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## Fast-Track Regulation Agency Background Document

<b>Agency name</b>	Virginia Department of Alcoholic Beverage Control
<b>Virginia Administrative Code (VAC) citation(s)</b>	3 VAC 5- 20
<b>Regulation title(s)</b>	Advertising
<b>Action title</b>	Advertising Print and Electronic Media
<b>Date this document prepared</b>	August 26, 2015

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 17 (2014) and 58 (1999), and the *Virginia Register Form, Style, and Procedure Manual*.

### Brief summary

*Please provide a brief summary (preferably no more than 2 or 3 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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.*

The Alcoholic Beverage Control Board proposes to amend 3 VAC 5-20, Advertising, by deleting paragraphs (A)(2) and (A)(4) and modifying paragraph (A)(3) by deleting, "except in reference to a dining establishment as provided in subdivision 3" of the existing regulation 3VAC 5-20-40 that prohibits or limits the advertising of alcoholic beverages in college student publications.

### 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.*

Board – The Virginia Alcoholic Beverage Control Board.

Electronic Media – shall mean any system involving the transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by wire, radio, television, electromagnetic, photo-electronic or photo-optical system, including but not limited to, television, electronic mail, and the Internet.

**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.*

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On October 28, 2015, The Alcoholic Beverage Control Board adopted an amendment to 3 VAC 5-20, Advertising, amending the existing regulation 3 VAC 5-20-40, Advertising, Print and Electronic Media, 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 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.*

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Section 4.1-103 authorizes the Board to promulgate regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq. and § 4.1-111 of the ABC Act. This section of the Code also provides the Board with broad authority to do all acts necessary to carry out the purposes of Title 4.1.

Section 4.1-111 (A), further authorizes the Board the authority to amend or repeal regulations adopted by it in accordance with the Administrative Process Act (§ 2.2-4000 et seq)

**Purpose**

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

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The prohibition against advertising alcoholic beverages in “College Publications” as currently found in 3 VAC 5-20-40 (A)(2) was held to be in violation of the 1<sup>st</sup> Amendment by the U.S. Court of Appeals for the 4<sup>th</sup> Circuit in the case of *Educational Media Co. v. Insley*, 731 F.3d 291,301. This proposed amendment will remove the language from the existing regulation found to be in violation of the 1<sup>st</sup> amendment to the Constitution. The deletion from (A)(3), removes language referring back to the deleted subsection (A)(2), which is no longer necessary. Subsection (A)(4) does not violate the 1<sup>st</sup> amendment under the reasoning of *Educational Media*, supra *Insley*. However, with the deletion of Subsection (A)(2), it is no longer necessary to authorize the forum of advertising in college student publications described in Subsection (A)(4).

### 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?*

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This proposal is expected to be noncontroversial because the agency is only proposing to delete 3-VAC 5-20-40 (A)(2) and (A)(4) to comply with the ruling of the U.S. Court of Appeals for the 4<sup>th</sup> Circuit in the case of Educational Media Co v Insley, and modify the rest of the regulation for consistency.

### Substance

*Please 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.*

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The removal of the prohibition of advertising alcoholic beverages in "college student publications" will bring the agency into compliance with a ruling of the U.S. Court of Appeals for the 4<sup>th</sup> Circuit.

### 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.*

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The primary advantage for the agency is the removal of the language in 3 VAC 5-20-40 (A)(2) that the U. S. Court of Appeals for the Fourth Circuit found to be in violation of the 1<sup>st</sup> Amendment to the U.S. Constitution and making the rest of the regulation consistent with the Fourth Circuit's ruling. There are no disadvantages.

### 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.*

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There are no 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 this proposed regulatory action.

### Regulatory flexibility analysis

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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 agency has no discretion in this matter as it is following the dictate of the federal court.

### 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.*

<b>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</b>	None
<b>Projected cost of the new regulations or changes to existing regulations on localities.</b>	None
<b>Description of the individuals, businesses, or other entities likely to be affected by the new regulations or changes to existing regulations.</b>	Manufacturers, wholesalers and retailers of alcoholic beverages.
<b>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.</b> Small business means a business entity, including its affiliates, that: a) is independently owned and operated and; b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.	10,000 plus, of which the majority would be classified as small businesses.
<b>All projected costs of the new regulations or changes to existing regulations for affected individuals, businesses, or other entities. Please be specific and include all costs including: a) the projected reporting, recordkeeping, and</b>	None

<p><b>other administrative costs required for compliance by small businesses; and b) 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.</b></p>	
<p><b>Beneficial impact the regulation is designed to produce.</b></p>	<p>The proposal is designed to bring the current regulation into compliance with the Courts holding.</p>

### 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 are no viable alternatives.

### Public participation notice

*If an objection to the use of the fast-track process is received within the 30-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: 1) file notice of the objections with the Registrar of Regulations for publication in the Virginia Register; and 2) proceed with the normal promulgation process with the initial publication of the fast-track regulation serving as the Notice of Intended Regulatory Action.*

### Periodic review and small business impact review report of findings

*If this fast-track is the result of a periodic review/small business impact review, use this form to report the agency's findings. Please (1) summarize all comments received during the public comment period following the publication of the Notice of Periodic Review and (2) indicate whether the regulation meets the criteria set out in Executive Order 17 (2014), e.g., is necessary for the protection of public health, safety, and welfare, and is clearly written and easily understandable. In addition, as required by 2.2-4007.1 E and F, please include 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.*

Commenter	Comment	Agency response

N/A

### Family impact

*Please assess the impact of this 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 regulatory action will have no negative impact on the institution of the family and family stability.

### Detail of changes

*Please list all changes that are being proposed and the consequences of the proposed changes; explain the new requirements and what they mean rather than merely quoting the proposed text of the regulation. 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
3 VAC 5-20-40 (A)(2) (deleted) and (A)(3) (modified) and (A)(4) (deleted)		The existing regulation prohibits the advertising of alcoholic beverages in “college student publications”	<p>The proposed change would eliminate the prohibition on advertising alcoholic beverages in college student publications which was found to be unconstitutional by the U.S. Court of Appeals by the 4<sup>th</sup> Circuit. The elimination of the language found sub paragraph (A)(2) would necessitate the deletion of the limitations contained in subparagraph (A)(4) The deletion in subparagraph (A)(3) is for consistency.</p> <p>The removal of this prohibition will permit those entities who manufacture or sell alcoholic beverages to advertise in such publications.</p>

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