

**ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION  
ALCOHOLIC BEVERAGE CONTROL BOARD**

**NOTICE OF FINAL RULEMAKING**

The Alcoholic Beverage Control Board (Board), pursuant to the authority set forth in D.C. Official Code §§ 25-211(b), 25-830(f) (2012 Repl. and 2016 Supp.) and Mayor’s Order 2001-96 (June 28, 2001), as amended by Mayor’s Order 2001-102 (July 23, 2001), hereby gives notice of the intent to adopt, as final, amendments to Chapter 8 (Enforcement, Infractions, and Penalties) set forth in Title 23 (Alcoholic Beverages) of the District of Columbia Municipal Regulations (DCMR).

The proposed rules are intended to update the civil penalty schedule (“Schedule”) by (1) incorporating new infractions and penalties, including those passed by the Council for the District of Columbia in the Omnibus Alcoholic Beverage Regulation Amendment Act of 2016, effective April 7, 2017 (D.C. Law 21-260; 64 DCR 2079 (February 24, 2017)); (2) changing the tier for certain infractions from “primary to secondary” or “secondary to primary”; (3) allowing the Board to issue discretionary warnings for infractions that are not presently eligible for receiving a warning; and (4) correcting D.C. Official Code and DCMR citations. Those infractions not listed on the Schedule below shall remain in full effect and not be impacted by the proposed rulemaking.

**BACKGROUND**

On June 21, 2017, the Board voted, six (6) to zero (0), to approve the *Civil Penalty Schedule Notice of Proposed Rulemaking*. The proposed rules are intended to update the Schedule by (1) incorporating new infractions and penalties, including those passed by the Council for the District of Columbia in the Omnibus Alcoholic Beverage Regulation Amendment Act of 2016, effective April 7, 2017 (D.C. Law 21-260); (2) changing the tier for certain infractions from “primary to secondary” or “secondary to primary”; (3) allowing the Board to issue discretionary warnings for infractions that are not presently eligible for receiving a warning; and (4) correcting D.C. Official Code and DCMR citations. The Board made it clear in the proposed rulemaking that any infractions not listed in the rulemaking were to remain in effect and were not being amended by the rulemaking.

The Board held a public hearing regarding the rulemaking on August 9, 2017. Joe Gibbons, Commissioner for Advisory Neighborhood Commission (ANC) 2E, and Marc Barnes, an ABC Licensee, testified at the hearing.

Commissioner Gibbons testified, generally, in support of the proposed rulemaking. He, however, opposed the Board’s treatment of settlement agreement violations as Secondary Tier Violations rather than treating them as Primary Tier Violations. Commissioner Gibbons argued that ANC 2E works tirelessly with establishments to draft licensee-specific settlement agreements rather than utilizing boilerplate language. It is Commissioner Gibbons’ position that by treating settlement agreement violations as a secondary tier violation, the Board undermines the ANC’s efforts to enter into and enforce settlement agreements.

During his testimony, Mr. Barnes sought guidance from the Board concerning the interpretation or application of several offenses listed on the Civil Penalty Schedule. First, Mr. Barnes asked the Board to consider further clarifying or re-defining what “bottle service” means. Second, he sought guidance regarding the Board’s requirement that an ABC Manager provide ABRA with his/her Manager’s License upon request. Additionally, Mr. Barnes sought guidance as to when “last call” ends so that it can be uniform among all licensed establishments. Lastly, he sought guidance about establishments’ liability when a patron wears revealing clothing or when a licensee or its employee or agent serves an intoxicated person.

After the public hearing, the proposed rulemaking was published in the *D.C. Register* for thirty (30)-day public comment. *See* 64 DCR 8604 (September 1, 2017). The comment period ended on October 2, 2017. The Board did not receive any additional comments during the comment period.

The Board carefully considered the testimony it received from Commissioner Gibbons and Mr. Barnes concerning the proposed rulemaking. Commissioner Gibbons asked the Board to treat settlement agreement violations as primary tier violations rather than treating them as secondary tier violations. The Board, however, rejects this recommendation.

The Board does not reject Commissioner Gibbons’ recommendation lightly. The Board recognizes the hard work, time, and effort Advisory Neighborhood Commissioners, citizens associations, community members, and the establishments put in when drafting their settlement agreements. The Board, however, does not support treating settlement agreement violations as primary tier violations. Oftentimes, settlement agreements include terms that merely restate the law which, by themselves, would be enforceable by the Board. These infractions, absent their inclusion in the settlement agreements, may not constitute primary tier violations, but rather secondary tier violations (*e.g.*, noise violations). The Board does not find any justifiable reason to elevate what otherwise would be a secondary tier to a primary tier violation simply because it is included in a settlement agreement.

Similarly, many establishments with settlement agreements are also subject to Board Orders which include provisions that are mirrored in their settlement agreement. If the establishment violates the Board Order, their doing so would be treated as a primary tier violation for purposes of determining the applicable fine range. The Board wants to ensure the peace, order, and quiet of the community but it does not believe that this is achieved by imposing primary tier violations on an establishment simply because they violate a provision that is covered by both a settlement agreement and a Board Order.

The Board appreciates Mr. Barnes’ testimony and his questions regarding the rulemaking. Nonetheless, the Board finds that his comments are outside the scope of this rulemaking which only addresses the Civil Penalty Schedule, and not the interpretation or definition of offenses listed in the schedule. Such amendments are best reserved for one of the Board’s future customary Technical Rulemakings. As the Board suggested to Mr. Barnes at the hearing, he is encouraged to continue to work with the Board by submitting any comments or recommendations that he has for future amendments to Title 23 DCMR.

## **COUNCIL ACTION**

On December 20, 2017, the Civil Penalty Notice of Proposed Rulemaking was submitted to the Council of the District of Columbia (Council) for the mandatory ninety (90)-day review period. *See* D.C. Official Code § 25-211(b)(2))(2012 Repl.). On April 10, 2018, the Council unanimously approved the rulemaking. *See Revised ABRA Civil Penalty Schedule Resolution of 2017* (PR 22-694).

## **BOARD ACTION**

Having considered the comments received, and in light of the Council's approval of the proposed rulemaking, on April 25, 2018, the Board voted five (5) to zero (0) to approve the Civil Penalty Schedule Notice of Final Rulemaking. No changes have been made to the rulemaking as published as a proposed rulemaking on September 1, 2017. Pursuant to D.C. Official Code § 25-211(d), the final rules shall not take effect until five (5) days after publication of the final rulemaking in the *D.C. Register*.

**Chapter 8, ENFORCEMENT, INFRACTIONS, AND PENALTIES, of Title 23 DCMR, ALCOHOLIC BEVERAGES, is amended as follows:**

**Section 800, ABRA CIVIL PENALTY SCHEDULE, Subsection 800.1, is amended by inserting and replacing the following infractions to the ABRA Civil Penalty Schedule in numerical order:**

<b>Section</b>	<b>Description</b>	<b>Violation</b>	<b>Warning</b>
25-110	Violating Terms of Manufacturer's License	Primary	Y
25-111	Violating Terms of Wholesaler's License	Primary	Y
25-112(a)-(c)	Violating Terms of Off-Premise Retailer's License	Primary	Y
25-113	Violating Terms of On-Premise Retailer's License	Primary	Y
25-113(a)(5)(A)	Retailer's Class C or D Purchased Alcoholic Beverages from an Off-Premises Retailer's Class A or B	Primary	N
25-113a(b)(1)	Failure to Obtain Entertainment Endorsement	Primary	Y
25-113a(b)(1)	Cover Charge Without Endorsement	Secondary	Y
25-113a(b)(1)	Dancing Without Endorsement	Secondary	Y
25-113a(c)	Operating a Summer Garden or a Sidewalk Café Outside of Allowed Hours	Primary	Y
25-114(a)	Violating Terms of Arena C/X License	Primary	Y
25-115(a)	Violating Terms of Temporary License	Primary	Y
25-116	Violating Terms of Solicitor's License	Primary	Y
25-117	Violating Terms of Brew Pub Permit	Primary	Y

25-118	Failure to Obtain Tasting Permit, or Exceeding Scope of Tasting Permit	Primary	Y
25-120(i)(A)(i)	A Manager Directly Sold an Alcoholic Beverage to a Minor	Primary	Y
25-120(i)(A)(ii)	A Manager Directly Interfered with an ABRA or MPD Investigation	Primary	N
25-120(i)(A)(iii)	A Manager Made False or Misleading Statements During or After a RI or Investigation	Primary	N
25-120(i)(A)(iv)	A Manager Aided, Abetted, or Conspired with a Licensed or Unlicensed Person to Evade Compliance with ABRA Requirements	Primary	N
25-120(i)(A)(v)	A Manager Allowed the Manager's License to be Used by an Unlicensed Person	Primary	N
25-123	Violating Terms of Farm Winery License	Primary	Y
25-126(a)	Sale, Service and/or Consumption Without the On-Site Sale and Consumption Permit – Manufacturer Licenses	Primary	Y
25-126(b)	Sale, Service, and/or Consumption Outside of the On-Site Sale and Consumption Permit Approved Hours- Manufacturer Licenses	Primary	Y
25-127	Violating Terms of Festival License	Primary	Y
25-371	Allowing Nude Dancing Without a License	Primary	Y
25-372	Violating Restrictions on Nude Dancing Performances	Primary	Y
25-401	False Statement on an Application or in Any Accompanying Statement required by the Board	Primary	N
25-405	Transfer of Ownership Without Board Approval	Primary	Y
25-701	Board-Approved Manager Required	Secondary	Y
25-703	Licensee or Board Approved Manager Superintending the Licensed Establishment under the Influence of Alcohol or Illegal Drugs	Primary	Y
25-711(f)	Owner or Licensed Manager Failure to Produce a Valid ID to ABRA or MPD	Secondary	Y
25-721	Sale and Delivery Outside of Allowed Hours for Manufacturer & Wholesaler	Primary	Y
25-722	Sale and Delivery Outside of Allowed Hours - Off Premises Licensees	Primary	Y
25-723(b)	Sale and Delivery Outside of Allowed Hours - On-Premises Licensees	Primary	Y
25-723(b)	Sale and Service Outside of Licensed Hours	Primary	Y
25-724	Operating After Board Restricted Hours	Primary	Y

25-725	Noise from Licensed Establishment	Secondary	Y
25-753	Keg Registration Required	Primary	Y
25-762(b)(10)	Failure to Obtain Approval to Change Entertainment to Include Nude Performances	Primary	Y
25-762(b)(13)	Failure to Obtain Approval to Extend Hours of Operation	Primary	Y
25-762(b)(18)	Failure to Obtain Approval to Increase Number of Vessels Under On-Premises	Primary	Y
25-781	Sale to Minors - Egregious	Primary	Y
25-781	Sale to Minors - Non-egregious	Primary	Y - Mandatory
25-781	Sale to Intoxicated Persons	Primary	Y
25-802	Failure to Allow Examination of Premises, Books and Records	Primary	Y
25-823(a)(1)	Violation of Any Law Outside of Title 25 of the District of Columbia Code or Title 23 of the District of Columbia Municipal Regulations	Primary	Y
25-823(a)(2)	Allowing Establishment to be Used for an Unlawful or Disorderly Purpose	Primary	N
25-823(a)(3)	Failure by Owner or ABC Manager to Superintend Licensed Business	Secondary	Y
25-823(a)(4)	Allowing Employees or Agents to Engage in Prostitution, Sexual Acts, or Sexual Contact	Primary	Y
25-823(a)(5)	Failure to Allow/Delays ABRA or MPD to Inspect Premises or Books and Records	Primary	N
25-823(a)(5)	Interferes With ABRA or MPD Investigation	Primary	Y
25-823(a)(6)	Failure to Follow Settlement Agreement	Secondary	Y
25-823(a)(6)	Failure to Follow Security Plan	Primary	Y
25-823(a)(6)	Failure to Follow a Board Order	Primary	Y
25-828(c)	Licensee Defaces Notice of Suspension Placard	Secondary	Y
25-833	Tampering or Refilling Bottles	Primary	N
25-834	Sell or Offer to Sell Powdered Alcohol	Primary	N
25-835	Forged, Counterfeit, or Endorse a Document Issued by ABRA	Primary	N
23 DCMR 705.9	Retailer's Class C, D, F, G, or Caterer Permits the Consumption of Alcoholic Beverages After Hours	Primary	Y
23 DCMR 706	Remaining Open Without Securing Beverages or Having an ABC Manager or Owner Present	Secondary	Y
23-DCMR 707.1	Licensee or Board Approved Manager on Licensed Premises During Hours of Sale,	Secondary	Y

	Service or Consumption		
23-DCMR 721.1	Allowing Establishment to Provide Bottle Service of Alcoholic Beverages to One (1) or More Non-seated Patrons	Secondary	Y
23-DCMR 721.2	Allowing Establishment to Serve a Bucket filled with Containers of Beer to One (1) or More Non-seated Patrons	Secondary	Y
23-DCMR 721.3	Failure by the Server to Open All Closed Containers Before Serving Them to the Seated Patrons	Secondary	Y
23-DCMR 721.4	Allowing Patrons to Remove the Bottle or Pitcher from the Table, Bar or Other Seating Area Where Served	Secondary	Y
23 DCMR 902	Open Container or Package in Vehicle	Primary	Y
23 DCMR 1207.9	False Statement on a Quarterly Statement or Annual Report	Primary	N
23 DCMR 2002.2	Failure to Maintain Caterer Records	Primary	Y