



Proposed 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 | October 5, 2007 |

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

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

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.

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 number(s), if applicable, and (2) promulgating entity, i.e., the 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 by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal, the environmental benefits, 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 briefly identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. (More detail about these changes is requested in the "Detail of changes" 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 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 overconsumption.

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 the regulatory action poses no disadvantages to the public or the Commonwealth, please so 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.

Requirements more restrictive than federal

Please identify and describe any requirement of the proposal which are more restrictive than applicable federal requirements. Include 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 statement to that effect.

There are no applicable federal requirements.

Localities particularly affected

Please identify any locality particularly affected by the proposed regulation. Locality particularly affected means any locality which bears any identified disproportionate material impact which would not be experienced by other localities.

There are no localities particularly affected by the proposed regulation.

Public participation

Please include a statement that in addition to any other comments on the proposal, the agency is seeking comments on the costs and benefits of the proposal and the impacts of the regulated community.

In addition to any other comments, the board/agency is seeking comments on the costs and benefits of the proposal and the potential impacts of this regulatory proposal. Also, the agency/board is seeking information on impacts on small businesses as defined in § 2.2-4007.1 of the Code of Virginia. Information may include 1) projected reporting, recordkeeping and other administrative costs, 2) probable effect of the regulation on affected small businesses, and 3) description of less intrusive or costly alternative methods of achieving the purpose of the regulation.

Anyone wishing to submit written comments may do so by mail, email or fax to Jeffrey L. Painter, Post Office Box 27491, Richmond, Virginia 23261, telephone (804) 213-4621, fax (804) 213-4411, e-mail jeffrey.painter@abc.virginia.gov. Written comments must include the name and address of the commenter. In order to be considered comments must be received by the last date of the public comment period.

[A public hearing will be held and notice of the public hearing may appear on the Virginia Regulatory Town Hall website (www.townhall.virginia.gov) and can be found in the Calendar of Events section of the Virginia Register of Regulations. Both oral and written comments may be submitted at that time.

Economic impact

Please identify the anticipated economic impact of the proposed regulation.

| | |
|---|---|
| Projected cost to the state to implement and enforce the proposed regulation, including (a) fund source / fund detail, and (b) a delineation of one-time versus on-going expenditures | None |
| Projected cost of the regulation on localities | None |
| Description of the individuals, businesses or other entities likely to be affected by the regulation | Alcohol-licensed grocery stores, convenience stores, private clubs, restaurants |
| 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 (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. | About 12,500 licensed establishments would be affected. It is estimated that over 95% of these would meet the definition of small business. |
| All projected costs of the regulation for affected individuals, businesses, or other entities. Please be specific. Be sure to include the projected reporting, recordkeeping, and other administrative costs required for compliance by small businesses. | None |

Alternatives

Please describe any viable alternatives to the proposal considered and the rationale used by the agency to select the least burdensome or intrusive alternative that meets the essential purpose of the action. 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 regulation.

The Alcoholic Beverage Control Board has considered alternatives including taking no action to amend the regulation. The suggested amendments were determined to be the best viable alternatives to achieve the goals of this regulation, while clarifying and slightly relaxing regulatory controls.

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.

Public comment

Please summarize all comments received during public comment period following the publication of the NOIRA, and provide the agency response.

| Commenter | Comment | Agency response |
|-------------------|--|--|
| Kevin Martingayle | Objects to fast track process | Normal process will be followed |
| W. Baldwin | Objects to fast track process | Normal process will be followed |
| James Kemp | Objects to fast track process | Normal process will be followed |
| B. Wade | Objects to fast track process | Normal process will be followed |
| Corinne Brainard | Objects to fast track process | Normal process will be followed |
| Richard Green | Objects to fast track process | Normal process will be followed |
| Johann Keady | Objects to fast track process 3-foot separation between performer and patron difficult for compliance, enforcement, and unnecessary | Normal process will be followed Proposal has been amended to require no contact, but no specified distance between performer and patron |

| | | |
|-----------------|--|--|
| Christie Fisher | Objects to fast track process 3-foot separation between performer and patron difficult for compliance, enforcement, and unnecessary | Normal process will be followed Proposal has been amended to require no contact, but no specified distance between performer and patron |
| Robert Brown | Objects to fast track process 3-foot separation between performer and patron difficult for compliance, enforcement, and unnecessary | Normal process will be followed Proposal has been amended to require no contact, but no specified distance between performer and patron |
| Scott Hudson | Objects to fast track process | Normal process will be followed |
| Kenneth Eddie | Objects to fast track process | Normal process will be followed |

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.

Detail of changes

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

If the proposed regulation is intended to replace an emergency regulation, please list separately (1) all changes between the pre-emergency regulation and the proposed regulation, and (2) only changes made since the publication of the emergency regulation.

For changes to existing regulations, use this chart:

| Current section number | Proposed new section number, if applicable | Current requirement | Proposed change and rationale |
|-------------------------------|---|--|--|
| 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. Currently the board may suspend or revoke the license of anyone employing persons with certain |

| | | | |
|-----------------------|--|--|--|
| <p>3 VAC 5-50-50</p> | | <p>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</p> | <p>convictions, but there is no prescribed process to get permission to do so.</p> <p>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.</p> |
| <p>3 VAC 5-50-80</p> | | <p>Alcoholic beverages may not be placed in containers of ice in public display</p> | <p>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.</p> |
| <p>3 VAC 5-50-100</p> | | <p>Grocery and convenience stores must stock at least 5 items from each of 5 basic food groups.</p> | <p>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.</p> |
| <p>3 VAC 5-50-130</p> | | <p>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</p> | <p>Licensed club premises may be opened to the public 24 times per year. Simplifies the rule for the licensees and enforcement.</p> |
| <p>3 VAC 5-50-140</p> | | <p>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.</p> | <p>“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. 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.</p> |