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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Board of Nursing, Department of Health Professions
Virginia Administrative Code (VAC) citation	18 VAC 90-20-10 et seq.
Regulation title	Regulations Governing the Practice of Nursing
Action title	Increase in certain fees
Document preparation date	5/14/03

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apa.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Preamble

The APA (Section 2.2-4011) states that an “emergency situation” is: (i) a situation involving an imminent threat to public health or safety; or (ii) a situation in which Virginia statutory law, the Virginia appropriation act, or federal law requires that a regulation shall be effective in 280 days or less from its enactment, or in which federal regulation requires a regulation to take effect no later than 280 days from its effective date.

- 1) *Please explain why this is an “emergency situation” as described above.*
- 2) *Summarize the key provisions of the new regulation or substantive changes to an existing regulation.*

In the 2003 General Assembly, House Bill 1441 strengthened requirements for health care institutions to report misconduct by nurses when there is a “reasonable probability that such health professional may have engaged in unethical, fraudulent or unprofessional conduct as defined by the pertinent licensing statutes and regulations.” Both the time limit for reporting and

the content of the report have been specified in the Code, and the civil penalty for failure to report has been increased from a maximum of \$10,000 to \$25,000.

Accordingly, the agency estimated that complaints or reports of misconduct by nurses could increase from 1400 to 1750 per year, resulting in approximately 315 new cases to fully investigate, 78 more informal conferences and 22 more formal hearings. In addition, there may be approximately 174 cases that will result in a confidential consent agreement, which must be prepared by legal staff and reviewed by counsel. During debate on the bill, it was clearly noted that the additional cost associated with compliance and implementation of HB1441 would result in increased costs for the affected boards and would generate an immediate need for additional revenue.

In response, the General Assembly included an enactment clause to authorize the promulgation of emergency regulations to increase fees. The fifth enactment clause in Chapter 762 of the 2003 Acts of the Assembly requires, “That the health regulatory boards shall promulgate regulations to address any fee adjustments necessary to accomplish the regulatory and enforcement responsibilities set forth in this act to be effective within 280 days of its enactment.” Although the regulation is not otherwise exempt under the provisions of the Administrative Process Act, the adoption of emergency regulations is authorized by § 2.2-4011 of the Code of Virginia.

To accommodate the projected increase in reporting, investigations and disciplinary proceedings for the Board of Nursing, the agency has calculated costs for additional staff, hearings, equipment and related expenses. It is estimated that by June 30, 2006 at the conclusion of the 2004-06 biennium, costs related to HB1441 could result in a \$2.1 million deficit for the Board. In order to adjust fees as necessary to accomplish the regulatory and enforcement responsibilities set forth in the act, the Board has adopted an emergency regulation to increase the biennial renewal fee by \$12 and has set other fees accordingly.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

In the Notice of Intended Regulatory Action, the Board intends to address the need for increased revenue related to two legislative actions of the 2003 General Assembly.

House Bill 1441

House Bill 1441 strengthened requirements for health care institutions to report misconduct by nurses when there is a “reasonable probability that such health professional may have engaged in unethical, fraudulent or unprofessional conduct as defined by the pertinent licensing statutes and regulations.” Both the time limit for reporting and the content of the report have been specified in the Code, and the civil penalty for failure to report has been increased from a maximum of \$10,000 to \$25,000.

Accordingly, the agency estimated that complaints or reports of misconduct by nurses could increase from 1400 to 1750 per year, resulting in approximately 315 new cases to fully investigate, 78 more informal conferences and 22 more formal hearings. In addition, there may be approximately 174 cases that will result in a confidential consent agreement, which must be prepared by legal staff and reviewed by counsel. During debate on the bill, it was clearly noted that the additional cost associated with compliance and implementation of HB1441 would result in increased costs for the affected boards and would generate an immediate need for additional revenue.

In response, the General Assembly included an enactment clause to authorize the promulgation of emergency regulations to increase fees. The fifth enactment clause in Chapter 762 of the 2003 Acts of the Assembly requires, "That the health regulatory boards shall promulgate regulations to address any fee adjustments necessary to accomplish the regulatory and enforcement responsibilities set forth in this act to be effective within 280 days of its enactment." Accordingly, the board has adopted emergency regulations and proposes to make them permanent regulations.

House Bill 1871

House Bill 1871 authorizes Virginia's membership in a multi-state nursing compact that provides for the reciprocal recognition of other states' licenses to practice as a registered nurse or a licensed practical nurse. While the provisions of this bill will not become effective until January 1, 2005, the Board must begin the process of addressing the resulting loss of revenue, which can only be accomplished through an increase in fees charged to applicants and licensees.

Currently, there are 22 states that have implemented or are in the process of implementing membership in the Compact. For those nurses who hold a license in Virginia but reside in a Compact state, it will become unnecessary for them to retain a Virginia license. Therefore, it is expected that the Board of Nursing will realize a loss of revenue from renewals, application fees for licensure by endorsement, and fees for verification of licensure to other states.

While there may be some very modest savings from fewer licensees and fewer applicants, the expenditures for the Board are largely related to its disciplinary caseload, which would not be decreased by this action. Nurses who practice in Virginia, even though they hold a license in another state and pay their renewal fees to that state, would still be subject to the investigations and disciplinary proceedings in this state. Therefore, all the costs for investigating and conducting a hearing on a complaint of misconduct on a compact nurse will be borne by those nurses who hold a Virginia license. To ensure that there is sufficient revenue for the Board to continue its operation on the effective date of the Compact, it must begin to revise its fee schedule accordingly. If the Board delayed the adoption of increased fees related to the loss of revenue until after entry into the Compact, a deficit would likely result which would necessitate even higher fees to resolve the deficit and have sufficient revenue for current operations.

- 1) Please confirm that the Office of the Attorney General has certified that the agency has the statutory authority to promulgate the emergency regulation and that it comports with applicable state and/or federal law.
- 2) Please indicate that the regulation is not otherwise exempt under the provisions of subdivision A.4 of Section 2.2-4006 of the APA.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400 (6) provides the Board 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 legal authority to promulgate the emergency regulation is in fifth enactment clause of Chapter 762 of the 2003 Acts of the Assembly. See complete copy of HB 1441 (Chapter 762) - <http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+CHAP0762>

The Office of the Attorney General has certified that the “emergency situation” which exists is specified in § 2.2-4011 of the Code of Virginia as one in which the agency is required by statutory law to have a regulation in effect within 280 days from the enactment of the law. The regulation is not otherwise exempt under the provisions of subdivision A.4 of Section 2.2-4006 of the Administrative Process Act.

The legal authority to promulgate the regulation for a fee increase as needed to offset a loss of revenue related to the Nurse Licensure Compact is Chapter 249 of the 2003 Acts of the Assembly. See complete copy of HB 1871 (Chapter 249) – <http://leg1.state.va.us/cgi-bin/legp504.exe?031+ful+CHAP0249>

Substance

Please detail any changes that are proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Set forth the specific reasons the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of Virginians. Delineate any potential issues that may need to be addressed as a permanent final regulation is developed.

Emergency regulations are proposed as follows, but the NOIRA to increase fees addresses these proposed changes and additional fees that will be necessary to offset the loss of revenue related to membership in the Nurse Licensure Compact.

Current section number	Current requirement	Proposed change and rationale
30	Fees required in connection with the licensing of applicants by the board are: 1. Application for licensure by examination \$105 2. Application for licensure by endorsement \$105 4. Biennial licensure renewal \$70 5. Late renewal \$25 6. Reinstatement of lapsed license \$120 7. Reinstatement of suspended or revoked license \$160	\$117 \$117 \$82 \$30 \$132 \$172

House Bill 1441

To accommodate the projected increase in reporting, investigations and disciplinary proceedings for the Board of Nursing, the agency has calculated costs for additional staff, hearings, equipment and related expenses. It is estimated that by June 30, 2006 at the conclusion of the 2004-06 biennium, costs related to HB1441 could result in a \$2.1 million deficit for the Board. In order to adjust fees as necessary to accomplish the regulatory and enforcement responsibilities set forth in the act, the Board adopted an emergency regulation to increase the biennial renewal fee by \$12 and has set other fees accordingly.

The emergency action amended 18VAC90-20-30 to increase the biennial renewal fee for registered nurses and licensed practical nurses by \$12 from \$70 to \$82. Other fees which are associated with the licensing (renewal) fee are also be increased accordingly. The application fee for licensure by examination or by endorsement increased from \$105 to \$117, because the first renewal cycle is included in the initial application fee. The fee for late renewal anytime within the two years following the expiration date increased by \$5 from \$25 to \$30. The fees for reinstatement of a lapsed license after two years increased from \$120 to \$132 and for reinstatement of a license that has been suspended or revoked from \$160 to \$172.

House Bill 1871

Fee increases necessary to offset the loss of revenue related to membership in the Compact have not been fully assessed. In the fiscal impact statement prepared by the Department of Planning and Budget on HB1871, the estimate was that renewal fees would need to increase by approximately \$10 per biennium; other fees would experience a similar increase. Since the FIS was prepared, six additional states have voted to join the Compact, including Tennessee, so an additional loss of revenue can be anticipated. In the development of proposed regulations, the Board will assess the expected impact on its budget and adjust fees that anticipate its revenue and expenditure needs through the next biennium.

Failure to provide sufficient funding through the adoption of regulations to cover the costs of implementing this legislation would place the agency in non-compliance with the law. If the Board failed to increase fees sufficient to provide adequate staffing and support for investigative and disciplinary activities, the public health and safety would suffer by long delays in responding to complaints, processing cases and possibly removing incompetent or dangerous practitioners.

The proposed regulatory action is essential to ensure that the Board and the Department have sufficient resources to respond to reports of misconduct in a timely and thorough fashion.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action.

House Bill 1441

Since the passage of HB1441, the agency has worked internally and in conjunction with the Office of the Attorney General to calculate the potential impact of the legislation and determine costs that are reasonable but sufficient to address the anticipated case load. At this time, the agency has calculated the costs attributable to HB1441 to be:

FY04	1,678,874
FY05	2,286,311
FY06	2,388,767

Should the workload and expenditures be less than expected, the Board will take advantage of the exemption in the APA and immediately reduce fees accordingly.

In the fiscal impact statement (FIS) prepared for HB1441, the Department of Planning and Budget (DPB) estimated that an additional 27.5 FTE's would be needed for the boards, investigations, compliance, and administrative proceedings. The agency has further refined the estimates and determined that 27 FTE's will likely be necessary. For planning purposes, costs for those positions have been staged into projected hiring quarters over the next fiscal year. Those positions will only be filled as necessary in response to the actual caseload that develops. In addition, however, the Office of the Attorney General estimates that 4,000 additional hours will be needed to handle related legal matters.

DPB had estimated in the FIS that the biennial renewal fees for registered and licenses practical nurses would increase by approximately \$18 with the renewal fee increasing from \$70 to \$88 for a 26 percent increase. In fact, the agency has estimated that a slightly higher percentage of the overall cost would likely fall to Medicine and has proposed an increase for the nursing renewal of \$12 per biennium rather than \$18 for a 17 percent increase.

Without an increase in fees, it is estimated that the Board of Nursing would have a deficit of (\$2,126,401) by the end of FY 2006. The calculation for the increase in renewal fees that is necessary to produce another \$2,258,532 in revenue is based on an expectation that the increased fee would be in effect at the beginning of FY04 for three years of additional income. Nurses renew their licenses on a continuous schedule with the renewal due in their birth month in an odd or even year, depending on the year of birth. Therefore, it is essential that the Board have emergency regulations in effect by July 1, 2003 or the revenue projections on which the fee increase was based will be miscalculated and may result in a revenue shortfall. Any delay in adjusting fees will result in a higher increase than has been identified in the emergency regulaiton.

With the passage of House Bill 1441 (Chapter 762 of the 2003 Acts of the Assembly), the Board was mandated to promulgate regulations implementing provisions of the law within 280 days. In accordance, it has adopted emergency regulations and a Notice of Intended Regulatory Action to receive comment on its intent to replace those regulations with permanent regulations.

House Bill 1871

In the fiscal impact statement prepared on HB1871 by the Department of Planning and Budget, it was clearly stated that the legislation is likely to decrease the amount of revenue collected by the Board of Nursing, thereby increasing regulatory fees for the remaining Virginia nurses. At the time the legislation was introduced, there were 16 states that were a part of the compact; there are now 22 (including Virginia) that have passed enabling legislation. Beginning July 1, 2003, the additional states will be implementing the compact.

At the time the FIS was prepared, the calculation for fiscal impact was based on the number of Virginia licensees who listed addresses in compact states. Assuming all nurses who reside in compact states surrender Virginia licenses (7,280 registered nurses (RN) and 1,688 licensed practical nurses (LPN) have addresses in compact states) and retain their home state's license, the Board of Nursing would lose an estimated \$391,380 each year. In addition, there would be a loss of income for verification of licensure to another state; the extent of that loss is not known, but it could be \$20,000 per biennium. The loss of revenue from applications from nurses seeking to endorse into Virginia is unknown, however the Board earns approximately \$900,000 per biennium on endorsement of LPN's and RN's; it is estimated that 15 to 20 percent (or about \$135,000 per biennium) of that income might also be eliminated. The Board of Nursing will experience some licensure savings associated with issuing/renewing licenses. Assuming \$0.50 per renewal, the Board would save about \$5,000 per biennium. However, since the Board would still regulate all nurses practicing in the Commonwealth, no enforcement savings would be realized.

Therefore, it was estimated in the FIS on HB 1871 that the loss of licensure revenue might result in at least a \$10 increase in renewal fees for Virginia nurses. As additional states (especially border states) become a part of the compact, revenues for the Board will continue to decline, so the additional increase in fees to offset the loss of income beginning January 1, 2005 with the implementation of the Act will likely exceed the estimated \$10. While the total dollar amount does not appear excessive per licensee, the increases could cause some current license-holders who are not actively practicing to relinquish their nursing license, resulting in a further decline in revenue.

Family impact

Please assess the impact of the emergency regulatory action on the institution of the family and family stability.

The Board has determined that there is no impact on the family or family stability as a result of these regulations. While there would be a modest effect on disposable family income, the increase, which may total at least \$25 per biennium for the two initiatives, should not be overly burdensome.

