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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of Professional and Occupational Regulation
Virginia Administrative Code (VAC) Chapter citation(s)	18 VAC120-30
VAC Chapter title(s)	Regulations Governing Polygraph Examiners
Action title	General Review of Regulations Governing Polygraph Examiners
Date this document prepared	November 1, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), 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 the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

The Department of Professional and Occupational Regulation (“DPOR”) intends to undertake a general regulatory review of the Regulations Governing Polygraph Examiners. The regulation provides for the licensure of polygraph examiners, the registration of polygraph examiner interns, and approval of polygraph schools.

The goals of the action include:

1. Review of discretionary requirements imposed on regulated parties to determine whether such requirements impose burdens that are not necessary to protect the public health, safety, and welfare; or are not necessary to effectively administer the licensure program, in accordance with the regulatory reduction goal of Executive Directive Number One (2022);
2. Review to ensure the regulation complements current Virginia law and meets applicable federal requirements, if any;

3. Review to ensure the regulation is organized, clear, and understandable; and
4. Review to ensure the regulation provides minimal burdens on regulants while still protecting the public.

In addition, the review will ensure the regulation reflects current DPOR procedures and policies, along with any other changes determined to be necessary and appropriate.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

“APA” means American Polygraph Association.

“DPOR” means Department of Professional and Occupational Regulation.

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 the ORM procedures, “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.”

The impetus for this regulatory action is Executive Directive Number One (2022), which directs Executive Branch entities under the authority of the Governor “...to initiate regulatory processes to reduce by at least 25 percent the number of regulations not mandated by federal or state statute, in consultation with the Office of the Attorney General, and in a manner consistent with the laws of the Commonwealth.”

This action is not the result of a mandate.

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.

The agency is Department of Professional and Occupational Regulation.

Section 54.1-201 of the Code of Virginia provides, in part:

- A. The powers and duties of regulatory boards shall be as follows:
 1. To establish the qualifications of applicants for certification or licensure by any such board, provided that all qualifications shall be necessary to ensure either competence or integrity to engage in such profession or occupation.
 5. To promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) necessary to assure continued competency, to prevent deceptive or

misleading practices by practitioners and to effectively administer the regulatory system administered by the regulatory board. The regulations shall not be in conflict with the purposes and intent of this chapter or of Chapters 1 (§ 54.1-100 et seq.) and 3 (§ 54.1-300 et seq.) of this title.

Purpose

Describe the specific reasons why the agency has determined that this regulation is essential to protect the health, safety, or welfare of citizens. In addition, explain any potential issues that may need to be addressed as the regulation is developed.

The General Assembly has charged DPOR with the responsibility for regulating those who use a polygraph to test or question individuals for the purpose of determining truthfulness.

As mandated by the General Assembly, DPOR protects the public welfare, in part, by establishing through regulation (i) the minimum qualifications of applicants for certification or licensure, provided that all qualifications are necessary to ensure either competence or integrity to engage in the profession or occupation; (ii) minimum standards to assure continued competency and to prevent deceptive or misleading practices by practitioners; and (iii) requirements to effectively administer the regulatory system administered by DPOR.

As the regulation is developed, DPOR, in accordance with Executive Directive Number One (2022), will review discretionary requirements imposed on regulated parties to determine whether such requirements impose burdens that are not necessary to protect the public health, safety, and welfare; or are not necessary to effectively administer the licensure program. To the extent any such current requirement may not be necessary to protect the public health, safety, and welfare, or not necessary to effectively administer the licensure program, DPOR will consider eliminating the requirement.

These issues are not inclusive of all potential issues that may be addressed during development of the regulation.

Substance

Briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.

The Polygraph Examiners Advisory Board (“the Board”) is conducting a review of this regulation. Pursuant to 18VAC120-30-30, the Board advises DPOR on any matters relating to the practice of polygraphy and the licensure of polygraph examiners in Virginia. The Board’s membership includes licensed polygraph examiners employed by law enforcement agencies and licensed polygraph examiners employed by private industry.

The Board is performing a review of the regulation. The Board is expected consider recommending the substantive changes detailed below. However, the Board may consider recommending other changes prior to DPOR’s adoption of the proposed regulation.

Part I – Definitions (18 VAC 120-30-10 et seq.):

Explanation of Terms (18 VAC 120-30-20): This section will be repealed as it is no longer necessary. The Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10) published by the Virginia Code Commission provide for general rules of construction for regulations, including for gender and number.

Part II – Entry Requirements (18 VAC 120-30-40 et seq.):

Registration of Polygraph Examiner Interns (18 VAC 120-30-50): The education requirements of this section will be revised to provide that an intern applicant complete training in detection of deception at an accredited American Polygraph Association (APA) Training Program or an equivalent polygraph school. Currently, an intern applicant must complete training at a polygraph school approved by DPOR. This change will effectively make all APA accredited training programs “board-approved.” An intern applicant may still submit evidence of completing substantially equivalent training to meet the education requirement.

Qualifications for Licensure by Examination (18 VAC 120-30-55): The experience requirements of this section will be revised to remove the provision that an applicant for licensure have experience as a registered intern examiner under the “personal and direct on premise” supervision of a qualified examiner. As revised, an applicant for licensure would be required to have six (6) months of experience under the supervision of a qualified examiner. The change is designed to create flexibility for individuals to gain the required experience as registered interns and reduce the restrictiveness of the regulation.

Qualifications for Licensed Polygraph Examiners to Act as Supervisors of Polygraph Interns (18 VAC 120-30-60): The provisions of this section will be revised to reduce from three (3) years to two (2) years the length of time an individual is required to be licensed as an examiner in order to qualify to supervise a registered intern examiner. The change is designed to align the regulation with experience requirements for law enforcement training, where an individual can become a field training officer after two years.

Procedures for Licensed Polygraph Examiners to Certify the Procedures to be Used to Supervise an Intern During an Internship (18 VAC 120-30-70):

- The provisions of this section will be revised to remove the requirements in subsection A that a licensee supervising an intern file with the intern’s registration application a description regarding how the intern will be supervised. Currently, a supervising licensee must file with the intern’s application a description of (i) the frequency and duration of contact between the licensee and the intern; (ii) the procedures the licensee will employ in reviewing and evaluating the intern’s performance; and (iii) the polygraph techniques that will be used. These provisions are being removed to provide flexibility to licensees that supervise interns. Licensees may not be able to conduct examinations as frequently as specified in the description provided with the application.
- The provisions of current subsection B of this section will be revised to clarify that a licensee supervising an intern review the intern’s charts “for quality control and address any deficiencies” prior to the intern rendering an opinion or conclusion on any polygraph administered by the intern. Currently, a supervising licensee is required to review the intern’s charts. The clarification is intended to align the requirements of the regulation to current industry practice.

Qualifications for Licensure by Reciprocity (18 VAC 120-30-80): The provisions of this section will be revised to remove the requirement that an individual licensed as a polygraph examiner in another jurisdiction must have been a licensed examiner engaged in polygraphy for at least 12 months prior to applying for licensure in Virginia. This requirement is being removed to reduce the restrictiveness of the regulation.

Part V – Standards of Practice and Conduct (18 VAC 120-30-200 et seq.):

Examination Standards of Practice (18 VAC 120-30-220):

- The provisions of subsection B will be revised to provide that an examiner cannot perform more than five (5) polygraph examinations in any 24-hour period. Currently, an examiner is not permitted to perform more than 12 polygraph examinations in any 24-hour period. This change is being made to align the regulation with current industry practice.

- The provisions of subsection D will be revised to provide that an examiner allow a minimum time interval of 20 seconds between an examinee’s answer to question from an examiner and the start of the next question from the examiner. Currently, an examiner must allow a minimum of 10 seconds between an examinee’s answer and the start of the next question. This change is being made to align the regulation with current industry practice.
- The provisions of subsection E will be revised to provide that a polygraph test chart contain the examiner’s name. Currently, a polygraph test chart is only required to contain the examiner’s initials. This change is being made to align the regulation with current industry practice.
- The provisions of subsection F will be revised to update the terminology used for evaluations that are rendered during a polygraph test. Currently, an examiner is required to render an evaluation of “deception indicated,” “no deception indicated,” or “inconclusive.” As revised, an examiner would be required to render an evaluation of “significant response,” “no significant response,” or “inconclusive.” The change aligns this standard in the regulation with standard used by the National Counterterrorism Center.

Prohibited Acts (18 VAC 120-30-240): The prohibited act in subdivision 10 will be revised to provide that failure to report any conviction for a non-marijuana misdemeanor to the Board within 30 days is a prohibited act. Currently, a regulant is required to report non-marijuana misdemeanor convictions for activities carried out while engaged in the practice of polygraphy. The change would align this prohibited act with the prohibited act in subdivision 3 which provides that conviction for a non-marijuana misdemeanor is a prohibited act.

As the regulation is developed, the Board, in accordance with Executive Directive Number One (2022), will review discretionary requirements imposed on regulated parties to determine whether such requirements impose burdens that are not necessary to protect the public health, safety, and welfare; or are not necessary to effectively administer the licensure program. To the extent any such current requirement may not be necessary to protect the public health, safety, and welfare, or not necessary to effectively administer the licensure program, the Board will consider eliminating the requirement.

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.

A goal of this regulatory action is to review of discretionary requirements imposed on regulated parties to determine whether such requirements impose burdens that are not necessary to protect the public health, safety, and welfare; or are not necessary to effectively administer the licensure program, in accordance with the regulatory reduction goal of Executive Directive Number One (2022). As the regulation is developed, DPOR will consider potential alternatives to existing requirements that may be less burdensome or intrusive while still meeting the essential purpose of the regulation.

Periodic Review and Small Business Impact Review Announcement

If you wish to use this regulatory action to conduct, and this NOIRA to announce, a periodic review (pursuant to § 2.2-4017 of the Code of Virginia and the ORM procedures), and a small business impact review (§ 2.2-4007.1 of the Code of Virginia) of this regulation, keep the following text. Modify it as necessary for your agency. Otherwise, delete the paragraph below and insert “This NOIRA is not being used to announce a periodic review or a small business impact review.”

This NOIRA is not being used to announce a periodic review or a small business impact review.

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. In addition, as required by § 2.2-4007.02 of the Code of Virginia, describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Board is conducting a review of this regulation. Pursuant to 18VAC120-30-30, the Board advises DPOR on any matters relating to the practice of polygraphy and the licensure of polygraph examiners in Virginia. The Board held meetings in February 2023 and July 2023. These meetings included opportunities for public comment. Future meetings of the Board will include opportunities for public comment.

The Department of Professional and Occupational Regulation is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, and (iii) the potential impacts of the regulation.

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:

Marjorie King
Executive Director
9960 Mayland Drive
Perimeter Center, Suite 400
Richmond, VA 23233
polygraph@dpor.virginia.gov
(866) 430-1033 (fax)

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 the proposed stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.