



Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Dentistry, Department of Health Professions
Virginia Administrative Code (VAC) citation	18VAC60-20-10 et seq.
Regulation title	Regulations Governing the Practice of Dentistry and Dental Hygiene
Action title	Recovery of administrative costs in disciplinary actions
Date this document prepared	5/28/09

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

The purpose of this regulatory action is to initiate rules for recovery of administrative costs relating to the investigation and monitoring of a licensee disciplined by the Board of Dentistry. Legislation passed by the 2009 General Assembly (HB2058 – Delegate Hamilton) provides statutory authorization for imposition of such costs, and the goal of the amendments is to establish the regulatory framework for which costs may be assessed, how those costs may be determined, the process for assessment of costs and conditions under which the Board may choose to waive the imposition of costs.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Dentistry the 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:

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.

...

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. ...

Specific regulatory authority for the Board of Dentistry is found in Chapter 89 of the 2009 Acts of the Assembly:

§ [54.1-2708.2](#). *Recovery of monitoring costs.*

The Board may recover from any licensee against whom disciplinary action has been imposed reasonable administrative costs associated with investigating and monitoring such licensee and confirming compliance with any terms and conditions imposed upon the licensee as set forth in the order imposing disciplinary action. Such recovery shall not exceed a total of \$5,000. All administrative costs recovered pursuant to this section shall be paid by the licensee to the Board. Such administrative costs shall be deposited into the account of the Board and shall not constitute a fine or penalty.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

Enforcement activities constitute the largest expenditure for the board, although only a small percentage of licensees undergo investigation, and an even smaller percentage are found to be in violation of statutes and regulations governing their professions. Therefore, it is equitable to

assess at least a portion of enforcement and monitoring costs to those who are the cause of the expenditure. By recovering a portion of its enforcement costs, the Board will be better able to meet its obligation to investigate every complaint it receives and to more efficiently and effectively resolve cases related to patient care. The Board will have the additional resources necessary to adequately investigate reports of misconduct to make the practice of dentistry and dental hygiene safer for patients in Virginia.

Substance

Please detail any changes that will be proposed. For new regulations, include a summary of the proposed regulatory action. Where provisions of an existing regulation are being amended, explain how the existing regulation will be changed.

The statute is specific about some aspects of the authority to recover “reasonable administrative costs associated with investigating and monitoring” a licensee. The recovery of costs will only be implemented if a licensee has had disciplinary action imposed. It will not affect those licensees: 1) who are investigated by the Department, but for whom no probable cause is found to indicate a violation may have occurred; 2) who have a disciplinary proceeding, but for whom no violation is found and no discipline imposed; or 3) who have matters resolved through a confidential consent agreement or an advisory letter.

Rather than setting specific fees or dollar amounts in regulation, the amendments will provide a process for determination of both the investigative and monitoring costs, as specified in the Code section. At the end of each fiscal year, regulations will require a calculation of the average hourly cost for enforcement that is chargeable to the work of the Board of Dentistry. The Enforcement Division of the Department tracks the number of hours an investigator spends on a case, so that number could be multiplied by the hourly cost to determine the specific costs relating to the investigation of the case against a specific respondent. In addition, the Board would assess any costs relating to hiring expert witnesses and the reports generated by such witnesses. While not inclusive of all related administrative costs, a fee based on the actual number of hours and the hourly cost of an investigation would be reasonable and not arbitrary or selectively punitive. The imposition of the recovery cost would become part of the order from an informal or formal proceeding or part of a consent order agreed to by the parties.

The monitoring costs would be calculated based on the terms and conditions imposed and the length of time the licensee is to be monitored. As with the enforcement costs, the Board would annually calculate the average costs of monitoring certain terms, such as the acquisition of continuing education in an area of practice. If the licensee is to be monitored beyond one year, the monitoring cost would be imposed for each of those years. A guidance document would be adopted annually setting out the average investigative and monitoring cost (for the various terms and conditions to be monitored), so the licensees (and their attorneys, if applicable) would have knowledge of the recovery of costs, if disciplinary action is imposed. Since the costs would be incorporated in the order, the respondent would have the option to accept the order, request a formal hearing following an informal, or appeal an order from a formal hearing to a circuit court.

As specified in statute, the total of the recovery of costs could not exceed \$5,000. However, the regulations will reference current fees for inspection of dental offices and returned checks as fees not subject to the recovery maximum. Additionally, the Board may seek to recover the collection costs for delinquent fines and fees.

Finally, the Board intends to set in regulation a limited number of reasons for which all or part of the costs may be waived. The Board would be required to set out in the findings of fact in the disciplinary order the specific reasons for such a waiver. Regulations may provide that a total or partial waiver could be granted if the imposition of costs would create a substantial undue hardship on the licensee, or if it would be unjust to the public to assess fees, or if the collection of such fees does not appear to be feasible.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also, please describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

The only viable alternative for the Board of Dentistry is to continually increase application and renewal fees for all licensees to cover rising administrative costs for discipline and enforcement. The Board has already been notified that a significant deficit in the next biennia is projected and documented, and it will need to consider appropriate regulatory action as mandated by law. While the recovery of some of those costs from the licensees who generate the need for investigation and disciplinary action will not replace future need for increased fees, it may help to mitigate against large fee increases for all licensees in the future.

The statutory authority for recovery of disciplinary costs is already held by the boards at the Department of Professional and Occupational Regulation and the Board of Accountancy. Therefore, the Board will consult with its sister agencies to learn from their experience with a recovery program. Additionally, there are other states in which the Board of Dentistry has such authority, so those states' statutes and regulations will be reviewed. In the state of Washington, legislation recently passed that authorizes the Board to seek reasonable reimbursement of disciplinary proceedings up to \$10,000. If the licensee seeks judicial review of the disciplinary action and does not receive a "substantial element of relief," the law requires that the trial or appellate court shall impose \$25,000 at each level of judicial review. Such authorization is not included in the Virginia statute.

To the extent possible, the intent of the regulation would be to set out a process by which fees could be calculated, assessed, collected or waived in a manner that would be reasonable and equitable to all parties.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments on this notice.

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by posting comment on the Regulatory Townhall at www.townhall.virginia.gov or by mail, email or fax to Elaine Yeatts, Agency Regulatory Coordinator, 9960 Mayland Drive, (804) 527-4434 (fax) or elaine.yeatts@dhp.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public hearing will be held after the Board has adopted proposed regulations. Notice of the hearing may be found on the Virginia Regulatory Town Hall website at www.townhall.virginia.gov and can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent 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.

There is no impact on the family.