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Notice of Intended Regulatory Action (NOIRA) 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	March 24, 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*.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action.

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 identifies the process for conducting the background check. This regulatory action is intended update the regulation to address the current VCheck technology used by the Department of State Police. 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 and remove language that conflicts with the requirements set forth in the Code of Virginia.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and(2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency'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 describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.

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 State Police, while facilitating the sales of firearms to the law abiding public.

Substance

Please 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 following substantive revisions are being considered:

- 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 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 State Police receive 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 State Police to use alternate systems as technology capabilities change.
- Adding language requiring the second form or 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.
- 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. This language is no longer necessary as the background checks are instantaneous.
- Removing language requiring DCJS 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 "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 State Police. State Police monitor criminal history record information transactions and if there suspicion or evidence a dealer is inappropriately requesting or misusing criminal history records information a criminal investigation is initiated.

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.

There are no viable alternatives. 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 State Police for the purpose of criminal history records checks for the transfer of firearms.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency's contact if you're interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for 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 and a panel will not be used following the publication of the proposed stage of this regulatory action.

Periodic review and small business impact review report of findings

If this NOIRA is the result of a periodic review/small business impact review, use this NOIRA to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) 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 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.

Commenter	Comment	Agency response
Aaron Stevenson	6VAC20-130-30(B)(4) should be stricken 6VAC20-130-30(B) lists classes of transactions that are exempt from regulation. The exemptions are	Thank you for your comments. This issue was reviewed by DCJS's representative from the Office of the Attorney General.

	<p>taken directly from Virginia Code §18.2-308.2:2(I), which enumerates the exceptions.</p> <p>The fourth exemption, 6VAC20-130-30(B) (4), pertaining to transactions that are subject to certain local ordinances, was deleted from §18.2-308.2:2(I) with the enactment of HB530 (Chapter 837) in 2004.</p> <p>Prior to that enactment, the firearms 'preemption' statute (§15.2-915) forbade counties and cities from enacting ordinances regulating the transfer of firearms, but preserved ordinances that had been enacted prior to January 1, 1987 under a 'grandfather' clause. HB530 abolished the grandfather clause, thereby invalidating the earlier ordinances as well.</p> <p>6VAC20-130-30(B) (4) is an obsolete reference to a portion of the Virginia Code that no longer exists. It should therefore be stricken.</p>	
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The regulation is still necessary as it 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 State Police, while facilitating the sales of firearms to the public. The regulation does overlap and duplicate federal and state law. References to federal law 18 U.S.C § 921 et seq are included throughout the regulation. Language in sections of the document duplicates the state statute. This duplication is serves to revise and correct regulatory language that currently conflicts with the Code of Virginia and to ensure that dealers have the correct information related to criminal history information background checks for firearms when reviewing either the Code of Virginia or the Virginia Administrative Code. This regulation was last reviewed and amended in July of 1992.