



## Notice of Intended Regulatory Action (NOIRA) Agency Background Document

<b>Agency name</b>	Board of Medicine, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation</b>	18VAC85-20-10 et seq.
<b>Regulation title</b>	Regulations Governing the Practice of Medicine, Osteopathic Medicine, Podiatry and Chiropractic
<b>Action title</b>	Requirements for malpractice reporting on practitioner profile
<b>Document preparation date</b>	5/20/05

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 21 (2002) 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 Board intends to modify section 290, which sets out the requirements for reporting of malpractice paid claims and board actions.

The changes are intended to clarify ambiguous provisions and specify more clearly the timing of a malpractice report, the definition of a paid claim and the conditions under which a report is required.

### 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 Medicine 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 statutory requirements for paid malpractice claims to be reported on the Practitioner Profile System are found in § 54.1-2910.1:

**§ 54.1-2910.1. Certain data required.**

*A. The Board of Medicine shall require all doctors of medicine, osteopathy and podiatry to report and shall make available the following information:*

- 1. The names of the schools of medicine, osteopathy, or podiatry and the years of graduation;*
- 2. Any graduate medical, osteopathic, or podiatric education at any institution approved by the Accreditation Council for Graduation Medical Education, the American Osteopathic Association or the Council on Podiatric Medical Education;*
- 3. Any specialty board certification as approved by the American Board of Medical Specialties, the Bureau of Osteopathic Specialists of the American Osteopathic Association, the American Board of Multiple Specialties in Podiatry, or the Council on Podiatric Medical Education of the American Podiatric Medical Association;*
- 4. The number of years in active, clinical practice as specified by regulations of the Board;*
- 5. Any hospital affiliations;*
- 6. Any appointments, within the most recent 10-year period, of the doctor to the faculty of a school of medicine, osteopathy or podiatry and any publications in peer-reviewed literature within the most recent five-year period and as specified by regulations of the Board;*
- 7. The location and telephone number of any primary and secondary practice settings and the approximate percentage of the doctor's time spent practicing in each setting. For the sole purpose of expedited dissemination of information about a public health emergency, the doctor shall also provide to the Board any e-mail address or facsimile number; however, such e-mail address or facsimile number shall not be published on the profile database and shall not be released or made available for any other purpose;*
- 8. The access to any translating service provided to the primary and secondary practice settings of the doctor;*

9. *The status of the doctor's participation in the Virginia Medicaid Program;*

10. *Any final disciplinary or other action required to be reported to the Board by health care institutions, other practitioners, insurance companies, health maintenance organizations, and professional organizations pursuant to §§ 54.1-2400.6, 54.1-2908, and 54.1-2909 that results in a suspension or revocation of privileges or the termination of employment or a final order of the Board relating to disciplinary action;*

11. *Conviction of any felony; and*

12. *Other information related to the competency of doctors of medicine, osteopathy, and podiatry, as specified in the regulations of the Board.*

*B. In addition, the Board shall provide for voluntary reporting of insurance plans accepted and managed care plans in which the doctor participates.*

*C. The Board shall promulgate regulations to implement the provisions of this section, including, but not limited to, the release, upon request from a consumer, of such information relating to a specific doctor. **The Board's regulations shall provide for reports to include all paid claims in categories indicating the level of significance of each award or settlement; however, the specific numeric values of reported paid claims shall not be released in any individually identifiable manner under any circumstances.***

## 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. Include the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. Delineate any potential issues that may need to be addressed as the regulation is developed.*

The amended regulations would accomplish the following:

- 1) In subsection A, the Board proposes to repeat the statutory requirement in § 54.1-2909 for reporting of a paid malpractice claim within 30 days. However, claims are sometimes paid through structured settlements or in installments, so an additional amendment will clarify that the report must be made within 30 days *of the initial payment* rather than after completion of the settlement.
- 2) Subsection C would be added to specify the definition and requirements for a malpractice paid claim. By doing so, the Board will clarify provisions for practitioners who have raised questions about what is considered a paid claim and therefore is required to be reported.

The Board will specify that, for purposes of reporting required under this section, a malpractice paid claim is a payment for the benefit of a doctor of medicine, osteopathic medicine, or podiatry in satisfaction in whole or in part of a settlement or a judgment based on the provision of or failure to provide healthcare services by that practitioner. A claim is considered a paid claim when a lump sum payment is made or when the first payment of multiple payments is made and must be reported at that time. A claim is reportable even if payment is made from personal funds

or if a payment was made on behalf of a doctor of medicine, osteopathic medicine, or podiatry by a corporation or entity comprised only of the doctor of medicine, osteopathic medicine, or podiatry.

The regulations should also specify that when a doctor of medicine, osteopathic medicine or podiatry who was named in the claim is dismissed independently of the settlement, judgment or release, then the payment is not reportable. However, if the doctor is dismissed as a condition of, or in consideration of the settlement, judgment or release, then the payment is reportable. Further, if a fee refund or waiver of debt was made due to a claim of malpractice, then the claim is still reportable.

The intent of the Practitioner Profile System is to make information available to the public that will assist them in choosing appropriate practitioners who can safely deliver health care. Since the payment of a malpractice claim is not always an indicator of a practitioner's ability to practice with skill and safety, the following disclaimer is displayed before a consumer can scroll down to the malpractice information on the Profile.

*When considering malpractice paid claims data, please keep in mind:*

*Some studies have shown little correlation between the existence of a malpractice paid claims history and the practitioner's competence to provide care.*

*Malpractice paid claims histories tend to vary by specialty. Some specialties are more likely than others to be the subject of litigation.*

*Some doctors work primarily with high-risk patients. These doctors may have malpractice paid claims histories that are higher than average because they specialize in cases or patients who are at very high risk for problems.*

*Settlement of a claim may occur for a variety of reasons, which do not necessarily reflect negatively on the professional competence or conduct of the practitioner. A payment in settlement of a medical malpractice action or claim should not be construed as creating a presumption that medical malpractice has occurred.*

*The incident causing the malpractice paid claim may have happened years before a payment is finally made. Sometimes, it takes a long time for a malpractice lawsuit to move through the legal system.*

*Presentation of Required Data:*

*Practitioners are required to report all paid claims in the last 10 years. For doctors practicing less than 10 years, the data covers their total years of practice.*

*To provide perspective regarding the reported data, the Board displays information about the paid claims experience of the practitioner's specialty along with the practitioner's history of paid claims. In reporting the data in this manner, each practitioner is seen relative to other practitioners in the specialty, rather than to all practitioners in all specialties.*

*Paid claims are not expressed in dollar amounts. Each paid claim has been analyzed and assigned to one of three statistical categories: below average, average, or above average. This analysis was made relative to the other claims in the specialty in which the claim occurred.*

*The information provided, in the manner provided, should offer perspective about this aspect of medical practice. You could miss an opportunity for high quality care by excluding a doctor based solely on the presence of a*

*malpractice history. You may wish to discuss information provided in this report, and malpractice generally, with your doctor.*

With a disclaimer about paid claims in general and about the characterization of such claims on the Profile, the Board believes the malpractice information that is presented is an important element for informed patients in making health care decisions that affect their health and safety.

## 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.*

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As alternatives to the promulgation of regulations, Board staff will continue to advise practitioners or their attorneys about the Board's definition of a "paid claim" and when that claim must be reported. However, that does not obviate the need for amendments because the interpretation of "paid claim" will continue to be subjective and not definitive for some practitioners. Those who inquire will receive the Board's interpretation but others may fail to report a paid claim if their definition of "paid claim" differs. The Board may also adopt the interpretation as a guidance document, but that is not enforceable as a law or regulation, so any enforcement of failure by a practitioner to report a paid malpractice may be challengeable. The proposed amendments will provide a consistent and level standard for practitioners who will be better able to comply with requirements of law and regulations that are more descriptive and enforceable.

## Family impact

*Assess the potential impact of the proposed regulatory action on the institution of the family and family stability.*

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There is no potential impact of the proposed regulatory action on the institution of the family and family stability.