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Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Department of Elections
Virginia Administrative Code (VAC) citation(s)	1 VAC 20-90-10
Regulation title(s)	Definitions
Action title	Express Advocacy
Date this document prepared	August 3, 2018

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 VAC 7-10), 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 the subject matter, intent, and goals of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an 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.

1 VAC 20-90-10 has been reserved for definitions relating to campaign finance. 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 or technical definitions used in the Agency Background Document .

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

Mandate and Impetus

Please identify the mandate for this regulatory change, and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, board decision, etc.). For purposes of executive branch review, “mandate” has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), “a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

The Code of Virginia §24.2-946 requires the State Board of Elections (the Board) to summarize election laws relating to the CFDA for candidates and committees.

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.

The Virginia Department of Elections is promulgating this regulation on behalf of the Board, which 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 describe the specific reasons why the agency has determined that this regulation 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.

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 that are being considered, the substantive changes to existing sections that are being considered, or both.

This regulatory action seeks to include the definition of “express advocacy” in the Virginia Administrative Code. The proposed definition is taken verbatim from federal regulations governing campaign finance, so the exact text is:

“The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

- “Express advocacy” includes any communication that uses phrases such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot for,’ ‘Smith for Congress,’ ‘vote against,’ ‘defeat,’ ‘reject’ or any variations thereof, or any communication when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) 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 candidate(s).”

Alternatives

Please describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.

No alternative action was considered because the Code of Virginia authorizes the State Board of Elections to promulgate regulations to promote the uniform application of election law throughout the Commonwealth, and because the Board unanimously approved the decision to submit this regulation verbatim.

Periodic Review and Small Business Impact Review Announcement

This NOIRA is not being used to announce a periodic review or a small business impact review.

Public Participation

The State Board of Elections is seeking comments on this regulation, including but not limited to: ideas to be considered in the development of this regulation, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation. Also, the Board is also 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) the probable effect of the regulation on affected small businesses; and 3) the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at <https://www.townhall.virginia.gov>. Written comments must include the name and address of the commenter. Comments may also be submitted by mail, email or fax to

Arielle A. Schneider

by mail at 1100 Bank Street 1st Floor, Richmond Virginia 23219

by phone at (804) 864-8933

via email at Arielle.Schneider@elections.virginia.gov

or fax (804) 371-0194.

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 the proposed stage of this regulatory action, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://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.