



# Virginia Department of Planning and Budget **Economic Impact Analysis**

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## **3 VAC 5-70 Other Provisions**

### **Virginia Alcoholic Beverage Control Authority**

#### **Town Hall Action/Stage: 6209 / 10234**

March 4, 2024 (revised on March 8, 2024)

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The Department of Planning and Budget (DPB) has analyzed the economic impact of this proposed regulation in accordance with § 2.2-4007.04 of the Code of Virginia (Code) and Executive Order 19. The analysis presented below represents DPB’s best estimate of the potential economic impacts as of the date of this analysis.<sup>1</sup>

### **Summary of the Proposed Amendments to Regulation**

The Virginia Alcoholic Beverage Control Authority Board of Directors (Board) proposes to 1) increase license suspension periods and/or civil penalties for any licensee when a first-time offender chooses to settle a violation; 2) allow first-time offenders more time to settle; 3) no longer allow a waiver of penalties for three types of serious offenses; 4) add new restrictions on the use of grain alcohol; 5) extend the time period during which a winery, brewery, bottler or importer is not allowed to increase prices following a notification to the wholesaler; 6) require monthly rather than quarterly activity reports from wine and beer shippers and Internet retail licensees; 7) no longer require delivery permittees or licensees with a delivery privilege to file a report of activity if no sales or deliveries were made in the preceding 12 months; 8) add language stating that records kept by all licensees must be available for inspection “any time the licensee is open to the public”; and 9) make editorial changes aimed at removing text that the Board

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<sup>1</sup> Code § 2.2-4007.04 requires that such economic impact analyses determine the public benefits and costs of the proposed amendments. Further the analysis should include but not be limited to: (1) the projected number of businesses or other entities to whom the proposed regulatory action would apply, (2) the identity of any localities and types of businesses or other entities particularly affected, (3) the projected number of persons and employment positions to be affected, (4) the projected costs to affected businesses or entities to implement or comply with the regulation, and (5) the impact on the use and value of private property.

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indicates is redundant of the Code of Virginia or otherwise updating the language to comport with current practices within the industry and the agency.

## **Background**

This regulation contains catch-all rules about alcoholic beverages that do not clearly fall under other regulatory chapters of the Board. These include but are not limited to transportation, shipping, delivery, warehousing, wholesale, recordkeeping, non-commercial or commercial carrier permits, handling of cider, culinary licenses, schedule of penalties and waiver of penalty for first-offense violations, etc.

After conducting a comprehensive review of this chapter, and to reduce regulatory requirements in response to the regulatory reduction objectives in Executive Order 19 (2022), the Board proposes the changes discussed below.

## **Estimated Benefits and Costs**

The Code of Virginia Section 4.1-227(B) provides the Board authority to impose a civil penalty of up to \$3,000 for first violations involving either the sale of alcoholic beverages to a person who is prohibited from purchasing alcoholic beverages or allowing alcoholic beverages to be consumed by underage, intoxicated, or interdicted persons; civil penalties of up to \$2,000 can also be imposed for other types of first violations. The Code does not appear to limit the duration of the suspension period that can be imposed by the Board and the Board also appears to have the authority to revoke a license. In addition to any suspension or civil penalty, the Board may also impose a requirement that the licensee pay for the cost incurred by the Board (not to exceed \$25,000) in investigating the licensee and in holding the proceeding resulting in the violation. Thus, a licensee faced with a notice of hearing for a first-time violation faces a substantial risk in terms of the range of possible outcomes of such a hearing.

This regulation allows for the settlement of first-time violations (i.e., no pending charges and no substantiated charges within the preceding three years) in lieu of going to a hearing and contesting the charge. Settlement is available if the licensee agrees to either a suspension period or a civil penalty, as provided in the schedule of penalties for first offense violations, and enters into an agreement with the Virginia Alcoholic Beverage Control Authority (Authority). However, according to the Authority, negotiated orders may include both a suspension period as well as a monetary fine if both sides agree.

One of the proposed changes would amend the schedule of penalties contained in 3VAC5-70-210. The schedule consists of 26 types of violations for which the penalty includes either suspension of a license for a certain number of days or, in lieu of the suspension, the payment of a civil monetary charge. Additionally, four types of offenses allow for less stringent suspension periods or reduced charges if the licensee has recently completed certified training. All 26 violations would see an increase in either the suspension periods or in the monetary fines or both. The complete schedule with the proposed changes can be found in the Appendix of this analysis. The increases currently proposed by the Board would be in addition to increases that were made in 2019, at which time the civil monetary penalties were increased by either \$250 or \$500 over the amounts that were in effect prior to 2019.<sup>2</sup> The 2019 increases followed 2017 legislation that increased the maximum amounts that the Board may charge.<sup>3</sup>

The changes in the Appendix can be summarized as follows. For 16 types of offenses, the current suspension period of 7-days would be increased to 10-days and the civil penalty would increase by an additional \$250 (i.e., from \$500 to \$750 for one type of violation, from \$750 to \$1,000 for 15 types of violations). For one type of violation, the suspension period would increase from 10 days to 15 days with a corresponding increase in the charge from \$1,250 to \$1,500. For five types of violations, the civil charge would increase from \$1,250 to \$1,500 with no change in the suspension period (i.e., the suspension period would remain at 10 days for all five violations). There is no change to either suspension periods or in monetary penalties in four offenses, although these four offenses provide for less onerous penalties if the licensee has completed training recently which are separately discussed below.

ABC reports that the intent of increasing these penalties is to act as a deterrent, although no data or information has been provided to indicate why additional deterrence is needed. As a result of the proposed changes to the schedule of penalties for first offense violations, the Authority projects a 20-25 percent increase in the monetary penalties collected from licensees that settle their charges before a hearing. In fiscal year 2023, the Authority collected \$853,429 in total from penalties (i.e., \$702,500 from 302 expedited consent orders and \$150,929 from 78 matters resolved through negotiations). Using these data, and assuming no change in behavior by

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<sup>2</sup> <https://townhall.virginia.gov/L/ViewXML.cfm?textid=13595>

<sup>3</sup> <https://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+CHAP0698&171+ful+CHAP0698> & <https://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+CHAP0707&171+ful+CHAP0707>

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licensees, this equates to a 20-25 percent increase corresponds to an amount between \$170,686 and \$213,357 in additional collections to the Authority.

The proposed changes would also increase the suspension periods during which the licensee would be prohibited from selling alcohol. In cases where alcohol sales make up the majority of the revenue stream of the licensee, the licensee may close the business in its entirety. Thus, if suspension is chosen, the licensee would lose revenues for the duration of the suspension, which would be increased by an additional three or five days depending on the specific violation, and some businesses may have to temporarily furlough their employees if they are highly reliant upon alcohol sales. In fiscal year 2023, 36 consent orders (11 percent of all consent orders) and 9 negotiated orders (11 percent of all negotiated orders) contained a suspension period.

In general, the opportunity to settle may incentivize some individuals because settlements often result in the imposition of reduced penalties compared to the full extent of the law. This can include lower fines, shorter license suspensions, or other consequences. Additionally, settling a violation may lead to a faster resolution of the case. This can be advantageous for businesses looking to move past the incident and continue operations without prolonged administrative proceedings. Settling a violation may also help in preserving the reputation of the business. The act of contesting a violation is public information which can be damaging to a company's image, and settling may minimize negative publicity. Moreover, a settlement provides certainty regarding the outcome. A businesses can better plan for the future without the uncertainty of a protracted administrative process. This is no different in the case of the violations discussed here.

However, an increase in the penalties associated with settlement may change this incentive, with the result that some individuals may decide to contest the charges. The imposition of higher penalties would increase the cost of settling disputed violations depending on the type of violation. Thus, an increase in the suspension periods or the monetary penalties may lead to an increase in the number of contested cases and hearings the Authority would conduct. In fiscal year 2023, there were 7 initial hearings involving a single first-time violation in the schedule of penalties that had a suspension period ranging from no suspension to up to 28 days, and the

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licensee also paid a monetary penalty ranging from \$900 to \$2,650. Thus, it is unclear whether and how much this change would lead to more contested cases.

Additionally, an increase in the cost of settling a dispute may incentivize some licensees to be more careful and devote more resources to employee training or supervision to reduce the chances of a violation. Thus, it is unclear whether and how much this change would alter the number of violations or contested cases.

The regulation also identifies four violations for which the suspension periods and monetary penalties are reduced if the licensee can demonstrate that they provided the employee responsible for the violation with certified training within the preceding 12 months. The Authority provides the training online free of charge, and the reduced penalties are aimed at incentivizing licensees to ensure that their employees are knowledgeable about the current rules and regulations. The suspension period with training for all four of these violations would increase from five days to 15 days. Only two of the four violations would have an increased monetary penalty (which would increase from \$1,500 to \$2,000) while the monetary penalty for the other two violations would remain at \$1,500.

The proposed increases in suspension period or the monetary penalties for the four types of violations where the licensee has recently completed certified training would reduce the potential benefit of having completed training, compared to the status quo. For example, the current suspension period is five days with the training and 25 days without the training, which provides a 20-day reduction in the suspension period for all four types of violations in this category. Because the proposal would increase the suspension period from five days to 15 days for all four violations, it would reduce the benefit of training by half: from 20 days to 10 days. Similarly, the monetary benefit of training is currently \$1,000 for two of the four violations (i.e., \$2,500 without training vs. \$1,500 with training). Under the proposal, the monetary penalty with training would increase from \$1,500 to \$2,000. This increase would therefore reduce the monetary benefit of training by half: to \$500. In short, a potentially unintended consequence of these changes would be to decrease the relative attractiveness of training in terms of the suspension period and the monetary penalty. All other things being equal, the number of licensees who require their employees to complete annual training may decline.

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The relative significance of the suspension period and monetary penalty would also change, because 17 violations would see an increase in both the suspension period and civil penalty, five of the violations would see an increase in only in monetary penalty, and suspension and monetary fines would remain the same for four violations unless the licensee recently completed training. Of the four violations that offer lesser penalties (suspension or monetary) compared to those licensees without recent training, two would see an increase in both types of penalties. The Authority explains that the main reason for the proposed longer suspension periods for certain violations were to increase the significance of suspension periods in conjunction with the proposed increases in civil penalties. If suspension periods were not increased, the Board feels that violators would choose the suspension period and easily avoid increased monetary fines.

Another amendment to the schedule of penalties would allow a licensee more time to settle. Currently, the regulation allows the licensees 20 days from the date of notification to settle the violation. The Board proposes to strike the notification language, which would have the effect of allowing the licensee to settle the violation at any point until the time of the hearing. This change would benefit licensees who could not settle the violation within 20 days, but who would have settled it if they had more time.

The regulation currently also allows penalties to be waived for licensees that have not had a violation in the preceding five years, if it appears that the violation was unintentional. The Board proposes to no longer allow penalties to be waived for three of these offenses because the Board has determined that the nature of the offenses is “too significant.” These offenses are: allowing an intoxicated person to loiter on the premises; after hours sales or consumption of alcoholic beverages; and sale by a wholesaler of wine/beer to unauthorized person. Under the proposed changes, licensees who may have received a waiver of the penalty for one of these violations would no longer have that option. According to the Board, the penalty for one of these offenses has only been waived twice in the past eight years and there were no waivers for two other offenses in the same time period; and no waivers for any of the three violations were granted in the last fiscal year. Removing the availability of a waiver for the three violations would make the penalties more punitive and encourage licensees to take actions (e.g., training, increased supervision, etc.) that would help them avoid these serious violations.

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Two of the proposed changes would add new restrictions on the use of grain alcohol. The proposal would add that grain alcohol cannot be used in the manufacture of products intended for human consumption and remove the current allowance for the commercial and culinary uses of grain alcohol. According to the Board, both internal and external stakeholders were concerned about the risks involved in the current approach, which allows products containing a high alcohol proof to be sold for human consumption. Thus, the Board proposes to introduce restrictions on the use of grain alcohol in manufacturing and to no longer allow the commercial and culinary uses.

Another change in the proposal includes an extension in the time that must elapse before a price increase by a winery, brewery, bottler or importer can go into effect. The regulation currently states that price increase (from a winery, brewery, bottler or importer) to wholesalers cannot go into effect until 30 calendar days after a notice of such increase is postmarked. The proposed change would start the required 30-day notice period from the date of delivery of the price increase notice to the wholesaler, rather than the day the notice is postmarked. Since the delivery of the notice to the wholesaler would be after the notice is postmarked, the price increase would not go in effect for a longer period of time. This change would delay the ability of winery, brewery, bottler or importer to increase their prices and would allow the wholesaler additional time to take action if they choose.

Under the proposed changes, wine and beer shippers and Internet retail licensees would be required to file activity reports more frequently and would be required to report the weight of the items shipped and delivered in the report. Currently, these entities are required to file activity reports with the Authority quarterly (i.e., on or before the 15th day of January, April, July, and October). Under the proposed changes, they would be required to file activity reports on or before the 15th day of each month. According to the Authority, this change is being proposed because the current quarterly reporting is not effective. The Board states that if there is a violation, several months would elapse before enforcement is made aware of the violation, and then even more time would pass before it is brought to a hearing. Reporting monthly increases the likelihood that violations would be discovered sooner and addressed more quickly. However, more frequent report filing would also add to the shippers' and licensees' administrative costs because they would collect data more often and prepare and send additional reports to the Authority. As noted above, the Board also proposes to require the report to include the weight of

the shipment. The Board states that this would provide more oversight to make sure that entities are not shipping more than what is permitted by law.

Another report-related change would no longer require delivery permittees, or licensees with a delivery privilege, to file a report of activity at least once every 12 months even if no sales or deliveries were made in the preceding 12 months. Thus, affected permittees and licensees would be expected to save the administrative cost of this reporting.

The Board proposes to also add language stating that records kept by all licensees must be available for inspection “any time the licensee is open to the public.” Currently, the records must be available for inspection during reasonable hours and between the hours of 9:00 am and 5:00 pm, but some licensees open their business after 5:00 pm. According to the Board, this change clarifies that “reasonable hours” includes hours the licensee is open. The Board states that there have been few instances where agents were not provided access when the businesses were open outside of the current 9:00 am to 5:00 pm window. Therefore, this change should improve the agents’ ability to inspect records and thereby improve compliance.

Of the proposed editorial changes, some would remove text that the Board states is redundant of the Code of Virginia. This would reduce the length of the regulatory text but would also remove the convenience of identifying relevant statutory requirements by reading the regulation itself. Although the laws of the Commonwealth are presumed to be known by all citizens, a decrease in information about statutory requirements may reduce compliance for those persons who rely upon the regulation instead of consulting the Code of Virginia. Although the Board notes that the laws could change over time, and that outdated statutory requirements would remain in the regulation until the regulation is updated, the time and effort to retain and then update the regulation may be beneficial to the Board and to citizens and consumers to the degree that it increases compliance.

The other editorial changes would remove language that is no longer applicable since the implementation of alcoholic beverage control license reform.

### **Businesses and Other Entities Affected**

There are 20,892 licensees that are subject to this regulation. No entity appears to be disproportionately affected.



The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.<sup>4</sup> An adverse impact is indicated if there is any increase in net cost or reduction in net benefit for any entity, even if the benefits exceed the costs for all entities combined.<sup>5</sup> As noted above, all changes except three (i.e., allowing more time to settle a first time violation; no longer requiring delivery permittees or licensees with delivery privilege to file a report of activity if there is no deliveries or sales; and the editorial changes) are expected to add to compliance costs as discussed above. The changes to schedule of penalties would make it more costly for a violator to settle the case. Thus, an adverse impact on licensees is indicated.

### **Small Businesses<sup>6</sup> Affected:<sup>7</sup>**

It is more than likely that some of the licensees are small businesses. Thus, the proposal does appear to adversely affect small businesses.

#### Types and Estimated Number of Small Businesses Affected

The Board states that it does not have the capability to determine how many of its licensees meet the definition of a small business.

#### Costs and Other Effects

The costs and other effects on small business licensees are the same as discussed above for all licensees.

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<sup>4</sup> Pursuant to Code § 2.2-4007.04(D): In the event this economic impact analysis reveals that the proposed regulation would have an adverse economic impact on businesses or would impose a significant adverse economic impact on a locality, business, or entity particularly affected, the Department of Planning and Budget shall advise the Joint Commission on Administrative Rules, the House Committee on Appropriations, and the Senate Committee on Finance.

<sup>5</sup> Statute does not define “adverse impact,” state whether only Virginia entities should be considered, nor indicate whether an adverse impact results from regulatory requirements mandated by legislation. As a result, DPB has adopted a definition of adverse impact that assesses changes in net costs and benefits for each affected Virginia entity that directly results from discretionary changes to the regulation.

<sup>6</sup> Pursuant to § 2.2-4007.04 of the Code of Virginia, small business is defined as “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.”

<sup>7</sup> If the proposed regulatory action may have an adverse effect on small businesses, Code § 2.2-4007.04 requires that such economic impact analyses include: (1) an identification and estimate of the number of small businesses subject to the proposed regulation, (2) the projected reporting, recordkeeping, and other administrative costs required for small businesses to comply with the proposed regulation, including the type of professional skills necessary for preparing required reports and other documents, (3) a statement of the probable effect of the proposed regulation on affected small businesses, and (4) a description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation. Additionally, pursuant to Code § 2.2-4007.1, if there is a finding that a proposed regulation may have an adverse impact on small business, the Joint Commission on Administrative Rules shall be notified.

### Alternative Method that Minimizes Adverse Impact

There are no clear alternative methods that both reduce adverse impact and meet the intended policy goals.

### **Localities<sup>8</sup> Affected<sup>9</sup>**

The proposed changes apply statewide and they do not appear to introduce any costs for the localities.

### **Projected Impact on Employment**

The proposal to increase the suspension periods for first-time offenders if they choose to settle the violation may lead to a reduction in their demand for labor because of decreased sales, or potentially the closure of some licensed premises for a several additional days if they significantly rely on alcohol sales, depending on the type of violation. This may lead to a reduction in the need for employees and negatively affect employment.

### **Effects on the Use and Value of Private Property**

With the exception of small benefits to licensees from having more time to settle with the Authority and a reduced reporting requirement, all of the remaining proposed changes are expected to add to compliance costs of licensees. An increase in compliance costs would reduce profitability, and consequently lead to a negative impact on asset values of affected licensees. No impact is expected on real estate development costs.

## **Appendix**

Violation	Suspension	Civil Charge	Suspension with Certified Training	Civil Charge with Certified Training
Sale of beer, wine, or mixed beverages to a person at least 18 but younger than 21 years of age.	25 days	\$2,500	5 (15) days	<del>\$1,500</del> (\$2,000)
Allowing consumption of beer, wine, or mixed beverages by a	25 days	\$2,500	5 (15) days	<del>\$1,500</del> (\$2,000)

<sup>8</sup> "Locality" can refer to either local governments or the locations in the Commonwealth where the activities relevant to the regulatory change are most likely to occur.

<sup>9</sup> § 2.2-4007.04 defines "particularly affected" as bearing disproportionate material impact.

person at least 18 but younger than 21 years of age.				
Aiding and abetting the purchase of alcoholic beverages by a person at least 18 but younger than 21 years of age.	<del>10</del> (15) days	<del>\$1,250</del> (\$1,500)		
Keeping unauthorized alcoholic beverages on the premises, upon which appropriate taxes have been paid.	<del>7</del> (10) days	<del>\$750</del> (\$1,000)		
Allow an intoxicated person to loiter on the premises.	<del>7</del> (10) days	<del>\$750</del> (\$1,000)		
Sale to an intoxicated person.	25 days	\$2,500	<del>5</del> (15) days	\$1,500
Allow consumption by an intoxicated person.	25 days	\$2,500	<del>5</del> (15) days	\$1,500
After hours sales or consumption of alcoholic beverages.	10 days	<del>\$1,250</del> (\$1,500)		
No designated manager on premises.	<del>7</del> (10) days	<del>\$750</del> (\$1,000)		
Invalid check to wholesaler or authority.	<del>7</del> (10) days	<del>\$500</del> (\$750)		
Inadequate illumination.	<del>7</del> (10) days	<del>\$750</del> (\$1,000)		
ABC license not posted.	<del>7</del> (10) days	<del>\$750</del> (\$1,000)		
Not timely submitting report required by statute or regulation.	<del>7</del> (10) days	<del>\$750</del> (\$1,000)		
Designated manager not posted.	<del>7</del> (10) days	<del>\$750</del> (\$1,000)		
Person younger than 18 years of age serving alcoholic beverages; younger than 21 years of age acting as bartender.	<del>7</del> (10) days	<del>\$750</del> (\$1,000)		
Sale of alcoholic beverages in unauthorized place or manner.	10 days	<del>\$1,250</del> (\$1,500)		

Consumption of alcoholic beverages in unauthorized area.	7 (10) days	<del>\$750</del> (\$1,000)		
Removal of alcoholic beverages from authorized area.	7 (10) days	<del>\$750</del> (\$1,000)		
Failure to obliterate mixed beverage stamps.	7 (10) days	<del>\$750</del> (\$1,000)		
Employee on duty consuming alcoholic beverages.	7 (10) days	<del>\$750</del> (\$1,000)		
Conducting illegal happy hour.	7 (10) days	<del>\$750</del> (\$1,000)		
Illegally advertising happy hour.	7 (10) days	<del>\$750</del> (\$1,000)		
Unauthorized advertising.	7 (10) days	<del>\$750</del> (\$1,000)		
Failure to remit state beer or wine tax (if deficiency has been corrected).	10 days	<del>\$1,250</del> (\$1,500)		
Wholesaler sale of beer or wine in unauthorized manner.	10 days	<del>\$1,250</del> (\$1,500)		
Wholesaler sale of beer or wine to unauthorized person.	10 days	<del>\$1,250</del> (\$1,500)		