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## Fast-Track Regulation Agency Background Document

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| <b>Agency name</b>  | Virginia Alcoholic Beverage Control Authority |
| <b>Virginia Administrative Code (VAC) Chapter citation(s)</b> | 3 VAC5-50-220                                 |
| <b>VAC Chapter title(s)</b>                                   | Interests in the businesses of licensees      |
| <b>Action title</b>   | Percentage Payments                           |
| <b>Date this document prepared</b>                            | September 21, 2021                            |

This information is required for executive branch review and the Virginia Registrar of Regulations, pursuant to the Virginia Administrative Process Act (APA), Executive Order 14 (as amended, July 16, 2018), the Regulations for Filing and Publishing Agency Regulations (1VAC7-10), and the *Form and Style Requirements for the Virginia Register of Regulations and Virginia Administrative Code*.

### Brief Summary

*Provide a brief summary (preferably no more than 2 or 3 paragraphs) of this regulatory change (i.e., new regulation, amendments to an existing regulation, or repeal of an existing regulation). Alert the reader to all substantive matters. If applicable, generally describe the existing regulation.*

The purpose of this action is to amend 3VAC5-50-220 so that it creates an additional exception to the general rule that a licensee may not let another person receive a percentage of the income of the licensed business or have any beneficial interest in such business. Presently, the regulation allows an exception to the general rule where the percentage-based payment is a franchise fee or a rent payment.

### Acronyms and Definitions

*Define all acronyms used in this form, and any technical terms that are not also defined in the "Definitions" section of the regulation.*

NA

## Statement of Final Agency Action

*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.*

The action was commenced on October 5, 2021. The agency taking the action is the Virginia Alcoholic Beverage Control Authority. The title of the regulation currently is "Interests in the businesses of licensees" and will remain the same.

## Mandate and Impetus

*Identify the mandate for this regulatory change and any other impetus that specifically prompted its initiation (e.g., new or modified mandate, petition for rulemaking, periodic review, or board decision). For purposes of executive branch review, "mandate" has the same meaning as defined in Executive Order 14 (as amended, July 16, 2018), "a directive from the General Assembly, the federal government, or a court that requires that a regulation be promulgated, amended, or repealed in whole or part."*

*As required by Virginia Code § 2.2-4012.1, also explain why this rulemaking is expected to be noncontroversial and therefore appropriate for the fast-track process.*

The impetus for this action is the Authority's decision that the regulation should be revised so that it accurately reflects current business trends for compensation structures in management agreements.

## Legal Basis

*Identify (1) the promulgating agency, and (2) the state and/or federal legal authority for the regulatory change, including the most relevant citations to the Code of Virginia and Acts of Assembly chapter number(s), if applicable. Your citation must include a specific provision, if any, authorizing the promulgating agency to regulate this specific subject or program, as well as a reference to the agency's overall regulatory authority.*

- 1) The promulgating agency is the Virginia Alcoholic Beverage Control Authority.
- 2) Section 4.1-101 of the Code of Virginia (Code) establishes the Virginia Alcoholic Beverage Control Authority (ABC Board.)

Section 4.1-103 of the Code enumerates the powers of the Board which includes the authority to adopt regulations and to do all acts necessary or advisable to carry out the purposes of Title 4.1 of the Code (ABC Act). Section 4.1-103(7) states the Board may delegate or assign any duty or task to be performed by the Authority to any officer or employee of the Authority. Section 4.1-103(24) permits the Board to promulgate regulations in accordance with the Administrative Process Act and Section 4.1-111.

Section 4.1-111 (A) provides the Board with the authority to adopt reasonable regulations which it deems reasonable to carry out the provisions of the ABC Act and to amend or repeal such regulations.

## Purpose

*Explain the need for the regulatory change, including a description of: (1) the rationale or justification, (2) the specific reasons the regulatory change is essential to protect the health, safety or welfare of citizens, and (3) the goals of the regulatory change and the problems it's intended to solve.*

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VA ABC recognized that the regulation needed to be revised because current trends in compensation structure of management agreements involves management companies being paid a percentage of the income from the business that they manage. VA ABC is often met with resistance when trying to enforce this provision of the regulation because it is not indicative of how most companies operate. The goal is to create another exception to the general rule that will allow for a percentage-based payment while still giving the Authority the ability to hold the licensee liable for any violations committed by the management company and also enforce a reasonable cap on the percentage of income from the licensed business that a management company may receive as payment.

## Substance

*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 regulation is amended to create an additional exception to the general rule in 3VAC5-50-220 that a licensee may not let another person receive a percentage of the income of the licensed business or have any beneficial interest in such business. Presently, the regulation allows an exception to the general rule where the percentage-based payment is a franchise fee or a rent payment. The revision will allow percentage based payments to management companies and promoters hired by the licensee to handle operational duties on behalf of the licensee provided that the management company or promoter receives less than 10% of the business income and the Authority is provided a copy of the contract indicating that the management company or promoter is an agent of the licensee for the purposes of exercising the privileges of the license and the licensee is liable for any violations of Title 4.1 of the code or Board regulations committed by the management company or promoter.

## Issues

*Identify the issues associated with the regulatory change, 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, include a specific statement to that effect.*

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The primary advantage to the public and the Commonwealth is that this amendment will allow the regulation to catch up to current business trends while still maintaining control over who can receive percentage-based payments from licensed entities, limiting the amount of these payments, and maintaining administrative liability for entities that are not within the exception created by this provision. There are no perceived disadvantages to the Commonwealth.

## Requirements More Restrictive than Federal

*Identify and describe any requirement of the regulatory change which is more restrictive than applicable federal requirements. Include a specific citation for each applicable federal requirement, and 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 specific statement to that effect.*

NA

**Agencies, Localities, and Other Entities Particularly Affected**

*Identify any other state agencies, localities, or other entities particularly affected by the regulatory change. "Particularly affected" are those that are likely to bear any identified disproportionate material impact which would not be experienced by other agencies, localities, or entities. "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulation or regulatory change are most likely to occur. If no agency, locality, or entity is particularly affected, include a specific statement to that effect.*

Other State Agencies Particularly Affected

NA

Localities Particularly Affected

NA

Other Entities Particularly Affected

NA

**Economic Impact**

*Pursuant to § 2.2-4007.04 of the Code of Virginia, identify all specific economic impacts (costs and/or benefits), anticipated to result from the regulatory change. When describing a particular economic impact, specify which new requirement or change in requirement creates the anticipated economic impact. Keep in mind that this is change versus the status quo.*

**Impact on State Agencies**

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| <p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:<br/>                 a) fund source / fund detail;<br/>                 b) delineation of one-time versus on-going expenditures; and<br/>                 c) whether any costs or revenue loss can be absorbed within existing resources</p> | <p>There are no projected costs.</p>  |
| <p><i>For other state agencies:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including a delineation of one-time versus on-going expenditures.</p>  | <p>There are no projected costs.</p>  |
| <p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>  | <p>The revision will allow percentage based payments to management companies and promoters hired by the licensee to handle operational duties on behalf of the licensee</p> |

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|  | <p>provided that the management company or promoter receives less than 10% of the business income and the Authority is provided a copy of the contract indicating that the management company or promoter is an agent of the licensee for the purposes of exercising the privileges of the license and the licensee is liable for any violations of Title 4.1 of the code or Board regulations committed by the management company or promoter.</p> |
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**Impact on Localities**

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| <p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p> | <p>There are no projected costs.</p>   |
| <p>Benefits the regulatory change is designed to produce.</p>                           | <p>The revision will allow percentage based payments to management companies and promoters hired by the licensee to handle operational duties on behalf of the licensee provided that the management company or promoter receives less than 10% of the business income and the Authority is provided a copy of the contract indicating that the management company or promoter is an agent of the licensee for the purposes of exercising the privileges of the license and the licensee is liable for any violations of Title 4.1 of the code or Board regulations committed by the management company or promoter.</p> |

**Impact on Other Entities**

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| <p>Description of the individuals, businesses, or other entities likely to be affected by the regulatory change. If no other entities will be affected, include a specific statement to that effect.</p>  | <p>This revision will only impact applicants for ABC licenses and current ABC licensees.</p>  |
| <p>Agency's best estimate of the number of such entities that will be affected. Include an estimate of the number of small businesses affected. Small business means a business entity, including its affiliates, that:<br/> a) is independently owned and operated and;<br/> b) employs fewer than 500 full-time employees or has gross annual sales of less than \$6 million.</p>   | <p>Currently, there are 20,728 active licenses. This revision will only impact those licensees that hire management companies or promoters to handle operational duties. The Authority does not track which of these licensees would qualify as a small business.</p> |
| <p>All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Be specific and include all costs including, but not limited to:<br/> a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses;<br/> b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change;<br/> c) fees;<br/> d) purchases of equipment or services; and</p> | <p>There are no projected costs.</p>  |

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| e) time required to comply with the requirements.      |   |
| Benefits the regulatory change is designed to produce. | The revision will allow percentage based payments to management companies and promoters hired by the licensee to handle operational duties on behalf of the licensee provided that the management company or promoter receives less than 10% of the business income and the Authority is provided a copy of the contract indicating that the management company or promoter is an agent of the licensee for the purposes of exercising the privileges of the license and the licensee is liable for any violations of Title 4.1 of the code or Board regulations committed by the management company or promoter. |

**Alternatives to Regulation**

*Describe any viable alternatives to the regulatory change that were considered, and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the regulatory change. 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 regulatory change.*

There are no viable alternatives.

**Regulatory Flexibility Analysis**

*Pursuant to § 2.2-4007.1B of the Code of Virginia, 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) establishing less stringent compliance or reporting requirements; 2) establishing less stringent schedules or deadlines for compliance or reporting requirements; 3) consolidation or simplification of compliance or reporting requirements; 4) establishing 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 regulatory change.*

There was no analysis of alternative regulatory methods. This revision requires licensees who enter into management agreements with other entities to provide a copy of the contract and the contract must reflect that the management company or promoter is an agent of the licensee for the purposes of exercising the privileges of the ABC license and that the licensee shall be liable for any violations of Title 4.1 of the code and Board regulations committed by the management company or promoter. Licensees and applicants are already required to provide copies of management agreements to the Authority. The revision does not impose any new schedules or deadlines other than those that are already in effect. The regulation does not establish any new performance standards for small businesses. There are no exemptions for small businesses.

**Public Participation**

*Indicate how the public should contact the agency to submit comments on this regulation, and whether a public hearing will be held, by completing the text below.*

*As required by § 2.2-4011 of the Code of Virginia, 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.*

If you are objecting to the use of the fast-track process as the means of promulgating this regulation, please clearly indicate your objection in your comment. Please also indicate the nature of, and reason for, your objection to using this process.

The [insert agency] is providing an opportunity for comments on this regulatory proposal, including but not limited to (i) the costs and benefits of the regulatory proposal and any alternative approaches, (ii) the potential impacts of the regulation, and (iii) the agency's regulatory flexibility analysis stated in this background document.

Anyone wishing to submit written comments for the public comment file may do so through the Public Comment Forums feature of the Virginia Regulatory Town Hall web site at: <https://townhall.virginia.gov>. Comments may also be submitted by mail, email or fax to [insert: staff contact person's name, mailing address, phone number, fax number and email address]. In order to be considered, comments must be received by 11:59 pm on the last day of the public comment period.

### Detail of Changes

*List all regulatory changes and the consequences of the changes. Explain the new requirements and what they mean rather than merely quoting the text of the regulation. For example, describe the intent of the language and the expected impact. Describe the difference between existing requirement(s) and/or agency practice(s) and what is being proposed in this regulatory change. Use all tables that apply, but delete inapplicable tables.*

*If an existing VAC Chapter(s) is being amended or repealed, use Table 1 to describe the changes between existing VAC Chapter(s) and the proposed regulation. If existing VAC Chapter(s) or sections are being repealed and replaced, ensure Table 1 clearly shows both the current number and the new number for each repealed section and the replacement section.*

**Table 1: Changes to Existing VAC Chapter(s)**

| Current chapter-section number | New chapter-section number, if applicable | Current requirements in VAC  | Change, intent, rationale, and likely impact of new requirements   |
|--------------------------------|---|--|--|
| 3VAC5-10-220                   |   | 3VAC5-50-220. Interests in the businesses of licensees. Persons to whom licenses have been issued shall not allow any other person to receive a percentage of the income of the licensed business or have any beneficial interest in such business; provided, however, that nothing in this section shall be construed to prohibit:<br>1. The payment by the licensee of a franchise fee based in whole or in part | 3VAC5-50-220. Interests in the businesses of licensees. Persons to whom licenses have been issued shall not allow any other person to receive a percentage of the income of the licensed business or have any beneficial interest in such business; provided, however, that nothing in this section shall be construed to prohibit:<br>1. The payment by the licensee of a franchise fee based in whole or in part |



| Current chapter-section number | New chapter-section number, if applicable | Current requirements in VAC   | Change, intent, rationale, and likely impact of new requirements   |
|--------------------------------|---|---|--|
|                                |   | <p>upon a percentage of the entire gross receipts of the business conducted upon the licensed premises, where such is reasonable as compared to prevailing franchise fees of similar businesses; or</p> <p>2. Where the licensed business is conducted upon leased premises, and the lease when construed as a whole does not constitute a shift or device to evade the requirements of this section:</p> <p>a. The payment of rent based in whole or in part upon a percentage of the entire gross receipts of the business, where such rent is reasonable as compared to prevailing rentals of similar businesses; and</p> <p>b. The landlord from imposing standards relating to the conduct of the business upon the leased premises, where such standards are reasonable as compared to prevailing standards in leases of similar businesses, and do not unreasonably restrict the control of the licensee over the sale and consumption of alcoholic beverages.</p> | <p>upon a percentage of the entire gross receipts of the business conducted upon the licensed premises, where such is reasonable as compared to prevailing franchise fees of similar businesses; or</p> <p>2. Where the licensed business is conducted upon leased premises, and the lease when construed as a whole does not constitute a shift or device to evade the requirements of this section:</p> <p>a. The payment of rent based in whole or in part upon a percentage of the entire gross receipts of the business, where such rent is reasonable as compared to prevailing rentals of similar businesses; and</p> <p>b. The landlord from imposing standards relating to the conduct of the business upon the leased premises, where such standards are reasonable as compared to prevailing standards in leases of similar businesses, and do not unreasonably restrict the control of the licensee over the sale and consumption of alcoholic beverages.</p> <p>3. <u>The payment by the licensee of a management fee based in whole or in part upon a percentage of the entire gross receipts of the business conducted under the license where the licensee has contracted with a management company or promoter to perform operational duties on behalf of the licensee, provided that:</u></p> <p><u>a. All payments to any management company or promoter are less than 10% in aggregate of the gross receipts of the business conducted under the license; and</u></p> <p><u>b. The licensee provides the Authority a copy of the contract between the licensee and the promoter that identifies the management company or promoter as an agent of the licensee for the purposes of exercising the privileges of the license and holds the licensee liable for any violations of Title 4.1 of the code or Board regulation committed by the management company or promoter.</u></p> |

*If a new VAC Chapter(s) is being promulgated and is not replacing an existing Chapter(s), use Table 2.*



**Table 2: Promulgating New VAC Chapter(s) without Repeal and Replace**

| New chapter-section number | New requirements | Other regulations and law that apply | Intent and likely impact of new requirements |
|----------------------------|------------------|--------------------------------------|--|
|                            |                  |                                      |  |
|                            |                  |                                      |  |

*If the regulatory change is replacing an **emergency regulation**, and the proposed regulation is identical to the emergency regulation, complete Table 1 and/or Table 2, as described above.*

*If the regulatory change is replacing an **emergency regulation**, but changes have been made since the emergency regulation became effective, also complete Table 3 to describe the changes made since the emergency regulation.*

**Table 3: Changes to the Emergency Regulation**

| Emergency chapter-section number | New chapter-section number, if applicable | Current <u>emergency</u> requirement | Change, intent, rationale, and likely impact of new or changed requirements since emergency stage |
|----------------------------------|---|--------------------------------------|---|
|                                  |   |                                      |   |
|                                  |   |                                      |   |