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## FIXING VIRGINIA'S FOOD-BEVERAGE RATIO: IS THIS INESCAPABLE PROBLEM ALSO AN INSOLVABLE ONE?

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## ABSTRACT

*In efforts to reduce public drunkenness and irresponsible consumption of alcohol, the Virginia General Assembly has passed various forms of limitations on how much and what type of alcohol can be served in public establishments. The current framework requires bars in the Commonwealth to generate at least 45% of sales from food and nonalcoholic beverages, with the logic that eating reduces the rate of intoxication. This Article presents the history of alcohol regulation in Virginia, discusses past efforts to investigate potential solutions and introduces recently proposed legislation to modify state laws regulating the food-beverage ratio required in Virginia.*

## INTRODUCTION

The use of alcohol in its many forms has perplexed society and its government from time immemorial and still does. It confronts them with an inescapable problem and apparently with an insolvable one. Some are cursed by it and some are comforted. Unhappy results have followed intemperate indulgence – certainly from the time of Noah – while discreet indulgence has added zest and wit to social gatherings long before the marriage feast at Cana.

After the Civil War little control was undertaken. Abuses were flagrant, the effect of which was to place our government under the complete control of those who wished to prohibit its use as a beverage, although, as a concession to the taste of others, an allowance of a quart a month was once made. Later came the Noble Experiment, which was a disappointment to many of its friends. Prohibition lost control, and one is now permitted to purchase two quarts a month, provided he is registered and presents his own coupon. This strange diagonal did not please everybody. You cannot placate the implacable.

The question of how much food a seller of alcoholic beverages must sell – the food-beverage ratio – has been an inescapable problem for the Virginia General Assembly for the better part of a decade. During the 2016 and 2017 Regular Sessions of the General Assembly, legislation was introduced and a study was conducted, yet no change to the law has resulted. Is this inescapable problem also an insolvable one?

This article will summarize the current statutory requirements, explain the historical framework for the statutory scheme, analyze recent legislation involving the food-beverage ratio, address the food sales requirements of other states, and assess possible future approaches to modernizing the food-beverage ratio.

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<sup>1</sup> Commonwealth v. Anheuser-Busch, Inc., 26 S.E.2d 94, 94–95 (1943).

## I. FOOD-BEVERAGE RATIO

Section 4.1-210(A)(1) of the *Code of Virginia* applies to holders of mixed beverage restaurant licenses and requires that the “gross receipts from the sale of food cooked or prepared, and consumed on the premises and nonalcoholic beverages served on the premises [...] amount to at least 45% of the gross receipts from the sale of mixed beverages and food.”<sup>2</sup> This statutory requirement is referred to as the “food-beverage ratio”<sup>3</sup> and must be reviewed by the Virginia Alcoholic Beverage Control Board (“ABC Board”) annually.<sup>4</sup> Wine and beer sales were previously included in the food-beverage ratio equation, but were removed in 1990 through legislative amendment, resulting in the current statutory scheme.<sup>5</sup>

In recent years, the food-beverage ratio has been criticized as “draconian;”<sup>6</sup> however, public health and safety concerns underlying the policy, discussed further *infra*, continue to be supported by medical evidence showing that food slows the absorption rate of alcohol and can increase alcohol elimination rates in healthy people.<sup>7</sup>

For nearly a decade, the General Assembly endeavored to reassess the food-beverage ratio requirement and consider alternative methods for calculating the ratio.<sup>8</sup> None of the various legislative proposals resulted in amendments to the law, but several studies did result. In order to understand these legislative efforts, a review of the historical evolution of the food-beverage ratio is helpful.

## I. HISTORICAL FRAMEWORK

At a referendum election on October 3, 1933, after passage of the Twenty-First Amendment to the US Constitution, the people of Virginia were faced with the choice of “continuation of state prohibition” or adopt-

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<sup>2</sup> VA. CODE ANN. § 4.1-210 (West 2016).

<sup>3</sup> VA. CODE ANN. § 4.1-114 (West 2016).

<sup>4</sup> *Id.*

<sup>5</sup> 1990 Va. Acts 402.

<sup>6</sup> C. Jarrett Dieterle, *Virginia's Infamous Food-Beverage Ratio Prioritizes Cronyism Over Consumers*, THE R STREET INSTITUTE (Jun. 27, 2016), <http://www.rstreet.org/2016/06/27/virginias-infamous-food-beverage-ratio-prioritizes-cronyism-over-consumers/>.

<sup>7</sup> Vijay A. Ramchandani, Paul Y. Kwo & Ting-Kai Li, *Effect of Food and Food Composition on Alcohol Elimination Rates in Healthy Men and Women*, J. CLIN PHARMACOL 1345, 1345–48 (2001).

<sup>8</sup> See Stacy Parker, *Virginia Beach Restaurateurs Want Relief From “Outdated” Food Sale Requirements*, VIRGINIAN-PILOT, Jan. 16, 2017, [http://pilotonline.com/life/flavor/restaurants/virginia-beach-restaurateurs-want-relief-from-outdated-food-sale-requirements/article\\_68471198-9f04-5431-a330-1c474dcb3c32.html](http://pilotonline.com/life/flavor/restaurants/virginia-beach-restaurateurs-want-relief-from-outdated-food-sale-requirements/article_68471198-9f04-5431-a330-1c474dcb3c32.html).

ing “a plan of liquor control.”<sup>9</sup> A majority of the votes cast were in favor of a plan of liquor control and a legislative Liquor Control Committee began developing recommendations for instituting this plan of liquor control.<sup>10</sup>

Many of the provisions contained in the original version of “The Alcoholic Beverage Control Act” (“ABC Act”) – recommended by the Committee and enacted in 1934 – are still in effect today; however, one significant change to the Act is the permissibility of “distilled liquors by the drink” or on-premises consumption of mixed beverages.<sup>11</sup> In its 1934 report, “Liquor Control,” the Committee disapproved of liquors by the drink in large part because the electorate explicitly opposed “the return of the saloon” when it chose a plan of liquor control.<sup>12</sup>

Saloon culture and its “attendant evils”<sup>13</sup> has been blamed for many of the societal problems that lead to Prohibition, and avoiding a return of that culture became a primary focus of those individuals tasked with setting up effective alcohol regulatory schemes after the repeal of Prohibition.<sup>14</sup> When announcing ratification of the Twenty-First Amendment on December 5, 1933, President Franklin D. Roosevelt said: “I ask especially that no State shall by law or otherwise, authorize the return of the saloon either in its old form or in some modern guise.”<sup>15</sup> Raymond B. Fosdick and Albert L. Scott, authors of the widely renowned treatise *Toward Liquor Control*, published in 1933, identified public concern over saloon culture as a key principle upon which they based their recommendations regarding alcohol regulation:

The saloon, as it existed in pre-prohibition days, was a menace to society and must never be allowed to return. Behind its blinds degradation and crime were fostered, and under its principle of stimulated sales poverty and drunkenness, big profits and political graft, found a secure foothold. Public opinion has not forgotten the evils symbolized by this disreputable institution and it does not intend that it shall worm its way back into our social life.<sup>16</sup>

Taking this public concern to heart, the Liquor Control Committee opposed allowing liquors by the drink, likening such service to that which existed in pre-Prohibition saloons.<sup>17</sup> The Committee acknowledged that “[n]o

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<sup>9</sup> COMMONWEALTH OF VA. LIQUOR CONTROL COMM’N., REPORT TO GENERAL ASSEMBLY JOINT SUBCOMMITTEE ON LIQUOR CONTROL, Sen. Doc. 5 (1934).

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See RAYMOND B. FOSDICK & ALBERT L. SCOTT, TOWARD LIQUOR CONTROL 16-17 (1933).

<sup>15</sup> Proclamation No. 2065, 48 Stat. 1721 (Dec. 5, 1933).

<sup>16</sup> FOSDICK, *supra* note 14, at 10.

<sup>17</sup> COMMONWEALTH OF VA. LIQUOR CONTROL COMM’N., REPORT TO GENERAL ASSEMBLY JOINT

one [had] yet satisfactorily defined a saloon,"<sup>18</sup> but nonetheless concluded the following: "It may be argued that a hotel or restaurant which serves distilled liquors at tables is not a saloon in the common acceptance of the word, but really the only difference is that the bar and swinging doors are missing."<sup>19</sup>

Though the prevailing public opinion was anti-saloon, there were some who actually yearned for the return of the saloon.<sup>20</sup> Indeed, some states did adopt regulatory schemes that permitted liquors by the drink to be served in barrooms; however, according to the implacable writer Don Marquis, this "New Barroom" did not resemble the "Old Saloon."<sup>21</sup> Marquis satirically attributed the difference in the two establishments to the presence of a new type of consumer: "drinking as it was practiced in the Old Saloon ... [was] killed by [the] invasion of women."<sup>22</sup>

In Virginia, service of liquors by the drink – or "mixed beverages" – in licensed restaurants was eventually approved by the General Assembly.<sup>23</sup> In 1968, the ABC Act was amended to allow for service of mixed beverages at licensed restaurants in localities upon passage of a referendum to allow the conduct.<sup>24</sup> The requirement of a local referendum is still in place today, and there continue to be localities that have not approved the sale of mixed beverages by referenda.<sup>25</sup>

According to Curtis W. Coleburn, former Chief Operating Officer of the Virginia Department of Alcoholic Beverage Control, at the time the General Assembly approved the sale of mixed beverages in 1968, concerns about the resurgence of the saloon continued to persist.<sup>26</sup> The food-beverage ratio was instituted as a way to curb excessive alcohol consumption and ensure that mixed beverages were only served in full-service restaurants and dining establishments.<sup>27</sup> Initially, mixed beverage licensees were required to sell more food than alcoholic beverages, including wine and beer.<sup>28</sup> The ratio

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SUBCOMMITTEE ON LIQUOR CONTROL, Sen. Doc. 5, at 4 (1934).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> See DON MARQUIS, *HER FOOT IS ON THE BRASS RAIL* (1935), <http://www.donmarquis.org/herfoot.txt>.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> 1968 Va. Acts 7.

<sup>24</sup> *Id.*

<sup>25</sup> VA. CODE ANN. § 4.1-124 (West).

<sup>26</sup> Nathan Cushing, *Behind ABC's food-to-alcohol ratio*, RVANews (Feb. 17, 2014), <https://rvanews.com/features/behind-abcs-food-to-alcohol-ratio/108958>.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

was modified through the years, wine and beer were removed from the equation, and the current requirement was adopted in 1990.<sup>29</sup>

## II. EFFORTS TO MODERNIZE THE FOOD-BEVERAGE RATIO

In 2009, the General Assembly recognized “the concerns raised that certain mixed beverage restaurant licensees are having difficulty in meeting the food-beverage ratio prescribed in statute” and mandated a two-year pilot project to test an alternative method of calculating the ratio.<sup>30</sup> The ABC Board noted in a 2011 report of findings (“2011 Report”) that, “[d]uring the committee study which resulted in the pilot project legislation, licensees indicated that consumer trends toward higher-priced spirits drinks were contributing to difficulties in meeting the food[-beverage] ratio” but concluded that “[t]here was no evidence of such a phenomenon in the pilot project restaurants’ reports.”<sup>31</sup>

In 2015, at the request of the General Assembly in relation to House Bill 1814 (“HB 1814”), the ABC Board submitted another report on the food-beverage ratio (“2015 Report”).<sup>32</sup> HB 1814 proposed an amendment to the food-beverage ratio intending to lower the amount of food required to be sold as compared to mixed beverages. In the 2015 Report, ABC Board Chairman Jeffrey L. Painter, writing on behalf of the ABC Board, analyzed the proposed formula, which he described as follows:

Under the proposed formula in HB 1814, the percentage of food sold would be calculated by dividing total food by total mixed beverage sales with the result multiplied by 100 to provide the percentage. The fundamental difference between the two calculations is that under current law there must be 81 cents of food sales for every dollar of mixed beverage sales, whereas under the formula proposed in HB 1814, the ratio is lowered to 75 cents of food sales for every dollar in mixed beverage sales.<sup>33</sup>

Among other findings, Painter explained that when applied to licensees who came close to compliance, but fell short of the statutory requirement by a few percentage points, the proposed ratio formula brought the li-

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<sup>29</sup> 1990 Va. Acts 402.

<sup>30</sup> 2009 Va. Acts 238.

<sup>31</sup> VA. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, PILOT PROJECT ON ALTERNATIVE METHOD FOR CALCULATING THE FOOD-TO-BEVERAGE RATIO FOR MIXED BEVERAGE RESTAURANTS 2 (July 29, 2011), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD1352011/\\$file/RD135.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD1352011/$file/RD135.pdf).

<sup>32</sup> VA. DEP’T OF ALCOHOLIC BEVERAGE CONTROL, REPORT ON MIXED BEVERAGE FOOD-TO-BEVERAGE RATIO (Oct. 30, 2015), [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD3562015/\\$file/RD356.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD3562015/$file/RD356.pdf).

<sup>33</sup> *Id.*

censes into compliance.<sup>34</sup> The ABC Board's reported findings were that under the proposed ratio formula,

[T]he mixed beverage licensees that are well qualified would remain well qualified and those extremely under qualified would remain as such. The group of licensees impacted are those whose food sales are marginally or just below the qualifying 45%. As is demonstrated in the second calculation example, the licensee's food ratio is 44% and thus just below qualifying under the current formula. However when calculated under the proposed formula, the licensee's food sales are 79% of their mixed beverage sales and would thus be qualified.<sup>35</sup>

Additionally, the ABC Board provided further comment relating to feedback it had received from the regulated community, noting that "[t]hese suggestions run from doing away with the mixed beverage ratio altogether to enforcing the current provisions more strenuously."<sup>36</sup> The ABC Board did not endorse any particular suggestion, but rather advocated for a clear law that is easy to understand and that would result in voluntary compliance.<sup>37</sup>

### III. 2016 AND 2017 LEGISLATIVE PROPOSALS

Since submission of the 2015 Report, two regular sessions of the General Assembly have come and gone and several proposed amendments to the food-beverage ratio have been introduced, but every bill failed to reach enrollment.

During the 2016 Regular Session, five bills were introduced to amend the food-beverage ratio in a variety of ways; House Bill 171, House Bill 219, Senate Bill 373, Senate Bill 488, and Senate Bill 489.<sup>38</sup> Several of the bills were passed by the chamber in which the bill originated, but eventually, all five bills were continued to the 2017 Regular Session and referred to either the House Committee on General Laws or the Senate Committee on Rehabilitation and Social Services.<sup>39</sup> From there, a Special Joint Subcommittee comprised of the two committees was formed to study ABC issues.<sup>40</sup> The Special Joint Subcommittee met on three occasions while the

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> VA. DEP'T OF ALCOHOLIC BEVERAGE CONTROL, *supra* note 32.

<sup>38</sup> *2016 Session; Alcoholic Beverage Control Act*, VIRGINIA'S LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?161+sbj+004> (last visited Ap. 13, 2017).

<sup>39</sup> *Id.*

<sup>40</sup> *Alcoholic Beverage Control Laws, Joint Subcommittee to Study*, VIRGINIA GENERAL ASSEMBLY,



General Assembly was in recess,<sup>41</sup> discussed approximately nine options for legislative amendment, and ultimately settled on one option as the legislative recommendation of the Special Joint Subcommittee.<sup>42</sup>

On January 11, 2017, Senator William DeSteph, Chairman of the Senate Committee of Rehabilitation and Social Services, and a member of the Special Joint Subcommittee, offered the legislative recommendation as Senate Bill 970 (“SB 970”).<sup>43</sup> SB 970 proposed a hybrid model for the food-beverage ratio, which would have required mixed beverage licensees to sell 35% food and nonalcoholic beverages and 65% mixed beverages if the licensee’s monthly food sales were at least \$4000, but less than \$10,000.<sup>44</sup> If a licensee’s monthly food sales equaled \$10,000 or more, however, no food-beverage ratio requirement was imposed.<sup>45</sup>

The Department of Planning and Budget reported in its Legislative Impact Statement for SB 970 that, according to the ABC Board, 92% of licensees would have sufficient monthly food sales to be exempt from the food-beverage ratio proposed and that 99% of licensees would be in compliance with the food-beverage ratio requirements based on 2016 data.<sup>46</sup>

Ultimately, however, SB 970 was defeated when it failed to report out of the Senate Committee on Rehabilitation and Social Services. When put to a vote, six “yeas”, eight “nays”, and one abstention were cast.<sup>47</sup>

#### IV. COULD A LOCAL OPTION BE THE KEY?

With SB 970 the only bill to address the food-beverage ratio during the 2017 Session, upon adjournment *sine die* on February 25, 2017,<sup>48</sup> the Gen-

<http://studies.viriniageneralassembly.gov/meetings/348> (last visited on Apr. 13, 2017).

<sup>41</sup> *Id.*

<sup>42</sup> S.B. 970, 2017 Va. Gen. Assemb., Reg. Sess. (Va. 2016), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+SB970+pdf>; VA. SPECIAL JOINT SUBCOMMITTEE STUDYING CERTAIN ALCOHOLIC BEVERAGE CONTROL (ABC) LAWS MEETING SUMMARY, (Oct. 25, 2016), available at <http://dls.virginia.gov/groups/SenRSS/sm102516.pdf>.

<sup>43</sup> S.B. 970, 2017 Gen. Assemb., Reg. Sess. (Va. 2016) (unenacted), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?171+ful+SB970+pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> VA. DEP’T OF PLANNING AND BUDGET, 2017 FISCAL IMPACT STATEMENT: SB 970 (2017), <http://lis.virginia.gov/cgi-bin/legp604.exe?171+oth+SB970F122+PDF>.

<sup>47</sup> 2017 Session; *Alcoholic Beverage Control Act*, VIRGINIA’S LEGIS. INFO. SYS., <http://lis.virginia.gov/cgi-bin/legp604.exe?161+sbj+004> (last visited Apr. 13, 2017).

<sup>48</sup> See VA. SENATE, MINUTE BOOK (FEB. 25, 2017), <http://lis.virginia.gov/cgi-bin/legp604.exe?171+min+SM0225>; VA. HOUSE OF DELEGATES, 2017 REGULAR SESSION HOUSE MINUTES (Feb. 25, 2017),

eral Assembly ended yet another session without solving what will likely continue to be an inescapable problem. Nonetheless, a remark from the venerable Senator Richard Saslaw on the food-beverage ratio might provide the only effective solution to this inescapable problem: “If you can’t meet that ratio, you ain’t running a restaurant, you are running a bar. If you want saloons in Virginia, say so.”<sup>49</sup>

Perhaps it is time to create a new type of on-premises retail license in Virginia; one that permits the sale of beer, wine and mixed beverages for on-premises consumption, but requires minimal or no food sales. Mixed beverage sales are already only permissible in localities that have passed the appropriate referendum, so it would be reasonable to extend the local-option model to a new bar licenses, which could only be issued to establishments in localities that have passed a separate appropriate referendum.

Local option has been the preferred and most effective regulatory model since the repeal of Prohibition. Fosdick and Scott relied considerably on community choice and local option in their recommendations in *Toward Liquor Control*.<sup>50</sup> The local option has also been utilized in other states to determine food sales requirements; in Alabama and Georgia, among other states, food sales requirements are established by local or municipal ordinance.<sup>51</sup>

#### CONCLUSION

After nearly a decade of continued machinations over the food-beverage ratio, few lessons have been learned and virtually no progress has been made to reform the statute. Perhaps one of the most consistent aspects of this inescapable problem is the dissatisfaction of those members of the regulated community, for whom compliance is difficult. To be sure, consensus in the regulated community appears to be the highest hurdle for regulators and legislators to clear, but also the least likely to be removed overnight. At least for now, it appears that Justice Holt’s apt observation of the liquor industry over seven decades ago still runs true: “You cannot placate the implacable.”<sup>52</sup>

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<http://vacap.legis.virginia.gov/chamber.nsf/86d49cd44f9175d285256ca5006e80d4/75c2a6b311945967852580d20044cb11?OpenDocument>).

<sup>49</sup> Dieterle, *supra* note 6.

<sup>50</sup> See FOSDICK, *supra* note 14, at 53 (“the case for [local option] in the United States, within proper limits, is too clear to need defense.”).

<sup>51</sup> See Ala. Code. § 11-47-112 (1975); Ga. Code Ann. § 3-3-2 (2006).

<sup>52</sup> Commonwealth v. Anheuser-Busch Inc., 26 S.E.2d 94, 95 (Va. 1943).

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