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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Board of Funeral Directors and Embalmers, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation(s)</b>	18VAC65-20-10 et seq.
<b>Regulation title(s)</b>	Regulations of the Board of Funeral Directors and Embalmers
<b>Action title</b>	Permission to embalm and refrigeration of dead human bodies
<b>Date this document prepared</b>	August 14, 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.*

At its meeting on January 10, 2017, the Board of Funeral Directors and Embalmers adopted guidance documents on its interpretation of the statutory requirements for express permission to embalm a body and for refrigeration of a dead human body. The amendments in this regulatory action will incorporate the board's guidance on those requirements into its regulations so, if necessary, compliance can be enforced through a disciplinary proceeding.

### 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.

N/A

### 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.

**18VAC65-20-10 et seq. Regulations of the Board of Funeral Directors and Embalmers** are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6) provides the Board with authority to promulgate regulations to administer the regulatory system:

**§ 54.1-2400 -General powers and duties of health regulatory boards**

*The general powers and duties of health regulatory boards shall be:*

...

*6. To promulgate regulations in accordance with the Administrative Process Act (§ [2.2-4000](#) et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ [54.1-100](#) et seq.) and Chapter 25 (§ [54.1-2500](#) et seq.) of this title.*

Authority for the Board to take disciplinary action for failure to obtain permission to embalm and for refrigeration of human remains is found in:

**§ 54.1-2806. Refusal, suspension, or revocation of license.**

*The Board may refuse to admit a candidate to any examination, refuse to issue a license to any applicant and may suspend a license for a stated period or indefinitely, or revoke any license or censure or reprimand any licensee or place him on probation for such time as it may designate for any of the following causes:*

- 1. Conviction of any felony or any crime involving moral turpitude;*
- 2. Unprofessional conduct that is likely to defraud or to deceive the public or clients;*
- 3. Misrepresentation or fraud in the conduct of the funeral service profession, or in obtaining or renewing a license;*
- 4. False or misleading advertising or solicitation;*
- 5. Solicitation at-need or any preneed solicitation using in-person communication by the licensee, his agents, assistants or employees; however, general advertising and preneed solicitation, other than in-person communication, shall be allowed;*
- 6. Employment by the licensee of persons known as "cappers" or "steerers," or "solicitors," or other such persons to obtain the services of a holder of a license for the practice of funeral service;*

7. *Employment directly or indirectly of any agent, employee or other person, on part or full time, or on a commission, for the purpose of calling upon individuals or institutions by whose influence dead human bodies may be turned over to a particular funeral establishment;*
8. *Direct or indirect payment or offer of payment of a commission to others by the licensee, his agents, or employees for the purpose of securing business;*
9. *Use of alcohol or drugs to the extent that such use renders him unsafe to practice his licensed activity;*
10. *Aiding or abetting an unlicensed person to practice within the funeral service profession;*
11. *Using profane, indecent, or obscene language within the immediate hearing of the family or relatives of a deceased, whose body has not yet been interred or otherwise disposed of;*
12. *Solicitation or acceptance by a licensee of any commission or bonus or rebate in consideration of recommending or causing a dead human body to be disposed of in any crematory, mausoleum, or cemetery;*
13. ***Violation of any statute, ordinance, or regulation affecting the handling, custody, care, or transportation of dead human bodies;***
14. *Refusing to surrender promptly the custody of a dead human body upon the express order of the person lawfully entitled to custody;*
15. *Knowingly making any false statement on a certificate of death;*
16. *Violation of any provisions of Chapter 7 (§ 32.1-249 et seq.) of Title 32.1;*
17. *Failure to comply with § 54.1-2812, and to keep on file an itemized statement of funeral expenses in accordance with Board regulations;*
18. *Knowingly disposing of parts of human remains, including viscera, that are received with the body by the funeral establishment, in a manner different from that used for final disposition of the body, unless the persons authorizing the method of final disposition give written permission that the body parts may be disposed of in a manner different from that used to dispose of the body;*
19. *Violating or failing to comply with Federal Trade Commission rules regulating funeral industry practices;*
20. *Violating or cooperating with others to violate any provision of Chapter 1 (§ 54.1-100 et seq.), Chapter 24 (§ 54.1-2400 et seq.), this chapter, or the regulations of the Board of Funeral Directors and Embalmers or the Board of Health;*
21. *Failure to comply with the reporting requirements as set forth in § 54.1-2817 for registered funeral service interns;*
22. *Failure to provide proper and adequate supervision and training instruction to registered funeral service interns as required by regulations of the Board;*
23. *Violating any statute or regulation of the Board regarding the confidentiality of information pertaining to the deceased or the family of the deceased or permitting access to the body in a manner that is contrary to the lawful instructions of the next-of-kin of the deceased;*
24. *Failure to include, as part of the general price list for funeral services, a disclosure statement notifying the next of kin that certain funeral services may be provided off-premises by other funeral service providers;*
25. *Disciplinary action against a license, certificate, or registration issued by another state, the District of Columbia, or territory or possession of the United States;*
26. ***Failure to ensure that a dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed if it is to be stored for more than 48 hours prior to disposition. A dead human body shall be maintained in refrigeration and shall not be***

*embalmed in the absence of express permission by a next of kin of the deceased or a court order; and*

*27. Mental or physical incapacity to practice his profession with safety to the public.*

**§ 54.1-2811.1. Handling and storage of human remains.**

*A. Upon taking custody of a dead human body, a funeral service establishment shall maintain such body in a manner that provides complete coverage of the body and that is resistant to leakage or spillage, except during embalming or preparation of an unembalmed body for final disposition; restoration and dressing of a body in preparation for final disposition; and viewing during any visitation and funeral service.*

***B. If a dead human body is to be stored for more than 48 hours prior to disposition, a funeral services establishment having custody of such body shall ensure that the dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed. A dead human body shall be maintained in refrigeration and shall not be embalmed in the absence of express permission by a next of kin of the deceased or a court order.***

*C. If a dead human body is to be stored for more than 10 days prior to disposition at a location other than a funeral service establishment, the funeral service establishment shall disclose to the contract buyer the location where the body is to be stored and the method of storage.*

*D. Funeral services establishments, crematories, or transportation services shall not transport animal remains together with dead human bodies. Further, animal remains shall not be refrigerated in a unit where dead human bodies are being stored.*

**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.*

The purpose of this regulatory action is to provide clear, enforceable regulations on the meaning of the statutory requirement for “express” permission to embalm and on the requirement to maintain a body in refrigeration at no more than approximately 40 degrees. The Board has received complaints and noted deficiencies on compliance with these requirements. Both the licensees and the public need clarity on these matters so public health and safety is not jeopardized.

**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.*

Guidance document 65-8 specifies that: Virginia Code §54.1-2806 (26) and §54.1-2811.1 (B) state that a dead human body “shall not be embalmed in the absence of express permission by a next of kin of the deceased or a court order.” The Board interprets “*express permission by a next*

*of kin*” to mean written authorization *to embalm* as a specific and separate statement on a document or contract provided by the facility. Express permission may include direct, verbal authorization *to embalm*, provided it is followed as soon as possible by a written document signed by the next of kin confirming the verbal authorization to embalm and including the time, date, and name of the person who gave verbal authorization.

Guidance document 65-18 specifies that: Virginia Code §54.1-2811.1 (B) states, “if a dead human body is to be stored for more than 48 hours prior to disposition, a funeral services establishment having custody of such body shall ensure that the dead human body is maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed.” The Board of Funeral Directors and Embalmers interprets this provision as meaning that if a body is to be in the possession of the funeral home or crematory for more than 48 hours from the time the funeral establishment or crematory takes physical possession of the body until embalming, cremation, or burial, the body is to be placed in a mechanical refrigeration unit suitable for storing human remains. The Board does not interpret lowering the air conditioning in a storage room to 40 degrees or packing the body in ice or dry ice as meeting the statutory requirement.

The Board would view evidence of compliance with Virginia Code §54.1-2811.1 (B) as a working refrigeration unit in the funeral home or crematory or a letter of agreement/contract with another funeral establishment, hospital, or morgue to allow the funeral home or crematory to refrigerate in its refrigeration unit. The Board would view evidence of the body being “maintained in refrigeration” as log entries indicating times of placement and removal of a body in refrigeration.

In order to enforce its interpretative statements on permission to embalm and refrigeration of human remains, the Board has incorporated the guidance into its regulations.

## 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.*

- 1) The primary advantage of the amendments to the public is assurance of proper care of the human remains of their loved ones, so an un-embalmed body is not allowed to deteriorate with refrigeration or conversely, remains are not embalmed without express permission of the next of kin. There are no disadvantages to the public.
- 2) There are no advantages or disadvantages to the Commonwealth, except more clarity in regulation will assist the Board in interpretation of the law.
- 3) The Director of the Department of Health Professions has reviewed the proposal and performed a competitive impact analysis. The Board is authorized under § 54.1-2400 to “*promulgate regulations in accordance with the Administrative Process Act which are reasonable and necessary to administer effectively the regulatory system.*”

The proposed amendments are a foreseeable result of the statute requiring the Board to protect the health and safety of patients in the Commonwealth and to enforce the Code of Virginia.

**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 are no localities particularly affected.

**Public participation**

*Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.*

In addition to any other comments, the Board of Funeral Directors and Embalmers is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to Elaine Yeatts at [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov) or at 9960 Mayland Drive, Henrico, VA 23233 or by fax at (804) 527-4434.. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <http://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will be held following the publication of this stage and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website

(<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

**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.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including:</b>  <b>a) fund source / fund detail; and</b>  <b>b) a delineation of one-time versus on-going expenditures</b></p>	<p>There are no costs for implementation and enforcement. Funds for the Board of Funeral Directors and Embalmers are provided by fees charged to applicants and licensees.</p>
<p><b>Projected cost of the new regulations or changes to existing regulations on localities.</b></p>	<p>There are no costs to localities</p>
<p><b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b></p>	<p>Funeral establishments or crematories that handle human remains that must be refrigerated.</p>
<p><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:  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.</p>	<p>There are 76 branch establishments, 113 crematories, and 430 funeral establishments licensed in Virginia. There is no estimate of the number that may be affected. Section 54.1-2811.1, which has been in effect since 2010, requires a dead human body to be maintained in refrigeration at no more than approximately 40 degrees Fahrenheit or embalmed. Therefore, it is presumed that the majority of funeral establishments have refrigeration or have made arrangements for storage of human remains in refrigeration. There is no estimate of the number of independently owned small business, since many have been bought by large national chains in recent years.</p>
<p><b>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:</b>  <b>a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and</b>  <b>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.</b></p>	<p>If there are small establishments that do not have refrigeration units or a contract with an entity for refrigeration, they will incur costs of \$3,000 to \$5,000 to purchase such a unit. If a small funeral home does not want to purchase a unit or cannot contract for refrigeration, it can either embalm or transfer the remains to another establishment.</p> <p>There should be no additional costs for documentation for the permission to embalm or for refrigeration, since the required records</p>

	or statements may be incorporated into forms currently maintained by a funeral establishment.
<b>Beneficial impact the regulation is designed to produce.</b>	The beneficial impact is compliance with the law which requires refrigeration and express permission from the next of kin or designee for embalming.

### 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.*

The Board has a guidance document addressing its interpretation of the statutory requirements for refrigeration and express permission to embalm. However, a guidance document is not enforceable and cannot be cited in a disciplinary care. An amendment to regulation is the least intrusive alternative consistent with public health and safety.

### 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.*

As discussed above, there are no regulatory methods consistent with the law.

### Public comment

*Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.*

<b>Commenter</b>	<b>Comment</b>	<b>Agency response</b>
Bruce Keeney, Assoc. of Independent Funeral Homes of Virginia	Concurs with the intent and supports the issue moving forward in a regulatory process. Concerned that draft language implies the maintenance of a separate log on refrigeration.	The Board amended the draft to require evidence of compliance with the refrigeration requirement to be maintained as a log entry <i>or other documentation</i> indicating times of placement in and removal of the body from refrigeration.



Nelson Greene, Jr.	Expressed concern that a separate form would be necessary for authorization to embalm; would be another piece of paper to maintain.	The Board amended the draft to allow the express permission to embalm to be on a written document or a statement signed by the next of kin or designee. Therefore, the permission may be incorporated into other documents signed by the next of kin, provided there is a place to sign or initial for permission to embalm.
Barry Robinson	Expressed concern about an additional separate document for permission to embalm.  Concerns about options for refrigeration; in reality a contract with another entity for refrigeration may not be practical. Recommended a grandfathering clause to assist small funeral homes.	See response above.  Refrigeration has been a statutory requirement since 2010. The Board did not concur with a grandfathering clause in the adoption of proposed regulations.

### 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.*

There is no impact on the family.

### 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.*

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
510		Sets out requirements for an embalming report.	Subsection A is added to clarify the statutory requirement for express permission to embalm. Express permission must be written authorization as a specific and separate statement on a

		<p>document or contract provided by the funeral establishment. Express permission may include direct, verbal authorization to embalm, provided it is followed as soon as possible by a written document or statement signed by the next of kin confirming the verbal authorization to embalm and including the time, date, and name of the person who gave verbal authorization.</p> <p><i>Express permission that is clearly identifiable protects both the consumer and the funeral establishment. Sometimes a consumer will deny that permission was given and be dissatisfied that a body was embalmed. Verbal authorization is permissible provided it is followed as soon as possible with the written document signed by the next of kin or designee. There are often circumstances in which the decision of whether to embalm has to be made before the next of kin is physically present to sign the paperwork. If the body is to be maintained without embalming, cremation or burial for more than 48 hours, it must be refrigerated – so permission to embalm can be verbally given.</i></p>
	581	<p>Subsection A specifies that if a dead human body is to be in the possession of a funeral establishment or crematory for more than 48 hours from the time the funeral establishment or crematory takes physical possession of the body until embalming, cremation, or burial, the body shall be placed and maintained in refrigeration in a mechanical refrigeration unit suitable for storing human remains in accordance with § 54.1-2811.1(B) of the Code of Virginia.</p> <p><i>The intent of the new subsection is clarity about the statutory requirement for refrigeration. The Code requires refrigeration if a dead human body is to be stored for more than 48 hours prior to disposition; regulations clarify that the 48 hours begins when the establishment or crematory takes physical possession of the body. It also clarifies that “refrigeration” means a mechanical unit capable of storing human remains.</i></p>

		<p>Subsection B provides that the mechanical refrigeration unit may be located in the funeral establishment or crematory, or the funeral establishment or crematory may enter into an agreement or contract with another funeral establishment, crematory, or other licensed entity for refrigeration in a mechanical refrigeration unit.</p> <p><i>The intent of subsection B is to offer alternatives for smaller funeral homes who do not want to purchase a refrigeration unit to contract with another entity to fulfill the refrigeration requirement. If the body is to be cremated or embalmed with 48 hours, it is not necessary to refrigerate.</i></p> <p>C. Evidence of compliance with the requirement for refrigeration shall be maintained as a log entry or other documentation indicating times of placement in and removal of a body in refrigeration.</p> <p><i>The Board responded to concerns about maintenance of a separate log for refrigeration and included "other documentation" to allow the funeral home to document the times for placement and removal from refrigeration on other records maintained.</i></p>
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