

BOARD FOR PROFESSIONAL & OCCUPATIONAL REGULATION



GUIDELINES Evaluation of Petitions for Regulation



Department of Professional and Occupational Regulation

9960 Mayland Drive, Suite 400
Richmond, Virginia 23233
(804) 367-8500

<http://www.dpor.virginia.gov>

TABLE OF CONTENTS

Introduction	1
Standards for Regulation.....	1
Criteria	2
<i>Application of Criteria</i>	3
Procedures.....	4
<i>Who may request a study?</i>	4
<i>How is a study conducted?</i>	5
<i>What happens to the results?</i>	6
APPENDIX A: Statutory Authority	7
APPENDIX B: Supplemental Questions to Address Criteria	11

INTRODUCTION

The Board for Professional and Occupational Regulation (the Board) established these guidelines for reviewing the proposed regulation of professions and occupations in order to inform interested parties of the Board's statutory authority and its approach toward conducting studies and evaluations.

The Board initially developed study guidelines as the result of a recognized need to document best practices and procedures used in prior studies. BPOR originally incorporated portions of the *Policies and Procedures for the Evaluation of the Need to Regulate Health Occupations and Professions* (1998), issued by the Virginia Board for Health Professions, into those guidelines.

The Board updated its guidelines for the Department of Professional and Occupational Regulation (DPOR) in September 2016, to reflect changes made when the General Assembly enacted Chapter 467 during the 2016 Session.

STANDARDS FOR REGULATION

Section 54.1-310 of the *Code of Virginia (Code)* provides the statutory authority for the Board to evaluate and make recommendations to the Governor, General Assembly, and DPOR Director on matters of professional and occupational regulation, as well as propose administrative systems to accomplish the necessary degree of regulation.

The legislature, however, is the sole entity empowered to make the final determination over whether a profession or occupation warrants regulation, pursuant to subsection A of § 54.1-311. Only upon approval from the General Assembly can a profession be regulated, with enabling legislation specifying the degree of regulation and the overall regulatory framework to administer the program (e.g., board, advisory committee, registry).

The Commonwealth's philosophy on the regulation of professions and occupations is that: ***The occupational property rights of an individual may be abridged only to the extent necessary to protect the public.*** Section 54.1-100 clearly enumerates the overarching principle to guide the Board's approach to all reviews of professional and occupational regulation:

The right of every person to engage in any lawful profession, trade, or occupation of his choice is clearly protected by both the Constitution of the United States and the Constitution of the Commonwealth of Virginia. The Commonwealth cannot abridge such rights except as a reasonable exercise of its police powers when (i) it is clearly found that such abridgement is necessary for the protection or preservation of the health, safety, and welfare of the public and

(ii) any such abridgement is no greater than necessary to protect or preserve the public health, safety, and welfare.

Before the Commonwealth can interfere with an individual's right to engage freely in their chosen field, the *Code* states that all four of the following pre-conditions must be satisfied in order to justify the exercise of the state's police powers:

1. The unregulated practice of a profession or occupation can harm or endanger the health, safety or welfare of the public, and the potential for harm is recognizable and not remote or dependent upon tenuous argument;
2. The practice of the profession or occupation has inherent qualities peculiar to it that distinguish it from ordinary work or labor;
3. The practice of the profession or occupation requires specialized skill or training and the public needs, and will benefit by, assurances of initial and continuing professional and occupational ability; and
4. The public is not effectively protected by other means.

The following Criteria and Procedures used to guide the Board in its studies are derived from the clear guidance codified by the General Assembly, provided in their entirety in Appendix A (Statutory Authority).

CRITERIA

Based on the parameters enumerated in § 54.1-311, and informed by the Commonwealth's philosophical predisposition toward public protection, the Board adopts the following criteria to guide its evaluations. Appendix B provides additional factors to consider for each standard, as well as sample questions to assist with data collection.

1. **Risk for Harm to the Consumer**—The unregulated practice of the profession or occupation will harm or endanger the public's health, safety or welfare. The harm is recognizable and not remote or dependent on tenuous argument. The harm results from:
 - a. practices inherent in the occupation,
 - b. characteristics of the clients served
 - c. the setting or supervisory arrangements for the delivery of services, or
 - d. any combination of these factors.

2. **Specialized Skills and Training**—The practice of the profession or occupation requires specialized education and training, and the public needs assurance of competence.
3. **Autonomous Practice**—The functions and responsibilities of the practitioner require independent judgment, and the members of the occupational group practice autonomously.
4. **Scope of Practice**—The scope of practice is distinguishable from other licensed, certified, and registered professions and occupations.
5. **Economic Impact**—The economic cost(s) to the public of regulating the occupational group are justified. Such costs may result from restriction of the supply of practitioners, as well as expense associated with administration of regulatory boards or agencies.
6. **Alternatives to Regulation**—No alternatives to state regulation of the profession or occupation exist that adequately protect the public. Examples of methods to address the risk for public harm that do not require professional regulation include inspections, injunctions, disclosure requirements, and the strengthening of consumer protection laws and regulations.
7. **Least Restrictive Regulation**—If it is determined that state regulation of the occupation or profession is necessary, only the least restrictive level of occupational regulation consistent with public protection will be recommended to the Governor, the General Assembly and DPOR Director.

Application of criteria

In conducting studies, the Board will evaluate requests for regulating a professional or occupational group by assessing the criteria against the potential degrees of regulation, from least restrictive (registration) to most restrictive (licensure). The following outline delineates the characteristics of registration, certification, and licensure, and criteria applicable to each category.

Registration. Registration requires only that an individual or entity file his name, location, and possibly background information with the Commonwealth. No entry standard is typically established for a registration program.

- **RISK POTENTIAL:** Low, though consumers need to know that redress is possible.
- **SKILL & TRAINING:** Variable; can be differentiated from ordinary work or labor.
- **AUTONOMY:** Variable.
- **SCOPE OF PRACTICE:** N/A
- **APPLICATION OF CRITERIA:** Criteria 4, 5 and 6 must be met.

Certification. Certification by the state is a form of voluntary regulation, also known as "title protection." No scope of practice is reserved to a particular group; rather, only those individuals who meet certification standards (generally defined in terms of education and minimum competencies that can be measured) may use the protected title.

- **RISK POTENTIAL:** Moderate; attributable to the nature of the practice, consumer vulnerability, or practice setting and level of supervision.
- **SKILL & TRAINING:** Specialized; can be differentiated from ordinary work. Individual must complete specific education, experience, or examination requirements.
- **AUTONOMY:** Variable. Some independent decision-making; majority of practice actions directed or supervised by others.
- **SCOPE OF PRACTICE:** Definable in legally enforceable terms.
- **APPLICATION OF CRITERIA:** Criteria 1 through 6 must be met.

Licensure. Licensure is mandatory and the most restrictive form of professional regulation. State licensure typically confers a monopoly upon a specific profession or occupation within a well-defined scope of practice. It generally involves the statutory delineation of practice reserved to a select group based on unique, identifiable, minimal competencies deemed necessary to protect the public.

- **RISK POTENTIAL:** High; attributable to the nature of the profession or occupation.
- **SKILL & TRAINING:** Highly specialized education required.
- **AUTONOMY:** High; practices independently with little or no direct supervision.
- **SCOPE OF PRACTICE:** Definable in legally enforceable terms.
- **APPLICATION OF THE CRITERIA:** Criteria 1 through 6 must be met.

Alternatives. In cases where the Board identifies a potential risk to an unregulated profession or occupation, but other criteria is insufficient to substantiate that licensure, certification, or registration are appropriate remedies, other recommendations may be warranted. In accordance with Criteria 6 and 7, the Board must consider less restrictive means to protect the public's health, safety, and welfare than interfering in the occupational property rights of individuals.

PROCEDURES

During the 2016 Session, the General Assembly passed legislation prescribing a process for objective assessment of proposals to regulate currently unregulated professions or occupations (House Bill 499, sponsored by Delegate Yancey).

Who may request a study?

Petitions for the Board to conduct a study must be submitted in accordance with the process outlined in § 54.1-310.1, summarized below:

- Request for evaluation must be received by the Board no later than December 1, and be filed with a statement of support by either:
 1. at least 10 members of the professional or occupational group for which regulation is being sought, or
 2. at least 10 individuals who are not affiliated with such professional or occupational group.
- Request for evaluation shall include, at a minimum:
 1. A description of the professional or occupational group proposed for regulation;
 2. A list of associations, organization, and other groups representing the practitioners of such group proposed for regulation, and an estimate of the number of practitioners in the Commonwealth from each group;
 3. A definition of the problems to be solved by the proposed regulation of the professional or occupational group and the reasons why such regulation is necessary;
 4. Reasons why registration, certification, licensure, or other type of regulation is being proposed and why that regulatory alternative was chosen;
 5. Benefit(s) *to the public* that would result from the proposed regulation of such professional or occupational group;
 6. Cost(s) associated with the proposed regulation, to practitioners of the group to be regulated as well as to the public; and
 7. A description of what type of criteria might disqualify an applicant from approval for certification, licensure, or renewal (e.g., education, experience, examination, other entry requirements) and how such anticipated disqualifications serve public safety or commercial or consumer protection interests.

Provided a request satisfies the statutory requirements of subsections A, B, and C of § 54.1-310.1, the Board shall complete its analysis and evaluation no later than November 1 of the year following the request submission, and issue a report on its findings to the appropriate legislative bodies.

The Board may decline to conduct a review only if it (1) issued a report on the requested professional or occupational group within the immediately preceding three years and (2) finds no information in the newly submitted request that would cause a change in the prior report's recommendation.

How is a study conducted?

Pursuant to subsection D of § 54.1-310.1, upon receipt of a petition for regulation that satisfies all statutory requirements, the Board shall conduct its analysis based on the Criteria above, as derived from § 54.1-311.

The Board adopts a work plan specific to each study, detailing the background for the evaluation, its scope, and the specific methodology to be employed. Generally, in addition to the Criteria, work plans include a comprehensive review of the relevant literature such as:

- Job analyses to identify the knowledge, skills, and abilities that define a profession and distinguish it from related professions;
- Laws and regulations of other jurisdictions;
- Insurance rates and the extent of coverage based upon their actuarial assessment of the risk posed by the insured group;
- Civil suits, assessments of the type of work and work settings involved in practice, and evaluations of similar professions' claim histories, among other factors; and
- Data commonly used to develop credentialing examinations.

Job analysis and insurance rate data, in particular, are selected because (1) they are generally readily available; (2) most occupations and professions have professionally developed examinations based on job analyses, and (3) most professions have insurance. Moreover, the sources can be considered relatively objective because they were designed for purposes other than to promote regulation of the profession or occupation. Finally, job analyses and actuarial risk predictions each offer specific insight into the level of potential harm to consumers, as well as a more thorough understanding of what comprises the necessary entry-level competencies to practice the profession.

The work plan also provides opportunities for the Board to receive public comment. In some instances, additional information is gathered through surveys of practitioners, regulatory boards in other states, or other parties knowledgeable about the issues germane to the profession or occupation.

After adoption of the work plan by the Board, staff prepares a draft report based on the research and data gathered from identified sources. The Board then reviews, edits as necessary and issues its findings on whether the public interest requires the requested professional or occupational group be regulated.

What happens to the results?

No later than November 1 of the year following the request submission, the study report (including findings and recommendations) is submitted to the requesting group, the DPOR Director, the Governor, the House Committee on General Laws, the Senate Committee on General Laws and Technology, and the Joint Commission on Administrative Rules.

Staff also posts the report on the DPOR website and disseminates copies to interested parties upon request.

APPENDIX A | Statutory Authority

§ 54.1-310. Powers and duties of Board.

A. The Board shall have the following powers and duties:

1. Provide a means of citizen access to the Department.
2. Provide a means of publicizing the policies and programs of the Department in order to educate the public and elicit public support for Department activities.
3. Monitor the policies and activities of the Department and have the right of access to departmental information.
4. Advise the Governor and the Director on matters relating to the regulation of professions and occupations.
5. Promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) necessary to carry out its responsibilities.
6. Evaluate constantly each profession and occupation in the Commonwealth not otherwise regulated for consideration as to whether such profession or occupation should be regulated and, if so, the degree of regulation that should be imposed. Whenever it determines that the public interest requires that a profession or occupation which is not regulated by law should be regulated, the Board shall recommend to the General Assembly next convened a regulatory system accompanied by comprehensive regulations necessary to conduct the degree of regulation required.

B. Upon the regulation of a profession or occupation as set forth in subsection A, the Board shall have the power and duty to promulgate supplemental regulations necessary to effectuate the purposes and intent of this chapter and to establish regulatory boards to administer the system of regulation and the regulations recommended by the Board and approved by the General Assembly.

§ 54.1-310.1. Petitions for regulation; review by Board; report.

A. Any professional or occupational group or organization, any person, or any other interested party that proposes the regulation of any unregulated professional or occupational group shall submit a request to the Board no later than December 1 of any year for analysis and evaluation during the following year.

B. The Board shall review the request only when filed with a statement of support for the proposed regulation signed by at least 10 members of the professional or occupational group for which regulation is being sought or at least 10 individuals who are not members of the professional or occupational group.

C. The request shall include, at a minimum, the following information:

1. A description of the group proposed for regulation, including a list of associations, organizations, and other groups representing the practitioners in the Commonwealth, and an estimate of the number of practitioners in each group;
2. A definition of the problems to be solved by regulation and the reasons why regulation is necessary;
3. The reasons why registration, certification, licensure, or other type of regulation is being proposed and why that regulatory alternative was chosen;
4. The benefit to the public that would result from the proposed regulation;
5. The cost of the proposed regulation; and
6. A description of any anticipated disqualifications on an applicant for certification, licensure, or renewal and how such disqualifications serve public safety or commercial or consumer protection interests.

D. Upon receipt of a request submitted in accordance with the requirements of subsection C, the Board shall conduct an analysis and evaluation of any proposed regulation based on the criteria enumerated in § 54.1-311.

E. The Board may decline to conduct a review only if it:

1. Previously conducted an analysis and evaluation of the proposed regulation of the same professional or occupational group;
2. Issued a report not more than three years prior to the submission of the current proposal to regulate the same professional or occupational group; and
3. Finds that no new information has been submitted in the request that would cause the Board to alter or modify the recommendations made in its earlier report on the proposed regulation of the professional or occupational group.

F. The Board shall submit a report with its findings on whether the public interest requires the requested professional or occupational group be regulated to the House Committee on General Laws, the Senate Committee on General Laws and Technology, and the Joint Commission on Administrative Rules no later than November 1 of the year following the request submission.

§ 54.1-311. Degrees of regulation.

A. Whenever the Board determines that a particular profession or occupation should be regulated, or that a different degree of regulation should be imposed on a regulated profession or occupation, it shall consider the following degrees of regulation in the order provided in subdivisions 1 through 5. The Board shall regulate only to the degree necessary to fulfill the need for regulation and only upon approval by the General Assembly.

1. Private civil actions and criminal prosecutions. -- Whenever existing common law and statutory causes of civil action or criminal prohibitions are not sufficient to eradicate existing harm or prevent potential harm, the Board may first consider the recommendation of statutory change to provide more strict causes for civil action and criminal prosecution.

2. Inspection and injunction. -- Whenever current inspection and injunction procedures are not sufficient to eradicate existing harm, the Board may promulgate regulations consistent with the intent of this chapter to provide more adequate inspection procedures and to specify procedures whereby the appropriate regulatory board may enjoin an activity which is detrimental to the public well-being. The Board may recommend to the appropriate agency of the Commonwealth that such procedures be strengthened or it may recommend statutory changes in order to grant to the appropriate state agency the power to provide sufficient inspection and injunction procedures.

3. Registration. -- Whenever it is necessary to determine the impact of the operation of a profession or occupation on the public, the Board may implement a system of registration.

4. Certification. -- When the public requires a substantial basis for relying on the professional services of a practitioner, the Board may implement a system of certification.

5. Licensing. -- Whenever adequate regulation cannot be achieved by means other than licensing, the Board may establish licensing procedures for any particular profession or occupation.

B. In determining the proper degree of regulation, if any, the Board shall determine the following:

1. Whether the practitioner, if unregulated, performs a service for individuals involving a hazard to the public health, safety or welfare.

2. The opinion of a substantial portion of the people who do not practice the particular profession, trade or occupation on the need for regulation.

3. The number of states which have regulatory provisions similar to those proposed.

4. Whether there is sufficient demand for the service for which there is no regulated substitute and this service is required by a substantial portion of the population.

5. Whether the profession or occupation requires high standards of public responsibility, character and performance of each individual engaged in the profession or occupation, as evidenced by established and published codes of ethics.

6. Whether the profession or occupation requires such skill that the public generally is not qualified to select a competent practitioner without some assurance that he has met minimum qualifications.

7. Whether the professional or occupational associations do not adequately protect the public from incompetent, unscrupulous or irresponsible members of the profession or occupation.

8. Whether current laws which pertain to public health, safety and welfare generally are ineffective or inadequate.

9. Whether the characteristics of the profession or occupation make it impractical or impossible to prohibit those practices of the profession or occupation which are detrimental to the public health, safety and welfare.

10. Whether the practitioner performs a service for others which may have a detrimental effect on third parties relying on the expert knowledge of the practitioner.

APPENDIX B | Supplemental Questions to Address Criteria

1. Risk for Harm to the Consumer.

- ❖ Provide a description of the typical functions performed and services provided by members of this occupational group.
- ❖ Has the public actually been harmed by unregulated providers or by providers who are regulated in other states? If so, how is the evidence of harm documented (i.e., court case or disciplinary or other administrative action)? Was it physical, emotional, mental, social, or financial?
- ❖ If no evidence of actual harm is available, what aspects of the group's practice constitute a potential for harm?
- ❖ To what can the harm be attributed? Elaborate as necessary.
 - lack of skills
 - lack of knowledge
 - lack of ethics
 - lack of supervision
 - practices inherent in the occupation
 - characteristics of the clients being served
 - characteristics of the practice setting
 - other (specify)
- ❖ Does a potential for fraud exist because of the inability of the public to make an informed choice in selecting a competent practitioner?
- ❖ Is the public seeking regulation or greater accountability of this group?

2. Specialized Skills and Training.

- ❖ What are the educational or training requirements for entry into this occupation? Are these programs accredited? By whom?
 - Are sample curricula available?
 - Are there training programs in Virginia?
- ❖ If no programs exist in Virginia, what information is available on programs elsewhere that prepare practitioners for practice in the Commonwealth? What are

the minimum competencies (knowledge, skills, and abilities) required for entry into the profession? How were they derived?

- ❖ Are there national, regional, and/or state examinations available to assess entry-level competency?
 - Who develops and administers the examination?
 - What content domains are tested?
 - Are the examinations psychometrically sound, in keeping with *The Standards for Educational and Psychological Testing*?
- ❖ Are there requirements and mechanisms for ensuring continuing competence? For example, are there mandatory education requirements, re-examination, peer review, practice audits, institutional review, practice simulations, or self-assessment models?
- ❖ Why does the public require state assurance of initial and continuing competence? What assurances does the public have already through private credentialing or certification or institutional standards, etc.?
- ❖ Are there recognized or emerging specialties (or levels or classifications) within the occupational grouping? If so:
 - What are these specialties?
 - How are they recognized? (by whom and through what mechanisms, e.g., specialty certification by a national association, society or other organization?)
 - What are the various levels of specialties in terms of the functions or services performed by each?
 - How can the public differentiate among these levels or specialties for classification of practitioners?
- ❖ Is a “generic” regulatory program appropriate, or should classifications (specialties/levels) be regulated separately (e.g., basic licensure with specialty certification)?

3. Autonomous Practice.

- ❖ Which functions typically performed by this practitioner group are unsupervised (i.e., neither directly monitored nor routinely checked)?
 - What proportion of the practitioner’s time is spent in unsupervised activity?
 - Who is legally accountable/liable for acts performed with no supervision?

- ❖ Which functions are performed only under supervision?
 - Is the supervision direct (i.e., the supervisor is on the premises and responsible) or general (i.e., supervisor is responsible but not necessarily on the premises)? Who provides the supervision? How frequently? Where? For what purpose?
 - Who is legally accountable/liable for acts performed under supervision?
 - Is the supervisor a member of a regulated profession (please elaborate)?
 - What is contained in a typical supervisory or collaborative arrangement protocol?
- ❖ Does the practitioner of this occupation supervise others? Describe the nature of this supervision (as above).
- ❖ What is a typical work setting like, including supervisory arrangements and interaction of the practitioner with other regulated/unregulated occupations and professions?
- ❖ Does this occupational group treat or serve a specific consumer population?
- ❖ Are consumers referred *to* this occupational group for services? If so, by whom? Describe a typical referral mechanism.
- ❖ Are consumers referred *from* this occupational group for services? If so, to what practitioners are such referrals made? Describe a typical referral mechanism.
- ❖ How and on what basis are decisions to refer made?

4. Scope of Practice.

- ❖ Which functions of this occupation are similar to those performed by other occupational groups?
 - Which group(s)?
 - Are the other groups regulated by the state?
 - If so, why might the applicant group be considered different?
- ❖ Which functions of this occupation are distinct from other similar occupational groups?

- Which group(s)?
- Are the other groups regulated by the state?
- ❖ How will the regulation of this occupational group affect the scope of practice, marketability, and economic status of the other, similar groups (whether regulated or unregulated)?
- ❖

5. Economic Impact.

- ❖ What are the range and average incomes of members of this occupational group in the Commonwealth? In adjoining states? Nationally?
- ❖ What are the typical current fees for services provided by this group in the Commonwealth? In adjoining states? Nationally?
- ❖ Is there any evidence that cost for services provided by this occupational group will increase if the group becomes state regulated? In other states, have there been any effects on fees/salaries attributable to state regulation?
- ❖ Would state regulation of this occupation restrict other groups from providing services given by this group?
 - Are any of the other groups able to provide similar care at lower costs?
 - How is it that this lower cost is possible?
- ❖ Are there current shortages/oversupplies of practitioners in Virginia? In the region? Nationally?

6. Alternatives to Regulation. .

- ❖ What laws or regulations currently exist to govern:
 - Facilities in which practitioners practice or are employed?
 - Standards or practice?
- ❖ Does the occupational group participate in a nongovernmental credentialing program, either through a national certifying agency or professional association.
 - How are the standards set and enforced in the program?
 - What is the extent of participation of practitioners in the program?

- ❖ Does a Code of Ethics exist for this profession?
 - What is it?
 - Who established the Code?
 - How is it enforced?
 - Is adherence mandatory?

- ❖ Does any peer group evaluation mechanism exist in Virginia or elsewhere? Elaborate.

- ❖ How is a practitioner disciplined and for what causes? Violation of standards of care? Unprofessional conduct? Other causes?

- ❖ Do any other means exist within the occupational group to protect the consumer from negligence or incompetence (e.g., insurance, review boards that handle complaints)? How are challenges to a practitioner's competency handled?

7. Least Restrictive Regulation

- ❖ Should the occupation or profession be regulated?

- ❖ If so, what is the most appropriate level of regulation?