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Proposed Regulation Agency Background Document

Agency name	Board of Dentistry, Department of Health Professions
Virginia Administrative Code (VAC) Chapter citation(s)	18VAC60-21
VAC Chapter title(s)	Regulations Governing the Practice of Dentistry
Action title	Advertising restrictions
Date this document prepared	12/19/18

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 (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.

Section 18VAC60-21-80 specifies the regulations for advertising one's dental practice. Subsection G (3) of section 80 is amended to replace the word "false" with "unsubstantiated" and delete all of the language about use of a term that designates a dental specialty. Subsection G (4) is modified to delete language relating to specialty certification and to refer to the provisions of the Code of Virginia, which address the use of trade names.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

N/A

Mandate and Impetus

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, or board decision). 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the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part.”

This issue began with a petition for rulemaking requesting that the American Board of Dental Specialties be included in the advertising regulations along with the American Dental Association 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 officially recognized specialties of the American Dental Association. Board counsel advised that the current regulation is subject to a legal challenge and should be amended.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency’s overall regulatory authority.

Regulations are promulgated under the general authority of Chapter 24 of Title 54.1 of the Code of Virginia. Section 54.1-2400, which provides the Board of Dentistry the authority to promulgate regulations to administer the regulatory system:

§ 54.1-2400 -General powers and duties of health regulatory boards
The general powers and duties of health regulatory boards shall be:

- 1. To establish the qualifications for registration, certification or licensure in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.*
- 2. To examine or cause to be examined applicants for certification or licensure. Unless otherwise required by law, examinations shall be administered in writing or shall be a demonstration of manual skills.*
- 3. To register, certify or license qualified applicants as practitioners of the particular profession or professions regulated by such board.*

...
6. To promulgate regulations in accordance with the Administrative Process Act (§ 9-6.14:1 et seq.) which are reasonable and necessary to administer effectively the regulatory system. Such regulations shall not conflict with the purposes and intent of this chapter or of Chapter 1 (§ 54.1-100 et seq.) and Chapter 25 (§ 54.1-2500 et seq.) of this title. ...

Specific statutory reference to use of a trade name in advertising is in:

§ 54.1-2718. Practicing under firm or assumed name.

A. No person shall practice, offer to practice, or hold himself out as practicing dentistry, under a name other than his own. This section shall not prohibit the practice of dentistry by a partnership under a firm name, or a licensed dentist from practicing dentistry as the employee of a licensed dentist, practicing under his own name or under a firm name, or as the employee of a professional corporation, or as a member, manager, employee, or agent of a professional limited liability company or as the employee of a dental clinic operated as specified in subsection A of § 54.1-2715.

B. A dentist, partnership, professional corporation, or professional limited liability company that owns a dental practice may adopt a trade name for that practice so long as the trade name meets the following requirements:

- 1. The trade name incorporates one or more of the following: (i) a geographic location, e.g., to include, but not be limited to, a street name, shopping center, neighborhood, city, or county location; (ii) type of practice; or (iii) a derivative of the dentist's name.*
- 2. Derivatives of American Dental Association approved specialty board certifications may be used to describe the type of practice if one or more dentists in the practice are certified in the specialty or if the specialty name is accompanied by the conspicuous disclosure that services are provided by a general dentist in every advertising medium in which the trade name is used.*
- 3. The trade name is used in conjunction with either (i) the name of the dentist or (ii) the name of the partnership, professional corporation, or professional limited liability company that owns the practice. The owner's name shall be conspicuously displayed along with the trade name used for the practice in all advertisements in any medium.*
- 4. Marquee signage, web page addresses, and email addresses are not considered to be advertisements and may be limited to the trade name adopted for the practice.*

Purpose

Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.

The purpose of the amended action is delete provisions in regulation specific to the advertising of dental specialties and reference the statutory language about the use of trade names. The prohibition of a claim of professional superiority remains in regulation as it may be false, deceptive, or misleading to the public to the detriment of public health and safety in choosing appropriate dental care.

Substance

Briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both. A more detailed discussion is provided in the “Detail of Changes” section below.

Section 18VAC60-21-80 specifies the regulations for advertising one’s dental practice. Subsection G (3) of section 80 is amended to replace the word “false” with “unsubstantiated” and delete all of the language about use of a term that designates a dental specialty. Subsection G (4) is modified to delete language relating to specialty certification and to refer to the provisions of the Code of Virginia, which address the use of trade names.

Issues

Identify the issues associated with the regulatory change, including: 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions; 2) the primary advantages and disadvantages to the agency or the Commonwealth; and 3) other pertinent matters of interest to the regulated community, government officials, and the public. If there are no disadvantages to the public or the Commonwealth, include a specific statement to that effect.

1) The primary advantage to the public is a continued restriction on publishing an advertisement that contains a claim of superiority in the practice of dentistry if that claim cannot be substantiated. Comments from dentists indicate their concern that the proposed change will be harmful and misleading to patients who will believe they are receiving care from a specialist. Current regulations allow general dentists to practice a specialty area of dentistry, provided their advertisements include information that they are general dentists. The Board does not believe there will be a substantive change.

2) There are no advantages or disadvantages to the agency or the Commonwealth.

3) The Director of the Department of Health Professions has reviewed the proposal and performed a competitive impact analysis. The Board is authorized under § 54.1-2400 “*To promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) which are reasonable and necessary to administer effectively the regulatory system...*” The prohibition on false, misleading, or deceptive advertising is intended to protect the public from choosing dental services from a dentist who is not competent to provide such services. Therefore, the proposed amendments are a foreseeable result of the statute requiring the Board to protect the safety and health of patients in the Commonwealth. The proposal is intended to eliminate any perceived restraint on competition that results from the current regulation.

Requirements More Restrictive than Federal

Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and a rationale for the need for the more restrictive requirements. If there are no applicable federal requirements, or no requirements that exceed applicable federal requirements, include a specific statement to that effect.

There are no applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.

Other State Agencies Particularly Affected - None

Localities Particularly Affected - None

Other Entities Particularly Affected - None

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:</p> <ul style="list-style-type: none"> a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources 	<p>a) As a special fund agency, the Board must generate sufficient revenue to cover its expenditures from non-general funds, specifically the renewal and application fees it charges to practitioners for necessary functions of regulation; b) The agency will incur no additional costs for mailings to the Public Participation Guidelines mailing lists, conducting a public hearing, and sending notice of final regulations to regulated entities. Since most mailings to the PPG list are handled electronically, there is very little cost involved. Every effort will be made to incorporate those into anticipated mailings and Board meetings already scheduled. There are no on-going costs.</p>
<p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>	<p>No other agencies are affected</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>There are no benefits.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>None</p>
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Benefits the regulatory change is designed to produce.	None
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Impact on Other Entities

Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.	Licensed dentists
Agency’s best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	There are 7,463 dentists licensed in Virginia. It is likely the vast majority are small businesses.
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	There are no costs for compliance with the amended regulation.
Benefits the regulatory change is designed to produce.	The amendments may benefit a small number of dentists who may be able to advertise a dental specialty that is currently not recognized by the National Certifying Boards for Dental Specialists.

Alternatives to Regulation

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.

This issue began with a petition for rulemaking requesting that the American Board of Dental Specialties be included in the advertising regulations along with the American Dental Association 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 officially recognized specialties of the American Dental Association.

The petition was considered by the Board at its meeting on March 10, 2017. While its decision was to take no action at that time, the petitioner's comments and suggestions were referred to the Regulatory/Legislative Committee for further review and consideration. The Board decided that it needed to gather additional information and consider various options relating to its regulations regarding dental specialties. The Board continued to receive communications from the attorneys representing the American Board of Dental Specialties, and it reviewed additional actions by other states.

At its meeting on June 30, 2017, the Regulatory/Legislative Committee recommended that the Board defer to §54.1-2718 (B) of the Code of Virginia which addresses trade names and strike 18VAC-60-21-80 (G) (3) and 18VAC60-20-80 (G) (4) of the Regulations Governing the Practice of Dentistry which address advertising as a specialist. Subsequently, the Board voted to leave in subdivision 3 the prohibition against advertising an unsubstantiated claim of professional superiority but to delete the remainder of that subdivision and all of subdivision 4 and to reference the statutory provisions on advertising.

This proposal was submitted by the Board in November of 2017 as a fast-track action; it was waiting for approval by the Governor for publication. In the meantime, the Board received public comment from more than 10 persons opposing the proposal and requesting opportunities for input and further discussion. Therefore, the Board determined that, in accordance with the Administrative Process Act, it could not proceed under a fast-track process and voted to issue a Notice of Intended Regulatory Action.

Following the publication of the NOIRA, the Regulatory/Legislative Committee convened to discuss the public comment that had been received. With concurrence from Board Counsel, the Committee voted to recommend the proposed regulation as included as draft amendments in the NOIRA.

Regulatory Flexibility Analysis

Pursuant to § 2.2-4007.1B of the Code of Virginia, describe the agency's analysis of alternative regulatory methods, consistent with health, safety, environmental, and economic welfare, that will accomplish the objectives of applicable law while minimizing the adverse impact on small business. Alternative regulatory methods include, at a minimum: 1) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing performance standards for small businesses to replace design or operational standards required in the proposed regulation; and 5) the exemption of small businesses from all or any part of the requirements contained in the regulatory change.

With advice from Board counsel, the Board has determined that amendments to regulations are necessary accomplish the objectives of applicable law.

Public Comment

Summarize all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency. If no comment was received, enter a specific statement to that effect.

Commenter	Comment	Agency response
285 comments posted on Townhall in opposition	<p>Opposed to the proposed action for the following reasons:</p> <p>1) Does not protect the public; already too many dentists are advertising specialty practices for which they are not well-trained.</p> <p>2) Will undermine the efforts of dentists seeking specialty training in post-graduate residencies</p> <p>3) Deceptive to the public to allow a dentist who has completed a week-end course to claim he is a specialist.</p> <p>4) Should revise regulations to require those who advertise as specialists to have successfully completed a post-doctoral dental educational program of at least 2 years in a program that is accredited by the Commission on Dental Accreditation.</p>	<p>The Board has considered the comments and acknowledges the concerns expressed. . The Board does not license dentists for specialty practice. Currently, a dentist may practice a specialty (such as implantology) with board certification provided he clearly discloses that he is a general dentist. While the current rule does restrict the use of the term “specialist” to those holding an ADA certification, it does not prevent general dentists or those with other certifications and training from practicing in a specialty area of dentistry.</p> <p>The Board does not believe a change in the regulation will deter persons from seeking post-doctoral training to be proficient as specialists.</p> <p>To revise regulations requiring completion of a post-doctoral program accredited by CODA would not resolve the issues raised by lawsuits in other states. For example, there is no post-doctoral program accredited by CODA in implantology.</p> <p>It was also suggested that the Board could recognize other specialty certifications that may currently exist. The Board did not believe it had the resources to fully assess organizations or credentialing bodies that may offer “specialty certification” based on a variety of qualifications.</p> <p>The Board has exercised its authority to regulate by referring to the provisions of the Code of Virginia relating to advertising of specialties. Further restriction on such advertising would need to be specifically set out or authorized by amendments to the law.</p>
Jonathan Wong, DMD (3 comments on Townhall)	Discusses a variety of topics, including the distinctions and comparison drawn between Medicine and Dentistry.	The Board acknowledges the information and is aware that there is no clear comparison between the two professions.
R. S. Mayberry, DDS (Townhall comment)	Describes his qualifications in implant dentistry and background for the controversy with the ADA and the American Academy of Implant Dentistry (AAID).	Dr. Mayberry was the original petitioner who requested an amendment to regulation. His comments have been received and thoroughly considered.

	Details the court decisions on use of specialty designations. Favors recognition of a specialty in implant dentistry. The lack of education is the real threat to the public.	
Richard Hughes (Townhall comment)	Agrees with the proposed amendment. Those who have successfully challenged the examinations of the American Board of Dental Specialties have proved knowledge and skills.	The Board acknowledges the comment in support.
Adam Foleck (Townhall comment)	Strongly in favor; there are organizations other than the ADA that recognize and certify specialists. Patients should do their due diligence and research the credentials of their implantologist.	The Board acknowledges the comment in support.
Josh Hanson (Townhall comment)	Noted the successful lawsuits – other certifying bodies should be recognized and allowed to advertise their specialties.	The Board did not believe it had the resources to fully assess organizations or credentialing bodies that may offer “specialty certification” based on a variety of qualifications.
Adam Hogan, DDS (Townhall comment)	Favors amendment; there are other pathways and examinations, such as a Diplomate of the ABOI. AAID, ABOI and ABDS have already won court cases in several states.	The Board acknowledges the comment in support.
Brett Ferguson, DDS, American Association of Oral and Maxillofacial Surgeons	Urged the board to consider all specialties on their merits rather than approving a single credentialing board; any newly recognized specialty should complete a CODA-accredited post-doctoral residency.	See responses above
Neil Agnihotri, DMD, Virginia Society of Oral & Maxillofacial Surgeons	Same comments as above	See responses above
Steven Daniel, DDS, American Academy of Periodontology	Supports the rigorous educational standards of CODA and urges the board to recognize specialty dental practices that meet similar standards. Noted court decision did not forbid restriction on specialist advertising supported by better evidence.	See responses above
Michael Gazori, DDS	Expressed concern about how the public is misled and does not understand the difference between general dentists and pediatric dentists who have completed a residency.	See responses above

Public Participation

Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.

The Board of Dentistry is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal, (ii) any alternative approaches, (iii) the potential impacts of the regulation, and (iv) the agency's regulatory flexibility analysis stated in that section of this background document.

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://townhall.virginia.gov>. Comments may also be submitted by mail or email to Elaine Yeatts at Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or elaine.yeatts@dhp.virginia.gov or by fax to (804) 527-4434. 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 this stage, and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<https://townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://commonwealthcalendar.virginia.gov/>). Both oral and written comments may be submitted at that time.

Detail of Changes

List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.

If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.

Table 1: Changes to Existing VAC Chapter(s)

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements

<p>80</p>		<p>Sets out the rules for advertising, including certain practices that may be considered false, deceptive or misleading.</p>	<p>Subsection G specifies those practices that constitute false, deceptive or misleading advertising.</p> <p>Subsection G (3) is amended to replace the word “false” with the word “unsubstantiated” and delete all of the language about use of a term that designates a dental specialty.</p> <p><i>Publishing an advertisement that contains a false an unsubstantiated claim of professional superiority, contains a claim to be a specialist, or uses any terms to designate a dental specialty unless he is entitled to such specialty designation under the guidelines or requirements for specialties approved by the American Dental Association (Requirements for Recognition of Dental Specialties and National Certifying Boards for Dental Specialists, November 2013), or such guidelines or requirements as subsequently amended;</i></p> <p>The word “false” is deleted because the Board finds that any advertisement claims superiority is typically based on a publication that lists “best” in various areas; those polls are less than scientific and often designations are based on advertising in the circular or publication. Therefore, unless the dentist can substantiate the claim of superiority, it may be deemed to be false, misleading, and deceptive.</p> <p>Subsection G (4) is modified to delete language relating to specialty certification and to refer to the provisions of the Code of Virginia, which address the use of trade names.</p> <p>4. Representation by a dentist who does not currently hold specialty certification that his practice is limited to providing services in such specialty area without clearly disclosing that he is a general dentist <u>Publishing an advertisement that</u></p>
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			<p>is not in compliance with § 54.1-2718 of the Code of Virginia.</p> <p>The Board has chosen not to regulate the advertising of dental specialties but to rely on the Code of Virginia for setting the standards by which a dentist may use and advertise a trade name under which he/she practices.</p>
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If a new VAC Chapter(s) is being promulgated and is not replacing an existing Chapter(s), use Table 2.

Table 2: Promulgating New VAC Chapter(s) without Repeal and Replace

New chapter-section number	New requirements to be added to VAC	Other regulations and laws that apply	Change, intent, rationale, and likely impact of new requirements

If the regulatory change is replacing an **emergency regulation**, and the proposed regulation is identical to the emergency regulation, complete Table 1 and/or Table 2, as described above.

If the regulatory change is replacing an **emergency regulation**, but changes have been made since the emergency regulation became effective, also complete Table 3 to describe the changes made since the emergency regulation.

Table 3: Changes to the Emergency Regulation

Emergency chapter-section number	New chapter-section number, if applicable	Current <u>emergency</u> requirement	Change, intent, rationale, and likely impact of new or changed requirements since emergency stage