



## Proposed Regulation Agency Background Document

<b>Agency name</b>	Alcoholic Beverage Control Board
<b>Virginia Administrative Code (VAC) citation</b>	3 VAC 5 - 50
<b>Regulation title</b>	Retail Operations
<b>Action title</b>	Nudity and Related Activity on Licensed Premises
<b>Date this document prepared</b>	June 4, 2008

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*.

### Brief summary

*In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.*

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. This action brings the regulation in compliance with Carandola.

## Legal basis

*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., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.*

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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 explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, and the problems the proposal is intended to solve.*

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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.

## Substance

*Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" section.)*

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This action will make permanent three substantive changes to 3 VAC 5-50-140 previously adopted as an emergency regulation, 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.

## Issues

*Please identify the issues associated with the proposed regulatory action, 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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

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The primary advantage to the public and the Commonwealth associated with the proposed regulatory action is reasonable regulation of sexually oriented businesses in order to protect the health and well-being of the citizens. Sexually oriented businesses will be disadvantaged in having limits imposed on the types of conduct and the level of nudity permitted on premises licensed for the sale of alcoholic beverages. There are no disadvantages to individual private citizens or the Commonwealth.

### Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include 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 statement to that effect.

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There are no applicable federal requirements.

### Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

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There are no localities particularly affected by the proposed regulation.

### Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

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In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is 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 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](mailto: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 date of the public comment period.

A public hearing will be held and notice of the public hearing may appear on the Virginia Regulatory Town Hall website ([www.townhall.virginia.gov](http://www.townhall.virginia.gov)) and can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

**Economic impact**

*Please identify the anticipated economic impact of the proposed regulation.*

<b>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures</b>	None
<b>Projected cost of the regulation on localities</b>	None
<b>Description of the individuals, businesses or other entities likely to be affected by the regulation</b>	The regulation will affect all alcoholic beverage licensees in the Commonwealth, but will mainly affect on-premises licensees. Subsection B will affect only mixed beverage licensees.
<b>Agency’s best estimate of the number of such entities that will be affected. Please include an estimate of the number of small businesses affected.</b> Small business means 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.	There are approximately 14,000 alcoholic beverage licensed businesses in Virginia. Of these, approximately 6,400 are licensed as restaurants. Of the restaurants, approximately 4,000 hold mixed beverage licenses. It is estimated that approximately 95% of these businesses would qualify as small businesses.
<b>All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses.</b>	None

**Alternatives**

*Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.*

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 proposed regulation restores the status quo prior to the court injunction. The board will consider any viable alternatives identified during the public comment period.

**Regulatory flexibility analysis**

*Please 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) the establishment of less stringent compliance or reporting requirements; 2) the establishment of less stringent schedules or deadlines for compliance or reporting requirements; 3) the consolidation or simplification of compliance or reporting requirements; 4) the establishment of 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 proposed regulation.*

The proposed regulation contains no reporting requirements, design or operational standards. It merely restores the status quo with respect to the level of nudity allowed in ABC-licensed premises. There should be no adverse impact on small business.

**Public comment**

*Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.*

<b>Commenter</b>	<b>Comment</b>	<b>Agency response</b>
None		

**Family impact**

*Please assess the 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.

**Detail of changes**

*Please detail all changes that are being proposed and the consequences of the proposed changes. Detail all new provisions and/or all changes to existing sections.*

*If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.*

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		<p>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.</p> <p>No real or simulated sex acts or fondling of breasts, buttocks, or genitals.</p>	<p>“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.</p> <p>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 from overbreadth challenge.</p> <p>No one allowed on mixed beverage premises with less than a fully opaque covering of the breasts, buttocks, and genitals. Implements Code provisions revised by the General Assembly in the 2008 Session to overcome the statutory defects which led to the court injunction.</p>