



Proposed Regulation Agency Background Document

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| Agency name | Alcoholic Beverage Control Board |
| Virginia Administrative Code (VAC) citation | 3 VAC5-30 |
| Regulation title | Tied-House |
| Action title | Updating Tied-House Regulations as a Result of Periodic Review |
| Date this document prepared | October 30, 2012 |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 14 (2010) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

Brief summary

In a short paragraph, please summarize all substantive provisions of new regulations or changes to existing regulations that are being proposed in this regulatory action.

The purpose of this review is to 1) allow wine wholesalers to merchandise product on Sunday; 2) transfer the prohibitions of price discrimination between wholesalers and retailers from the "Other Provisions" section of the Regulations to this section; 3) expand ordinary and commercial reasons for product return.

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.

There are no acronyms or technical terms used in the document.

Legal basis

Please identify the state and/or federal legal authority to promulgate this proposed regulation, including (1) the most relevant citations to the Code of Virginia or General Assembly chapter number(s), if applicable, and (2) promulgating entity, i.e., agency, board, or person. Your citation should include a

specific provision authorizing the promulgating entity to regulate this specific subject or program, as well as a reference to the agency/board/person’s overall regulatory authority.

§ 4.1-111 of the Code of Virginia authorizes the Alcoholic Beverage Control Board to promulgate reasonable regulations necessary to carry out the provisions of this title or the general laws of the Commonwealth. § 4.1-111.3 of the Code of Virginia also provides that the Alcoholic Beverage Control Board must “(m)aintain the reasonable separation of retailer interests from those of the manufacturers, bottlers, brokers, imports and wholesalers in accordance with § 4.1-216 and in consideration of the established trade customs, quantity and value of the articles or services provided; 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.”

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 streamlining and clarification of the provisions of this regulation should help promote the welfare of the citizens by providing more definitive and reliable guidance on the marketing of alcoholic beverages. The expansion of ordinary and commercial reasons for product return promotes product integrity for manufacturers and protects retailers when a product is discontinued.

Substance

Please briefly identify and explain new substantive provisions (for new regulations), substantive changes to existing sections or both where appropriate. (More detail about all provisions or changes is requested in the “Detail of changes” section.)

Chapter 30 will be amended to 1) expand and clarify the merchandising of alcoholic beverages; 2) establish a new section that more appropriately incorporates into this regulation the current provisions prohibiting price discrimination between wholesalers and retailers of alcoholic beverages; 3) expand ordinary and commercial reasons for product return.

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 indicate.

The primary advantage associated with the proposed regulatory action is increased flexibility for alcoholic beverage manufacturers, importers, bottlers, brokers and wholesalers in the marketing and merchandising of their products. There are no disadvantages to the public or the Commonwealth.

Requirements more restrictive than federal

Please identify and describe any requirements of the proposal, which are more restrictive than applicable federal requirements. Include a rationale 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 parallel federal requirements for some provisions. To the extent there are federal requirements, the proposal is not more restrictive than 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 localities are 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 via the Regulatory Town Hall website (<http://www.townhall.virginia.gov>), or by mail, email or fax to **W. Curtis Coleburn, Chief Operating Officer, Department of Alcoholic Beverage Control, Post Office Box 27941, Richmond, Va. 23261, curtis.coleburn@abc.virginia.gov, telephone (804) 213-4409, facsimile (804) 213-4411.** 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 date of the public comment period.

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 requirements creates the anticipated economic impact.

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| <p>Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source, and (b) a delineation of one-time versus on-going expenditures.</p> | <p>None</p> |
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| 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> | 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. | 15,000 businesses of which approximately 70% are small businesses. |
| Beneficial impact the regulation is designed to produce. | This will improve product integrity when a product is discontinued and promote efficiency in the distribution of alcoholic beverages. |

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.

There is no viable alternative to affect the proposed changes. Circular Letters and other memoranda of interpretation do not carry the consequences prescribed by the regulations if a reluctant licensee fails or refuses to comply with the standard.

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 proposal does not adversely impact small business. It imposes no additional or more stringent compliance or reporting requirements.

Small business impact review result

In order to minimize the economic impact of regulations on small businesses, please include, pursuant to Code of Virginia § 2.2-4007.1 E and F, 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. Also, include a discussion of the agency’s determination of whether the regulation should be amended or repealed, consistent with the stated objectives of applicable law, to minimize the economic impact of regulations on small businesses.

The proposal is easily understandable and does not conflict with other state or federal laws or regulations. This regulation was last amended in 2010. The proposals are a result of industry suggestions. Neither technology, economic conditions, or other factors have changed significantly in the area affected by the regulation. The proposal imposes no reporting or additional record keeping requirements.

Public comment

Please summarize all comments received during the public comment period following the publication of the NOIRA, and provide the agency response.

| Commenter | Comment | Agency response |
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| Virginia Beer Wholesalers | 3VAC5-30-10 (B) (3) (c) Supports clarifying that manufacturer includes importer. | The agency accepted this proposal. |
| | 3VAC5-30-10 (B) (3) (g) Suggest substitute “alcoholic beverages” for “wine and beer” and where production of product discontinued, distributor could exchange for a comparable one. | The agency accepted this proposal. |
| | 3VAC5-30-30 Oppose including credit and debit cards as “cash.” | The agency accepted this after considering expert opinion that this proposal would inevitably shift costs to the consumer. |
| | 3VAC5-30-60 Object to expansion of types of equipment and supplies that could be provided to retailers. | The agency accepted this because the expansion posed a risk to maintaining the three-tiered system. |
| | 3VAC5-30-90 Propose substituting “similarly situated” with “equal.” | The agency accepted this proposal. |
| Virginia Wine Wholesalers | 3VAC5-30-80 (H) Propose not allowing wholesalers to provide retailers with wine lists. | The agency accepted this proposal. |
| | 3VAC5-30-30 Oppose including | The agency accepted this after considering |

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| <p>Distilled Spirits Counsel of U.S.</p> | <p>credit and debit cards as “cash.”</p> <p>3VAC5-30-60 Object to expansion of types of equipment and supplies that could be provided to retailers.</p> <p>3VAC5-30-90 Propose substituting “similarly situated” with “equal.”</p> <p>3VAC5-30-10 Propose allowing wholesalers to provide product displays to retailers.</p> <p>3VAC5-30-60 Propose lifting limitations on equipment and supplies that wholesalers and manufacturers of alcoholic beverages may provide to retailers.</p> <p>3VAC5-30-70 Suggest expanding industry members recognized under this section.</p> <p>3VAC5-30-80 (H) Recommend allowing industry members to list two or more licensed retailers where product offered.</p> <p>3VAC5-30-80 (H) Propose allowing wholesalers to provide retailers with price lists of alcoholic beverages.</p> <p>3VAC5-30-80 (E) Suggest substituting “alcoholic beverages” for “wine and beer” for advertising materials to retailers.</p> | <p>expert opinion that this proposal would inevitably shift costs to the consumer.</p> <p>The agency accepted this because the expansion posed a risk to maintaining the three-tiered system.</p> <p>The agency accepted this proposal.</p> <p>The agency rejected this because it posed a risk to maintaining the three-tiered system.</p> <p>The agency rejected this because it posed a risk to maintaining the three-tiered system.</p> <p>The agency accepted this proposal.</p> <p>The agency rejected this because cooperative advertising is fundamental to maintaining three-tiered system.</p> <p>The agency rejected this because it posed a risk to maintaining the three-tiered system.</p> <p>The agency accepted this proposal.</p> |
| <p>Virginia Retail Merchants</p> | <p>3VAC5-30-10 Propose allowing Sunday merchandising.</p> <p>3VAC5-30-30 Support including credit and debit cards as “cash.”</p> | <p>The agency accepted this proposal with exception to localities that prohibit Sunday sale under local ordinance.</p> <p>The agency rejected this after considering expert opinion that this proposal would inevitably shift costs to the consumer.</p> |
| <p>Virginia Wine Council</p> | <p>3VAC5-30-10 (A) Support amending “to allow continuity among similar licensees by providing same right for wine wholesalers, including agents of Virginia Wine Distribution Company, to provide services to retailers as beer wholesalers in this instance.”</p> | <p>This concept is currently in the regulation, so no action was taken.</p> |
| <p>Diageo North</p> | <p>3VAC5-30-10 Oppose inclusion of</p> | <p>The agency accepted this suggestion because</p> |

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| <p>America</p> | <p>multiple references to “state government stores.”</p> <p>3VAC5-30-60 (A) 1 and 2 Modify language to change “draft beer knobs” and “beer” to “alcoholic beverage knobs” and “alcoholic beverages” so as to remove distinctions among alcoholic beverages.</p> <p>3VAC5-30-60 (F) Change “banquet licensees” to “banquet and retail licensees.”</p> <p>3VAC5-30-60 (G) Clarify that “customized advertising materials” provided to retailers may include the retailer’s name, logo, address, and website.</p> <p>3VAC5-30-80 (C) Modify to allow manufacturers and wholesalers (industry members) to supply service items to retailers.</p> <p>3VAC5-30-80 (H) Allow industry members to provide alcoholic beverages lists rather than only wine lists.</p> | <p>this can be addressed by board policy.</p> <p>The agency rejected because draft wine and distilled wines are not prevalent in the market place.</p> <p>The agency rejected this because it posed a risk to maintaining the three-tiered system.</p> <p>The agency accepted this proposal.</p> <p>The agency rejected this because it posed a risk to maintaining the three-tiered system.</p> <p>The agency rejected this because it posed a risk to maintaining the three-tiered system.</p> |
| <p>Wine Institute</p> | <p>3VAC5-30-80 (H) Object to industry members providing retailers wine lists at no cost.</p> <p>3VAC5-30-90 Oppose exception allowing different prices for on and off premises licenses.</p> | <p>The agency followed this recommendation.</p> <p>The agency rejected this and added the distinction based on type of license.</p> |
| <p>Virginia Hospitality and Travel Assoc.</p> | <p>3VAC5-30-30 Support including credit and debit cards as “cash.”</p> <p>3VAC5-30-80 (H) Support allowing industry members to provide retailers wine lists at no cost.</p> | <p>The agency rejected this after considering expert opinion that this proposal would inevitably shift costs to the consumer.</p> <p>The agency rejected this because it posed a risk to maintaining the three-tiered system.</p> |

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.

This action is not anticipated to have any impact on the institution of the family or family stability.

Detail of changes

Please list 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. Please describe the difference between existing regulation(s) and/or agency practice(s) and what is being proposed in this regulatory action.

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all differences between the pre-emergency regulation and this proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulation(s), use this chart:

| Current section number | Proposed new section number, if applicable | Current requirement | Proposed change, intent, rationale, and likely impact of proposed requirements |
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| 3VAC5-30-10 | | No merchandising of alcoholic beverages by wine wholesalers on Sundays. | Allow merchandising of alcoholic beverages by wholesalers on Sundays except in localities where Sunday sales are prohibited by local ordinances. No public policy reason exists for current distinction between beer and wine merchandising. |
| | | Wholesalers may provide merchandising services to retailers. | Manufacturers, importers, bottlers, brokers may provide merchandising services to retailers. Limited services should not create tied-house problem. |
| | | Prohibits consignment sales between retailer and wholesaler but for ordinary and usual commercial reasons. | Expands ordinary and usual commercial reasons to include situation where product discontinued. |
| 3VAC5-30-20 | | Retail licensee may not employ someone involved in manufacturing or wholesaling of alcoholic beverages, and Manufacturer or wholesaler may not employ someone | Prohibition does not apply if the manufacturer or wholesaler does not supply products, directly or indirectly, to the retailer. Tied-house relationship will not exist in the absence of product sales. |

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| 3 VAC 5-30-30 | | involved in retailing. Retail licensee must pay for purchases from the board with cash or equivalent. | Provision removed. By statute, licensees may purchase alcoholic beverages from the board using credit cards. |
| 3 VAC5-30-60 | | Manufacturers and wholesalers may provide tapping equipment and customized advertising materials to retailers. | Importers, brokers, and authorized representatives added to the list of who may provide tapping equipment and customized advertising materials to retailers. Will provide additional flexibility without creating unacceptable risk of commercial bribery. |
| 3VAC5-30-70 | | Manufacturers and wholesalers may provide routine business entertainment to retailers. | Clarifies that manufacturers and wholesalers may provide local transportation in connection with routine business entertainment. |
| 3VAC5-30-80 | | Neckers, brochures, for wine may be provided to retailers by wholesalers. | Items may be provided by manufacturers, importers, bottlers, brokers, instead of just wholesalers, and may be provided in connection with all alcoholic beverage products, not just wine. |
| | 3VAC5-30-90 | Price discrimination provisions located in 3 VAC 5-70, Other Provisions. | Relocated from Other Provisions chapter to "Tied- House" provisions language regarding price discrimination between wholesalers and retailers. Added exception that price discrimination is allowed between on and off premises licenses. Creates more flexibility for wholesalers in pricing. |

If a new regulation is being promulgated, use this chart:

| Section number | Proposed requirements | Other regulations and law that apply | Intent and likely impact of proposed requirements |
|----------------|-----------------------|--------------------------------------|---|
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Enter any other statement here