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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	State Council of Higher Education for Virginia (SCHEV)
Virginia Administrative Code (VAC) citation(s)	8VAC 40-31
Regulation title(s)	Regulations Governing the Certification of Certain Institutions to Confer Degrees, Diplomas and Certificates
Action title	Fee Changes
Date this document prepared	08/30/2019

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 (1 VAC 7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please 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 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 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.

Acronyms and Definitions

Please define all acronyms or technical definitions used in the Agency Background Document. .

SCHEV and “Council” mean the State Council of Higher Education for Virginia.
PPE means the Private Postsecondary Education unit of SCHEV

Mandate and Impetus

Please 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, board decision, etc.). 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 § 23.1-224 Council may establish nonrefundable fees for services and methods for collecting such fees. PPE fees were last evaluated for an increase 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

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

§ 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 chapter.

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

Purpose

Please 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, please explain any potential issues that may need to be addressed as the regulation is developed.

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

In FY18 PPE’s expenditures plus SCHEV’s indirect assessment totaled to an amount greater than total revenue collected, amounting to a shortfall of \$133,680.35. In FY19, PPE ended with net positive solely due to the non-collection of indirect fees by SCHEV in that year as a temporary measure to help PPE make the transition to a new fee structure that will be sustainable. PPE has implemented an austere budget for FY20 that eliminates or severely reduces all budget lines with the exception of salaries, benefits and required operational expenses. However, even with deep cuts to expenditures, the shortfall for FY2020 is projected to be \$145,420.05.

One notable factor that affects the PPE’s ability to operate in the black is the ratio between salaries and benefits and the revenue collected by the unit. Salaries and benefits comprise the greatest portion of the unit’s expenditures. Between FY 15 and FY 19, salary and benefit expenditures have increased every year. The total increase between FY15 and FY19 is 42%. In FY20, salaries and benefits will increase by 7.5% over FY 19. This increase is mostly due to the salary increases granted to state employees that became effective in June 2019. As mentioned above, mandated salary increases are equivalent to a revenue reduction for a non-general fund unit such as PPE.

There exists a correlation between the percent of revenue consumed by salaries and benefits and the PPE unit’s net losses. In FY 15, FY16 and FY17, the ratio of salaries & benefits to revenue did not exceed 70%. The PPE unit showed net profits in those years. In FY18, FY19 and the projected budget for FY20, costs for salaries and benefits exceed 80% of revenue collected by PPE. Those years show net losses. It’s clear that when salaries and benefits exceed 80% of revenues collected, the PPE unit cannot meet the expenditures required to perform duties mandated by Code and regulation. Based on prior years’ data, SCHEV estimates that the ratio between salaries & benefits and revenue should be no more than 70% to achieve a self-supporting PPE unit.

Another factor that affects the PPE unit’s ability to maintain self-sufficiency is the unpredictable events that affect revenues. In FY17 the unit collected the highest revenue in its history—\$995,360. This is also the last year the PPE unit posted a profit. FY18 total revenue collections dropped 20% and FY19 revenue collections were 14% less than posted in FY17. This drop in revenue collections was due in part to large, well established postsecondary school closures. Between FY 2017 and FY 2019, 73 postsecondary schools that contributed to PPE revenues closed their doors.

Paradoxically, in the same period of time between FY17 and FY19, the PPE unit certified 74 new schools, leaving the number of postsecondary schools regulated by SCHEV virtually unchanged. However, revenue generated from new schools is significantly lower than revenue collected from established schools with greater enrollment. So, while the number of schools regulated by SCHEV is unchanged, the revenue stream has decreased.

It should be noted here that the loss estimated for the PPE unit in FY 20 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 the duties assigned to PPE by the Code of Virginia by drastically cutting expenses, as the unit has been forced to do during the current fiscal year. One of the significant responsibilities the Code of Virginia § 23.1-215 charges Council with is ensuring student protections for those attending certified institutions. Every function that the PPE unit performs is related to student protections, in one form or another. 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 maintain adequate staffing; must have sufficient funds to cover the expense of travel and accommodations for its compliance investigators; must have adequate resources to pay for the costs of sustaining an online portal and database; and must be able to provide crucial and timely training for staff and regulated institutions.

Substance

Please 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 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.

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
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

Alternatives

Please 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:** As stated before in this narrative, the FY20 PPE budget that the unit is currently operating under cannot be reduced further. Even with this austere budget, PPE is expected to show a shortfall for FY20. This level of austerity cannot continue since without additional funding, the activities carried out by PPE that ensure student protections will be inadequate. Students will be at risk of enrolling in postsecondary schools that are not monitored for compliance with the laws and regulations in Virginia that protect students from substandard education.
- **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. § 23.1-224 of the Code of Virginia 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.

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

Please indicate how the public should contact the agency to submit comments on this regulation, including ideas to assist the agency in the development of the regulation and the costs and benefits of the alternatives stated in this notice or other alternatives.

The Agency is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation. Also, the agency/board 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) the probable effect of the regulation on affected small businesses; and 3) the description of less intrusive or costly alternatives for achieving the purpose 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://www.townhall.virginia.gov>.

Comments may also be submitted by mail, email or fax to:
Sylvia Rosa-Casanova, Director of Private Postsecondary Education
State Council of Higher Education for Virginia (SCHEV)
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Richmond VA 23219
(P) 804-225-3399 (C) 804-592-8772
(F) 804-225-2604
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Written comments must include the name and address of the commenter. 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 the proposed stage of this regulatory action.