



Virginia
Regulatory
Town Hall

Final Regulation Agency Background Document

Agency Name:	Board of Nursing, Department of Health Professions
VAC Chapter Number:	18 VAC 90-50-10 et seq.
Regulation Title:	Regulations Governing the Certification of Massage Therapists
Action Title:	Fee increase
Date:	January 23, 2001

Please refer to the Administrative Process Act (§ 9-6.14:9.1 *et seq.* of the *Code of Virginia*), Executive Order Twenty-Five (98), Executive Order Fifty-Eight (99) , and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the final regulatory action package.

Summary

Please provide a brief summary of the new regulation, amendments to an existing regulation, or the regulation being repealed. There is no need to state each provision or amendment; instead give a summary of the regulatory action. If applicable, generally describe the existing regulation. Do not restate the regulation or the purpose and intent of the regulation in the summary. Rather, alert the reader to all substantive matters or changes contained in the proposed new regulation, amendments to an existing regulation, or the regulation being repealed. Please briefly and generally summarize any substantive changes made since the proposed action was published.

The Board of Nursing has adopted amendments to its regulations in order to increase certain fees pursuant to its statutory mandate to levy fees as necessary to cover expenses of the board. Biennial renewal fees for certified massage therapists would be increased from \$50 to \$70. While other fees would also be increased, the fee for a late renewal within one biennium would decrease from \$50 to \$25. Fees sufficient to fund the operations of the Board are essential for activities such as licensing, approval of education programs, investigation of complaints, and adjudication of disciplinary cases.

Changes Made Since the Proposed Stage

Please detail any changes, other than strictly editorial changes, made to the text of the proposed regulation since its publication. Please provide citations of the sections of the proposed regulation that have been altered since the proposed stage and a statement of the purpose of each change.

There were no changes to the proposed regulations in the adoption of final amended regulations.

Statement of Final Agency Action

Please provide a statement of the final action taken by the agency: including the date the action was taken, the name of the agency taking the action, and the title of the regulation.

On January 23, 2001, the Board of Nursing adopted final amendments to 18 VAC 90-50-10 et seq. Regulations Governing the Certification of Massage Therapists to increase certain fees for applicants and regulants.

Basis

Please identify the state and/or federal source of legal authority to promulgate the regulation. The discussion of this statutory authority should: 1) describe its scope and the extent to which it is mandatory or discretionary; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. In addition, where applicable, please describe the extent to which proposed changes exceed federal minimum requirements. Full citations of legal authority and, if available, web site addresses for locating the text of the cited authority, shall be provided. If the final text differs from that of the proposed, please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the final regulation and that it comports with applicable state and/or federal law

Regulations of the Board of Nursing were promulgated under the general authority of Title 54.1 of the Code of Virginia.

Chapter 24 establishes the general powers and duties of health regulatory boards including the responsibility to promulgate regulations and levy fees.

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

1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.

2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.
3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.
4. To establish schedules for renewals of registration, certification and licensure.
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 and Chapter 25 of this title.
7. To revoke, suspend, restrict, or refuse to issue or renew a registration, certificate or license which such board has authority to issue for causes enumerated in applicable law and regulations.
8. To appoint designees from their membership or immediate staff to coordinate with the Intervention Program Committee and to implement, as is necessary, the provisions of Chapter 25.1 (§ 54.1-2515 et seq.) of this title. Each health regulatory board shall appoint one such designee.
9. To take appropriate disciplinary action for violations of applicable law and regulations.
10. To appoint a special conference committee, composed of not less than two members of a health regulatory board, to act in accordance with § 9-6.14:11 upon receipt of information that a practitioner of the appropriate board may be subject to disciplinary action. The special conference committee may (i) exonerate the practitioner; (ii) reinstate the practitioner; (iii) place the practitioner on probation with such terms as it may deem appropriate; (iv) reprimand the practitioner; (v) modify a previous order; and (vi) impose a monetary penalty pursuant to § 54.1-2401. The order of the special conference committee shall become final thirty days after service of the order unless a written request to the board for a hearing is received within such time. If service of the decision to a party is accomplished by mail, three days shall be added to the thirty-day period. Upon receiving a timely written request for a hearing, the board or a panel of the board shall then proceed with a hearing as provided in § 9-6.14:12, and the action of the committee shall be vacated. This subdivision shall not be construed to affect the authority or procedures of the Boards of Medicine and Nursing pursuant to §§ 54.1-2919 and 54.1-3010.
11. To convene, at their discretion, a panel consisting of at least five board members or, if a quorum of the board is less than five members, consisting of a quorum of the members to

conduct formal proceedings pursuant to § 9-6.14:12, decide the case, and issue a final agency case decision. Any decision rendered by majority vote of such panel shall have the same effect as if made by the full board and shall be subject to court review in accordance with the Administrative Process Act. No member who participates in an informal proceeding conducted in accordance with § 9-6.14:11 shall serve on a panel conducting formal proceedings pursuant to § 9-6.14:12 to consider the same matter.

12. To issue inactive licenses and certificates and promulgate regulations to carry out such purpose. Such regulations shall include, but not be limited to, the qualifications, renewal fees, and conditions for reactivation of such licenses or certificates.

The proposed regulation is mandated by § 54.1-113; however the Board must exercise some discretion in the amount and type of fees which 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.

The Assistant Attorney General who provides counsel to the Board has certified that the amended regulations are consistent with statutory authority and do not conflict with existing law.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the final regulatory action and detail the specific reasons it is essential to protect the health, safety or welfare of citizens. A statement of a general nature is not acceptable, particular rationales must be explicitly discussed. Please include a discussion of the goals of the proposal and the problems the proposal is intended to solve.

The purpose of the amendments is to establish fees sufficient to cover the administrative and disciplinary activities of the Board of Nursing. Without adequate funding, the approval of certification for massage therapists could be delayed. In addition, sufficient funding is essential to carry out the investigative and disciplinary activities of the Board in order to protect the public health, safety, and welfare.

Need for Fee Increases

It is necessary for the Board of Nursing to increase their fees in order to cover expenses for essential functions of licensing, investigation of complaints against massage therapists, nurses and nurse aides, adjudication of disciplinary cases, and the review and approval of nursing

education programs. While rules setting fees for registered nurses and licensed practical nurses, nurse practitioners, and massage therapists are found in three separate sets of regulations, there is a single budget for the Board of Nursing through which the regulatory and disciplinary program is funded.

The need to increase fees for the Board of Nursing was established in the submission of amendments to regulations, 18 VAC 90-20-10 et seq., which sets fees registered nurses, licensed practical nurses, clinical nurse specialists, and certified nurse aides. Approval for promulgation of those regulations was given on November 3, 1999. In the analysis of projected fees submitted with those regulations, it was assumed that fees for nurse practitioners and massage therapists would be increased accordingly and consistently with the Principles for Fee Development. Therefore, in order to meet the revenue projections that were submitted, it is necessary to adopt increased fees.

In its analysis of the funding under the current fee structure for programs under the Board of Nursing, the following deficits have been projected:

<u>FY Ending</u>	<u>Board</u>	<u>Amount</u>	<u>Percent</u>
6/30/0	Nursing	-\$1,299,307	-17.4%
6/30/02	Nursing	-\$4,615,498	-50.5%

§ 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. Since the fees from licensees and certificate holders no longer generate sufficient funds to pay operating expenses for the Board of Nursing, a fee increase for all of its regulated entities is essential.

Despite the efficiencies and reductions in staff (MEL from 132 to 125) which the Department and the Board have undertaken in the past five years, funding from fees has failed to keep up with expenditures. Renewal fees for massage therapists are \$50 each biennium and have not been increased since 1997, the year in which massage therapists were initially certified.

Fee increases are related to increased need for funds for staff pay and related benefit increases included in the Governor’s budget and for the general costs of doing business beyond the department’s control (Y2K compliance, the health practitioner intervention program, installation of new computer system, relocation of the Department, etc.)

Fee increases for all categories of persons regulated by the Board of Nursing are necessary in order for the Board and the Department to continue performing essential functions of certifying new massage therapists and of protecting the public from continued practice by incompetent or unethical massage therapists.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. Please note that a more detailed discussion is required under the statement of the regulatory action's detail.

Fees are being amended for certified massage therapists as consistent with other regulated entities under the Board of Nursing. The fee for an application for massage therapists have increased from \$40 to \$105, and the proposed biennial renewal fee increases from \$50 to \$70 to reflects the cost of the administrative and disciplinary activities of the Board of Nursing and the allocated costs of the Department. Some miscellaneous fees are increased and other have been decreased.

Amendments are also adopted to conform the policies on reinstatement of the Board of Nursing to those for all boards within the Department. The new rule requires a person who wants to renew an expired certification within one renewal cycle to pay a late fee of \$25 and the current renewal fee. Beyond the biennium, the lapsed certification could be reinstated by submission of a reinstatement application and payment of a reinstatement fee. The board also proposes a higher fee for reinstatement of a certification which has been suspended or revoked to recover some of the costs for holding a hearing of the board.

Issues

Please provide a statement identifying the issues associated with the final regulatory action. The term "issues" means: 1) the advantages and disadvantages to the public of implementing the new provisions; 2) the 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 include a sentence to that effect.

Prior to consideration of amendments to regulations by the Board of Nursing, the Department of Health Professions set forth a set of principles by which all boards would be guided in the development of regulations. The "Principles for Fee Development" are intended to provide structure, consistency, and equity for all professionals regulated within the Department. In consideration of various alternatives and issues surrounding the adoption of fees, the Principles served to guide the Board in the development of an appropriate and necessary fee.

ISSUE 1: Proration of initial certification fees based on timing within the renewal cycle an applicant is initially certified.

It is unknown at the time of application for initial certification when or if the applicant will qualify. Applicants may be delayed or ineligible because they fail to subsequently submit required information (such as transcripts or verification from other states), do not meet substantive requirements (education, experience, moral character, etc.) or fail to pass an examination. While most candidates are eventually found eligible, it is impossible to predict when or if any given candidate will be certified.

Therefore, in order to prorate an initial 'certification fee' for the current period of certification it would require the assessment, after the determination of eligibility, of each newly qualified candidate. To accomplish this, the Department would need to incur a cost to program automated systems to generate assessments in various occupational categories. In addition to generating the assessment, the agency will be required to receive and account for the additional payment. This task could possibly be contracted out, as we do with a number of lock box transactions. All exceptions to lock box transactions, however, are handled in-house, which is an activity that would result in additional administrative costs.

Prorating of fees would have negative impact on prompt certifying of massage therapists. It is likely that it would add a minimum of 14 days and likely average 21 days to the time it will take to issue a certification after approval (the period to generate an assessment, mailing out, writing of a check, return mail, and accounting for the fee). In many cases a candidate is legally prohibited from employment until the certification is in hand. Therefore, the equity that may be achieved by prorating fees will not be of sufficient value to lead to its implementation. During the two to three weeks of delay, the applicant could have been working with a certification issued promptly upon approval by the Board. The additional income earned during that period would far exceed the small amount of the initial fee that might have been saved by a system of proration.

In the proposed regulations, all applicants for massage therapy certification would be certified for a full two years once eligibility has been determined. Since massage therapists renew biennially in their birth month, some applicants may receive more than two years, but no one would receive less than the equivalent of a biennial renewal, which is the amount calculated for initial certification in the application fee.

Advantages and disadvantages to the certified massage therapists

As is stated above, the advantage of not prorating fees is that initial certification can occur in a more timely manner. All newly certified massage therapists receive at least a full biennial renewal cycle, so there is no advantage to prorating the initial certification fee.

ISSUE 3. Uniformity in renewal and application fees across professions.

As is stated in the Principles, renewal fees for all occupations regulated by a board should be consistent across occupations unless there is clear evidence to indicate otherwise. Certified massage therapists proportionally account for costs within the Board of Nursing similar to those of registered or licensed practical nurses. They are similar in their rate of discipline and in their participation in the Health Practitioner Intervention Program (HPIP). Likewise, the amount of work entailed in application processing and credential review is similar for all the professions.

Advantages and disadvantages to the certified massage therapists

Massage therapists certified by the Board of Nursing will experience increased renewal fees under the proposed regulations. While that is a disadvantage to the regulants, the alternative of reduced services for the Board would be unacceptable to applicants, massage therapists and

the general public. As a specially funded agency, renewal fees pay the vast majority of the expenses of Board operations, which include investigation of complaints against massage therapists, nurses and nurse aides, adjudication of disciplinary cases, review and approval of nursing and nurse aide education program, verification of certification and education to other jurisdictions and entities, and communications with nurses and massage therapists about current practice and regulation.

ISSUE 4. Establishment of different fees for renewing an expired certification versus reinstating a lapsed certification.

Currently, Board of Nursing regulations require a fee of \$50 for an expired certification, regardless of the amount of time elapsed – one day or ten years. For a person who is simply late in paying the renewal fee, the current “reinstatement” fee may seem excessive. In the Principles, there is a distinction made between those who are expired (have failed to renew within one renewal cycle) and those who are lapsed (have failed to renew beyond one renewal cycle). The appropriate late fee for an expired certification should be set at 35% of the renewal fee (\$25 for a certified massage therapist); the current renewal fee must also be paid. Since a reinstatement application is required for a certificate holder to reinstate a lapsed certification, the reinstatement fee should include the current renewal fee, the late fee, and a credential review fee.

Reinstatement of a certification which has been suspended or revoked necessitates an additional cost of a hearing before a panel of the Board. Therefore, an additional amount of \$30 is proposed for reinstatement of a suspended or revoked certification to recover some of those costs to the Board.

Advantages and disadvantages to the certificate holders

For persons who are late in paying their biennial renewal but who pay within two years, there would be an advantage in the proposed regulations. Currently, the late fee is \$50; the proposed late fee is \$25. For those who fail to renew a certification for more than a biennium, the proposed reinstatement will be a higher fee to cover the costs of a reinstatement application and the late fee.

ISSUE 5. Uniformity among boards for setting miscellaneous fees.

In setting proposed fees for miscellaneous activities of the Board, the Principles call for uniformity among boards and regulated entities. Such activities as replacement of a duplicate certification, duplicate certificate, or processing and collecting on a bad check are similar for all boards and should be based on cost estimates provided by the Deputy Director for Finance of the Department.

Advantages and disadvantages to the certificate holders

The advantage of proposed regulations is that all persons certified or licensed by a board under the Department of Health Professions will consistently pay a fee for miscellaneous activities determined by actual costs for that activity. There will not be inconsistent fees for certificate

holders or licensees regulated under different boards. For massage therapists, the fee for a duplicate certification will be reduced from \$15 to \$5; the fee for a returned check will increase from \$15 to \$25.

Advantage or disadvantages to the public

Fee increases proposed by the Board of Nursing should have no disadvantage to the consuming public. There is no projection of a reduction in the number of applicants for certification or the number of certified persons available to provide massage therapy services to the public. An increase in the biennial renewal fee will result in an additional \$10 per year for a massage therapist's certification.

There would be considerable disadvantages to the public if the Board of Nursing took no action to address its deficit and increase fees to cover its expenses. The only alternative currently available under the Code of Virginia would be a reduction in services and staff, which would result in delays in licensing or certifying applicants who would be unable to work and delays in approval or disapproval of education programs. Potentially, the most serious consequence would be a reduction in or reprioritization of the investigation of complaints against massage therapists, nurses and nurse aides. In addition, there may be delays in adjudicating cases of substandard care, neglect, abuse or other violations, resulting in potential danger to the patients who are often the most sick and vulnerable consumers in the Commonwealth.

Public Comment

Please summarize all public comment received during the public comment period and provide the agency response. If no public comment was received, please include a statement indicating that fact.

Proposed regulations were published in the Virginia Register of Regulations on November 6, 2000 with public comment requested for a 60-day period ending January 5, 2001. No comment was received.

A Public Hearing before the Board of Nursing was held on November 15, 2000 at which no public comment was received.

Detail of Changes

Please detail any changes, other than strictly editorial changes, that are being proposed. Please detail new substantive provisions, all substantive changes to existing sections, or both where appropriate. This statement should provide a section-by-section description - or crosswalk - of changes implemented by the proposed regulatory action. Include citations to the specific sections of an existing regulation being amended and explain the consequences of the changes.

18 VAC 90-50-30. Fees.

Fees are amended as follows:

- The fee for an application has increased from \$40 to \$105 for massage therapists and now includes \$25 for application processing and credential review, the cost of a biennial renewal and certification (\$70), and the cost of the wall certificate.
- The biennial renewal fee increases from \$50 to \$70 and reflects the cost of the administrative and disciplinary activities of the Board of Nursing and the allocated costs of the Department.
- Currently, anyone who does not renew his certification by the due date must be “reinstated” at a cost of \$50, regardless of the amount of time the certification was expired. Amended regulations establish a late fee of \$25 for anyone who renews the expired certification within the biennium (approximately 35% of the biennial renewal). If the certification is allowed to lapse beyond the biennium, it would require reinstatement with an application review fee and payment of the late fee and biennial renewal fee for a combined total of \$120. For reinstatement following suspension or revocation, the applicant would pay an additional \$30 to help offset the additional disciplinary cost for a reinstatement hearing.
- The cost for producing and sending a duplicate certification has been reduced, so the fee decreases from \$15 to \$5 and reflects the actual cost.
- A fee for replacing a wall certificate is currently been paid by the person making the request directly to the vendor. The amended fee of \$15 would make the process and fee uniform for all boards within the Department.
- The cost of verifying a certification to another jurisdiction or sending all or part of a transcript is estimated to be \$25, so the amended fees of \$25 for either activity reflects those costs.
- The fee of \$25 is estimated to be the actual administrative costs for processing and collecting on a returned check; it is proposed to be the same fee for all boards within the Department.

18 VAC 90-50-80. Reinstatement of certifications.

Amendments are adopted to conform the policies on reinstatement of the Board of Nursing to those in the “Principles for Fee Development” for all boards within the Department. Under the current rule, anyone who is late renewing his certification (even by one day) would pay the current renewal fee and a reinstatement fee of \$50. The amended rule would require a person who wants to renew an expired certification within one renewal cycle to pay a late fee of \$25 and the current renewal fee. Beyond the biennium, the lapsed certification could be reinstated by submission of a reinstatement application and payment of a reinstatement fee.

The board also proposes a higher fee for reinstatement of a certification which has been suspended or revoked to recover some of the costs for holding a hearing of the board.

Family Impact Statement

Please provide an analysis of the regulatory action that assesses the impact on the institution of the family and family stability including the extent to which 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.

The agency has reviewed the proposed regulation in relation to its impact on the institution of the family and family stability. There would be no effect of the proposal on the authority and rights of parents, economic self-sufficiency or the marital commitment. The effect on disposable family income would be very modest; increased fees for certified massage therapists will cost them an additional \$10 per year to maintain their certification