



COMMONWEALTH of VIRGINIA

Department of Alcoholic Beverage Control

COMMISSIONERS
J. NEAL INSLEY, CHAIRMAN
SANDRA C. CANADA

2901 HERMITAGE ROAD
P O BOX 27491
RICHMOND, VIRGINIA 23261
PHONE (804) 213-4400
FAX (804) 213-4411
TDD LOCAL (804) 213-4687

CHIEF OPERATING OFFICER/SECRETARY TO THE BOARD
W. CURTIS COLEBURN, III

August 19, 2013

The Honorable Marla Graff Decker
Secretary of Public Safety
Patrick Henry Building
Richmond, Virginia 23219

The Honorable Frank W. Wagner, Chair
Committee on Rehabilitation and Social Services
Senate of Virginia
General Assembly Building
Richmond, Virginia 23219

The Honorable S. Chris Jones, Chair
Committee on General Laws
House of Delegates
General Assembly Building
Richmond, Virginia 23219

Re: Mixed Beverage Food to Beverage Ratio—Report Pursuant to Chapter 661, 2013 Acts of Assembly

Dear Secretary Decker, Senator Wagner, and Delegate Jones:

The second enactment clause of Chapter 661 of the 2013 Acts of Assembly (SB 1349) directs:

2. That the Virginia Alcoholic Beverage Control Board shall meet with interested parties, including licensees and trade associations representing the same, to develop guidelines for appropriate sanctions, including license revocation, for violations of alcoholic beverage control laws and regulations governing

(i) the food-to-beverage ration for mixed beverage licensees and

(ii) the submission of the annual MBAR report by such licensees, including instances where the Alcoholic Beverage Control Board finds that a licensee has submitted a fraudulent report.

On or before September 1, 2013, the Alcoholic Beverage Control Board shall report to the Secretary of Public Safety and the Chairmen of the Senate Committee on Rehabilitation and Social Services and the House Committee on General Laws on the aforementioned guidelines. The Alcoholic Beverage Control Board's report shall also include the number of audits it has conducted of mixed beverage licensees during the preceding two-year period, the number of instances of substantiated violations relating to either the food qualification requirement or the MBAR report, the penalties imposed for such violations, and whether the Board has made findings of fraud in relation to such reports.

The Virginia Alcoholic Beverage Control Board hereby submits the report required by this legislation.

Background

Liquor by the drink was approved by the General Assembly in 1968. Initially, mixed beverage licensees were required to sell more food than alcoholic beverages, including wine and beer. Gradually this requirement has been modified through the years resulting in the current requirement that food sales must be at least 45 percent of the combined gross receipts from the sale of mixed beverages and food. Wine and beer sales are no longer considered when determining the ratio. Section 4.1-114 of the Code of Virginia compels the Board to annually review the ratio of food and mixed beverage sales of each mixed beverage licensee. The Board requires each mixed beverage licensee to annually file a Mixed Beverage Annual Review Report (MBAR) form. A copy of the form is attached as Appendix 1. Licensees are audited when there is reason to suspect the report does not accurately represent the actual sales, or in the course of reviewing the performance of a new licensee which has been issued a temporary license under the provisions of §4.1-211.

Currently, there are over 4,500 mixed beverage restaurant licensees in the Commonwealth of Virginia. According to §4.1-100, these restaurants are "...an established place of business (i) where meals with substantial entrees are regularly sold and (ii) which has adequate facilities and sufficient employees for cooking, preparing, and serving such meals for consumption at tables in dining areas on the premises, and includes establishments specializing in full course meals with a single substantial entrée." Annually, less than 2% of these licensees will face disciplinary charges pertaining to qualifications to retain the license because of food ratio concerns or for insufficient food sales. Table 1 below indicates the number of audits conducted the past two fiscal years.

Table 1: Number of Audits

	<i>FY12</i>	<i>FY13</i>	<i>Total</i>
Number of Audits Conducted	138	129	267

Mixed Beverage Annual Review Violations

Most violations are first offenses, and most late-filing violations are corrected as soon as the matter is called to the attention of the licensee. Table 2 shows the numbers of mixed beverage food requirement cases disposed of by written warning for the most recent fiscal years. More serious, uncorrected, or repeat cases are usually disposed of with formal disciplinary hearings. Data from the last two fiscal years was examined and it was determined that there were 158 violations relating to either the mixed beverage licensee food-to-beverage ratio or the annual MBAR report substantiated by board orders. These 158 violations stemmed from 142 cases which were heard and had board orders rendered during Fiscal Years 2012 and 2013. This data is contained in Table 3.

Of the violators in Fiscal Year 2012, 12 were repeat offenders. In Fiscal Year 2013 there were 32 repeat offenders.

For the purposes of reporting this information, a charge must receive a disposition before it can be counted as substantiated. The disposition date was used to determine which fiscal year the charge was counted towards.

Table 2: Number of Written Warnings

	<i>FY12</i>	<i>FY13</i>	<i>Total</i>
Total Mixed Beverage Annual Review Written Warnings	698	752	1450
<i>Infraction</i>			
<i>Late filing</i>	663	725	1388
<i>Failure to Submit</i>	15	13	28
<i>Ratio Infraction</i>	20	14	34

Table 3: Substantiated Violation Counts

<i>Violation</i>	<i>FY12</i>	<i>FY13</i>	<i>Total</i>
Food-to-Beverage Ratio/Insufficient Food Sales	9	45	54
Mixed Beverage Annual Report (MBAR) Violations	40	64	104
<i>Late filing</i>	23	47	70
<i>Failure to Submit</i>	16	14	30
<i>Inaccurate</i>	1	3	4

Of the 158 violations, six licenses were revoked over the last two fiscal years. Other mixed beverage licensees received suspensions of up to 30 days and/or civil penalties up to \$5,000. This data does not account for those licenses surrendered while charges were pending.

Table 4: Penalties Imposed

<i>Penalty</i>	<i>FY12</i>	<i>FY13</i>	<i>Total</i>
Suspension Days Assessed	156	531	687
Civil Penalties Imposed	\$30,600.00	\$73,500.00	\$104,100.00
Mandatory Suspension Days (w/ Civil penalty)	0	35	35
Probation Months Assessed	24	24	48
Licenses Revoked	1	5	6

No substantiated instances of fraud were found in either of the last two fiscal years pertaining to the filing of MBAR reports.

Stakeholder Meeting

To facilitate the provisions of SB1349, stakeholders, including licensees and trade associations, gathered on May 31, 2013 with Board staff. The purpose of the meeting was to discuss the development of guidelines for appropriate sanctions for food ratio violations for mixed beverage licensees and fraudulent submission of the annual Mixed Beverage Annual Review (MBAR) report. Their specific recommendations can be found in Appendix 2.

Some of the recommendations from the stakeholders found in Appendix 2 are not feasible at this time due to statutory limitations. For example, the Board's authority is limited for these types of violations. Subsection B of § 4.1 227 limits the Board's authority to impose monetary penalties on first violations to \$1,000, on second violations to \$2,500, and on third and subsequent offenses to \$5,000. The suggestion that we impose monetary penalties that equate to one-half of one-month's sales (or more) of mixed beverages could easily run into the tens of thousands of dollars for some establishments.

Additionally, the Board is not authorized to issue a temporary license subsequent to a one-year suspension. Temporary licenses may only be issued to new applicants where the sole objection to the granting of a license is that the establishment will not be qualified in terms of the sale of food. While the Board is not opposed to these suggested increases of monetary penalties and the issuance of a temporary license subsequent to a one-year suspension, this increased authority for the Board would require legislative action.

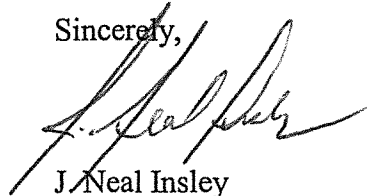
In the absence of legislative action to facilitate the recommendations of the interested parties, the Board will initiate the following range of penalties on or about January 1, 2014. This effective date will give the Board an opportunity to adequately inform mixed beverage licensees of the range of penalties for violations of the food/mixed beverage ratio.

- | | |
|--|------------------------------|
| 1) For a ratio of 44% or higher (up to 45%): | Written Warning |
| 2) For a ratio of greater than 30%, but less than 44% | |
| a) 1 st offense: 30 day suspension lifted at the end of 15 days upon payment of \$1,000 | |
| b) 2 nd offense: 60 day suspension lifted at the end of 30 days upon payment of \$2,500 | |
| c) 3 rd offense: Revocation of license | |
| 3) For a ratio of 30% or less: | Revocation of license |
| 4) Fraudulent MBAR reports: | Revocation of license |

** Any substantiated violation penalty short of revocation will require a CPA-audited report of food and mixed beverage sales for the following MBAR period.*

Please let me know if you have any other questions.

Sincerely,



J. Neal Insley
Chairman

Appendix 1
Form--Mixed Beverage Annual Review (MBAR)

MBAR

VIRGINIA DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL (ABC)
MIXED BEVERAGE ANNUAL REVIEW

SALES						
1 Month & Year for Sales	2 Food & Nonalcoholic Beverage Sales	3 Mixed Beverage Sales	4 Wine & Beer Sales	5 Miscellaneous Sales	6 MONTHLY SALES	
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
		.00	.00	.00	.00	.00
7 TOTAL SALES		.00	.00	.00	.00	8 GROSS SALES .00

PURCHASES					
9	Food & Nonalcoholic Beverage Purchases	Mixed Beverage Purchases	Wine & Beer Purchases	Miscellaneous Purchases	10 GRAND TOTAL PURCHASES
TOTAL PURCHASES	.00	.00	.00	.00	.00

"I certify that this report and the accompanying inventories have been examined by me and to the best of my knowledge and belief are complete, true and accurate."

Signature _____

Print Title _____

Date _____

Print Name _____

REMINDER: A physical inventory of all alcoholic beverages must be attached to this Mixed Beverage Annual Review. (See the instruction booklet for Inventory Report forms.)

VA Sales Tax Number _____

Telephone _____

() -

Total Seating at Tables & Counters _____

Appendix 2
Stakeholder Proposed Violation Sanction Guidelines

The following work product was developed by the interested parties as recommended guidelines for violation sanctions:

- 1). For A MBAR Report of 44% or higher (up to 45%):
 - a). First Offense: A Written Warning.
 - b). Subsequent Offense: A Written Warning.

- 2). For A MBAR Report of 40% or higher (up to 44%):
 - a). First Offense: A Thirty (30) Day Suspension – OR – A Fifteen (15) Day Suspension And Monetary Penalty Equal to the Average Gross Revenue from One-Half of One Month’s Sale of Mixed Beverages (Based on the most recent 12-Month MBAR report). In addition, the Licensee shall be required to provide a C.P.A. audited report of food and mixed beverages sales for the following MBAR period.

 - b). Second Offense (within A Five Year Period): A Sixty (60) Day Suspension – OR – A Thirty (30) Day Suspension And Monetary Penalty Equal to the Gross Revenue from One Month’s Sale of Mixed Beverages (Based on the most recent 12-Month MBAR report). In addition, the Licensee shall be required to provide a C.P.A. audited report of food and mixed beverages sales for the following MBAR period.

 - c). Third Offense (within A Five Year Period): License Revocation – OR – A One Year License Suspension followed by a Temporary License (Six Months) with monthly reporting of food and mixed beverages sales to ABC Board, together with a C.P.A. audited report of food and mixed beverages sales at the end of the Six Month period.

- 3). For A MBAR Report of 35% or higher (up to 40%):
 - a). First Offense: A Sixty (60) Day Suspension – OR – A Thirty (30) Day Suspension And Monetary Penalty Equal to the Gross Revenue from One Month’s Sale of Mixed Beverages (Based on the most recent 12-Month MBAR report). In addition, the Licensee shall be required to provide monthly reporting of food and mixed beverages sales to ABC Board, together with a C.P.A. audited report of food and mixed beverages sales for the following MBAR period.

 - b). Second Offense (within A Five Year Period): License Revocation – OR – A One Year License Suspension followed by a Temporary License (Six Months) with monthly reporting of Food and Mixed Beverage Sales to ABC Board, together with a C.P.A. audited report of food and mixed beverages sales at the end of the Six Month period.

- 4). For A MBAR Report of 30% or higher (up to 35%):
 - a). First Offense: One Year License Suspension and a Temporary License (Six Months) for the period following the suspension with Monthly reporting of Food and Mixed Beverage Sales to ABC Board, together with a C.P.A. audited report of food and mixed beverages sales at the end of the Six Month period.

 - b). Second Offense (within A Five Year Period): License Revocation.

- 5). For A MBAR Report of under 30%:
 - a). First Offense: License Revocation.