



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

3 VAC 5-30 Tied-House
Virginia Alcoholic Beverage Control Authority
Town Hall Action/Stage: 6205 / 10230
February 23, 2024

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.¹

Summary of the Proposed Amendments to Regulation

As part of a periodic review, the Virginia Alcoholic Beverage Control Board (Board) proposes amendments to the regulation to align the regulation with current industry practices, conform to the Code of Virginia, improve clarity, and remove redundant and obsolete language.

Background

Code of Virginia §4.1-111 (B) (3) states that the Board shall promulgate regulations that “maintain the reasonable separation of retailer interests from those of the manufacturers, bottlers, brokers, importers, and wholesalers” and “prevent undue competitive domination of any person by any other person engaged in the manufacture, distribution and sale at retail or wholesale of alcoholic beverages in the Commonwealth.”² In addition, Virginia Code §4.1-215 (C) states that,

“The General Assembly finds that it is necessary and proper to require a separation between manufacturing interests, wholesale interests, and retail interests in the production and distribution of alcoholic beverages in order to prevent suppliers from dominating local markets through vertical

¹ 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.

² See <https://law.lis.virginia.gov/vacode/title4.1/chapter1/section4.1-111/>.

integration and to prevent excessive sales of alcoholic beverages caused by overly aggressive marketing techniques.”³

Accordingly, 3 VAC 5-30 *Tied House* addresses various details pertaining to business arrangements between manufacturers or wholesalers and retail establishments, including the rotation and exchange of retailers’ stocks by wholesalers, deposits for containers, recordkeeping requirements, routine business entertainment, the provision of advertising materials, and price discrimination.

In order to meet the regulatory reduction requirements of Executive Order 19, the Board met six times between June and October 2022 to review all of the Virginia Alcoholic Beverage Control Authority’s (ABC) regulations, and convened roughly sixty stakeholders, representing all categories of license holders.⁴ Thus, the Board seeks to make a number of changes that would update the regulation to reflect current practice, align the language with statute, and remove redundant or obsolete language. The most substantive changes are summarized below.

- Deposits on containers (Section 40): This section currently specifies the minimum deposit fees that wholesalers must charge retailers for beer bottles, cases, kegs, and other equipment for use by customers. The Board proposes to remove the table of specific minimum deposit charges and instead specify, (i) that wholesalers collect a deposit from retail licensees, and (ii) that wholesalers charge the same deposit fee for all of their retailers. The Board would retain text in this section requiring that invoices reflect the deposit charges and that the deposits be refunded upon return of the containers in good condition.
- Routine business entertainment (Section 70): The definition of “routine business entertainment” in this section only includes (i) meals and beverages; (ii) concerts, theater, and arts entertainment; (iii) sports participation and entertainment; (iv) entertainment at charitable events; (v) private parties; and (vi) local transportation in order to attend one or more of the aforementioned activities. The Board proposes to remove this definition to thereby allow other types of events and expenses. ABC indicated that the intent of the regulation is not to restrict the types of expenses, but rather the magnitude and frequency at

³ See <https://law.lis.virginia.gov/vacode/title4.1/chapter2/section4.1-215/>.

⁴ See <https://townhall.virginia.gov/L/Meetings.cfm?BoardID=2&time=Past>. ABC provided a list of external stakeholders; although all stakeholders may not have attended every meeting, the meetings were spent conducting a line-by-line review of the regulations, and the proposed changes reflect the Board’s decisions after considering stakeholder input.

which such expenses are incurred, thus the listing of individual activities is unnecessary. Accordingly, the Board would retain the expense-related limits currently in the regulation. These include a spending cap of \$400 in a 24-hour period, as well as the limitation that no person may be entertained more than six times in a year by a wholesaler and six times in a year by a manufacturer.

- Price discrimination (Section 90): This section prohibits wholesale wine or beer licensees from engaging in price discrimination (charging different prices to different retailers for the same product) except under certain circumstances. This section was modified in 2017 to allow wholesale wine licensees to charge different prices for the same product to retail purchasers. Specifically, retail purchasers with on-premises privileges could be charged different prices than retailers with off-premises privileges, provided all retailers within each category were charged the same price.⁵ Subsequently, the Board issued a Guidance Document requiring certain documentation for retail licensees with dual privileges.⁶ The Board seeks to include the provisions of that document in the regulation, and to delete that Guidance Document once this action becomes effective.⁷ The proposed amendments would specify that (i) the wholesale price provided to a retailer with both privileges must depend on the type of sales from which the licensee obtains the majority of its business revenue, (ii) retailers with both privileges who choose to accept the price differentiations shall provide wholesalers with a written statement declaring which privilege generates the majority of their business revenue,⁸ (iii) wholesalers shall maintain these statements and indicate which privilege the retailer has designated on their sales invoices, and (iv) upon request,

⁵ See <https://townhall.virginia.gov/L/ViewAction.cfm?actionid=4660>.

⁶ See <https://townhall.virginia.gov/L/ViewGDoc.cfm?gdid=6207>. The guidance was issued in response to complaints that retail licensees with on- and off-premises privileges were exploiting the new provision to purchase wine at the wholesale price for off-premises licensees, which is lower than the price for on-premises licensees, but sell it to customers for on-premises consumption, which allows for a higher markup.

⁷ Although ABC reports widespread voluntary compliance with the guidance, a licensee pointed out that ABC could not legally enforce the guidance document, prompting the Board to make this change. In addition, as a result of 2020 license reform, all on-premises retail licensees now also have off-premises privileges; the on-premises retail license was effectively converted into the on-and-off-premises retail license. (See Chapter 1113 of the 2020 *Acts of Assembly*.) ABC also reports that they can verify if a retailer is being honest with the wholesaler about which privilege generates the majority of its revenues based on record-keeping requirements contained in Virginia Code § 4.1-204 and 3 VAC 5-70-90.

⁸ Choosing to accept price differentiations, as used here and in the regulation, applies to on-and-off-premises retail licensees who choose to pay the “off-premises” price. ABC has clarified that on-and-off-premises retail licensees who choose to pay the “on-premises” price would not be choosing a price differentiation and would not be subject to these recordkeeping requirements.

wholesalers and retailers shall provide the Board with written substantiation for any price differentiation.

In addition to these changes, the Board also proposes to reorganize some of the provisions in Section 60 (Inducements to retailers), moving some stipulations regarding advertising to Section 80 (Advertising materials that may be provided to retailers by manufacturers, importers, bottlers, or wholesalers), and deleting language redundant of statute, specifically subsection K, which contains a reference to statute that provides the penalties for violating that section of the regulation. Lastly, Section 80 (Advertising materials) would also be amended to add two provisions that would be moved from 3 VAC 5-20 (Advertising) and a new Section 100 (Novelties and specialties) would be created in this regulation, in which existing requirements would be moved verbatim from the *Advertising* regulation, 3 VAC 5-20.⁹

Estimated Benefits and Costs

The proposed amendments largely serve to update the regulation to reflect current practice, conform to statute, and remove redundant or obsolete language, and are therefore not expected to create significant costs. The changes pertaining to price discrimination by wine wholesalers could add new administrative costs for on-and-off-premises licensees that choose to accept price differentiation and for the wine wholesalers, but only if they do not already follow the provisions of the guidance document. However, as mentioned previously, ABC reports that they enjoy widespread voluntary compliance with the guidance, and any new recordkeeping cost for a one-time declaration of which privilege generates greater revenue is likely negligible for on-and-off-premises retail licensees.

Removing the minimum deposit amounts for beer containers and equipment for customer use (such as taps for kegs) from the regulation and specifying that all retailers be charged the same amount is unlikely to have any practical impact. ABC reports that stakeholders who were convened to review the regulation reported that they already charge higher deposit fees than the minimums specified in the regulation. Thus, removing the minimum charges would be unlikely to result in an increase in those fees by wholesalers. Although ABC does not collect information on the deposit amounts charged by beer wholesalers, and the regulation does not currently

⁹ The Board is concurrently amending 3 VAC 5-20 to remove these provisions so as not to be duplicative, and to make other changes and conduct a periodic review. See <https://townhall.virginia.gov/L/viewstage.cfm?stageid=10229> for proposed changes to that regulation.

specify that wholesalers must charge all retailers the same deposit fees, ABC reports that in practice, participants in the industry communicate openly with each other, and retailers tend to learn if they are being charged a different deposit by the same wholesaler. Thus, adding the requirement that deposit fees be uniform across retailers would mainly serve to reflect current practice.

Removing the definition of “routine business entertainment” would provide wholesalers, manufacturers, importers, and brokers with greater flexibility for the type of entertainment they are able to provide to retail licensees. This would likely benefit them as well as the retail licensees who are the recipients of such business entertainment.

Lastly, the Board’s proposal to delete 3 VAC 5 30-60 (K) entirely, instead of amending the language to reference the relevant Code section, may make it more difficult for industry members and the public to find information on the penalties for non-compliance with the section.

Businesses and Other Entities Affected

The proposed amendments potentially affect ABC’s approximate 20,892 licensees¹⁰ who manufacture, distribute, or sell and serve alcoholic beverages in the Commonwealth, and other interested parties. Changes pertaining to price discrimination and minimum deposits would affect 524 beer and wine wholesaler licensees. There are 19,349 retail licensees in total; retail licensees with on-and-off-premises privileges who choose to accept price differentiations from wine wholesalers may incur a small one-time administrative cost if they have not already provided a written declaration in accordance with the 2017 Guidance Document.

The Code of Virginia requires DPB to assess whether an adverse impact may result from the proposed regulation.¹¹ 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.¹² The proposed amendments do not appear to increase net costs or reduce benefit. Thus, no adverse impact is indicated.

¹⁰ Data Source: ABC

¹¹ 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.

¹² 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

Small Businesses¹³ Affected:¹⁴

The proposed amendments do not appear to adversely affect small businesses. Some of the retail licensees with on-and-off-premises privileges who choose to accept price differentiations from wine wholesalers may be small businesses and may incur a small one-time administrative cost if they have not already provided a written declaration in accordance with the 2017 Guidance Document.

Localities¹⁵ Affected¹⁶

The proposed amendments neither disproportionately affect any particular localities, nor affect costs for local governments.

Projected Impact on Employment

The proposed amendments do not appear to affect total employment.

Effects on the Use and Value of Private Property

The proposed amendments do not substantively affect the use and value of private property. The proposed amendments do not affect real estate development costs.

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.

¹³ 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.”

¹⁴ 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.

¹⁵ “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.

¹⁶ § 2.2-4007.04 defines “particularly affected” as bearing disproportionate material impact.