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Proposed Regulation Agency Background Document

Agency name	Board of Nursing, Department of Health Professions
Virginia Administrative Code (VAC) citation(s)	18VAC90-50-10 et seq.
Regulation title(s)	Regulations Governing the Licensure of Massage Therapists
Action title	Periodic review
Date this document prepared	2/20/17

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

As a result of the periodic review of regulations, the Board of Nursing has amended Chapter 50, Regulations for the Licensure of Massage Therapists to clarify certain sections, offer additional options for completion of continuing education, require an attestation of compliance with laws and ethics for initial licensure, and include additional provisions to the standards of conduct that may subject a licensee to disciplinary action.

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.

N/A

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, which provides the Board of Nursing 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 authorization to promulgate regulations for massage therapists is found in Chapter 30 or Title 54.1: <http://law.lis.virginia.gov/vacode/title54.1/chapter30/>

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.

Over the years since initial certification, massage therapy has evolved as a health care profession. In 2016, legislation passed in the General Assembly changing the level of regulation from certification to licensure. In the periodic review of Chapter 50, it was noted that there needs to be more assurance of ethical behavior and accountable for unprofessional conduct. Accordingly, the Board proposes to add a requirement for initial licensure that an applicant has read the laws and regulations and will comply with the Code of Ethics for the profession. Additionally, the Board proposes to add several new provisions to the disciplinary section regarding boundary violations, falsification of records, reporting of abuse, and patient confidentiality. Greater oversight and accountability will benefit the health, safety, and welfare of clients who avail themselves of massage therapy services.

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.

In a separate action, the Board amended Chapter 50 to conform the regulation to the statutory change from certification to licensure of massage therapists, pursuant to HB562 of the 2016 General Assembly. In accordance with § 2.2-4006 (4)(a), that action was exempt from the requirements of the Administrative Process Act.

In addition to changing all references from certification to licensure and adding the requirement for a criminal background for all applicants, the Board published a Notice of Intended Regulatory Action. After conducting a review of all sections of 18VAC90-50-10 et seq. and of the public comment received in response to the Notice of Periodic Review, the Advisory Board recommended and the full Board of Nursing identified the following provisions being considered for amendment:

18VAC90-50-40 Initial certification

Amend to: 1) require attestation of having read and will comply with laws and regulations and the professional Code of Ethics relating to massage therapy; and 2) require certification of equivalency for education obtained in another country from a credentialing body acceptable to the board.

18VAC90-50-60 Provisional certification

Amend to: 1) clarify that someone is eligible for a provisional license when he has filed a completed application, including completion of educational requirement, while waiting to take the licensing examination; and 2) specify that no more than one provisional license may be granted.

18VAC90-50-70 Renewal of certification

Clarify that if a license is lapsed, one may not use the title of massage therapist and may not practice massage therapy.

18VAC90-50-80 Continuing competency requirements

Amend to expand the listing of approved providers of CE.

18VAC90-50-90 Disciplinary provisions

Amend to include grounds for disciplinary action currently found in other nursing regulations but missing in Chapter 50 for licensed massage therapists.

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) The primary advantage to the public is the greater protection for the citizens of the Commonwealth who receive massage therapy services; additional grounds for disciplinary action will further protect the privacy of patient information and protect clients from exploitation by fraud, misrepresentation or duress. There are no disadvantages.

2) There are no advantages or 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...*”

Therefore, the proposed amendments are a foreseeable result of the statute requiring the Board to protect the safety and health of patients in the Commonwealth. Any restraint on competition that results from this regulation is in accord with the General Assembly’s policy as articulated in § 54.1-100 and is necessary for the preservation of the health, safety, and welfare of the public.

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 Nursing 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 for the public comment file may do so by mail, email or fax to Elaine Yeatts at elaine.yeatts@dhp.virginia.gov or at 9960 Mayland Drive, Henrico, VA 23233 or by fax at (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>The Board of Nursing is a non-general fund agency with all funding derived from fees charged to licensees and applicants. There are no one-time expenditures; all actions and hearings will occur in the context of regularly scheduled meetings. Notifications will occur electronically. There could be a very modest increase in the number of disciplinary proceedings, but it is likely that specific causes for discipline being enumerated in the proposed regulations are now being generally cited in findings of fact.</p>
<p>Projected cost of the new regulations or changes to existing regulations on localities.</p>	<p>There are no costs for 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>Massage therapists and applicants for 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 8,178 licensed massage therapists who will be affected by this regulation. Although there is no practice setting information associated with licensure, it is estimated that the majority of that number operate as a small business or are employed by small businesses.</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 residential purposes that are a consequence of the proposed regulatory changes or new regulations.</p>	<p>There are no costs for affected individuals or businesses.</p>
<p>Beneficial impact the regulation is designed to produce.</p>	<p>More specificity and clarity in regulation, particularly in establishing grounds for unprofessional conduct.</p>

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.

The Board requested any comment for less burdensome alternatives but none were received. In its periodic review, the Advisory Board recommended more flexibility and opportunity in the acquisition of continuing education hours which may result in less costly alternatives for licensees meeting requirements for renewal.

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 massage therapy is now a licensed profession, there is no less stringent requirement consistent with public health and safety.

Periodic review and small business impact review report of findings

If you are using this form to report the result of a periodic review/small business impact review that was announced during the NOIRA stage, please indicate whether the regulation meets the criteria set out in

Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include a discussion of the agency’s consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.

The proposed amendments are enacted following a notice of periodic review followed by a Notice of Intended Regulatory Action (Action 4559 / Stage 7550) that reported the findings from the periodic review and small business impact review.

Public comment

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

The Notice of Intended Regulatory Action closed on August 10, 2016; there were no comments.

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
40	Sets out requirements for initial licensure.	Subsection A is amended to add a requirement that the applicant attest to having read and will comply with laws and regulations and the professional ethics for

		<p>massage therapy. <i>The intent is to assist a licensee with compliance by ensuring that he/she understands the laws/regulations/ethics for the profession to avoid non-compliance and possible disciplinary action.</i> Subsection B is amended to address issues with foreign-trained applicants by requiring certification of equivalency from a credentialing body acceptable to the Board. <i>Currently regulations specify that equivalency of education in a foreign country is determined by the "opinion of the board." Since the Board has no expertise in evaluating the curriculum of training and education in other countries, it is a problematic requirement. Therefore, the Board must rely on a credentialing organization that has such experience and expertise in determining equivalency. This provision will create a more equitable and definitive standard for applicants who have been licensed or certified in another country.</i></p>
60	Sets out the conditions for issuance of a provisional license	<p>Subsection A is amended to clarify: 1) that a completed application includes completion of educational requirements; 2) that the provisional period is only while the applicant is waiting to take the licensure examination for a period not to exceed 90 days; and 3) that the provisional license may not be renewed. <i>The purpose of a provisional license is allow massage therapy applicants who have completed all coursework to begin employment while waiting to take the examination, for a period not to exceed 90 days. The licensing examination is offered on a daily basis, so 90 days should be ample time for an applicant to take the examination. Subsection C provides that if an applicant fails the exam, his provisional license is withdrawn.</i></p>
70	Sets out the requirement for the biennial renewal of licensure	<p>Subsection D is amended consistent with licensure rather than certification, which was title protection. <i>Failure to renew one's license means that one cannot practice massage therapy, not just a prohibition on the use of the title.</i></p>
75	Establishes the continuing competency requirements	<p>Subsection A is amended to list 6 additional providers of continuing education that may offer approved courses, seminars, workshops, etc. They include nationally-recognized associations in massage and bodyworks, accredited educational programs in massage, and any school of massage approved by SCHEV. <i>The addition of approved providers will expand opportunities for licensees who may become more professionally qualified in specialty areas of practice or may be able to obtain coursework at a lower cost.</i></p>
90	Sets out the provisions by which the Board may find grounds for disciplinary action	<p>In § 54.1-3007 of the Code of Virginia, the Board is authorized to take disciplinary action for unprofessional conduct. Regulations specify what constitutes unprofessional conduct in section 90. There are five additional grounds for disciplinary action based on</p>

		<p>unprofessional conduct listed in the proposed regulation. They are:</p> <ul style="list-style-type: none"> i. Obtaining money or property of a patient or client by fraud, misrepresentation or duress; j. Violating state laws relating to the privacy of patient information, including but not limited to §32.1-127.1:03 of the Code of Virginia; k. Providing false information to staff or board members in the course of an investigation or proceeding; l. Failing to report evidence of child abuse or neglect as required in § 63.2-1509 of the Code of Virginia or elder abuse or neglect as required in § 63.2-1606 of the Code of Virginia; m. Violating any provision of this chapter <p><i>In deciding whether there should be addition to grounds for a finding of unprofessional conduct, the Advisory Board discussed complaints and cases for which the conduct was clearly unprofessional but they did not have specific grounds to cite. Additionally, they reviewed unprofessional conduct in the regulations for nurses and found that there were several missing in regulations for massage therapy. Consequently, provisions were added to expand boundary violations, falsification of records, patient confidentiality, failure to report child or elder abuse and for violating any provision of this chapter. Greater accountability will benefit the health, safety, and welfare of clients who avail themselves of massage therapy services.</i></p>
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