

Virginia Alcoholic Beverage Control Authority

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Circular Letter

23-01

To: Manufacturers

Subject: Label approval of cross-over products

Purpose: Section 3 VAC 5-20-10 of the Virginia Administrative Code prohibits advertising that is false or misleading in any material aspect or which may tend to induce minors to drink. The Virginia Alcoholic Beverage Control Authority ("Virginia ABC") has deemed it necessary to issue guidance with regard to what may be viewed as "false or misleading" or as "tend[ing] to induce minors to drink" as it pertains to its label approval process pursuant to 3 VAC 5-40-20 and products in the marketplace.

Background: Many manufacturers are creating alcoholic versions of beverages already in the market ("cross-over products"). There have been reports of consumer confusion and illegal sales to minors with regard to these products. In addition to Virginia ABC's concerns regarding public safety and tax differentials, affected licensees have requested additional guidance as to what Virginia ABC considers to be a violation of our statutes and regulations for these products, and guidance for what Virginia ABC considers to be the best practices for achieving compliance. As a result, Virginia ABC has deemed it necessary and beneficial to circulate this guidance document.

Held: Section 4.1-103(19) of the Code of Virginia ("Code") grants Virginia ABC authority to determine the nature, form, and capacity of all containers used for holding alcoholic beverages to be kept or sold under the ABC Act as well as prescribe the form and content of all labels and seals to be placed thereon.

Cross-over products should be clearly distinguishable from the original product so as to avoid misleading consumers.

Virginia ABC will review each cross-over product submission with the following guidance in mind:

For cross-over products which are based on other alcoholic beverages or products (for example, a spirits manufacturer creating a malt-beverage version of the original product):

- The cross-over product label review submission must include:
 - Both a copy of the proposed label and a picture of the container, which must include the complete product packaging (showing the



container and label together as it would be packaged for retail sale, as well as any and all secondary packaging). Virginia ABC may request a physical sample of the single sale label, container, and secondary packaging for additional review.

- Manufacturers should also submit the same label review items for the original versions of beverages which were already in the marketplace so that Virginia ABC may determine whether the new product is compliant with applicable regulations.
- Virginia ABC shall consider the following in determining whether a product is misleading to consumers:
 - Whether the cross-over product clearly indicates the type of alcohol it contains in at least three different locations;
 - The size of such alcohol references and warnings in relation to other writing on the product label (flavor, ingredient lists, other branding items, etc.). It will also consider whether at least one such reference to alcohol is in at least sixteen (16) point font based upon Times New Roman font. If using another font, the manufacturer should ensure that it is at least as large as this example: “**Example.**”;
 - Any and all changes in product label, container, and secondary packaging to determine if the cross-over product is clearly distinguishable from the original product so as to prevent consumer confusion. Such changes may include but are not limited to color palette; font type; imagery; placement of words, images, or descriptions; and backgrounds.

Note: Virginia ABC shall consider other alternatives put forth by a manufacturer which sufficiently address the underlying concerns raised in this document.

For cross-over products which are based on other non-alcoholic beverages or products:

- The cross-over product label review submission must include:
 - A copy of the proposed label and a picture of the container, including the complete product packaging (showing the container and label together as it would be packaged for retail sale, as well as any and all secondary packaging). Virginia ABC may request a sample single sale label, container, and secondary packaging for additional review.
 - Copies of the same product label submission items for any original non-alcoholic versions of products which were already in the marketplace so that Virginia ABC may determine whether the new product is compliant with applicable regulations.
- Virginia ABC shall consider the following in determining whether a product is misleading to consumers or may tend to induce minors to drink:
 - Whether the label includes at least six different explicit warnings that the product contains alcohol. Such references may include percentage alcohol by volume (“ABV”), warnings to minors (i.e. 21+, etc.), descriptions of the type of beverage (i.e. wine or beer,). Otherwise, such references should use the word “alcohol,” and terms such as “spiked,” “twisted,” and “hard”, or similar words or phrases, are not sufficiently explicit for purposes of this section.



- Virginia ABC will consider the size of such alcohol warnings in relation to other writing on the product label (flavor, ingredient lists, other branding items, etc.). Virginia ABC will also consider whether at least one reference to the type of alcohol, the percentage of alcohol by volume, or other reference to alcohol content is in at least sixteen (16) point font based upon Times New Roman font. If using another font, the manufacturer should ensure that it is at least as large as this example: “**Example.**”
- Whether manufacturers use secondary closures with additional warnings (such as foil lids, plastic wrapping, lip guards, stickers, or other “child-proof” packaging) in an effort to prevent the accidental consumption by a minor of a cross-over product of this nature.
- Any and all changes in product label, container, and secondary packaging that clearly distinguish the cross-over product from the original product so as to prevent the accidental consumption of the cross-over product by consumers or minors. Such changes may include but are not limited to color palette; font type; imagery; placement of words, images, or descriptions; container type and size; and backgrounds.
- Virginia ABC seeks to protect minors of all age groups, and manufacturers should therefore not rely exclusively on verbal warnings or descriptions to show that the products are clearly distinguishable.
- Note: Virginia ABC shall consider other alternatives put forth by a manufacturer which sufficiently address the underlying concerns in the holding of this circular letter.

Virginia ABC intends to undertake a review of cross-over products already in the marketplace, and those products which are non-compliant may be issued a disapproval letter with details regarding next steps, which may include the opportunity for resubmission of a revised label or a formal hearing, negotiation, or mediation. *Virginia ABC strongly encourages manufacturers to review their products and to make changes voluntarily to ensure that their products are compliant and to address the underlying concerns raised in this circular.*

This guidance shall remain in effect until such time as there is a statutory or regulatory update that addresses this matter. Should you have questions regarding the provisions of this Circular Letter, please contact the Special Agent in Charge located at your regional ABC office.

