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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Counseling, Department of Health Professions
Virginia Administrative Code (VAC) citation(s)	18VAC115-80-10 et seq.
Regulation title(s)	Regulations Governing the Registration of Qualified Mental Health Professionals
Action title	New chapter
Date this document prepared	August 22, 2017

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to eighteen months), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation. This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

Please provide a brief summary of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

Regulations for registration of qualified mental health professionals are being promulgated pursuant to a mandate of Chapters 418 and 426 of the 2017 Acts of the Assembly. Regulations establish the fees required for registration and renewal of registration and specify the education and experience necessary to qualify for registration. In order to maintain registration, there is a requirement of eight hours of continuing education with a minimum of one hour in ethics. Standards of practice for qualified mental health professionals include practicing within one's

competency area, practicing in a manner that does not endanger public health and safety, maintaining confidentiality, and avoiding dual relationships that would impair objectivity and increase risk of client exploitation. A violation of standards of practice or of applicable law or regulation provides grounds for disciplinary action by the Board.

Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the “Definition” section of the regulations.

DBHDS = Virginia Department of Behavioral Health and Developmental Services
 DMAS = Department of Medical Assistance Services
 QMHP = qualified mental health professional

Emergency Authority

The APA (Code of Virginia § 2.2-4011) states that agencies may adopt emergency regulations in situations in which Virginia statutory law or the appropriation act or federal law or federal regulation requires that a regulation be effective in 280 days or less from its enactment, and the regulation is not exempt under the provisions of subdivision A. 4. of § 2.2-4006. Please explain why this is an emergency situation as described above, and provide specific citations to the Code of Virginia or the Appropriation Act, if applicable.

Chapters 418 and 426 of the 2017 Acts of the Assembly included a second enactment providing “that the Board of Behavioral Health and Developmental Services and the Board of Counseling shall promulgate regulations to implement the provisions of this act to be effective within 280 days of its enactment.” Therefore, the Board is authorized to adopt emergency regulations pursuant to § 2.2-4011 of the Code of Virginia.

Legal basis

Other than the emergency authority described above, 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) the promulgating entity, i.e., agency, board, or person.

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 Counseling 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. ...

The definition of a qualified mental health professional is found in:

§ 54.1-3500. Definitions.

As used in this chapter, unless the context requires a different meaning: ...

Qualified mental health professional" means a person who by education and experience is professionally qualified and registered by the Board to provide collaborative mental health services for adults or children. A qualified mental health professional shall provide such services as an employee or independent contractor of the Department of Behavioral Health and Developmental Services or a provider licensed by the Department of Behavioral Health and Developmental Services.

In addition, the Board has specific statutory authority to promulgate regulations for registration of qualified mental health professionals in:

§ 54.1-3505. Specific powers and duties of the Board.

In addition to the powers granted in § 54.1-2400, the Board shall have the following specific powers and duties:...

- 9. To promulgate regulations for the registration of qualified mental health professionals, including qualifications, education, and experience necessary for such registration.

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.

This emergency regulation is the result of collaborative efforts by DHP, DBHDS, DMAS, private providers, and other licensing boards to address concerns about the use of unlicensed and unregistered persons in the provision of services to clients and the lack of accountability for those services. DBHDS has been working with DHP to make titles and definitions for mental

health professionals more consistent with licensure and certification under health regulatory boards, but there remains a large group of "qualified" mental health professionals who have no such oversight. The intent of the emergency regulation is to establish a registry of QMHPs, so there is some accountability for their practice and a listing of qualified persons for the purpose of reimbursement by DMAS.

Need

Please describe 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.

The purpose of the registration is to address concerns jointly expressed by DHP, DBHDS, and DMAS about the lack of oversight and accountability for persons who are providing mental health, but who are not responsible to a health regulatory board with authority to take disciplinary action. By requiring a person who works as a QMHP in a program approved by DBHDS, to be registered by the Board of Counseling, persons who have been disciplined and removed from the registry would no longer be able to be employed in that capacity. The purpose is greater protection for the public and a reduction in the incidents of abuse and fraud in Medicaid-funded programs.

Substance

Please describe any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons the agency has determined that the proposed regulatory action is essential to protect the healthy, safety, or welfare of Virginians.

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements
10	Establishes definitions for words and terms used in the Chapter including collaborative mental health services, face-to-face, mental health professional, qualified mental health professional, QMHP-A, and QMHP-C	§§ 54.1-2400 & 54.1-3500	Words and terms are defined in conformity to definitions found in the Code and to offer the Board's interpretation of meaning as used in the context of the regulation.
20	Establishes fees to be charged to applicants and registrants, including a registration fee of \$50 and a renewal fee of \$30	§§ 54.1-2400 and 54.1-113	Fees are consistent with other registered professions and are minimally intended to offset costs associated with registration. Review of an application and credentials for a QMHP will be considerably more time-consuming and potentially

			contentious than for a peer recovery specialist, so the initial registration fee is higher; it is identical to the fee for registered medication aides.
30	Sets a requirement for a registrant to maintain a current name and address	§ 54.1-2400	All current information required for notifications to registrants must be maintained with the Board.
40	<p>Sets forth the requirements for registration of a QMHP-A, including submission of an application and fee and evidence of meeting the one of the educational qualifications in subsection B and the experience requirements in subsection C.</p> <p>In subsection B, the following educational background may qualify a person as a QMHP-A:</p> <ol style="list-style-type: none"> 1. A master's degree in psychology, social work, counseling, substance abuse, or marriage and family therapy from an accredited college or university with an internship or practicum of at least 500 hours of experience with persons who have mental illness; 2. A master's or bachelor's degree in human services or a related field from an accredited college with no less than 1,500 hours of supervised experience to be obtained within a five-year period immediately preceding application for registration and as specified in subsection C of this section; 3. A bachelor's degree from an accredited college in an unrelated field that includes at least 15 semester credits or 22 quarter hours in a human services field and with no less than 3,000 hours of supervised experience to be obtained within a five-year period immediately preceding application for registration and as specified in subsection C of this section; 4. A registered nurse licensed in Virginia with no less than 1,500 hours of supervised experience to be obtained within a five-year period immediately preceding application for registration and as specified in subsection C of this section; or 5. A licensed occupational therapist with no less than 1,500 hours of supervised 	§§ 54.1-2400 & 54.1-3505	<p>The qualifications for registration are less burdensome than the current definitions of a QMHP-A as stated by DBHDS.</p> <p>DBHDS includes in its definitions persons licensed as physicians or mental health providers. Those persons do not need registration as a QMHP since they can provide services limited to a licensed persons and can bill under their license. To avoid confusion, those categories were omitted. DBHDS includes a person with a master's degree in psychology with at least one year of clinical experience. In this chapter, a person with a mental health degree and at least 500 hours in an internship or practicum can qualify as a QMHP without further experience.</p> <p>The DBHDS definitions specify one to three years of experience for person who do not have a mental health license. This chapter specifies 1,500 to 3,000 hours to be obtained within a five-year period to give persons working part-time an ample period for completion. The experience must be within five years immediately preceding application to avoid the scenario in which a person remains a trainee</p>

	<p>experience to be obtained within a five-year period immediately preceding application for registration and as specified in subsection C of this section. The experience requirements required for registration are specified in subsection C as follows:</p> <ol style="list-style-type: none"> 1. In order to be registered as a QMHP-A, an applicant who does not have a master's degree as set forth in subsection B 1 of this section shall provide documentation of experience in providing direct services to individuals as part of a population of adults with mental illness in a setting where mental health treatment, practice, observation or diagnosis occurs. The services provided shall be appropriate to the practice of a QMHP-A and under the supervision of a licensed mental health professional or a person under supervision approved by a board as a pre-requisite for licensure under the Boards of Counseling, Psychology, or Social Work. 2. Supervision shall consist of face-to-face training in the services of a QMHP-A until the supervisor determines competency in the provision of such services, after which supervision may be indirect in which the supervisor is either on-site or immediately available for consultation with the person being trained. 3. Hours obtained in a bachelor's or master's level internship or practicum in a human services field may be counted towards completion of the required hours of experience. 4. A person receiving supervised training in order to qualify as a QMHP-A may register with the board. 		<p>indefinitely or the experience occurred many years ago.</p> <p>Subsection C sets out the specific requirements for supervision of a person gaining experience to become a QMHP. Supervision must be provided by a licensed mental health professional or a person under supervision as a pre-requisite for licensure. The supervision must be face-to-face until the supervisor determines competency, after which it may be indirect supervision. A person in training, working under supervision, may register with the Board. While such registration of one's supervised experience is not mandated, it will be required by DMAS for reimbursement and will be required of persons working for a DBHDS licensed provider.</p>
50	<p>Sets forth the requirements for registration of a QMHP-C, including submission of an application and fee and evidence of meeting the one of the educational qualifications in subsection B and the experience requirements in subsection C. Qualifications are similar as those for a QMHP-A, except someone with a bachelor's degree in an unrelated field cannot qualify as a QMHP-C.</p>	§§ 54.1-2400 & 54.1-3505	The requirements are similar to those for a QMHP-A.

	Experience requirements are stated in subsection C and are virtually identical to those for a QMHP-A except the experience must be in providing services to a population of children or adolescents with mental illness.		
60	Provides a “grandfathering” for persons who have been working as QMHPs prior to December 31, 2017. Those persons have one year to apply for registration and provide an attestation from an employer that they were qualified during the time of employment.	§§ 54.1-2400 & 54.1-3505	In order to give persons currently providing QMHP services an opportunity to be registered, the Board will grandfather them based only on submission of a fee and an attestation from an employer that they were qualified. Currently, the definition from DBHDS lists the qualifications of a QMHP-A or QMHP-C, but only the employer determines whether they, in fact, hold such qualifications. While the Board acknowledges that registration based on such an attestation may allow some who are not truly qualified to become registered, it is a practical necessity to grandfather current QMHPs who may number in the 1,000s and to prevent a sudden reduction in the number of registered QMHPs currently providing services in the mental health field.
70	States that renewal of registration is annual on or before June 30 of each year.	§§ 54.1-2400	The renewal cycle is consistent with all certified and licensed professions under the Board.
80	Sets forth the continued education requirements for renewal to include eight contact hours with a minimum of one hour in ethics. Subsection B specifies that CE must related to services provided by a QMHP. Subsection C lists governmental entities that are approved to provide continuing education and includes any approved for CE by a health regulatory board at DHP. Subsection D exempts newly registered peers from CE for the first renewal. Subsection E allows the Board to grant an extension for up to one year for good cause shown.	§§ 54.1-2400 & 54.1-103	Continuing education is a requirement specified consistent with registered peer recovery specialists. Allowances for the first renewal, extensions or exemptions are consistent with those of other professions.

	<p>Subsection F allows the Board to grant an exemption for circumstances beyond the control of the peer. Subsection G requires maintenance of documentation for three years. Subsection H authorizes an audit of registrants and specifies the documentation required. Subsection I specifies that CE hours required by a disciplinary order may not be counted towards the annual requirement.</p>		
90	<p>Sets out the standards of practice for a registered QMHP, including practicing within one’s competency area, practicing in a manner that does not endanger public health and safety, maintaining confidentiality, and avoiding dual relationships that would impair objectivity and increase risk of client exploitation.</p>	<p>§§ 54.1-2400 & 54.1-3505 12VAC35-250</p>	<p>The standards of conduct are the same set for other mental health professions and emphasize the need for professionalism, confidentiality, and safety in practice.</p>
100	<p>Establishes grounds for disciplinary action or denial of registration including conviction of a felony, violation of law or regulation, fraud or misrepresentation, practicing in a manner to be a danger to the health and welfare of a client, and functioning outside one’s competency or scope of practice</p>	<p>§§ 54.1-2400 & 54.1-111</p>	<p>Likewise, the grounds for disciplinary action or denial of registration are the same as those for other professions under the Board.</p>
110	<p>Establishes the requirements for reinstatement after a disciplinary action.</p>	<p>§§ 54.1-2400</p>	<p>Requirements for reinstatement are necessary to ensure that the registrant is qualified and competent to return to practice.</p>

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 describe the process by which the agency has considered or will consider other alternatives for achieving the need in the most cost-effective manner.

Legislation establishing a definition of a qualified mental health professional and authorizing the registration of this new profession mandates the Board of Counseling: *To promulgate regulations for the registration of qualified mental health professionals, including qualifications, education, and experience necessary for such registration.* Therefore, there are no alternatives that can be considered to achieve the essential purpose of the action.

Fees established in this chapter are minimal for a registered profession and are consistent with fees charged to applicants and registrants by other health regulatory boards at DHP. It is

unknown whether the fees will generate sufficient revenue to offset the expenses of registration, renewal, and potential investigations and disciplinary proceedings for this profession.

In the development of regulations, the Department of Health Professions worked collaboratively for several months with staff from the Secretary's office, DMAS, and DBHDS. Then on June 26, 2017, the Board of Counseling convened a Regulatory Advisory Panel (RAP) with 18 members representing the three health regulatory boards at DHP, staff from the other agencies, community services boards, private providers of mental health services, and professional associations. Regulations were recommended by the RAP to the Regulatory Committee, which met on July 21, 2017. Public comment has been received at each of these meetings.

Public participation

Please indicate whether 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 meeting is to be held to receive comments. Please also indicate whether a Regulatory Advisory Panel or a Negotiated Rulemaking Panel has been used in the development of the emergency regulation and whether it will also be used in the development of the permanent regulation.

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the 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: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>) or by mail to Elaine Yeatts, 9960 Mayland Drive, Suite 300, Henrico, VA 23233; by email to elaine.yeatts@dhp.virginia.gov; by fax to (804) 527-4434. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.

Family impact

Please assess the impact of this 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.

To the extent a QMHP is available and effective for persons and families experiencing mental illness, these regulations could have a positive impact on the institution and stability of the family.