

Adverse impact notification sent to Joint Commission on Administrative Rules, House Committee on Appropriations, and Senate Committee on Finance (COV § 2.2-4007.04.C): Yes<sup>1</sup>  Not Needed

If/when this economic impact analysis (EIA) is published in the *Virginia Register of Regulations*, notification will be sent to each member of the General Assembly (COV § 2.2-4007.04.B).



## Virginia Department of Planning and Budget Economic Impact Analysis

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**1 VAC 20-90 Campaign Finance and Political Advertisements**  
**Department of Elections**  
**Town Hall Action/Stage: 5096 / 8523**  
March 29, 2019

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### Summary of the Proposed Amendments to Regulation

The State Board of Elections (Board) proposes to adopt the federal definition of “express advocacy.” The definition of express advocacy is important in determining if disclosure statements need to be made in advertisements.

### Result of Analysis

Whether the benefits exceed the costs depend on the policy views of the observer. Detailed analysis of the benefits and costs can be found in the next section.

### Estimated Economic Impact

Generally speaking, disclosure statements identify the person(s) or organization(s) that has paid for the advertisement. Code of Virginia § 24.2-955 states that disclosure requirements for political campaign advertisements apply to any sponsor of an advertisement in the print media or on radio or television the cost or value of which constitutes an **expenditure** or **contribution**.<sup>2</sup> “Expenditure” is defined in § 24.2-945.1 as:

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<sup>1</sup> Adverse impact is indicated if there is any increase in net cost for any entity, even if the benefits exceed the costs for all entities combined.

<sup>2</sup> The Code section exempts “(i) an individual who makes independent expenditures aggregating less than \$1,000 in an election cycle for or against a candidate for statewide office or less than \$200 in an election cycle for or against a candidate for any other office or (ii) an individual who incurs expenses only with respect to a referendum.”

money and services of any amount, and any other thing of value, paid, loaned, provided, or in any other way disbursed by any candidate, campaign committee, political committee, or person for the purpose of **expressly advocating** the election or defeat of a clearly identified candidate or by any inaugural committee for the purpose of defraying the costs of the inauguration of a Governor, Lieutenant Governor, or Attorney General.

“Contribution” is defined in § 24.2-945.1 as:

money and services of any amount, in-kind contributions, and any other thing of value, given, advanced, loaned, or in any other way provided to a candidate, campaign committee, political committee, or person for the purpose of **expressly advocating** the election or defeat of a clearly identified candidate or to an inaugural committee for the purpose of defraying the costs of the inauguration of a Governor, Lieutenant Governor, or Attorney General. "Contribution" includes money, services, or things of value in any way provided by a candidate to his own campaign and the payment by the candidate of a filing fee for any party nomination method.

Thus, the definition of express advocacy is important in determining if disclosure statements need to be made in political campaign advertisements.

The Board currently uses the following definition for express advocacy:

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.

There has been concern that this definition has provided a loophole by effectively permitting the absence of disclosure statements for political advertising that is intended to affect the outcome of an election, but does not use the specific wording listed above.

Consequently, the Board proposes to adopt the federal definition of “express advocacy,” which is expected to close the loophole. This definition includes the specific wording above, and adds:

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 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.

The proposed new definition does appear to close the loophole, and would require that more advertising be accompanied with disclosure statements. For those who believe the more transparent political campaigns and their associated advertising are, the better, the Board's proposed new definition would produce a net benefit. For those who believe privacy should trump transparency, the proposed new definition of "express advocacy" would not be beneficial.

**Businesses and Entities Affected**

The proposed amendment affects persons and organizations that pay for political advertisements.

**Localities Particularly Affected**

The proposed amendment does not disproportionately affect particular localities.

**Projected Impact on Employment**

The proposed amendment is unlikely to affect employment.

**Effects on the Use and Value of Private Property**

The proposed amendment is unlikely to significantly affect the use and value of private property.

**Real Estate Development Costs**

The proposed amendment is unlikely to affect real estate development costs.

**Small Businesses:****Definition**

Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as "a business entity, including its affiliates, that (i) is independently owned and operated and (ii) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million."

**Costs and Other Effects**

The proposed amendment is unlikely to significantly affect costs for small businesses.

**Alternative Method that Minimizes Adverse Impact**

The proposed amendment is unlikely to adversely affect small businesses.

**Adverse Impacts:****Businesses:**

The proposed amendment is unlikely to adversely affect businesses.

**Localities:**

The proposed amendment is unlikely to adversely affect localities.

**Other Entities:**

The proposed amendments is unlikely to adversely affect other entities.

**Legal Mandates**

**General:** The Department of Planning and Budget has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 14 (as amended, July 16, 2018). Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the report should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

**Adverse impacts:** Pursuant to Code § 2.2-4007.04(C): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance within the 45-day period.

If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.