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## Fast-Track Regulation Agency Background Document

<b>Agency name</b>	Office of Attorney General
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	1 VAC §§ 45-10 through 45-10-100
<b>VAC Chapter title(s)</b>	Regulations Governing Disclosure of CID (Civil Investigative Demands)
<b>Action title</b>	Extends coverage to material obtained through CIDs issued pursuant to Bad Faith Assertions of Patent Infringement law; and makes clear that chapter does not apply to law-enforcement authorities that represent States other than the Commonwealth.
<b>Date this document prepared</b>	January 15, 2021

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

### Brief Summary

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.*

The proposed amendments to 1 Va. Admin. Code §§ 45-10-10 through 45-10-100 are intended to further modernize the CID regulations. The current regulations provide a uniform procedure for select Virginia law-enforcement authorities to request copies of CID material we obtain through CIDs issued pursuant to the Virginia Antitrust Act, Solicitation of Contributions law, Virginia Consumer Protection Act, and Virginia Telephone Privacy Protection Act. The proposed amendments extend their coverage to CIDs we issue pursuant to the Bad Faith Assertions of Patent Infringement law, which was enacted in 2014, but is not currently included in the list of laws governed by the CID regulations. 2014 Va. Acts, Chapters 810 and 819. Similar to their non-application to federal law-enforcement authorities, a second proposed amendment makes clear that the chapter does not apply to law-enforcement authorities representing States other than the Commonwealth.

### Acronyms and Definitions

*Define all acronyms used in this form, and any technical terms that are not also defined in the “Definitions” section of the regulation.*

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The only acronyms used in this form are OAG, which stands for Office of Attorney General; CID, which stands for Civil Investigative Demand; and VAA, which stands for Virginia Antitrust Act. The only technical terms used in the form are “law-enforcement authority” and “material,” both of which are defined in the definitions section of the regulation.

### Statement of Final Agency Action

*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 OAG/Department of Law approved the proposed amendments on October 16, 2019. The regulations are titled “Regulations Governing Disclosure of CID (Civil Investigative Demand).”

### Mandate and Impetus

*Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”*

*As required by Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.*

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The proposed regulatory changes were prompted by a periodic review conducted by the OAG. The CID Regulations were last amended in November 2015 pursuant to another periodic review. The proposed amendments are expected to be noncontroversial because they do not directly affect the public. The direct effect of the CID Regulations is limited to law-enforcement authorities that represent the Commonwealth (and its political subdivisions) in enforcing the VAA and other consumer protection statutes that incorporate its CID provisions. In addition, the CID Regulations merely establish a formal, transparent process for the OAG to evaluate information sharing requests it receives from other Virginia law-enforcement authorities who enforce the same laws. One proposed amendment merely extends coverage to allow the OAG to share CID material it receives with other Virginia law-enforcement authorities that enforce the Bad Faith Assertions of Patent Infringement law. The other amendment merely makes clear that the CID Regulations do not apply to information sharing requests the OAG may receive from law-enforcement authorities that represent states other than the Commonwealth, similar to the manner in which the CID Regulations do not apply to requests the OAG may receive from federal law-enforcement authorities.

### Legal Basis

*Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter*

*number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.*

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The OAG is the promulgating agency. The Attorney General is the chief executive officer of the Virginia Department of Law and is “authorized to perform such duties as may be provided by law.” Va. Code § 2.2-500. The VAA, Virginia Code §§ 59.1-9.1 through 59.1-9.17, authorizes the Attorney General to promulgate rules and regulations to implement and carry out the provisions of the section giving the Attorney General authority to issue CIDs. Va. Code § 59.1-9.10(M).

**Purpose**

*Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it’s intended to solve.*

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The first proposed amendment is needed for consistency. It will allow the OAG to share CID material it receives with other Virginia law-enforcement authorities that enforce the Bad Faith Assertions of Patent Infringement law, similar to the manner in which the OAG currently can share relevant CID material with other Virginia law-enforcement agencies that enforce the VAA, the Solicitation of Contributions law, the Virginia Consumer Protection Act, and the Virginia Telephone Privacy Protection Act. The amendment will serve the public welfare by promoting enforcement of the Bad Faith Assertions of Patent Infringement law. The second proposed amendment also is needed for consistency. The CID Regulations currently state that the chapter “shall not apply to federal law-enforcement authorities.” The amendment makes clear that the chapter does not apply to “law-enforcement authorities that represent states other than the Commonwealth.” Without the amendment, the OAG is concerned that someone may have the impression that we do not, on occasion, share CID material with Attorneys General and agencies of other states that enforce similar consumer protection laws, when that is not the case. The amendment will serve the public welfare by encouraging coordination between consumer protection authorities operating in different states.

**Substance**

*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.*

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The first amendment makes clear that we can share CID material with other Virginia law-enforcement authorities that enforce the Bad Faith Assertions of Patent Infringement law. The law gives this authority to local Commonwealth’s Attorneys. Va. Code §§ 59.1-215.3(B), (C), and (E). The second amendment makes clear that the CID Regulations do not apply to our sharing CID material with Attorneys General and agencies in other states that enforce similar consumer protection laws. The CID Regulations already make clear that their provisions do not apply to our sharing of CID material with federal law-enforcement authorities. The CID provisions found within the VAA, which are incorporated *mutatis mutandis* into each of the other consumer protection statutes listed, are clear that we can share investigative material with other “federal and state law-enforcement authorities” that have restrictions governing confidentiality similar to those contained in Virginia Code § 59.1-9.10(N).

**Issues**

*Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.*

The first proposed amendment will benefit the OAG and local Commonwealth’s Attorneys by allowing us to share CID material and local Commonwealth’s Attorneys to receive such material, if it relates to possible violations of the Bad Faith Assertions of Patent Infringement law. The second proposed amendment will benefit the OAG and the Attorneys General and agencies in other states that enforce similar consumer protection laws by making clear that nothing in the CID Regulations limits our ability to share CID material with those agencies. We are still limited, however, by the CID statute itself which makes clear that we can only share CID material with federal and state law-enforcement authorities that have similar restrictions governing confidentiality. Va. Code § 59.1-9.10(N). Neither proposed amendment results in any disadvantages to the public.

**Requirements More Restrictive than Federal**

*Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.*

There are no applicable federal requirements.

**Agencies, Localities, and Other Entities Particularly Affected**

*Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. “Particularly affected” are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.*

**Other State Agencies Particularly Affected**

The only other Virginia state agencies affected by the proposed amendments are the local Commonwealth’s Attorney Offices that have authority to enforce the Bad Faith Assertions of Patent Infringement law. State agencies in other states, including state attorneys general and other agencies that enforce similar consumer protection laws, are affected by the second proposed amendment.

**Localities Particularly Affected**

All Virginia localities that have a local Commonwealth’s Attorney are affected by the first proposed amendment.

**Other Entities Particularly Affected**

The only other entities affected by either proposed amendment are the entities being investigated for violations of Virginia consumer protection laws. These entities are not directly affected.

## Economic Impact

*Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.*

### Impact on State Agencies

<i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources	No significant costs are expected.
<i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	No significant costs are expected.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	Ability for OAG to share investigative information with local Virginia law-enforcement authorities that enforce the same laws, and to share information with agencies in other states that enforce similar laws.

### Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	No significant costs are expected.
Benefits the regulatory change is designed to produce.	Ability for OAG to share investigative information with local Virginia law-enforcement authorities that enforce the same laws.

### Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	The only other individuals and entities affected by either proposed amendment are those being investigated for possible violations of the Bad Faith Assertions of Patent Infringement law and/or other state consumer protection laws.
Agency's best estimate of the number of such entities that will be affected. 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.	The OAG has no ability to estimate the number of individuals or entities in this category. It certainly hopes the number is low. The impact on such individuals or entities is indirect.

<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> <li>a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses;</li> <li>b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change;</li> <li>c) fees;</li> <li>d) purchases of equipment or services; and</li> <li>e) time required to comply with the requirements.</li> </ul>	<p>No significant costs are expected.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>Ability for OAG to share investigative information with local Virginia law-enforcement authorities that enforce the same laws, and to share information with agencies in other states that enforce similar laws.</p>

**Alternatives to Regulation**

*Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.*

The only alternative considered was to have no regulations governing the information sharing procedures relating to CID material received by the OAG. This alternative was rejected in favor of continuing to have required and written procedures governing our sharing of CID material with other Virginia law-enforcement authorities, as we have since 1981. If we continue to have regulations in this area, the regulations should apply to all similarly-situated statutes, i.e., those where we have CID authority and share enforcement authority with other Virginia law-enforcement authorities. The proposed amendments are needed for consistency. Neither the existing CID Regulations, nor the proposed amendments, have any direct impact on small businesses.

**Regulatory Flexibility Analysis**

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.*

The existing regulation and the proposed amendments have no direct impact on small businesses. The regulation and proposed amendments relate only to procedures that govern how and when the OAG may share CID investigative material with other state and federal law-enforcement authorities. The regulations and proposed amendments impose no compliance or reporting requirements on small businesses.

**Public Participation**

*Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.*

*As required by § 2.2-4011 of the Code of Virginia, 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.*

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The OAG is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency’s regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to David B. Irvin, Senior Assistant Attorney General, 202 North Ninth Street, Richmond, Virginia 23219, Phone: (804) 786-4047, Fax: (804) 786-0122, Email: [dirvin@oag.state.va.us](mailto:dirvin@oag.state.va.us). 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.

**Detail of Changes**

*List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply but delete inapplicable tables.*

*If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.*

**Table 1: Changes to Existing VAC Chapter(s)**

<b>Current chapter-section number</b>	<b>New chapter-section number, if applicable</b>	<b>Current requirements in VAC</b>	<b>Change, intent, rationale, and likely impact of new requirements</b>
45-10-10	N/A	The current regulation defines “law-enforcement authority” to include those public officials that enforce	The proposed amendment extends the definition to include those public officials that enforce the Bad Faith Assertions of Patent Infringement law.

		the VAA, the Virginia Consumer Protection Act, Virginia Telephone Privacy Protection Act, or the Solicitation of Contributions law.	
45-10-10	N/A	The current regulation defines “material” to include certain information that the Attorney General receives in response to CIDs issued pursuant to the VAA, the Virginia Consumer Protection Act, Virginia Telephone Privacy Protection Act, or the Solicitation of Contributions law.	The proposed amendment extends the definition to include information the Attorney General receives in response to CIDs issued pursuant to the Bad Faith Assertions of Patent Infringement law, which is another statute that incorporates the VAA’s CID provision.
45-10-10	N/A	The current regulation defines each of the statutes identified in the definitions of “law-enforcement authority” and “material.”	The proposed amendment includes a new definition for “Bad Faith Assertions of Patent Infringement law.”
45-10-30	N/A	The current regulation states the chapter shall not apply to “federal law-enforcement authorities.”	The proposed amendment expands the exclusion to include “law-enforcement authorities that represent states other than the Commonwealth.”
45-10-70	N/A	The current regulation states a law-enforcement authority that receives CID material shall use the material to enforce the VAA, the Virginia Consumer Protection Act, the Virginia Telephone Privacy Protection Act, or the Solicitation of Contributions law.	The proposed amendment adds the Bad Faith Assertions of Patent Infringement law into the list of Virginia statutes that a law-enforcement authority can use CID material to enforce.
45-10-80	N/A	The current regulation prohibits disclosure of CID material to any person who is not employed by or assigned to a law-enforcement authority for purposes of enforcing the VAA, the Virginia Consumer Protection Act, the Virginia Telephone Privacy Protection Act, or the Solicitation of Contributions law.	The proposed amendment adds the Bad Faith Assertions of Patent Infringement law into the list of statutes provided.

*If a new VAC Chapter(s) is being promulgated and is not replacing an existing Chapter(s), use Table 2.*

**Table 2: Promulgating New VAC Chapter(s) without Repeal and Replace**

New chapter-	New requirements	Other regulations and law that apply	Intent and likely impact of new requirements
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<b>section number</b>			

If the regulatory change is replacing an **emergency regulation**, and the proposed regulation is identical to the emergency regulation, complete Table 1 and/or Table 2, as described above.

If the regulatory change is replacing an **emergency regulation**, but changes have been made since the emergency regulation became effective, also complete Table 3 to describe the changes made since the emergency regulation.

**Table 3: Changes to the Emergency Regulation**

<b>Emergency chapter-section number</b>	<b>New chapter-section number, if applicable</b>	<b>Current <u>emergency</u> requirement</b>	<b>Change, intent, rationale, and likely impact of new or changed requirements since emergency stage</b>