



Virginia
Regulatory
Town Hall

Final 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, Osteopathic Medicine, Chiropractic and Podiatry
Action Title:	Fee Increase
Date:	March 12, 2004

Please refer 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* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

House Bill 1441 of the 2003 General Assembly strengthened requirements for health care institutions to report misconduct by doctors and changed the threshold for a finding of unprofessional conduct from a gross negligence standard to a simple negligence standard. The end result will be a substantial increase in the number of disciplinary proceedings conducted by the Board of Medicine. It was recognized that the additional cost associated with compliance and implementation of HB1441 would result in increased costs for the board and an immediate need for additional revenue.

In response, the General Assembly included an enactment clause to authorize the promulgation of emergency regulations to increase fees, which the Board has completed. An increase of \$77 per licensee for a biennial renewal, with other associated fees increased by a like amount, has

been in effect since July 15, 2003. This regulatory action will replace the emergency regulations currently in effect.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

There were no changes made to the proposed regulation in the final adoption.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On March 12, 2004, the Board of Medicine adopted final amendments to 18 VAC 85-20-10 et seq., Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry & Chiropractic, in order to increase certain fees as necessary for implementation of changes to the disciplinary system and standards of conduct.

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, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (5) provides the Board the authority to levy fees and (6) provides authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards

The general powers and duties of health regulatory boards shall be:

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 legal authority to promulgate the regulation for a fee increase is in fifth enactment clause of Chapter 762 of the 2003 Acts of the Assembly. See complete copy of HB 1441 (Chapter 762) - <http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+CHAP0762>

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final 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.

In the 2003 General Assembly, House Bill 1441 strengthened requirements for health care institutions to report misconduct by doctors when there is a “reasonable probability that such health professional may have engaged in unethical, fraudulent or unprofessional conduct as defined by the pertinent licensing statutes and regulations.” Both the time limit for reporting and the content of the report have been specified in the Code, and the civil penalty for failure to report has been increased from a maximum of \$10,000 to \$25,000. Accordingly, the agency estimated that complaints or reports of misconduct by doctors could increase from 1500 to 1800 per year.

In addition, HB1441 changed the threshold for a finding of unprofessional conduct from a gross negligence standard to a simple negligence standard. The current standard is: *Gross ignorance or carelessness in his practice, or gross malpractice*; since July 1, 2003, the standard has been: *Intentional or negligent conduct in the practice of any branch of the healing arts that causes or is likely to cause injury to a patient or patients.*

The end result of the reduction in the threshold for disciplinary action coupled with the additional reporting requirements will be a substantial increase in the number of disciplinary proceedings conducted by the Board of Medicine. Additional reporting will likely result in approximately 160 new cases to fully investigate (from 1200 to 1360), but the number of informal conferences is expected to more than double from 80 to 175 per year. Likewise, it is projected that the number of formal hearings may double from 25 to 50 per year. In addition, it is expected that a number of cases that may have previously been closed as “no violation” under the old disciplinary standard may be settled with a confidential consent agreement. The number of confidential consent agreements, which must be prepared by legal staff and reviewed by counsel, is estimated to be approximately 375 per year. During debate on the bill, it was clearly noted that the additional cost associated with compliance and implementation of HB1441 would result in increased costs for the affected boards and would generate an immediate need for additional revenue.

In a recent review of cases opened for the Board of Medicine, the figures indicate that the increased caseload may have been somewhat underestimated. From July 1, 2002 to February 28, 2003, the number of new cases was 917; from July 1, 2003 to February 28, 2004, the number of new cases was 1956. Clearly, there is a need for additional resources to address the increase in investigations, adjudication and monitoring compliance in disciplinary cases.

The provision of sufficient funding to support the costs of investigating and adjudicating reports of negligence or unprofessional conduct is essential to the mission of the Board, which is to protect the health and safety of the public. Delays in the disciplinary process due to insufficient resources could potentially allow unsafe doctors to remain in active practice and would be harmful to consumers of medical care.

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 of the regulatory action's detail.

To accommodate the projected increase in reporting, investigations and disciplinary proceedings for the Board of Medicine, the agency has calculated costs for additional staff, hearings, equipment and related expenses. It is estimated that by June 30, 2006 at the conclusion of the 2004-06 biennium, costs related to HB1441 could result in a \$3.7 million deficit for the Board. In order to adjust fees as necessary to accomplish the regulatory and enforcement responsibilities set forth in the act, the Board has adopted an emergency regulation to increase the biennial renewal fee by \$77 and has set other fees accordingly. The adoption of the proposed fee increase will result in an additional \$3,701,292 in revenue by FY 06 – an amount sufficient to offset the projected deficit.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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.

1) In order for the Department to continue processing applications, investigating complaints and conducting disciplinary proceedings against doctors, it is necessary for the Board to have sufficient funding. There are no direct advantages to the public in taking action to increase renewal fees, but failure to act could place the public in jeopardy as there could be delays in licensing practitioners and in the investigation and adjudication of complaints of negligence or other unprofessional conduct. To the extent the Board has acted in anticipation of its need for additional revenue to offset additional expenditures and loss of income, the public is well-served. There are no disadvantages to the public; a \$77 increase in a professional licensure fee payable every two years is not likely to deter persons interested in the entering the profession nor is it likely to cause any currently-practicing doctor to leave the profession.

- 2) The primary advantage to the Commonwealth is the availability of sufficient funding for the Department and the Board to carry out its statutory responsibilities. Since the agency is self-funded through its licensure fees, an increase in fees is the only mechanism for producing adequate income to meet its budget. There are no disadvantages to the agency or the Commonwealth.
- 3) There are no other matters of interest related to this regulatory action that are pertinent to the regulated community, government officials, and the public.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

Proposed regulations were published in the Virginia Register of Regulations on December 15, 2003. Public comment was requested for a 60-day period ending February 13, 2004. Proposed regulations replace emergency regulations that have been in effect since July 15, 2003. The following comment was received at the public hearing held before the Board on January 22, 2004:

The Medical Society of Virginia presented a letter from the President in which MSV supported reasonable fee increases during this period of expanding oversight responsibilities. MSV expressed concern about an ongoing policy of transferring fees to other state agencies in support of other programs. Worthy programs should receive funding from other sources.

Board response:

The Board has responded that it has no authority to override the statutory action by the General Assembly. The transfer of medicine funds referenced by the commenter is set in the Appropriation Act of the Commonwealth and requires a cash transfer to the Department of Health to fund medical scholarship for persons who plan to practice in underserved areas of the state. The Board adopted a position in opposition to the transfer of its licensure fees, and a letter expressing that position was sent to the Director of the Department of Health Professions and communicated to the Secretary of Health and Human Resources. At this time, it is unknown whether the transfer of funds will be included in the budget passed for 2005-06.

Dr. Joseph Leming, former member of the Board spoke against a fee increase based on a \$560,000 cash transfer from the fees paid by licensees of the Board to a program previously supported by taxpayer dollars from the General Fund. There is no legal foundation for the diversion of funds, since the Board has statutory authority to levy fees to support licensing and disciplinary responsibilities.

Board response:

The Board has responded as noted above. In addition, the commenter stated that there was no legal foundation for the diversion of funds collected for regulation of practitioners of the healing arts to the General Fund. In response, the Board pointed out that the Appropriations Act superseded all other provisions of any other law (see §4-11.00 of the Appropriation Act) and therefore, does provide a legal basis for the transfer.

Dr. Karsten Konerding presented a letter on behalf of the Richmond Academy of Medicine expressing support for a reasonable fee increase to support the mission of the Board to protect the health and safety of the public. The Academy also sought assurances that fees of the Board would not be transferred to support other boards within the Department or to be diverted to other agencies. The Academy also expressed concern that “user fees” will be imposed, such as a fee for obtaining credentialing information.

Board response:

The Board has responded as noted above. In addition, the Board commented that the “user fees” for obtaining credentialing information are fees of an entity outside the Department of Health Professions and over which the Board and the Department have no control. Obtaining information in a certain format is voluntary, and those charges are unrelated to the need for increased fees to support the disciplinary function of the Board.

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 crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

Current section number	Current requirement	Proposed change and rationale
22	<p>The application fee for licensure in medicine, osteopathy, and podiatry shall be \$225 <u>302</u>, and the fee for licensure in chiropractic shall be \$200 <u>277</u>.</p> <p>The fee for board approval to sit for Part 3 of the United States Medical Licensing Examination without subsequent licensure in Virginia shall be \$85.</p> <p>The fee for biennial renewal shall be \$260 <u>337</u> for licensure in medicine, osteopathy and podiatry and \$235 <u>312</u> for licensure in chiropractic, due in <u>each even-numbered year in</u> the licensee's birth month. An additional fee for processing a late renewal application within one renewal cycle shall be \$90 <u>115</u> for licensure in medicine, osteopathy and podiatry and \$80 <u>105</u> for licensure in chiropractic.</p> <p>The fee for requesting reinstatement of licensure <u>or certification</u></p>	See below for rationale

	<p>pursuant to §54.1-2921 <u>54.1-2408.2</u> of the Code of Virginia <u>or after a petition to reinstate the certificate or license of any person has been denied</u> shall be \$2,000.</p> <p>The fee for reinstatement of a license issued by the Board of Medicine pursuant to §54.1-2904 of the Code of Virginia which has expired for a period of two years or more shall be \$305 <u>382</u> for licensure in medicine, osteopathy and podiatry and \$290 <u>367</u> for licensure in chiropractic and shall be submitted with an application for licensure reinstatement.</p> <p>The fee for biennial renewal of an inactive license shall be \$130 <u>168</u>, due in the licensee's birth month. An additional fee for late renewal of licensure shall be \$45 <u>55</u> for each renewal cycle.</p>	
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This action will amend 18VAC85-20-22 to increase the biennial renewal fee for doctors of medicine, osteopathic medicine and podiatry by \$77 from \$260 to \$337 and for doctors of chiropractic from \$235 to \$312. Other fees which are associated with the licensing (renewal) fee are also increased accordingly. The application fee for initial licensure in Virginia is increased from \$225 to \$302 doctors of medicine, osteopathic medicine and podiatry and for doctors of chiropractic from \$200 to \$277, because the first renewal cycle is included in the initial application fee. The fee for late renewal anytime within the two years following the expiration date is increased by \$25 from \$90 to \$115 (late fees are calculated at approximately 1/3 of the renewal fee). The fees for reinstatement of a lapsed license after two years are increased from \$305 to \$382 doctors of medicine, osteopathic medicine and podiatry and for doctors of chiropractic from \$290 to \$367. Renewal fees for inactive licensees are increased by \$38 from \$130 to \$168 with the late fee increasing from \$45 to \$55 (renewal of inactive licenses is calculated at approximately 1/2 of the active fee).

A fee currently in regulation is eliminated because it is no longer applicable. The fee for board approval to sit for Part 3 of the USMLE examination without subsequent licensure in Virginia is deleted, since those applicants now can apply directly to USMLE to be approved to sit for the exam. An amendment in subsection H clarifies that renewal occurs in each even-numbered year, which is the current policy of the board.

Finally, the legislation eliminated § 54.1-2921 in the Medical Practice Act and inserted a new section, § 54.1-2408.2, in which a three-year time limit is set before a health regulatory board can consider a petition for reinstatement following revocation. The deleted Code section in Chapter 29 of Title 54.1 is referenced in current regulation for a reinstatement fee charged to an applicant who is seeking reinstatement following revocation or after a petition to reinstate has been denied. The Board must change the Code cite in its regulation and specifically add the requirement for the \$2,000 fee for an applicant after a petition to reinstate has been denied, since that is not referenced in the new § 54.1-2408.2.

Failure to provide sufficient funding through the adoption of regulations to cover the costs of implementing this legislation would place the agency in non-compliance with the law. If the Board failed to increase fees sufficient to provide adequate staffing and support for investigative

and disciplinary activities, the public health and safety would suffer by long delays in responding to complaints, processing cases and possibly removing incompetent or dangerous practitioners. The proposed regulatory action is essential to ensure that the Board and the Department have sufficient resources to respond to reports of misconduct in a timely and thorough fashion.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the 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.

The Board has determined that there is no impact on the family or family stability as a result of these regulations. While there would be a modest effect on disposable family income, the increase in fees, which total approximately \$39 per year for renewal of a license to practice medicine, osteopathy, podiatry or chiropractic, should not be overly burdensome.