

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

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

Wednesday, September 14, 2016, at 10:00 a.m.
General Assembly Building, Senate Room B
Richmond, Virginia

MEETING SUMMARY

I. Introduction and Opening Remarks

Co-chairmen Senator John Cosgrove and Delegate Barry Knight called to order the third 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. Continuation of Study Plan: 45 Percent Food-to-Beverage Ratio for Mixed Beverage Licensees

Maria J.K. Everett, Senior Attorney, Division of Legislative Services, provided an explanation of the five food-beverage ratio bills from the 2016 Session that were included in the study: HB 171 (Albo), HB 219 (Taylor), SB 373 (Ebbin), SB 488 (DeSteph), and SB 489 (DeSteph).² Ms. Everett also provided an overview of possible alternatives to the current food-beverage ratio,³ 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.

Travis Hill, Chief Operating Officer, Department of Alcoholic Beverage Control (the Department), then testified about the aforementioned alternatives to the food-beverage ratio.

Option 1 – Food must be sold whenever alcohol is served:

Mr. Hill agreed with the subcommittee's opinion that Option 1, which would impose a requirement that food be sold whenever alcohol is served, should be implemented regardless of whether any other changes are made to the food-beverage ratio.

Option 2 – Maintain the status quo:

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

² Summaries of these bills are included in Appendix A.

³ These alternatives, which were posted online for public comment, can be found here: <http://dls.virginia.gov/groups/SenRSS/Alternatives.pdf>

Mr. Hill stated that many licensees have expressed concern over the current ratio structure, and he noted that these concerns would obviously continue to exist should the subcommittee choose to continue with the current ratio.

Option 3 – Maintain current ratio but give the Department discretion, upon petition by licensee, to craft alternatives for those who cannot meet the ratio:

Mr. Hill opined that this practice could be considered arbitrary because some licensees would be required to comply with the ratio while others would not. Mr. Hill further noted that this option would likely lead to an overflow of petitions and may result in the exception (exception by petition) swallowing the rule (food-beverage ratio).

Option 4 – Current ratio but based on "purchase" versus "sale" price:

Mr. Hill stated that one challenge associated with this option is that it is difficult to determine what is consumed on a licensee's premises when calculations are based on the price that the licensee paid for items rather than the price for which they are ultimately sold. Mr. Hill noted that this option could affect licensees' inventory practices and might require the Department to collect more information from licensees than what is currently required, when many licensees already complain about such record-producing requirements.

Option 5 – Lower current ratio:

Mr. Hill stated that this option would entail the same recordkeeping burdens and costs on licensees that are associated with the current food-beverage ratio, as well as retain the same enforcement burdens on the Department. The only difference would be the number of licensees that meet the required ratio.

Option 6 – Replace current ratio with minimum food sale requirement (\$4,000–\$10,000):

Mr. Hill opined that this option would be the most efficient of all, would be less burdensome on licensees and the Department, and would result in less confusion regarding compliance. Mr. Hill noted that this option rids all concern over liquor sales and focuses the attention on licensees' food sales, which should be the central question in determining whether an establishment is a "restaurant" or a "bar." Mr. Hill noted, however, that approximately seven percent of current licensees would not be able to meet a minimum food sale requirement of \$10,000 per month based on existing statistics.

Option 6A – Set minimum food sale requirement (\$4,000–\$10,000) with alternative option of complying with current ratio:

Mr. Hill stated that this option would lower the number of licensees that would have to comply with the food-beverage ratio structure but would entail the same burdens currently complained of on all licensees that could not meet the minimum food sale requirement of \$10,000 per month. Mr. Hill also questioned whether this option would alleviate any enforcement burdens currently experienced by the Department.

Option 6B – Set minimum food sale requirement (\$4,000–\$10,000) with alternative option of complying with a lower ratio:

Mr. Hill's comments mirrored those under Option 6A, with the only difference being a lower number of licensees that fail to meet the food-beverage ratio.

Option 7 – Establish a tiered minimum food sale requirement based on the Certificate of Occupancy (CO) for the licensed establishment:

Mr. Hill stated that this option would require the Department to make systematic changes but may alleviate some burdens on smaller establishments.

Option 8 – Create a new MB "tavern" or "entertainment" license (separate and distinct from mixed-beverage restaurants and caterers subject to ratio):

Mr. Hill opined that this option may help clarify the difference between establishments that operate as a "restaurant" and those that operate as a "bar" but that the decision is ultimately a policy one to be made by the members of the General Assembly.

Option 9 – Establish tiered annual license tax based on food sales:

Mr. Hill clarified that this option would simply entail a system in which licensees pay more money in exchange for less stringent food sale requirements and, accordingly, may favor the wealthy.

Option 10 – Set ratio based on proof-gallon:

Mr. Hill noted that this option was the subject of a 2008 study and ultimately did not work well for any of the parties involved.

Option 11 – Enter into Memorandum of Understanding with Department of Taxation to verify sales:

Mr. Hill stated that this practice could be beneficial to the Department regarding the accuracy of information submitted by licensees but might require the Department of Taxation to modify its current practices.

Option 12 – Maintain status quo but authorize funding to ABC for additional auditing agents to ensure MBAR compliance:

Mr. Hill noted that one of the concerns expressed regarding the current food-beverage ratio is a lack of enforcement. Additionally, opinions have been expressed that many licensees are not truthful regarding their current food and liquor sales reports to the Department. Accordingly, the low percentage of licensees who are not in compliance with the food-beverage ratio may be higher than it appears. Mr. Hill explained that under this option, the Department would be able to more adequately enforce the current requirements of the food-beverage ratio and formulate a more accurate number regarding the percentage of licensees who fail to meet these requirements.

III. Discussion

Co-chairman Knight stated that, in his opinion, Option 6B is the best alternative to the current food-beverage ratio. Co-Chairman Knight explained that under this option, he would impose a minimum food sale requirement of \$10,000 per month and provide licensees who are unable to meet this requirement with the alternate option of complying with a lower food-beverage ratio that requires a licensee's food sales to account for 35 percent of its gross receipts from the sale of mixed beverages, food, and nonalcoholic beverages combined, rather than the current 45 percent requirement. Mr. Hill noted that this option would simplify the current ratio

structure for 92 percent of licensees, would make the process easier for the remaining eight percent, and would lessen enforcement burdens on the Department.

However, Delegate Dave Albo expressed concern that licensees may be able to cheat the system under this approach. Delegate Albo stated that under Option 6B, a requirement of \$10,000 in food sales per month equates to approximately \$333 per day. Delegate Albo stated that if we assume the average cost of a meal is around \$15, restaurants could simply sell 22 meals per day to their employees and would thereby meet Option 6B's requirements.

Co-chairman Cosgrove suggested that, in light of the debate between the competing alternatives to the current food-beverage ratio, the subcommittee members should avoid making a decision at this time. Instead, Co-chairman Cosgrove suggested that before the subcommittee's next meeting, all members should weight the various options and decide which option(s) they believe would serve as the best alternative to the current food-beverage ratio. After feedback is gathered from all members, a decision will be made at the next and final meeting. Delegate Albo noted that in weighing the options, the final selection may be a combination of two or more options.

IV. Public Comment

Bill Dillon, Owner and Operator of Abbey Road Pub & Restaurant, 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. Another member of the public, William Stewart, Catalyst Media, echoed this concern.

Mr. Dillon also raised concern over the rules governing microbreweries, 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 workload and allow agents to more effectively enforce the provisions of the Code.

Curtis Coleburn, Virginia Distillers Association, stated that the food-beverage ratio was originally created to promote the sale of beer and wine over liquor. Now, however, the industry operates under a structure that places less emphasis on the difference between beer, wine, and liquor. In light of this shift, it would be better to have a single license for the sale of wine, beer, and liquor, rather than having a mixed beverage license that allows the sale of all alcohol, and other licenses that are limited to wine and beer.

Tom Lisk, Virginia Restaurant, Lodging, and Travel Association, stated that the purpose of the food-beverage ratio and similar rules is to identify whether an establishment is a bona fide restaurant instead of a bar. Mr. Lisk opined that the most efficient method of making this determination is Option 6; however, recognizing that some licensees would be unable to meet a \$10,000 minimum monthly food sale requirement, Mr. Lisk stated that Option 6B would be an effective compromise. This would relieve current burdens on many businesses, including those that consistently comply with the current food-beverage ratio requirements. Eric Terry,

President, Virginia Restaurant, Lodging, and Travel Association, concurred with Mr. Lisk's comments. Mr. Terry further noted that Virginia's restaurant industry is currently in a state of decline. Mr. Terry opined that Options 6A and 6B could serve as a means of reversing this trend and simplify a process for restaurant owners that is currently overcomplicated.

William McCormack, owner, McCormack's Big Whisky Grill, stated that his establishment specializes in the sale of high-end spirits, many of which sell for \$55 and some for over \$100 per drink. Mr. McCormack explained that because these drinks sell at such high prices, it is nearly impossible to match those sales with food sales in an effort to meet the requirements of the current food-beverage ratio. Mr. McCormack noted that some customers do not wish to order food, and even if they do, the price of food is not enough to counteract his spirit sales. Mr. McCormack stated that the food-beverage ratio needs to be changed to account for his business and others alike that sell high-end drinks, which will allow these small businesses that create employment opportunities and drive the economy to thrive.

Myles Louria, Downtown Business Group, proposed the following question: If a mere one percent of licensees are having difficulty meeting the current food-beverage ratio, why are we here? Mr. Louria opined that the current food-beverage ratio does not need a major overhaul and suggested that if any changes are made, they should be small. Mr. Louria further opined that, regarding the proposition of imposing a minimum monthly food sale requirement, \$10,000 is not a tremendous amount of food. Mr. Louria also noted that current restaurant licensees have invested a lot of money to secure kitchen equipment and other resources in an effort to comply with current law, and it would be unfair to change the rules in light of those investments. Similarly, Mike Burns stated that liquor is currently treated differently than beer and wine, and for good reason. Mr. Burns stated that a person's intent is different when drinking wine or beer as opposed to liquor. And in response to the argument that the food-beverage ratio should be modified to account for high-end liquor sales due to the difficulty of matching those sales with food sales, Mr. Burns stated that this practice accounts for only approximately 1.3 percent of liquor sales in Virginia.

V. Adjournment and Next Meeting

Upon deciding that the subcommittee will meet again in October, 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 is 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 on 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 the 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.