



Virginia
Regulatory
Town Hall

Notice of Intended Regulatory Action Agency Background Document

Agency Name:	Board of Nursing, Department of Health Professions
VAC Chapter Number:	18 VAC 90-20-10 et seq., 18VAC90-25-10 et seq., 18VAC90-30-10 et seq., 18VAC90-40-10 et seq., and 18VAC90-50-10 et seq.
Regulation Title:	Regulations Governing the Practice of Nursing Regulations Governing the Certification of Nurse Aides Regulations Governing the Licensure of Nurse Practitioners Regulations Governing Prescriptive Authority for Nurse Practitioners Regulations Governing the Certification of Massage Therapists
Action Title:	Increase in fees
Date:	7/21/09

This information is required prior to the submission to the Registrar of Regulations of a Notice of Intended Regulatory Action (NOIRA) pursuant to the Administrative Process Act § 9-6.14:7.1 (B). Please refer to Executive Order Twenty-Five (98) and Executive Order Fifty-Eight (99) for more information.

Purpose

Please describe the subject matter and intent of the planned regulation. This description should include a brief explanation of the need for and the goals of the new or amended regulation.

The issue to be addressed is the need of the Board of Nursing to increase its fees to cover expenses for essential functions of licensing, investigation of complaints, and adjudication of disciplinary cases to ensure minimal competency for persons licensed, certified or registered by the Board. The Board needs to consider expenditures relating to review and initial or continued approval of nursing education programs.

The scope of the Board's regulatory responsibility includes the following 12 occupations or entities with approximately 182,000 licensees, certificate holders and registrants:

Registered nurses
Licensed practical nurses
Licensed nurse practitioners

Authorization to prescribe
Clinical nurse specialists
Certified nurse aides

Advanced nurse aides
 Medication aides
 Certified massage therapists

Virginia professional schools of nursing
 Virginia practical schools of nursing
 Volunteer registration

§ 54.1-113 of the *Code of Virginia* requires that at the end of each biennium, an analysis of revenues and expenditures of each regulatory board shall be performed. It is necessary that each board have sufficient revenue to cover its expenditures. By the close of the FY09 fiscal year, it is projected that the Board of Nursing (in the combined budgets of Nursing and Certified Nurse Aides) will have \$10,466,605 in expenses and only \$8,405,816 in revenue. With a surplus carried forward from previous years, the Board should end this fiscal year with a surplus but is projected to have a **deficit** of \$978,609 by June 30, 2010 and will continue to build increasing deficits through the fiscal years going forward. Since the fees from regulants will no longer generate sufficient funds to pay operating expenses for the Board, consideration of a fee increase is essential. In order to begin to reduce the deficits and have sufficient funding for the operation of the Board by calendar year 2011, it is necessary to promulgate amendments to regulations at the earliest possible date.

Legal basis

Regulations of the Board of Nursing are promulgated under the general authority of Title 54.1, Chapter 24 of the Code of Virginia.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations in accordance with the Administrative Process Act which are reasonable and necessary and the authority to **levy and collect fees** that are **sufficient to cover all expenses** for the administration of a regulatory program.

§ 54.1-2400. General powers and duties of health regulatory boards.--The general powers and duties of health regulatory boards shall be:

- 5. To levy and collect fees for application processing, examination, registration, certification or licensure and renewal that are sufficient to cover all expenses for the administration and operation of the Department of Health Professions, the Board of Health Professions and the health regulatory boards.*
- 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 **contemplated regulation is mandated by § 54.1-113**; however the Board must exercise some discretion in the amount and type of fees that will be increased in order to comply with the statute.

§ 54.1-113. Regulatory boards to adjust fees.--Following the close of any biennium, when the account for any regulatory board within the Department of Professional and Occupational Regulation or the Department of Health Professions maintained under § 54.1-308 or § 54.1-2505 shows expenses allocated to it for the past biennium to be more than ten percent greater or less than moneys collected on behalf of the board, it shall revise the fees levied by it for certification or licensure and renewal thereof so that the fees are sufficient but not excessive to cover expenses.

Need

Please detail 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.

Funding from fees has failed to keep up with expenditures in the past two fiscal years. In its analysis of the funding under the current fee structure for programs under the Board of Nursing, the following deficits are projected:

	<u>Nursing</u>	<u>Certified Nurse Aides</u>	<u>Nursing & CNA</u>
Cash Balance as of June 30, 2008	4,721,795	(1,130,618)	3,591,177
Projected FY09 Budget Revenue	6,954,204	1,451,612	8,405,816
Projected FY09 Direct and Allocated Budget Expenditures	<u>8,366,920</u>	<u>2,099,686</u>	<u>10,466,605</u>
Projected Cash Balance as of June 30, 2009	<u>3,309,079</u>	<u>(1,778,692)</u>	<u>1,530,387</u>
Projected Cash Balance as of June 30, 2009	3,309,079	(1,778,692)	1,530,387
FY10 Budget Revenue	6,960,515	1,350,573	8,311,088
Total FY10 Direct and Allocated Budget Expenditures	<u>8,639,144</u>	<u>2,180,940</u>	<u>10,820,084</u>
Projected Cash Balance as of June 30, 2010	<u>1,630,450</u>	<u>(2,609,059)</u>	<u>(978,609)</u>
Projected Cash Balance as of June 30, 2010	1,630,450	(2,609,059)	(978,609)
FY11 Budget Revenue	7,029,665	1,526,903	8,556,568
Total FY11 Direct and Allocated Budget Expenditures	<u>8,855,800</u>	<u>2,293,973</u>	<u>11,149,773</u>
Projected Cash Balance as of June 30, 2011	<u>(195,685)</u>	<u>(3,376,129)</u>	<u>(3,571,814)</u>
Projected Cash Balance as of June 30, 2011	(195,685)	(3,376,129)	(3,571,814)
FY12 Budget Revenue	6,960,515	1,350,573	8,311,088
Total FY12 Direct and Allocated Budget Expenditures	9,181,336	2,464,121	11,645,457

Projected Cash Balance as of June 30, 2012	<u>(2,416,506)</u>	<u>(4,489,677)</u>	<u>(6,906,183)</u>
Projected Cash Balance as of June 30, 2012	(2,416,506)	(4,489,677)	(6,906,183)
FY13 Budget Revenue	7,029,665	1,526,903	8,556,568
Total FY13 Direct and Allocated Budget Expenditures	<u>9,394,745</u>	<u>2,530,977</u>	<u>11,925,722</u>
Projected Cash Balance as of June 30, 2013	<u>(4,781,586)</u>	<u>(5,493,752)</u>	<u>(10,275,338)</u>
Projected Cash Balance as of June 30, 2013	(4,781,586)	(5,493,752)	(10,275,338)
FY14 Budget Revenue	6,960,515	1,350,573	8,311,088
Total FY14 Direct and Allocated Budget Expenditures	<u>9,484,112</u>	<u>2,557,513</u>	<u>12,041,624</u>
Projected Cash Balance as of June 30, 2014	<u>(7,305,182)</u>	<u>(6,700,691)</u>	<u>(14,005,874)</u>

Fee increases are related to increased need for funds for enforcement and adjudication staffing and related benefit increases over the past few years and for the general costs of doing business, such as operation of the DHP data system and moving and space reorganization expenses. For example, the allocated expenditures for data operations and equipment through VITA were \$973,768, \$251,586 over budget in FY08. Also in FY08, the cost for enforcement (investigations) was \$2,169,454, \$116,962 over budget; and the cost for moving Department offices allocated to the Board of Nursing was \$333,575, \$79,985 over budget.

Through May 31, 2009, data costs to VITA allocated to the budget of the Board of Nursing were already \$2,253,986, which was \$208,045 over the amount projected for FY09. Since 2004, there has been a 100% increase in VITA cost. An additional \$502,000 per fiscal year for FY09 and FY10 has been budgeted.

Fee increases for licensees regulated by the Board of Nursing are necessary in order for the Board and the Department to continue performing essential functions of licensing, certifying or registering new practitioners and to protect the public from continued practice by incompetent or unethical practitioners. Since the Board of Nursing is the only health regulatory board with a statutory responsibility for approval of education programs, it must also have additional revenue to support functions related to assuring that new and existing nursing education programs meet minimal standards.

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.

No specific regulatory language has been developed; the agency will develop alternative fee structures that will address the deficit in funding for the Board to consider in its adoption of proposed regulations. Expenditures related to various statutory functions of the Board will be examined to determine if fees directly related to those activities are sufficient to cover the expenses. Fees for all occupations regulated by the Board will be examined and may need to be increased.

The Education Committee of the Board is examining all costs relating to nursing education including program approval, site visits, and hearings. The Board will consider recovery of costs for survey visits and program review required for ongoing approval of a nursing education program and for non-routine survey visits outside the normal cycle of approval and review.

The Board must also consider modifying the renewal cycle for certified nurse aides and a modest increase in the fee. From FY06 through 2009 to date, the CNA Registry has built a deficit of approximately \$2 million as revenue from federal programs has steadily decreased from \$1 million in FY04 to \$571,000 in FY09. The Board will consider changing to an annual renewal (as was adopted for medication aides) and increasing the fee from \$50 biennially to \$30 annually. Even with such an increase, the budget of the CNA Registry will continue to operate with a deficit.

It is essential that the Board move forward with fee increases at the earliest possible date in order to avoid escalating deficits, which must then be recouped by even higher fees. If the renewal fee for RN's is increased from \$95 to \$150 and the fee for LPN's was increased from \$95 to \$120 and if amended regulations were effective *by January, 2011*, the Board's revenue could exceed expenditures with a very modest surplus (approximately \$12,000) by June 30, 2013.

If amended regulations are not effective until July 2011, the renewal fees would need to rise to \$165 for RN's and \$135 for LPN's. Any further delay would necessitate even higher fees for all professions regulated by the Board.

As the Board receives comment on the Notice of Intended Regulatory Action and continues to examine its expenditures, options be further developed and considered.

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

The Department of Health Professions could consider two possible solutions to the projected deficit of the Board of Nursing; they are as follows:

1. Increase fees through the promulgation of regulations.

As required by law, the Board is obligated to establish and collect fees that are necessary to fund operations of the Board and the Department. An alternative is to seek the revenue from licensees and applicants to fully fund appropriated expenditures. Costs of services will be paid by consumers who use the services of providers, but licensure fees represent a miniscule percentage of the over-all costs of health care. The cost of operation of regulatory boards does not significantly affect the cost or access to health care. However, failure to fully fund the licensing and disciplinary services through fees will have a detrimental affect on quality and availability of care.

2. Significantly reduce department/board operations and staff and remain at current fee level.

In order to prevent deficit spending, the department would need to lay off staff to reduce expenses associated with operations. Since the Board of Nursing already has minimal staffing in its direct budget, the net result would likely be delays in the performance of the responsibilities for licensing, renewal, approval of new nursing and nurse aide education programs, and review of existing education programs. Delays in licensing, renewal and program approval would have a negative impact on the workforce at a time with there is already an identified shortage.

Delays in investigation of complaints and adjudication of disciplinary cases could place a vulnerable population in Virginia at health risk as nurses and nurse aides who should not be practicing would continue to practice and supply of new licensees needed in the health system could be delayed or curtailed. It is believed that these consequences would not be acceptable to the administration, the General Assembly, or to the general public.

To avoid increases in fees, the Board and the Department of Health Professions have delayed hiring of new positions and held some positions approved for hiring. Travel restrictions are in effect, and the agency has reduced the use of media services for recruitment. Through the use of agency subordinates, the Board has been able to reduce the costs of disciplinary proceedings by avoiding costs related to board member per diem and travel expenditures. Additionally, the Board has increased delegation to staff to reduce the number of proceedings.

Renewal Schedule

It is essential to have increased fees in place by January 2011 in order to prevent the deficit from growing even larger and necessitating an even greater fee increase.

Public participation

The agency is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) 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 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 comments may do so via the Regulatory Townhall website , www.townhall.virginia.gov, or by mail, email or fax to Elaine Yeatts, Agency Regulatory Coordinator, 9960 Mayland Drive, Richmond, VA 23233 or elaine.yeatts@dhp.virginia.gov or 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 the last day of the public comment period.

A public hearing will be held after the publication of proposed amendments and notice of the hearing may be found on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov) and can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Participatory approach

The Board will be using the participatory approach in the development of the proposal through inclusion of the public in meetings of the Board at which fee proposals will be discussed and licensees and other interested parties will have the opportunity to offer comment.

Family impact

The proposed regulatory action would not strengthen or erode the authority and rights of parents, encourage or discourage economic self-sufficiency, or strengthen or erode the marital commitment. There could be a very modest decrease in disposable family income depending on the amount and nature of the fee increase.