



Fast Track Proposed Regulation Agency Background Document

Agency name	Alcoholic Beverage Control Board
Virginia Administrative Code (VAC) citation	3 VAC 5-70
Regulation title	Other Provisions
Action title	Marketing Portal and Fulfillment Warehouse Approval Process
Date this document prepared	July 7, 2010

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

Please provide a brief summary (no more than 2 short 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.

This action promulgates a new section, 3 VAC 5-70-240, providing the application process for marketing portals or fulfillment warehouses as defined in § 4.1-209.1 of the Code of Virginia to seek approval to provide services to holders of wine or beer shipper's license. The new section will require marketing portals to demonstrate that they are appropriately organized as an agricultural cooperative. It will require both marketing portals and fulfillment warehouses to demonstrate that they are licensed by the state in which they are located to provide the intended services. Both will be required to enter into a written contract with the wine or beer shipper to which services are to be rendered, designating the marketing portal or fulfillment warehouse as the agent of the shipper for the purposes of complying with applicable regulations and statutes. Approved fulfillment warehouses will be required to maintain certain shipment records.

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 June 28, 2010, the Alcoholic Beverage Control Board adopted an amendment to 3 VAC 5-70, Other Provisions, creating a new section 3 VAC 5-70-240, Marketing portal and fulfillment warehouse approval process, to proceed under the fast-track regulatory process.

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 General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the scope of the legal authority and the extent to which the authority is mandatory or discretionary.

Chapters 317 and 561 of the 2010 Acts of Assembly amend § 4.1-209.1 of the Code of Virginia. Subsection F of that section provides: “The Board shall develop regulations pursuant to which fulfillment warehouses may apply for approval to provide storage, packaging, and shipping services to holders of licenses issued pursuant to this section. Such regulations shall include provisions that require (i) the fulfillment warehouse to demonstrate that it is appropriately licensed for the services to be provided by the state in which its place of business is located, (ii) the Board-approved fulfillment warehouse to maintain such records and to submit to the Board such information as the Board may prescribe, and (iii) the fulfillment warehouse and each wine or beer shipper licensed under this section to whom services are provided to enter into a contract designating the fulfillment warehouse as the agent of the shipper for purposes of complying with the provisions of this section.”

Subsection G. of the section provides: “The Board shall develop regulations pursuant to which marketing portals may apply for approval to provide marketing services to holders of licenses issued pursuant to this section. Such regulations shall include provisions that require (i) the marketing portal to demonstrate that it is appropriately organized as an agricultural cooperative association and licensed for the services to be provided by the state in which its place of business is located, (ii) the Board-approved marketing portal to maintain such records and to submit to the Board such information as the Board may prescribe, and (iii) the marketing portal and each wine or beer shipper licensed under this section to whom services are provided to enter into a contract designating the marketing portal as the agent of the shipper for purposes of complying with the provisions of this section.”

For the purposes of Title 4.1, “Board” means the Virginia Alcoholic Beverage Control Board.

Purpose

Please explain the need for the new or amended regulation. Describe the rationale or justification of the proposed regulatory action. Detail 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.

Since 2003, Virginia has allowed the direct shipment of limited quantities of wine and beer to consumers in the Commonwealth by licensed shippers. These shippers have indicated a desire to use third-party service providers to facilitate such sales and shipments to consumers. “Marketing portals” are third-party companies which solicit and accept orders for alcoholic beverages and accept and process payment for such orders. For example, a marketing portal might be a website that allows consumers to place orders for wine. The website operator forwards the order and payment to the winery, which ships the product to the consumer under its shipper’s license. “Fulfillment warehouses” are third-party facilities that provide

logistic services to producers. They warehouse the winery's product, and provide picking, packing, and shipping services at the winery's direction. Amendments to §§ 4.1-209 and 4.1-209.1 of the Code of Virginia adopted by the 2010 General Assembly make such arrangements legal in Virginia, and require this regulatory action. This regulation, coupled with the existing regulation of direct shippers, is necessary to protect the health, safety, and welfare of citizens, to ensure that only licensed shippers are shipping approved products on which the appropriate taxes have been paid.

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?

Please note: If an objection to the use of the fast-track process is received within the 60-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 (i) file notice of the objection with the Registrar of Regulations for publication in the Virginia Register, and (ii) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.

This rulemaking is expected to be noncontroversial. It tracks the requirements of the statute, with minimal record-keeping requirements. The provisions of the proposed regulation impose no more burden than the minimum required by the enabling legislation.

Substance

Please briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (Provide more detail about these changes in the "Detail of changes" section.)

This action creates a new section, providing the procedure for a marketing portal or fulfillment warehouse to apply for approval to provide services to a Virginia-licensed wine or beer shipper. An applicant for approval would be required to establish that it met the minimum statutory requirements. Approved fulfillment warehouses, which ship wine or beer on behalf of a licensed shipper, would be required to maintain records of shipping transactions.

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.

There are no disadvantages to the public or the Commonwealth. The primary advantage to the public and to the agency is an orderly marketplace, in which the legally drinking public is able to obtain the products it desires, with reasonable certainty that products are genuine and that appropriate taxes have been paid.

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.

No locality is particularly affected by 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.

The Board did not identify any alternative regulatory methods. The proposed regulation closely tracks the statute, without imposing any more stringent compliance or reporting requirements.

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.

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 <i>new regulations or changes to existing regulations on localities.</i>	None
Description of the individuals, businesses or other entities likely to be affected by the <i>new regulations or changes to existing regulations.</i>	Operators of marketing portals or fulfillment warehouses
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.	There are no current affected entities in Virginia. The agency has no way of knowing how many from other states might seek approval, although it is not aware of any agricultural cooperative in any state operating as a marketing portal.
All projected costs of the <i>new regulations or changes to existing regulations</i> for affected individuals, businesses, or other entities. Please be specific and do include all costs. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. 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.	Minimal copying and postage costs providing application letter and copies of documents
Beneficial impact the regulation is designed to produce.	The use of fulfillment warehouses should allow manufacturers and retailers to reduce expenses by sharing logistical services. The use of marketing portals should increase sales for direct shippers of wine and beer.

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 Board did not identify any viable alternative to the proposal considered. The proposal merely incorporates the precise minimum regulation required by the statute. There is no less intrusive or less costly alternative that achieves the purpose of the regulation.

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.

The proposed regulatory action will not affect the institution of the family.

Detail of changes

Please detail all changes that are being proposed and the consequences of the proposed changes. If the proposed regulation is a new chapter, describe the intent of the language and the expected impact in each section. Please detail the difference between the requirements of the new provisions and the current practice or if applicable, the requirements of other existing regulations in place.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all provisions of the new regulation or changes to existing regulations 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 5-70-240	None	<p>Wine or beer shippers wishing to use a marketing portal or fulfillment warehouse must use an approved marketing portal or fulfillment warehouse.</p> <p>To seek approval, a marketing portal or fulfillment warehouse must apply by letter, attaching copies of all licenses issued by the state in which it is located.</p> <p>A marketing portal must submit copies of documents showing it is an agricultural cooperative.</p> <p>The Board may refuse, suspend, or revoke approval if it has reasonable cause to believe that a marketing portal or fulfillment warehouse is not licensed by its home state, has failed to comply with the regulations of the Board, or a cause exists that would authorize the Board to refuse, suspend, or revoke a license under Title 4.1 of the Code of Virginia.</p>

			<p>Approved marketing portals or fulfillment warehouses must enter into a contract with a licensed shipper prior to performing services. The contract must designate the marketing portal or fulfillment warehouse as the agent of the shipper for purposes of complying with this regulation and the related provisions of the Code of Virginia. A copy of the contract must be submitted to the Board.</p> <p>Approved fulfillment warehouses must maintain for two years records of all shipments made on behalf of Virginia wine or beer shippers.</p> <p>This section is designed to meet the minimum requirements of §§ 4.1-209 and 4.1-209.1, Code of Virginia, to ensure that only properly licensed businesses perform marketing and logistic services involving the sale and shipment of alcoholic beverages directly to Virginia consumers, and to allow sufficient record-keeping to ensure compliance with shipping laws. It will have minimum impact on the operation of affected businesses.</p>
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For new chapters, use this chart:

Section number	Proposed requirements	Other regulations and law that apply	Intent and likely impact of proposed requirements

Enter any other statement here