



Final Regulation Agency Background Document

Agency name	Alcoholic Beverage Control Board
Virginia Administrative Code (VAC) citation	3 VAC 5-50
Regulation title	Retail Operations
Action title	Clarifying and Simplifying Retailer Regulations
Date this document prepared	November 19, 2008

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Orders 36 (2006) 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of the proposed new regulation, proposed amendments to the existing regulation, or the regulation proposed to be repealed.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 Alcoholic Beverage Control Board is proposing amendments to its regulations governing operations by retail licensees. The new provisions will (1) provide a process for licensees to apply for permission to employ individuals with certain criminal convictions, (2) allow persons 18 and over to serve wine at a counter in establishments selling wine only, (3) allow wine to be placed in containers of ice by farm wineries at wine festivals, (4) simplify food requirements for grocery stores and convenience grocery stores, (5) simplify the limitations of non-member use of licensed club facilities, and (6) clarify the rules with respect to partially nude entertainers at licensed establishments to define the separation that must be maintained from customers, specify the minimum clothing required at mixed beverage establishments, and clarify that this regulation does not restrict legitimate theatrical productions.

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.

On November 17, 2008, the Alcoholic Beverage Control Board took final action to adopt amendments to 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 law and/or regulation, including Code of Virginia citation and General Assembly chapter numbers, if applicable, and (2) promulgating entity, i.e., agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

Title 4.1 of the Code of Virginia gives the Alcoholic Beverage Control Board general authority to regulate the manufacture, distribution and sale of alcoholic beverages within the Commonwealth, including the authority to promulgate regulations which it deems necessary to carry out the provisions of Title 4.1, in accordance with the Administrative Process Act. The Code mandates that the Board promulgate regulations, but details are left to the Board's discretion.

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.

This action is intended to revise the Alcoholic Beverage Control Board's regulations governing qualifications and operating rules for retail licensees.

The goals of this regulation are:

1. To prescribe reasonable minimum qualifications for holders of retail licenses; and
2. To promote the public health, safety, and welfare by reasonably regulating retail alcoholic beverage sales so as to prevent sales to those under the legal age or intoxicated, and to discourage overconsumption.

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.

3 VAC 5-50-40 would be revised to provide a process for licensees to apply for approval for the employment of individuals whose records of criminal or alcoholic beverage violations might subject the licensee to disciplinary action pursuant to § 4.1-225 I of the Code of Virginia.

In 3 VAC 5-50-50, a provision would be added allowing persons 18 years of age or older to sell or serve wine for on-premises consumption at a counter in an establishment selling wine only.

3 VAC 5-50-80 would be amended to create an exception to the prohibition against placing alcoholic beverages in containers of ice available to consumers for off-premises consumption for farm winery licensees operating a remote retail location at a wine festival.

In 3 VAC 5-50-100, the provision in subsection A4 requiring grocery stores and convenience grocery stores to have at least five items from each of the basic food groups would be repealed.

In subsection C of 3 VAC 5-50-130, the rules for non-member use of club premises would be simplified to allow licensed clubs to admit non-members to the licensed club area for events at which alcohol is served up to 24 times each year. Limits on use of the unlicensed portion of club premises would be repealed.

3 VAC 5-50-140 would be revised to clarify that its provisions do not apply to legitimate theatrical or art exhibits or performances, and current provisions requiring partially nude performers to remain reasonably separate from patrons would be clarified by defining “reasonably separated” to mean no contact between performers and patrons. A new paragraph would establish the minimum level of clothing required of persons connected with the business at mixed beverage establishments.

These amendments will protect the health, safety, or welfare of citizens by allowing alcoholic beverage retailers fewer restrictions on the operation of their businesses, while continuing to discourage over-consumption.

The amendments to 3 VAC 5-50-140 will help to protect citizens from the negative secondary effects of sexually oriented businesses.

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.*

There are no disadvantages to the public or the Commonwealth. The primary advantages to regulated businesses are simplification or clarification of existing rules, to ease compliance. Businesses wishing to employ persons with convictions which could otherwise result in risking license suspension or revocation will now be able to apply for advance approval, and will be able to employ persons convicted of many offenses without prior approval.

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 5-50-140	Mixed beverage licensees prohibited from allowing anyone to enter or remain on the premises with less than a fully-opaque covering of the genitals, pubic hair, or buttocks, or any portion of the breast	This provision is limited to “persons connected with the licensed business.”	This section has been amended to conform to the provisions of Section 4.1-325 of the Code of Virginia, which prohibits mixed beverage licensees from allowing “anyone connected with the

	below the top of the areola.		licensed business” to appear nude or partially nude.
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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
Dennis P. Gallagher, Virginia Beer Wholesalers Association	<p>Proposed amendment to 3 VAC 5-50-50 should be expanded to apply to allow 18-year-olds to serve beer and wine at a counter in beer and wine licensed establishments.</p> <p>Proposed amendment to 3 VAC 5-50-80 should be expanded to allow breweries who participate at special events to keep beer in containers of ice.</p>	<p>3 VAC 5-50-50 is designed to carry out a Code provision that says that a person must be 21 to serve in the capacity of a bartender. The proposed amendment is drafted to make only a slight exception for persons pouring wine in winery tasting rooms, which are the only wine-only licensees with on-premises consumption. The amendment proposed by the commenter would open this to all restaurants. The board does not think such an expansion would be within the spirit of the statute.</p> <p>The regulation only applies to products intended for off-premises consumption. Brewers are not licensed to sell beer for off-premises consumption at special events. Therefore, the suggested expansion of the proposed amendment is not appropriate.</p>
James Neal Insley, LeClair Ryan, for the Virginia Nightlife Association	Proposed nudity requirements for mixed beverage establishments would make licensees liable for customers walking in wearing clothing that is legal on the street.	The board amended the proposal so that it now applies only to persons connected with the licensed business, not to patrons. This conforms the regulation to the provisions of Section 4.1-325 of the Code of Virginia, which provides that no mixed beverage licensee may allow any person connected with the licensed business to appear nude or partially nude.
William Baldwin, President, Virginia Nightlife Association	Proposed nudity requirements for mixed beverage establishments would prohibit patrons entering wearing most bikinis, and would be unfair, especially in the summer at the beach.	The board amended the proposal so that it now applies only to persons connected with the licensed business, not to patrons. This conforms the regulation to the provisions of Section 4.1-325 of the Code of Virginia, which provides that no mixed beverage licensee may allow any person connected with the licensed business to appear nude or partially nude.
Robert Brown	Exotic dancers should not have to cover the areola of the breast.	The proposed regulation was not intended to address any issues concerning the level of

<p>Gwynne Cunningham, Chair, Virginia Offender Workforce Development Partnership</p>	<p>Supports the amendment of 3 VAC 5-50-40 to increase job opportunities for jobseekers with criminal records, but recommend further amendment to allow employers to hire persons with all but alcohol-related convictions.</p>	<p>nudity permitted performers in gentlemen’s clubs.</p> <p>The adopted proposal greatly increases the ability of licensees to employ persons with criminal records without seeking approval. It only requires a review by the agency when a person has a conviction for violation of the alcoholic beverage laws, when a person with a felony drug conviction is to be employed in a position selling or serving alcohol, or a person with a felony conviction for fraud or theft is to be employed in a position involving accounting for taxes or maintaining required business records. At this time, the board feels the adopted proposal is necessary to protect the public safety and revenue.</p>
<p>151 nonregistered public users of the Townhall Public Comment Forum</p>	<p>Several commenters objected that the proposed amendments to 3 VAC 5-50-140, as proposed, would prohibit customers in bathing suits or revealing clothing from entering any mixed beverage restaurant.</p> <p>Most of the remaining commenters appeared to believe that the proposed regulation modified the level of nudity allowed exotic dancers, and objected to such a change, or expressed opposition to other portions of the existing regulation not proposed for amendment in this action. One commenter favored banning nude dancing.</p>	<p>The board amended the proposal so that it now applies only to persons connected with the licensed business, not to patrons. This conforms the regulation to the provisions of Section 4.1-325 of the Code of Virginia, which provides that no mixed beverage licensee may allow any person connected with the licensed business to appear nude or partially nude.</p> <p>This action includes only three changes to the current 3 VAC 5-50-140: (1) “reasonably separated” is defined to mean no touching between patron and entertainer; (2) employees and other persons connected with mixed beverage establishments must maintain a minimum level of dress; and (3) museums, theaters, and other organizations engaged in legitimate artistic, scientific, or political expression are exempt from the provisions.</p>

Enter any other statement here

All changes made in this regulatory action

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

Current section number	Proposed new section number, if	Current requirement	Proposed change and rationale
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	applicable		
3 VAC 5-50-40		Provides process for obtaining board approval of designated managers, but not of other employees	Add new subsection providing a process for licensees to request approval for the hiring of persons with criminal records and limiting the types of offenses which would require board approval for employment. Currently the board may suspend or revoke the license of anyone employing persons with certain convictions, but there is no prescribed process to get permission to do so.
3 VAC 5-50-50		18-year-olds may serve beer at a counter in a beer only establishment, but there is no parallel provision for places serving only wine	18-year-olds may serve beer at a counter in a beer-only establishment, and may serve wine at a counter in a wine-only establishment. This will allow 18-year-olds to man tasting rooms at farm wineries.
3 VAC 5-50-80		Alcoholic beverages may not be placed in containers of ice in public display	Exception created for farm wineries exercising their remote privileges at wine festivals. Much of this wine is sold for on-premises consumption at the festival, and ice containers provide the only available refrigeration.
3 VAC 5-50-100		Grocery and convenience stores must stock at least 5 items from each of 5 basic food groups.	Reference to specific food groups eliminated. Licensees will still have to maintain a minimum inventory of foods normally used in the preparation of meals. Simplifies enforcement.
3 VAC 5-50-130		Clubs may hold public events 12 times per year, may allow non-members with banquet licenses to hold events on the club premises 12 times per year, and may obtain banquet licenses on unlicensed premises 12 times per year	Licensed club premises may be opened to the public 24 times per year. Simplifies the rule for the licensees and enforcement.
3 VAC 5-50-140		Adult entertainers may be more scantily clad when "reasonably separated" from customers. "Reasonably separated" is not defined. No exception to the nudity prohibitions exists for legitimate theatrical productions.	"Reasonably separated" is defined as no contact between any part of performer's body with any part of patron's body. In mixed beverage establishments, breasts, buttocks, and pubic area must be covered by anyone connected with the business. Legitimate theatrical productions are exempt from the regulation. Current provisions are not precise, and court decisions indicate they should not be applied to legitimate theatrical productions.

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 proposals clarify and simplify existing rules. There are no provisions creating adverse impacts on small business.

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.

It is not expected that this regulatory action will have any impact on the institution of the family.