

Report to the Governor and the General Assembly of Virginia

Operations and Performance of the Department of Professional and Occupational Regulation

2018



Joint Legislative Audit and Review Commission

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Summary: Operations and Performance of the Department of Professional and Occupational Regulation

WHAT WE FOUND

DPOR licensing requirements are generally appropriate, but regulation of some occupations may not be warranted

Requirements to enter and remain in DPOR occupations appear appropriate to protect consumers and are not overly burdensome to applicants. The requirements for DPOR's largest occupations are largely in line with the requirements set by Virginia's neighboring states, and most regulated individuals reported that licensing requirements were appropriate.

There are 11 occupations regulated by DPOR that do not appear to meet the criteria for regulation that are established in the Code of Virginia. These occupations include community managers, opticians, residential energy analysts, soil scientists, waste management facility operators, landscape architects, natural gas automobile mechanics, and others. State statute clearly indicates that the state should *not* restrict access to any occupation unless it is "necessary for the protection or preservation of the health, safety, and welfare of the public" (§ 54.1-100). These occupations do not meet the criteria, and regulation of these occupations could be reduced or eliminated through legislation.

Licensing process could better evaluate applicants' qualifications and be less cumbersome for both applicants and DPOR staff

DPOR's application review and approval process ensures that all necessary information is received before an application is approved, but it does not always verify the accuracy of the work experience or criminal and disciplinary history reported by the applicant. DPOR does not regularly audit education providers for the occupations it oversees to confirm they are operating legitimately.

Overall, DPOR issues licenses in a timely manner, taking less than the goal of 30 days on average to process applications. However, the many limitations of DPOR's licensing IT system create challenges for both staff and applicants. The system does not allow DPOR to offer basic, user-friendly online services and does not effectively automate key licensing processes.

WHY WE DID THIS STUDY

In 2017, the Joint Legislative Audit and Review Commission directed staff to study the Department of Professional and Occupational Regulation (DPOR). JLARC staff reviewed the department's staffing and organization, its processing of occupational licenses, and enforcement of occupational rules. JLARC staff also assessed the affordability of fees and processes for adjusting fees.

ABOUT DPOR

DPOR is charged with protecting the health, safety, and welfare of the public by licensing qualified individuals and businesses and enforcing standards of professional conduct for a wide variety of professions and occupations. DPOR is funded through the fees that it charges applicants, and has a non-general fund budget of \$23 million.

DPOR has charged higher-than-needed fees in the past, resulting in current, large fund balances

DPOR is funded by the fees it charges to applicants, and those fees are based on the expenses the agency expects to incur. DPOR's method for calculating fees has over-projected agency expenses and led to unnecessarily large increases to the fees charged under two of its largest boards (Board for Contractors and Board for Barbers and Cosmetology). These past fee increases contributed to the agency's current, high balances. DPOR has since reduced most of those fees, and the current fees are generally not over-collecting and are not excessive compared to other states. However, DPOR and its boards are not adequately monitoring when fee changes are needed or projecting what those changes should be. Statutory requirements that are intended to keep DPOR from accruing excessive fund balances have not been effective.

DPOR closes some cases prematurely and could improve the fairness and consistency of disciplinary decisions

DPOR staff closed a majority (71 percent) of the cases that it opened in FY17, and not all staff decisions about these cases were well supported. DPOR's boards have not established well-defined criteria for when staff can close cases, and such decisions are overly reliant on staff discretion. This creates a risk that regulants who have committed serious rule violations will not be held accountable for potentially harmful practices.

DPOR staff do not investigate all potential violations committed by regulants, even when they are aware of the violations. DPOR could also better identify violations by performing routine inspections. DPOR also has insufficient authority to deter individuals or businesses that are practicing without a license, and concerns have been raised about the prevalence of unlicensed practice.

DPOR's disciplinary process provides regulants who have allegedly committed a violation with sufficient due process. However, the process could be improved by providing regulants an additional opportunity to present their case. DPOR levies fines and other sanctions on regulants who are found to have committed a violation, but DPOR does not have well-developed sanction guidelines.

DPOR's organization does not ensure that core functions receive sufficient focus from management

DPOR's operations should be organized to ensure that its core functions are well supervised and that the division of responsibilities across the agency is logical and clear. Licensing is one of the agency's core functions, but the licensing division has several extraneous responsibilities that contribute to the substantial size of the division and could prevent its managers from effectively supervising the licensing function. This includes several important IT-related functions that should instead be managed by DPOR's IT division. It also includes some executive-level functions that could be more effectively handled.

DPOR's leadership has not sufficiently addressed long-standing agency problems

DPOR has several long-standing problems that impede its ability to fulfill its mission of protecting consumers through effective occupational licensing and enforcement. These problems have persisted because DPOR's leadership has not identified the problems in need of a resolution or taken adequate steps to address known problems. These long-standing problems have contributed to staffing shortages in key agency divisions, inefficient IT systems that are fundamental to effective agency operations, and vulnerability to licensing fraud.

WHAT WE RECOMMEND

Legislative action

- Eliminate regulation of community managers, opticians, residential energy analysts, and natural gas automobile mechanics.
- Require that any legislation to increase or begin regulation of an occupation under DPOR first be evaluated for regulation by DPOR's Board for Professional and Occupational Regulation.
- Establish a cap on board fund balances and require DPOR to distribute to current regulants the funds that exceed the cap.
- Authorize DPOR to issue cease and desist notices to individuals and businesses found to be engaged in the unlicensed practice of an occupation that is licensed by DPOR.

Executive action

- Develop a plan for upgrading or replacing the agency's licensing IT system.
- Establish specific criteria for closing enforcement cases at various stages, and develop formal guidance that addresses the types of cases and circumstances under which staff may close a case without board review.
- Resume unannounced inspections and audits for certain occupations, and establish specific protocols for how all potential violations uncovered during an investigation should be handled.
- Take action to address staff vacancies, remove non-licensing functions from the licensing division, and develop an internal plan to address long-standing agency problems.

The complete list of recommendations is available on page v.

Recommendations: Operations and Performance of the Department of Professional and Occupational Regulation

RECOMMENDATION 1

The General Assembly may wish to consider amending the Code of Virginia to eliminate the occupational regulation of common interest community managers, opticians, and residential energy analysts and firms. (Chapter 2)

RECOMMENDATION 2

The Board for Professional Occupational Regulation (BPOR) should review the need for continued regulation of soil scientists, waste management facility operators, and landscape architects. In carrying out these reviews, BPOR should follow the guidelines set in § 54.1-311 of the Code of Virginia for determining the need for regulation and the appropriate degree of regulation for an occupation. BPOR should begin reporting its evaluation findings to the General Assembly by December 31, 2019 and complete these evaluations by December 31, 2020. (Chapter 2)

RECOMMENDATION 3

The Board for Professional Occupational Regulation (BPOR) should review the need for continued state certification of (i) common interest community manager employees; (ii) interior designers; (iii) backflow prevention device workers; and (iv) wetland delineators. BPOR should begin reporting its evaluation findings to the General Assembly by December 31, 2019 and complete these evaluations by December 31, 2020. (Chapter 2)

RECOMMENDATION 4

The General Assembly may wish to consider eliminating regulation of natural gas automobile mechanics and technicians by repealing §§ 54.1-2355 through 54.1-2358 of the Code of Virginia. (Chapter 2)

RECOMMENDATION 5

The General Assembly may wish to consider amending the Code of Virginia to require that any proposed legislation to increase or begin regulation of an occupation under the Department of Professional and Occupational Regulation (DPOR) must first be evaluated by the Board for Professional and Occupational Regulation (BPOR) using the criteria described in § 54.1-311 of the Code of Virginia. (Chapter 2)

RECOMMENDATION 6

The Department of Professional and Occupational Regulation (DPOR) should establish one or more positions vested with the following agency-wide duties: (i) coordinate and assist in the development of agency regulations; (ii) coordinate agency legislative efforts; (iii) lead agency communications with external parties; and (iv) serve as staff to the Board for Professional and Occupational Regulation (BPOR). (Chapter 2)

RECOMMENDATION 7

The Secretary of Commerce and Trade should complete the executive review of two pending regulatory actions: (i) lead-based paint renovation, repair, and painting regulations; and (ii) the proposed fee increase for hearing aid specialists. (Chapter 2)

RECOMMENDATION 8

The boards for the Department of Professional and Occupational Regulation (DPOR) should develop formal guidance describing when board review of an application for a license is necessary based on the applicant's reported criminal convictions. Guidance should describe the types of felonies and misdemeanors that warrant board review and how long they remain relevant to an application. (Chapter 3)

RECOMMENDATION 9

The Department of Professional and Occupational Regulation (DPOR) should begin performing reviews of randomly selected applications to verify work experience. Reviews should be conducted on an ongoing basis and should include at least five percent of the completed applications received by each of DPOR's boards each year. (Chapter 3)

RECOMMENDATION 10

The General Assembly may wish to consider amending the Code of Virginia to give the Department of Professional and Occupational Regulation (DPOR) authority to request and receive criminal record name searches as part of the review of individuals for initial licensure for any of the occupations that it regulates. (Chapter 3)

RECOMMENDATION 11

The Department of Professional and Occupational Regulation (DPOR) should perform checks of new applicants for past occupational disciplinary violations when there is evidence that the applicant may have recently worked in another state. (Chapter 3)

RECOMMENDATION 12

The Department of Professional and Occupational Regulation (DPOR) should perform regular unannounced site audits of education providers for personal care occupations and real estate professionals to confirm that they are operating legitimately. Audits should include at least five percent of education providers for those occupations, each year. Every newly approved education provider should be audited within a year of approval. (Chapter 3)

RECOMMENDATION 13

The Department of Professional and Occupational Regulation (DPOR) should develop an internal plan to replace or upgrade the current licensing system. The new or improved licensing system should have the capacity to (i) accept and process applications and payments online; (ii) improve the ease of online renewals; and (iii) integrate licensing data with enforcement case management data. The plan should identify the expected staffing needs during and after the system upgrade or replacement project, how staffing needs will be met, and the cost of the proposed upgrade or project. The plan should be submitted to the Department of Planning and Budget, along with the agency's appropriation request, by July 1, 2019. (Chapter 3)

RECOMMENDATION 14

The Department of Professional and Occupational Regulation (DPOR) should conduct a comprehensive assessment of the staffing needs of its five licensing sections and take steps to address unmet staffing needs. The purpose of the assessment is to ensure that each section has sufficient staffing resources to (i) meet DPOR's performance goals for processing transactions and handling customer inquiries and (ii) perform the needed verifications and audits recommended in this report. If the assessment finds additional positions are needed, DPOR should evaluate whether existing part-time positions in the licensing sections should be converted to full-time positions and if existing positions elsewhere in DPOR can be reallocated to the licensing sections. (Chapter 3)

RECOMMENDATION 15

The Board for Contractors should require all licensed contractors to complete an in-person education course that explains all of their occupational rules before they can receive their license. This requirement should go into effect by December 31, 2019. (Chapter 4)

RECOMMENDATION 16

The Department of Professional and Occupational Regulation (DPOR) staff should email regulants of the Board for Contractors and the Board for Barbers and Cosmetology at least annually to inform them of all changes to occupational rules. (Chapter 4)

RECOMMENDATION 17

The Department of Professional and Occupational Regulation (DPOR) should establish an evidentiary standard for evaluating whether to advance regulatory enforcement cases from the intake to the investigation stage. The standard should be a relatively low burden of proof, such as "reasonable suspicion." Cases that meet the standard should not be closed. (Chapter 4)

RECOMMENDATION 18

The Department of Professional and Occupational Regulation (DPOR) should establish “preponderance of evidence” as the evidentiary standard for advancing regulatory enforcement cases from the investigation stage. Cases that meet the standard should not be closed. (Chapter 4)

RECOMMENDATION 19

The Department of Professional and Occupational Regulation (DPOR) should develop an internal policy that defines specific criteria that must be met before a case can be closed by enforcement staff for lack of jurisdiction or reasons other than insufficient evidence or compliance. (Chapter 4)

RECOMMENDATION 20

All regulatory boards under the Department of Professional and Occupational Regulation (DPOR) should develop a process through which board members, or board staff with delegated authority, review and approve all decisions made by enforcement staff to close regulatory enforcement cases for insufficient evidence, or reasons other than compliance or lack of jurisdiction, at the intake and investigation stages. (Chapter 4)

RECOMMENDATION 21

All regulatory boards under the Department of Professional and Occupational Regulation (DPOR) should develop formal guidance that addresses (i) whether they wish to delegate authority to DPOR staff to close enforcement cases for compliance and (ii) the circumstances under which cases cannot be closed for compliance. Each board should have its guidance in place no later than December 31, 2019. (Chapter 4)

RECOMMENDATION 22

The Department of Professional and Occupational Regulation (DPOR), in consultation with DPOR regulatory boards, should develop formal guidance that prescribes whether and under what circumstances DPOR staff should fully investigate and act on violations identified during an investigation. Guidance should be finalized no later than December 31, 2019. (Chapter 4)

RECOMMENDATION 23

The Board for Barbers and Cosmetology should direct Department of Professional and Occupational Regulation (DPOR) staff to conduct unannounced inspections of personal care shops and salons in Virginia to ensure compliance with occupational rules. Inspections should begin by July 1, 2019. (Chapter 4)

RECOMMENDATION 24

The Board for Contractors should direct Department of Professional and Occupational Regulation (DPOR) staff to conduct unannounced audits of contracting documents to ensure compliance by contractors with occupational rules. Audits should begin by July 1, 2019. (Chapter 4)

RECOMMENDATION 25

The Department of Professional and Occupational Regulation (DPOR) should establish a standardized process through which regulants under each board can formally request that their regulatory enforcement case, which has reached the full board, be remanded for an informal fact finding (IFF) conference. This process should be available to any regulant who (i) has a reasonable basis to claim that the initial IFF conference was unfair; (ii) has new evidence to present that is integral to the case; or (iii) did not initially opt for an IFF conference but would like one. (Chapter 4)

RECOMMENDATION 26

The Department of Professional and Occupational Regulation (DPOR) should develop detailed sanction guidelines for occupational rule violations. The guidelines should provide direction on (i) factors to be considered in sanction decisions; (ii) appropriate sanctions for particular violations; and (iii) how sanctions should escalate for multiple or subsequent violations. (Chapter 4)

RECOMMENDATION 27

The General Assembly may wish to consider amending § 54.1-111 of the Code of Virginia to authorize the director of the Department of Professional and Occupational Regulation (DPOR), or a designee, to issue cease and desist notices to individuals and businesses that are found through investigation to be engaged in the unlicensed practice of occupations overseen by DPOR and its boards. (Chapter 4)

RECOMMENDATION 28

The Department of Professional and Occupational Regulation (DPOR) should develop criteria for determining when to issue cease and desist notices to individuals and businesses determined to be practicing a profession or occupation without the required license. DPOR should begin issuing cease and desist notices for unlicensed practice when the criteria are met. The notices should explain DPOR's requirements for obtaining a license, and make clear that § 54.1-111 of the Code of Virginia establishes criminal penalties for unlicensed practice and gives DPOR authority to initiate a civil court action to enjoin unlicensed practice and to recover civil penalties for violations. (Chapter 4)

RECOMMENDATION 29

The Department of Professional and Occupational Regulation (DPOR) should base staffing cost assumptions on historical staffing costs when calculating the expense projections that are used to determine when fee changes should occur and what the new fees should be. (Chapter 5)

RECOMMENDATION 30

The Department of Professional and Occupational Regulation (DPOR) should report, at least annually, the fund status of each of the regulatory boards to its members. At a minimum, DPOR should provide a detailed explanation of revenues and expenditures for the previous year in comparison to what was projected, the board's current fund balance, and revenue and expense projections for two biennia into the future. (Chapter 5)

RECOMMENDATION 31

The General Assembly may wish to consider amending § 54.1-113 of the Code of Virginia as follows, effective July 1, 2022: (i) to require that a regulatory board must reduce its fees if the board's fund balance exceeds a certain percentage of expenses allocated to it for the previous biennium or a set dollar amount, whichever is greater; and (ii) to require that, at the close of any biennium, all unspent or unencumbered revenue in excess of the cap be distributed to current regulants. This amendment should only apply to the Department of Professional and Occupational Regulation (DPOR) and its regulatory boards. (Chapter 5)

RECOMMENDATION 32

The Department of Professional and Occupational Regulation (DPOR) should (i) immediately fill the assistant director position in its Human Resources division and (ii) assess whether additional full-time or part-time staff positions are needed in the human resources division to address current hiring backlogs. (Chapter 6)

RECOMMENDATION 33

The director, deputy directors, and division directors of the Department of Professional and Occupational Regulation (DPOR) should rank all vacant positions based on how critical they are to DPOR's ability to fulfill its responsibilities. Human resources staff should use the rankings to prioritize the advertising and filling of positions, using hiring processes that reflect best practices. (Chapter 6)

RECOMMENDATION 34

The Department of Professional and Occupational Regulation (DPOR) should transfer IT-related responsibilities for its licensing system and technical aspects of website management, records management, and electronic forms, from the licensing division to the Information Technology division. (Chapter 6)

RECOMMENDATION 35

The Department of Professional and Occupational Regulation (DPOR) should reassign to other divisions the following functions that are currently assigned to the licensing division: (i) handling Freedom of Information Act requests; (ii) scanning documents; (iii) managing policies and procedures; (iv) evaluating business processes; and (v) agency-wide training. (Chapter 6)

RECOMMENDATION 36

The Department of Professional and Occupational Regulation (DPOR) should develop an internal plan that describes its objectives for resolving long-standing problems. The plan should, at a minimum, include actions and timelines for addressing (i) DPOR's licensing fraud vulnerabilities; (ii) lack of guidance for enforcement decisions; (iii) key staff position vacancies; (iv) excessive fund balances; and (v) outdated information technology licensing system. DPOR should report on progress toward meeting objectives in its biennial report, starting with its next report. (Chapter 6)

Recommendations: Operations and Performance of the Department of Professional and Occupational Regulation

1 The Department of Professional and Occupational Regulation

SUMMARY The Department of Professional and Occupational Regulation (DPOR) is one of numerous state agencies tasked with regulating occupations in Virginia. DPOR regulates dozens of diverse occupations, ranging from contractors and cosmetologists to interior designers and auctioneers. DPOR regulants encompass about six percent of the Virginia workforce. By statute, DPOR and its regulatory boards are responsible for establishing qualifications and issuing licenses and other credentials, enforcing occupational rules, and setting fees and regulations. DPOR is a non-general fund agency, and most revenue comes from fees assessed for new credential applications or renewals of existing credentials.

In 2017 the Joint Legislative Audit and Review Commission (JLARC) approved a study resolution that directed JLARC staff to review the operation and performance of the Department of Professional and Occupational Regulation (DPOR). As part of this review, JLARC staff were directed to evaluate whether DPOR is organized and staffed efficiently to process occupational credentials, respond to complaints, and support the work of its regulatory boards; determine whether the standards of professional conduct established by the regulatory boards are appropriately enforced; determine whether standards and fees, and the processes for changing them, are reasonable; and compare DPOR's regulatory requirements to those of other states. (See Appendix A for study mandate.)

To address the mandate, numerous interviews were conducted with DPOR staff and board members. A survey of DPOR staff was completed, along with two surveys of DPOR regulants covering (1) licensing requirements and the application and renewal processes, and (2) the enforcement process. Statutes and regulations pertaining to occupational licensing requirements were reviewed for Virginia and nearby states. Data on DPOR's licensing and enforcement processes, fees and finances, and regulatory changes was collected and analyzed. (See Appendix B for a detailed description of research methods.)

A **regulant** is an individual or business who holds a credential issued by DPOR.

Virginia regulates occupations through numerous state agencies

Occupational regulation is the practice of a government requiring a person to obtain a credential to practice a profession. The purpose of occupational regulation is to protect consumers by (1) ensuring individuals and businesses have the minimum qualifications needed to safely practice their occupation; and (2) correcting unsafe activity

or conditions and removing unscrupulous individuals from the marketplace. Regulation is viewed as especially necessary when there is the possibility of serious physical or financial harm and the quality of services provided by individuals and businesses is difficult for consumers to evaluate. Accordingly, professions and occupations are regulated in Virginia when “the unregulated practice of the profession or occupation can harm or endanger the health, safety, or welfare of the public” (§ 54.1-100). Most occupational regulation is done at the state level, and DPOR is one of many state agencies tasked with occupational regulation (Table 1-1).

TABLE 1-1
Numerous state agencies regulate occupations in Virginia

Agency	Regulated occupations
Board of Accountancy	Accountants
Department of Behavioral Health and Developmental Services	Service providers for mental illness, developmental disabilities, substance abuse
Department of Criminal Justice Services	Private security occupations (alarm companies, security officers, etc.), bail bondsmen, locksmiths, private investigators, tow truck drivers
Department of Education	Teachers and school administrators
Department of Health Professions	Health professions in 13 fields: audiology and speech pathology, counseling, dentistry, funeral services, long-term care, medicine (medical doctors and various others), nursing, optometry, pharmacology, physical therapy, psychology, social work, and veterinary medicine
Department of Motor Vehicles	Drivers of commercial vehicles
Department of Professional and Occupational Regulation	Total of 44 occupations, including contractors, tradesmen, real estate professionals, cosmetologists, and professional engineers (full list in Appendix C)
Motor Vehicle Dealer Board	Car dealers and salespersons
State Corporation Commission	Insurance agents, mortgage loan originators, financial planners, investment advisors
Virginia State Bar	Attorneys
Virginia State Police	Safety inspectors performing state vehicle inspections

SOURCE: Code of Virginia and agency websites.

There are three levels of occupational regulation: licensing, certification, and registration. In Virginia, licensing is the most restrictive form of regulation. It is unlawful to practice a licensed occupation without a license. To gain and keep a license, the individual or business must meet certain requirements and standards set by the government, such as minimum hours of training. Certification is a less restrictive form of regulation because participation is voluntary. Individuals who meet prescribed standards can apply for permission to use a designated title, such as “certified interior designer.” Certification is beneficial for individuals practicing the occupation because it signals to consumers a certain level of competency and service quality. Registration is the least restrictive form

of regulation. Individuals are not required to meet specific requirements but are required to register with the government, providing name, address, and a description of services. Registration is intended to benefit consumers by deterring bad actors from entering the market and helping the government track who is practicing the profession.

The General Assembly determines which occupations are regulated and which agency is responsible for regulating them. Though agencies play a limited role in advising the General Assembly, they do not have the authority to autonomously decide which occupations should or should not be regulated. Shifting to a different level of regulation or regulating an additional occupation can only be done upon approval by the General Assembly (§ 54.1-311). The enabling statutes then direct the agencies to develop regulations regarding entry requirements and occupational rules for each occupation. Table 1-2 illustrates how authority is divided between DPOR and the General Assembly.

TABLE 1-2
DPOR and the General Assembly share authority for regulating occupations

Action	Responsible entity	
	General Assembly	DPOR
Decides which occupations to regulate	✓	
Decides which agency regulates each occupation	✓	
Develops regulations		✓
Issues licenses and other credentials		✓
Enforces occupational rules		✓

SOURCE: §§ 54.1-201 and 54.1-311 of the Code of Virginia.

DPOR regulates occupations by establishing minimum competencies and occupational rules

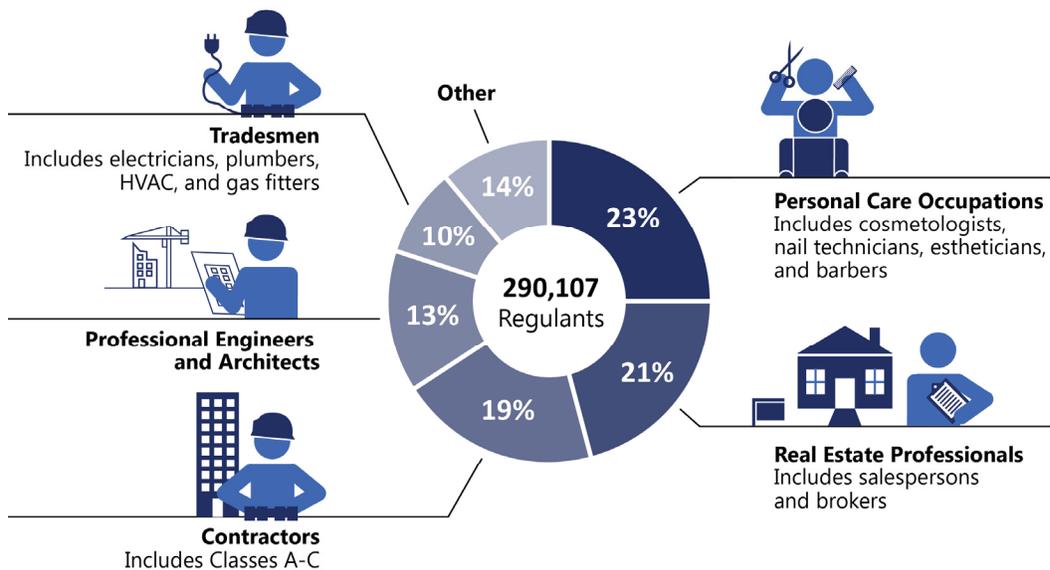
DPOR establishes qualifications, issues licenses and other credentials, enforces occupational rules, and sets fees and regulations for a wide variety of unrelated occupations. These occupations include professions with large membership, such as contractors and real estate salespersons, and professions with relatively small numbers, such as auctioneers, geologists, and tattooists. In total, DPOR issues 152 different types of licenses and other credentials to 44 occupation groups (Figure 1-1). (See Appendix C for full list.) The regulated community includes over 290,000 individuals and businesses, and accounts for about six percent of Virginia’s workforce (sidebar).

The number of occupations that DPOR has been directed through statute to regulate has increased over time. Since 2004, the General Assembly has directed DPOR to newly regulate nine occupations, and increased regulation, from voluntary certification to mandatory licensure, for four occupations (onsite sewage system professionals, landscape architects, soil scientists, and home inspectors). The General Assembly has

Percentage of Virginia workforce regulated by DPOR determined using the number of unique DPOR credential holders, as a portion of the total Virginia workforce. Non-occupational, inactive, and trainee credentials were excluded from this calculation.

only fully deregulated two occupations (mold remediators and hair braiders). Although the number of regulated *occupations* has increased, the population of *individuals* regulated by DPOR has actually decreased by about 2,000 (one percent) since 2009.

FIGURE 1-1
Occupations regulated by DPOR and percentage of total regulants



SOURCE: DPOR regulant population list.

NOTE: "Other" category includes 38 additional occupation groups. See Appendix C for full list. The number of regulants shown here double-counts some individuals who hold more than one credential. The number of unique DPOR credential holders is estimated to be 266,000.

When issuing licenses and other credentials, DPOR is required by statute to determine the minimum level of competency needed to practice an occupation. DPOR establishes requirements, such as minimum hours of training, that must be met to demonstrate competency. DPOR then issues licenses and other credentials to applicants who have satisfied those requirements. Credentials are awarded to individuals (barbers) and businesses (barber shops).

Most occupational rules are established in regulation by DPOR, but can also be set in statute by the General Assembly.

DPOR must develop regulations to ensure that occupations are practiced safely by its regulants. Regulations are created, amended, or repealed through the process defined in the Administrative Process Act (Title 2.2 Chapter 40) and in an executive order of the governor (Executive Order 14). DPOR is charged in statute with establishing and enforcing occupational rules to prevent deceptive actions by regulants and assure continued competency to practice the occupation. For example, contractors are required to have a written contract that includes cost estimates, work to be performed, and a scheduled completion date for construction projects, and must obtain signatures from all parties for modifications to the original terms.

Once the occupational rules are in place, DPOR has the authority to take disciplinary action in response to complaints about the conduct of a regulant. DPOR investigates complaints of misconduct and may take punitive action to correct inappropriate practices. The main punitive actions DPOR uses are fines, remedial education, and credential suspension or revocation.

The “License Lookup” on DPOR’s website provides public access to information on credentialed individuals and their disciplinary history. This function allows consumers to check the status of an individual or business credential to ensure it is up-to-date and view records of disciplinary action. DPOR staff have conducted outreach to improve public awareness of this feature, including attending conferences, setting up booths at hardware stores, and purchasing advertisements on Richmond city buses.

DPOR cannot require regulants to refund money or correct deficient work through the enforcement process. Individuals must pursue civil action through the court system if they wish to seek compensation for losses caused by regulants.

DPOR has 19 boards and is organized into six divisions

DPOR supports 19 boards composed of 196 members (Table 1-3). Members of most boards are appointed by the governor. Membership for each board includes a mix of representatives from the occupations they oversee and citizen members. The authority to establish qualifications, review applications and issue credentials, develop regulations, receive complaints concerning the conduct of a regulant, and take appropriate disciplinary action is largely assigned to the boards (§ 54.1-201). However, these responsibilities are predominantly carried out through the assistance of DPOR staff (§§ 54.1-304 and 54.1-306).

The workload of each board varies, and is mainly driven by the nature of the occupations and the number of regulants it oversees. Boards meet from one to more than six times each year, depending on the amount of business the board has to complete.

Of the 19 boards, 15 are regulatory boards. Regulatory boards are responsible for establishing entry requirements and issuing licenses and other credentials, making enforcement decisions, and authorizing any changes to regulations or fees. Regulatory boards are the highest authority for the occupations they oversee.

Three of DPOR’s boards are advisory boards: Boxing, Martial Arts and Professional Wrestling, Natural Gas Automobile Mechanics and Technicians, and Polygraph Examiners. These boards have less power than the regulatory boards. They are responsible for advising the DPOR director on core aspects of regulation, but the authority for making decisions regarding regulatory changes, fees, and credentialing and enforcement rests with the director.

In addition to the regulatory and advisory boards, DPOR has a policy board, the Board for Professional and Occupational Regulation (BPOR). The main responsibilities of BPOR are to advise the governor and DPOR director on occupational regulation and evaluate the need for regulation of any occupations that are not currently regulated

(§ 54.1-310). BPOR does not have supervisory authority to review or approve the DPOR budget or make changes to DPOR leadership.

TABLE 1-3
DPOR boards and their regulated populations (as of July 1, 2018)

Board	Population	Percentage of DPOR regulants
Contractors	86,662	29.9%
Barbers and Cosmetology	72,549	25.0
Real Estate	62,640	21.6
Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects	43,326	14.9
Asbestos, Lead, and Home Inspectors	6,189	2.1
Waterworks and Wastewater Works Operations and Onsite Sewage System Professionals	5,716	2.0
Real Estate Appraisers	3,896	1.3
Hearing Aid Specialists and Opticians	2,645	0.9
Auctioneers	1,437	0.5
Cemetery	1,257	0.4
Professional Soil Scientists, Wetland Professionals, and Geologists	1,161	0.4
Common Interest Community	822 ^a	0.3
Boxing, Martial Arts, and Professional Wrestling	792 ^b	0.3
Waste Management Facility Operators	670	0.2
Polygraph Examiners	301	0.1
Branch Pilots	44	0.0
Fair Housing	0 ^c	0.0
Natural Gas Automobile Mechanics and Technicians	0	0.0

SOURCE: DPOR regulant population list and board websites.

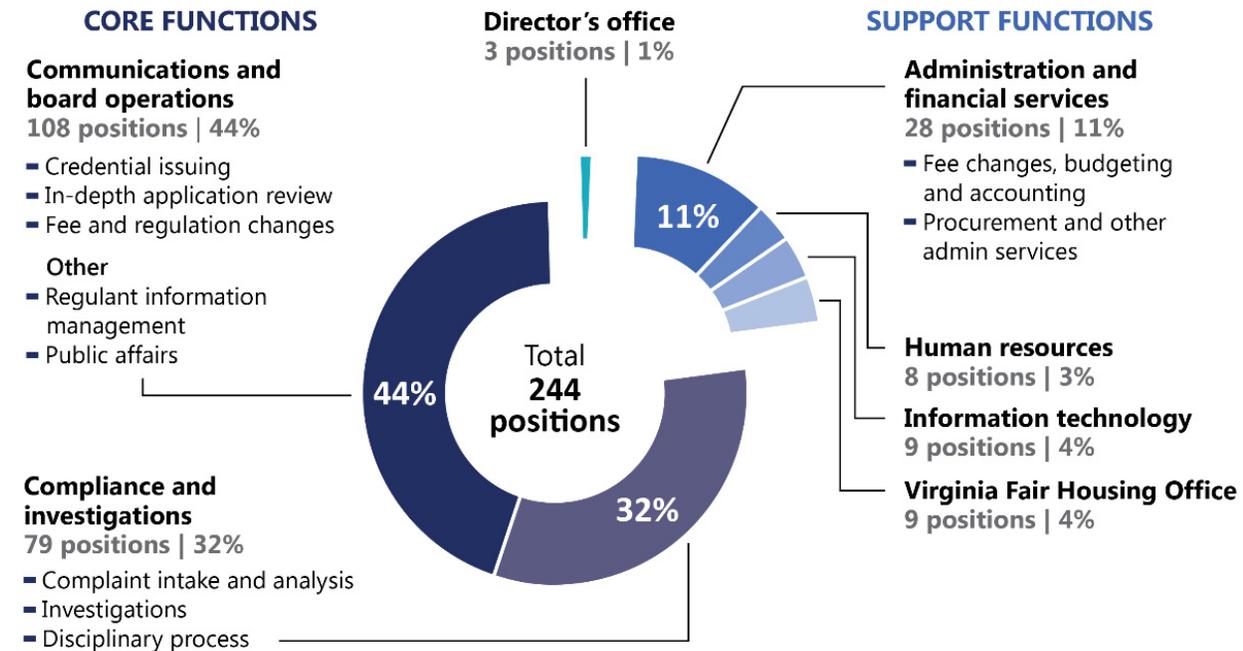
NOTE: Table does not include counts of real estate and tradesmen licenses with an inactive status or any training and interim licenses, including engineer-in-training, surveyor-in-training, appraiser trainees, and interim lead abatement licenses. Population count does not adjust for individuals who hold more than one credential under multiple boards. There are currently no regulants under the Natural Gas Automobile Mechanics and Technicians Advisory Board.

^aThe Common Interest Community Board also regulates 6,299 community associations, which have not been included as they are not related to an occupation. ^bThe Boxing, Martial Arts, and Professional Wrestling Advisory Board also regulates boxing and wrestling events, which have not been included as they are not related to an occupation.

^cThe Fair Housing Board regulates 2,466 certificate holders and nine instructors, which have not been included as they are not related to an occupation.

DPOR has nearly 250 staff positions within six divisions that carry out core and support functions (Figure 1-2). The largest division is Communications and Board Operations, which helps the boards issue licenses and other credentials. The division's main licensing functions are performed by five licensing sections. Staff in the licensing sections handle all licensing applications and renewals for their assigned boards. In FY18, DPOR staff processed 25,851 new applications and 125,914 renewals. DPOR staff also help the boards change fees and regulations, as well as provide general support to board members and coordinate meetings.

FIGURE 1-2
DPOR divisions and their main functions



SOURCE: DPOR organizational chart and interviews with DPOR staff.

NOTE: Includes full- and part-time positions; many positions are vacant. The Virginia Fair Housing Office investigates housing discrimination and administers and enforces Virginia Fair Housing Law. It does not serve a “core” occupational or support function.

Compliance and Investigations, the second largest division, is responsible for enforcing occupational rules. Division staff receive and analyze all incoming complaints about unsafe conditions or activity or irresponsible regulants. Staff investigate complaints for potential violations. The investigations section includes 11 positions within Central Investigations and 38 positions within Field Investigations, located in five regions throughout the state. If violations are found, staff carry out the disciplinary process that determines what punitive action, if any, is taken. In FY17, DPOR opened 2,545 enforcement cases (sidebar).

The Administration and Financial Services division mostly performs support functions but also assists with fee changes. As DPOR is primarily funded by fees, staff project future revenues and expenses to identify when fee changes may be necessary and work with the Communications and Board Operations staff to develop fee change proposals. DPOR may only introduce a few fee change proposals each year, but the financial services staff monitor and produce annual forecasts for each of DPOR’s boards, to ensure DPOR complies with the statutory requirements for making fee adjustments. The division also carries out a number of financial support functions—such as budgeting, accounting, and processing fee payments—and administrative functions such as procurement.

Enforcement cases include regulatory cases where an individual or business is alleged to have violated one of DPOR’s regulations or statutes, and unlicensed practice cases where an individual or business operates without a credential when one is required. DPOR also handles non-enforcement cases related to its recovery funds and the Fair Housing Board.

Information Technology (IT) is another key DPOR division because it is responsible for providing support for the licensing system used to issue credentials, the case management system used in the enforcement process, and IT support to the agency as a whole.

DPOR is primarily funded through fee revenues

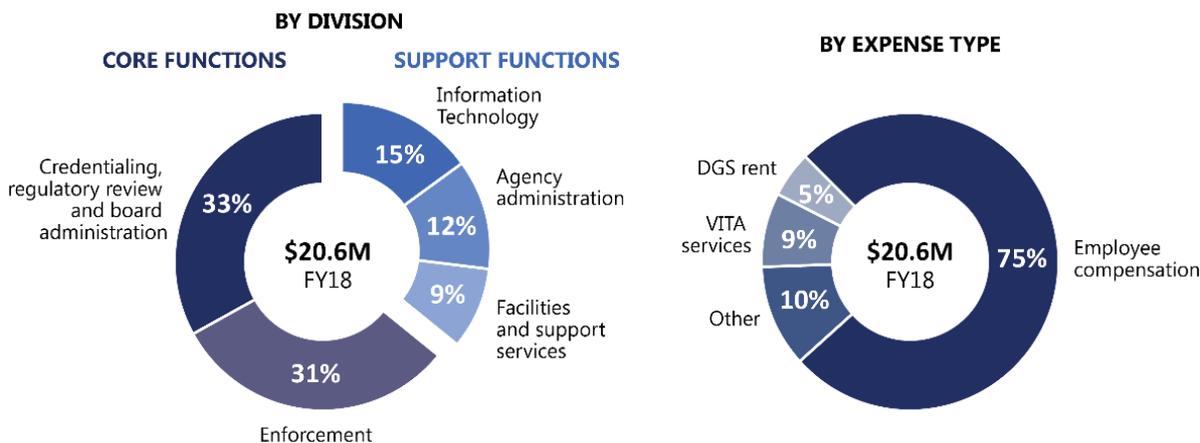
The Callahan Act (§ 54.1-113) requires DPOR to revise a board's fees when expenses are more than 10 percent greater or less than moneys collected on behalf of the board for the previous biennium.

DPOR is a non-general fund agency, and most of its revenue comes from fees assessed for new credential applications or renewals of existing credentials. Most of DPOR's costs are allocated by formula to each of its boards, with the exception of BPOR. For example, enforcement costs are allocated to each board based on the number of cases closed and orders issued, weighted by the number of licensees under the board. This approach of allocating costs subsidizes some of the smaller boards and makes it feasible to sustain their operations. Each board then sets fees charged to the individuals and businesses it regulates in order to adequately cover its share of agency costs. Application fees range from \$25 to \$580 and renewal fees range from \$20 to \$500. (See Chapter 5 for additional discussion of DPOR's fees.)

To ensure that fees are "sufficient but not excessive to cover expenses," DPOR is required to adjust fees in accordance with the Callahan Act (sidebar). DPOR staff use forecasts to determine when a fee change will be needed and provides the various occupational boards with fee change proposals for their consideration.

DPOR spends a majority of its funds on core functions and personnel (Figure 1-3). Nearly two-thirds of DPOR's spending supports core agency functions. The proportion of funds devoted to core functions has been relatively stable over time, fluctuating between 60 and 64 percent over the past five years.

FIGURE 1-3
DPOR spending by division and expense type



SOURCE: APA Data Point and DPOR board financial statements for FY18.

NOTE: "Other" category includes expenses such as attorney and legal services, employee and board member travel, and postal and printing services. Numbers may not add due to rounding.

Research shows that there are both costs and benefits to occupational regulation

The costs and benefits of occupational regulation have been the subject of increased national scrutiny. The Office of Economic Policy in the U.S. Department of the Treasury, the Council of Economic Advisers, and the U.S. Department of Labor (2015) and the National Conference for State Legislatures (2017) issued reports that summarized much of the literature on occupational licensing and concluded that the case for licensing is strongest when there is a high risk to consumers from low-quality practitioners, or when the quality of service providers is difficult to evaluate. Two later reports laid out conflicting viewpoints on the costs and benefits of licensing (Redbird 2017; Gittleman, Klee, Kleiner 2018). Occupational regulation can provide some benefits to consumers and practitioners, but the value of these benefits is difficult to determine, and there is no consensus among researchers regarding whether regulation is the most efficient way to provide them.

Proponents of occupational regulation maintain that it protects the health, safety, and welfare of consumers by providing a means of screening and monitoring unscrupulous individuals. Regulation may lead to higher service quality because it ensures providers have requisite skills and experience to carry out their occupation. It also offers a mechanism for removing unqualified parties from the occupation. For those individuals considering going into a profession, occupational regulation provides a clear path to entry by outlining the necessary education and experience. By restricting the occupation to those individuals who meet certain qualifications, occupational regulation can increase wages and add legitimacy to the occupation. This can be particularly beneficial for disadvantaged groups, including minorities and women.

However, opponents argue that occupational regulation may not be an effective or efficient means of reducing risks to consumers. Regulation imposes barriers to enter a given profession, but these barriers may not increase the quality of services or ensure competency of those practicing the occupation. Additionally, the costs imposed on practitioners, such as time and monetary costs to obtain education and training, may prevent otherwise qualified individuals from entering the market. This can increase the costs to consumers by restricting supply and reducing the availability of services. Restricting the market supply in a given profession can also hinder competition and innovation.

The impact of these costs and benefits can vary from one occupation to the next, depending on the risk of harm to consumers and whether there are any other mechanisms in place to mitigate this risk. The need for regulation is lower for those occupations that pose a low risk or where consumers can reasonably distinguish between good and bad providers. In general, however, there is insufficient research on the effectiveness of regulation in protecting the public, and because the existing research literature largely focuses on medical, teaching, and legal professions, the conclusions drawn are not directly applicable to DPOR and its regulated professions.

2 Regulation of Occupations

SUMMARY The General Assembly determines which occupations are regulated by DPOR. The Code of Virginia specifies that occupations should be regulated if they present a risk to public health, safety, or welfare and meet three additional criteria that are set in statute. DPOR's largest occupations, accounting for almost 90 percent of all regulants, meet the state's criteria and warrant regulation. However, six occupations with relatively few regulants are currently *licensed* but do not meet the criteria and do not warrant regulation. Five other occupations are currently *certified* by DPOR, but state certification appears unnecessary because there are well-recognized national certifications that serve the same purpose. The state has a process for evaluating whether individual occupations should be regulated by DPOR, but it has been rarely used in the past 15 years. Greater use of this evaluation process would help ensure the General Assembly is able to make fully informed decisions about which occupations should be regulated. DPOR develops many of the rules and requirements for regulated occupations, but is hampered by its decentralized internal process for developing regulations and the state's slow process for reviewing and approving regulations.

The General Assembly decides which occupations are regulated by the Department of Professional and Occupational Regulation (DPOR). The decision to regulate an occupation should consider two priorities: the need to protect the public and the need to avoid placing unnecessary restrictions on individuals and businesses entering the workforce. The Code of Virginia sets four criteria that must be met for an occupation to be regulated (§ 54.1-100):

- The unregulated practice of the occupation can harm public health, safety, or welfare.
- The occupation's work has inherent qualities that distinguish it from other occupations.
- The public needs and will benefit from state assurances of competency.
- The public is not effectively protected by other means.

The first criterion is the most important because it identifies the risk posed by the unregulated practice of an occupation. In most cases, it is the consumer of a service who is put at risk. For example, an individual getting a tattoo is at risk of bodily harm if the tattoo parlor does not sterilize its needles. Similarly, a company that employs a contractor to build an office building is at risk of financial loss if the contractor delivers poor or incomplete work. In some cases, unregulated practice of an occupation can put the general public at risk. For example, the general public would be at risk if

an engineer designs an unsafe bridge or if a waterworks treatment operator fails to properly treat the drinking water supply.

The second criterion determines if regulation is an effective means of addressing the risks that have been identified. Regulation is only effective if the work performed by the regulated occupation is unique and is not also performed by an unregulated occupation. For example, Virginia regulates electricians and electrical contractors. Both are allowed to do electrical work. If only electricians were regulated, regulation would be ineffective because electrical contractors would be allowed to perform the same work without state approval.

The third and fourth criteria determine if there are actual benefits from regulation. Regulation is only necessary (a) if it provides the public with the assurance that individuals and businesses are competent to safely perform their jobs and (b) if the risks from improper practice are not otherwise addressed. For example, by licensing real estate brokers, Virginia assures consumers that brokers have the basic training and experience needed to facilitate real estate transactions in compliance with state law. State assurance is necessary because there is no other direct oversight of a broker's activities.

JLARC staff assessed the need for regulating occupations by assessing the rationale for regulation, DPOR enforcement activity related to the occupation, extent of regulation in other states, state evaluations of the need for regulation, the availability of alternatives to regulation (e.g., national certifications), and the extent to which other parties may mitigate or eliminate the risks posed by the occupation.

After the state has determined that an occupation will be regulated, DPOR develops the regulations that will govern it. DPOR does this through the state's process for developing and issuing new regulations. Regulations define the entry requirements, occupational rules, and fees charged for a given occupation. Some regulatory rules and requirements are mandated by statute, and others are developed under the authority of DPOR and its boards.

Largest DPOR occupations meet statutory criteria for regulation

A few large occupation groups account for almost 90 percent of the individuals and businesses regulated by DPOR. Each of these large occupation groups meets the criteria Virginia has set for regulation, either in whole or in part (Table 2-1). These large occupation groups are contractors, tradesmen, real estate professionals, personal care occupations, professional engineers, and architects.

Contractors should be regulated because their work—if practiced improperly—poses financial risks to consumers. Contractors provide a variety of services to consumers, ranging from residential construction to road paving. The most likely harm is that a consumer pays a contractor for services and the contractor delivers poor or incomplete work. The consumer would then incur costs to correct or complete the work. For example, if a roofing contractor incorrectly re-shingles a house, the homeowner would have to hire another contractor to redo the work.

TABLE 2-1
DPOR’s largest occupations meet criteria for regulation

	Unregulated practice can harm public	Work is distinguishable from others	Public benefits from state assurance	Public is not protected by other means
Contractors 56,000 regulants	●	●	●	◐
Tradesmen 28,000 regulants	●	●	●	◐
Real estate professionals 62,000 regulants	●	●	●	◐
Personal care occupations 67,000 regulants	●	●	◐	◐
Professional engineers & architects 36,000 regulants	●	●	●	◐

KEY ●=meets criteria ◐=partially meets criteria ○=does not meet criteria

NOTE: Tradesmen include electricians, plumbers, HVAC technicians, and gas pipe fitters. Real estate professionals include brokers, salespersons, and their associated businesses. Personal care occupations include barbers, cosmetologists, estheticians, nail technicians, wax technicians, and their associated shops, salons, and spas.

Contractors account for almost half of all enforcement cases handled by DPOR (1,105 per year, on average), indicating a need for continued regulation. In about one in five enforcement cases, DPOR found the contractor had committed a violation (220 per year, on average). One of the most common violations was abandonment, when contractors did not complete the work that consumers paid them to perform. DPOR can compensate consumers for financial losses from the contractor recovery fund. DPOR has paid out \$4.5 million in recovery fund claims over the past five years. This figure represents only a portion of the total losses consumers have incurred because of negligent or incompetent contractors.

Virginia’s approach for regulating contractors is effective because regulation applies to most if not all people who perform this kind of work. Virginia regulates all of the types of contractors that pose a significant financial risk to consumers. (All contractors performing work valued at over \$1,000 must be licensed.) Consumers benefit from the assurance of a state license because most consumers are not otherwise able to determine if a contractor is qualified. Consumers are partially, but not fully, protected by other means. For example, state and local building codes, permitting requirements, and post-project inspections help reduce the risk of unsafe structures and low-quality workmanship. However, these measures do not protect consumers from financial risks.

Personal care occupations—barbers, cosmetologists, estheticians, nail technicians, wax technicians, and their associated shops, salons, spas, and schools—should be regulated based on health and safety risks. Individuals in these occupations have the potential to cause bodily harm to consumers, such as cuts, scrapes, and burns. Individuals and businesses that practice improper sanitation can put the consumer at risk of injury or

Enforcement cases include regulatory cases, in which a licensed regulant is investigated for violating DPOR regulations or statutes, and unlicensed activity cases, in which an individual or business is investigated for operating without a license. A violation of regulations is found to have occurred in about one in every four regulatory cases.

DPOR recovery funds exist to compensate consumers who have been harmed by regulants and are unable to recover losses through the civil court system. Three of DPOR’s boards have recovery funds: Board for Contractors, Real Estate Board, and Common Interest Community Board. The recovery funds are established in statute and funded through fees charged to regulants.

infection. While most injuries and infections are likely to be minor, there is a reasonable expectation that harm could occur.

Personal care occupations account for 227 enforcement cases and 31 violations each year, indicating a need for continued regulation. Only two other occupation groups had more cases or violations. Personal care schools and nail salons have a disproportionately large share of cases and violations, suggesting the risk associated with these establishments is higher than for the other personal care occupations. Wax salons and technicians have a disproportionately small share of cases and violations, suggesting that the risk associated with these occupations is lower. Nevertheless, there appears to be sufficient reason for regulation.

Virginia’s approach for regulating personal care occupations is effective because regulation applies to most if not all people performing this kind of work. (Hair stylists, the exception, were deregulated in 2018.) Consumers benefit from the assurance of a state license because many consumers are first-time customers and may not know if the individual they are seeing is qualified. Most consumers are likely unaware of whether the salon, shop, or spa they are visiting practices appropriate sanitation. Consumers are partially, but not fully, protected by other means. For example, local departments of health have the authority to inspect salons, shops, and spas. However, health inspections do not protect consumers from incompetent practitioners and, according to DPOR staff, are rarely performed in many jurisdictions.

The other large occupations—real estate professionals, tradesmen, professional engineers and architects—meet all the criteria for regulation in full or in part. There is a reasonable, risk-based rationale for regulating each of these occupations, and there is evidence that these occupations have been improperly practiced in Virginia, with negative consequences in some cases. Moreover, the public benefits from the assurance that state regulation of these occupations provides because it is not sufficiently protected by other means.

Unlike licenses, **certifications are voluntary.** Certified occupations can legally be performed by any individual or business without certification. An individual or business may choose to become state-certified because it shows prospective clients, customers, or employers that they are qualified to perform their work.

For several occupations, regulation may not be warranted

DPOR regulates several small occupation groups, which account for just over 10 percent of regulated individuals and businesses. Some of these small occupations are licensed, and others are voluntarily certified. For example, real estate appraisers, auctioneers, and opticians must be licensed to perform their occupations. It is illegal to perform these occupations in Virginia without a state license. Geologists and interior designers do not have to be licensed, but they do have the option to voluntarily obtain a state certification. (See Appendix C for a list of all occupations regulated by DPOR.)

Some licensed occupations do not substantially meet the criteria for regulation

Six occupations do not substantially meet the criteria Virginia has set for regulation (Table 2-2). Three of these occupations do not appear to pose a risk of harm (community managers, opticians, and residential energy analysts). Three occupations pose some risk of harm, but regulation is not needed because the public is protected by other means so the risk is low (soil scientist); or regulation provides little added benefit (waste management facility operators); or regulation does not fully address the risk because much of the same work can be performed by unregulated occupations (landscape architects).

Virginia’s licensing requirements restrict access to these six occupations. State statute clearly indicates that the state should *not* restrict access to any occupation unless it is “necessary for the protection or preservation of the health, safety, and welfare of the public” (§ 54.1-100). Applicants are required to meet education and experience requirements, pass exams, and pay application fees. They must renew their licenses every few years and are subject to disciplinary action if they violate occupational rules.

TABLE 2-2
Some licensed occupations do not substantially meet criteria for regulation

	Unregulated practice can harm public	Work is distinguishable from others	Public benefits from state assurance	Public is not protected by other means
Community managers 185 regulants	○	◐	◐	◐
Opticians 1,895 regulants	○	◐	◐	◐
Residential energy analysts & firms 127 regulants	○	●	◐	◐
Soil scientists 102 regulants	◐	●	◐	○
Waste mgmt. facility operators 670 regulants	◐	●	○	◐
Landscape architects 925 regulants	◐	◐	◐	◐

KEY ●=meets criteria ◐=partially meets criteria ○=does not meet criteria

Community managers

Community managers—officially “common interest community managers”—pose little risk to the public if left unregulated. Community managers are companies that contract with nonprofit homeowner and condominium associations. They are responsible for managing association finances, day-to-day maintenance and repair of common property, and contracting for services such as trash collection. There is a

PROFILE: Community manager**Board:** Common Interest Community Board**Regulants:** 185 businesses**Year licensed:** 2008**Number of states that regulate:** at least 8**Average enforcement cases per year:** 17**National certifications for occupation:**

Accredited Association Management Company; Professional Community Association Manager

risk that a community association could be defrauded by an unscrupulous community manager. However, associations are already protected against this risk because they are required to be bonded or insured against losses resulting from theft or dishonesty by managers and their employees. An incompetent community manager could potentially cause other financial harm to an association or its members by failing in its duties, but this risk appears remote. Community management appears to be *less* risky under a professional manager than when performed by a volunteer board. Also, the risks from incompetent community management are not unique. Volunteer boards and property managers at privately owned apartment complexes can perform all the same functions as community managers but are not subject to licensing or certification requirements.

Community managers are occasionally the subject of complaints in Virginia, but only one violation has been found to have occurred in the past five years. A 2006 DPOR study of community managers found no evidence to suggest a need for regulation. At the time, there was a concern that unscrupulous community managers were taking advantage of associations by not fully disclosing their fees. However, the DPOR study found that community managers' fees were clearly disclosed in their contracts.

Licensing community managers provides homeowner and condominium associations with assurance that the companies they hire meet qualification standards, but the same assurance is available through existing national certifications. Virginia recognizes these national certifications as largely fulfilling the requirements for a state license. National certification could therefore serve as an alternative to state regulation.

Opticians**PROFILE: Optician****Board:** Board for Hearing Aid Specialists and Opticians**Regulants:** 1,895 individuals**Year licensed:** 1954**Number of states that regulate:** 22**Average enforcement cases per year:** Three**National certifications for occupation:**

American Board of Optometry; National Contact Lens Examiners

Opticians would pose little risk to the public if left unregulated. Opticians fill prescriptions for eyeglasses and contact lenses and help customers pick out eyeglass frames. Opticians do not write prescriptions or craft lenses; prescriptions are written by licensed ophthalmologists or optometrists, and lenses are manufactured at ophthalmic laboratories. An incompetent optician could improperly fill a prescription, cut a lens wrong, or sell a customer ill-fitting frames, but the customer is likely to notice these errors and seek correction. Errors that are small enough to go unnoticed by the customer likely pose minimal risk to health and safety.

There is no evidence that opticians are improperly practicing their occupation in Virginia. Over the past 10 years, there have been an average of two or fewer complaints each year resulting in a DPOR investigation, and DPOR found only one violation of rules. DPOR found two or fewer cases of unlicensed activity per year. Opticians are currently regulated in 22 states. Alaska and North Carolina recently studied the regulation of opticians and concluded it may not be necessary, and Texas recently deregulated opticians.

Regulating opticians does not appear effective at reducing what few risks exist because the same services are provided by unlicensed individuals and businesses. Virginia allows individuals working under a licensed optometrist or ophthalmologist to perform optician work without their own license, and consumers are free to purchase eyeglasses and contact lenses over the internet with a valid prescription.

Licensing provides consumers and prospective employers with assurance that an optician meets qualification standards. However, existing national certifications for dispensing eyeglasses and contact lenses can also offer assurances. The national certification written exams are the same ones that are used for a Virginia optician's license. National certifications do not have the same education or experience requirements, but could serve as a less rigorous alternative to state regulation. Many opticians are employed by optometrists, and optometrists could rely on these national certifications when hiring opticians.

Residential energy analysts and firms

Residential energy analysts, and their related firms, pose little risk to the public if left unregulated. Analysts conduct energy audits on residential properties, identify ways to improve energy efficiency, calculate potential cost savings, and document their findings. The analyst may also conduct a post-implementation review to see if recommendations were properly implemented. An incompetent analyst could provide bad advice or perform a poor post-work inspection. If homeowners follow bad advice, and pay for unnecessary work, they could suffer a small financial loss. A home could also suffer minor damage from improper or incomplete weatherization. However, even these worst-case scenarios do not present the level of risk that would warrant the protections of state regulation.

There is no evidence that residential energy analysts are improperly practicing their occupation in Virginia. Since they became regulated in 2011, there have been no complaints resulting in DPOR investigation, no violations of rules found, and no cases of unlicensed activity. A 2011 DPOR study of residential energy analysts found no evidence to support the need for regulation. It does not appear that this occupation is licensed in other states, although at least two other states, California and Oregon, offer certification.

Licensing provides consumers with assurance that a residential energy analyst meets qualification standards, but the same assurance is available through existing national certifications for energy auditors. Virginia already recognizes national certification as fulfilling the requirements for a state license. National certification could therefore serve as an alternative to state regulation.

Soil scientists

Soil scientists pose little risk to the public if left unregulated. Soil science is a small and highly specialized field, with only 120 licensed individuals, and it is unlikely that there

PROFILE: Residential energy analyst or firm

Board: Board for Contractors
Regulants: 78 individuals and 49 businesses
Year licensed: 2011
Number of states that regulate: At least three
Average enforcement cases per year: None
National certifications for occupation: BPI Building Analyst; RESNET Home Energy Rater

PROFILE: Soil scientist

Board: Board for Professional Soil Scientists, Wetland Professionals, and Geologists

Regulants: 102 individuals

Year licensed: 2011 (was previously certified)

Number of states that regulate: Nine

Average enforcement cases per year: None

National certifications for occupation: Soil Science Society of America certification programs (CPSS, CPSC, and CST)

is widespread incompetency among practitioners. Many soil scientists work in government or academic settings, and their prospective employers have the knowledge needed to verify their competency. Some soil scientists provide services directly to consumers, such as consulting on land use for agriculture, conservation, or development. An incompetent soil scientist could provide bad soil maps or poor technical advice, potentially resulting in ineffective land use or land management problems.

Soil scientists can help determine the suitability of a site for construction of a structure by performing site investigations and laboratory testing. However, the risk of incompetent practice leading to a problem with a structure appears remote because many other experts are involved in the process. Engineers are responsible for providing technical expertise on structure foundations, and construction plans must be sealed by a licensed professional engineer and approved by local permitting authorities. Construction companies often employ geotechnical engineers, instead of soil scientists, to perform site investigations.

There is no evidence that soil scientists are improperly practicing their occupation in Virginia. Over the past 10 years, there have been a total of three complaints resulting in DPOR investigations, and DPOR found no violations of rules and no cases of unlicensed activity. Soil scientists are licensed in only nine states.

Licensing provides consumers and prospective employers, such as land developers, with assurance that a soil scientist meets qualification standards. However, the same assurance is available through an existing national certification. The national certification exam is the same one that is used for a Virginia soil scientist's license. National certification could therefore serve as an alternative to state regulation.

PROFILE: Waste management facility operator

Board: Board for Waste Management Facility Operators

Regulants: 670 individuals

Year licensed: 1991

Number of states that regulate: At least 23

Average enforcement cases per year: Less than one

National certifications for occupation: SWANA Manager of Landfill Operations; NWRA Certified Landfill Manager

Waste management facility operators

Waste management facility operators pose little risk to the public if left unregulated. Operators are individuals who manage the day-to-day operations of solid waste facilities, such as landfills and transfer stations. Incompetent management could result in unsafe practices, such as improper venting of landfill gases, that put employees at risk. Incompetent management could also result in environmental problems, such as groundwater contamination, or public health risks, such as vermin infestation. However, these risks are already addressed through regulation of solid waste facilities by the Virginia Department of Environmental Quality (DEQ). DEQ is the primary state agency charged with protecting human health and the environment in this area. DEQ monitors facility construction and compliance with operation requirements, including management of gas and risks to groundwater.

There is little evidence that waste management facility operators are improperly practicing their occupation in Virginia. Over the past 10 years, there was only one complaint resulting in a DPOR investigation, and DPOR found no violations of rules and only five cases of unlicensed activity. The board for this occupation rarely meets; the last stretch between meetings went from July 2016 until April 2018. The occupation is

regulated in 23 states, including Virginia, although some states and localities require operators to have a national certification.

State assurances are not necessary for waste management facility operators because they are not providing services to consumers or the general public. Instead, they are employed by facility owners, and facility owners could reasonably be expected to check the qualifications of the individuals they hire. A state license provides prospective employers with assurance that a waste management facility operator meets qualification standards, but the same assurance is available through national certification. National certification could serve as an alternative to state licensure or certification.

Landscape architects

Landscape architects pose some risk to the public, but regulation does not effectively address risks. Landscape architects design outdoor spaces for business and residential developments, campuses, recreational facilities, parks, traffic corridors, and other open areas. They develop plans for grading and drainage, retaining walls, and locating buildings, roads, walkways, and plants (trees, shrubs, and flowers). A poorly designed feature, such as a hill with an overly steep grade, could create a safety hazard. Other design flaws, such as improper drainage, could lead to property or environmental damage. However, individuals in other unregulated occupations, such as landscape designers, are allowed to perform largely the same work and present the same risks. The existence of unregulated occupations performing the same work suggests state regulation of landscape architects does not fully address risks.

There is little evidence that landscape architects are improperly practicing their occupation in Virginia. Over the past 10 years, there were four complaints resulting in a DPOR investigation, and DPOR found only one violation of rules and one case of unlicensed activity. The occupation is regulated to some extent in all 50 states, but seven states assessed the need for regulation and concluded that landscape architects should either be voluntarily certified or not regulated at all. A 1999 DPOR study concluded that “a licensure program for landscape architects is not warranted” because an existing voluntary certification was sufficient to protect the public.

Licensing provides consumers and prospective employers with assurance that a landscape architect meets qualification standards. However, the same assurance could be gained through a less restrictive voluntary certification program, similar to what Virginia had in place until 2010.

Regulation of several occupations should be eliminated or further evaluated

Regulation could be reduced or eliminated, through legislation, for those occupations that do not meet all the statutory criteria for regulation. The General Assembly could cease regulation of the three occupations for which unregulated practice is unlikely to harm the public (community managers, opticians, and residential energy analysts and firms).

PROFILE: Landscape architect

Board: Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects

Regulants: 925 individuals

Year licensed: 2009 (was previously certified)

Number of states that regulate: 50

Average enforcement cases per year: Less than one

National certifications for occupation: None

The General Assembly could also consider reducing or eliminating regulation of the other three occupations after additional evaluation (soil scientists, waste management professionals, and landscape architects). These occupations pose some potential for public harm if left unregulated, but the risks appear minimal for other reasons. These occupations should be evaluated by the Board for Professional Occupational Regulation (BPOR) to conclusively determine what level of regulation is warranted, if any. BPOR has statutory responsibility to evaluate whether currently unregulated occupations should be regulated (§ 54.1-310). BPOR's evaluations follow guidelines set in statute, and evaluations of occupations that are currently regulated could follow the same guidelines (§ 54.1-311). BPOR is not required to evaluate occupations that are already regulated, but it has done so in the past, when asked. BPOR should report its evaluation findings and recommendations to the General Assembly for consideration. The General Assembly could then decide to deregulate these occupations or reduce the level of regulation from licensing to certification.

RECOMMENDATION 1

The General Assembly may wish to consider amending the Code of Virginia to eliminate the occupational regulation of common interest community managers, opticians, and residential energy analysts and firms.

RECOMMENDATION 2

The Board for Professional Occupational Regulation (BPOR) should review the need for continued regulation of soil scientists, waste management facility operators, and landscape architects. In carrying out these reviews, BPOR should follow the guidelines set in § 54.1-311 of the Code of Virginia for determining the need for regulation and the appropriate degree of regulation for an occupation. BPOR should begin reporting its evaluation findings to the General Assembly by December 31, 2019 and complete these evaluations by December 31, 2020.

Some voluntary state certifications unnecessarily duplicate national certifications

Of the nine occupation groups that are voluntarily certified by DPOR, five could be certified through a national program instead (Table 2-3). Occupations that have a national certification equivalent to Virginia's do not meet the statutory criteria for regulation. According to statute, regulation of an occupation is only needed if "the public needs and will benefit from state assurances of competency" (§ 54.1-100). National certification that is equivalent to state certification provides the same level of assurance to consumers and the public. State certification of these five occupations is therefore not necessary.

Eliminating state certification could harm current certificate holders. For example, some local governments may not recognize other certifications for some occupations.

The lack of uniformity could make it difficult for individuals and businesses to conduct their work. However, this problem is not among the statutory criteria for regulating occupations.

TABLE 2-3
Some DPOR certifications are duplicative of national certifications

	National certification exists?	Qualification requirements are similar?
Community manager employees 296 regulants	✓	✓
Interior designers 491 regulants	✓	✓
Backflow prevention device workers 1,377 regulants	✓	✓
Natural gas auto mechanics 0 regulants	✓	✓
Wetland delineators 114 regulants	✓	

Two state certifications—for community manager employees and interior designers—are completely duplicative of national certifications. For community manager employees, individuals with one of three nationally recognized credentials in community management automatically qualify for a state certificate. This equivalency means that the national and state certifications are essentially interchangeable. For interior designers, the requirements for national and state certification are almost identical. Applicants must have similar education and experience and pass the same national exam. State certification therefore offers no additional assurance of competency for this occupation.

Virginia’s certification for backflow prevention device workers is largely duplicative of national and local training certifications. To become certified in Virginia, an individual must take a training course on backflow prevention from one of dozens of state-approved training providers. The individual must then pass the state’s certification exam. Many state-approved training providers also offer their own certification for completing their training program, and some offer a national certification that has historically been recognized by some Virginia localities. The availability of these certifications suggests that state certification is unnecessary.

Natural gas automobile mechanics can be certified by Virginia or through a national organization, but the state’s certification program, which was established in 2014, has proven unnecessary. To date, no one has applied for or received a certification in this occupation.

Backflow prevention device workers install plumbing fixtures that prevent “backflow” of contaminated water into local or municipal water supplies.

DPOR studied whether to regulate this occupation in 1997 and concluded regulation was unnecessary because “local enforcement has not failed to protect the public.” The study noted that the main reason for regulation was to establish a universal certification that localities would recognize. Recognition of an occupation is not one of the statutory criteria for regulation.

Wetland delineators could be certified through a national organization, but the state and national requirements do not exactly align. The national certification for “professional wetland scientist,” has a broader scope of practice than the state certification for “wetland delineator.” The qualification requirements for the national certification appear to be more stringent than Virginia’s. Most individuals who hold the state certification are likely to have a background in wetland science, so it is likely that most certificate holders would qualify for national certification. However, according to the Virginia Association of Wetland Professionals, the national certification does not address the same professional skill set as the state certification.

Eliminating state certification for the occupations described above would not harm the public. However, it could negatively impact those individuals who would lose their *only* certification. Most of those individuals could obtain national certification because they already meet the requirements. For wetland delineators, however, obtaining a national certification may be harder than obtaining a state certification. Individuals obtaining new certifications would also pay application fees and potentially higher renewal fees. For national certification of wetland delineators, the application fee is \$400 and renewal costs \$150 every two years; for DPOR certification, the application fee is \$90 and renewal costs \$70 every two years.

The potential impacts on current certificate holders should be reviewed by BPOR before any action is taken by the General Assembly. The certification program for natural gas automobile mechanics can be eliminated immediately because there are no certificate holders.

RECOMMENDATION 3

The Board for Professional Occupational Regulation (BPOR) should review the need for continued state certification of (i) common interest community manager employees; (ii) interior designers; (iii) backflow prevention device workers; and (iv) wetland delineators. The board should consider how ending these certifications would affect current certificate holders. BPOR should begin reporting its evaluation findings to the General Assembly by December 31, 2019 and complete these evaluations by December 31, 2020.

RECOMMENDATION 4

The General Assembly may wish to consider eliminating regulation of natural gas automobile mechanics and technicians by repealing §§ 54.1-2355 through 54.1-2358 of the Code of Virginia.

Virginia has increased regulation of occupations under DPOR without first evaluating need

Virginia has a process for reviewing proposals to begin or increase regulation of an occupation (§ 54.1-311). Under this process, BPOR is expected to evaluate whether regulation of an occupation is necessary and the degree of regulation that is needed (licensing, certification, registration). BPOR evaluations can be directed by the General Assembly, requested by a legislator, requested by an occupation group or the general public, or performed under the board's own initiative. These evaluations can provide valuable information for the General Assembly and others about the need to regulate an occupation.

Virginia has regularly increased regulation of occupations under DPOR without first performing a BPOR evaluation. In the past 15 years, 11 occupations became regulated or had their level of regulation increased by the General Assembly without first being evaluated by BPOR (not including occupations that were added to comply with federal law). BPOR has evaluated the need to regulate only four occupations in 15 years. In contrast, the Board of Health Professions performed 14 such evaluations in the past 15 years. Most studies were requested by a legislator or performed under the board's own initiative.

BPOR's evaluations can provide valuable information for the General Assembly to consider before it decides whether to regulate an occupation. One of the more recent BPOR evaluations examined the need to regulate individuals and businesses in the auto body repair industry. This evaluation was requested by a legislator and the industry. BPOR members met with industry representatives and held hearings for public comment. BPOR also surveyed other states that regulate the industry, collected information from insurance companies, and examined consumer complaint data. BPOR concluded, based on this evidence, that regulation was unnecessary because the level of risk posed by the occupation was very low. According to a lobbyist for the auto repair industry, the BPOR report helped his clients—auto repair businesses—to understand that regulation was not in their best interest.

BPOR evaluations were routinely used by the General Assembly to inform its decisions in the 1990s and early 2000s. Over a 10-year span, BPOR evaluated the need to regulate 18 different occupations and recommended against regulating 14 occupations, such as arborists, court reporters, and carpenters. The General Assembly followed the BPOR recommendations in all but two instances. Without BPOR evaluation, these occupations could have been regulated unnecessarily.

Some states require evaluation of any legislation to begin regulating an occupation. In Colorado, Maine, and Vermont, the licensing agency performs a “sunrise” review whenever proposed legislation would license or otherwise regulate an occupation that

is not currently regulated. In Georgia, reviews are performed by an occupational regulation review council. Missouri and Oklahoma are currently considering legislation to establish similar requirements.

By requiring BPOR to evaluate all legislative proposals that involve changes to occupational regulation, the General Assembly could ensure that it has complete information when making decisions about occupational regulation. The requirements could be structured based on laws in Colorado, Maine, and Vermont. In practice, when proposed legislation to increase or begin regulation of an occupation under DPOR is referred to a committee of the General Assembly, the committee could direct BPOR to perform and evaluation.

RECOMMENDATION 5

The General Assembly may wish to consider amending the Code of Virginia to require that any proposed legislation to increase or begin regulation of an occupation under the Department of Professional and Occupational Regulation (DPOR) must first be evaluated by the Board for Professional and Occupational Regulation (BPOR) using the criteria described in § 54.1-311 of the Code of Virginia.

BPOR is supported by staff from one of DPOR's five licensing sections, but BPOR's role does not align with the role of the licensing sections. BPOR's purpose, as defined in statute, is to provide advice on regulation of occupations and communicate with outside parties. BPOR should therefore be supported by a new position that is not located within the licensing division. In addition to serving as staff to BPOR, this position could coordinate agency communications and legislative and regulatory efforts. (See following section and Chapter 6 for additional information on the need for one or more proposed new positions.)

RECOMMENDATION 6

The Department of Professional and Occupational Regulation (DPOR) should establish one or more positions vested with the following agency-wide duties: (i) coordinate and assist in the development of agency regulations; (ii) coordinate agency legislative efforts; (iii) lead agency communications with external parties; and (iv) serve as staff to the Board for Professional and Occupational Regulation (BPOR).

DPOR updates regulations but is hampered by its decentralized approach and a slow state process

DPOR regulations establish the operating rules for the core licensing and enforcement functions. Each of DPOR's boards has its own set of regulations defining application and renewal requirements, occupational rules, and fees. Regulation changes can impact how licenses are issued and which violations are investigated. DPOR boards, with staff assistance, regularly review their regulations and propose changes. DPOR and its

boards have reviewed every set of regulations at least once over the past four years, as required by statute (§ 2.2-4017).

DPOR, including all its boards, completes an average of 22 regulatory actions each year. DPOR initiates the majority of these regulatory actions (60 percent). However, a substantial portion are initiated by changes to state law (35 percent) or federal requirements (five percent). In these cases, regulations must be changed to conform to the new law or requirement.

DPOR uses a decentralized approach for developing regulations that has contributed to inconsistencies in processes and rules

DPOR's process for developing regulations is largely decentralized. Changes to regulations are drafted by the individual boards with the assistance of licensing staff. DPOR has a regulatory coordinator responsible for reviewing draft regulations from all the boards before they are published. However, the coordinator does not play a substantial role in developing or drafting the regulations. The coordinator's main responsibilities are to ensure that proper formats are followed and to identify potentially controversial or ill-advised regulations. The coordinator rarely suggests changes.

Because the development of regulations for DPOR's many occupational boards is decentralized, there are inconsistencies in the processes and requirements for application and renewal that do not have any basis. For example, the Real Estate Board requires individuals to take an examination before they apply, whereas most boards have the individual submit the application before taking the examination. Some boards require pre-approval of education providers and courses, while others do not; as a result, there are different approaches to verifying that education requirements have been met. These inconsistencies have created challenges for automating DPOR's business processes because the IT licensing system has to be able to accommodate the different processes.

The lack of central coordination has also resulted in inconsistencies in basic occupational rules. For example, boards have set different grace periods for reinstating expired licenses, and some boards have set rules against cheating on exams, and others have not.

The regulatory coordinator at DHP has a more active, central role than the equivalent position at DPOR. The DHP position is responsible for working directly with the boards to draft regulations. The more active role helps DHP ensure that basic processes, requirements, and rules are consistent across its boards.

DPOR's regulatory coordinator does not need to take full responsibility for drafting regulations but should be more involved in the process. The regulatory coordinator should assist in development of all agency regulations to better ensure their quality and consistency. DPOR should transfer responsibilities for regulatory coordination to a new position that has other similar, agency-wide responsibilities. (See Recommendation 6.)

The state’s slow regulatory process can delay needed changes

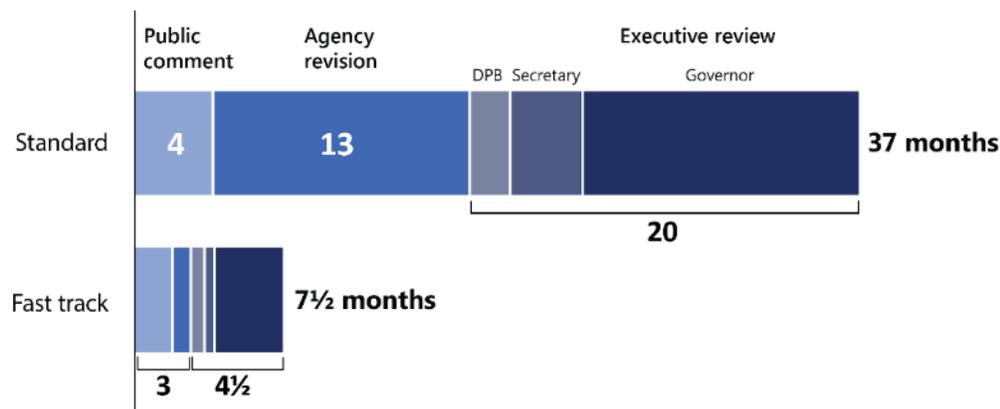
Like other state agencies, DPOR follows the state’s process for developing and issuing new regulations. The regulatory process is defined in statute, under the Administrative Process Act (Title 2.2, Chapter 40), and in the governor’s executive order (Executive Order 14). Regulation changes can take one of three tracks: standard, fast-track, and exempt. Standard and fast-track changes are subject to public comment and executive review by the governor, cabinet secretaries, and the Department of Planning and Budget. Exempt changes are not subject to comment or review. DPOR’s regulatory changes can be exempt when they are made to conform to Virginia law or federal requirements, or when they decrease fees.

DPOR’s standard regulation changes are slow, due in large part to the amount of time spent awaiting executive review. Most DPOR changes follow the standard process which has taken, on average, more than three years to complete (Figure 2-1). Time spent in the standard process was split among

- public comment (4 months),
- agency revision (13 months), and
- executive review (20 months).

Most of the time in executive review was spent waiting for the governor’s approval.

FIGURE 2-1
Executive review is the most time-consuming part of the regulation process



SOURCE: Regulation process data from the Department of Planning and Budget.

NOTE: Shows average processing times for regulations enacted during FY14-FY18. During this time, 42% of enacted changes went through the standard process, 21% fast-track, and 37% exempt. Exempt changes (not shown) are generally enacted within 2 to 4 months after the draft regulation is complete.

DPOR’s fast-track changes to regulations take less time than standard changes but still spend a substantial amount of time awaiting executive review. Fast-track changes averaged more than seven months to complete. A majority of that time was spent in executive review and waiting on the governor’s approval.

The slow regulatory process can delay changes that reduce regulatory burdens on licensed individuals and businesses. For example, a 2016 regulatory change made it easier for contractors in nine specialties to get a license. The change allowed contractors to be tested only on their specialty (e.g., flooring or drywall) instead of all aspects of home or commercial improvement. During the 22-month regulatory process, new contractors were required to meet entry requirements that were more stringent than necessary.

The slow regulatory process can also keep regulations that would better protect the public from being implemented. One way the Board of Contractors protects the public is by compensating individuals who have been harmed by contractors. Compensation is provided from the board's recovery fund. In a 2014 regulatory change, the board required all residential contractors to include language in their contracts to notify consumers of (1) the existence of the recovery fund, and (2) how to contact DPOR to file a claim. During the 27-month regulatory process, consumers who were harmed by contractors may have missed the opportunity to file a claim and reduce their financial damages.

In addition, the slow regulatory process can delay increases in application and renewal fees, putting DPOR's boards at risk of running fund deficits. For example, the Board for Barbers and Cosmetology initiated a fee increase in December 2008 that took 34 months to implement. The board's fund balance declined to -\$102,000 in FY10 and -\$772,000 in FY11.

The slow regulatory process, and the challenges it presents, are not unique to DPOR. In 2009, JLARC reported that Virginia's regulatory process was slow for all agencies. Other states' regulatory processes took less than half as long as Virginia's standard process, mostly because other states did not include the lengthy "Notice of Intended Regulatory Action" that Virginia requires. The 2009 report noted that the executive reviews performed at the beginning and end of the standard regulatory process are not required by statute but have been instituted by executive order. Placing time constraints on these reviews would speed up the regulatory process.

Before changing the regulatory process, the state would have to consider how all agencies, and their different types of regulatory actions, would be affected. However, DPOR and the Secretary of Commerce and Trade should take action to resolve two regulatory actions that have been under way for an extended period.

- A regulatory action for lead abatement professionals has been in process for more than nine years. The action, which is needed to comply with a 2009 state law, would establish a new regulatory program for lead-based paint renovation and repair. The Secretary of Commerce and Trade should complete the executive review of these regulations. If the Secretary believes regulation of this occupation may not be warranted, he should request a BPOR review.

DPOR's contractor recovery fund provides compensation to consumers who have (1) incurred loss through the improper or dishonest conduct of a licensed residential contractor, (2) been awarded a court judgment, and (3) had a claim approved by DPOR Board for Contractors.

Fee changes account for one-fourth of DPOR's regulatory actions. Most fee changes in the past five years were decreases, which are exempt actions. Fee increases go through the standard regulatory process.

- A fee increase for hearing aid specialists has been in process for more than four years. The delay has not presented problems because the fee was based on an over-projection of expenses by DPOR. However, JLARC staff project that an increase will be needed to prevent the Board for Hearing Aid Specialists and Opticians from running a deficit by 2022. DPOR should revise the fee change using more realistic expense projections, and the Secretary of Commerce and Trade should complete the executive review of the fee change. If, however, DPOR determines that a fee change is not needed in the near term, the fee change could be withdrawn.

RECOMMENDATION 7

The Secretary of Commerce and Trade should complete the executive review of two pending regulatory actions: (i) lead-based paint renovation, repair, and painting regulations; and (ii) the proposed fee increase for hearing aid specialists.

3 Licensing

SUMMARY To ensure that only qualified parties receive licenses or other credentials, DPOR sets requirements for entering occupations, reviews applications to determine if applicants qualify, and checks that renewing regulants have met any additional requirements. DPOR's entry and renewal requirements are viewed favorably by regulants and generally align with other states. DPOR's process for reviewing applications ensures necessary information is provided and decisions to deny applications are handled fairly. However, DPOR does not fully verify some key application information, such as work experience and criminal convictions. DPOR has also not fully addressed the risk posed by organized fraud schemes that help unqualified individuals gain licenses by falsifying application information. DPOR is processing the applications it receives in a timely manner, but licensing sections face high workloads and staffing shortages. DPOR's poor IT systems keep it from offering basic, user-friendly online services and effectively automating key licensing processes.

Issuing licenses and other credentials (certifications, registrations) is one of the main responsibilities of the Department of Professional and Occupational Regulation (DPOR). In order to obtain a license or other credential, applicants must meet specific entry requirements and pay an application fee. Most licenses and other credentials must be renewed every two years. To renew, regulants pay a fee and, for some occupations, must meet additional ongoing requirements. Requirements are established by state statutes and DPOR regulations. Requirements should ensure a minimum level of competence for regulated occupations without unnecessarily restricting access to those occupations.

To obtain a DPOR license or other credential, applicants must submit an application. DPOR staff review the applications, including supporting documentation, and determine if the applicants have met the entry requirements. DPOR staff also check that renewing regulants have met the ongoing requirements for their occupations. A strong review process verifies that the information submitted is complete and accurate.

DPOR handles a high volume of applications and renewals. DPOR receives 25,000 applications and 125,000 renewals each year. DPOR also annually receives 200,000 phone calls and 55,000 emails with questions from applicants, current regulants, and the general public. DPOR also processes 40,000 other transactions annually, such as name and address changes. DPOR must have sufficient staff and an adequate licensing IT system to quickly and effectively handle this workload.

Requirements to enter and remain in DPOR occupations are not burdensome

JLARC staff surveyed current DPOR regulants to learn about their experience obtaining and maintaining a credential under DPOR. 1,988 regulants from 15 boards and 35 occupations responded to the survey. The survey response rate was 16 percent. (See Appendix B for more information.)

Each DPOR occupation has its own specific entry and renewal requirements. Entry requirements typically include minimum education and experience qualifications and passing an exam. To renew, regulants in several occupations must meet continuing education requirements. A few occupations have unique renewal requirements, such as the requirement for home inspectors to provide proof of liability insurance.

Entry and renewal requirements are intended to establish a minimum standard of competence for regulated occupations in order to protect the health, safety, and welfare of the public. However, requirements that are overly burdensome can unnecessarily hinder people from entering or remaining in their occupation.

Main entry requirements are acceptable to regulants and generally align with other states

DPOR regulants do not view their entry requirements as overly burdensome. Eighty-six percent of survey respondents who expressed an opinion said that their entry requirements were “about right” overall. Respondents also did not identify any particular requirements as problematic. Between 84 and 86 percent of respondents rated each of their main entry requirements—education, experience, and exam requirements—as “about right.” Responses were consistent across each of DPOR’s occupation groups. No group was particularly dissatisfied with their entry requirements.

JLARC staff compared DPOR’s entry and renewal requirements for its largest occupations to the requirements in neighboring states: Kentucky, Maryland, North Carolina, Tennessee, and West Virginia. (See Appendix B for more information.)

The entry requirements for DPOR’s largest occupations are similar to the requirements set by neighboring states. (These occupations include almost 90 percent of DPOR regulants.) Education, experience, and exam requirements for most of the largest occupations were not substantially different from surrounding states’ requirements, with two notable exceptions: contractors and tradesmen (Table 3-1).

Tradesmen include electricians; plumbers; gas pipe fitters; and heating, ventilation, and air-conditioning (HVAC) technicians.

Virginia regulates all types of residential and commercial contractors performing projects of over \$1,000. In contrast, two neighboring states only regulate some types of contractors, and the other three states set higher minimum values for regulation (\$2,500, \$25,000, and \$30,000). Contractors in Virginia meet minimum education requirements (eight hours) and experience requirements (two to five years, depending on project value) before they can perform their occupation, while contractors in other states are not required to.

TABLE 3-1
Virginia has higher entry requirements than other states for two large occupations

	Education	Experience	Exam
Contractors	↑	↑	↑
Tradesmen	↑	↑	↔
Real estate professionals	↔	↔	↔
Personal care occupations	↔	↔	↔
Professional engineers & architects	↔	↔	↔

KEY ↑ Virginia is higher ↔ Virginia is similar ↓ Virginia is lower

SOURCE: JLARC analysis of state statutes and regulations.

NOTE: Virginia has lower requirements for one personal care occupation, nail technicians, than neighboring states. This appears justified by the low level of enforcement cases related to nail technicians. (In contrast, nail salons are often the subject of enforcement actions in Virginia.)

Virginia’s requirements for contractors are reasonable given the financial risks associated with this occupation. Contractors account for half of DPOR enforcement cases, and the improper practice of this occupation costs Virginia consumers millions of dollars every year. (See Chapter 2.) DPOR requirements help reduce improper practice. In 2012, DPOR required an additional 32 contractor specialties to pass an exam showing they had the requisite skills to perform their work, which not all states require. The change was made because half of the contractor enforcement cases were related to lack of competency. After the change was implemented, the number of Board for Contractor cases where violations were found declined by 23 percent. Current regulators believe the requirements are appropriate; 84 percent of contractors surveyed and expressing an opinion said that their entry requirements were “about right” overall.

Virginia’s education and experience requirements for tradesmen are higher than in neighboring states. However, in several of these states, some categories of tradesmen are also regulated at the local level. Local regulation adds additional burdens because individuals are often required to hold multiple licenses to practice the same occupation in different jurisdictions. Virginia only regulates tradesmen at the state level, and Virginia’s requirements are reasonable given the safety and property damage risks associated with this occupation. (See Chapter 2.)

Requirements are reasonable for renewal, criminal and violation history reporting, and acceptance of out-of-state licenses

DPOR’s renewal requirements are acceptable to regulators, and requirements for the largest occupations generally align with neighboring states. For many occupations, the only renewal requirements are to complete a renewal form and make a payment. However, regulators in some DPOR occupations are required to meet continuing education requirements. Renewal requirements are not burdensome; 95 percent of survey respondents expressing an opinion said that it was easy to renew. Renewal rates for DPOR’s largest occupations have remained steady, which further indicates regulators are able to remain in their occupations. Like Virginia, neighboring states have few requirements for

renewal for their largest occupations and only required continuing education for some occupations. Virginia and one other state require continuing education for tradesmen.

DPOR uses information on criminal and disciplinary history to determine if applicants can safely perform their occupation without putting the public at risk. Many of DPOR's occupations are self-employed, which means that there are no employers or other parties performing this type of check.

Applicants are required to disclose criminal convictions when they apply for a license or other credential, and DPOR's requirements for disclosing criminal convictions are generally in line with statute and other states. Statute allows DPOR to take criminal convictions into consideration by applying nine specific criteria, such as the nature and seriousness of the crime and whether it is related to the occupation for which the applicant is seeking licensure (§ 54.1-204). As required by statute, DPOR clearly stipulates the specific types of convictions that must be disclosed on the application form. Virginia does not automatically bar applicants with criminal convictions from applying for the occupations DPOR regulates; this is consistent with practices in other states.

Applicants are also required to disclose past violations of occupational regulations that they committed in Virginia or any other state. Requiring applicants to report this information is consistent with practices in other states.

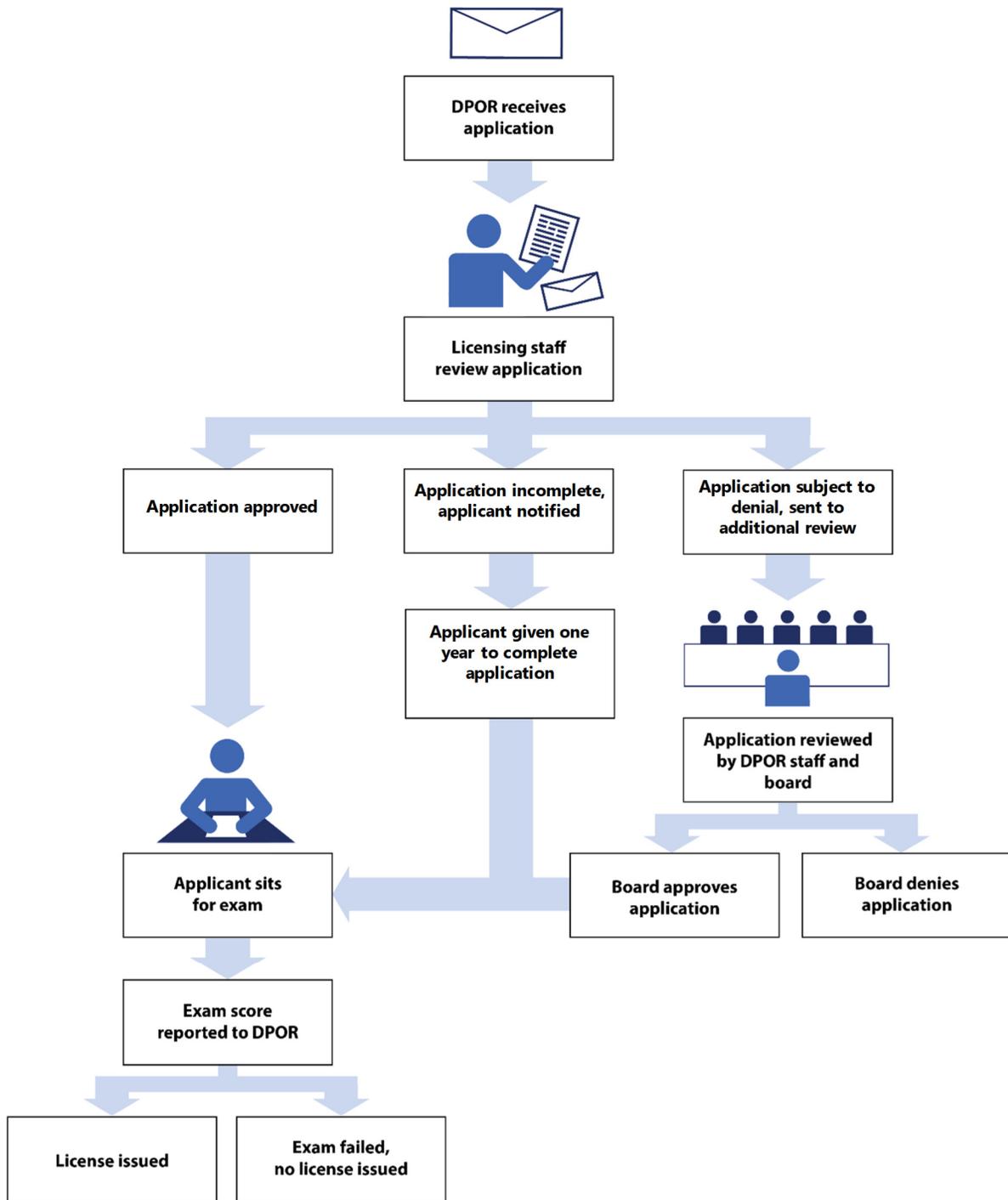
DPOR generally accepts applicants who hold a substantially equivalent license from another state as being qualified for a Virginia license and imposes few, if any, additional entry requirements.

- Contractors and tradesmen licensed in certain specialties in specific states, such as electricians licensed in North Carolina, are required to meet few additional requirements to get a Virginia license.
- Personal care professionals licensed in other states are eligible for a Virginia license without having to take an exam or meet any additional requirements, if they have completed a substantially equivalent training program and exam.
- Professional engineers licensed in other states are eligible for a Virginia license if they can show they met requirements that were substantially equivalent to Virginia's at the time they were licensed. Architects licensed in other states, and holding a national professional certification, are eligible for a Virginia license without having to meet any additional requirements.
- Real estate professionals with licenses from other states must pass the Virginia exam, and real estate brokers must also meet Virginia's experience requirements. However, experience in other states counts towards this requirement.

Application approval process could be more efficient and better verify applicants' qualifications

DPOR issues thousands of new licenses and other credentials every year. From FY13 to FY17, DPOR issued over 100,000 new credentials. Processing this high volume of applications requires an efficient review and approval process so that applicants can enter their occupation without unnecessary delay. That process must also ensure only qualified applicants are approved. DPOR reviews and approves applications through a well-defined process (Figure 3-1). Most applications are approved by staff, but a small number are directly reviewed and approved by the regulatory boards.

FIGURE 3-1
DPOR's application review and approval process



SOURCE: JLARC analysis of DPOR's application review and approval process.

NOTES: Application process for some professions is different; real estate professional and personal care occupation applicants apply through the exam vendor and sit for the exam before any information is received by DPOR, and professional engineer and architect applicants have work experience evaluated by two board members. Applications are considered incomplete if they do not include all required information and supporting documentation. Applications are reviewed by the board if there are concerns about the applicant's criminal or disciplinary history or unique circumstances related to their education or experience qualifications that could be grounds for denial.

Applications are incomplete if information is missing or the applicant has not met the entry requirements. Instead of denying these applications, the applicant is given one year to meet requirements. After one year, the application is dropped. DPOR staff report that a quarter or more of applications they receive are incomplete.

Only one-and-a-half percent of applications require additional review for criminal convictions, disciplinary history, or special consideration of education and experience qualifications. Only one in 10 of these applications are ultimately denied. A total of 44 applications were denied in FY18 (0.2% of all applications received).

The proceedings for additional application reviews are defined in statute and are largely the same as those used for enforcement cases (Title 2.2, Chapter 40, Article 3).

DPOR's application review and approval process ensures that necessary information is received before an application is approved. Each licensing section has well-established procedures for handling applications and accompanying documentation (transcripts, proof of experience, financial documents). DPOR staff use a checklist to confirm that all required information has been received before an application can be approved. DPOR notifies applicants when an application is incomplete so that applicants can correct problems. After applications are approved, DPOR licensing managers conduct quality control audits to identify and mitigate processing errors and ensure credentials were not improperly awarded.

Some applications are subject to unnecessary additional review

Applications can be denied if the applicant has a criminal or disciplinary history or if the applicant has unconventional experience and education qualifications. Denials can only be made by one of DPOR's boards after an additional review in which the applicant has an opportunity to present his or her case, and these applications take several weeks longer to approve than other applications.

A small number of applications are needlessly delayed because they are unnecessarily subject to additional review. This is because most of DPOR's smaller boards have not established appropriate screening guidelines. For example, the Cemetery Board has no guidelines for screening out applicants whose crimes are unlikely to disqualify them. One recent application to the Cemetery Board underwent additional review because the applicant reported a nonviolent misdemeanor conviction that was three years old. Approval of the individual's application was unnecessarily delayed by five months because the board had to convene and vote on the application.

In contrast, three of DPOR's largest boards have well-defined guidelines for screening applications before subjecting them to board review. For example, the Board for Contractors, the Board for Barbers and Cosmetology, and the Real Estate Board waive the review process for most cases that involve nonviolent misdemeanors. The boards have chosen not to review applications involving these and certain other crimes because, historically, they have always approved these applications. Other DPOR boards that regularly send applications through the additional review process should develop similar guidelines to avoid unnecessary delays to applicants.

RECOMMENDATION 8

The boards for the Department of Professional and Occupational Regulation (DPOR) should develop formal guidance describing when board review of an application for a license is necessary based on the applicant's reported criminal convictions. Guidance should describe the types of felonies and misdemeanors that warrant board review and how long they remain relevant to an application.

DPOR does not fully verify self-reported work experience or criminal history

DPOR does not independently verify the truthfulness of some of the information received from applicants. Verifying that entry requirements have been met is a key part of the licensing process. Otherwise DPOR is likely to issue licenses for unqualified or potentially dangerous individuals. Poor verification can also encourage organized fraud and require DPOR to later take enforcement actions. DPOR staff generally believe the licensing process is effective, but several licensing managers indicated DPOR could be doing more to verify the information provided by applicants.

DPOR fully verifies some but not all key entry requirements (Table 3-2). The identities of applicants are verified when they go to take the exam, and exam scores are reported directly to DPOR by the exam provider. Education providers send DPOR transcripts verifying that an applicant has completed the necessary coursework. Other information—work experience and criminal and disciplinary history—is self-reported by applicants or regulants and is only sometimes verified by DPOR.

TABLE 3-2
DPOR does not fully verify some key entry requirements

Exam result	Education	Experience	Criminal & disciplinary history
●	●	◐	◐
KEY ● = verified ◐ = partially verified ○ = not verified			

Experience requirements are not fully verified for several occupations

DPOR’s approach for verifying experience requirements for some occupations has weaknesses. Several of DPOR’s occupations—including contractors, tradesmen, real estate brokers, lead and asbestos workers, and others—have substantial work experience requirements. DPOR requires applicants for these occupations to self-report their work experience. DPOR also requires a third-party reference, such as a current licensee or a government official, to complete a form verifying the applicant’s experience. However, DPOR typically does *not* confirm that the information provided on the form is accurate. A falsified verification form would likely not be detected.

Improving DPOR verification of work experience would reduce risk of applicants falsifying their applications. In 2014, the Board for Contractors was concerned about experience being falsified on applications, so licensing staff called the experience references listed on a sample of applications. Staff said they found that about 40 percent of applicants had reported inaccurate experience information. The board tightened requirements on who could be listed as a reference, but the lack of ongoing verification under this and other boards suggests the problem has likely continued.

The need to verify information must be weighed against the need to issue and renew licenses in a timely manner and keep fees affordable. DPOR should therefore verify information using small, random samples of applicants to see if there is an accuracy problem. Sample sizes of five percent appear reasonable, based on audit samples used by DPOR and the Board of Accountancy to verify that continuing education requirements have been met. If DPOR finds evidence of widespread problems in a given occupation, the sample size could be increased or universal checks could be considered for that occupation.

DPOR could employ commercial background check services to assist with verifying work experience. DPOR staff uniformly expressed an interest in having access to these services to improve their ability to verify application information.

RECOMMENDATION 9

The Department of Professional and Occupational Regulation (DPOR) should begin performing reviews of randomly selected applications to verify work experience. Reviews should be conducted on an ongoing basis and should include at least five percent of the completed applications received by each of DPOR's boards each year.

DPOR does not check for criminal convictions and out-of-state disciplinary history for most occupations

In Virginia, criminal record checks are performed by state police. Fingerprint checks of state and federal criminal databases can be requested by any organization or member of the general public, as long as they have the consent of the individual being checked. State agencies can request name search checks if they have been authorized to do so under statute (§ 19.2-389).

DPOR does not verify whether applicants for most occupations have reported criminal convictions that might warrant additional review by a board. DPOR only performs criminal record checks for real estate professionals and real estate appraisers. DPOR performs criminal record checks of real estate professionals because there is statutory language that specifically authorizes checks and regulations that require these checks be performed. DPOR performs checks of real estate appraisers because it is required to do so under federal law (as of 2017). For other occupations, DPOR has general statutory authority to perform fingerprint checks but not name searches, which are less intrusive (§§ 19.2-389 and 54.1-204).

DPOR checks all applicants to see if they have had previous disciplinary violations in Virginia but not in other states. The only occupation where disciplinary history is universally checked for all applicants is real estate appraisers. The checks performed for other occupations are more limited. For applicants who claim to hold a license in another state, DPOR checks that the license is legitimate and that the individual does not have a disciplinary history in *that* state, but DPOR does not check other states. For the majority of applicants, no check is performed.

Better checks of criminal and disciplinary history would help DPOR identify cases that require board review and could avoid future enforcement actions. Every year, DPOR investigates several cases where a regulant was later found to have concealed a past crime or violation. For example, in 2016 DPOR revoked the license of a real

estate appraiser who had failed to disclose a past conviction for felony extortion. The appraiser had obtained a license before the current mandatory background check requirement for that occupation had been put in place. If the background check requirement had been in place, this omission would have been caught and the appraiser's case would have been reviewed by the board before a license was issued.

DPOR currently does not have the authority to verify the criminal history information that it requires applicants to report. The General Assembly could consider granting it the authority to perform name search background checks for all applicants. This type of criminal record check is faster and easier than fingerprint checks and would not unduly increase application processing times. This authority would also allow DPOR to perform targeted criminal history checks to determine if criminal history information is being underreported. For example, if DPOR finds there are a high number of enforcement cases coming before the Board for Auctioneers involving regulants who concealed past financial crimes, DPOR could use this authority to start performing criminal history checks of auctioneers.

RECOMMENDATION 10

The General Assembly may wish to consider amending the Code of Virginia to give the Department of Professional and Occupational Regulation (DPOR) authority to request and receive criminal record name searches as part of the review of individuals for initial licensure for any of the occupations that it regulates.

DPOR should perform checks of applicant disciplinary histories in other states when there is evidence that the applicant may have recently worked in another state. DPOR could do this by using commercial background check services and non-commercial databases managed by national board or industry associations.

RECOMMENDATION 11

The Department of Professional and Occupational Regulation (DPOR) should perform checks of new applicants for past occupational disciplinary violations when there is evidence that the applicant may have recently worked in another state.

DPOR has addressed many but not all risks of organized fraud

DPOR, like occupational licensing agencies in many other states, has been targeted by organized, criminal fraud schemes. These schemes help unqualified individuals obtain licenses by systematically cheating on exams and falsifying application information (Case Studies 3-1 and 3-2). Most fraud schemes have been operated by education providers (schools, training programs) for contractors, tradesmen, personal care occupations, and real estate professionals. DPOR has taken several steps to mitigate organized fraud, but more could be done to identify and address vulnerabilities.

CASE STUDY 3-1

Large-scale fraud scheme resulted in hundreds of licenses being awarded to unqualified individuals

An individual obtained DPOR approval to be an education provider for contractors, tradesmen, and real estate professionals. The school did not have any actual instructors or teach actual courses. Instead, the individual used his school to fraudulently obtain licenses for students in exchange for payment.

The individual helped students falsify information and cheat on exams. He submitted falsified records to DPOR certifying that students had completed required education courses when they had not. He helped students falsify work experience by providing bogus employment verification letters. He helped students cheat on exams by distributing stolen questions and taking exams on students' behalf. The individual also fraudulently obtained his own personal credentials from DPOR, including licenses to practice as a plumber, electrician, HVAC technician, real estate salesperson, real estate broker, and real estate firm.

While the full extent of this fraud scheme is unclear, it is estimated that around 1,000 contractors, 300 tradesmen, and 80 real estate practitioners obtained credentials without the proper qualifications. The fraud scheme operated from 2004 until 2011, when it was uncovered by the Federal Bureau of Investigation.

DPOR formed a special investigations unit to identify and remove regulants who were licensed through this fraud scheme. The unit investigated 750 enforcement cases. Most investigations have been completed and most cases have been resolved. In most cases, the regulants had their licenses revoked.

CASE STUDY 3-2

Fraud scheme improperly obtained licenses for several unqualified individuals

Two individuals operated a DPOR-licensed cosmetology school. The school offered actual courses, but these two individuals also helped students fraudulently obtain licenses in exchange for payment.

The two individuals helped students falsify education information and cheat on exams. They submitted falsified records to DPOR certifying that students had completed required education courses when they had not. They also helped students cheat on exams by taking exams on students' behalf.

While the full extent of this fraud scheme is unclear, it appears at least fifteen people obtained credentials without the proper qualifications.

The fraud scheme was uncovered in 2011, when the Alabama Board for Cosmetology reported it had found a graduate of the school who had lied about his education on his application.

In response to past fraud schemes, DPOR has greatly improved exam security and identity verification. For example, to prevent individuals from stealing exam questions or cheating during an exam, DPOR increased the ratio of exam proctors to students and required video monitoring of most exams. To prevent an individual from taking an exam for someone else, applicants must provide the exam proctor with two forms of identification, including at least one government-issued photo ID. Exam providers for most of the largest occupations also take fingerprints and photographs to ensure that individuals are not retaking tests under different identities. Most DPOR exams are conducted by exam vendors under contract with DPOR. In response to past fraud, DPOR has incorporated security requirements into its vendor contracts and inspects exam sites to ensure vendors are complying with requirements.

DPOR investigates suspicious applications that are identified by licensing staff during the review process. For example, in June 2018 licensing staff found irregularities in the experience qualifications reported by several applicants who had attended classes at the same training program.

DPOR requires applicants for many of its occupations—including contractors, tradesmen, real estate professionals, and personal care occupations—to obtain their education through DPOR-approved schools and training programs. DPOR has taken action to improve oversight of some education providers but not others. DPOR recently began site audits of the 207 classroom training programs for contractors and tradesmen. Site audits allow DPOR staff to determine if the provider has actually enrolled students, is teaching courses, and coursework is consistent with the curriculum they have on file. However, DPOR does *not* perform site audits of the 555 education providers for personal care occupations or real estate professionals, even though licensing staff for these occupations indicated site audits are needed to help prevent fraud and ensure quality of education.

DPOR should perform additional site audits of education providers to confirm they are operating legitimately. Education providers for personal care occupations and real estate professionals should be subject to an unannounced site audit within the first year of being approved and unannounced site audits thereafter. DPOR should perform unannounced site audits of at least five percent of schools under each of these two boards. This sample size would equate to about 17 audits per year for personal care occupations and 10 audits per year for real estate occupations. Some schools are accredited by third parties; unannounced audits should target schools that are not accredited.

RECOMMENDATION 12

The Department of Professional and Occupational Regulation (DPOR) should perform regular unannounced site audits of education providers for personal care occupations and real estate professionals to confirm that they are operating legitimately. Audits should include at least five percent of education providers for those occupations, each year. Every newly approved education provider should be audited within a year of approval.

Staff in DPOR’s licensing sections indicated they would like to perform site audits of education providers but do not have the necessary resources or expertise. DPOR should assess whether additional staff would be needed to carry out site audits as part of a larger review of the staffing needs for the licensing sections (See Recommendation 14.) DPOR could consult with the State Council of Higher Education for Virginia to determine how audits should be designed and conducted.

DPOR is providing timely licensing services but is hindered by poor IT systems and staffing shortages

DPOR’s goal is to issue licenses and other credentials to qualified regulants with minimal processing delays. To accomplish this goal, DPOR relies on 74 full-time-equivalent employees assigned to one of five licensing sections. Staff use a licensing IT system to process all key transactions and maintain records on regulants.

Less than half the total time involved in issuing a license is spent waiting for DPOR to process an application, according to a review of total application times for four large occupations (Table 3-3). The rest of the time is spent waiting for the applicant to pass an exam or provide additional information needed to complete an application. The time to issue some licenses, such as a professional engineer’s license, is longer than others because the qualifying national exams are only held once or twice a year.

TABLE 3-3
Less than half of time involved in issuing a license is spent waiting for DPOR

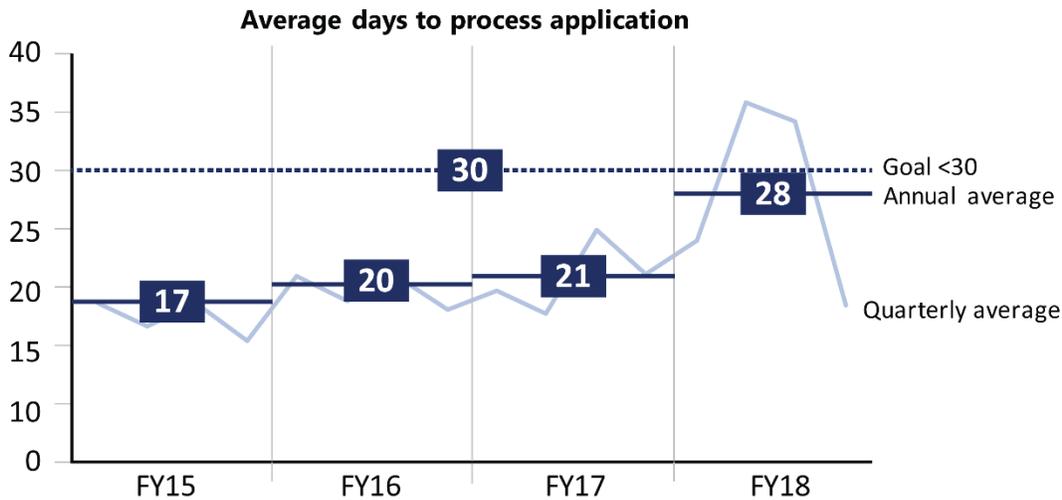
	DPOR processing time	Applicant exam and completion time	Total licensing time
Contractors	6 weeks	12 weeks	18 weeks
Personal care occupations (cosmetologists)	3.5	5	8.5
Professional engineers	8	29	37
Real estate professionals (salespersons)	1.5	5.5	7

SOURCE: JLARC analysis of DPOR licensing data.

NOTE: Applicant exam and completion time includes all time spent waiting for applicant to take and pass exam and submit additional materials required to complete their application, such as school transcripts.

DPOR itself is providing timely licensing services. Even though DPOR experienced a sharp rise in processing times in FY18, it still took DPOR an average of 28 days to process an application (Figure 3-2). While this was higher than DPOR’s historical processing times, it is below the 30-day goal set by licensing agencies in Virginia and other states. DPOR’s application processing times increased due to staff turnover and shortages in three of the licensing sections (contractors and tradesmen, personal care occupations, and professional engineers and architects). DPOR took steps to address the problem by adding staff to these sections. By the end of FY18, the average processing time had returned to its historical average of around 20 days. Processing times for the largest occupations also returned to their historical averages.

FIGURE 3-2
Processing times for initial applications experienced a sharp rise in FY18



SOURCE: JLARC analysis of DPOR licensing data.

Application processing times vary from one board to the next due to a combination of factors. Key factors include differences in the requirements for occupations, the reviews performed to verify requirements have been met, the extent to which verification is automated, and staffing levels in the licensing section that processes the application. FY18 application processing times for the boards with the greatest volumes of applicants were: nine days (Real Estate Board), 28 days (Board for Barbers and Cosmetology), 51 days (Board for Contractors), and 64 days (Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects.)

DPOR does not provide some basic customer services due to limitations of its licensing system

DPOR, like other state agencies that regulate occupations, uses a licensing IT system to process applications and renewals, and to update changes to a regulant’s status. DPOR’s current licensing system does not meet its needs, according to virtually all staff and managers. The licensing system does not allow DPOR to offer basic, user-friendly online services and does not effectively automate key licensing processes. A majority of DPOR’s regulants are satisfied with the agency’s licensing services, but improvements to IT systems could make service more efficient and customer-friendly.

Applicants cannot apply online or track the status of their applications

DPOR’s IT system is not capable of handling online applications. Instead, most applicants submit paper applications forms, which are manually processed by DPOR staff. In FY18, DPOR received about 26,000 applications. About 15,000 of these were

Only two DPOR occupations can be applied for online: real estate professionals and tradesmen. Applicants for a third occupation, personal care occupations, can submit a scanned copy of a paper application using an online system. However, this method does not provide the full benefits of a fully online application process.

paper applications, and 5,700 were digital scans of paper applications. Only 5,300 applications, for two occupations, were submitted completely online (sidebar).

The ability to apply online is a basic option that customers expect and other state agencies offer. Seventy-five percent of DPOR regulants who had recently received their licenses or other credentials indicated they would have preferred to have applied online. Licensing agencies in Virginia and other states offer this option for most of the occupations they regulate. Staff from the Virginia Department of Health Professions (DHP) indicated that almost 80 percent of the applications they receive are submitted online, and Virginia Board of Accountancy staff indicated almost 100 percent of their applications are online. Licensing agencies in other states—including California, Colorado, Florida, Georgia, Hawaii, New York, Pennsylvania, and South Carolina—offer the option to apply online.

Licensing agencies in Virginia and other states also allow applicants to track the status of their application online. For example, DHP's tracking system allows applicants to see where in the process their application is and whether information is missing from their application package. Online tracking improves the transparency of the application process.

Offering online applications would benefit DPOR by making its internal licensing operations more efficient and less prone to error. Currently, when an application is received, DPOR staff manually enter data from a paper application into the licensing system. After an application has been approved, staff manually scan the paper application into a database. Use of online applications would automate these processes.

Allowing applicants to track the status of their applications online would also benefit DPOR by reducing the volume of calls it receives. For example, in May 2018 licensing staff for the Board for Contractors received 642 calls from applicants about the status of their application or about additional information they needed to submit (25 percent of all calls received that month). If the volume of status update calls were reduced by half, licensing staff in this section would have an additional hour every day to focus on application processing or other work.

Licensing IT system has challenges with online renewals and is not linked to enforcement IT system

DPOR allows almost all regulants to renew their license online, but according to some regulants, online renewal is unnecessarily difficult. Some regulants have difficulty with online renewal because of one simple and avoidable problem: DPOR's renewal system does not allow them to reset their login information. Instead, regulants who need to reset their login information must call DPOR and have staff do it manually. A call log from May 2018 for DPOR's Board for Contractors indicated that 287 calls were about renewal login problems (11 percent of all calls received that month). Updating this one very common function could prevent frustration for regulants and allow DPOR staff more time for other work.

Another shortcoming of DPOR's licensing system is that it is not integrated with its enforcement system. DPOR staff have to manually review and update regulant data in both systems. For example, the enforcement system tracks enforcement cases and their outcomes. When, for example, a license is revoked, staff have to update this information in both systems; otherwise, an individual could inappropriately keep a revoked license. Similarly, when DPOR receives an application, staff perform a manual search of the enforcement system to see if the applicant has been previously subject to a disciplinary action. According to DPOR staff, it is difficult to confirm whether an applicant has been previously subject to a disciplinary action, and trying to make this determination can unnecessarily delay application approvals.

DPOR has resources to fix problems with the licensing IT system but has not developed a plan of action

DPOR has the financial and staffing resources to upgrade or replace its licensing system. DPOR has a cumulative fund balance of \$27 million, which should be adequate to cover the cost of a system upgrade or replacement project. DPOR would still have to request and receive an appropriation to use these funds. DPOR also has two positions, currently vacant, that could be reallocated to support IT operations. DPOR could also hire temporary staff under the state's contract for IT staff augmentation.

DPOR will face several challenges to improving its licensing system. The system is highly customized, which will make it harder to upgrade to the needed level of functionality. Even if the system can be upgraded, it will need to be maintained by skilled programmers who are familiar with how the system works. IT programmers are in high demand, so it may be difficult for DPOR to keep these individuals on staff. DPOR could replace the system with a new commercial product, similar to the one used by the DHP. Replacing the system would involve a substantial one-time cost and temporary disruption of agency operations. Replacing or updating the system should also involve a review of the licensing processes used by each DPOR board to see if there are unnecessary differences that could make automation overly difficult.

DPOR should comprehensively assess options for replacing or upgrading its current licensing system, giving consideration to impacts on business processes, staffing, and agency costs, and promptly develop an internal action plan to undertake needed improvements.

RECOMMENDATION 13

The Department of Professional and Occupational Regulation (DPOR) should develop an internal plan to replace or upgrade the current licensing system. The new or improved licensing system should have the capacity to (i) accept and process applications and payments online, (ii) improve the ease of online renewals, and (iii) integrate licensing data with enforcement case management data. The plan should identify the expected staffing needs during and after the system upgrade or replacement project, how staffing needs will be met, and the cost of the proposed upgrade or project. The plan should be submitted to the Department of Planning and Budget, along with the agency's appropriation request, by July 1, 2019.

Once completed, upgrades to the licensing system could reduce the number of staff required to process applications. Manual data entry and documents scanning would be largely automated in an improved licensing system. Even with automation, licensing staff would be required to look through applications and accompanying materials, perform verification checks, and confirm that qualifications have been met. While these reviews and verifications cannot be fully automated, some of these activities could become easier in an improved licensing system. An improved IT system would also reduce the volume of calls and emails that licensing staff receive.

DPOR does not have enough licensing staff to perform all needed functions**Number of licensing staff varies by section**

Contractors & tradesmen	17
Real estate	13
Personal care	9
Prof. engineers & architects	6
Asbestos, lead, water & wastewater	5

Counts are for full-time equivalent licensing analysts, specialists, and supervisors. Section also employ managers, administrative assistants, and other staff.

Most of DPOR's licensing operations are carried out by staff in its five licensing sections. Licensing staff process all applications and handle customer phone calls and emails. They process or assist with a number of other licensing transactions, such as renewals, reinstatements, name changes, and address changes. DPOR has enough licensing staff to carry out these basic functions in a timely manner, but employee turnover sometimes causes backlogs in individual sections. For example, in FY18 DPOR processed only half of applications for contractors and tradesmen within its 30-day goal because of employee turnover in that licensing section. Additionally, none of the five licensing sections appear to have enough staff to perform additional work that is needed to better ensure that only qualified individuals and businesses are licensed. While improvements to the licensing IT system recommended above will make some existing staff work more efficient, efficiency gains would not be realized until the project is complete, which could take several years.

Licensing sections appear to be narrowly keeping pace with their workloads. Staff in these sections were more likely than other DPOR staff to report that they had challenges keeping up with their workload (Table 3-4). Licensing managers indicated that staff are typically able to keep up with the inflow of new applications and customer phone calls but fall behind if a staff member is unexpectedly sick or otherwise absent for a prolonged period. Managers indicated that they often assist with application reviews, customer calls, and responding to emails in order to keep their sections on track.

Managers said that staffing limitations prevent their sections from doing additional activities they believe are needed, such as better verification of applicant information.

Four licensing sections have especially high workloads compared to the fifth section. The main workload indicators for licensing sections are the number of applications and phone calls received. Licensing staff spend more time on these two activities than any other. The licensing section for personal care occupations receives 78 percent more applications and almost five times as many phone calls as the real estate section, per licensing staff position (Figure 3-3). The section manager indicated that answering phone calls accounts for up to half of their staff’s work time. The contractors section also handles five times as many phone calls as the real estate section, per licensing staff position. The contractors section handles a similar number of applications as the real estate section, but the actual application workload is greater because more time is required to process contractor applications. The professional engineers section handles 73 percent more applications and twice as many phone calls as the real estate section. The section for asbestos and lead occupations also handled slightly more applications and twice as many phone calls.

The real estate section is a good workload benchmark for the other licensing sections. This section has the lowest application processing times and the lowest staff turnover among the five sections. Staff were also less concerned about their ability to handle day-to-day application processing and phone calls.

The real estate section had the lowest workload per licensing staff position and the lowest turnover rate. This suggests that if workloads were reduced in other sections, turnover might decline.

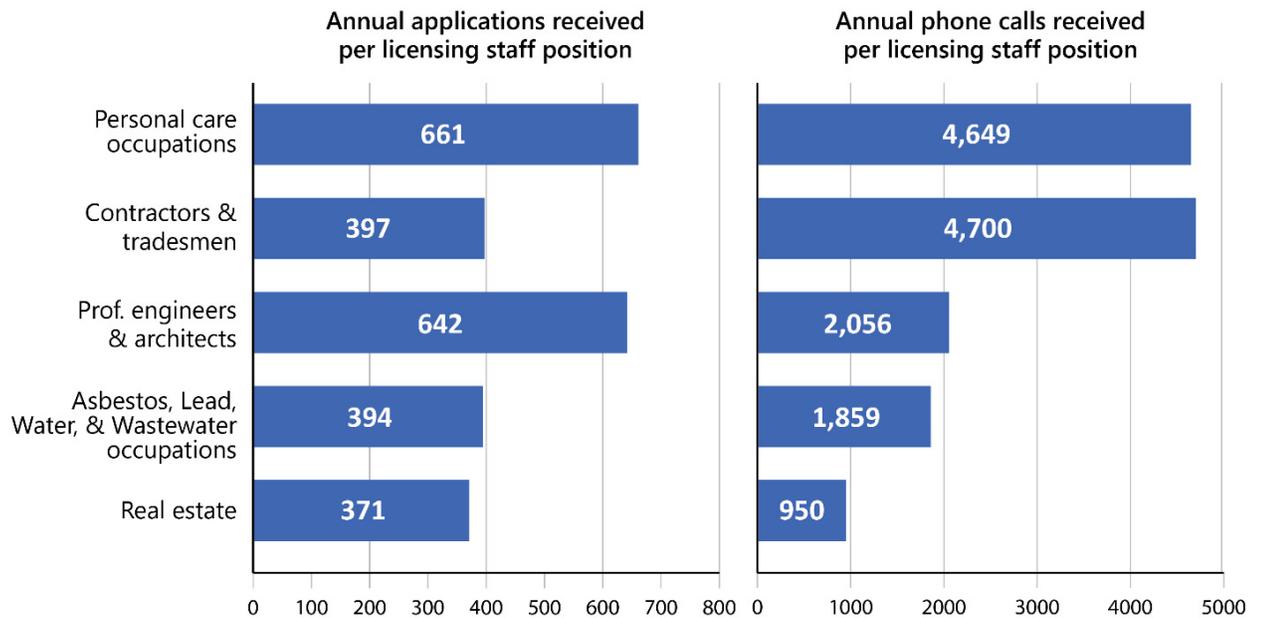
TABLE 3-4
Licensing section staff were two-to-three times more likely than other DPOR staff to report workload challenges

Survey question	Licensing sections	All other sections
Workload is unreasonable	25%	12%
Division has insufficient number of staff to carry out and support mission-critical functions	40	18
Work overtime at least once a week over past year	33	15
Workload contributed to dissatisfaction	10	3

SOURCE: JLARC survey of DPOR staff.

NOTE: Higher percentages indicate respondents had more concern about their workload. Survey questions have been rephrased slightly for ease of reporting.

FIGURE 3-3
Four sections have higher workloads relative to the fifth section



SOURCE: JLARC analysis of DPOR workload data and organizational charts.

NOTE: Figure shows average number of applications and phone calls received for each section FY16-FY18 per *current* number of full-time-equivalent staff positions for licensing supervisors, licensing specialists, and licensing analysts. Part-time positions are assumed to be available for the maximum allowed 28 hours. Figure does not show the actual time to process an application or handle a phone call and actual times vary from one section to the next. Staff in each section also respond to emails and process other transactions, such as name and address changes.

High workloads in the past may have contributed to exceptionally high turnover in the four licensing sections. The four sections had annual average turnover of 29 percent or more, including a 46 percent turnover rate for the section for personal care occupations (Table 3-5). Managers in this section and the contractors section were especially concerned about staff “burnout” from high workloads. Managers across all five sections indicated that turnover hurts their ability to process applications because it takes several months before a new employee has the knowledge and skills to fully handle all types of applications and phone calls. Managers also said that DPOR is slow to fill vacant positions, which extends this time and contributes to backlogs.

DPOR has taken some steps to address staffing shortages in the licensing sections but has not fully addressed the problem. In the past year, DPOR has added at least one full-time equivalent position to three of the five licensing sections (personal care occupations, contractors, and professional engineers). However, as discussed above, the workloads for four of the licensing sections remain relatively high, and there are high levels of staff dissatisfaction across *all* the licensing sections. Managers across all five sections said they still do not have enough staff to perform the types of checks they believe are needed, including checks of education providers to better prevent fraud.

TABLE 3-5

Turnover and vacancy rates are higher for four of DPOR's licensing sections than for the agency as a whole

Licensing section	Average annual turnover full-time staff FY15-FY18
Personal care occupations	17%
Contractors & tradesmen	19
Professional engineers & architects	13
Lead, asbestos, water & wastewater occupations	15
Real estate professionals	4
DPOR overall	9

SOURCE: DPOR organization charts and data from Department of Human Resource Management.

NOTE: Table shows turnover of full-time staff only. Estimated turnover rates for all staff, including full-time and wage, were as follows: personal care occupations section 26%; contractors & tradesmen section 22%; professional engineers & architects section 20%; lead, asbestos, water & wastewater occupations section 16%; real estate professionals section 7%, and DPOR overall 12%.

DPOR should perform a comprehensive assessment of staffing needs for the licensing sections. In performing this assessment, DPOR should take into consideration the actual time required for staff in each individual section to process applications, handle phone calls, respond to emails, and perform other transactions. DPOR should develop performance goals for each of these activities and use those goals to inform its assessments. (DPOR has set a goal to process 75% of applications within 15 days but does not have official goals for other licensing processes, such as handling phone calls.) DPOR should also assess the need for additional staffing resources to perform the additional verifications and audits recommended throughout this report. If additional positions are needed in one or more sections, DPOR should examine whether existing part-time staff positions in the section could be converted to full-time positions and if existing positions elsewhere in DPOR could be reallocated to meet the need.

Following this initial staffing review, DPOR should continue to monitor performance measures for the licensing sections and regularly reevaluate staffing needs. Long-term growth or decline in different occupations can result in higher or lower workloads for the licensing sections. Improvements to DPOR's licensing IT system should reduce workloads by automating some processes. DPOR needs to adapt staffing levels in each section to account for these and other changes.

RECOMMENDATION 14

The Department of Professional and Occupational Regulation (DPOR) should conduct a comprehensive assessment of the staffing needs of its five licensing sections and take steps to address unmet staffing needs. The purpose of the assessment is to ensure that each section has sufficient staffing resources to (i) meet DPOR's performance goals for processing transactions and handling customer inquiries and (ii) perform the needed verifications and audits recommended in this report. If the assessment finds additional positions are needed, DPOR should evaluate whether existing part-time positions in the licensing sections should be converted to full-time positions and if existing positions elsewhere in DPOR can be reallocated to the licensing sections.

4 Enforcement

SUMMARY DPOR helps ensure that regulants are practicing their occupations safely and competently by enforcing the rules that have been established for each occupation. DPOR staff investigate complaints about regulants who have allegedly violated occupational rules, and DPOR boards decide whether a violation has occurred and what sanctions should be levied. DPOR’s approach to handling enforcement cases is generally objective and transparent, but it could be more thorough. DPOR staff do not have adequate guidance on when to close cases, and some closure decisions are not well supported. Additionally, DPOR does not fully investigate or act on some violations and does not use inspections or audits to help identify violations. DPOR’s disciplinary process provides regulants with sufficient due process by giving them multiple opportunities to present their case. However, the absence of sanction guidelines can result in different treatment of cases that involve the same violations. DPOR and its boards should adopt policies and procedures to ensure that cases are not improperly closed, violations are appropriately addressed, routine inspections and audits are used as needed to identify potential violations, and consistent sanctions are issued. DPOR also investigates cases involving unlicensed practice, but DPOR regulatory boards have limited authority to address any problems that are found.

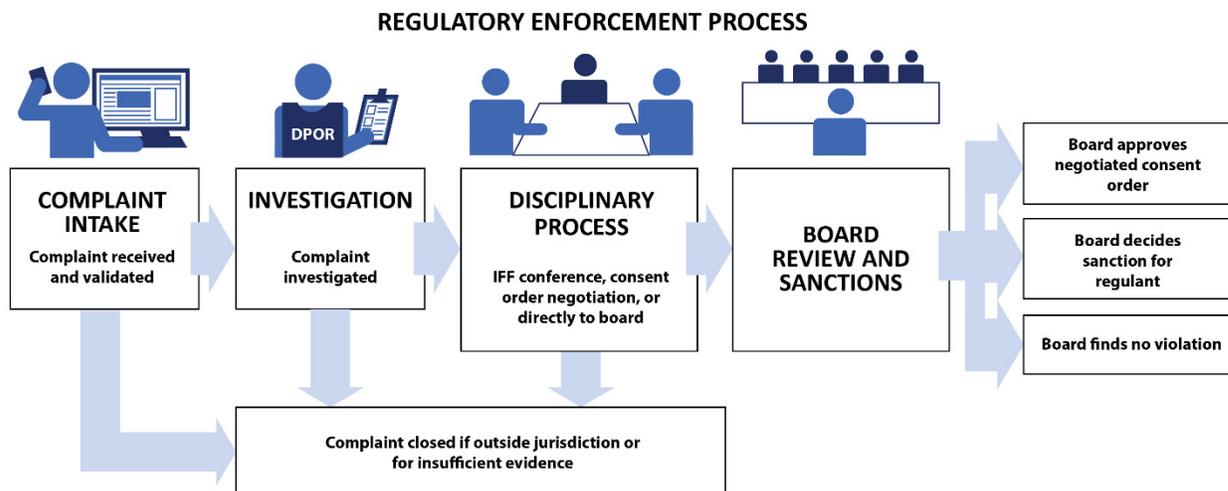
Regulants who are granted a credential by the Department of Professional and Occupational Regulation (DPOR) are required to follow a set of occupational rules to ensure that they safely and competently practice their occupation. Occupational rules include practices that regulants must follow when performing their occupations, acts they are prohibited from doing, and administrative reporting requirements. Occupational rules are established in state statutes and DPOR regulations, and are intended to protect consumers.

DPOR and its boards are responsible for enforcing occupational rules (§§ 54.1-306 and 54.1-201). DPOR’s enforcement process is primarily complaint-driven. When DPOR receives a complaint that a regulant has violated an occupational rule, DPOR staff open a regulatory enforcement case (Figure 4-1). Staff assess the validity of the complaint through a preliminary review, and complaints that are determined to be credible are investigated. Cases with sufficient evidence of a violation move forward to the disciplinary process. Following the disciplinary process, cases are presented to DPOR’s regulatory boards for a decision on whether a rule has been violated and what sanctions should be levied. Sanctions can include fines, remedial education, or the suspension or revocation of a regulant’s license.

Regulatory enforcement cases are cases in which an individual or business violates one of DPOR’s regulations or statutes.

DPOR also handles cases of unlicensed activity in which an individual or business operates without a credential when one is required.

FIGURE 4-1
DPOR receives and investigates complaints, and determines the outcome of regulatory enforcement cases



NOTE: In some cases, when the regulant does not choose a consent order or IFF conference and there is sufficient evidence that a violation has been committed, cases are sent directly to the board for a decision.

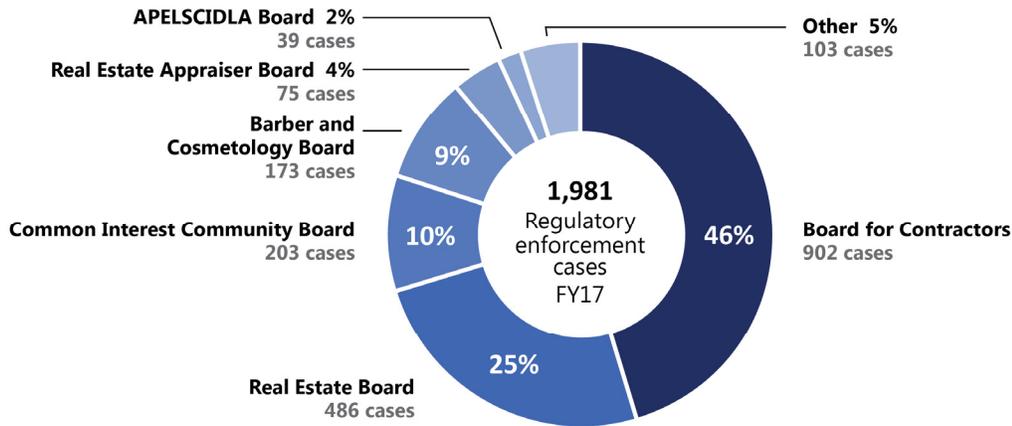
DPOR has a similar enforcement process for unlicensed enforcement cases, but DPOR is not responsible for the disciplinary process or the case outcome for unlicensed cases. (See Figure 4-5 for a more detailed illustration of the enforcement process for unlicensed cases.)

DPOR closed 1,981 regulatory enforcement cases in FY17. Most of DPOR's cases involved regulants from the three boards with the greatest number of regulants: Board for Contractors, Real Estate Board, and Board for Barbers and Cosmetology (Figure 4-2). (The Common Interest Community board also handled a large number of cases, but these were mostly related to homeowner's associations and not the practice of an occupation.) Each case takes approximately 200 days to resolve, on average. DPOR boards levied fines on a regulant in 491 cases and revoked a regulant's license in 148 cases that were decided in FY17. In some cases, regulants received more than one type of sanction. Still, fewer than one percent of DPOR regulants are involved in a case each year.

DPOR is also responsible for investigating the unlicensed practice of occupations under its purview. When DPOR receives a complaint that an individual or business is practicing an occupation without the required license, DPOR staff conduct an investigation to gather evidence. Cases with sufficient evidence are shared with local authorities for prosecution in the criminal justice system.

To have a good regulatory enforcement process, DPOR must (1) inform regulants of occupational rules; (2) thoroughly investigate all complaints about violations; (3) proactively identify violations that are not reported through complaints; (4) provide regulants with sufficient due process during the disciplinary process; and (5) determine case outcomes fairly and consistently. Overall, DPOR has adequate regulatory enforcement policies and processes. However, DPOR should take additional steps to inform regulants of the rules for their occupation, identify and investigate violations, and ensure that the disciplinary process and sanction decisions are as fair and consistent as possible.

FIGURE 4-2
Majority of enforcement cases involve regulants from largest boards



SOURCE: JLARC analysis of enforcement data provided by DPOR staff (FY17).

NOTE: Percentages do not add to 100 percent due to rounding. Data includes all regulatory enforcement cases that DPOR received in FY17. Data does not include unlicensed activity cases. Board for APELSCIDLA = Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects. Other = Auctioneers Board; Board for Asbestos, Lead, and Home Inspectors; Cemetery Board; Boxing, Martial Arts, and Professional Wrestling Advisory Board; Board for Hearing Aid Specialists and Opticians; Polygraph Examiners Advisory Board; Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals; and Unknown.

Occupational rules are reasonable but regulants are not always familiar with them

DPOR’s occupational rules, especially for its largest occupations, appear reasonable. The rules for contractors, tradesmen, cosmetologists, and real estate professionals are generally consistent with rules in neighboring states. Regulants in these and other occupations also report that the rules are appropriate; 86 percent of survey respondents indicated that the rules of their occupation are “about right.” DPOR enforcement staff also generally agreed that there were no rules that seem overly difficult for regulants to follow.

Regulants are required to know and follow their occupational rules in order to remain credentialed by DPOR to practice their occupation. This includes being familiar with the rules at the time their license is issued and keeping apprised of rule changes over time. Most current DPOR regulants reported that they have a good understanding of the rules for their occupation (97 percent of survey respondents who expressed an opinion). Nearly all real estate professionals and professional architects and engineers indicated that they understand their rules (99 percent of survey respondents who expressed an opinion).

However, some regulants involved in enforcement cases have violated their occupational rules because they are unfamiliar with them. DPOR staff and the members of

JLARC staff conducted three surveys: (1) DPOR regulants were surveyed to learn about their experience obtaining and maintaining a credential under DPOR (1,988 responses; 16 percent rate); (2) DPOR regulants who had been the subject of an enforcement case were surveyed to gain their perspective on the enforcement process (406 responses; 13 percent response rate); (3) DPOR staff were surveyed to gain their perspective on the agency and its operations (158 responses; 86 percent response rate). (See Appendix B for more information.)

“
*[Regulants] don't understand the regulations—
 they don't understand the rules that they have
 to play by.*”

— Board member
 Board for Contractors

several DPOR boards—especially the Board for Contractors and the Board for Barbers and Cosmetology—report that regulants are not always sufficiently familiar with their occupational rules. Regulants under these boards confirmed this, as a slightly below-average percentage of regulants reported that they were familiar with the rules for their occupation. Several regulants under these boards also recently testified during meetings with board members that they did not know they had violated a rule. For example, one contractor said he did not know that he was required to include certain provisions in his contracts with consumers.

Contractors, who are responsible for almost half of enforcement cases, are not routinely assisted by DPOR in learning the rules of their occupation before they are licensed. The Board for Contractors only requires contractors to certify that they “have read, understand, and complied with” their occupational rules. DPOR does not require or provide any pre-license education on the rules. The chair of the Board for Contractors, and DPOR staff who support the board, said that contractors would benefit from pre-license education. DPOR’s two largest boards, the Real Estate Board, the Board for Barbers and Cosmetology, require regulants to learn their occupational rules—through pre-license education—before they receive a license. Evidence suggests that education is effective in increasing compliance; the Board for Contractors has a remedial education course that has nearly eliminated repeat violations among contractors with enforcement cases by teaching them their occupational rules.

Contractors must take an eight-hour education course prior to receiving their license (18VAC50-22-300). This course teaches business principles such as formulating a business plan, choosing a business structure, and filing taxes, but it does not teach contractors their occupational rules.

A pre-license education course on occupational rules for contractors should provide quality education without overburdening the prospective licensees. The course could use a curriculum similar to the Board for Contractors’ remedial education course, and could be limited to four hours. The course should be conducted in person and required, in addition to the existing eight-hour business principles course.

RECOMMENDATION 15

The Board for Contractors should require all licensed contractors to complete an in-person education course that explains all of their occupational rules before they can receive their license. This requirement should go into effect by December 31, 2019.

The **APELSCIDLA board** is the Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects.

Implementing a pre-license education course on occupational rules for contractors through the state’s slow regulatory process could take several years. In the meantime, DPOR staff could take steps to educate contractors about their occupational rules. For example, staff could send a one-page summary of the top 10 most frequently violated rules to all contractors who submit a license application or renewal form to DPOR, or include a summary as an attachment to the form.

Regulants also may not know their occupational rules because some boards do not regularly inform them of changes. The Board for Contractors and the Board for Barbers and Cosmetology do not notify all regulants when a rule is changed. The two

other large DPOR boards regularly notify applicants of changes by sending either letters (Real Estate Board) or email (APELSCIDLA Board). Some boards cover rule changes as part of their continuing education.

DPOR could reduce the frequency of violations by regularly emailing all regulants under the Board for Contractors and the Board for Barbers and Cosmetology to inform them of occupational rule changes. DPOR should use email to avoid the cost of a mass mailing. (One mass mailing would cost the Board for Contractors an estimated \$50,000, according to staff.) To ensure that most regulants can be reached by email, DPOR should ask regulants to provide a valid email address when they apply for a license and each time they renew it.

RECOMMENDATION 16

The Department of Professional and Occupational Regulation (DPOR) staff should email regulants of the Board for Contractors and the Board for Barbers and Cosmetology at least annually to inform them of all changes to occupational rules.

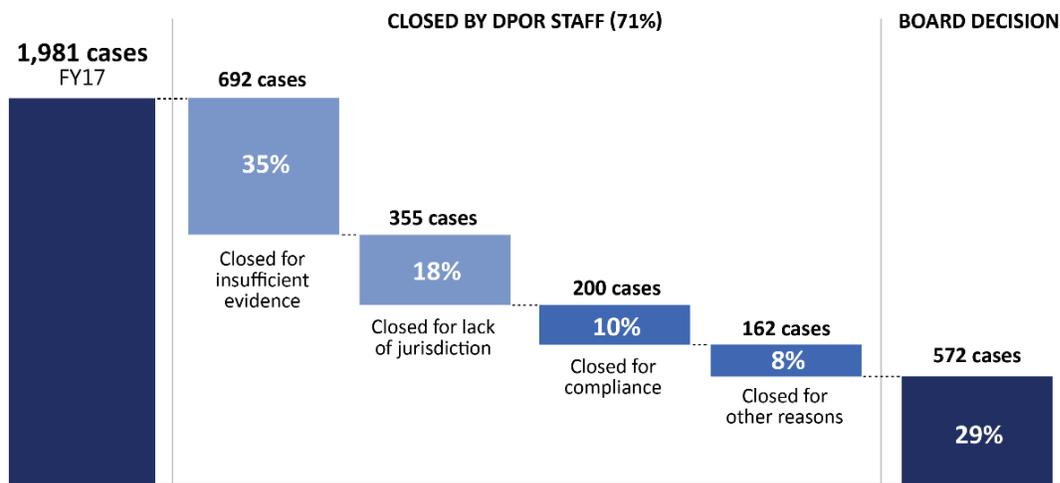
DPOR staff are closing some cases prematurely and without authorization from the boards

When DPOR receives a complaint that a regulant has violated an occupational rule, intake staff open a regulatory enforcement case and conduct a preliminary review to assess whether the case appears to have sufficient evidence of a violation and the violation is within DPOR's jurisdiction. Cases that meet these criteria are passed on for investigation. In a typical investigation, staff conduct interviews with and request documents from the regulant, complainants, and witnesses. Cases that are determined to have sufficient evidence advance to the disciplinary process, and most of these cases ultimately go to a board for a decision.

At any point during intake or investigation, staff can close a case if they determine the alleged violation is outside of DPOR's jurisdiction, there is not sufficient evidence of a violation, the regulant is brought into compliance by correcting the violation, or other reasons. Of all regulatory enforcement cases that DPOR completed in FY17, most (71 percent) were closed by staff before going to a board for a decision (Figure 4-3). Staff closed the majority of these cases (1,047 cases) because they determined that there was not sufficient evidence of a violation, or the alleged violation was outside DPOR's jurisdiction. Staff also closed a portion of cases for compliance (200 cases) and miscellaneous other reasons (162 cases).

DPOR has jurisdiction to pursue a regulatory enforcement case if a regulant has a current DPOR license, violated a DPOR regulation or statute, committed the violation in Virginia, and committed the violation within the statute of limitations (three years in most cases).

FIGURE 4-3
Most cases are closed by staff before they go through DPOR’s full regulatory enforcement process



SOURCE: JLARC analysis of enforcement data provided by DPOR staff (FY17).
 NOTE: Cases shown are regulatory enforcement cases completed by DPOR in FY17. Cases resolved through mediation between the regulant and consumer are included in board decision category. Cases may be “closed for other reasons” if there is an unusual reason to close the case, such as multiple cases being brought against a regulant at the same time.

Some cases were prematurely closed at intake or during or after investigation

It is reasonable for DPOR staff to close enforcement cases if DPOR does not have jurisdiction, if staff cannot find sufficient evidence that a violation occurred, or for other reasons. However, it is important that staff make these determinations appropriately. DPOR staff should not close cases if there is credible indication that a violation has occurred and there are potential leads that have not been explored. It appears that credible cases are sometimes prematurely closed during the intake stage by intake staff and during or after the investigation stage by investigators.

Some cases were closed at intake stage even though cases appeared credible

Staff decisions to close cases at the intake stage are sometimes made prematurely. For example, DPOR’s enforcement procedures manual directs intake staff to close cases if “there is insufficient evidence to support a violation and no further evidence can be obtained through investigation.” However, according to managers, staff rely primarily on the information submitted with the complaint to determine whether a case has sufficient evidence. Staff close cases when there is not sufficient evidence to suggest a violation in the initial complaint, even though the alleged violations could potentially be proven through further investigation.

Several cases that were closed by intake staff (sidebar) appear to have been closed even though sufficient evidence of a violation may have been obtained through further investigation. For example, staff closed a real estate case in FY17 before contacting the real estate agent or property seller, both of whom may have been able to prove or disprove the alleged violation (Case Study 4-1). Staff also closed cases in FY17 that had alleged violations of improper handling of customer funds, unlicensed practice, and failing to obtain building permits before intake staff had collected reasonably attainable information about the cases.

JLARC staff reviewed 60 regulatory enforcement cases closed in FY17.

Cases were selected randomly and included 30 cases closed by DPOR's complaint intake staff and 30 cases closed by DPOR investigators. See Appendix B for more information.

CASE STUDY 4-1

DPOR intake staff closed a real estate case before obtaining all possible evidence of the alleged violation

DPOR received a case about a real estate agent who was accused of failing to convey a consumer's offer to a seller to buy a property. The consumer provided evidence that he submitted an offer that was \$27,500 over the seller's asking price.

DPOR intake staff closed the case because the consumer did not provide evidence that the real estate agent failed to convey his offer to the seller. The case was closed before intake staff had contacted the real estate agent or the seller, although either party may have been able to provide evidence to prove or disprove the alleged violation.

Some cases were closed during or after investigation even though cases appeared credible

Staff decisions to close cases for insufficient evidence at the investigation stage are also sometimes made prematurely. For example, investigators have closed cases for insufficient evidence when they were unable to contact the regulant who committed the alleged violation. DPOR investigators routinely open new cases against regulants for failing to respond to requests for information, but, according to managers, investigators do not always follow through on investigating the initial complaint. One case reviewed for this study was closed by investigators because they could not reach the regulant, a contractor who was accused of failing to finish a home renovation (Case Study 4-2).

CASE STUDY 4-2

DPOR staff closed a case where a contractor failed to finish a home renovation

DPOR staff received a complaint that a Class A contractor failed to complete a home renovation project, obtain the appropriate permits, and have a written contract. The consumer who filed the complaint said the house was unsafe in the condition the contractor left it.

DPOR staff obtained evidence that the contractor had completed a portion, but not all, of the work that he and the consumer had agreed upon. DPOR staff contacted the contractor to get an explanation of why some work was not completed. DPOR staff closed the case for “insufficient evidence” because they could not reach the contractor. Staff then opened a separate case for a lesser administrative infraction (failure to respond to DPOR).

Investigators also sometimes close cases despite having sufficient evidence to pursue them. For example, when regulants are facing multiple enforcement cases, some of which are likely to result in license revocation, investigators often close some of the cases against them. This practice makes efficient use of DPOR’s resources, but it also allows these regulants to avoid sanctions for some of their violations. Moreover, it results in regulants’ enforcement records not including all confirmed violations. DPOR licensing staff and board members would have incomplete enforcement records to consider when regulants apply for a new DPOR license.

One of the cases reviewed for this study was closed by investigators because the regulant was the subject of 13 separate regulatory enforcement cases. The case was about a contractor who was accused of failing to complete work, damaging the customer’s property, and overbilling the customer. Investigators closed this case (as well as eight others) even though there seemed to be sufficient evidence and jurisdiction to investigate the regulant’s alleged violations (Case Study 4-3).

CASE STUDY 4-3

DPOR investigators closed a contractor case because there were already cases against him expected to result in license revocation

DPOR received a case about a Class A contractor who was accused of failing to complete a home renovation, damaging the customer’s property, and billing the customer more than the amount agreed upon in the contract. The regulant had 13 separate cases against him when DPOR received the case.

Investigators learned that four of the regulant’s cases were scheduled to go to the Board for Contractors for a decision. Investigators anticipated that the regulant’s license would be revoked as a result of those cases; therefore, they held this case in DPOR’s investigations section for eight months. When the board revoked the regulant’s license for the other cases, staff closed this case and eight others for “lack of jurisdiction” even though the actual reason was that staff believed it was unnecessary to pursue the case.

If the violations alleged in this case had been confirmed, the Board for Contractors might have decided to impose additional sanctions on the regulant. The additional violations and sanctions would be documented in the regulant’s enforcement record, which would inform future decisions about the regulant should the regulant reapply for a license.

Cases are closed prematurely because staff are not given adequate guidance to make closure decisions

Cases can be closed prematurely because intake and investigation staff are afforded a large degree of discretion to determine whether to close cases. The guidance for DPOR staff on when, and for what reasons, cases can be closed is relatively vague. Managers in DPOR's enforcement division review some staff closure decisions, but there is no check from outside the division. Clear rules and outside checks are needed to ensure that cases are not closed prematurely.

Broadly, DPOR has not provided a clear standard for the amount of evidence needed to move a case forward. DPOR's enforcement procedures manual states that "there should be sufficient information and documentation included with the complaint to establish probable cause for a violation." However, the manual does not define "probable cause," and not all staff consider "probable cause" to be their evidentiary standard. Clear evidentiary standards would help prevent the premature closure of credible cases.

DPOR should establish formal evidentiary standards to clarify the level of evidence needed at the first two stages of the enforcement process (intake and investigation) to advance a case to the next stage of the process. Staff should set a relatively low standard early in the process, such as "reasonable suspicion" at the intake stage, and increase the burden of proof to advance cases from investigation to the disciplinary process. To advance past investigation, it should be more likely than not that a violation occurred (preponderance of evidence). The standards should be drafted by enforcement staff and shared with DPOR boards and board staff to obtain their input. The standards should be approved by DPOR's director and the deputy director of enforcement and incorporated into the enforcement procedures manual.

RECOMMENDATION 17

The Department of Professional and Occupational Regulation (DPOR) should establish an evidentiary standard for evaluating whether to advance regulatory enforcement cases from the intake to the investigation stage. The standard should be a relatively low burden of proof, such as "reasonable suspicion." Cases that meet the standard should not be closed.

RECOMMENDATION 18

The Department of Professional and Occupational Regulation (DPOR) should establish "preponderance of evidence" as the evidentiary standard for advancing regulatory enforcement cases from the investigation stage. Cases that meet the standard should not be closed.

DPOR does not have clear guidelines staff can use to determine when a case can be closed for lack of jurisdiction or "other" reasons. Without clear guidelines, staff may close cases for a wide range of reasons, some of which may not be appropriate. For

example, investigators closed one case for lack of jurisdiction because the regulant's license was void (Case Study 4-3). This reason for closing the case was used even though the regulant's license was valid when he committed the alleged violations and when investigators received the case. DPOR policies do not clearly define when cases can be closed for lack of jurisdiction because a regulant's license is void. They also do not clearly define what types of "other" reasons are appropriate reasons for closure.

DPOR should develop specific criteria that must be met for DPOR staff to close cases for lack of jurisdiction and "other" reasons. The policy should be drafted by enforcement staff and shared with DPOR boards and their support staff so that they have the opportunity to provide input before the policy is finalized. The final policy should be approved by DPOR's director and the deputy director of enforcement and incorporated into DPOR's enforcement procedure manual.

RECOMMENDATION 19

The Department of Professional and Occupational Regulation (DPOR) should develop an internal policy that defines specific criteria that must be met before a case can be closed by enforcement staff for lack of jurisdiction or reasons other than insufficient evidence or compliance.

To ensure that cases are not being closed prematurely, staff from outside of the enforcement division should regularly review decisions to close cases at the intake and investigation stages. DPOR boards are statutorily responsible for taking disciplinary action against regulants (§ 54.1-201). Therefore, outside reviews should be performed by members of the relevant board, or a designee, such as a former board member or board staff. At a minimum, these reviews should include decisions to close cases for insufficient evidence and any atypical "other" reasons that do not fall in DPOR's standard closing categories. At their discretion, DPOR boards or their designees could also review cases closed for a lack of jurisdiction if they have concerns that this basis for closing cases may be used inappropriately. After concluding the review, any cases that the board or its designee believe should remain open should be returned to enforcement staff for further investigation.

DPOR's peer agency, the Virginia Department of Health Professions (DHP), has implemented a similar approach. DHP board members, or designated board staff, review and approve all decisions to close cases for insufficient evidence and atypical "other" reasons. DHP board members, or designated board staff, do not currently review decisions to close cases for lack of jurisdiction.

RECOMMENDATION 20

All regulatory boards under the Department of Professional and Occupational Regulation (DPOR) should develop a process through which board members, or board staff with delegated authority, review and approve all decisions made by enforcement staff to close regulatory enforcement cases for insufficient evidence, or reasons other than compliance or lack of jurisdiction, at the intake and investigation stages.

DPOR staff have used discretion to close cases for compliance to forgive some violations

It is reasonable for DPOR staff to close enforcement cases if the violation they have found is minor and the regulant quickly comes into compliance by correcting the violation. In FY17, DPOR staff used discretion to close 200 cases for compliance. While many of these decisions appear appropriate, some cases involved serious rule violations, including misrepresentation, unlicensed practice, and building code violations (Case Study 4-4).

CASE STUDY 4-4

DPOR staff closed a case where a contractor did not obtain an electrical permit

In 2016, DPOR received a complaint about a Class A contractor who did not have the necessary electrical permits for the installation of lights in a residential renovation project. Permits ensure that electrical work is inspected by local building code officials to verify that the work was done correctly and is safe. Improperly installed electrical work presents a serious safety hazard.

The contractor told DPOR staff that it was an oversight that he had not applied for a permit. A communication error within his company caused his staff to overlook the need for a permit. DPOR staff closed the enforcement case against the contractor for compliance because he agreed to apply for the permit. This was not the contractor's first enforcement case with DPOR.

Because the case was closed, the Board for Contractors did not have the opportunity to review the case and determine whether corrective action was needed. The board often issues sanctions to contractors who fail to obtain permits.

Although it is reasonable for staff to close some cases for compliance, staff have not been formally delegated this authority by the boards. By closing enforcement cases for compliance, staff effectively prevent the boards from exercising their statutory authority to take disciplinary action against regulants. Staff also prevent board members from levying sanctions on regulants with violations that are typically punished, such as building code violations.

“ I think the department's investigative procedures could be updated to outline when it is appropriate to offer compliance and updated to provide more specific guidance on how/when compliance should be obtained. ”

– DPOR staff
Enforcement Division

DPOR boards should develop formal guidance that prescribes whether and under what circumstances staff can close regulatory enforcement cases for compliance, including if cases involving certain violations cannot be closed for compliance. For example, the Board for Contractor's guidance could prohibit staff from closing cases for compliance when the case involves a serious violation, such as a contractor failing to finish work agreed upon in a contract. Guidance should be based on a well-developed rationale and should allow staff to close cases for compliance only when the cases involve minor violations.

RECOMMENDATION 21

All regulatory boards under the Department of Professional and Occupational Regulation (DPOR) should develop formal guidance that addresses (i) whether they wish to delegate authority to DPOR staff to close enforcement cases for compliance and (ii) the circumstances under which cases cannot be closed for compliance. Each board should have its guidance in place no later than December 31, 2019.

DPOR boards can choose not to delegate staff the authority to close cases for compliance. DPOR's peer agency, DHP, has chosen not to delegate authority to enforcement staff to close enforcement cases that are within the agency's jurisdiction.

Potential violations discovered during investigations are not always fully investigated or acted on

During the course of an investigation, DPOR staff sometimes uncover additional violations committed by the regulant under investigation. Staff are instructed to "check for additional violations beyond the complaint" in the investigation procedures manual, but they ultimately have discretion to choose which additional violations, if any, they fully investigate and advance to the disciplinary process. According to investigations staff, additional violations are typically not fully investigated or acted on if DPOR staff perceive the violations to be minor or if regulants can easily be brought into compliance.

However, some of the violations that are not fully investigated or acted on can be substantial and warrant investigation. For example, in a recent case against a tattoo artist, staff did not act on additional violations (Case Study 4-5). Not addressing the additional violations prevents DPOR boards from fully understanding the risk that regulants pose to consumers. Boards need to be informed about substantial violations so they can reach an appropriate case decision, including whether a regulant's license should be revoked.

CASE STUDY 4-5

DPOR staff did not act on multiple violations identified for a tattoo artist

DPOR staff opened enforcement cases against a tattoo artist and the parlor where he works after receiving a complaint from a consumer that the artist reused parts of tattoo needles, lives in the tattoo parlor, and does not have customers sign the required forms each time they receive services. This was not the first time the regulant had been investigated by DPOR.

DPOR staff identified several additional violations after investigating the cases, including that the regulant did not perform the required sanitation tests on his equipment, allowed an employee to perform body piercings without a license, and did not keep the parlor clean and orderly.

Staff negotiated settlements with the tattoo artist to address three of his violations. However, they did not consider the additional violations while imposing sanctions, even though the evidence appears to have been sufficient to do so. For example, staff did not sanction the regulant for (1) unlicensed body piercing on his tattoo artist's license, (2) failing to keep his tattoo parlor clean, (3) living in the tattoo parlor, and (4) failing to have customers sign the required forms.

Because staff did not act on all of the regulant's violations, the board reviewing the case had incomplete information about the extent of violations the regulant had committed. The regulant's public disciplinary record is incomplete.

“ If [DPOR staff] were told to report violations when they see them, it would help. Trouble is out there. It's unfortunate that investigators don't file complaints. ”

— Board member
Real Estate Board

DPOR staff, in consultation with DPOR boards, should develop formal guidance that prescribes whether and under what circumstances staff are required to fully investigate and act on potential violations discovered during investigations. Such guidance should prevent staff from deciding not to address serious violations. For example, staff investigating tattoo artist cases should be required to fully investigate and act on any violations related to unlicensed practice and parlor sanitation. Board guidance for how violations are addressed should be consistent with guidance for when cases can be closed (Recommendations 17, 18, 19, and 21).

DPOR's peer agency, DHP, has implemented a similar approach. DHP enforcement staff fully investigate and act on additional violations discovered during an investigation as long as the violations are related to the case. If DHP enforcement staff discover violations that are unrelated to the case, they consult board staff to determine whether to docket a new case.

RECOMMENDATION 22

The Department of Professional and Occupational Regulation (DPOR), in consultation with DPOR regulatory boards, should develop formal guidance that prescribes whether and under what circumstances DPOR staff should fully investigate and act on violations identified during an investigation. Guidance should be finalized no later than December 31, 2019.

DPOR does not use inspections and audits to proactively identify violations of occupational rules

Complaints submitted by consumers are the source of most (65 percent) of DPOR's enforcement cases (FY17).

Nationwide, state agencies that are responsible for regulating occupations use two methods to identify rules violations: complaints and inspections. Complaints are the main way that agencies identify violations. Responding to complaints ensures agencies are responsive to public concerns and is the most cost-effective way to identify potential problems. However, many regulatory agencies also perform random inspections, including site visits and document audits, to strengthen enforcement.

DPOR and its boards do not currently perform inspections even though they have this authority (§§ 54.1-201 and 54.1-306). DPOR previously conducted unannounced health and safety inspections of personal care shops and salons. DPOR also audited real estate documents related to the management of escrow funds. DPOR stopped conducting inspections in FY12 due to staffing constraints.

DPOR's previous inspections were effective at identifying rule violations that put consumers at risk. About one in five inspections resulted in an enforcement case (FY12). Inspections found some major rules violations (e.g., abandonment and unlicensed practice).

Inspections of personal care shops and salons are conducted in Maryland, North Carolina, Kentucky, and Tennessee. North Carolina, for example, inspects new shops and salons when they open, and existing shops at random each year or when they change ownership. DHP also conducts inspections for several of its boards, including the Virginia Board of Pharmacy.

Resuming inspections could help DPOR identify violations, deter noncompliance, and reduce risks to consumers. Over one-fourth of regulants (28 percent who expressed an opinion) believe that DPOR is not doing enough to make sure that people in their occupation are following the rules. Random inspections could be used to determine whether regulants are following rules. Targeted inspections could also be used to determine whether regulants with past violations have corrected previously identified problems. Regardless of the type of inspection, all inspections should be unannounced so that DPOR staff can gain an accurate view of regulants' everyday occupational practices.

DPOR should resume unannounced health and safety inspections of personal care shops and salons to better educate regulants and protect consumers. Resuming inspections is supported by DPOR board members and staff and would align with practices in other states and one of Virginia's peer regulatory agencies (sidebar). Inspections should be conducted under guidelines set by the Board for Barbers and Cosmetology.

DPOR should also begin document audits of contactors. Contractors have the highest volume of violations and present significant financial risks to consumers. Many poten-

tially harmful practices could be identified through document audits. For example, document audits could determine whether contracts are being used, whether they include all necessary provisions, and whether building permits are being obtained. Staff should conduct unannounced audits of a sample of contractors' documents each year. At least one other state—California—currently performs random audits of contractors' documents. Audits should be conducted under guidelines set by the Board for Contractors.

When developing guidelines, boards should consider using inspections and audits to educate regulants and correct practices instead of simply punishing violators. For example, after each inspection or audit, DPOR staff could send regulants a copy of the inspection results and a current list of occupational rules. The handling of violations found during inspections and audits should be consistent with the handling of additional violations found during investigations. (See Recommendation 22.)

DPOR may need to fill its seven vacant investigator positions before it can resume inspections and undertake audits. DPOR should determine the number of inspections and audits it can conduct with current staff without falling behind on complaint-based cases. Vacant positions should be filled as necessary.

RECOMMENDATION 23

The Board for Barbers and Cosmetology should direct Department of Professional and Occupational Regulation (DPOR) staff to conduct unannounced inspections of personal care shops and salons in Virginia, to ensure compliance with occupational rules. Inspections should begin by July 1, 2019.

RECOMMENDATION 24

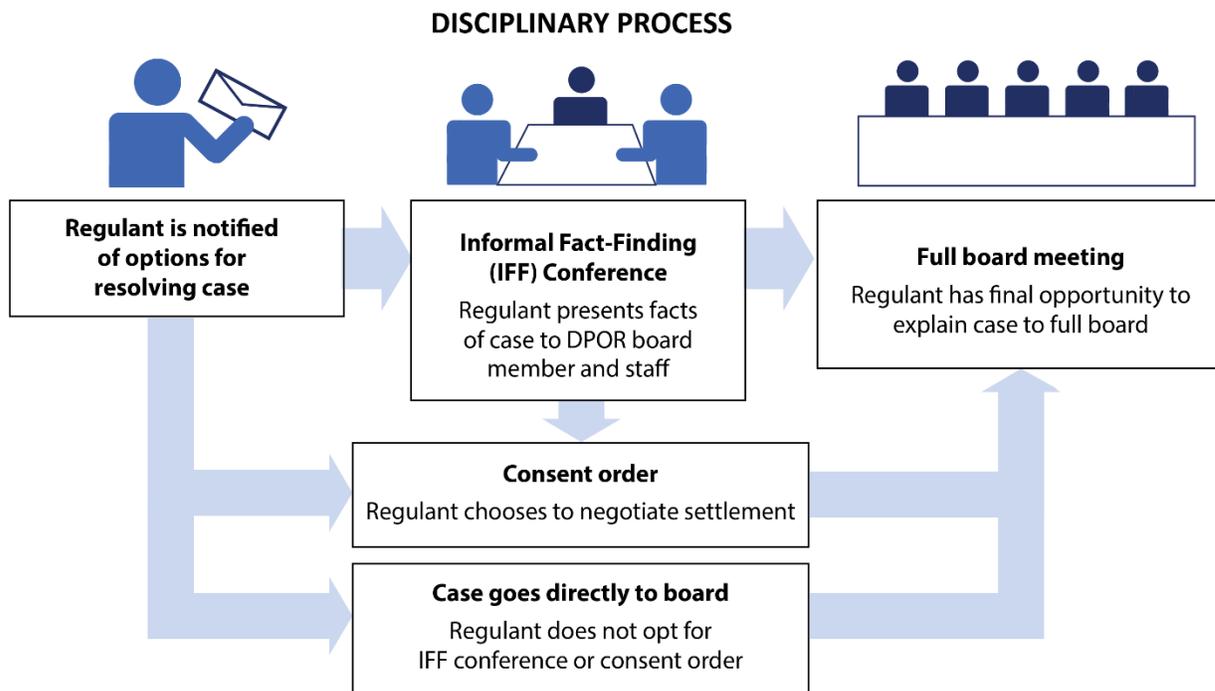
The Board for Contractors should direct Department of Professional and Occupational Regulation (DPOR) staff to conduct unannounced audits of contracting documents to ensure compliance by contractors with occupational rules. Audits should begin by July 1, 2019.

Disciplinary process provides regulants sufficient due process, but fairness could be improved

After a DPOR enforcement case has been investigated, and sufficient evidence of a violation has been found, cases move forward for adjudication. Cases are resolved through two primary means. About one-fifth of cases go through an informal fact finding (IFF) conference, in which the regulant presents his or her case to a DPOR board member. More than half of regulants choose to waive the IFF conference and instead negotiate a settlement, called a consent order. When the regulant does not choose an IFF conference or a consent order, the case is moved directly to the board for a “prima facie” case decision (§ 54.1-201). No matter which approach is followed, all regulants have a final opportunity to explain their case to the full board (Figure 4-4).

Majority (58 percent) of regulatory enforcement cases presented to the full board in FY17 were resolved through consent orders. The rest were resolved through board-decided final orders. Approximately half of the cases not resolved through consent order had an IFF conference, and the other half were sent directly to the boards.

FIGURE 4-4
Regulants have several options for sharing information about their case



NOTE: Regulants do not have to present their case at an IFF conference or speak at a full board meeting. Presentations are optional. Regulants who opt for a consent order can have an IFF conference before the consent order is signed and may comment on their case at the full board meeting before the board votes to approve their consent order.

DPOR is required by law to provide regulants with sufficient due process. To satisfy the legal due process requirement, regulants must have (1) reasonable notification of meetings and (2) sufficient opportunity to present their case. These two conditions were confirmed to be necessary to satisfy procedural due process by the Court of Appeals of Virginia (*Haley v. Commonwealth of Virginia*, 2006). Several other conditions are also required by Virginia’s Administrative Process Act to satisfy due process (§ 2.2-4019).

Regulants receive reasonable notice and explanation of disciplinary process

Regulants are provided ample explanation of the disciplinary process and their rights within that process. When an investigation is concluded, DPOR staff contact the regulant and explain the results of the investigation, including whether a violation has been found. Staff offer the option to proceed to an IFF conference or negotiate a consent order. These options, including the right to make a counteroffer to the proposed consent order, are all described in letters to the regulant.

Regulants who choose to resolve their cases through consent orders largely appear to understand them. Regulants receive consent order terms in writing and certify that they have read, understand, and agree to the terms by signing them. At DPOR board

meetings observed by JLARC staff, only a few regulants indicated they did not understand or agree with their consent orders. In these cases, DPOR board members and staff immediately clarified the meaning of the consent orders, and several regulants were given the opportunity to reconsider their consent orders.

Regulants also seem to understand the purpose and procedures of IFF conferences. Regulants receive a letter describing the IFF conference's purpose at least 30 days in advance, which gives them time to prepare. They receive an in-person explanation of how the IFF conference will work before it begins. As a result of these communications, most regulants who recently had an IFF conference agreed that they understood the purpose of their IFF conference in advance (86 percent of regulants who expressed an opinion). After the IFF conference, regulants receive a letter explaining the conference findings.

Regulants who do not choose a consent order or IFF conference still receive sufficient information about the disciplinary process. DPOR staff mail regulants a copy of their case findings and recommended sanctions, and regulants are encouraged to review them. Regulants are told they have the right to speak to DPOR staff and the board about their case before it is resolved, but few communicate with staff or attend the board meetings.

All regulants receive a letter with the date their case will be taken up by their full board about 30 days in advance. Cases can be postponed at the request of the regulant, as long as the regulant has a valid reason such as a medical problem or travel conflict.

Regulants receive sufficient opportunities to present their case, but an additional opportunity could be provided in some circumstances

DPOR's use of IFF conferences provides regulants sufficient opportunity to present their cases. The Court of Appeals of Virginia ruled that DPOR's use of IFF conferences complies with the state's requirement for procedural due process (*Haley v. Commonwealth of Virginia*, 2006). Regulants who do not choose to participate in an IFF conference are also provided due process because they are given an *opportunity* to present their case. All regulants receive the opportunity to speak to the full board about their case before a decision is made. Regulants, and any attorneys or witnesses they bring, each have five minutes to discuss the case. However, boards often allow regulants to speak for longer if they believe arguments or concerns raised by the regulant need to be further explored.

DPOR conducts IFFs in a fair and transparent manner. Most regulants (82 percent of surveyed regulants who expressed an opinion) agreed that DPOR's IFF conferences provide an adequate opportunity to present their case. Regulants are given as much time as they need to explain the circumstances of their violation, submit evidence relevant to their case, and have witnesses speak on their behalf. However, more than a

third of regulants (38 percent) indicated that they would have liked another opportunity to present their case. In particular, regulants indicated they would have liked a second IFF with a different DPOR board member and staff.

Other state agencies use formal hearings to resolve contested cases. The Department of Health Professions holds formal hearings for enforcement cases where a license could be revoked. Formal hearings can be used as an alternative to informal fact finding conferences or as a second step (in place of a board decision).

Virginia statute allows state agencies to resolve cases in formal hearings, but formal hearings are not required to satisfy due process. Formal hearings are different from IFF conferences because regulants and witnesses can be cross-examined and provide testimony under oath. However, the Court of Appeals has ruled that DPOR does not have to hold formal hearings to satisfy due process because “there is no general constitutional right ... to cross-examine witnesses and have testimony provided under oath.” This is a requirement for criminal cases, but not for regulatory enforcement cases, which are civil cases (*Haley v. Commonwealth of Virginia*, 2006).

Although formal hearings do not appear necessary, there are special circumstances in which regulants should be afforded an additional opportunity to present their case. These circumstances include:

1. the regulant has a reasonable basis to claim the initial IFF was unfair (for example, DPOR staff omitted a key piece of evidence or the regulant was not prepared for the IFF conference because he or she did not have a good understanding of its purpose);
2. new evidence has come to light that needs to be considered; or
3. the regulant has not yet had an IFF conference, because he or she chose an alternative and would now like an IFF conference.

Regulants can appeal board decisions in the Virginia court system. However, less than one percent of regulatory enforcement cases are ever appealed, underscoring the importance of a strong administrative adjudication process.

Several DPOR boards already refer cases to another IFF conference for these reasons, but this is not an established board or DPOR policy.

To further enhance the fairness of DPOR’s enforcement process, DPOR should develop a standardized process for referring cases meeting the above criteria to an IFF conference. Under this new process, DPOR should conduct additional IFF conferences as appropriate, and assign a different board member or staff member to cases in which the regulant has a reasonable basis for claiming that the first board member or staff member did not handle the case fairly. To determine whether a regulant has a reasonable basis for claiming that the initial IFF conference was unfair, DPOR staff could consult the disqualification petition provisions of the Administrative Process Act (§ 2.2-4024.1).

RECOMMENDATION 25

The Department of Professional and Occupational Regulation (DPOR) should establish a standardized process through which regulants under each board can formally request that their regulatory enforcement case, which has reached the full board, be remanded for an informal fact finding (IFF) conference. This process should be available to any regulant who (i) has a reasonable basis to claim that the initial IFF conference was unfair; (ii) has new evidence to present that is integral to the case; or (iii) did not initially opt for an IFF conference but would like one.

DPOR board sanction decisions are inconsistent

DPOR regulatory boards are charged in statute with determining what (if any) penalties or other sanctions regulants should receive if they are found to have committed violations (§ 54.1-201). Commonly issued penalties include remedial education, fines, or suspension or revocation of the regulant's license. Board members make case decisions by a majority vote after reviewing case evidence and summaries compiled by staff. The board also votes to approve consent orders.

DPOR boards have levied a wide range of sanctions on regulants, from fines to license revocation. The regulants that received fines in FY17 paid a total of \$1,382, on average, with total fines ranging from \$100 to \$10,500 (for multiple violations). Sanctions vary depending on the number and severity of a regulant's violations, and this variation can be appropriate. However, to ensure that regulants are treated fairly, board decisions should be consistent across regulants with similar violations.

DPOR boards do not always levy consistent sanctions for similar violations. DPOR board members and staff report significant differences in sanction decisions for similar cases. For example, the Board for Contractors has levied a wide range of sanctions on contractors for failing to complete agreed-upon work and failing to comply with contract terms (18VAC50-22-260 B.15). Since FY08, the board has decided 12 cases in which a regulant violated this rule under similar circumstances (sidebar). The board levied fines on regulants in 10 of the 12 cases, with fines ranging from \$250 (10 percent of the maximum fine allowed) to \$2,500 (the maximum fine allowed). The board also collected board costs ranging from \$150 to \$500 in seven of the 12 cases. The board revoked regulants' licenses in four of the 12 cases. Inconsistencies in the board's sanctions for these cases do not appear to be warranted by the evidence, according to a review of case documents.

Similarly, the Board for Contractors has levied a wide range of sanctions on contractors for failing to use a written contract (18VAC50-22-260 B.8). The board has decided 115 cases since FY08 in which a regulant violated this rule under similar circumstances. The board levied fines on regulants in all these cases, but fines ranged from \$100 (less than one percent of the maximum fine allowed) to \$1,000 (40 percent of the maximum fine allowed).

Each case has unique circumstances that may contribute to differences in board-imposed sanctions. However, the lack of guidance for boards on how to determine appropriate sanctions inevitably leads to inequitable inconsistencies. DPOR's largest boards use statistics on minimum, average, and maximum sanctions for particular violations, but the statistics are not useful in determining which sanctions are appropriate for particular violations. Smaller boards, whose members have limited experience with enforcement cases, do not receive this or any other formal guidance. Without guidance on appropriate sanctions for certain violations, board members often default to the average sanction or issue sanctions based on individual discretion.

“ In general, there are a lot of differences in how board members lean on sanctions. ”

— DPOR board member
Board for Contractors

Violations occurred under similar circumstances if they had (1) one count of the violation, (2) no other violations as part of the case, and (3) no previous violations within the past 10 years. See Appendix B for more information.

In contrast, other state agencies that regulate occupations have developed detailed guidance on appropriate sanctions for violations. For example, the Board of Dentistry at the Virginia Department of Health Professions has sanctions guidelines for all regulatory enforcement cases that go through an IFF conference. Board members assign scores to account for certain aspects of the case, such as number of consumers affected and regulant's history of offenses, total the scores, and then check the guidance for sanctions that correspond to the total score. Regulatory agencies in Virginia's neighboring states—Maryland, North Carolina, Tennessee, and West Virginia—also use guidance to determine sanctions. In these states, guidance is specified in statute or regulation and prescribes the factors that should be considered when determining sanctions or the specific violations that are eligible for license suspension or revocation.

DPOR could improve the fairness and consistency of sanctions by developing sanction guidelines for each of the boards. The guidelines should be established in formal guidance documents and should provide direction on which sanctions are appropriate for each type of violation, and how sanctions should escalate for multiple counts of the same violation. Guidelines should apply to regulatory enforcement cases resolved through IFF conferences, consent orders, or cases that go directly to the boards. Guidelines should also cover appropriate sanctions for violations identified through inspections. Guidelines should provide recommended rather than required sanctions, as board member discretion is needed to address mitigating factors. To develop the guidelines, DPOR should consider hiring a consultant to work with board members and staff. Other state agencies, including the Virginia Department of Health Professions, have used a consultant to develop guidelines.

RECOMMENDATION 26

The Department of Professional and Occupational Regulation (DPOR) should develop detailed sanction guidelines for occupational rule violations. The guidelines should provide direction on (i) factors to be considered in sanction decisions; (ii) appropriate sanctions for particular violations; and (iii) how sanctions should escalate for multiple or subsequent violations.

Many regulants believe that sanctions are not always proportional to the violations. Although regulants generally believed that they were treated fairly during the enforcement process, 72 percent of surveyed regulants who expressed an opinion disagreed that the board-issued sanctions were reasonable for the violations they had committed. Similarly, 57 percent of surveyed regulants who expressed an opinion disagreed that the sanctions in their consent orders were reasonable for the violations they had committed. Sanction guidelines for occupational rule violations would help address these concerns by limiting and standardizing the discretionary authority of boards to make sanction decisions.

DPOR staff have limited authority to deter unlicensed practice of occupations

DPOR has the authority to investigate cases of unlicensed practice of the occupations that it regulates (§ 54.1-306). However, neither DPOR or its boards have the authority to decide case outcomes for unlicensed practice. Unlicensed practice is a misdemeanor offense that can be pursued through the criminal justice system. After DPOR staff investigate unlicensed practice, they turn the cases over to local Commonwealth's attorneys, who decide whether to prosecute them (Figure 4-5). According to DPOR staff, local Commonwealth's attorneys prosecute the most egregious cases, such as those with felony charges where there is a victim. However, many cases go unaddressed because they only involve misdemeanor charges. DPOR investigated 477 cases of unlicensed practice in FY17, most of which were related to contractors and personal care professionals.

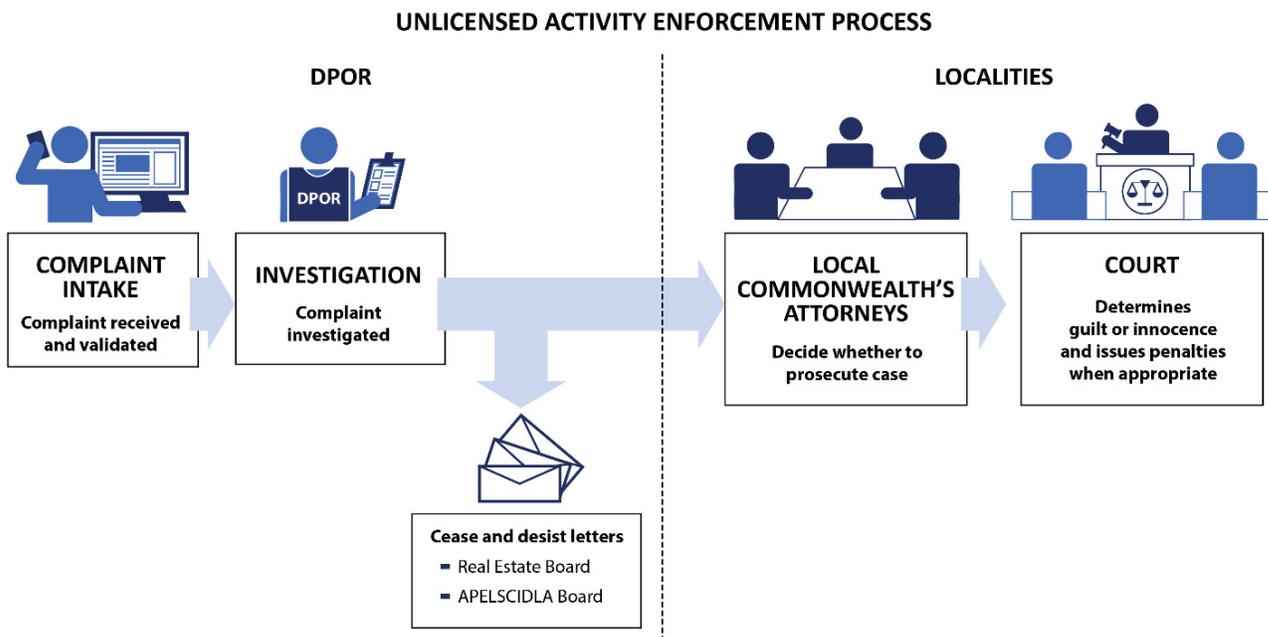
Unlicensed practice puts consumers at risk because practitioners have not necessarily met the credentialing requirements established by DPOR to ensure consumer health, safety, and welfare. For example, an unlicensed contractor who has not satisfied DPOR's experience requirements may not have the expertise needed to build a sound structure. An unlicensed contractor who has not satisfied DPOR's net worth requirements may experience financial difficulties during a project and abandon it before it is complete.

Unlicensed practice also renders consumers ineligible to receive compensation from DPOR recovery funds. For example, DPOR has a Contractor Recovery Fund to compensate consumers who have been harmed by contractors and were unable to recover their losses through the civil court system. To be eligible to submit a claim to the Contractor Recovery Fund, consumers must have a case against a *licensed* contractor.

“There are literally hundreds and hundreds of people working in both barber shops and salons without a license.”

— Regulant
Cosmetology

FIGURE 4-5
DPOR investigates cases of unlicensed activity, but localities are largely responsible for addressing them



SOURCE: JLARC analysis of DPOR's enforcement process for unlicensed practice cases.

Two DPOR boards have authority to issue cease and desist orders for unlicensed practice of occupations. DPOR staff indicated the boards do not often use this authority due to concerns about potential legal challenges following a recent Supreme Court case (*N.C. State Board of Dental Examiners v. Federal Trade Commission*, 2015). Allowing DPOR staff to issue cease and desist notices negates this risk.

Data is not available on the extent of unlicensed practice in Virginia, but DPOR staff and board members report that unlicensed activity is prevalent, especially among contractors, tradesmen, and personal care occupations. Over half of DPOR regulants surveyed in these occupations think the state is not doing enough to stop the unlicensed practice of their occupation. Allowing individuals and businesses to practice without a license is unfair to legally licensed regulants, who have invested the resources required to meet the state's qualifications.

DPOR has limited authority in statute to hold individuals and businesses accountable for unlicensed practice of the occupations they oversee. DPOR staff currently investigate unlicensed practice, but local Commonwealth's attorneys to decide whether to prosecute the cases. DPOR can institute proceedings for civil penalties but must involve the court system to use this authority. DPOR lacks the authority to independently take action to deter unlicensed practice.

Having the authority to issue cease and desist notices could help DPOR deter unlicensed practice of its occupations without the costs or delays associated with the court system. In particular, notices could help to stop unlicensed practice simply by informing the recipients that unlicensed practice is a criminal offense, and DPOR staff can initiate legal proceedings to levy civil penalties if unlicensed practice persists. The Vir-

ginia State Bar currently uses cease and desist notices, and has found them to be effective in addressing unlicensed practice. Notices should be issued by the director or his designees, such as the deputy director of DPOR's enforcement division.

RECOMMENDATION 27

The General Assembly may wish to consider amending § 54.1-111 of the Code of Virginia to authorize the director of the Department of Professional and Occupational Regulation (DPOR), or a designee, to issue cease and desist notices to individuals and businesses that are found through investigation to be engaged in the unlicensed practice of occupations overseen by DPOR and its boards.

With authority granted in statute through the implementation of Recommendation 27, DPOR should be proactive in issuing cease and desist notices. DPOR should develop specific criteria that unlicensed practice cases should meet in order to warrant the agency issuing a cease and desist notice. At a minimum, cease and desist notices should be issued when DPOR determines that instances of unlicensed practice are creating substantial financial or safety risks for the public.

Cease and desist notices are likely to be most effective when they contain warnings about the penalties established for unlicensed practice. The Code of Virginia sets forth both criminal and civil penalties for unlicensed practice. Specifically, § 54.1-111 establishes that an individual found guilty of unlicensed practice can be convicted of a misdemeanor or a felony, depending on the number of unlicensed practice convictions. § 54.1-111 also gives DPOR the authority to initiate a court action seeking (1) to enjoin the unlicensed practice and (2) recover civil penalties for unlawfully engaging in unlicensed practice. DPOR's cease and desist notices should clearly explain these potential penalties, and also explain the steps that the individual or business should take in order to obtain the necessary license.

RECOMMENDATION 28

The Department of Professional and Occupational Regulation (DPOR) should develop criteria for determining when to issue cease and desist notices to individuals and businesses determined to be practicing a profession or occupation without the required license. DPOR should begin issuing cease and desist notices for unlicensed practice when the criteria are met. The notices should explain DPOR's requirements for obtaining a license, and make clear that § 54.1-111 of the Code of Virginia establishes criminal penalties for unlicensed practice and gives DPOR authority to initiate a civil court action to enjoin unlicensed practice and to recover civil penalties for violations.

5 Fees and Finances

SUMMARY DPOR is mostly funded by fees charged for license applications and renewals. DPOR's current fees are relatively low and affordable to regulants. However, DPOR's approach for calculating fees is problematic because it makes inaccurate assumptions about DPOR's future expenses. This approach has resulted in past DPOR fees being set higher than necessary and excess revenue collections. DPOR's overall fund balance has grown over the past 10 years from \$15.0 million to its current level of \$27.2 million. The high fees have since been reduced, but DPOR's large fund balance is declining slowly and will not approach the break-even point for over a decade. Existing statutory requirements intended to keep DPOR from accumulating large fund balances should therefore be strengthened.

As a non-general fund agency, the Department of Professional and Occupational Regulation (DPOR) is primarily funded by fees. Fees paid by applicants and renewing regulants fund agency operations such as licensing and enforcement. Each individual board sets the fees it charges to its applicants and renewing regulants. Any surplus revenue remaining at the end of the fiscal year becomes part of the board's fund balance.

Setting fees as low as possible minimizes barriers to entry for regulated occupations. Low fees are especially important for many of the professions regulated by DPOR, as a number of these occupations have limited earnings potential. Low fees are also required by statute, which states that DPOR's fees should be "sufficient but not excessive to cover expenses" (§ 54.1-113).

Because DPOR is almost completely fee-funded, DPOR's cumulative fund balance is a good indicator of whether fees have been set too high. The cumulative fund balance is all of the surplus revenue that DPOR's occupational boards have accumulated over past years. Fees that are set to sufficiently cover expenses would not collect much surplus revenue and would result in a small fund balance. A large fund balance suggests that DPOR has charged higher than necessary fees in the past.

Current fees charged by DPOR are relatively low and are not burdensome

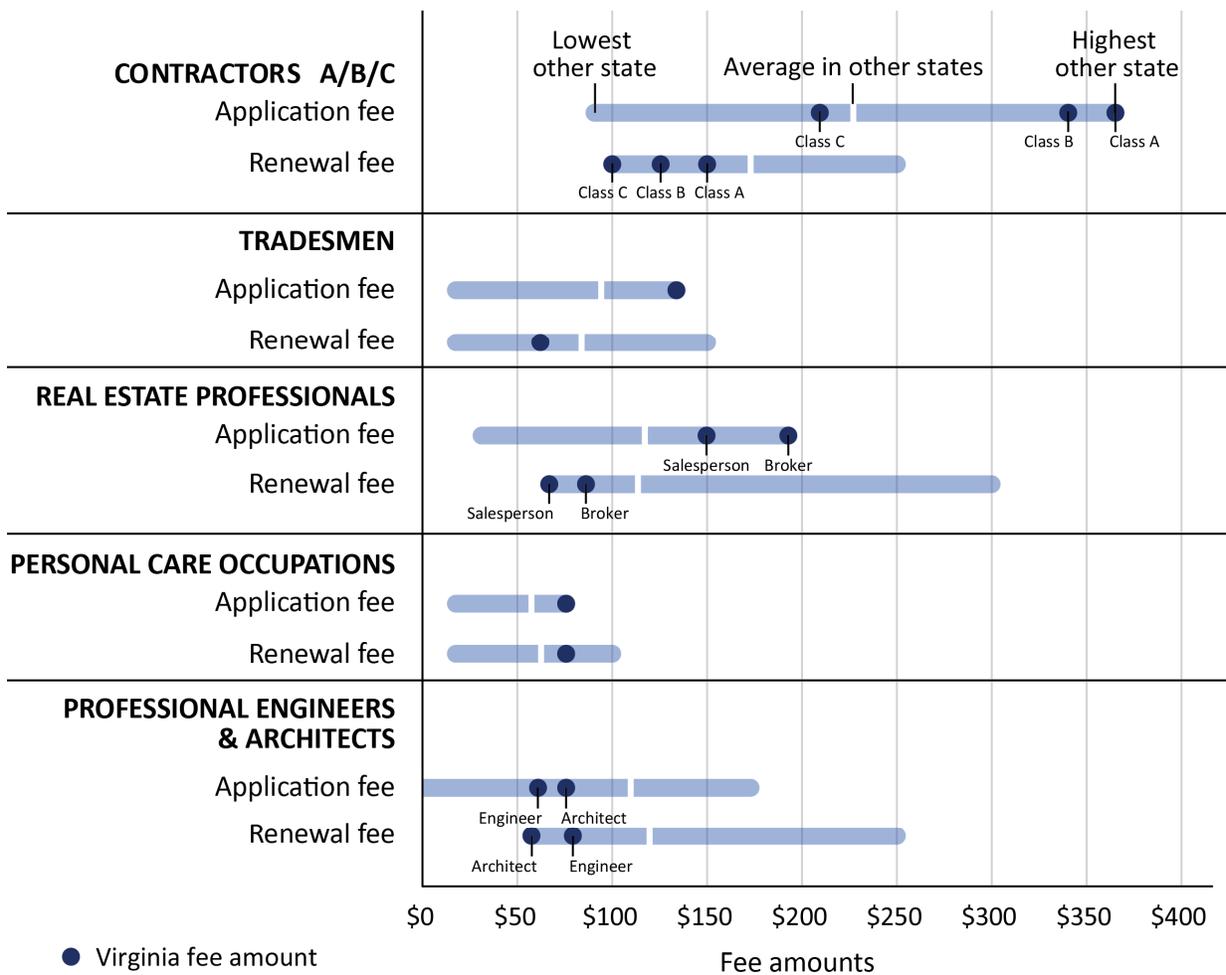
DPOR charges fees for processing applications and renewing licenses and other credentials. Each DPOR board is given discretion to set its own fees, and most boards charge different fees for applications and renewals. Application fees are generally higher than renewal fees. This difference is reasonable because it takes DPOR staff more time to process applications.

DPOR largest occupations are contractors, tradesmen, real estate professionals, personal care occupations, professional engineers, and architects. These occupations represent almost 90 percent of regulants and 83 percent of fee revenues.

DPOR's current fees are relatively low and affordable. Application fees range from \$25 to \$580 and renewal fees range from \$20 to \$500. The highest fees are charged to businesses rather than individuals. For individuals, 82 percent of application fees, and 92 percent of renewal fees, are \$100 or less. Most respondents expressing an opinion about their fees agreed that the fees were affordable (86 percent).

DPOR's fees are largely in line with the fees charged by neighboring states. For the largest occupation groups, 96 percent of fees fall within \$100 of their regional average (Figure 5-1). Because Virginia's application fees tend to be higher than renewal fees, Virginia charges above the regional average for most application fees and below the average for renewal fees. However, taken together, Virginia's application and renewal fees are comparable to other states.

FIGURE 5-1
DPOR's fees are within the range of fees in nearby states



SOURCE: Statutes and regulations of Virginia and surrounding states.

NOTES: Application fees do not include fees paid prior to obtaining the credential, such as fees for interim training licenses, exam fees, or recovery fund fees. Renewal fees standardized for 2-year renewal cycle. Fees for contractors were compared to neighbor states and Georgia, Michigan, and South Carolina.

The biggest costs to enter many occupations are not DPOR fees but education and training costs. Sixty percent of regulants surveyed cited education and training as the largest cost involved in obtaining their credential. Some occupations, such as professional engineers, require a college degree. According to SCHEV data, obtaining an engineering degree at a major Virginia state university would cost an average of \$57,000 in tuition alone. Individuals entering personal care occupations face high education costs relative to their expected earnings. For example, cosmetologists are required to have 1,500 hours of training at a state-approved cosmetology school. In 2017, tuition at for-profit Virginia cosmetology schools ranged from \$9,000 to over \$20,000, but the annual mean wage for cosmetologists in Virginia was \$37,070.

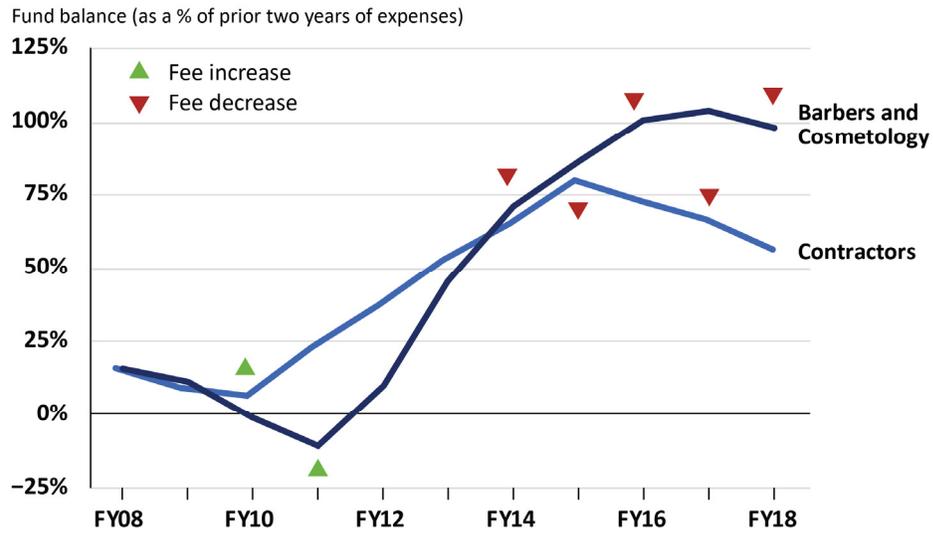
DPOR has charged higher-than-needed fees in the past, resulting in current, large fund balances

Although DPOR's *current* fees are not over-collecting, DPOR has historically charged fees that were higher than necessary to fund agency operations. DPOR fees are based on the expenses it expects to incur. DPOR miscalculated expense projections in the past, resulting in unnecessarily large increases to some fees. These fee increases led the agency to over-collect revenue and accrue a large fund balance. DPOR has since reduced most of these fees but its methodology for determining fees changes remains problematic.

When determining whether fee changes are needed, DPOR has regularly over-projected its future expenses. Every year, DPOR projects expenses for each of its boards. If a board's current fees are not expected to cover projected costs within the next two biennia, DPOR increases fees to cover expenses. However, DPOR has over-projected expenses by making unrealistic assumptions about long-time vacant positions being filled. By relying on this assumption, DPOR has over-projected expenses for its four largest boards by an average of 12 percent (\$2 million annually) over the past 10 years.

Inflated expense projections have resulted in unnecessarily large fee increases for two of DPOR's largest boards. DPOR implemented large fee increases for the occupations under the Board for Contractors in 2010 and the Board for Barbers and Cosmetology in 2011. Fees increased by as much as \$160 for class A contractors and \$85 for personal care occupations, in some cases more than doubling the original fee. Once fee changes were implemented, these two boards quickly accumulated large fund balances (Figure 5-2). The fund balance for the Board for Contractors grew by an average of \$2.2 million annually from FY11 to FY15. No fee action was taken to reduce the fund balance until 2015, after the fees had collected \$12.1 million in surplus revenue. For the Board for Barbers and Cosmetology, the fund balance grew by an average of \$1.8 million annually from FY13 to FY15. A modest fee decrease was implemented in FY14, but the fund balance continued to grow until it reached \$7.2 million in FY17, when a larger fee decrease took effect.

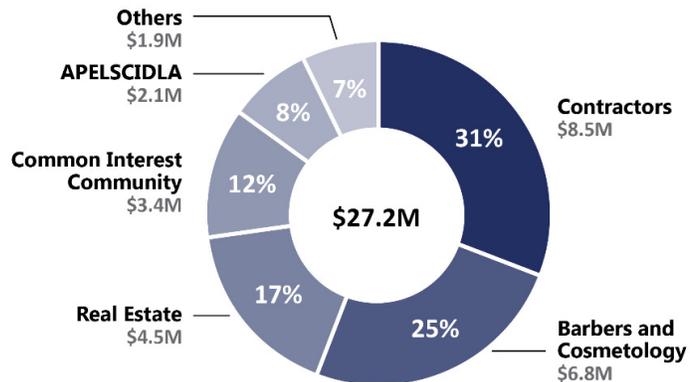
FIGURE 5-2
Fee increases resulted in DPOR's largest boards accumulating large fund balances



SOURCE: Virginia Regulatory Town Hall and DPOR board financial statements.

Due in large part to those fee increases, DPOR currently has an overly large fund balance. DPOR's current cumulative fund balance, including all boards, is \$27.2 million, compared to \$15.0 million 10 years ago. Most of the current balance is attributable to five boards (Figure 5-3). The cumulative fund balance has been declining very slowly since the contractor fees were decreased in FY16. However, at the current rate, the balance will not approach the breakeven point for well over a decade.

FIGURE 5-3
Five boards account for most of DPOR's cumulative fund balance



SOURCE: DPOR board financial statements.

NOTES: APELSCIDLA is the board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects. Other category includes: Real Estate Appraisers; Asbestos, Lead, and Home Inspectors; Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals; Boxing, Martial Arts, and Professional Wrestling; Auctioneers; Professional Soil Scientists, Wetland Professionals, and Geologists; Polygraph Examiners; Cemetery; Waste Management Facility Operators; Hearing Aid Specialists and Opticians; and Branch Pilots.

DPOR boards have limited insight into whether the fees they have approved are over-collecting, and the lack of information keeps boards from effectively carrying out their statutory duty to initiate fee changes (§ 54.1-201). Most boards do not receive regular reports on their board’s financial status and future outlook, including the two boards that accumulated overly large fund balances. Some boards receive copies of their financial statements, but this practice is not universal, and the statements are generally not discussed at board meetings. Additional information on each board’s financial position would allow boards to have a more active role in deciding when to implement fee decreases to avoid overcharging regulants.

To ensure that DPOR does not collect too much revenue going forward, staff should incorporate more realistic vacancy assumptions into annual expense projections. By assuming the historical vacancy rate of 15 percent, with reasonable adjustments to account for planned recruiting and retirements, DPOR could better predict expenses for the upcoming biennium and set fees accordingly. DPOR should evaluate the accuracy of expense projections at the end of each biennium and revise the process for calculating projections as necessary. DPOR should also report on the financial status of each board to the board members at least once a year. In the event that a fee begins to substantially over collect, DPOR should use a temporary fee decrease to promptly lower the fee.

DPOR uses temporary fee decreases, which allow it to lower a fee for a few years and then have the fee return to its previous level without going through the lengthy regulatory fee increase process. Temporary decreases are exempt from the regulatory process and can be implemented quickly. This approach was first utilized by the Department of Health Professions.

RECOMMENDATION 29

The Department of Professional and Occupational Regulation (DPOR) should base staffing cost assumptions on historical staffing costs when calculating the expense projections that are used to determine when fee changes should occur and what the new fees should be.

RECOMMENDATION 30

The Department of Professional and Occupational Regulation (DPOR) should report, at least annually, the fund status of each of the regulatory boards to its members. At a minimum, DPOR should provide a detailed explanation of revenues and expenditures for the previous year in comparison to what was projected, the board’s current fund balance, and revenue and expense projections for two biennia into the future.

Statutory requirements are not effective at keeping DPOR from accruing excessive fund balances

DPOR accrued and will continue to have an overly large fund balance despite a statutory requirement—the Callahan Act—that is intended to keep this from happening. The Callahan Act requires DPOR boards to initiate a fee change when expenses are “more than 10 percent greater or less than moneys collected on behalf of the board” for the previous biennium (§ 54.1-113). This constraint operates as a “soft” cap. Boards are required to revise their fees if the cap is exceeded, but there is no further action required if the action taken is not sufficient to bring revenues in line with expenses.

At the end of FY18, all of DPOR's occupational boards had fund balances above the Callahan Act's soft cap of 10 percent (Table 5-1). Taken together, the Callahan Act percentage for all of DPOR's boards combined was 68 percent. Several boards with large fund balances recently implemented fee decreases, but according to a JLARC estimate, their balances will remain above the 10 percent cap for at least the next two biennia. Boards with the largest balances, such as the Board for Barbers and Cosmetology, will still be well above the 10 percent cap for the next decade unless there are additional, larger fee decreases.

In order for the Callahan Act to work as intended, there needs to be a hard cap on the amount of surplus revenue DPOR and its boards can collect. An effective hard cap would require DPOR boards to distribute any excess revenues to regulants if their fund balance moved above a certain threshold. Excess revenues should be distributed to current board regulants and would not need to be sent to individuals who are no longer credential holders.

TABLE 5-1
DPOR's boards have Callahan percentages above the "soft" cap of 10 percent

Board	FY16-FY18 expenses	End of FY18 fund balance	Callahan Act percentage
APELSCIDLA	\$3,719,325	\$2,051,103	55%
Asbestos, Lead, and Home Inspectors	532,674	357,152	67
Auctioneers	128,640	172,051	134
Barbers and Cosmetology	7,069,098	6,798,121	96
Boxing, Martial Arts, and Professional Wrestling	389,183	206,786	53
Branch Pilots	6,122	22,950	375
Cemetery	118,775	65,461	55
Common Interest Community	1,470,069	3,367,009	229
Contractors	15,515,699	8,536,106	55
Hearing Aid Specialists and Opticians	290,855	56,620	19
Natural Gas Automobile Mechanics and Technicians ^a	6	(385)	--
Polygraph Examiners	17,908	82,112	459
Real Estate Appraisers	521,734	406,471	78
Real Estate	9,544,869	4,538,945	48
Soil Scientists, Wetland Professionals, and Geologists	105,187	118,828	113
Waste Management Facility Operators	45,645	59,003	129
Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals	552,058	332,425	60

SOURCE: DPOR board financial statements.

NOTE: APELSCIDLA is the Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects. Callahan Act percentage is calculated by subtracting the previous biennium's expenses from a board's cumulative revenues, and dividing the remaining fund balance by expenses for the previous biennium.

^aThere are currently no regulants under the Natural Gas Automobile Mechanics and Technicians Advisory Board.

The current 10 percent cap set in the Callahan Act would not serve as a good across-the-board hard cap. A 10 percent hard cap would not allow DPOR to save funds for major one-time improvements, such as IT system upgrades. It would also be difficult for smaller boards, such as Branch Pilots or Polygraph Examiners, to comply with a 10 percent cap. These boards have very small year-to-year operating expenses, and a 10 percent cap would allow them to maintain fund balances of only a few hundred dollars, putting them at risk of insolvency.

The hard cap should provide DPOR and its boards needed flexibility while still deterring the accumulation of excessive funds. For example, a hard cap of 20 percent of expenses for large boards and \$100,000 for small boards could provide flexibility while still greatly reducing balances to well below their current amounts. These caps would lower DPOR's fund balance from its current level at \$27.2 million to around \$8.7 million. A 20 percent cap for large boards would also align with the state's benchmark for the amount of money that internal service fund agencies, such as the Department of General Services, can have on hand to cover operating costs and pay for unexpected expenses.

Several of DPOR's large boards have balances much greater than 10 percent, so implementation of a hard cap should be delayed to allow the boards time to lower fund balances through temporary fee decreases or suspensions. Amendments to the Callahan Act should apply only to DPOR and its boards.

RECOMMENDATION 31

The General Assembly may wish to consider amending § 54.1-113 of the Code of Virginia as follows, effective July 1, 2022: (i) to require that a regulatory board must reduce its fees if the board's fund balance exceeds a certain percentage of expenses allocated to it for the previous biennium or a set dollar amount, whichever is greater; and (ii) to require that, at the close of any biennium, all unspent or unencumbered revenue in excess of the cap be distributed to current regulants. This amendment should only apply to the Department of Professional and Occupational Regulation (DPOR) and its regulatory boards.

6 DPOR Organization and Management

SUMMARY Several aspects of DPOR’s organization and management make it difficult for DPOR to effectively carry out its core licensing and enforcement functions. DPOR takes significantly more time to fill vacant staff positions than other state agencies, which has contributed to staffing shortages in the licensing, enforcement, and support divisions. In addition, DPOR’s largest division—the licensing division—has been assigned several non-licensing functions that divert attention from its main responsibilities. DPOR’s leadership has not identified or addressed these and other long-standing problems.

In order for the Department of Professional and Occupational Regulation (DPOR) to effectively carry out its mission of protecting consumers, it needs to be well organized and managed. DPOR’s core licensing and enforcement functions should be staffed appropriately. Its operations should be organized in a structure that ensures these functions receive sufficient focus, and that the division of responsibilities across DPOR is logical and clear. DPOR leadership should proactively identify problems affecting these and other functions and take actions to address problems.

DPOR faces organization and management challenges in several areas, and similar challenges have been observed in previous reviews. In order for DPOR to successfully implement the recommendations in this report for strengthening its operations, DPOR would need to promptly address these shortcomings.

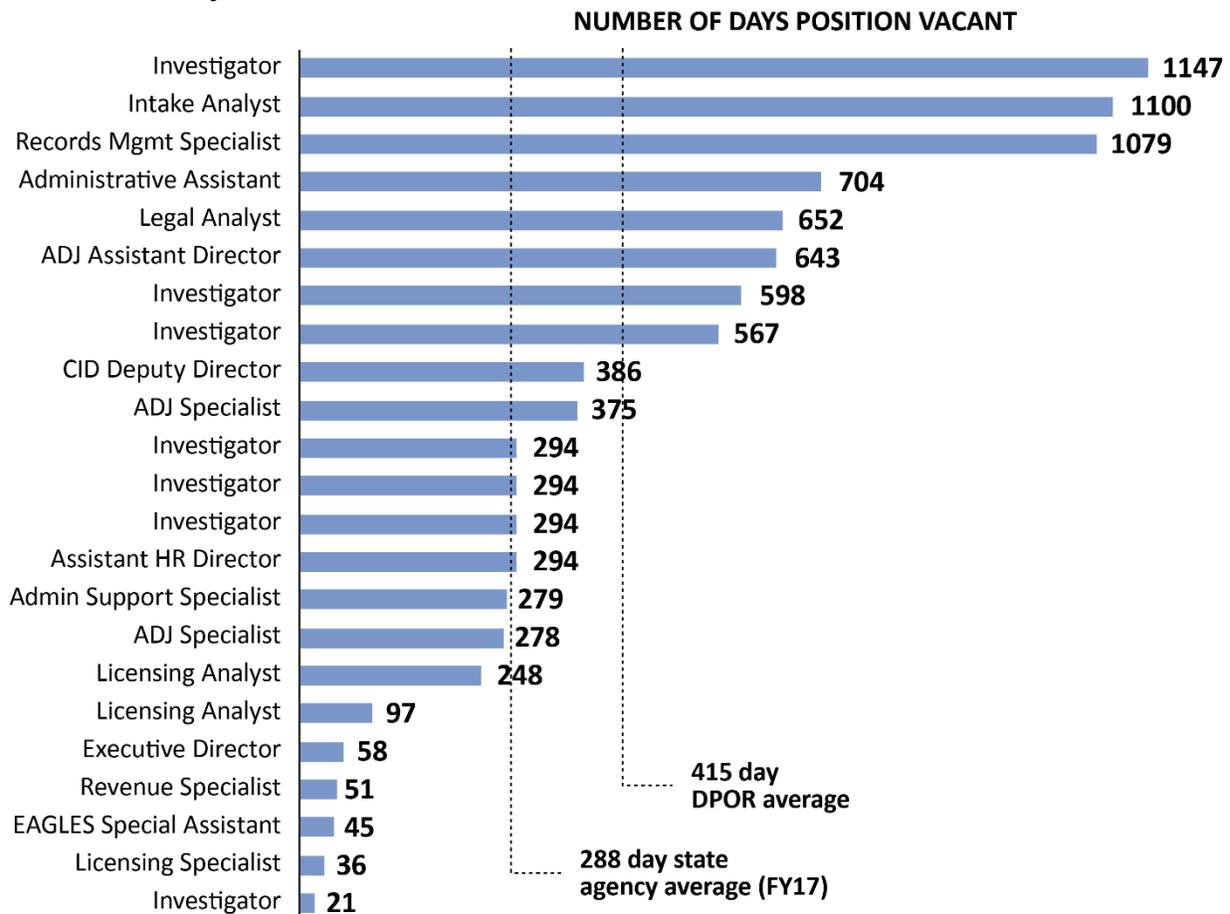
DPOR is ineffective at filling vacant staff positions, contributing to staffing shortages

DPOR takes an excessive amount of time to fill vacant staff positions, and this has affected DPOR operations. DPOR had 23 full-time positions that were vacant as of August 2018, accounting for 11 percent of DPOR’s full-time positions. These positions have been vacant for 415 days, on average, several months longer than the statewide average across Virginia state agencies in FY17 (288 days) (Figure 6-1). Examples of unfilled positions that are critical to DPOR’s core licensing and enforcement functions include the deputy director of DPOR’s enforcement division (Compliance and Investigations), seven investigators, and two licensing analysts for the Board for Contractors. Managers across DPOR have expressed dissatisfaction about the slowness with which DPOR fills vacant positions; 70 percent of DPOR staff who responded to the JLARC survey indicated that the process for hiring new staff takes an unreasonable amount of time (sidebar).

Past consultant reviews of DPOR were conducted by InsightLink Communications (2005, 2010) and the Titan Group (2011). Insightlink surveyed staff on DPOR’s mission, culture, leadership, performance, and employee satisfaction. The Titan Group interviewed DPOR staff and reviewed information on DPOR’s organization, structure, programs, and processes.

JLARC staff surveyed current DPOR staff to gain their perspective on DPOR and its operations. 158 staff across all divisions and sections responded to the survey, for an overall response rate of 86 percent of salaried staff. (See Appendix B for more information.)

FIGURE 6-1
DPOR had 23 vacant full-time positions as of August 2018, many of which had been vacant more than one year



SOURCE: JLARC analysis of data from Department of Human Resource Management and DPOR.

NOTE: Full-time positions only. Median number of days DPOR positions were vacant as of August 2018: 294 days. Statewide median was not available. ADJ = Adjudication; CID = Compliance and Investigations Division

Several **part-time wage positions** are also vacant at DPOR. As of August 2018, 25 part-time positions were vacant, 11 of which were in board sections, and the rest in support functions like Information Technology.

Advertising positions as soon as possible after they become vacant is important, given that DPOR’s open positions take a long time to fill once advertised. As of August 2018, at least eight of DPOR’s vacant positions had never been advertised. In FY17, DPOR took 97 days, on average, to fill vacant positions after they were advertised. This is longer than the Department of Human Resource Management’s goal (60 days) and the statewide average across Virginia state agencies in FY17 (87 days). It is important to process employment applications quickly because, according to DPOR staff, qualified applicants sometimes find employment elsewhere before their applications to DPOR are acted on.

The large number of unfilled positions makes it harder for DPOR to perform its core licensing and enforcement functions. In the licensing division, some managers indicated that they are not able to keep up with their workloads if positions are vacant for an extended period of time, resulting in work backlogs. (See Chapter 3 for information

on licensing backlogs.) Similarly, DPOR must keep up with new enforcement cases. If too many investigator positions are unfilled, DPOR will not have the staff needed to proactively identify and investigate rule violations. (See Chapter 4 for information on DPOR's limited resources to conduct inspections of rule violations.)

DPOR has not filled vacant positions in a timely manner, in part because the Human Resources (HR) division has not filled one of its own key positions. DPOR's assistant HR director position has been vacant and was not advertised for more than 300 days. This position is one of only five HR positions in DPOR. Without it, the capacity of DPOR's HR division to carry out hiring efforts is somewhat limited.

A few vacant positions have gone unfilled for reasons beyond the control of the HR division. The position of deputy director for enforcement (CID deputy director) was purposefully held open by the DPOR director. The director did not want to fill the position until he was either reappointed or a new director was named who could then make their own hiring decision. Two licensing analyst positions have not yet been advertised because DPOR has not received approval to fill them from the Secretary of Commerce and Trade.

To ensure that DPOR has the staffing capacity needed to fill key vacant positions in a timely manner, DPOR should prioritize filling the assistant HR director position. This would increase the HR division's capacity to handle HR responsibilities by 20 percent. DPOR should also assess whether additional full-time or part-time HR staff are needed to address current hiring backlogs.

RECOMMENDATION 32

The Department of Professional and Occupational Regulation (DPOR) should (i) immediately fill the assistant director position in its Human Resources division and (ii) assess whether additional full-time or part-time staff positions are needed in the human resources division to address current hiring backlogs.

DPOR should develop a plan to help HR staff prioritize filling the most critical positions. HR staff should work with DPOR's director, deputy directors, and division directors to rank all vacant positions based on how critical they are to DPOR operations. HR staff should use the rankings to determine which positions to advertise first. DPOR should also work closely with staff of the Department of Human Resource Management to ensure that its existing hiring processes (e.g., scheduling interview panels, making hiring decisions) align with best practices and occur in a timely manner.

RECOMMENDATION 33

The director, deputy directors, and division directors of the Department of Professional and Occupational Regulation (DPOR) should rank all vacant positions based on how critical they are to DPOR's ability to fulfill its responsibilities. Human resources staff should use the rankings to prioritize the advertising and filling of positions, using hiring processes that reflect best practices.

“The hiring process is ridiculously slow. Many times, I have watched good people leave the process because it took so long they had to find a job elsewhere.”

— DPOR staff

It is critical that DPOR address its unfilled positions and slow hiring process promptly, because DPOR will likely lose additional full-time staff in the near future. Nearly one-fourth of DPOR staff are currently eligible to retire within the next five years. In addition, 46 staff (29 percent of survey respondents) indicated that they are considering leaving DPOR for retirement, another job, or other reasons within the next year. The likelihood of additional staff vacancies underscores the importance of filling critical positions and properly allocating staffing resources.

Not all of DPOR's vacant positions currently need to be filled. Some DPOR positions are vacant but have not been posted because they are no longer needed. For example, managers have not indicated the need to fill a vacant intake analyst position in the enforcement division and a vacant records management specialist position in the licensing division. If DPOR determines that additional staff are needed in other divisions, such as HR, Information Technology (IT), or licensing, DPOR staff could re-allocate these positions. (See Chapter 3 for information on staffing concerns in the IT and licensing divisions.)

DPOR's licensing division is not sufficiently focused on licensing functions

DPOR's largest function, licensing, is most visible to the public and impacts more applicants and regulants than any other function. Licensing functions are carried out by DPOR's licensing division (officially the Communications and Board Operations division). Each of the occupations it licenses has unique requirements, processes, and concerns. To effectively perform its functions, the division should be structured around reviewing and approving applications and other transactions, handling phone calls, responding to email inquiries, and providing support to DPOR boards. The deputy director who manages the division should be focused on ensuring licensing operations are carried out as efficiently and effectively as possible. Currently, DPOR's licensing division is not sufficiently focused on licensing.

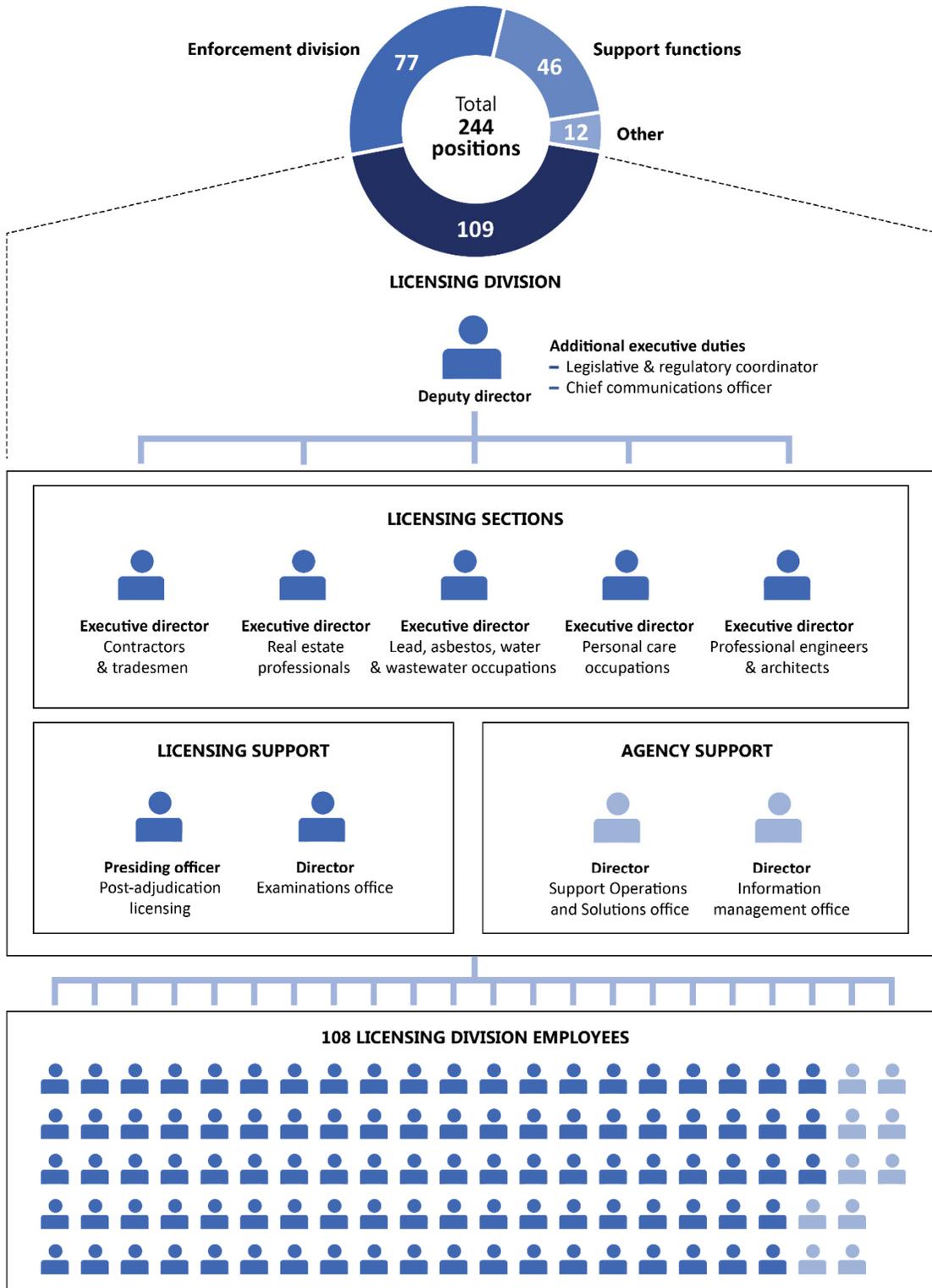
Deputy director of the licensing division has several non-licensing duties that distract from main responsibilities

The deputy director of DPOR's licensing division is responsible for managing more than half of the agency as well as carrying out two additional, non-licensing roles. The deputy director supervises nine direct reports and oversees 108 staff (Figure 6-2). Nine direct reports is a relatively large number of managers to supervise. The deputy director for DPOR's next largest division—enforcement—only has six direct reports and oversees 77 staff. The DPOR director also has six direct reports.

“ I think [deputy director of the licensing division] has too many direct reports ... and it impacts the sections. ”

— DPOR staff
Licensing division

FIGURE 6-2
Deputy director of licensing division oversees nearly half of DPOR staff positions



SOURCE: JLARC analysis of DPOR organizational chart (updated May 2018).

In addition to managing the licensing division, the deputy director has two non-licensing, agency-wide roles: communications officer and coordinator for legislative and regulatory affairs. Prior to 2017, the deputy director's current roles were divided among three or more staff positions at DPOR. DPOR's closest peer agency, the Virginia Department of Health Professions (DHP), allocates these roles across three staff positions.

The placement of non-licensing duties with the deputy director has the potential to prevent the licensing function from being well managed. The deputy director needs to work with division staff to identify and address problems, such as how to better prevent license fraud or avoid backlogs in processing applications. Unrelated tasks, such as monitoring DPOR-related legislation for up to two months during the General Assembly session, divert the deputy director's time and focus away from licensing responsibilities.

DPOR supported two bills in the 2018 General Assembly session.

HB 523 added citizen members to the board for architects and professional engineers. HB 790 exempted persons working in a barbershop or cosmetology salon from licensing requirements if their duties were confined to blow drying, cleansing, and styling hair.

Placing agency-wide duties with the deputy director for licensing also causes there to be insufficient focus on these other duties. For example, DPOR's 2018 legislative agenda, which is managed by the deputy director, was not coordinated with its boards. DPOR only supported two bills, but neither the bills nor the changes they proposed were discussed with the relevant boards in advance. Even after the bills were enacted, staff did not inform the boards that DPOR had initiated the bills. Several members of one of the affected boards expressed strong disagreement with changes that were enacted. In contrast, DHP actively works with its boards on bills that affect them.

DPOR should move responsibilities for communications and coordinating legislation and regulation out of the licensing division and create one or more new positions to handle these and other related, agency-wide responsibilities. These duties are interrelated, and state agencies commonly assign them to the same office or individual. DPOR could assign these responsibilities to the position(s) created pursuant to Recommendation 6 (Chapter 2). Alternatively, DPOR could re-establish its former deputy director of finance and administration position to oversee these functions. A deputy director of finance and administration could also oversee other agency-wide support functions, such as IT.

Licensing division includes agency-wide support functions related to IT

DPOR's licensing division includes two sections that perform non-licensing support functions for DPOR as a whole, including several IT functions. This results in IT being carried out within the licensing division and the IT division. By placing IT functions in the licensing division, DPOR has unnecessarily complicated the management of its licensing IT system. The IT division must coordinate across another division to ensure that the system is up-to-date and functioning correctly. The arrangement also creates confusion among the system's users, who do not always know where to seek IT support. As a result, neither the IT division nor the licensing division is clearly accountable for fixing problems or making necessary changes to the system. This lack of clear

accountability may have contributed to the system’s many shortcomings. (See Chapter 3 for information on shortcomings of the licensing IT system.)

By dividing responsibility for IT, DPOR has made it unnecessarily difficult to improve its licensing IT system. DPOR needs to improve the capability of the system so that it can, for example, accept online applications. Under the current structure, the IT division must resolve technical issues across divisions in order to make improvements to the system.

Staff in DPOR’s licensing division are also responsible for the agency website. Although licensing staff can post information to the website, they do not have the technical skills to address problems with how information on the website is organized and presented to visitors. This and other IT-related functions that are currently housed in the licensing division should be moved to the IT division.

RECOMMENDATION 34

The Department of Professional and Occupational Regulation (DPOR) should transfer IT-related responsibilities for its licensing system and technical aspects of website management, records management, and electronic forms, from the licensing division to the Information Technology division.

The licensing division’s two non-licensing sections perform additional functions that should be moved out of the licensing division. One non-licensing section responds to Freedom of Information Act (FOIA) requests, scans documents for all agency divisions, and manages DPOR policies and procedures. These responsibilities could be moved under a new position created by DPOR, such as a director of legislative and public affairs or a deputy director of administration and finance.

RECOMMENDATION 35

The Department of Professional and Occupational Regulation (DPOR) should reassign to other divisions the following functions that are currently assigned to the licensing division: (i) handling Freedom of Information Act requests; (ii) scanning documents, (iii) managing policies and procedures; (iv) evaluating business processes; and (v) agency-wide training.

DPOR leadership has not identified or addressed long-standing problems

DPOR’s mission is clearly defined in statute. The agency and its boards are responsible for licensing specific occupations, enforcing the rules for those occupations, and establishing related fees and regulations. DPOR has developed broad goals for fulfilling its mission in its state-required strategic plan. However, DPOR has several long-standing problems that impede its ability to fulfill its mission and goals.

“Communication from the top of the agency down is generally a problem. Issues across sections also do not get addressed directly, which can make certain issues even more problematic as sections are left to address work responsibilities on their own.”

— DPOR staff

DPOR's long-standing problems affect almost every aspect of the agency's operations, including licensing, enforcement, finance, and IT. Specifically,

- DPOR is not adequately protected against licensing fraud schemes (Chapter 3);
- boards and staff make enforcement decisions with limited guidance on how cases should be handled and what sanctions are appropriate (Chapter 4);
- excessive fund balances have been accrued and are likely to persist for years if not addressed (Chapter 5);
- key staff positions have been vacant for an excessive amount of time (Chapter 6); and
- poor IT systems prevent DPOR from offering basic, user-friendly online services and create inefficiencies in the licensing process (Chapter 3).

In contrast to DPOR, the Department of Health Professions has monthly "executive team" meetings, which include the DHP director and senior managers. DHP staff indicated these meetings are helpful in facilitating communication across the agency.

Long-standing problems have persisted because DPOR's leadership has not identified them as problems that need to be addressed or taken adequate steps to address them. DPOR staff expressed concern that leadership is not addressing problems; of the survey respondents who expressed an opinion, 51 percent indicated DPOR leadership was not proactively identifying and addressing challenges.

DPOR leadership has shown that it is capable of effectively identifying and addressing problems. For example, leadership began allowing the use of temporary fee decreases to avoid problems with the state's slow regulatory change process, and leadership added staff to several licensing sections in FY18 to address backlogs in application processing. However, additional efforts are needed to address the challenges identified throughout this report.

DPOR leadership needs to improve communications with managers to effectively identify problems. While most managers indicated they feel free to approach leadership with their concerns, leadership does not usually initiate discussion of potential problems. There are no regular meetings between the DPOR director and senior management, and neither the licensing nor enforcement divisions have regular meetings with their section managers. Some managers indicated they do not report problems, and leadership does not usually ask if there are problems. Similarly, several managers from across the agency indicated they do not always effectively communicate with other managers. These communication problems are not new; a 2011 consultant report identified the same concerns.

After problems are identified, DPOR leadership should take action to address them. Problems with DPOR's licensing IT system have been known for years but DPOR only recently began to address them. For example, the licensing IT system was originally capable of processing online applications but lost this capability because it was not properly maintained by the IT division. DPOR only began exploring ways to address this and other problems with the system when a new IT director and staff were hired this past year.

DPOR should set clear and achievable objectives for resolving its long-standing problems. The objectives should be established in an internal plan, through which DPOR leadership and managers should prioritize the resolution of DPOR's long-standing problems. For each objective, DPOR should document the actions needed and the timeline for completion. DPOR should report on progress toward achieving its long-term objectives in its biennial report.

RECOMMENDATION 36

The Department of Professional and Occupational Regulation (DPOR) should develop an internal plan that describes its objectives for resolving long-standing problems. The plan should, at a minimum, include actions and timelines for addressing (i) DPOR's licensing fraud vulnerabilities; (ii) lack of guidance for enforcement decisions; (iii) key staff position vacancies; (iv) excessive fund balances; and (v) outdated information technology licensing system. DPOR should report on progress toward meeting objectives in its biennial report, starting with its next report.

Appendix A: Study mandate

Resolution of the Joint Legislative Audit and Review Commission directing staff to review the operation and performance of the Virginia Department of Professional and Occupational Regulation.

Authorized by the Commission on July 10, 2017

WHEREAS, the Department of Professional and Occupational Regulation protects the health, safety, and welfare of the public by licensing qualified individuals and businesses and enforcing standards of professional conduct for professions and occupations, including architects, contractors, cosmetologists, real estate professionals, land surveyors, and many others; and

WHEREAS, the Department oversees the 20 regulatory boards that establish minimum standards and appropriate credentials for the professions and occupations they regulate, and set the amount of fees charged when issuing credentials; and

WHEREAS, the Department issues professional credentials—licenses, certificates, or registrations—to individuals and businesses that meet the minimum standards established by each board; and

WHEREAS, more than 304,000 individuals and businesses held professional credentials issued by the Department as of May 1, 2017; and

WHEREAS, the Department enforces the standards of professional conduct established by the regulatory boards by investigating reports of violations and issuing sanctions and other disciplinary actions, including fines, probationary terms, and license suspension or revocation; and

WHEREAS, the Department receives no general fund appropriations, being funded exclusively through credential application fees, which are required by the Callahan Act to be sufficient for operating expenses but not excessive; and

WHEREAS, changes to the Department's credential qualifications or application fees are subject to the Administrative Process Act; and

WHEREAS, the Department employs 203 staff and operates with a non-general fund budget of \$23.4 million; and

WHEREAS, Executive Order 17 issued in 2014 establishes that all regulatory activity should be necessary to protect the health, safety, and welfare of the public, and that regulations should be designed to achieve their objectives in the most efficient and cost-effective manner; and

WHEREAS, the Joint Legislative Audit and Review Commission (JLARC) last completed a review of Virginia's occupational and regulatory boards in 1982; now, therefore be it

RESOLVED by the Joint Legislative Audit and Review Commission that staff be directed to review the operation and performance of the Department of Professional and Occupational Regulation. In conducting its study, staff shall (i) review whether the Department is organized and staffed to efficiently and effectively process applications for new and renewed professional credentials, respond to complaints about individuals or businesses, and support the work of each regulatory board; (ii) determine whether the Department's staffing and administration of regulatory board meetings effectively facilitate public participation and access; (iii) determine whether the Department appropriately enforces the standards of professional conduct established by the regulatory boards; (iv) determine whether the standards and fees established by the Department and its regulatory boards, and the requirements of the Administrative Process Act, are reasonable and identify any requirements or fees that unnecessarily prevent or hinder individuals or businesses from entering into or remaining in their professions; (v) determine whether the policies and procedures for modifying fees allow the Department and regulatory boards to respond to changing budgetary needs in a timely manner and ensure that boards are not carrying excessive surpluses or deficits; (vi) compare the Department's regulatory requirements and other provisions and the number and type of professions it regulates to those regulated in other states; and (vii) evaluate whether the Department is effectively contributing to the Commonwealth's economic interests through coordination with other agencies in the Commerce and Trade Secretariat and the Virginia Community College System. JLARC staff may review other issues and make recommendations as appropriate.

All agencies of the Commonwealth, including the Department of Professional and Occupational Regulation and its regulatory boards, the Virginia Board for Workforce Development, and the Virginia Community College System shall provide assistance, information, and data to JLARC for this study, upon request. JLARC staff shall have access to all information in the possession of state agencies pursuant to § 30-59 and § 30-69 of the Code of Virginia including all documents related to disciplinary proceedings or actions of the boards. No provision of the Code of Virginia shall be interpreted as limiting or restricting the access of JLARC staff to information pursuant to its statutory authority.

JLARC shall complete its work and submit a report of its findings and recommendations to the Commission by December 15, 2018.

Appendix B: Research activities and methods

Key research activities performed by JLARC staff for this study included

- structured interviews with staff from the Virginia Department of Professional and Occupational Regulation (DPOR), Virginia Department of Health Professions, Board of Accountancy;
- surveys of regulants and DPOR staff;
- collection and analysis of data on entry requirements in Virginia compared to other states, licensing process participation and duration, enforcement process participation and duration, regulatory change process duration, agency staffing, agency organization, and agency funding;
- file review of a sample of enforcement cases;
- review of national research;
- evaluation of the need to regulate occupations; and
- review of various other documents and data, including statutes and regulations in Virginia and other states, DPOR application processing times, DPOR workload data (applications processed, phone calls received), and previous consultant reviews of DPOR.

Structured interviews

Structured interviews were a key research method for this report. Interviews were conducted with

- 38 DPOR staff and seven members of DPOR's occupational boards;
- staff at the Virginia Department of Health Professions, the Board of Accountancy, and other state agencies; and
- six professional associations.

DPOR staff

JLARC staff conducted in-depth structured interviews with 38 of DPOR's 207 staff (18 percent), many of whom were interviewed multiple times. The DPOR staff selected for interviews represented each core service division, support division, and administrative office and had differing job roles and levels of responsibility. Interviews were conducted in person and by phone. Interview questions varied but were intended to help JLARC staff understand DPOR staffs' roles and responsibilities, policies and practices, training, coordination within DPOR, and opportunities for improvement.

JLARC staff also interviewed ten current members of DPOR's various occupational boards, as well as three previous board members. JLARC staff selected board members to interview with different professional backgrounds and years of service on DPOR's boards, with an emphasis on boards representing the largest DPOR regulant populations. Six of the members interviewed were current or former chairs of their respective boards. Interviews were conducted in person and by phone and covered the roles and responsibilities of DPOR and its boards, credential requirements, occupational rules and the enforcement process, and the fee and regulatory change process.

Staff at the Department of Health Professions, Board of Accountancy, and other state agencies

JLARC staff conducted in-depth interviews in person and by phone with staff at the Virginia Department of Health Professions and the Board of Accountancy. These state agencies were selected for

interviews based on their similar functions to DPOR of issuing credentials and regulating occupations. Interview questions varied but were intended to identify benchmarks and assess any best practices that could be used to improve DPOR's practices.

JLARC staff also met with staff from several state agencies to discuss different aspects of DPOR's operations and to help interpret its governing statutes. These agencies included the Department of Human Resources Management, the Department of Planning and Budget, the Auditor of Public Accounts, the Office of the Attorney General, and the Division of Legislative Services.

Professional associations

JLARC staff conducted in-depth interviews with four organizations representing the largest occupations regulated by DPOR—the Associated General Contractors of Virginia, the Professional Beauty Association, the Virginia REALTORS Association, and Virginia Society of Professional Engineers—to obtain their perspectives on the efficiency and effectiveness of DPOR's activities, DPOR's engagement with the regulated community, and suggested areas for improvement to DPOR's operations. JLARC staff also met with current and former board members from the Opticians Association of Virginia and the Virginia Association of Community Managers to discuss the need for regulation of these occupations. Staff also interviewed a currently licensed residential energy analyst (there were no board members or professional associations representing this occupation).

Surveys

Three surveys were conducted for this study: (1) a survey of current regulants, (2) a survey of regulants subject to enforcement, and (3) a survey of all full-time DPOR staff.

Current regulants

The survey of DPOR regulants was administered electronically to sample of current regulants. Individuals were selected for the survey from a subset of total DPOR regulants who had an email address on file with DPOR. Regulants from occupations under each of DPOR's boards were sampled. (No regulants were sampled from the Natural Gas Automobile Mechanics and Technicians Advisory Board because it has zero current regulants, nor the Fair Housing Board, which does not regulate occupations; other DPOR credential holders that were not deemed "occupations," such as homeowners associations or wrestling events, were also excluded.) Some occupations were oversampled to ensure enough responses were received to draw meaningful conclusions about these occupations. Responses were then weighted to be reflective of each board population and overall regulant population. JLARC staff sent the survey to 12,717 total regulants and received 1,988 responses, representing 15 boards and 35 occupations, for an overall response rate of 16 percent.

Topics covered in this survey included: (1) satisfaction with the application process, including education, exam, and experience requirements, (2) satisfaction with the renewal process, including any continuing education requirements, (3) costs for obtaining and maintaining a DPOR credential, (4) understanding of occupational rules, and (5) unlicensed practice.

Regulants subject to enforcement

JLARC staff administered a survey electronically to DPOR regulants who had been the subject of a DPOR enforcement case within the past five years to gain their perspective on the enforcement process. Staff surveyed any regulant who had been subject to an enforcement action during that time period who had an email address on file with DPOR.

JLARC staff received responses from 406 of the 3,021 regulants (13 percent) who received the survey. All of these regulants had an enforcement case that went through DPOR's complaint intake process. Just over one-third (143 regulants) had an enforcement case that was investigated. A similar portion (141 regulants) had an informal fact-finding conference. Fewer regulants negotiated a settlement (121 regulants) or had their case heard by a DPOR board (100 regulants). Only seven percent (29 regulants) attended the board meeting where their case was decided.

The survey asked regulants about their occupation and license status with DPOR, and whether DPOR's complaint intake process, investigations, disciplinary proceedings, and board decisions were well explained and handled fairly. Survey questions were designed to determine whether regulants felt DPOR had provided them sufficient due process and treated them fairly during their enforcement case.

The survey provided regulants the opportunity to provide additional feedback on DPOR staffs' handling of their enforcement case through an open-ended survey question. Several regulants with comments also contacted JLARC staff through email or a phone call.

DPOR staff

JLARC staff administered a survey electronically to all salaried, full-time staff at DPOR, including the director, deputy director, and division directors. JLARC staff received responses from 158 of DPOR's 183 full-time staff (86 percent). These staff represented all of DPOR's core service divisions and support divisions.

Topics covered in the survey included staff's (1) years of experience and division placement at DPOR; (2) workload and understanding of their individual responsibilities; (3) perception of licensing and enforcement policies and processes; (4) perception of their division's communication and management; (5) perception of senior leaders' management and accountability mechanisms; and (6) satisfaction with work at DPOR.

Staff were given the opportunity to respond to the survey anonymously, given the sensitive nature of the survey topics. Out of the 183 staff who responded to the survey, 118 (64 percent) responded anonymously.

Data collection and analysis

Several types of data analyses were performed for this study.

Evaluations of the need to regulate occupations (Chapter 2)

JLARC staff evaluated the need for regulating 25 of DPOR's 44 occupations. Occupations were selected for evaluation if they (1) were one of DPOR's largest occupation groups, with more than 5,000 regulants, (2) had a low level of enforcement activity (very few cases or disciplinary actions in the past five years), or (3) a DPOR report had recommended against regulating the occupation. Each occupation was graded on the four criteria for regulation established in statute (§ 54.1-100). The methods for assigning grades are discussed below.

Criterion 1: Unregulated practice can harm public health, safety, or welfare.

This criterion was graded using several different analyses. (1) Staff evaluated the rationale for regulating occupations by examining the nature of the work performed and the health, safety, and welfare risks it could present to the public if it was not regulated. Staff also considered the arguments for and against regulation given in state sunrise and sunset reviews and other sources. The rationale for regulating some occupations was also discussed with DPOR staff, board members, associations, and practitioners. (2) Staff analyzed DPOR enforcement activity related to the occupation to determine if there was evidence that the occupation is practiced improperly. Staff considered the number of regulatory enforcement cases, unlicensed practice cases, and disciplinary orders issued each year, in total and per 1,000 regulants. (3) Staff considered the conclusions drawn in sunrise and sunset reviews performed by Virginia and other states, including whether the state determined if the occupation should or should not be regulated. (4) Staff considered the extent of to which the occupation is also regulated in other states.

If the occupation was found to have a reasonable rationale, some level of enforcement activity in Virginia, and was regulated in many other states, it was graded "meets criteria." If the rationale was reasonable but there was little or no enforcement activity in Virginia, it was graded "partially meets criteria." If the rationale was not found to be reasonable, regardless of enforcement activity, it was graded "does not meet criteria."

Criterion 2: Occupation has inherent qualities that distinguish it from other occupations

This criterion was graded by assessing whether there were unregulated occupations performing similar work. The main source for this assessment were staff's own assessment of the nature of the work performed, discussion with practitioners and DPOR staff, and discussion of the occupation in state sunrise and sunset reviews.

If Virginia regulated all or almost all occupations performing this work, it was graded "meets criteria." If there were other unregulated occupations performing similar work, but not completely identical work, it was graded "partially meets criteria." If there was an unregulated occupation performing identical work it was graded "does not meet criteria."

Criterion 3: Public needs and will benefit from state assurances

This criterion was graded using two different analyses. (1) Staff reviewed the nature of the work to determine if services were likely to be employed by non-experts, such as a member of the general public hiring a contractor, or experts, such as a wastewater treatment plant hiring an operator. (2) Staff assessed if there was a reasonable alternative to state regulation that could provide assurances to the public, such as if there was a nationally-recognized certification program with requirements that were similar to Virginia's.

If consumers (or in some cases prospective employers) could be expected to have difficulty assessing the quality of a service provider before or after services were completed, and there were no alternatives to state regulations, the occupation was graded "meets criteria." If one or the other of these tests were not met, then it was graded "partially meets criteria." If neither test was met, it was graded "does not meet criteria."

Criterion 4: Public is not protected by other means

This criterion examined if potential risks presented by an occupation were offset, in whole or in part, by other government oversight or professional practices. For example, the risk of a contractor building an unsafe structure is mitigated by permitting requirements and post-construction building inspections. However, this regulation does not protect consumers against the risk of financial loss from improperly performed work or abandoned projects.

If there was no government oversight or standard professional practice that would mitigate risks, then the occupation was graded "meets criteria." If there was government oversight or standard professional practice that reduced but did not eliminate risks, or eliminated some risks but not others, then the occupation was graded "partially meets criteria." If risk was completely or almost completely eliminated, then the occupation was graded "does not meet criteria."

One of the crucial data sources for JLARC staff's evaluations were sunrise and sunset reviews performed in Virginia and other states. JLARC staff reviewed 88 sunrise and sunset reviews of occupations, including 5 performed by DPOR and 83 performed by agencies in other states. These reviews were used to inform JLARC staff's assessment of the need to regulate twelve different occupation groups that are currently regulated by DPOR.

JLARC staff also reviewed Virginia sunrise and sunset reviews for several other occupations to better understand how these types of reviews have been used in the state, including an additional 30 reviews performed by DPOR and 14 reviews performed by the Department of Health Professions.

Entry requirements in Virginia compared to other states (Chapter 3)

JLARC staff reviewed the entry and renewal requirements for a subset of occupations regulated by DPOR. JLARC staff chose occupations to review based on the size of the regulant population or whether there had been recent legislative action in another state concerning an occupation (Table B-1). This analysis assumed an equal scope of regulation across states; exemptions from regulation in state statute or regulation were not analyzed.

JLARC staff compared Virginia’s entry and renewal requirements to the entry and renewal requirements for the same occupations (if regulated) in Virginia’s neighboring states, including Kentucky, Maryland, North Carolina, Tennessee, and West Virginia. This approach to examining the reasonableness of entry and renewal requirements was also used in recent reports on occupational regulation in other states, such as reports in Delaware (2016) and Pennsylvania (2018).

Between February 27th and March 9th, 2018, JLARC staff retrieved current statutes and regulations from Virginia and surrounding states. For each state, JLARC first went to the website of the relevant regulatory board or agency and recorded the sections of statute and regulations the board or agency reported it is subject to. Then, JLARC staff gathered statutes from the website of each state’s legislature (JLARC staff retrieved Tennessee’s statutes from LexisNexis). Regulations were gathered from the relevant administrative code website.

TABLE B-1 Occupations chosen by JLARC staff for review of entry and renewal requirements

Occupation	Criterion	Regulant population
Contractors	Population size	56,226
Real estate salesperson	Population size	49,233
Cosmetologist	Population size	42,284
Professional engineer	Population size	28,932
Tradesman	Population size	27,779
Real estate broker	Population size	11,297
Nail technician	Population size	8,367
Architect	Population size	7,444
Esthetician	Population size	3,242
Barber	Population size	2,871
Optician	Other states ^a	1,895
Auctioneer	Other states ^b	1,194

SOURCE: DPOR regulant population list

NOTES: Regulant population as of July 1, 2018. Data for real estate occupations includes inactive regulants. Real estate brokers include principal and associate brokers.

^aTexas deregulated opticians in 2015. ^bRhode Island deregulated auctioneers in 2015.

License processing times, workloads, and staff turnover (Chapter 3)

JLARC staff analyzed timeliness of DPOR’s application processing by looking at quarterly data on processing times collected by the agency’s finance and administration division. These were then compared to the 30-day goal used by the Department of Health Professions and regulatory agencies in several other states. DPOR’s own internal processing goal was not used because it was recently changed, and the old goal appeared to be unrealistic. DPOR’s old goal was to process 90 percent of applications within 15 days. DPOR’s current goal is to process 75 percent of applications within 15 days.

To determine workload, JLARC staff used DPOR’s monthly data on the number of applications and phone calls received and compared them to the number of full- and part-time licensing positions in each of the five licensing sections. These positions included licensing analysts, licensing specialists,

and licensing supervisors. It did not include executive directors, board administrators, education or compliance specialists, administrative or other assistants, or other office support staff. Number of positions was determined by looking at the DPOR organization chart dated May 25, 2018.

To estimate turnover in the licensing sections, JLARC staff looked at whether individuals remained within the same licensing section from one year to the next. JLARC staff compared staff listed in each section in organization charts from 2014, 2015, 2016, 2017, and 2018. To estimate turnover for the agency as a whole, JLARC staff performed the same task for all agency staff.

Occupational rules in Virginia compared to other states (Chapter 4)

JLARC staff reviewed a subset of DPOR's occupational rules (also called standards of conduct or standards of practice) to determine whether they appear appropriate. Staff reviewed the occupational rules for contractors, tradesmen, real estate professionals, and cosmetologists because they have a relatively high number of enforcement cases each year. Staff determined that these occupations' rules appear appropriate if (1) they were similar to rules in neighboring states near Virginia (Maryland, North Carolina, West Virginia, Kentucky, and Tennessee), (2) they were not unnecessarily or overly burdensome on regulants, and (3) were not too lenient to protect consumers. To make these determinations, staff reviewed other states' statutes and regulations and solicited feedback from DPOR staff, DPOR board members, and current DPOR regulants.

Enforcement cases and sanctions (Chapter 4)

JLARC staff analyzed data on all of the enforcement cases that DPOR received between FY08 and FY17. Staff obtained data from DPOR staffs' enforcement database (ETS) to perform these analyses. These analyses were conducted to assess the nature of DPOR's enforcement cases, including how they were resolved.

Analysis 1: Assessment of the number and types of regulatory enforcement cases opened and closed by DPOR in FY17 and over time (FY08-FY17)

Analysis 2: Assessment of the range of regulatory enforcement case sanctions levied on regulants by DPOR boards in FY17 and over time (FY08- FY17)

Analysis 3: Assessment of the number and types of unlicensed practice enforcement cases opened and closed by DPOR in FY17 and over time (FY08-FY17)

Analysis 1

JLARC staff performed several analyses to determine the types of regulatory enforcement cases that DPOR staff handled in FY17 and over time. For example, staff calculated how many regulatory enforcement cases were opened and closed for each DPOR board and occupation. Staff also assessed how regulatory enforcement cases were resolved (e.g., closed by DPOR staff or sent to the board for decision). Cases that were closed by DPOR staff were analyzed by which DPOR section closed the case (e.g., complaint intake, investigations, or adjudication), and by the reason staff provided for closing the case (e.g., insufficient evidence, lack of jurisdiction, compliance obtained, "other" reasons.). Finally, staff looked at the types of cases that DPOR staff opened and closed (e.g., sanitation, unlicensed practice) to understand the seriousness of their violations.

Analysis 2

JLARC staff assessed the types of sanctions that DPOR boards levied on regulants for different types of violations in FY17 and over time. Staff identified the range of sanctions, including remedial education, fines, and license suspension/revocation that DPOR boards levied on regulants for different violations, and assessed whether any appeared overly harsh or lenient. For example, staff checked to see whether any minor administrative violations, such as a contractor failing to have a written contract with the required provisions, resulted in a sanction of license revocation.

In addition, JLARC staff compared the types of sanctions that DPOR boards levied on regulants for similar violations to assess whether they were relatively consistent. To ensure that the violations being compared were similar, staff only included cases where the regulant (1) was charged with one count of the same violation; (2) had no other violations as part of their enforcement case; and (3) had no prior enforcement cases with DPOR within the past 10 years. Staff assessed whether the regulants in each of these cases were found to have a violation, and whether they were sanctioned with remedial education, a fine, board costs, or a license suspension/revocation.

The number of regulatory enforcement cases that regulants appealed in court was also assessed. JLARC staff calculated the number of closed regulatory enforcement cases that regulants appealed in court between FY08 and FY17 as a percentage of all regulatory enforcement cases closed during that time period.

Analysis 3

JLARC staff analyzed data on the unlicensed practice enforcement cases that DPOR received between FY08 and FY17. Similar to regulatory enforcement cases, staff calculated how many unlicensed practice enforcement cases were opened and closed for each DPOR board and occupation. Staff also calculated how many unlicensed practice enforcement cases were closed by staff, and determined which DPOR section made the decision to close the case (e.g., complaint intake, investigations, or adjudication).

Agency funding (Chapter 5)

JLARC staff evaluated DPOR's methodology for forecasting future revenues and expenses by comparing data from DPOR's financial analyses, revenue and expense projections, and board financial statements over time (FY08 to FY18). This assessment was completed for a subset including DPOR's largest boards, as well as smaller boards with proposed or implemented fee changes within the past four years. Boards in this analysis included (a) Asbestos, Lead, and Home Inspectors, (b) Architects, Professional Engineers, Land Surveyors, Certified Interior Designers, and Landscape Architects, (c) Barbers and Cosmetology, (d) Contractors, (e) Hearing Aid Specialists and Opticians, (f) Real Estate Appraisers, (g) Real Estate, (h) Professional Soil Scientists, Wetland Professionals, and Geologists, and (i) Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals. JLARC staff also used this data to assess any fee changes for these boards that became effective from FY14 through FY18.

JLARC staff used financial statements for all 18 DPOR boards, from FY08 through FY18, to determine trends in fund balances over time. Analysis included comparing changes in expenses and changes in ending cash balances from year to year for each board, as well as for DPOR as a whole.

Agency staffing and organization (Chapter 6)

JLARC staff assessed DPOR's staffing levels across all agency functions using data from the Virginia Department of Human Resource Management's HuRMan database and data provided by DPOR's human resources office. Staff assessed, as of August 2018, (1) how many full-time DPOR staff positions were vacant, (2) how long these positions had been vacant, and (3) how many of these positions had been advertised. Staff also requested information from DPOR's human resources office on the reason each of DPOR's full-time vacant positions were vacant, and whether DPOR still needs them.

DPOR's structure was also reviewed to assess whether key functions are organized efficiently and effectively. JLARC staff reviewed DPOR's organizational charts to identify whether similar agency functions were grouped together. Staff also assessed how the agency's structure has changed over time and obtained feedback from staff on how well previous organizational structures have worked. In addition, DPOR's current structure was compared to peer regulatory agencies, including the Virginia Department of Health Professions and the Virginia Board of Accountancy.

File review of enforcement cases

JLARC staff reviewed 60 randomly-selected enforcement case files that DPOR staff closed in FY17 before they went to a DPOR board for decision. DPOR staff closed a total of 1,409 enforcement cases before they went to a DPOR board for decision. The purpose of the review was to determine whether DPOR staffs' decisions to close the cases were well supported. The cases that staff reviewed were closed by complaint intake staff and investigators for various reasons (Table B-2)

TABLE B-2 Characteristics of 60 enforcement cases JLARC staff reviewed

Reason for closing case	Closed by complaint intake staff	Closed by investigation staff
Insufficient evidence	15	24
Lack of jurisdiction	10	3
Other reasons	5	2
Compliance obtained	0	1
TOTAL	30	30

SOURCE: Enforcement cases provided by DPOR staff.

NOTES: Case files reviewed were closed by DPOR staff in FY17. JLARC staff considered a case to be closed for "insufficient evidence" if the reason for closing the case was that it lacked sufficient evidence or the complaint was withdrawn/incomplete. JLARC staff considered a case to be closed for a "lack of jurisdiction" if the reason for closing the case was that the regulant's license was void, there was no law or regulation, or there was no jurisdiction.

As part of the case file review, JLARC staff reviewed all of the documents included in each case file. For example, staff reviewed documents prepared by DPOR staff, such as action sheets and closing memos describing the key evidence of a case and why it was closed. Staff also reviewed the initial complaint filed for each case and all of the evidence that DPOR staff collected to assess the validity of the alleged violations, such as written contracts, bank statements, interview transcripts, photos, and emails. When it was not clear why DPOR staff closed a case, JLARC staff discussed the circumstances of the case with the directors of DPOR's complaint intake and investigations sections.

In addition to reviewing 60 randomly-selected enforcement case files that were closed by DPOR staff before they went to a DPOR board for decision, staff also reviewed case files for multiple cases that were sent to a DPOR board for a decision between December 2017 and September 2018. These case files were part of the materials sent to board members prior to board meetings.

Review of national research

JLARC staff reviewed peer-reviewed academic research on occupational regulation, as well as research published by government agencies and advocacy groups. JLARC staff reviewed articles from the *American Economic Review*, *American Sociological Review*, *Journal of Economic Perspectives*, *Journal of Labor Economics*, *Journal of Law and Economics*, *Journal of Regulatory Economics*, *British Journal of Industrial Relations*, and *Industrial Relations*, among others. JLARC staff also reviewed non-peer-reviewed academic research published by the National Bureau of Economic Research. Last, JLARC staff read two books published by a prominent scholar in occupational regulation, entitled "Licensing Occupations: Ensuring Quality or Restricting Competition" and "Guild-Ridden Labor Markets: The Curious Case of Occupational Licensing."

JLARC staff also reviewed research from other sources, such as other government agencies and advocacy groups. JLARC staff reviewed a report published by the Obama Administration entitled "Occupational Licensing: A Framework for Policymakers." JLARC staff also reviewed reports published by the Institute for Justice and the Hamilton Project. JLARC staff also reviewed research and data compiled by the National Conference for State Legislatures' Occupational Licensing Project. Last, JLARC staff also participated in webinars provided by the National Conference for State Legislatures and the Federal Trade Commission.

Document review

JLARC staff reviewed numerous other documents and literature pertaining to occupational regulation in Virginia and nationwide, such as

- Virginia statutes and regulations on the authority of DPOR's boards and staff, and entry requirements and standards of conduct/practice for DPOR-regulated occupations
- other states' statutes and regulations on entry requirements and standards of conduct/practice for occupations;
- previous reviews of occupational regulation and agencies conducted in Virginia and other states;
- sanction guidelines used by regulatory agencies in Virginia and other states;
- recent occupational regulation legislation in Virginia;
- prior studies and reports on DPOR, such as the Insightlink Communications and Titan Group consultant reviews of DPOR.

Board meetings and informal fact-finding conferences

During the course of the study, JLARC staff regularly attended public meetings of many of DPOR's regulatory and advisory boards. Between September 2017 and September 2018, JLARC staff attended 50 public meetings.

In addition, JLARC staff attended nine informal fact-finding (IFF) conferences for licensing cases, and nine IFF conferences for enforcement cases.

Appendix C: Occupations regulated by DPOR

TABLE C-1
DPOR occupations and their regulated populations (as of July 1, 2018)

Occupation group	Board	Credential type	Regulant population
Personal care occupations Includes cosmetologists and salons, barbers and shops, nail technicians and salons, estheticians and spas, wax technicians and salons, and schools for these occupations	Board for Barbers and Cosmetology	License	67,420
Real estate professionals Includes salespersons, brokers, sole proprietors, and businesses	Real Estate Board	License	61,843
Contractors Includes contractors in Classes A-C	Board for Contractors	License	56,226
Professional engineers	Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects	License	28,932
Tradesmen Includes electricians, plumbers, HVAC tradesmen, and gas fitters	Board for Contractors	License	27,779
Architects	Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects	License	7,444
Asbestos professionals or businesses Includes asbestos analytical laboratories, contractors, inspectors, management planners, project designers, project monitors, supervisors, training programs, and workers	Board for Asbestos, Lead, and Home Inspectors	License	4,451
Businesses for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects Includes business entities, professional corporations, professional limited liability corporations, and branch offices for each occupation	Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects	Registration	4,055
Real estate appraisers and businesses	Real Estate Appraiser Board	License	3,638
Personal care instructors Includes instructors for personal care occupations	Board for Barbers and Cosmetology	Certification ^a	3,237
Waterworks operators	Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals	License	2,212

Appendixes

Occupation group	Board	Credential type	Regulant population
Wastewater works operators	Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals	License	2,157
Opticians	Board for Hearing Aid Specialists and Opticians	License	1,895
Tattooists and body piercers Includes individuals, parlors, shops, and salons for tattooing, body piercing, and permanent cosmetic tattooing	Board for Barbers and Cosmetology	License	1,892
Land surveyors	Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects	License	1,479
Auctioneers and auction firms	Auctioneers Board	License	1,437
Backflow prevention device workers	Board for Contractors	Certification	1,377
Onsite sewage system professionals Includes conventional and alternative onsite soil evaluators and onsite sewage system installers and operators	Board for Waterworks and Wastewater Works Operators and Onsite Sewage System Professionals	License	1,347
Cemetery sales personnel	Cemetery Board	Registration	1,004
Geologists	Board for Professional Soil Scientists, Wetland Professionals, and Geologists	Certification	945
Landscape architects	Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects	License b	925
Lead professionals or businesses Includes lead abatement contractors, inspectors, project designers, risk assessors, supervisors, training programs, and workers	Board for Asbestos, Lead, and Home Inspectors	License	877
Home inspectors	Board for Asbestos, Lead, and Home Inspectors	License	861
Real estate schools and instructors	Real Estate Board	Certification ^a	797
Hearing aid specialists	Board for Hearing Aid Specialists and Opticians	License	750
Elevator and accessibility mechanics	Board for Contractors	License	672
Waste management facility operators	Board for Waste Management Facility Operators	License	670
Boxers, wrestlers, and martial artists	Boxing, Martial Arts, and Professional Wrestling Advisory Board	License	592
Interior designers	Board for Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects	Certification	491

Appendixes

Occupation group	Board	Credential type	Regulant population
Water well systems providers	Board for Contractors	License	481
Common interest community businesses Includes time shares and condominiums	Common Interest Community Board	Registration	341
Polygraph examiners	Polygraph Examiners Advisory Board	License	301
Common interest community certificate holders	Common Interest Community Board	Certification	296
Cemeteries and cemetery companies	Cemetery Board	License	253
Common interest community managers	Common Interest Community Board	License	185
Trainers, seconds, and cutmen	Boxing, Martial Arts, and Professional Wrestling Advisory Board	License	149
Real estate appraisal management companies	Real Estate Appraiser Board	License	140
Residential energy firms and analysts	Board for Contractors	License	127
Real estate appraiser schools and instructors	Real Estate Appraiser Board	Certification ^a	118
Wetland delineators	Board for Professional Soil Scientists, Wetland Professionals, and Geologists	Certification	114
Soil Scientists	Board for Professional Soil Scientists, Wetland Professionals, and Geologists	License	102
Promoters, managers, and matchmakers	Boxing, Martial Arts, and Professional Wrestling Advisory Board	License	51
Branch pilots	Board for Branch Pilots	License	44
Natural gas automobile mechanics and technicians	Natural Gas Automobile Mechanics & Technicians Advisory Board	Certification	0
Total			290,107

SOURCE: DPOR regulant population list and board websites.

NOTE: Table does not include (1) counts of real estate and tradesmen licenses with an inactive status, (2) credentials that are not related to an occupation, including credentials for common interest community associations, fair housing, and boxing and wrestling events, or (3) training and interim licenses, including engineer-in-training, surveyor-in-training, appraiser trainees, and interim lead abatement licenses. Population count does not adjust for individuals who hold more than one credential under multiple boards.

^aCertification functions similar to a license; it is not unlawful to practice the occupation without the certification but DPOR does not recognize schools or instructors who are not certified. ^bLicense functions like a voluntary certification to some extent; a license is only required if the individual wants to use the title "landscape architect" and seal project plans.

Appendix D: Agency responses

As part of an extensive validation process, the state agencies and other entities that are subject to a JLARC assessment are given the opportunity to comment on an exposure draft of the report. JLARC staff sent an exposure draft of this report to Virginia's Secretary of Commerce and Trade and the Virginia Department of Professional and Occupational Regulation. Appropriate corrections resulting from technical and substantive comments are incorporated in this version of the report.

This appendix includes a response letter from the Virginia Department of Professional and Occupational Regulation.



COMMONWEALTH of VIRGINIA
Department of Professional and Occupational Regulation

Ralph S. Northam
Governor

Brian Ball
Secretary of
Commerce and Trade

October 9, 2018

Hal E. Greer, Director
Joint Legislative Audit and Review Commission
919 East Main Street, Suite 2101
Richmond, VA 23219

Dear Mr. Greer:

On behalf of the staff of the Department of Professional and Occupational Regulation, I wish to thank you and the staff of JLARC for the exposure draft of the recent study entitled *Operations and Performance of the Department of Professional and Occupational Regulation*. We appreciate the opportunity to review and comment upon that draft.

During the period of the review, we were very pleased to work with the members of your staff, who attended nearly every meeting of our 19 boards held over the past year. I know personally how taxing that can be. DPOR's many parts can move at a rapid pace, and some of our board meeting agendas exceed 15,000 pages. Your staff assuredly now has a grasp of a wide cross-section of administrative law that is unfamiliar to many Virginians, including those who are attorneys. Each staff member was unfailingly courteous and professional in each contact with us.

We are grateful for the report's findings as to DPOR's compliance with legislative intent in degree and levels of regulation, our regulatory "burden," our costs relative to neighboring states, our speed in delivering services, and our customer satisfaction levels.

We are also grateful for the thoughtful recommendations as to needed improvements in our information technology, our processes, and agency organization. There are assuredly advances that can be made in any system, and we are willing to undertake them. Based on the study, some of the recommended changes are already under way, others are planned, and others still will require third-party action or consent.

We will continue to work with the members of the General Assembly in areas of licensure and regulation, in a changing economy, but always with the protection of the public's health, safety, and welfare at the forefront.

Very truly yours,

A handwritten signature in black ink that reads "Jay W. DeBoer".

Jay W. DeBoer
Director



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