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## Notice of Intended Regulatory Action (NOIRA) 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>	3/12/18

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*.

### Subject matter and intent

*Please describe briefly the subject matter, intent, and goals of the planned regulatory action.*

The Board's intent is to amend section 80 in order to 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 advertising 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. The prohibition against false, deceptive or misleading advertising would remain. An amendment would then reference the statutory language about use of a specialty designation in a trade name.

### Legal basis

Please identify the (1) the agency (includes any type of promulgating entity) and(2) the state and/or federal legal authority for the proposed regulatory action, including the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable. Your citation should include a specific provision, if any, authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

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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 describe 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, please explain any potential issues that may need to be addressed as the regulation is developed.*

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**

*Please briefly identify and explain the new substantive provisions that are being considered, the substantive changes to existing sections that are being considered, or both.*

The Board’s intent is to amend section 80 in order to 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 would then reference the statutory language about use of a specialty designation in a trade name.

**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.

**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. Additionally, the American Dental Association announced on January 11, 2018 the formation of a “new commission to oversee the decision-making process for recognizing dental specialties, an effort to reduce potential or perceived bias and conflict of interest in the process.” 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.**

### Public participation

*Please indicate whether the agency is seeking comments on the intended regulatory action, including 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 hearing is to be held to receive comments. Please include one of the following choices: 1) a panel will be appointed and the agency’s contact if you’re interested in serving on the panel is \_\_\_\_\_; 2) a panel will not be used; or 3) public comment is invited as to whether to use a panel to assist in the development of this regulatory proposal.*

The agency is seeking comments on this regulatory action, including but not limited to: ideas to be considered in the development of this proposal, the costs and benefits of the alternatives stated in this background document or other alternatives, and the potential impacts of the regulation.

The agency is also seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include: projected reporting, recordkeeping, and other administrative costs; the probable effect of the regulation on affected small businesses; and the description of less intrusive or costly alternatives for achieving the purpose of the regulation.

Anyone wishing to submit comments may do so via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email, or fax to Elaine Yeatts at Department of Health Professions, 9960 Mayland Drive, Suite 300, Richmond, VA 23233 or [elaine.yeatts@dhp.virginia.gov](mailto:elaine.yeatts@dhp.virginia.gov) or by fax to (804) 527-4434. Written comments must include the name and address of the commenter. In order to be considered, comments must be received by midnight on the last day of the public comment period.

A public hearing will be held following the publication of the proposed stage of this regulatory action and notice of the hearing will be posted on the Virginia Regulatory Town Hall website (<http://www.townhall.virginia.gov>) and on the Commonwealth Calendar website (<https://www.virginia.gov/connect/commonwealth-calendar>). Both oral and written comments may be submitted at that time.