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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) Chapter citation(s)	18VAC115-20
VAC Chapter title(s)	Regulations Governing the Practice of Professional Counseling
Action title	Implementation of the Counseling Compact
Date this document prepared	May 5, 2023

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

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). Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

These amendments are promulgated at the direction of the General Assembly. Chapters [684](#) and [685](#) of the 2023 Acts of Assembly entered Virginia into the Counseling Compact. That legislation additionally directed the Board to promulgate emergency regulations to implement the Counseling Compact within 280 days of the legislation's enactment.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

N/A

Mandate and Impetus (Necessity for Emergency)

Explain why this rulemaking is an emergency situation in accordance with § 2.2-4011 A and B of the Code of Virginia. In doing so, either:

- a) *Indicate whether the Governor's Office has already approved the use of emergency regulatory authority for this regulatory change.*
- b) *Provide specific citations to Virginia statutory law, the appropriation act, federal law, or federal regulation that require that a regulation be effective in 280 days or less from its enactment.*

As required by § 2.2-4011, also describe the nature of the emergency and of the necessity for this regulatory change. In addition, delineate any potential issues that may need to be addressed as part of this regulatory change.

The General Assembly stated that these amendments were emergency regulations. See Chapters [684](#) and [685](#) of the 2023 Acts of Assembly. Because the legislature made this determination rather than the Board, the Board can only speculate that the nature of the emergency is the shortage of mental health practitioners available in Virginia.

The Commission for the Counseling Compact has not yet issued rules for member states. Therefore, the final regulations to implement the Compact may not exactly match the emergency regulations. If the Commission does not issue rules prior to final, effective regulations becoming effective, the Board may have to amend the regulations implementing the Compact very soon after promulgation.

Legal Basis

Identify (1) the promulgating agency, 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 and Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

Regulations of the Board of Counseling are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Virginia Code § 54.1-2400(6) specifically states that the general powers and duties of health regulatory boards shall be "[t]o promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) that are reasonable and necessary to administer effectively the regulatory system."

Purpose

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

The Board has not determined that these regulations are essential to protect the health, safety, or welfare of citizens. The General Assembly made that determination.

The Commission for the Counseling Compact has not yet issued rules for member states. Therefore, the final regulations to implement the Compact may not exactly match the emergency regulations. If the Commission does not issue rules prior to final, effective regulations becoming effective, the Board may have to amend the regulations implementing the Compact very soon after promulgation.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the "Detail of Changes" section below.

The amendments add definitions consistent with the Compact, set the fee for a Compact privilege to practice in Virginia, set forth the requirements to obtain a privilege to practice under the Compact, and specify that renewal of the privilege is based upon adherence to Compact rules for continued competency. Additionally, the amendments make changes to incorporate individuals practicing in Virginia under a Compact privilege into disciplinary and practice provisions.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary 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, include a specific statement to that effect.

- 1) The primary advantage to the public is that licensed professional counselors practicing in Virginia through a Compact privilege will be held to the same standards of conduct as Virginia licensees. There are no disadvantages to the public.
- 2) There are no primary advantages or disadvantages to the agency or the Commonwealth.
- 3) The Director of the Department of Health Professions has reviewed the proposal and performed a competitive impact analysis. Any restraint on competition as a result of promulgating these regulations is a foreseeable, inherent, and ordinary result of the statutory obligation of the Board to protect the safety and health of citizens of the Commonwealth and to implement the Counseling Compact. The Board is authorized under § 54.1-2400 "[t]o promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 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 promulgated regulations do not conflict with the purpose or intent of Chapters 1 or 25 of Title 54.1.

Alternatives to Regulation

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.

There are no alternatives to regulation as the enacting legislation mandated promulgation of regulations.

Periodic Review and Small Business Impact Review Announcement

This NOIRA is not being used to announce a periodic review or small business impact review.

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below. In addition, as required by § 2.2-4007.02 of the Code of Virginia describe any other means that will be used to identify and notify interested parties and seek their input, such as regulatory advisory panels or general notices.

The Board of Counseling is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, (iii) the potential impacts of the regulation, and (iv) the agency’s regulatory flexibility analysis stated in that section of the background document.

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>. Written comments must include the name and address of the commenter. Comments may also be submitted by mail, email or fax to Erin Barrett, Agency Regulatory Coordinator, 9960 Mayland Drive, Henrico, VA 23233 or erin.barrett@dhp.virginia.gov or by fax to (804) 915-0382. 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 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.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the emergency regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-	New chapter-section	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
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section number	number, if applicable		
20-10		Sets forth definitions for the Chapter.	Definitions are added for “Compact,” “compact privilege,” Counseling Compact Commission,” “home state,” “practitioner,” and “remote state.”
20-20		Sets forth fees for the Board.	<p>Adds a \$50 fee for obtaining an initial compact privilege and a \$50 fee for renewing a compact privilege. These fees are necessary for the Board to have sufficient revenue to investigate and adjudicate any potential disciplinary cases involving licensed professional counselors.</p> <p>The Compact Commission has not yet issued the cost to states of issuing a compact privilege. Based on similar compacts, the Board believes it may ultimately have 10% of counselors operating in Virginia using a compact privilege, which would be approximately 875 counselors renewing and 104 initial applicants in a given year. At current license issuance and renewal rates, the \$50 fee will result in a possible loss of approximately \$9,450 in initial licensure fees and approximately \$70,000 in renewal fees. While the lower fees may result in an annual loss of revenue for the Board, the Board reported a cash balance of \$3,123,122 as of June 30, 2022. Projected approximate losses can be absorbed by the Board for the foreseeable future.</p> <p>The Board has determined that a reasonable fee for a compact privilege and renewal is \$50 given the current lack of information regarding Compact cost. The Board will reassess this fee as needed to ensure it is sufficient to cover costs associated with membership in the Compact and with discipline of compact privilege holders.</p>
	20-41		This new section establishes requirements to obtain a compact privilege in Virginia. A counselor licensed in a member state shall comply with current rules of the Compact Commission.
20-100		Sets forth requirements for annual renewal of licensure.	New (D) is added to specify that, to renew a compact privilege, the holder of the privilege must comply with current rules of the Compact Commission.

			<p>(D) is amended to become (E), and words and phrases included in this subsection that referred to licensees are changed to “practitioners” to incorporate compact privilege holders into the requirements.</p> <p>(E) is amended to become (F) and the phrase “compact privilege” is inserted to ensure that compact privilege holders do not practice on an expired privilege.</p>
20-130		Sets forth standards of practice.	In (B), (C), (D), (E), and (F), the phrase “persons licensed by this board” is amended to “practitioners.” The intent behind this change is to ensure that compact privilege holders must comply with the disciplinary rules governing counselors practicing in Virginia. This amendment is intended to hold compact privilege holders to the same standards of a Virginia licensee.
20-140		Sets out grounds for discipline.	(A), (A)(2), and (B) are amended to ensure compact privilege holders may be disciplined for conduct listed in this section along with other licensees practicing in Virginia.
20-150		Sets forth reinstatement following disciplinary actions.	(A) Is amended to clarify that a compact privilege holder whose privilege was suspended or denied reinstatement may submit a new application and fee for reinstatement. This ensures compact privilege holders are treated identically to Virginia licensees following discipline or denial of reinstatement.