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Final Regulation Agency Background Document

Agency name	The Virginia Alcoholic Beverage Control Authority
Virginia Administrative Code (VAC) Chapter citation(s)	3 VAC 5-40
VAC Chapter title(s)	Requirements for Product Approval
Action title	Chapter 40 Reform
Date this document prepared	11/25/2024

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 19 (2022) (EO 19), any instructions or procedures issued by the Office of Regulatory Management (ORM) or the Department of Planning and Budget (DPB) pursuant to EO 19, the Regulations for Filing and Publishing Agency Regulations (1 VAC 7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

Brief Summary

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.

A comprehensive review and amendment of the full chapter. The intent is to remove any redundancies or language that contradicts the Code of Virginia, modernize various rules dealing with product approval, and make sure the regulations comport with current practices of the industry.

Acronyms and Definitions

Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.

NA

Statement of Final Agency Action

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.

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1. December 3, 2024 – Board approval of final stage
 2. Virginia Alcoholic Beverage Control Authority
 3. Requirements for Product Approval

Mandate and Impetus

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding the mandate for this regulatory change, and any other impetus that specifically prompted its initiation. If there are no changes to previously reported information, include a specific statement to that effect.

There are no changes to previously reported information.

Legal Basis

Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.

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- 1) The promulgating agency is the Virginia Alcoholic Beverage Control Authority.
 - 2) Section 4.1-101 of the Code of Virginia (Code) establishes the Virginia Alcoholic Beverage Control Authority (ABC Board.)

Section 4.1-103 of the Code enumerates the powers of the Board which includes the authority to adopt regulations and to do all acts necessary or advisable to carry out the purposes of Title 4.1 of the Code (ABC Act).

Section 4.1-103(7) states the Board has the authority to adopt, alter, and repeal bylaws, rules, and regulations governing the manner in which its business shall be transacted and the manner in which the powers of the Authority shall be exercised, and its duties performed.

Section 4.1-103(19) state that the Board shall have the authority to determine the nature, form and capacity of all containers used for holding alcoholic beverages to be kept or sold under this subtitle, and prescribe the form and content of all labels and seals to be placed thereon; however, no container sold in or shipped into the Commonwealth shall include powdered or crystalline alcohol.

Section 4.1-103(24) permits the Board to promulgate regulations in accordance with the Administrative Process Act and Section 4.1-111.

Section 4.1-111 (A) of the Code provides the Board with the authority to adopt reasonable regulations which it deems reasonable to carry out the provisions of the ABC Act and to amend or repeal such regulations.

Section 4.1-111 (B)(11) states that the Board shall promulgate regulations that permit the sale of wine for off-premises consumption in resealable growlers made of glass, ceramic, metal, or other materials approved by the Board, or other resealable containers approved by the Board, with a maximum capacity of 64 fluid ounces or, for metric-sized containers, two liters. Wine growlers may be used only by persons licensed to sell wine for both on-premises and off-premises consumption or by gourmet shops granted a retail off-premises wine and beer license. Growlers sold by gourmet shops shall be labeled with (i) the manufacturer's name or trade name, (ii) the place of production, (iii) the net contents in fluid ounces, and (iv) the name and address of the retailer.

Purpose

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 is intended to solve.

This regulation is essential to protect the health, safety, and welfare of citizens because it provides guidance for how alcohol is labeled so that it does not encourage unlawful consumption, does not mislead the consumer, and does not exceed maximum lawful quantities for containers.

Substance

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.

New substantive provisions: NA

Substantive changes of existing regulations:

3VAC5-40-20 includes a statement that provides for a rebuttal presumption of approval if the label has federal approval; revise previously proposed language for labels that utilize imagery from a spirits product; includes a new subsection that addresses labeling of alcoholic brands of non-alcoholic products; revisions to use of athletes in labels to ensure the athlete is at least 21 years of age.

3VAC5-40-30 includes additional language regarding wine and beer sold for off-premises consumption by on-premises licensees.

Issues

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.

- 1) These revisions to the regulation will benefit the public because they update the rules to comport with modern practices for label approval while maintaining the mission of preventing misleading advertising, advertising the encourages overconsumption, and advertising that is otherwise improper.

2) The Commonwealth benefits from these revisions because they clarify the Authority's rules and make them more accessible/understandable and easier to apply equitably. There are no disadvantages to the public or Commonwealth.

Requirements More Restrictive than Federal

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any requirement of the regulatory change which is more restrictive than applicable federal requirements. If there are no changes to previously reported information, include a specific statement to that effect.

There no requirements that exceed applicable federal requirements.

Agencies, Localities, and Other Entities Particularly Affected

List all changes to the information reported on the Agency Background Document submitted for the previous stage regarding any other state agencies, localities, or other entities that are particularly affected by the regulatory change. If there are no changes to previously reported information, include a specific statement to that effect.

Other State Agencies Particularly Affected

NA

Localities Particularly Affected

NA

Other Entities Particularly Affected

NA

Public Comment

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

Commenter	Comment	Agency response
Kevin McNally, Counsel for the Virginia Beer Wholesalers Association	3VAC5-40 – Product Label Approval. The Virginia Beer Wholesalers Association generally supports the proposed amendments to the Product Labeling standards. However, VBWA and its member wholesalers urge the	VA ABC does not believe this comment warrants an amendment to the regulations. VA ABC already permits pre-approval of labels or discussions with applicants about potential violations.

Commenter	Comment	Agency response
	<p>Authority to consider implementing procedures to bring greater transparency to the label review process and appeal procedures.</p> <p>Many, if not most, suppliers are designing labels for national distribution, and the ability for a label to receive prior approval from the Authority before the product is introduced nationally would be far less costly than mandating changes to an already-existing label to meet Virginia’s standards.</p> <p>In addition, the VBWA urges the Authority to make it clear to the alcoholic beverage community that the changes to label approval proposed are proactive, and will not be enforced against those labels that already have been approved and are presently marketed in Virginia.</p>	
<p>Tom Perrick – National Director – State Government Affairs American Distilled Spirits Alliance</p>	<p>Your stated purpose of the proposed regulations is generally to provide guidance for how alcohol is labeled, to discourage unlawful consumption and to not mislead the consumer. We agree with these goals and want to work with you. One overarching issue that we urge you to consider: our members operate in all 50 states and therefore must comply with all labeling and advertising laws as set forth by the Alcohol and Tobacco Tax and Trade Bureau. The TTB’s goals are your stated goals, you share a united purpose. We are concerned that by adding another set of rules just for Virginia with regard to labeling – particularly with regards to proposed changes to 3VAC5-40-20, subparagraph B, subsection (5) – it would add cost and confusion to the Commonwealth’s consuming public. TTB has clearly ruled on these matters whereas, for example, it is unclear what you intend by “imitation” or “facsimile.” Correcting for something already decided at the federal level could create regulatory uncertainty without more specific guidance and evidence-based</p>	<p>Virginia ABC reviewed the TTB requirements for labels and made some revisions to the proposed regulations.</p>

Commenter	Comment	Agency response
	<p>rationale. In addition, there are a number of highly successful brands carried by the Virginia Alcohol Beverage Control Authority (VABC) that would be impacted by the implied direction of this particular aspect of your proposal.</p> <p>At a time when yesterday's The New Virginian article, ABC Lays Off Four Directors as Sales Continue to Slip, noted the pressure on the VABC to deliver its budget, it may not be the right juncture to limit offerings or create changes that might adversely impact the VABC's tax receipts. https://newsvirginian.com/news/state-regional/article_6b30934b-c060-5519-b28c-50010d2dcd97.html</p> <p>In addition to the TTB's legal framework under which our members operate, the majority of the alcohol industry adheres to the Distilled Spirits Code of Responsible Practices for Advertising and Marketing. It recommends that information on product labels, packaging, and promotional materials be clear and "prominently display the type of alcohol contained in the product, the percentage of alcohol by volume present, general notices that the product contains alcohol, and/or inclusion in the statement of composition." Our members diligently follow the Code to help ensure that products are packaged and marketed appropriately, responsibly, and to those of legal purchase age. It is important to note this code includes spirits companies that produce malt and wine-based products.</p> <p>We would also offer that there are a few entries in the proposed regulations that may require more definition. For example, in the Issues section, "advertising that is otherwise improper," improper would need to be defined; under Disqualifying Factors section, "likely to induce" and</p>	

Commenter	Comment	Agency response
	<p>“likely to mislead,” likely would need defining. In the Substance section, (i) addressing the labeling of alcoholic brands of nonalcoholic products; does this sentence refer to so-called cross-over beverage alcohol products? And, if so, weren’t cross-over products and associated labels already addressed in VA ABC guidance Circular Letter 23-01? I recall you and I spoke on the phone about 23-01 when it was released. It is my belief that ADSA members, when applicable, continue to follow the guidance for labeling and cross-over products specified in Comment Letter 23-01. Will these Proposed Regulations supersede Comment Letter 23-01? Finally, the proposed rules should make clear that these new rules would not apply retroactively to products already approved and sold in the Virginia marketplace.</p> <p>The proposed regulations should encourage compliance and address bad actors, but should do so without limiting consumer choice, stifling product innovation or slowing product to market – especially legal products with TTB-approved labels that already meet all federal guidelines. ADSA appreciates the opportunity to review and comment on the proposed regulations noted above. We look forward to working with you during the remainder of the comment process.</p>	

Detail of Changes Made Since the Previous Stage

*List all changes made to the text since the previous stage was published in the Virginia Register of Regulations and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	New requirement from previous stage	Updated new requirement since previous stage	Change, intent, rationale, and likely impact of updated requirements
3VAC5-40-20(B)			<p>*B. There shall be a rebuttable presumption that any label that has obtained prior approval by the appropriate federal agency may be approved by the Authority; however, the Authority may withhold approval of any label if it has reasonable cause to believe the container or label :</p> <ol style="list-style-type: none"> 1. Contains any obscene subject matter or illustration; 2. Contains a design or statement that is likely to induce underage persons to drink or targets underage persons; 3. Suggests the intoxicating effect of wine or beer; 4. Contains any design or statement which is likely to mislead the consumer; <p>*5. Except as provided in this subsection, containers of wine or beer, or any labels on such containers, or any carton, case, or individual covering of such containers, used for sale at retail, or any written, printed, graphic, or other material accompanying such containers to the consumer, must not contain any statement, design, device, or representation that tends to create a false or misleading impression that the wine or beer contains distilled spirits or is a distilled spirits product. Except that this subsection does not prohibit:</p> <ol style="list-style-type: none"> a. A truthful and accurate statement of alcohol content; b. The use of a brand name or imagery of a distilled spirits product provided that in the Authority's determination the label in its totality does not create a misleading or confusing impression as to the identity and composition of the product; c. The use of a cocktail name as a brand name, provided that the overall labeling does not present a 	<p>VA ABC received multiple comments regarding the label approval process and making it more transparent. The first revision provides that federal approval of a label creates a rebuttable presumption that VA ABC will approve the label; however provides that VA ABC may withhold approval for the listed issues. Originally, B.5 stated that VA ABC could reject a wine/beer label if it were a facsimile of a spirits label. This received some pushback in the comments, primarily with a request that VA ABC adopt the TTB regulations. The result is a revision to #5 that incorporates the TTB regulations while still addressing the concern over wine and beer labels confusing consumers as to their contents.</p> <p>Requirement that any athlete used in a label must be at least 21 years of age.</p>

			<p>misleading impression about the identity or composition of the product; or</p> <p>d. The use of truthful and accurate statements about the production of the product as part of a statement of composition or otherwise as long as such statements do not create a misleading impression as to the identity or composition of the product.</p> <p>*6. Which implies or indicates that the product is government (federal, state, or local) endorsed;</p> <p>7. Is not clearly distinguishable from a non-alcoholic product, or which minimizes, fails to identify, or disguises the product's alcoholic contents. The authority shall take into account:</p> <p>a. the number, location, size, and clarity of references to the alcohol content therein;</p> <p>b. whether the labeling or container emphasizes features that are more commonly associated with nonalcoholic consumable products;</p> <p>c. any and all differences between it and the non-alcoholic product, including but not limited to color palette, font type, imagery, placement of words, images or descriptions, backgrounds; and</p> <p>d. Any other relevant factor, including but not limited to, whether the non-alcoholic product is clearly marketed as a non-alcoholic beverage alternative to an alcoholic beverage product; or</p> <p>8. Implies the product enhances athletic prowess or depicts any athlete consuming or about to consume alcohol prior to or while engaged in an athletic activity;</p> <p>*uses the name, image, or likeness of an athlete under the age of 21, or depicts an athlete consuming alcohol while the athlete is operating or about to operate a motor vehicle or other machinery</p>	
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Detail of All Changes Proposed in this Regulatory Action

*List all changes proposed in this action and the rationale for the changes. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. * Put an asterisk next to any substantive changes.*

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
3VAC5-40-10		Provides guidance on approval for spirits' labels.	Changed "board" to "Authority" to comport to appropriate language.
3VAC5-40-20		Provides guidance for approval of wine and beer labels.	<ul style="list-style-type: none"> • Deleted Subsection B because it is redundant. • Cleaned of the first sentence in Subsection C to make it easier to understand. • Deleted Subsections (C)(1) and (2) because there are now low alcohol beverage coolers that have spirits in their ingredients. • Revised (C)(4) so that it says "contains a design or statement that is likely to induce underage persons to drink or targets underage persons." • *Revised 3VAC5-40-20 to include a statement that provides for a rebuttal presumption of approval if the label has federal approval; revise previously proposed language for labels that utilize imagery from a spirits product; includes a new subsection that addresses labeling of alcoholic brands of non-alcoholic products; revisions to use of athletes in labels to ensure the athlete is at least 21 years of age. • Added section dealing with labels that are not clearly distinguishable from a non-alcoholic product. Listed factors the Authority will take into consideration when reviewing those labels. • Added subsection stating that the Authority may consider the totality of the product label and

Current chapter-section number	New chapter-section number, if applicable	Current requirements in VAC	Change, intent, rationale, and likely impact of new requirements
			packaging, and consider any relevant factors. • Changed “board” to “Authority”
3VAC5-40-30			• Added Subsection (B)(ii) to provide guidance for off-premises sales of products that are not in the original manufacturer’s seal. • Moved Subsection D to Chapter 50 because it deals more with retail operation regulations. • Changed “board” to “Authority”