



Final Regulation Agency Background Document

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	August 5, 2013

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

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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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. If applicable, generally describe the existing regulation. Also, please include a brief description of changes to the regulation from publication of the proposed regulation to the final regulation.

The purpose of this action 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.

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 or board taking the action, and (3) the title of the regulation.

On August 5, 2013, the Alcoholic Beverage Control Board took final action to amend 3 VAC 5-30, Tied-House.

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. Describe the rationale or justification of the proposed regulatory action. Detail the specific reasons it 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.

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 identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the “All changes made in this regulatory action” 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 there are no disadvantages to the public or the Commonwealth, please indicate.

The primary advantage associated with the 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.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar's office, please put an asterisk next to any substantive changes.

Section number	Requirement at proposed stage	What has changed	Rationale for change
3 VAC 5-30-10	Discontinued products may be exchanged for products from the same supplier.	Discontinued products may be exchanged for products from the same manufacturer.	"Supplier" was broader than intended. One supplier, such as an importer, may represent several manufacturers. The intent is to provide for the substitution to be with a product as similar to the discontinued product as possible.
3 VAC 5-30-60	Industry members may sell or give beer tap knobs to retailers. Industry members may sell dispensing accessories "including but not limited to" listed items.	Industry members may sell or give beer or wine tap knobs to retailers. Industry members may sell dispensing accessories "such as" listed items.	There has been increased sale of wine in draft form. It was felt that "such as" better expressed the intent that the authority to sell was limited to items similar to those in the list.
	Manufacturers, importers, bottlers, or wholesalers may sell and install dispensing accessories to retailers, provide customized advertising materials to retailers, or clean and service dispensing equipment for retailers.	Representatives of manufacturers, importers, bottlers, or wholesalers may also sell and install dispensing accessories to retailers, provide customized advertising materials to retailers, or clean and service dispensing equipment for retailers.	The general intent of the revisions is to allow industry members to perform authorized activities through representatives.
3 VAC 5-30-80	Industry members may provide retailers brochures relating to the wine manufacturing process.	Industry members may provide retailers brochures relating to the alcoholic beverage manufacturing process.	There is no policy reason to limit brochures only to wine.

<p>3 VAC 5-30-90</p>	<p>Industry members may supply coupons to retailers, and may install advertising materials supplied to retailers.</p> <p>Wholesalers may discriminate between retailers based upon their status as an on-premises or off-premises retailer.</p>	<p>Industry members or their representatives may supply coupons to retailers, and may install advertising materials supplied to retailers.</p> <p>Wholesalers may not discriminate between retailers based upon their status as an on-premises or off-premises retailer.</p>	<p>The general intent of the revisions is to allow industry members to perform authorized activities through representatives.</p> <p>Proposal needs more consideration. It did not take into consideration retailers holding both on- and off-premises privileges.</p>
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Public comment

Please summarize all comments received during the public comment period following the publication of the proposed stage, and provide the agency response. If no comment was received, please so indicate.

Commenter	Comment	Agency response
<p>Virginia Wine Wholesalers Association, Inc.</p>	<p>3 VAC 5-30-60—Add the word “wine” to make the giving of draft wine knobs permissible.</p>	<p>The agency made the requested change to its proposal.</p>
<p>Virginia Beer Wholesalers Association, Inc.</p>	<p>3 VAC 5-30-10—Supports the amendment proposed at B.3.c. In B.3.g., limit exchange in case of discontinued product to product within the same family.</p> <p>3 VAC 5-30-20—Supports proposed amendment.</p> <p>3 VAC 5-30-60—Replace “including but not limited to” with “such as,” and limit the authorized gases to carbon dioxide.</p> <p>3 VAC 5-30-70 and 3 VAC 5-30-90—Supports proposed amendments.</p>	<p>“Family” is not a defined term. The agency has changed to language to limit exchanges to products from the same “manufacturer” rather than the same “supplier,” to achieve the desired result.</p> <p>The agency made the requested change to its proposal to replace “including but limited to” with “such as”. Since tapping equipment may be sold, it is appropriate that any gases required to operate it be permitted as well.</p>
<p>Distilled Spirits Council of the United States</p>	<p>3 VAC 5-30-10—Allow industry members to furnish recommended shelf plans/shelf schematics and product displays, and allow services to be provided by industry member representatives.</p>	<p>Such expansion would be inconsistent with the retailer/industry member independence required by Virginia’s tied house statutes. The agency made the requested change to allow services to be provided by industry member representatives.</p>

	<p>Align exceptions allowing for return of product from retailer to wholesaler with the applicable federal rules.</p> <p>3 VAC 5-30-60—Eliminate beer-only equipment provisions in section A.</p> <p>Add non-logoed glassware and similar containers to the list of dispensing accessories in section B.</p> <p>Eliminate the requirement that customized advertising materials must be made available to all retailers.</p> <p>Revise sections B, G, and I to allow industry members to engage in permitted activities.</p> <p>3 VAC 5-30-70—Allow all industry members and their representatives to engage in business entertainment.</p> <p>3 VAC 5-30-80—Allow exceptions to cooperative advertising in section A. Allow industry members to advertise consumer tastings at retail locations. Add illustrative list of allowable types of advertising items. Allow industry members to provide wine lists to retailers.</p> <p>In section E, allow brochures relating to the manufacturing process of any type of beverage alcohol, not just wine.</p> <p>Entries for contests should be allowed on neck hangers and other items.</p> <p>Sections F and H should allow</p>	<p>Federal rules are vague. Current regulation as amended gives clearer guidance.</p> <p>Beer is different than wine or spirits with respect to tapping equipment. Tapping equipment is required for dispensing of draft beer, and it is common in most on-premise establishments. In most circumstances, tapping equipment is not necessary for the service of wine or mixed beverages. To limit the tied house risk, industry members may sell wine or spirits tapping equipment at no less than cost to retailers, but not provide it at no cost.</p> <p>Glassware can already be sold by industry members to retailers as service items.</p> <p>Requiring equal treatment of all retailers keeps industry members from exerting undue influence upon retailers by making special deals available to preferred retailers.</p> <p>The agency made the requested change to its proposal.</p> <p>Allowing third-party representatives to engage in business entertainment would defeat the requirement that industry members actually accompany those being entertained.</p> <p>No amendments to the subject provisions were published as proposed. Changes requested would require another public comment period.</p> <p>The agency made the requested change to its proposal.</p> <p>The regulation as proposed allows such entry forms.</p> <p>The agency made the requested change to its</p>
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Virginia Hospitality and Travel Association	industry member representatives to furnish coupons and install advertising materials. Supports proposals.	proposal.
Wine Institute	3 VAC 5-30-90—In A (iii), oppose price discrimination based upon status as an off-premises or on-premises licensee.	The agency made the requested change to its proposal.

Enter any other statement here

All changes made in this regulatory action

Please list all changes that are being proposed and the consequences of the proposed changes. Describe new provisions and/or all changes to existing sections.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
3VAC5-30-10		No merchandising of alcoholic beverages by wine wholesalers on Sundays. Wholesalers may provide merchandising services to retailers. Prohibits consignment sales between retailer and wholesaler but for ordinary and usual commercial reasons.	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. Manufacturers, importers, bottlers, brokers may provide merchandising services to retailers. Limited services should not create tied-house problem. 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.

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. Creates more flexibility for wholesalers in pricing.

Enter any other statement here