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## Final Regulation Agency Background Document

<b>Agency name</b>	Boards of Nursing and Medicine, Department of Health Professions
<b>Virginia Administrative Code (VAC) Chapter citation(s)</b>	18VAC90-40
<b>VAC Chapter title(s)</b>	Regulations Governing Prescriptive Authority for Nurse Practitioners
<b>Action title</b>	Waiver for electronic prescribing of opioids
<b>Date this document prepared</b>	9/20/21

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

### Brief Summary

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.*

Section 122 is added to Chapter 40 to: 1) reiterate the requirement that took effect on July 1, 2020 that a prescription for a controlled substance that contains an opioid must be issued as an electronic prescription unless the prescriber qualifies for an exemption set out in the law; and 2) provide for a one-year from the requirement if the practitioner can demonstrate economic hardship technological limitations or other exceptional circumstances beyond the practitioner's control.

### Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

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N/A

### Statement of Final Agency Action

Provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

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On August 6, 2021, the Board of Medicine and on September 14, 2021, the Board of Nursing adopted a final regulation for waiver of electronic prescribing in 18VAC90-40-10 et seq., Regulations Governing Prescriptive Authority for Nurse Practitioners

### Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

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The Boards of Nursing and Medicine are complying with provisions of HB2559 of the 2019 General Assembly and are replacing emergency regulations adopted pursuant to the second enactment of the Act. There are no changes to previously reported information.

### Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

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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 Boards of Nursing and 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 specific statutory for electronic prescribing and the authority for granting a waiver are found in:

**§ 54.1-3408.02. (Effective July 1, 2020) *Transmission of prescriptions.***

*A. Consistent with federal law and in accordance with regulations promulgated by the Board, prescriptions may be transmitted to a pharmacy as an electronic prescription or by facsimile machine and shall be treated as valid original prescriptions.*

*B. Any prescription for a controlled substance that contains an ~~opiate~~ opioid shall be issued as an electronic prescription.*

*C. The requirements of subsection B shall not apply if:*

*1. The prescriber dispenses the controlled substance that contains an opioid directly to the patient or the patient's agent;*

*2. The prescription is for an individual who is residing in a hospital, assisted living facility, nursing home, or residential health care facility or is receiving services from a hospice provider or outpatient dialysis facility;*

*3. The prescriber experiences temporary technological or electrical failure or other temporary extenuating circumstance that prevents the prescription from being transmitted electronically, provided that the prescriber documents the reason for this exception in the patient's medical record;*

*4. The prescriber issues a prescription to be dispensed by a pharmacy located on federal property, provided that the prescriber documents the reason for this exception in the patient's medical record;*

*5. The prescription is issued by a licensed veterinarian for the treatment of an animal;*

*6. The FDA requires the prescription to contain elements that are not able to be included in an electronic prescription;*

*7. The prescription is for an opioid under a research protocol;*

*8. The prescription is issued in accordance with an executive order of the Governor of a declared emergency;*

*9. The prescription cannot be issued electronically in a timely manner and the patient's condition is at risk, provided that the prescriber documents the reason for this exception in the patient's medical record; or*

*10. The prescriber has been issued a waiver pursuant to subsection D.*

*D. The licensing health regulatory board of a prescriber may grant such prescriber, in accordance with regulations adopted by such board, a waiver of the requirements of subsection B, for a period not to exceed one year, due to demonstrated economic hardship, technological limitations that are not reasonably within the control of the prescriber, or other exceptional circumstances demonstrated by the prescriber.*

### **Purpose**

*Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.*

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The purpose of this regulatory action is compliance with a statutory requirement to promulgate regulations setting out the conditions upon which the Boards may grant a one-year waiver from the requirement for e-prescribing of a controlled substance containing an opioid. Since the circumstances may vary from practitioner to practitioner, the Boards have used the conditions set forth in the Code as the basis for the regulation and will take into consideration in making a case-by-case decision on a waiver the health, safety, and welfare of a practitioner's patients.

### **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.*

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Section 122 is added to Chapter 40 to: 1) reiterate the requirement that took effect on July 1, 2020 that a prescription for a controlled substance that contains an opioid must be issued as an electronic prescription unless the prescriber qualifies for an exemption provided in the law; and 2) provide for a one-year from the requirement if the practitioner can demonstrate economic hardship technological limitations or other exceptional circumstances beyond the practitioner's control.

### **Issues**

*Please identify the issues associated with the regulatory change, 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, include a specific statement to that effect.*

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- 1) There are no advantages or disadvantages to the public apart from those in the statutory language. Submitting opioid prescriptions electronically has been shown to reduce prescription fraud and thereby reduce the volume of opioids available for abuse or misuse. The waiver provision (in addition to the specific exemptions to electronic prescribing) will allow for continued prescribing for practitioners who are not able to comply for exceptional circumstances beyond their control.

- 2) There are no particular advantages or disadvantages to the agency; there may be an advantage to the Commonwealth by a reduction in fraudulent prescriptions.
- 3) Other matters interest revolve around the implementation and application of statutory and regulatory provisions. Some prescribers are concerned about the requirement for electronic prescribing, as required by statute by July 1, 2020.

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 “*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.*” Any restraint on competition as a result of promulgating this regulation is a foreseeable result of the statute.

**Requirements More Restrictive than Federal**

*Please identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.*

There are no applicable federal requirements.

**Agencies, Localities, and Other Entities Particularly Affected**

*Please identify any other state agencies, localities, or other entities particularly affected by the regulatory change. “Particularly affected” are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. “Locality” can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.*

Other State Agencies Particularly Affected - None

Localities Particularly Affected - None

Other Entities Particularly Affected - None

**Public Comment**

*Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.*

There was a public comment period from 5/10/21 to 7/9/21, and a public hearing was conducted on 5/18/21. No comment was received.

**Detail of Changes Made Since the Previous Stage**

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. \* Put an asterisk next to any substantive changes.*

There were no changes since the previous stage.

**Detail of All Changes Proposed in this Regulatory Action**

*List all changes proposed in this action and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. \* Put an asterisk next to any substantive changes.*

Current section number	New section number, if applicable	Change, intent, rationale, and likely impact of new requirements
N/A	122	<p>Subsection A of section 21 will reiterate the law that becomes effective on July 1, 2020, which requires that a prescription containing an opioid must be issued as an electronic prescription as consistent with 54.1-3408.02 of the Code, unless the prescriber qualifies for one of the exemptions listed in subsection B of that Code section.</p> <p><i>While reiteration of the law is not necessary in regulation, this provision is included in the chapter on prescribing of opioids because it is necessary for the regulations to be consistent with the law.</i></p> <p>Subsection B of section 21 sets out the conditions on which the Board may grant a waiver from the e-prescribing requirement. The Code provides that: <i>The licensing health regulatory board of a prescriber may grant such prescriber, in accordance with regulations adopted by such board, a waiver of the requirements of subsection B, for a period not to exceed one year, due to demonstrated economic hardship, technological limitations that are not reasonably within the control of the prescriber, or other exceptional circumstances demonstrated by the prescriber.</i></p>

		The waiver application is a one-page fillable form submitted electronically and is approved unless the request is incomplete.
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