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## Proposed Regulation Agency Background Document

<b>Agency name</b>	Department of Elections
<b>Virginia Administrative Code (VAC) citation(s)</b>	1 VAC 20-90-10
<b>Regulation title(s)</b>	Definitions
<b>Action title</b>	Express Advocacy
<b>Date this document prepared</b>	January 24, 2019

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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

### Brief Summary

*Please 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.*

The term “express advocacy” is not defined in the Code of Virginia or in other regulations. The State Board of Elections currently provides a definition of express advocacy in campaign finance summaries that the Board is required to provide to candidates and the public. The Board now seeks to adopt the federal definition of express advocacy in regulation form to provide continuity and clarity to campaign finance interpretation and application.

1 VAC 20-90-10 has been reserved for definitions relating to campaign finance. This regulation will align Virginia’s interpretation of express advocacy with the operative definition of express advocacy as provided in 11 C.F.R. §100.22, the Federal Election Commission’s regulation defining express advocacy.

## 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.*

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The State Board of Elections – The Board  
The Virginia Department of Elections – ELECT  
Code of Federal Regulations – C.F.R.  
Federal Election Commission – FEC

## Mandate and Impetus

*Please 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, board decision, etc.). 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.”*

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The Code of Virginia §24.2-946 requires the State Board of Elections (the Board) to summarize election laws relating to the CFDA for candidates and committees.

## Legal Basis

*Please identify (1) the agency or other promulgating entity, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia or Acts of Assembly chapter number(s), if applicable. Your citation must 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 or promulgating entity’s overall regulatory authority.*

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The Virginia Department of Elections is promulgating this regulation on behalf of the Board, which is authorized to “make rules and regulations and issue instructions ... to promote the proper administration of election laws” as per the Code of Virginia §24.2-103.

## Purpose

*Please 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.*

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Current campaign finance summaries define express advocacy as a direct or indirect contribution, in-kind contribution, independent expenditure or loan made to a candidate or political committee for the purpose of influencing the outcome of an election; an advertisement that refers to a party or candidate(s) by name and states “Vote for...”; “Support”; “Elect ...”; “Smith for Congress”; “Send him home”; “Oppose, etc.”

The Board has repeatedly expressed concern that the definition currently included in campaign finance summaries does not provide sufficient clarity to citizens and entities of the Commonwealth who wish to sponsor political campaign advertisements.

## 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.*

This regulatory action seeks to include the definition of "express advocacy" in the Virginia Administrative Code. The proposed definition is taken verbatim from federal regulations governing campaign finance, so the exact text is:

"The following words and terms when used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

- "Express advocacy" includes any communication that uses phrases such as 'vote for,' 'elect,' 'support,' 'cast your ballot for,' 'Smith for Congress,' 'vote against,' 'defeat,' 'reject' or any variations thereof,
- or any communication when taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s) because
- (i) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and
  - (ii) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s)."

## Issues

*Please 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.*

There are no disadvantages to the public or the Commonwealth.

### Requirements More Restrictive than Federal

*Please 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.*

This regulation will align Virginia’s interpretation of express advocacy with the operative definition of express advocacy as provided in 11 C.F.R. §100.22, the Federal Election Commission’s regulation defining express advocacy.

### Agencies, Localities, and Other Entities Particularly Affected

*Please 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.*

No agency, locality or entity is particularly affected.

### Economic Impact

*Pursuant to § 2.2-4007.04 of the Code of Virginia, please 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. Please keep in mind that this is change versus the status quo.*

#### Impact on State Agencies

<i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including: 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	No projected cost savings, fees or revenues.
<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.	No projected costs resulting from the change.
<i>For all agencies:</i> Benefits the regulatory change is designed to produce.	Regulatory change would align Virginia election advertisement definitions with those adopted by the Federal Election Commission.

**Impact on Localities**

Projected costs, savings, fees or revenues resulting from the regulatory change.	No projected cost savings.
Benefits the regulatory change is designed to produce.	No projected benefits.

**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.	N/A
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. 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.	N/A
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please 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.	N/A
Benefits the regulatory change is designed to produce.	N/A

**Alternatives**

*Please 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.*

No alternative action was considered because the Code of Virginia authorizes the State Board of Elections to promulgate regulations to promote the uniform application of election law throughout the Commonwealth, and because the Board unanimously approved the decision to submit this regulation verbatim.

### 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) 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.*

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No alternative action was considered.

### Periodic Review and Small Business Impact Review Report of Findings

*If you are using this form to report the result of a periodic review/small business impact review that is being conducted as part of this regulatory action, and was announced during the NOIRA stage, please indicate whether the regulatory change meets the criteria set out in Executive Order 14 (as amended, July 16, 2018), e.g., is necessary for the protection of public health, safety, and welfare; minimizes the economic impact on small businesses consistent with the stated objectives of applicable law; and is clearly written and easily understandable.*

*In addition, as required by § 2.2-4007.1 E and F of the Code of Virginia, include a discussion of the agency's consideration of: (1) the continued need for the regulation; (2) the nature of complaints or comments received concerning the regulation from the public; (3) the complexity of the regulation; (4) the extent to which the regulation overlaps, duplicates, or conflicts with federal or state law or regulation; and (5) the length of time since the regulation has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the regulation.*

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N/A

### Public Comment

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

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No comment was received.

## Public Participation

*Please include a statement that in addition to any other comments on the regulatory change, the agency is seeking comments on the costs and benefits of the regulatory change and the impacts of the regulated community. Also, indicate whether a public hearing will be held to receive comments.*

In addition to any other comments, the State Board of Elections 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 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>. Written comments must include the name and address of the commenter. Comments may also be submitted by mail, email or fax to Arielle Schneider, who can be reached at [Arielle.schneider@elections.virginia.gov](mailto:Arielle.schneider@elections.virginia.gov) or (804) 801-6435. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

**THEN, INSERT EITHER:**

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

*Please 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.*

*If the regulatory change will be 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 change. Delete inapplicable tables.*

*If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.*

For changes to existing regulation(s), please use the following chart:

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
10		Definitions (Reserved)	Add a definition of “express advocacy” to Chapter 90 of the State Board of Elections’ regulations. Currently the reserved chapter does not include any definitions. This regulatory action would insert the definition of express advocacy,

			<p>as described in the text of the regulation, into the regulations. Both the State Board of Elections and the Department of Elections will refer to this definition to distinguish between advertisements that can be regulated because they expressly advocate for the election or defeat of a named candidate, and communications that cannot be regulated as they do not expressly advocate for a named candidate.</p>
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