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Proposed Regulation Agency Background Document

Agency name	Board of Medicine, Department of Health Professions
Virginia Administrative Code (VAC) citation(s)	18VAC85-80-10 et seq.
Regulation title(s)	Regulations Governing the Licensure of Occupational Therapists
Action title	NBCOT certification as option for continuing competency
Date this document prepared	10/31/16

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 (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

The Board has proposed amendments to section 71 on continued competency requirements to eliminate the requirement for completion of the Continued Competency Activity and Assessment Form and to allow a licensee to fulfill the continuing competency requirement by maintenance of current certification by the National Board of Certification in Occupational Therapy.

An amendment will also change the title of the chapter from Regulations Governing the Licensure of Occupational Therapists to Regulations Governing the Practice of Occupational Therapy.

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.

NBCOT = National Board of Certification in Occupational Therapy

AOTA = American Occupational Therapy Association

VOTA = Virginia Occupational Therapy Association

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person's overall regulatory authority.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6), 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 (§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 specific mandate for the Board of Medicine to promulgate regulations requiring continuing education is found in:

§ 54.1-2912.1. (Effective until July 1, 2022) Continued competency and office-based anesthesia requirements.

A. The Board shall prescribe by regulation such requirements as may be necessary to ensure continued practitioner competence, which may include continuing education, testing, or any other requirement.

B. In promulgating such regulations, the Board shall consider (i) the need to promote ethical practice, (ii) an appropriate standard of care, (iii) patient safety, (iv) application of new medical technology, (v) appropriate communication with patients, and (vi) knowledge of the changing health care system.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the amendment is to: 1) eliminate the requirement that the Continued Competency Activity and Assessment Form be completed and retained with supporting documentation of CE courses or activities for renewal of an active license; and 2) allow maintenance of NBCOT certification to fulfill the continued competency requirements for a biennium. Since maintenance of NBCOT certification requires completion of evidence-based professional development units, it is likely that the content is equal to or superior to traditional continuing education courses in the preparing a licensee to practice with skill and competency and therefore to protect public health and safety.

Substance

Please 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 amended regulations will: 1) eliminate the requirement that the Continued Competency Activity and Assessment Form be completed and retained with supporting documentation of CE courses or activities for renewal of an active license; 2) allow maintenance of NBCOT certification to fulfill the continued competency requirements for a biennium; 3) eliminate the percentage of licensees that must be audited; and 4) amend the title of the chapter to be consistent with other professional regulations.

Issues

Please identify the issues associated with the proposed regulatory action, 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, please indicate.

- 1) There are no primary advantages or disadvantages to the public.
- 2) There may be an advantage to the agency by simplifying the audit process for verification of continued competency. There are no 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. The Board is authorized under § 54.1-2400 to "*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.*" In this proposal, recognition of NBCOT certification expands the opportunities for meeting continuing competency requirements. NBCOT recognizes coursework offered by AOTA and other state-related organizations, but it also allows an OT or OTA to complete education offered by

regionally accredited colleges and universities, do peer review of practice-related research articles or textbooks, serve as a presenter at a professional workshop or conference, provide in-service training, provide direct supervision for fieldwork, etc. Maintenance of NBCOT certification is voluntary for a licensee, who may chose it as an option for renewal of licensure or may chose completion of 20 hours per biennium as currently required. Therefore, there is no restraint on competition as a result of promulgating this regulation.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which is more restrictive than applicable federal requirements. Include a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements or no requirements that exceed applicable federal requirements, include a statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities particularly affected.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the Board of Medicine is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is 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) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so via the Regulatory Townhall website, www.townhall.virginia.gov, or by mail to Elaine Yeatts at Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or elaine.yeatts@dhp.virginia.gov or by fax to (804) 527-4434. Comments may also be submitted through the Public Forum feature of the Virginia Regulatory Town Hall web site at: <http://www.townhall.virginia.gov>. 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 be held following the publication of this stage 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.

Economic impact

Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.

<p>Projected cost to the state to implement and enforce the proposed regulation, including: a) fund source / fund detail; and b) a delineation of one-time versus on-going expenditures</p>	<p>As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation. All notifications will be done electronically. There are no on-going expenditures.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>There are no costs to localities.</p>
<p>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</p>	<p>The individuals affected will be occupational therapists and occupational therapy assistants in renewal of licensure.</p>
<p>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>	<p>There are 3,803 persons with a current license as an occupational therapist and 1,384 with a current license as an occupational therapy assistant. 60% work in skilled nursing facilities 12% in rehab/residential or inpatient facilities 9% in K-12 school systems 6% in assisted living/continuing care 6% in home health care 16% in other settings, such as academic, private practice, etc.</p> <p>Only 2% work in private practices, either in a group or solo practice, so it is likely that would be the number of small businesses. (23 out of 1,037 responses)</p>
<p>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or</p>	<p>The amendments clarify existing regulations or allow an option for meeting continued competency requirements. NBCOT reports that 80% to 90% of certificate holders renew certification, so there would be no additional costs to those who already maintain NBCOT certification. The cost to NBCOT is \$65 every 3 years for maintenance of certification, but there are assessment tools and other resources available</p>

residential purposes that are a consequence of the proposed regulatory changes or new regulations.	from NBCOT for no costs to certificate holders.
Beneficial impact the regulation is designed to produce.	Licensees will have a choice for fulfilling continued competency requirements that may involve obtaining additional hours and courses beyond those required for NBCOT certification.

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

There are no alternatives that meet the essential purpose of the action. The Advisory Board and the full Board of Medicine heard concerns expressed by the VOTA and others but voted unanimously to propose the same amendments that were originally fast-tracked.

Regulatory flexibility analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, please describe the agency’s analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the proposed regulation.

Since regulations for continuing competency are required by statute, an amendment is necessary to change the current requirements for evidence of continued competency for renewal of licensure.

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

Commenter	Comment	Agency response
A) American Occupational Therapy Association B) Erin Clemens, OTR/L	1) Proposal has not been adequately discussed with stakeholders.	1) Because there were 10 or more objections to promulgating this regulation by a fast-track process, the Advisory Board considered all the comment from stakeholders, heard

<p>C) Barbara Kornblau, JD,OTR</p> <p>4) Albert Copolillo, PhD, OTR/L</p> <p>E) An identical letter was sent from the following: Commenters:</p> <p>Molly Campbell, COTA/L</p> <p>Amy Petersen, OTR/L</p> <p>Rebecca E. Argabrite Grove, MS, OTR/L</p> <p>Joleen Y Melanovich COTAL, CDP</p> <p>Dianne F. Simons, Ph.D., OTR/L, FAOTA</p> <p>Dr. Tilda Sorensen, OTD, OTR/L</p> <p>Nathan “Ben” Herz, OTD, MBA, OTR/L</p> <p>Jennifer Faherty, MOT, OTR/L</p> <p>Katherine Koman, OTL</p> <p>Christine M Kraft, Certified Occupational Therapy Assistant</p> <p>Britney Henson OTR/L, DOR</p> <p>Heather Parsons, MSOT</p> <p>Steve Faherty, OTR/L</p> <p>Nicole Pryor, MS, OTR/L</p> <p>Nancy Krolikowski, MS, OTR/L, CHT</p> <p>Jan F. Kress, M.Ed., OT/L</p> <p>Cody Cox, M.Ed., OTR/L</p> <p>Mandi Ogaard MA OTR/L</p> <p>Carissa Howell Parrish,</p>	<p>2) NBCOT permits a broad range of “competency assessment activities” to count towards certification renewal, such as competency assessments activities.</p> <p>3) The renewal cycle for NBCOT (every 3 years) differs from the licensee renewal cycle (every 2 years).</p> <p>4) Questions whether licensee would be able to show NBCOT certification as proof of meeting renewal requirements.</p> <p>5) Board would not have access to detailed NBCOT records & would lose the ability to ensure licensee is truly</p>	<p>extensive testimony from the VOTA, and discussed the pros and cons extensively before unanimously recommending proposed regulations for adoption by the Board. Additionally, VOTA presented comment to the Board at its meeting prior to consideration of this regulation.</p> <p>2) Currently, regulations specify that at least 10 hours of 20 hours of continuing competencies hours must be offered by a sponsor or organization recognized by the profession and may include self-study courses, in-service training, etc. Up to 10 hours may be “experiences that promote continued learning.” Activities or courses offered through NBCOT would already count towards the 20 hours required each biennium because NBCOT is an organization “recognized by the profession.” Additionally, competency assessment activities are widely recognized as valuable tools to direct a practitioner towards gaps or deficiencies that need to be addressed by additional coursework or clinical experiences.</p> <p>3) Three of the professions regulated by the Board <u>require</u> maintenance of professional certification for renewal (for OT, it would be voluntary) – athletic trainers, physician assistants, and certified professional midwives. The certification cycles differ from the renewal cycle in each case, and the Board has no difficulty with renewal. At renewal, the licensee attests that his certification is current; if audited, he would need to produce proof of current certification.</p> <p>5) As with other professions, an OT or OTA who wants to use professional certification to meet continuing competency requirements would have to show proof of such certification. NBCOT audits for compliance with certification requirements.</p> <p>5) The Board currently does not ask AOTA or any organization that provides or approves CE for its detailed records; it only asks the</p>
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<p>COTA/L</p> <p>Tracie Conner,</p> <p>A. Christine Carroll,</p> <p>Maxine A. Paige COTA/L</p> <p>Tamitha R. Blake, OTD, OTR/L</p> <p>Kristin H. Eddy MS OTR/L</p> <p>Carrie Evans, COTA/L</p> <p>Mary J. Leslie, COTA/L</p> <p>Judy DuPrey MSOT OTR/L</p> <p>Kelly Pennock, COTA</p> <p>Patricia Laverdure, OTD, OTR/L, BCP</p> <p>Antoinette D. Parsons COTA/L</p> <p>Brenda S. Baynham, MEd, OT/L</p> <p>Cynthia W. Pechaitis, COTA</p> <p>Shanna Hodges, OTAS</p> <p>Samantha Emsley, Occupational Therapy Assistant Student, EVCC</p> <p>Michana Shaner, OTA</p> <p>Deborah B. Schwind, M.Ed., OTR/L</p>	<p>competent.</p> <p>6) Would Board recognize assessment activities from providers other than NBCOT?</p> <p>7) By permitting NBCOT certification to fulfill state continuing education requirements, Board is giving regulatory authority to a private entity.</p>	<p>licensee for proof of hours for a Type 1 activity or course from the entity or organization “recognized by the profession.”</p> <p>6) The NBCOT specifies states that it recognizes assessment activities of the AOTA or an employer of the OT, so those units would count towards meeting certification renewal requirements. The Board would also accept assessment activities form AOTA.</p> <p>7) Certification by NBCOT is currently required for initial licensure. NBCOT is the nationally-recognized competency assessor that offers the professional examination and requires documentation of graduation from an accredited OT program in order to obtain professional certification. Allowing maintenance of NBCOT certification is consistent with the recognition of its role in professional credentialing.</p> <p>Persons who use OTR or COTA must already maintain NBCOT certification because those initials are trademarks and reserved for persons who are currently certified.</p>
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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.

There is no impact on the family.

Detail of changes

Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.

Current section number	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
Chapter title	Regulations Governing the Licensure of Occupational Therapists	The proposed change: <i>Regulations Governing the Practice of Occupational Therapy</i> would make this chapter consistent with other professional regulations and more accurately reflect the scope of the chapter. The chapter includes regulations for licensure of occupational therapy assistants as well as for occupational therapists. It also regulates the individual and supervisory responsibilities of practitioners and includes the standards of practice for the profession. The current title was given when the profession changed from “certification” to “licensure.”
71	Sets out requirements for continued competency for a biennial renewal of licensure.	<p>Subsection A is amended to:</p> <ul style="list-style-type: none"> • Clarify that it is not required for a licensee to complete the Continued Competency Activity and Assessment Form in order to renew biennially. Renewal is completed electronically with an attestation that the licensee has met the requirements of this section for continued competency. • Provide an option for meeting the requirement by maintenance of current NBCOT certification. <p><i>Several states have included such an option in their regulations, including MD, CO, OR and NH. South Carolina requires NBCOT certification for renewal. NBCOT certification is a requirement for initial licensure in Virginia, and NBCOT reports that 80% to 90% of OT’s renew certification every 3 years. Therefore, the option of using current NBCOT certification as evidence of continued competency may be less burdensome to many Va. licensees. NBCOT requires 24 professional development units for renewal of certification every 3 years. A random audit of certificate holders is conducted each year to validate the courses and activities used for a professional development unit. In some cases, a unit may be completion of an on-line assessment tool that</i></p>

		<p><i>is provided by NBCOT from evidence-based literature about OT practice. If maintenance of NBCOT certification is used by a licensee to fulfill continued competency requirements for licensure in Virginia, an audit by the Board would only involve documentation from NBCOT that the licensee's certification is current and valid, rather than submission of documentation of all Type 1 and 2 hours.</i></p> <p>Subsection C is amended to specify record of courses and activities for licensees to retain along with supporting documentation for the hours claimed.</p> <p>Subsection D is amended to delete the specific percentage that would be used to conduct a random audit. The number of licensees to be audited is calculatedly a statistically valid random sample of the total number of licensees who renewed. The statistically valid percentage may be more or less than one to two percent as stated in current regulation.</p>
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