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Notice of Intended Regulatory Action (NOIRA) 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 Certification of Massage Therapists
Action title	Periodic review
Date this document prepared	5/19/16

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*.

Subject matter and intent

Please describe briefly the subject matter, intent, and goals of the planned regulatory action.

As a result of the periodic review of regulations, the Board of Nursing will amend Chapter 50 to clarify certain sections, offer additional options for completion of continuing education, require an attestation of compliance with laws and ethics for initial certification, and include additional provisions to the standards of conduct that may subject a regulant to disciplinary action.

Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and(2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency'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 describe the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, please explain any potential issues that may need to be addressed as the regulation is developed.

Over the years since initial certification, massage therapy has evolved as a health care profession. In the periodic review, 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 certification 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, supervision of assistants or students, falsification of records, 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 that are being considered, the substantive changes to existing sections that are being considered, or both.

In a separate action, the Board will amend 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 will be 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 is publishing 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:

18VAC90-50-10 Definitions

May add a definition for the Federation of State Boards of Massage Therapy and any other term that requires clarification as regulations are amended.

18VAC90-50-20 Operational requirements

May amend to accommodate paperless licenses and electronic communication with licensee.

18VAC90-50-40 Initial certification

May 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.

18VAC90-50-60 Provisional certification

May 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

May amend to: 1) clarify certification by NCBTMB; 2) eliminate the option of 12 hours in “experiences that promote continued learning,” but offer a greater variety of options for course work and approved continuing competency activities; 3) expand the listing of approved providers of CE; and 4) further specify the “good cause shown” reasons for granting an extension of continuing competency requirements.

18VAC90-50-90 Disciplinary provisions

- 1) Either in this section or a new section, specify the responsibilities for supervision of a massage therapy student or an unlicensed assistant by a licensed massage therapist.
- 2) Amend the rule about dual relationships or boundary violations to include language used in our health professional regulation, including financial exploitation.
- 3) Add falsification of educational records.
- 4) Consider the violation of patient confidentiality to possibly include social media.
- 5) Consider the inclusion of failure to practice in accordance with the NCBTMB standards of practice in addition to its code of ethics.

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.

In its review, the Advisory Board considered the Model Massage Therapy Practice Act of the Federation of State Massage Therapy Boards, received information about regulation of the profession in other states, and considered comment from the Notice of Periodic Review. There is no less burdensome or intrusive alternative to meet the essential purpose of public protection than adoption of regulation, as mandated by the Code of Virginia.

Public participation

Please indicate whether the agency is seeking comments on the intended regulatory action, including ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency's contact if you're interested in serving on the panel is _____; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Townhall website , www.townhall.virginia.gov, or by mail, email or fax to Elaine Yeatts, Agency Regulatory Coordinator, 9960 Mayland Drive, Richmond, VA 23233 or elaine.yeatts@dhp.virginia.gov or by fax to (804) 527-4434. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage of this regulatory action 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.

The Advisory Board on Massage Therapy, consisting of four certified massage therapists and one citizen member, will serve as the Regulatory Advisory Panel to develop proposed regulations resulting from the periodic review and any subsequent comment on the NOIRA.

Periodic review and small business impact review report of findings

If this NOIRA is the result of a periodic review/small business impact review, use this NOIRA to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) 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.

Commenter	Comment	Agency response
Brock Ingmire Federation of State Massage Therapy Boards	Recommended repeal of the acceptance of the Board Certification Examination for Therapeutic Massage and Bodywork (BCETMB) as an appropriate examination for entry-level certification.	House Bill 562 of the 2016 General Assembly deletes the statutory reference to the BCETMB as an acceptable examination for initial licensure. After the effective date of the law, regulations will be amended to conform to the changes, including the deletion of that examination.
Scott Deldun, American Massage & Bodywork Institute	Recommended designation of licensure rather than certification.	Required a statutory change, which was accomplished with passage of HB562.

1. The 2016 mandate for licensure of massage therapists and promulgation of regulations for purpose confirms that the regulation is necessary for public protection, as the General Assembly has deemed that the practice of massage therapy, not just the title of “massage therapist,” needs to be regulated to protect the health and safety of the public. Therefore, there is a continued need for the regulation.
2. Judging from the lack of comment on the content of the regulation following publication and circulation of the Notice of Periodic Review and the review of the Advisory Board, the regulation is, for the most part, clearly written and easily understandable. There are a few clarifying amendments recommended.
3. As part of the periodic review, the Advisory Board has determined that continuing education requirements are somewhat confusing and limiting. The intent of the proposed action is to simplify the regulations for continuing competency for ease of compliance by regulated entities.
4. The regulation does not overlap, duplicate, or conflict with federal or state law or regulation.
5. The Board of Nursing completed periodic reviews and amended Chapter 50 in 2003 and 2008 and amended the chapter again during Regulatory Reform in 2013. It has been

amended four other times since 2003. As the profession has matured and grown into a licensed profession, the qualifications stated in the Code are changing.