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Proposed Regulation Agency Background Document

Agency name	Virginia Alcoholic Beverage Control Authority
Virginia Administrative Code (VAC) citation(s)	3 VAC 5-50-250
Regulation title(s)	Confectionery license; definition; restrictions; labeling
Action title	Confectionery license
Date this document prepared	September 30, 2019

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 (1 VAC7-10), and the *Virginia Register Form, Style, and Procedure Manual for Publication of Virginia Regulations*.

Brief Summary

Please 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.

Senate Bill 61 (and its duplicate House Bill 1602), from the 2018 General Assembly Session, created a confectionery license, which authorizes the licensee to prepare and sell on the licensed premises for off-premises consumption confectionery that contains five percent or less alcohol by volume. The bill provides that any alcohol contained in such confectionery shall not be in liquid form at the time such confectionery is sold and requires the Board of Directors of the Alcoholic Beverage Control Authority to promulgate regulations to implement the provisions of the bill, which shall include a definition of the term "confectionery" and labeling requirements for such confectionery.

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.

NA

Mandate and Impetus

Please 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, board decision, etc.). 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."

Senate Bill 61 (and its duplicate House Bill 1602), from the 2018 General Assembly Session, created a confectionery license and directed the Board of Directors of the Alcoholic Beverage Control Authority to promulgate regulations to implement the provisions of the bill, which shall include a definition of the term "confectionery" and labeling requirements for such confectionery.

In order to provide the licensing community with a definition of confectionery along with special requirements for licensing at the time that the law went into effect, VA ABC promulgated an emergency regulation. The emergency regulation only received two comments. One comment in support of the regulation and one requesting that the definition include jams, jellies, ice creams, sorbets, yogurts, puddings, and gelatins. VA ABC did not make any changes pursuant to that comment. VA ABC held the position that since the additional items mentioned in the comment were not presented to the General Assembly when the two bills were passed, then VA ABC could not include them in the definition. The emergency regulation has been in effect since July 1, 2018. There have not been any issues with the current enforcement of the regulation. VA ABC proposes to remove some language from the emergency regulation so that it is clear that a confectionery *only* includes baked goods and candies.

Legal Basis

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

Section 4.1-101 of the Code of Virginia (Code) establishes the Department of Alcoholic Beverage Control (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

Please 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.

The purpose of the regulation is to provide a definition of 'confectionery', as well as providing clarification as to the restrictions regarding the alcohol content, sales to those 21 and over, and labeling requirements for confections containing alcohol.

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.

The current emergency regulation reads as follows:

3VAC5-50-250. Confectionery; definition; restrictions; labeling

- A. "Confectionery" - shall mean a general class of sweet foods and edibles, including baked goods and candies having an alcohol content not more than 5% by volume.
- B. Any alcohol contained in such confectionery shall not be in liquid form at the time such confectionery is sold. Such alcohol shall be fully integrated or blended into the confectionery product.
- C. Any such confectionery shall only be sold to those individuals who can lawfully consume alcohol.
- D. Any establishment licensed to sell confectioneries for off-premises consumption, shall properly label the product with such label including:
 1. Notice that the product contains alcohol;
 2. Notice that the product can only be consumed off-premises; and
 3. Warning that the product should not be consumed by anyone under the age of 21.

The proposed change is as follows:

3VAC5-50-250. Confectionery; definition; restrictions; labeling

- A. "Confectionery" - shall mean ~~a general class of sweet foods and edibles, including~~ baked goods and candies having an alcohol content not more than 5% by volume.
- B. Any alcohol contained in such confectionery shall not be in liquid form at the time such confectionery is sold. Such alcohol shall be fully integrated or blended into the confectionery product.
- C. Any such confectionery shall only be sold to those individuals who can lawfully consume alcohol.
- D. Any establishment licensed to sell confectioneries for off-premises consumption, shall properly label the product with such label including:
 1. Notice that the product contains alcohol;
 2. Notice that the product can only be consumed off-premises; and
 3. Warning that the product should not be consumed by anyone under the age of 21.

Issues

Please 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.

The primary advantage to the public, the agency, and the Commonwealth is that the emergency regulation will be substituted with a permanent regulation. The permanent regulation is straightforward and does not lend to any confusion.

Requirements More Restrictive than Federal

Please 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

Please 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.

No agency, locality, or entity is particularly affected by this regulatory change.

Economic Impact

Pursuant to § 2.2-4007.04 of the Code of Virginia, please 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. Please keep in mind that this is change versus the status quo.

Impact on State Agencies

<p><i>For your agency:</i> projected costs, savings, fees or revenues resulting from the regulatory change, including:</p> <ul style="list-style-type: none"> a) fund source / fund detail; b) delineation of one-time versus on-going expenditures; and c) whether any costs or revenue loss can be absorbed within existing resources 	<p>There are no projected costs, savings, fees, or revenues associated with this regulatory change.</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, savings, fees, or revenues associated with this regulatory change.</p>
<p><i>For all agencies:</i> Benefits the regulatory change is designed to produce.</p>	<p>VA ABC is the only agency that stands to benefit from this change as it only applies to a specific licensee. The benefit to VA ABC is that it will now have a permanent regulation that comports with the requirements of the associated statute and is easy to comprehend.</p>

Impact on Localities

<p>Projected costs, savings, fees or revenues resulting from the regulatory change.</p>	<p>There are no projected costs, savings, fees, or revenues associated with this regulatory change.</p>
<p>Benefits the regulatory change is designed to produce.</p>	<p>VA ABC is the only agency that stands to benefit from this change as it only applies to a specific licensee. The benefit to VA ABC is that it will now have a permanent regulation that is easily understood within the licensee community.</p>

Impact on Other Entities

<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 regulation only affects businesses with confectionery licenses. No other entities will be affected.</p>
<p>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:</p> <ul style="list-style-type: none"> a) is independently owned and operated and; b) employs fewer than 500 full-time employees or 	<p>This regulation only affects businesses with confectionery licenses. Currently there are only 5 businesses in the state with a confectionery license. No other entities will be affected.</p>

has gross annual sales of less than \$6 million.	
All projected costs for affected individuals, businesses, or other entities resulting from the regulatory change. Please be specific and include all costs including, but not limited to: a) projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses; b) specify any costs related to the development of real estate for commercial or residential purposes that are a consequence of the regulatory change; c) fees; d) purchases of equipment or services; and e) time required to comply with the requirements.	There are no projected costs associated with this regulation.
Benefits the regulatory change is designed to produce.	The benefit is that the regulation provides the definition for a confectionery as well as the labeling requirements. The statute does not provide this information and it is necessary for licensees and anyone interested in obtaining this license to have this information readily available.

Alternatives

Please 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 alternatives.

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) 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.

The agency does not anticipate adverse impacts on small businesses. The regulation is meant to provide guidance to a newly created classification of license that did not exist prior to the regulation. Businesses who have obtained this license have always operated under these provisions since the existence of the license. There are no reporting requirements, schedules, performance standards, or deadlines associated with this regulation.

Public Comment

Please *summarize* all comments received during the public comment period following the publication of the previous stage, and provide the agency response. Ensure to include all comments submitted: including those received on Town Hall, in a public hearing, or submitted directly to the agency or board. If no comment was received, enter a specific statement to that effect.

Commenter	Comment	Agency response
<p>Virginia Beer Wholesalers Association</p>	<p>Pursuant to §2.2-4007 of the Code of Virginia, the Virginia Beer Wholesalers Association (“VBWA”) submit the following comments as regards the proposed amendment to regulation 3 VAC 5- 50 of the Virginia Administrative Code. Published in the Virginia Register on July 9, 2018, the amendment proposes regulations governing the newly created “confectionery license” that became available on July 1, 2018.</p> <p>New section 3 VAC 5-5-250 provides a definition of “confectionery” and sets forth certain restrictions on the manufacture and sale of such items to consumers. VBWA does not object to the definition or the restrictions proposed, believing that the proposed language tracks the intent of the General Assembly in creating the confectionery license.</p> <p>VBWA does wish to emphasize that the General Assembly created the “confectionery license” not as a manufacturer license, but as a <i>retail</i> license. The license permits its holders to sell confections containing alcohol <i>for off premises consumption</i>, not resale. VBWA believes that, as retail licensees, those holding confectionery licenses are members of the Virginia’s Three Tier system. As such, confectionery licensees are subject to the Virginia’s Tied House provisions and the same operational, promotional, and recordkeeping requirements as any other Virginia retail licensee, including the requirement that retail licensees purchase alcoholic beverages from licensed wholesalers or the Board.</p>	<p>No action was taken based on this comment.</p>
<p>Matt Bolling</p>	<p>This intent of this legislation sponsored by Del. Peace and Sen.</p>	<p>VA ABC holds the position that since the additional food items mentioned in the</p>

	<p>Favola was to allow for confectionery food products (read: sweetened food products) to be manufactured and sold in Virginia. This legislation created that license to manufacture and sell those products. This intended to represent a number of example companies such as those making cupcakes, cakes, cheesecakes, jams, jellies, ice creams, sorbets, yogurts, puddings, gelatins, etc. The current definition does not limit confectioneries to "baked goods and candies", but we have been informed that enforcement may be limiting certain subcategories of confectionery. We would like to see this regulation either specifically list products such as frozen desserts, custards/puddings, jams/jellies; or specifically left so as to not limit the type of food products due to the wide nature of sweetened confectionery dessert products. The enforcement of the regulation should specifically not restrict the sale of any of the products listed above as was the intent of the legislation originally in the General Assembly.</p>	<p>comment were not presented to the General Assembly when the two bills were passed, then VA ABC could not include them in the definition. The emergency regulation has been in effect since July 1, 2018. There have not been any issues with the current enforcement of the regulation. VA ABC took the action of clarifying that a confectionery <i>only</i> includes baked goods and candies.</p>
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Public Participation

Please include a statement that in addition to any other comments on the regulatory change, the agency is seeking comments on the costs and benefits of the regulatory change and the impacts of the regulated community. Also, indicate whether a public hearing will be held to receive comments.

A public hearing will not be held following the publication of this stage of this regulatory action.

Detail of Changes

Please 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.

If the regulatory change will be 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 change. Delete inapplicable tables.

If the regulatory change is intended to replace an emergency regulation, please follow the instructions in the text following the three chart templates below. Please include citations to the specific section(s) of the regulation that are changing.

For changes to existing regulation(s), please use the following chart:

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements

If an existing regulation or regulations (or parts thereof) are being repealed and replaced by one or more new regulations, please use the following chart:

Current chapter-section number	New chapter-section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements

If a new regulation is being promulgated, that is not replacing an existing regulation, please use this chart:

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

If the regulatory change is intended to replace an emergency regulation, and is identical to the emergency regulation, please choose and fill out the appropriate chart template from the choices above. In this case “current section number” or “current chapter-section number” would refer to the **pre-emergency** regulation.

If the regulatory change is intended to replace an emergency regulation, but includes changes made since the emergency regulation, please create two charts:

1. A chart describing changes from the **pre-emergency** regulation to the regulatory change, as described in the paragraph above; or if a new chapter is being promulgated, a chart describing the proposed new regulation.
2. A chart describing changes from the **emergency** regulation to the regulatory change. For the second chart please use the following title: “Changes from the Emergency Regulation.” In this case “current section number” or “current chapter-section number” would refer to the **emergency** regulation.

For changes to an emergency regulation(s), please use the following chart (pre-emergency):

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
3VAC5-50-250		This emergency regulation created a new regulation.	The current emergency regulation reads as follows: 3VAC5-50-250. Confectionery; definition; restrictions; labeling A. “Confectionery” - shall mean a general class of sweet foods and edibles, including

			<p>baked goods and candies having an alcohol content not more than 5% by volume.</p> <p>B. Any alcohol contained in such confectionery shall not be in liquid form at the time such confectionery is sold. Such alcohol shall be fully integrated or blended into the confectionery product.</p> <p>C. Any such confectionery shall only be sold to those individuals who can lawfully consume alcohol.</p> <p>D. Any establishment licensed to sell confectioneries for off-premises consumption, shall properly label the product with such label including:</p> <ol style="list-style-type: none"> 1. Notice that the product contains alcohol; 2. Notice that the product can only be consumed off-premises; and 3. Warning that the product should not be consumed by anyone under the age of 21. <p>The intent of the regulation was to provide guidance for the definition of a confectionery and the labeling requirements.</p>

For changes to an emergency regulation(s), please use the following chart (post emergency):

Current section number	New section number, if applicable	Current requirement	Change, intent, rationale, and likely impact of new requirements
3VAC5-50-250		<p>The current emergency regulation reads as follows:</p> <p>3VAC5-50-250. Confectionery; definition; restrictions; labeling</p> <p>E. "Confectionery" - shall mean a general class of sweet foods and edibles, including baked goods and candies having an alcohol content not more than 5% by volume.</p> <p>F. Any alcohol contained in such</p>	<p>The proposed change is as follows:</p> <p>3VAC5-50-250. Confectionery; definition; restrictions; labeling</p> <p>A. "Confectionery" - shall mean a general class of sweet foods and edibles, including baked goods and candies having an alcohol content not more than 5% by volume.</p> <p>B. Any alcohol contained in such confectionery shall not be in</p>

		<p>confectionery shall not be in liquid form at the time such confectionery is sold. Such alcohol shall be fully integrated or blended into the confectionery product.</p> <p>G. Any such confectionery shall only be sold to those individuals who can lawfully consume alcohol.</p> <p>H. Any establishment licensed to sell confectioneries for off-premises consumption, shall properly label the product with such label including:</p> <ol style="list-style-type: none"> 1. Notice that the product contains alcohol; 2. Notice that the product can only be consumed off-premises; and 3. Warning that the product should not be consumed by anyone under the age of 21. 	<p>liquid form at the time such confectionery is sold. Such alcohol shall be fully integrated or blended into the confectionery product.</p> <p>C. Any such confectionery shall only be sold to those individuals who can lawfully consume alcohol.</p> <p>D. Any establishment licensed to sell confectioneries for off-premises consumption, shall properly label the product with such label including:</p> <ol style="list-style-type: none"> 1. Notice that the product contains alcohol; 2. Notice that the product can only be consumed off-premises; and 3. Warning that the product should not be consumed by anyone under the age of 21. <p>The substance remains the same; the language is revised so that it is clearer.</p>
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