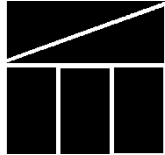


Adverse impact notification sent to Joint Commission on Administrative Rules, House Committee on Appropriations, and Senate Committee on Finance (COV § 2.2-4007.04.C): Yes¹ Not Needed

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

18 VAC 60-21 Regulations Governing the Practice of Dentistry
Department of Health Professions
Town Hall Action/Stage: 4920/8500
April 11, 2019

Summary of the Proposed Amendments to Regulation

The Board of Dentistry (Board) proposes to modify the restrictions on advertising by: (1) amending an existing restriction on claims of professional superiority, (2) striking the specific prohibition that limited advertisements of dental specialties only to specialties approved by the American Dental Association (ADA), and (3) replacing another regulatory limitation on specialty advertising with a requirement that an advertisement not violate § 54.1-2718 of the *Code of Virginia*.

Result of Analysis

There are insufficient data to accurately compare the magnitude of the benefits versus the costs. Detailed analysis of the benefits and costs can be found in the next section. A different design would likely yield the same benefits at lower cost for at least one proposed change.

Estimated Economic Impact

The Board issues a license for general dentistry. No separate license is issued for dental specialties. However, there are dentists who have training, possess experience, and practice in a specialty area. Current regulation allows advertising to contain a claim about a specialty only if

¹ 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.

the dentist is entitled to such specialty designation by the ADA, which recognizes only nine specialties.² In 2016, the Board received a petition for rulemaking requesting that the American Board of Dental Specialties also be included in the advertising regulations along with the ADA and that the Board immediately recognize specialists in implant dentistry certified by the American Board of Oral Implantology/Implant Dentistry. The petitioner noted a recent decision in federal court that the Texas State Board of Dental Examiners could not prohibit two dentists from advertising themselves as “specialists” in implant dentistry simply because implantology was not among the nine specialties recognized by the ADA.³

In this action, the Board proposes to make three changes to the requirements that prohibit false, deceptive, and misleading advertisements. First, the Board proposes to amend an existing restriction on claims of professional superiority, by replacing the term “false” with “unsubstantiated.” Board staff indicate this is a more effective standard when evaluating claims of professional superiority, such as an advertisement containing a claim to be the “best” dentist. Second, the Board proposes to strike the specific prohibition that has heretofore limited advertisements regarding dental specialties only to those specialties approved by the ADA. Board staff state that the Board does not wish to endorse specialties recognized by various organizations. Third, the Board proposes to replace another regulatory limitation, that prohibited certain representations about specialty services by dentists who did not have a current specialty designation, with a requirement that an advertisement not violate § 54.1-2718 of the *Code of Virginia*; violations of that statute would now be a regulatory violation. The referenced statute restricts the use of trade names, including how ADA specialties may be used to describe the practice.

The degree to which the proposed change is beneficial depends upon the extent to which the Board will no longer regulate the use of specialty designations in advertisements. The changes would confer a direct benefit on the Board if they prevent litigation such as has occurred in Texas. The changes would also confer a direct benefit on dentists who have gained specialty expertise in areas other than those approved by the ADA if they can now advertise their

² These specialties are Dental Public Health, Endodontics, Oral and Maxillofacial Pathology, Oral and Maxillofacial Radiology, Oral and Maxillofacial Surgery, Orthodontics and Dentofacial Orthopedics, Pediatric Dentistry, Periodontics, and Prosthodontics.

³ Source: Department of Health Professions.

specialty. On the other hand, dentists with an ADA designation would likely face increased competition as a result of advertising by dentists with non-ADA specialties.

However, these potential benefits would be lessened to the extent that the Board continues to regulate the use of specialty designations in advertisements. This could occur either in response to a complaint that a dentist has made “an unsubstantiated claim of professional superiority” because of an advertisement claiming to be a specialist. If the Board determines that a claim about a specialty designation could constitute an “unsubstantiated” claim, then the removal of the specific language that references ADA specialties would introduce uncertainty for dentists who wish to determine which claims regarding specialties are permissible. Board staff indicate that it would review the education and the experience of a dentist to determine if there is an unsubstantiated claim of professional superiority in those cases. Nonetheless, whether such a claim will be deemed unsubstantiated will not be known until the Board makes its determination.

Businesses and Entities Affected

There are 7,463 licensed dentists in Virginia. According to Board staff, 421 complaints were received in Fiscal Year (FY) 2017, and 441 in FY 2018. Of those, 203 were in the case category of "Business practices" in FY 2017 and 165 in FY 2018. Business practices is a broad category that includes advertising but also includes complaints about record-keeping, etc. However, the exact number of these complaints alleging false advertising is not tracked by the Board.

Localities Particularly Affected

The proposed regulation will not affect any particular locality more than others.

Projected Impact on Employment

The proposed changes should not have a significant impact on employment.

Effects on the Use and Value of Private Property

No significant effect on the use and value of private property is expected.

Real Estate Development Costs

No impact on real estate development costs is expected.

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 vast majority of the dentists are small businesses. To the degree that specialty advertisements are deemed to violate the restriction on unsubstantiated claims then the proposed language would introduce uncertainty for dentists wishing to advertise their specialty. In addition, small dental practices with a member who has an ADA designation, and previously advertised that designation, would likely face increased competition as a result of advertising by dentists with non-ADA specialties. The impact on small dental practices with members who do not have an ADA specialty designation are the same as discussed above.

Alternative Method that Minimizes Adverse Impact

The proposed regulation would introduce uncertainty for dentists who are specialists and who want to advertise their specialty. The Board could reduce this uncertainty to a large extent by adding minimal language stating the factors or principles it would consider or follow in determining what constitutes an “unsubstantiated claim of professional superiority.”

Adverse Impacts:**Businesses:**

The impact is the same as noted above for small businesses,

Localities:

The proposed regulation will not adversely affect localities.

Other Entities:

The proposed regulation will not 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.