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Fast-Track Regulation
Agency Background Document

Agency name	Virginia Department of Health
Virginia Administrative Code (VAC) citation(s)	12VAC5-371
Regulation title(s)	Regulations for the Licensure of Nursing Facilities
Action title	Amend regulations to address implementation of voluntary electronic monitoring
Date this document prepared	June 7, 2017

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Brief summary

Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

Senate Bill 553 enacted by the 2016 General Assembly mandates the Board of Health to promulgate regulations governing the implementation of voluntary electronic monitoring in the rooms of residents of nursing homes. SB553 (2016) requires that the Board utilize existing policies and procedures set forth in the Board's 2004 Guideline "Electronic Monitoring of Residents' Rooms" in the promulgation of the regulations. The proposed amendments in this fast track action are a combination of the 2004 guidelines which were developed to assist facilities with the privacy issues that may arise when installing electronic monitoring equipment and the work of a workgroup assembled pursuant to SB553. Installing such equipment is not mandatory on the nursing home; however, if installed, facilities must safeguard resident's autonomy and rights according to current federal and state privacy laws and regulations. This regulatory action provides the framework to address policies and procedures, informed consent,

admission, and discharge or transfer. The proposed amendments include the equipment request process and notice procedures, retention and ownership of tapes or recordings, and reporting suspected abuse, neglect, accident or injury discovered through electronic monitoring.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

The acronyms that appear in this document are as follows:

OLC means the Office of Licensure and Certification

VDH means the Virginia Department of Health

Statement of final agency action

Please provide a statement of the final action taken by the agency including:1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

This regulatory action was approved by the State Board of Health on June 1, 2017.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

Senate Bill 553 enacted by the 2016 General Assembly mandates the Board of Health to promulgate regulations governing the implementation of voluntary electronic monitoring in the rooms of residents of nursing homes. SB553 (2016) required that the Board convene a workgroup that includes representatives of nursing facilities, advocates for residents of nursing facilities, and other stakeholders to make recommendations to the Board concerning such regulations. Therefore, this regulatory action is mandated by law.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

Senate Bill 553 enacted by the 2016 General Assembly mandates the Board of Health to promulgate regulations governing the implementation of voluntary electronic monitoring in the rooms of residents of nursing homes. Installing such equipment is not mandatory; however, if installed, facilities must

safeguard resident's autonomy and rights according to current federal and state privacy laws and regulations. This regulatory action provides the framework to address policies and procedures, informed consent, admission, and discharge or transfer. The proposed amendments include the equipment request process and notice procedures, retention and ownership of tapes or recordings, and reporting suspected abuse, neglect, accident or injury discovered through electronic monitoring. The proposed amendments will protect and promote public health, safety and welfare of citizens through the establishment of a framework which would set standards regarding electronic monitoring in nursing facility resident rooms. This framework will ensure that resident privacy and autonomy is paramount when electronic monitoring is utilized.

Rationale for using fast-track process

Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?

SB553 (2016) mandates the Board of Health to promulgate regulations governing the implementation of voluntary electronic monitoring in the rooms of residents of nursing homes. The proposed amendments were developed cooperatively with the assistance of a workgroup convened pursuant to SB553 and relied heavily on language included in a VDH Guidance Document in use since 2004. Therefore, VDH believes the proposed amendments will be noncontroversial, allowing use of the fast-track process.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of changes" section below.

Electronic monitoring in resident rooms - Provides the framework for policies and procedures, informed consent, right of implementation/refusal, retention of tapes and recordings, and reporting of abuse, neglect, accident or injury discovered via electronic monitoring.

Issues

Please identify the issues associated with the proposed regulatory action, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please indicate.

The primary advantages of the regulatory action to the public are increased safety of nursing facility patients. There are no known disadvantages to the public. The primary advantages to the Agency and the Commonwealth are increased quality of care and safety for nursing home residents throughout the Commonwealth who chose to utilize electronic monitoring. There are no known disadvantages to the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no requirements in this proposal that exceed federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

No locality will be particularly affected by the proposed regulatory action.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

SB553 (2016) mandates the Board of Health to promulgate regulations governing the implementation of voluntary electronic monitoring in the rooms of residents of nursing homes. The regulations are mandated by law and there are no viable alternatives to the proposed regulatory action to achieve the necessary regulatory changes mandated by SB553 (2016).

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

Projected cost to the state to implement and enforce the proposed regulation, including: **a) fund source / fund detail; and** **b) a delineation of one-time versus on-going expenditures**	None

Projected cost of the new regulations or changes to existing regulations on localities.	None
Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.	The 281 licensed nursing facilities within the Commonwealth of Virginia, patients or residents of those facilities and their family members or legal representatives.
Agency's best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than $6 million.	All 281 licensed nursing facilities within the Commonwealth of Virginia must comply with 12VAC5-371. A majority of the licensed nursing facilities within the Commonwealth of Virginia qualify as small businesses.
All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	None, there are no costs unless the facility receives a request to install equipment. The proposed amendments provide that such costs can be charged to the family, patient or resident seeking implementation of the electronic monitoring. There will be a cost for those individuals (patients, residents, family members) who wish to avail themselves of electronic monitoring.
Beneficial impact the regulation is designed to produce.	Provides the controls necessary to assure that resident autonomy and rights to personal privacy are not violated.

Alternatives

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

SB553 (2016) mandates the Board of Health to promulgate regulations governing the implementation of voluntary electronic monitoring in the rooms of residents of nursing homes. The regulations are mandated by law and there are no viable alternatives to the proposed regulatory action to achieve the necessary regulatory changes mandated by SB553 (2016).

Public participation notice

If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

Periodic review and small business impact review report of findings

If this fast-track is the result of a periodic review/small business impact review, use this form to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to the which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

Commenter	Comment	Agency response

Not applicable.

Family impact

Please assess the impact of this regulatory action on the institution of the family and family stability including to what extent the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

VDH anticipates the proposed amendments will strengthen the family and family stability through increased involvement in nursing home resident's care and greater assurance for family members that residents are being well cared for.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.

For changes to existing regulation(s), please use the following chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
12VAC5-371-10		Definitions. Current definitions all remain unchanged.	Defined terms to be added: "Electronic monitoring" means an unmanned video recording system, with or without audio capability, installed in the room of a resident. "Facility-managed" is an electronic monitoring system that is installed, controlled, and maintained by the nursing facility with the knowledge of the resident or resident's responsible party in accordance with the facility's policies. "Resident-managed" is an electronic monitoring system that is installed, controlled, and maintained by the resident with the knowledge of the nursing facility. Intent: Provides definition to terms and phrases used in 12VAC5-371-191. Likely impact: provides clarity to the new regulatory section.
N/A	12VAC5-371-191- Electronic monitoring in resident rooms.	N/A	A. All requests for electronic monitoring shall be made in writing and signed by the resident or the resident's responsible party if the resident has been properly assessed incapable of requesting and authorizing the monitoring. B. Only electronic monitoring in accordance with this section is permitted. C. A facility shall not refuse to admit an individual and shall not discharge or transfer a resident due to a request to conduct authorized electronic monitoring. D. Family members cannot obtain electronic monitoring over the objections of the resident, the resident's roommate or the resident's responsible party. No equipment may be installed pursuant to 12VAC5-371-191 (Q) over the objections of the resident, or if the resident is incapable, the resident's responsible party. Facilities shall not use monitoring equipment in violation of the law based solely on a family member's request or approval. E. Consent for electronic monitoring shall be kept in the resident's medical record. F. Facilities shall designate one staff person

			to be responsible for managing the electronic monitoring program. G. Facilities may designate custodial ownership of any recordings from monitoring devices to the resident or the resident's responsible party. Facility retained recordings shall be considered part of the resident's medical record and shall be retained for no less than two years or as required by state and federal laws. H. If a facility chooses to retain ownership of recordings, the facility shall not permit viewings of recordings without consent of the resident or the resident's responsible party except to the extent that disclosure is required by law through a court order or pursuant to a lawful subpoena duces tecum. Should a resident or a resident's responsible party approve viewing, the facility shall accommodate viewing of any recordings in a timely manner, including, but not limited to providing: 1. Appropriate playing/viewing equipment; 2. Privacy during viewing; and 3. Viewing times convenient to the resident or the resident's responsible party. If unauthorized viewing is discovered, the facility shall report any such violation to the Office of Long Term Care Ombudsman and to OLC. I. A facility shall require its staff to report any incidents regarding safety or quality of care discovered as a result of viewing a recording immediately to the facility administrator and to the OLC. Facilities shall instruct the resident or the resident's responsible party of this reporting requirement and shall provide the resident or the resident's responsible party with the OLC's Complaint Hotline telephone number. J. A facility shall have no obligation to seek access to a recording in its possession or to have knowledge of a recording's content, unless the facility is aware of a recorded incident of suspected abuse, neglect, accident or injury; or the resident or the resident's responsible party, or a government agency seeks to use a recording. Facilities shall immediately report suspected abuse and neglect discovered as a result of using monitoring devices, as required by law. K. A facility may require the resident or the

			resident's responsible party to be responsible for all aspects of the operation of the monitoring equipment, including the removal and replacement of recordings, adherence to local, state, and federal privacy laws, and for firewall protections to prevent images that would violate obscenity laws from being inadvertently shown on the Internet. L. A facility shall prohibit assigned staff from refusing to enter a resident's room solely because of electronic monitoring. M. Any electronic monitoring equipment shall be installed in a manner that is safe for residents, employees, or visitors who may be moving about the resident's room. N. A facility shall make reasonable physical accommodation for monitoring equipment including: 1. Providing a reasonably secure place to mount the device; and 2. Providing access to power sources for the device. O. A facility may require a resident or a resident's responsible party to pay for all costs, other than the cost of electricity, associated with installing electronic monitoring equipment. Such costs shall be reasonable and may include, but are not limited to: equipment, recording media and installation, compliance with life safety and building/electrical codes, maintenance or removal of the equipment, posting and removal of any public notices, or structural repairs to the building resulting from the removal of the equipment. Facilities shall give 45 days notice of an increase in monthly monitoring fees. P. Any equipment installed for the purpose of monitoring a resident room shall be fixed and unable to rotate. Q. The informed consent of all residents, or if the resident is incapable, the resident's responsible party, assigned to the monitored room shall be obtained prior to any electronic monitoring equipment being installed. R. A copy of any signed consent form shall be kept in the resident's medical record as well as on file with the facility's designated electronic monitoring coordinator. S. Any resident or his or her responsible party of a monitored room may condition his or her consent for use of monitoring devices. Such conditions may include, but are not limited to, pointing the camera away or

			limiting or prohibiting the use of certain devices. If conditions are placed on consent, then electronic monitoring shall be conducted according to those conditions. T. The facility shall conspicuously post and maintain a notice at the entrance to the resident's room stating that an electronic monitoring device is in operation. U. Facilities shall notify all staff and their OLC Long Term Care Supervisor that electronic monitoring is in use. V. A facility shall prohibit staff from covert monitoring in violation of this chapter. Facilities shall instruct the resident or the resident's responsible party of this prohibition and shall provide the resident or the resident's responsible party with the OLC's Complaint Hotline telephone number. W. If covert monitoring is discovered, the facility shall report any such violation to the Office of Long Term Care Ombudsman and OLC, and the facility may require a resident or a resident's responsible party to meet all the requirements for authorized monitoring, if permitted by the facility. X. Each nursing facility, including those that choose not to offer electronic monitoring, shall adopt policies and procedures for electronic monitoring. These policies and procedures shall address all the elements of this section, 12VAC5-371-191. Y. A facility shall prohibit staff from tampering with electronic monitoring in violation of this chapter. Facilities shall instruct the resident or the resident's responsible party of this prohibition and shall provide the resident or the resident's responsible party with the OLC's Complaint Hotline telephone number. Intent: Providing assurance that a resident's dignity and right to personal, bodily privacy and autonomy are not violated should electronic monitoring be implemented within their room with their consent. These provisions largely already exist in a Guidance document published by VDH in 2004. The Department is simply placing those provisions, updated with input from the workgroup, into the regulations as required by SB553 (2016). Likely impact: Greater patient safety, more comprehensive regulations.