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## Fast-Track Regulation Agency Background Document

<b>Agency name</b>	Board of Dentistry, Department of Health Professions
<b>Virginia Administrative Code (VAC) citation(s)</b>	18VAC60-21
<b>Regulation title(s)</b>	Regulations Governing the Practice of Dentistry
<b>Action title</b>	Advertising restrictions
<b>Date this document prepared</b>	9/22/17

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (preferably no more than 2 or 3 paragraphs) of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed. Alert the reader to all substantive matters or changes. If applicable, generally describe the existing regulation.*

The amendments to section 80 will delete the specific prohibition against advertising a claim of a dental specialty unless it is approved by the National Certifying Boards for Dental Specialists of the American Dental Association or representation by a dentist who does not hold specialty certification that his practice is limited to providing services in such specialty area without disclosing that he is a general dentist. An amendment will also reference the statutory language about use of a specialty designation in a trade name.

### Acronyms and Definitions

Please define all acronyms used in the Agency Background Document. Also, please define any technical terms that are used in the document that are not also defined in the "Definition" section of the regulations.

N/A

### Statement of final agency action

Please provide a statement of the final action taken by the agency including: 1) the date the action was taken; 2) the name of the agency taking the action; and 3) the title of the regulation.

On September 15, 2017, the Board of Dentistry amended 18VAC60-21-10 et seq., Regulations Governing the Practice of Dentistry.

### Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including: 1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable; and 2) promulgating entity, i.e., agency, board, or person. Your citation should include a specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person'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**

*Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Describe the specific reasons the regulation is essential to protect the health, safety or welfare of citizens. Discuss the goals of the proposal and the problems the proposal is intended to solve.*

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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.

**Rationale for using fast-track process**

*Please explain the rationale for using the fast-track process in promulgating this regulation. Why do you expect this rulemaking to be noncontroversial?*

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This action has been discussed over a period of many months and a number of meetings. We believe it will be noncontroversial because the dental community understands the need for these amendments.

### Substance

*Please 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 18VAC60-21-180 specifies the regulations for advertising one’s dental practice. Subsection G (3) of section 180 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

*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 there are no disadvantages to the public or the Commonwealth, please indicate.*

- 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. There are no disadvantages.
- 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. Any restraint on competition that results from this regulation is in accord with the General Assembly’s policy as articulated in § 54.1-100 and is necessary for the preservation of the health, safety, and welfare of the public.

### Requirements more restrictive than federal

*Please identify and describe any requirement of the proposal which is 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.*

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.*

There are no localities particularly affected.

**Regulatory flexibility analysis**

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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.*

There is no alternative regulatory method since the action removes a restriction rather than creating an adverse impact on small business.

**Economic impact**

*Please identify the anticipated economic impact of the proposed new regulations or amendments to the existing regulation. When describing a particular economic impact, please specify which new requirement or change in requirement creates the anticipated economic impact.*

<p><b>Projected cost to the state to implement and enforce the proposed regulation, including:</b>  <b>a) fund source / fund detail; and</b>  <b>b) a delineation of one-time versus on-going expenditures</b></p>	<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>
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<b>Projected cost of the new regulations or changes to existing regulations on localities.</b>	There are no costs to localities.
<b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b>	Licensed dentists
<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: 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 7,171 licensed dentists in Virginia. It is likely the vast majority are small businesses.
<b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including:</b> a) the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; and b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the proposed regulatory changes or new regulations.	There are no costs for compliance with the amended regulation.
<b>Beneficial impact the regulation is designed to produce.</b>	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

*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.*

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 a 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.

### Public participation notice

*If an objection to the use of the fast-track process is received within the 30-day public comment period from 10 or more persons, any member of the applicable standing committee of either house of the General Assembly or of the Joint Commission on Administrative Rules, the agency shall: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.*

### Family impact

*Please assess the impact of this 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.*

This action has no impact on the institution of the family and family stability.

### Detail of changes

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action. If the proposed regulation is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below.*

Current section number	Current requirement	Proposed change, intent, rationale, and likely impact of proposed requirements
80	Sets out the rules for advertising, including certain	Subsection G specifies those practices that constitute false, deceptive or misleading advertising.

	<p>practices that may be considered false, deceptive or misleading.</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><del>Publishing an advertisement that contains a false <u>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;</u></del></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><del>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</del> <u>Publishing an advertisement that is not in compliance with § 54.1-2718 of the Code of Virginia.</u></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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