



Proposed Regulation Agency Background Document

Agency name	Alcoholic Beverage Control Board
Virginia Administrative Code (VAC) citation	3 VAC5-20
Regulation title	Advertising
Action title	Alcoholic beverage advertising on outdoor signs and billboards
Date this document prepared	April 26, 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.

This proposed action would amend 3 VAC 5-20-30 to simplify regulations concerning outdoor advertising of alcoholic beverages, and to promulgate restrictions on such advertising consistent with and required by actions of the 2011 and 2012 General Assemblies.

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 Agency Background 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.

Chapter 728 of the 2011 Acts of Assembly and Chapters 760 and 818 of the 2012 Acts of Assembly amended § 4.1-111 of the Code of Virginia to require that the Alcoholic Beverage Control promulgate regulations establishing reasonable time, place, and manner restrictions on outdoor advertising of alcoholic beverages. While the promulgation of regulations is mandatory, most details are discretionary, although the statute contains more specific limitations on where billboard signs advertising alcoholic beverages may be placed.

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.

This action carries out the mandate of Chapter 728 of the 2011 Acts of Assembly and Chapters 760 and 818 of the 2012 Acts of Assembly, which require the Alcoholic Beverage Control Board to promulgate regulations to “establish reasonable time, place, and manner restrictions on outdoor advertising of alcoholic beverages...” The legislation specifies provisions which must be included in such regulations restricting where outdoor advertising signs may be placed. The Alcoholic Beverage Control Board has determined that the proposed regulatory action is essential to protect the health, safety, or welfare of citizens because regulation of alcoholic beverage advertising is necessary to ensure that such advertising does not encourage over-consumption of alcoholic beverages, nor does it encourage or otherwise promote the consumption of alcoholic beverages by persons to whom alcoholic beverages may not be lawfully sold.

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.)

The proposed action would amend 3 VAC 5-20-30 by deleting most of the existing language, which specifies certain numbers of signs, their placement, and content, for various categories of alcoholic beverage industry members. In their place would be four paragraphs which would (1) prohibit the use of persons consuming alcohol, cartoon characters, or persons under the legal drinking age in outdoor alcoholic beverage advertising; (2) prohibit alcoholic beverage advertising within 500 feet of religious institutions, schools, recreational facilities, or residences, with measurements as defined in the Code of Virginia; (3) prohibit outdoor alcoholic beverage advertising on property zoned for agricultural use or un-zoned; and (4) require that outdoor alcoholic beverage advertising comply with Virginia Department of Transportation laws and regulations. Three other paragraphs prohibit manufacturers, importers, or wholesalers from providing outdoor advertising to retailers or engaging in cooperative advertising with retailers, and prohibit manufacturers or importers from requiring wholesalers to engage in outdoor advertising.

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 advantages to the public and regulated businesses lie in the opportunity for increased sharing of information about lawful products. The amended regulation would provide fewer restrictions on commercial speech. The new provisions would be easier to comply with and to enforce. Some members of the public would find additional alcohol advertising or additional outdoor advertising of any nature to be a disadvantage, out of concern for substance abuse or esthetics. The regulatory action poses no disadvantages to 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 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.

There are no localities 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, Department of Alcoholic Beverage Control, Post Office Box 27491, Richmond, Virginia 23261, telephone (804) 213-4409, facsimile (804) 213-4411, curtis.coleburn@abc.virginia.gov. 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.

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.	None
Projected cost of the <i>new regulations or changes to existing regulations</i> on localities.	None
Description of the individuals, businesses or other entities likely to be affected by the <i>new regulations or changes to existing regulations</i>.	Alcoholic beverage manufacturers, wholesalers, and retailers
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.	Virginia licenses approximately 16,000 such entities, of which an estimated 90% are small businesses.
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 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.	There are no costs for affected individuals, businesses, or other entities.
Beneficial impact the regulation is designed to produce.	The regulation is expected to positively influence sales by alcoholic beverage retailers due to greater product exposure.

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.

No viable alternatives to the proposed regulatory action have been identified. The action represents the minimum regulation necessary to meet the statutory mandate. Additional restrictions on outdoor alcoholic beverage advertising were considered, but this alternative was not deemed viable, due to potential conflict with constitutional protections of speech.

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 proposed amendments have no adverse impact on small business. There are no compliance or reporting requirements, other than content limitations on advertising materials, placement in various zones, and distances from schools, churches, and playgrounds. The new regulation results in fewer restrictions than current law.

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.

3 VAC 5-20-30 regulates outdoor advertising of alcoholic beverages within the Commonwealth. The regulation continues to be needed because provisions of Title 4.1 of the Code of Virginia mandate that the board regulate this activity and specifically require the promulgation of regulations in this area. Complaints received by the agency on the existing regulation were that it unduly restricted otherwise lawful commercial speech, protected by the First Amendment to the United States Constitution. The proposed amended regulation is much simpler than the existing regulation. It does not overlap, duplicate,

or conflict with federal or state law or regulation. It was last reviewed in 2010. It does not have any unusual impact on small businesses.

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
Walter A. Marston, on behalf of the Virginia Beer Wholesalers Association and the Virginia Wine Wholesalers Association	<ol style="list-style-type: none"> 1. Ban on placing outdoor alcoholic beverage advertising near “residentially zoned” property should not be limited to property restricted to exclusively residential uses. 2. Prohibition against placing outdoor alcoholic beverage advertising on agricultural property should not be limited to property zoned exclusively for agricultural use. 3. Regulation should contain provisions prohibiting cooperative advertising between industry members and retailers, and provisions restricting manufacturer control over wholesaler expenditures on outdoor alcoholic beverage advertising. 	<ol style="list-style-type: none"> 1. 2012 amendments to the statute on which this regulation is based render this concern partially moot. Measurement is now from structure used as dwelling, not from “residentially zoned” property. 2. Definitions of “residentially zoned” or “agriculturally zoned” property remain limited to property exclusively zoned for such purposes. Broader definitions would likely result in an effective ban on outdoor signs in many areas, a likely unconstitutional result. 3. The draft has been revised to address these concerns.
Virginia Municipal League	Define “residentially zoned” property or “property zoned agricultural” to mean “property shown on the locality’s zoning map or ordinance to be residential zoning.”	Definitions of “residentially zoned” or “agriculturally zoned” property remain limited to property exclusively zoned for such purposes. Broader definitions would likely result in an effective ban on outdoor signs in many areas, a likely unconstitutional result.
Virginia Association of Counties	Define “residentially zoned” property or “property zoned agricultural” to mean “property shown on the locality’s zoning map or ordinance to be residential zoning.”	Definitions of “residentially zoned” or “agriculturally zoned” property remain limited to property exclusively zoned for such purposes. Broader definitions would likely result in an effective ban on outdoor signs in many areas, a likely unconstitutional result.
John G. “Chip”	1. Content restrictions are	Underlying statutes were amended by

<p>Dicks, FutureLaw, LLC, on behalf of the Outdoor Advertising Association of Virginia</p>	<p>unconstitutional when same advertisements are allowed in other forms of media.</p> <ol style="list-style-type: none"> 2. Department of Transportation should administer distance requirements. 3. Regulations should include more specific guidance on how to calculate distance. 	<p>the 2012 General Assembly to address outdoor advertisers' concerns. Necessary changes were incorporated into the proposed draft regulation.</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 proposed regulatory action is not expected to have an 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. 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 5-20-30		<p>Outdoor alcoholic beverage advertising for manufacturers and wholesalers is limited to one sign upon the licensed premises, no more than 30 feet about the ground on a wholesaler’s premises; no more than two directional signs not farther than ½ mile from the establishment, limited to 64 square feet; if a winery or farm winery with off-premises sales privileges, additional directional signs; and on vehicles and uniforms of persons employed exclusively in the business.</p> <p>Retailers are limited to no more than two signs at the establishment, or three if located at an intersection, with letters or symbols not larger than 12 inches in height or width and not animated, with no reference to “happy hour.”</p> <p>No advertising of alcoholic beverages may be displayed in exterior windows or in such a manner that it may be viewed from the exterior of the retail premises.</p> <p>Billboard advertising is only allowed in stadia, coliseums, or racetracks primarily used for professional sporting events.</p>	<p>Restrictions on number, height, size, and size of type of signs will be removed. Signs may not depict persons consuming alcohol, use cartoon characters, or use persons under the legal drinking age as models. Signs may not be located on agricultural or residential property, or un-zoned property, and must comply with statutory distances from schools, churches, playgrounds, and residences, as well as Virginia Department of Transportation statutes and regulations.</p> <p>Changes are designed to simplify the regulation, and lessen restrictions in line with U. S. Supreme Court decisions on the protection of commercial speech. Alcoholic beverage manufacturers, wholesalers, importers, and retailers will likely engage in more outdoor advertising of beverage products. The regulation seeks to minimize impacts on children by restricting sign locations in areas where children congregate regularly.</p>

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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

Enter any other statement here