



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Board of Medicine/Department of Health Professions
VAC Chapter Number:	18 VAC 85-20-10 et seq.
Regulation Title:	Regulations Governing the Practice of Medicine, Osteopathy, Chiropractic and Podiatry
Action Title:	Periodic review
Date:	

This information is required pursuant to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99), and the *Virginia Register Form, Style and Procedure Manual*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

Regulations are promulgated to provide educational and examination requirements for the licensure of doctors of medicine, osteopathy, podiatry and chiropractic. Provisions establish standards of professional conduct, requirements for limited or temporary licenses, and requirements for renewal or reinstatement of a license including evidence of continuing competency. Regulations implementing the physician profile system are set forth as are fees to support the regulatory and disciplinary activities of the board.

Amendments are proposed to change the term osteopathy to osteopathic medicine clarify the Board policies on: payment of late fees for failure to renew a license; advertising ethics; and utilization of acupuncture as a treatment modality. Amendments will also reduce the regulatory burden for applicants discharged from the military, for foreign medical graduates seeking a limited license, and for practitioners seeking to return to reinstate or reactivate a license.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations, levy fees, administer a licensure and renewal program, and discipline regulated professionals.

§ 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.*

The legal authority to promulgate regulations for the licensure and practice of doctors of medicine, osteopathy, podiatry and chiropractic is found in Chapter 29 of Title 54.1 of the Code of Virginia. (<http://leg1.state.va.us/000/1st/h3800731.HTM>)

The Office of the Attorney General has certified by letter that the Board has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

While most of the amendments are clarifications of regulations to more clearly state Board policy, the changes related to advertising ethics are intended to better protect the public health, safety and welfare by establishing clearer guidance for advertisements of professional services. To ensure that the public is not being misled, the practitioner is required to advertise in a manner that is not deemed to be deceptive or misleading by doing such things as inflating charges for the purpose of advertising a discounted rate.

Amendments to requirements for applicants discharged from the military, foreign-trained applicants seeking limited licensure, or applicants for reinstatement or reactivation of a license are intended to eliminate or reduce any barriers to entry that are not essential for the protection of the public or assurance of competency to practice.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement providing detail of the regulatory action's changes.

The Board is recommending amendments that will eliminate unnecessary provisions of the regulations, clarify others that have raised questions for licensees or the public and further specify restrictions on advertisements to ensure they are not deceptive to the consumer. Amendments to the fee section are intended to clarify that late fees are assessed for every biennial renewal period in which the license has been lapsed. Amendments to licensure requirements will: reduce the number of years from 10 to 5 within which an applicant discharged from the military must submit discharge papers; allow a determination of English proficiency to be delegated by the Credentials Committee to facilitate the process; and make the passage of an examination for reinstatement optional if a practitioner seeking reinstatement has not been engaged in active practice. Active practice is now defined as at least 640 hours of clinical practice within the past four years. Finally, the regulation specifies that the use of acupuncture as a treatment modality must be appropriate to the doctor's scope of practice as defined in the law.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, please include a sentence to that effect.

The primary advantage to the public of the proposed regulatory action is making the rules on advertising more explicit to ensure that practitioners are acting ethically and lawfully. For example, advertisements that inflate the cost of treatment in order to advertise a discount or fail to disclose the total cost are misleading and can be harmful to patients. There is also an advantage to clarifying that acupuncture as a treatment modality must only be used within the

scope of a licensee practice, as defined in the Code. There have been reports of practitioners, such as chiropractors, who have provided acupuncture treatment unrelated to the statutory scope of practice. Clarity in the regulation should protect patients or at least provide the Board with grounds for disciplinary action. There are no disadvantages to the public of any of the proposed amendments.

There are no specific advantages or disadvantages to the agency or to the Commonwealth. Clarity in regulations is always advantageous to the agency as it strives to interpret law and regulation to its licensee and the public.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

Projected cost to the state to implement and enforce:

(i) Fund source: As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation.

(ii) Budget activity by program or subprogram: There is no change required in the budget of the Commonwealth as a result of this program.

(iii) One-time versus ongoing expenditures: The agency will incur some one-time costs (less than \$2,000) for mailings to the Public Participation Guidelines mailing lists, conducting a public hearing, and sending copies of final regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and Board meetings already scheduled.

Projected cost on localities:

There are no projected costs to localities.

Description of entities that are likely to be affected by regulation:

The entities that are likely to be affected by these regulations would be licensed doctors of medicine, osteopathy, podiatry or chiropractic or persons applying for licensure in one of those categories; interns and residents; and persons with a university limited license.

Estimate of number of entities to be affected:

Doctors of medicine and surgery

28,174

Doctors of osteopathy and surgery	893
Doctors of podiatry	487
Doctors of chiropractic	1,590
Interns and residents	2,154
University limited licensees	24

Projected costs to the affected entities:

The only proposed amendment that may have an effect on regulated entities is the requirement for payment of late fees in addition to a reinstatement fee. It is estimated that 50 doctors who have allowed their license to lapse in Virginia seek reinstatement each year. The additional cost for late fees for a doctor of medicine, osteopathy or podiatry will range from \$90 for one biennium of lapsed licensure to \$180 to four or more years of lapsed licensure. Given the income level of physicians in the Commonwealth, the additional fee of less than \$200 is not anticipated to be a deterrent to reinstatement.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

18 VAC 85-20-10. Definitions.

Amendments are proposed to delete the definition for “acupuncturist” as it is not relevant to these regulations. The change in terminology from “osteopathy” to “osteopathic medicine” would be made in this section and as it appears throughout the regulation.

18 VAC 85-20-22. Required fees.

Minor amendments are proposed to clarify terminology and to reduce the fee for a temporary permit from \$30 to \$25, the limit allowed in the Code. Amendments are recommended to specify that reinstatement of a license expired for two years or more in medicine, osteopathy, podiatry and chiropractic requires payment of a late fee of \$90 per biennium (\$80 for chiropractic), not to exceed the total for four years.

18 VAC 85-20-30. Advertising ethics.

Amendments are proposed for consistency with federal law and to clarify the policy of the Board on advertising of fees to ensure that all patients are treated equally and equitably.

18 VAC 85-20-120. Prerequisites to licensure.

An applicant discharged from the military within the past 5 years would be required to submit a copy of discharge papers, rather than the current requirement of 10 years. The board only requires a chronology of practice for the past 5 years, so the change is consistent with current application requirements.

18 VAC 85-20-131. Requirements to practice acupuncture.

The board is recommending deletion of the provision that a podiatrist may only use acupuncture for treatment of the human foot. It would be replaced with a provision that more clearly states that acupuncture, as a treatment modality, should only be used as appropriate to the doctor's scope of practice as defined in § 54.1-2900 of the Code of Virginia.

18 VAC 85-20-150. Reexamination.

It is recommended that this section be repealed, as each examining body has its own requirements for reexamination and additional training.

18 VAC 85-20-210. Limited licenses to foreign medical graduates.

Regulations currently permit the waiver of the requirement for evidence of equivalency from the Educational Commission for Foreign Medical Graduates, but there has been no criteria established for such a waiver. The amended regulation would allow a designee of the Credentials Committee (normally the Executive Director and the Chair) to issue the waiver based on other evidence of medical competency and English proficiency.

18 VAC 85-20-230. Renewal of an active license.

The current regulation states that a practitioner who intends to continue his practice must renew biennially, but many doctors intend to maintain an active license without continuing in active practice. An amendment will clarify that provision.

18 VAC 85-20-235. Continued competency requirements for renewal of an active license.

For consistency and clarity, the section may be amended to designate the Continued Competency Activity and Assessment Form as the "Form."

18 VAC 85-20-240. Reinstatement of an inactive or lapsed license.

The Board has determined that provisions for the reinstatement of a lapsed license and reactivation of an inactive license should be less restrictive. Currently, a practitioner seeking to reinstate or reactivate a license, who has not actively practiced for more than four years, would be required to re-examined in order to be licensed. Amendments continue to give the Board authority to require re-examination but make it discretionary. If there is other evidence of continued competency to practice, that could be considered and the examination waived. Also, there has been no specificity about a definition of "active practice" – it could mean anything from one hour of practice in four years to 2,000 hours per year. To clarify the term, the Board has adopted a standard for active practice of at least 640 hours of clinical practice within four

years preceding application, consistent with the active practice definition for other professions regulated by Medicine.

Alternatives

Please describe the specific alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action.

The amendments that are recommended are relatively minor, but will serve to clarify and simplify the requirements. The recommended amendments are intended to make compliance with regulations less burdensome and subjective.

Fees

There were no alternatives considered to changes in the fee regulations; the fee for a temporary authorization to practice is limited by the Code to \$25, so the \$30 fee set in regulation has not been enforceable. The requirement that late fees be paid for each biennium in which the license has been lapsed (not to exceed four years or two biennia) is consistent with current policy of the Department. The Principles for Fee Development state that the reinstatement fee should not create an incentive to allow the license to lapse, which current regulations do. The renewal fee for doctors of medicine, osteopathy or podiatry is \$260 and the late fee, payable within one biennium, is \$90 for a total of \$350. If a doctor allows his license to lapse for more than two years, he may reinstate by payment of a reinstatement fee, which is currently \$305. With the proposed regulation, a doctor seeks to reinstate a license would need to pay the reinstatement fee, plus a maximum of \$180 in late fees.

Advertising Ethics

Amendments proposed in section 30 on Advertising Ethics are intended to resolve questions that often arise and situations seen in disciplinary cases before the Board. In subsection A, there is a prohibition on advertising a fee for services which, in all likelihood, is insufficient to complete treatment. Questions have been raised about whether this applies if the services were advertised for no fee or a discounted fee. The intent is to ensure that unexpected charges are not added to the bill later, having the effect of enticing the patient to receive treatment by deceptive advertisement of an insufficient fee that is later increased.

In subsection B, the Board has prohibited the doctor from getting a patient to sign a waiver of the 72-hour rule; the rule prohibits the doctor from charging for any additional service or treatment within 72 hours of having seen a patient who came as a result of a discounted or free service. The rule is intended to give the patient an opportunity to fully consider and explore treatment options without being pressured into agreeing to a costly series of treatments. The Board policy, as stated in case decisions, has been that the patient cannot waive the 72-hour rule to prevent a hard sell approach to medical care.

In subsection C, the Board is clarifying the meaning of the requirement for documented evidence to substantiate any advertisement for a discounted fee and adding a requirement that such information must be made available to a consumer upon request. The Board gets frequent phone calls from doctors or their attorneys about the meaning of this section, and the attorney for the Board has recommended the proposed language to address the confusion.

Other changes to regulations

In section 131, the current regulation limits the use of acupuncture by podiatrists for pain originating from the human foot. The Board considered an additional provision with a similar limitation for doctors of chiropractic, but concluded that a more general statement was appropriate to all doctors to the use of acupuncture only within the scope of their practice as defined by the Code.

Other changes, such as the designation of someone (the Chair or staff) by the Credentials Committee to make a determination of English proficiency for foreign medical graduates seeking limited licensure, are intended to remove an unnecessary barrier to licensure and alleviate the process for applicants.

The changes to reinstatement regulations are intended to clarify the meaning of “active practice” which may be used as an indication that a practitioner continues to be competent to practice. If he has not engaged in active practice within the last four years prior to seeking reinstatement, the current regulation mandated passage of a special purpose examination. There were two problems with the regulation: 1) there was no standard for “active practice” so it was not enforceable. Anyone who could document a single hour of practice in four years could claim “active practice.” To achieve a consistent standard by which the Board could interpret its regulation, it adopted the “definition” for active practice applied to other professions it regulates, such as occupational therapy. The criteria would be 640 hours of clinical practice within four years immediately preceding application for reinstatement, which translates into an average of 160 hours a year. 2) there was no flexibility in the regulation for mandating passage of the special purpose examination, which could be a high hurdle for a practitioner seeking reinstatement. To allow the Board to consider all factors presented, the terminology was made permissive, giving the Board the authority to require passage of the examination without mandating it in every case. Decisions on reinstatement that are not easily determined by staff are taken to the Credentials Committee and treated as case decisions with opportunity given to the applicant to appeal and present his case.

Other changes are clarifying and not substantive.

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

An announcement of the board's intent to amend its regulations was posted on the Virginia Regulatory Townhall, sent to the Registrar of Regulations, and sent to persons on the PPG mailing list for the board. Public comment was received until June 19, 2002. During the 30-day comment period, no comments were received from members of the public.

During the Periodic Review of regulations, a 60-day comment period was provided, and the only comment was received from the American Osteopathic Association, requesting amendments to update the terminology for the profession from “osteopathy” to “osteopathic medicine.”

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

An informal workgroup consisting of the Board president and staff that are responsible for implementation of the regulations met to conduct a preliminary review of regulations. Its recommendations were reviewed by the Legislative Committee, which reported to the full Board. The Assistant Attorney General who provides counsel to the Board and the Agency Regulatory Coordinator have been involved during the adoption of proposed regulations to ensure clarity and compliance with law and regulation. The draft regulations have been available at public meetings, and the public has been invited to offer suggested changes.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

Public participation guidelines require the Board to review regulations each biennium or as required by Executive Order. Regulations will be reviewed again during the 2004-05 fiscal year.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential impact on the institution of the family and family stability including the extent to which the regulatory action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

In its preliminary analysis of the proposed regulatory action, the agency has determined that there is no potential impact on the institution of the family and family stability or on disposable family income.