Virginia Regulatory Town Hall

Emergency Regulation
Agency Background Document

Agency Name:	Alcoholic Beverage Control Board
VAC Chapter Number:	3 VAC 5-50
Regulation Title:	Retail Operations
Action Title:	Lewd or Disorderly Conduct
Date:	January 6, 2003

Section 9-6.14:4.1(C)(5) of the Administrative Process Act allows for the adoption of emergency regulations. Please refer to the APA, Executive Order Twenty-Four (98), and the *Virginia Register Form, Style and Procedure Manual* for more information and other materials required to be submitted in the emergency regulation submission package.

Emergency Preamble

Please provide a statement that the emergency regulation is necessary and provide detail of the nature of the emergency. Section 9-6.14:4.1(C)(5) of the Administrative Process Act states that an "emergency situation" means: (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. The statement should also identify that the regulation is not otherwise exempt under the provisions of § 9-6.14:4.1(C)(4).

Please include a brief summary of the emergency action. There is no need to state each provision or amendment.

The United States Court of Appeals for the Fourth Circuit recently ruled in *Carandola v. Bason*, that North Carolina's ABC regulations governing nudity in licensed establishments, which are similar in may respects to Virginia's regulations, were constitutionally overbroad and therefore unenforceable. North Carolina's petition to rehear this matter was recently denied.

The Office of the Attorney General believes that current ABC regulations banning lewd and disorderly conduct in licensed facilities are reasonable time, place and manner restrictions that constitutionally target the well-documented secondary effects of adult establishments. They also believe that lap dancing is conduct, not expression within the meaning of the First Amendment,

and that such conduct can be regulated in ABC licensed facilities. The current regulations, however, are at risk of being declared facially unconstitutional unless they are narrowed to target only those adult establishments that regularly feature nudity, and to narrow the type of conduct that may be regulated

The Code of Virginia permits the ABC Board to amend and narrow the scope of its regulations banning lewd and disorderly conduct in licensed facilities and to do so on an emergency basis without going through the time-consuming procedures of the Administrative Process Act ("APA"). Section 2.2-4011 of the APA permits regulatory changes to be exempt from the APA in a situation "involving an imminent threat to public health or safety," and the regulation is not exempt under the provision of § 2.2-4012.

Unless Virginia's regulations are narrowed to satisfy the Court's concerns about overbreadth in *Carandola v. Bason*, the regulations may be constitutionally vulnerable and subject to invalidation by state or federal courts. There is currently such a challenge pending before the Henrico County Circuit Court, and a complaint raising a constitutional challenge to the regulation has recently been filed in the United States District Court for the Eastern District of Virginia. With a narrowing of the regulations, the ABC Board and the Office of the Attorney General are confident that the regulations can withstand constitutional scrutiny. The Board finds that there exists a situation involving an imminent threat to public health or safety if the regulations are not amended on an emergency basis. The various negative effects of the regulated conduct on public health and safety are detailed in the section entitled "Substance" below.

Basis

Please identify the state and/or federal source of legal authority to promulgate the emergency regulation. The discussion of this emergency statutory authority should: 1) describe its scope; and 2) include a brief statement relating the content of the statutory authority to the specific regulation. Full citations of legal authority and web site addresses, if available for locating the text of the cited authority, should be provided.

Please provide a statement 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.

Section 4.1-103 of the Code of Virginia grants the Alcoholic Beverage Control Board general authority to promulgate regulations, to grant, suspend, and revoke licenses, and to do all acts necessary or advisable to carry out the purposes of Title 4.1. Section 4.1-111 authorizes the Board to promulgate reasonable regulations, not inconsistent with law, which it deems necessary to carry out the provisions of Title 4.1. Section 4.1-225 provides that the Board may suspend or revoke the license of any licensee who has allowed any noisy, lewd or disorderly conduct upon the licensed premises. The purpose of this regulation is to clarify and define specified conduct prohibited upon licensed premises. 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.

Substance

Please detail any changes, other than strictly editorial changes, that would be implemented. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate. Please provide a cross-walk which includes citations to the specific sections of an existing regulation being amended and explain the consequences of the proposed changes. The statement should set forth the specific reasons the agency has determined that the proposed regulatory action would be essential to protect the health, safety or welfare of Virginians. The statement should also delineate any potential issues that may need to be addressed as a permanent final regulation is developed.

The emergency regulation would amend 3 VAC 5-50-140, which limits regulates nudity and sexually oriented conduct on licensed premises. Substantive changes to the regulation include the addition of language at the beginning and end of the section limiting its application to sexually oriented businesses and making clear that it does not apply to art or theatrical performances having serious literary, artistic, scientific, or political value. The amendments also more clearly define the terms "a platform or stage" and "reasonable separated" as used in the regulations. The regulation sets two different levels of nudity permitted on licensed premises based upon whether the performer is on a platform or stage and reasonably separated from the patrons of the establishment. The emergency regulation will require that a platform or stage must be at least 18 inches high, and nude performers must keep at least 3 feet from any patron.

The Board has adopted the following, explaining in detail the specific reasons it has determined that this regulatory action is essential to protect the health, safety or welfare of Virginians:

WHEREAS, the United States Supreme Court recognized in 1972 that illicit, unsanitary, and illegal sexual conduct occurs in sexually oriented businesses, including those establishments that sell liquor, *see California v. LaRue*, 409 U.S. 109, 111 (1972) (describing illicit "sexual conduct between dancers and customers" which included oral copulation and prostitution, as well as public masturbation, indecent exposure, attempted rape, rape, and assaults on law enforcement officers); *see also Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976), *Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991) (noting cases of prostitution linked with nude dancing establishments); and

WHEREAS, the Supreme Court has repeatedly stated that society's interest in protecting sexually oriented expression "is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate" because "few of us would march our sons and daughters off to war to preserve the citizen's right to see "Specified Sexual Activities" exhibited in the [venues] of our choice," *Young*, 427 U.S. at 70 (plurality opinion); *Renton*, 475 U.S. at 50 (quoting *Young*); and

WHEREAS, the Supreme Court has held that a governmental entity may "reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult

entertainment establishment" in a community, *see City of Erie v. Pap's A.M.*, 529 U.S. 277, 297 (2000); and

WHEREAS, the United States Court of Appeals for the Fourth Circuit, citing *California v. LaRue*, explained in 1999 that, "In fact, nude and topless barroom dancing have a long history of spawning deleterious effects. They encourage prostitution and the criminal abuse and exploitation of young women," *Steakhouse, Inc. v. City of Raleigh*, 166 F.3d 634 (4th Cir. 1999) (noting that hundreds of police calls to local adult businesses "involved not simply lascivious conduct but drunken driving, larcenies, assaults, and narcotics use. The First Amendment does not foreclose communities from taking modest precautions against the secondary maladies of nude or topless barroom dancing."); and

WHEREAS, the Fourth Circuit has also noted that it is "well-established that the regulation of nudity in public places advances a substantial governmental interest in maintaining order and morality," *D.G. Restaurant Corp. v. Myrtle Beach*, 953 F.2d 140, 145 (4th Cir. 1991); *see also Mermaids, Inc. v. Currituck County*, 19 F.Supp.2d 493, 497 (E.D. N.C. 2002); and

WHEREAS, the Fourth Circuit has stated that, "In assessing the reasonableness of local legislative determinations of ends and means under this quite deferential standard of constitutional review, we may not confine the local legislature to only what it knows and can foresee from purely local conditions already experienced. Legislatures can no more be held bound not to know what the whole world knows than can courts; legislative notice of facts must be deemed to run at least as wide as does judicial notice." *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165, 1169 (4th Cir. 1986); and

WHEREAS, the Fourth Circuit recently explained that regulatory agencies seeking to preserve societal order and morality and the protection of communities against the negative secondary effects of sexually oriented businesses can adopt "narrower regulations, targeting only those venues where secondary effects are likely to arise," *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, *25 (4th Cir. 2002); and

WHEREAS, the Board intends, in amending its regulations, to preserve societal order and morality and to protect Virginia communities against the negative secondary effects of sexually oriented alcohol licensed establishments by adopting narrow regulations tailored to affect only those venues offering activities similar to the activities "at issue in *Renton*, *Young v. American Mini Theatres*, *Inc.*, and *California v. LaRue*," *City of Erie*, 529 U.S. at 296-297; and

WHEREAS, the Board intends to apply the following regulations only at those establishments which regularly feature sexually oriented conduct as one of its principal business purposes, *see FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 259-260 (1990) (Scalia, J., concurring in part and dissenting in part) (narrowly construing the term "regularly" in the context of sexually oriented business regulations); and

WHEREAS, the Board finds that sexually oriented businesses are frequently used for illicit sexual activities, including prostitution and sexual liaisons of a casual nature, and the concern over sexually transmitted diseases is a legitimate health concern of the Commission which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens; and

WHEREAS, conduct regulations are a legitimate and reasonable means of accountability to ensure that operators of sexually oriented businesses licensed to sell alcohol comply with reasonable regulations and to ensure that operators do not knowingly allow their establishments to be used as places of illegal sexual activity or solicitation; and

WHEREAS, there is convincing documented evidence that sexually oriented businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding areas adjacent to them, causing crime and other adverse effects; and

WHEREAS, it is not the intent of the Board to condone or legitimize the distribution of obscene materials or performances of obscene conduct; and

WHEREAS, the Board recognizes its constitutional duty to interpret, construe, and amend its laws and ordinances to comply with constitutional requirements as they are announced; and

WHEREAS, with the passage of any regulations, the Board accepts as binding the application of general principles of criminal and civil law and procedure and the rights and obligations under the United States and Virginia Constitutions, Virginia Revised Code, and the Virginia Rules of Civil and Criminal Procedure; and

WHEREAS, it is not the intent of this regulation to suppress any speech activities protected by the First Amendment of the U.S. Constitution or Article I, § 12 of the Virginia Constitution, but to enact a content neutral regulation which addresses the secondary effects of sexually oriented businesses.

NOW, THEREFORE, BE IT ORDAINED by the Virginia Alcoholic Beverage Commission that 3 VAC 5-50-140 be amended as follows:

Section 1. Purpose and Findings.

(A) Purpose. It is the purpose of these regulations to regulate sexually oriented alcohol-licensed establishments in order to promote the health, safety, morals, and general welfare of the citizens of the Commonwealth, and to establish reasonable and uniform regulations to prevent the deleterious secondary effects of sexually oriented businesses within the Commonwealth. The provisions of this regulation have neither the purpose nor effect of imposing a limitation or restriction on the content or reasonable access to any communicative materials, including sexually oriented materials. Similarly, it is neither the intent nor effect of this regulation to restrict or deny access by adults to sexually oriented

materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of this regulation to condone or legitimize obscene conduct.

(B) Findings. Based on evidence of the adverse secondary effects of sexually oriented businesses presented in reports made available to the Board, and on findings incorporated in the cases of *Pap's A.M. v. City of Erie,* 529 U.S. 277 (2000); *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), *Young v. American Mini Theatres*, 426 U.S. 50 (1976), *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991); *California v. LaRue*, 409 U.S. 109 (1972); *City of Erie v. Pap's A.M*, 529 U.S. 277 (2000); *Allno Enters. v. Baltimore County*, 2001 U.S. App. LEXIS 11522 (4th Cir. 2001); *Steakhouse, Inc. v. City of Raleigh*, 2001 U.S. App. LEXIS 1544; *Mom N Pops, Inc. v. City of Charlotte*, 1998 U.S. App. LEXIS 20272; *D.G. Restaurant Corp v. Myrtle Beach*, 953 F.2d 140 (1992); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979); as well as all the cases cited in the preceding preamble; and reports of secondary effects occurring in and around sexually oriented businesses, including, but not limited to, Phoenix, Arizona – 1979; Minneapolis, Minnesota-1980; Houston, Texas - 1997; Indianapolis, Indiana – 1984; Amarillo, Texas; Garden Grove, California - 1991; Los Angeles, California - 1977; Whittier, California - 1978; Austin, Texas - 1986; Seattle, Washington - 1989; Oklahoma City, Oklahoma - 1986; Cleveland, Virginia - ; and Dallas, Texas - 1997; St. Croix County, Wisconsin - 1993; Bellevue, Washington, - 1998; Newport News, Virginia - 1996; New York Times Square – 1994; Phoenix, Arizona – 1995-98; and also on findings from the paper entitled "*Stripclubs According to Strippers: Exposing Workplace Sexual Violence*," by Kelly Holsopple, Program Director, Freedom and Justice Center for Prostitution Resources, Minneapolis, Minnesota, from *"Sexually Oriented Businesses: An Insider's View,"* by David Sherman, presented to the Michigan House Committee on Ethics and Constitutional Law, Jan. 12, 2000; from the *Expert Report of Dr. Richard McCleary*, Professor of Social Ecology, dated October 22, 2002, from the *Report of Dr. Peter R. Hecht to the Board of Supervisors of Henrico County, Virginia; The Secondary Impacts of Sexually Oriented Businesses* (March 12, 2002), and *The Report of the Attorney General's Working Group On The Regulation Of Sexually Oriented Businesses,* (June 6, 1989, State of Minnesota), the Virginia ABC Board hereby incorporates these findings, judicial conclusions, and constitutional limitations of the cases in the preceding preamble, and additionally find:

(1) Sexually oriented businesses lend themselves to ancillary unlawful and unhealthy activities that are presently inadequately controlled by the operators of licensed establishments.

(2) Certain employees and independent contractors of sexually oriented businesses engage in certain types of illicit sexual behavior on the premises of the establishments.

(3) Sexual acts, including masturbation, and oral and anal sex, occur at unregulated sexually oriented businesses, especially those which provide private or semi-private areas or cubicles for live sexually oriented shows.

(4) Offering and providing such unregulated space encourages such activities, which creates unhealthy conditions.

(5) Persons frequent certain sexually oriented businesses for the purpose of engaging in illicit sexually oriented contact on and off the premises of such establishments, or for the purpose of purchasing or selling illicit drugs.

(6) Numerous communicable diseases may be spread by activities occurring in sexually oriented businesses, including, but not limited to, syphilis, gonorrhea, human immunodeficiency virus infection (HIV-AIDS), genital herpes, hepatitis salmonella, campylobacter and shigella infections, chlamydial, myoplasmal and ureoplasmal infections, trichomoniasis and chancroid. According to the United States Department of Health & Human Services, AIDS and HIV infection, as well as syphilis and gonorrhea, are principally transmitted through intimate sexual acts.

(7) Sanitary conditions in some sexually oriented businesses are unhealthy, in part, because the activities conducted there are unhealthy, and, in part, because of the unregulated nature of the activities and the failure of the owners and the operators of the facilities to self-regulate those activities and maintain those facilities. Numerous reports have determined that semen is found in areas of sexually oriented businesses where persons view sexually oriented live performances and films.

(8) The findings noted in paragraphs number 1 through 7 raise substantial governmental concerns.

(9) Sexually oriented businesses have operational characteristics that should be reasonably regulated in order to protect those substantial governmental concerns.

(10) It is appropriate to impose reasonable conduct regulations to ensure that the licensee in possession and control of the licensed premises prevents illicit activities from occurring therein. The general welfare, health, morals and safety of the citizens of the Commonwealth will be promoted by the enactment of this regulation.

Section 2. Amendments to Regulation.

3VAC5-50-140. ~~Lewd or disorderly conduct~~ Prohibited conduct on licensed premises.

A. The following lewd and disorderly conduct is prohibited upon licensed premises that regularly feature live sexually oriented conduct where persons, whether employees, independent contractors, lessees or otherwise, regularly display any portion of the female breast below the top of the areola:

~~While not limited thereto, the board shall consider the following conduct upon any licensed premises to constitute lewd or disorderly conduct:~~

1. The real or simulated display of any portion of the genitals, pubic hair or buttocks, or any portion of the breast below the top of the areola, by any employee, or by any other person; except that when entertainers are on a platform or stage at least eighteen

inches high and ~~reasonably separated~~ at least three feet from ~~the~~ any patrons of the establishment, they shall be in conformity with subdivision 2;

2. The real or simulated display of any portion of the genitals, pubic hair or anus by an entertainer, or any portion of the areola of the breast of a female entertainer. When not on a platform or stage at least eighteen inches high and ~~reasonably separate~~ at least three feet from ~~the~~ any patrons of the establishment, entertainers shall be in conformity with subdivision 1;

3. Any real or simulated act of sexual intercourse, sodomy, masturbation, flagellation or any other sexual act prohibited by law, by any person, whether an entertainer or not; or

4. The fondling or caressing by any person, whether an entertainer or not, of his own or of another's breast, genitals or buttocks.

B. The provisions of this section shall not apply to a theater, concert hall, art center, museum, or similar establishment which is primarily devoted to the arts or theatrical performances and in which any of the circumstances contained in this section were permitted or allowed as part of such art exhibits or performances, expressing a matter of serious literary, artistic, scientific or political value.

Alternatives

Please describe the specific alternatives that were considered and the rationale used by the agency to select the least burdensome or intrusive method to meet the essential purpose of the action.

The purpose of the action is to avoid First Amendment challenges to the existing regulation on the grounds that it is overbroad. There was no alternative identified less intrusive than limiting the application to sexually oriented businesses.

Family Impact Statement

Please provide a preliminary analysis of the potential impact of the emergency action on the institution of the family and family stability including to what extent the action will: 1) strengthen or erode the authority and rights of parents in the education, nurturing, and supervision of their children; 2) encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one's spouse, and one's children and/or elderly parents; 3) strengthen or erode the marital commitment; and 4) increase or decrease disposable family income.

While the regulation itself might have some impact on the marital relationship as it seeks to limit the negative secondary effects of sexually oriented businesses, such as illicit sexual activity, and sexually transmitted disease, the emergency action itself should have no impact on the institution of the family, since it merely seeks to clarify existing law.