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Proposed Regulation Agency Background Document

Agency name	State Council of Higher Education for Virginia
Virginia Administrative Code (VAC) Chapter citation(s)	8VAC 40-31
VAC Chapter title(s)	Regulations Governing Certification of Certain Institutions to Confer Degrees, Diplomas and Certificates
Action title	Fee Changes
Date this document prepared	3/29/2021

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

The Private Postsecondary Education (PPE) unit of the Academic Affairs division of the State Council of Higher Education for Virginia is responsible for regulating private and out-of-state postsecondary educational institutions operating in Virginia. The PPE unit currently regulates 126 degree-granting institutions and 165 career-technical schools at more than 300 locations throughout Virginia. Staff responsibilities include approval of new postsecondary schools; program approvals; compliance audits; granting exemptions; agent approvals; and annual recertification of postsecondary schools. The PPE unit is also charged with investigating student complaints against all postsecondary institutions in the Commonwealth; investigating schools operating without authorization; ensuring student protections for students enrolled in certified postsecondary schools; assisting with school closures; the retention of student transcripts; and serving as the repository for student records from closed institutions.

SCHEV does not receive general funds to perform the duties delegated to the PPE unit by Code and Regulation. The Code of Virginia (Virginia Code) allows Council to establish nonrefundable fees for services provided by the PPE unit. All salaries, benefits and expenditures are paid out of the fees collected from regulated institutions.

The issue addressed here is the need for SCHEV to increase its fees to cover the essential functions of the PPE unit. While the PPE unit performs many functions, the underlying purpose in the performance of these duties is to protect the citizens of the Commonwealth from fraudulent or substandard educational institutions and to ensure that institutions certified to operate in Virginia meet minimal academic and administrative capability standards. PPE has no other source of revenue from which to fund its operations.

Since the NOIRA, fees for out-of-state online institutions of higher education and postsecondary schools that are not members of the National Council for State Authorization Reciprocity Agreements (NC-SARA) have been added, to align with legislative mandate enacted in the 2020 General Assembly session. The new law that will become effective July 1, 2022 requires out-of-state postsecondary schools offering distance education to Virginia citizens to be certified by the State Council of Higher Education for Virginia or be participants in a reciprocity agreement to which the Commonwealth belongs. Schools that need to be certified by SCHEV will be required to pay initial and annual fees that are comparable to fees paid by in-state schools.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

SCHEV and "Council" mean the State Council of Higher Education for Virginia.
PPE means the Private Postsecondary Education unit of SCHEV.
NOIRA means the Notice of Intended Regulatory Action under APA.

Mandate and Impetus

Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."

Pursuant to Virginia Code § 23.1-224, Council may establish nonrefundable fees for services and methods for collecting such fees. PPE fees were last evaluated for an increase over ten years ago. The fee schedule derived from the 2009 analysis provided a fee increase to meet the needs of the PPE unit at that time. However, due to a delay in the implementation of the new regulation, the fees did not become effective until February 2014. While the fees were adequate to cover the costs of operating expenditures in the few years immediately following the increase, this is no longer the case due, among other reasons, to increases in indirect cost assessments by SCHEV and salary increases mandated by the General Assembly. These changes constitute significant de facto revenue reductions for a non-general fund unit such as PPE. An analysis of projected revenues for FY 2020 indicates that PPE's revenue collection will not cover normal expenditures of the unit. PPE has implemented an austere budget, with severe reductions in expenses for essential activities such as compliance audits and training for regulated

institutions. However, reducing expenditures to this extent is not feasible in the long run since the performance of these duties is the very thing that protects students from fraudulent or substandard educational institutions.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Article 3 of Chapter 2 of Title 23.1 of the *Code of Virginia* mandates that the State Council of Higher Education for Virginia regulate Certain Private and Out-of-State Institutions of Higher Education.

Virginia Code § 23.1-215 authorizes the State Council of Higher Education for Virginia to adopt, pursuant to the Administrative Process Act, such regulations as may be necessary to implement the provisions of this Article.

Virginia Code § 23.1-224 grants Council authority to establish nonrefundable fees for services and methods for collecting such fees.

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

The PPE unit of SCHEV is funded solely by revenue collected from certification application fees; annual recertification fees; agent fees; religious exemption fees; transcript fees; and program approval fees. The unit does not receive money from general funds.

SCHEV must establish fees adequate to support the direct and indirect costs of operating the PPE unit. Indirect costs are assessed to the PPE unit via a cost allocation method that ensures an equitable distribution of costs assumed by SCHEV but consumed by the PPE unit. The annual assessment allows SCHEV to collect PPE's share of rent; VITA charges; general operations fees; budget and finance services; and a proportionate share of the Directors' time dedicated to oversight of the PPE.

The deficit in the PPE unit budget in FY2020 is based on an austere budget that severely limits the unit's operation in the areas of compliance audits, and institutional training. This is not a long-term solution. The unit cannot adequately perform its duties by drastically cutting expenses. Virginia Code § 23.1-215 charges Council with the significant responsibility of ensuring student protections for those attending certified institutions. New schools are only certified to operate after they have been given a thorough assessment to ensure they will be operating within the confines of Virginia law and regulation. Annual re-certifications verify financial compliance as well as enrollment and graduation data. Compliance audits verify student records, refunds, quality of online education and faculty qualifications to teach subjects assigned. PPE staff also handles student complaints, investigates institutions operating without certification; and issues transcripts for closed institutions. In order to perform all these duties effectively, the PPE unit must 1) maintain adequate staffing; 2) have sufficient funds to cover the expense of travel and accommodations for its compliance investigators; 3) have adequate resources to pay for the costs of sustaining an online portal and database; and 4) be able to provide crucial and timely training for staff and regulated institutions.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

Fee schedule in existing regulation is being changed to increase certain fees.

Issues

Identify the issues associated with the regulatory change, including: 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, include a specific statement to that effect.

- 1) One primary advantage to the public is that consumer protections for students at the regulated schools will be enabled to continue at sufficient levels.
- 2) Other primary advantages to the agency and the Commonwealth are that the PPE unit will be able to fund its operations. The unit will be fully staffed and able to perform the necessary duties to regulate the schools under its purview, providing students of certified schools with adequate consumer protections against fraud and/or substandard service.
- 3) Increased fees disadvantage the regulated community due to increased operating costs, but the schools will benefit from the assurance that the unit has adequate resources to respond to concerns and conduct business effectively.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected

The Board of Nursing regulates certain schools that are certified by SCHEV to operate.

Localities Particularly Affected

No localities are particularly affected.

Other Entities Particularly Affected

Schools required to be certified by SCHEV will see increased operating expenses from required fees. However, care was taken to minimize the burden on the smaller schools. The smallest certified schools, those collecting less than \$50,000 in tuition will see no increases in recertification fees.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

<i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources	The fee change will result in increased revenues to the agency of \$ 384,250.00 (all NGF).
<i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.	No changes for other agencies.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	Increase the NGF available for the PPE unit to perform assigned duties.

Impact on Localities

Projected costs, savings, fees or revenues resulting from the regulatory change.	N/A
Benefits the regulatory change is designed to produce.	N/A

Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	Schools certified by SCHEV will be affected by the change.
Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected.	120 small businesses would be affected.

<p>Small business means a business entity, including its affiliates, that:</p> <ul style="list-style-type: none"> a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million. 	
<p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:</p> <ul style="list-style-type: none"> a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements. 	<p>No projected costs (beyond the amount of the fee changes).</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>Continued ability of the PPE Department to work at full capacity and fulfill its mission.</p>

Alternatives to Regulation

Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. Also, include discussion of less intrusive or less costly alternatives for small businesses, as defined in § 2.2-4007.1 of the Code of Virginia, of achieving the purpose of the regulatory change.

The PPE unit has considered the following alternatives to increasing fees:

- **Reducing expenditures:** The unit is currently operating with an austere budget that cannot be reduced further. This level of austerity cannot continue since without additional funding, the activities carried out by PPE that ensure student protections will be inadequate.
- **Supplement PPE activities with General Funds:** The PPE unit currently does not receive general funds revenue, and this would require a change in the Code of Virginia and the Appropriation Act. Virginia Code § 23.1-224 grants Council authority to establish nonrefundable fees for services and methods for collecting such fees. Use of general funds to partially support the activities of the PPE unit instead of a fee increase does not appear to be politically feasible.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

An alternative regulatory method would be to establish less stringent requirements for the certified schools. However, this is not desirable as it would put students at risk of enrolling in postsecondary schools that are not adequately monitored for compliance with laws and regulations that protect students from substandard education.

Periodic Review and Small Business Impact Review Report of Findings

If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, indicate whether the regulatory change meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable.

In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, discuss the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation. Also, discuss why the agency's decision, consistent with applicable law, will minimize the economic impact of regulations on small businesses.

This form is not being used for periodic review or small business impact review.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

No public comment was received following the publication of the NOIRA stage.

Commenter	Comment	Agency response

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

The State Council of Higher Education for Virginia (SCHEV) is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, (iii) the potential impacts of the regulation, and (iv) the agency’s regulatory flexibility analysis stated in that section of this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to **Beverly A. Rebar, J.D., Senior Associate for Academic and Legislative Affairs, State Council of Higher Education for Virginia (804) 371-0571; (757) 572-1169; BeverlyRebar@schev.edu**. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

A public hearing will not be held following the publication of this stage of this regulatory action.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

The PPE unit regulates degree and non-degree postsecondary schools with annual tuition and fee collections ranging between \$2500 and \$84,000,000. Currently, regulated postsecondary schools pay recertification fees each year on a sliding scale from \$250 to \$5,000 based on tuition and fee collections. The PPE unit also collects fees for a variety of other services performed by the unit.

The chart below shows current fees and proposed fees. In preparing these recommendations, SCHEV took the following items into consideration:

- Care was taken to minimize the burden on the smaller schools. The smallest certified schools, those collecting less than \$50,000 in tuition will see no increases in recertification fees.
- For the remaining schools, SCHEV has proposed recertification fee increases in proportion to the size of the school. Fee increases for those schools will be 20%, 50% or 100%. The 100% increase is limited to those schools earning revenue at the highest end of the spectrum—\$5,000,000 or more in annual gross tuition.
- SCHEV also considered fee increases for performing duties that require the largest number of man-hours to complete and for institutions that provide the greatest risk to student protections (e.g. unaccredited institutions).
- Finally, the fee structure proposed here is intended to be sustainable for PPE and SCHEV for the next decade or more.
- Since the NOIRA, fees for out-of-state online institutions of higher education and postsecondary schools that are not members of the National Council for State Authorization Reciprocity Agreements (NC-SARA) have been added, to align with legislative mandate enacted in the 2020 General Assembly session. The new law that will become effective July 1, 2022 requires out-of-state postsecondary schools offering distance education to Virginia citizens to be certified by the

State Council of Higher Education for Virginia or be participants in a reciprocity agreement to which the Commonwealth belongs. Schools that need to be certified by SCHEV will be required to pay initial and annual fees that are comparable to fees paid by in-state schools.

CHART I

Item	Current Fee	Proposed Fee
New school orientation session, per person	\$150	No change
Initial fee for all new institutions of higher education	\$6,000	\$10,000
Initial fee for all new non-degree schools	\$2,500	No Change
Annual fee for all <u>unaccredited</u> institutions of higher education	\$6,000	\$10,000
Initial fee for out-of-state online institutions of higher education that are not members of NC-SARA		\$10,000
Renewal fee for out-of-state online institutions of higher education that are not members of NC-SARA		\$10,000
Renewal fee for all postsecondary schools with an annual gross tuition collected less than \$50,000, as recorded on most recent financial statement	\$250	No Change
Renewal fee for all postsecondary schools with an annual gross tuition collected greater than or equal to \$50,000 but less than \$100,000, as recorded on most recent financial statement	\$1,000	\$1,200
Renewal fee for all postsecondary schools with an annual gross tuition collected greater than or equal to \$100,000 but less than \$500,000, as recorded on most recent financial statement	\$2,500	\$3,000
Renewal fee for all postsecondary schools with an annual gross tuition collected greater than or equal to \$500,000 but less than \$1,000,000, as recorded on most recent financial statement	\$4,000	\$6,000
Renewal fee for all postsecondary schools with an annual gross tuition collected greater than or equal to \$1,000,000, but less than \$5,000,000, as recorded on most recent financial statement	\$ 5,000	\$7,500
Renewal fee for all postsecondary schools with an annual gross tuition collected greater than \$5,000,000 as recorded on most recent financial statement (New Category)	N/A	\$10,000
Returned check fee	\$35	No Change
Initial or renewed exemption application/request for name acknowledgement/agent registration	\$300	\$350
Nonrefundable administrative fee (withdrawal of application) (non-degree)	\$500	No Change
Nonrefundable administrative fee (withdrawal of application) (degree)	\$1,000	\$2,000
Request for Change in Degree Level Authorization (NEW)	N/A	\$1,000
Request duplicate certificate to operate due to school name or address change	\$100	No Change
Request duplicate agent permit, to replace lost/stolen/misplaced permit	\$100	No Change
Application fee for each additional program, modification to an existing program, or program deletion.	\$100	No Change
Application fee for each additional site instructional location	\$100	\$300