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

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| Agency name | Board of Medicine, Department of Health Professions |
| Virginia Administrative Code (VAC) citation | 18 VAC 85-20-10 et seq. |
| Regulation title | Regulations Governing the Practice of Medicine, Osteopathy, Podiatry and Chiropractic |
| Action title | Increase in certain fees |
| Document preparation date | 6/5/03 |

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), 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 review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Preamble

The APA (Section 2.2-4011) states that an "emergency situation" is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) Please explain why this is an "emergency situation" as described above.*
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.*

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. The additional cost associated with compliance and implementation of HB1441 will result in increased costs for the board and will generate 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. The fifth enactment clause in Chapter 762 of the 2003 Acts of the Assembly requires, “That the health regulatory boards shall promulgate regulations to address any fee adjustments necessary to accomplish the regulatory and enforcement responsibilities set forth in this act to be effective within 280 days of its enactment.” Although the regulation is not otherwise exempt under the provisions of the Administrative Process Act, the adoption of emergency regulations is authorized by § 2.2-4011 of the Code of Virginia.

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.

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*; the standard after July 1, 2003 will be: *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.

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.

Legal basis

- 1) Please confirm that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the emergency regulation and that it comports with applicable state and/or federal law.
- 2) Please indicate that the regulation is not otherwise exempt under the provisions of subdivision A.4 of Section 2.2-4006 of the APA.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6) provides the Board 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:

- ...
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 emergency regulation 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>

The Office of the Attorney General has certified that the “emergency situation” which exists is specified in § 2.2-4011 of the Code of Virginia as one in which the agency is required by statutory law to have a regulation in effect within 280 days from the enactment of the law. The regulation is not otherwise exempt under the provisions of subdivision A.4 of Section 2.2-4006 of the Administrative Process Act.

Substance

Please detail 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 health, safety, or welfare of

Virginians. Delineate any potential issues that may need to be addressed as a permanent final regulation is developed.

| 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> 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> | See below for rationale |

The emergency 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 will also be increased accordingly. The application fee for initial licensure in Virginia will increase 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 will increase 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 will increase 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 will increase by

\$38 from \$130 to \$168 with the late fee increasing from \$45 to \$55 (renewal of inactive licenses is calculated at approximately ½ 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 emergency 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.

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.

Since the passage of HB1441, the agency has worked internally and in conjunction with the Office of the Attorney General to calculate the potential impact of the legislation and determine costs that are reasonable but sufficient to address the anticipated case load. At this time, the agency has calculated the costs attributable to HB1441 to be:

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| FY04 | 1,678,874 |
| FY05 | 2,286,311 |
| FY06 | 2,388,767 |

Should the workload and expenditures be less than expected, the Board will take advantage of the exemption in the APA and immediately reduce fees accordingly.

In the fiscal impact statement (FIS) prepared for HB1441, the Department of Planning and Budget (DPB) estimated that an additional 27.5 FTE’s would be needed for the boards, investigations, compliance, and administrative proceedings. The agency has further refined the estimates and determined that 27 FTE’s will likely be necessary. For planning purposes, costs

for those positions have been staged into projected hiring quarters over the next fiscal year. Those positions will only be filled as necessary in response to the actual caseload that develops. In addition, however, the Office of the Attorney General estimates that 4,000 additional hours will be needed to handle related legal matters.

DPB had estimated in the FIS that the biennial renewal fees for doctors licensed by the Board of Medicine would increase by approximately \$73 for a 28 percent increase. In fact, the agency has estimated that a slightly higher percentage of the overall cost would likely fall to Medicine and has proposed an increase for the biennial renewal of \$77 for a 29.6 percent increase.

Without an increase in fees, it is estimated that the Board of Medicine would have a deficit of (\$3,690,380) by the end of FY 2006. The calculation for the increase in renewal fees that is necessary to produce another \$3,701,292 in revenue is based on an expectation that the increased fee would be in effect at the beginning of calendar year 2004 for three years of additional renewal income. Doctors renew their licenses in even years with the renewal due in their birth month.

Family impact

Please assess the impact of the emergency regulatory action on the institution of the family and family stability.

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.