PRELIMINARY DETERMINATION
NOTICE OF INTENDED REGULATORY ACTION

DEPARTMENT OF HEALTH PROFESSIONS
BOARD OF MEDICINE

18 VAC 85-50-10 et seq. Regulations Governing the Practice of Physician Assistants

ITEM 1: LEGAL AUTHORITY FOR REGULATION

Regulations of the Board of Medicine, as listed above, were promulgated under the general authority of Title 54.1 of the Code of Virginia.

§ 54.1-2400 establishes the general powers and duties of health regulatory boards including the authority to promulgate regulations in accordance with the Administrative Process Act (#6).

§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:

1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.

2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.

3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.

4. To establish schedules for renewals of registration, certification and licensure.

5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.

6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the

regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 and Chapter 25 of this title.

7. *To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations.*

8. *To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.*

9. *To take appropriate disciplinary action for violations of applicable law and regulations.*

10. *To appoint a special conference committee, composed of not less than two members of a health regulatory board, to act in accordance with § 9-6.14:11 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final thirty days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the thirty-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 9-6.14:12, and the action of the committee shall be vacated. This subdivision shall not be construed to affect the authority or procedures of the Boards of Medicine and Nursing pursuant to §§ 54.1-2919 and 54.1-3010.*

11. *To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to conduct formal proceedings pursuant to § 9-6.14:12, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 9-6.14:11 shall serve on a panel conducting formal proceedings pursuant to § 9-6.14:12 to consider the same matter.*

12. *To issue inactive licenses and certificates and promulgate regulations to carry out such purpose. Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for reactivation of such licenses or certificates.*

ITEM 2: ISSUES RELATED TO THE REGULATION

The issue that has necessitated rule-making is the Board's recent interpretation of a regulation regarding the practice of physician assistants in emergency departments. The Board has been asked to proffer its opinion on the meaning of the language in 18 VAC 85-50-115 D 4. The sentence in question reads: "*No physician assistant shall perform the initial evaluation, or institute treatment of a patient who presents to the emergency room or is admitted to the hospital for a life threatening illness or injury."* The regulation continues with the sentence, "*In non-critical care areas, the physician assistant may perform the initial evaluation in an in-patient setting provided the supervising physician evaluates the patient within eight hours of the physician assistant's initial evaluation."*

Hospitals, emergency room physicians and physician assistants have been interpreting the sentence in question to mean that the physician assistant cannot perform the initial evaluation or institute treatment on a patient **who presents for a life threatening illness or injury** either within the emergency room or admitted as an in-patient. Physician assistants are being utilized in a large percentage of hospitals in the Commonwealth, especially in the "fast track" systems within emergency departments that treat patients who present with non-life threatening, relatively minor problems (sprained ankle, laceration, etc.) In support of that interpretation was the fact that the Board of Medicine has routinely approved protocols that describe the practice of the physician assistant who work under a supervising physician in the emergency department. (See Attachment A)

A question about the meaning of the regulation has arisen, and at its June meeting, the Board was asked for its interpretation. After a lengthy discussion, the Board determined that the rule means that a physician assistant cannot perform the initial evaluation or institute treatment for a patient who presents to the emergency room and that the "life threatening illness or injury" refers to the patient who is admitted to the hospital.

With that interpretation, many emergency departments within hospitals have found themselves and the physician assistants they employ out of compliance with the Board's regulations. The Virginia College of Emergency Physicians (VACEP) and the Virginia Hospital and Healthcare Association (VHHA) initially requested that the Board reconsider its interpretation. (See comments to the August 6, 1999 meeting of the Executive Committee - Attachments B and C) When the Executive Committee affirmed the Board's opinion at its August meeting, the VACEP sent a petition for ruling-making to request that the Board consider amending the regulation (The letter requesting rule-making is Attachment D.)

At the September meeting of the Advisory Committee for Physician Assistants, representatives of the Virginia College of Emergency Physicians, the Virginia Hospital and Healthcare Association, the Virginia Academy of Physician Assistants and individual physicians and physician assistants spoke of the problem that has been created by the regulation. The Committee recommended that the Board proceed with a Notice of Intended Regulatory Action.

At that meeting, Dr. Joe Leming, President of the Board of Medicine and Chair of the Advisory Committee noted that there were a significant number of the involved parties and people with expertise in attendance and suggested that the Committee take the opportunity to work on some preliminary

language that could be considered by the Board at a later date. The preliminary proposed language agreed to by the Advisory Committee and the interested parties is attached (Attachment E).

ITEM 3: SPECIFIC REASON FOR PROPOSED REGULATION

The Board of Medicine is seeking to publish a Notice of Intended Regulatory Action in order to address the problem of a Board regulation prohibiting physician assistants from performing the initial evaluation or initiating treatment for patients who present to the emergency department of a hospital.

The Board of Medicine has received a petition for rule-making from the Virginia College of Emergency Physicians requesting amendments to 18 VAC 85-50-115, related to the practice of physician assistants in emergency departments. The problems created by the interpretation of the regulation have been enumerated in the statements by the VACEP and the VHHA. Primarily, the interpretation of the regulation results in longer waiting times for many patients, especially those who are considered non-emergent. For patients who do not present with a life-threatening condition, evaluation and initiation of treatment will have to wait until an emergency physician is available. Understaffing in the emergency department is already a problem in many hospitals and will be exacerbated by the inability to utilize physician assistants in the role for which they have been trained and employed.

A survey conducted by Virginia Beach General Hospital of patients in their "fast track" system in the emergency department indicates that patients are very satisfied with the care they received from a physician assistant and that they would not want to wait longer to see the physician. In order to improve access to care and the delivery of appropriate care to patients, the Board intends to consider amendments to its regulation on the practice of physician assistants.

ITEM 4: ALTERNATIVES CONSIDERED

In order for the Board of Medicine to address the issues related to the practice of physician assistants in the emergency department, 18 VAC 85-50-115 must be amended. The Assistant Attorney General who provides counsel to the Board has advised the Board and the interested parties that that is the remedy.

Seeking the intent of the Board in the adoption of the regulation that is currently in effect and has been in effect since February 1, 1989, the Board reviewed the regulation which was in effect prior to that date. The 1988 regulation stated that "*No physician's assistant shall perform the initial evaluation, or institute treatment of a patient who has been admitted to a critical care unit or emergency room."* In the promulgation of regulations in 1989, the current language was adopted, and it is the belief of the Board that the intent was to distinguish between the permissible practices of physician assistants in non-critical care areas of the hospital versus the non-permissible practices in the emergency room or critical care areas of the hospital.

Since in the opinion of the Board, the language in the regulation clearly prohibits a physician assistant from performing the initial evaluation or instituting treatment for a patient presenting to an emergency room, there is no alternative other than the promulgation of an amended rule.