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Notice of Intended Regulatory Action (NOIRA)
Agency Background Document

Agency name	Board of Counseling, Department of Health Professions
Virginia Administrative Code (VAC) citation(s)	18VAC 115-20-10 et seq. 18VAC115-30-10 et seq. 18VAC115-40-10 et seq. 18VAC115-50-10 et seq. 18VAC115-60-10 et seq.
Regulation title(s)	Regulations Governing the Practice of Counseling Regulations Governing the Certification of Substance Abuse Counselors and Substance Abuse Counseling Assistants Regulations Governing the Certification of Rehabilitation Providers Regulations Governing The Practice Of Marriage And Family Therapy Regulations Governing The Practice Of Licensed Substance Abuse Treatment Practitioners
Action title	Increase in fees
Date this document prepared	9/14/15

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual.*

Subject matter and intent

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

The issue to be addressed is the need of the Board of Counseling to increase their fees to cover expenses for essential functions of review of applications, licensing, investigation of complaints

against licensees, and adjudication and monitoring of disciplinary cases required for public health and safety in the Commonwealth.

§ 54.1-113 of the *Code of Virginia* requires that at the end of each biennium, an analysis of revenues and expenditures of each regulatory board shall be performed. It is necessary that each board have sufficient revenue to cover its expenditures. Since the fees from licensees will no longer generate sufficient funds to pay operating expenses for the Board, consideration of a fee increase is essential. In order to have sufficient funding for the operation of the Board by fiscal year 2018, it is necessary to begin the process of promulgating amendments to regulations.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and(2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Regulations of the Board of Counseling are promulgated under the general authority of Title 54.1, Chapter 24 of the Code of Virginia.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations in accordance with the Administrative Process Act which are reasonable and necessary and the authority to **levy and collect fees** that are **sufficient to cover all expenses** for the administration of a regulatory program.

> ***§ 54.1-2400. General powers and duties of health regulatory boards.--****The general powers and duties of health regulatory boards shall be:*
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> *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 (§ 54.1-100 et seq.) and Chapter 25 (§ 54.1-2500 et seq.) of this title.*

The **contemplated regulation is mandated by § 54.1-113**; however the board must exercise some discretion in the amount and type of fees that will be increased in order to comply with the statute.

> ***§ 54.1-113. Regulatory boards to adjust fees.--****Following the close of any biennium, when the account for any regulatory board within the Department of Professional and Occupational Regulation or the Department of Health Professions maintained under § 54.1-308 or § 54.1-2505 shows expenses allocated to it for the past biennium to be more than ten percent greater or less than moneys collected on behalf of the board, it shall revise the fees levied by it for certification or licensure and renewal thereof so that the fees are sufficient but not excessive to cover expenses.*

Purpose

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

Fees charged to applicants and licensees of the Board of Counseling **have not been increased in over 15 years**. During that time period, there have been **four reductions in renewal fees**. Expenditures of the Board were not as great as projected largely because the Board has been substantially under-staffed. As staffing issues have been addressed, expenditures have increased and now exceed revenues. While the Board has maintained a positive cash balance due to carry-over revenue, expenditures exceeded revenue in FY15. The imbalance with continue to grow in the next biennium and beyond. Therefore, the Board will have a shortfall in its budget by 2018. Since it has taken in excess of four years to promulgate regulations for a fee increase for other boards, Counseling must begin the process of amending regulations to avoid the additional fee assessments that other boards had to adopt.

Without adequate revenue to support licensing and discipline functions, applicants cannot be approved for licensure in a timely manner thus depriving the citizens of the Commonwealth with some of the mental health services that are needed. Additionally, if there is a substantial backlog of disciplinary cases, public health and safety may be at risk by allowing practitioners guilty of unprofessional conduct to continue in practice for several months awaiting a review and adjudication of an investigative report.

Substance

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

At this time, no specific regulatory language has been developed; the agency will develop alternative fee structures that will address the deficit in funding for the board to consider in its adoption of proposed regulations. The board will apply the Principles for Fee Development adopted by the agency in 1999 to ensure equitable distribution of costs and fees that are proportional to the activities they support.

Alternatives

The Department of Health Professions could consider two possible solutions to the deficit of the Board of Funeral Directors and Embalmers; they are as follows:

1. Increase fees through the promulgation of regulations.

As required by law, the board is obligated to establish and collect fees that are necessary to fund operations of the board and the Department. An alternative is to seek the revenue from licensees and applicants to fully fund appropriated expenditures. Costs of services will be paid by consumers who use the services of providers, but licensure fees represent a miniscule percentage of the over-all costs of health care. The cost of operation of regulatory boards does not significantly affect the cost or access to health care. However, failure to fully fund the licensing and disciplinary services through fees will have a detrimental effect on quality and availability of services.

2. Reduce department/board operations and staff and remain at current fee level.

In order to prevent deficit spending, the department would need to lay off staff to reduce expenses associated with operations. The net result being a delay in the performance of or the elimination of the following responsibilities:

- Investigations and discipline
- Examinations leading to license
- License renewals
- Regulation

Delays in licensing and investigation could place the public at risk as victims of unscrupulous practitioners and could increase costs as new licensees would not be available. It is believed that these consequences would not be acceptable to the administration, the General Assembly, or to the general public.

The Board of Counseling has been understaffed for several years; any further reduction would be extremely detrimental to the public. The consequence of understaffing has been substantial delays in licensing decisions and adjudication of disciplinary cases. To address the backlog of applications and cases, positons are being filled and expenditures of the Board are increasing and will continue to increase in the next several years. Therefore, the option of reductions in board operations and staffing is unacceptable and cannot be chosen.

Public participation

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

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Townhall website , www.townhall.virginia.gov, or by mail, email or fax to Elaine Yeatts, Agency Regulatory Coordinator, 9960 Mayland Drive, Henrico, VA 23233 or **elaine.yeatts@dhp.virginia.gov** or by fax to (804) 527-4434. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (**http://www.townhall.virginia.gov**) and on the Commonwealth Calendar website (https://www.virginia.gov/connect/commonwealth-calendar). Both oral and written comments may be submitted at that time.

A regulatory panel will not be used to develop proposed regulations.