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Emergency Regulation and Notice of Intended Regulatory Action (NOIRA) Agency Background Document

Agency name	Alcoholic Beverage Control Board
Virginia Administrative Code (VAC) citation	3 VAC 5 -50
Regulation title	Retail Operations
Action title	Nudity and Related Activity on Licensed Premises
Date this document prepared	August 30, 2007

This form is used when an agency wishes to promulgate an emergency regulation (to be effective for up to one year), as well as publish a Notice of Intended Regulatory Action (NOIRA) to begin the process of promulgating a permanent replacement regulation.

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Preamble

The APA (Code of Virginia § 2.2-4011) states that an "emergency situation" is: (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.

- 1) Please explain why this is an "emergency situation" as described above.
- 2) Summarize the key provisions of the new regulation or substantive changes to an existing regulation.

On August 2, 2007, Judge Walter D. Kelley, Jr., of the United States District Court for the Eastern District of Virginia entered a preliminary injunction, enjoining the Alcoholic Beverage Control Board and its agents from enforcing 3 VAC 5-50-140, as well as those portions of §§ 4.1-225, 4.1-226, and 4.1-325 of the Code of Virginia which prohibit lewd conduct on licensed premises and nudity and topless entertaining at mixed beverage establishments in Virginia. The court found that these provisions of the law were facially

unconstitutional because they are overbroad. This ruling follows the decision of the United States Court of Appeals for the Fourth Circuit in the case of Carandola v. Fox, 470 F.3d 1074 (2006), which held similar North Carolina laws overbroad because the statute did not contain an exemption for legitimate artistic expression. In its order enjoining enforcement of the current Virginia laws and regulation, the District Court indicated that the Alcoholic Beverage Control Board could move for dissolution of the preliminary injunction should the Commonwealth enact a statute or regulation that complies with the standards set forth in Carandola.

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 on the health, safety and welfare of the public. Without the enjoined Code and regulation provisions, there is currently no state law or regulation governing sexually oriented entertainment at establishments licensed for the sale of alcoholic beverages, presenting an imminent threat to public health and safety.

This emergency action will make three substantive changes to 3 VAC 5-50-140, to conform it to the Carandola decision and restore the status quo with respect to the regulation of nudity and sexually oriented behavior in licensed establishments. First, it will add an exemption to the restrictions for legitimate theatrical performances and other performances involving serious literary, artistic, scientific, or political expression. Second, it will prohibit nudity on mixed beverage licensed premises, as currently prohibited by the enjoined statutory provisions. Finally, it will define the term "reasonably separated" as used in the existing portion of the regulation, to more clearly define the separation which must be maintained between nude entertainers and patrons in licensed establishments.

Legal basis

Other than the emergency authority described above, please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly chapter number(s), if applicable, and 2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Title 4.1 of the Code of Virginia gives the Alcoholic Beverage Control Board general authority to regulate the manufacture, distribution and sale of alcoholic beverages within the Commonwealth, including the authority to promulgate regulations which it deems necessary to carry out the provisions of Title 4.1, in accordance with the Administrative Process Act. The Code mandates that the Board promulgate regulations, but details are left to the Board's discretion.

Purpose

Please describe the subject matter and intent of the planned regulatory action. Also include a brief explanation of the need for and the goals of the new or amended regulation.

It is the purpose of this regulation to regulate sexually oriented conduct at 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.

Need

Please detail the specific reasons why the agency has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens. In addition, delineate any potential issues that may need to be addressed as the regulation is developed.

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 board which demands reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens. 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. 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.

Substance

Please detail any changes that will be proposed. Please outline new substantive provisions, all substantive changes to existing sections, or both where appropriate.

For changes to existing regulations, use this chart:

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
3 VAC 5-50-140		Entertainers displaying any portion of the genitals, pubic hair or buttocks, or any portion of the breast below the top of the areola must be on a stage and reasonably separate from patrons. No real or simulated sex acts or fondling of breasts, buttocks, or genitals.	"Reasonably separate" is defined as having no portion of the entertainers body in contact with any portion of a patron's body. Definition provided to allow clear guidance to licensees on expected conduct. Exemption provided for theaters and similar venues for performances having literary, artistic, scientific, or political value. This provision is necessary under court decisions to protect regulation for overbreadth challenge. No one allowed on mixed beverage premises with less than a fully opaque covering of the breasts, buttocks, and genitals. Replaces current Code provisions enjoined as overbroad because of lack of exemption for legitimate expression.

Alternatives

Please describe all viable alternatives to the proposed regulatory action that have been or will be considered to meet the essential purpose of the action. Also describe the process by which the agency has considered or will consider, other alternatives for achieving the need in the most cost-effective manner.

The board has considered taking no action, but does not view that as a viable alternative. The failure to take action leaves no enforceable regulation of these activities, which present an imminent risk to public safety. The adoption of the emergency regulation restores the status quo prior to the court injunction. The board will consider any viable alternatives identified during the development of the permanent regulation, in discussions with the advisory committee and considering public comment received.

Public participation

Please indicate the agency is seeking comments on the intended regulatory action, to include ideas to assist the agency in the development of the proposal and the costs and benefits of the alternatives stated in this notice or other alternatives. Also, indicate whether a public meeting is to be held to receive comments on this notice.

The board is seeking comments on the intended regulatory action, including but not limited to 1) ideas to assist in the development of a proposal, 2) the costs and benefits of the alternatives stated in this background document or other alternatives and 3) potential impacts of the regulation. 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) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments for the public comment file may do so by mail, email or fax to **Jeffrey L. Painter, Post Office Box 27491, Richmond, Virginia 23261, telephone (804) 213-4621, fax (804) 213-4411, e-mail jeffrey.painter@abc.virginia.gov**. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last day of the public comment period.

A public meeting will not be held pursuant to an authorization to proceed without holding a public meeting.

Participatory approach

Please indicate the extent to which an ad hoc advisory group will be used in the development of the proposed regulation. Indicate that 1) the agency is not using the participatory approach in the development of the proposal because the agency has authorized proceeding without using the participatory approach; 2) the agency is using the participatory approach in the development of the proposal; or 3) the agency is inviting comment on whether to use the participatory approach to assist the agency in the development of a proposal.

The board is using the participatory approach to develop a proposal. Persons interested in assisting in the development of a proposal should notify the department contact person by the end of the comment period and provide their name, address, phone number, email address and the organization you represent (if any). The primary function of the advisory committee is to develop recommended regulation amendments for Department consideration through the collaborative approach of regulatory negotiation and consensus. Notification of the composition of the advisory committee will be sent to all applicants.

Family impact

Assess the potential impact of the proposed regulatory action on the institution of the family and family stability including to what extent the regulatory 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.

The prohibition of sexual acts and limiting contact between patrons and nude entertainers should serve to strengthen the marital commitment, particularly by limiting prostitution and the opportunity for the transmission of sexually transmitted diseases.