



Final Regulation Agency Background Document

Agency name	Alcoholic Beverage Control Board
Virginia Administrative Code (VAC) citation	3 VAC5-50
Regulation title	Retail Operations
Action title	Updating Retail Operations Regulations as a Result of Periodic Review
Date this document prepared	October 31, 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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 proposed amendments (i) clarify the types of restaurants that are eligible for a wine and beer license and further distinguishes restaurants that are eligible for a mixed beverage license; (ii) expand the current statutory provisions for licensees (e.g., ability to read, write, speak, and understand the English language) to managers; (iii) lower the dollar amount of food that must be sold at gourmet shops in order for them to be licensed from \$2,000 to \$1,000; (iv) describe the specific criminal conduct that disqualifies an employee of a business rather than cite specific sections of the Code of Virginia; and (v) expand a restaurant's ability to advertise that drink specials are offered during specific times, without allowing advertising of specific special prices.

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 October 31, 2013, the Alcoholic Beverage Control Board took final action to amend 3 VAC 5-50, Retail Operations.

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.

Section 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 Title 4.1 of the Code of Virginia or the general laws of the Commonwealth. Section 4.1-103 of the Code of Virginia compels the Alcoholic Beverage Control Board to establish minimum food sale requirements for all retail licensees.

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 board wishes to clarify the types of restaurants that are eligible for a wine and beer license, as well as those restaurants that qualify for a mixed beverage license. This proposal extends current statutory provisions for licensees (ability to read, write, speak, and understand the English language) to managers. It further simplifies the regulation by describing the criminal offenses that disqualify an employee of the business rather than citing specific sections of the Code of Virginia. Finally, the proposal will expand a restaurant's ability to advertise the fact that drink specials are offered during specific times.

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.

The proposed amendments are intended to provide the regulated industry a better understanding of the types of restaurants eligible for licensure and give further guidance concerning the responsibility of licensees in conducting and advertising happy hours. The amendments simplify the regulation by identifying the specific criminal conduct that disqualifies an individual as opposed to the section of the Code of Virginia.

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.

This proposed action will benefit the regulated community by clarifying the types of restaurants that are eligible for a wine and beer license, as well as those restaurants that qualify for a mixed beverage license. The proposed amendments expand current statutory provisions for licensees (ability to read, write, speak, and understand the English language) to managers. The industry will benefit from expanding a restaurant's ability to advertise drink specials offered during specific times. The public will be protected by continuing the limitation of any practice associated with happy hour, such as extending the time frame beyond 9 p.m. 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 5-50-10	No licensee shall allow the possession of any alcoholic beverage by any person to whom such alcoholic beverage may not lawfully be sold.	Proposed change is withdrawn.	Current statutes and regulations sufficiently address the problem.
3 VAC 5-50-110	"Table" defined as being supported by one or more vertical legs. Service of food in a bona fide, full-service restaurant includes taking a food order at the table.	Table definition modified to include "or similar supports" and clarify that counters behind which meals are prepared are not included within the definition of "table." Taking an order at the table not required.	Some dining tables do not have vertical legs. Since the regulation still requires service to the table with plates and tableware, specifying where the order is taken is unnecessary.

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
Virginia Beer Wholesalers Association	3 VAC 5-50-10—Recommend striking “due to such person’s making a delivery of alcoholic beverages” to make it clear distributor employees under the legal age rendering services in addition to deliveries will not be subject to this regulation.	The proposed language is identical to the applicable statute. The regulation as proposed does not expand any legal limitation on possession by underage distributor employees. However, the agency has decided not to adopt this proposal at this time.
Distilled Spirits Council of the United States	3 VAC 5-50-160—Allow pitchers for mixed beverages.	Due to the much higher alcohol concentration that can be present in mixed beverages, the allowance of pitchers of mixed beverages would represent an unacceptable risk to public safety.
Virginia Hospitality and Travel Association	3 VAC 5-50-10—Opposes proposal to prohibit licensee allowing possession of alcohol by underage on licensed premises.	The agency has decided not to adopt this proposal at this time.
	3 VAC 5-50-40—Opposes restriction on employment of individuals with misdemeanor DUI convictions.	The proposed regulation does not change current law on this point. Any alcohol law violation, whether misdemeanor or felony, requires a licensee to seek approval to hire. No change is intended.
	3 VAC 5-50-60—Recommend clarification that mixed beverage licensees may pre-mix sangria.	No change to the regulation is necessary. The handling of sangria is established by statute.
	3 VAC 5-50-110—Amend the definition of “table” to remove requirement of vertical legs, and remove the requirement of “taking a food order at the table” to be considered full-service restaurant.	The agency is amending the proposal to broaden the definition of “table” and to remove the requirement that the food order be taken at the table, so long as all food and beverages are served at the table.
	3 VAC 5-50-160—Oppose new language in paragraph B9.	The proposal will proceed as proposed. The purpose of the provision is to make it clear that a mixed beverage licensee may not establish artificially low regular prices for alcoholic beverages to circumvent happy hour restriction.

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
3 VAC 5-50-20		Bona fide evidence of legal age must include the weight of the person identified.	Requirement that identification include the weight of the subject is repealed. Virginia driver licenses, the most common form of state government identification card, no longer include the subject's weight.
3 VAC 5-50-40		Licensee shall have a designated manager present and in charge of the business.	Amendment will make it clear that this provision applies to retail licensees only, and will require that the designated manager be able to understand and communicate in English. Licensees are required by statute to be able to communicate in English, so those they leave in charge of the premises should also be able to do so.
		Licensees must seek permission to employ persons with convictions of certain articles of certain chapters of the criminal code.	References to articles and chapters of the criminal code are converted to description of the actual conduct prohibited by the previously cited sections. Affected persons can more easily determine what crimes are potential barriers to employment.
3 VAC 5-50-60		No mixed beverage restaurant or carrier licensee shall prepare mixed drinks except pursuant to a patron's order and immediately preceding delivery to him, except in frozen drink dispensers of types approved by the board.	Reference to frozen drink dispensers of types approved by the board is removed. A statutory change exempts all frozen drinks from the prohibition against pre-mixing, so the use of approved frozen drink dispensers is not longer necessary.
3 VAC 5-50-100		Gourmet shop licensees must maintain monthly sales and inventory of at least \$2,000.	Gourmet shop licensees must maintain monthly sales and inventory of at least \$1,000. The food sales requirement was set by statute.
3 VAC 5-50-110	Definitions and qualifications for retail on-premises and on-premises and off-premises licenses are set forth.	Existing definitions are rearranged to clarify and simplify the regulation. New definitions of "meal" and "table" are added as well as service requirements for "bona fide full-service restaurants." These terms required definition since mixed beverage restaurant licenses are limited by law to bona fide full-service, specializing in full-course meals, with more seats at tables than at counters.	

<p>3 VAC 5-50-160</p>		<p>No retail licensee shall engage in advertising happy hour in the media or on the exterior of the licensed premises.</p> <p>Retail licensees may not sell alcoholic beverages at reduced prices between 9 p.m. of each day and 2 a.m. of the following day.</p>	<p>A licensee may use the term "Happy Hour" or "Drink Specials" and the time period within which alcoholic beverages are being sold at reduced prices in any otherwise lawful advertisement. This change allows licensees more freedom in advertising the fact that they have reduced prices during certain hours, but continues to adequately avoid promotion of excessive drinking by continuing to prohibit the advertising of specific reduced prices.</p> <p>A retail licensee may not establish a customary retail price for any drink at a markup significantly lower than that applied to beverages of similar type, quality, or volume. This change will prevent licensees from circumventing the "happy hour" restrictions by establishing an artificially low regular retail price for a particular drink or drinks.</p>
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