by OSIG.

"Internal audit director" means a director of a governmental agency internal audit program.

"Misconduct" means conduct or behavior by an employee that is inconsistent with state, local, or agency standards for which specific corrective or disciplinary action is warranted.

"Nonstate agency" means any public or private foundation, authority, institute, museum, corporation, or similar organization that is (i) not a unit of state government or a political subdivision of the Commonwealth as established by general law or special act and (ii) wholly or principally supported by state funds. "Nonstate agency" shall not include any such entity that receives state funds (a) as a subgrantee of a state agency; (b) through a state grant-in-aid program authorized by law; (c) as a result of an award of a competitive grant or a public contract for the procurement of goods, services, or construction; or (d) pursuant to a lease of real property as described in subdivision 5 of § 2.2-1149 of the Code of Virginia.

"Office of the State Inspector General" or "OSIG" means the governmental agency that conducts independent investigations, performance audits, and other services designed to provide objective and useful information to the Commonwealth and those charged with its governance and promotes efficiency and effectiveness in state government executive branch agencies in accordance with Article 1 (§ 2.2-307 et seq.) of Chapter 13.2 of the Code of Virginia.

"Public body" means any legislative body; any authority, board, bureau, commission, district, agency, or political subdivision of the Commonwealth, including counties, cities, towns, city councils, boards of supervisors, school boards, planning commissions, and boards of visitors of institutions of higher education; and other organizations, corporations, or agencies in the Commonwealth supported wholly or principally by public funds. "Public body" includes any committee, subcommittee, or other entity however designated of the public body or formed to advise the public body, including those with private sector or citizen members and corporations organized by the Virginia Retirement System. For the purposes of this chapter, the term "public body" does not include the courts of the Commonwealth.

"Reward" means a monetary benefit payable from the fund by OSIG to an eligible whistle blower.

"Screening process" means OSIG's internal review to ensure reports of information or disclosures of wrongdoing fall within the authority of the WBPA Program.

"State Fraud, Waste and Abuse Hotline" or "hotline" means the program (i) that provides Commonwealth citizens with a confidential and anonymous method to report suspected occurrences of fraud, waste, and abuse in state agencies and institutions and (ii) that provides the Commonwealth a way to investigate such occurrences to determine their validity and make appropriate recommendations to address deficiencies.

"Whistle blower" means a Commonwealth employee or citizen who witnesses or has evidence of wrongdoing or abuse and who makes a good faith, open, and public report of the wrongdoing or abuse to one of the employee's superiors, an agent of the employer, or an appropriate authority.

"Wrongdoing" means a violation, which is not of a merely technical or minimal nature, of a federal or state law or regulation or a formally adopted code of conduct or ethics of a professional organization designed to protect the interests of the public or an employee. "Wrongdoing" includes (i) any violation of any law, rule, or regulation; (ii) gross mismanagement; (iii) a gross waste of funds; (iv) an abuse of authority; or (v) a substantial and specific danger to public health or safety.

1VAC42-30-20. Office of the State Inspector General responsibilities.

A. OSIG is responsible for administering the WBPA Program and fund and the following tasks:

1. Notifying annually Commonwealth employees, citizens, and governmental bodies, including state agencies, of the WBPA Program and fund regulations and procedures for submitting information regarding wrongdoing or abuse.

2. Protecting the identity of Commonwealth employees and citizens who make allegations of wrongdoing or abuse through the WBPA Program. OSIG will keep this information confidential to the extent allowed by law.

3. Conducting appropriate investigations and preparing official reports.

4. Receiving and evaluating fund claims.

5. Ensuring payment of approved fund moneys to whistle blowers.

6. Submitting an annual report on WBPA Program activities to the Governor and General Assembly.

7. Notifying individuals making allegations of the possible incentives as a result of moneys recovered and available through the fund.

B. OSIG is responsible for assigning, coordinating, and investigating alleged wrongdoing or abuse reported to OSIG under the WBPA Program. OSIG may work with executive branch agency internal audit directors, executive branch agency hotline coordinators, or representatives of public bodies when performing WBPA Program investigations.

1VAC42-30-30. Fraud and Abuse Whistle Blower Protection Act Program and Reward Fund notification.

A. Annually, the State Inspector General will communicate with all state agency heads. The communication will:

1. Publicize the WBPA Program and fund.

2. Explain the protections afforded to individuals who report instances of wrongdoing or abuse committed within executive branch agencies and nonstate agencies.

3. Notify state agency heads of relevant statutory amendments or program changes.

4. Contain the requirements for reporting allegations to OSIG and the incentives under the WBPA Program.

5. Clarify pertinent differences between the WBPA Program and the hotline regarding the rules governing anonymity and confidentiality.

6. Provide available materials to assist agency heads in promoting the WBPA Program and fund, as well as available training for Commonwealth employees regarding the WBPA Program and fund.

B. Annually, OSIG will publicize the WBPA Program and fund on the OSIG website and to Commonwealth citizens through the distribution of a news release to Virginia media, as well as to state employees through an electronic communication in partnership with the Department of Human Resource Management. The communication will:

1. Contain the requirements for reporting allegations to OSIG and the incentives under the WBPA Program.

2. Clarify pertinent differences between the WBPA Program and the hotline regarding the rules governing anonymity and confidentiality.

1VAC42-30-40. Reporting alleged fraud, abuse, or wrongdoing.

A. A Commonwealth employee or citizen with an allegation of wrongdoing or abuse under the WBPA Program may contact OSIG by phone, email, online complaint form, United States Postal Service, or FAX.

B. OSIG staff is available to advise citizens on what to report that meets the definition of wrongdoing or abuse.

C. If an investigation results in recoverable funds, and the whistle blower seeks to file a fund claim under the WBPA Program, the whistle blower will be required to provide his name and lawful residence.

While not anonymous, OSIG will keep this information confidential to the extent allowed by law.

1VAC42-30-50. Office of the State Inspector General receipt of an allegation.

A. Allegations of wrongdoing or abuse received by OSIG undergo the hotline screening process.

B. Allegations submitted by an individual who is not a Commonwealth employee or citizen will be referred to the appropriate governmental agency or organization.

C. If the agency or organization reported is not an executive branch or independent state agency or entity or a local governmental agency or entity or school division, the information will be forwarded to that entity where possible for informational purposes only.

1VAC42-30-60. Allegation investigative process.

A. OSIG will prepare a detailed written summary that describes the allegation of wrongdoing or abuse submitted through the WBPA Program.

B. The hotline manager or designee will create a confidential tracking number for each case and assign it for formal investigation.

C. OSIG will monitor the progress of each investigation and provide the State Inspector General with regular status updates of the assignment.

D. Upon completion of an investigation, the investigator will prepare and submit a case report for management review and approval. When appropriate, recommendations for corrective action to address procedural deficiencies disclosed during the investigation will be included in the case report.

E. Formal case reports will describe all financial recovery realized on behalf of the Commonwealth as a result of the information received from the whistle blower and the subsequent investigation.

F. Case reports will be forwarded to the State Inspector General for review. Upon authorization by the State Inspector General, the investigator will prepare an executive summary that recaps the findings of the investigation, the recommendations, the recovery of funds, and the status of applicable fund claims. Upon signature approval of the State Inspector General, the executive summary will be forwarded to the subject state executive branch agency head, respective secretariat, and the Chief of Staff of the Governor.

1VAC42-30-70. Nonreverting fund.

A. OSIG will coordinate with the State Comptroller to establish a special nonreverting fund.

B. The fund will be established on the books of the State Comptroller and administered by the State Inspector General.

C. All moneys recovered by an OSIG investigation as a result of whistle blower activity shall be deposited in the fund.

D. Except for the moneys described in subsection F of this section, moneys remaining in the fund at the end of each fiscal year, including interest, shall not revert to the general fund, but shall remain in the fund.

E. Moneys in the fund shall solely be used to:

1. Provide monetary rewards to Commonwealth employees and citizens who have disclosed information of wrongdoing or abuse under the WBPA Program (§ 2.2-3009 et seq. of the Code of Virginia), and the disclosure resulted in a recovery of at least $5,000.

2. Support the administration of the fund, defray fund advertising costs, or subsidize the operation of the hotline.

F. Per the State Inspector General's authorization by the end of each calendar quarter, 85% of all sums recovered by an OSIG investigation will be remitted to the institutions or agencies concerned, unless otherwise directed by a court of law.

1VAC42-30-80. Fund payments to whistle blowers.

A. Within 10 working days, excluding state holidays and weekends, of the closing of a WBPA Program investigation that verifies a final recovery and deposit in the fund of $5,000 or more, the State Inspector General will review and certify the fund claim. Within five working days after the State Inspector General's verification, the whistle blower will be notified of the award amount he is eligible to receive. Upon approval of the fund claim, the State Inspector General will submit a written request to the State Comptroller to make a reward payment from the fund to the whistle blower.

B. The State Treasurer will make reward payments from the fund based on a warrant issued by the State Comptroller and a written request signed by the State Inspector General.

C. Award amounts.

1. The amount of the fund reward shall be up to 10% of the actual sums recovered by the Commonwealth as a result of the disclosure of the wrongdoing or abuse.

2. OSIG will consider many factors in determining the amount of an award based on the unique facts and circumstances of each case. OSIG may increase the award percentage up to the maximum allowed based on the following factors: (i) the significance of the information provided to OSIG to the success of any proceeding brought against wrongdoers; (ii) the extent of the assistance provided to OSIG in its investigation and any resulting findings; (iii) OSIG's law-enforcement interest in deterring violations of the applicable laws by making awards to whistle blowers who provide information that leads to the successful enforcement of these laws; and (iv) whether and the extent to which the whistle blower participated in his agency's internal compliance systems, such as, for example, reporting the possible violations through internal whistle blower, legal, or compliance procedures, before or at the same time the possible violations were reported to OSIG.

3. OSIG may reduce the amount of an award based on the following: (i) if the whistle blower was a participant in or culpable for the violations reported; (ii) if the whistle blower unreasonably delayed reporting the violations to OSIG; and (iii) if the whistle blower interfered with his agency's internal compliance and reporting systems, such as, for example, making false statements to the compliance department that hindered its efforts to investigate possible wrongdoing or abuse.

4. The amount of the reward will not exceed the balance of the fund, regardless of the sums recovered.

5. In the event that multiple whistle blowers have simultaneously reported the same fund-eligible occurrence of wrongdoing or abuse, the fund moneys may be split up to 10% among the whistle blowers at the State Inspector General's discretion. The State Inspector General's decision regarding the allocation of fund moneys is final and binding upon all parties and cannot be appealed.

6. The request for payment will include the name and address of the whistle blower and the payment amount. OSIG will provide documentation supporting the amount of the payment to the State Comptroller.

7. Once approved, the State Comptroller shall forward the request to Finance and Administration of the Department of Accounts (DOA) with a request that Finance and Administration process the payment to the whistle blower.

8. DOA will ensure the amount of the fund reward is properly included in the whistle blower's federal and state tax records (i.e., W-2 for employees; 1099 for Commonwealth citizens).

9. OSIG will confirm that DOA processes the fund request and that the reward payment is made to the whistle blower for the amount approved by the State Inspector General.

D. Five percent of all sums recovered on behalf of the Commonwealth will be retained in the fund to support the administration of the fund, defray advertising costs, and subsidize the operation of the hotline. Expenditures for administrative costs for management of the fund will be approved by the State Inspector General.

1VAC42-30-90. Whistle blower protections.

A. Employee protections.

1. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower, whether acting individually or under the direction of another individual.

2. No employer may discharge, threaten, or otherwise discriminate or retaliate against a whistle blower who is

requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry.

3. Nothing in this chapter shall prohibit an employer from disciplining or discharging a whistle blower for misconduct or violation of criminal law.

4. If an employee has, in good faith, exhausted existing internal procedures for reporting and seeking recovery of falsely claimed sums through official channels, and if the Commonwealth failed to act on the information provided in a reasonable period of time, no court shall have jurisdiction over an action brought under § 8.01-216.5 of the Code of Virginia based on information discovered by a present or former employee of the Commonwealth during the course of his employment.

5. Any whistle blower covered by the state grievance procedure may initiate a grievance alleging retaliation for reporting wrongdoing or abuse through the WBPA Program and may request relief throughout that procedure.

B. Commonwealth citizen protections.

1. No governmental agency may threaten or otherwise discriminate or retaliate against a citizen whistle blower because the whistle blower is requested or subpoenaed by an appropriate authority to participate in an investigation, hearing, or inquiry.

2. Except for the provisions of § 2.2-3011 E of the Code of Virginia, the WBPA Program does not limit the remedies provided by the Virginia Fraud Against Taxpayers Act (§ 8.01-216.1 et seq. of the Code of Virginia).

C. Protection against discrimination and retaliation - good faith required.

1. To be protected by the provisions of this chapter, an employee or Commonwealth citizen who discloses information about suspected wrongdoing or abuse shall do so in good faith and upon a reasonable belief information provided is accurate.

2. Reckless disclosures or disclosures the employee or citizen knows or should have known were false, confidential by law, or malicious are not deemed good faith reports and are not protected.

1VAC42-30-100. Whistle Blower Protection Act Program and Reward Fund annual report.

A. OSIG shall submit an annual report to the Governor and the General Assembly of Virginia summarizing the activities of the fund.

B. OSIG will provide a copy of the WBPA Program annual report to the Chief of Staff to the Governor, the Secretary of Finance, and the State Comptroller.

VA.R. Doc. No. R16-4186; Filed May 7, 2019, 10:34 a.m.

TITLE 2. AGRICULTURE

BOARD OF AGRICULTURE AND CONSUMER SERVICES

Final Regulation

REGISTRAR'S NOTICE: The Board of Agriculture and Consumer Services is claiming an exemption from the Administrative Process Act in accordance with § 2.2-4002 A 13 of the Code of Virginia, which excludes the board when promulgating regulations pursuant to § 3.2-5206 of the Code of Virginia.

Title of Regulation: **2VAC5-490. Regulations Governing Grade "A" Milk (amending 2VAC5-490-50).**

Statutory Authority: § 3.2-5206 of the Code of Virginia.

Effective Date: May 27, 2019.

Agency Contact: Ryan Davis, Program Manager, Office of Dairy and Foods, Department of Agriculture and Consumer Services, P.O. Box 1163, Richmond, VA 23218, telephone (804) 786-8899, FAX (804) 371-7792, TTY (800) 828-1120, or email ryan.davis@vdacs.virginia.gov.

Summary:

In response to a petition for rulemaking, the amendments reduce maximum bacteria count to 50,000 bacteria per milliliter of milk and reduce maximum somatic cell count to 500,000 per milliliter of milk as standards that must be met for milk to be considered grade A in Virginia. Additional amendments since publication of the proposed regulation clarify that these reductions only apply to cow's milk.

Part VI
Standards for Milk and Milk Products

2VAC5-490-50. Quality standards for milk and milk products.

A. No person may produce, provide, manufacture, sell, offer for sale, or store in the Commonwealth, or bring, send, or receive into the Commonwealth, any milk, milk product, condensed milk product, or dry milk product for use in the commercial preparation of grade A pasteurized, ultra-pasteurized, or aseptically processed milk or milk products that do not comply with the following:

1. Grade A raw milk for pasteurization or ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging and all grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall be produced, processed, manufactured and pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged to conform with the following chemical, physical, bacteriological, somatic cell,

and temperature standards, and with the requirements of this chapter;

2. No process or manipulation other than (i) pasteurization; (ii) ultra-pasteurization; (iii) aseptic processing and packaging; (iv) retort processed after packaging; or (v) processing methods integral with pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging; and refrigeration may be applied to milk or milk products for the purpose of removing or deactivating microorganisms provided that filtration, bactofugation, or filtration and bactofugation may be performed in the plant in which the milk or milk product is pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged. Nothing in this chapter is deemed to prohibit any grade A permit holder who operates a milk plant from preparing bulk shipments of cream, skim milk, reduced fat or lowfat milk labeled as "heat treated"; if the raw milk, raw cream, skim milk, reduced fat or lowfat milk is heated, one time, to a temperature warmer than 125°F but cooler than 161°F for separation purposes. In the case of heat treated cream, the cream may be further heated to less than 166°F in a continuing heating process and immediately cooled to 45°F or less when necessary for enzyme deactivation (such as lipase reduction) for a functional reason;

3. Grade A raw milk and milk products for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall comply with the following standards:

a. The temperature of the raw milk shall be cooled to 40°F or cooler, but not frozen, within two hours after milking and the temperature after the first or any subsequent milking shall not be warmer than 50°F;

b. The bacteria count of [~~the~~] raw [cow's] milk shall not exceed ~~100,000~~ 50,000 bacteria per milliliter prior to commingling with any other milk; and the bacteria count of [~~the~~] raw [cow's] milk that is commingled shall not exceed 300,000 bacteria per milliliter prior to pasteurization;

c. [The bacteria count of raw sheep's milk, raw goat's milk, raw water buffalo's milk, or raw milk from any other hooved mammal shall not exceed 100,000 bacteria per milliliter prior to commingling with any other milk; and the bacteria count of raw sheep's milk, raw goat's milk, raw water buffalo's milk, or raw milk from any other hooved mammal that is commingled shall not exceed 300,000 bacteria per milliliter prior to pasteurization;

d.] Raw milk shall freeze at or below -0.530° Hortvet;

[~~d.~~ e.] Raw milk shall have no positive results of tests for drug residues by detection methods reported to the State Regulatory Authority by official laboratories, officially designated laboratories, milk plants, receiving stations, or transfer stations;

[~~e.~~ f.] The somatic cell count of raw cow's milk [~~, raw water buffalo's milk, or raw sheep's milk~~] shall not exceed ~~750,000~~ 500,000 somatic cells per milliliter. [The somatic cell count of raw water buffalo's milk, raw sheep's milk, or raw milk from any other hooved mammal shall not exceed 750,000 somatic cells per milliliter.] The somatic cell count of raw goat's milk shall not exceed 1,500,000 somatic cells per milliliter;

[~~f.~~ g.] Raw milk shall not exceed the actionable level, tolerance level, or safe level for any chemical residue or pesticide residue specified in 40 CFR Part 180 and 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 570, 573, and 589. In the event that no actionable level, tolerance level, or safe level for a chemical residue or pesticides residue has been established in 40 CFR Part 180 and 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 570, 573, and 589, the tolerance level shall be deemed to be zero; and

[~~g.~~ h.] Raw milk shall not contain aflatoxin residues equal to or greater than 0.50 parts per billion as determined by the Charm II aflatoxin test or other equivalent method;

4. Grade A pasteurized or ultra-pasteurized milk and milk products shall comply with the following standards:

a. The temperature of milk products shall be cooled to 45°F or cooler (but not frozen) and maintained at that temperature;

b. The bacteria count for any milk or milk products (except acidified or cultured milk or milk products, eggnog, cottage cheese, and other milk or milk products as identified in FDA M-a-98) shall not exceed 20,000 bacteria per milliliter;

c. Except for commingled milk shipped in a transport tank the coliform count for any milk or milk products shall not exceed 10 coliform organisms per milliliter. Commingled milk shipped in a transport tank shall not exceed 100 coliform organisms per milliliter;

d. The phenol value of test samples of pasteurized finished product shall be no greater than the maximum specified for the particular product as determined and specified by (i) any phosphatase test method prescribed in the Official Methods of Analysis, 19th Edition, 2012, published by the Association of Official Analytical Chemists; (ii) the Fluorometer test method; (iii) the Charm ALP test method; or (iv) other equivalent method as determined by the Virginia Department of Agriculture

and Consumer Services. A phenol value greater than the maximum specified for the particular product shall mean that the product was not properly pasteurized. A phenol value less than the maximum specified for the particular product shall not be deemed to mean that the product was properly pasteurized, unless there is evidence of proper pasteurization equipment in conformance with this chapter and records to determine an adequate pasteurization process has been completed for each separate batch or lot of milk, milk product, condensed milk, condensed milk product, dry milk, or dry milk product;

e. Milk or milk products shall have no positive results of tests for drug residues by detection methods reported to the State Regulatory Authority by official laboratories, officially designated laboratories, milk plants, receiving stations, or transfer stations;

f. Milk or milk products shall not exceed the actionable level, tolerance level, or safe level for any chemical residue or pesticide residue specified in 40 CFR Part 180 and 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 570, 573, and 589. In the event that no actionable level, tolerance level, or safe level for a chemical residue or pesticides residue has been established in 40 CFR Part 180 and 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 570, 573, and 589, the tolerance level shall be deemed to be zero; and

g. Milk or milk products shall not contain aflatoxin residues equal to or greater than 0.50 parts per billion as determined by the Charm II aflatoxin test or other equivalent method;

5. Grade A pasteurized concentrated (condensed) milk or milk product shall comply with the following standards:

a. The temperature of milk products shall be cooled to 45°F or cooler (but not frozen) and maintained thereat unless drying is commenced immediately after condensing;

b. Except for commingled milk shipped in a transport tank, the coliform count for any milk or milk product shall not exceed 10 coliform organisms per gram. Commingled milk shipped in a transport tank shall not exceed 100 coliform organisms per gram;

6. Grade A aseptically processed and packaged milk and milk products shall comply with the following standards:

a. Aseptically processed and packaged milk and milk products shall be commercially sterile;

b. Aseptically processed and packaged milk and milk products shall have no positive results of tests for drug residues by detection methods reported to the State Regulatory Authority by official laboratories, officially designated laboratories, milk plants, receiving stations, or transfer stations;

c. Aseptically processed and packaged milk and milk products shall not exceed the actionable level, tolerance level, or safe level for any chemical residue or pesticide residue specified in 40 CFR Part 180 and 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 570, 573, and 589. In the event that no actionable level, tolerance level, or safe level for a chemical residue or pesticides residue has been established in 40 CFR Part 180 and 21 CFR Parts 70, 71, 73, 74, 80, 82, 130, 131, 133, 170, 172, 173, 174, 175, 176, 177, 178, 189, 556, 570, 573, and 589, the tolerance level shall be deemed to be zero; and

d. Aseptically processed and packaged milk and milk products milk shall not contain aflatoxin residues equal to or greater than 0.05 parts per billion;

7. Grade A nonfat dry milk and dry milk or milk products shall comply with the following standards:

a. The bacteria count shall not exceed 10,000 bacteria per gram, and

b. The coliform count shall not exceed 10 coliform organisms per gram;

8. Grade A whey for condensing or drying shall be maintained at a temperature of 45°F (7°C) or less, or 135°F (57°C) or greater; provided that, acid-type whey with a titratable acidity of 0.40% or above or a pH of 4.6 or below shall be exempt for the requirements of this subdivision;

9. Grade A pasteurized condensed whey and whey products shall be cooled to 50°F (10°C) or less during crystallization and within 72 hours of condensing. The coliform count of grade A pasteurized condensed whey and whey products shall not exceed 10 coliform organisms per gram; and

10. The coliform count of grade A dry whey, grade A dry whey products, grade A dry buttermilk, and grade A dry buttermilk products shall not exceed 10 coliform organisms per gram.

B. Sanitation requirements for grade A raw milk.

1. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall comply with:

a. The following administrative procedures contained in the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision": Section 4; Section 7, Items 1r, 2r, 3r, 4r, 5r, 6r, 7r, 8r, 9r, 10r(1), 10r(2), 11r, 12r, 13r, 14r, 15r, 16r, 17r, 18r(2), 18r(3), and 19r; Section 8; Section 10; and Section 13;

b. The following appendices contained in the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision": Appendices A, B, C, D, F, G, H, N, Q, and R;

c. Item 1r. Abnormal milk. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Milk last or with separate equipment cows, sheep, goats, water buffalo, or other mammals that show evidence of the secretion of abnormal milk in one or more quarters (based upon bacteriological, chemical, or physical examination) and discard the milk obtained from cows, sheep, goats, water buffalo, or other mammals that show evidence of the secretion of abnormal milk in one or more quarters based upon bacteriological, chemical, or physical examination; and

(2) Milk last or with separate equipment cows, sheep, goats, water buffalo, or other mammals treated with, or that have consumed, chemical, medicinal, or radioactive agents that are capable of being secreted in the milk and that may be deleterious to human health; and dispose of in a manner that will not pollute the environment or any human food the milk obtained from cows, sheep, goats, water buffalo, or other mammals treated with, or that have consumed, chemical, medicinal, or radioactive agents that are capable of being secreted in the milk and that may be deleterious to human health;

d. Item 2r. Milking barn, stable, or parlor; construction. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Provide on the person's dairy farm a milking barn, stable, or parlor in which the milking herd shall be housed during milking time;

(2) Provide on the grade A permit holder's dairy farm a milking barn, stable, or parlor, which milking barn, stable, or parlor shall:

(a) Have floors constructed of concrete or equally impervious material;

(b) Have walls and ceiling that are smooth, painted, or finished in an approved manner, and in good repair and have a ceiling which is dust tight;

(c) Have separate stalls or pens for horses, calves, and bulls;

(d) Have natural or artificial light, well distributed for day or night milking;

(e) Have sufficient air space and air circulation to prevent condensation and excessive odors;

(f) Have dust-tight covered boxes or bins, or separate storage facilities for ground, chopped, or concentrated feed; and

(g) Not be overcrowded; and

(3) Provide and use only an "automatic milking installation" that complies with the requirements of Appendix Q of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision" if the person milks any cows, goats, sheep, water buffalo, or other mammals (except humans) using robots or other automated means in the absence of any human;

e. Item 3r. Milking barn, stable, or parlor; cleanliness. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Keep the interior of the milking barn, stable, or parlor clean;

(2) Keep the floors, walls, ceilings, windows, pipelines, and equipment in the milking barn, stable, or parlor free of filth or litter and clean;

(3) Keep swine and fowl out of the milking barn, stable, and parlor;

(4) Keep surcingles, belly straps, milk stools, and antikickers clean and stored above the floor; and

(5) Store feed in a manner that will not increase the dust content of the air or interfere with the cleaning of the floor;

f. Item 4r. Cow yard, sheep yard, goat yard, water buffalo yard, or other milking mammal yard. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Provide and maintain the cow yard, sheep yard, goat yard, water buffalo yard or other milking mammal yard, to be graded and drained, and to have no standing pools of water or accumulations of organic wastes;

(2) In the cow loafing, goat loafing, sheep loafing, water buffalo loafing, or other milking mammal loafing, cattle-housing, sheep-housing, goat-housing, water buffalo-housing, or other milking mammal-housing areas remove cow droppings, sheep droppings, goat droppings, water buffalo droppings, and other milking mammal droppings and remove soiled bedding or add clean bedding at sufficiently frequent intervals to prevent the soiling of the cow's, sheep's, goat's, water buffalo's, or other milking mammal's udder and flanks;

(3) Assure that waste feed does not accumulate in the goat yard, cow yard, sheep yard, water buffalo yard,

other milking mammal yard, cow loafing, sheep loafing, goat loafing, water buffalo loafing, other milking mammal loafing, cattle-housing, sheep-housing, goat-housing, water buffalo-housing, or other milking mammal-housing area;

(4) Maintain any manure packs so as to be properly drained and so as to provide a reasonably firm footing; and

(5) Keep swine and fowl out of the cow yard, sheep yard, goat yard, water buffalo yard, other milking mammal yard, cow loafing, sheep loafing, goat loafing, water buffalo loafing, other milking mammal loafing, cattle-housing, sheep-housing, goat-housing, water buffalo-housing, or other milking mammal-housing area;

g. Item 5r. Milkhouse or room; construction and facilities. Each who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Provide a milkhouse or milkroom of sufficient size in which the cooling, handling, and storing of milk and the washing, sanitizing, and storing of milk containers and utensils shall be conducted except as provided under subdivision 1 n of this subsection;

(2) Provide a milkhouse with a smooth floor, constructed of concrete or equally impervious material graded to drain, and maintained in good repair;

(3) Dispose of in a sanitary manner all liquid waste generated in the milkhouse;

(4) Provide one or more floor drains in the milkhouse, which floor drains shall be accessible, and if connected to a sanitary sewer system trapped;

(5) Provide in the milkhouse walls and ceilings constructed of a smooth material, in good repair, well painted, or finished in an equally suitable manner;

(6) Provide adequate natural or artificial light and ventilation in the milkhouse;

(7) Use the milkhouse for no other purpose than milkhouse operations;

(8) Provide no direct opening from the milkhouse into any barn, stable, or into any room used for domestic purposes, other than a direct opening between the milkhouse and milking barn, stable, or parlor provided with a tight-fitting, self-closing, solid door, which door has been hinged to be single or double acting. Screened vents in the wall between the milkhouse and a breezeway, which separates the milkhouse from the milking parlor, are permitted, provided animals are not housed within the milking facility;

(9) Provide in the milkhouse water under pressure which has been piped into the milkhouse;

(10) Provide in the milkhouse a two-compartment wash vat and adequate hot water heating facilities;

(11) Except as provided for under subdivision 1 g (12) of this subsection provide a suitable shelter for the receipt of milk when the grade A permit holder uses a transportation tank for the cooling or storage of milk on the grade A permit holder's dairy farm, which shelter adjacent to, but not a part of, the milkroom; and with the requirements of the milkroom shall comply with respect to construction, light, drainage, insect and rodent control, and general maintenance. In addition to providing a suitable shelter as required by this subsection, the grade A permit holder shall:

(a) Install an accurate, accessible temperature-recording device in the milk line used to fill the transportation tank downstream from an effective cooling device capable of cooling the milk to 40°F or less before the milk enters the transportation tank. Electronic records that comply with the applicable provisions as referred to in Sections IV and V of Appendix H of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision," with or without hard copy, may be used in place of temperature-recording records;

(b) Install an indicating thermometer as close as possible to the temperature-recording device in the milk line used to fill the transportation tank to be used for verification of recording temperatures, which indicating thermometer shall:

(i) Have a temperature span of not less than 50°F including normal storage temperatures plus or minus 5°F, with an extension of the scale on either side permitted and graduated in not more than 2°F divisions;

(ii) Have temperature scale divisions spaced not less than 0.0625 inches apart between 35°F and 55°F;

(iii) Have an accuracy within plus or minus 2°F throughout the scale range; and

(iv) Have the stem fitting installed in a pressure-tight seat or other sanitary fitting with no threads exposed;

(c) Provide an effective means to agitate the transport tank or an approved in-line sampling device in order to collect a representative milk sample;

(12) If the State Regulatory Authority determines conditions exist whereby the milk transport tank may be adequately protected and sampled without contamination, a shelter need not be provided if the grade A permit holder:

(a) Provides a means to make all milk hose connections to the transport tank accessible from within the milkhouse;

(b) Provides a means to completely protect the milk hose connection to the transport tank from the outside environment. With approval of the State Regulatory Authority, the direct loading of milk from the milkhouse to the milk tank truck may be conducted through a properly designed hose port that adequately protects the milkhouse opening or by stubbing the milk transfer and associated CIP cleaned lines outside the milkhouse wall in accordance with Item 5r, Administrative Procedure #15, of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision";

(c) Ensures only milk transport tanks the manholes of which have been sealed after cleaning and sanitizing are utilized;

(d) Ensures only milk transport tanks that have been washed and sanitized at permitted dairy plants or a permitted milk tank truck cleaning facilities acceptable to the State Regulatory Agency are utilized;

(e) Installs an accurate, accessible temperature-recording device in the milk line used to fill the transportation tank downstream from an effective cooling device capable of cooling the milk to 40°F or less before the milk enters the transportation tank. Electronic records that comply with the applicable provisions as referred to in Sections IV and V of Appendix H of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision," with or without hard copy, may be used in place of temperature-recording records;

(f) Installs an indicating thermometer as close as possible to the temperature-recording device in the milk line used to fill the transportation tank to be used for verification of recording temperatures, which indicating thermometer shall:

(i) Have a temperature span of not less than 50°F including normal storage temperatures plus or minus 5°F, with an extension of the scale on either side permitted and graduated in not more than 2°F divisions;

(ii) Have temperature scale divisions spaced not less than 0.0625 inches apart between 35°F and 55°F;

(iii) Have an accuracy within plus or minus 2°F throughout the scale range; and

(iv) Have the stem fitting installed in a pressure-tight seat or other sanitary fitting with no threads exposed;

(g) Provides an effective means to agitate the transport tank or an approved in-line sampling device in order to collect a representative milk sample; and

(h) Provides a self-draining concrete or equally impervious surface on which the transport tank can be parked during filling and storage;

h. Item 6r. Milkhouse or milkroom; cleanliness. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Keep clean the floors, walls, ceilings, windows, tables, shelves, cabinets, wash vats, nonproduct contact surfaces of milk containers, utensils, equipment, and other milkroom equipment in the milkroom;

(2) Place in the milkroom only those articles directly related to milkroom activities; and

(3) Keep the milkroom free of trash, animals, and fowl;

i. Item 7r. Toilets. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Provide on the person's grade A dairy farm one or more toilets, which shall be conveniently located and properly constructed, and operated, and maintained in a sanitary manner;

(2) Prevent the access of flies to the waste contained in or from the toilet;

(3) Prevent the waste contained in or from the toilet from polluting the soil surface or contaminating any water supply; and

(4) Assure that there is no direct opening from the toilet into any milkroom;

j. Item 8r. Water supply. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Provide water for milkhouse and milking operations from a water supply properly located, protected, and operated. The water supply shall be easily accessible, adequate, of a safe, sanitary quality, and meet the construction standards of Appendix D of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision";

(2) Construct the water supply so that no cross connections between a safe water supply and any unsafe or questionable water supply or other source of pollution exists; and

(3) Construct the water supply so that no submerged inlets exist through which a safe water supply may be contaminated;

k. Item 9r. Utensils and equipment-construction. Each person who holds a grade A permit to produce raw milk

for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Provide multiuse containers, equipment, and utensils for use in the handling, storage, or transportation of any milk, which multiuse containers, equipment, and utensils, shall be made of smooth, nonabsorbent, corrosion-resistant, and nontoxic materials; constructed as to be easily cleaned; and maintained in good repair;

(2) Provide milk pails that are constructed to be seamless and of the hooded type if the grade A permit holder does hand milking and stripping;

(3) Abstain from using multiple-use woven material for straining any milk;

(4) Use only single-service articles that have been manufactured, packaged, transported, stored, and handled in a sanitary manner and that comply with the requirements of subdivision C 1 of this section;

(5) Abstain from reusing any article intended for single-service use; and

(6) Provide farm holding or cooling tanks, welded sanitary piping, and transportation tanks that comply with the requirements of subdivisions C 1 l and C 1 m of this section on any grade A dairy farm;

l. Item 10r. Utensils and equipment; cleaning. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Clean after each use, or once every 24 hours in the case of continuous operations, the product-contact surfaces of all multiuse containers, multiuse equipment, and multiuse utensils used in the handling, storage, or transportation of any milk;

(2) Offer for sale or sell no milk that has passed through any equipment if the milk-contact surfaces of the equipment are no longer visible or are covered or partially covered by an accumulation of milk solids, milk fat, cleaning compounds, or other soils. Any milk that passes through equipment, the milk-contact surfaces of which are no longer visible, or are covered or partially covered by an accumulation of milk solids, milk fat, cleaning compounds, or other soils shall be deemed adulterated; and

(3) Construct a separate wash manifold for all CIP cleaned milk pipelines in all new or extensively remodeled facilities;

m. Item 11r. Utensils and equipment; sanitization. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall sanitize before each use the product-contact surfaces of all multiuse containers, equipment, and utensils used in the handling, storage, or transportation of any milk;

n. Item 12r. Utensils and equipment; storage. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall store containers, utensils, and equipment used in the handling, storage, or transportation of any milk in a sanitizing solution or store the containers, utensils, and equipment used in the handling, storage, or transportation of any milk to assure complete drainage, and protected from contamination prior to use. Nothing in this requirement shall be deemed to prohibit a grade A permit holder from storing in a milking barn or milking parlor a milk pipeline, or the following pipeline milking equipment: milker claw, inflation, weigh jar, meter, milk hose, milk receiver, tubular cooler, plate cooler, or milk pump; if the milk pipeline or pipeline milking equipment specified in this subdivision is designed for mechanical cleaning; and designed, installed, and operated to protect the milk product and solution-contact surfaces from contamination at all times;

o. Item 13r. Milking; flanks, udders, and teats. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Milk all cows, sheep, goats, water buffalo, and other mammals in a milking barn, stable, or parlor;

(2) Trim the hair from the udder and tail of all milking cows, sheep, goats, water buffalo, and other mammals to facilitate cleaning of the udder and tail;

(3) Keep the flanks, udders, bellies, and tails of all milking cows, sheep, goats, water buffalo, and other mammals free of visible dirt;

(4) Keep the hair on the udders of all milking cows, sheep, goats, water buffalo, and other mammals to a length that the hair on the udder of any cow, sheep, goat, water buffalo, or other mammal cannot be incorporated with the teat in the inflation during milking;

(5) Abstain from milking any cow, sheep, goat, water buffalo, or other mammal whose udder or teats is not clean and dry;

(6) Treat with a sanitizing solution, just prior to milking, the teats of each milking cow, sheep, goat, water buffalo, and other mammal and dry the teats of each milking cow, sheep, goat, water buffalo, and other mammal before milking; and

(7) Milk all cows, sheep, goats, water buffalo, and other mammal with dry hands;

p. Item 14r. Protection from contamination. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Locate and operate the milking and milk house operations, equipment, and facilities to prevent any contamination of the milk, equipment, containers, or utensils;

(2) Transfer immediately from the milking barn, stable, or parlor to the milkhouse each pail or container of milk;

(3) Strain, pour, transfer, or store any milk unless it is protected from contamination;

(4) Handle all containers, utensils and equipment that have been sanitized in such a manner as to prevent contamination of any product-contact surfaces;

(5) Transport from the grade A permit holder's dairy farm to a milk plant or receiving station all milk in cans, using vehicles that are constructed and operated to protect the milk from sun, freezing, and contamination;

(6) Keep clean the inside and outside of each vehicle used to transport from the grade A permit holder's dairy farm to a milk plant or receiving station any milk in cans; and

(7) Transport no substance capable of contaminating the milk when transporting milk;

q. Item 15r. Drug and chemical control. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Store all drugs and medicinals in such a manner that neither the drugs nor the medicinals can contaminate any milk or the milk product-contact surface of any equipment, containers, or utensils;

(2) Abstain from using unapproved or improperly labeled medicinals or drugs to treat any dairy animals or store unapproved or improperly labeled medicinals or drugs in the milkhouse, milking barn, stable or parlor. Except for topical antiseptics, wound dressings (unless intended for direct injection into the teat), vaccines and other biologics, and dosage form vitamins and mineral products, a drug or medicinal is properly labeled only if the drug or medicinal is labeled with the following:

(a) For over-the-counter medicinals or drugs, the name and address of the manufacturer or distributor, or for prescription and extra-label use medicinals or drugs, the name of the veterinary practitioner dispensing the product;

(b) Directions for use of the drug or medicinal and the prescribed holding time;

(c) Any cautionary statement for the drug or medicinal, if needed; and

(d) The active ingredient or ingredients in the drug or medicinal;

(3) Except for topical antiseptics, wound dressings (unless intended for direct injection into the teat), vaccines and other biologics, and dosage form vitamins and mineral products, segregate all medicinals and drugs used for lactating dairy animals from any medicinals and drugs used for nonlactating dairy animals to include dairy calves, dairy heifers, and dairy bulls;

(4) Except for topical antiseptics, wound dressings (unless intended for direct injection into the teat), vaccines and other biologics, and dosage form vitamins and mineral products, provide separate shelves in a cabinet, refrigerator, or other storage facility for the storage of all medicinals and drugs for treatment of nonlactating dairy animals, to include dairy calves, dairy heifers, and dairy bulls, separate from those medicinals or drugs used for lactating dairy animals; and

(5) Store topical antiseptics, wound dressings (unless intended for direct injection into the teat), vaccines and other biologics, and dosage-form vitamins and mineral products in a manner that does not contaminate any milk or the milk-product surfaces of any containers or utensils;

r. Item 16r. Personnel; hand-washing facilities. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall provide hand-washing facilities that are convenient to the milkhouse, milking barn, stable, or parlor, and flush toilet and that include separate hot and cold running water; soap or detergent; and individual sanitary towels or other approved hand-drying devices. When individual sanitary towels are used, covered trash containers shall be provided;

s. Item 17r. Personnel; cleanliness. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Wash clean and dry with an individual sanitary towel or other approved hand drying device the person's hands immediately before milking, before performing any milkhouse function, and immediately after the interruption of milking or performing any milkhouse function; and

(2) Wear clean outer garments while milking or handling any milk, milk containers, utensils, or equipment. Bulk milk haulers shall wear clean outer garments while handling any milk, milk containers, utensils, or equipment;

t. Item 18r. Cooling. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Cool to 40°F or cooler (but not freeze) all raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging within two hours after the grade A permit holder completes milking and assure that the temperature of the grade A permit holder's raw milk is not warmer than 50°F after the first milking or any subsequent milking. Raw milk for pasteurization that is warmer than a temperature of 50°F after the first milking or any subsequent milking shall be deemed a public health hazard and shall not be offered for sale or sold;

(2) Assure that circular recording charts are operated continuously and maintained in a properly functioning manner. Circular charts shall not overlap; and

(3) Agitate all raw milk for pasteurization for not less than five minutes at least once every hour; assure that the milk in the farm's bulk milk cooling or holding tank covers the agitator paddle sufficiently to facilitate proper cooling and sampling after the completion of the first milking; and abstain from selling or offering for sale milk that does not cover the agitator paddle sufficiently to facilitate proper cooling and sampling after the completion of the first milking;

u. Item 19r. Insect and rodent control. Each person who holds a grade A permit to produce raw milk for pasteurization, ultra-pasteurization, aseptic processing and packaging, or retort processed after packaging shall:

(1) Take effective measures to prevent the contamination of any milk, containers, equipment, and utensils by insects, rodents, and other animals, and by chemicals used to control insects, rodents, and other animals;

(2) Maintain the milkroom free of insects, rodents and other animals;

(3) Keep the areas surrounding the milkhouse; milking barn; milking stable; milking parlor; cattle, sheep, water buffalo, other mammal, or goat housing; cattle, sheep, water buffalo, other mammal, or goat loafing area; water supply; or other facilities on the grade A permit holder's dairy farm neat, clean, and free of conditions that might harbor or be conducive to the breeding of insects and rodents; and

(4) Store all feed in such a manner that the feed will not attract birds, rodents, or insects.

C. Sanitation requirements for grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products.

1. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall comply with:

a. The following administrative procedures contained in the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision": Section 7, Items 1p, 2p, 3p, 4p, 5p, 6p, 7p, 8p, 9p, 10p, 11p, 12p, 13p, 14p, 15p, 16p, 17p, 18p, 19p, 20p, 21p, and 22p (provided in the case of milk plants or portions of milk plants that are IMS Listed to produce aseptically processed and packaged milk or milk products, the APPS or RPPS, respectively, as defined in the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision," shall be exempt from Items 7p, 10p, 11p, 12p, 13p, 15p, 16p, 17p, 18p, and 19p of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision" and shall comply with the applicable portions of 21 CFR Parts 108, 110, and 113); Section 13; and Section 14;

b. The following appendices contained in the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision": Appendices D, F, G, H, I, J, K, L, N, O, R, and S;

c. Item 1p. Floors; construction. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Except as specified in subdivision C 1 c (2) of this section, provide floors for all rooms in which milk or milk products are processed, handled, packaged, or stored, or in which milk containers, equipment, or utensils are washed, constructed of concrete or other equally impervious and easily cleaned material and that are smooth, properly sloped, provided with trapped drains, and kept in good repair;

(2) The floor in any cold-storage room used for storing milk and milk products need not be provided with floor drains if the floors are sloped to drain to one or more exits from the cold-storage room. The floor in any storage room used for storing dry ingredients or packaging materials need not be provided with drains, and the floor in any storage room used for storing dry ingredients or packaging materials may be constructed of tightly joined wood;

d. Item 2p. Walls and ceilings; construction. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall provide walls and ceilings of rooms in which milk or milk products are handled, processed, packaged, or stored, or in which milk containers, utensils, or equipment are washed, that have a smooth, washable, light-colored surface, and that are in good repair;

e. Item 3p. Doors and windows. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall provide:

(1) Effective means to prevent the access of insects and rodents to any part of a milk plant, receiving station, or transfer station; and

(2) Solid doors or glazed windows for all openings to the outside of any milk plant, receiving station, or transfer station and keep the doors and windows closed during dusty weather;

f. Item 4p. Lighting and ventilation. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall provide rooms in which any milk or milk products are handled, processed, packaged, or stored, or in which any milk containers, equipment, or utensils are washed, that are well lighted and well ventilated;

g. Item 5p. Separate rooms. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Provide separate rooms for: (i) pasteurizing, processing, cooling, reconstituting, condensing, drying, and packaging of milk, dry milk, and milk products; (ii) cleaning milk cans, containers, bottles, cases, and dry milk or dry milk product containers; (iii) the fabrication of containers and closures for milk and milk products, except for aseptically processed and packaged milk and milk products, or retort processed after packaging milk and milk products in which the containers and closures are fabricated within the APPS or RPPS, respectively; (iv) cleaning and sanitizing facilities for bulk milk transport tanks if the grade A permit holder receives any milk or milk product in bulk milk transport tanks; and (v) receiving cans of milk and milk products separate from clauses (i), (ii) and (iii) of this subdivision, unless all of the grade A permit holder's milk or milk products are received in bulk milk transport tanks;

(2) Not use any room with a direct opening into any stable or room used for domestic purposes to handle, process, or store any milk or milk products or to wash or store any milk containers, utensils, or equipment;

(3) Use rooms of sufficient size so as not to be crowded to handle, process, or store any milk or milk products or to wash or store any milk containers, utensils, or equipment; and

(4) Provide designated areas or rooms for the receiving, handling, and storage of returned packaged milk and milk products if the permit holder receives any returned packaged milk or milk products;

h. Item 6p. Toilet-sewage disposal facilities. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall provide each milk plant with toilet facilities conforming with the regulations of the Commonwealth and the following requirements: no toilet room may open directly into any room in which milk or milk products are processed; the toilet room shall be completely enclosed and shall have tight-fitting, self-closing doors; the dressing room, toilet room, and fixtures shall be kept in a clean condition, in good repair, and shall be well ventilated and well lighted; and sewage and other liquid wastes from the toilet room shall be disposed of in a sanitary manner;

i. Item 7p. Water supply. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Provide water for each milk plant from a supply that is properly located, protected, and operated; and

(2) Provide water from a supply that is easily accessible for inspection by the State Regulatory Authority, adequate, and of a safe, sanitary quality;

j. Item 8p. Hand-washing facilities. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Provide hand-washing facilities, including separate hot and cold running water, mix valve, soap, and individual sanitary towels or other approved hand-drying devices, convenient in any area where milk or milk products are handled, processed, or stored, and any area where containers, utensils, or equipment, are washed or stored; and

(2) Keep the hand-washing facilities clean and in good repair;

k. Item 9p. Milk plant cleanliness. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Keep clean, neat, and free of any evidence of animals, insects, or rodents all rooms in which milk or milk products are handled, processed, or stored or in which containers, utensils, or equipment are washed or stored; and

(2) Permit only equipment directly related to processing operations or to the handling of containers, utensils, and equipment, in pasteurizing, processing, cooling, condensing, drying, packaging, bulk milk, or milk product storage rooms;

l. Item 10p. Sanitary piping. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Use only sanitary piping, fittings, and connections consisting of smooth, impervious corrosion-resistant, nontoxic, easily cleanable materials that are exposed to any milk or milk products, or from which liquids may drip, drain, or be drawn into any milk or milk products;

(2) Keep all piping in good repair;

(3) Except as specified in subdivision 1 l of this subsection, use only sanitary piping to transfer any pasteurized or ultra-pasteurized milk or milk products from one piece of equipment to another piece of equipment; and

(4) Transport cottage cheese, cheese dressings, or cheese ingredients by methods that protect the product from contamination;

m. Item 11p. Construction and repair of containers and equipment. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Use only multiuse containers and equipment, that may come in contact with any milk or milk products constructed of smooth, impervious, corrosion-resistant, and nontoxic materials; constructed for ease of cleaning; and kept in good repair;

(2) Use only single-service containers, closures, gaskets, and other articles that may come in contact with any milk or milk products that are nontoxic and have been manufactured, packaged, transported, and handled in a sanitary manner;

(3) Abstain from using more than once any articles intended for single-service use; and

(4) Use only single-service containers, closures, caps, gaskets, and similar articles manufactured, packed, transported, and handled in a manner that complies with the requirements of Appendix J, "Standards for the Fabrication of Single-Service Containers and Closures for Milk and Milk Products" contained in the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision";

n. Item 12p. Cleaning and sanitizing of containers and equipment. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Effectively clean and sanitize before each use the product-contact surfaces of all multiuse containers and equipment, utensils, and equipment used in the transportation, processing, handling, and storage of any milk or milk products;

(2) Use only multiuse containers for packaging pasteurized milk and milk products that comply with the following: (i) the residual bacteria count on multiuse containers may not exceed one per milliliter of capacity when the rinse test is used, or the residual bacteria count on multiuse containers shall not exceed 50 colonies per eight square inches (one per square centimeter) of product-contact surface when the swab test is used; in three-out-of-four samples taken at random on a given day; and (ii) all multiuse containers shall be free of coliform organisms; and

(3) Use only single-service containers for packaging pasteurized milk and milk products that comply with the following: (i) the residual bacteria count of single-service containers shall not exceed 50 per container when the rinse test is used, except that in containers less than 100 milliliters, the count shall not exceed 10, or the residual bacteria count of single-service containers shall not exceed 50 colonies per eight square inches (one per square centimeter) of product contact surface when the swab test is used; in three-out-of-four samples taken at random on a given day; and (ii) all single-service containers shall be free of coliform organisms;

o. Item 13p. Storage of cleaned containers and equipment. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products, shall after cleaning any multiuse milk or milk product containers, utensils, or equipment, transport or store the multiuse milk or milk product containers, utensils, or equipment in a manner that assures complete drainage and in a manner that protects the multiuse milk or milk product containers, utensils, or equipment from contamination before use;

p. Item 14p. Storage of single-service containers, utensils, and materials. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Purchase all single-service caps, cap stock, parchment paper, containers, gaskets, and other single-service articles for use in contact with milk or milk products in sanitary tubes, wrappings, or cartons;

(2) Store in a clean dry place until used, single-service caps, cap stock, parchment paper, containers, gaskets,

and other single-service articles for use in contact with milk or milk products;

(3) Store single-service caps, cap stock, parchment paper, containers, gaskets, and other single-service articles for use in contact with milk or milk products in sanitary tubes, wrappings, or cartons; and

(4) Handle single-service caps, cap stock, parchment paper, containers, gaskets, and other single-service articles for use in contact with milk or milk products in a sanitary manner;

q. Item 15p. Protection from contamination. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Locate the person's equipment and facilities and conduct milk plant operations to prevent any contamination of any milk or milk products, ingredients, equipment, containers, or utensils;

(2) Discard all milk, milk products, or ingredients that have been spilled, overflowed, or leaked;

(3) Perform the processing and handling of products other than grade A milk and milk products in the person's milk plant to preclude the contamination of any grade A milk or milk products;

(4) Store, handle, or use any poisonous or toxic material to preclude the contamination of any milk, milk product, or ingredient and the milk product contact surfaces of all equipment, containers, or utensils; and

(5) Clean, prior to use, all multiuse cases used to encase packaged milk or milk product containers;

r. Item 16p. Pasteurization and ultra-pasteurization. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Perform pasteurization or ultra-pasteurization as defined in 2VAC5-490-10, and Item 16p of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision"; and

(2) Perform aseptic processing and packaging and retort processed after packaging in accordance with the applicable requirements of 21 CFR Parts 108, 110, and 113;

s. Item 17p. Cooling of milk. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Maintain all raw milk and milk products at a temperature of 45°F or cooler, but not frozen, until processed;

(2) Maintain all whey and whey products for condensing, drying, or condensing and drying at a temperature of 45°F (7°C) or cooler; or 135°F (57°C) or greater until processed, except that acid-type whey with a titratable acidity of 0.40% or above, or a pH of 4.6 or below, is exempted from these temperature requirements;

(3) Completely empty and clean the tanks and vessels used to blend and hold all milk or milk product flavoring slurries that contain milk and milk products after each four hours of operation or less if such tanks are not intended to be injected within a HTST pasteurization system as part of a liquid ingredient injection system as outlined in Appendix H of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision" or unless the slurry is stored at a temperature of 45°F (7°C) or cooler, or at a temperature of 150°F (66°C) or greater and maintained thereat;

(4) Immediately cool, except for the following milk or milk products, all pasteurized or ultra-pasteurized milk or milk products prior to filling or packaging in approved cooling equipment to a temperature of 45°F or cooler, but not frozen, unless drying is commenced immediately after condensing:

(a) Those milk or milk products to be cultured;

(b) Cultured sour cream at all milkfat levels with a pH of 4.70 or below;

(c) Acidified sour cream at all milkfat levels with a pH of 4.60 or below;

(d) All yogurt products at all milkfat levels with an initial pH of 4.80 or below at filling;

(e) Cultured buttermilk at all milkfat levels with a pH of 4.60 or below;

(f) All condensed whey and whey products shall be cooled during the crystallization process to 50°F (10°C) or less within 72 hours of condensing, including the filling and emptying time, unless filling occurs above 135°F (57°C), in which case, the 72-hour time period begins when cooling started; and

(g) All cultured cottage cheese at all milkfat levels with a pH of 5.2 or below shall be cooled as per specifications of Item 17p (6a-6e) of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision";

(5) Store, transport, and deliver at a temperature of 45°F or cooler, but not frozen, all pasteurized or ultra-pasteurized milk or milk products with the following exceptions:

(a) Cultured sour cream at all milkfat levels with a pH of 4.70 or below shall be cooled to 45°F (7°C) or cooler within 168 hours of filling;

(b) Acidified sour cream at all milkfat levels with a pH of 4.60 or below shall be cooled to 45°F (7°C) or cooler within 168 hours of filling;

(c) All yogurt products at all milkfat levels with an initial pH of 4.80 or below at filling and with a subsequent pH of 4.60 or below within 24 hours after filling shall be cooled to 45°F (7°C) or cooler within 96 hours after filling;

(d) Cultured buttermilk at all milkfat levels with a pH of 4.60 or below shall be cooled to 45°F (7°C) or cooler within 24 hours after filling; and

(e) Cultured cottage cheese at all milkfat levels with a pH of 5.2 or below shall be stored as per specifications of item 17p (5a-5d) of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision";

(6) Store all pasteurized milk and milk products to be condensed, dried, or condensed and dried at a temperature of 50°F (10°C) or cooler until further processed;

(7) Equip with an accurate indicating thermometer each of the rooms or tanks in which any milk, milk products, whey, or whey products are stored;

(8) Maintain the temperature on delivery vehicles of milk and milk products at 45°F (7°C) or cooler. Aseptically processed and packaged milk and milk products and retort processed after packaged milk and milk products to be packaged in hermetically sealed containers shall be exempt from the cooling requirements of this item; and

(9) Provide ready access at the plant to cleaning records and product storage temperature records stored electronically for review by the State Regulatory Authority. Electronic records of cleaning shall comply with the applicable provisions of Appendix H, Sections IV and V of the "Grade "A" Pasteurized Milk Ordinance, 2013 Revision";

t. Item 18p. Bottling and packaging. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Bottle or package all milk or milk products at the place of pasteurization in the grade A permit holder's milk plant and in approved mechanical equipment;

(2) Package and store in a sanitary manner all dry milk products in new containers, which protect the contents from contamination; and

(3) Transport and store in a sanitary manner all condensed and dry milk products in sealed containers from one milk plant to another milk plant for further processing or packaging;

u. Item 19p. Capping. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Cap or close all milk or milk product containers in a sanitary manner by use of approved mechanical capping or closing and sealing equipment; and

(2) Use only caps or closures for all milk or milk products that protect the pouring lip of a milk or milk product container to at least its largest diameter and, use with respect to fluid product containers, only caps or closures that the removal of the cap or closure cannot be made without detection;

v. Item 20p. Personnel; cleanliness. No person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall:

(1) Permit any person in a milk plant to commence any plant function before the person has thoroughly washed the person's hands to remove soil and contamination or to permit any person in a milk plant to continue any plant function if the person's hands are not clean;

(2) Permit any person in a milk plant to resume work after the person has visited the toilet room before the person has thoroughly washed the person's hands;

(3) Permit any person in a milk plant to engage in the processing, pasteurization, handling, storage, or transportation of any milk, milk products, containers, equipment or utensils, unless the person is wearing clean outer garments;

(4) Permit any person in a milk plant to engage in the processing of any milk or milk products unless the person wears adequate hair covering; or

(5) Permit any person in a milk plant to engage in the processing of any milk or milk products if the person is using tobacco;

w. Item 21p. Vehicles. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall use vehicles to transport pasteurized and ultra-pasteurized milk and milk products that are constructed and operated so that the milk or milk products are maintained at a temperature of 45°F or cooler, but not frozen, and protected from sunlight, from freezing, and from contamination;

x. Item 22p. Surroundings. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaged milk or milk products shall keep neat, clean, and free from conditions that might attract or harbor flies, other insects, rodents, or other pests that otherwise constitute a nuisance, the area surrounding any milk plant;

y. Each grade A permit holder's receiving station shall comply with subdivisions C 1 a through q of this section, inclusive, and subdivisions C 1 s, v, and x of this section, except that the partitioning requirement of subdivision C 1 g of this section shall not be deemed to apply;

z. Each grade A permit holder's transfer station shall comply with subdivisions C 1 c, f, h through n, p, q, s, v, and x of this section, and as climatic and operating conditions require, the provisions of subdivisions C 1 d and e of this section; except that each person shall provide overhead protection for a transfer station; and

a1. Each grade A permit holder's facilities for the cleaning and sanitizing of bulk tanks that transport milk and milk products shall comply with subdivisions C 1 a, f, h through n, p, q, v, and x of this section, and as climatic and operating conditions require, the provisions of subdivisions C 1 d and e of this section except that each grade A permit holder shall provide overhead protection for facilities for the cleaning and sanitizing of bulk tanks which transport milk and milk products in the grade A permit holder's milk plant, receiving station, or transfer station.

D. Minimum facilities requirements for milk processing plant. Each person who holds a grade A permit to produce grade A pasteurized, ultra-pasteurized, aseptically processed and packaged, or retort processed after packaging milk or milk products shall:

1. Provide a separate receiving room meeting the requirements of subdivision C 1 y of this section from any other area of the plant for the receipt of milk or milk products in bulk if the plant receives any milk or milk products in bulk;

2. Provide cleaning and sanitizing facilities for milk tank trucks as part of the plant's receiving room facilities if the plant receives any milk or milk products in bulk;

3. Provide a separate receiving room from any other area of the plant for the receipt of milk or milk product in cans or other containers if the plant receives any milk or milk product in cans or other containers;

4. Provide a separate room from any other area of the plant for the cleaning of milk cans or containers, bottles, milk cases, and dry milk or milk product containers if the plant receives any milk in cans or containers or washes any bottles, milk cases, or dry milk or milk product containers;

5. Provide a separate room for the fabrication of containers and closures for milk and milk products if the plant fabricates any containers or closures;

6. Provide a separate room for the packaging of dry milk or milk products if the plant packages any dry milk or milk product; and

7. Provide separate rooms from any other area of the plant for each of the following operations performed on any milk, milk product, or condensed and dry milk product: (i) pasteurization; (ii) processing; (iii) cooling; (iv) reconstitution; (v) condensing; (vi) drying; and (vii) packaging, if the operation is performed in the plant.

VA.R. Doc. No. R18-34; Filed May 6, 2019, 4:35 p.m.

TITLE 3. ALCOHOLIC BEVERAGES

ALCOHOLIC BEVERAGE CONTROL AUTHORITY

Final Regulation

REGISTRAR'S NOTICE: The Alcoholic Beverage Control Authority is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 4 a of the Code of Virginia, which excludes regulations that are necessary to conform to changes in Virginia statutory law or the appropriation act where no agency discretion is involved. The Alcoholic Beverage Control Authority will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **3VAC5-50. Retail Operations (amending 3VAC5-50-60).**

Statutory Authority: § 4.1-103 and 4.1-111 Code of Virginia.

Effective Date: July 1, 2019.

Agency Contact: LaTonya D. Hucks-Watkins, Legal Liaison, Virginia Alcoholic Beverage Control Authority, 2901 Hermitage Road, Richmond, VA 23220, telephone (804) 213-4698, FAX (804) 213-4574, or email latonya.hucks-watkins@abc.virginia.gov.

Summary:

Pursuant to Chapter 706 of the 2019 Acts of Assembly, the amendments provide that the Board of Directors of the Alcoholic Beverage Control Authority may suspend the privilege of a mixed beverage licensee to purchase spirits from the board if the licensee fails to submit records or other documents necessary to verify the licensee's compliance with applicable minimum food sale

requirements within 30 days of the date such records or documents are due.

3VAC5-50-60. ~~Procedures for mixed~~ Mixed beverage licensees generally; ~~mixed beverage restaurant licensees;~~ sales of spirits in closed containers; suspension of purchase privileges.

A. No mixed beverage restaurant or carrier licensee shall:

1. Serve as one drink the entire contents of a container of spirits in its original container for on-premises consumption except as provided by subsections C, D, and E of this section.

2. Sell any mixed beverage to which alcohol has been added.

B. No mixed beverage restaurant licensee shall:

1. Allow to be kept upon the licensed premises any container of alcoholic beverages of a type authorized to be purchased under his license that does not bear the required mixed beverage stamp imprinted with his license number and purchase report number.

2. Use in the preparation of a mixed beverage any alcoholic beverage not purchased from the board or a wholesale wine licensee.

3. Fail to obliterate the mixed beverage stamp immediately when any container of spirits is emptied.

4. Allow any patron to possess more than two drinks of mixed beverages at any one time, except that a mixed beverage licensee may sell to a patron who may lawfully purchase mixed beverages a flight of distilled spirits products consisting of samples of not more than five different spirits products. Each distilled spirits product shall contain no more than one-half ounce of distilled spirits.

C. If a restaurant for which a mixed beverage restaurant license has been issued under § 4.1-210 of the Code of Virginia is located on the premises of a hotel or motel, whether the hotel or motel be under the same or different ownership, sales of mixed beverages, including sales of spirits packaged in original closed containers purchased from the board, as well as other alcoholic beverages, for consumption in bedrooms and private rooms of such hotel or motel, may be made by the licensee subject to the following conditions in addition to other applicable laws:

1. Spirits sold by the drink as mixed beverages or in original closed containers must have been purchased under the mixed beverage restaurant license upon purchase forms provided by the board;

2. Delivery of sales of mixed beverages and spirits in original closed containers shall be made only in the bedroom of the registered guest or to the sponsoring group in the private room of a scheduled function. This section shall not be construed to prohibit a licensee catering a scheduled private function from delivering mixed beverage drinks to guests in attendance at such function;

3. Receipts from the sale of mixed beverages and spirits sold in original closed containers, as well as other alcoholic beverages, shall be included in the gross receipts from sales of all such merchandise made by the licensee; and

4. Complete and accurate records of sales of mixed beverages and sales of spirits in original closed containers to registered guests in bedrooms and to sponsors of scheduled private functions in private rooms shall be kept separate and apart from records of all mixed beverage sales.

D. Carrier licensees may serve miniatures not in excess of two fluid ounces or 50 milliliters, in their original containers, for on-premises consumption.

E. A mixed beverage restaurant may serve as one drink the entire contents of a container of soju in its original container for on-premises consumption under the following conditions:

1. The container may be no larger than 375 milliliters.

2. Each container of soju served must be served for consumption by at least two patrons legally eligible to consume alcoholic beverages.

F. A mixed beverage restaurant licensee may infuse, store, and sell flavored distilled spirits under the following circumstances:

1. If infused in the original spirits container, the mixed beverage stamp must remain affixed to the bottle.

2. If infused in a container other than the original spirits container, the substitute container, which shall not exceed 20 liters in volume, will be labeled with the following information:

a. Date of infusion;

b. Brand of spirits; and

c. Amount of spirits used.

3. Accurate records must be kept by the mixed beverage licensee as to the spirits used in any spirits infusion process.

4. Licensees infusing distilled spirits shall comply with all applicable state and federal food safety regulations.

G. Mixed beverage licensees may premix containers of sangria and other mixed beverages and serve such alcoholic beverages in pitchers subject to the following limitations:

1. Pitchers of mixed beverages may only be sold in containers with a maximum capacity of 32 fluid ounces or

one liter if the container is in metric size containing a spirits product mixed with nonalcoholic beverages.

2. A pitcher of mixed beverages may only be served to two or more patrons. A licensee shall not allow any two patrons to possess more than one pitcher at any one time.

3. Containers of premixed sangria and other mixed beverages must be labeled as to the type of mixed beverage and the quantities of the products used to produce the mixed beverage.

H. The board may suspend the privilege of a mixed beverage licensee to purchase spirits from the board upon such licensee's failure to submit any records or other documents necessary to verify the licensee's compliance with applicable minimum food sale requirements within 30 days of the date such records or documents are due.

VA.R. Doc. No. R19-5972; Filed May 1, 2019, 9:43 a.m.

TITLE 9. ENVIRONMENT

STATE AIR POLLUTION CONTROL BOARD

Final Regulation

Title of Regulation: **9VAC5-140. Regulation for Emissions Trading Programs (adding 9VAC5-140-6010 through 9VAC5-140-6440).**

Statutory Authority: §§ 10.1-1308 and 10.1-1322.3 of the Code of Virginia; §§ 108, 109, 110, and 302 of the Clean Air Act; 40 CFR Part 51.

Effective Date: June 26, 2019.

Agency Contact: Karen G. Sabasteanski, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4426, FAX (804) 698-4510, or email karen.sabasteanski@deq.virginia.gov.

Summary:

This action establishes the Virginia CO_2 Budget Trading Program. The regulation includes provisions to (i) implement a declining cap on carbon emissions and establish an allowance that will be issued for each ton of carbon emitted by an electricity generating facility, which can then decide whether to reduce carbon emissions and sell the resulting additional allowances or not reduce carbon emissions and make up the difference with purchased allowances; (ii) establish a consignment auction as the mechanism for determining the cost of allowances; (iii) provide cost containment reserve allowances and emission containment reserve allowances to ensure market stability; (iv) implement monitoring, recording, and recordkeeping requirements; and (v) allocate conditional allowances to the Department of Mines, Minerals and Energy.

Amendments since publication of the revised proposed regulation in 35:12 VA.R. 1404-1438 February 4, 2019, include (i) modifying several definitions, (ii) adding a section to address program implementation, (iii) modifying 9VAC5-140-6040 and 9VAC5-140-6050 regarding applicability, (iv) removing 2031–2040 budget reductions from 9VAC5-140-6190, and (v) providing that post-2031 base budgets may be modified as a result of program review and regulatory action.

Summary of Public Comments and Agency's Response: A summary of comments made by the public and the agency's response may be obtained from the promulgating agency or viewed at the office of the Registrar of Regulations.

Part VII
CO_2 Budget Trading Program

Article 1
CO_2 Budget Trading Program General Provisions

9VAC5-140-6010. Purpose.

This part establishes the Virginia component of the CO_2 Budget Trading Program, which is designed to reduce anthropogenic emissions of CO_2, a greenhouse gas, from CO_2 budget sources in ~~an economically efficient manner~~ a manner that is protective of human health and the environment and is economically efficient.

9VAC5-140-6020. Definitions.

A. As used in this part, all words or terms not defined here shall have the meanings given them in 9VAC5-10 (General Definitions), unless otherwise required by the context.

B. For the purpose of this part and any related use, the words or terms shall have the meanings given them in this section.

C. Terms defined.

"Account number" means the identification number given by the department or its agent to each COATS account.

"Acid rain emission limitation" means, as defined in 40 CFR 72.2, a limitation on emissions of sulfur dioxide (SO_2) or nitrogen oxides (NO_X) under the Acid Rain Program under Title IV of the CAA.

"Acid Rain Program" means a multistate SO_2 and NO_X air pollution control and emission reduction program established by the administrator under Title IV of the CAA and 40 CFR Parts 72 through 78.

"Adjustment for banked allowances" means an adjustment applied to the Virginia CO_2 Budget Trading Program base budget for allocation years 2021 through 2025 to address allowances held in general and compliance accounts, including compliance accounts established pursuant to the

CO_2 Budget Trading Program, but not including accounts opened by participating states, that are in addition to the aggregate quantity of emissions from all CO_2 budget sources in all of the participating states at the end of the [initial] control period in 2020 and as reflected in the CO_2 Allowance Tracking System on March [~~17~~ 15], 2021.

"Administrator" means the administrator of the U.S. Environmental Protection Agency or the administrator's authorized representative.

"Allocate" or "allocation" means the determination by the department of the number of [~~CO_2~~] conditional allowances [~~allocated to a CO_2 budget unit~~ recorded in the conditional allowance account of a CO_2 budget unit] or to the Department of Mines, Minerals and Energy (DMME) pursuant to 9VAC5-140-6211.

"Allocation year" means a calendar year for which the department allocates [~~CO_2~~] conditional allowances pursuant to Article 5 (9VAC5-140-6190 et seq.) of this part. The allocation year of each [~~CO_2~~] conditional allowance is reflected in the unique identification number given to the allowance pursuant to 9VAC5-140-6250 C.

~~"Allowance" means an allowance up to one ton of CO_2 purchased from the consignment auction in accordance with Article 9 (9VAC5-140-6410 et seq.) of this part and that may be deposited in the compliance account of a CO_2 budget source.~~

"Allowance auction" or "auction" means an auction in which the department or its agent offers [~~CO_2~~ conditional] allowances for sale.

~~"Alternate CO_2 authorized account representative" means, for a CO_2 budget source and each CO_2 budget unit at the source, the alternate natural person who is authorized by the owners and operators of the source and all CO_2 budget units at the source, in accordance with Article 2 (9VAC5-140-6080 et seq.) of this part, to represent and legally bind each owner and operator in matters pertaining to the CO_2 Budget Trading Program or, for a general account, the alternate natural person who is authorized, under Article 6 (9VAC5-140-6220 et seq.) of this part, to transfer or otherwise dispose of CO_2 allowances held in the general account. If the CO_2 budget source is also subject to the Acid Rain Program, CSAPR NO_X Annual Trading Program, CSAPR NO_X Ozone Season Trading Program, CSAPR SO_2 Group 1 Trading Program, or CSAPR SO_2 Group 2 Trading Program then, for a CO_2 Budget Trading Program compliance account, this alternate natural person shall be the same person as the alternate designated representative as defined in the respective program.~~

"Attribute" means a characteristic associated with electricity generated using a particular renewable fuel, such as its generation date, facility geographic location, unit vintage, emissions output, fuel, state program eligibility, or other characteristic that can be identified, accounted for, and tracked.

"Attribute credit" means a credit that represents the attributes related to one megawatt-hour of electricity generation.

"Automated Data Acquisition and Handling System" or "DAHS" means that component of the Continuous Emissions Monitoring System (CEMS), or other emissions monitoring system approved for use under Article 8 (9VAC5-140-6330 et seq.) of this part, designed to interpret and convert individual output signals from pollutant concentration monitors, flow monitors, diluent gas monitors, and other component parts of the monitoring system to produce a continuous record of the measured parameters in the measurement units required by Article 8 (9VAC5-140-6330 et seq.) of this part.

"Billing meter" means a measurement device used to measure electric or thermal output for commercial billing under a contract. The facility selling the electric or thermal output shall have different owners from the owners of the party purchasing the electric or thermal output.

"Boiler" means an enclosed fossil or other fuel-fired combustion device used to produce heat and to transfer heat to recirculating water, steam, or other medium.

"CO_2 allowance" means a limited authorization by the department or another participating state under the CO_2 Budget Trading Program to emit up to one ton of CO_2, subject to all applicable limitations contained in this part. CO_2 offset allowances generated by other participating states will be recognized by the department.

"CO_2 allowance deduction" or "deduct CO_2 allowances" means the permanent withdrawal of CO_2 allowances by the department or its agent from a COATS compliance account to account for the number of tons of CO_2 emitted from a CO_2 budget source for the [initial control period,] a control period [,] or an interim control period [;] determined in accordance with Article 8 (9VAC5-140-6330 et seq.) of this part, or for the forfeit or retirement of CO_2 allowances as provided by this part.

"CO_2 Allowance Tracking System" or "COATS" means the system by which the department or its agent records allocations, deductions, and transfers of CO_2 allowances under the CO_2 Budget Trading Program. The tracking system may also be used to track CO_2 allowance prices and emissions from affected sources.

"CO_2 Allowance Tracking System account" means an account in COATS established by the department or its agent for purposes of recording the allocation, holding, transferring, or deducting of CO_2 allowances.

"CO_2 allowance transfer deadline" means midnight of March 1 occurring after the end of the [~~relevant~~ initial

control period, the] control period [,] and each [~~relevant~~] interim control period [,] or [;] if that March 1 is not a business day, midnight of the first business day thereafter and is the deadline by which CO_2 allowances shall be submitted for recordation in a CO_2 budget source's compliance account for the source to meet the CO_2 requirements of 9VAC5-140-6050 C for the [initial control period, a] control period [,] and each interim control period immediately preceding such deadline.

"CO_2 allowances held" or "hold CO_2 allowances" means the CO_2 allowances recorded by the department or its agent, or submitted to the department or its agent for recordation, in accordance with Article 6 (9VAC5-140-6220 et seq.) and Article 7 (9VAC5-140-6300 et seq.) of this part, in a COATS account.

"CO_2 authorized account representative" means, for a CO_2 budget source and each CO_2 budget unit at the source, the natural person who is authorized by the owners and operators of the source and all CO_2 budget units at the source, in accordance with Article 2 (9VAC5-140-6080 et seq.) of this part, to represent and legally bind each owner and operator in matters pertaining to the CO_2 Budget Trading Program or, for a general account, the natural person who is authorized, under Article 6 (9VAC5-140-6220 et seq.) of this part, to transfer or otherwise dispose of CO_2 allowances held in the general account. If the CO_2 budget source is also subject to the Acid Rain Program, CSAPR NO_X Annual Trading Program, CSAPR NO_X Ozone Season Trading Program, CSAPR SO_2 Group 1 Trading Program, or CSAPR SO_2 Group 2 Trading Program, then for a CO_2 Budget Trading Program compliance account, this natural person shall be the same person as the designated representative as defined in the respective program.

"CO_2 authorized alternate account representative" means, for a CO_2 budget source and each CO_2 budget unit at the source, the alternate natural person who is authorized by the owners and operators of the source and all CO_2 budget units at the source, in accordance with Article 2 (9VAC5-140-6080 et seq.) of this part, to represent and legally bind each owner and operator in matters pertaining to the CO_2 Budget Trading Program or, for a general account, the alternate natural person who is authorized, under Article 6 (9VAC5-140-6220 et seq.) of this part, to transfer or otherwise dispose of CO_2 allowances held in the general account. If the CO_2 budget source is also subject to the Acid Rain Program, CSAPR NO_X Annual Trading Program, CSAPR NO_X Ozone Season Trading Program, CSAPR SO_2 Group 1 Trading Program, or CSAPR SO_2 Group 2 Trading Program then, for a CO_2 Budget Trading Program compliance account, this alternate natural person shall be the same person as the alternate designated representative as defined in the respective program.

"CO_2 budget emissions limitation" means, for a CO_2 budget source, the tonnage equivalent, in CO_2 emissions in [the initial control period,] a control period [,] or an interim control period [;] of the CO_2 allowances available for compliance deduction for the source for a control period or an interim control period.

"CO_2 budget permit" means the portion of the legally binding permit issued by the department pursuant to 9VAC5-85 (Permits for Stationary Sources of Pollutants Subject to Regulation) to a CO_2 budget source or CO_2 budget unit that specifies the CO_2 Budget Trading Program requirements applicable to the CO_2 budget source, to each CO_2 budget unit at the CO_2 budget source, and to the owners and operators and the CO_2 authorized account representative of the CO_2 budget source and each CO_2 budget unit.

"CO_2 budget source" means a source that includes one or more CO_2 budget units.

"CO_2 Budget Trading Program" means ~~the Regional Greenhouse Gas Initiative (RGGI),~~ a multistate CO_2 air pollution control and emissions reduction program established according to this part and corresponding regulations in other states as a means of reducing emissions of CO_2 from CO_2 budget sources.

"CO_2 budget unit" means a unit that is subject to the CO_2 Budget Trading Program requirements under 9VAC5-140-6040.

"CO_2 cost containment reserve allowance" or "CO_2 CCR allowance" means [~~a conditional CO_2 allowance that is offered for sale~~ an allowance that has been sold] at an auction for the purpose of containing the cost of CO_2 allowances. CO_2 CCR allowances offered for sale at an auction are separate from and additional to CO_2 allowances allocated from the Virginia CO_2 Budget Trading Program base and adjusted budgets. CO_2 CCR allowances are subject to all applicable limitations contained in this part.

"CO_2 cost containment reserve trigger price" or "CCR trigger price" means the minimum price at which CO_2 CCR allowances are offered for sale at an auction. ~~Beginning in 2020 and each calendar year thereafter, the CCR trigger price shall be 1.025 multiplied by the CCR trigger price from the previous calendar year, rounded to the nearest whole cent.~~ The CCR trigger price in calendar year 2020 shall be $10.77. The CCR trigger price in calendar year 2021 shall be $13. Each calendar year thereafter, the CCR trigger price shall be 1.07 multiplied by the CCR trigger price from the previous calendar year, rounded to the nearest whole cent, as shown in Table 140-1A.

Table 140-1A CO_2 CCR Trigger Price	
2020	$10.77
2021	$13.00
2022	$13.91
2023	$14.88
2024	~~$15.93~~ $15.92
2025	~~$17.04~~ $17.03
2026	~~$18.23~~ $18.22
2027	~~$19.51~~ $19.50
2028	~~$20.88~~ $20.87
2029	~~$22.34~~ $22.33
2030	~~$23.90~~ $23.89

"CO_2 [~~emission~~ emissions] containment reserve allowance" or "CO_2 ECR allowance" means a [~~CO_2~~ conditional] allowance that is withheld from sale at an auction by the department for the purpose of additional emission reduction in the event of lower than anticipated emission reduction costs.

"CO_2 [~~emission~~ emissions] containment reserve trigger price" or "ECR trigger price" means the price below which [~~CO_2~~ conditional] allowances will be withheld from sale by the department or its agent at an auction. The ECR trigger price in calendar year 2021 shall be $6.00. Each calendar year thereafter, the ECR trigger price shall be 1.07 multiplied by the ECR trigger price from the previous calendar year, rounded to the nearest whole cent, as shown in Table 140-1B.

Table 140-1B CO_2 ECR Trigger Price	
2021	$ 6.00
2022	$ 6.42
2023	$ 6.87
2024	$ 7.35
2025	$ 7.86
2026	~~$ 8.42~~ $8.41
2027	$ 9.00
2028	$ 9.63
2029	~~$10.31~~ $10.30
2030	~~$11.03~~ $11.02

"CO_2 offset allowance" means a CO_2 allowance that is awarded to the sponsor of a CO_2 emissions offset project by a participating state and is subject to the relevant compliance deduction limitations of the participating state's corresponding offset regulations as a means of reducing CO_2 from CO_2 budget sources.

"Combined cycle system" means a system comprised of one or more combustion turbines, heat recovery steam generators, and steam turbines configured to improve overall efficiency of electricity generation or steam production.

"Combustion turbine" means an enclosed fossil or other fuel-fired device that is comprised of a compressor (if applicable), a combustor, and a turbine, and in which the flue gas resulting from the combustion of fuel in the combustor passes through the turbine, rotating the turbine.

"Commence commercial operation" means, with regard to a unit that serves a generator, to have begun to produce steam, gas, or other heated medium used to generate electricity for sale or use, including test generation. For a unit that is a CO_2 budget unit under 9VAC5-140-6040 on the date the unit commences commercial operation, such date shall remain the unit's date of commencement of commercial operation even if the unit is subsequently modified, reconstructed, or repowered. For a unit that is not a CO_2 budget unit under 9VAC5-140-6040 on the date the unit commences commercial operation, the date the unit becomes a CO_2 budget unit under 9VAC5-140-6040 shall be the unit's date of commencement of commercial operation.

"Commence operation" means to begin any mechanical, chemical, or electronic process, including, with regard to a unit, start-up of a unit's combustion chamber. For a unit that is a CO_2 budget unit under 9VAC5-140-6040 on the date of commencement of operation, such date shall remain the unit's date of commencement of operation even if the unit is subsequently modified, reconstructed, or repowered. For a unit that is not a CO_2 budget unit under 9VAC5-140-6040 on the date of commencement of operation, the date the unit becomes a CO_2 budget unit under 9VAC5-140-6040 shall be the unit's date of commencement of operation.

"Compliance account" means a COATS account, established by the department or its agent for a CO_2 budget source under Article 6 (9VAC5-140-6220 et seq.) of this part, in which [~~are held~~] CO_2 allowances available for use by the source for [the initial control period,] a control period [,] and each interim control period [are held] for the purpose of meeting the CO_2 requirements of 9VAC5-140-6050 C.

"Conditional allowance" means an allowance allocated by the department to [a] CO_2 budget [~~sources and~~ source

or] to DMME. Such conditional allowance shall be consigned by the entity to whom it is allocated to the consignment auction as specified under Article 9 (9VAC5-140-6410 et seq.) of this part, after which the conditional allowance becomes ~~an allowance to be used for compliance purposes.~~ a CO_2 allowance once it is sold to an auction participant. [~~A conditional allowance may also be contained in the CCR and may be auctioned.~~]

"Conditional [allowance account" means a general COATS account established by the department for CO_2 budget sources and DMME or its contractor where conditional allowances allocated to CO_2 budget sources and DMME are held until auction.

"Conditional cost containment reserve allowance" or "conditional] CCR allowance" means [~~a CCR~~ an] allowance that may be offered for sale when the CCR is triggered. If any [conditional] CCR allowances are unsold, they [~~shall be returned to the CCR account and~~] may be offered for sale in future auctions during the same year. [Conditional CCR allowances offered for sale at an auction are separate from and additional to conditional allowances allocated from the Virginia CO_2 Budget Trading Program base and adjusted budgets. Conditional CCR allowances are subject to all applicable limitations contained in this part.]

"Consignment auction" or "auction" means the CO_2 auction conducted on a quarterly basis by ~~RGGI, Inc.~~ the CO_2 Budget Trading Program, in which CO_2 budget sources and DMME are allocated a share of allowances by the department that CO_2 budget sources and the holder of a public contract with DMME consign into the auction, and auction revenue is returned to CO_2 budget sources and the holder of a public contract with DMME in accordance with procedures established by the department.

"Continuous Emissions Monitoring System" or "CEMS" means the equipment required under Article 8 (9VAC5-140-6330 et seq.) of this part to sample, analyze, measure, and provide, by means of readings recorded at least once every 15 minutes (using an automated DAHS), a permanent record of stack gas volumetric flow rate, stack gas moisture content, and oxygen or carbon dioxide concentration (as applicable), in a manner consistent with 40 CFR Part 75 and Article 8 (9VAC5-140-6330 et seq.) of this part. The following systems are types of CEMS required under Article 8 (9VAC5-140-6330 et seq.) of this part:

a. A flow monitoring system, consisting of a stack flow rate monitor and an automated DAHS and providing a permanent, continuous record of stack gas volumetric flow rate, in standard cubic feet per hour ~~(scf)~~;

b. A NO_X emissions rate (or NO_X-diluent) monitoring system, consisting of a NO_X pollutant concentration monitor, a diluent gas (CO_2 or O_2) monitor, and an automated DAHS and providing a permanent, continuous record of NO_X concentration, in parts per million (ppm), diluent gas concentration, in percent CO_2 or O_2, and NO_X emissions rate, in pounds per million British thermal units (lb/MMBtu);

c. A moisture monitoring system, as defined in 40 CFR 75.11(b)(2) and providing a permanent, continuous record of the stack gas moisture content, in percent H_2O;

d. A CO_2 monitoring system, consisting of a CO_2 pollutant concentration monitor (or an O_2 monitor plus suitable mathematical equations from which the CO_2 concentration is derived) and an automated DAHS and providing a permanent, continuous record of CO_2 emissions, in percent CO_2; and

e. An O_2 monitoring system, consisting of an O_2 concentration monitor and an automated DAHS and providing a permanent, continuous record of O_2, in percent O_2.

"Control period" means a three-calendar-year time period. The [~~first~~ fifth] control period is from January 1, 2021, to December 31, 2023, inclusive [~~. Each subsequent compliance control period shall be a sequential three-calendar-year period.~~ , which is the first control period of Virginia's participation in the CO_2 Budget Trading Program.] The first two [~~compliance~~ calendar] years of each control period are each defined as an interim control period, beginning on January 1, [~~2022~~ 2021].

"Cross State Air Pollution Rule (CSAPR) NO_X Annual Trading Program" means a multistate NO_X air pollution control and emission reduction program established in accordance with Subpart AAAAA of 40 CFR Part 97 and 40 CFR 52.38(a), including such a program that is revised in a SIP revision approved by the administrator under 40 CFR 52.38(a)(3) or (4) or that is established in a SIP revision approved by the administrator under 40 CFR 52.38(a)(5), as a means of mitigating interstate transport of fine particulates and NO_X.

"Cross State Air Pollution Rule (CSAPR) NO_X Ozone Season Trading Program" means a multistate NO_X air pollution control and emission reduction program established in accordance with Subpart BBBBB of 40 CFR Part 97 and 40 CFR 52.38(b), including such a program that is revised in a SIP revision approved by the administrator under 40 CFR 52.38(b)(3) or (4) or that is established in a SIP revision approved by the administrator under 40 CFR 52.38(b)(5), as a means of mitigating interstate transport of ozone and NO_X.

"Cross State Air Pollution Rule (CSAPR) SO_2 Group 1 Trading Program" means a multistate SO_2 air pollution control and emission reduction program established in accordance with Subpart CCCCC of 40 CFR Part 97 and

40 CFR 52.39(a), (b), (d) through (f), (j), and (k), including such a program that is revised in a SIP revision approved by the administrator under 40 CFR 52.39(d) or (e) or that is established in a SIP revision approved by the administrator under 40 CFR 52.39(f), as a means of mitigating interstate transport of fine particulates and SO_2.

"Cross State Air Pollution Rule (CSAPR) SO_2 Group 2 Trading Program" means a multistate SO_2 air pollution control and emission reduction program established in accordance with Subpart DDDDD of 40 CFR Part 97 and 40 CFR 52.39(a), (c), and (g) through (k), including such a program that is revised in a SIP revision approved by the administrator under 40 CFR 52.39(g) or (h) or that is established in a SIP revision approved by the administrator under 40 CFR 52.39(i), as a means of mitigating interstate transport of fine particulates and SO_2.

"Department" means the Virginia Department of Environmental Quality.

"DMME" means the Virginia Department of Mines, Minerals and Energy.

"Excess emissions" means any tonnage of CO_2 emitted by a CO_2 budget source during [the initial control period or] a control period that exceeds the CO_2 budget emissions limitation for the source.

"Excess interim emissions" means any tonnage of CO_2 emitted by a CO_2 budget source during an interim control period multiplied by 0.50 that exceeds the CO_2 budget emissions limitation for the source.

"Fossil fuel" means natural gas, petroleum, coal, or any form of solid, liquid, or gaseous fuel derived from such material.

"Fossil fuel-fired" means the combustion of fossil fuel, alone or in combination with any other fuel, where the fossil fuel combusted comprises, or is projected to comprise, more than ~~10%~~ 5.0% of the annual heat input on a Btu basis during any year.

"General account" means a COATS account [,] established under Article 6 (9VAC5-140-6220 et seq.) of this part that is not a compliance account.

"Gross generation" means the electrical output in MWe at the terminals of the generator.

"Initial control period" means the period beginning January 1, 2020, and ending December 31, 2020.

"Interim control period" means a one-calendar-year time period [,] during each of the first and second calendar years of each three-year control period. The first interim control period starts January 1, 2021, and ends December 31, 2021, inclusive. The second interim control period starts January 1, 2022, and ends December 31, 2022, inclusive. Each successive three-year control period will have two interim control periods, comprised of each of the first two calendar years of that control period.

"Life-of-the-unit contractual arrangement" means a unit participation power sales agreement under which a customer reserves, or is entitled to receive, a specified amount or percentage of nameplate capacity or associated energy from any specified unit pursuant to a contract:

a. For the life of the unit;

b. For a cumulative term of no less than 30 years, including contracts that permit an election for early termination; or

c. For a period equal to or greater than 25 years or 70% of the economic useful life of the unit determined as of the time the unit is built, with option rights to purchase or release some portion of the nameplate capacity and associated energy generated by the unit at the end of the period.

~~"Maximum design heat input" means the ability of a unit to combust a stated maximum amount of fuel per hour on a steady state basis, as determined by the physical design and physical characteristics of the unit.~~

"Maximum potential hourly heat input" means an hourly heat input used for reporting purposes when a unit lacks certified monitors to report heat input. If the unit intends to use Appendix D of 40 CFR Part 75 to report heat input, this value shall be calculated, in accordance with 40 CFR Part 75, using the maximum fuel flow rate and the maximum gross calorific value. If the unit intends to use a flow monitor and a diluent gas monitor, this value shall be reported, in accordance with 40 CFR Part 75, using the maximum potential flow rate and either the maximum CO_2 concentration in percent CO_2 or the minimum O_2 concentration in percent O_2.

"Minimum reserve price" means, in calendar year 2020, ~~$2.00~~ $2.32. Each calendar year thereafter, the minimum reserve price shall be 1.025 multiplied by the minimum reserve price from the previous calendar year, rounded to the nearest whole cent.

"Monitoring system" means any monitoring system that meets the requirements of Article 8 (9VAC5-140-6330 et seq.) of this part, including a CEMS, an excepted monitoring system, or an alternative monitoring system.

"Nameplate capacity" means the maximum electrical output in MWe that a generator can sustain over a specified period of time when not restricted by seasonal or other deratings as measured in accordance with the U.S. Department of Energy standards.

"Net-electric output" means the amount of gross generation in MWh the generators produce, including output from steam turbines, combustion turbines, and gas expanders, as

measured at the generator terminals, less the electricity used to operate the plant (i.e., auxiliary loads); such uses include fuel handling equipment, pumps, fans, pollution control equipment, other electricity needs, and transformer losses as measured at the transmission side of the step up transformer (e.g., the point of sale).

"Non-CO_2 budget unit" means a unit that does not meet the applicability criteria of 9VAC5-140-6040.

"Operator" means any person who operates, controls, or supervises a CO_2 budget unit or a CO_2 budget source and shall include any holding company, utility system, or plant manager of such a unit or source.

"Owner" means any of the following persons:

a. Any holder of any portion of the legal or equitable title in a CO_2 budget unit;

b. Any holder of a leasehold interest in a CO_2 budget unit, other than a passive lessor, or a person who has an equitable interest through such lessor, whose rental payments are not based, either directly or indirectly, upon the revenues or income from the CO_2 budget unit;

c. Any purchaser of power from a CO_2 budget unit under a life-of-the-unit contractual arrangement in which the purchaser controls the dispatch of the unit; or

d. With respect to any general account, any person who has an ownership interest with respect to the CO_2 allowances held in the general account and who is subject to the binding agreement for the CO_2 authorized account representative to represent that person's ownership interest with respect to the CO_2 allowances.

"Participating state" means a state that ~~has established a corresponding regulation as part of~~ participates in the CO_2 Budget Trading Program.

"Receive" or "receipt of" means, ~~with regard to CO_2 allowances, the movement of CO_2 allowances by the department or its agent from one COATS account to another, for purposes of allocation, transfer, or deduction~~ when referring to the department or its agent, to come into possession of a document, information, or correspondence (whether sent in writing or by authorized electronic transmission) as indicated in an official correspondence log, or by a notation made on the document, information, or correspondence by the department or its agent in the regular course of business.

"Recordation," "record," or "recorded" means, with regard to CO_2 allowances, the movement of CO_2 allowances by the department or its agent from one COATS account to another, for purposes of allocation, transfer, or deduction.

~~"RGGI, Inc." means the 501(c)(3) nonprofit corporation created to support development and implementation of the Regional Greenhouse Gas Initiative (RGGI). Participating RGGI states use RGGI, Inc., as their agent to conduct the consignment auction and to operate and manage COATS.~~

"Reserve price" means the minimum acceptable price for each [~~CO_2~~ conditional] allowance in a specific auction. The reserve price at an auction is either the minimum reserve price or the CCR trigger price, as specified in Article 9 (9VAC5-140-6410 et seq.) of this part.

"Serial number" means, when referring to CO_2 allowances, the unique identification number assigned to each CO_2 allowance by the department or its agent under 9VAC5-140-6250 C.

"Source" means any governmental, institutional, commercial, or industrial structure, installation, plant, building, or facility that emits or has the potential to emit any air pollutant. A source, including a source with multiple units, shall be considered a single facility.

~~"State" means the Commonwealth of Virginia. The term "state" shall have its conventional meaning where such meaning is clear from the context.~~

"Submit" or "serve" means to send or transmit a document, information, or correspondence to the person specified in accordance with the applicable regulation:

a. In person;

b. By ~~U.S.~~ United States Postal Service; or

c. By other means of dispatch or transmission and delivery.

Compliance with any "submission," "service," or "mailing" deadline shall be determined by the date of dispatch, transmission, or mailing and not the date of receipt.

"Ton" or "tonnage" means any short ton, or 2,000 pounds. For the purpose of determining compliance with the CO_2 requirements of 9VAC5-140-6050 C, total tons for [the initial control period, an interim control period, or] a control period shall be calculated as the sum of all recorded hourly emissions, or the tonnage equivalent of the recorded hourly emissions rates, in accordance with Article 8 (9VAC5-140-6330 et seq.) of this part, with any remaining fraction of a ton equal to or greater than 0.50 ton deemed to equal one ton and any fraction of a ton less than 0.50 ton deemed to equal zero tons. A short ton is equal to 0.9072 metric tons.

"Total useful energy" means the sum of gross electrical generation and useful net thermal energy.

"Undistributed [~~CO_2~~ conditional] allowances" means [~~CO_2~~ conditional] allowances originally allocated to a set aside account as pursuant to 9VAC5-140-6210 that were not distributed.

"Unit" means a fossil fuel-fired stationary boiler, combustion turbine, or combined cycle system.

"Unit operating day" means a calendar day in which a unit combusts any fuel.

"Unsold [~~CO_2~~ conditional] allowances" means [~~CO_2~~ conditional] allowances that have been made available for sale in an auction conducted by the department or its agent, but not sold.

"Useful net thermal energy" means energy:

1. In the form of direct heat, steam, hot water, or other thermal form that is used in the production and beneficial measures for heating, cooling, humidity control, process use, or other thermal end use energy requirements, excluding thermal energy used in the power production process (e.g., house loads and parasitic loads); and

2. For which fuel or electricity would otherwise be consumed.

"Virginia CO_2 Budget Trading Program adjusted budget" means an adjusted budget determined in accordance with 9VAC5-140-6210 and is the annual amount of CO_2 tons available in Virginia for allocation in a given allocation year, in accordance with the CO_2 Budget Trading Program. [~~CO_2~~ Conditional] CCR allowances offered for sale at an auction are separate from and additional to [~~CO_2~~ conditional] allowances allocated from the Virginia CO_2 Budget Trading Program adjusted budget.

"Virginia CO_2 Budget Trading Program base budget" means the budget specified in 9VAC5-140-6190. [~~CO_2~~ Conditional] CCR allowances offered for sale at an auction are separate from and additional to [~~CO_2~~ conditional] allowances allocated from the Virginia CO_2 Budget Trading Program base budget.

9VAC5-140-6030. Measurements, abbreviations, and acronyms.

Measurements, abbreviations, and acronyms used in this part are defined as follows:

Btu - British thermal unit.

CAA - federal Clean Air Act.

CCR - cost containment reserve.

CEMS - Continuous Emissions Monitoring System.

COATS - CO_2 Allowance Tracking System.

CO_2 - carbon dioxide.

DAHS - Data Acquisition and Handling System.

~~EEM - efficiency measure.~~

H_2O - water.

lb - pound.

LME - low mass emissions.

MMBtu - million British thermal units.

MW - megawatt.

MWe - megawatt electrical.

MWh - megawatt hour.

NO_X - nitrogen oxides.

O_2 - oxygen.

ORIS - Office of Regulatory Information Systems.

QA/QC - quality assurance/quality control.

ppm - parts per million.

~~scf - standard cubic feet per hour.~~

SO_2 - sulfur dioxide.

9VAC5-140-6040. Applicability.

A. Any fossil fuel-fired unit that serves an electricity generator with a nameplate capacity equal to or greater than 25 MWe shall be a CO_2 budget unit, and any source that includes one or more such units shall be a CO_2 budget source, subject to the requirements of this part.

B. Exempt from the requirements of this part is any [fossil fuel] ~~power generating unit owned by an individual facility and located at that individual facility that generates electricity and heat from fossil fuel for the primary use of operation of the facility~~ CO_2 budget source located at or adjacent to and physically interconnected with a manufacturing facility that, prior to January 1, 2019, and in every subsequent calendar year, met either of the following requirements:

1. Supplies less than or equal to 10% of its annual net electrical generation to the electric grid; or

2. Supplies less than or equal to 15% of its annual total useful energy to any entity other than the manufacturing facility to which the CO_2 budget source is interconnected.

For the purpose of subdivision 1 of this subsection, annual net electrical generation shall be determined as follows:

(ES – EP) / EG x 100

Where:

ES = electricity sales to the grid from the CO_2 budget source

EP = electricity purchases from the grid by the CO_2 budget source and the manufacturing facility to which the CO_2 budget source is interconnected

EG = electricity generation

Such CO_2 budget source shall have an operating permit containing the applicable restrictions under this subsection.

[9VAC5-140-6045. CO_2 Budget Trading Program implementation.

In the event the allocation of conditional allowances by the department as required by 9VAC5-140-6190 B has not occurred by January 1, 2020, the program will be considered to be operating and effective as of the calendar year following the date on which the department allocates the conditional allowances as it corresponds to the schedule of 9VAC5-140-6190 A. Permitting and compliance dates, including the due date for a permit as required by 9VAC5-140-6150, shall be adjusted to be in force six months after the date the department allocates the conditional allowances. Any excess emissions tonnage identified by the new program implementation date may be addressed through program review and regulatory action as necessary to ensure compliance with the final compliance date. The department will notify the board and each affected CO_2 budget source accordingly.]

9VAC5-140-6050. Standard requirements.

A. Permit requirements shall be as follows.

1. The CO_2 authorized account representative of each CO_2 budget source required to have an operating permit pursuant to 9VAC5-85 (Permits for Stationary Sources of Pollutants Subject to Regulation) and each CO_2 budget unit required to have an operating permit pursuant to 9VAC5-85 shall:

a. Submit to the department a complete CO_2 budget permit application under 9VAC5-140-6160 in accordance with the deadlines specified in 9VAC5-140-6150; and

b. Submit in a timely manner any supplemental information that the department determines is necessary in order to review the CO_2 budget permit application and issue or deny a CO_2 budget permit.

2. The owners and operators of each CO_2 budget source required to have an operating permit pursuant to 9VAC5-85 (Permits for Stationary Sources of Pollutants Subject to Regulation) and each CO_2 budget unit required to have an operating permit pursuant to 9VAC5-85 for the source shall have a CO_2 budget permit and operate the CO_2 budget source and the CO_2 budget unit at the source in compliance with such CO_2 budget permit.

B. Monitoring requirements shall be as follows.

1. The owners and operators and, to the extent applicable, the CO_2 authorized account representative of each CO_2 budget source and each CO_2 budget unit at the source shall comply with the monitoring requirements of Article 8 (9VAC5-140-6330 et seq.) of this part.

2. The emissions measurements recorded and reported in accordance with Article 8 (9VAC5-140-6330 et seq.) of this part shall be used to determine compliance by the unit with the CO_2 requirements under subsection C of this section.

C. CO_2 requirements shall be as follows.

1. The owners and operators of each CO_2 budget source and each CO_2 budget unit at the source shall hold CO_2 allowances available for compliance deductions under 9VAC5-140-6260, as of the CO_2 allowance transfer deadline, in the source's compliance account in an amount not less than the total CO_2 emissions [that have been generated as a result of combusting fossil fuel] for the [initial control period, an interim control period, or] control period from all CO_2 budget units at the source, less the CO_2 allowances deducted to meet the requirements of subdivision 2 of this subsection, with respect to the previous two interim control periods as determined in accordance with Article 6 (9VAC5-140-6220 et seq.) and Article 8 (9VAC5-140-6330 et seq.) of this part.

2. The owners and operators of each CO_2 budget source and each CO_2 budget unit at the source shall hold CO_2 allowances available for compliance deductions under 9VAC5-140-6260, as of the CO_2 allowance transfer deadline, in the source's compliance account in an amount not less than the total CO_2 emissions [that have been generated as a result of combusting fossil fuel] for the [initial control period, an interim control period, or] for the interim control period from all CO_2 budget units at the source multiplied by 0.50, as determined in accordance with Article 6 (9VAC5-140-6220 et seq.) and Article 8 (9VAC5-140-6330 et seq.) of this part.

3. Each ton of CO_2 emitted in excess of the CO_2 budget emissions limitation for [the initial control period or] a control period shall constitute a separate violation of this part and applicable state law.

4. Each ton of excess interim emissions shall constitute a separate violation of this part and applicable state law.

5. A CO_2 budget unit shall be subject to the requirements under subdivision 1 of this subsection starting on the later of January 1, 2020, or the date on which the unit commences operation.

6. CO_2 allowances shall be held in, deducted from, or transferred among COATS accounts in accordance with Article 5 (9VAC5-140-6190 et seq.), Article 6 (9VAC5-140-6220 et seq.), and Article 7 (9VAC5-140-6300 et seq.) of this part.

7. A CO_2 allowance shall not be deducted, to comply with the requirements under subdivision 1 or 2 of this subsection, for a control period that ends prior to the year for which the CO_2 allowance was allocated.

8. A CO_2 allowance under the CO_2 Budget Trading Program is a limited authorization by the department to

emit one ton of CO_2 in accordance with the CO_2 Budget Trading Program. No provision of the CO_2 Budget Trading Program, the CO_2 budget permit application, or the CO_2 budget permit or any provision of law shall be construed to limit the authority of the department or a participating state to terminate or limit such authorization.

9. A CO_2 allowance under the CO_2 Budget Trading Program does not constitute a property right.

D. The owners and operators of a CO_2 budget source that has excess emissions in [~~any~~ an initial control period or a] control period shall:

1. Forfeit the CO_2 allowances required for deduction under 9VAC5-140-6260 D 1; and

2. Pay any fine, penalty, or assessment or comply with any other remedy imposed under 9VAC5-140-6260 D 2.

E. Recordkeeping and reporting requirements shall be as follows:

1. Unless otherwise provided, the owners and operators of the CO_2 budget source and each CO_2 budget unit at the source shall keep on site at the source each of the following documents for a period of 10 years from the date the document is created. This period may be extended for cause, at any time prior to the end of 10 years, in writing by the department.

a. The account certificate of representation for the CO_2 authorized account representative for the source and each CO_2 budget unit at the source and all documents that demonstrate the truth of the statements in the account certificate of representation, in accordance with 9VAC5-140-6110, provided that the certificate and documents shall be retained on site at the source beyond such 10-year period until such documents are superseded because of the submission of a new account certificate of representation changing the CO_2 authorized account representative.

b. All emissions monitoring information, in accordance with Article 8 (9VAC5-140-6330 et seq.) of this part and 40 CFR 75.57.

c. Copies of all reports, compliance certifications, and other submissions and all records made or required under the CO_2 Budget Trading Program.

d. Copies of all documents used to complete a CO_2 budget permit application and any other submission under the CO_2 Budget Trading Program or to demonstrate compliance with the requirements of the CO_2 Budget Trading Program.

2. The CO_2 authorized account representative of a CO_2 budget source and each CO_2 budget unit at the source shall submit the reports and compliance certifications required under the CO_2 Budget Trading Program, including those under Article 4 (9VAC5-140-6170 et seq.) of this part.

F. Liability requirements shall be as follows.

1. No permit revision shall excuse any violation of the requirements of the CO_2 Budget Trading Program that occurs prior to the date that the revision takes effect.

2. Any provision of the CO_2 Budget Trading Program that applies to a CO_2 budget source, including a provision applicable to the CO_2 authorized account representative of a CO_2 budget source, shall also apply to the owners and operators of such source and of the CO_2 budget units at the source.

3. Any provision of the CO_2 Budget Trading Program that applies to a CO_2 budget unit, including a provision applicable to the CO_2 authorized account representative of a CO_2 budget unit, shall also apply to the owners and operators of such unit.

G. No provision of the CO_2 Budget Trading Program, a CO_2 budget permit application, or a CO_2 budget permit shall be construed as exempting or excluding the owners and operators and, to the extent applicable, the CO_2 authorized account representative of the CO_2 budget source or CO_2 budget unit from compliance with any other provisions of applicable state and federal law or regulations.

9VAC5-140-6060. Computation of time.

A. Unless otherwise stated, any time period scheduled, under the CO_2 Budget Trading Program, to begin on the occurrence of an act or event shall begin on the day the act or event occurs.

B. Unless otherwise stated, any time period scheduled, under the CO_2 Budget Trading Program, to begin before the occurrence of an act or event shall be computed so that the period ends the day before the act or event occurs.

C. Unless otherwise stated, if the final day of any time period, under the CO_2 Budget Trading Program, falls on a weekend or a state or federal holiday, the time period shall be extended to the next business day.

9VAC5-140-6070. Severability.

If any provision of this part, or its application to any particular person or circumstances, is held invalid, the remainder of this part, and the application thereof to other persons or circumstances, shall not be affected thereby.

Article 2
CO_2 Authorized Account Representative for CO_2 Budget Sources

9VAC5-140-6080. Authorization and responsibilities of the CO_2 authorized account representative.

A. Except as provided under 9VAC5-140-6090, each CO_2 budget source, including all CO_2 budget units at the source, shall have one and only one CO_2 authorized account representative, with regard to all matters under the CO_2 Budget Trading Program concerning the source or any CO_2 budget unit at the source.

B. The CO_2 authorized account representative of the CO_2 budget source shall be selected by an agreement binding on the owners and operators of the source and all CO_2 budget units at the source and must act in accordance with the [account] certificate of representation under 9VAC5-140-6110.

C. Upon receipt by the department or its agent of a complete account certificate of representation under 9VAC5-140-6110, the CO_2 authorized account representative of the source shall represent and, by his representations, actions, inactions, or submissions, legally bind each owner and operator of the CO_2 budget source represented and each CO_2 budget unit at the source in all matters pertaining to the CO_2 Budget Trading Program, notwithstanding any agreement between the CO_2 authorized account representative and such owners and operators. The owners and operators shall be bound by any decision or order issued to the CO_2 authorized account representative by the department or a court regarding the source or unit.

D. No CO_2 budget permit shall be issued, and no COATS account shall be established for a CO_2 budget source, until the department or its agent has received a complete account certificate of representation under 9VAC5-140-6110 for a CO_2 authorized account representative of the source and the CO_2 budget units at the source.

E. Each submission under the CO_2 Budget Trading Program shall be submitted, signed, and certified by the CO_2 authorized account representative for each CO_2 budget source on behalf of which the submission is made. Each such submission shall include the following certification statement by the CO_2 authorized account representative: "I am authorized to make this submission on behalf of the owners and operators of the CO_2 budget sources or CO_2 budget units for which the submission is made. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

F. The department or its agent will accept or act on a submission made on behalf of owners or operators of a CO_2 budget source or a CO_2 budget unit only if the submission has been made, signed, and certified in accordance with subsection E of this section.

9VAC5-140-6090. ~~Alternate~~ CO_2 authorized alternate account representative.

A. An account certificate of representation may designate one and only one ~~alternate~~ CO_2 authorized alternate account representative who may act on behalf of the CO_2 authorized account representative. The agreement by which the ~~alternate~~ CO_2 authorized alternate account representative is selected shall include a procedure for authorizing the ~~alternate~~ CO_2 authorized alternate account representative to act in lieu of the CO_2 authorized account representative.

B. Upon receipt by the department or its agent of a complete account certificate of representation under 9VAC5-140-6110, any representation, action, inaction, or submission by the ~~alternate~~ CO_2 authorized alternate account representative shall be deemed to be a representation, action, inaction, or submission by the CO_2 authorized account representative.

C. Except in this section and 9VAC5-140-6080 A, 9VAC5-140-6100, 9VAC5-140-6110, and 9VAC5-140-6230, whenever the term "CO_2 authorized account representative" is used in this part, the term shall be construed to include the ~~alternate~~ CO_2 authorized alternate account representative.

9VAC5-140-6100. Changing the CO_2 authorized account representatives and the ~~alternate~~ CO_2 authorized alternate account representative; changes in the owners and operators.

A. The CO_2 authorized account representative may be changed at any time upon receipt by the department or its agent of a superseding complete account certificate of representation under 9VAC5-140-6110. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative prior to the time and date when the department or its agent receives the superseding account certificate of representation shall be binding on the new CO_2 authorized account representative and the owners and operators of the CO_2 budget source and the CO_2 budget units at the source.

B. The ~~alternate~~ CO_2 authorized alternate account representative may be changed at any time upon receipt by the department or its agent of a superseding complete account certificate of representation under 9VAC5-140-6110. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous ~~or~~

~~alternate~~ CO_2 authorized alternate account representative or ~~alternate~~ CO_2 authorized alternate account representative prior to the time and date when the department or its agent receives the superseding account certificate of representation shall be binding on the new ~~alternate~~ CO_2 authorized alternate account representative and the owners and operators of the CO_2 budget source and the CO_2 budget units at the source.

C. Changes in the owners and operators shall be addressed as follows.

1. In the event a new owner or operator of a CO_2 budget source or a CO_2 budget unit is not included in the list of owners and operators submitted in the account certificate of representation, such new owner or operator shall be deemed to be subject to and bound by the account certificate of representation, the representations, actions, inactions, and submissions of the CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative of the source or unit, and the decisions, orders, actions, and inactions of the department, as if the new owner or operator were included in such list.

2. Within 30 days following any change in the owners and operators of a CO_2 budget source or a CO_2 budget unit, including the addition of a new owner or operator, the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative shall submit a revision to the account certificate of representation amending the list of owners and operators to include the change.

9VAC5-140-6110. Account certificate of representation.

A. A complete account certificate of representation for a CO_2 authorized account representative or ~~an alternate~~ a CO_2 authorized alternate account representative shall include the following elements in a format prescribed by the department or its agent:

1. Identification of the CO_2 budget source and each CO_2 budget unit at the source for which the account certificate of representation is submitted;

2. The name, address, email address, telephone number, and facsimile transmission number of the CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative;

3. A list of the owners and operators of the CO_2 budget source and of each CO_2 budget unit at the source;

4. The following certification statement by the CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative: "I certify that I was selected as the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative, as applicable, by an agreement binding on the owners and operators of the CO_2 budget source and each CO_2 budget unit at the source. I certify that I have all the necessary authority to carry out my duties and responsibilities under the CO_2 Budget Trading Program on behalf of the owners and operators of the CO_2 budget source and of each CO_2 budget unit at the source and that each such owner and operator shall be fully bound by my representations, actions, inactions, or submissions and by any decision or order issued to me by the department or a court regarding the source or unit."; and

5. The signature of the CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative and the dates signed.

B. Unless otherwise required by the department or its agent, documents of agreement referred to in the account certificate of representation shall not be submitted to the department or its agent. Neither the department nor its agent shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

9VAC5-140-6120. Objections concerning the CO_2 authorized account representative.

A. Once a complete account certificate of representation under 9VAC5-140-6110 has been submitted and received, the department and its agent will rely on the account certificate of representation unless and until the department or its agent receives a superseding complete account certificate of representation under 9VAC5-140-6110.

B. Except as provided in 9VAC5-140-6100 A or B, no objection or other communication submitted to the department or its agent concerning the authorization, or any representation, action, inaction, or submission of the CO_2 authorized account representative shall affect any representation, action, inaction, or submission of the CO_2 authorized account representative or the finality of any decision or order by the department or its agent under the CO_2 Budget Trading Program.

C. Neither the department nor its agent will adjudicate any private legal dispute concerning the authorization or any representation, action, inaction, or submission of any CO_2 authorized account representative, including private legal disputes concerning the proceeds of CO_2 allowance transfers.

9VAC5-140-6130. Delegation by CO_2 authorized account representative and ~~alternate~~ CO_2 authorized alternate account representative.

A. A CO_2 authorized account representative may delegate, to one or more natural persons, his authority to make an electronic submission to the department or its agent under this part.

B. ~~An alternate~~ A CO_2 authorized alternate account representative may delegate, to one or more natural persons, his authority to make an electronic submission to the department or its agent under this part.

C. To delegate authority to make an electronic submission to the department or its agent in accordance with subsections A and B of this section, the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative, as appropriate, shall submit to the department or its agent a notice of delegation, in a format prescribed by the department that includes the following elements:

1. The name, address, email address, telephone number, and facsimile transmission number of such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative;

2. The name, address, email address, telephone number, and facsimile transmission number of each such natural person, referred to as the "electronic submission agent";

3. For each such natural person, a list of the type of electronic submissions under subsection A or B of this section for which authority is delegated to him; and

4. The following certification statement by such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative: "I agree that any electronic submission to the department or its agent that is by a natural person identified in this notice of delegation and of a type listed for such electronic submission agent in this notice of delegation and that is made when I am a CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative, as appropriate, and before this notice of delegation is superseded by another notice of delegation under 9VAC5-140-6130 D shall be deemed to be an electronic submission by me. Until this notice of delegation is superseded by another notice of delegation under 9VAC5-140-6130 D, I agree to maintain an email account and to notify the department or its agent immediately of any change in my email address unless all delegation authority by me under 9VAC5-140-6130 is terminated."

D. A notice of delegation submitted under subsection C of this section shall be effective, with regard to the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative identified in such notice, upon receipt of such notice by the department or its agent and until receipt by the department or its agent of a superseding notice of delegation by such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative as appropriate. The superseding notice of delegation may replace any previously identified electronic submission agent, add a new electronic submission agent, or eliminate entirely any delegation of authority.

E. Any electronic submission covered by the certification in subdivision C 4 of this section and made in accordance with a notice of delegation effective under subsection D of this section shall be deemed to be an electronic submission by the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative submitting such notice of delegation.

F. A CO_2 authorized account representative may delegate, to one or more natural persons, his authority to review information in the CO_2 allowance tracking system under this part.

G. ~~An alternate~~ A CO_2 authorized alternate account representative may delegate, to one or more natural persons, his authority to review information in the CO_2 allowance tracking system under this part.

H. To delegate authority to review information in the CO_2 allowance tracking system in accordance with subsections F and G of this section, the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative, as appropriate, ~~must~~ shall submit to the department or its agent a notice of delegation, in a format prescribed by the department that includes the following elements:

1. The name, address, email address, telephone number, and facsimile transmission number of such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative;

2. The name, address, email address, telephone number, and facsimile transmission number of each such natural person, referred to as the "reviewer";

3. For each such natural person, a list of the type of information under subsection F or G of this section for which authority is delegated to him; and

4. The following certification statement by such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative: "I agree that any information that is reviewed by a natural person identified in this notice of delegation and of a type listed for such information accessible by the reviewer in this notice of delegation and that is made when I am a CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative, as appropriate, and before this notice of delegation is superseded by another notice of delegation under subsection I of this section shall be deemed to be a reviewer by me. Until this notice of delegation is superseded by another notice of delegation under subsection I of this section, I agree to maintain an email account and to notify the department or its agent immediately of any change in my email address unless all delegation authority by me under this section is terminated."

I. A notice of delegation submitted under subsection H of this section shall be effective, with regard to the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative identified in such notice,

upon receipt of such notice by the department or its agent and until receipt by the department or its agent of a superseding notice of delegation by such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative as appropriate. The superseding notice of delegation may replace any previously identified reviewer, add a new reviewer, or eliminate entirely any delegation of authority.

Article 3
Permits

9VAC5-140-6140. CO_2 budget permit requirements.

A. Each CO_2 budget source shall have a permit issued by the department pursuant to 9VAC5-85 (Permits for Stationary Sources of Pollutants Subject to Regulation).

B. Each CO_2 budget permit shall contain all applicable CO_2 Budget Trading Program requirements and shall be a complete and distinguishable portion of the permit under subsection A of this section.

9VAC5-140-6150. Submission of CO_2 budget permit applications.

For any CO_2 budget source, the CO_2 authorized account representative shall submit a complete CO_2 budget permit application under 9VAC5-140-6160 covering such CO_2 budget source to the department by the later of January 1, 2020, or 12 months before the date on which the CO_2 budget source, or a new unit at the source, commences operation.

9VAC5-140-6160. Information requirements for CO_2 budget permit applications.

A complete CO_2 budget permit application shall include the following elements concerning the CO_2 budget source for which the application is submitted, in a format prescribed by the department:

1. Identification of the CO_2 budget source, including plant name and the ORIS (Office of Regulatory Information Systems) or facility code assigned to the source by the Energy Information Administration of the U.S. Department of Energy if applicable;

2. Identification of each CO_2 budget unit at the CO_2 budget source; and

3. The standard requirements under 9VAC5-140-6050.

Article 4
Compliance Certification

9VAC5-140-6170. Compliance certification report.

A. For [the initial control period and] each control period in which a CO_2 budget source is subject to the CO_2 requirements of 9VAC5-140-6050 C, the CO_2 authorized account representative of the source shall submit to the department by March 1 following the relevant control period, a compliance certification report. A compliance certification report is not required as part of the compliance obligation during an interim control period.

B. The CO_2 authorized account representative shall include in the compliance certification report under subsection A of this section the following elements, in a format prescribed by the department:

1. Identification of the source and each CO_2 budget unit at the source;

2. At the CO_2 authorized account representative's option, the serial numbers of the CO_2 allowances that are to be deducted from the source's compliance account under 9VAC5-140-6260 for the control period; and

3. The compliance certification under subsection C of this section.

C. In the compliance certification report under subsection A of this section, the CO_2 authorized account representative shall certify, based on reasonable inquiry of those persons with primary responsibility for operating the source and the CO_2 budget units at the source in compliance with the CO_2 Budget Trading Program, whether the source and each CO_2 budget unit at the source for which the compliance certification is submitted was operated during the calendar years covered by the report in compliance with the requirements of the CO_2 Budget Trading Program, including:

1. Whether the source was operated in compliance with the CO_2 requirements of 9VAC5-140-6050 C;

2. Whether the monitoring plan applicable to each unit at the source has been maintained to reflect the actual operation and monitoring of the unit, and contains all information necessary to attribute CO_2 emissions to the unit, in accordance with Article 8 (9VAC5-140-6330 et seq.) of this part;

3. Whether all the CO_2 emissions from the units at the source were monitored or accounted for through the missing data procedures and reported in the quarterly monitoring reports, including whether conditional data were reported in the quarterly reports in accordance with Article 8 (9VAC5-140-6330 et seq.) of this part. If conditional data were reported, the owner or operator shall indicate whether the status of all conditional data has been resolved and all necessary quarterly report resubmissions have been made;

4. Whether the facts that form the basis for certification under Article 8 (9VAC5-140-6330 et seq.) of this part of each monitor at each unit at the source, or for using an excepted monitoring method or alternative monitoring method approved under Article 8 (9VAC5-140-6330 et seq.) of this part, if any, have changed; and

5. If a change is required to be reported under subdivision 4 of this subsection, specify the nature of the change, the reason for the change, when the change occurred, and how the unit's compliance status was determined subsequent to the change, including what method was used to determine emissions when a change mandated the need for monitor recertification.

9VAC5-140-6180. Action on compliance certifications.

A. The department or its agent may review and conduct independent audits concerning any compliance certification or any other submission under the CO_2 Budget Trading Program and make appropriate adjustments of the information in the compliance certifications or other submissions.

B. The department or its agent may deduct CO_2 allowances from or transfer CO_2 allowances to a source's compliance account based on the information in the compliance certifications or other submissions, as adjusted under subsection A of this section.

Article 5
CO_2 Allowance Allocations

~~Editor's Note: Two versions of 9VAC5-140-6190 are provided for comment. The board seeks comment on whether the base budget should be 33 million tons or 34 million tons, with corresponding 3.0% per year reductions. The first version (Version 1) represents a 33 million ton base budget, and the second version (Version 2) represents a 34 million ton base budget.~~

9VAC5-140-6190. Base budgets.

~~**Version 1, 33 million ton base budget:**~~

A. The Virginia CO_2 Budget Trading Program base budget shall be as follows:

1. For 2020, the Virginia CO_2 Budget Trading Program base budget is ~~33~~ 28 million tons.

2. For 2021, the Virginia CO_2 Budget Trading Program base budget is ~~32.01~~ 27.16 million tons.

3. For 2022, the Virginia CO_2 Budget Trading Program base budget is ~~31.02~~ 26.32 million tons.

4. For 2023, the Virginia CO_2 Budget Trading Program base budget is ~~30.03~~ 25.48 million tons.

5. For 2024, the Virginia CO_2 Budget Trading Program base budget is ~~29.04~~ 24.64 million tons.

6. For 2025, the Virginia CO_2 Budget Trading Program base budget is ~~28.05~~ 23.80 million tons.

7. For 2026, the Virginia CO_2 Budget Trading Program base budget is ~~27.06~~ 22.96 million tons.

8. For 2027, the Virginia CO_2 Budget Trading Program base budget is ~~26.07~~ 22.12 million tons.

9. For 2028, the Virginia CO_2 Budget Trading Program base budget is ~~25.08~~ 21.28 million tons.

10. For 2029, the Virginia CO_2 Budget Trading Program base budget is ~~24.09~~ 20.44 million tons.

11. For 2030, the Virginia CO_2 Budget Trading Program base budget is ~~23.10~~ 19.60 million tons.

B. The department will allocate conditional allowances to CO_2 budget units and to DMME. After a conditional allowance has been consigned in an auction by a CO_2 budget unit [~~and~~ or] the holder of a public contract with DMME as specified under Article 9 (9VAC5-140-6410 et seq.) of this part, the conditional allowance becomes [~~an allowance to be used for compliance purposes~~ a CO_2 allowance once it is sold to an auction participant].

C. For 2031 and each succeeding calendar year, ~~the Virginia CO_2 Budget Trading Program base budget is 23.10 million tons~~ [~~the department will review the Virginia CO_2 Budget Trading Program base budget and recommend to the board appropriate adjustments in the base budget for such succeeding years. The department will consider the best available science and all relevant information and policies available from any CO_2 multistate trading program in which Virginia is participating when considering further reductions. Absent any adjustment, the Virginia CO_2 Budget Trading Program base budget for each year of the decade 2031-2040 shall be reduced by 840,000 tons from the preceding year~~ the Virginia CO_2 Budget Trading Program base budget is 19.60 million tons unless modified as a result of a program review and future regulatory action].

~~**Version 2, 34 million ton base budget:**~~

~~A. The Virginia CO_2 Budget Trading Program base budget shall be as follows:~~

~~1. For 2020, the Virginia CO_2 Budget Trading Program base budget is 34 million tons.~~

~~2. For 2021, the Virginia CO_2 Budget Trading Program base budget is 32.98 million tons.~~

~~3. For 2022, the Virginia CO_2 Budget Trading Program base budget is 31.96 million tons.~~

~~4. For 2023, the Virginia CO_2 Budget Trading Program base budget is 30.94 million tons.~~

~~5. For 2024, the Virginia CO_2 Budget Trading Program base budget is 29.92 million tons.~~

~~6. For 2025, the Virginia CO_2 Budget Trading Program base budget is 28.90 million tons.~~

~~7. For 2026, the Virginia CO_2 Budget Trading Program base budget is 27.88 million tons.~~

~~8. For 2027, the Virginia CO_2 Budget Trading Program base budget is 26.86 million tons.~~

~~9. For 2028, the Virginia CO_2 Budget Trading Program base budget is 25.84 million tons.~~

~~10. For 2029, the Virginia CO_2 Budget Trading Program base budget is 24.82 million tons.~~

~~11. For 2030, the Virginia CO_2 Budget Trading Program base budget is 23.80 million tons.~~

~~B. The department will allocate conditional allowances to CO_2 budget units and to DMME. After a conditional allowance has been consigned in an auction by a CO_2 budget unit and the holder of a public contract with DMME as specified under Article 9 (9VAC5-140-6410 et seq.) of this part, the conditional allowance becomes an allowance to be used for compliance purposes.~~

~~C. For 2031 and each succeeding calendar year, the Virginia CO_2 Budget Trading Program base budget is 23.80 million tons.~~

9VAC5-140-6200. Undistributed and unsold [~~CO_2~~ conditional] allowances.

A. The department ~~may~~ will retire undistributed ~~CO_2~~ conditional allowances at the end of [the initial control period and] each [subsequent] control period.

B. The department ~~may~~ will retire unsold ~~CO_2~~ conditional allowances at the end of [the initial control period and] each [subsequent] control period.

~~Editor's Note: Two versions of 9VAC5-140-6210 are provided for comment. The board seeks comment on whether the base budget should be 33 million tons or 34 million tons, with corresponding 3.0% per year reductions. The first version (Version 1) represents a 33 million ton base budget, and the second version (Version 2) represents a 34 million ton base budget.~~

9VAC5-140-6210. [~~CO_2~~ Conditional] allowance allocations.

~~**Version 1, 33 million ton base budget:**~~

A. The department will allocate ~~95% of~~ the Virginia CO_2 Budget Trading Program base budget [conditional] allowances to CO_2 budget sources to be consigned to auction to the Virginia Consignment Auction Account.

~~B. The department will allocate 5.0% of the Virginia CO_2 Budget Trading Program base budget to DMME to be consigned to auction by DMME to assist the department for the abatement and control of air pollution, specifically, CO_2.~~

~~C.~~ B. For allocation years 2020 through 2031, the Virginia CO_2 Budget Trading Program adjusted budget shall be the maximum number of allowances available for allocation in a given allocation year, except for [~~CO_2~~ conditional] CCR allowances.

~~D.~~ C. [Conditional allowances allocated for a calendar year will be automatically transferred to the Virginia Consignment Auction Account to be consigned to auction. Following each auction, all conditional allowances sold at the auction will be transferred from the Virginia Consignment Auction Account to winning bidders' accounts as CO_2 allowances.

D.] The cost containment reserve (CCR) allocation shall be managed as follows. The department will allocate [~~CO_2~~ conditional] CCR allowances, separate from and additional to the Virginia CO_2 Budget Trading Program base budget set forth in 9VAC5-140-6190 [~~,~~] to the Virginia [Consignment] Auction Account. The CCR allocation is for the purpose of containing the cost of CO_2 allowances. The department will allocate [~~CO_2~~ conditional] CCR allowances as follows [~~,~~ :]

1. ~~The~~ Beginning in calendar year 2020, the department will initially allocate ~~3.3 million~~ [~~CO_2,~~] on a pro rata basis to CO_2 budget sources, 2.8 million [conditional] CO_2 CCR allowances ~~for calendar year 2020~~.

2. On or before January 1, 2021, and each year thereafter, the department will allocate, on a pro rata basis to CO_2 budget sources, current vintage year [conditional] CCR allowances equal to the quantity in Table 140-5A [~~, and withdraw the number of CO_2 CCR allowances that remain in the Virginia Auction Account at the end of the prior calendar year~~].

Table 140-5A
[Conditional] CCR Allowances from 2021 Forward

2021	~~3.201~~ 2.716 million tons
2022	~~3.102~~ 2.632 million tons
2023	~~3.003~~ 2.548 million tons
2024	~~2.904~~ 2.464 million tons
2025	~~2.805~~ 2.380 million tons
2026	~~2.706~~ 2.296 million tons
2027	~~2.607~~ 2.212 million tons
2028	~~2.508~~ 2.128 million tons
2029	~~2.409~~ 2.044 million tons
2030 and each year thereafter	~~2.310~~ 1.960 million tons

3. The pro rata calculation to be used for the distribution of [~~CO_2~~ conditional] CCR allowances is as follows:

SAA/TAA * CCR = SCCR

Where:

SAA = source adjusted allocation

TAA = total adjusted allocation

SCCR = source CCR

[4. Conditional CCR allowances allocated for a calendar year will be automatically transferred to the Virginia Consignment Auction Account to be consigned to auction. Following each auction, all conditional CCR allowances sold at auction will be transferred to winning bidders' accounts as CO_2 CCR allowances.

5. Unsold conditional CCR allowances will remain in the Virginia Consignment Auction Account to be re-offered for sale at auction within the same calendar year. Conditional CCR allowances remaining unsold at the end of the calendar year in which they were originated will be made unavailable for sale at future auctions.]

[E.] ~~Annual base budgets as described in subsections A and B of this section may be decreased in any year as necessary to account for transfers to the Virginia Emission Containment Reserve (ECR) account and adjustments for banked allowances [D.]~~ In the event that the ECR is triggered during an auction, the department will authorize its agent to withhold conditional allowances as needed. The department will further authorize its agent to convert and transfer any ~~CO_2~~ conditional allowances that have been withheld from any auction ~~in the prior year~~ into the Virginia ECR account. The ECR withholding is for the purpose of additional emission reduction in the event of lower than anticipated emission reduction costs. The ~~department~~ department's agent will withhold CO_2 ECR allowances as follows:

1. If the condition in 9VAC5-140-6420 D 1 is met at an auction, then the maximum number of CO_2 ECR allowances that will be withheld from that auction will be equal to the quantity shown in Table 140-5B minus the total quantity of CO_2 ECR allowances that have been withheld from any prior auction in that calendar year. Any CO_2 ECR allowances withheld from an auction will be transferred into the Virginia ECR account.

Table 140-5B
ECR Allowances from 2021 Forward

2021	~~3.201~~ 2.716 million tons
2022	~~3.102~~ 2.632 million tons
2023	~~3.003~~ 2.548 million tons
2024	~~2.904~~ 2.464 million tons
2025	~~2.805~~ 2.380 million tons
2026	~~2.706~~ 2.296 million tons
2027	~~2.607~~ 2.212 million tons
2028	~~2.508~~ 2.128 million tons
2029	~~2.409~~ 2.044 million tons
2030 and each year thereafter	~~2.310~~ 1.960 million tons

2. Allowances that have been transferred into the Virginia ECR account shall not be withdrawn.

F. ~~E.~~ The adjustment for banked allowances ~~shall~~ will be as follows. On March [15 ~~17~~], 2021, the department ~~will~~ may determine the ~~third~~ adjustment for banked allowances quantity for allocation years 2021 through 2025 through the application of the following formula:

TABA = ((TA – TAE)/5) x RS%

Where:

TABA is the adjustment for banked allowances quantity in tons.

TA, adjustment, is the total quantity of allowances of vintage years prior to 2021 held in general and compliance accounts, including compliance accounts established pursuant to the CO_2 Budget Trading Program but not including accounts opened by participating states, as reflected in the CO_2 Allowance Tracking System on March 15, 2021.

TAE, adjustment emissions, is the total quantity of 2018, 2019, and 2020 emissions from all CO_2 budget sources in all participating states, reported pursuant to CO_2 Budget Trading Program as reflected in the CO_2 Allowance Tracking System on March [15 ~~17~~], 2021.

RS% is Virginia budget divided by the regional budget.

G. ~~F.~~ CO_2 Budget Trading Program adjusted budgets for 2021 through 2025 shall be determined as follows [~~. On~~: on April 15, 2021, the department will determine the Virginia CO_2 Budget Trading Program adjusted budgets for the 2021 through 2025 allocation years by the following formula:

AB = BB – TABA

Where:

AB is the Virginia CO_2 Budget Trading Program adjusted budget.

BB is the Virginia CO_2 Budget Trading Program base budget.

TABA is the adjustment for banked allowances quantity in tons.

H. ~~G.~~ The department or its agent will publish the CO_2 trading program adjusted budgets for the 2021 through 2025 allocation years.

I. ~~H.~~ Timing requirements for [~~CO_2~~ conditional] allowance allocations shall be as follows~~.~~:

1. By [~~May 1~~ August 25], 2019, the department will submit to ~~RGGI, Inc.,~~ its agent the ~~CO_2~~ conditional allowance allocations~~, in a format prescribed by RGGI, Inc., and~~ in accordance with 9VAC5-140-6215 A and B, for the initial control period, 2020.

2. By [~~May 1~~ the month and day established by subdivision 1 of this subsection], 2020, the department will submit to its agent 50% of the conditional allowance allocations in accordance with 9VAC5-140-6215 A and B, for the 2021 control period. By [~~April 1~~ the month and day one month before the date established by subdivision 1 of this subsection], 2021, the department will submit to its agent the remainder of the conditional allowance allocations in accordance with 9VAC5-140-6215 A and B, for 2021.

3. By [~~May 1,~~] ~~2020~~ [the month and day established by subdivision 1 of this subsection,] 2021, and [~~May 1~~ the month and day established by subdivision 1 of this subsection] of every ~~third~~ subsequent year thereafter, the department will submit to ~~RGGI, Inc.,~~ its agent the [~~CO_2~~ conditional] allowance allocations~~, in a format prescribed by RGGI, Inc.,~~ for the applicable control period~~, and~~ in accordance with 9VAC5-140-6215 A and B.

~~I.~~ J. Implementation of the CCR (subsection C of this section), the ECR (subsection D of this section) and the banking adjustment (subsection E of this section) shall be determined based on the extent of the CO_2 trading program.

[K. Conditional allowances and conditional CCR allowances allocated for a calendar year will be automatically transferred to the Virginia Consignment Auction Account to be consigned to auction. Following each auction, all conditional allowances sold at the auction will be transferred from the Virginia Consignment Auction Account to winning bidders' accounts as CO_2 allowances. Conditional CCR allowances sold at auction will be transferred to winning bidders' accounts as CO_2 CCR allowances. Unsold conditional CCR allowances will remain in the Virginia Consignment Auction Account to be re-offered for sale at auction within the same calendar year. Conditional CCR allowances remaining unsold at the end of the calendar year in which they were originated will be made unavailable for sale at future auctions.]

~~**Version 2, 34 million ton base budget:**~~

~~A. The department will allocate 95% of the Virginia CO_2 Budget Trading Program base budget to CO_2 budget sources to be consigned to auction to the Virginia Consignment Auction Account.~~

~~B. The department will allocate 5.0% of the Virginia CO_2 Budget Trading Program base budget to DMME to be consigned to auction by the holder of a public contract with DMME to assist the department for the abatement and control of air pollution, specifically CO_2.~~

~~C. For allocation years 2020 through 2031, the Virginia CO_2 Budget Trading Program adjusted budget shall be the maximum number of allowances available for allocation in a given allocation year, except for CO_2 CCR allowances.~~

~~D. The cost containment reserve (CCR) allocation shall be managed as follows. The department will allocate CO_2 CCR allowances, separate from and additional to the Virginia CO_2 Budget Trading Program base budget set forth in 9VAC5-140-6190, to the Virginia Auction Account. The CCR allocation is for the purpose of containing the cost of CO_2 allowances. The department will allocate CO_2 CCR allowances as follows.~~

~~1. The department will initially allocate 3.4 million CO_2 CCR allowances for calendar year 2020.~~

~~2. On or before January 1, 2021, and each year thereafter, the department will allocate current vintage year CCR allowances equal to the quantity in Table 140-5A, and withdraw the number of CO_2 CCR allowances that remain in the Virginia Auction Account at the end of the prior calendar year.~~

~~Table 140-5A~~
~~CCR Allowances from 2021 Forward~~

~~2021~~	~~3.298 million tons~~
~~2022~~	~~3.196 million tons~~
~~2023~~	~~3.094 million tons~~
~~2024~~	~~2.992 million tons~~
~~2025~~	~~2.890 million tons~~
~~2026~~	~~2.788 million tons~~
~~2027~~	~~2.686 million tons~~
~~2028~~	~~2.584 million tons~~
~~2029~~	~~2.482 million tons~~
~~2030 and each year thereafter~~	~~2.390 million tons~~

~~E. Annual base budgets as described in subsections A and B of this section may be decreased in any year as necessary to account for transfers to the Virginia Emission Containment Reserve (ECR) account and adjustments for banked allowances. The department will convert and transfer any CO_2 allowances that have been withheld from any auction in the prior year into the Virginia ECR account. The ECR withholding is for the purpose of additional emission reduction in the event of lower than anticipated emission reduction costs. The department will withhold CO_2 ECR allowances as follows:~~

~~1. If the condition in 9VAC5-140-6420 D 1 is met at an auction, then the maximum number of CO_2 ECR allowances that will be withheld from that auction will be equal to the quantity shown in Table 140-5B minus the total quantity of CO_2 ECR allowances that have been withheld from any prior auction in that calendar year. Any~~

~~CO_2 ECR allowances withheld from an auction will be transferred into the Virginia ECR account.~~

~~Table 140-5B ECR Allowances from 2021 Forward~~	
~~2021~~	~~3.298 million tons~~
~~2022~~	~~3.196 million tons~~
~~2023~~	~~3.094 million tons~~
~~2024~~	~~2.992 million tons~~
~~2025~~	~~2.890 million tons~~
~~2026~~	~~2.788 million tons~~
~~2027~~	~~2.686 million tons~~
~~2028~~	~~2.584 million tons~~
~~2029~~	~~2.482 million tons~~
~~2030 and each year thereafter~~	~~2.390 million tons~~

~~2. Allowances that have been transferred into the Virginia ECR account shall not be withdrawn.~~

~~F. The adjustment for banked allowances shall be as follows. On March 15, 2021, the department will determine the third adjustment for banked allowances quantity for allocation years 2021 through 2025 through the application of the following formula:~~

~~TABA = ((TA – TAE)/5) x RS%~~

~~Where:~~

~~TABA is the adjustment for banked allowances quantity in tons.~~

~~TA, adjustment, is the total quantity of allowances of vintage years prior to 2021 held in general and compliance accounts, including compliance accounts established pursuant to the CO_2 Budget Trading Program but not including accounts opened by participating states, as reflected in the CO_2 Allowance Tracking System on March 15, 2021.~~

~~TAE, adjustment emissions, is the total quantity of 2018, 2019, and 2020 emissions from all CO_2 budget sources in all participating states, reported pursuant to CO_2 Budget Trading Program as reflected in the CO_2 Allowance Tracking System on March 15, 2021.~~

~~RS% is Virginia budget divided by the regional budget.~~

~~G. CO_2 Budget Trading Program adjusted budgets for 2021 through 2025 shall be determined as follows. On April 15, 2021, the department will determine the Virginia CO_2 Budget Trading Program adjusted budgets for the 2021 through 2025 allocation years by the following formula:~~

~~AB = BB – TABA~~

~~Where:~~

~~AB is the Virginia CO_2 Budget Trading Program adjusted budget.~~

~~BB is the Virginia CO_2 Budget Trading Program base budget.~~

~~TABA is the adjustment for banked allowances quantity in tons.~~

~~H. The department or its agent will publish the CO_2 trading program adjusted budgets for the 2021 through 2025 allocation years.~~

~~I. Timing requirements for CO_2 allowance allocations shall be as follows:~~

~~1. By May 1, 2019, the department will submit to RGGI, Inc., the CO_2 conditional allowance allocations, in a format prescribed by RGGI, Inc., and in accordance with 9VAC5-140-6215 A and B, for the initial control period, 2020.~~

~~2. By May 1, 2020, and May 1 of every third year thereafter, the department will submit to RGGI, Inc., the CO_2 allowance allocations, in a format prescribed by RGGI, Inc., for the applicable control period, and in accordance with 9VAC5-140-6215 A and B.~~

9VAC5-140-6211. [~~CO_2~~ Conditional] allowance allocations, DMME allowances.

Notwithstanding 9VAC5-140-6210, the department will allocate 5.0% of the Virginia CO_2 Budget Trading Program base or adjusted budget allowances, as applicable, to DMME to be consigned to auction by the holder of a public contract with DMME to assist the department for the abatement and control of air pollution, specifically CO_2, by the implementation of programs that lower base and peak electricity demand and reduce the cost of the program to consumers and budget sources.

9VAC5-140-6215. [~~CO_2~~ Conditional] allocation methodology.

A. The net-electric output in MWh used with respect to [~~CO_2~~ conditional] allowance allocations under subsection B of this section for each CO_2 budget unit shall be:

1. For units operating on or before January 1, 2020, the average of the three amounts of the unit's net-electric output during 2016, 2017, and 2018 to determine allocations for the initial control period.

2. For all units operating in each control period after 2020, the average of the three amounts of the unit's total net-electric output during the three most recent years for which data are available prior to the start of the control period.

B. 1. For each control period beginning in 2020 and thereafter, the department will allocate to all CO_2 budget units

that have a net-electric output, as determined under subsection A of this section, a total amount of [~~CO_2~~] conditional allowances equal to the CO_2 base budget.

2. The department will allocate [~~CO_2~~] conditional allowances to each [~~CO_2~~ conditional] budget unit under subdivision 1 of this subsection in an amount determined by multiplying the total amount of CO_2 allowances allocated under subdivision 1 of this subsection by the ratio of the baseline electrical output of such CO_2 budget unit to the total amount of baseline electrical output of all such CO_2 budget units and rounding to the nearest whole allowance as appropriate.

3. New CO_2 budget units will be allocated [~~CO_2~~] conditional allowances once they have established electrical output data to be used in the conditional allowance allocation process.

C. For the purpose of the allocation process as described in subsections A and B of this section, CO_2 budget units shall report the unit's net-electric output to the department on a yearly basis as follows:

1. By [~~March 1~~ August 25], 2019, each CO_2 budget unit shall report yearly net-electric output data during 2016, 2017, and 2018.

2. By [~~March 1,~~ the month and day established by subdivision 1 of this subsection,] 2020, and each year thereafter, each CO_2 budget unit shall report yearly net-electric output data for the previous year.

Article 6
CO_2 Allowance Tracking System

9VAC5-140-6220. CO_2 Allowance Tracking System accounts.

A. Consistent with 9VAC5-140-6230 A, the department or its agent will establish one compliance account for each CO_2 budget source. Allocations of [~~CO_2~~] conditional allowances pursuant to Article 5 (9VAC5-140-6190 et seq.) of this part and deductions or transfers of [~~CO_2~~] conditional allowances pursuant to 9VAC5-140-6180, 9VAC5-140-6260, 9VAC5-140-6280, or Article 7 (9VAC5-140-6300 et seq.) of this part will be recorded in the compliance accounts in accordance with this section.

B. Consistent with 9VAC5-140-6230 B, the department or its agent will establish, upon request, a general account for any person. Transfers of CO_2 allowances pursuant to Article 7 (9VAC5-140-6300 et seq.) of this part will be recorded in the general account in accordance with this article.

9VAC5-140-6230. Establishment of accounts.

A. Upon receipt of a complete account certificate of representation under 9VAC5-140-6110, the department or its agent will establish a conditional allowance account and a compliance account for each CO_2 budget source [for which an account certificate of representation was submitted] and a conditional [~~compliance~~ allowance] account for DMME [~~for which the account certificate of representation was submitted~~].

B. General accounts shall operate as follows.

1. Any person may apply to open a general account for the purpose of holding and transferring CO_2 allowances. An application for a general account may designate one and only one CO_2 authorized account representative and one and only one ~~alternate~~ CO_2 authorized alternate account representative who may act on behalf of the CO_2 authorized account representative. The agreement by which the ~~alternate~~ CO_2 authorized alternate account representative is selected shall include a procedure for authorizing the ~~alternate~~ CO_2 authorized alternate account representative to act in lieu of the CO_2 authorized account representative. A complete application for a general account shall be submitted to the department or its agent and shall include the following elements in a format prescribed by the department or its agent:

a. Name, address, email address, telephone number, and facsimile transmission number of the CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative;

b. At the option of the CO_2 authorized account representative, organization name and type of organization;

c. A list of all persons subject to a binding agreement for the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative to represent their ownership interest with respect to the CO_2 allowances held in the general account;

d. The following certification statement by the CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative: "I certify that I was selected as the CO_2 authorized account representative or the CO_2 ~~alternate~~ authorized alternate account representative, as applicable, by an agreement that is binding on all persons who have an ownership interest with respect to CO_2 allowances held in the general account. I certify that I have all the necessary authority to carry out my duties and responsibilities under the CO_2 Budget Trading Program on behalf of such persons and that each such person shall be fully bound by my representations, actions, inactions, or submissions and by any order or decision issued to me by the department or its agent or a court regarding the general account.";

e. The signature of the CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative and the dates signed; and

f. Unless otherwise required by the department or its agent, documents of agreement referred to in the application for a general account shall not be submitted to the department or its agent. Neither the department nor its agent shall be under any obligation to review or evaluate the sufficiency of such documents, if submitted.

2. Authorization of the CO_2 authorized account representative shall be as follows:

a. Upon receipt by the department or its agent of a complete application for a general account under subdivision 1 of this subsection:

(1) The department or its agent will establish a general account for the person for whom the application is submitted.

(2) The CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative for the general account shall represent and, by his representations, actions, inactions, or submissions, legally bind each person who has an ownership interest with respect to CO_2 allowances held in the general account in all matters pertaining to the CO_2 Budget Trading Program, notwithstanding any agreement between the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative and such person. Any such person shall be bound by any order or decision issued to the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative by the department or its agent or a court regarding the general account.

(3) Any representation, action, inaction, or submission by any ~~alternate~~ CO_2 authorized alternate account representative shall be deemed to be a representation, action, inaction, or submission by the CO_2 authorized account representative.

b. Each submission concerning the general account shall be submitted, signed, and certified by the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative for the persons having an ownership interest with respect to CO_2 allowances held in the general account. Each such submission shall include the following certification statement by the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative: "I am authorized to make this submission on behalf of the persons having an ownership interest with respect to the CO_2 allowances held in the general account. I certify under penalty of law that I have personally examined, and am familiar with, the statements and information submitted in this document and all its attachments. Based on my inquiry of those individuals with primary responsibility for obtaining the information, I certify that the statements and information are to the best of my knowledge and belief true, accurate, and complete. I am aware that there are significant penalties for submitting false statements and information or omitting required statements and information, including the possibility of fine or imprisonment."

c. The department or its agent will accept or act on a submission concerning the general account only if the submission has been made, signed, and certified in accordance with subdivision 2 b of this subsection.

3. Changing CO_2 authorized account representative and ~~alternate~~ CO_2 authorized alternate account representative, and changes in persons with ownership interest, shall be accomplished as follows:

a. The CO_2 authorized account representative for a general account may be changed at any time upon receipt by the department or its agent of a superseding complete application for a general account under subdivision 1 of this subsection. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous CO_2 authorized account representative, or the previous ~~alternate~~ CO_2 authorized alternate account representative, prior to the time and date when the department or its agent receives the superseding application for a general account shall be binding on the new CO_2 authorized account representative and the persons with an ownership interest with respect to the CO_2 allowances in the general account.

b. The ~~alternate~~ CO_2 authorized alternate account representative for a general account may be changed at any time upon receipt by the department or its agent of a superseding complete application for a general account under subdivision 1 of this subsection. Notwithstanding any such change, all representations, actions, inactions, and submissions by the previous CO_2 authorized account representative, or the previous ~~alternate~~ CO_2 authorized alternate account representative, prior to the time and date when the department or its agent receives the superseding application for a general account shall be binding on the new alternate CO_2 authorized account representative and the persons with an ownership interest with respect to the CO_2 allowances in the general account.

c. In the event a new person having an ownership interest with respect to CO_2 allowances in the general account is not included in the list of such persons in the application for a general account, such new person shall be deemed to be subject to and bound by the application for a general account, the representations, actions, inactions, and submissions of the CO_2 authorized account representative and any ~~alternate~~ CO_2 authorized alternate account representative, and the decisions, orders, actions,

and inactions of the department or its agent, as if the new person were included in such list.

d. Within 30 days following any change in the persons having an ownership interest with respect to CO_2 allowances in the general account, including the addition or deletion of persons, the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative shall submit a revision to the application for a general account amending the list of persons having an ownership interest with respect to the CO_2 allowances in the general account to include the change.

4. Objections concerning CO_2 authorized account representative shall be governed as follows:

a. Once a complete application for a general account under subdivision 1 of this subsection has been submitted and received, the department or its agent will rely on the application unless and until a superseding complete application for a general account under subdivision 1 of this subsection is received by the department or its agent.

b. Except as provided in subdivisions 3 a and 3 b of this subsection, no objection or other communication submitted to the department or its agent concerning the authorization, or any representation, action, inaction, or submission of the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative for a general account shall affect any representation, action, inaction, or submission of the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative or the finality of any decision or order by the department or its agent under the CO_2 Budget Trading Program.

c. Neither the department nor its agent will adjudicate any private legal dispute concerning the authorization or any representation, action, inaction, or submission of the CO_2 authorized account representative or any ~~alternate~~ CO_2 authorized alternate account representative for a general account, including private legal disputes concerning the proceeds of CO_2 allowance transfers.

5. Delegation by CO_2 authorized account representative and ~~alternate~~ CO_2 authorized alternate account representative shall be accomplished as follows:

a. A CO_2 authorized account representative may delegate, to one or more natural persons, his authority to make an electronic submission to the department or its agent provided for under this article and Article 7 (9VAC5-140-6300 et seq.) of this part.

b. ~~An alternate~~ A CO_2 authorized alternate account representative may delegate, to one or more natural persons, his authority to make an electronic submission to the department or its agent provided for under this article and Article 7 (9VAC5-140-6300 et seq.) of this part.

c. To delegate authority to make an electronic submission to the department or its agent in accordance with subdivisions 5 a and 5 b of this subsection, the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative, as appropriate, shall submit to the department or its agent a notice of delegation, in a format prescribed by the department that includes the following elements:

(1) The name, address, email address, telephone number, and facsimile transmission number of such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative;

(2) The name, address, email address, telephone number, and facsimile transmission number of each such natural person, referred to as "electronic submission agent";

(3) For each such natural person, a list of the type of electronic submissions under subdivision 5 c (1) or 5 c (2) of this subsection for which authority is delegated to him; and

(4) The following certification statement by such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative: "I agree that any electronic submission to the department or its agent that is by a natural person identified in this notice of delegation and of a type listed for such electronic submission agent in this notice of delegation and that is made when I am a CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative, as appropriate, and before this notice of delegation is superseded by another notice of delegation under 9VAC5-140-6230 B 5 d shall be deemed to be an electronic submission by me. Until this notice of delegation is superseded by another notice of delegation under 9VAC5-140-6230 B 5 d, I agree to maintain an email account and to notify the department or its agent immediately of any change in my email address unless all delegation authority by me under 9VAC5-140-6230 B 5 is terminated."

d. A notice of delegation submitted under subdivision 5 c of this subsection shall be effective, with regard to the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative identified in such notice, upon receipt of such notice by the department or its agent and until receipt by the department or its agent of a superseding notice of delegation by such CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative as appropriate. The superseding notice of delegation may replace any previously identified electronic submission agent, add a new

electronic submission agent, or eliminate entirely any delegation of authority.

e. Any electronic submission covered by the certification in subdivision 5 c (4) of this subsection and made in accordance with a notice of delegation effective under subdivision 5 d of this subsection shall be deemed to be an electronic submission by the CO_2 authorized account representative or ~~alternate~~ CO_2 authorized alternate account representative submitting such notice of delegation.

C. The department or its agent will assign a unique identifying number to each account established under subsection A or B of this section.

9VAC5-140-6240. CO_2 Allowance Tracking System responsibilities of CO_2 authorized account representative.

Following the establishment of a COATS account, all submissions to the department or its agent pertaining to the account, including submissions concerning the deduction or transfer of CO_2 allowances in the account, shall be made only by the CO_2 authorized account representative for the account.

9VAC5-140-6250. Recordation of [~~CO_2~~ conditional] allowance allocations.

A. By January 1 of each calendar year, the department or its agent will record in the following accounts:

1. In each CO_2 budget source's and DMME's conditional allowance account, the [~~CO_2~~] conditional allowances allocated to those sources and DMME by the department prior to being consigned to auction; and

2. In each CO_2 budget source's compliance account, the CO_2 allowances purchased at auction by CO_2 budget units at the source under 9VAC5-140-6210 A.

B. Each year the department or its agent will record [~~CO_2~~ conditional] allowances, as allocated to the unit under Article 5 (9VAC5-140-6190 et seq.) of this part, in the compliance account for the year after the last year for which [~~CO_2~~ conditional] allowances were previously allocated to the compliance account. Each year, the department or its agent will also record [~~CO_2~~ conditional] allowances, as allocated under Article 5 (9VAC5-140-6190 et seq.) of this part, in an allocation set-aside for the year after the last year for which [~~CO_2~~ conditional] allowances were previously allocated to an allocation set-aside.

C. Serial numbers for allocated [~~CO_2~~ conditional] allowances shall be managed as follows. When allocating [~~CO_2~~ conditional] allowances to and recording them in an account, the department or its agent will assign each [~~CO_2~~ conditional] allowance a unique identification number that will include digits identifying the year for which the [~~CO_2~~ conditional] allowance is allocated.

9VAC5-140-6260. Compliance.

A. CO_2 allowances that meet the following criteria are available to be deducted for a CO_2 budget source to comply with the CO_2 requirements of 9VAC5-140-6050 C for [the initial control period,] a control period [,] or an interim control period.

1. The CO_2 allowances are of allocation years that fall within [an initial control period,] a prior control period, the same control period, or the same interim control period for which the allowances will be deducted.

2. The CO_2 allowances are held in the CO_2 budget source's compliance account as of the CO_2 allowance transfer deadline for that [initial control period,] control period [,] or interim control period or are transferred into the compliance account by a CO_2 allowance transfer correctly submitted for recordation under 9VAC5-140-6300 by the CO_2 allowance transfer deadline for that [initial control period,] control period [,] or interim control period.

3. For CO_2 offset allowances generated by other participating states, the number of CO_2 offset allowances that are available to be deducted in order for a CO_2 budget source to comply with the CO_2 requirements of 9VAC5-140-6050 C for a control period [or an] initial control period [~~, or an interim control period~~] shall not exceed 3.3% of the CO_2 budget source's CO_2 emissions for that control period, or may not exceed 3.3% of 0.50 times the CO_2 budget source's CO_2 emissions for an interim control period, as determined in accordance with this article and Article 8 (9VAC5-140-6330 et seq.) of this part.

~~3.~~ 4. The CO_2 allowances are not necessary for deductions for excess emissions for a prior [initial control period or a] control period under subsection D of this section.

B. Following the recordation, in accordance with 9VAC5-140-6310, of CO_2 allowance transfers submitted for recordation in the CO_2 budget source's compliance account by the CO_2 allowance transfer deadline for [the initial control period,] a control period [,] or [an] interim control period, the department or its agent will deduct CO_2 allowances available under subsection A of this section to cover the source's CO_2 emissions, as determined in accordance with Article 8 (9VAC5-140-6330 et seq.) of this part, for the [initial control period,] control period [,] or interim control period, as follows:

1. Until the amount of CO_2 allowances deducted equals the number of tons of total CO_2 emissions, or 0.50 times the number of tons of total CO_2 emissions for an interim control period, determined in accordance with Article 8 (9VAC5-140-6330 et seq.) of this part, from all CO_2 budget units at the CO_2 budget source for the [initial control period,] control period [,] or interim control period; or

2. If there are insufficient CO_2 allowances to complete the deductions in subdivision 1 of this subsection, until no more CO_2 allowances available under subsection A of this section remain in the compliance account.

C. Identification of available CO_2 allowances by serial number and default compliance deductions shall be managed as follows:

1. The CO_2 authorized account representative for a source's compliance account may request that specific CO_2 allowances, identified by serial number, in the compliance account be deducted for emissions or excess emissions for [the initial control period,] a control period [,] or interim control period in accordance with subsection B or D of this section. Such identification shall be made in the compliance certification report submitted in accordance with 9VAC5-140-6170.

2. The department or its agent will deduct CO_2 allowances for [the initial control period, an interim control period, or] a control period from the CO_2 budget source's compliance account, in the absence of an identification or in the case of a partial identification of available CO_2 allowances by serial number under subdivision 1 of this subsection, as follows: Any CO_2 allowances that are available for deduction under subdivision 1 of this subsection. CO_2 allowances shall be deducted in chronological order (i.e., CO_2 allowances from earlier allocation years shall be deducted before CO_2 allowances from later allocation years). In the event that some, but not all, CO_2 allowances from a particular allocation year are to be deducted, CO_2 allowances shall be deducted by serial number, with lower serial number allowances deducted before higher serial number allowances.

D. Deductions for excess emissions shall be managed as follows.

1. After making the deductions for compliance under subsection B of this section, the department or its agent will deduct from the CO_2 budget source's compliance account a number of CO_2 allowances equal to three times the number of the source's excess emissions. In the event that a source has insufficient CO_2 allowances to cover three times the number of the source's excess emissions, the source shall be required to immediately transfer sufficient allowances into its compliance account.

2. Any CO_2 allowance deduction required under subdivision 1 of this subsection shall not affect the liability of the owners and operators of the CO_2 budget source or the CO_2 budget units at the source for any fine, penalty, or assessment, or their obligation to comply with any other remedy, for the same violation, as ordered under applicable state law. The following guidelines will be followed in assessing fines, penalties, or other obligations:

a. For purposes of determining the number of days of violation, if a CO_2 budget source has excess emissions for a control period, each day in the control period constitutes a day in violation unless the owners and operators of the unit demonstrate that a lesser number of days should be considered.

b. Each ton of excess emissions is a separate violation.

c. For purposes of determining the number of days of violation, if a CO_2 budget source has excess interim emissions for an interim control period, each day in the interim control period constitutes a day in violation unless the owners and operators of the unit demonstrate that a lesser number of days should be considered.

d. Each ton of excess interim emissions is a separate violation.

3. The propriety of the department's determination that a CO_2 budget source had excess emissions and the concomitant deduction of CO_2 allowances from that CO_2 budget source's account may be later challenged in the context of the initial administrative enforcement, or any civil or criminal judicial action arising from or encompassing that excess emissions violation. The commencement or pendency of any administrative enforcement, or civil or criminal judicial action arising from or encompassing that excess emissions violation will not act to prevent the department or its agent from initially deducting the CO_2 allowances resulting from the department's original determination that the relevant CO_2 budget source has had excess emissions. Should the department's determination of the existence or extent of the CO_2 budget source's excess emissions be revised either by a settlement or final conclusion of any administrative or judicial action, the department will act as follows:

a. In any instance where the department's determination of the extent of excess emissions was too low, the department will take further action under subdivisions 1 and 2 of this subsection to address the expanded violation.

b. In any instance where the department's determination of the extent of excess emissions was too high, the department will distribute to the relevant CO_2 budget source a number of CO_2 allowances equaling the number of CO_2 allowances deducted which are attributable to the difference between the original and final quantity of excess emissions. Should such CO_2 budget source's compliance account no longer exist, the CO_2 allowances will be provided to a general account selected by the owner or operator of the CO_2 budget source from which they were originally deducted.

E. The department or its agent will record in the appropriate compliance account all deductions from such an account pursuant to subsections B and D of this section.

F. Action by the department on submissions shall be as follows:

1. The department may review and conduct independent audits concerning any submission under the CO_2 Budget Trading Program and make appropriate adjustments of the information in the submissions.

2. The department may deduct CO_2 allowances from or transfer CO_2 allowances to a source's compliance account based on information in the submissions, as adjusted under subdivision 1 of this subsection.

9VAC5-140-6270. Banking.

Each CO_2 allowance that is held in a compliance account or a general account will remain in such account unless and until the CO_2 allowance is deducted or transferred under 9VAC5-140-6180, 9VAC5-140-6260, 9VAC5-140-6280, or Article 7 (9VAC5-140-6300 et seq.) of this part.

9VAC5-140-6280. Account error.

The department or its agent may, at its sole discretion and on its own motion, correct any error in any COATS account. Within 10 business days of making such correction, the department or its agent will notify the CO_2 authorized account representative for the account.

9VAC5-140-6290. Closing of general accounts.

A. A CO_2 authorized account representative of a general account may instruct the department or its agent to close the account by submitting a statement requesting deletion of the account from the COATS and by correctly submitting for recordation under 9VAC5-140-6300 a CO_2 allowance transfer of all CO_2 allowances in the account to one or more other COATS accounts.

B. If a general account shows no activity for a period of one year or more and does not contain any CO_2 allowances, the department or its agent may notify the CO_2 authorized account representative for the account that the account will be closed in the COATS 30 business days after the notice is sent. The account will be closed after the 30-day period unless before the end of the 30-day period the department or its agent receives a correctly submitted transfer of CO_2 allowances into the account under 9VAC5-140-6300 or a statement submitted by the CO_2 authorized account representative demonstrating to the satisfaction of the department or its agent good cause as to why the account should not be closed. The department or its agent will have sole discretion to determine if the owner or operator of the unit demonstrated that the account should not be closed.

Article 7
CO_2 Allowance Transfers

9VAC5-140-6300. Submission of CO_2 allowance transfers.

The CO_2 authorized account representatives seeking recordation of a CO_2 allowance transfer shall submit the transfer to the department or its agent. To be considered correctly submitted, the CO_2 allowance transfer shall include the following elements in a format specified by the department or its agent:

1. The numbers identifying both the transferor and transferee accounts;

2. A specification by serial number of each CO_2 allowance to be transferred;

3. The printed name and signature of the CO_2 authorized account representative of the transferor account and the date signed;

4. The date of the completion of the last sale or purchase transaction for the allowance, if any; and

5. The purchase or sale price of the allowance that is the subject of a sale or purchase transaction under subdivision 4 of this section.

9VAC5-140-6310. Recordation.

A. Within five business days of receiving a CO_2 allowance transfer, except as provided in subsection B of this section, the department or its agent will record a CO_2 allowance transfer by moving each CO_2 allowance from the transferor account to the transferee account as specified by the request, provided that:

1. The transfer is correctly submitted under 9VAC5-140-6300; and

2. The transferor account includes each CO_2 allowance identified by serial number in the transfer.

B. A CO_2 allowance transfer into or out of a compliance account that is submitted for recordation following the CO_2 allowance transfer deadline and that includes any CO_2 allowances that are of allocation years that fall within a control period prior to or the same as the control period to which the CO_2 allowance transfer deadline applies will not be recorded until after completion of the process pursuant to 9VAC5-140-6260 B.

C. Where a CO_2 allowance transfer submitted for recordation fails to meet the requirements of subsection A of this section, the department or its agent will not record such transfer.

9VAC5-140-6320. Notification.

A. Within five business days of recordation of a CO_2 allowance transfer under 9VAC5-140-6310, the department or its agent will notify each party to the transfer. Notice will

be given to the CO_2 authorized account representatives of both the transferor and transferee accounts.

B. Within 10 business days of receipt of a CO_2 allowance transfer that fails to meet the requirements of 9VAC5-140-6310 A, the department or its agent will notify the CO_2 authorized account representatives of both accounts subject to the transfer of (i) a decision not to record the transfer and (ii) the reasons for such nonrecordation.

C. Nothing in this section shall preclude the submission of a CO_2 allowance transfer for recordation following notification of nonrecordation.

Article 8
Monitoring, Reporting, and Recordkeeping

9VAC5-140-6330. General requirements.

A. The owners and operators, and to the extent applicable, the CO_2 authorized account representative of a CO_2 budget unit shall comply with the monitoring, recordkeeping, and reporting requirements as provided in this section and all applicable sections of 40 CFR Part 75. Where referenced in this article, the monitoring requirements of 40 CFR Part 75 shall be adhered to in a manner consistent with the purpose of monitoring and reporting CO_2 mass emissions pursuant to this part. For purposes of complying with such requirements, the definitions in 9VAC5-140-6020 and in 40 CFR 72.2 shall apply, and the terms "affected unit," "designated representative," and "CEMS" in 40 CFR Part 75 shall be replaced by the terms "CO_2 budget unit," "CO_2 authorized account representative," and "CEMS," respectively, as defined in 9VAC5-140-6020. For units not subject to an acid rain emissions limitation, the term "administrator" in 40 CFR Part 75 shall be replaced with "the department or its agent." Owners or operators of a CO_2 budget unit who monitor a non-CO_2 budget unit pursuant to the common, multiple, or bypass stack procedures in 40 CFR 75.72(b)(2)(ii), or 40 CFR 75.16 (b)(2)(ii)(B) pursuant to 40 CFR 75.13, for purposes of complying with this part, shall monitor and report CO_2 mass emissions from such non-CO_2 budget ~~unit~~ units according to the procedures for CO_2 budget units established in this article.

B. The owner or operator of each CO_2 budget unit shall meet the following general requirements for installation, certification, and data accounting.

1. Install all monitoring systems necessary to monitor CO_2 mass emissions in accordance with 40 CFR Part 75, except for equation G-1. Equation G-1 in Appendix G shall not be used to determine CO_2 emissions under this part. This may require systems to monitor CO_2 concentration, stack gas flow rate, O_2 concentration, heat input, and fuel flow rate.

2. Successfully complete all certification tests required under 9VAC5-140-6340 and meet all other requirements of this section and 40 CFR Part 75 applicable to the monitoring systems under subdivision 1 of this subsection.

3. Record, report, and quality-assure the data from the monitoring systems under subdivision 1 of this subsection.

C. The owner or operator shall meet the monitoring system certification and other requirements of subsection B of this section on or before the following dates. The owner or operator shall record, report, and quality-assure the data from the monitoring systems under subdivision B 1 of this section on and after the following dates:

1. The owner or operator of a CO_2 budget unit, except for a CO_2 budget unit under subdivision 2 of this subsection, shall comply with the requirements of this section by January 1, 2020.

2. The owner or operator of a CO_2 budget unit that commences commercial operation July 1, 2020, shall comply with the requirements of this section by (i) January 1, 2021, or (ii) the earlier of 90 unit operating days after the date on which the unit commences commercial operation~~,~~ or 180 calendar days after the date on which the unit commences commercial operation.

3. For the owner or operator of a CO_2 budget unit for which construction of a new stack or flue installation is completed after the applicable deadline under subdivision 1 or 2 of this subsection by the earlier of (i) 90 unit operating days after the date on which emissions first exit to the atmosphere through the new stack or flue or (ii) 180 calendar days after the date on which emissions first exit to the atmosphere through the new stack or flue.

D. Data shall be reported as follows:

1. Except as provided in subdivision 2 of this subsection, the owner or operator of a CO_2 budget unit that does not meet the applicable compliance date set forth in subsection C of this section for any monitoring system under subdivision B 1 of this section shall, for each such monitoring system, determine, record, and report maximum potential, or as appropriate minimum potential, values for CO_2 concentration, CO_2 emissions rate, stack gas moisture content, fuel flow rate, heat input, and any other parameter required to determine CO_2 mass emissions in accordance with 40 CFR 75.31(b)(2) or (c)(3) or Section 2.4 of Appendix D of 40 CFR Part 75 as applicable.

2. The owner or operator of a CO_2 budget unit that does not meet the applicable compliance date set forth in subdivision C 3 of this section for any monitoring system under subdivision B 1 of this section shall, for each such monitoring system, determine, record, and report substitute data using the applicable missing data procedures in Subpart D, or Appendix D of 40 CFR Part 75, in lieu of the maximum potential, or as appropriate minimum potential, values for a parameter if the owner or operator demonstrates that there is continuity between the data streams for that parameter before and after the construction or installation under subdivision C 3 of this section.

a. CO_2 budget units subject to an acid rain emissions limitation or CSAPR NO_X Ozone Season Trading Program that qualify for the optional SO_2, NO_X, and CO_2 (for acid rain) or NO_X (for CSAPR NO_X Ozone Season Trading Program) emissions calculations for low mass emissions (LME) units under 40 CFR 75.19 and report emissions for such programs using the calculations under 40 CFR 75.19, shall also use the CO_2 emissions calculations for LME units under 40 CFR 75.19 for purposes of compliance with these regulations.

b. CO_2 budget units subject to an acid rain emissions limitation that do not qualify for the optional SO_2, NO_X, and CO_2 (for acid rain) or NO_X (for CSAPR NO_X Ozone Season Trading Program) emissions calculations for LME units under 40 CFR 75.19 shall not use the CO_2 emissions calculations for LME units under 40 CFR 75.19 for purposes of compliance with these regulations.

c. CO_2 budget units not subject to an acid rain emissions limitation shall qualify for the optional CO_2 emissions calculation for LME units under 40 CFR 75.19, provided that they emit less than 100 tons of NO_X annually and no more than 25 tons of SO_2 annually.

3. The owner or operator of a CO_2 budget unit shall report net-electric output data to the department as required by Article 5 (9VAC5-140-6190 et seq.) of this part.

E. Prohibitions shall be as follows.

1. No owner or operator of a CO_2 budget unit shall use any alternative monitoring system, alternative reference method, or any other alternative for the required CEMS without having obtained prior written approval in accordance with 9VAC5-140-6380.

2. No owner or operator of a CO_2 budget unit shall operate the unit so as to discharge, or allow to be discharged, CO_2 emissions to the atmosphere without accounting for all such emissions in accordance with the applicable provisions of this article and 40 CFR Part 75.

3. No owner or operator of a CO_2 budget unit shall disrupt the CEMS, any portion thereof, or any other approved emissions monitoring method, and thereby avoid monitoring and recording CO_2 mass emissions discharged into the atmosphere, except for periods of recertification or periods when calibration, quality assurance testing, or maintenance is performed in accordance with the applicable provisions of this article and 40 CFR Part 75.

4. No owner or operator of a CO_2 budget unit shall retire or permanently discontinue use of the CEMS, any component thereof, or any other approved emissions monitoring system under this article, except under any one of the following circumstances:

a. The owner or operator is monitoring emissions from the unit with another certified monitoring system approved, in accordance with the applicable provisions of this article and 40 CFR Part 75, by the department for use at that unit that provides emissions data for the same pollutant or parameter as the retired or discontinued monitoring system; or

b. The CO_2 authorized account representative submits notification of the date of certification testing of a replacement monitoring system in accordance with 9VAC5-140-6340 D 3 a.

9VAC5-140-6340. Initial certification and recertification procedures.

A. The owner or operator of a CO_2 budget unit shall be exempt from the initial certification requirements of this section for a monitoring system under 9VAC5-140-6330 B 1 if the following conditions are met:

1. The monitoring system has been previously certified in accordance with 40 CFR Part 75; and

2. The applicable quality-assurance and quality-control requirements of 40 CFR 75.21 and Appendix B and Appendix D of 40 CFR Part 75 are fully met for the certified monitoring system described in subdivision 1 of this subsection.

B. The recertification provisions of this section shall apply to a monitoring system under 9VAC5-140-6330 B 1 exempt from initial certification requirements under subsection A of this section.

C. Notwithstanding subsection A of this section, if the administrator has previously approved a petition under 40 CFR 75.72(b)(2)(ii), or 40 CFR 75.16(b)(2)(ii)(B) as pursuant to 40 CFR 75.13 for apportioning the CO_2 emissions rate measured in a common stack or a petition under 40 CFR 75.66 for an alternative requirement in 40 CFR Part 75, the CO_2 authorized account representative shall submit the petition to the department under 9VAC5-140-6380 A to determine whether the approval applies under this program.

D. Except as provided in subsection A of this section, the owner or operator of a CO_2 budget unit shall comply with the following initial certification and recertification procedures for a CEMS and an excepted monitoring system under Appendix D of 40 CFR Part 75 and under 9VAC5-140-6330 B 1. The owner or operator of a unit that qualifies to use the low mass emissions excepted monitoring methodology in 40 CFR 75.19 or that qualifies to use an alternative monitoring system under Subpart E of 40 CFR Part 75 shall comply with the procedures in subsection E or F of this section, respectively.

1. For initial certification, the owner or operator shall ensure that each CEMS required under 9VAC5-140-6330 B 1, which includes the automated DAHS, successfully completes all of the initial certification testing required under 40 CFR 75.20 by the applicable deadlines specified

in 9VAC5-140-6330 C. In addition, whenever the owner or operator installs a monitoring system to meet the requirements of this article in a location where no such monitoring system was previously installed, initial certification in accordance with 40 CFR 75.20 is required.

2. For recertification, the following requirements shall apply.

a. Whenever the owner or operator makes a replacement, modification, or change in a certified CEMS under 9VAC5-140-6330 B 1 that the administrator or the department determines significantly affects the ability of the system to accurately measure or record CO_2 mass emissions or to meet the quality-assurance and quality-control requirements of 40 CFR 75.21 or Appendix B to 40 CFR Part 75, the owner or operator shall recertify the monitoring system according to 40 CFR 75.20(b).

b. For systems using stack measurements such as stack flow, stack moisture content, CO_2 or O_2 monitors, whenever the owner or operator makes a replacement, modification, or change to the flue gas handling system or the unit's operation that the administrator or the department determines to significantly change the flow or concentration profile, the owner or operator shall recertify the CEMS according to 40 CFR 75.20(b). Examples of changes that require recertification include replacement of the analyzer, change in location or orientation of the sampling probe or site, or change of flow rate monitor polynomial coefficients.

3. The approval process for initial certifications and recertification shall be as follows: ~~Subdivisions~~ subdivisions 3 a through 3 d of this subsection apply to both initial certification and recertification of a monitoring system under 9VAC5-140-6330 B 1. For recertifications, replace the words "certification" and "initial certification" with the word "recertification," replace the word "certified" with "recertified," and proceed in the manner prescribed in 40 CFR 75.20(b)(5) and (g)(7) in lieu of subdivision 3 e of this subsection.

a. The CO_2 authorized account representative shall submit to the department or its agent, the appropriate EPA Regional Office and the administrator a written notice of the dates of certification in accordance with 9VAC5-140-6360.

b. The CO_2 authorized account representative shall submit to the department or its agent a certification application for each monitoring system. A complete certification application shall include the information specified in 40 CFR 75.63.

c. The provisional certification date for a monitor shall be determined in accordance with 40 CFR 75.20(a)(3). A provisionally certified monitor may be used under the CO_2 Budget Trading Program for a period not to exceed 120 days after receipt by the department of the complete certification application for the monitoring system or component thereof under subdivision 3 b of this subsection. Data measured and recorded by the provisionally certified monitoring system or component thereof, in accordance with the requirements of 40 CFR Part 75, will be considered valid quality-assured data, retroactive to the date and time of provisional certification, provided that the department does not invalidate the provisional certification by issuing a notice of disapproval within 120 days of receipt of the complete certification application by the department.

d. The department will issue a written notice of approval or disapproval of the certification application to the owner or operator within 120 days of receipt of the complete certification application under subdivision 3 b of this subsection. In the event the department does not issue such a notice within such 120-day period, each monitoring system that meets the applicable performance requirements of 40 CFR Part 75 and is included in the certification application will be deemed certified for use under the CO_2 Budget Trading Program.

(1) If the certification application is complete and shows that each monitoring system meets the applicable performance requirements of 40 CFR Part 75, then the department will issue a written notice of approval of the certification application within 120 days of receipt.

(2) If the certification application is incomplete, then the department will issue a written notice of incompleteness that sets a reasonable date by which the CO_2 authorized account representative shall submit the additional information required to complete the certification application. If the CO_2 authorized account representative does not comply with the notice of incompleteness by the specified date, then the department may issue a notice of disapproval under subdivision 3 d (3) of this subsection. The 120-day review period shall not begin before receipt of a complete certification application.

(3) If the certification application shows that any monitoring system or component thereof does not meet the performance requirements of 40 CFR Part 75, or if the certification application is incomplete and the requirement for disapproval under subdivision 3 d (2) of this subsection is met, then the department will issue a written notice of disapproval of the certification application. Upon issuance of such notice of disapproval, the provisional certification is invalidated by the department and the data measured and recorded by each uncertified monitoring system or component thereof shall not be considered valid quality assured data beginning with the date and hour of provisional certification. The owner or operator shall follow the procedures for loss of certification in subdivision 3 e of this subsection for each

monitoring system or component thereof, which is disapproved for initial certification.

(4) The department may issue a notice of disapproval of the certification status of a monitor in accordance with 9VAC5-140-6350 B.

e. If the department issues a notice of disapproval of a certification application under subdivision 3 d (3) of this subsection or a notice of disapproval of certification status under subdivision 3 d (3) of this subsection, then:

(1) The owner or operator shall substitute the following values for each disapproved monitoring system, for each hour of unit operation during the period of invalid data beginning with the date and hour of provisional certification and continuing until the time, date, and hour specified under 40 CFR 75.20(a)(5)(i) or 40 CFR 75.20(g)(7): (i) for units using or intending to monitor for CO_2 mass emissions using heat input or for units using the low mass emissions excepted methodology under 40 CFR 75.19, the maximum potential hourly heat input of the unit; or (ii) for units intending to monitor for CO_2 mass emissions using a CO_2 pollutant concentration monitor and a flow monitor, the maximum potential concentration of CO_2 and the maximum potential flow rate of the unit under Section 2.1 of Appendix A of 40 CFR Part 75 [~~,~~ ;]

(2) The CO_2 authorized account representative shall submit a notification of certification retest dates and a new certification application in accordance with subdivisions 3 a and 3 b of this subsection; and

(3) The owner or operator shall repeat all certification tests or other requirements that were failed by the monitoring system, as indicated in the department's notice of disapproval, no later than 30 unit operating days after the date of issuance of the notice of disapproval.

E. The owner or operator of a unit qualified to use the low mass emissions excepted methodology under 9VAC5-140-6330 D 3 shall meet the applicable certification and recertification requirements of 40 CFR 75.19(a)(2), 40 CFR 75.20(h), and this section. If the owner or operator of such a unit elects to certify a fuel flow meter system for heat input determinations, the owner or operator shall also meet the certification and recertification requirements in 40 CFR 75.20(g).

F. The CO_2 authorized account of each unit for which the owner or operator intends to use an alternative monitoring system approved by the administrator and, if applicable, the department under Subpart E of 40 CFR Part 75 shall comply with the applicable notification and application procedures of 40 CFR 75.20(f).

9VAC5-140-6350. Out-of-control periods.

A. Whenever any monitoring system fails to meet the quality assurance/quality control (QA/QC) requirements or data validation requirements of 40 CFR Part 75, data shall be substituted using the applicable procedures in Subpart D or Appendix D of 40 CFR Part 75.

B. Whenever both an audit of a monitoring system and a review of the initial certification or recertification application reveal that any monitoring system should not have been certified or recertified because it did not meet a particular performance specification or other requirement under 9VAC5-140-6340 or the applicable provisions of 40 CFR Part 75, both at the time of the initial certification or recertification application submission and at the time of the audit, the department or administrator will issue a notice of disapproval of the certification status of such monitoring system. For the purposes of this subsection, an audit shall be either a field audit or an audit of any information submitted to the department or the administrator. By issuing the notice of disapproval, the department or administrator revokes prospectively the certification status of the monitoring system. The data measured and recorded by the monitoring system shall not be considered valid quality-assured data from the date of issuance of the notification of the revoked certification status until the date and time that the owner or operator completes subsequently approved initial certification or recertification tests for the monitoring system. The owner or operator shall follow the initial certification or recertification procedures in 9VAC5-140-6340 for each disapproved monitoring system.

9VAC5-140-6360. Notifications.

The CO_2 authorized account representative for a CO_2 budget unit shall submit written notice to the department and the administrator in accordance with 40 CFR 75.61.

9VAC5-140-6370. Recordkeeping and reporting.

A. The CO_2 authorized account representative shall comply with all recordkeeping and reporting requirements in this section, the applicable recordkeeping and reporting requirements under 40 CFR 75.73, and the requirements of 9VAC5-140-6080 E.

B. The owner or operator of a CO_2 budget unit shall submit a monitoring plan in the manner prescribed in 40 CFR 75.62.

C. The CO_2 authorized account representative shall submit an application to the department within 45 days after completing all CO_2 monitoring system initial certification or recertification tests required under 9VAC5-140-6340, including the information required under 40 CFR 75.63 and 40 CFR 75.53(e) and (f).

D. The CO_2 authorized account representative shall submit quarterly reports, as follows:

1. The CO_2 authorized account representative shall report the CO_2 mass emissions data for the CO_2 budget unit, in an electronic format prescribed by the department unless otherwise prescribed by the department for each calendar quarter.

2. The CO_2 authorized account representative shall submit each quarterly report to the department or its agent within 30 days following the end of the calendar quarter covered by the report. Quarterly reports shall be submitted in the manner specified in Subpart H of 40 CFR Part 75 and 40 CFR 75.64. Quarterly reports shall be submitted for each CO_2 budget unit, or group of units using a common stack, and shall include all of the data and information required in Subpart G of 40 CFR Part 75, except for opacity, heat input, NO_X, and SO_2 provisions.

3. The CO_2 authorized account representative shall submit to the department or its agent a compliance certification in support of each quarterly report based on reasonable inquiry of those persons with primary responsibility for ensuring that all of the unit's emissions are correctly and fully monitored. The certification shall state that:

a. The monitoring data submitted were recorded in accordance with the applicable requirements of this article and 40 CFR Part 75, including the quality assurance procedures and specifications;

b. For a unit with add-on CO_2 emissions controls and for all hours where data are substituted in accordance with 40 CFR 75.34(a)(1), the add-on emissions controls were operating within the range of parameters listed in the QA/QC program under Appendix B of 40 CFR Part 75 and the substitute values do not systematically underestimate CO_2 emissions; and

c. The CO_2 concentration values substituted for missing data under Subpart D of 40 CFR Part 75 do not systematically underestimate CO_2 emissions.

9VAC5-140-6380. Petitions.

A. Except as provided in subsection C of this section, the CO_2 authorized account representative of a CO_2 budget unit that is subject to an acid rain emissions limitation may submit a petition to the administrator under 40 CFR 75.66 and to the department requesting approval to apply an alternative to any requirement of 40 CFR Part 75. Application of an alternative to any requirement of 40 CFR Part 75 is in accordance with this article only to the extent that the petition is approved in writing by the administrator, and subsequently approved in writing by the department.

B. Petitions for a CO_2 budget unit that is not subject to an acid rain emissions limitation shall meet the following requirements.

1. The CO_2 authorized account representative of a CO_2 budget unit that is not subject to an acid rain emissions limitation may submit a petition to the administrator under 40 CFR 75.66 and to the department requesting approval to apply an alternative to any requirement of 40 CFR Part 75. Application of an alternative to any requirement of 40 CFR Part 75 is in accordance with this article only to the extent that the petition is approved in writing by the administrator and subsequently approved in writing by the department.

2. In the event that the administrator declines to review a petition under subdivision 1 of this subsection, the CO_2 authorized account representative of a CO_2 budget unit that is not subject to an acid rain emissions limitation may submit a petition to the department requesting approval to apply an alternative to any requirement of this article. That petition shall contain all of the relevant information specified in 40 CFR 75.66. Application of an alternative to any requirement of this article is in accordance with this article only to the extent that the petition is approved in writing by the department.

C. The CO_2 authorized account representative of a CO_2 budget unit that is subject to an acid rain emissions limitation may submit a petition to the administrator under 40 CFR 75.66 and to the department requesting approval to apply an alternative to a requirement concerning any additional CEMS required under the common stack provisions of 40 CFR 75.72 or a CO_2 concentration CEMS used under 40 CFR 75.71(a)(2). Application of an alternative to any such requirement is in accordance with this article only to the extent the petition is approved in writing by the administrator and subsequently approved in writing by the department.

9VAC5-140-6390. (Reserved.)

9VAC5-140-6400. (Reserved.)

Article 9
Auction of CO_2 CCR and ECR Allowances

9VAC5-140-6410. Purpose.

The following requirements shall apply to each allowance auction. The department or its agent may specify additional information in the auction notice for each auction. Such additional information may include the time and location of the auction, auction rules, registration deadlines, and any additional information deemed necessary or useful.

9VAC5-140-6420. General requirements.

A. The department's agent will include the following information in the auction notice for each auction:

1. The number of [~~CO_2~~ conditional] allowances offered for sale at the auction, not including any [~~CO_2~~ conditional] CCR allowances;

2. The number of [~~CO_2~~ conditional] CCR allowances that will be offered for sale at the auction if the condition of subdivision [B] 1 of this [~~subsection~~ section] is met;

3. The minimum reserve price for the auction;

4. The CCR trigger price for the auction;

5. The maximum number of [~~CO_2~~ conditional] allowances that may be withheld from sale at the auction if the condition of subdivision D 1 of this section is met; and

6. The ECR trigger price for the auction.

B. The department's agent will follow these rules for the sale of [~~CO_2~~ conditional] CCR allowances.

1. [~~CO_2~~ Conditional] CCR allowances shall only be sold at an auction in which total demand for allowances, above the CCR trigger price, exceeds the number of [~~CO_2~~ conditional] allowances available for purchase at the auction, not including any [~~CO_2~~ conditional] CCR allowances.

2. If the condition of subdivision 1 of this subsection is met at an auction, then the number of [~~CO_2~~ conditional] CCR allowances offered for sale by the department or its agent at the auction shall be equal to the number of [~~CO_2~~ conditional] CCR allowances in the Virginia [~~auction account~~ Consignment Auction Account] at the time of the auction.

3. After all of the [~~CO_2~~ conditional] CCR allowances in the Virginia [~~auction~~ Consignment Auction Account] account have been sold in a given calendar year, no additional [~~CO_2~~ conditional] CCR allowances will be sold at any auction for the remainder of that calendar year, even if the condition of subdivision 1 of this subsection is met at an auction.

4. At an auction in which [~~CO_2~~ conditional] CCR allowances are sold, the reserve price for the auction shall be the CCR trigger price.

5. If the condition of subdivision 1 of this subsection is not satisfied, no [~~CO_2~~ conditional] CCR allowances shall be offered for sale at the auction, and the reserve price for the auction shall be equal to the minimum reserve [~~prices~~ price].

C. The department's agent shall implement the reserve price as follows: (i) no allowances shall be sold at any auction for a price below the reserve price for that auction and (ii) if the total demand for allowances at an auction is less than or equal to the total number of allowances made available for sale in that auction, then the auction clearing price for the auction shall be the reserve price.

D. The department's agent will meet the following rules for the withholding of CO_2 ECR allowances from an auction.

1. CO_2 ECR allowances shall only be withheld from an auction if the demand for allowances would result in an auction clearing price that is less than the ECR trigger price prior to the withholding from the auction of any ECR allowances.

2. If the condition in subdivision 1 of this subsection is met at an auction, then the maximum number of CO_2 ECR allowances that may be withheld from that auction will be equal to the quantity shown in Table 140-5B of 9VAC5-140-6210 E minus the total quantity of CO_2 ECR allowances that have been withheld from any prior auction in that calendar year. Any CO_2 ECR allowances withheld from an auction will be transferred into the Virginia ECR Account.

9VAC5-140-6430. Consignment auction.

In accordance with Article 5 (9VAC5-140-6190 et seq.) of this part, one quarter of the annual conditional ~~allowances~~ allowance allocation shall be consigned by the CO_2 budget source to whom they are allocated or the holder of a public contract with DMME to each auction ~~on a quarterly pro rata basis~~ in accordance with procedures specified by the department. At the completion of the consignment auction, a conditional allowance sold at auction shall become ~~an allowance to be used for compliance purposes~~ a CO_2 allowance.

9VAC5-140-6435. Other auction.

Notwithstanding the requirements of 9VAC5-140-6430, the department may participate in a direct auction of allowances without consignment in accordance with requirements established by the Virginia General Assembly. A "direct auction" means a CO_2 auction conducted by a CO_2 Budget Trading Program in which Virginia is a participating state.

Article 10
Program Monitoring and Review

9VAC5-140-6440. Program monitoring and review.

In conjunction with the CO_2 Budget Trading Program program monitoring and review process, the department will evaluate impacts of the program specific to Virginia, including economic, energy, and environmental impacts and impacts on vulnerable and environmental justice and underserved communities. The department will, in evaluating the impacts on environmental justice communities, including low income, minority, and tribal communities, develop and implement a plan to ensure increased participation of environmental justice communities in the review.

VA.R. Doc. No. R17-5140; Filed May 1, 2019, 3:08 p.m.

TITLE 12. HEALTH

DEPARTMENT OF HEALTH

Forms

REGISTRAR'S NOTICE: Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

Title of Regulation: **12VAC5-115. Virginia Immunization Information System.**

Contact Information: Kristin Collins, Policy Analyst, Office of Epidemiology, Virginia Department of Health, 109 Governor Street, Office 642, Richmond, VA 23219-3623, telephone (804) 864-7298, or email kristin.collins@vdh.virginia.gov.

FORMS (12VAC5-115)

Administrator Information, VIISADM (eff. 10/2012)

Electronic Data Exchange with VIIS (eff. 10/2012)

Information Systems Security Access Agreement (eff. 10/2012)

Organization Information, VIISORG (eff. 10/2012)

~~VIIS Security Policy and User Confidentiality Agreement~~

Memorandum of Agreement between Virginia Department of Health/Division of Immunization (VDH/DOI) and VIIS Organization Interested in Data Exchange (8/2011)

Virginia Immunization Information System (VIIS) Opt-In of VIIS (reviewed 6/2015)

Virginia Immunization Information System (VIIS) Opt-Out of VIIS (reviewed 6/2015)

VIIS Security Policy and User Confidentiality Agreement (rev. 5/2019)

VIIS User Acknowledgement Page

VIIS User Signature Page

VA.R. Doc. No. R19-5998; Filed May 10, 2019, 4:01 p.m.

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Final Regulation

Title of Regulation: **12VAC30-141. Family Access to Medical Insurance Security Plan (amending 12VAC30-141-10 through 12VAC30-141-70, 12VAC30-141-100, 12VAC30-141-110, 12VAC30-141-150, 12VAC30-141-160, 12VAC30-141-175, 12VAC30-141-500, 12VAC30-141-660 through 12VAC30-141-760, 12VAC30-141-790, 12VAC30-141-800, 12VAC30-141-880; repealing 12VAC30-141-120).**

Statutory Authority: § 32.1-351 of the Code of Virginia; 42 USC § 1396 et seq.

Effective Date: June 26, 2019.

Agency Contact: Emily McClellan, Regulatory Supervisor, Policy Division, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, or email emily.mcclellan@dmas.virginia.gov.

Summary:

Effective January 1, 2014, the Affordable Care Act required eligibility for health coverage under all health insurance affordability programs to be based on a new modified adjusted gross income (MAGI) methodology. Calculating MAGI eligibility entails defining household composition and executing income counting procedures based on Internal Revenue Service rules. Federal law requires these changes to be made in the State Child Health Plan under Title XXI of the Social Security Act.

The amendments incorporate the required changes in eligibility determination standards and update operational processes supporting eligibility and renewal actions, including (i) adding new definitions and modifying existing definitions pertinent to MAGI and operational processes; (ii) updating operational processes to reflect current practice; (iii) updating the reference to the Children's Health Insurance Program Advisory Committee; (iv) specifying financial and nonfinancial eligibility standards consistent with MAGI requirements and updating operational processes pertinent to the Virginia Department of Social Services (VDSS) and Cover Virginia, the central processing unit (CPU); (v) clarifying that inpatient status in an institution for mental disease is a factor for ineligibility at initial enrollment or renewal; (vi) updating terminology regarding VDSS and CPU consistent with implementation of MAGI standards; (vii) streamlining application, case documentation, and maintenance processes in implementation of MAGI standards; and (viii) specifying that a choice of managed care organization may be made at the time of application.

Technical, nonsubstantive amendments to conform to style guidelines were made for publication of the final regulation.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

Part I
General Provisions

12VAC30-141-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

~~"Act" means the Social Security Act.~~

~~"Adult caretaker relative" or "caretaker relative" means an individual who is age 18 or older, who is not the parent of, but who is related to, the child by blood or marriage, and who lives with and assumes responsibility for day to day care of the child in a place of residence maintained as his or their own home.~~

"Adverse action," consistent with 42 CFR 457.1130, means the denial of eligibility; failure to make a timely determination of eligibility; suspension or termination of enrollment, including disenrollment for failure to pay cost sharing; or delay, denial, reduction, suspension, or termination of health services, in whole or in part, including a determination about the type or level of services; and failure to approve, furnish, or provide payment for health services in a timely manner; provided, however, that determination of eligibility to participate in and termination of participation in the FAMIS Select program shall not constitute an adverse action.

"Adverse benefit determination," consistent with 42 CFR 438.400, means the denial or limited authorization of a requested service; the failure to take action or timely take action on a request for service; the reduction, suspension, or termination of a previously authorized service; denial in whole or in part of a payment for a service; failure to provide services within the timeframes required by the state; for a resident of a rural exception area with only one MCO, the denial of a enrollee's request to exercise the enrollee's right under 42 CFR 438.52(b)(2)(ii) to obtain services outside of the network; the denial of a enrollee's request to dispute a financial liability as provided in 42 CFR [~~438(b)(7)~~ 438.400(b)(7)]; or the failure of an MCO to act within the timeframes provided in 42 CFR 438.408(b).

"Agency" means a local department of social services, the central processing unit, or other entity designated by DMAS to make eligibility determinations for FAMIS.

~~"Agency error" means a person or persons received benefits to which they were not entitled as a result of an error on the part of an eligibility worker at a local department of social services or the central processing unit.~~

"Agent" means an individual designated in writing to act on behalf of a FAMIS Plan applicant or enrollee during the administrative review process.

"Appeal" means an enrollee's request for review of an adverse benefit determination by an MCO or an adverse action by the LDSS, CPU, or DMAS.

"Applicant" means a child who has filed an application (or who has an application filed on his behalf) for child health insurance and is awaiting a determination of eligibility. A child is an applicant until his eligibility has been determined.

"Application for health insurance" means the ~~form or forms developed and approved by the Department of Medical Assistance Services that are used for determining eligibility for Family Access to Medical Insurance Security Plan (FAMIS), FAMIS Plus (Children's Medicaid), for Medicaid for pregnant women, and for FAMIS MOMS~~. single streamlined application for determining eligibility in public health insurance programs operated by the Commonwealth.

"Authorized representative" means a person, 18 years of age or older, who is authorized to conduct the personal or financial affairs for an individual ~~who is 18 years of age or older~~.

~~"Board" or "BMAS" means that policy board created by § 32.1 324 of the Code of Virginia to administer the plans established by the Social Security Act.~~

~~"CMSIP" means that original child health insurance program that preceded FAMIS.~~

"Central processing unit" or "CPU" means Cover Virginia, which is the ~~private contractor that will determine eligibility for and administer part of the Family Access to Medical Insurance Security Plan or FAMIS~~ centralized entity supported by DMAS to accept and act on applications for health insurance.

"Child" means an individual ~~under the age of~~ younger than 19 years of age.

~~"Competent individual" means a person who has not been judged by a court to be legally incapacitated.~~

~~"Comprehensive health insurance coverage" means health benefits coverage, which includes the following categories of services at a minimum: inpatient and outpatient hospital services; physician's surgical and medical services; and laboratory and radiological services.~~

"Conservator" means a person appointed by a court of competent jurisdiction to manage the estate and financial affairs of an incapacitated individual.

"Continuation of ~~enrollment~~ coverage" means ensuring an enrollee's benefits are continued until completion of the

review process, with the condition that should the enrollee not prevail in the review process, the enrollee shall be liable for the repayment of all benefits received during the review process.

"Director" means the individual, or his designee, specified in § 32.1-324 of the Code of Virginia with all of the attendant duties and responsibilities to administer the State Plan for Medical Assistance and the State Plan for FAMIS.

"DMAS" or "department" means the Department of Medical Assistance Services.

[~~"Eligibility worker" means an individual who, under supervision, applies regulations, policies, and procedures to determine eligibility for public assistance programs, including FAMIS and FAMIS MOMS."Enrollee" means a child who has been determined eligible to participate in FAMIS and is enrolled in the FAMIS program.~~]

"Ex parte review" means the review of administratively available information pertinent to the application or renewal process, conducted by eligibility staff, in order to expediently process the applicant's renewal without seeking that information from the applicant.

~~"External quality review organization" means the independent contractor assigned by DMAS to handle quality reviews and to conduct final review of MCHIP adverse actions for FAMIS.~~

~~"Family" means parents, including adoptive and stepparents, and their children under the age of 19, who are living in the same household. Family shall not mean grandparents, other relatives, or legal guardians.~~

"Family," when used in the context of the FAMIS Select component, means a unit or group that has access to ~~an~~ a private or employer's group health plan. Thus, it includes the policyholder or employee and any dependents who can be covered under the ~~employer's~~ plan.

~~"Family income" means the total income of all family members in a household. Income includes, but is not necessarily limited to, before tax earnings from a job, including cash, wages, salary, commissions, tips, self-employment net profits, Social Security, Retirement Survivor Disability Insurance (RSDI), veterans benefits, Railroad Retirement, disability workers' compensation, unemployment benefits, child support, alimony, spousal support, pensions, retirement benefits, settlement benefits, rental income, and lottery/bingo winnings. Income excludes public assistance program benefits such as SSI and TANF payments, foster care payments, general relief, loans, grants, or scholarships for educational expenses or earned income of a child who is a student.~~

"FAMIS" means the Family Access to Medical Insurance Security Plan.

"FAMIS Select" means an optional program available to children determined eligible for FAMIS, whereby DMAS provides premium assistance to the family to cover the child through a private or employer-sponsored health plan instead of directly through the FAMIS program.

"Federal poverty level" or "FPL" means that income standard as published annually by the U.S. Department of Health and Human Services in the Federal Register.

"Fee-for-service" means the traditional Medicaid health care delivery and payment system in which physicians and other providers receive a payment for each unit of service they provide.

"Fixed premium assistance amount" means a predetermined amount of premium assistance that DMAS will pay per child to a family who chooses to enroll its FAMIS eligible child in a private or employer-sponsored health plan. The fixed premium assistance amount will be determined annually by DMAS to ensure that the FAMIS Select program is cost-effective as compared to the cost of covering a child directly through the FAMIS program.

~~"Fraud" means an intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to himself or some other person. It includes any act that constitutes fraud under applicable federal or state laws.~~

~~"Group health plan" or "health insurance coverage" means that health care coverage as defined in § 2791 of the Public Health Services Act (42 USC § 300gg 91(a) and (b)(1)).~~

"Guardian" means a person appointed by a court of competent jurisdiction to be responsible for the affairs of an incapacitated individual, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, and therapeutic treatment, and if not inconsistent with an order of commitment, residence.

"Household" means the household composition and follows the federal tax rules through the use of modified adjusted gross income (MAGI) methodology. An individual's household is based upon the tax filing relationships of applicant, persons living with the individual, and those claimed as dependents and as outlined in 42 USC § 435.603(3)(f)(1) through (f)(4) [~~,~~]

"Household income" means the sum of MAGI-based income as outlined in 42 USC § 435.603(3)(d) through (3)(e) to include every individual in the household.

~~"Incapacitated individual" means a person who, pursuant to an order of a court of competent jurisdiction, has been found to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements of his health, care, safety, or therapeutic needs without the assistance or protection of a~~

~~guardian, or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator.~~

"Internal appeal" means a request to the MCO by an enrollee, an enrollee's authorized representative, or a provider, acting on behalf of the enrollee and with the enrollee's written consent, for review of an MCO's adverse benefit determination. The internal appeal is the only level of appeal with the MCO and must be exhausted by an enrollee or deemed exhausted according to 42 CFR 438.408(c)(3) before the enrollee may initiate a state fair hearing.

"Lawfully residing" means the individual is lawfully present in the United States.

~~"Legally emancipated" means that the parents and child have gone through the court and a judge has declared that the parents have surrendered the right to care, custody, and earnings of the child and have renounced parental duties. A married minor is not emancipated unless a court has declared the married minor emancipated from his parents.~~

"LDSS" or "local department" means the local department of social services.

~~"Managed care health insurance plan" or "MCHIP" as defined in § 32.1-137.1 of the Code of Virginia means an arrangement for the delivery of health care in which a health carrier means under contract with DMAS for Title XXI delivery systems, undertakes to provide, arrange and pay for, or reimburse any of the costs of health care services for a covered person on a prepaid or insured basis, which contains one or more incentive arrangements, including any credential requirements intended to influence the cost of the health care services between the health carrier and one or more providers and requires or creates benefit payment differential incentives for covered persons to use providers that are directly or indirectly managed, owned, under contract with or employed by the health carrier.~~

~~"Maternal and child health insurance application" means the form or forms developed and approved by the Department of Medical Assistance Services that are used by local departments of social services and the FAMIS CPU for determining eligibility for Medicaid for poverty level children and for the Family Access to Medical Insurance Security Plan (FAMIS).~~

~~"Member of a family," for purposes of determining whether the child is eligible for coverage under a state employee health insurance plan, means a parent or parents, including stepparents with whom the child is living if the stepparent claims the child as a dependent on the employee's federal tax return.~~

"Managed care organization" or "MCO" means an organization that offers managed care health insurance plans (MCHIPs) as ["MCHIP" is] defined in [~~this section~~ § 32.1-137.1 of the Code of Virginia].

[~~"Notice of reasonable opportunity" means the written notice that is sent to the applicant to inform the applicant that the applicant must provide verification of citizenship and identity within 90 calendar days.~~]

"Premium assistance" means the portion of the family's cost of participating in a private or employer's health plan that DMAS will pay to cover the FAMIS-eligible children under the private or employer-sponsored plan if DMAS determines it is cost effective to do so.

"Private or employer-sponsored health ~~insurance coverage~~ plan" means a health insurance policy that is either purchased by an individual directly or through an employer. This component of FAMIS refers to the ability of DMAS to provide coverage to FAMIS-eligible children by providing premium assistance to families who enroll the FAMIS-eligible children in a private or employer-sponsored health plan.

"Provider" means the individual, facility or other entity registered, licensed, or certified, as appropriate, and enrolled by an MCHIP or in fee-for-service to render services to FAMIS enrollees eligible for services.

~~"Supplemental coverage" means coverage provided to FAMIS eligible children covered under the FAMIS Select component so that they can receive all childhood immunizations included in the FAMIS benefits.~~

"Reasonable opportunity period" means a 90-calendar-day period given to applicants to supply verification of citizenship and identity.

"State fair hearing" means, consistent with 42 CFR 438.400, the process set forth in 42 CFR 431 Subpart E.

"Targeted low-income child" means an uninsured child younger than age 19 years whose household income is within the FAMIS eligibility standards established by the Commonwealth.

[~~"Targeted low-income pregnant woman" means an uninsured pregnant woman whose household income is within the Medicaid or FAMIS MOMS eligibility standards established by the Commonwealth.~~]

"Title XXI" means the federal State Children's Health Insurance Program as established by Subtitle J of the Balanced Budget Act of 1997.

~~"Virginia State Employee Health Insurance Plan" means a health insurance plan offered by the Commonwealth of Virginia to its employees.~~

12VAC30-141-20. Administration and general background.

A. The state shall use funds provided under Title XXI for obtaining coverage that meets the requirements for a State Child Health Insurance Plan (also known as Title XXI).

B. The DMAS director will have the authority to contract with entities for the purpose of establishing a centralized processing site, determining eligibility, enrolling eligible children into health plans, performing outreach, data collection, reporting, and other services necessary for the administration of the Family Access to Medical Insurance Security Plan ~~and for employing state staff to perform Medicaid eligibility determinations on children referred by FAMIS staff~~.

C. Health care services under FAMIS shall be provided through MCHIPs and through fee-for-service or through any other health care delivery system deemed appropriate by the Department of Medical Assistance Services.

12VAC30-141-30. Outreach and public participation.

A. DMAS will work cooperatively with other state agencies and contractors to ensure that federal law and any applicable federal regulations are met.

~~B. Pursuant to § 32.1-351.2 of the Code of Virginia, DMAS shall establish an Outreach Oversight Committee (committee) to discuss strategies to improve outreach activities. The committee members shall be selected by DMAS and shall be composed of representatives from community-based organizations engaged in outreach activities, social services eligibility workers, the provider community, health plans, and consumers. The committee shall meet on a quarterly basis. As may be appropriate, the committee shall make recommendations regarding state-level outreach activities, the coordination of regional and local outreach activities, and procedures for streamlining and simplifying the application process, brochures, other printed materials, forms, and applicant correspondence.~~

~~C. The board, in consultation with the committee, shall develop a comprehensive, statewide community-based outreach plan to enroll children in the FAMIS program and, if so eligible, in Medicaid. The outreach plan shall include specific strategies for: (i) improving outreach and enrollment in those localities where enrollment is less than the statewide average and (ii) enrolling uninsured children of former Temporary Assistance to Needy Families (TANF) recipients.~~

~~D.~~ B. DMAS shall develop a comprehensive marketing and outreach effort. The marketing and outreach efforts will be aimed at promoting the FAMIS and Medicaid programs and increasing enrollment~~,~~ and may include contracting with a public relations firm, nonprofit agencies, and foundations; coordination with other state agencies~~,~~; coordination with the business community~~,~~; and coordination with health care associations and providers.

C. DMAS shall ensure consultation by Native American tribes on the development and implementation of enrollment processes and procedures to exempt cost-sharing for American Indian and Alaskan Native children in compliance with 42 CFR 457.120 and 42 CFR 457.125.

Part II
~~Review~~ Appeal of Adverse Actions

12VAC30-141-40. ~~Review~~ Appeal of adverse actions or adverse benefit determinations.

A. Upon written request, all FAMIS ~~Plan~~ applicants and enrollees shall have the right to a ~~review~~ state fair hearing of an adverse action made by the ~~MCHIP,~~ local department of social services, CPU, or DMAS and to an internal appeal of an adverse benefit determination made by an MCO.

B. During ~~review~~ the appeal of a suspension or termination of enrollment or a reduction, suspension, or termination of services, the enrollee shall have the right to continuation of coverage if the enrollee requests ~~review~~ an internal appeal with the MCO or an appeal to DMAS prior to the effective date of the suspension or termination of enrollment or suspension, reduction, or termination of services.

C. ~~Review~~ An appeal of an adverse action made by the local department of social services, CPU, or DMAS shall be heard and decided by an agent of DMAS who has not been directly involved in the adverse action under ~~review~~ appeal.

D. ~~Review~~ An internal appeal of an adverse ~~action~~ benefit determination made by the ~~MCHIP~~ MCO must be conducted by a person or agent of the ~~MCHIP~~ MCO who has not been directly involved in the adverse ~~action~~ benefit determination under ~~review~~ appeal.

E. ~~After final review by the MCHIP,~~ Pursuant to 42 CFR 438.402(c)(1)(B), after exhausting the MCO's internal appeals process, there shall ~~also~~ be opportunity for ~~final independent~~ the enrollee to request an external medical review by ~~the~~ an independent external quality review organization. ["External quality review organization" means the independent contractor assigned by DMAS to handle quality reviews and to conduct final review of MCHIP adverse actions for FAMIS.] The review is optional and shall not be required before proceeding to a state fair hearing. The review shall not extend any of the timeframes for issuing a decision and shall not disrupt any continuation of coverage granted to the enrollee.

F. There will be no opportunity for ~~review~~ appeal of an adverse action to the extent that such adverse action is based on a determination by the director that funding for FAMIS has been terminated or exhausted. ~~There will be no opportunity for review based on which type of delivery system (i.e., fee-for-service, MCHIP) is assigned.~~ There will

be no opportunity for ~~review~~ appeal if the sole basis for the ~~adverse action is a state or federal law or regulation requiring an automatic change that affects all applicants or enrollees or a group of applicants or enrollees without regard to their individual circumstances.~~ decision is a provision in the State Plan or in a state or federal law requiring an automatic change in eligibility or enrollment or is a change in coverage under the health benefits package that affects all applicants or enrollees or a group of applicants or enrollees without regard to their individual circumstances.

G. The burden of proof shall be upon the applicant or enrollee to show that an adverse action or adverse benefit determination is incorrect.

H. At no time shall ~~the MCHIP's,~~ local ~~department's~~ department of social services, ~~the CPU's, or DMAS'~~ MCO, CPU, or DMAS failure to meet the ~~time frames~~ timeframes set in this chapter or set in ~~the MCHIP's~~ MCO or ~~DMAS'~~ DMAS written ~~review~~ appeal procedures constitute a basis for granting the applicant or enrollee the relief sought.

I. Adverse actions related to health benefits covered through the FAMIS Select program shall be resolved between the insurance company or employer's plan and the FAMIS Select enrollee~~,~~ and are not subject to further ~~review~~ appeal by DMAS or its contractors. ~~Adverse actions made by an MCHIP, the local department of social services, the CPU, or DMAS shall be subject to the review process set forth in Part II (12VAC30-141-40 et seq.) of this chapter.~~

12VAC30-141-50. Notice of adverse action or adverse benefit determination.

A. The local department of social services, ~~the~~ CPU, or DMAS shall send written notification to enrollees at least 10 calendar days prior to suspension or termination of enrollment.

B. DMAS or the ~~MCHIP~~ MCO shall send written notification to enrollees at least 10 calendar days prior to reduction, suspension, or termination of a previously authorized health service.

C. The local department of social services, ~~the~~ CPU, DMAS, or the ~~MCHIP~~ MCO shall send written notification to applicants and enrollees of all other adverse actions within 10 calendar days of the adverse action.

D. Notice shall include ~~the reasons for determination, an explanation of applicable rights to a review of that determination, the standard and expedited time frames for review, the manner in which a review can be requested, and the circumstances under which enrollment or services may continue pending review.~~:

1. The determination the LDSS, CPU, DMAS, or MCO has made or intends to make;

2. The reasons for the determination, including the right of the enrollee to be provided, upon request and free of charge, reasonable access to and copies of all documents, records, and other information relevant to the determination;

3. An explanation of applicable rights to request an appeal of that determination. For adverse benefit determinations by an MCO, this shall include information on the MCO's internal appeal process and, after the internal appeal process is exhausted, a state fair hearing pursuant to 42 CFR 402(b) and 42 CFR 402(c);

4. The procedure for exercising these appeal rights;

5. The circumstances under which an appeal process can be expedited and how to request it; and

6. The circumstances under which enrollment or services may continue pending appeal, how to request benefits be continued, and the circumstances, consistent with state policy, under which the enrollee may be required to pay the costs of these services.

12VAC30-141-60. Request for ~~review~~ appeal.

A. Requests for ~~review~~ internal appeal of ~~MCHIP~~ MCO adverse ~~actions~~ benefit determinations shall be submitted orally or in writing to the ~~MCHIP~~ MCO. Unless the enrollee requests an expedited appeal, an oral appeal request must be followed by a written appeal request. The enrollee must exhaust the MCO's internal appeals process before appealing to DMAS.

B. If the MCO fails to adhere to the notice or timing requirements set forth in this part, the enrollee is deemed to have exhausted the MCO's internal appeals process and may initiate a state fair hearing.

C. Requests for ~~review~~ appeal of adverse actions made by the local department of social services, ~~the~~ CPU, or DMAS or of internal appeal decisions by the MCO shall be submitted ~~in writing~~ to DMAS.

~~C.~~ D. Any ~~written~~ communication ~~clearly~~ expressing a desire to have an adverse ~~action~~ benefit determination by an MCO reviewed shall be treated as a request for ~~review~~ an internal appeal. Any communication expressing a desire to have an adverse action by the LDSS, CPU, or DMAS reviewed shall be treated as a request for a state fair hearing. Any communication expressing a desire to have an MCO's internal appeal decision reviewed shall be treated as a request for a state fair hearing.

~~D.~~ E. To be timely, requests for ~~review~~ internal appeal of ~~a MCHIP~~ an MCO's adverse benefit determination shall be received by the ~~MCHIP~~ MCO no later than ~~30~~ 60 calendar days from the date of the ~~MCHIP's~~ MCO's notice of adverse ~~action~~ benefit determination.

~~E.~~ F. To be timely, a request for an appeal of an adverse benefit determination upheld in whole or in part by the MCO's internal appeal decision shall be received by DMAS within 120 calendar days from the date of the internal appeal decision.

G. To be timely, requests for ~~review~~ appeal of a local department of social services, DMAS, or CPU ~~determination~~ adverse action shall be filed with DMAS no later than 30 calendar days from the date of the ~~CPU's, LDSS' or DMAS'~~ notice of adverse action. Requests for ~~review~~ appeal of ~~a local department of social services, DMAS, or CPU~~ an agency determination shall be considered filed with DMAS on the date the request is postmarked~~,~~ if mailed, or on the date the request is received~~,~~ if delivered other than by mail, by DMAS.

12VAC30-141-70. ~~Review~~ Appeal procedures.

A. At a minimum, the ~~MCHIP review~~ MCO internal appeal shall be conducted pursuant to written procedures as defined in § 32.1-137.6 of the Code of Virginia and ~~as may be further defined by DMAS~~ 42 CFR 438.400 et seq. Such procedures shall be subject to review and approval by DMAS.

B. Any adverse benefit determination upheld in whole or in part by the internal appeal decision issued by the MCO may be appealed by the enrollee to DMAS in accordance with the DMAS client appeals regulations at 12VAC30-110-10 through 12VAC30-110-370. DMAS shall conduct an evidentiary hearing in accordance with the 12VAC30-110-10 through 12VAC30-110-370 and shall not base any appealed decision on the record established by any internal appeal decision of the MCO. The MCO shall comply with the DMAS appeal decision. The DMAS decision in these matters shall be final and shall not be subject to appeal by the MCO.

~~The DMAS review~~ C. Appeals of adverse actions by the LDSS, CPU, or DMAS shall be conducted pursuant to ~~written procedures developed by DMAS~~ 12VAC30-110.

~~C. The procedures in effect on the date a particular request for review is received by the MCHIP or DMAS shall apply throughout the review.~~

D. Copies of the procedures shall be promptly ~~mailed~~ provided by the ~~MCHIP~~ MCO or DMAS to applicants and enrollees upon receipt of timely requests for ~~review~~ internal appeals or state fair hearings. Such written procedures shall include ~~but not be limited to~~ the following:

1. The right to representation by an attorney or other agent of the applicant's or enrollee's choice, but at no time shall the ~~MCHIP~~ MCO, local department of social services, DSS, or DMAS be required to obtain or compensate attorneys or other agents acting on behalf of applicants or enrollees;

2. The right to timely review of ~~their~~ files and other applicable information relevant to the ~~review of the~~ internal appeal or state fair hearing decision;

3. The right to fully participate in the ~~review~~ internal appeal or state fair hearing process, whether the ~~review~~ internal appeal or state fair hearing is conducted in person or in writing, including the presentation of supplemental information during the ~~review~~ internal appeal or state fair hearing process;

4. The right to have personal and medical information and records maintained as confidential; ~~and~~

5. The right to a written final decision ~~within 90 calendar days of receipt of the request for review, unless the applicant or enrollee requests or causes a delay.~~:

a. For internal appeals to the MCO, within 30 calendar days of receipt of the request for an internal appeal; or

b. For state fair hearings, within the time limitations for appeals imposed by federal regulations and as permitted in 12VAC30-110-30;

6. For eligibility and enrollment matters, if the applicant's or enrollee's physician or health plan determines that the 90-calendar-day timeframe could seriously jeopardize the applicant's or enrollee's life or health or ability to attain, maintain, or regain maximum function, an applicant or enrollee will have the opportunity to request an expedited ~~review~~ appeal. Under these conditions, a request for ~~review~~ an expedited appeal shall result in a written final decision within ~~three business days~~ 72 hours after DMAS receives~~,~~ the expedited appeal request from the physician or health plan~~,~~ with the case record and information indicating that taking the time for a standard resolution of the ~~review~~ appeal request could seriously jeopardize the applicant's or enrollee's life or health or ability to attain, maintain, or regain maximum function, unless the applicant or enrollee ~~or his authorized representative causes a delay.~~ requests an extension;

7. For health services matters for FAMIS enrollees receiving services through ~~MCHIPs, if~~ an MCO:

a. If the enrollee's physician or health plan determines that the ~~90-calendar-day~~ 30-calendar-day timeframe for a standard internal appeal could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function, an enrollee will have the opportunity to request an expedited ~~review~~ internal appeal. Under these conditions, a request for ~~review~~ an internal appeal shall result in a written decision by the ~~external quality review organization~~ MCO within 72 hours from the time ~~an enrollee requests~~ the expedited ~~review~~ internal appeal is requested, unless the applicant, enrollee, or authorized representative requests ~~or causes~~ a delay. If a delay is requested ~~or caused~~ by the applicant,

enrollee, or authorized representative, then the expedited ~~review~~ internal appeal may be extended up to 14 calendar days.

b. If the adverse benefit determination is upheld in whole or in part by the expedited internal appeal decision issued by the MCO, and if the enrollee's physician or health plan determines that the timeframe for a standard appeal to DMAS could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function, and enrollee will have the opportunity to request an expedited appeal to DMAS. Under these conditions, a request for a state fair hearing shall result in a written decision within 72 hours from the time an enrollee requests the expedited appeal, unless the applicant, enrollee, or authorized representative requests a delay. If a delay is requested by the applicant, enrollee, or authorized representative, then the expedited appeal may be extended up to 14 calendar days; and

8. For health services matters for FAMIS enrollees receiving services through fee-for-service, if the enrollee's physician or health plan determines that the 90-calendar-day timeframe for a standard appeal could seriously jeopardize the enrollee's life, health, or ability to attain, maintain, or regain maximum function, an enrollee will have the opportunity to request an expedited review. Under these conditions, a request for ~~review~~ an expedited appeal shall result in a written decision within 72 hours from the time ~~an enrollee requests~~ the expedited ~~review~~ appeal is requested, unless the applicant, enrollee, or authorized representative requests ~~or causes~~ a delay. If a delay is requested ~~or caused~~ by the applicant, enrollee, or authorized representative, then expedited ~~review~~ appeal may be extended up to 14 calendar days.

Part III
Eligibility Determination and Application Requirements

12VAC30-141-100. ~~Eligibility requirements~~ General conditions of eligibility.

A. ~~This section shall be used to determine eligibility of children for FAMIS.~~ An LDSS, DMAS, or the CPU determines eligibility for Title XXI services.

B. FAMIS shall be in effect statewide.

C. ~~Eligible children must:~~ FAMIS serves targeted low-income children consistent with requirements at 42 CFR 457.310, 42 CFR 457.315, and 42 CFR 457.320.

~~1. Be determined ineligible for Medicaid by a local department of social services or be screened by the FAMIS central processing unit and determined not Medicaid likely;~~

~~2. Be under 19 years of age;~~

~~3. Be residents of the Commonwealth;~~

~~4. Be either United States citizens, United States nationals or qualified noncitizens;~~

~~5. Be uninsured, that is, not have comprehensive health insurance coverage; and~~

~~6. Not be an inpatient in an institution for mental diseases (IMD), or an inmate in a public institution that is not a medical facility.~~

~~D. Income.~~

~~1. Screening. All child health insurance applications received at the FAMIS central processing unit must be screened to identify applicants who are potentially eligible for Medicaid. Children screened and found potentially eligible for Medicaid cannot be enrolled in FAMIS until there has been a finding of ineligibility for Medicaid. Children who do not appear to be eligible for Medicaid shall have their eligibility for FAMIS determined. Children determined to be eligible for FAMIS will be enrolled in the FAMIS program. Child health insurance applications received at a local department of social services shall have a full Medicaid eligibility determination completed. Children determined to be ineligible for Medicaid due to excess income will have their eligibility for FAMIS determined. If a child is found to be eligible for FAMIS, the local department of social services will enroll the child in the FAMIS program.~~

~~2. Standards. Income standards for FAMIS are based on a comparison of countable income to 200% of the federal poverty level for the family size, as defined in the State Plan for Title XXI as approved by the Centers for Medicare and Medicaid Services. Children who have income at or below 200% of the federal poverty level, but are ineligible for Medicaid due to excess income, will be income eligible to participate in FAMIS.~~

~~3. Grandfathered CMSIP children. Children who were enrolled in the Children's Medical Security Insurance Plan at the time of conversion from CMSIP to FAMIS and whose eligibility determination was based on the requirements of CMSIP shall continue to have their income eligibility determined using the CMSIP income methodology. If their income exceeds the FAMIS standard, income eligibility will be based on countable income using the same income methodologies applied under the Virginia State Plan for Medical Assistance for children as set forth in 12VAC30-40-90. Income that would be excluded when determining Medicaid eligibility will be excluded when determining countable income for the former CMSIP children. Use of the Medicaid income methodologies shall only be applied in determining the financial eligibility of former CMSIP children for FAMIS and for only as long as the children meet the income eligibility requirements for CMSIP. When a former CMSIP child is determined to be ineligible for FAMIS, these former CMSIP income~~

~~methodologies shall no longer apply and income eligibility will be based on the FAMIS income standards.~~

~~4. Spenddown. Deduction of incurred medical expenses from countable income (spenddown) shall not apply in FAMIS. If the family income exceeds the income limits described in this section, the individual shall be ineligible for FAMIS regardless of the amount of any incurred medical expenses.~~

~~E. Residency. The requirements for residency, as set forth in 42 CFR 435.403, will be used when determining whether a child is a resident of Virginia for purposes of eligibility for FAMIS. A child who is not emancipated and is temporarily living away from home is considered living with his parents, adult relative caretaker, legal guardian, or person having legal custody if the absence is temporary and the child intends to return to the home when the purpose of the absence (such as education, medical care, rehabilitation, vacation, visit) is completed.~~

~~F. United States citizen or nationality. Upon signing the declaration of citizenship or nationality required by § 1137(d) of the Social Security Act, the applicant or recipient is required under § 2105(c)(9) to furnish satisfactory documentary evidence of United States citizenship or nationality and documentation of personal identity unless citizenship or nationality has been verified by the Commissioner of Social Security or unless otherwise exempt.~~

~~G. Qualified noncitizen. The requirements for qualified aliens set out in Public Law 104-193, as amended, and the requirements for noncitizens set out in subdivisions 3 b, c, and e of 12VAC30-40-10 will be used when determining whether a child is a qualified noncitizen for purposes of FAMIS eligibility.~~

~~H. Coverage under other health plans.~~

~~1. Any child covered under a group health plan or under health insurance coverage, as defined in § 2791 of the Public Health Services Act (42 USC § 300gg-91(a) and (b)(1)), shall not be eligible for FAMIS.~~

~~2. No substitution for private insurance.~~

~~a. Only uninsured children shall be eligible for FAMIS. A child is not considered to be insured if the health insurance plan covering the child does not have a network of providers in the area where the child resides. Each application for child health insurance shall include an inquiry about health insurance. Each redetermination of eligibility shall also document inquiry about current health insurance.~~

~~b. Health insurance does not include Medicare, Medicaid, FAMIS, or insurance for which DMAS paid premiums under Title XIX through the Health Insurance Premium Payment (HIPP) Program or under Title XXI through the SCHIP premium assistance program~~

D. Each individual covered under the plan shall be:

1. Financially eligible to receive services as established using the methods and standards described in subsection F of this section; and

2. Meet the applicable nonfinancial eligibility conditions.

E. Nonfinancial eligibility conditions.

1. Eligible individuals shall be younger than 19 years of age.

2. Eligible individuals shall be residents of the Commonwealth. A child is considered to be a resident of the Commonwealth under the following conditions:

a. A noninstitutionalized child if capable of indicating intent and who is emancipated or married if the child is living in the state and intends to reside in the state, including without a fixed address;

b. A noninstitutionalized child not described in subdivision E 2 a of this section and who is not in the custody of the state:

(1) Residing in the state, with or without a fixed address; or

(2) The state of residency of the parent or caretaker, in accordance with 42 CFR.435.403(h)(1), with whom the individual resides;

c. An institutionalized child who is not a ward of the state if the state is the state of residence of the child's custodial parent or caretaker at the time of placement;

d. A child who is in the custody of the state regardless of where the child lives; or

e. A child physically located in the state when there is a dispute with one or more states as to the child's actual state of residence.

3. FAMIS eligibility is open to:

a. United States citizens;

b. United States nationals;

c. Qualified noncitizens as defined in § 431 of the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) (8 USC § 1641) or whose eligibility is required by § 402(b) of PRWORA (8 USC § 1612(b)) and is not prohibited by § 403 of PRWORA (8 USC § 1613);

d. Individuals who have declared themselves to be citizens or nationals of the United States or an individual having satisfactory immigration status, during a reasonable opportunity period pending verification of their citizenship, nationality, or satisfactory immigration status consistent with requirements of §§ 1903(x), 1137(d), and 1902(ee) of the Social Security Act and

42 CFR 435.407, 42 CFR 407, [~~42 CFR 956~~ 42 CFR 435.956], and 42 CFR 457.380.

(1) The reasonable opportunity period begins on and extends 90 calendar days from the date the notice of reasonable opportunity is received by the individual. ["Notice of reasonable opportunity" means the written notice that is sent to the applicant to inform the applicant that the applicant must provide verification of citizenship and identity within 90 calendar days.]

(2) An extension of the reasonable opportunity period is allowed if the individual is making a good faith effort to resolve any inconsistencies or obtain any necessary documentation, or the agency determining eligibility needs more time to complete the verification process.

(3) The agency will provide benefits to otherwise eligible individuals during the reasonable opportunity period;

e. Lawfully residing in the United States, as provided in § 2107(e)(1)(J) of the Social Security Act (§ 214 of CHIPRA 2009, P.L. 111-3). An individual is considered to be lawfully residing in the United States if the person is:

(1) A qualified noncitizen as defined in 8 USC § 1641(b) and (c);

(2) A noncitizen in a valid nonimmigrant status as defined in 8 USC § 1101(a)(15) or otherwise under the immigration laws (as defined in 8 USC § 1101 (a)(17));

(3) A noncitizen who has been paroled into the United States in accordance with 8 USC § 1182(d)(5) for less than one year, except for an individual paroled for prosecution, for deferred inspection, or pending removal proceedings;

(4) A noncitizen who belongs to one of the following classes:

(a) Granted temporary resident status in accordance with 8 USC § 1160 or 1255a, respectively;

(b) Granted temporary protected status (TPS) in accordance with 8 USC § 1254a and individuals with pending applications for TPS who have been granted employment authorization;

(c) Granted employment authorization under 8 CFR § 274a.12(c);

(d) Family unity beneficiaries in accordance with § 301 of P.L. 101-649, as amended;

(e) Under deferred enforced departure in accordance with a decision made by the President;

(f) Granted deferred action status;

(g) Granted an administrative stay of removal under 8 CFR 241; or

(h) Beneficiary of approved visa petition who has a pending application for adjustment of status;

(5) Is an individual with a pending application for asylum under 8 USC § 1158, for withholding of removal under 8 USC § 1231, or under the Convention Against Torture who:

(a) Has been granted employment authorization; or

(b) Is younger than 14 years of age and has had an application pending for at least 180 calendar days;

(6) Has been granted withholding of removal under the Convention Against Torture;

(7) Is a child who has a pending application for Special Immigrant Juvenile Status as described in 8 USC § 1101(a)(27)(J);

(8) Is lawfully present in American Samoa under the immigration laws of American Samoa; or

(9) Is a victim of severe trafficking in persons, in accordance with the Victims of Trafficking and Violence Protection Act of 2000, P.L. 106-386, as amended (22 USC § 7105(b)).

f. An individual with deferred action under the Department of Homeland Security's deferred action for the childhood arrivals process, as described in the Secretary of Homeland Security's June 15, 2012, memorandum, shall not be considered to be lawfully present with respect to any of the categories in subdivision E 3 e of this section.

4. Eligible individuals shall be uninsured, that is, not have creditable health insurance coverage. ["Creditable health insurance coverage" means coverage that meets the definition of 42 CFR 457.10.]

a. Individuals eligible for FAMIS shall not be found eligible or potentially eligible for Medicaid under policies of the State Plan determined through the screening process described at 42 CFR 457.350.

b. Any child covered under a group health plan or under health insurance coverage, as defined in § 2791 of the Public Health Services Act (42 USC § 300gg-91(a) and (b)(1)), shall not be eligible for FAMIS.

(1) FAMIS shall not be a substitution for private insurance.

(2) Only uninsured children shall be eligible for FAMIS. A child is not considered to be insured if the health insurance plan covering the child does not have a network of providers in the area where the child resides. Each application for child health insurance shall include an inquiry about health insurance. Each redetermination of eligibility shall also document inquiry about current health insurance.

(3) Health insurance does not include Medicare, Medicaid, FAMIS, or insurance for which DMAS paid premiums under Title XIX through the Health Insurance Premium Payment Program or under Title XXI through the state children's health insurance program premium assistance program known as FAMIS Select.

5. Residents of an institution. Eligible individuals may not be an inpatient in an institution for mental diseases or an inmate in a public institution that is not a medical facility at the time of the initial eligibility determination or redetermination.

6. Social Security Number.

a. All eligible individuals shall furnish their Social Security Numbers (SSNs), with the following exceptions: (i) individuals refusing to obtain a SSN because of well-established religious objections [~~,~~] (ii) individuals who are not eligible for a SSN [~~,~~] or (iii) individuals who are issued a SSN only for a valid nonwork purpose.

b. DMAS or its designee shall:

(1) Assist individuals who are required to provide their SSN to apply for or obtain an SSN from the Social Security Administration if the individuals do not have or forgot their SSNs;

(2) Inform individuals required to provide their SSNs (i) by what statutory authority the number is required to be provided; and (ii) how the Commonwealth will use the SSN;

(3) Verify each SSN furnished by applicants or beneficiaries with the Social Security Administration; and

(4) Not deny or delay services to an otherwise eligible applicant pending issuance or verification of the individual's SSN by the Social Security Administration.

c. The utilization of the SSN is consistent with §§ 205 and 1137 of the Social Security Act and the Privacy Act of 1974.

d. DMAS requests nonapplicant household members to voluntarily provide their SSNs. When requesting an SSN for nonapplicant household members, DMAS (i) informs the nonapplicant that this information is voluntary and provides information regarding how the SSN will be used and (ii) uses the SSN for determination of eligibility for Children's Health Insurance Program (CHIP) or other insurance affordability programs or for a purpose directly connected with the administration of the state plan.

F. Financial eligibility.

1. Screening. All applications shall have a Medicaid income eligibility screen completed. Children determined to be ineligible for Medicaid due to excess income will have their eligibility for FAMIS determined.

2. Standards.

a. The Commonwealth shall apply modified adjusted gross income (MAGI) methodologies for all separate CHIP covered groups, consistent with 42 CFR 457.315 and 435.603(b) through (i). FAMIS shall be available for targeted low-income children. Income standards shall be applied statewide. Children from birth to age 19 years who have income above the Medicaid-eligible limit at or below 200% of the federal poverty level, with a 5% income disregard, shall be income eligible to participate in FAMIS.

b. In determining family size for the eligibility determination of other individuals in the household that includes a pregnant woman, the pregnant woman is counted just as herself.

c. Financial eligibility is determined consistent with the following provisions:

(1) For new applicants, financial eligibility is based on the monthly income and family size.

(2) When determining eligibility for current beneficiaries, financial eligibility is based on current monthly household income and family size.

(3) In determining current household income, the agency will use reasonable methods to account for current income and reasonable prediction of changes in future income or family size.

d. Unless an exception exists, as provided at 42 CFR 457.315 and 42 CFR 435.603(d)(2) through (d)(4), household income is the sum of the MAGI-based income for every person counted in the individual's MAGI household.

3. Spenddown. The Commonwealth shall not apply a spenddown process for FAMIS where household income exceeds the income eligibility limit for FAMIS.

~~I.~~ G. Eligibility of newborns.

1. If a child otherwise eligible for FAMIS is born within the three months prior to the month in which a signed application is received, the eligibility for coverage is effective retroactive to the child's date of birth if the child would have met all eligibility criteria during that time.

~~A child born to a mother who is enrolled in FAMIS, under either the XXI Plan or a related waiver (such as FAMIS MOMS), on the date of the child's birth shall be deemed eligible for FAMIS for one year from birth unless the child is otherwise eligible for Medicaid.~~

2. A child born to a targeted low-income pregnant woman is deemed to have applied for and be eligible for FAMIS or

Medicaid until the child turns age one year in accordance with § 2112 of the Social Security Act. ["Targeted low-income pregnant woman" means an uninsured pregnant woman whose household income is within the Medicaid or FAMIS MOMS eligibility standards established by the Commonwealth.]

a. The child is deemed to have applied for and been found eligible for FAMIS or Medicaid, as appropriate, as of the date of the child's birth and remains eligible without regard to changes in circumstances until the child's first birthday.

b. DMAS shall cover as a deemed newborn a child born to a mother who is covered under Medicaid or CHIP through the authority of the state's § 1115 demonstration on the date of the newborn's birth.

12VAC30-141-110. Duration of eligibility and renewal.

A. The effective date of FAMIS eligibility shall be the date of birth for a newborn deemed eligible under 12VAC30-141-100 ~~I~~ G. ~~Otherwise~~ For all other children, the effective date of FAMIS eligibility shall be the first day of the month in which a signed completed application was received by either the ~~FAMIS central processing unit or a local department of social services~~ LDSS or CPU if the applicant met all eligibility requirements in that month. In no case shall a child's eligibility be effective earlier than the date of the child's birth.

B. Eligibility for FAMIS will continue for 12 months so long as the child remains a resident of Virginia and the child's countable income does not exceed 200% of the federal poverty level. A child born to a mother who was enrolled in FAMIS, under either the Title XXI Plan or a related waiver (such as FAMIS MOMS), on the date of the child's birth shall remain eligible for one year regardless of income unless otherwise found to be eligible for Medicaid. A change in eligibility will be effective the first of the month following expiration of a ~~10-day~~ 10-calendar-day advance notice. Eligibility based on all eligibility criteria listed in 12VAC30-141-100 ~~C~~ D will be redetermined no less often than annually.

C. Renewal of coverage.

1. Renewal of coverage for individuals whose financial eligibility is based on the applicable modified adjusted gross income (MAGI) standard are performed as follows, consistent with 42 CFR 457.343:

a. Renewal of coverage is completed once every 12 months, and

b. Without requiring information from the individual if able to do so based on an ex parte review of reliable information contained in the individual's account or other more current information available to the agency.

2. If the agency cannot determine eligibility solely on the basis of the ex parte review or otherwise needs additional information to complete the redetermination, the individual is provided with a renewal form that is prepopulated with information contained in the individual's case. The individual shall be allowed 30 calendar days to return the renewal form and the necessary verifications.

If the individual's coverage is canceled because the renewal was not completed (either electronically, by phone, or on paper) or because verifications needed to complete the renewal were not returned, the individual has 90 calendar days after the coverage is canceled to provide the information necessary to complete the renewal without having to file a new application. This 90-calendar-day period is called the reconsideration period. If all necessary information is provided during the reconsideration period and the individual found eligible, enrollment will be restored without any lapse in coverage.

12VAC30-141-120. ~~Children ineligible for FAMIS.~~ (Repealed.)

~~A. If a child is:~~

~~1. Eligible for Medicaid, or would be eligible if he applied for Medicaid, he shall be ineligible for coverage under FAMIS. A child found through the screening process to be potentially eligible for Medicaid but who fails to complete the Medicaid application process for any reason, cannot be enrolled in FAMIS;~~

~~2. An inmate of a public institution as defined in 42 CFR §435.1009, he shall be ineligible for FAMIS; or~~

~~3. An inpatient in an institution for mental disease (IMD) as defined in 42 CFR §435.1010, he shall be ineligible for FAMIS.~~

~~B. If a child's parent or other authorized representative does not meet the requirements of assignment of rights to benefits or requirements of cooperation with the agency in identifying and providing information to assist the Commonwealth in pursuing any liable third party, the child shall be ineligible for FAMIS.~~

~~C. If a child, if age 18, or if under age 18, a parent, adult relative caretaker, guardian, or legal custodian obtained benefits for a child or children who would otherwise be ineligible by willfully misrepresenting material facts on the application or failing to report changes, the child or children for whom the application is made shall be ineligible for FAMIS. The child, if age 18, or if under age 18, the parent, adult relative caretaker, guardian, or legal custodian who signed the application shall be liable for repayment of the cost of all benefits issued as the result of the misrepresentation.~~

12VAC30-141-150. Application requirements.

A. Availability of program information. DMAS or its designee shall furnish the following information in written form and orally as appropriate to all applicants and to other individuals who request it:

1. The eligibility requirements;

2. Summary of covered benefits;

3. Copayment amounts required; and

4. The rights and responsibilities of applicants and enrollees.

B. Opportunity to apply. DMAS or its designee must afford an individual, wishing to do so, the opportunity to apply ~~for child health insurance~~. ~~Applications for health insurance will be accepted at a central site designated by DMAS and at local departments of social services throughout the Commonwealth.~~ Applicants may file an application ~~for child health insurance~~ by mail, by fax, by phone, via the internet, or in person at local departments of social services. ~~Applications filed at the FAMIS CPU can be submitted by mail, by fax, via the Internet, or by phone.~~ Face-to-face interviews for the program are not required. Eligibility determinations for FAMIS shall occur at either local departments of social services ~~or at the~~, DMAS ~~designated central site~~, or the CPU.

C. Application. DMAS or its designee shall require an application from the applicant if the applicant is at least 18 years of age or older, or from a parent, adult relative caretaker, guardian, legal custodian, or authorized representative if the applicant is younger than 18 years of age or the applicant is incapacitated. ["Incapacitated" means a person who, pursuant to an order of a court of competent jurisdiction, has been found to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i) meet the essential requirements of his health, care, safety, or therapeutic needs without the assistance or protection of a guardian, or (ii) manage property or financial affairs or provide for his support or for the support of his legal dependents without the assistance or protection of a conservator.]

1. DMAS employs a single, streamlined application developed by the state and approved by the Secretary of the Department of Health and Human Services in accordance with § 1413(b)(I)(B) of the Affordable Care Act.

2. DMAS may employ an alternative application used to apply for multiple human service programs approved by the Secretary of the Department of Health and Human Services, provided that the agency makes readily available the single or alternative application used only for insurance affordability programs to individuals seeking assistance only through such programs.

~~C.~~ D. Right to apply. An individual who is 18 years of age shall not be refused the right to complete an application for ~~health insurance for~~ himself and shall not be discouraged from asking for assistance for himself under any circumstances.

~~D.~~ E. Applicant's signature. The applicant must sign state-approved application forms submitted, even if another person fills out the form, unless the application is filed and signed by the applicant's parent, adult relative caretaker, legal guardian or conservator, attorney-in-fact or authorized representative.

~~E.~~ F. The authorized representative for an individual 18 years of age or older shall be those individuals as set forth in 12VAC30-110-1380.

~~F.~~ G. The authorized representative for children younger than 18 years of age shall be those individuals as set forth in 12VAC30-110-1390.

~~G.~~ H. Persons prohibited from signing an application. An employee of, or an entity hired by, a medical service provider who stands to obtain FAMIS payments shall not sign an application for health insurance on behalf of an individual who cannot designate an authorized representative.

~~H. Written application. DMAS or its designee shall require a written application from the applicant if he is at least 18 years of age or older, or from a parent, adult relative caretaker, guardian, legal custodian, or authorized representative if the applicant is less than 18 years of age or the applicant is incapacitated. The application must be on a form prescribed by DMAS, and must be signed under a penalty of perjury. The application form shall contain information sufficient to determine Medicaid and FAMIS eligibility.~~

I. Assistance with application. DMAS or its designee shall allow an individual ~~or individuals~~ of the applicant's choice to assist and represent the applicant in the application process, ~~or~~ a ~~redetermination~~ renewal process ~~for eligibility~~, or both.

J. Timely determination of eligibility. The time processing standards for determining eligibility ~~for child health insurance~~ begin with the date ~~a signed~~ an application is submitted online, by telephone, by fax, or received in hard copy either at a ~~local department of social services~~ LDSS or the ~~FAMIS~~ CPU. An application for health insurance ~~received at local departments of social services must~~ shall have ~~a full Medicaid eligibility determination and, when a child is determined to be ineligible for Medicaid due to excess income, a FAMIS eligibility determination~~ an eligibility determination performed~~,~~ within the ~~same Medicaid~~ established federal case processing time standards.

~~Except in cases of unusual circumstances as described below, an application for health insurance received at the FAMIS CPU and screened as ineligible for Medicaid, shall have a FAMIS eligibility determination completed within 10 business days of the date the complete application was~~

~~received at the CPU. Applications that are screened as Medicaid likely will be processed within Medicaid case processing time standards.~~

~~1. Unusual circumstances include: administrative or other emergency beyond the agency's control. In such case, DMAS, or its designee, or the LDSS must document, in the applicant's case record, the reasons for delay. DMAS or its designee or the local department of social services must not use the time standards as a waiting period before determining eligibility or as a reason for denying eligibility because it has not determined eligibility within the time standards.~~

~~2. Incomplete applications shall be held open for a period of 30 calendar days to enable applicants to provide outstanding information needed for an eligibility determination. Any applicant who fails to provide, within 30 calendar days of the receipt of the initial application, information or verifications necessary to determine eligibility, shall have his application for FAMIS eligibility denied.~~

K. Notice of ~~DMAS', its designee's or~~ the ~~local department of social services'~~ decision concerning eligibility. ~~DMAS, its designee or the local department of social services must~~ The determining agency shall send each applicant a written notice of the ~~agency's/designee's~~ agency's or designee's decision on ~~his~~ the applicant's application, and~~,~~ if approved, ~~his~~ the applicant's obligations under the program. If eligibility for both FAMIS and Medicaid is denied, notice must be given concerning the reasons for the action and an explanation of the applicant's right to request a review of the adverse actions, as described in 12VAC30-141-50.

L. Case documentation. ~~DMAS, its designee, or the local department of social services must~~ The determining agency shall include in each applicant's record all necessary facts to support the decision on ~~his~~ the applicant's application~~,~~ and must dispose of each application by a finding of eligibility or ineligibility, unless (i) there is an entry in the case record that the applicant voluntarily withdrew the application and that the agency or its designee sent a notice confirming ~~his~~ the applicant's decision; or (ii) there is a supporting entry in the case record that the applicant cannot be located.

M. Case maintenance. All cases approved for FAMIS shall be maintained at ~~the FAMIS CPU~~ local departments of social services or another entity designated by DMAS. ~~Children determined by local departments of social services to be eligible for FAMIS shall have their cases transferred to the FAMIS CPU for ongoing case maintenance. The FAMIS CPU~~ The determining agency will be responsible for providing newly enrolled recipients with program information, benefits available, how to secure services under the program, a FAMIS handbook, and for processing changes in eligibility and annual renewals within established ~~time frames~~ timeframes. DMAS outreach resources may also provide information or assistance to the enrollee.

N. ~~Redetermination~~ Renewal of eligibility. DMAS, LDSS, or the ~~FAMIS~~ CPU ~~must~~ shall redetermine the eligibility of enrollees with respect to circumstances that may change at least every 12 months. During the 12-month period of coverage, enrollees must make timely and accurate reports if an enrollee no longer resides in the Commonwealth of Virginia or when changes in income exceed 200% of the federal poverty level plus a 5.0% income disregard. ~~DMAS or the FAMIS CPU must~~ The agency responsible for managing the case shall promptly redetermine eligibility when it receives information about changes in a FAMIS enrollee's circumstances that may affect eligibility. DMAS or its designee may assist with documenting changes reported by the enrollee.

O. Notice of decision concerning eligibility. ~~DMAS or the FAMIS CPU must~~ The agency responsible for managing the case shall give enrollees timely notice of proposed action to terminate their eligibility under FAMIS. The notice must meet the requirements of 42 CFR 457.1180.

Part IV
Cost Sharing

12VAC30-141-160. Copayments for families not participating in FAMIS Select.

A. Copayments shall apply to all enrollees in an MCHIP.

B. These cost-sharing provisions shall be implemented with the following restrictions:

1. Total cost sharing for each 12-month eligibility period shall be limited to (i) for families with incomes equal to or less than 150% of ~~FPL~~ federal poverty level (FPL), the lesser of (a) $180 and (b) 2.5% of the family's income for the year (or 12-month eligibility period); and (ii) for families with incomes greater than 150% of FPL, the lesser of $350 and 5.0% of the family's income for the year (or 12-month eligibility period).

2. DMAS or its designee shall ensure that the annual aggregate cost sharing for all FAMIS enrollees in a family does not exceed the aforementioned caps.

3. Families will be required to submit documentation to DMAS or its designee showing that their maximum copayment amounts are met for the year.

4. Once the cap is met, DMAS or its designee will issue a new eligibility card excluding such families from paying additional copays for the 12-month enrollment period.

C. Exceptions to the above cost-sharing provisions:

1. Copayments shall not be required for [~~well child~~ well child], well baby, and pregnancy-related services. This shall include:

a. All healthy newborn inpatient physician visits, including routine screening (inpatient or outpatient);

b. Routine physical examinations, laboratory tests, immunizations, and related office visits;

c. Routine preventive and diagnostic dental services (i.e., oral examinations, prophylaxis and topical fluoride applications, sealants, and x-rays);

d. Services to pregnant females related to the pregnancy; and

e. Other preventive services as defined by the department.

2. Enrollees are not held liable for any additional costs, beyond the standard copayment amount, for emergency services furnished outside of the individual's managed care network. Only one copayment charge will be imposed for a single office visit.

3. No cost sharing will be charged to American Indians and Alaska Natives.

12VAC30-141-175. FAMIS Select.

A. Enrollees in FAMIS may, but shall not be required to, enroll in a private or employer-sponsored health plan if DMAS or its designee determines that such enrollment is cost effective, as defined in this section.

B. Eligibility determination. FAMIS children may elect to receive coverage under a health plan purchased privately or through an employer and DMAS may elect to provide coverage by paying all or a portion of the premium if all of the following conditions are met:

1. The children are determined to be eligible for FAMIS;

2. The cost of coverage for the child [~~or children~~] under FAMIS Select is equal to or less than the Commonwealth's cost of obtaining coverage under FAMIS only for the eligible targeted low-income children involved. The cost-effectiveness determination methodology is described in subsection E of this section;

3. The policyholder agrees to assign rights to benefits under the private or [~~employer's~~ employer-sponsored health] plan to DMAS to assist the Commonwealth in pursuing these third-party payments for childhood immunizations. When a child is provided coverage under a private or [~~employer's~~ employer-sponsored health] plan, that plan becomes the payer for all other services covered under that plan; and

4. The policyholder is not under a court order to provide medical support for the applicant child.

C. DMAS will continually verify the child's or [~~or children's~~] coverage under the private or [~~employer's~~ employer-sponsored health] plan and will redetermine the eligibility of the child [~~or children~~] for the FAMIS Select component when it receives information concerning an applicant's or enrollee's circumstances that may affect eligibility.

D. Application requirements.

1. DMAS shall furnish the following information in written form and orally, as appropriate, to the families of FAMIS children who have indicated an interest in FAMIS Select:

a. The eligibility requirements for FAMIS Select;

b. A description of how the program operates, the amount of premium assistance available, and how children can move from FAMIS Select into FAMIS if requested;

c. A summary of the covered benefits and cost-sharing requirements available through FAMIS;

d. A guide to help families make an informed choice by comparing the FAMIS plan to their private or employer-sponsored health plan. Such guide shall include a notice to the effect that children covered by FAMIS Select will not receive FAMIS-covered services, but only those health services covered by their private or employer-sponsored health plan, and that the FAMIS Select enrollee shall be responsible for any and all costs associated with their chosen health plan;

e. Information on coverage for childhood immunizations through FAMIS; and

f. The rights and responsibilities of applicants and enrollees.

2. DMAS will provide interested families with applications for FAMIS Select.

3. ~~A~~ An electronic or written application for the FAMIS Select component shall be required from interested families.

4. DMAS shall determine eligibility for the FAMIS Select component promptly, within 45 calendar days from the date of receiving an application that contains all information and verifications necessary to determine eligibility, except in unusual circumstances beyond the agency's control. Actual enrollment into the FAMIS Select component may not occur for extended periods of time, depending on the ability of the family to enroll in the employer's plan.

5. Incomplete FAMIS Select applications shall be held for a period of 30 calendar days to enable applicants to provide outstanding information needed for a FAMIS Select eligibility determination. Any applicant who, within 30 calendar days of the receipt of the initial application, fails to provide information or verifications necessary to

determine FAMIS Select eligibility shall have his application denied.

6. DMAS must send each applicant a written notice of the agency's decision on his application for FAMIS Select and, if approved, his obligations under the program. If eligibility is denied, notice will be given concerning the reasons for the denial.

E. Cost effectiveness. DMAS may elect to provide coverage to FAMIS children by paying all or a portion of the family's private or employer-sponsored health insurance premium if the cost of such premium assistance under FAMIS Select is equal to or less than the Commonwealth's cost of obtaining coverage under FAMIS only for the eligible, targeted, low-income child [~~or children~~] involved. Providing premium assistance for the FAMIS-eligible children may result in the coverage of an adult or other ~~relative/dependent~~ relative or dependent; however, this coverage shall be solely incidental to covering the FAMIS child.

1. To ensure that the FAMIS Select program remains cost effective, DMAS will establish a fixed premium assistance amount per child that will be paid to a family choosing to enroll their FAMIS-eligible child in FAMIS Select. The fixed premium assistance amount will be determined annually by:

a. Determining the cost of covering a child under FAMIS. The cost will be determined by using the capitated payment rate paid to MCHIPs, or an average cost amount developed by DMAS;

b. Determining the administrative costs associated with the FAMIS Select program; and

c. Establishing a fixed premium assistance amount that includes administrative costs and is less than or equal to the cost of covering the FAMIS child [~~or children~~] under FAMIS.

DMAS will ensure that the total of the fixed premium assistance amounts for all the FAMIS-eligible children per family do not exceed the total cost of the family's health insurance premium payment for the private or employer-sponsored [~~coverage~~ health plan]. If the total fixed premium assistance amounts do exceed the family's premium payment, then the family premium assistance will be reduced by an amount necessary to ensure the premium assistance payment is less than or equal to the family's premium payment.

F. Enrollment and disenrollment.

1. FAMIS children applying for FAMIS Select will receive coverage under FAMIS until their eligibility for coverage under the FAMIS Select component is established and until they are able to enroll in the private or employer-sponsored health plan.

2. The timing and procedures employed to transfer FAMIS children's coverage to the FAMIS Select component will be coordinated between DMAS and the ~~CPU~~ agency managing the case to ensure continuation of ~~health plan~~ coverage.

3. Participation by families in the FAMIS Select component shall be voluntary. Families may disenroll their child [~~or children~~] from the FAMIS Select component as long as the proper timing and procedures established by DMAS are followed to ensure continued health coverage.

G. Premium assistance. When a child is determined eligible for coverage under the FAMIS Select component, premium assistance payments shall become effective the month in which the FAMIS child [~~or children are~~ is] enrolled in the employer's plan. Payment of premium assistance shall end:

1. On the last day of the month in which FAMIS eligibility ends;

2. The last day of the month in which the child [~~or children lose~~ loses] eligibility for coverage under the private or [~~employer's~~ employer-sponsored health] plan;

3. The last day of the month in which the family notifies DMAS that it wishes to disenroll its child [~~or children~~] from the FAMIS Select component; or

4. On the next business day following a request by the family to immediately transfer the child from FAMIS Select into the FAMIS program. The request must include notification that the child's private or employer-sponsored [~~coverage~~ health plan] has been terminated as of the date of transfer and an agreement by the family to return to DMAS the premium assistance payment prorated for that portion of the month in which the child was not enrolled in the private or employer-sponsored [health] plan.

H. Supplemental health benefits coverage will be provided to ensure that FAMIS children enrolled in the FAMIS Select component receive all childhood immunizations available under the FAMIS benefits. FAMIS children can obtain these supplemental benefits through Medicaid providers.

I. Cost sharing. FAMIS Select families will be responsible for all copayments, deductibles, coinsurance, fees, or other cost-sharing requirements of the private or employer-sponsored health plan in which they enroll their children. There is no Title XXI family cost-sharing cap applied to families with children enrolled in FAMIS Select.

There is no copayment required for the supplemental immunization benefits provided through FAMIS.

12VAC30-141-500. Benefits reimbursement.

A. Reimbursement for the services covered under FAMIS fee-for-service and MCHIPs shall be as specified in this section.

B. Reimbursement for physician services, surgical services, clinic services, prescription drugs, laboratory and radiological services, outpatient mental health services, early intervention services, emergency services, home health services, immunizations, mammograms, medical transportation, organ transplants, skilled nursing services, well baby and well child care, vision services, durable medical equipment, disposable medical supplies, dental services, case management services, physical ~~therapy/occupational therapy/speech-language~~ therapy, occupational therapy, or speech-language therapy services, hospice services, school-based health services, behavioral therapy services including ~~but not limited to~~ applied behavior analysis, and certain community-based mental health services shall be based on the Title XIX rates.

C. Reimbursement to MCHIPs shall be determined on the basis of the estimated cost of providing the MCHIP benefit package and services to an actuarially equivalent population. MCHIP rates will be determined annually and published 30 days prior to the effective date.

D. Exceptions.

1. Prior authorization is required after five visits in a fiscal year for physical therapy, occupational therapy, and ~~speech~~ speech-language therapy provided by home health providers and outpatient rehabilitation facilities and for home health skilled nursing visits. Prior authorization ~~is required after 26 visits for outpatient mental health visits in the first year of service and prior authorization~~ is required for the following nonemergency outpatient procedures: Magnetic Resonance Imaging, including Magnetic Resonance Angiography (MRA), Computerized Axial Tomography (CAT) scans, including Computed Tomography Angiography (CTA), or Positron Emission Tomography (PET) scans performed for the purpose of diagnosing a disease process or physical injury. Prior authorization for dental services will be based on the Title XIX prior authorization requirements for dental services.

2. Reimbursement for inpatient hospital services will be based on the Title XIX rates in effect for each hospital. Reimbursement shall not include payments for disproportionate share or graduate medical education payments made to hospitals. Payments made shall be final and there shall be no retrospective cost settlements.

3. Reimbursement for outpatient hospital services shall be based on the Title XIX rates in effect for each hospital. Payments made will be final and there will be no retrospective cost settlements.

4. Reimbursement for inpatient mental health services other than by free standing psychiatric hospitals will be based on the Title XIX rates in effect for each hospital. Reimbursement will not include payments for disproportionate share or graduate medical education payments made to hospitals. Payments made will be final and there will be no retrospective cost settlements.

5. Reimbursement for outpatient rehabilitation services will be based on the Title XIX rates in effect for each rehabilitation agency. Payments made will be final and there will be no retrospective cost settlements.

6. Reimbursement for outpatient substance abuse treatment services will be based on rates determined by DMAS for children ages six through 18 years. Payments made will be final and there will be no retrospective cost settlements.

7. Reimbursement for prescription drugs will be based on the Title XIX rates in effect. Reimbursements for Title XXI do not receive drug rebates as under Title XIX.

8. Reimbursement for covered prescription drugs for noninstitutionalized FAMIS recipients receiving the fee-for-service benefits will be subject to review and prior authorization when their current number of prescriptions exceeds nine unique prescriptions within 180 calendar days, and as may be further defined by the agency's guidance documents for pharmacy utilization review and the prior authorization program. The prior authorization process shall be applied consistent with the process set forth in 12VAC30-50-210 A 7.

12VAC30-141-660. Assignment to managed care.

A. Except for children enrolled in the Virginia Birth-Related Neurological Injury Compensation Program established pursuant to Chapter 50 (§ 38.2-5000 et seq.) of Title 38.2 of the Code of Virginia, all eligible enrollees shall be assigned in managed care through the department or ~~the central processing unit (CPU) under contract to DMAS~~ CPU. FAMIS individuals, during the preassignment period to an MCHIP, shall receive Title XXI benefits via fee-for-service utilizing a FAMIS card issued by DMAS. After assignment to an MCHIP, benefits and the delivery of benefits shall be administered specific to the managed care program in which the individual is enrolled. DMAS shall contract with MCHIPs to deliver health care services for infants born to mothers enrolled in FAMIS for the month of birth plus two additional months regardless of the status of the newborn's application for FAMIS. If federal funds are not available for those months of coverage, DMAS shall use state funding only.

1. MCHIPs shall be offered to enrollees in all areas.

2. All enrollees shall be assigned to the contracted MCHIPs.

3. ~~Enrollees~~ Applicants for FAMIS may choose an MCHIP at the time of application. If a choice is not made at application, enrollees shall be assigned through a random system algorithm; provided however, all children within the same family shall be assigned to the same MCHIP.

4. All children enrolled in the Virginia Birth-Related Neurological Injury Compensation Program shall be assigned to the fee-for-service component.

5. Enrolled individuals will receive a letter indicating that they may select one of the contracted MCHIPs that serve such area. Enrollees who do not select an MCHIP as described above, shall be assigned to an MCHIP as described in subdivision 3 of this subsection.

6. Individuals assigned to an MCHIP who lose and then regain eligibility for FAMIS within 60 days will be reassigned to their previous MCHIP.

B. Following their initial assignment to an MCHIP, those enrollees shall be restricted to that MCHIP until their next annual eligibility redetermination, unless appropriately disenrolled by the department.

1. During the first 90 calendar days of managed care assignment, an enrollee may request reassignment for any reason. Such reassignment shall be effective no later than the first day of the second month after the month in which the enrollee requests reassignment.

2. Enrollees may only request reassignment to another MCHIP serving that geographic area.

3. After the first 90 calendar days of the assignment period, the enrollee may only be reassigned from one MCHIP to another MCHIP upon determination by DMAS that good cause exists pursuant to subsection C of this section or for any reason at annual renewal.

C. Disenrollment for good cause, defined in 12VAC30-120-370, may be requested at any time.

1. After the first 90 calendar days of assignment in managed care, enrollees may request disenrollment from DMAS based on good cause. The request must ~~be made in writing to DMAS and~~ cite the reasons why the enrollee wishes to be reassigned. The department shall establish procedures for good cause reassignment through written policy directives.

2. DMAS shall determine whether good cause exists for reassignment.

Part VII
FAMIS MOMS

12VAC30-141-670. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

~~"Act" means the Social Security Act.~~

~~"Adult caretaker relative" or "caretaker relative" means an individual who is 18 years of age or older, who is not the parent of but who is related to the child applicant by blood or marriage, and who lives with and assumes responsibility for day-to-day care of the child applicant in a place of residence maintained as his or their own home.~~

"Adverse action," consistent with 42 CFR 457.1130, means the denial of eligibility; failure to make a timely determination of eligibility; suspension or termination of enrollment, including disenrollment for failure to pay cost sharing; or delay, denial, reduction, suspension, or termination of health services, in whole or in part, including a determination about the type or level of services; and failure to approve, furnish, or provide payment for health services in a timely manner; provided, however, that determination of eligibility to participate in and termination of participation in the FAMIS Select program shall not constitute an adverse action.

"Adverse benefit determination," consistent with 42 CFR 438.400, means the denial or limited authorization of a requested service; the failure to take action or timely take action on a request for service; the reduction, suspension, or termination of a previously authorized service; denial in whole or in part of a payment for a service; failure to provide services within the timeframes required by the state; for a resident of a rural exception area with only one MCO, the denial of a enrollee's request to exercise the enrollee's right under 42 CFR 438.52(b)(2)(ii) to obtain services outside of the network; the denial of a enrollee's request to dispute a financial liability as provided in 42 CFR [~~438(b)(7)~~ 438.400(b)(7)]; or the failure of an MCO to act within the timeframes provided in 42 CFR 438.408(b).

"Agency" means ~~a local department of social services, the central processing unit, or other entity designated by DMAS to make eligibility determinations for FAMIS MOMS.~~ the same as defined in 12VAC30-141-10.

~~"Agency error" means a person or persons received benefits to which they were not entitled as a result of an error on the part of an eligibility worker at a local department of social services or the central processing unit.~~

"Agent" means an individual designated in writing to act on behalf of a FAMIS MOMS Plan applicant or enrollee during the administrative review process.

"Appeal" means an enrollee's request for review of an adverse benefit determination by an MCO or an adverse action by the LDSS, CPU, or DMAS.

"Applicant" means a pregnant woman who has filed an application (or who has an application filed on her behalf) for health insurance and is awaiting a determination of eligibility. A pregnant woman is an applicant until her eligibility has been determined.

"Application for health insurance" means the ~~form or forms developed and approved by the Department of Medical Assistance Services that are used for determining eligibility~~

~~for Medicaid for poverty level children, for the Family Access to Medical Insurance Security Plan (FAMIS) for children, for Medicaid for pregnant women, and for FAMIS MOMS coverage for pregnant women~~ single streamlined application for determining eligibility in public health insurance programs operated by the Commonwealth.

"Authorized representative" means a person who is authorized to conduct the personal or financial affairs for an individual who is 18 years of age or older.

~~"Board" or "BMAS" means that policy board created by § 32.1-324 of the Code of Virginia to administer the plans established by the Social Security Act.~~

"Central processing unit" or "CPU" means Cover Virginia, which is the ~~private contractor that will determine eligibility for and administer part of the FAMIS MOMS Plan~~ same as defined in 12VAC30-141-10.

"Child" means an individual ~~under the age of~~ younger than 19 years of age.

~~"Competent individual" means a person who has not been judged by a court to be legally incapacitated.~~

~~"Comprehensive health insurance coverage" means health benefits coverage, which includes the following categories of services at a minimum: inpatient and outpatient hospital services, physician's surgical and medical services, and laboratory and radiological services.~~

"Conservator" means a person appointed by a court of competent jurisdiction to manage the estate and financial affairs of an incapacitated individual.

"Continuation of ~~enrollment~~ coverage" means ensuring an enrollee's benefits are continued until completion of the review process, with the condition that should the enrollee not prevail in the review process, the enrollee shall be liable for the repayment of all benefits received during the review process.

"Director" means the individual, or his designee, specified in § 32.1-324 of the Code of Virginia with all of the attendant duties and responsibilities to administer the State Plan for Medical Assistance and the State Plan for Title XXI.

"DMAS" or "department" means the Department of Medical Assistance Services.

"Enrollee" means a pregnant woman who has been determined eligible to participate in FAMIS MOMS and is enrolled in the FAMIS MOMS program.

~~"External quality review organization" means the independent contractor assigned by DMAS to handle quality reviews and to conduct final review of MCHIP adverse actions for FAMIS MOMS.~~

~~"Family" for a pregnant woman under the age of 21, means parents, including adoptive parents, if they are all residing together and the spouse of the pregnant woman if the woman is married and living with her spouse, as well as any children under the age of 21 the woman may have.~~

~~For a pregnant woman over the age of 21, "family" means her spouse, if married and living together, as well as any children under the age of 21 the pregnant woman may have.~~

~~"Family income" means the total income of all family members in a household. Income includes, but is not necessarily limited to, before tax earnings from a job, including cash, wages, salary, commissions, tips, self-employment net profits, Social Security, Retirement Survivor Disability Insurance (RSDI), veterans benefits, Railroad Retirement, disability workers' compensation, unemployment benefits, child support, alimony, spousal support, pensions, retirement benefits, settlement benefits, rental income, and lottery/bingo winnings. Income excludes public assistance program benefits such as SSI and TANF payments, foster care payments, general relief, loans, grants, or scholarships for educational expenses or earned income of a child who is a student.~~

"FAMIS" means the Family Access to Medical Insurance Security Plan.

"FAMIS MOMS" means the Title XXI program available to eligible pregnant women.

"Federal poverty level" or "FPL" means that income standard as published annually by the U.S. Department of Health and Human Services in the Federal Register.

"Fee-for-service" means the traditional Medicaid health care delivery and payment system in which physicians and other providers receive a payment for each unit of service they provide.

~~"Fraud" means an intentional deception or misrepresentation made by a person with the knowledge that the deception could result in some unauthorized benefit to herself or some other person. It includes any act that constitutes fraud under applicable federal or state laws.~~

~~"Group health plan" or "health insurance coverage" means that health care coverage as defined in § 2791 of the Public Health Services Act (42 USC § 300gg-91(a) and (b)(1)).~~

"Guardian" means a person appointed by a court of competent jurisdiction to be responsible for the affairs of an incapacitated individual, including responsibility for making decisions regarding the person's support, care, health, safety, habilitation, education, and therapeutic treatment, and, if not inconsistent with an order of commitment, residence.

"Incapacitated ~~individual~~" means a person who, pursuant to an order of a court of competent jurisdiction, has been found to be incapable of receiving and evaluating information effectively or responding to people, events, or environments to such an extent that the individual lacks the capacity to (i)

meet the essential requirements of her health, care, safety, or therapeutic needs without the assistance or protection of a guardian, or (ii) manage property or financial affairs or provide for her support or for the support of her legal dependents without the assistance or protection of a conservator.

~~"Legally emancipated" means that the parents and child have gone through the court and a judge has declared that the parents have surrendered the right to care, custody, and earnings of the child and have renounced parental duties. A married minor is not emancipated unless a court has declared the married minor emancipated from her parents.~~

[~~"Lawfully residing" means the individual is lawfully present in the United States and meets state residency requirements.~~]

"LDSS" or "local department" means the local department of social services.

~~"Managed care health insurance plan" or "MCHIP," as defined in § 32.1-137.1 of the Code of Virginia, means an arrangement for the delivery of health care in which a health carrier under contract with DMAS for Title XXI delivery systems undertakes to provide, arrange and pay for, or reimburse any of the costs of health care services for a covered person on a prepaid or insured basis, which contains one or more incentive arrangements, including any credential requirements intended to influence the cost of the health care services between the health carrier and one or more providers and requires or creates benefit payment differential incentives for covered persons to use providers that are directly or indirectly managed, owned, under contract with, or employed by the health carrier.~~

~~"Member of a family," for purposes of determining whether the applicant is eligible for coverage under a state employee health insurance plan, means a spouse, parent or parents, including stepparents with whom the child is living if the stepparent claims the child as a dependent on the employee's federal tax return.~~

"Managed care organization" or "MCO" means an organization that offers managed care health insurance plans (MCHIPs) as defined in [~~this section~~ § 32.1-137.1 of the Code of Virginia].

"Pregnant woman" means a woman of any age who is medically determined to be pregnant. The pregnant woman definition is met from the first day of the earliest month that the medical practitioner certifies as being a month in which the woman was pregnant, through the last day of the month in which the 60th day occurs, following the last day of the month in which her pregnancy ended, regardless of the reason the pregnancy ended.

"Provider" means the individual, facility, or other entity registered, licensed, or certified, as appropriate, and enrolled by an MCHIP or in fee-for-service to render services to FAMIS MOMS enrollees eligible for services.

"State fair hearing" means, consistent with 42 CFR 438.400, the process set forth in 42 CFR 431 Subpart E.

"Title XXI" means the federal State Children's Health Insurance Program as established by Subtitle J of the Balanced Budget Act of 1997.

~~"Virginia State Employee Health Insurance Plan" means a health insurance plan offered by the Commonwealth of Virginia to its employees.~~

12VAC30-141-680. Administration and general background.

A. The state shall use funds provided under Title XXI for obtaining coverage that meets the requirements of Title XXI of the Social Security Act and any waiver of federal regulations approved by the Centers for Medicare and Medicaid Services.

B. The DMAS director will have the authority to contract with entities for the ~~purpose~~ purposes of establishing a centralized processing site, determining eligibility, enrolling eligible pregnant women into health plans, performing outreach, data collection, reporting, and other services necessary for the administration of the FAMIS MOMS program~~; and for employing state staff to perform Medicaid eligibility determinations on pregnant women referred by the contractor's staff~~.

C. Health care services under FAMIS MOMS shall be provided through MCHIPs and fee-for-service or through any other health care delivery system deemed appropriate by the Department of Medical Assistance Services.

12VAC30-141-690. Outreach and public participation.

A. DMAS will work cooperatively with other state agencies and contractors to ensure that state and federal law and any applicable state and federal regulations are met.

B. DMAS shall develop a comprehensive marketing and outreach effort. The marketing and outreach efforts will be aimed at promoting FAMIS MOMS and Medicaid for pregnant women and increasing enrollment~~,~~ and may include contracting with a public relations firm, nonprofit agencies, and foundations, and coordination with other state agencies, coordination with the business community, and coordination with health care associations and providers.

12VAC30-141-700. ~~Review~~ Appeal of adverse actions or adverse benefit determinations.

A. Upon ~~written~~ request, all FAMIS MOMS program applicants and enrollees shall have the right to a ~~review~~ state fair hearing of an adverse action made by the ~~MCHIP,~~ local department of social services, CPU, or DMAS, or an internal

appeal of an adverse benefit determination made by the MCO.

B. During ~~review~~ the appeal of a suspension or termination of enrollment or a reduction, suspension, or termination of services, the enrollee shall have the right to continuation of coverage if the enrollee requests ~~review~~ an internal appeal with the MCO or an appeal to DMAS prior to the effective date of the suspension or termination of enrollment or suspension, reduction, or termination of services.

C. ~~Review~~ An appeal of an adverse action made by the local department of social services, CPU, or DMAS shall be heard and decided by an agent of DMAS who has not been directly involved in the adverse action under ~~review~~ appeal.

D. ~~Review~~ An internal appeal of an adverse ~~action~~ benefit determination made by the ~~MCHIP~~ MCO must be conducted by a person or agent of the ~~MCHIP~~ MCO who has not been directly involved in the adverse ~~action~~ benefit determination under ~~review~~ appeal.

E. ~~After final review by~~ Pursuant to 42 CFR 438.402(c)(1)(B), after exhausting the ~~MCHIP~~ MCO's internal appeals process, there shall ~~also~~ be opportunity for ~~final independent~~ the enrollee to request an external medical review by ~~the~~ an independent external quality review organization. ["External quality review organization" means the independent contractor assigned by DMAS to handle quality reviews and to conduct final review of MCHIP adverse actions for FAMIS MOMS.] The review is optional and shall not be required before proceeding to a state fair hearing. The review shall not extend any of the timeframes for issuing a decision and shall not disrupt any continuation of coverage granted to the enrollee.

F. There will be no opportunity for ~~review~~ appeal of an adverse action to the extent that such adverse action is based on a determination by the director that funding for FAMIS MOMS has been terminated or exhausted. ~~There will be no opportunity for review based on which type of delivery system (i.e., fee for service, MCHIP) is assigned.~~ There will be no opportunity for ~~review~~ appeal if the sole basis for the ~~adverse action~~ decision is a provision in the State Plan or in a state or federal law ~~or regulation~~ requiring an automatic change in eligibility or enrollment or a change in coverage under the health benefits package that affects all applicants or enrollees or a group of applicants or enrollees without regard to their individual circumstances.

G. The burden of proof shall be upon the applicant or enrollee to show that an adverse action or adverse benefit determination is incorrect.

H. At no time shall ~~the MCHIP's, local department's of social services, the CPU's~~ MCO, LDSS, CPU, or ~~DMAS'~~ DMAS failure to meet the ~~time frames~~ timeframes set in this chapter or set in ~~the MCHIP's~~ MCO or ~~DMAS'~~ DMAS written ~~review procedures~~ appeal procedure constitute a basis for granting the applicant or enrollee the relief sought.

12VAC30-141-710. Notice of adverse action or adverse benefit determination.

A. The ~~CPU or~~ LDSS, CPU, DMAS, or DMAS contractor shall send written notification to enrollees at least 10 calendar days prior to suspension or termination of enrollment.

B. DMAS or the ~~MCHIP~~ MCO shall send written notification to enrollees at least 10 calendar days prior to reduction, suspension, or termination of a previously authorized health service.

C. The local department of social services, ~~the~~ CPU, DMAS, or ~~the MCHIP~~ MCO shall send written notification to applicants and enrollees of all other adverse actions within 10 calendar days of the adverse action.

D. Notice shall include ~~the reasons for determination, an explanation of applicable rights to a review of that determination, the standard and expedited time frames for review, the manner in which a review can be requested, and the circumstances under which enrollment or services may continue pending review.~~:

1. The determination the LDSS, CPU, DMAS, or MCO has made or intends to make;

2. The reasons for the determination, including the right of the enrollee to be provided upon request and free of charge reasonable access to and copies of all documents, records, and other information relevant to the determination;

3. An explanation of applicable rights to request an appeal of that determination. For adverse benefit determinations by an MCO, this shall include information on the MCO's internal appeals process and, after the internal appeals process is exhausted, a state fair hearing pursuant to 42 CFR 402(b) and 42 CFR 402(c);

4. The procedures for exercising these appeal rights;

5. The circumstances under which an appeal process can be expedited and how to request it; and

6. The circumstances under which enrollment or services may continue pending appeal, how to request benefits be continued, and the circumstances, consistent with state policy, under which the enrollee may be required to pay the costs of these services.

12VAC30-141-720. Request for ~~review~~ appeal.

A. Requests for ~~review~~ internal appeal of ~~MCHIP~~ MCO adverse ~~actions~~ benefit determinations shall be submitted orally or in writing to the ~~MCHIP~~ MCO. Unless the enrollee requests an expedited appeal, an oral appeal request must be followed by a written appeal request. The enrollee must exhaust the MCO's internal appeals process before appealing to DMAS.

B. If the MCO fails to adhere to the notice or timing requirements set forth in this part, the enrollee is deemed to have exhausted the MCO's internal appeals process and may initiate a state fair hearing.

[~~B.~~] C. Requests for ~~review~~ appeal of adverse actions made by the ~~local department of social services,~~ LDSS, ~~the~~ CPU, or DMAS, or of internal appeal decisions by the MCO shall be submitted ~~in writing~~ to DMAS.

~~C.~~ D. Any ~~written~~ communication ~~clearly~~ expressing a desire to have an adverse ~~action~~ benefit determination by an MCO reviewed shall be treated as a request for ~~review~~ an internal appeal. Any communication expressing a desire to have an adverse action by the LDSS, CPU, or DMAS reviewed shall be treated as a request for a state fair hearing. Any communication expressing a desire to have an MCO internal appeal decision reviewed shall be treated as a request for a state fair hearing.

~~D.~~ E. To be timely, requests for ~~review~~ an internal appeal of ~~a MCHIP~~ an MCO's adverse benefit determination shall be received by the ~~MCHIP~~ MCO no later than ~~30~~ 60 calendar days from the date of the ~~MCHIP's~~ MCO's notice of adverse ~~action~~ benefit determination.

~~E.~~ F. To be timely, requests for an appeal of an adverse benefit determination upheld in whole or in part by the MCO's internal appeal decision shall be received by DMAS within 120 calendar days from the date of the internal appeal decision.

G. To be timely, requests for ~~review~~ appeal of a local department of social services, DMAS, or CPU ~~determination~~ adverse action shall be filed with DMAS no later than 30 calendar days from the date of the ~~CPU's, LDSS' or DMAS'~~ notice of adverse action. Requests for ~~review~~ appeal of ~~a local department of social services, DMAS, or CPU~~ an agency determination shall be considered filed with DMAS on the date the request is postmarked~~,~~ if mailed, or on the date the request is received~~,~~ if delivered other than by mail, by DMAS.

12VAC30-141-730. ~~Review~~ Appeal procedures.

A. At a minimum, the ~~MCHIP review~~ MCO internal appeal shall be conducted pursuant to written procedures as defined in § 32.1-137.6 of the Code of Virginia and ~~as may be further defined by DMAS~~ 42 CFR 438.400 et seq. Such procedures shall be subject to review and approval by DMAS.

B. Any adverse benefit determination upheld in whole or in part by the internal appeal decision issued by the MCO may be appealed by the enrollee to DMAS in accordance with the DMAS client appeals regulations at 12VAC30-110-10 through 12VAC30-110-370. DMAS shall conduct an evidentiary hearing in accordance with 12VAC30-110-10 through 12VAC30-110-370 and shall not base any appealed decision on the record established by any internal appeal decision of the MCO. The MCO shall comply with the DMAS appeal decision. The DMAS decision in these matters shall be final and shall not be subject to appeal by the MCO.

~~The DMAS review~~ C. Appeals of adverse actions by the LDSS, CPU, or DMAS shall be conducted pursuant to ~~written procedures developed by DMAS~~ 12VAC30-110.

~~C. The procedures in effect on the date a particular request for review is received by the MCHIP or DMAS shall apply throughout the review.~~

D. Copies of the procedures shall be promptly ~~mailed~~ provided by the ~~MCHIP~~ MCO or DMAS to applicants and enrollees upon receipt of timely requests for ~~review~~ internal appeals or state fair hearings. Such written procedures shall include ~~but not be limited to~~ the following:

1. The right to representation by an attorney or other agent of the applicant's or enrollee's choice, but at no time shall the ~~MCHIP, local department of social services,~~ MCO, LDSS, DSS, or DMAS be required to obtain or compensate attorneys or other agents acting on behalf of applicants or enrollees;

2. The right to timely review of ~~their~~ files and other applicable information relevant to the ~~review~~ internal appeal or state fair hearing of the decision;

3. The right to fully participate in the ~~review~~ internal appeal or state fair hearing process, whether the ~~review~~ internal appeal or state fair hearing is conducted in person or in writing, including the presentation of supplemental information during the ~~review~~ internal appeal or state fair hearing process;

4. The right to have personal and medical information and records maintained as confidential; ~~and~~

5. The right to a written final decision ~~within 90 calendar days of receipt of the request for review, unless the applicant or enrollee requests or causes a delay.~~:

a. For internal appeals to the MCO, within 30 calendar days of receipt of the request for an internal appeal; or

b. For state fair hearings, within the time limitations for appeals imposed by federal regulations and as permitted in 12VAC30-110-30;

~~E.~~ 6. For eligibility and enrollment matters, if the applicant's or enrollee's physician or health plan determines that the 90-calendar-day timeframe could seriously jeopardize the applicant's or enrollee's life or health or ability to attain, maintain, or regain maximum function, an applicant or enrollee will have the opportunity to request an expedited ~~review~~ appeal. Under these conditions, a request for ~~review~~ an expedited appeal shall result in a written final decision within ~~three business days~~ 72 hours after DMAS receives~~,~~ the expedited appeal request from the physician or health plan~~,~~ with the case record and

information indicating that taking the time for a standard resolution of the ~~review~~ appeal request could seriously jeopardize the applicant's or enrollee's life or health or ability to attain, maintain, or regain maximum function, unless the applicant or enrollee ~~or her authorized representative causes a delay.~~ requests an extension;

~~F.~~ 7. For health services matters for FAMIS MOMS enrollees receiving services through ~~MCHIPs, if~~ an MCO:

a. If the enrollee's physician or health plan determines that the ~~90-calendar-day~~ 30-calendar-day timeframe for a standard internal appeal could seriously jeopardize the enrollee's life ~~or~~, health, or ability to attain, maintain, or regain maximum function, an enrollee will have the opportunity to request an expedited ~~review~~ internal appeal. Under these conditions, a request for ~~review~~ an internal appeal shall result in a written decision by the ~~external quality review organization~~ MCO within 72 hours from the time ~~an enrollee requests~~ the expedited ~~review~~ internal appeal is requested, unless the applicant, enrollee, or authorized representative requests ~~or causes~~ a delay. If a delay is requested ~~or caused~~ by the applicant, enrollee, or authorized representative, then expedited ~~review~~ internal appeal may be extended up to 14 calendar days.

b. If the adverse benefit determination is upheld in whole or in part by the expedited internal appeal decision issued by the MCO, and if the enrollee's physician or health plan determines that the timeframe for a standard appeal to DMAS could seriously jeopardize the enrollee's life or health or ability to attain, maintain, or regain maximum function, an enrollee will have the opportunity to request an expedited appeal to DMAS. Under these conditions, a request for a state fair hearing shall result in a written decision within 72 hours from the time an enrollee requests the expedited appeal, unless the applicant, enrollee, or authorized representative requests or causes a delay. If a delay is requested by the applicant, enrollee, or authorized representative, then the expedited appeal may be extended up to 14 calendar days; and

~~G.~~ 8. For health services matters for FAMIS MOMS enrollees receiving services through fee-for-service, if the enrollee's physician or health plan determines that the 90-calendar-day timeframe for a standard appeal could seriously jeopardize the enrollee's life, health, or ability to attain, maintain, or regain maximum function, an enrollee will have the opportunity to request an expedited review. Under these conditions, a request for ~~review~~ an expedited appeal shall result in a written decision within 72 hours from the time ~~an enrollee requests~~ the expedited ~~review~~ appeal is requested, unless the applicant, enrollee, or authorized representative requests or causes a delay. If a delay is requested or caused by the applicant, enrollee, or authorized representative, then expedited ~~review~~ appeal may be extended up to 14 calendar days.

12VAC30-141-740. ~~Eligibility requirements~~ General conditions of eligibility.

A. This section shall be used to determine eligibility of pregnant women for FAMIS MOMS.

B. FAMIS MOMS shall be in effect statewide.

C. Eligible pregnant women must:

1. Be determined ineligible for Medicaid due to excess income by ~~a local department of social services or~~ LDSS, by DMAS ~~eligibility staff co-located at the FAMIS~~, or by the CPU;

2. Be a pregnant woman at the time of application;

3. Be a resident of the Commonwealth as described in 12VAC30-141-100 E;

4. Be either a ~~U.S.~~ United States citizen, ~~U.S.~~ United States national, lawfully residing, or a qualified noncitizen as described in 12VAC30-141-100 E;

5. Be uninsured, that is, not have ~~comprehensive~~ creditable health insurance coverage; and

6. Not be an inpatient in an institution for mental diseases ~~(IMD)~~, or an inmate in a public institution that is not a medical facility.

["Lawfully residing" means the individual is lawfully present in the United States and meets state residency requirements. "Creditable health insurance coverage" means coverage that meets the definition at 42 CFR 457.10.]

D. ~~Income~~ Financial eligibility.

1. Screening. All applications for FAMIS MOMS coverage ~~received at the FAMIS central processing unit must be screened to identify applicants who are potentially eligible for Medicaid~~ shall have a Medicaid income eligibility screen completed. Pregnant women ~~screened and found potentially eligible for Medicaid cannot be enrolled in FAMIS MOMS until there has been a finding of ineligibility for Medicaid. Pregnant women who do not appear to be eligible for Medicaid due to excess income~~ determined to be ineligible for Medicaid due to excess income shall have their eligibility for FAMIS MOMS determined ~~and, if eligible, will be enrolled in the FAMIS MOMS program. Applications for FAMIS MOMS received at a local department of social services shall have a full Medicaid eligibility determination completed. Pregnant women determined to be ineligible for Medicaid due to excess income will have their eligibility for FAMIS MOMS determined and, if eligible, the local department of social services will enroll the pregnant woman in the FAMIS MOMS program~~.

2. Standards. Income standards for FAMIS MOMS are ~~based on a comparison of countable income to 200% of the federal poverty level for the family size. Countable income and family size are based on the methodology utilized by the Medicaid program as defined in 12VAC30-40-100 B 1 b. Pregnant women who have income at or below 200% of the federal poverty level, but are ineligible for Medicaid due to excess income, will be income eligible to participate in FAMIS MOMS~~ the same as those described at 12VAC30-141-100 F 2, applied to pregnant women. For purposes of income determination, the family size of the pregnant woman will count the unborn child.

3. Spenddown. ~~Deduction of incurred medical expenses from countable income (spenddown) shall not apply in FAMIS MOMS. If the family income exceeds the income limits described in this section, the individual shall be ineligible for FAMIS MOMS regardless of the amount of any incurred medical expenses~~ DMAS does not apply a spenddown process for FAMIS MOMS where household income exceeds the income eligibility limit for FAMIS MOMS.

~~E. Residency. The requirements for residency, as set forth in 42 CFR 435.403, will be used when determining whether a pregnant woman is a resident of Virginia for purposes of eligibility for FAMIS MOMS. A child who is not emancipated and is temporarily living away from home is considered living with her parents, adult relative caretaker, legal guardian, or person having legal custody if the absence is temporary and the child intends to return to the home when the purpose of the absence (such as education, medical care, rehabilitation, vacation, visit) is completed.~~

~~F. U.S. citizenship or nationality. Upon signing the declaration of citizenship or nationality required by § 1137(d) of the Social Security Act, the applicant or recipient is required under § 2105(c)(9) to furnish satisfactory documentary evidence of U.S. citizenship or nationality and documentation of personal identity unless citizenship or nationality has been verified by the Commissioner of Social Security or unless otherwise exempt.~~

~~G. Qualified noncitizen. The requirements for qualified aliens set out in Public Law 104-193, as amended, and the requirements for noncitizens set out in subdivisions 3 b, c, and e of 12VAC30-40-10 will be used when determining whether a pregnant woman is a qualified noncitizen for purposes of FAMIS MOMS eligibility.~~

~~H.~~ E. Coverage under other health plans.

1. Any pregnant woman covered under a group health plan or under health insurance coverage, as defined in § 2791 of the Public Health Services Act (42 USC § 300gg-91(a) and (b)(1)), shall not be eligible for FAMIS MOMS.

2. ~~No~~ FAMIS MOMS shall not be a substitution for private insurance.

a. Only uninsured pregnant women shall be eligible for FAMIS MOMS. A pregnant woman is not considered to be insured if the health insurance plan covering the pregnant woman does not have a network of providers in the area where the pregnant woman resides. Each application for FAMIS MOMS coverage shall include an inquiry about health insurance the pregnant woman has at the time of application.

b. Health insurance does not include Medicare, Medicaid, FAMIS or insurance for which DMAS paid premiums under Title XIX through the Health Insurance Premium Payment (HIPP) Program or under Title XXI through the SCHIP premium assistance program.

12VAC30-141-750. Duration of eligibility.

A. The effective date of FAMIS MOMS eligibility shall be the first day of the month in which ~~a signed~~ an application was received by ~~either the FAMIS central processing unit or a local department of social services~~ LDSS, DMAS, or the CPU if the applicant met all eligibility requirements in that month.

B. Eligibility for FAMIS MOMS will continue through the last day of the month in which the 60th day occurs, following the last day the woman was pregnant, regardless of the reason the pregnancy ended. Eligibility will continue until the end of the coverage period, regardless of changes in circumstances such as income or family size.

12VAC30-141-760. Pregnant women ineligible for FAMIS MOMS.

A. If a pregnant woman is:

1. Eligible for Medicaid, ~~or would be eligible if she applied for Medicaid,~~ she shall be ineligible for coverage under FAMIS MOMS~~. A pregnant woman found through the screening process to be potentially eligible for Medicaid but who fails to complete the Medicaid application process for any reason, cannot be enrolled in FAMIS MOMS~~;

2. An inmate of a public institution as ~~defined~~ provided in 42 CFR ~~435.1009~~ 435.1009(a)(1), she shall be ineligible for FAMIS MOMS at the initial determination of eligibility; or

3. An inpatient in an institution for mental disease ~~(IMD)~~ as [defined ~~provided~~] in [42 CFR 435.1010 ~~42 CFR 435.1010(a)(2)~~], she shall be ineligible for FAMIS MOMS at the initial determination of eligibility.

B. If a pregnant woman age 18 years or older or, if younger than age 18 years, a parent or other authorized representative does not meet the requirements of assignment of rights to benefits or requirements of cooperation with the agency in identifying and providing information to assist the

Commonwealth in pursuing any liable third party, the pregnant woman shall be ineligible for FAMIS MOMS.

C. If a pregnant woman age 18 years or older, or if younger than age 18 years, a parent, adult relative caretaker, guardian, or legal custodian obtained benefits for a pregnant woman who would otherwise be ineligible by willfully misrepresenting material facts on the application or failing to report changes, the pregnant woman for whom the application is made shall be ineligible for FAMIS MOMS. The pregnant woman age 18 years or older, or if younger than age 18 years, the parent, adult relative caretaker, guardian, or legal custodian who signed the application shall be liable for repayment of the cost of all benefits issued as the result of the misrepresentation.

12VAC30-141-790. Application requirements.

A. Availability of program information. DMAS or its designee shall furnish the following information in written form and orally as appropriate to all applicants and to other individuals who request it:

1. The eligibility requirements;

2. Summary of covered benefits;

3. Copayment amounts required; and

4. The rights and responsibilities of applicants and enrollees.

B. Opportunity to apply. DMAS or its designee must afford a pregnant woman, wishing to do so, the opportunity to apply for the FAMIS MOMS program. ~~Applications from pregnant women will be accepted at a central site designated by DMAS and at local departments of social services throughout the Commonwealth.~~ Applicants may file an application ~~for health insurance~~ by mail, by fax, by phone, via the internet, or in person at local departments of social services. ~~Applications filed at the FAMIS CPU can be submitted by mail, by fax, by the Internet, or by phone.~~ Face-to-face interviews for the program are not required. Eligibility determinations for FAMIS MOMS shall occur at ~~either local departments of social services or at the DMAS designated central site~~ LDSS, DMAS, or the CPU.

C. Application. DMAS or its designee shall require an application from the applicant if the applicant is at least 18 years of age or older, or from a parent, adult relative caretaker, guardian, legal custodian, or authorized representative if the applicant is younger than 18 years of age or the applicant is incapacitated.

1. DMAS employs a single, streamlined application developed by the state and approved by the Secretary of the Department of Health and Human Services in accordance with § 1413(b)(1)(B) of the Affordable Care Act.

2. DMAS may employ an alternative application used to apply for multiple human service programs approved by the Secretary of the Department of Health and Human Services, provided that the agency makes readily available the single or alternative application used only for insurance affordability programs to individuals seeking assistance only through such programs.

D. Right to apply. An individual who is 18 years of age or older shall not be refused the right to complete an application for health insurance for herself and shall not be discouraged from asking for assistance for herself under any circumstances.

~~D.~~ E. Applicant's signature. The applicant must sign state-approved application forms submitted, even if another person fills out the form, unless the application is filed and signed by the applicant's parent, spouse, adult relative caretaker, legal guardian or conservator, attorney-in-fact or authorized representative.

~~E.~~ F. The authorized representative for an individual 18 years of age or older shall be those individuals as set forth in 12VAC30-110-1380.

~~F.~~ G. The authorized representative for children younger than 18 years of age shall be those individuals as set forth in 12VAC30-110-1390.

~~G.~~ H. Persons prohibited from signing an application. An employee of, or an entity hired by, a medical service provider who stands to obtain FAMIS MOMS payments shall not sign an application for health insurance on behalf of an individual who cannot designate an authorized representative.

~~H. Written application. DMAS or its designee shall require a written application from the applicant if she is at least 18 years of age or older, or from a parent, adult relative caretaker, guardian, legal custodian, or authorized representative if the applicant is less than 18 years of age or the applicant is incapacitated. The application must be on a form prescribed by DMAS and must be signed under a penalty of perjury. The application form shall contain information sufficient to determine Medicaid and FAMIS MOMS eligibility.~~

I. Assistance with application. DMAS or its designee shall allow an individual ~~or individuals~~ of the applicant's choice to assist and represent the applicant in the application process, or a ~~redetermination~~ renewal process for eligibility.

J. Timely determination of eligibility. The time processing standards for determining eligibility for FAMIS MOMS coverage begin with the date ~~a signed~~ an application is submitted online, by telephone, by fax, or received ~~either~~ in hard copy at a local department of social services or the ~~FAMIS~~ CPU. All ~~Applications received at local departments of social services must~~ applications shall have ~~a full Medicaid~~ an eligibility determination ~~and, when a pregnant woman is~~

~~determined to be ineligible~~ for Medicaid ~~due to excess income, a~~ for pregnant women and FAMIS MOMS ~~eligibility determination~~ performed~~,~~ within ~~the~~ ~~same~~ Medicaid case processing time standards (10 business days) if all information necessary to make ~~the~~ determination has been received.

~~Except in cases of unusual circumstances as described below, health insurance applications for pregnant women received at the local department of social services shall have a Medicaid eligibility determination completed and, if denied Medicaid for excess income, a FAMIS MOMS eligibility determination completed within 10 business days of the date the signed application was received at the local department. An application from a pregnant woman received at the FAMIS CPU and screened as ineligible for Medicaid, shall have a FAMIS MOMS eligibility determination completed within 10 business days of the date the complete application was received at the CPU. Complete applications that are screened as Medicaid likely will be processed within the 10 business day time standard. If the application cannot be processed within this standard, a notice will be sent to the applicant explaining why a decision has not yet been made.~~

~~1. Unusual circumstances include administrative or other emergency beyond the agency's control. In such case, DMAS or its designee or the LDSS must document, in the applicant's case record, the reasons for delay. DMAS or its designee or the local department of social services must not use the time standards as a waiting period before determining eligibility or as a reason for denying eligibility because it has not determined eligibility within the time standards.~~

~~2. Applications filed at the CPU that are incomplete shall be held open for a period of 30 calendar days to enable applicants to provide outstanding information needed for an eligibility determination. Incomplete applications determined complete by the receipt of additional information required to determine FAMIS MOMS eligibility will be processed in an expedited manner upon receipt of the additional information. Any applicant who fails to provide, within 30 calendar days of the receipt of the initial application, information or verifications necessary to determine eligibility, shall have her application for FAMIS MOMS eligibility denied.~~

K. Notice of ~~DMAS', its designee's or~~ the ~~local department of social services'~~ decision concerning eligibility. DMAS, ~~its designee or the local department of social services must~~ an LDSS, or the CPU shall send each applicant a written notice of the ~~agency's/designee's~~ agency's or designee's decision on ~~her~~ the applicant's application, and~~,~~ if approved, ~~her~~ the applicant's obligations under the program. If eligibility for FAMIS MOMS is denied, notice ~~must~~ shall be given concerning the reasons for the action and an explanation of the applicant's right to request a review of the adverse actions, as described in 12VAC30-141-50.

L. Case documentation. DMAS, ~~its designee, or~~ the local department of social services ~~must~~, or the CPU shall include in each applicant's record all necessary facts to support the decision on ~~her~~ the applicant's application~~,~~ and ~~must~~ shall dispose of each application by a finding of eligibility or ineligibility, unless (i) there is an entry in the case record that the applicant voluntarily withdrew the application and that the agency or its designee sent a notice confirming ~~her~~ the applicant's decision~~;~~ or (ii) there is a supporting entry in the case record that the applicant cannot be located.

M. Case maintenance. All cases approved for FAMIS MOMS shall be maintained at ~~the FAMIS CPU~~ departments of social services or the CPU. ~~Pregnant women determined by local departments of social services to be eligible for FAMIS MOMS shall have their cases transferred to the FAMIS CPU for ongoing case maintenance. The FAMIS CPU~~ The LDSS or the agency determining eligibility will be responsible for providing newly enrolled recipients with program information, benefits available, how to secure services under the program, a FAMIS MOMS handbook, and for processing changes in eligibility within established ~~time frames~~ timeframes. DMAS outreach resources may also provide information or assistance to the enrollee.

N. Notice of decision concerning eligibility. ~~DMAS or the FAMIS CPU~~ LDSS, DMAS, or the CPU must give enrollees timely notice of proposed action to terminate their eligibility under FAMIS MOMS. The notice must meet the requirements of 42 CFR 457.1180.

12VAC30-141-800. Copayments.

A. Pregnant women enrolled in FAMIS MOMS will be subject to copayments for medical services in the same manner and amount as pregnant women covered by the Medicaid program as defined in 12VAC30-10-570 B and C.

B. These cost-sharing provisions shall be implemented with the following restrictions:

1. Total cost sharing for a pregnant woman shall be limited to ~~the lesser of (i) $180 and (ii) 2.5% of the family's income~~ (i) for families with incomes equal to or less than 150% of federal poverty level (FPL), the lesser of (a) $180 and (b) 2.5% of the family's income for the year; and (ii) for families with incomes greater than 150% of FPL, the lesser of $350 and 5.0% of the family's income for the year for the duration of ~~her~~ the pregnant woman's enrollment in FAMIS MOMS.

2. If a family includes a pregnant woman enrolled in FAMIS MOMS and a child ~~or children~~ enrolled in FAMIS, DMAS or its designee shall ensure that the annual aggregate cost sharing for all Title XXI enrollees in a

family does not exceed the cost sharing caps as defined in 12VAC30-141-160 B.

3. Families will be required to submit documentation to DMAS or its designee showing that their maximum copayment amounts are met for the year.

4. Once the cap is met, DMAS or its designee will issue a new eligibility card or written documentation excluding such families from paying additional copays.

C. Exceptions to the above cost-sharing provisions. No cost sharing will be charged to American Indians and Alaska Natives.

12VAC30-141-880. Assignment to managed care.

A. All eligible enrollees shall be assigned in managed care through the department or the central processing unit (CPU) under contract to DMAS. FAMIS MOMS individuals, during the preassignment period to an MCHIP, shall receive Medicaid-like benefits via fee-for-service utilizing a FAMIS MOMS card issued by DMAS. After assignment to an MCHIP, benefits and the delivery of benefits shall be administered specific to the managed care program in which the individual is enrolled.

1. MCHIPs shall be offered to enrollees in all areas.

2. All enrollees shall be assigned to that contracted MCHIP.

3. Enrollees shall be assigned through a random system algorithm.

4. Enrolled individuals will receive a letter indicating that they may select one of the contracted MCHIPs that serve such area. Enrollees who do not select an MCHIP as described above, shall be assigned to an MCHIP as described in subdivision 3 of this subsection.

5. Individuals assigned to an MCHIP who lose and then regain eligibility for FAMIS MOMS within 60 calendar days will be reassigned to their previous MCHIP.

B. Following their initial assignment to an MCHIP, those enrollees shall be restricted to that MCHIP until their next annual eligibility redetermination, unless appropriately disenrolled by the department.

1. During the first 90 calendar days of managed care assignment, an enrollee may request reassignment for any reason from that MCHIP to another MCHIP serving that geographic area. Such reassignment shall be effective no later than the first day of the second month after the month in which the enrollee requests reassignment.

2. After the first 90 calendar days of the assignment period, the enrollee may only be reassigned from one MCHIP to another MCHIP upon determination by DMAS that good cause exists pursuant to subsection C of this section.

C. Disenrollment for good cause may be requested at any time.

1. After the first 90 calendar days of assignment in managed care, enrollees may request disenrollment from DMAS based on good cause. The request must ~~be made in writing to DMAS and~~ cite the reasons why the enrollee wishes to be reassigned. ~~The department shall establish procedures for good cause reassignment through written policy directives~~.

2. DMAS shall determine whether good cause exists for reassignment.

D. Exclusion for assignment to a MCHIP. The following individuals shall be excluded from assignment to a MCHIP. Newly eligible individuals who are in the third trimester of pregnancy and who request exclusion within a department-specified ~~time frame~~ timeframe of the effective date of their MCHIP enrollment. Exclusion may be granted only if the member's obstetrical provider (physician or hospital) does not participate with the enrollee's assigned MCHIP. Exclusion requests made during the third trimester may be made by the enrollee, MCHIP, or provider. DMAS shall determine if the request meets the criteria for exclusion.

VA.R. Doc. No. R17-4662; Filed April 30, 2019, 4:22 p.m.

TITLE 13. HOUSING

BOARD OF HOUSING AND COMMUNITY DEVELOPMENT

Emergency Regulation

Title of Regulation: **13VAC5-63. Virginia Uniform Statewide Building Code (amending 13VAC5-63-540).**

Statutory Authority: § 36-98 of the Code of Virginia.

Effective Dates: May 14, 2019, through November 12, 2020.

Agency Contact: Kyle Flanders, Senior Policy Analyst, Department of Housing and Community Development, Main Street Centre, 600 East Main Street, Suite 300, Richmond, VA 23219, telephone (804) 786-6761, FAX (804) 371-7090, TTY (804) 371-7089, or email kyle.flanders@dhcd.virginia.gov.

Preamble:

Section 2.2-4011 A of the Code of Virginia states that regulations that an agency finds are necessitated by an emergency situation may be adopted upon consultation with the Attorney General, which approval shall be granted only after the agency has submitted a request stating in writing the nature of the emergency, and the necessity for such action shall be at the sole discretion of the Governor.

Currently, the Virginia Maintenance Code (VMC), a part of the Uniform Statewide Building Code (USBC), requires that when cooling is provided to tenants of certain multifamily buildings, it must be provided to a temperature of at least 80° Fahrenheit. The current threshold has been identified as a public health concern in multiple localities that adopt the VMC. The amendment lowers the required cooling temperature as provided in the USBC to to 77° Fahrenheit.

13VAC5-63-540. Chapter 6 Mechanical and electrical requirements.

A. Delete the following sections from Chapter 6 of the IPMC:

1. Section 601.2 Responsibility.

2. Section 603.6 Energy conservation devices.

3. Section 604.2 Service.

4. Section 604.3.2 Abatement of electrical hazards associated with fire exposure.

B. Change the following sections in Chapter 6 of the IPMC to read:

1. Section 601.1 General. The provisions of this chapter shall govern the maintenance of mechanical and electrical facilities and equipment.

2. Section 602 Heating and cooling facilities.

3. Section 602.2 Heat supply. Every owner and operator of a Group R-2 apartment building or other residential building who rents, leases, or lets one or more dwelling unit, rooming unit, dormitory, or guestroom on terms, either expressed or implied, to furnish heat to the occupants thereof shall supply heat during the period from October 15 to May 1 to maintain a temperature of not less than 68°F (20°C) in all habitable rooms, bathrooms, and toilet rooms. The code official may also consider modifications as provided in Section 104.5.2 when requested for unusual circumstances or may issue notice approving building owners to convert shared heating and cooling piping HVAC systems 14 calendar days before or after the established dates when extended periods of unusual temperatures merit modifying these dates.

Exception: When the outdoor temperature is below the winter outdoor design temperature for the locality, maintenance of the minimum room temperature shall not be required provided that the heating system is operating at its full design capacity. The winter outdoor design temperature for the locality shall be as indicated in Appendix D of the IPC.

4. Section 602.3 Occupiable work spaces. Indoor occupiable work spaces shall be supplied with heat during the period from October 1 to May 15 to maintain a minimum temperature of 65°F (18°C) during the period the spaces are occupied.

Exceptions:

1. Processing, storage, and operation areas that require cooling or special temperature conditions.

2. Areas in which persons are primarily engaged in vigorous physical activities.

5. Section 602.4 Cooling supply. Every owner and operator of a Group R-2 apartment building who rents, leases, or lets one or more dwelling units, rooming units, or guestrooms on terms, either expressed or implied, to furnish cooling to the occupants thereof shall supply cooling during the period from May 15 to October 1 to maintain a temperature of not more than ~~80°F (27°C)~~ 77°F (25°C) in all habitable rooms. The code official may also consider modifications as provided in Section 104.5.2 when requested for unusual circumstances or may issue notice approving building owners to convert shared heating and cooling piping HVAC systems 14 calendar days before or after the established dates when extended periods of unusual temperatures merit modifying these dates.

Exception: When the outdoor temperature is higher than the summer design temperature for the locality, maintenance of the room temperature shall not be required provided that the cooling system is operating at its full design capacity. The summer outdoor design temperature for the locality shall be as indicated in the IECC.

6. Section 603.1 Mechanical equipment and appliances. Required or provided mechanical equipment, appliances, fireplaces, solid fuel-burning appliances, cooking appliances, chimneys, vents, and water heating appliances shall be maintained in compliance with the code under which the appliances, system, or equipment was installed, kept in safe working condition, and capable of performing the intended function.

7. Section 603.2 Removal of combustion products. Where required by the code under which installed, fuel-burning equipment and appliances shall be connected to an approved chimney or vent.

8. Section 603.5 Combustion air. Where required by the code under which installed, a supply of air for complete combustion of the fuel shall be provided for the fuel-burning equipment.

9. Section 604.1 Electrical system. Required or provided electrical systems and facilities shall be maintained in accordance with the applicable building code.

10. Section 604.3 Electrical system hazards. Where it is found that the electrical system in a structure constitutes a hazard to the occupants or the structure by reason of deterioration or damage or for similar reasons, the code

official shall require the defects to be corrected to eliminate the hazard.

11. Section 604.3.1.1 Electrical equipment. Electrical distribution equipment, motor circuits, power equipment, transformers, wire, cable, flexible cords, wiring devices, ground fault circuit interrupters, surge protectors, molded case circuit breakers, low-voltage fuses, luminaires, ballasts, motors, and electronic control, signaling, and communication equipment that have been exposed to water shall be replaced in accordance with the provisions of the VCC.

Exception: The following equipment shall be allowed to be repaired or reused where an inspection report from the equipment manufacturer, an approved representative of the equipment manufacturer, a third party licensed or certified electrician, or an electrical engineer indicates that the exposed equipment has not sustained damage that requires replacement:

1. Enclosed switches, rated 600 volts or less;

2. Busway, rated 600 volts or less;

3. Panelboards, rated 600 volts or less;

4. Switchboards, rated 600 volts or less;

5. Fire pump controllers, rated 600 volts or less;

6. Manual and magnetic motor controllers;

7. Motor control centers;

8. Alternating current high-voltage circuit breakers;

9. Low-voltage power circuit breakers;

10. Protective relays, meters, and current transformers;

11. Low-voltage and medium-voltage switchgear;

12. Liquid-filled transformers;

13. Cast-resin transformers;

14. Wire or cable that is suitable for wet locations and whose ends have not been exposed to water;

15. Wire or cable, not containing fillers, that is suitable for wet locations and whose ends have not been exposed to water;

16. Luminaires that are listed as submersible;

17. Motors; or

18. Electronic control, signaling, and communication equipment.

12. 604.3.2.1 Electrical equipment. Electrical switches, receptacles and fixtures, including furnace, water heating, security system and power distribution circuits, that have been exposed to fire shall be replaced in accordance with the provisions of the Virginia Construction Code.

Exception: Electrical switches, receptacles and fixtures that shall be allowed to be repaired or reused where an inspection report from the equipment manufacturer or an approved representative of the equipment manufacturer, a third party licensed or certified electrician, or an electrical engineer indicates that the equipment has not sustained damage that requires replacement.

13. Section 605.1 Electrical components. Electrical equipment, wiring, and appliances shall be maintained in accordance with the applicable building code.

14. Section 605.2 Power distribution and receptacles. Required or provided power circuits and receptacles shall be maintained in accordance with the applicable building code, and ground fault and arc-fault circuit interrupter protection shall be provided where required by the applicable building code. All receptacle outlets shall have the appropriate faceplate cover for the location when required by the applicable building code.

15. Section 605.3 Lighting distribution and luminaires. Required or provided lighting circuits and luminaires shall be maintained in accordance with the applicable building code.

16. Section 605.4 Flexible cords. Flexible cords shall not be run through doors, windows, or cabinets or concealed within walls, floors, or ceilings.

17. Section 606.1 General. Elevators, dumbwaiters, and escalators shall be maintained in compliance with ASME A17.1. The most current certificate of inspection shall be on display at all times within the elevator or attached to the escalator or dumbwaiter, be available for public inspection in the office of the building operator, or be posted in a publicly conspicuous location approved by the code official. Where not displayed in the elevator or attached on the escalator or dumbwaiter, there shall be a notice of where the certificate of inspection is available for inspection. An annual periodic inspection and test is required of elevators and escalators. A locality shall be permitted to require a six-month periodic inspection and test. All periodic inspections shall be performed in accordance with Section 8.11 of ASME A17.1. The code official may also provide for such inspection by an approved agency or through agreement with other local certified elevator inspectors. An approved agency includes any individual, partnership, or corporation who has met the certification requirements established by the VCS.

C. Add the following sections to Chapter 6 of the IPMC:

1. Section 602.2.1 Prohibited use. In dwelling units subject to Section 602.2, one or more unvented room heaters shall not be used as the sole source of comfort heat in a dwelling unit.

2. Section 607.2 Clothes dryer exhaust duct. Required or provided clothes dryer exhaust systems shall be maintained in accordance with the applicable building code.

VA.R. Doc. No. R19-5869; Filed May 14, 2019, 4:47 p.m.

VIRGINIA MANUFACTURED HOUSING BOARD

Final Regulation

Title of Regulation: **13VAC6-20. Manufactured Housing Licensing and Transaction Recovery Fund Regulations (amending 13VAC6-20-10, 13VAC6-20-30, 13VAC6-20-50, 13VAC6-20-60, 13VAC6-20-80, 13VAC6-20-90, 13VAC6-20-100, 13VAC6-20-170, 13VAC6-20-320).**

Statutory Authority: § 36-85.18 of the Code of Virginia.

Effective Date: July 1, 2019.

Agency Contact: Kyle Flanders, Senior Policy Analyst, Department of Housing and Community Development, 600 East Main Street, Suite 300, Richmond, VA 23219, telephone (804) 786-6761, FAX (804) 371-7090, TTY (804) 371-7089, or email kyle.flanders@dhcd.virginia.gov.

Summary:

The amendments include (i) clarifying the parameters for warranties on manufactured homes, (ii) eliminating unnecessary individual biographical information of license applicants, (iii) expanding the list of specific items that must be included on a sales contract, and (iv) providing when and what disclosures must be given to buyers.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

Part I
General

13VAC6-20-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise.

"Board" means the Virginia Manufactured Housing Board.

"Buyer" means the person who purchases at retail from a dealer or manufacturer a manufactured home for personal use as a residence or other related use.

"Claimant" means any person who has filed a verified claim under Chapter 4.2 (§ 36-85.16 et seq.) of Title 36 of the Code of Virginia.

"Code" means the appropriate standards of the Virginia Uniform Statewide Building Code (13VAC5-63) and the Manufactured Home Safety Regulations (13VAC5-95) adopted by the Board of Housing and Community Development and administered by the Department of Housing and Community Development pursuant to the National Manufactured Housing Construction and Safety Standards Act of 1974 (42 USC § 5401 et seq.) for manufactured homes.

"Controlling financial interest" means the direct or indirect ownership or control of a firm.

"Date of delivery" means the date on which all terms or conditions of the sales contract agreed to or required of the regulant have been completed.

"Dealer/manufacturer sales agreement" means a written contract or agreement between a manufactured housing manufacturer and a manufactured housing dealer whereby the dealer is granted the right to engage in the business of offering, selling, and servicing new manufactured homes of a particular line or make of the stated manufacturer of such line or make. The term shall include any severable part [~~or parts~~] of such sales agreement which separately provides for selling or servicing different lines or makes of the manufacturer.

"Defect" means any deficiency in or damage to materials or workmanship occurring in a manufactured home which has been reasonably maintained and cared for in normal use. The term also means any failure of any structural element, utility system or the inclusion of a component part of the manufactured home which fails to comply with the Code.

"Department" means the Department of Housing and Community Development.

"Director" means the Director of the Department of Housing and Community Development, or ~~his~~ the director's designee.

"Fund" or "recovery fund" means the Virginia Manufactured Housing Transaction Recovery Fund.

"HUD" means the ~~United States~~ U.S. Department of Housing and Urban Development.

"Imminent safety hazard" means a hazard that presents an imminent and unreasonable risk of death or severe personal injury that may or may not be related to failure to comply with an applicable federal manufactured home construction or safety standard.

"Licensed" means the regulant has met all applicable requirements of this chapter, paid all required fees, and been authorized by the board to manufacture or offer for sale or sell manufactured homes in accordance with this chapter.

"Manufactured home" means a structure constructed to federal standards, transportable in one or more sections, which, in the traveling mode is eight feet or more in width and is 40 feet or more in length, or when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning, and electrical systems contained therein.

"Manufactured home broker" or "broker" means any person, partnership, association or corporation, resident or nonresident, who, for compensation or valuable consideration, sells or offers for sale, buys or offers to buy, negotiates the purchase or sale or exchange, or leases or offers to lease used manufactured homes that are owned by a party other than the broker.

"Manufactured home dealer" or "dealer" means any person engaged in the business of buying, selling, or dealing in manufactured homes or offering or displaying manufactured homes for sale in Virginia. Any person who buys, sells, or deals in three or more manufactured homes in any 12-month period shall be presumed to be a manufactured home dealer. The terms "selling" and "sale" include lease-purchase transactions. The term "manufactured home dealer" does not include banks and finance companies that acquire manufactured homes as an incident to their regular business.

"Manufactured home manufacturer" or "manufacturer" means any persons, resident or nonresident, who manufacture or assemble manufactured homes for sale in Virginia.

"Manufactured home salesperson" or "salesperson" means any person who for compensation or valuable consideration is employed either directly or indirectly by, or affiliated as an independent contractor with, a manufactured home dealer to sell or offer to sell; or to buy or offer to buy; or to negotiate the purchase, sale or exchange; or to lease or offer to lease new or used manufactured homes.

"New manufactured home" means any manufactured home that (i) has not been previously sold except in good faith for the purpose of resale, (ii) has not been previously occupied as a place of habitation, (iii) has not been previously used for commercial purposes such as offices or storage, and (iv) has not been titled by the Virginia Department of Motor Vehicles and is still in the possession of the original dealer. If the home is later sold to another dealer and then sold to a consumer within two years of the date of manufacture, the home is still considered new and must continue to meet all state warranty requirements. However, if a home is sold from the original dealer to another dealer and it is more than two years after the date of manufacture, and it is then sold to a consumer, the home must be sold as "used" for warranty purposes. Notice of the "used" status of the manufactured home and how this status affects state warranty requirements must be provided, in writing, to the consumer prior to the closing of the sale.

"Person" means any individual, natural person, firm, partnership, association, corporation, legal representative, or other recognized legal entity.

"Regulant" means any person, firm, corporation, association, partnership, joint venture, or any other legal entity required by Chapter 4.2 (§ 36-85.16 et seq.) of Title 36 of the Code of Virginia to be licensed by the board.

"Regulations" or "these regulations" means this chapter, the Virginia Manufactured Housing Licensing and Transaction Recovery Fund Regulations.

"Reinstatement" means having a license restored to effectiveness after the expiration date has passed or license has been revoked or not renewed by the board.

"Relevant market area" means the geographical area established in the dealer/manufacturer sales agreement and agreed to by both the dealer and the manufacturer in the agreement.

"Renewal" means continuing the effectiveness of a license for another period of time.

"Responsible management" means the following individuals:

1. The sole proprietor of a sole proprietorship;
2. The partners of a general partnership;
3. The managing partners of a limited partnership;
4. The officers of a corporation;
5. The managers of a limited liability company;
6. The officers or directors of an association or both; and
7. Individuals in other business entities recognized under the laws of the Commonwealth as having a fiduciary responsibility to the firm.

"Responsible party" means a manufacturer, dealer, or supplier of manufactured homes.

"Set-up" means the operations performed at the occupancy site which render a manufactured home fit for habitation. Such operations include, but are not limited to, transportation, positioning, blocking, leveling, supporting, anchoring, connecting utility systems, making minor adjustments, or assembling multiple or expandable units. Such operations do not include lawful transportation services performed by public utilities operating under certificates or permits issued by the State Corporation Commission.

"Standards" means the Federal Manufactured Home Construction and Safety Standards adopted by the U.S. Department of Housing and Urban Development.

"Statement of Compliance" means the statement found on the initial license application and on the renewal application, that the regulant licensed by the board will comply with the Manufactured Housing Licensing and Transaction Recovery Fund Law, this chapter, and the orders of the board.

"Substantial identity of interest" means (i) a controlling financial interest by the individual or corporate principals of the manufactured home broker, dealer, or manufacturer whose license has been revoked or not renewed for cause by the board or (ii) substantially identical principals or officers

as the manufactured home broker, dealer, or manufacturer whose license has been revoked or not renewed for cause by the board.

"Supplier" means the original producers of completed components, including refrigerators, stoves, water heaters, dishwashers, cabinets, air conditioners, heating units, and similar components~~,~~ and materials such as floor coverings, paneling, siding, trusses, and similar materials, which are furnished to a manufacturer or a dealer for installation in the manufactured home prior to sale to a buyer.

"Used manufactured home" means any manufactured home other than a new home as defined in this section.

"Warranty" means any written assurance of the manufacturer, dealer, or supplier or any promise made by a regulant in connection with the sale of a manufactured home that becomes part of the basis of the sale. The term "warranty" pertains to the obligations of the regulant in relation to materials, workmanship, and fitness of a manufactured home for ordinary and reasonable use of the home for the term of the promise or assurance.

13VAC6-20-30. Application for licensing; renewal.

A. Application for license or renewal shall be on forms supplied by the department and may be submitted as designated in hard copy or by electronic means. All information required on the form shall be furnished by the applicant for the board's review.

B. Each application for original licensure shall be accompanied by the following:

1. Deposit in the Transaction Recovery Fund required by 13VAC6-20-420 A 1.

2. Licensing fee required by 13VAC6-20-200 A 1.

3. Copy of the manufacturer's homeowner and installation ~~manual or~~ manuals.

4. Statement of ~~Compliance~~ compliance.

5. List of salespeople licensed in Virginia ~~with the following biographical information for each:~~.

~~Date of birth~~

~~Sex~~

~~Weight~~

~~Height~~

~~Eye/hair color~~

C. The Department of Housing and Community Development will mail a notice of renewal to the licensee at the last known address of record. Licensees may submit renewals by mail or electronically. Failure to receive this notice shall not relieve the licensee of the obligation to renew. If the licensee does not receive the notice of renewal, a copy of the license may be substituted with the required fee. Each application for renewal shall be accompanied by the following:

1. Licensing fee required by 13VAC6-20-200 A 2.

2. If revised, a copy of the revised homeowner and installation ~~manual or~~ manuals.

3. Statement of ~~Compliance~~ compliance.

4. Updated list of salespeople employed.

Article 2
Dealers

13VAC6-20-50. License required; annual renewal.

A. Any person located in or outside of the Commonwealth buying or selling or offering or displaying manufactured homes for sale in Virginia and meeting the definition of a dealer in 13VAC6-20-10 shall apply to the board for a license. The license shall be displayed in a conspicuous place accessible to the public in the office of the business location. The license shall be issued for a term of one year from the date of issuance.

B. Each licensed dealer shall apply for license renewal annually~~,~~ by application and accompanied by the required fee. Applicants for license renewal shall meet all the criteria for original licensing. Upon failure to renew, the license shall automatically expire.

C. Should the department fail to receive a licensed dealer's renewal form and appropriate fee within 30 days of the license expiration date, the dealer shall be required to reinstate the license according to the terms and conditions of Article 8 (13VAC6-20-201 et seq.) of this part.

D. For licensing purposes, a dealer operating more than one retail location shall have each location treated as a separate entity and shall adhere to all requirements for dealer licensing including posting a license at each location.

E. Each dealer licensed under this chapter shall also obtain a certificate of dealer registration from the Virginia ~~Department of~~ Motor ~~Vehicles~~ Vehicle Dealer Board (MVDB). The certificate of registration shall be renewed annually and shall be maintained in effect with the ~~Department of Motor Vehicles~~ MVDB as long as the dealer is licensed under this chapter.

13VAC6-20-60. Application for licensing; renewal.

A. Application for license or renewal shall be on forms supplied by the department and may be submitted as designated in hard copy or by electronic means. All information required on the form shall be furnished by the applicant for the board's review.

B. Each application for original licensure shall be accompanied by the following:

1. Deposit in the Transaction Recovery Fund required by 13VAC6-20-420 A 2.

2. Licensing fee required by 13VAC6-20-200 A 3.

3. Statement of ~~Compliance~~ compliance.

4. Verification of a business office with all utilities, including a business telephone, and where the required business records are maintained.

5. Verification of a permanent business sign, in view of public traffic, bearing the name of the firm.

6. List of salespeople employed ~~with the following biographical information for each:~~.

~~Date of Birth~~

~~Sex~~

~~Weight~~

~~Height~~

~~Eye/hair color~~

7. Name of the owner, principal, manager, agent, or other person designated as the holder of the dealer's license for the specific location and the names of other partners or principals in the dealership.

Photographs of the front of the business office and required sign may be considered as verification required by this subsection.

C. The Department of Housing and Community Development will mail a notice of renewal to the licensee at the last known address of record. Licensees may submit renewals by mail or electronically. Failure to receive this notice shall not relieve the licensee of the obligation to renew. If the licensee does not receive the notice of renewal, a copy of the license may be substituted with the required fee. Each application for renewal shall be accompanied by the following:

1. Licensing fee required by 13VAC6-20-200 A 4.

2. Statement of ~~Compliance~~ compliance.

3. Notification of any significant changes to the office or the business sign.

4. Updated list of salespeople employed.

5. Any changes of officers or directors of the company or corporation.

6. A copy of the dealer's current certificate of registration from the ~~Department of Motor Vehicles~~ Virginia Motor Vehicle Dealer Board.

D. Any change in the form of ownership of the dealer or any changes (deletions or additions) in the partners or principals of the dealer shall be submitted to the board with an application and fee for a new license. If the new owner ~~or owners~~ assume the liabilities of the previous owner ~~or owners~~, then a new recovery fund assessment is not required. New recovery fund assessments shall be required when the new owner ~~or owners do~~ does not assume the liabilities of the previous owner ~~or owners~~. The board shall be notified immediately by the dealer of any change in the operating name of the dealer. The director shall endorse the change on the license without requiring an additional fee. The board shall be notified immediately by the dealer of any change in the location of the dealer. The dealer shall pay a fee of $50 for the change of location on the license~~,~~ but shall not be required to pay an additional assessment to the recovery fund for the change of location only.

13VAC6-20-80. Dealer responsibility for inspections; other items.

A. The dealer shall inspect every new manufactured home unit upon delivery from a manufacturer. If a dealer becomes aware of a noncompliance or an imminent safety hazard in a manufactured home, the dealer shall contact the manufacturer, provide full information concerning the problem, and request appropriate action by the manufacturer. No dealer shall sell a new manufactured home if he becomes aware that it contains a ~~noncompliance~~ defect or an imminent safety hazard.

B. The dealer shall inspect every new manufactured home unit prior to selling to determine that all ~~items of furniture,~~ appliances, fixtures, and devices are not damaged and are in place and operable.

C. A dealer shall not alter or cause to be altered any manufactured home to which a HUD label has been affixed if such alteration or conversion causes the manufactured home to be in violation of the standards.

D. If the dealer provides for the installation of any manufactured home ~~he~~ the dealer sells, the dealer shall be responsible for making sure the installation of the home meets the manufacturer's installation requirements and the Code.

E. On each home sold by the dealer, the dealer shall collect the applicable title fees and title tax for the manufactured home, to include an additional $30 inspection/administrative fee, and forward such fees and taxes to the Virginia Department of Motor Vehicles.

The above fees shall be submitted to the Virginia Department of Motor Vehicles within 30 days from the completion date of the sale.

F. On each home sold by the dealer, the dealer shall provide the owner with information to file a claim supplied by the department.

Article 3
Brokers

13VAC6-20-90. License required; annual renewal.

A. Any person located in or outside of the Commonwealth (i) buying or selling, negotiating the purchase or sale or exchange of, or leasing used manufactured homes and (ii) meeting the definition of broker in 13VAC6-20-10 shall apply to the board for a license. The license shall be displayed in a conspicuous place accessible to the public in the office of the business location. The license shall be issued for a term of one year from the date of issuance.

B. Each licensed broker shall apply for license renewal annually~~,~~ by application and accompanied by the required fee. Applicants for license renewal shall meet all the criteria for original licensing. Upon failure to renew, the license shall automatically expire.

C. Should the department fail to receive a licensed broker's renewal form and appropriate fee within 30 days of the license expiration date, the broker shall be required to reinstate the license according to the terms and conditions of Article 8 (13VAC6-20-201 et seq.) of this part.

D. For licensing purposes, a broker operating more than one business location shall have each location treated as a separate entity and shall adhere to all requirements for broker licensing, including posting a license, at each location.

E. Each broker licensed under this chapter shall also obtain a certificate of dealer registration from the Virginia ~~Department of~~ Motor ~~Vehicles~~ Vehicle Dealer Board (MVDB). The certificate of registration shall be renewed annually and shall be maintained in effect with the ~~Department of Motor Vehicles~~ MVDB as long as the broker is licensed under this chapter.

13VAC6-20-100. Application for licensing; renewal.

A. Application for license or renewal shall be on forms supplied by the department and may be submitted as designated in hard copy or by electronic means. All information required on the form shall be furnished by the applicant for the board's review.

B. Each application for original licensure shall be accompanied by the following:

1. Deposit in the Transaction Recovery Fund required by 13VAC6-20-420 A 3.

2. Licensing fee required by 13VAC6-20-200 A 5.

3. Statement of ~~Compliance~~ compliance.

4. Verification of a business office with all utilities, including a business telephone, and where the required business records are maintained.

5. Verification of a permanent business sign, in view of public traffic, bearing the name of the firm.

6. Name of the owner, principal, manager, agent or other person designated as the holder of the broker's license for the specific location and the names of the partners or principals in the broker's firm.

7. List of salespeople employed ~~with the following biographical information for each:~~.

~~Date of birth~~

~~Sex~~

~~Weight~~

~~Height~~

~~Eye/hair color~~

Photographs of the front of the business office and required sign may be considered as verification required by this subsection.

C. The Department of Housing and Community Development will mail a notice of renewal to the licensee at the last known address of record. Licensees may submit renewals by mail or electronically. Failure to receive this notice shall not relieve the licensee of the obligation to renew. If the licensee does not receive the notice of renewal, a copy of the license may be substituted with the required fee. Each application for renewal shall be accompanied by the following:

1. Licensing fee required by 13VAC6-20-200 A 6.

2. Statement of ~~Compliance~~ compliance.

3. Notification of any significant changes to the office or the business sign.

4. Any changes of officers or directors of the company or corporation.

5. A copy of the broker's current certificate of registration from the ~~Department of Motor Vehicles~~ Virginia Motor Vehicle Dealer Board.

6. Updated list of salespeople employed.

D. Any change in the form of ownership of the broker or any changes (deletions or additions) in the partners or principals of the broker shall be submitted to the board with an application and fee for a new license. If the new ~~owner(s)~~ owner assume the liabilities of the previous ~~owner(s)~~ owner, then a new recovery fund assessment is not required. New recovery fund assessments shall be required when the new ~~owner(s) do~~ owner does not assume the liabilities of the previous ~~owner(s)~~ owner.

The board shall be notified immediately by the broker of any change in the operating name of the broker. The director shall endorse the change on the license without requiring an

additional fee. The board shall be notified immediately by the broker of any change in location of the broker. The broker shall pay a fee of $50 for the change of location on the license~~,~~ but shall not be required to pay an additional assessment to the recovery fund for the change of location only.

Article 6
Violations and Hearings

13VAC6-20-170. Prohibited conduct; grounds for denying, suspending or revoking license.

A. The following acts by regulants are prohibited and may be considered by the board as grounds for action against the regulant:

1. Engaging in business as a manufactured home manufacturer, dealer, or broker without first obtaining a license from the board.

2. Engaging in business as a manufactured home salesperson without first applying to the board for a license.

3. Making a material misstatement in an application for license.

4. Failing to pay a required assessment to the Transaction Recovery Fund.

5. Failing to comply with the warranty service obligations and claims procedures required by this chapter.

6. Failing to comply with the set-up and tie-down requirements of the Code.

7. Knowingly failing or refusing to account for or pay over money or other valuables belonging to others which have come into the regulant's possession due to the sale of a manufactured home.

8. Using unfair methods of competition or unfair or deceptive commercial acts or practices.

9. Failing to comply with the advertising provisions in Part IV ~~of this chapter~~ (13VAC6-20-270 et seq.) of this chapter.

10. Defrauding any buyer to the buyer's damage, and any other person in the conduct of the regulant's business.

11. Employing an unlicensed salesperson.

12. Knowingly offering for sale a manufactured home produced by a manufacturer ~~which~~ that is not licensed as a manufacturer under this chapter.

13. Knowingly selling a manufactured home to a dealer who is not licensed as a dealer under this chapter.

14. Failing to appear before the board upon due notice.

15. Failing to comply with orders issued by the board pursuant to this chapter.

16. Failing to renew a license and continuing to engage in business as a manufacturer, dealer, broker, or salesperson after the expiration of any license.

17. A salesperson selling, exchanging, or offering to sell or exchange a manufactured home for any dealer or broker other than the licensed dealer or broker employing the salesperson.

18. A salesperson offering, transferring, or assigning any negotiated sale or exchange of a manufactured home to another dealer, broker, manufacturer, or salesperson.

19. Failing to comply with the ~~Statement~~ statement of ~~Compliance~~ compliance.

20. Failing to notify the board of a change of location or address of the business office.

21. Failing to comply with any provisions of this chapter.

a. The board may revoke or deny renewal of an existing license or refuse to issue a license to any manufactured home broker, dealer, manufacturer, or salesperson who is shown to have a substantial identity of interest with a manufactured home broker, dealer, or manufacturer whose license has been revoked or not renewed by the board.

b. Any person whose license is revoked or not renewed for cause by the board shall not be eligible for a license under any circumstances or under any name, except as provided by regulations of the board pursuant to § 36-85.18 of the Code of Virginia.

22. Failing to comply with the regulations of state or federal agencies regarding the financing, titling, taxation, or transporting of manufactured homes.

23. Failing to perform a written contract between the regulant and seller or buyer that contains the following minimum requirements:

a. A statement of the total cost of the contract and the amounts, including specific statement on the cost of the home, any additional costs for work to be performed, and the amount of the down payment, taxes, and titling fees.

b. A listing of specified materials and work to be performed and who is to supply the materials and perform that work.

c. Contract to identify the business name as shown on the license issued per this chapter and to include the address and the phone number of the business.

d. Specify the make and model of the home.

e. Specify if the home is new or used.

f. Specify the length and width of the home as defined by the HUD Standards.

g. Specify the date of manufacture and the serial number, except when the home is specially ordered from the manufacturer for the buyer and this information is not known.

24. Failing to provide a statement notifying consumers of the limitations on damages retained by dealer disclosure to the buyer.

25. Failing to provide a statement notifying consumers of the dispute resolution program available to resolve disputes concerning defects in manufactured homes.

B. The board may deny, suspend, revoke, or refuse to renew or reinstate the license of a regulant because of, but not limited to, one or more of the following grounds:

1. Having had a license previously denied, revoked, or suspended under this chapter.

2. Having a license denied, suspended, or revoked by a similar licensing entity in another state.

3. Engaging in conduct in another state ~~which~~ that would have been a violation of this chapter if the actions were committed in Virginia.

4. Failing to obtain a required certification of registration from the ~~Department of~~ Motor ~~Vehicles~~ Vehicle Dealer Board (MVDB), failing to renew the annual certificate of registration from the MVDB, or having the certificate of registration suspended or revoked by the ~~Department of Motor Vehicles~~ MVDB.

5. Having been convicted or found guilty in any jurisdiction of a felony.

13VAC6-20-320. Duration of warranties.

All warranties provided by regulants as required by 13VAC6-20-310 shall be for a period of not less than 12 months~~,~~ measured from the date of delivery of the home to the buyer. ~~The date of delivery shall be the date on which all terms or conditions of the sales contract agreed to or required of the regulant have been completed.~~

NOTICE: The forms used in administering the regulation were filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the accompanying web address to access the online forms. Contact the State Building Codes office, (804) 371-7060 or sbco@dhcd.virginia.gov, with questions regarding the online application.

FORMS (13VAC6-20)

Complete license registration application forms for broker, dealer, manufacturer, salesperson, and special licensing online at https://dmz1.dhcd.virginia.gov/BFR/Main/LogOn.aspx.

VA.R. Doc. No. R17-5104; Filed May 1, 2019, 3:25 p.m.

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TITLE 18. PROFESSIONAL AND OCCUPATIONAL LICENSING

VIRGINIA BOARD FOR ASBESTOS, LEAD, AND HOME INSPECTORS

Final Regulation

Title of Regulation: **18VAC15-20. Virginia Asbestos Licensing Regulations (amending 18VAC15-20-10, 18VAC15-20-20, 18VAC15-20-33, 18VAC15-20-52, 18VAC15-20-53, 18VAC15-20-454, 18VAC15-20-456, 18VAC15-20-459.4; adding 18VAC15-20-33.1, 18VAC15-20-33.2, 18VAC15-20-456.1).**

Statutory Authority: §§ 54.1-201 and 54.1-501 of the Code of Virginia.

Effective Date: September 1, 2019.

Agency Contact: Trisha Henshaw, Executive Director, Virginia Board for Asbestos, Lead, and Home Inspectors, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8595, FAX (866) 350-5354, or email alhi@dpor.virginia.gov.

Summary:

The amendments (i) clarify requirements for entities required to obtain a license for asbestos-related work by amending the definition of "person," the licensure requirements for asbestos analytical laboratories with multiple locations, the asbestos firm entry requirements for consistency with other similar regulations applicable to firms, and the information applicants need to be licensed; (ii) specify that firm licenses may not be transferred and are valid only so long as the business entity holding the license is in existence and when asbestos analytical laboratories must notify the board of changes to responsible personnel and types of analysis performed at laboratory locations; (iii) expand the responsibilities of asbestos project monitors to include changes to air sample reporting requirements; and (iv) add language (a) detailing specific entry requirements for asbestos contractors and asbestos analytical laboratories, respectively and (b) pertaining to conduct during onsite analysis.

Amendments since publication of the proposed regulation clarify that to qualify for onsite phase contrast microscopy analysis a laboratory must maintain a training and quality control document demonstrating the competency of each onsite analyst who performs onsite analysis.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

Part I
Scope

18VAC15-20-10. Scope.

The purpose of this section is to identify ~~individuals and firms~~ persons, as defined in 18VAC15-20-20, who need to be licensed.

Asbestos Contractor's License: Required for firms that contract with another person, for compensation, to carry out an asbestos abatement project that exceeds 10 linear or 10 square feet.

Asbestos Worker's License: Required for individuals who remove or otherwise engage in an asbestos project.*

Asbestos Supervisor's License: Required for individuals who supervise an asbestos abatement project. The Commonwealth of Virginia National Emission Standards for Hazardous Air Pollutants (NESHAP) Program recognizes the "competent person" as an individual licensed under this classification.*

Asbestos Inspector's License: Required for individuals who inspect buildings to identify asbestos-containing material.*

Asbestos Management Planner's License: Required for individuals who prepare or update an asbestos management plan.*

Asbestos Project Monitor's License: Required for individuals who act as a project monitor on asbestos abatement sites. ~~Project monitors who analyze Phase Contrast Microscopy (PCM) asbestos air samples on an asbestos abatement project shall be employed by a firm that holds a valid Virginia Asbestos Analytical Laboratory license, and shall have National Institute of Occupational Safety and Health (NIOSH) 582 training, or equivalent.~~

Asbestos Analytical Laboratory License: Required for firms serving as laboratories that analyze air or bulk samples for the presence of asbestos by ~~Polarized Light Microscopy~~ polarized light microscopy (PLM), phase contrast microscopy (PCM), or ~~Transmission Electron Microscopy~~ transmission electron microscopy (TEM). A laboratory that has multiple locations shall obtain an asbestos analytical laboratory license for the main office, and submit the remaining offices as branch offices in accordance with this chapter.

Asbestos Project Designer's License: Required for individuals who prepare or update an asbestos abatement project design, specifications for asbestos abatement projects, and addenda to the specifications.*

Accredited Asbestos Training Program: ~~Required~~ Approval from the board is required for those who offer asbestos training programs to individuals seeking licensure as an asbestos worker, supervisor, inspector, management planner, project monitor or project designer.

*Employees who conduct asbestos response actions, inspections, prepare management plans or project designs for their employer, on property owned or leased by the employer, are exempt from Virginia asbestos licensure; however, they are required to meet all OSHA and EPA training requirements.

Part II
Definitions and General

18VAC15-20-20. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"AAR" means the Asbestos ~~Analyst~~ Analysts Registry program offered by the AIHA Registry Programs.

"AAT" means Asbestos Analyst Testing.

[~~"ACM" means asbestos-containing material.~~]

"Accredited asbestos training program" means a training program that has been approved by the board to provide training for individuals to engage in asbestos abatement, conduct asbestos inspections, prepare management plans, prepare project designs or act as a project monitor.

"Accredited asbestos training provider" means a firm or individual who has been approved by the board to offer an accredited asbestos training program.

"AHERA" means Asbestos Hazard Emergency Response Act, 40 CFR Part 763, Subpart E.

"AIHA" means American Industrial Hygiene Association.

"Approval letter" means a written notice confirming the firm or individual applicant's licensure or accreditation by the board.

"Asbestos" means the asbestiform varieties of actinolite, amosite, anthophyllite, chrysotile, crocidolite, and tremolite.

"Asbestos Analytical Laboratory License" means an authorization issued by the board to perform phase contrast, polarized light, or transmission electron microscopy on material known or suspected to contain asbestos.

"Asbestos-containing material" or "ACM" means any material or product which contains more than 1.0% asbestos or such percentage as established by EPA final rule.

"Asbestos contractor" means any person who has met the board's requirements and has been issued an asbestos contractor's license by the board to enter into contracts to perform asbestos projects.

"Asbestos Contractor's License" means an authorization issued by the board permitting a person to enter into contracts to perform an asbestos abatement project.

"Asbestos inspector" means any person who performs an inspection as defined in this chapter.

"Asbestos Inspector's License" means an authorization issued by the board permitting a person to perform ~~on-site~~ onsite investigations to identify, classify, record, sample, test and prioritize by exposure potential asbestos-containing materials.

"Asbestos Management Plan" means a program designed to control or abate any potential risk to human health from asbestos.

"Asbestos management planner" means any person preparing or updating a management plan.

"Asbestos Management Planner's License" means an authorization issued by the board permitting a person to prepare or update an asbestos management plan.

"Asbestos project" or "asbestos abatement project" means an activity involving job set-up for containment, removal, encapsulation, enclosure, encasement, renovation, repair, construction or alteration of asbestos-containing materials. An asbestos project or asbestos abatement project shall not include nonfriable asbestos-containing roofing, flooring and siding material which when installed, encapsulated or removed does not become friable.

"Asbestos project design" means any descriptive form written as instructions or drafted as a plan describing the construction of an asbestos abatement area or site, response action or work practices to be utilized on the asbestos abatement project.

"Asbestos project designer" means any person providing an asbestos project design or specifications for an asbestos abatement project.

"Asbestos Project Designer's License" means an authorization issued by the board permitting a person to design an asbestos abatement project.

"Asbestos project monitor" means any person hired by a building owner, lessee or his agent to monitor, inspect, provide visual clearance or clearance monitoring of an asbestos abatement project.

"Asbestos Project Monitor's License" means an authorization issued by the board permitting a person to monitor an asbestos project, subject to board regulations.

"Asbestos supervisor" means any person so designated by an asbestos contractor who provides ~~on-site~~ onsite supervision and direction to the workers engaged in asbestos projects.

"Asbestos Supervisor's License" means an authorization issued by the board permitting an individual to supervise and work on an asbestos project.

"Asbestos worker" means any person who engages in an asbestos abatement project.

"Asbestos Worker's License" means an authorization issued by the board permitting an individual to work on an asbestos project.

"ASHARA" means Asbestos School Hazard Abatement Reauthorization Act, 40 CFR Part 763, Subpart E.

"BAPAT" means the Bulk Asbestos Proficiency Analytical Testing Program of the AIHA Proficiency Analytical Testing Programs.

"Board" means the Virginia Board for Asbestos, Lead, and Home Inspectors.

"Department" means the Department of Professional and Occupational Regulation.

"Direct supervision" means a licensed or accredited inspector, management planner, project monitor or project designer, who undertakes to supervise the activities of an unlicensed inspector, management planner, project monitor or project designer, shall be physically present on the premises at all times while any unlicensed inspector, management planner, project monitor or project designer under his supervision is engaged in the activities of an inspector, management planner, project monitor or project designer.

"Director" means the Director of the Department of Professional and Occupational Regulation.

"Employee" means all persons in the service of another under any contract of hire, express or implied, oral or written.

"Encapsulation" means the treatment of asbestos-containing material (ACM) with a material that surrounds or embeds asbestos fibers in an adhesive matrix to prevent the release of fibers, as the encapsulant creates a membrane over the surface (bridging encapsulant) or penetrates the material and binds its components together (penetrating encapsulant).

"Encasement" means any process by which an asbestos-containing material (ACM) is sprayed with an insulating sealer which is then mechanically fastened to the asbestos covered substrate. The insulating sealer is then covered with a sealer to give structural strength and durability.

"Enclosure" means the construction or installation over or around the asbestos-containing material (ACM) of any leak tight solid or flexible coverings, which will not deteriorate or decompose for an extended period of time, so as to conceal the ACM, contain ACM fibers, and render the ACM inaccessible.

"Environmental remediation activity" means any activity planned or carried out for the purpose of reducing or eliminating any environmental hazard, including activities necessary to train individuals in the proper or lawful conduct of such activities, which are regulated by federal or state law or regulation.

"EPA" means ~~United States~~ U.S. Environmental Protection Agency.

"Financial interest" means financial benefit accruing to an individual or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership exceeds 3.0% of the total equity of the business; (ii) annual gross income that exceeds, or may be reasonably anticipated to exceed $1,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination of it, paid or provided by a business that exceeds or may be reasonably expected to exceed $1,000 annually; (iv) ownership of real or personal property if the interest exceeds $1,000 in value and excluding ownership in business, income, salary, other compensation, fringe benefits or benefits from the use of property.

"Firm" means any company, partnership, corporation, sole proprietorship, association, or other business entity.

"Friable" means that the material when dry, may be crumbled, pulverized or reduced to powder by hand pressure and includes previously nonfriable material after such previously nonfriable material becomes damaged to the extent that when dry it may be crumbled, pulverized, or reduced to powder by hand pressure.

"Guest instructor" means an instructor who is invited to instruct a specific topic or topics in an accredited asbestos training program and whose instruction is limited to two hours per day.

"Hands-on experience" means the physical participation of students in an asbestos training program. The physical participation includes mock sampling and inspection techniques, report preparation, writing project specifications, glovebag demonstrations and containment construction.

"IHLAP" means the Industrial Hygiene Laboratory Accreditation Program of the AIHA Laboratory Accreditation Programs, LLC.

"IHPAT" means the Industrial Hygiene Proficiency Analytical Testing Program of the AIHA Proficiency Analytical Testing Programs [, LLC].

"Immediate family" means (i) a spouse, (ii) a sibling or step sibling, (iii) a parent or step parent, (iv) children or step children, or (v) any other person residing in the same household as the individual.

"Inspection" means an activity undertaken to determine the presence or location, or to access the condition of, friable or nonfriable asbestos-containing material (ACM) or suspected ACM, whether by visual or physical examination, or by collecting samples of such material. This term includes reinspections of friable and nonfriable known or assumed ACM that has been previously identified. The term does not include the following:

1. Periodic surveillance of the type described in 40 CFR 763.92(b) solely for the purpose of recording or reporting a change in the condition of known or assumed ACM;

2. Inspections performed by employees or agents of federal, state, or local governments solely for the purpose of determining compliance with applicable statutes or regulations; or

3. Visual inspections solely for the purpose of determining completion of response actions.

"Instructor" means a person who instructs one or more accredited asbestos training programs, to include the principal instructor, but excluding guest instructors.

"Licensee" means any person, as ["person" is] defined by § 54.1-500 of the Code of Virginia, who has been issued and holds a currently valid license as an asbestos worker, asbestos supervisor, asbestos inspector, asbestos management planner, asbestos project designer, asbestos project monitor or asbestos contractor under this chapter.

"NIOSH" means National Institute of Occupational Safety and Health.

"NIST" means National Institute of Standards and Technology.

"NVLAP" means the Asbestos Fiber Analysis Program of the National Institute of Standards and Technology National Voluntary Laboratory Accreditation Program.

"Occupied" means any area of any building designed or intended for human occupancy for any purpose.

"OSHA" means the U.S. Department of Labor Occupational Safety and Health Administration.

"OSHA Class III Work" means repair and maintenance operations where asbestos-containing material (ACM), including thermal system insulation and surfacing material, is likely to be disturbed.

"PAT" means ~~Proficiency Analytical Testing~~ proficiency analytical testing.

"PCM" means phase contrast microscopy.

"Person" means a ~~corporation, partnership, sole proprietorship, firm, enterprise, franchise, association or any other~~ firm, individual, or any other entity.

"PLM" means polarized light microscopy.

"Preliminary review" means a review conducted by the department following the submission of training materials to ascertain if the proposed asbestos training program meets the standards established by this chapter.

"Principal instructor" means an instructor whose main responsibility is to instruct accredited asbestos training

programs, supervise other instructors, and manage the overall asbestos training program curriculum.

"Removal" means the physical removal of asbestos-containing material (ACM) in accordance with all applicable regulations.

"Renovation" means altering in any way, one or more facility components.

"Repair" means returning damaged asbestos-containing material (ACM) to an undamaged condition or to an intact state so as to prevent fiber release.

"Residential buildings" means site-built homes, modular homes, condominium units, mobile homes, manufactured housing, and duplexes, or other multi-unit dwellings consisting of four units or fewer that are currently in use or intended for use only for residential purposes.

"Response action" means any method, including removal, encapsulation, enclosure, encasement, or operation and maintenance, that protects human health and the environment from friable asbestos-containing material.

"Responsible individual" means the employee, officer, manager, owner, or principal of the firm who shall be designated by each firm to ensure compliance with Chapter 5 (§ 54.1-500 et seq.) of Title 54.1 of the Code of Virginia and all regulations of the board and to receive communications and notices from the board that may affect the firm. In the case of a sole proprietorship, the sole proprietor shall be the responsible individual.

"Substantial change" means a change in overall asbestos training program, materials, principal instructors, training managers, directors, ownership, facilities, equipment, examinations, and certificates of completion. The addition of updated regulations, exam questions or news articles shall not be considered a substantial change.

"TEM" means transmission electron microscopy.

"Training manager" means the individual responsible for administering a training program and monitoring the performance of the instructors.

"Visual inspection" means a process of looking for conditions [~~, which~~ that] if not corrected during the asbestos abatement project, will lead to residual asbestos-containing dust or debris. Visual inspection includes examination of an asbestos abatement project area prior to clearance air monitoring for evidence that the project has been successfully completed as indicated by the absence of residue, dust and debris.

18VAC15-20-33. ~~Qualifications~~ General qualifications for ~~licensure—business entities~~ licensure: firms.

A. ~~General. Every business entity shall secure a license before transacting business.~~ Each firm applying for a license shall meet the requirements of this section.

B. ~~Name. The business name shall be disclosed on the application. The name under which the entity conducts business and holds itself out to the public (i.e., the trade or fictitious name) shall also be disclosed on the application. Business entities~~ The applicant shall disclose the name under which the business entity conducts business and holds itself out to the public. The firm shall register ~~their~~ trade or fictitious names, when applicable, with the State Corporation Commission or the clerk of the circuit court in the ~~county or jurisdiction~~ locality where the business is to be conducted in accordance with ~~§§ 59.1-69 through 59.1-76~~ Chapter 5 (§ 59.1-69 et seq.) of Title 59.1 of the Code of Virginia before submitting ~~their~~ an application to the board.

C. ~~Address.~~ The applicant shall disclose the firm's mailing address~~,~~ and the firm's physical address. A post office box is only acceptable as a mailing address when a physical address is also provided.

D. ~~Form of organization.~~ Applicants shall meet the additional requirements listed ~~below~~ in this subsection for ~~their business type~~ the firm's form of organization:

1. Corporations. ~~All applicants~~ Applicants shall have been incorporated in the Commonwealth of Virginia or, if a foreign corporation, shall have obtained a certificate of authority to conduct business in Virginia from the State Corporation Commission in accordance with ~~§ 13.1-544.2~~ requirements governing corporations pursuant to Title 13.1 of the Code of Virginia. ~~The corporation~~ Corporations shall be in good standing with the State Corporation Commission at the time of application to the board and at all times when the license is in effect.

2. Limited liability companies. ~~All applicants~~ Applicants shall have obtained a certificate of organization in the Commonwealth of Virginia or, if a foreign limited liability company, shall have obtained a certificate of registration to do business in Virginia from the State Corporation Commission in accordance with ~~§ 13.1-1105~~ requirements governing limited liability companies pursuant to Title 13.1 of the Code of Virginia. ~~The company~~ Companies shall be in good standing with the State Corporation Commission at the time of application to the board and at all times when the license is in effect.

3. Partnerships. ~~All applicants~~ Applicants shall have a written partnership agreement. The partnership agreement shall state that ~~all professional~~ asbestos abatement services of the partnership shall be under the direction and control of ~~a licensed or certified professional~~ the appropriate asbestos abatement licensee.

~~4. Sole proprietorships. Sole proprietorships desiring to use an assumed or fictitious name, that is, a name other than the individual's full name, shall have their assumed or fictitious name recorded by the clerk of the court of the county or jurisdiction wherein the business is to be conducted.~~

~~E. Qualifications.~~

~~1. Asbestos contractor. Each applicant shall hold a valid Virginia contractor license issued by the Virginia Board for Contractors with an asbestos specialty and shall be in compliance with all other requirements found in Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia governing the regulation of contractors.~~

~~2. Asbestos analytical laboratory. Each applicant shall submit evidence of meeting the standards to perform one or more of the following analysis:~~

~~a. For PLM analysis, a current NVLAP accreditation for bulk asbestos fiber analysis or a current AIHA accreditation and proficiency in the AIHA bulk asbestos program. A copy of the NVLAP Certificate of Accreditation, Scope of Accreditation and documentation of NVLAP proficiency or a copy of an AIHA accreditation certificate and proof of proficiency in the AIHA bulk program shall be submitted with the application.~~

~~b. For PCM analysis:~~

~~(1) At fixed laboratory sites, a current accreditation by AIHA or evidence that each facility has been rated "proficient" in the PAT Program's most recent round of asbestos evaluations, or evidence that each analyst is listed or has applied for listing in the Asbestos Analyst Registry (AAR) and has a performance rating of "acceptable" for the most recent Asbestos Analyst Testing (AAT) round. Each analyst shall have completed the NIOSH 582 training program or equivalent.~~

~~(2) For on-site analysis, each on-site analyst shall be listed or shall have applied for listing in the AAR and have a performance rating of "acceptable" for the most recent AAT round, or is accredited by AIHA or has been rated "proficient" in the PAT Program's most recent round of asbestos evaluations. Each analyst shall have completed the NIOSH 582 training program or equivalent.~~

~~c. For TEM analysis, a current accreditation by NVLAP to analyze asbestos airborne fibers using TEM. A copy of the NVLAP Certificate of Accreditation, Scope of Accreditation and documentation of NVLAP proficiency shall be submitted with the application.~~

~~F. Conviction or guilt. Neither~~ E. In accordance with § 54.1-204 of the Code of Virginia, the applicant shall disclose the following information about the firm ~~nor the~~ and its owners, officers ~~or~~, managers, members, and directors ~~shall have been convicted or found guilty, regardless of adjudication, in any jurisdiction of any felony or of any misdemeanor involving lying, cheating or stealing or of any violation while engaged in environmental remediation activity that resulted in the significant harm or the imminent and substantial threat of significant harm to human health or the environment, there being no appeal pending therefrom or the time of appeal having lapsed. Any plea of nolo contendre shall be considered a conviction for the purposes of this section. A certified copy of the final order, decree or case decision by a court or regulatory agency with lawful authority to issue such order, decree or case decision shall be admissible as prima facie evidence of such conviction or discipline. The board, at its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia~~, as applicable:

1. All felony convictions;

2. All misdemeanor convictions involving lying, cheating, or stealing; and

3. Any conviction resulting from engaging in environmental remediation activity that resulted in the significant harm or the imminent and substantial threat of significant harm to human health or the environment.

Any plea of nolo contendre or finding of guilt, regardless of adjudication or deferred adjudication, shall be considered a conviction for the purposes of this section. The board, at its discretion, may deny licensure to any applicant in accordance with § 54.1-204 of the Code of Virginia. The applicant has the right to request further review of any such action by the board under the Administrative Process Act (§ 2.2-4000 et seq. of the Code of Virginia).

~~G. Standards of practice and conduct. Applicants shall be in compliance with the standards of practice and conduct set forth 18VAC15-20-400 through 18VAC15-20-454 and 18VAC15-20-459.2 through 18VAC15-20-459.5 at the time of application to the board, while the application is under review by the board, and at all times when the license is in effect.~~

~~H. Standing. Both the firm and the owners, officers and directors shall be in good standing in every jurisdiction where licensed and the applicant shall not have had a license that was suspended, revoked or surrendered in connection with any disciplinary action in any jurisdiction prior to applying for licensure in Virginia.~~ F. The applicant shall report (i) the suspension, revocation, or surrender of a license, certification, or registration in connection with a disciplinary action by any jurisdiction and (ii) whether the firm, owners, officers, managers, members, or directors have been the subject of discipline in any jurisdiction prior to applying for licensure and while the application is under review by the board. The board, at its discretion, may deny licensure to ~~any~~ an applicant based on disciplinary action by any jurisdiction.

~~I. Denial of license. The board may refuse to issue a license to any asbestos contractor or asbestos analytical laboratory applicant if the applicant or its owners, officers or directors have a financial interest in an asbestos contractor whose asbestos license has been revoked, suspended, or denied renewal in any jurisdiction.~~

G. The board may deny the application of an applicant who is shown to have a substantial identity of interest with a person whose license or certificate has been revoked or not renewed by the board. A substantial identity of interest includes (i) a controlling financial interest by the individual or corporate principals of the person whose license or certificate has been revoked or has not been renewed or (ii) substantially identical owners, officers, managers, members, or directors, as applicable.

H. An applicant shall not knowingly make a materially false statement, submit falsified documents, or fail to disclose a material fact requested in connection with an application submitted to the board.

18VAC15-20-33.1. Qualifications for asbestos contractor license.

In addition to the requirements of 18VAC15-20-33, each applicant for an asbestos contractor license shall hold a valid Virginia contractor license issued by the Virginia Board for Contractors with an asbestos contracting specialty and shall be in compliance with all other requirements found in Chapter 11 (§ 54.1-1100 et seq.) of Title 54.1 of the Code of Virginia governing the regulation of contractors.

18VAC15-20-33.2. Qualifications for asbestos analytical laboratory license.

A. In addition to the requirements of 18VAC15-20-33, each applicant for an asbestos analytical laboratory license shall submit evidence of meeting the standards to perform one or more of PLM, PCM, or TEM analysis.

1. For PLM analysis, one of the following:

a. Current NVLAP accreditation demonstrated by submittal of a copy of the Certificate of Accreditation, Scope of Accreditation, and documentation of proficiency with the application;

b. The asbestos analytical laboratory is rated "proficient" in the BAPAT Program and maintains the training and quality control document such as is necessary to demonstrate competency in performing analysis; or

c. The asbestos analytical laboratory is accredited under the IHLAP and maintains the training and quality control documentation such as is necessary to demonstrate competency.

2. For PCM analysis, each analyst shall have completed the NIOSH 582 or NIOSH 582 Equivalency course. In addition, at least one of the following must be satisfied:

a. At fixed laboratory sites, one of the following qualifications must be met:

(1) The asbestos analytical laboratory is accredited under the IHLAP and maintains the training and quality control documentation such as is necessary to demonstrate competency;

(2) The asbestos analytical laboratory is rated "proficient" in the IHPAT Program and maintains the training and quality control document such as is necessary to demonstrate competency in performing analysis; or

(3) Each analyst is listed in the AAR and has a performance rating of "acceptable" for the most recent AAT round.

b. For onsite analysis, one of the following qualifications must be met:

(1) The asbestos analytical laboratory is rated "proficient" in the IHPAT Program and maintains the training and quality control document such as is necessary to demonstrate competency in performing onsite analysis [for each onsite analyst];

(2) The asbestos analytical laboratory is accredited under the IHLAP and maintains compliance with the requirements of its accreditation, as well as the training and quality control document such as is necessary to demonstrate competency in performing [onsite] analysis [for each onsite analyst]; or

(3) Each analyst is listed in the AAR and has a performance rating of "acceptable" for the most recent AAT round.

3. For TEM analysis, a current accreditation by NVLAP to analyze asbestos airborne fibers using TEM. A copy of the NVLAP Certificate of Accreditation, Scope of Accreditation, and documentation of NVLAP proficiency shall be submitted with the application.

B. The applicant shall name a responsible individual for the asbestos analytical laboratory.

C. Any branch office of an asbestos analytical laboratory shall complete a branch office application from the board. Each branch office shall name a resident responsible individual at each branch office.

D. The branch office application shall provide the information contained in subsection A of this section for the applicable branch office.

E. Any of the training and quality control documentation required to be maintained pursuant to this section shall be provided to the board upon request.

18VAC15-20-52. Application fees.

Application fees are set out in this section.

Fee Type	Fee Amount	When Due
Application for worker, supervisor, inspector, management planner, project designer or project monitor license	$80	With application
Application for asbestos analytical laboratory license	$120	With application
Application for asbestos analytical laboratory branch office	$100	With application
Application for an asbestos contractor license	$110	With application
Application for accredited asbestos training program approval	$500 per day of training	With application

18VAC15-20-53. Renewal and late renewal fees.

A. Renewal and late renewal fees are set out in this section.

Fee Type	Fee Amount	When Due
Renewal for worker, supervisor, inspector, management planner, project designer or project monitor license	$45	With renewal application
Renewal for asbestos analytical laboratory license	$75	With renewal application
Renewal for asbestos analytical laboratory branch office	$55	With renewal application
Renewal for asbestos contractor's license	$70	With renewal application
Renewal for accredited asbestos training program approval	$125	With renewal application
Late renewal for worker, supervisor, inspector, management planner, project designer or project monitor license (includes a $35 late renewal fee in addition to the regular $45 renewal fee)	$80	With renewal application
Late renewal for asbestos analytical laboratory license (includes a $35 late renewal fee in addition to the regular $75 renewal fee)	$110	With renewal application
Late renewal for asbestos analytical laboratory branch office (includes $35 late renewal fee in addition to the regular $55 renewal fee)	$90	With renewal application
Late renewal for asbestos contractor's license (includes a $35 late renewal fee in addition to the regular $70 renewal fee)	$105	With renewal application
Late renewal for accredited asbestos training program approval (includes a $35 late renewal fee in addition to the regular $125 renewal fee)	$160	With renewal application

B. For licenses expiring after February 1, 2018, and before February 1, 2020, the renewal fees shall be as follows:

Renewal for worker, supervisor, inspector, management planner, project designer, or project monitor license	$25
Renewal for asbestos analytical laboratory license	$40
Renewal for asbestos contractor's license	$30
Renewal for accredited asbestos training program approval	$40

For late renewals received after March 1, 2018, and on or before February 28, 2020, the late renewal fees shall be as follows:

Late renewal for worker, supervisor, inspector, management planner, project designer, or project monitor license	$60
Late renewal for asbestos analytical laboratory license	$75
Late renewal for asbestos contractor's license	$65
Late renewal for accredited asbestos training program approval	$75

18VAC15-20-454. Transfer of asbestos contractor license.

~~The transfer of an asbestos contractor license is prohibited.~~

Asbestos contractor licenses are issued to firms as defined in this chapter and are not transferable. Whenever the legal firm holding the license is dissolved or altered to form a new firm, the original license becomes void and shall be returned to the board within 30 days of the change. Additionally, the new firm shall apply for a new license, on a form provided by the board, within 30 days of the change in the firm. Such changes include:

1. Death of a sole proprietor;

2. Death or withdrawal of a general partner in a general partnership or the managing partner in a limited partnership;

3. Termination or cancellation of a corporation or limited liability company; and

4. Conversion, formation, or dissolution of a corporation, a limited liability company, or an association or any other firm recognized under the laws of the Commonwealth of Virginia.

18VAC15-20-456. Responsibilities.

A. Asbestos project monitors shall conduct inspections of the contractor's work practices and inspections of the containment.

B. Asbestos project monitors shall be present on the job site each day response actions are being conducted or in accordance with the owner-approved contractual agreement with the project monitor, shall perform the duties and functions established in 18VAC15-20-455, and shall maintain a daily log of all work performed. The daily log shall include~~, but not be limited to,~~ inspection reports, air sampling data, type of work performed by the contractor, problems encountered and corrective action taken.

C. Asbestos project monitors shall take final air samples on all abatement projects, except for abatement projects in residential buildings.

D. ~~Project monitors who analyze PCM air samples on site shall be employed by a licensed analytical laboratory and shall be listed or have applied for listing in the AAR and rated "acceptable" or is accredited by AIHA or has been rated "proficient" in the PAT Program's most recent round of asbestos evaluations.~~ The asbestos project monitor shall include, prior to reoccupancy, the air sample report on the employing asbestos analytical laboratory's letterhead in the final clearance report. Such report shall include the licensed asbestos project monitor's signature.

18VAC15-20-456.1. Onsite analysis by project monitors.

Project monitors who analyze PCM air samples on site shall (i) be employed by a licensed asbestos analytical laboratory, (ii) have completed the NIOSH 582 or NIOSH 582 Equivalency Course, and (iii) satisfy one of the following:

1. The project monitor is listed in the AAR and rated "acceptable" for the most recent AAT round;

2. The licensed asbestos analytical laboratory employing the project monitor is rated as "proficient" in the IHPAT Program and maintains training and quality control documentation necessary to demonstrate competency in performing onsite analysis; or

3. The licensed asbestos analytical laboratory employing the project monitor is accredited under the IHLAP, remains in compliance with accreditation requirements, and maintains training and quality control documentation necessary to demonstrate competency in performing onsite analysis.

18VAC15-20-459.4. Change of status.

A. The licensee shall notify the department ~~immediately~~ within 10 days of any ~~addition or deletion regarding employment of trained and experienced supervisors, and any changes regarding the signing officer's relationship with the company~~ changes to the resident responsible individual for each laboratory location.

B. The licensee shall notify the board within 10 business days upon the loss of accreditation or proficiency rating by NVLAP ~~or AIHA~~, IHLAP, or IHPAT by any laboratory location. The asbestos analytical laboratory shall notify the board if an employed analyst or project monitor performing asbestos laboratory analysis is removed from the AAR.

C. The licensee shall notify the board, in writing, if the type of analysis ~~to be performed~~ it will undertake is different from the type of analysis ~~in~~ for which the initial license was issued. The licensee shall submit a new application or branch office application, as applicable, reflecting the changes and submit evidence of meeting the qualifications required by this chapter to perform the analysis. ~~The above information shall be submitted to the board prior to performing the analysis.~~ The licensee must receive approval from the board prior to performing the analysis. No additional fees are required to ~~upgrade~~ amend the type of analysis performed by the analytical laboratory ~~license~~ licensee.

D. The licensee shall notify the department within 10 days of any changes in the laboratory location.

E. Asbestos analytical laboratory licenses are issued to firms as defined in this chapter and are not transferable. Whenever the legal firm holding the license is dissolved or altered to form a new firm, the original license becomes void and shall be returned to the board within 30 days of the change. Additionally, the new firm shall apply for a new license, on a form provided by the board, within 30 days of the change in the firm. Such changes include:

1. Death of a sole proprietor;

2. Death or withdrawal of a general partner in a general partnership or the managing partner in a limited partnership;

3. Termination or cancellation of a corporation or limited liability company; and

4. Conversion, formation, or dissolution of a corporation, a limited liability company, or an association or any other firm recognized under the laws of the Commonwealth of Virginia.

NOTICE: Forms used in administering the regulation have been filed by the agency. The forms are not being published; however, online users of this issue of the Virginia Register of Regulations may click on the name of a form with a hyperlink to access it. The forms are also available from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, 11th Floor, Richmond, Virginia 23219.

[FORMS (18VAC15-20)

Asbestos Worker License Application, A506-3301LIC-v4 (rev. 8/2015)

Asbestos Supervisor License Application, A506-3302LIC-v4 (rev. 8/2015)

Asbestos Inspector License Application, A506-3303LIC-v5 (rev. 8/2015)

Asbestos Management Planner License Application, A506-3304LIC-v4 (rev. 8/2015)

Asbestos Project Designer License Application, A506-3305LIC-v4 (rev. 8/2015)

Asbestos Project Monitor License Application, A506-3309LIC-v5 (rev. 8/2015)

Individual - Asbestos License Renewal Form, A506-33AREN-v4 (rev. 2/2018)

~~Asbestos Analytical Laboratory License Renewal Form, A506-3333REN-v4 (rev. 2/2018)~~

~~Contractor - Asbestos & Lead License Renewal Form, A506-33CONREN-v4 (rev. 2/2018)~~

Asbestos Analytical Laboratory License Renewal/Branch Office Renewal Form, A506-3333REN-v4 (rev. 9/2019)

Contractor - Asbestos & Lead License Renewal Form, A506-33CONREN-v5 (rev. 9/2019)

Asbestos - Experience Verification Application, A506-33AEXP-v4 (rev. 8/2015)

Asbestos - Education Verification Application, A506-33AED-v3 (rev. 8/2015)

Virginia Asbestos Licensing Consumer Information Sheet, A506-33ACIS-v2 (rev. 8/2013)

Inspector/Project Designer/Contractor Disclosure Form, A506-33DIS-v2 (rev. 8/2013)

~~Asbestos Contractor License Application, A506-3306LIC-v4 (rev. 8/2015)~~

~~Asbestos Analytical Laboratory License Application, A506-3333LIC-v6 (rev. 8/2015)~~

Asbestos Contractor License Application, A506-3306LIC-v5 (rev. 9/2019)

Asbestos Analytical Laboratory License Application, A506-3333LIC-v7 (rev. 9/2019)

Asbestos Analytical Laboratory - Branch Office Application, A506-3333BR-v1 (rev. 9/2019)

Change of Laboratory Analysis Type Form, A506-3333COA-v1 (rev. 9/2019)

Asbestos Training Program Review and Audit Application, A506-3331ACRS-v4 (rev. 8/2015)

Asbestos Project Monitor - Work Experience Log, A506-3309EXP-v3 (rev. 8/2015)]

VA.R. Doc. No. R17-4855; Filed May 6, 2019, 3:55 p.m.

BOARD OF NURSING

Fast-Track Regulation

Title of Regulation: **18VAC90-25. Regulations Governing Certified Nurse Aides (amending 18VAC90-25-10, 18VAC90-25-15, 18VAC90-25-70, 18VAC90-25-71, 18VAC90-25-80 through 18VAC90-25-120; adding 18VAC90-25-16; repealing 18VAC90-25-130, 18VAC90-25-140).**

Statutory Authority: §§ 54.1-2400 and 54.1-3005 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: June 26, 2019.

Effective Date: July 15, 2019.

Agency Contact: Jay P. Douglas, R.N., Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4520, FAX (804) 527-4455, or email jay.douglas@dhp.virginia.gov.

Basis: Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia. The specific statutory authority for registration of medication aides and approval of training programs is found in § 54.1-3005 of the Code of Virginia.

Purpose: It is necessary to retain the current chapter because its provisions protect the health and safety of a vulnerable population of patients or clients who receive services from a nurse aide. The regulatory changes are consistent with the principle that regulations should be clearly written and easily understandable.

Rationale for Using Fast-Track Rulemaking Process: As required by Executive Order 14 (2018), the Board of Nursing conducted a periodic review of this chapter. The amendments are either less restrictive and clarifying or intended for consistency with similar regulations for medication aides or nursing. There are no substantive changes, so the amendments are not expected to be controversial.

Substance: Pursuant to its periodic review of 18VAC90-25, the Board of Nursing has amended regulations to clarify certain provisions, make some rules less burdensome, and add requirements that are necessary for protection of the public or clients of nurse aides. Additional requirements include (i) a requirement for an applicant who does not take the state examination within two years of approval or who fails it three times to take another training program; (ii) a new subsection on reinstatement after revocation or suspension; and (iii) repeal of 18VAC90-25-130 and 18VAC90-25-140 and move of the requirements for an approved nurse aide advanced certification education program to 18VAC90-26.

Issues: There are no substantive changes to the regulation, so there are no real advantages or disadvantages to the public. The consolidation of fees into one section and the nametag changes are advantageous to a certified nursing aide (CNA) or a person seeking registration as a CNA. Most of the amendments are technical and clarifying.

There are no advantages or disadvantages to the agency or the Commonwealth, except clearer regulations may result in fewer inquiries to staff.

Small Business Impact Review Report of Findings: This fast-track regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to a periodic review,[1] the Board of Nursing (Board) proposes to 1) require certified nurse aides (aides), who do not take the certification exam within two years of completing training or who fail it three times, repeat the training program before reapplying for certification, 2) incorporate in the regulations the option to send license renewal notices electronically, 3) allow facilities to establish their own policy for the name identification (nametags) of aides subject to certain requirements, and 4) clarify existing processes and requirements and change the location of some of the requirements.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. The Board proposes to require that an aide who does not take the certification exam within two years of completing training or who fails the exam three times to repeat the training program before applying for certification. According to Department of Health Professions (DHP), it is highly unlikely that an applicant who has not taken the examination within two years of completion or who has failed three times would be able to pass the skills and written portions of the exam. Nurse aide training programs are usually offered by the community colleges. The training consists of seven credit hours and can be completed over a semester or an eight-week period. The costs include tuition ($1,085 -$1,140), trainee's time (approximately 180 hours of class time), and other costs such as background check, drug screen, immunizations, textbooks, uniform, stethoscope, etc. ($200 -$300). DHP does not have an estimate on the number of individuals who may have to repeat training. However, the proposed change would encourage the applicants to achieve certification and help ensure that they are competent to perform their tasks.

The Board also proposes to incorporate in the regulations the option of sending license renewal notices electronically as has been the current practice. Currently, licensees are providing an email address for the purpose of receiving notices and communications from the Board. As with other boards under DHP, the Board's renewal notices are currently being sent to the email address on record. If a licensee fails to renew before the renewal deadline, a paper renewal notice is also sent as a courtesy to the licensee.

According to DHP, each paper renewal notice costs $0.45 ($0.38 for postage and $0.07 for tri-fold generic stock). Currently, there are 53,055 certified nurse aides who would likely renew their licenses every two years with a cost of about $11,937 per year which has been avoided by the electronic notifications. However, the cost savings from electronic notices would likely be less than this amount because the Board may not have an email address for some of the licensees, and a paper copy would still be sent if renewal does not occur 30 days prior to the expiration of the license. In addition to the savings, electronic notices are likely beneficial because they expedite the renewal process with an almost instantaneous delivery process and also mitigate potential issues that could result from the delivery of paper notices. Since the Board already sends electronic notices, the main impact of this change is providing consistency between the current practice and the regulatory text.

Another amendment would replace the current requirement that the nametag include the aide's first and last name with a requirement that the facility employing the aide set the policy for identifying the aide on nametags. The requirement that the nametag must include the title under which the person is practicing would be retained. It should be noted that a similar change was made in the nursing regulations in response to a petition for rulemaking.[2]

In a survey of 320 nurses in the Commonwealth conducted by the Virginia Nurses Association, 81% preferred that that the nametag not include their full name.[3] Those supporting the change cited concerns for safety and stalking as reasons to establish a more confidential method of identification. The proposal to allow flexibility to employers concerning name identification on the badge would potentially be beneficial due to the chance that some or many employers may elect to not list the full name, which may reduce the occurrences of stalking and harassment of aides.

The proposed regulations maintain the requirement that the nametag have the person's appropriate title, but does not establish a minimum criteria for name identification. An employer could potentially choose to not have the name on the badge at all. It seems likely though, that most employers would prefer to have a form of name (first name and last initial for example) on the badge so that patients or family members could correctly identify an aide.

The remaining amendments would provide clarification to existing board processes and regulatory requirements and change the location of existing requirements. These amendments would not reflect a change in current practice and would not create any significant economic impact beyond adding clarity to existing processes and expectations.

Businesses and Entities Affected. There are 53,055 certified nurse aides in the Commonwealth.

Localities Particularly Affected. The proposed amendments would not disproportionately affect particular localities.

Projected Impact on Employment. The proposed retraining requirement would likely add to the demand for nurse aide educators by a small amount. Switching from paper to electronic renewal notices may have reduced the demand for U.S. Postal Service workers by a negligible amount. However, the proposed amendments are unlikely to significantly affect total employment.

Effects on the Use and Value of Private Property. The proposed amendments would not significantly affect the use and value of private property.

Real Estate Development Costs. The proposed amendments would not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. Most training programs are offered by community colleges and large health care entities. Thus, proposed amendments would not significantly affect small businesses.

Alternative Method that Minimizes Adverse Impact. The proposed amendments would not impose adverse impact on small businesses.

Adverse Impacts:

Businesses. The proposed amendments would not impose adverse impact on businesses.

Localities. The proposed amendments would not adversely affect localities.

Other Entities. Switching from paper to electronic renewal notices may have reduced the demand for U.S. Postal Service workers by a negligible amount. In addition, the demand for training offered by community colleges and large health care institutions may increase by a small amount.

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[1] http://townhall.virginia.gov/l/ViewPReview.cfm?PRid=1635

[2] http://townhall.virginia.gov/L/ViewStage.cfm?stageid=8139

[3] http://townhall.virginia.gov/L/viewcomments.cfm?commentid=55675

Agency's Response to Economic Impact Analysis: The Board of Nursing concurs with the analysis of the Department of Planning and Budget.

Summary:

Pursuant to a periodic review of 18VAC90-25, the amendments (i) require certified nurse aides who do not take the certification exam within two years of completing training or who fail it three times to repeat the training program before reapplying for certification, (ii) incorporate into the regulations an option to send license renewal notices electronically, (iii) allow a facility to establish its own policy for the name identification of aides subject to certain requirements, (iv) add a new subsection on reinstatement after revocation or suspension, and (v) remove the requirements for an approved nurse aide advanced certification education program from this chapter because they are being added to 18VAC90-26.

Part I
General Provisions

18VAC90-25-10. Definitions.

The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Board" means the Virginia Board of Nursing.

"Client" means a person receiving the services of a certified nurse aide, to include a patient in a health care facility or at home or a resident of a long-term care facility.

"Nurse aide education program" means a program designed to prepare nurse aides for certification that is approved by the board.

18VAC90-25-15. Identification; accuracy of records.

A. Any person regulated by this chapter who provides direct patient care shall, while on duty, wear identification that is clearly visible and indicates the ~~person's first and last name and the~~ appropriate title issued to such person by the board under which he is practicing in that setting. ~~Any person practicing in hospital emergency departments, psychiatric and mental health units and programs, or in health care facilities units offering treatment for patients in custody of state or local law enforcement agencies may use identification badges of first name and first letter only of last name and appropriate title.~~ Name identification on a badge shall follow the policy of the facility in which the nurse aide is employed.

B. A certificate holder who has changed his name shall submit as legal proof to the board a copy of the marriage certificate, a certificate of naturalization, or court order evidencing the change. A duplicate certificate shall be issued by the board upon receipt of such evidence.

C. Each certificate holder shall maintain an address of record with the board. Any change in the address of record or in the public address, if different from the address of record, shall be submitted in writing or electronically to the board within 30 days of such change. All notices required by law and by this chapter to be ~~mailed~~ sent by the board to any certificate holder shall be validly given when ~~mailed~~ sent to the latest address of record on file with the board.

18VAC90-25-16. Fees.

A. The following fees shall apply:

1. Annual renewal for certified nurse aide	$30
2. Returned check	$35
3. Application for certification as an advanced certified nurse aide	$25
	$20
4. Renewal of advanced certified nurse aide certification	$30
5. Reinstatement of advanced certified nurse aide certification	

B. Fees shall not be refunded once submitted.

Part II
Certification of Nurse Aides

18VAC90-25-70. Initial certification for the nurse aide registry.

A. The ~~executive director of the~~ board shall issue a certificate as a certified nurse aide to each applicant who qualifies for such a certificate under §§ 54.1-3024, 54.1-3025, 54.1-3026, and 54.1-3028 of the Code of Virginia and provisions of this chapter.

B. Nurse aide competency evaluation.

1. The board may contract with a test service for the development and administration of a competency evaluation, which shall be a state examination.

2. All individuals completing a nurse aide education program in Virginia shall successfully complete the ~~competency evaluation~~ state examination required by the board prior to being certified and to using the title Certified Nurse Aide.

3. The board shall determine the minimum passing standard on the ~~competency evaluation~~ state examination.

C. Initial certification shall be for two years.

18VAC90-25-71. Certification by examination.

A. To be placed on the registry and certified by examination, the nurse aide must:

1. Have satisfactorily completed:

a. A nurse aide education program approved by the board;

b. At least one clinical nursing course that includes at least 40 hours of clinical experience involving direct client care within the past 12 months while enrolled in a nursing education program preparing for registered nurse or practical nurse licensure; or

c. A nursing education program preparing for registered nurse licensure or practical nurse licensure;

2. Pass the ~~competency evaluation~~ state examination required by the board; and

3. Submit the required application and testing fee as prescribed by the board.

B. An applicant who fails to take the board-approved skills and written portions of the state examination within two years of completion of the training or who has failed the examination in three attempts shall reenroll and successfully complete another approved nurse aide training program before reapplying.

18VAC90-25-80. Renewal or reinstatement of certification.

A. Renewal of certification.

1. No less than 30 days prior to the expiration date of the current certification, a notice for renewal shall be ~~mailed~~ sent by the board to the address of record of each currently ~~registered~~ certified nurse aide.

2. The certified nurse aide shall annually submit a completed renewal application with the required fee ~~of $30~~ and ~~verification~~ attestation of performance of nursing-related activities for compensation within the two years immediately preceding the expiration date.

3. Failure to receive the application for renewal shall not relieve the certificate holder of the responsibility for renewing the certification by the expiration date.

4. A certified nurse aide who has not performed nursing-related activities for compensation during the two years preceding the expiration date of the certification shall repeat and pass the nurse aide ~~competency evaluation~~ state examination prior to applying for ~~recertification~~ renewal of certification.

~~5. The board shall also charge a fee of $35 for a returned check.~~

B. Reinstatement of certification.

1. An individual whose certification has lapsed for more than 90 days shall submit the required application and renewal fee and provide:

a. Verification of performance of nursing-related activities for compensation in the two years prior to the expiration date of the certificate and within the preceding two years; or

b. Evidence of having repeated and passed the nurse aide ~~competency evaluation~~ state examination.

2. An individual who has previously had a finding of abuse, neglect, or misappropriation of property is not eligible for reinstatement of his certification, except as provided in 18VAC90-25-81, which provides a process for removal of the finding of neglect based on a single occurance.

C. A certified nurse aide whose certification has been suspended or revoked by the board and who is eligible for reinstatement may apply for reinstatement by filing a reinstatement application and fulfilling requirements of subsection B of this section.

18VAC90-25-81. Removal of a finding of neglect.

A. If a finding of neglect was made against a certificate holder based on a single occurrence, an individual may petition for removal of the finding of neglect provided:

1. A period of at least one year has passed since the finding was made; and

2. The individual ~~seeking reinstatement~~ demonstrates sufficient evidence that employment and personal history do not reflect a pattern of abusive behavior or neglect.

B. A certificate holder can petition the board only once for removal of a finding of neglect.

18VAC90-25-100. Disciplinary provisions for nurse aides.

The board has the authority to deny, revoke, or suspend a certificate issued, or to otherwise discipline a certificate holder upon proof that ~~he~~ the certificate holder has violated any of the provisions of § 54.1-3007 of the Code of Virginia.

For the purpose of establishing allegations to be included in the notice of hearing, the board has adopted the following definitions:

1. Fraud or deceit in order to procure or maintain a certificate shall mean~~,~~ but shall not be limited to:

a. Filing false credentials;

b. Falsely representing facts on an application for initial certification, reinstatement or renewal of a certificate; or

c. Giving or receiving assistance in taking the ~~competency evaluation~~ state examination.

2. Unprofessional conduct shall mean~~,~~ but shall not be limited to:

a. Performing acts beyond those authorized for practice as a nurse aide or an advanced certified nurse aide as defined in Chapter 30 (§ 54.1-3000 et seq.) of Title 54.1 of the Code of Virginia, and beyond those authorized by the Drug Control Act (§ 54.1-3400 et seq. of the Code of Virginia) or by provisions for delegation of nursing tasks in Part ~~X (18VAC90-20-420~~ VI (18VAC90-19-240 et seq.) of ~~18VAC90-20~~ 18VAC90-19.

b. Assuming duties and responsibilities within the practice of a nurse aide or an advanced certified nurse aide without adequate training or when competency has not been maintained;

c. Obtaining supplies, equipment or drugs for personal or other unauthorized use;

d. Falsifying or otherwise altering client or employer records, including falsely representing facts on a job application or other employment-related documents;

e. Abusing, neglecting, or abandoning clients;

f. Having been denied a license or certificate or having had a license or certificate issued by the board revoked or suspended;

g. Giving to or accepting from a client property or money for any reason other than fee for service or a nominal token of appreciation;

h. Obtaining money or property of a client by fraud, misrepresentation, or duress;

i. Entering into a relationship with a client or the client's family that constitutes a professional boundary violation in which the nurse aide uses his professional position to take advantage of the vulnerability of a client or his family, to include ~~but not limited to~~ actions that result in personal gain at the expense of the client, an inappropriate personal involvement or sexual conduct with a client;

j. Violating state laws relating to the privacy of client information, including ~~but not limited to~~ § 32.1-127.1:03 of the Code of Virginia; or

k. Providing false information to staff or board members during the course of an investigation or proceeding.

3. For the purposes of interpreting provisions of subdivision 7 of § 54.1-3007 ~~(7)~~ of the Code of Virginia, a restriction on nurse aide certification shall be interpreted as having a finding of abuse, neglect, or misappropriation of patient property made in another state or being placed on the abuse registry in another state.

Part III
Advanced Certification

18VAC90-25-110. Requirements for initial certification as an advanced certified nurse aide.

A. In order to be certified as and use the title of "Advanced Certified Nurse Aide," an applicant shall meet the following qualifications:

1. Hold current certification as a certified nurse aide in Virginia;

2. Have been certified for at least three years as a certified nurse aide;

3. Have never had a finding of abuse, neglect, or misappropriation of patient property entered on a nurse aide registry in any jurisdiction and have not had any disciplinary actions taken by the board within the five years preceding application for advanced certification;

4. Have a recommendation for advanced certification from a licensed nurse who has supervised the applicant in providing direct patient care for at least six months within the past year; and

5. Have successfully completed a minimum of 120 hours of advanced training in an approved program that includes a competency evaluation acceptable to the board.

B. An application for certification shall be accompanied by an application fee ~~of $25~~ as specified in 18VAC90-25-16.

18VAC90-25-120. Renewal and reinstatement of certification as an advanced certified nurse aide.

A. Current certification as a nurse aide in Virginia must be maintained in order to hold certification as an advanced certified nurse aide.

B. Renewal. If an individual is not eligible to renew as a certified nurse aide, certification as an advanced certified nurse aide may not be renewed. An advanced certification shall be renewed concurrently with the renewal of the basic certification as a nurse aide in Virginia by:

1. Submitting a completed renewal form and renewal fee ~~of $20~~ as specified in 18VAC90-25-16; and

2. Attesting to completion of at least three contact hours per year of continuing education and training in any of the competency areas identified in the advanced certification training program. The board may grant an extension or waiver of the continuing education requirement based on good cause shown by the certified nurse aide.

C. Late renewal. An advanced certified nurse aide may renew certification for 90 days following the expiration date by meeting the requirements of subsection A of this section.

D. Reinstatement. If an advanced certification has not been renewed for 90 days following the expiration date, it shall only be reinstated if the applicant for reinstatement:

1. Holds current certification as a nurse aide in Virginia;

2. Submits a completed reinstatement application on a form provided by the board;

3. Pays the reinstatement fee ~~of $30~~ as specified in 18VAC90-25-16; and

4. Provides evidence that ~~he~~ the applicant has completed all required hours of continuing education and training.

18VAC90-25-130. ~~Requirements for an approved advanced certification education program.~~ (Repealed.)

~~A. The advanced certification education program shall be approved by the Virginia Board of Nursing. An approved advanced certification education program shall also be an approved nurse aide education program as set forth in 18VAC90-25-20.~~

~~B. An advanced certification education program shall consist of a minimum of 120 hours including a minimum of 40 hours of clinical skills instruction in direct client care with on-site supervision by instructional personnel. When nurse aides are engaged in direct client care in the course of advanced certification training, the ratio shall not exceed 10 students to one instructor.~~

~~C. The instructional personnel in an approved advanced certification education program shall meet the requirements as set forth in 18VAC90-25-30.~~

~~D. The curricula of an approved advanced certification education program shall, at a minimum, meet the requirements of 18VAC90-25-140.~~

~~E. Each advanced certification program shall develop an individual record of major skills taught and the date of performance by the student. At the completion of the program, the program shall provide each nurse aide with a copy of this record and a certificate of completion.~~

~~F. An advanced certification education program shall develop and submit to the board a competency evaluation based on the curriculum content required in 18VAC90-25-140. Such an evaluation shall include both a written test on the curriculum and an assessment of manual skills. A record~~

~~of the reports of graduates' performance on the approved competency evaluation program shall be maintained for a minimum of three years.~~

~~G. Program review shall be in accordance with requirements of 18VAC90-25-60 and shall be conducted concurrently with the on-site review of the basic nurse aide education program. Loss of board approval for the basic nurse aide education program shall automatically result in the loss of approval for the advanced certification education program.~~

~~H. When an advanced certification education program closes, the provider shall notify the board of the date of closing and submit a list of all graduates with their date of graduation.~~

18VAC90-25-140. ~~Required curriculum content for an advanced certification education program.~~ (Repealed.)

~~A. An advanced certification education program shall include classroom and clinical instruction in the following curriculum:~~

~~1. Leadership and mentoring skills.~~

~~a. Principles of adult learning;~~

~~b. Learning styles;~~

~~c. Evaluation methods to assess learner knowledge;~~

~~d. Communication techniques and communication barriers; emphasizing cultural diversity of coworkers and clients;~~

~~e. Conflict management;~~

~~f. Precepting and mentoring new certified nurse aides;~~

~~g. Teamwork;~~

~~h. Contributing to care plan development and implementation;~~

~~i. Organizational responsibilities; and~~

~~j. Principles of documentation.~~

~~2. Care of the cognitively impaired client.~~

~~a. Signs and symptoms of dementia;~~

~~b. Concepts and techniques for addressing the unique needs and behaviors of individuals with dementia, including but not limited to agitation, combativeness, sundown syndrome, wandering, forgetfulness;~~

~~c. Basic concepts of communication with cognitively impaired clients, including techniques to reduce the effects of cognitive impairment;~~

~~d. Basic concepts of behavior management with cognitively impaired clients; and~~

~~e. Recognizing changes in the client's condition and reporting and documenting such changes.~~

~~3. Restorative care.~~

~~a. Anatomy and physiology with emphasis on the effects of aging;~~

~~b. Pathophysiology of common disorders of the elderly;~~

~~c. Measures to assist clients with common medical problems;~~

~~d. Recognizing changes in the client's condition and reporting and documenting such changes;~~

~~e. Concepts to maintain or improve client mobility and ability to perform activities of daily living; and~~

~~f. Rehabilitation procedures.~~

~~4. Wound care.~~

~~a. Prevention, identification and treatment of Stage I and Stage II pressure ulcers;~~

~~b. Positioning;~~

~~c. Sterile and clean technique;~~

~~d. Dressing changes;~~

~~e. Concepts of hydration;~~

~~f. Nutrition and weight loss; and~~

~~g. Recognizing changes in the client's condition and reporting and documenting such changes.~~

~~B. Written objectives for each unit of instruction shall be stated in behavioral terms that are measurable and shall be reviewed with the students at the beginning of each unit.~~

VA.R. Doc. No. R19-5681; Filed April 30, 2019, 1:09 p.m.

Fast-Track Regulation

Title of Regulation: **18VAC90-60. Regulations Governing the Registration of Medication Aides (amending 18VAC90-60-20, 18VAC90-60-30, 18VAC90-60-40, 18VAC90-60-60, 18VAC90-60-70, 18VAC90-60-90, 18VAC90-60-91, 18VAC90-60-92, 18VAC90-60-100, 18VAC90-60-120; adding 18VAC90-60-75).**

Statutory Authority: §§ 54.1-2400 and 54.1-3005 of the Code of Virginia.

Public Hearing Information: No public hearings are scheduled.

Public Comment Deadline: June 26, 2019.

Effective Date: July 15, 2019.

Agency Contact: Jay P. Douglas, R.N., Executive Director, Board of Nursing, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4520, FAX (804) 527-4455, or email jay.douglas@dhp.virginia.gov.

Basis: Regulations are promulgated under the general authority of § 54.1-2400 of the Code of Virginia. The specific statutory authority for registration of medication aides and approval of training programs is found in § 54.1-3005 of the Code of Virginia.

Purpose: It is necessary to retain the current chapter because its provisions protect the health and safety of a vulnerable population of residents in assisted living to whom medications are administered. The regulatory changes are consistent with the principle that regulations should be clearly written and easily understandable.

Rationale for Using Fast-Track Rulemaking Process: As required by Executive Order 14 (2018), the Board of Nursing conducted a periodic review of this chapter. The amendments are either less restrictive and clarifying or intended for consistency with similar regulations for nurse aide or nursing education programs. There are no substantive changes, so the amendments are not expected to be controversial.

Substance: Pursuant to its periodic review of 18VAC90-60, the Board of Nursing has amended regulations to clarify certain provisions, make some rules less burdensome, and add requirements that are necessary for protection of the public or the medication aide. Additional requirements include (i) more information on the certificate of completion; (ii) a process for conditional approval or withdrawal of approval of a medication aide training program; (iii) a new section on reinstatement after revocation or suspension; and (iv) language clarifying that the board may take disciplinary action for any violation of the chapter, including the standards of practice.

Issues: There are no substantive changes to the regulation, so there are no real advantages or disadvantages to the public. The additional information on a certificate of completion and the additional year in which the applicant has to take the examination are advantageous to a person seeking registration as a medication aide. Most of the amendments are technical and clarifying.

There are no advantages or disadvantages to the agency or the Commonwealth, except that clearer regulations may result in fewer inquiries to staff.

Small Business Impact Review Report of Findings: This fast-track regulatory action serves as the report of the findings of the regulatory review pursuant to § 2.2-4007.1 of the Code of Virginia.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. Pursuant to a periodic review,[1] the Board of Nursing (Board) proposes to 1) allow an additional year for medication aides (aides) to take the certification exam, 2) add a fourth option for aides to meet the clinical training requirement, 3) allow assisted living facilities to establish their own policy for the name identification (nametags) of aides subject to certain requirements, and 4) clarify several existing processes and requirements.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Currently, an aide has one year to pass the board-approved exam for registration after completing a training program. Those who cannot pass the exam in one year are required to repeat their training. The Board proposes to allow an additional year to pass the exam. The additional time afforded to the applicants would likely help them pass the exam (in terms of providing more time to study and/or flexibility to find the time to prepare) and avoid the costs of repeating training for some of them.

The Board also proposes to provide an additional option for an aide to document training requirements in client/patient care that would include a clinical nursing course with at least 40 hours of clinical experience in direct client care within the past 12 months. There are currently three pathways to provide documentation of training in client/patient care in the regulation; this fourth option would allow an applicant who has completed such a course to meet the criteria for documentation of training without incurring additional costs or repeating additional training in client care.

Another amendment would replace the current requirement that the nametag include the aide's first and last name with a requirement that the assisted living facility employing the aide set the policy for identifying the aide on nametags. The requirement that the nametag must include the title under which the person is practicing would be retained. It should be noted that a similar change was made in the nursing regulations in response to a petition for rulemaking.[2]

In a survey of 320 nurses in the Commonwealth conducted by the Virginia Nurses Association, 81% preferred that that the nametag not include their full name.[3] Those supporting the change cited concerns for safety and stalking as reasons to establish a more confidential method of identification. The proposal to allow flexibility to employers concerning name identification on the badge would potentially be beneficial due to the chance that some or many employers may elect to not list the full name, which may reduce the occurrences of stalking and harassment of aides.

The proposed regulation maintains the requirement that the nametag have the person's appropriate title, but does not establish a minimum criteria for name identification. An employer could potentially choose to not have the name on the badge at all. It seems likely though, that most employers would prefer to have a form of name (first name and last initial for example) on the badge so that patients or family members could correctly identify an aide.

The remaining amendments would provide clarification to existing board processes and regulatory requirements. The Board proposes to add language to describe the existing process for conditional approval and withdrawal of approval of an aide training program. Language would also be added to include the instructions for reinstatement of an aide after revocation or suspension of a registration. The proposal would add language to specify that the certificate of completion issued by training providers include the name of the program, the board approval number, and the signature of the instructor. An additional amendment would clarify that disciplinary action would result if an aide violated any provision of this chapter, rather than only including the standards of practice. Although all of these processes and requirements are currently reflected in practice, the Board is proposing to clarify them in regulation due to inquiries received from training programs or applicants. These amendments would not reflect a change in current practice and would not create any significant economic impact beyond adding clarity to existing processes and expectations.

Businesses and Entities Affected. There are 284 medication aide training programs and 6,595 registered medication aides in the Commonwealth.

Localities Particularly Affected. The proposed amendments would not disproportionately affect particular localities.

Projected Impact on Employment. The proposed amendments are unlikely to significantly affect total employment.

Effects on the Use and Value of Private Property. The proposed amendments would not affect the use and value of private property.

Real Estate Development Costs. The proposed amendments would not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. While some training programs are offered by large health care entities that include assisted living facilities, most are operated by small businesses. The proposed amendments would not affect costs for them.

Alternative Method that Minimizes Adverse Impact. The proposed amendments would not impose adverse impact on small businesses.

Adverse Impacts:

Businesses. The proposed amendments would not impose adverse impact on businesses.

Localities. The proposed amendments would not adversely affect localities.

Other Entities. The proposed amendments would not adversely affect other entities.

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[1]http://townhall.virginia.gov/l/ViewPReview.cfm?PRid=1637

[2]http://townhall.virginia.gov/L/ViewStage.cfm?stageid=8139

[3]http://townhall.virginia.gov/L/viewcomments.cfm?commentid=55675

Agency's Response to Economic Impact Analysis: The Board of Nursing concurs with the analysis of the Department of Planning and Budget.

Summary:

Pursuant to a periodic review of 18VAC90-60, amendments include (i) allowing an additional year for medication aides to take the certification exam; (ii) adding a fourth option for aides to meet the clinical training requirement; (iii) allowing assisted living facilities to establish their own policy for the name identification of aides, subject to certain requirements; (iv) requiring more information on the certificate of completion and a process for withdrawal of approval of a medication aide training program; (v) adding a new section on reinstatement after revocation or suspension; and (vi) clarifying that the board may take disciplinary action for any violation of the chapter, including the standards of practice.

18VAC90-60-20. Identification; accuracy of records.

A. Any person regulated by this chapter shall, while on duty, wear identification that is clearly visible to the client and that indicates the ~~person's first and last name and the~~ appropriate title issued to such person by the board under which ~~he~~ the person is practicing in that setting. Name identification on a badge shall follow the policy of the assisted living facility in which the medication aide is employed.

B. A medication aide who has changed his name shall submit as legal proof to the board a copy of the marriage certificate, a certificate of naturalization, or a court order evidencing the change. A duplicate certificate shall be issued by the board upon receipt of such evidence.

C. A medication aide shall maintain an address of record with the board. Any change in the address of record or in the public address, if different from the address of record, shall be submitted electronically or in writing to the board within 30 days of such change. All notices required by law and by this chapter to be ~~mailed~~ sent by the board to any registrant shall be validly given when ~~mailed~~ sent to the latest address of record on file with the board.

18VAC90-60-30. Fees.

A. The following fees shall apply:

1. Application for program approval	$500
2. Application for registration as a medication aide	$50
3. Annual renewal for medication aide	$30
4. Late renewal	$15
5. Reinstatement of registration	$90
6. Returned check	$35
7. Duplicate registration	$15
8. Reinstatement following suspension, mandatory suspension, or revocation	$120

B. Fees shall not be refunded once submitted.

C. The fee for the ~~competency evaluation~~ state examination shall be paid directly to the examination service contracted by the board for its administration.

~~D. For renewal of registration from July 1, 2017, through June 30, 2018, the following fee shall be in effect:~~

~~Annual renewal for medication aide~~	~~$22~~

Part II
Medication Aide Training Programs

18VAC90-60-40. Establishing and maintaining a medication aide training program.

A. Establishing a medication aide training program.

1. A program provider wishing to establish a medication aide training program shall submit a completed application and pay the prescribed fee to the board at least 90 days in advance of the first expected offering of the program.

2. Initial approval may be granted when all documentation of the program's compliance with requirements as set forth in this part has been submitted and deemed satisfactory to the board.

3. If approval is denied, the applicant may request, within 30 days of the mailing of the decision, an informal conference committee to be convened in accordance with § 2.2-4019 of the Code of Virginia.

4. If the committee's recommendation is to deny approval, no further action will be required of the board unless the program requests a hearing before the board or a panel thereof in accordance with § 2.2-4020 and subdivision 11 of § 54.1-2400 of the Code of Virginia.

B. Maintaining an approved medication aide training program. To maintain approval, the program shall:

1. Continue to comply with requirements as set forth in this part.

2. Document that the cumulative passing rate for the program's first-time test takers taking the competency evaluation required for registration over the past two years is not less than 80%.

3. Report all substantive changes within 10 days of the change to the board to include~~, but not be limited to,~~ a change in the program instructors, curriculum or program location.

4. Cooperate with any unannounced visits to the program conducted by board representatives for the purpose of ensuring compliance with requirements for approval or in response to complaints about the program.

5. Provide documentation that each student enrolled in such program has been given a copy of applicable Virginia law and regulation for the registration and practice of medication aides.

6. Provide each student with a certificate of completion, which shall include the name of the program, the approval number provided by the board, and the signature of the instructor.

18VAC90-60-60. Requirements for the program curriculum.

A. Prerequisite for the program. A student seeking enrollment in a medication aide training program shall have successfully completed the direct care staff training required by the Department of Social Services for employment in an assisted living facility or an approved nurse aide education program.

B. Hours of instruction. An approved program shall consist of a minimum of 68 hours of student instruction and training to include:

1. At least 40 hours of classroom or didactic instruction over and above any facility orientation program or training in direct client care provided by the facility;

2. At least 20 hours of supervised skills practice in medication administration to residents of an assisted living facility, after which the training program shall evaluate the student's minimal competency in the clinical skills of administering medications on a form provided by the board. Up to 20% of the supervised skills practice may be completed by a simulation experience in a simulation laboratory. The clinical evaluation shall be conducted one-on-one with a qualified instructor with experience in medications in long-term care; and

3. An eight-hour module in facilitating client self-administration or assisting with the administration of insulin to include instruction and skills practice in the administration of insulin as specified in the board-approved curriculum.

C. Content of the curriculum. An approved program shall use the curriculum developed and provided by the board, which shall, at a minimum, include the following topics:

1. Preparing for safe administration of medications to clients in assisted living facilities;

2. Maintaining aseptic conditions;

3. Understanding of basic pharmacology;

4. Facilitating client self-administration or assisting with medication administration;

5. Following proper procedure for preparing, administering, and maintaining medications; and

6. Following appropriate procedures for documentation and reporting to the licensed health care professional on duty at the facility or to the client's prescriber.

D. In addition to the training curriculum, the program ~~shall~~ may provide one or more four-hour modules that can be used by facilities as refresher courses or by medication aides to satisfy requirements for continuing education.

18VAC90-60-70. Other program requirements.

A. Ratio. An approved training program shall maintain a ratio of no more than 10 students for one instructor for the 20 hours of supervised skills practice as required by 18VAC90-60-60 B.

B. Records.

1. Each medication aide training education program shall develop and maintain an individual record of major skills taught and the date of performance by the student. At the completion of the program, the medication aide must receive a copy of this record and a certificate of completion from the program, as specified in 18VAC90-60-40.

2. A record of the reports of graduates' performance on the approved competency evaluation program shall be maintained.

3. A record that documents the disposition of complaints against the program shall be maintained.

4. All records required by this section shall be maintained for at least five years.

C. Student identification. The medication aide students shall wear identification that clearly distinguishes them as a "medication aide student" while engaged in practical skills training under direct supervision by an instructor. Name identification shall follow the policy of the assisted living facility in which the medication aide is engaged in practical training.

18VAC90-60-75. Conditional or withdrawal of approval of a medication aide training program.

A. If the board determines that a medication aide training program is not maintaining the requirements of Part II (18VAC90-60-40 et seq.) of this chapter, the board may:

1. Place the program on conditional approval with terms and conditions to be met within the timeframe specified by the board; or

2. Withdraw program approval.

B. If the board either places a program on conditional approval with terms and conditions to be met within a timeframe specified by the board or withdraws approval, the following shall apply:

1. No further action will be required of the board unless the program requests an informal conference pursuant to §§ 2.2-4019 and 54.1-109 of the Code of Virginia.

2. If withdrawal or continued program approval with terms and conditions is recommended following the informal conference, the recommendation shall be presented to the board or a panel of the board for review and action.

3. If the recommendation of the informal conference committee is accepted by the board or a panel of the board, the decision shall be reflected in a board order, and no further action by the board is required unless the program requests a formal hearing within 30 days from entry of the order in accordance with § 2.2-4020 of the Code of Virginia.

4. If the decision of the board or a panel of the board following a formal hearing is to withdraw approval or continue on conditional approval with terms or conditions, the program shall be advised of the right to appeal the decision to the appropriate circuit court in accordance with § 2.2-4026 of the Code of Virginia and Part 2A of the Rules of the Supreme Court of Virginia.

Part III
Registration of Medication Aides

18VAC90-60-90. Requirements for initial registration.

A. To be registered as a medication aide, an applicant shall:

1. Provide documentation of successful completion of ~~a~~:

a. A staff training program in direct client care approved by the Department of Social Services~~, a~~;

b. A nursing education program~~, or~~;

c. An approved nurse aide education program~~, an~~; or

d. A clinical nursing course that includes at least 40 hours of clinical experience involving direct client care within the past 12 months;

2. Provide documentation of successful completion of one of the following:

a. A medication aide training program approved by the board in accordance with this chapter; or

b. A nursing education program preparing for registered nurse licensure or practical nurse licensure;

3. Submit the required application and fee as prescribed by the board;

4. Disclose whether there are grounds for denial of registration as specified in § 54.1-3007 of the Code of Virginia; and

5. Provide documentation of successful completion of competency evaluations consisting of:

a. A clinical evaluation of minimal competency in the skills of administering medications as specified in 18VAC90-60-60 B 2; and

b. A written examination as specified by the board with a passing score determined by the board.

B. An applicant who fails to take the board-approved examination within ~~one year~~ two years of completion of the training or who has failed the examination in three attempts shall reenroll and successfully complete another approved medication aide training program before reapplying for registration.

18VAC90-60-91. Requirements for provisional practice.

A. An applicant for registration who wants to practice as a medication aide on a provisional basis shall:

1. Submit the required application for registration and fee as prescribed by the board; and

2. Provide evidence to the board of successful completion of the medication aide training course or a nursing education program.

B. An applicant shall practice for no more than 120 days from the date of a letter from the board acknowledging receipt of the documentation required in subsection A of this section and granting provisional authorization.

C. An applicant acting as a medication aide under provisional authorization shall be identified as a "provisional medication aide" on a nametag worn in the facility.

D. An applicant with provisional authorization shall immediately cease acting as a medication aide at the conclusion of the 120-day period or upon notification of failure after three attempts to pass the written examination required for registration, whichever comes first.

18VAC90-60-92. Requirements for registration by endorsement.

An applicant applying for registration by endorsement who has met the requirements for registration or certification as a medication aide in another state or the District of Columbia may be deemed eligible to sit for the ~~competency evaluation~~ state examination if there are no grounds for denial of registration as specified in § 54.1-3007 of the Code of Virginia and upon submission of:

1. A completed application and fee; and

2. Verification of registration or certification as a medication aide in another state or the District of Columbia that is current or eligible for reinstatement.

18VAC90-60-100. Renewal or reinstatement of registration.

A. Renewal of registration.

1. Registered medication aides shall renew by the last day of their birth month each year.

2. The medication aide shall complete the ~~application~~ renewal notice and submit it with the required fee and an attestation that he has completed continuing education as required by subsection B of this section.

3. Failure to receive the ~~application~~ notice for renewal shall not relieve the medication aide of the responsibility for renewing his registration by the expiration date.

4. The registration shall automatically lapse if the medication aide fails to renew by the expiration date.

5. Any person administering medications in an assisted living facility during the time a registration has lapsed shall be considered an illegal practitioner and shall be subject to prosecution under the provisions of § 54.1-3008 of the Code of Virginia.

B. Continuing education required for renewal.

1. In addition to hours of continuing education in direct client care required for employment in an assisted living facility, a medication aide shall have the following:

a. Four hours each year of population-specific training in medication administration in the assisted living facility in which the aide is employed; or

b. A refresher course in medication administration offered by an approved program.

2. A medication aide shall maintain documentation of continuing education for a period of four years following the renewal period for which the records apply.

3. The board shall periodically conduct a random audit of its registrants to determine compliance. A medication aide selected for audit shall provide documentation as evidence

of compliance within 30 days of receiving notification of the audit.

4. The board may grant an extension for compliance with continuing education requirements for up to one year, for good cause shown, upon a written request from the registrant prior to the renewal deadline.

C. Reinstatement of registration.

1. An individual whose registration has lapsed for less than one renewal cycle may renew by payment of the renewal fee and late fee and attestation that ~~he~~ the individual has completed all required continuing education for the period since his last renewal.

2. An individual whose registration has lapsed for more than one year shall:

a. Apply for reinstatement of registration by submission of a completed application and fee;

b. Provide evidence of completion of all required continuing education for the period since his last renewal, not to exceed eight hours of training in medication administration;

c. Retake the written and practical competency evaluation as required by the board; and

d. Attest that there are no grounds for denial of registration as specified in § 54.1-3007 of the Code of Virginia.

D. A medication aide whose registration has been suspended or revoked by the board may apply for reinstatement by filing a reinstatement application, fulfilling requirements of subsection C of this section, and paying the fee for reinstatement after suspension or revocation. A medication aide whose registration has been revoked may not apply for reinstatement sooner than three years from entry of the order of revocation.

18VAC90-60-120. Disciplinary provisions for medication aides.

The board has the authority to deny, revoke, or suspend a registration issued, or to otherwise discipline a registrant upon proof that ~~he~~ the registrant has violated any of the provisions of § 54.1-3007 of the Code of Virginia. For the purpose of establishing allegations to be included in the notice of hearing, the board has adopted the following definitions:

1. Fraud or deceit in order to procure or maintain a registration shall mean, but shall not be limited to:

a. Filing false credentials;

b. Falsely representing facts on an application for initial registration, reinstatement or renewal of a registration; or

c. Giving or receiving assistance in taking the competency evaluation.

2. Unprofessional conduct shall mean, but shall not be limited to:

a. Performing acts beyond those authorized by the Code of Virginia and this chapter for practice as a medication aide;

b. Assuming duties and responsibilities within the practice of a medication aide without adequate training or when competency has not been maintained;

c. Obtaining supplies, equipment or drugs for personal or other unauthorized use;

d. Falsifying or otherwise altering client or drug records relating to administration of medication;

e. Falsifying or otherwise altering employer records, including falsely representing facts on a job application or other employment-related documents;

f. Abusing, neglecting or abandoning clients;

g. Having been denied a license, certificate, or registration or having had a license, certificate, or registration issued by the board revoked or suspended;

h. Giving to or accepting from a client property or money for any reason other than fee for service or a nominal token of appreciation;

i. Obtaining money or property of a client by fraud, misrepresentation or duress;

j. Entering into a relationship with a client that constitutes a professional boundary violation in which the medication aide uses his professional position to take advantage of a client's vulnerability, to include ~~but not limited to~~ actions that result in personal gain at the expense of the client, an inappropriate personal involvement or sexual conduct with a client;

k. Violating state laws relating to the privacy of client information, including ~~but not limited to~~ § 32.1-127.1:03 of the Code of Virginia;

l. Failing to follow provisions of the Medication Management Plan for the assisted living facility in which the aide is employed; or

m. Violating any provision of this chapter, including the standards of practice as set forth in 18VAC90-60-110.

3. For the purposes of interpreting provisions of subdivision 5 of § 54.1-3007 of the Code of Virginia, a pattern of medication errors may constitute practice that presents a danger to the health and welfare of clients or to the public.

VA.R. Doc. No. R19-5680; Filed April 30, 2019, 1:10 p.m.

BOARD OF PHARMACY

Final Regulation

Title of Regulation: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-80, 18VAC110-20-105; adding 18VAC110-20-22).**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Effective Date: June 26, 2019.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

Summary:

The amendments require a pharmacist, pharmacy intern, or pharmacy technician applicant to provide an e-profile identification number from the National Association of Boards of Pharmacy in an application for a license, registration, or renewal or reinstatement of license or registration.

Summary of Public Comments and Agency's Response: No public comments were received by the promulgating agency.

18VAC110-20-22. Application to include e-profile number.

An application for licensure as a pharmacist by examination or endorsement or for registration as a pharmacy intern or pharmacy technician shall include an e-profile number issued by NABP.

18VAC110-20-80. Renewal and reinstatement of license.

A. Pharmacist licenses expire on December 31 and shall be renewed annually prior to that date by the submission of a renewal fee, renewal form, an e-profile number issued by NABP, and statement of compliance with continuing education requirements.

B. A pharmacist newly licensed on or after October 1 shall not be required to renew that license until December 31 of the following year.

C. A pharmacist who fails to renew his license by the expiration date may renew his license at any time within one year of its expiration by submission of the renewal fee and late fee, renewal form, and statement of compliance with continuing education requirements.

D. A pharmacist who fails to renew his license for more than one year following expiration and who wishes to reinstate such license shall submit an application for reinstatement, pay the current renewal fee and a reinstatement fee, and submit documentation showing compliance with continuing education requirements. Reinstatement is at the discretion of the board and may be granted by the executive director of the board provided no grounds exist to deny said reinstatement.

E. A pharmacist who has been registered as inactive for more than one year must apply for reinstatement, submit documentation showing compliance with continuing education requirements, and pay the current year active renewal fee in order to resume active licensure.

F. In order to reactivate or reinstate a license to active status, a pharmacist who holds an inactive license, who has allowed his license to lapse, or who has had his license suspended or revoked must submit evidence of completion of CEU's or hours equal to the requirements for the number of years in which his license has not been active, not to exceed a total of 60 hours of CE.

G. A pharmacist whose license has been lapsed, in inactive status, or suspended or revoked for more than five years shall, as a condition of reinstatement in addition to 60 hours CE, take and receive a passing score on the board-approved law examination and furnish acceptable documentation of one of the following:

1. Active pharmacy practice within the past five years as a properly licensed pharmacist in another state; or

2. Practical experience as a pharmacy intern registered with the board of at least 160 hours within six months immediately prior to being reinstated.

H. The practice of pharmacy without a current, active pharmacist license is unlawful and shall constitute grounds for disciplinary action by the board.

I. It shall be the duty and responsibility of each licensee to inform the board of his current address. A licensee shall notify the board within 14 days in writing or electronically of any change of an address of record. Properly updating address of record directly through the board's web-based application or other approved means shall constitute lawful notification. All notices required by law or by these rules and regulations are deemed to be legally given when mailed to the address of record and shall not relieve the licensee of the obligation to comply.

18VAC110-20-105. Renewal and reinstatement of registration.

A. Pharmacy technician registrations expire on December 31 and shall be renewed annually prior to that date by the submission of a renewal fee, ~~and~~ renewal form, and an e-profile number issued by NABP. A pharmacy technician newly registered on or after July 1 shall not be required to renew that registration until December 31 of the following year. Failure to receive the application for renewal shall not relieve the pharmacy technician of the responsibility for renewing the registration by the expiration date.

B. A pharmacy technician who fails to renew his registration by the expiration date may renew his registration at any time within one year of its expiration by submission of the renewal

fee and late fee, renewal form, and attestation of having obtained required continuing education.

C. A pharmacy technician who fails to renew his registration for more than one year following expiration and who wishes to reinstate such registration shall submit an application for reinstatement, pay the current renewal fee and a reinstatement fee, and submit documentation showing compliance with continuing education requirements. Reinstatement is at the discretion of the board and may be granted by the executive director of the board provided no grounds exist to deny said reinstatement. Conducting tasks associated with a pharmacy technician with a lapsed registration shall be illegal and may subject the registrant to disciplinary action by the board.

D. A person who fails to reinstate a pharmacy technician registration within five years of expiration, shall not be eligible for reinstatement and shall repeat an approved training program and repeat and pass the examination, or hold current PTCB certification, before applying to be reregistered.

VA.R. Doc. No. R18-5278; Filed April 30, 2019, 12:18 p.m.

Final Regulation

REGISTRAR'S NOTICE: The Board of Pharmacy is claiming an exemption from Article 2 of the Administrative Process Act in accordance with § 2.2-4006 A 13 of the Code of Virginia, which exempts amendments to regulations of the board to schedule a substance in Schedule I or II pursuant to subsection D of § 54.1-3443 of the Code of Virginia. The board will receive, consider, and respond to petitions by any interested person at any time with respect to reconsideration or revision.

Title of Regulation: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-322).**

Statutory Authority: §§ 54.1-2400 and 54.1-3443 of the Code of Virginia.

Effective Date: June 26, 2019.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

Summary:

The amendments add three compounds into Schedule I of the Drug Control Act as recommended by the Virginia Department of Forensic Science pursuant to § 54.1-3443 of the Code of Virginia. The compounds added by this regulatory action will remain in effect for 18 months or until the compounds are placed in Schedule I by legislative action of the General Assembly.

18VAC110-20-322. Placement of chemicals in Schedule I.

A. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. 2-(methylamino)-2-phenyl-cyclohexanone (other name: Deschloroketamine), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

2. 2-methyl-1-(4-(methylthio)phenyl)-2-morpholinopropiophenone (other name: MMMP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

3. Alpha-ethylaminohexanophenone (other name: N-ethylhexedrone), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

4. N-ethyl-1-(3-methoxyphenyl)cyclohexylamine (other name: 3-methoxy-PCE), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

5. 4-fluoro-alpha-pyrrolidinohexiophenone (other name: 4-fluoro-alpha-PHP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

6. N-ethyl-1,2-diphenylethylamine (other name: Ephenidine), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

7. Synthetic opioids:

a. N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]-1,3-benzodioxole-5-carboxamide (other name: Benzodioxole fentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

b. 3,4-dichloro-N-[2-(diethylamino)cyclohexyl]-N-methylbenzamide (other name: U-49900), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

c. 2-(2,4-dichlorophenyl)-N-[2-(dimethylamino) cyclohexyl]-N-methylacetamide (other name: U-48800), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

8. Central nervous system stimulants:

a. Methyl 2-(4-fluorophenyl)-2-(2-piperidinyl)acetate (other name: 4-fluoromethylphenidate), including its salts, isomers, and salts of isomers.

b. Isopropyl-2-phenyl-2-(2-piperidinyl)acetate (other name: Isopropylphenidate), including its salts, isomers, and salts of isomers.

The placement of drugs listed in this subsection shall remain in effect until August 21, 2019, unless enacted into law in the Drug Control Act.

B. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. Research chemicals:

a. 2-(ethylamino)-2-phenyl-cyclohexanone (other name: deschloro-N-ethyl-ketamine), its optical, position, and geometric isomers, salts, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

b. 3,4-methylenedioxy-N-tert-butylcathinone, its optical, position, and geometric isomers, salts, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

c. 4-fluoro-N-ethylamphetamine, its optical, position, and geometric isomers, salts, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

d. Beta-keto-4-bromo-2,5-dimethoxyphenethylamine (other name: bk-2C-B), its optical, position, and geometric isomers, salts, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

2. Synthetic opioids:

a. N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]-2butenamide (other name: Crotonyl fentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

b. 2-(3,4-dichlorophenyl)-N-[2-(dimethylamino) cyclohexyl]-N-methylacetamide (other name: U-51754), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

c. N-phenyl-N-[4-phenyl-1-(2-phenylethyl)-4piperidinyl]-propanamide (other name: 4phenylfentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until December 12, 2019, unless enacted into law in the Drug Control Act.

C. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. 2,5-dimethoxy-4-chloroamphetamine (other name: DOC), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

2. Synthetic opioids:

a. N-(2-fluorophenyl)-2-methoxy-N-[1-(2-phenylethyl)-4-piperidinyl]-acetamide (other name: Ocfentanil), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

b. N-(4-methoxyphenyl)-N-[1-(2-phenylethyl)-4-piperidinyl]-butanamide (other name: 4-methoxybutyrylfentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

c. N-phenyl-2-methyl-N-[1-(2-phenylethyl)-4-piperidinyl]-propanamide (other name: Isobutyryl fentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

d. N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]-cyclopentanecarboxamide (other name: Cyclopentyl fentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

e. N-phenyl-N-(1-methyl-4-piperidinyl)-propanamide (other name: N-methyl norfentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

3. Cannabimimetic agent: 1-(4-cyanobutyl)-N-(1-methyl-1-phenylethyl)-1H-indazole-3-carboxamide (other name: 4-cyano CUMYL-BUTINACA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

4. Benzodiazepine: Flualprazolam, its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until March 4, 2020, unless enacted into law in the Drug Control Act.

D. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. Synthetic opioid: N-[2-(dimethylamino)cyclohexyl]-N-methyl-1,3-benzodioxole-5-carboxamide (other names: 3,4-methylenedioxy U-47700 or 3,4-MDO-U-47700), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

2. Cannabimimetic agent: N-(adamantanyl)-1-(5-chloropentyl) indazole-3-carboxamide (other name: 5-chloro-AKB48), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until May 27, 2020, unless enacted into law in the Drug Control Act.

E. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. Synthetic opioid: N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl]-benzamide (other names: Phenyl fentanyl, Benzoyl fentanyl), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

2. Research chemicals:

a. 4-acetyloxy-N,N-diallyltryptamine (other name: 4-AcO-DALT), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

b. 4-chloro-N,N-dimethylcathinone, its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

c. 4-hydroxy-N,N-methylisopropyltryptamine (other name: 4-hydroxy-MiPT), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

d. 3,4-Methylenedioxy-alpha-pyrrolidinohexanophenone (other name: MDPHP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

3. Cannabimimetic agent: Methyl 2-[1-(5-fluoropentyl)-1H-indole-3-carboxamido]-3,3-dimethylbutanoate (other name: 5-Fluoro-MDMB-PICA), its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until October 2, 2020, unless enacted into law in the Drug Control Act.

F. Pursuant to subsection D of § 54.1-3443 of the Code of Virginia, the Board of Pharmacy places the following in Schedule I of the Drug Control Act:

1. 3,4-dichloro-N-[2-(dimethylamino)cyclohexyl]-N-isopropyl-benzamide (other name: Isopropyl U-47700), its isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation.

2. Alpha-pyrrolidinoisohexiophenone (other name: alpha-PiHP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

3. 1-[1-(3-hydroxyphenyl)cyclohexyl]piperidine (other name: 3-hydroxy PCP), its optical, position, and geometric isomers, salts, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation.

The placement of drugs listed in this subsection shall remain in effect until December 25, 2020, unless enacted into law in the Drug Control Act.

VA.R. Doc. No. R19-5898; Filed May 2, 2019, 8:20 a.m.

Proposed Regulation

Titles of Regulations: **18VAC110-20. Regulations Governing the Practice of Pharmacy (amending 18VAC110-20-20, 18VAC110-20-121).**

18VAC110-30. Regulations for Practitioners of the Healing Arts to Sell Controlled Substances (amending 18VAC110-30-15).

18VAC110-50. Regulations Governing Wholesale Distributors, Manufacturers, and Warehousers (amending 18VAC110-50-20).

Statutory Authority: §§ 54.1-2400 and 54.1-3307 of the Code of Virginia.

Public Hearing Information:

June 5, 2019 - 9:05 a.m. - Department of Health Professions, Perimeter Center, 9960 Mayland Drive, Suite 201, Board Room 2, Richmond, VA 23233

Public Comment Deadline: July 26, 2019.

Agency Contact: Caroline Juran, RPh, Executive Director, Board of Pharmacy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233-1463, telephone (804) 367-4456, FAX (804) 527-4472, or email caroline.juran@dhp.virginia.gov.

Basis: Regulations of the Board of Pharmacy are promulgated under the general authority of § 54.1-2400 of the Code of Virginia. The proposed regulation is mandated by § 54.1-113 of the Code of Virginia.

Purpose: Fees charged to applicants and licensees of the Board of Pharmacy have not been increased since 2002. During that time period, there have been three reductions in renewal fees, in 2005, 2006 and 2009. The number of regulated entities has substantially increased in recent years from 12,861 in 2002 to 37,608 in 2018, so the need for additional staff, six in 2002 to 12 in 2018, has increased costs to the board. Additionally, the cost of inspections has increased, as have expenditures for investigation and adjudication of disciplinary cases. Enforcement inspection and investigative hours have increased from 7,179.30 in fiscal year (FY) 2002 to 13,220.30 in FY17. The number of cases adjudicated have increased from 269 in 2002 to 651 in 2017. Additionally, the board's share of allocated expenditures has grown as costs to the department have increased. For example, in FY02, information technology costs were approximately $300,000; in FY17, they were $1.84 million.

Expenditures are now projected to exceed revenues in the 2018-2020 biennium. While the board has maintained a positive cash balance due to carry-over revenue, expenditures in FY18 of $3,745,630 are projected to exceed revenue of $3,131,895 by June 30, 2018. The imbalance will continue to grow in the next biennium and beyond. Therefore, the board will have a projected shortfall in its budget by 2021 of $648,614, which is projected to grow to $2,657,527 by June 30, 2022. The Board of Pharmacy must amend regulations as soon as possible to avoid the additional fee assessments that other boards had to adopt or being forced to curtail vital functions of inspection and investigation.

Without adequate revenue to support inspections of pharmacy facilities, licensing, and discipline functions, applicants for licensure or pharmacy permits cannot be approved in a timely manner, thus depriving the citizens of the Commonwealth with the pharmacy services needed. Additionally, if there is a substantial backlog of disciplinary cases, public health and safety may be at risk by allowing practitioners guilty of drug diversion or unprofessional conduct to continue in practice for several months while awaiting a review and adjudication of an investigative report.

Substance: The board has proposed a 30% increase in all fees with the exception of those functions that require an inspection, including an initial pharmacy permit and changes in location or remodeling. Those fees are set at an amount to offset the actual charge to the board by the enforcement division of the department.

Issues: The primary advantage to the public is avoidance of a reduction in investigations or inspections. There are no disadvantages to the public. The advantage to the agency is adequate revenue to offset expenditures so that a growing shortfall can be avoided, which would necessitate a one-time assessment for all regulated entities or an additional fee increase.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Pharmacy (Board) proposes to raise fees.

Result of Analysis. The benefits likely[1] outweigh the costs for the proposed amendments.

Estimated Economic Impact.

Background:

Fees charged to applicants and licensees of the Board of Pharmacy have not increased since December 2002.[2] During that period, there have been three reductions in renewal fees (2005, 2006 and 2009), while the rate of price inflation has been 33 percent.[3] The number of regulated entities has substantially increased in recent years (12,861 in 2002 to 37,608 in 2018); so the need for additional staff (six in 2002 to 12 in 2018) has increased costs to the Board. Additionally, the cost of inspections has increased, as have expenditures for investigation and adjudication of disciplinary cases. Enforcement inspection and investigative hours have

increased from 7,179.30 in Fiscal Year (FY) 2002 to 13,220.30 in FY 2017. The number of cases adjudicated have increased from 269 in 2002 to 651 in 2017. Additionally, the Board's share of allocated expenditures has grown as costs to the Department of Health Professions (DHP) have increased. For example, in FY 2002, information technology (IT) costs were approximately $300,000; in FY 2017, IT costs were $1.84 million.[4]

Code of Virginia § 54.1-113.A (commonly called the Callahan Act)[5] states that:

> Following the close of any biennium, when the account for any regulatory board within the Department of Professional and Occupational Regulation or the Department of Health Professions maintained under § 54.1-308 or 54.1-2505 shows expenses allocated to it for the past biennium to be more than 10 percent greater or less than moneys collected on behalf of the board, it shall revise the fees levied by it for certification, licensure, registration, or permit and renewal thereof so that the fees are sufficient but not excessive to cover expenses.

In FY2017, the Board's expenditures were $3,272,687, while its revenues were $3,293,583. DHP projects that expenditures for FY2018 will be $3,745,630 and revenues will be $3,131,895. Thus, total expenditures for the biennium are projected to be $7,018,317, with revenues projected at $6,425,478. The projected expenditures are 9.2 percent higher than the projected revenues. This being less than 10 percent, the mandate to raise fees via the Callahan Act is not yet triggered. Nevertheless, DHP does anticipate that expenditures will continue to rise faster than revenues, necessitating higher fees to cover costs.

Proposal:

The Board proposes to increase 110 different fees in this regulatory action, primarily those paid by pharmacists, pharmacies, pharmacist interns, and pharmacy technicians. In addition, the Board is also proposing fee increases for practitioners of the healing arts and wholesale manufacturers, distributors, and warehousers. The minimum dollar value of the proposed fee increases is $5,[6] while the maximum dollar value of the proposed fee increases is $230.[7]

The majority of the fees would increase by approximately thirty percent.[8] For the fees that result from an inspection, the Board plans to increase the current fees to an amount to offset the actual costs of enforcement. There are 91 separate fees that would be subject to the roughly thirty percent fee increase.[9] For pharmacists, these cover such areas as initial application fees, annual renewal fees, late fees, reinstatement fees, facility change and inspection fees, and the innovative program approval fee. For practitioners of the healing arts, these cover initial application fees, annual renewal fees, late fees, and reinstatement fees. For manufacturers and distributors, these cover application fees, renewal fees, late fees, and reinstatement fees.

The Board also proposes to increase the fee for facility permits where practitioners of the healing arts sell controlled substances, from $40 to $50. In addition, the Board proposes to repeal several fees related to humane society permits; these fees are no longer assessed since these facilities now pay a controlled substance registration fee. With the proposed fee increases, the DHP projects that the Board will have sufficient revenue to offset expenditures by June 30, 2021.

Analysis:

DHP points out that without adequate revenue to support inspections of pharmacy facilities, licensing and discipline functions, applicants for licensure or pharmacy permits cannot be approved in a timely manner. This may slow the growth of pharmacy services for the citizens of the Commonwealth. In addition, sufficient funding is needed to carry out the investigative and disciplinary activities of the board without creating significant delays in both activities. If there is a substantial backlog of disciplinary cases, public health and safety may be at risk by allowing practitioners guilty of drug diversion, unprofessional conduct, or careless security to continue in practice for several months awaiting a review and adjudication of an investigative report. Thus, there are both clear benefits and clear costs introduced by the fee increases.

It is not 100 percent certain whether or not the benefits exceed the costs. Since regulation of professions is not a market good, there is not an obvious market price at which speedier license processing and disciplinary investigations are valued. Nevertheless, since the proposed fee increases bring fees to approximately the same level as 15 years ago once inflation is taken into consideration, the benefits likely outweigh the costs.

Businesses and Entities Affected. The proposed amendments affect all entities that and individuals who are regulated by the Board, including: 1,857 pharmacies, 14,714 pharmacists, 1,848 pharmacy interns, 14,552 pharmacy technicians, 140 pharmacy technician-training programs, 727 physicians selling controlled substances, 175 physician selling drugs locations, 10 pilot programs, 2 repackaging training programs, 66 restricted manufacturers, 47 warehousers, 116 wholesale distributors, 1,196 business controlled substance registrants, 9 continuing education course providers, 19 limited use pharmacy technicians, 258 medical equipment suppliers, 335 nonresident medical equipment suppliers, 26 nonresident outsourcing facilities, 732 nonresident pharmacies, 749 nonresident wholesale distributors, 29 non-restricted manufacturers, and 1 permitted physician.[10]

Localities Particularly Affected. The proposed amendments do not disproportionately affect particular localities.

Projected Impact on Employment. The proposed fee increases are not likely to significantly affect employment but may at the margin discourage the creation of a limited number of positions at affected firms.

Effects on the Use and Value of Private Property. The proposed fee increases moderately increase costs for affected businesses and would have a commensurate moderate effect on their value.

Real Estate Development Costs. The proposed amendments do not affect real estate development costs.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. The proposed fee increases raise costs for small pharmacies and other small businesses.

Alternative Method that Minimizes Adverse Impact. If decision makers were to decide that not all current functions of the Board were necessary, or necessary to perform at the frequency or speed supported by the revenue that would be raised by the proposed fee increases, then smaller fee increases could potentially be set.

Adverse Impacts:

Businesses. The proposed fee increases raise costs for pharmacies, pharmacy technician-training programs, repackaging training programs, manufacturers, warehousers, wholesale distributors, continuing education course providers, medical equipment suppliers, outsourcing facilities, and physician practices that sell drugs.

Localities. The proposed fee increases would not likely significantly adversely affect localities.

Other Entities. The proposed fee increases would not likely significantly adversely affect other entities.

[1]This is not 100 percent certain. See Analysis subsection for discussion.

[2]This applies to fees that existed in 2002. There have been new fees introduced since then. Verification fees for the pharmacy professions were added in 2015 (http://townhall.virginia.gov/L/ViewAction.cfm?actionid=3444), and permit fees for practitioners selling controlled substances were added in 2017 (http://townhall.virginia.gov/L/ViewAction.cfm?actionid=4451).

[3]This rate of inflation is calculated using the Gross Domestic Product: Implicit Price Deflator. See https://fred.stlouisfed.org/series/GDPDEF

[4]All data (other than inflation rate) provided by Department of Health Professions.

[5]See https://law.lis.virginia.gov/vacode/title54.1/chapter1/section54.1-113/

[6]Several fees are proposed to increase from $15 to $20 (the pharmacy intern registration fee, the late fee for an inactive pharmacist license, and the late fee for approval of a pharmacy technician training program), or from $10 to $15 (the late fee for approval of a repackaging training program, and the duplicate license or registration fee).

[7]Some fees would increase from $270 to $500; these include the pharmacy permit application fee and the permit for a physician who is licensed to dispense drugs. This latter fee was just introduced in 2017. See http://townhall.virginia.gov/l/ViewAction.cfm?actionid=4451.

[8]The actual percentages range from 28.57 percent to 33.33 percent for those fees that are increasing by approximately 30 percent.

[9]For a more complete list of the proposed fee increases, see http://townhall.virginia.gov/L/ViewXML.cfm?textid=12504.

[10]Data source: Department of Health Professions

Agency's Response to Economic Impact Analysis: The Board of Pharmacy concurs with the Analysis of the Department of Planning and Budget.

Summary:

The proposed amendments increase Board of Pharmacy fees to cover expenses for essential functions of reviewing applications, licensing, inspecting, investigating complaints against licensees, and adjudicating and monitoring disciplinary cases. The board proposes a 30% increase in all fees, with the exception of those functions that require an inspection, including an initial pharmacy permit and changes in location or remodeling, which are set at the actual charge to the board by the enforcement division of the Department of Health Professions.

18VAC110-20-20. Fees.

A. Unless otherwise provided, fees listed in this section shall not be refundable.

B. Unless otherwise provided, any fees for taking required examinations shall be paid directly to the examination service as specified by the board.

C. Initial application fees.

1. Pharmacist license	~~$180~~ $235
2. Pharmacy intern registration	~~$15~~ $20
3. Pharmacy technician registration	~~$25~~ $35
4. Pharmacy permit	~~$270~~ $500
5. Permitted physician licensed to dispense drugs	~~$270~~ $500
6. Medical equipment supplier permit	~~$180~~ $235
~~7. Humane society permit~~	~~$20~~
~~8.~~ 7. Outsourcing facility permit	~~$270~~ $350
~~9.~~ 8. Nonresident pharmacy registration	~~$270~~ $350
~~10.~~ 9. Nonresident outsourcing facility registration	~~$270~~ $350

~~11.~~ 10. Controlled substances registrations — ~~$90~~ $120

~~12.~~ 11. Innovative program approval. — ~~$250~~ $325

If the board determines that a technical consultant is required in order to make a decision on approval, any consultant fee, not to exceed the actual cost, shall also be paid by the applicant in addition to the application fee.

~~13.~~ 12. Approval of a pharmacy technician training program — ~~$150~~ $200

~~14.~~ 13. Approval of a continuing education program — ~~$100~~ $130

~~15.~~ 14. Approval of a repackaging training program — ~~$50~~ $65

D. Annual renewal fees.

1. Pharmacist active license – due no later than December 31 — ~~$90~~ $120

2. Pharmacist inactive license – due no later than December 31 — ~~$45~~ $60

3. Pharmacy technician registration – due no later than December 31 — ~~$25~~ $35

4. Pharmacy permit – due no later than April 30 — ~~$270~~ $350

5. Physician permit to practice pharmacy – due no later than February 28 — ~~$270~~ $350

6. Medical equipment supplier permit – due no later than February 28 — ~~$180~~ $235

~~7. Humane society permit – due no later than February 28~~ — ~~$20~~

~~8.~~ 7. Outsourcing facility permit – due no later than April 30 — ~~$270~~ $350

~~9.~~ 8. Nonresident pharmacy registration – due no later than the date of initial registration — ~~$270~~ $350

~~10.~~ 9. Nonresident outsourcing facility registration – due no later than the date of initial registration — ~~$270~~ $350

~~11.~~ 10. Controlled substances registrations – due no later than February 28 — ~~$90~~ $120

~~12.~~ 11. Innovative program continued approval based on board order not to exceed ~~$200~~ $260 per approval period.

~~13.~~ 12. Approval of a pharmacy technician training program — ~~$75~~ $100 every two years

~~14.~~ 13. Approval of a repackaging training program — ~~$30~~ $40 every two years

E. Late fees. The following late fees shall be paid in addition to the current renewal fee to renew an expired license within one year of the expiration date or within two years in the case of a pharmacy technician training program. In addition, engaging in activities requiring a license, permit, or registration after the expiration date of such license, permit, or registration shall be grounds for disciplinary action by the board.

1. Pharmacist license — ~~$30~~ $40

2. Pharmacist inactive license — ~~$15~~ $20

3. Pharmacy technician registration — ~~$10~~ $15

4. Pharmacy permit — ~~$90~~ $120

5. Physician permit to practice pharmacy — ~~$90~~ $120

6. Medical equipment supplier permit — ~~$60~~ $80

~~7. Humane society permit~~ — ~~$5~~

~~8.~~ 7. Outsourcing facility permit — ~~$90~~ $120

~~9.~~ 8. Nonresident pharmacy registration — ~~$90~~ $120

~~10.~~ 9. Nonresident outsourcing facility registration — ~~$90~~ $120

~~11.~~ 10. Controlled substances registrations — ~~$30~~ $40

~~12.~~ 11. Approval of a pharmacy technician training program — ~~$15~~ $20

~~13.~~ 12. Approval of a repackaging training program — ~~$10~~ $15

F. Reinstatement fees. Any person or entity attempting to renew a license, permit, or registration more than one year after the expiration date, or more than two years after the expiration date in the case of a pharmacy technician training program, shall submit an application for reinstatement with any required fees. Reinstatement is at the discretion of the board and, except for reinstatement following license revocation or suspension, may be granted by the executive director of the board upon completion of an application and payment of any required fees.

1. Pharmacist license — ~~$210~~ $275

2. Pharmacist license after revocation or suspension — ~~$500~~ $650

3. Pharmacy technician registration	~~$35~~ $45
4. Pharmacy technician registration after revocation or suspension	~~$125~~ $165
5. Facilities or entities that cease operation and wish to resume shall not be eligible for reinstatement but shall apply for a new permit or registration. Facilities or entities that failed to renew and continued to operate for more than one renewal cycle shall pay the current and all back renewal fees for the years in which they were operating plus the following reinstatement fees:	
a. Pharmacy permit	~~$240~~ $315
b. Physician permit to practice pharmacy	~~$240~~ $315
c. Medical equipment supplier permit	~~$210~~ $275
~~d. Humane society permit~~	~~$30~~
~~e.~~ d. Outsourcing facility permit	~~$240~~ $315
~~f.~~ e. Nonresident pharmacy registration	~~$115~~ $150
~~g.~~ f. Nonresident outsourcing facility registration	~~$240~~ $315
~~h.~~ g. Controlled substances registration	~~$180~~ $235
~~i.~~ h. Approval of a pharmacy technician training program	~~$75~~ $100
~~j.~~ i. Approval of a repackaging training program	~~$50~~ $65

G. Application for change or inspection fees for facilities or other entities.

1. Change of pharmacist-in-charge	~~$50~~ $65
2. Change of ownership for any facility	~~$50~~ $65
3. Inspection for remodeling or change of location for any facility	~~$150~~ $300
4. Reinspection of any facility	~~$150~~ $300
5. Board-required inspection for a robotic pharmacy system	~~$150~~ $300
6. Board-required inspection of an innovative program location	~~$150~~ $300
7. Change of pharmacist responsible for an approved innovative program	~~$25~~ $35

H. Miscellaneous fees.

1. Duplicate wall certificate	~~$25~~ $50
2. Returned check	$35
3. Duplicate license or registration	~~$10~~ $15
4. Verification of licensure or registration	~~$25~~ $35

18VAC110-20-121. Innovative program approval.

A. An informal conference committee of the board may approve an innovative or pilot program in accordance with § 54.1-3307.2 of the Code of Virginia upon receipt of an application and fee specified in 18VAC110-20-20.

B. If the informal conference committee determines that an inspection is necessary to adequately consider an application, it may require that the applicant pay a fee specified in 18VAC110-20-20 to cover the cost of the inspection.

C. If the informal conference committee determines that a technical consultant is necessary in order for the board to make an informed decision on approval of a program, the applicant shall pay a consultant fee, not to exceed the actual cost of the consultation.

D. In the initial order granting approval of a program, the informal conference committee shall set the approval period with a schedule for submission of required reports and outcome data. The frequency of required reports shall not exceed four times a year.

E. The informal conference committee shall determine the appropriate fee for continued approval of the program based on the requirements for review and monitoring. Such renewal fee shall not exceed ~~$200~~ $260 per approval period.

18VAC110-30-15. Fees.

A. Unless otherwise provided, fees listed in this section shall not be refundable.

B. Initial application fees.

1. License for practitioner of the healing arts to sell controlled substances: ~~$180~~ $235.

2. Permit for facility in which practitioners of the healing arts sell controlled substances: ~~$240~~ $315.

C. Annual renewal fees.

1. License for practitioner of the healing arts to sell controlled substances: ~~$90~~ $120.

2. Permit for facility in which practitioners of the healing arts sell controlled substances: ~~$240~~ $315.

D. Late fees. The following late fees shall be paid in addition to the current renewal fee to renew an expired license within one year of the expiration date.

1. License for practitioner of the healing arts to sell controlled substances: ~~$30~~ $40.

2. Permit for facility in which practitioners of the healing arts sell controlled substances: ~~$40~~ $50.

E. Reinstatement fees. Any person or entity attempting to renew a license or permit more than one year after the expiration date shall submit an application for reinstatement with any required fees.

1. License for practitioner of the healing arts to sell controlled substances: ~~$150~~ $195.

2. Permit for facility in which practitioners of the healing arts sell controlled substances: ~~$240~~ $315.

3. Application fee for reinstatement of a license or permit that has been revoked or suspended indefinitely: ~~$500~~ $650.

F. Facilities in which only one practitioner of the healing arts is licensed by the board to sell controlled substances shall be exempt from fees associated with obtaining and renewing a facility permit. Facilities that change from only one practitioner to more than one shall notify the board within 30 days of such change.

G. The fee for reinspection of any facility shall be ~~$150~~ 300.

H. The fee for a returned check shall be $35.

18VAC110-50-20. Fees.

A. Unless otherwise provided, fees listed in this section shall not be refundable.

B. Initial application fees.

1. Nonrestricted manufacturer permit	~~$270~~ $350
2. Restricted manufacturer permit	~~$180~~ $235
3. Wholesale distributor license	~~$270~~ $350
4. Warehouser permit	~~$270~~ $350
5. Nonresident wholesale distributor registration	~~$270~~ $350
6. Controlled substances registration	~~$90~~ $120
7. Third-party logistics provider permit	~~$270~~ $350
8. Nonresident manufacturer registration	~~$270~~ $350
9. Nonresident warehouser registration	~~$270~~ $350
10. Nonresident third-party logistics provider registration	~~$270~~ $350

C. Annual renewal fees shall be due on February 28 of each year.

1. Nonrestricted manufacturer permit	~~$270~~ $350
2. Restricted manufacturer permit	~~$180~~ $235
3. Wholesale distributor license	~~$270~~ $350
4. Warehouser permit	~~$270~~ $350
5. Nonresident wholesale distributor registration	~~$270~~ $350
6. Controlled substances registration	~~$90~~ $120
7. Third-party logistics provider permit	~~$270~~ $350
8. Nonresident manufacturer registration	~~$270~~ $350
9. Nonresident warehouser registration	~~$270~~ $350
10. Nonresident third-party logistics provider registration	~~$270~~ $350

D. Late fees. The following late fees shall be paid in addition to the current renewal fee to renew an expired license within one year of the expiration date. In addition, engaging in activities requiring a license, permit, or registration after the expiration date of such license, permit, or registration shall be grounds for disciplinary action by the board.

1. Nonrestricted manufacturer permit	~~$90~~ $120
2. Restricted manufacturer permit	~~$60~~ $80
3. Wholesale distributor license	~~$90~~ $120
4. Warehouser permit	~~$90~~ $120
5. Nonresident wholesale distributor registration	~~$90~~ $120
6. Controlled substances registration	~~$30~~ $40
7. Third-party logistics provider permit	~~$90~~ $120
8. Nonresident manufacturer registration	~~$90~~ $120
9. Nonresident warehouser registration	~~$90~~ $120
10. Nonresident third-party logistics provider registration	~~$90~~ $120

E. Reinstatement fees.

1. Any entity attempting to renew a license, permit, or registration more than one year after the expiration date shall submit an application for reinstatement with any required fees. Reinstatement is at the discretion of the board and, except for reinstatement following license revocation or suspension, may be granted by the executive director of the board upon completion of an application and payment of any required fees.

2. Engaging in activities requiring a license, permit, or registration after the expiration date of such license, permit, or registration shall be grounds for disciplinary action by the board. Facilities or entities that cease operation and wish to resume shall not be eligible for reinstatement~~,~~ but shall apply for a new permit or registration.

3. Facilities or entities that failed to renew and continued to operate for more than one renewal cycle shall pay the

current and all back renewal fees for the years in which they were operating plus the following reinstatement fees:

a. Nonrestricted manufacturer permit	~~$240~~ $315
b. Restricted manufacturer permit	~~$210~~ $275
c. Wholesale distributor license	~~$240~~ $315
d. Warehouser permit	~~$240~~ $315
e. Nonresident wholesale distributor registration	~~$240~~ $315
f. Controlled substances registration	~~$180~~ $235
g. Third-party logistics provider permit	~~$240~~ $315
h. Nonresident manufacturer registration	~~$240~~ $315
i. Nonresident warehouser registration	~~$240~~ $315
j. Nonresident third-party logistics provider registration	~~$240~~ $315

F. Application for change or inspection fees.

1. Reinspection fee	~~$150~~ $300
2. Inspection fee for change of location, structural changes, or security system changes	~~$150~~ $300
3. Change of ownership fee	~~$50~~ $65
4. Change of responsible party	~~$50~~ $65

G. The fee for a returned check shall be $35.

H. The fee for verification of license, permit, or registration shall be ~~$25~~ $35.

VA.R. Doc. No. R18-5322; Filed May 8, 2019, 2:58 p.m.

BOARD OF PHYSICAL THERAPY

Reproposed Regulation

Title of Regulation: **18VAC112-20. Regulations Governing the Practice of Physical Therapy (adding 18VAC112-20-121).**

Statutory Authority: § 54.1-2400 of the Code of Virginia.

Public Hearing Information:

June 27, 2019 - 9 a.m. - Department of Health Professions, Perimeter Center, 9960 Mayland Drive, 2nd Floor Conference Center, Hearing Room 3 Henrico, VA 23233

Public Comment Deadline: July 6, 2019.

Agency Contact: Corie Tillman Wolf, Executive Director, Board of Physical Therapy, 9960 Mayland Drive, Suite 300, Richmond, VA 23233, telephone (804) 367-4674, FAX (804) 527-4413, or email ptboard@dhp.virginia.gov.

Basis: Regulations Governing the Practice of Physical Therapy (18VAC112-20) are promulgated under the general authority of § 54.1-2400 of the Code of Virginia, which provides the Board of Physical Therapy the authority to promulgate regulations to administer the regulatory system.

Purpose: The purpose of the action is to specify the qualifications for and limitations of the practice of dry needling as performed by physical therapists. For physical therapists, dry needling is not an entry level skill for which competency has been assured through an accredited educational program and national examination. It is an advanced procedure that requires additional training, referral and direction, and informed consent. Without a regulatory standard, the board cannot hold a physical therapist accountable for requirements specific to dry needling. Therefore, the board has determined that regulations are necessary to protect the health and safety of patients who may receive dry needling in the course of a physical therapy treatment.

Substance: Upon recommendation of a regulatory advisory panel, which was convened to consider comment on proposed regulations and to identify any additional safeguards that should be included in regulation, the following clarifications and changes have been proposed:

18VAC112-20-121 B states that dry needling is not an entry level skill but an advanced procedure that requires additional training. The term "post-graduate" is added to clarify that the additional training must occur subsequent to a physical therapist's graduate education in physical therapy.

18VAC112-20-121 B 2 specifies that the training must consist of didactic and hands-on laboratory education and must include passage of a theoretical and practical examination. The hands-on laboratory education shall be face-to-face.

18VAC112-20-121 B 3 specifies that the training must be in a course certified by the Federation of State Boards of Physical Therapy or approved or provided by a sponsor listed in regulations on continuing education.

18VAC112-20-121 B 4 specifies that the practitioner shall not practice beyond the scope of the highest level of the practitioner's training.

18VAC112-20-121 C is amended to delete a requirement that the informed consent must clearly state that the patient is not receiving an acupuncture treatment.

18VAC112-20-121 D is added to provide that dry needling can only be performed by a physical therapist trained pursuant to 18VAC112-20-121 B and cannot be delegated to a physical therapist assistant or other support personnel.

Issues: The board believes the proposed regulation offers the advantage of protection for patients who receive a dry needling procedure during the course of physical therapy treatment. Regulatory requirements for referral, training, and informed consent provide greater assurance of competency and accountability than the guidance document that currently exists. The board does not believe there are disadvantages to the public as the procedure is limited in scope and relatively safe to perform.

There are no advantages or disadvantages to the agency or the Commonwealth.

Department of Planning and Budget's Economic Impact Analysis:

Summary of the Proposed Amendments to Regulation. The Board of Physical Therapy (the board) proposes to add to its main regulation provisions regarding the practice of dry needling including referral, training, informed consent, and disclosure requirements.

Result of Analysis. The benefits likely exceed the costs for all proposed changes.

Estimated Economic Impact. Dry needling is a technique used in the practice of physical therapy to treat muscle tension and pain by inserting a special type of needle into areas of the muscle known as trigger points. According to the board, dry needling has been performed by physical therapists in Virginia for more than a decade. Currently, physical therapists performing the procedure are subject to the board's guidance document 112-9, which sets out referral, training, informed consent, and disclosure requirements for practice of dry needling.[1] The board proposes to add to this regulation provisions that are substantially similar to those in the guidance document. Adding these provisions to the regulation should not create any significant economic effects as there will be no change in practice. One notable exception is that 54 hours of post-professional training is required under the guidance while the proposed regulation does not state a specific number of training hours. This provision is not being added because the scope and content of each training may be different. However, a practitioner is not permitted to perform dry needling beyond the scope of the highest level of his training.

According to the board, if a physical therapist who has not received education and training in dry needling chooses to add it as a modality for his/her patients, there are a variety of courses offered. Most involve multi-day seminars with hands-on training and cost approximately $1,000. Thus, under the regulations, some physical therapists may be able to obtain sufficient training at less than the current cost while some others may have to incur a larger cost. In any event, practice of dry needling is voluntary, and by choosing to offer it as a modality, a therapist reveals that expected benefits to him or her are greater than the expected costs.

The board also notes that without a regulatory standard, a physical therapist cannot be held accountable for requirements specific to dry needling. Thus, having the requirements in regulations could improve enforcement, should there be a violation.[2]

Businesses and Entities Affected. Currently, there are 7,786 physical therapists licensed in Virginia. Not all of the physical therapists perform dry needling.

Localities Particularly Affected. The proposed changes apply statewide.

Projected Impact on Employment. No impact on employment is expected.

Effects on the Use and Value of Private Property. No impact on the use and value of private property is expected.

Real Estate Development Costs. No impact on real estate development costs is expected.

Small Businesses:

Definition. Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million."

Costs and Other Effects. Most if not all of the physical therapists work in offices that are small business.

Alternative Method that Minimizes Adverse Impact

No adverse impact on small businesses is expected.

Adverse Impacts:

Businesses. The proposed amendments do not have an adverse impact on businesses.

Localities. The proposed amendments will not adversely affect localities.

Other Entities. The proposed amendments will not adversely affect other entities.

[1]This guidance document posted on the Regulatory Town Hall on August 2010 can be found at: http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\223\GDoc_DHP_3650_v2.pdf

[2]DHP is unaware of any complaints regarding the practice of dry needling by physical therapists at least since 2010 when the guidance was adopted.

Agency's Response to Economic Impact Analysis: The Board of Physical Therapy concurs with the analysis of the Department of Planning and Budget.

Summary:

This action establishes the qualifications for and limitations of the performance of dry needling by physical therapists, including referral and direction from a medical practitioner, training, requirements for additional post-

graduate training, the content of the post-graduate training, and informed consent.

18VAC112-20-121. Practice of dry needling.

A. Dry needling is an invasive procedure that requires referral and direction in accordance with § 54.1-3482 of the Code of Virginia. Referral should be in writing; if the initial referral is received orally, it shall be followed up with a written referral.

B. Dry needling is not an entry level skill but an advanced procedure that requires additional [post-graduate] training.

[1.] The training shall be specific to dry needling and shall include emergency preparedness and response, contraindications and precautions, secondary effects or complications, palpation and needle techniques, and physiological responses.

[2. The training shall consist of didactic and hands-on laboratory education and shall include passage of a theoretical and practical examination. The hands-on laboratory education shall be face-to-face.

3. The training shall be in a course certified by FSBPT or approved or provided by a sponsor listed in subsection B of 18VAC112-20-131.

4. The practitioner shall not perform dry needling beyond the scope of the highest level of the practitioner's training.]

C. Prior to the performance of dry needling, the physical therapist shall obtain informed consent from the patient or his representative. The informed consent shall include the risks and benefits of the technique [~~and shall clearly state that the patient is not receiving an acupuncture treatment~~]. The informed consent form shall be maintained in the patient record.

[D. Dry needling shall only be performed by a physical therapist trained pursuant to subsection B of this section and shall not be delegated to a physical therapist assistant or other support personnel.]

VA.R. Doc. No. R16-4433; Filed April 30, 2019, 2:49 p.m.

GUIDANCE DOCUMENTS

PUBLIC COMMENT OPPORTUNITY

Pursuant to § 2.2-4002.1 of the Code of Virginia, a certified guidance document is subject to a 30-day public comment period after publication in the Virginia Register of Regulations and prior to the guidance document's effective date. During the initial or additional public comment period, comments may be made through the Virginia Regulatory Town Hall website (http://www.townhall.virginia.gov) or sent to the agency contact. Under subsection C of § 2.2-4002.1, the effective date of the guidance document may be delayed for an additional comment period. The guidance document may also be withdrawn.

The following guidance documents have been submitted for publication by the listed agencies to initiate or extend a public comment period. Online users of this issue of the Virginia Register of Regulations may click on the name of a guidance document to access it. Guidance documents are also available on the Virginia Regulatory Town Hall (http://www.townhall.virginia.gov) or from the agency contact or may be viewed at the Office of the Registrar of Regulations, 900 East Main Street, Richmond, Virginia 23219.

DEPARTMENT FOR AGING AND REHABILITATIVE SERVICES

Title of Document: Policy and Procedure Manual Memorandum 19-01.

Public Comment Deadline: June 26, 2019.

Effective Date: July 1, 2019.

Agency Contact: Charlotte Arbogast, Senior Policy Advisor, Department for Aging and Rehabilitative Services, 8004 Franklin Farms Drive, Richmond, VA 23229, telephone (804) 662-7093, or email charlotte.arbogast@dars.virginia.gov.

DEPARTMENT OF ENVIRONMENTAL QUALITY

Titles of Documents:

Virginia Petroleum Storage Tank Fund Reimbursement Guidance Manual, Volume VI.

Virginia Petroleum Storage Tank Fund Reimbursement Guidance Manual, Volume VII, Usual and Customary Rates.

Public Comment Deadline: June 26, 2019.

Effective Date: August 1, 2019.

Agency Contact: Cindy Berndt, Regulatory Coordinator, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4378, or email cindy.berndt@deq.virginia.gov.

DEPARTMENT OF MOTOR VEHICLES

Titles of Documents:

DMV 206 Military Guide.

Sample Virginia Addendum.

DMV 255 Troops to Trucks[SM].

Public Comment Deadline: June 26, 2019.

Effective Date: June 27, 2019.

Agency Contact: Melissa K. Velazquez, Senior Policy Analyst, Department of Motor Vehicles, 2300 West Broad Street, Richmond, VA 23220, telephone (804) 367-1844, or email melissa.velazquez@dmv.virginia.gov.

REAL ESTATE APPRAISER BOARD

Title of Document: Guidance Document: Hybrid Appraisals.

Public Comment Deadline: June 26, 2019.

Effective Date: June 27, 2019.

Agency Contact: Mary Broz-Vaughan, Deputy Director for Licensing and Regulation, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8537, or email mary.broz-vaughan@dpor.virginia.gov.

STATE BOARD OF SOCIAL SERVICES

Title of Document: Child Care Subsidy Program Guidance Manual.

Public Comment Deadline: June 26, 2019.

Effective Date: July 1, 2019.

Agency Contact: Karin Clark, Regulatory Coordinator, Department of Social Services, 801 East Main Street, Room 1507, Richmond, VA 23219, telephone (804) 726-7017, or email karin.clark@dss.virginia.gov.

DEPARTMENT OF TAXATION

Title of Document: Guidelines for Remote Sellers and Marketplace Facilitators.

Public Comment Deadline: June 26, 2019.

Effective Date: June 27, 2019.

Agency Contact: Joe Mayer, Regulatory Coordinator, Department of Taxation, P.O. Box 27185, Richmond, VA 23261-7185, telephone (804) 371-2299, or email joseph.mayer@tax.virginia.gov.

STATE AIR POLLUTION CONTROL BOARD

Opportunity for Public Comment on the Proposed State Implementation Plan Revision - Northern Virginia Ozone Nonattainment Area Certifications

Notice of action: The Department of Environmental Quality (DEQ) is announcing an opportunity for public comment on a proposed plan to attain and maintain the national ambient air quality standard (NAAQS) for ozone in the Northern Virginia Ozone Nonattainment Area. The Commonwealth intends to submit the plan as a revision to the Commonwealth of Virginia State Implementation Plan (SIP) in accordance with the requirements of § 110(a) of the federal Clean Air Act (the Act). The SIP is the plan developed by the Commonwealth in order to fulfill its responsibilities to attain and maintain the ambient air quality standards promulgated by the U.S. Environmental Protection Agency (EPA) under the Act.

Purpose of notice: DEQ is seeking public comment on the overall plan and on the issue of whether the plan demonstrates Virginia's ability to implement EPA's emissions statement requirements and nonattainment new source review program for ozone nonattainment areas subject to the 2015 NAAQS.

Public comment period: May 27, 2019, to June 26, 2019.

Public hearing: A public hearing will be conducted if a request is made in writing to the contact listed at the end of this notice. In order to be considered, the request must include the full name, address, and telephone number of the person requesting the hearing and be received by DEQ by the last day of the public comment period. Notice of the date, time, and location of any requested public hearing will be announced in a separate notice, and another 30-day comment period will be conducted.

Description of proposal: The proposed revision consists of a certification for the Northern Virginia Ozone Nonattainment Area that Virginia's existing emissions statement requirements are at least as stringent as the requirements at § 182(a)(3)(B) of the federal Clean Air Act. The nonattainment area consists of the Counties of Arlington, Fairfax, Loudoun, and Prince William; and the Cities of Alexandria, Fairfax, Falls Church, Manassas, and Manassas Park.

Federal information: This notice is being given to satisfy the public participation requirements of 40 CFR 51.102. The proposal will be submitted as a revision to the Commonwealth of Virginia SIP under § 110(a) of the federal Clean Air Act in accordance with 40 CFR 51.104. DEQ plans to submit all provisions of the proposal as a revision to the SIP.

How to comment: DEQ accepts written comments by email, fax, and postal mail. In order to be considered, comments must include the full name, address, and telephone number of the person commenting and be received by DEQ on the last day of the comment period. All materials received are part of the public record.

To review proposal: The proposal and any supporting documents are available on the DEQ Air Public Notices for Plans website at http://www.deq.virginia.gov/Programs/Air/PublicNotices/airplansandprograms.aspx. The documents may also be obtained by contacting the DEQ representative listed. The public may review the documents between 8:30 a.m. and 4:30 p.m. of each business day until the close of the public comment period at the following DEQ locations:

1) Main Street Office, 1111 East Main Street, Suite 1400, Richmond, VA, telephone (804) 698-4070 and 2) Northern Regional Office, 13901 Crown Court, Woodbridge, VA, telephone (703) 583-3800.

Contact Information: Doris A. McLeod, 1111 East Main Street, Suite 1400, P.O. Box 1405, Richmond, VA 23218, telephone (804) 698-4197, FAX (804) 698-4510, or email doris.mcleod@deq.virginia.gov.

BOARD FOR CONTRACTORS

Periodic Review and Small Business Impact Review

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board for Contractors is conducting a periodic review and small business impact review of each listed regulation. The review of each regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

18VAC50-11, Public Participation Guidelines

18VAC50-22, Board for Contractors Regulations

18VAC50-30, Individual License and Certification Regulations

The purpose of this review is to determine whether each regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins May 27, 2019, and ends June 17, 2019.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to Eric L. Olson, Executive Director, Board for Contractors, 9960 Mayland Drive, Suite 400, Richmond,

VA 23233, telephone (804) 367-2785, FAX (866) 430-1033, or email contractor@dpor.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of the review will be posted on the Virginia Regulatory Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

DEPARTMENT OF ENVIRONMENTAL QUALITY

Meherrin Solar LLC Revised Notice of Intent - Small Renewable Energy Project (Solar) - Brink, Greensville County

Meherrin Solar LLC, a wholly-owned subsidiary of Brookfield Renewable, has provided to the Department of Environmental Quality a notice of intent to submit the necessary documentation for a permit by rule for a small renewable energy project (solar) in Brink, Virginia pursuant to 9VAC15-60. The project has increased in size since the previous Notice of Intent was published in 33:24 VA.R. 2738 July 24, 2017. The project is located on the east and west side of Pine Logging Road and south of Brink Road in Greensville County. The project will be sited on roughly 840 acres across multiple parcels. The solar array will connect up to 60 megawatts alternating current (AC) to Dominion Virginia Power's grid via a new 115-kilovolt substation built off of a nearby Dominion-owned transmission line. The project will conceptually use 215,000 395-watt standard photovoltaic solar panels on a single axis tracker to follow the sun throughout the day.

Contact Information: Mary E. Major, Department of Environmental Quality, 1111 East Main Street, Suite 1400, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4423, FAX (804) 698-4319, or email mary.major@deq.virginia.gov.

Notice of Public Comment Opportunity - 2020 Water Quality Assessment Guidance Manual

The Virginia Department of Environmental Quality (DEQ) will release the draft 2020 Water Quality Assessment Guidance Manual on May 28, 2019.

Virginia's 2020 Water Quality Assessment Guidance Manual contains the assessment procedures and methods to be used for the development of Virginia's 2020 § 305(b)/§ 303(d) Integrated (i.e., combined Water Quality Assessment and Impaired Waters) Report. The assessment guidance seeks to address all key elements of the U.S. Environmental Protection Agency's (EPA) 2006 Assessment Guidance and subsequent updates through April 2019. In addition, the assessment guidance includes the assessment methodology for the Chesapeake Bay Water Quality Standards established by EPA and adopted by Virginia (Ambient Water Quality Criteria for Dissolved Oxygen, Water Clarity, and Chlorophyll a for the Chesapeake Bay and Its Tidal Tributaries).

A copy of the draft 2020 Water Quality Assessment Guidance Manual will be available for download on May 28, 2019, from the DEQ Water Quality Assessment webpage at http://www.deq.virginia.gov/Programs/Water/WaterQualityInformationTMDLs/WaterQualityAssessments.aspx. A hard copy can also be requested from Amanda Shaver, DEQ Water Quality Assessment Coordinator, using the contact information listed at the end of this notice.

Modifications have been made to the guidance document since 2018. The most notable change pertains to the inclusion of the recently effective EPA Chesapeake Bay Technical Addendum. A complete list of significant guidance modifications are described in Part II of the manual.

Section 62.1-44.19:5 C of the Code of Virginia requires DEQ to develop and publish the procedures used for defining and determining impaired waters and to provide for public comment on the procedures. The public is invited to submit written comments through June 27, 2019. Comments should include the name, address, telephone number, and, if applicable, the email address of each person or organization submitting comments. Comments and related correspondence should be addressed to Amanda Shaver. Responses to comments received will be made collectively, via a response document. The response document will be posted on the assessment webpage along with the final guidance manual.

Contact Information: Amanda Shaver, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4181, FAX (804) 698-4032, or via email amanda.shaver@deq.virginia.gov.

STATE BOARD OF HEALTH

Periodic Review and Small Business Impact Review

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Health is conducting a periodic review and small business impact review of each listed regulation. The review of each regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

The purpose of this review is to determine whether each regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

12VAC5-90, Regulations for Disease Reporting and Control

12VAC5-115, Virginia Immunization Information System

Agency Contact: Kristin Collins, Policy Analyst, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7298, or email kristin.collins@vdh.virginia.gov.

12VAC5-508, Regulations Governing the Virginia Physician Loan Repayment Program

12VAC5-510, Regulations for General Assembly Nursing Scholarships

12VAC5-540, Rules and Regulations for the Identification of Medically Underserved Areas in Virginia

Agency Contact: Olivette Burroughs, Program Manager, Virginia Department of Health, 109 Governor Street, Richmond, VA 23219, telephone (804) 864-7431, or email olivette.burroughs@vdh.virginia.gov.

Public comment period begins May 27, 2019, and ends June 17, 2019.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to the agency contacts listed in this notice.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of the review will be posted on the Virginia Regulatory Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

COMMISSION ON LOCAL GOVERNMENT

Schedule for the Assessment of State and Federal Mandates on Local Governments

Pursuant to the provisions of § 2.2-613 and subdivision 6 of § 15.2-2903 of the Code of Virginia, the following schedule, established by the Commission on Local Government and approved by Secretary of Commerce and Trade, R. Brian Ball, and Governor Ralph S. Northam, represents the timetable that the listed executive agencies will follow in conducting their assessments of certain state and federal mandates that they administer that are imposed on local governments. Such mandates are new (in effect for at least 24 months), newly identified, or have been significantly altered as to warrant a reassessment of the mandate (and have been in effect for 24 months). In conducting these assessments, agencies will follow the process established by Executive Order 58, which became effective October 11, 2007. These mandates are abstracted in the Catalog of State and Federal Mandates on Local Governments published by the Commission on Local Government.

For further information, contact Kristen Dahlman, Senior Policy Analyst, Commission on Local Government, telephone (804) 371-7017, email kristen.dahlman@dhcd.virginia.gov, or visit the Commission's website at www.dhcd.virginia.gov.

STATE AND FEDERAL MANDATES ON LOCAL GOVERNMENTS

Approved Schedule of Assessment Periods – July 2019 through June 2020

For Executive Agency Assessment of Cataloged Mandates

AGENCY Mandate Short Title	**CATALOG NUMBER**	**ASSESSMENT PERIOD**
AUDITOR OF PUBLIC ACCOUNTS		
Local Stormwater Utility Program Reporting	LEG.APA003	7/01/19 to 8/30/19
AGING AND REHABILITATIVE SERVICES		
Adult Protective Services	SHHR.DARS004	10/01/19 to 12/31/19
EDUCATION, DEPARTMENT OF		
Vision and Hearing of Student to be Tested	SOE.DOE088	8/01/19 to 9/30/19
Student Code of Conduct	SOE.DOE	8/01/19 to 9/30/19

Approved by the Commission on March 14, 2019

DEPARTMENT OF MEDICAL ASSISTANCE SERVICES

Opportunity for Public Comment on Draft Durable Medical Equipment Provider Manual for Stakeholder Input

Public comment period: April 30, 2019, through May 30, 2019.

Changes to the Durable Medical Equipment Provider Manual (Chapters 4 and 6) are now posted on the Department of Medical Assistance Services website at http://www.dmas.virginia.gov/#/manualdraft for public comment through May 30, 2019.

Agency Contact: Emily McClellan, Regulatory Manager, Division of Policy and Research, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, TDD (800) 343-0634, or email emily.mcclellan@dmas.virginia.gov.

Opportunity for Public Comment on Draft Peer Recovery Support Services Supplement for Stakeholder Input

Public comment period: May 8, 2019, through June 7, 2019.

Changes to the Peer Recovery Support Services Supplement are now posted on the Department of Medical Assistance Services website at http://www.dmas.virginia.gov/#/manualdraft for public comment through June 7, 2019.

Contact Information: Emily McClellan, Regulatory Manager, Division of Policy and Research, Department of Medical Assistance Services, 600 East Broad Street, Suite 1300, Richmond, VA 23219, telephone (804) 371-4300, FAX (804) 786-1680, TDD (800) 343-0634, or email emily.mcclellan@dmas.virginia.gov.

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

Periodic Review and Small Business Impact Review

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Department of Professional and Occupational Regulation is conducting a periodic review and small business impact review of **18VAC120-30, Regulations Governing Polygraph Examiners**. The review of this regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins May 27, 2019, and ends June 17, 2019.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to Eric L. Olson, Department of Professional and Occupational Regulation, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-7226, FAX (866) 430-1033, or email polygraph@dpor.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

STATE BOARD OF SOCIAL SERVICES

Periodic Review and Small Business Impact Review

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Board of Social Services is conducting a periodic review and small business impact review of **22VAC40-890, Human Subjects Research Regulations**. The review of this regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

The purpose of this review is to determine whether this regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to this regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economic performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins May 27, 2018, and ends June 17, 2019.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to Eleanor Brown, IRB Administrator and Chair, Virginia Department of Social Services, 801 East Main Street, Richmond, VA 23219, telephone (804) 726-7076, FAX (804) 726-7906, or email eleanor.brown@dss.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of both reviews will be posted on the Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

BOARD FOR WASTE MANAGEMENT FACILITY OPERATORS

Periodic Review and Small Business Impact Review

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the Board for Waste Management Facility Operators is conducting a periodic review and small business impact review of each listed regulation. The review of each regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

18VAC155-11, Public Participation Guidelines

18VAC155-20, Waste Management Facility Operators Regulations

The purpose of this review is to determine whether each regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins May 27, 2019, and ends June 17, 2019.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to Eric L. Olson, Executive Director, Board for Waste Management Facility Operators, 9960 Mayland Drive, Suite 400, Richmond, VA 23233, telephone (804) 367-8511, FAX (866) 430-1033, or email wastemgt@dpor.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of the review will be posted on the Virginia Regulatory Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

STATE WATER CONTROL BOARD

Proposed Enforcement Action for Fauquier County Public Schools

An enforcement action has been proposed for Fauquier County Public Schools for violations of the State Water Control Law at the H.M. Pearson Elementary School sewage treatment plant facility located in Fauquier County, Virginia. A description of the proposed action is available at the Department of Environmental Quality office listed in this notice or online at www.deq.virginia.gov. Jim Datko will accept comments by email at james.datko@deq.virginia.gov or postal mail at Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193, from May 28, 2019, through June 27, 2019.

Proposed Enforcement Action for Fauquier County Public Schools

An enforcement action has been proposed for Fauquier County Public Schools for violations of the State Water Control Law at the Mary Walter Elementary School sewage treatment plant facility located in Fauquier County, Virginia. A description of the proposed action is available at the Department of Environmental Quality office listed in this notice or online at www.deq.virginia.gov. Jim Datko will accept comments by email at james.datko@deq.virginia.gov or postal mail at Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193, from May 28, 2019, through June 27, 2019.

Proposed Consent Order for Forza Automotive Group Corporation

An enforcement action has been proposed for Forza Automotive Group Corporation for violations of the State Water Control Law and regulations at the Forza Automotive facility located in Fredericksburg, Virginia. The State Water Control Board proposes to issue a consent order to resolve violations associated with the Forza Automotive facility. A description of the proposed action is available at the Department of Environmental Quality office listed in this notice or online at www.deq.virginia.gov. Benjamin Holland will accept comments by email at benjamin.holland@deq.virginia.gov or by postal mail at Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193, from May 28, 2019, through June 27, 2019.

Proposed Consent Order for Vistas at Lake Manassas LLC

An enforcement action has been proposed for Vistas at Lake Manassas LLC for violations of the State Water Control Law and regulations at the Vistas at Lake Manassas facility located in Gainesville, Virginia. The State Water Control Board proposes to issue a consent order to resolve violations associated with the Vistas at Lake Manassas facility. A

description of the proposed action is available at the Department of Environmental Quality office listed in this notice or online at www.deq.virginia.gov. Benjamin Holland will accept comments by email at benjamin.holland@deq.virginia.gov or by postal mail at Department of Environmental Quality, Northern Regional Office, 13901 Crown Court, Woodbridge, VA 22193, from May 28, 2019, through June 27, 2019.

Periodic Review and Small Business Impact Review

Pursuant to Executive Order 14 (as amended July 16, 2018) and §§ 2.2-4007.1 and 2.2-4017 of the Code of Virginia, the State Water Control Board is conducting a periodic review and small business impact review of each listed regulation. The review of each regulation will be guided by the principles in Executive Order 14 (as amended July 16, 2018).

9VAC25-31, Virginia Pollutant Discharge Elimination System (VPDES) Permit Regulation

9VAC25-230, Procedural Rule No. 1 - Public and Formal Hearing Procedures

9VAC25-401, Sewage Treatment in the Dulles Area Watershed

The purpose of this review is to determine whether each regulation should be repealed, amended, or retained in its current form. Public comment is sought on the review of any issue relating to each regulation, including whether the regulation (i) is necessary for the protection of public health, safety, and welfare or for the economical performance of important governmental functions; (ii) minimizes the economic impact on small businesses in a manner consistent with the stated objectives of applicable law; and (iii) is clearly written and easily understandable.

Public comment period begins May 27, 2019, and ends June 17, 2019.

Comments may be submitted online to the Virginia Regulatory Town Hall at http://www.townhall.virginia.gov/L/Forums.cfm. Comments may also be sent to Melissa Porterfield, Office of Regulatory Affairs, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4238, FAX (804) 698-4019, or email melissa.porterfield@deq.virginia.gov.

Comments must include the commenter's name and address (physical or email) information in order to receive a response to the comment from the agency. Following the close of the public comment period, a report of the review will be posted on the Virginia Regulatory Town Hall and a report of the small business impact review will be published in the Virginia Register of Regulations.

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the State Water Control Board conducted a small business impact review of **9VAC25-101, Tank Vessel Oil Discharge Contingency Plan and Financial Responsibility Regulation**, and determined that this regulation should be retained in its current form. The State Water Control Board is publishing its report of findings dated March 4, 2019, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

The regulation continues to be needed. This regulation requires operators of tank vessels transporting or transferring oil as cargo upon state waters to develop contingency plans. No comments were received during the periodic review. This is not a state specific requirement, and vessels are required to develop these plans to meet federal requirements found in the Oil Pollution Control Act of 1990. Virginia's regulation has been written to minimize the regulatory burden on the regulated community by maintaining consistency with the requirements of federal regulations. By complying with specific provisions of the Oil Pollution Control Act of 1990, a vessel operator is complying with Virginia's regulation, and no additional action is required by the vessel operator. This regulation was last amended in 2015 to maintain consistency with federal law and state statute. The regulation remains consistent with federal laws, regulation, and state statute.

Contact Information: Melissa Porterfield, Office of Regulatory Affairs, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4238, FAX (804) 698-4019, or email melissa.porterfield@deq.virginia.gov.

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the State Water Control Board conducted a small business impact review of **9VAC25-580, Underground Storage Tanks: Technical Standards and Corrective Action Requirements**, and determined that this regulation should be retained in its current form. The State Water Control Board is publishing its report of findings dated March 15, 2019, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

The regulation continues to be needed to protect human health and the environment. No comments were received during the public comment period for the periodic review. The regulation is complex and technical in nature and is based on federal regulatory language. The regulation incorporates both federal requirements for underground storage tanks (USTs) and also state building code requirements for USTs. By maintaining consistency with the federal UST and state building code requirements, confusion within the regulated community is minimized. This regulation was last amended in 2018 to maintain consistency with

40 CFR 280. The regulation is consistent with current federal requirements applicable to USTs. The state regulation is written to be only as stringent as the federal UST requirements that sought to minimize where possible the economic impact of regulations on small businesses.

Contact Information: Melissa Porterfield, Office of Regulatory Affairs, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4238, FAX (804) 698-4019, or email melissa.porterfield@deq.virginia.gov.

Small Business Impact Review - Report of Findings

Pursuant to § 2.2-4007.1 of the Code of Virginia, the State Water Control Board conducted a small business impact review of **9VAC25-590, Petroleum Underground Storage Tank Financial Responsibility Requirements**, and determined that this regulation should be retained in its current form. The State Water Control Board is publishing its report of findings dated March 26, 2019, to support this decision in accordance with § 2.2-4007.1 F of the Code of Virginia.

The regulation continues to be needed to protect human health and the environment. No comments were received during the public comment period for the periodic review. The regulation is complex and technical in nature due to the fact the regulation addresses financial assurance requirements for underground storage tanks (USTs) and the various mechanisms that may be used to demonstrate financial assurance. Virginia's regulation is similar to the federal regulation concerning the financial assurance mechanisms available to owners and operators; however, the state regulation provides an additional financial assurance mechanism not mentioned in the federal regulation and allows owners and operators the ability to use the Virginia Petroleum Storage Tank Fund to assist owners and operators with demonstrating financial assurance. This regulation was last amended in 2018 to maintain consistency with 40 CFR 280. The regulation is consistent with current federal requirements applicable to USTs. The regulation, as currently written, minimizes the impact on small businesses, and Virginia's regulation is less obtrusive on small governments than the applicable federal regulation.

Contact Information: Melissa Porterfield, Office of Regulatory Affairs, Department of Environmental Quality, P.O. Box 1105, Richmond, VA 23218, telephone (804) 698-4238, FAX (804) 698-4019, or email melissa.porterfield@deq.virginia.gov.

VIRGINIA CODE COMMISSION

Notice to State Agencies

Contact Information: *Mailing Address:* Virginia Code Commission, Pocahontas Building, 900 East Main Street, 8th Floor, Richmond, VA 23219; *Telephone:* (804) 698-1810; *Email:* varegs@dls.virginia.gov.

Meeting Notices: Section 2.2-3707 C of the Code of Virginia requires state agencies to post meeting notices on their websites and on the Commonwealth Calendar at https://commonwealthcalendar.virginia.gov.

Cumulative Table of Virginia Administrative Code Sections Adopted, Amended, or Repealed: A table listing regulation sections that have been amended, added, or repealed in the *Virginia Register of Regulations* since the regulations were originally published or last supplemented in the print version of the Virginia Administrative Code is available at http://register.dls.virginia.gov/documents/cumultab.pdf.

Filing Material for Publication in the *Virginia Register of Regulations*: Agencies use the Regulation Information System (RIS) to file regulations and related items for publication in the *Virginia Register of Regulations*. The Registrar's office works closely with the Department of Planning and Budget (DPB) to coordinate the system with the Virginia Regulatory Town Hall. RIS and Town Hall complement and enhance one another by sharing pertinent regulatory information.