

**HOUSE COMMITTEE ON GENERAL LAWS AND
SENATE COMMITTEE ON REHABILITATION AND SOCIAL SERVICES**

*Special Joint Subcommittee Studying
Certain Alcoholic Beverage Control (ABC) Laws*

Monday, May 16, 2016, at 1:00 p.m.
General Assembly Building
Richmond, Virginia

MEETING SUMMARY

I. Introduction and Opening Remarks

Co-chairmen Senator John Cosgrove and Delegate Barry Knight called to order the second meeting of the special joint subcommittee (the subcommittee) of the House Committee on General Laws and the Senate Committee on Rehabilitation and Social Services.¹

II. Presentation: David May, Attorney, Division of Legislative Services

Mr. May provided an overview of the history and progression of liquor-by-the-drink in the Commonwealth. He explained that in the early 1900s, the Department of Alcoholic Beverage Control (the Department) had not yet been created; however, various licenses were available for a fee that allowed certain types of establishments to serve alcohol. In 1916, three years before national prohibition, Virginia went dry (did not permit the consumption of liquor by the drink) and remained so through prohibition. Congress lifted the national prohibition in 1933 via the enactment of the Twenty-First Amendment to the United States Constitution and repeal of the Eighteenth Amendment. The General Assembly immediately called a special session to legalize 3.2 percent beer. Within the next year, Virginia ratified the Twenty-First Amendment and created the Department.

In 1968, the General Assembly passed the "Whiskey Bill," which allowed the sale of mixed beverages in restaurants licensed by the Department. However, this legislation required that the voters of each locality approve the issuance of such licenses through local option referendums before liquor-by-the-drink would be available. By fiscal year-end, 345 licenses had been granted. Such licensed restaurants were required to sell more food (full meals) than alcohol (beer, wine, or liquor) and have a table-seating capacity of 50 or more.

In 1980, the requirement that 51 percent of a licensed restaurant's gross sales be from the sale of food was lowered to 45 percent, creating the 45-55 food-beverage ratio. Additionally, the definition of "food" was expanded to include snacks, sandwiches, appetizers, desserts, and more.

¹ The following subcommittee members were present: Senator John Cosgrove (co-chairman), Delegate Barry Knight (co-chairman), Senator Rosalyn Dance (called in), Senator Bill DeSteph, Senator Bryce Reeves, Delegate Dave Albo, and Delegate Luke Torian. Delegate Todd Gilbert was absent.

The intent of this ratio modification was to bring restaurants in line with "cocktail lounges" managed by hotels.

In 1990, the current food-beverage ratio was created with passage of legislation that excluded beer and wine from the definition of "alcohol" for purposes of the food-beverage ratio. Accordingly, the new ratio would consider only food and spirits. Subsequently, the Department established by regulation a \$4,000 minimum monthly food sale requirement, \$2,000 of which must come from the sale of "meals." Thereafter, during a regulatory review in 2016, the Department updated its definition of the term "meal" to be more inclusive and reflective of current dining habits.² The new definition includes items such as pizza, meal salads, substantial pasta dishes, and more.

III. Presentation: Travis Hill, Chief Operating Officer, Department of Alcoholic Beverage Control

Mr. Hill gave a PowerPoint presentation on certain issues, as requested by the subcommittee members, which included information regarding dry counties, approaches used in other states to control the balance of food and spirits sales, the Mixed Beverage Annual Review (MBAR) process, and the effects of food on alcohol absorption.³ Mr. Hill displayed maps showing a pictorial history of dry counties in Virginia from 1968 to present in 20-year increments. The maps indicated that dry counties gradually diminished after the Whiskey Bill passed in 1968 and further diminished with the creation of exceptions to the requirement in § 4.1-124 of the Code of Virginia that localities hold referendums on the issue of whether to allow liquor-by-the-drink.

Next, Mr. Hill explained that, based on National Alcoholic Beverage Control Association (NABCA) research, nine of 18 jurisdictions that directly control the distribution and sale of alcohol, including Virginia, use some form of ratio to regulate the amount of spirits sales in proportion to food sales. Additionally, 12 of 20 open, or non-control, states that reported information to NABCA use a ratio. However, implementation varies across states that utilize a ratio. For example, Utah requires that food sales amount to at least 70 percent of an establishment's total combined sales, while North Carolina requires that food sales account for 30 percent of total sales. New Hampshire requires that food sales account for at least 50 percent of gross sales unless the licensee's food sales meet or exceed \$75,000, in which case the licensee is exempt from compliance with the ratio. Pennsylvania, on the other hand, has no food sale requirement but defines a "restaurant" as a reputable place that is principally used for the purpose of providing food to the public.

Mr. Hill then provided clarification on Virginia's MBAR process. The MBAR process helps to ensure that licensees are in compliance with the food-beverage ratio through an annual self-reporting requirement of mixed beverage and food sales by mixed beverage licensees. The Department devotes approximately 12,480 man hours to MBAR-related issues per year. Of the approximate 4,500 to 4,900 mixed beverage licensees in Virginia, approximately one percent fell below the requirements of the food-beverage ratio during each of the last four years. At the request of Delegate Dave Albo, Mr. Hill explained that 90 percent of mixed beverage licensees

² 3VAC5-50-110 (A)(5).

³ The full version of Mr. Hill's PowerPoint presentation can be viewed here: http://dls.virginia.gov/GROUPS/SENrss/ABC_051616%20mtg.pdf.

sell \$10,000 or more of food per month, 92 percent sell more than \$8,000, 94 percent sell more than \$6,000, and 96 percent sell more than \$4,000.

Finally, Mr. Hill provided information on the effects of food on alcohol absorption. Substantial research has been conducted on the metabolism, absorption, and distribution of alcohol in the human body, along with factors that impact these processes. Research shows that gender, age, race, food, biological rhythms, exercise, body type, expectations, fatigue, drugs, and medications all impact the body's processing of alcohol. Regarding food consumption, meals that are high in fat, protein, and carbohydrates impact blood alcohol concentration (BAC). Research indicates that the body's process of eliminating alcohol from the blood is shortened by one to two hours when food is consumed. Moreover, the highest absorption rate occurs when the alcohol content of drinks consumed is between 10 and 30 percent.

IV. Presentation: Maria J.K. Everett, Senior Attorney, Division of Legislative Services

Ms. Everett provided an explanation of the bills related to the food-beverage ratio that are included in this study, a summary of ratio bills introduced during recent sessions of the General Assembly, and an overview of the provisions of § 4.1-126. Ms. Everett explained that five ratio bills from the 2016 Session were included in the study: HB 171 (Albo), HB 219 (Taylor), SB 373 (Ebbin), SB 488 (DeSteph), and SB 489 (DeSteph).⁴ Ms. Everett explained that subsequent to the 2008 study of the food-beverage ratio, no bills related to the food-beverage ratio were introduced during the next five sessions (2009–2013) but four such bills were introduced during the 2014 and 2015 Sessions.

In 2014, SB 502 (Favola and Ebbin), Chapter 633 of the 2014 Acts of Assembly, modified limited mixed beverage restaurant licenses to prohibit such licensees from having sales of wine or liqueur-based drinks, together with the sale of any other alcoholic beverages, exceeding 10 percent of their total annual gross sales of all food and alcoholic beverages. Prior law did not factor into the equation the sale of "other alcoholic beverages" and referred simply to "gross sales" rather than gross sales of all food and alcoholic beverages. Senator Don McEachin also introduced SB 642 during the 2014 Session to modify the sanctions for violations of the food-beverage ratio, but it did not pass.

During the 2015 Session, then-Delegate Bill DeSteph introduced two bills related to the food-beverage ratio. HB 1814 modified the food-beverage ratio to require that sales from food and nonalcoholic beverages meet or exceed 75% of mixed beverage sales, and HB 1815 added as an alternative to the current ratio a minimum monthly food sale requirement of \$4,000. Both bills were passed by indefinitely.

Last, Ms. Everett summarized the provisions of § 4.1-126. In 1972, four years after the Whiskey Bill passed, the General Assembly enacted § 4.1-126, creating the first exception to the requirement in § 4.1-124 that liquor-by-the-drink be permitted only in localities that approved of such practice through a referendum. There are currently 26 exceptions allowing the sale of liquor-by-the-drink at certain establishments within localities in the Commonwealth that have not passed such a referendum.

⁴ Summaries of these bills are included in Appendix A.

V. Presentation: David May, Attorney, Division of Legislative Services

Mr. May gave a presentation on possible alternatives to the current food-beverage ratio, which requires a mixed beverage restaurant licensee's gross receipts from the sale of food and nonalcoholic beverages to amount to at least 45 percent of its gross receipts from the sale of mixed beverages, food, and nonalcoholic beverages combined. At the subcommittee's first meeting, members expressed concern that compliance with and enforcement of the current food-beverage ratio was onerous, confusing, and outdated. Members indicated that it may be time to modify the ratio to some extent but emphasized that in making such modification, caution must be taken to avoid legislative changes that could result in a proliferation of "bars" throughout the Commonwealth.

In light of these concerns, Mr. May presented three potential alternatives to the current food-beverage ratio, all of which require licensees to serve food whenever mixed beverages are sold. The first option is to impose a minimum monthly food sale requirement. Per regulations of the Alcoholic Beverage Control Board (the Board), mixed-beverage restaurant licensees are currently required to sell at least \$4,000 of food per month. Though, 90 percent of licensees sell \$10,000 or more in food per month. With those considerations in mind, it was recommended that the minimum monthly food sale requirement be set at \$10,000 or an amount between \$4,000 and \$10,000. Under this approach, the remaining 10 percent of licensees who are unable to meet the minimum food sale requirement would have the option of complying with the current food-beverage ratio.

Similarly, the second and third options also include a minimum monthly food sale requirement but deviate with regard to the options available to the 10 percent of current licensees that are unable to meet the minimum food sale requirement. The second option would allow these licensees to comply with a food-beverage ratio as an alternative to the minimum food sale requirement but would lower the ratio to some degree. Conversely, the third option would impose a tiered minimum food sale requirement, lowering the amount of required sales from \$10,000 to lesser amounts based on the restaurant's capacity as determined by their certificate of occupancy.

After presenting the above alternatives to the current food-beverage ratio, Mr. May explained how these options meet the concerns raised previously by the subcommittee members. First, imposing a minimum food sale requirement would simplify compliance for licensees by ridding 90 percent of them from the requirements of extensive recordkeeping and detailed calculations. Rather than computing all sales from mixed beverages, food, and nonalcoholic beverages, these licensees would simply tally and report their food sales.

Second, the minimum food sale requirement would simplify and lower the cost of enforcement efforts for the Department by removing 90 percent of licensees from the MBAR's food-beverage ratio audit system, which has proven costly and resource intensive at an estimated 12,480 hours per annum.

Third, the minimum food sale requirement would better match the Commonwealth's rules of compliance with the current marketplace, consumer trends, and higher drink prices. For example, licensees who sell expensive, top-shelf spirits would no longer be tasked with the difficult job of attempting to match their food sales, in price or quantity, with those high-end spirits. Instead, such licensees would be permitted to sell such liquors bound only by the requirement that they sell at least \$10,000 of food per month or \$120,000 per year.

Finally, imposition of a minimum food sale requirement would not result in a proliferation of bars throughout the Commonwealth. Notably, as mentioned above, 90 percent of licensees already sell \$10,000 or more of food per month. Accordingly, the Commonwealth's existing landscape with regard to the number of establishments serving mixed beverages would remain relatively the same. A minimum food sale requirement would simply ease the process of compliance for licensed establishments that have consistently exceeded our statutory food sale requirements.

VI. Public Comment

One member of the public proposed the following question: "If a mere one percent of licensees are having difficulty meeting the current [food-beverage] ratio, why are we here? The gentleman stated that most licensees are in compliance, and the ratio should not be modified to account for the minority who are not. He further commented that the level of math required to complete an MBAR form is relatively simple.

Another citizen suggested that the General Assembly create a "tavern" license that would allow such licensee to sell spirits unbound by any food sale requirement. The gentleman stated that this would allow certain existing establishments that currently operate under the guise of a restaurant to "come out of the dark." The gentlemen explained that any establishment that specializes in high-end spirits is effectively specializing in liquor, not food, and is therefore a bar, rather than a restaurant.

A representative of the Commonwealth's restaurant and lodging industries stated that at some point an establishment should qualify as a "restaurant" based on the amount of its food sales without regard to the quantity of spirits it is also selling. The representative stated that a minimum food sale requirement would serve this purpose and would not give a restaurant any incentive to stop selling food upon meeting such requirement as long as the Code of Virginia requires that food be served whenever alcohol is sold.

Other topics raised by members of the public included (i) a concern that public safety was not a large part of the subcommittee's discussion of the food-beverage ratio and (ii) a suggestion that regardless of the subcommittee's ultimate decision, all alcohol—spirits, wine, and beer—should be regulated equally.

Bill Dillon, Owner and Operator of Abbey Road Pub & Restaurant, was not able to attend the meeting but submitted public comment via email. Mr. Dillon raised concern over certain bills passed during the 2016 Session that effectively exempted from the food-beverage ratio two private performing arts facilities. Mr. Dillon suggested that these bills indirectly created a "night club license" for these establishments and inquired as to the reason this legislation did not include all performing arts facilities. Mr. Dillon recommended that, as a matter of fairness, these new laws be amended to include all of Virginia's performing arts facilities. Mr. Dillon also raised concern over the rules governing micro-breweries, stating such breweries are "exploding" throughout the Commonwealth and are not bound by a food sale requirement. Finally, Mr. Dillon recommended that all ABC licenses be treated equally through imposition of a flat monthly food sale requirement, coupled with a requirement that food be served whenever alcohol is sold. Mr. Dillon stated that this rule would not only promote equal treatment of the Commonwealth's various licensees, but also reduce the Department's work load and allow agents to more effectively enforce the provisions of the Code.

VII. Discussion

Co-chairman Knight and Senator DeSteph expressed interest in the idea of replacing or supplementing the current food-beverage ratio with a minimum food sale requirement, provided a provision is included that requires establishments to serve food whenever alcohol is sold. Co-chairman Knight also stated that while statistics were presented that a mere one percent of licensees fall short of the food-beverage ratio's requirement, in practice, many more licensees are experiencing problems with the ratio.

Delegate Albo suggested, on the other hand, that it appears most licensees are satisfied and in compliance with the current ratio requirements. Following discussion with Delegate Luke Torian, Delegate Albo suggested that the subcommittee investigate the possibility of giving the Department discretion to craft solutions for the one percent of licensees who fall short of the ratio's requirements. Specifically, Delegate Albo suggested that, upon petition by the licensee, the Department could conduct a hearing and accept testimony on reasons the licensee is unable to comply with food-beverage ratio despite sincere effort. Delegate Albo further suggested that the subcommittee formulate a list of all possible alternatives to the current ratio and post it on its website for public comment and feedback.

VIII. Adjournment and Next Meeting

Upon deciding that the subcommittee will meet again in August or September, the meeting was adjourned by Co-chairmen Cosgrove and Knight.

APPENDIX A
2016 BILL SUMMARIES

HB 171

Albo

Alcoholic beverage control; food-beverage ratio for certain mixed beverage licensees.

Provides that for persons holding a mixed beverage restaurant, caterer's, or limited caterer's license, in calculating the minimum 45 percent ratio of food to mixed beverage and food, such licensees shall include the gross receipts from the sale of nonalcoholic beverages served on the premises in calculating the gross receipts from the sale of food. The bill provides that it declarative of existing law.

HB 219

Taylor

Alcoholic beverage control; food-beverage ratio. Reduces from 45 to 25 percent the requirement for mixed beverage restaurant licensees for the ratio of combined gross receipts from the sale of food consumed on the premises and nonalcoholic beverages served on the premises and the combined gross receipts from the sale of mixed beverages, food, and nonalcoholic beverages. The bill provides that gross receipts be calculated on the basis of the price that the licensee paid for the food, nonalcoholic beverages, or mixed beverages sold, rather than the price at which the licensee sells such items to consumers.

SB 373

Ebbin

Alcoholic beverage control; food sale requirements. Provides that a business may be considered a restaurant for purposes of mixed beverage licenses if it regularly sells foods, rather than meals, prepared on the premises. The bill also provides that in calculating the gross receipts from the sale of food for purposes of the food-to-beverage ratio, mixed beverage restaurant licensees, mixed beverage caterer's licensees, mixed beverage limited caterer's licensees, and limited mixed beverage restaurant licensees shall include the gross receipts from the sale of nonalcoholic beverages.

SB 488

DeSteph

Pilot project for mixed beverage licensees of the Alcoholic Beverage Control Board; alternative calculation for the 45 percent food-to-beverage ratio based on price paid by the licensee. Creates a two-year pilot project that directs participating mixed beverage restaurant licensees to calculate the required food-to-beverage ratio (i) on the basis of the price such licensee paid for the food, nonalcoholic beverages, and mixed beverages sold and (ii) on the basis of the price such licensee sold such food, nonalcoholic beverages, and mixed beverages to patrons. The bill provides that participating licensees shall be deemed to be in compliance with law if they meet the required food-to-beverage ratio based on either of the above calculations. The bill also requires participating licensees to serve food during any period of time mixed beverages are served and allows the Alcoholic Beverage Control Board to summarily suspend the license of participants for 24 hours for violation of this requirement.

SB 489**DeSteph**

Alcoholic beverage control; food-beverage ratio. Provides that a mixed beverage restaurant licensee meets the required food-beverage ratio if its gross receipts from the sale of food and nonalcoholic beverages amount to at least (i) \$5,000 per month or (ii) 25 percent of the gross receipts from the sale of mixed beverages and food. The bill also provides that mixed beverage caterer and limited mixed beverage caterer licensees meet the required food-beverage ratio if their gross receipts from the sale of food and nonalcoholic beverages amount to at least 25 percent of their gross receipts from the sale of mixed beverages and food. Under current law, mixed beverage restaurant, mixed beverage caterer, and limited mixed beverage caterer licensees' gross receipts from the sale of food and nonalcoholic beverages must amount to at least 45 percent of their gross receipts from the sale of mixed beverages and food. The bill also requires such licensees to serve food during any period of time mixed beverages are served and allows the Alcoholic Beverage Control Board to summarily suspend a license for a maximum of 24 hours for failure to comply with this provision.