



Virginia
Regulatory
Town Hall

Proposed Regulation Agency Background Document

Agency Name:	Board of Physical therapy/Department of Health Professions
VAC Chapter Number:	18 VAC 112-10-10 et seq.
Regulation Title:	Regulations Governing Public Participation Guidelines
Action Title:	Periodic review
Date:	3/16/01

This information is required pursuant 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*. Please refer to these sources for more information and other materials required to be submitted in the regulatory review package.

Summary

Please provide a brief summary of the proposed new regulation, proposed amendments to an existing regulation, or the regulation proposed to be repealed. There is no need to state each provision or amendment or restate the purpose and intent of the regulation; instead give a summary of the regulatory action and alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.

Regulations are promulgated to provide guidelines for public participation in the regulatory process of the board. These regulations replace emergency regulations that are currently in effect and are intended to further enable electronic communication, notification and comment in the development of regulations.

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 must be provided. Please state that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the proposed regulation and that it comports with applicable state and/or federal law.

The statutory authority for this regulation is the Administrative Process Act. § 9-6.14:7.1 specifically mandates the adoption of public participation guidelines pursuant to the provisions of the Act. Regulations so adopted do not exceed the mandate of the Act but do provide additional clarity to the public for their participation in the regulatory process.

§ 9-6.14:7.1. Public participation; informational proceedings; effect of noncompliance.

- A. Any person may petition an agency to request the agency to develop a new regulation or amend an existing regulation. The agency receiving the petition shall consider and respond to the petition within 180 days. Agency decisions to initiate or not initiate rulemaking in response to petitions are not subject to judicial review.*
- B. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, an agency shall provide the Registrar of Regulations with a Notice of Intended Regulatory Action which describes the subject matter and intent of the planned regulation. At least thirty days shall be provided for public comment after publication of the Notice of Intended Regulatory Action. An agency shall not file proposed regulations with the Registrar until the public comment period on the Notice of Intended Regulatory Action has closed.*
- C. Agencies shall state in the Notice of Intended Regulatory Action whether they plan to hold a public hearing on the proposed regulation after it is published. Agencies shall hold such public hearings if required by basic law. If the agency states an intent to hold a public hearing on the proposed regulation in the Notice of Intended Regulatory Action, then it shall hold the public hearing. If the agency states in its Notice of Intended Regulatory Action that it does not plan to hold a hearing on the proposed regulation, then no public hearing is required unless, prior to completion of the comment period specified in the Notice of Intended Regulatory Action: (i) the Governor directs that the agency shall hold a public hearing or (ii) the agency receives requests for a public hearing from twenty-five persons or more.*
- D. Public participation guidelines for soliciting the input of interested parties in the formation and development of its regulations shall be developed, adopted and utilized by each agency pursuant to the provisions of this chapter. The guidelines shall set out any methods for the identification and notification of interested parties, and any specific means of seeking input from interested persons or groups which the agency intends to use in addition to the Notice of Intended Regulatory Action. The guidelines shall set out a general policy for the use of standing or ad hoc advisory panels and consultation with groups and individuals registering interest in*

working with the agency. Such policy shall address the circumstances in which the agency considers such panels or consultation appropriate and intends to make use of such panels or consultation.

E. In formulating any regulation, including but not limited to those in public assistance programs, the agency pursuant to its public participation guidelines shall afford interested persons an opportunity to submit data, views, and arguments, either orally or in writing, to the agency or its specially designated subordinate. However, the agency may, at its discretion, begin drafting the proposed regulation prior to or during any opportunities it provides to the public to submit input.

F. In the case of all regulations, except those regulations exempted by § 9-6.14:4.1, the proposed regulation and general notice of opportunity for oral or written submittals as to that regulation shall be published in the Virginia Register of Regulations in accordance with the provisions of subsection B of § 9-6.14:22. In addition, the agency may, in its discretion, (i) publish the notice in any newspaper and (ii) publicize the notice through press releases and such other media as will best serve the purpose and subject involved. The Register and any newspaper publication shall be made at least sixty days in advance of the last date prescribed in the notice for such submittals. All notices, written submittals, and transcripts, summaries or notations of oral presentations, as well as any agency action thereon, shall be matters of public record in the custody of the agency.

G. Before delivering any proposed regulation under consideration to the Registrar as required in subsection H below, the agency shall deliver a copy of that regulation to the Department of Planning and Budget. In addition to determining the public benefit, the Department of Planning and Budget in coordination with the agency, shall, within forty-five days, prepare an economic impact analysis of the proposed regulation. The economic impact analysis shall include, but need not be limited to, the projected number of businesses or other entities to whom the regulation would apply; the identity of any localities and types of businesses or other entities particularly affected by the regulation; the projected number of persons and employment positions to be affected; the impact of the regulation on the use and value of private property; and the projected costs to affected businesses, localities or entities to implement or comply with such regulations, including the estimated fiscal impact on such localities and sources of potential funds to implement and comply with such regulation. Agencies shall provide the Department with such estimated fiscal impacts on localities and sources of potential funds. The Department may request the assistance of any other agency in preparing the analysis. The Department shall deliver a copy of the analysis to the agency drafting the regulation, which shall comment thereon as provided in subsection H, and a copy to the Registrar for publication with the proposed regulation. No regulation shall be promulgated for consideration pursuant to subsection H until such impact analysis has been received by the Registrar. For purposes of this section, the term "locality, business, or entity particularly affected" means any locality, business, or entity which bears any identified disproportionate material impact which would not be experienced by other localities, businesses, or entities. The analysis shall represent the Department's best estimate for the purposes of public review and comment on the proposed regulation. The accuracy of the estimate shall in no way affect the validity of the regulation, nor shall any failure to comply with or otherwise follow the procedures set forth in this subsection create any cause of action or provide standing for any person under Article 4 (§ 9-6.14:15 et seq.) of this chapter or otherwise to challenge the actions of the Department hereunder or the action of the agency in adopting the proposed regulation.

H. Before promulgating any regulation under consideration, the agency shall deliver a copy of that regulation to the Registrar together with a summary of the regulation and a separate and concise statement of (i) the basis of the regulation, defined as the statutory authority for promulgating the regulation, including an identification of the section number and a brief statement relating the content of the statutory authority to the specific regulation proposed; (ii) the purpose of the regulation, defined as the rationale or justification for the new provisions of the regulation, from the standpoint of the public's health, safety or welfare; (iii) the substance of the regulation, defined as the identification and explanation of the key provisions of the regulation that make changes to the current status of the law; (iv) the issues of the regulation, defined as the primary advantages and disadvantages for the public, and as applicable for the agency or the state, of implementing the new regulatory provisions; and (v) the agency's response to the economic impact analysis submitted by the Department of Planning and Budget pursuant to subsection G. Any economic impact estimate included in the agency's response shall represent the agency's best estimate for the purposes of public review and comment, but the accuracy of the estimate shall in no way affect the validity of the regulation. Staff as designated by the Code Commission shall review proposed regulation submission packages to ensure the requirements of this subsection are met prior to publication of the proposed regulation in the Register. The summary; the statement of the basis, purpose, substance, and issues; the economic impact analysis; and the agency's response shall be published in the Virginia Register of Regulations, together with the notice of opportunity for oral or written submittals on the proposed regulation.

I. When an agency formulating regulations in public assistance programs cannot comply with the public comment requirements of subsection F of this section due to time limitations imposed by state or federal laws or regulations for the adoption of such regulation, the Secretary of Health and Human Resources may shorten the time requirements of subsection F. If, in the Secretary's sole discretion, such time limitations reasonably preclude any advance published notice, he may waive the requirements of subsection F. However, the agency shall, as soon as practicable after the adoption of the regulation in a manner consistent with the requirements of subsection F, publish notice of the promulgation of the regulation and afford an opportunity for public comment. The precise factual basis for the Secretary's determination shall be stated in the published notice.

J. For the purpose of this article, public assistance programs shall consist of those specified in § 63.1-87.

K. If one or more changes with substantial impact are made to a proposed regulation from the time that it is published as a proposed regulation to the time it is published as a final regulation, any person may petition the agency within thirty days from the publication of the final regulation to request an opportunity for oral and written submittals on the changes to the regulation. If the agency receives requests from at least twenty-five persons for an opportunity to submit oral and written comments on the changes to the regulation, the agency shall (i) suspend the regulatory process for thirty days to solicit additional public comment and (ii) file notice of the additional thirty-day public comment period with the Registrar of Regulations, unless the agency determines that the changes made are minor or inconsequential in their impact. The comment period, if any, shall begin on the date of publication of the notice in the Register. Agency denial of petitions for a comment period on changes to the regulation shall be subject to judicial review.

L. In no event shall the failure to comply with the requirements of subsection F of this section be deemed mere harmless error for the purposes of § 9-6.14:17.

M. This section shall not apply to the issuance by the State Air Pollution Control Board of variances to its regulations.

Purpose

Please provide a statement explaining the need for the new or amended regulation. This statement must include the rationale or justification of the proposed 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.

Created by statute in the 2000 General Assembly, the new Board of Physical Therapy adopted emergency regulations to provide for public participation in the regulatory process. It has followed these regulations by sending notices to the public for any meeting at which a regulatory action is to be considered, for an intended regulatory action, for comment on a proposed regulation, and for adoption of a final regulation.

The Board has determined that the proposed public participation guidelines are reasonable, clearly stated and adequate to protect the public interest in the development and promulgation of regulations. Changes to emergency regulations are necessary for additional clarity and updating of the requirements in order to provide for electronic submissions by the agency and the affected parties. These regulations are intended to ensure participation in the process of developing and promulgating regulations for the health professions which are essential for public health, safety and welfare.

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 providing detail of the regulatory action's changes.

The Board is proposing Public Participation Guidelines regulations in order to improve the clarity of the rule, to incorporate forms of notification through the Virginia Regulatory Townhall and the Commonwealth Calendar, and to improve the procedures for public involvement in the process. The proposed regulations will replace the emergency regulations that are in effect from October 17, 2000 to October 16, 2001.

Issues

Please provide a statement identifying the issues associated with the proposed regulatory action. The term "issues" means: 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 include a sentence to that effect.

For the most part, regulations providing public participation guidelines are requirements on the Board in compliance with the Administrative Process Act. The primary issue identified during the review of these regulations was the need to incorporate electronic forms of regulatory submission, notification and communication that are currently available or may become available in the near future. Therefore, language that would permit notification and comment by facsimile, email or other electronic means was incorporated in the proposal. Regulations will also ensure that an electronic mailing list may be maintained on a state website in addition to the traditional list for mailings by the Board.

While requirements for public participation in the regulatory process should be electronically inclusive, the Board continues to be obligated to notify by regular mail if an entity chooses that form of notification. The regulation must continue to provide for notification and comment in that fashion.

Advantages and Disadvantages

There are no disadvantages of the proposed regulations to members of the public, who may chose to remain on the regular mailing list, be notified of regulatory actions electronically or both. Public comment on Notices of Intended Regulatory Action or proposed regulations is currently permitted and being received by facsimile or email, so these regulations will ensure that type of transmission is acceptable.

There are no disadvantages to the Board which is currently posting meeting notices affecting regulations and all regulatory submissions on the Townhall. If electronic notification and comment becomes more prevalent, there may be a modest reduction in the Board's cost of mailings.

Fiscal Impact

Please identify the anticipated fiscal impacts and at a minimum include: (a) the projected cost to the state to implement and enforce the proposed regulation, including (i) fund source / fund detail, (ii) budget activity with a cross-reference to program and subprogram, and (iii) a delineation of one-time versus on-going expenditures; (b) the projected cost of the regulation on localities; (c) a description of the individuals, businesses or other entities that are likely to be affected by the regulation; (d) the agency's best estimate of the number of such entities that will be affected; and e) the projected cost of the regulation for affected individuals, businesses, or other entities.

Projected cost to the state to implement and enforce:

(i) Fund source: As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation.

(ii) Budget activity by program or subprogram: There is no change required in the budget of the Commonwealth as a result of this program.

(iii) One-time versus ongoing expenditures: The agency will incur some costs (less than \$1000) for mailings to the Public Participation Guidelines Mailing List, conducting a public hearing, and sending copies of final regulations to regulated entities. Every effort will be made to incorporate those into anticipated mailings and Board meetings already scheduled.

Projected cost on localities:

There is no projected costs to localities.

Description of entities that are likely to be affected by regulation:

The entities that are likely to be affected by these regulations would be persons or organizations that request notices of any meeting at which a regulatory action is being taken by the Board or required notices during the promulgation of regulations.

Estimate of number of entities to be affected:

There are currently 184 entities listed on the PPG mailing list for the Board of Physical Therapy.

Projected costs to the affected entities:

There are no costs for the affected entities to comply with these regulations.

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 cross-walk - of changes implemented by the proposed regulatory action. Where applicable, include citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes.

This is a new set of regulations for a new regulatory board. An explanation of each section and the changes to the emergency regulations are as follows:

18 VAC 112-10-10. Purpose.

- This section describes the purpose of involving the public in the development and promulgation of those regulations not exempt from the Administrative Process Act. A change from the emergency rule would clarify that the purpose includes expanded participation in the rule-making process by electronic exchanges.

18 VAC 112-10-20. Definitions.

- This section defines certain terms used in the regulation for clarity of interpretation and compliance by the public. A definition for "notification lists" is proposed to facilitate an understanding of that term as used in the amended regulation.

18 VAC 112-10-30. Composition of lists.

- Changes to this section are proposed to expand the concept from that of a mailing list to notification lists, which may include a listing of persons who have chosen to be notified electronically.
- Subsection D clarifies that the Board should periodically ask those on notification lists about their desire to remain and should then remove persons who fail to indicate an interest in continuing to receive notices from the Board. It also specifies that persons who chose to be notified electronically may continue to receive notices sent by regular mail.

18 VAC 112-10-40. Documents to be sent to person on the mailing list.

- This section specifies which documents or notices must be sent by the board. Changes from the emergency regulation will provide for electronically-transmitted notices, will identify the notices to be sent, and will require that the notices include instructions on how to obtain a copy of the regulation and any supporting documentation, either from the Board office or from the Virginia Regulatory Townhall.

18 VAC 112-10-50. Petition for rulemaking.

- This section outlines the procedure and format to be followed in filing a petition for rulemaking and the response required by the board. No changes from the emergency regulation are proposed.

18 VAC 112-10-60. Notice of Intended Regulatory Action.

- This section describes the content and purpose of a NOIRA. Subsection C provides a requirement for a public hearing to be held on a proposed regulation if requested by at least 25 persons during the 30-day comment period on the NOIRA.

18 VAC 112-10-70. Notice of Comment Period.

- This section describes the content and purpose of the NOCP. A change from emergency regulations was adopted to clarify that the public may provide comment on proposed regulations electronically, including facsimile or internet. The regulation will also clarify that oral comment, outside of a scheduled public hearing, will not be accepted.

18 VAC 112-10-80. Notice of Meeting.

- Requirements for a notice of meeting are set out in this section, which states that the notice shall also be posted electronically.

18 VAC 112-10-90. Public hearings on regulations.

- This section requires a public hearing be held on any proposed regulation unless the board determines that such a hearing is unnecessary.

18 VAC 112-10-100. Periodic review of regulations.

- Requirements are established for an informational proceeding to occur at least biennially to receive comment on existing regulations and for notice of the proceedings to be published in the Register and sent to those on the mailing list.

18 VAC 112-10-110. Appointment of committees.

- This section provides for the appointment of ad hoc advisory committees to assist the board in the development of regulations in order to provide for inclusion of professional assistance or technical expertise.

18 VAC 112-10-120. Limitation of service.

- This section provides for the dissolution of an advisory committee when its services are no longer necessary. If an advisory committee needs to remain in existence for longer than 12 months, the board may extend its service for another six months.

Alternatives

Please describe the specific 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.

The current emergency regulations governing public participation in the regulatory process became effective on October 17, 2000. Since that time, there have been no comments or requests for amendments to the regulation.

At the time of adoption, the emergency regulations were identical to public participation guidelines currently in effect for all boards within the Department. Subsequently, amendments to PPG regulations have been adopted by the 13 other boards to reflect changes in the notification of the public and receipt of public comment. With the availability of e-mail and fax, notices may now be given and comments received electronically. For consistency and ease of compliance by the public, these proposed regulations have been conformed to those proposed by all other boards.

In the adoption of proposed regulations, the Board's intent was to implement but not duplicate provisions of the Administrative Process Act (§ 9-6.14:1 et seq. of the Code of Virginia).

Public Comment

Please summarize all public comment received during the NOIRA comment period and provide the agency response.

An announcement of the Board's intent to replace emergency regulations governing public participation in the regulatory process was posted on the Virginia Regulatory Townhall, sent to the Registrar of Regulations, and sent to persons on the PPG mailing list for the Board. Public comment on the NOIRA was received until December 6, 2000. During the 30-day comment period, no comments were received from members of the public.

Clarity of the Regulation

Please provide a statement indicating that the agency, through examination of the regulation and relevant public comments, has determined that the regulation is clearly written and easily understandable by the individuals and entities affected.

Since no public comment was received, an internal workgroup of regulatory coordinators for the agency and executive directors of regulatory Boards met to review the current regulations, provisions of the Administrative Process Act, and changes in the process resulting from the initiation of the Townhall. Amendments to regulations were recommended by that group and were reviewed by the Department of Planning and Budget and the office of the Secretary of Health and Human Services. The Department worked with persons from DPB to further amend the regulations to enhance the use of electronic submissions and communication in the regulatory process.

Periodic Review

Please supply a schedule setting forth when the agency will initiate a review and re-evaluation to determine if the regulation should be continued, amended, or terminated. The specific and measurable regulatory goals should be outlined with this schedule. The review shall take place no later than three years after the proposed regulation is expected to be effective.

Public participation guidelines require the Board to review its regulations each biennium or as required by Executive Order. Therefore, the Board intends to review regulations governing public participation in the regulatory process during the 2003-04 fiscal year.

Family Impact Statement

Please provide an analysis of the proposed regulatory action that assesses the potential 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.

In its analysis of the proposed regulatory action, the agency has determined that there is no potential impact on the institution of the family and family stability, economic self-sufficiency, or the marital commitment. The proposed regulations will not increase or decrease disposable family income.