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Proposed Regulation Agency Background Document

Agency name	Department of Criminal Justice Services
Virginia Administrative Code (VAC) citation(s)	6VAC20-130
Regulation title(s)	Regulations Governing the Privacy and Security of Criminal History Record Information Checks for Firearm Purchases
Action title	Comprehensive Review of the Regulations Governing the Privacy and Security of Criminal History Record Information Checks for Firearm Purchases
Date this document prepared	November 1, 2016

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

Pursuant to the provisions of § 18.2-308.2:2 of the *Code of Virginia*, criminal history record information checks are required prior to the sale, rental, trade or transfer of certain firearms. The Regulations Governing the Privacy and Security of Criminal History Record Information Checks for Firearm Purchases (6VAC20-130) identifies the process for conducting a background check. This regulatory action is intended to update the regulation to address the current VCheck technology used by the Virginia State Police (VSP). The current regulation references the use of telephone calls and the mail to obtain criminal history checks and while these are still options for firearms dealers the telephone and the mail are rarely used. This regulatory action is also intended to clarify existing regulatory language, remove unnecessary language, remove language that conflicts with the requirements set forth in the *Code of Virginia*, and eliminate duplication of work by DCJS and VSP.

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.

CJSB – Criminal Justice Services Board
DCJS – Department of Criminal Justice Services
VSP – Virginia State Police

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.

§ 18.2-308.2:2. Criminal history record information check required for the transfer of certain firearms.

A. Any person purchasing from a dealer a firearm as herein defined shall consent in writing, on a form to be provided by the Department of State Police, to have the dealer obtain criminal history record information. Such form shall include only the written consent; the name, birth date, gender, race, citizenship, and social security number and/or any other identification number; the number of firearms by category intended to be sold, rented, traded, or transferred; and answers by the applicant to the following questions: (i) has the applicant been convicted of a felony offense or found guilty or adjudicated delinquent as a juvenile 14 years of age or older at the time of the offense of a delinquent act that would be a felony if committed by an adult; (ii) is the applicant subject to a court order restraining the applicant from harassing, stalking, or threatening the applicant's child or intimate partner, or a child of such partner, or is the applicant subject to a protective order; and (iii) has the applicant ever been acquitted by reason of insanity and prohibited from purchasing, possessing or transporting a firearm pursuant to § 18.2-308.1:1 or any substantially similar law of any other jurisdiction, been adjudicated legally incompetent, mentally incapacitated or adjudicated an incapacitated person and prohibited from purchasing a firearm pursuant to § 18.2-308.1:2 or any substantially similar law of any other jurisdiction, or been involuntarily admitted to an inpatient facility or involuntarily ordered to outpatient mental health treatment and prohibited from purchasing a firearm pursuant to § 18.2-308.1:3 or any substantially similar law of any other jurisdiction. ...

... H. The Department of Criminal Justice Services shall promulgate regulations to ensure the identity, confidentiality and security of all records and data provided by the Department of State Police pursuant to this section. ...

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 regulation protects the health, safety and welfare of citizens by ensuring criminal history record information checks are conducted in a manner which protects the integrity of criminal history record information, guarantees individual rights to privacy, and supports the needs of the VSP and firearms dealers, while facilitating the sales of firearms to the law abiding public.

This regulatory action is intended to update the regulation to address the current VCheck technology used by VSP. The current regulation references the use of telephone calls and the mail to obtain criminal history checks and while these are still options for firearms dealers the telephone and the mail are rarely used. This regulatory action is also intended to clarify existing regulatory language, remove unnecessary language, remove language that conflicts with the requirements set forth in the *Code of Virginia*, and eliminate duplication of work by DCJS and VSP.

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.

DCJS worked with VSP to identify necessary revisions to this regulation. The following substantive revisions have been proposed:

- Removing the purpose statement.
- Removing definitions of terms that are defined in the *Code of Virginia* and providing the Code citation to the definition. Revising the definition of law-enforcement officer to match *the Code of Virginia*. Adding a definition for the term VCheck.
- Adding language referencing the use of VCheck or other authorized communication response systems throughout the regulation in all sections referring to obtaining criminal history checks by telephone and mail. It is rare that VSP receives a request for a criminal history check by telephone or mail. Adding the reference to VCheck codifies the technology currently used and including the language "or other authorized communication response system" allows VSP to use alternate systems as technology capabilities advance.
- Adding language requiring the second form of identification be current and show an address identical to that shown on the photo-identification form. This revision will make the regulation match the language in the *Code of Virginia*.
- Modifying language to match the language in the *Code of Virginia* related to identification and residency requirements for individuals using documents issued by the United States Department of Defense. The current regulatory language conflicts with the language in the *Code of Virginia* and cites outdated sections of the *Code of Federal Regulations*.

- Adding language referencing the *Code of Virginia* requirement that dealers not sell, rent, trade or transfer any assault firearm to any person who is not a citizen of the United States or not lawfully admitted for permanent residence.
- Removing language requiring an after sale check. Per VSP this language is no longer necessary as the background checks are instantaneous.
- Removing language requiring DCJS to audit dealers who use the criminal history check system improperly in a manner that jeopardizes the confidentiality and security of the system. Dealers do not receive specific criminal history record information related to criminal convictions. When a criminal history record check is conducted the dealer receives one of the following responses: 1) "Yes, approved" and the accompanying approval number is given or 2) "This transaction is not approved at this time". There is no need for DCJS to conduct audits of dealers. This is a duplication of the work conducted by VSP. VSP monitors criminal history record information transactions and if there is suspicion or evidence a dealer is inappropriately requesting criminal history records information a criminal investigation is initiated. The possibility of a criminal investigation by VSP is a far greater penalty than any administrative investigation and action that can be taken by DCJS. Additionally, language requiring DCJS to audit VSP records has been removed. The requirements for maintaining records and logs related to the firearms transactions are addressed in the Library of Virginia's *State Police Schedule Number 156-050*. VSP has an Internal Audit Section that reviews agency compliance with the laws, regulations, policies and procedures and audits information technology systems and related security of data. Results of all internal audits are reported to VSP management and the Superintendent.

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 amendments to this regulation to the public and the Commonwealth includes removing unnecessary language, correcting language that conflicts with the Code of Virginia, and identifying the VCheck system as the system used by firearms dealers and VSP to determine if there are any barriers to an individual purchasing a firearm. The current regulatory language only identifies the use of calling a toll-free number and the mail to request criminal history record information. There are no disadvantages to the public or 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 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.

There are no localities particularly affected by the amendments to this regulation.

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, DCJS and the CJSB are seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency and board are 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 Barbara Peterson-Wilson, 1100 Bank Street, Richmond, VA 23219, Barbara.Peterson-Wilson@dcjs.virginia.gov; or fax: (804) 225-4503. 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 not be held following the publication of this stage of this regulatory action.

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>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</p>	<p>There are no new costs associated with the implementation and enforcement of the proposed regulatory language. The current regulations are outdated and do not reference the current technology that is used by VSP to conduct background checks associated with purchasing a firearm. The VCheck system is already being used by VSP and firearms dealers. The revisions will ensure what is done in practice due to advances in technology is reflected within the language of the regulation.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>There are no new costs to localities associated with the proposed changes to this regulation.</p>

<p>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>The regulation in general affects VSP, firearms dealers, and individuals attempting to purchase firearms but promulgation of the proposed language will not have any new affect or impact on any of the above listed parties. The current regulations are outdated and do not reference the current technology that is used by VSP to conduct background checks associated with purchasing a firearm. The VCheck system is already being used by VSP and firearms dealers. The revisions will ensure that what is done in practice due to advances in technology is reflected within the language of the regulation.</p>
<p>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.</p>	<p>Promulgation of the proposed language will not have any new affect or impact on any of the parties listed below because the VCheck system while not identified in the regulation is currently being used by VSP and firearms dealers. VSP - VSP has employees who are responsible for administering the Virginia Firearms Transaction Program. Approval of the amendments to this regulation will not require any new staff or increase workload for existing staff. Firearms dealers - The federal law requires any individual or company engaged in the business of selling firearms, repairing firearms, manufacturing firearms, or who is a pawnbroker to obtain a federal firearms license (FFL). This licensing system is administered by the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE). In a report of the BATFE titled, <i>Firearms Commerce in the United States Annual Statistical Update 2016</i> it was reported that in 2015 the state of Virginia had 4,374 federal firearms licensees. Individuals attempting to purchase firearms – There is no way to determine the number of individuals who will attempt to purchase a firearm but in 2014 VSP reported processing 405,838 requests for criminal history record information on perspective buyers in its report titled <i>2014 Fact and Figures</i> published on the VSP website.</p>
<p>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.</p>	<p>There are no projected administrative costs or cost related to the development of real estate associated with amending this regulation. The current regulations are outdated and do not reference the current technology that is used by VSP to conduct background checks associated with purchasing a firearm. .</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>The proposed language is intended to remove unnecessary language, correct language that</p>

	<p>conflicts with language in the <i>Code of Virginia</i>, and identify the VCheck system as a process used by VSP and firearms dealers to determine if there are any barriers to an individual purchasing a firearm.</p>
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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 *Code of Virginia* requires the Department of Criminal Justice Services to promulgate regulations to ensure the identity, confidentiality and security of all records and data provided by the Department of VSP for the purpose of criminal history records checks for the transfer of firearms. VSP’s implementation of the VCheck system is the least burdensome way for businesses to conduct a criminal history check to determine if there are any barriers to perspective customers purchasing a firearm.

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.

VSP’s implementation of the VCheck system is the least burdensome way for businesses to conduct a criminal history check to determine if there are any barriers to perspective customers purchasing a firearm. The administrative and reporting requirements for businesses are minimal and involve maintenance of records and providing notification to VSP when there has been a change in registration information and notice of a business closing in advance of the closure date.

Periodic review and small business impact review report of findings

If you are using this form to report the result of a periodic review/small business impact review that was announced during the NOIRA stage, please 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.

A periodic review was not announced during the NOIRA stage.

Public comment

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

Commenter	Comment	Agency response

No public comments were received.

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.

The regulation has no impact on the institution of the family or family stability.

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
6VAC20-130-10		States the purpose of the regulation.	This section will be repealed. RIS staff has stated that purpose statements are no longer necessary.
6VAC20-130-20		Provides the definitions of the following terms: antique firearm, criminal history record information, criminal	The following terms were amended to refer an individual to the definition in the <i>Code of Virginia</i> : antique firearm, firearm, and handgun. This ensures that if the

		history record information check, dealer, dealer identification number, firearm, handgun, law-enforcement officer, prospective purchaser, resident of Virginia, Virginia Firearms Transaction Record Form	language in the <i>Code of Virginia</i> is modified the definition in the regulation will remain accurate. The following terms were amended: criminal history record information and law-enforcement officer. The term and definition for VCheck was added to this section.
6VAC20-130-30		4. Transactions in any county, city or town that has a local ordinance adopted prior to January 1, 1987, governing the purchase, possession, transfer, ownership, conveyance or transportation of firearms which is more stringent than § 18.2-308.2:2 of the Code of Virginia	This language has been deleted it is no longer accurate based on a revision to the <i>Code of Virginia</i> .
6VAC20-130-40		This language identifies the responsibilities of dealers.	Language was added to address the use of the VCheck system and the internet and to require the dealer to notify VSP if there is a change in registration information or the business is closing.
6VAC20-130-50		This language identifies the responsibilities of VSP.	Language was added to address the use of the VCheck system.
6VAC20-130-60		This language instructs the firearms dealer on obtaining the necessary information from the purchaser prior to requesting a criminal history record check.	The current language is in conflict with the language in the <i>Code of Virginia</i> as it relates to identification and residency requirements for individuals working for the Department of Defense and the armed forces. This section has been modified to mirror the language in the <i>Code of Virginia</i> to eliminate the confusion that has been caused by the conflicting language. Language was removed that referenced Part 178.124 of Title 27, of the Code of Federal Regulations and ATF Ruling 79-7. Title 27 has been re-organized and part 178.124 no longer exists. While the Code of Federal Regulations does still address residency for purchasing a firearm the language defines "identification document" but no longer specifically identifies examples of documents to meet the residency requirement. The language in the ATF ruling was superseded by ATF Ruling 2001-5. Additionally, language was added to identify the requirement to establish United States citizenship if an individual wants to purchase an assault firearm as required by the Code of Virginia.
6VAC20-		This language identifies the	Language has been added to address the

130-70		procedure for requesting a criminal history record check by telephone and the procedures for an after sale check.	use of the VCheck system. Additionally language addressing the after sale checks has been removed. Per State Police the VCheck system is instantaneous and the language requiring an after sale check is no longer necessary.
6VAC20-130-80		<p>This language identifies the procedure for requesting a criminal history record check by mail.</p> <p>A. At the request of a Virginia resident or a non-Virginia resident, a dealer may request a record check by mail for a firearm transfer. In either case, the dealer shall follow the procedures as set forth below. In addition, the dealer shall follow the provisions for establishing identity and residency as set forth in 6VAC20-130-60 C 1 a and b of this chapter.</p>	<p>A reference to section D of 6VAC20-130-60 which addresses citizenship for individuals purchasing an assault firearm has been added.</p> <p>A. At the request of a Virginia resident or a non-Virginia resident, a dealer may request a record check by mail for a firearm transfer. In either case, the dealer shall follow the procedures as set forth below. In addition, the dealer shall follow the provisions for establishing identity and residency as set forth in 6VAC20-130-60 C 1 a and b and if applicable, <u>D</u> of this chapter.</p>
6VAC20-130-90		This language addresses the forms and records that must be maintained by the dealer and the VSP.	Language has been added to address the use of the VCheck system.
6VAC20-130-100		This language addresses audits by VSP and the Department of Criminal Justice Services.	Language has been removed that requires DCJS to audit dealers who use the criminal history check system improperly in a manner that jeopardizes the confidentiality and security of the system. Dealers do not receive specific criminal history record information related to criminal convictions and therefore dealers are unable to use a criminal history check in a manner that would jeopardize the confidentiality and security of the system. When a criminal history record check is conducted the dealer receives one of the following responses "Yes, approved" and the accompanying approval number is given or "This transaction is not approved at this time". There is no need for DCJS to conduct audits of dealers. This is a duplication of the work conducted by VSP. VSP monitor criminal history record information transactions and if there is suspicion or evidence a dealer is inappropriately requesting criminal history records information a criminal investigation is initiated. The possibility of a criminal investigation by VSP is a far greater

			<p>penalty than any administrative investigation and action that can be taken by DCJS. Additionally, language requiring DCJS to audit VSP records has been removed. The requirements for maintaining records and logs related to the firearms transactions are addressed in the Library of Virginia's <i>State Police Schedule Number 156-050</i>. VSP has an Internal Audit Section that reviews compliance with the laws, regulations, policies and procedures and audits information technology systems and related security of data. Results of all internal audits are reported to management and the VSP Superintendent.</p>
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