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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board for Hearing Aid Specialists and Opticians
Virginia Administrative Code (VAC) Chapter citation(s)	18 VAC 80-30
VAC Chapter title(s)	Optician Regulations
Action title	OPT Fee Adjustment 2023
Date this document prepared	June 8, 2023 (Amended September 13, 2023)

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), 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 the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation).

The Board for Hearing Aid Specialists and Opticians (“the Board”) seeks to amend the Optician Regulations to adjust its licensing fee structure.

The Department of Professional and Occupational Regulation (“the Department”) is funded entirely from revenue collected for license applications, renewal, examination fees, and other licensing fees and receives no general fund money. The Department is self-supporting and must collect adequate revenue to support its mandated and approved activities and operations. Fee revenue collected on behalf of the various boards funds the Department’s authorized special revenue appropriation.

The Board must establish fees adequate to support the costs of the Board operations and a proportionate share of the Department’s operations. The Board’s balance from the 2020-2022 biennium was operating at a loss. At the close of the 2022-2024 biennium, the Board will be operating at a loss. By the close of the next biennium (2024-2026), fees will not provide adequate revenue for those costs.

The Board has no other source of revenue from which to fund its operations.

Acronyms and Definitions

Define all acronyms or technical definitions used in this form.

“DPOR” means the Department of Professional and Occupational Regulation.

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 the ORM procedures, “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.”

This regulatory change was prompted by a Department review of the Board’s financial position, and projected revenues and expenses for the 2024-2026 biennium. The Department’s Financial Services Director reported that at current fee levels, the Board’s expenditures are projected to exceed revenues by approximately 37% by the close of the 2024-2026 biennium.

The proposed regulatory action is mandated by the following sections of the Code of Virginia. To comply with these statutes, the Board evaluates its current and projected financial position, and determines the type of fees and amounts to be established for each fee that will provide revenue sufficient to cover its expenses.

Section 54.1-113 of the Code of Virginia states (“the Callahan Act”), in part:

Following the close of any biennium, when the account for any regulatory board within the Department of Professional and Occupational Regulation maintained under § 54.1-308 shows that unspent and unencumbered revenue exceeds \$100,000 or 20 percent of the total expenses allocated to the regulatory board for the past biennium, whichever is greater, the regulatory board shall (i) distribute all such excess revenue to current regulants and (ii) reduce the fees levied by it for certification, licensure, registration, or permit and renewal thereof so that the fees are sufficient but not excessive to cover expenses.

Section 54.1-201 of the Code of Virginia states, in part:

A. The powers and duties of regulatory boards shall be as follows:

4. To levy and collect fees for certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the regulatory board and a proportionate share of the expenses of the Department of Professional and Occupational Regulation and the Board for Professional and Occupational Regulation.

Section 54.1-304 of the Code of Virginia states, in part:

Each of the regulatory boards within the Department shall be a separate board. All of the administrative functions of the regulatory boards shall be under the direction and supervision of the Director.

In the performance and discharge of his duties with respect to the regulatory boards, the Director shall:

3. Collect and account for all fees prescribed to be paid into each board and account for and deposit the moneys so collected into a special fund from which the expenses of the Board, regulatory boards and Department shall be paid;

Section 54.1-308 of the Code of Virginia states:

The compensation of the Director and the employees within the Department, including the compensation of the members of each board, shall be paid out of the total funds collected and charged to the accounts of the respective boards. The Director shall maintain a separate account for each board showing the moneys collected on its behalf and the expenses allocated to each board.

These Code sections require the Department to:

- pay expenses of each board and the Department from revenues collected;
- establish fees adequate to provide sufficient revenue to pay expenses;
- account for the revenues collected and expenses charged to each board; and
- revise fees as necessary to ensure that revenue is sufficient but not excessive to cover all expenses.

To comply with these requirements, the Department:

- Accounts for the revenue collected for each board distinctly;
- Accounts for direct board expenses for each board, and allocates a proportionate share of agency operating expenses to each board; Town Hall Agency Background Document Form: TH-01 3
- Reviews the actual and projected financial position of each board biennially to determine whether revenues are adequate, but not excessive, to cover reasonable and authorized expenses for upcoming operating cycles; and
- Recommends adjustments to fees to respond to changes and projections in revenue trends and operating expenses. If projected revenue collections are expected to be more than sufficient to cover expenses for upcoming operating cycles, decreases in fees are recommended. **If projected revenue collections are expected to be inadequate to cover operating expenses for upcoming operating cycles, increases in fees are recommended.**

Fee adjustments are mandatory in accordance with these Code sections. The Board exercises minimal discretion on how the fees are adjusted by determining the amount of adjustment for each type of fee. The Board makes its determination based on the adequacy of the fees to provide sufficient revenue for upcoming operating cycles.

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.

- 1) Board for Hearing Aid Specialists and Opticians
- 2) § 54.1-113 (Callahan Act) requires regulatory boards to periodically review and adjust fees
§ 54.1-201(A)(4) provides the authority to regulatory boards to levy and collect fees.
§ 54.1-304(3) describes the authority of DPOR to collect and account for fees
§ 54.1-308 requires costs to be paid by regulatory boards

All of these provisions of the Code of Virginia are mandatory.

Purpose

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

The Board must establish fees adequate to support the costs of the Board operations and a proportionate share of the Department's operations. By the close of the next biennium (2024-2026), fees will not provide adequate revenue for those costs.

The Department is funded entirely from revenue collected for license applications, renewal, examination fees, and other licensing fees and receives no general fund money. The Department is self-supporting and must collect adequate revenue to support its mandated and approved activities and operations. Fee revenue collected on behalf of the various boards funds the Department's authorized special revenue appropriation.

The Board has no other source of revenue from which to fund its operations.

In 2014, the Board initiated a fee change for opticians in anticipation that the change would be needed to maintain Callahan Act required balances. In 2016, the Board voted to retain the existing fee structure and withdraw the fee change action due to changes in the Board's financial position.

With the effective date for new fees anticipated to be in FY2024, at the earliest, it will have been 19 years since fees for opticians were increased significantly to allow the Board to support the costs of the Board operations and a proportionate share of the Department's operations. The last fee increase occurred in 2005. At that time, it was anticipated that fees would increase in approximately six years. The Department generally tries to structure fees so that they will cover the Board's expenses for a period of 4- 8 years, with the assumption that revenues are adequate to cover operating expenses but are not excessive. It is generally anticipated that each board would need to reassess its fee structure and raise fees in response to ongoing cost increases about every 5-6 years. One-time expenses or unusual cost increases may shorten that time period.

The Department is always concerned about efficiency of operations as a means of maintaining or reducing costs, and has implemented budget review, approval, and monitoring processes, and performance measurement to monitor targets and goals.

While cost increases are not the sole reason for the fee increases, some cost categories have increased significantly since this program's last fee adjustment nearly two decades ago. Examples of increased costs from FY2005 to FY2023 include Information Technology which increased 232%, Building Rent which increased 221% and staff expenses which increased 195%.

Substance

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

The Board reviewed the fees listed in 18 VAC 80-30-50, and based on projected revenues and expenses, developed a fee schedule that meets the requirements of the applicable statutes while being the least burdensome to the licensee population.

The following is the expected range of the proposed fee increases to be made in this regulatory action.

Fee Type	Current Fee	New Fee	When Due
Application for licensure	\$100	\$125	With application.
Application for contact lens certification	\$100	\$125	With application.
Renewal	\$100	\$125	Up to the expiration date on the license with a 30-day grace period.
Late renewal (includes renewal fee)	\$125	\$150	Between 30 and 60 days after the expiration date on the license.
Reinstatement (includes renewal and late renewal fees)	\$225	\$275	After 60 days following the expiration date on the license.

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 Department has considered the following alternatives to increasing fees for opticians:

- **Reduce services.** Because the regulatory activities conducted by the Board are mandated by statute, this is not considered a viable alternative. In addition, reductions in services would result in delays in issuing licenses, creating barriers to applicants' and licensees' ability to work, and would decrease the Department's effectiveness in ensuring that licensees conduct their activities in a manner adequate to protect the public health, safety, and welfare.
- **Obtain a Treasury loan to fund operations.** The Department could request a loan from the general fund to cover the Board's deficit and supplement its ongoing operations. However, this would be a short-term solution only, and would only delay the need for fee increases. When eventually implemented, fee increases would need to be even greater to provide for loan repayment.
- **Supplement Board activities with general funds.** The Department currently receives no general fund revenue, and this would require a change in the Code of Virginia and the Appropriation Act. The Department's boards are intended to be self-funding pursuant to §§ 54.1-113, 54.1-201, 54.1-304.3, and 54.1-308 of the Code of Virginia. Use of general funds to support Board operations does not appear to be an appropriate use of taxpayer dollars.

Licenses for opticians are issued to individuals and do not fall within the meaning of the term “small business” as defined in § 2.2-4007.1.

Periodic Review and Small Business Impact Review Announcement

This NOIRA is not being used to announce a periodic review or a small business impact review.

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. In addition, as required by § 2.2-4007.02 of the Code of Virginia, describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Board 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, and (iii) the potential impacts of the regulation.

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:

Kelley Smith, Executive Director
Board for Hearing Aid Specialists and Opticians
Department of Professional and Occupational Regulation

By E-Mail to:
HASOPT@dpor.virginia.gov

By FAX to:
(866)245-9693

By U.S. Mail to:
9960 Mayland Drive, Suite 400
Henrico, Virginia 23233

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 be held following the publication of the proposed stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.