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## Final Regulation Agency Background Document

<b>Agency name</b>	State Board of Elections
<b>Virginia Administrative Code (VAC) citation(s)</b>	1 VAC 20-90-30
<b>Regulation title(s)</b>	Express Advocacy
<b>Action title</b>	Add 1 VAC 20-90-30
<b>Date this document prepared</b>	August 16, 2019, revised October 23, 2019

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

### Brief Summary

*Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.*

The term “express advocacy” is not defined in the Code of Virginia or in other regulations. The State Board of Elections currently provides a definition of express advocacy in campaign finance summaries that the Board is required to provide to candidates and the public. The Board now seeks to adopt the federal definition of express advocacy in regulation form to provide continuity and clarity to campaign finance interpretation and application. This regulation will align Virginia’s interpretation of express advocacy with the operative definition of express advocacy as provided in 11 C.F.R. §100.22, the Federal Election Commission’s regulation defining express advocacy.

### 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.*

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The State Board of Elections – The Board  
The Virginia Department of Elections – ELECT  
Code of Federal Regulations – C.F.R.  
Federal Election Commission – FEC

### Statement of Final Agency Action

*Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.*

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Pursuant to its authority under the Code of Virginia 24.2-103, the State Board of Elections approved the definition of “express advocacy” and authorized regulatory action on May 21, 2018.

### Mandate and Impetus

*Please list all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously-reported information, include a specific statement to that effect.*

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There is no change to previously reported information.

### Legal Basis

*Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must 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 or promulgating entity’s overall regulatory authority.*

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The State Board is authorized to “make rules and regulations and issue instructions ... to promote the proper administration of election laws” as per the Code of Virginia §24.2-103.

## Purpose

*Please explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.*

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Current campaign finance summaries define express advocacy as a direct or indirect contribution, in-kind contribution, independent expenditure or loan made to a candidate or political committee for the purpose of influencing the outcome of an election; an advertisement that refers to a party or candidate(s) by name and states "Vote for..."; "Support"; "Elect ..."; "Smith for Congress"; "Send him home"; "Oppose, etc."

The Board has repeatedly expressed concern that the definition currently included in campaign finance summaries does not provide sufficient clarity to citizens and entities of the Commonwealth who wish to sponsor political campaign advertisements.

## 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.*

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This regulatory action seeks to include the definition of "express advocacy" in the Virginia Administrative Code. The proposed definition is taken from federal regulations governing campaign finance:

When used in Chapter 9.3 (§ 24.2-945 et seq.) and Chapter 9.5 (§ 24.2-955 et seq.) of Title 24.2 of the Code of Virginia, "expressly advocating" or any variation thereof shall mean any communication that uses phrases such as "vote for," "elect," "support," "cast your ballot for," "Smith for Congress," "vote against," "defeat," "reject," or any variation thereof or any communication when taken as a whole and with limited reference to external events, such as the proximity to the election, that could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidates because (i) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning and (ii) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates.

## Issues

*Please identify the issues associated with the regulatory change, 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, include a specific statement to that effect.*

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There are no disadvantages to the public or the Commonwealth. However, the proposed amendment will affect persons and organizations that pay for political advertisements, as noted in the Economic Impact Analysis.

### Requirements More Restrictive than Federal

*Please list all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously-reported information, include a specific statement to that effect.*

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There is no change to previously reported information.

### Agencies, Localities, and Other Entities Particularly Affected

*Please list all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously-reported information, include a specific statement to that effect.*

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There is no change to previously reported information.

### Public Comment

*Please summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Ensure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency or board. If no comment was received, enter a specific statement to that effect.*

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We have not received comments on this regulation.

**Detail of Changes Made Since the Previous Stage**

*Please list all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. \* Please put an asterisk next to any substantive changes.*

No changes have been made to the text since the proposed stage was published in the Virginia Register of Regulations. However, the Agency Background Document has now been updated to reflect the change from amending an existing regulation (to add the definition of express advocacy to 1 VAC 20-90-10 *Definitions*) to enacting a new regulation, 1 VAC 20-90-30.

**Detail of All Changes Proposed in this Regulatory Action**

*Please list all changes proposed in this action and the rationale for the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. \* Please put an asterisk next to any substantive changes.*

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
	1 VAC 20-90-30	Express Advocacy	Add a definition of “express advocacy” to the State Board of Elections’ regulations. Currently the reserved chapter does not include any definitions. This regulatory action would insert the definition of express advocacy, as described in the text of the regulation, into the regulations. Both the State Board of Elections and the Department of Elections will refer to this definition to distinguish between advertisements that can be regulated because they expressly advocate for the election or defeat of a named candidate, and communications that cannot be regulated as they do not expressly advocate for a named candidate.