

18 VAC 41-70 – ESTHETICS REGULATIONS

BOARD FOR BARBERS AND COSMETOLOGY

DEPARTMENT OF PROFESSIONAL AND OCCUPATIONAL REGULATION

AGENCY RESPONSE TO ECONOMIC IMPACT ANALYSIS (EIA) PERFORMED BY THE VIRGINIA DEPARTMENT OF PLANNING AND BUDGET (DPB):

The Board concurs with the analysis for #1, 2, and 4-8 in the Summary of Proposed Amendments to Regulations. The Board respectfully disagrees with #3, 9, and 10.

Summary Item #3 - The Proposed Regulations would require that an applicant who does not apply for licensure within five years of passing the exam must retake the exam to be eligible for licensure.

EIA position – “The benefits of this change will only outweigh the costs if changes within fields licensed by the Board are significant enough to render individuals incompetent to practice without refreshing their knowledge and retaking the exam.”

Agency Response:

There are several fundamental reasons for implementing this change in the regulations, not just the single issue raised by the EIA. For someone who applies for their license more than five (5) years after taking the exam, the full scope of problems includes:

- The Board cannot know whether they still possess the knowledge or skill to competently practice,
- The Board does not have access to testing records older than 5 years to confirm the applicant truly passed the exam, and
- Changes in the industry may have made the applicant’s knowledge obsolete.

Without adding this requirement, the Board will face the dilemma of having to license individuals who may not be minimally competent, as well as experience increased costs for maintaining exam records in perpetuity.

Explanation:

The Board is statutorily required to establish the qualifications of applicants for licensure. The Board utilizes written and practical examinations to establish that applicants possess the competence to engage in the profession.

There are several issues that affect competence when an applicant has not been engaged with the profession for many years. The EIA correctly identifies that changes in the industry may render an applicant’s knowledge obsolete. However, the EIA fails to account for the other, more significant reason, which is that individuals who have not been engaged in the profession for five years are likely to have forgotten much of the knowledge and skill for engaging in the practice in a safe manner. The Board has no way of knowing whether an individual who has not been engaged in the practice for six, ten, or twenty years still has the practical skill or information base to practice safely. Since the Board regulates professions which use chemicals and must have current knowledge in preventing the

transmission of communicable diseases, it is particularly important that the Board meet its statutory obligation to ensure it licenses minimally competent individuals in order to protect the public. The Board believes that it cannot accurately assess if an individual possesses the skill and knowledge qualifications for licensure if those skills and knowledge have not been measured in the previous five years.

Further, the EIA does not identify that the proposed regulations add the requirement that records of examinations only be kept for five years. Currently, while the regulations allow an applicant to apply any time after they have taken the exam, the Board's examination vendor only maintains exam records for five years. This discrepancy means that the Board has no way to verify that an applicant claiming to have passed the exam more than five years ago has truly done so. To resolve this conflict without changing the regulation, the Board will have to either require the exam vendor to maintain records in perpetuity, or start maintaining these records itself. Either of these options will increase costs either through higher examination fees for the candidate or if the Board were to maintain the records, it would increase the Board's expenses, and ultimately licensing fees. As such, the Board believes that the five year recordkeeping will result in maintaining a lower cost for licensure, in addition to protecting the public's health, safety, and welfare.

Summary Item #9 - The Proposed Regulations would require a 2"X2" head and shoulder picture of the students attending any school licensed by the Board be attached to their student record files.

EIA Position - "[T]he cost of compliance for this requirement as written will likely be far higher than it needs to be. 2X2 (passport size) photos cost between \$8 and \$12, whereas larger, conventionally sized photos, are far cheaper."

Agency Response:

The proposed regulation does not specify passport photos, and can be met by any type of photo, as long as the head and shoulder portion are 2X2. The EIA assumes that the cost of this requirement will be the cost of acquiring passport photos. However, the EIA's assumptions fail to take into account that:

- This requirement is for the schools, not the students,
- The regulation does not require passport photos, and
- Students are already required to provide this 2X2 photo during the application process.

The EIA's incorrectly assumes that only a passport photo would meet this requirement. However, compliance costs would only be in the \$8.00-\$12.00 range if the school did not provide this service AND if the student chose to utilize passport photos instead of a low cost or free alternatives identified below. Further, the proposed regulation provides the Board with an important tool to combat rampant fraud in the pre-licensure process.

Explanation:

The Board is authorized to establish the qualifications of licensure and to promulgate regulations necessary to effectively administer the regulatory system. The authority currently in 18 VAC 41-70-20 of the Board's regulations already requires that in order to be eligible to sit for examination, a student must have completed a Board approved training program.

The language contained in proposed 18 VAC 41-70-230.A, requiring schools maintain a 2X2 color head and shoulder photo, is a necessary piece of fraud detection for the Board to corroborate that the individual sitting for the exam is, in fact, the student who completed the training program. This

regulation is being proposed, along with several other recordkeeping measures, to address fraud in the pre-licensure process.

The EIA does not take into account that the requirement is for the schools. The school would bear the requirement of maintaining the photo, and may utilize its own photograph equipment to comply with the regulation. It is likely that there will be variation in the market, with some schools generating the photo in-house, and others asking the students to provide the photo. As such, the cost of the regulation may be as little as the cost for the school in ink and printer paper.

The EIA incorrectly assumes that this requirement is met only with a passport photo. While a school may utilize a passport photo, the regulation does not specify or require a passport photo. Schools may utilize whatever sized photo they wish, as long as the head and shoulder portion is 2X2. The EIA's recommendation of using a \$0.09 4X6 photo is already acceptable under the proposed regulation, as long as the head and shoulder portion meets the 2X2 criteria. In fact, as will be explained below, the Board currently accepts and utilizes these types of photos for the other 2X2 photo requirements. It is worth noting that even the U. S. Department of State does not require individuals to purchase passport photos, and has a tool to allow passport applicants to take their own photo and convert it to the proper specifications for free. Schools would be able to utilize this free service to meet the Board's requirements.

The EIA incorrectly assumes that this requirement will create a new financial burden. Applicants already are required to provide a 2X2 head and shoulder color photograph when they apply for licensure. This photo must be submitted along with their application. The examination vendor utilizes this photo to ensure that the individual taking the exam is the same individual who applied for licensure. These photograph requirements have been essential to the Board's ability to stop testing fraud. Further, the board frequently sees 4X6 photos, whole or cut down to 2X2. The Board also accepts 2X2 photographs that have been printed on home printers if they meet the standard. This recordkeeping requirement for the schools, if the school defrays the cost to the student, only means the student would have to produce an additional copy of the 2X2 photo. So even if a student chose to utilize the higher cost passport photo, since passport photos come in sets, ranging from 2 to 10 photos, there would likely be no additional cost for students utilizing passport photos.

Summary Item #10 - The proposed regulations would add to the existing requirement that shops, salons, schools, and facilities maintain working toilet and sink, an additional requirement that the bathroom be exclusively for client use and have hot and cold running water.

EIA Position - The EIA argues that, "[g]iven the high cost of requiring shops to meet a stricter standard than is sometimes allowed now, costs for this proposed change likely outweigh the benefits..."

Agency Response:

The proposed regulations address a very rare situation in which a spa does not have a bathroom exclusively for client use with hot and cold water, usually because they are situated in a mall. Spas are already required to have bathrooms, and this change is meant to clarify an ambiguity in the regulation that has caused confusion for staff and business owners. The Board has encountered and foresees certain health and safety risks associated with not having this requirement, such as:

- Loss of oversight of chemical treatments while clients have left the spa, and
- Unsanitary bathroom conditions that the spa has no authority to address.

Additionally, this requirement would add a level of convenience, as patrons would not have to travel across the mall to use the bathroom. The Board believes these are substantial issues for the spas that are affected. The EIA fails to adequately account for the health and safety risk this regulation is meant to address and fails to mention that the Board may consider grandfathering existing businesses that would be non-compliant when this regulation takes effect.

Explanation:

As the EIA explains, this regulation partially stems out of a concern regarding spas in malls. Spas are already required to have bathrooms, but spas in mall have the unique problem of not having control over the common bathroom. This has led to some confusion on the part of staff and business owners regarding spa responsibility. So, for example, the mall may temporarily shut down the bathroom for maintenance or cleaning. This would put the spa in non-compliance with the regulations, even though the spa does not have control of the situation. This lack of control over the bathroom may lead to other regulatory violations, since current regulations require the bathroom's fixtures to be in good repair, have adequate lighting, and sufficient ventilation. By specifying the bathroom must be exclusively for client use, this should help resolve this issue and reduce staff and business owner confusion.

Also, the Board has expressed concern that if salons have to send their customers from one end of the mall to the other to use the bathroom, the spa is putting that client at risk. Spas use chemicals (such as those used in chemical peels) which have the potential to cause injury to clients if not used correctly, or left on the client for too long. When a client under the treatment of these chemicals leaves the spa, the spa no longer has oversight of that client. The spa cannot properly supervise the treatment or ensure that the chemicals are removed timely when the consumer is off site and subject to whatever delays they may encounter while at a shopping mall. This situation is a clear and foreseeable risk to the public which the Board seeks to address.

Further, the requirement that the bathroom be for client use only addresses a re-occurring problem of shared bathrooms. The Board has encountered during inspections the situations of spas sharing bathrooms with other businesses, where the spa did not have control over the sanitation of the bathroom. This left the Board in the dilemma of having to cite a business for unsanitary conditions it had no control over, or not citing a business that puts its clients in unsanitary conditions.

The Board is aware that there could be significant costs associated with renovating a facility to come into compliance with this proposed regulation. There are currently regulations in place that require spas to sanitize using hot water. Spas that cannot meet the new standard are likely unable to meet the current standard either, and thus are not properly sanitizing their implements. The requirement for hot and cold water is not necessarily adding a new requirement, but rather clarifying the need for hot water. Despite this, the Board will consider implementing a grandfather clause for facilities that this regulation may adversely affect due to what could be very large costs to comply. It is estimated that there are very few spas that would be adversely affected by this regulation. Even with a grandfather provision, the Board believes that applying the proposed regulation to new spas going forward will ensure a more sanitary and safer experience as the industry moves toward this standard.

Effects on the Use and Value of Private Property -

EIA Position – “Proposed changes such as requiring in-shop client bathrooms where shops currently are allowed to be in regulatory compliance by being in a large facility (such as a mall) that has bathroom accommodations are likely to greatly increase costs, and lower profits, for affected shops.”

Agency Response:

The Board believes that while the very few spas that would be affected by this change would incur a one-time expense, the actual use and value of the property would increase. Adding a bathroom to a facility that does not currently have one makes the building more functional and desirable as a marketable space.

Small Businesses: Costs and Other Effects-

EIA Position – “Proposed requirements that impact bathroom facilities will likely increase costs for affected small businesses. Several proposed requirements, such as having to periodically provide student rosters and have 2x2 headshots attached to student files, are likely to increase costs either for schools or for both schools and their students.”

Agency Response:

As noted above, the Board believes that there are very few spas, 15 or less, that would be affected by the requirement to have bathrooms exclusively for client use.

The reporting requirements being added in this action, including the 2X2 headshot, are not anticipated to have significant costs associated with compliance. The Board expects that compliance costs for all of the new reporting requirements should be less than \$25.00 annually. For those that choose to utilize digital recordkeeping, there may not be any increased costs at all. It should be noted that the Board currently is contracting with an exam vendor that allows schools to maintain almost all of the required records on the vendor’s online servers, at no charge to the school. Since the Board has access to these servers, schools that utilize this free service would essentially automatically be in compliance with the new regulations.

Small Businesses: Alternative Method that Minimizes Adverse Impact-

EIA Position – “The Board would likely be able to decrease costs for regulated entities by allowing photos that were larger than 2x2 for student files. The Board also may wish to revisit proposed bathroom requirements.”

Agency Response:

As noted above, schools may be able to meet the 2X2 photograph requirement several ways for little or no cost. The requirement is that the head and shoulder portion of the photo be 2X2. This does not preclude the use of larger photos, only necessitates cropping the photo to meet the Board’s requirement. Additionally, the Department of State has a free program that converts digital photos to the standards required by the Board.

The Board believes that the requirement for spas to have bathrooms available exclusively for client use is necessary to protect the health, safety, and welfare of the public.