



## Fast Track Proposed Regulation Agency Background Document

<b>Agency name</b>	Department of Minority Business Enterprise
<b>Virginia Administrative Code (VAC) citation</b>	7 VAC 10-21 et seq.
<b>Regulation title</b>	Regulations to Govern the Certification of Small, Women- and Minority-owned Businesses
<b>Action title</b>	Amend definitions, update eligible out-of-state business enterprise requirements, and remove "fee" reference for evaluating other certification programs.
<b>Date this document prepared</b>	March 1, 2010

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary of all regulatory changes, including the rationale behind such changes. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

The definition of "Principal Place of Business" is being revised for clarification by requiring the "control" of a business's day-to-day operations to be consistent with the requirements for becoming SWaM certified. The definition of "Virginia-based business" is also being revised to reflect the consistent use of one criterion (i.e., principal place of business) to determined eligibility for those states who programs deny Virginia-based businesses from participating in their SWaM Programs. The revision is also made in the eligibility requirements section, 7 VAC 10-21-130, to reflect the use of the "Principal Place of Business" criterion, instead of also providing the other alternative criterion, i.e., state of incorporation.

### 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.*

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The Department of Minority Business Enterprise hereby takes action on these changes to the regulations on March 1, 2010. The title of the regulation is Regulations to Govern the Certification of Small, Women- and Minority-owned Businesses.

### Legal basis

*Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of the legal authority and the extent to which the authority is mandatory or discretionary.*

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The Department of Minority Business Enterprise is required to adopt regulations to implement certification programs for small, women- and minority-owned business, which regulations are exempt from the Administrative Process Act (Section 2.2-4000 et seq., of the Code of Virginia) pursuant to subdivision B 2 of Section 2.2-4002.

### Purpose

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail 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.*

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Many businesses operate in states that deny access or participation to Virginia-based businesses, but still want to participate in the Virginia SWaM Program. One way that these non Virginia-based businesses circumvent the regulations that deny them access or participation is by incorporating (or changing incorporation status) in states such as Delaware, which is not their principal place of business. Having a different place of incorporation and principal place of business also enables companies to participate in Virginia's program while Virginia-based businesses are not able to participate in their home state's programs. Revising the eligibility requirements in section 7 VAC 10-21-130, to reflect the use of the "Principal Place of Business" criterion, instead of also providing the other alternative criterion, i.e., state of incorporation will close this loophole. The definition of "Virginia-based business" is also being revised to reflect the consistent use of one criterion, i.e., principal place of business, to determined eligibility for those states who programs deny Virginia-based businesses from participating in their SWaM Programs will close this loophole.

## 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?*

*Please note: If an objection to the use of the fast-track process is received within the 60-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 (i) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.*

The Department of Minority Business Enterprise does not expect that this change will be controversial for Virginia-based businesses because it enables fairness in program participation. The Agency, even though it was not required, utilized a 60-day public comment period on the Regulatory Town Hall and on the Agency website as well from September 13, 2009 to November 13, 2009. No comments were received.

## Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)*

The definition of "Principal Place of Business" is being revised by requiring "control" of a business's day-to-day operations, and not "management" of the operations--to be consistent with the requirements for becoming certified. The definition of "Virginia-based business" is also being revised to reflect the consistent use of one criterion (i.e., principal place of business) to determined eligibility for those states who programs deny Virginia-based businesses from participating in their SWaM Programs. The revision is also made in the eligibility requirements section, 7 VAC 10-21-130, to reflect the use of the "Principal Place of Business" criterion, instead of also providing the other alternative criterion, i.e., state of incorporation.

## 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 advantage with this regulatory amendment accrues to small, women-owned and minority-owned businesses based in the Commonwealth of Virginia participating in the SWaM Program. It levels the playing field of Virginia-based businesses with businesses from states who do not allow Virginia-based businesses to participate or provide some kind of preference for their in-state businesses. This

amendment uses one criterion to determine eligibility based on home state: their principal place of business.

**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 applicable 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.*

There is no locality that is particularly affected.

**Regulatory flexibility analysis**

*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.*

This amendment aims to improve the economic welfare and equal treatment of Virginia-based businesses against out-of-state businesses.

**Economic impact**

*Please identify the anticipated economic impact of the proposed regulation.*

<b>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</b>	None
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<b>expenditures</b>	
<b>Projected cost of the regulation on localities</b>	None
<b>Description of the individuals, businesses or other entities likely to be affected by the regulation</b>	Out-of-state/foreign businesses seeking to participate in the Virginia SWaM Program
<b>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.</b> Small business means 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.	Cannot be determined at this time
<b>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</b>	None

**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.*

This amendment aims to improve the economic welfare and equal treatment of Virginia-based businesses against out-of-state businesses seeking to compete for state procurement opportunities.

**Family impact**

*Please assess the impact of the proposed 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.*

No direct family impact however, this amendment aims to improve the economic welfare and equal treatment of Virginia-based businesses against out-of-state businesses seeking to compete for state procurement opportunities.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

For changes to existing regulations, use this chart:

<b>Current section number</b>	<b>Proposed new section number, if applicable</b>	<b>Current requirement</b>	<b>Proposed change and rationale</b>
7 VAC 10-21-20	NA	“Principal place of business” means the physical business location where natural persons who manage the business’s day-to-day operations spend most working hours.	“Principal place of business” means the physical business location where natural persons who <del>control</del> <b>manage</b> the business’s day-to-day operations spend most working hours.
7 VAC 10-21-20	NA	“Virginia-based business” means a business that is organized in and has its principal place of business in Virginia.	“Virginia-based business” means a business that <del>is organized in and</del> has its principal place of business in Virginia.
7 VAC 10-21-130	NA	The department may certify a non-Virginia based business if: <ol style="list-style-type: none"> <li>1. It meets the applicable eligibility standards for certification as a small, women- or minority-owned business; and</li> <li>2. The state in which the business is incorporated or has its principal place of business does not deny a like certification to a Virginia-based small, women- or minority-owned business or provide a preference to small, women- or minority-owned firms that is not available to Virginia-based businesses.</li> </ol>	The department may certify a non-Virginia based business if: <ol style="list-style-type: none"> <li>1. It meets the applicable eligibility standards for certification as a small, women- or minority-owned business; and</li> <li>2. The state in which the business <del>is incorporated or</del> has its principal place of business does not deny a like certification to a Virginia-based small, women- or minority-owned business or provide a preference to small, women- or minority-owned firms that is not available to Virginia-based businesses.</li> </ol>
7 VAC 10-21-310	NA	1. A Virginia-based business, which has been certified as a small, women- or minority-owned business by a local, state, private sector or federal certification program determined by the Department pursuant to Part V of this chapter to meet the minimum eligibility, ownership and control requirements, shall be certified as a small, women-	1. A Virginia-based business, which has been certified as a small, women- or minority-owned business by a local, state, private sector or federal certification program determined by the Department pursuant to Part V of this chapter to meet the minimum eligibility, ownership and control requirements, shall be certified as a small, women- or minority-owned business in Virginia,

		<p>or minority-owned business in Virginia, without additional paperwork or fee, upon presentation to the Department of documentation that the business has received such certification, the certification has not expired and ownership and control of the applicant business remains unchanged since the certification was granted.</p> <p>2. A business that is not based in Virginia, which has been certified as a small, women- or minority-owned business by a local, state, private sector or federal certification program determined by the Department pursuant to Part V of this chapter to meet the minimum eligibility, ownership and control requirements, shall be certified as a small, women- or minority-owned business in Virginia, without additional paperwork or fee, upon presentation to the Department of documentation that it has received such certification, the certification has not expired and ownership and control of the applicant business remains unchanged since the certification was granted only after the Department determines that such certification would be available to Virginia-based businesses in the state in which the business is incorporated or has its principal place of business.</p>	<p>without additional paperwork <del>or fee</del>, upon presentation to the Department of documentation that the business has received such certification, the certification has not expired and ownership and control of the applicant business remains unchanged since the certification was granted.</p> <p>2. A business that is not based in Virginia, which has been certified as a small, women- or minority-owned business by a local, state, private sector or federal certification program determined by the Department pursuant to Part V of this chapter to meet the minimum eligibility, ownership and control requirements, shall be certified as a small, women- or minority-owned business in Virginia, without additional paperwork <del>or fee</del>, upon presentation to the Department of documentation that it has received such certification, the certification has not expired and ownership and control of the applicant business remains unchanged since the certification was granted only after the Department determines that such certification would be available to Virginia-based businesses in the state in which the business is incorporated or has its principal place of business.</p>
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