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Regulatory
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Proposed Regulation Agency Background Document

Agency name	Alcoholic Beverage Control Board
Virginia Administrative Code (VAC) citation	3 VAC 5-20 and 3 VAC 5-30
Regulation title	Advertising and Tied House
Action title	Amendments to Advertising and Tied-House Regulations to conform to recent General Assembly action and to simplify and update them.
Date this document prepared	October 8, 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.

This action proposes several changes to the regulations governing the advertising of alcoholic beverages, as well as to the tied-house regulations, designed to maintain a reasonable separation between manufacturing and wholesaling interests and retailers of alcoholic beverages. Several outdated advertising regulations will be repealed. Others will be modified to conform to statutory changes or to modernize them. The two chapters will be reorganized, moving some provisions dealing with limitations on the provision of advertising materials by manufacturers or wholesalers to retailers from the advertising chapter to the chapter dealing with tied-house restrictions.

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.

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. Section 4.1-320 generally prohibits alcoholic beverage advertising in Virginia, except in accordance with Board regulations. Section 4.1-111, subsection B 3 requires that the Board promulgate regulations which maintain the reasonable separation of retailer interests from those of the manufacturers, bottlers, brokers, importers and wholesalers, prevent undue competitive domination of any person by any other person engaged in the manufacture, distribution and sale at retail or wholesale of alcoholic beverages in the Commonwealth, and promote reasonable accommodation of arm's length business transactions. 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.

The purpose of the proposed action is to develop amendments which will conform the board's advertising and tied-house regulations to statutory amendments enacted by the 2007 General Assembly; reorganize the advertising and tied-house chapters; and eliminate or modernize outdated provisions. These amendments will protect the health, safety, or welfare of citizens by maintaining reasonable restrictions by maintaining reasonable restrictions on alcoholic beverage promotion and maintaining a reasonable separation between the manufacturing, wholesaling and retail interests, to help ensure temperance, while allowing industry members additional ability to market their products.

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.)

In 3 VAC 5-20-10, subsection B, prohibiting cooperative advertising, will be moved to 3 VAC 5-30, Tied-House. In the same section, subsection E. 2. would be amended to delete the terms "lewd" and "indecent," and subsection E. 4. would be amended to eliminate references to curative or therapeutic claims, or claims disparaging to a competitor's product.

In 3 VAC 5-20-20, the section will be rewritten to eliminate the distinction between permanent and nonpermanent point-of-sale materials, and to allow retail establishments to use all but illuminated point-of-sale materials inside their establishments. Current restrictions on the provision of such materials by

industry members will be moved to 3 VAC 5-30, Tied-House. These provisions will be revised to conform to recent General Assembly action.

In 3 VAC 5-20-30, the section will be rewritten to eliminate specific language restrictions on exterior advertising signs at licensed retail establishments.

In 3 VAC 5-20-40, restrictions on specific language in alcoholic beverage advertising contained in subsections A.1., A. 2., A. 3., and B.3., shall be eliminated, and the limit on the percentage of advertising space which may be occupied by the identification of the sponsor in moderation messages in college student publications currently in subsection B.5., will be eliminated. The section will be revised to apply to all types of alcoholic beverages, and will define the term "electronic media."

3 VAC 5-20-50 would be repealed.

In 3 VAC 5-20-60, subsection 2 would be amended to allow the display of novelty and specialty items on retail premises, and to allow such items to be given to patrons during tasting events. Subsection 6 would be amended to allow wholesalers to put order blanks for novelty and specialty items on packages.

Sections 3 VAC 5-20-70 and 3 VAC 5-20-80 would be repealed.

3 VAC 5-20-90 would be amended to allow coupons to be distributed on the internet, and to allow beer wholesalers to affix manufacturers' coupons to the package.

In 3 VAC 5-20-100, the section would be amended to allow sponsorship of public events by wholesalers.

In 3 VAC 5-30-10, subsection B2 would be amended to allow wholesalers to affix prices to products they have sold to a retailer.

In 3 VAC 5-30-20, the last sentence would be amended to add farm wineries to the exemptions from the provisions of this section.

In 3 VAC 5-30-30, subsection B, the definition of "Cash" would be expanded to include payments by credit or debit cards.

In 3 VAC 5-30-60, subsection D, the wholesale value of bottle or can openers which may be given by a manufacturer, bottler or wholesaler to a retailer would be increased to \$20.

In 3 VAC 5-30-60, subsection F, wine glasses upon which advertising matter regarding wine may appear would be added to the items which a manufacturer or wholesaler could sell at reasonable wholesale price to banquet licensees.

A new section 3 VAC 5-30-80 would also be added, moving to this chapter current restrictions on the provision of various advertising items presently contained in the Advertising regulation, 3 VAC 5-20.

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.

The regulatory action poses no disadvantages to the public or the Commonwealth. The primary advantages to the public and the agency are the simplification of alcohol advertising and tied house regulations by the more logical organization of the provisions and removal of unnecessary or outdated regulations.

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.

The proposal removes or lessens current restrictions. It does not contain any restrictions that exceed 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 is no locality 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.

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, VA 23261, telephone (804) 213-4621, fax (804) 213-4411, e-mail 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) 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.

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	None
Projected cost of the regulation on localities	None
Description of the individuals, businesses or other entities likely to be affected by the regulation	Manufacturers, wholesalers, and retailers of alcoholic beverages
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 (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.	Approximately 14,000, of which it is estimated that over 95% would fall within the definition of small business
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.	None. The proposal does not add any reporting, recordkeeping, or other costs.

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 Alcoholic Beverage Control Board has considered making no changes to the regulations, other than those necessary as a result of General Assembly action, but believes the changes being considered can be made without endangering the public. It will consider any additional alternatives which may arise during the public comment period following the publication of the proposed regulation.

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.

In each case, the proposed revisions lessen or remove current restrictions. The proposed regulation does not impose any new compliance or reporting requirements. It has 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.

Commenter	Comment	Agency response
Virginia Hospitality & Travel Association	Craft new regulatory language that will eliminate overly restrictive, burdensome and outdated regulatory provisions wherever and whenever possible.	The proposal removes several unnecessarily restrictive or outdated regulatory provisions.
Virginia Retail Merchants Association	Craft new regulatory language that will eliminate overly restrictive, burdensome and outdated regulatory provisions wherever and whenever possible.	The proposal removes several unnecessarily restrictive or outdated regulatory provisions.
Diageo North America	Changes should include allowing all forms of interior point-of-sale advertising, both non-permanent and permanent, without any exclusions.	The proposal allows all but illuminated items for interior point-of-sale advertising.
	Changes should remove unnecessary restrictions on exterior advertising, including the prohibitions on billboards.	While not removing the current restrictions on placement of exterior advertising, the proposal does remove some limitations on the content of authorized signage.
	Clarify that licensees are permitted to use electronic media, including the internet and e-mail	The proposal authorizes the use of “electronic media,” and defines the term to include internet and e-mail.
	Manufacturers, bottlers and wholesalers should be able to sell, lend, buy for, or give to retailers any point-of-sale advertising.	The proposal tracks recent legislation on this point.
	Manufacturers should be able to sell, lease, give, or otherwise provide to retailers service items and equipment.	The board feels that current restrictions are necessary to maintain the legislatively-mandated separation between manufacturing and retail interests.

	<p>Manufacturers should be able to sell glassware, chiller machines and/or frozen drink dispensers to retailers.</p> <p>Adopt the federal regulation which allows manufacturers to provide advertising and service items to retailers, subject to an annual monetary limit.</p> <p>Manufacturer and wholesaler representatives should be able to give novelty and specialty items to patrons on retail premises.</p>	<p>The board feels that current restrictions are necessary to maintain the legislatively-mandated separation between manufacturing and retail interests.</p> <p>The board feels that current restrictions are necessary to maintain the legislatively-mandated separation between manufacturing and retail interests.</p> <p>The proposal allows limited ability to provide novelty and specialty items to patrons on retail premises during tasting events.</p>
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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.

It is not expected that this regulatory action will have any impact on the institution of the family.

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 5-20-10		No cooperative advertising between suppliers or wholesalers and retailers	Retain provision but move it to Chapter 30, Tied House, the chapter dealing with separation of manufacturing and wholesale interests from retailers, because the subject matter more properly belongs there

		<p>No advertising shall contain any lewd, obscene, or indecent material</p> <p>No advertising may imply that a product has a curative or therapeutic effect, or be disparaging of a competitor's product</p>	<p>Retain the prohibition on obscene material, but delete references to lewd or indecent, since these terms may be considered vague</p> <p>Delete these provisions, as the prohibition of false or misleading advertising sufficiently regulates this area</p>
3 VAC 5-20-20		<p>Retail licensees are prohibited from displaying any permanent point of sale advertising materials, and</p> <p>Numerous conditions or restrictions on what advertising materials may be provided by manufacturers or wholesalers to retailers</p>	<p>Distinction between permanent and non-permanent materials removed as unnecessary. Any non-illuminated advertising materials having a wholesale value of not more than \$250 per item which comply with 3 VAC 5-20-10 may be displayed by retailers. This brings the regulation in line with statutory provisions.</p> <p>Retain provisions but move them to Chapter 30, Tied House, the chapter dealing with separation of manufacturing and wholesale interests from retailers, because the subject matter more properly belongs there</p>
3 VAC 5-20-30		<p>Exterior signs at retail premises limited to certain specified words or terms</p>	<p>Restriction to specified words or terms deleted as no longer needed</p>
3 VAC 5-20-40		<p>Section governs advertising of beer, wine, and mixed beverages, but not distilled spirits, which are covered separately</p> <p>Specified terms are prohibited in print or electronic media advertising</p> <p>Manufacturer, bottler, or wholesaler may place a responsible drinking message in a college student publication, as long as the name, logo, and address of the sponsor occupies no more than 10% of the advertising space</p> <p>No definition of "electronic media"</p>	<p>Amend to apply provisions to "alcoholic beverages," combining the rules for advertising spirits products into the section to simplify</p> <p>Prohibitions against specified terms deleted as no longer needed</p> <p>10% restriction to be deleted, as other restrictions are sufficient</p> <p>"Electronic media" defined to include radio, television, electronic mail, and the internet, as well as similar technologies</p>
3 VAC 5-20-50		<p>Spirits advertising limited to newspapers and magazines, or programs for certain events; limitations</p>	<p>Section to be repealed. Spirits will be added to 3 VAC 5-20-40, and subject to the same rules as beer and wine.</p>

		on content	
3 VAC 5-20-60		<p>Manufacturers, importers, bottlers, wholesalers or their representatives may give novelty and specialty items not in excess of \$10 wholesale value to retailers, limited to one item per retailer and one item per employee, per visit. Items cannot be displayed on the retail premises, nor can they be given to customers on the retail premises.</p> <p>Wholesale licensees may not put order blanks on the package.</p>	<p>Section will be amended to conform with statute. Items can be given in quantities equal to the number of employees present at the time the items are delivered, and they can be displayed on the premises. During tasting events, manufacturers, wholesalers, or their authorized representatives may give no more than one item to each consumer provided a sample of alcoholic beverages during the event.</p> <p>The restriction will be removed as unnecessary.</p>
3 VAC 5-20-70		<p>Alcoholic beverage advertising at fairs and trade shows limited to booths assigned to manufacturers, bottlers and wholesalers.</p>	<p>This section will be repealed. Advertising at fairs and trade shows will be regulated in the same manner as other advertising. The specific provision is unnecessary.</p>
3 VAC 5-20-80		<p>Advertising of alcoholic beverages by means of film presentations restricted to educational presentations to private groups upon request.</p>	<p>This section will be repealed. Film advertising will be regulated in the same manner as other advertising. The specific provision is unnecessary.</p>
3 VAC 5-20-90		<p>Coupons may be distributed in the print media, by direct mail, or as a part of, or attached to, the package. Wholesale beer licensees may not attach refund coupons to package.</p>	<p>Coupons would also be authorized for distribution by way of the internet, and beer wholesalers will be allowed to attach manufacturers' coupons to the package. The addition of internet distribution conforms to current custom in other industries, and there is no policy reason to continue the prohibition against allowing beer wholesalers to affix coupons to packages.</p>
3 VAC 5-20-100		<p>Wholesalers may only co-sponsor charitable events, while manufacturers may sponsor several types of public events.</p>	<p>Wholesalers will be able to sponsor the same types of public events currently allowed to be sponsored by manufacturers. There is no policy reason for the difference between wholesaler and manufacturer privileges in this area.</p>
3 VAC 5-30-10		<p>Wholesalers may not mark or affix retail prices to products.</p>	<p>This section will be amended to allow wholesalers to affix prices to products they have sold to a retailer. Since wholesalers are already allowed to rotate, restock, and rearrange the products on retailer shelves, affixing prices does not represent an</p>

<p>3 VAC 5-30-20</p>		<p>No retail licensee shall employ anyone engaged in manufacturing or wholesaling alcoholic beverages. No manufacturer or wholesaler shall employ anyone engaged in retailing alcoholic beverages. This section does not apply to banquet licensees or off-premises winery licensees.</p>	<p>unreasonable extension of the exception to the general tied-house prohibitions.</p> <p>Farm wineries would be added to the exemptions contained in the last sentence of this section. Farm wineries requested this change, stating that they rely heavily on part-time and seasonal labor, and not being able to hire persons who also work part-time in retail businesses restricts their ability to hire needed employees.</p>
<p>3 VAC 5-30-30</p>		<p>Sales of wine or beer between wholesale and retail licensees and certain payments to the Board shall be for cash. "Cash" is defined to include legal tender, money order, check, or electronic funds transfer.</p>	<p>The definition of "Cash" would be expanded to include payments by credit or debit cards. Payment by credit or debit cards is generally accepted as present payment in most commercial transactions. The regulation is intended to prohibit wholesalers from extending credit to retailers.</p>
<p>3 VAC 5-30-60</p>		<p>Manufacturers or wholesalers may give retailers bottle or can openers having a wholesale value of not more than \$10.</p> <p>Manufacturers or wholesalers may sell at reasonable wholesale price to banquet licensees paper or plastic cups with advertising matter on them.</p>	<p>The wholesale value of openers which may be given will be increased to \$20. The price of bottle and can openers has increased.</p> <p>Wineglasses with alcohol advertising would be added to the list of items manufacturers and wholesalers can sell at reasonable wholesale price to banquet licensees.</p>
	<p>3 VAC 5-30-80</p>		<p>Tied-house restrictions formerly contained in 3 VAC 5-20-10 and 3 VAC 5-20-20 will be moved to this new section. This will put all restrictions on what may be provided to retailers by manufacturers and wholesalers in once place in the regulations.</p>

Enter any other statement here