

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

NOTICE OF PROPOSED RULEMAKING

The Alcoholic Beverage Control Board (Board), pursuant to the authority set forth in the Omnibus Alcoholic Beverage Amendment Act of 2004, effective September 30, 2004 (D.C. Law 15-187; D.C. Official Code § 25-211(b) and (c) (2012 Repl. & 2019 Repl.)) and Mayor's Order 2001-96, dated June 28, 2001, as revised by Mayor's Order 2001-102, dated July 23, 2001, hereby gives notice of a proposed rulemaking to amend Chapters 1 (Provisions of General Applicability), 3 (Limitations on Licenses), 5 (License Applications), 7 (General Operating Requirements), 8 (Enforcement, Infractions, and Penalties), 10 (Endorsements), 12 (Records and Reports), 16 (Contested Hearings, Non-contested Hearings, Protest Hearings, and Procedures), and 17 (Procedural Requirements for Board Hearings) of Title 23 (Alcoholic Beverages) of the District of Columbia Municipal Regulations (DCMR).

LEGISLATIVE HISTORY

On July 22, 2020, the Board approved the *Technical Amendment Notice of Proposed Rulemaking* (proposed rulemaking), by a vote of seven (7) to zero (0). The proposed rulemaking seeks to incorporate the statutory changes that the Council of the District of Columbia (Council) made in 2019 when it passed the following four bills: (1) Alcoholic Beverage Control Board License Categories, Endorsements, and Hourly and Percentage Rate Amendment Act of 2019, effective February 21, 2020 (D.C. Law 23-51; D.C. Official Code § 25-101 *passim*); (2) Manufacturer and Pub Permit Parity Amendment of 2019, effective February 21, 2020 (D.C. Law 23-54; D.C. Official Code § 25-101 *passim*); (3) Alcoholic Beverage Procedural and Technical Amendment Act of 2019, effective February 21, 2020 (D.C. Law 23-52; D.C. Official Code § 25-101 *passim*); and (4) Alcoholic Beverage Enforcement Amendment Act of 2019, effective February 21 2020 (D.C. Law 23-50; D.C. Official Code § 25-101 *passim*). The proposed rulemaking would also make technical and procedural changes to Title 23 DCMR that are unrelated to the four aforementioned bills.

The proposed rulemaking was published in the *D.C. Register* for a thirty (30)-day notice and comment on August 21, 2020. *See* 67 DCR 9975. The comment period ended on September 21, 2020. As noted below, the Board received comments on September 21, 2020 from the District of Columbia Association of Beverage Alcohol Wholesalers, Inc. (DCABAW).

On September 23, 2020, the Board held a virtual hearing to receive comments from the public concerning the proposed rulemaking. Notice of the hearing was published in the *D.C. Register* and on the Alcoholic Beverage Regulation Administration's website. The Board accepted oral and written comments. Although no one appeared to testify on the proposed rulemaking, the Board did receive written comments from DCABAW. Specifically, the DCABAW sought clarification from the Board concerning the meaning of the term "moratorium zone" as it is used in § 1603.

The Board considered the organization's comments and agreed that clarifying the meaning of the term "moratorium zone" would be beneficial to the public. As such, that revision was incorporated in this version of the proposed rulemaking. This change is technical in nature, as it merely seeks to clarify a phrase used in the rulemaking consistent with the terms existing meaning as set forth in D.C. Official Code § 25-351. Thus, the rulemaking does not need to be published for a second time for comment.

In addition to clarifying the phrase "moratorium zone", this version of the proposed rulemaking corrects the title of section 1207. In the published version of the proposed rulemaking, the title was "Quarterly Statement and Reports of Restaurants and Hotels". The phrase "and Reports" should have been omitted as suggested by the rest of the amendments to § 1207. This error was corrected by an Errata Notice that was published in the *D.C. Register* on September 18, 2020. See 67 DCR 11106. The revision herein is consistent with the Errata Notice, and thus, does not require the Board to republish the proposed rulemaking for further comment.

DETAILED SUMMARY OF THE PROPOSED CHANGES

Chapter 1 (Provisions of General Applicability) is amended to add new terms and definitions to 23 DCMR § 199. Chapter 3 (Limitations on Licenses), is amended to clarify that full-service grocery stores are exempt from the class B quota limits and to be consistent with changes made to D.C. Official Code § 25-314. Chapter 5 (License Applications) is amended by adding a new § 500.5 to make clear that the licensee must notify ABRA of any changes to its contact information within 30 days of a change.

The proposed rulemaking would make several changes to Chapter 7 (General Operating Requirements). Section 705 is amended by repealing the prohibition against "backup drinks". Section 709 is amended to only require notification to the Board by the licensee of criminal convictions of the owner, ABC-licensed manager, and solicitors. Lastly, § 712 is amended to reflect the Council's amendment extending the length of pub crawl licenses from one (1) year to three years.

Chapter 8 (Enforcement, Infractions, and Penalties) is amended to allow the Board to issue an order to cease and desist for a licensee's failure to comply with a Mayor's Order during a public health emergency. Chapter 10 (Endorsements) is amended by adding a new sports wagering endorsement and application.

Chapter 12 (Records and Reports) is amended to (1) allow on-premises retailer licensees, CR, DR, CH, and DH, to self-certify their quarterly statement of expenditures and receipts, (2) repeal the annual reporting requirement, (3) permit quarterly statements to be submitted electronically or digitally, and (4) clarify the information that must be reported in the quarterly statement. Additionally, Chapter 16 (Contested Hearings, Non-contested Hearings, Protest Hearings, and Procedures) is amended to (1) allow for the granting of conditional standing at roll call hearings and to allow the Advisory Neighborhood Commission (ANC) to designate a non-ANC member as a representative for protest purposes, (2) further clarify the purpose of the protest status hearing, (3) remove duplicative language and to authorize the Board to reject settlement

agreements in certain circumstances, and (4) allow the Board to dismiss the Applicant or the Protestant for the failure to pursue their case.

Chapter 17 (Procedural Requirements for Board Hearings), amends § 1710 to (1) allow the Board's Chairperson to issue subpoenas; (2) clarify the Board Chairperson's responsibilities; and (3) clarify that the Board's Chairperson may designate another Board member to serve in his or her absence. In addition, § 1720 is amended to clarify *ex parte* communications with the Board.

THE BOARD'S DECISION

As previously stated, the Board only received comments from the DCABAW, and in response to those comments revised § 1603.4 and 1603.5 to clarify the phrase "moratorium zone" when used in the subsection. The Board, however, did not make any substantive changes to the rulemaking since it was published on August 21, 2020.

Thus, on this day, October 21, 2020, the Board votes seven (7) to zero (0) to send the proposed rulemaking to the Council of the District of Columbia for a ninety (90) period of review in accordance with D.C. Official Code § 25-211(c).

Chapter 1, PROVISIONS OF GENERAL APPLICABILITY, of Title 23 DCMR, ALCOHOLIC BEVERAGES, is amended as follows:

Section 199, DEFINITIONS, is amended by adding the following terms and definitions in alphabetical order:

199 DEFINITIONS

199.1

Board-approved manager – a person, other than the owner, who is licensed by ABRA and is required to be on duty and on the premises during the approved licensed hours of sales, service, and consumption of alcoholic beverages.

Legitimate theater – the premises in which the principal business shall be the operation of live theatrical, operatic, or dance performances, the operation of recreational facilities, the viewing of motion picture films, or such other lawful adult entertainment as the Board, giving due regard to the convenience of the public and the strict avoidance of sales prohibited by Title 25 of D.C. Official Code, shall classify as a legitimate theater.

Service – unless the context indicates a different meaning, the term means to directly or indirectly provide, give, furnish, or distribute for the consumption of alcoholic beverages.

Solicitor – a person licensed by ABRA who is a representative of the wholesaler or manufacturer whose name appears on the solicitor's license and who is

permitted to sell alcoholic beverages on behalf of the wholesaler or manufacturer.

Sports wagering – shall have the same meaning as in D.C. Official Code § 36-601.01(c)(17).

Chapter 3, LIMITATIONS ON LICENSES, of Title 23 DCMR, ALCOHOLIC BEVERAGES, is amended as follows:

Section 300, LIMITATION ON THE NUMBER OF CLASS A AND CLASS B RETAILER’S LICENSES, is amended by adding a new § 300.3 to read as follows:

300.3 The quota limit set forth in § 300.2 shall not prohibit the issuance of a license for an off-premises retailer’s license, class B, for the sale of alcoholic beverages if the establishment meets the requirements set forth in D.C. Official Code § 25-331(d).

Section 300, LIMITATION ON THE NUMBER OF CLASS A AND CLASS B RETAILER’S LICENSES, is further amended by renumbering existing § 300.3 through 300.9 as § 300.4 through § 300.10.

Section 302, LICENSES NEAR SCHOOLS, COLLEGES, UNIVERSITIES, AND RECREATION AREAS, is amended by amending §§ 302.3, 302.8, and 302.10 in their entirety to read as follows:

302.3 A license may be issued, in the discretion of the Board, for a place of business located within four hundred feet (400 ft.) of a college or university if one (1) of the following applies:

- (a) The Board is satisfied that the college or university does not object to the granting of the license, as evidenced by a written statement to the Board from the governing body of the college or university;
- (b) The college or university is itself the holder of a license; or
- (c) The license is an on-premises retailer’s license, C/R, D/R, C/H, D/H, C/T, D/T, C/X, or D/X that will be located entirely on a college or university campus and will not have direct public access to the street or the outside of the college’s or university’s main entrance.

302.8 Repealed.

302.10 The four hundred foot (400 ft.) restriction shall not apply to an application for an off-premises retailer’s license class B that meets one (1) of the following three (3) exceptions:

- (a) The applicant's establishment will be located inside of a hotel and will have no direct public access to the street or the outside of the hotel's building; or
- (b) The applicant:
 - (1) Meets the definition of a full-service grocery store pursuant to § 199.1;
 - (2) The sale of alcoholic beverages constitutes no more than fifteen percent (15%) of the total volume of gross receipts on an annual basis;
 - (3) The establishment is not located in a residential-use district as defined in the zoning regulations and shown in the official atlases of the Zoning Commission for the District of Columbia, or if located within the Southeast Federal Center, in the SEFC-1 zone;
 - (4) The opinion of the ANC, if any, in which the establishment is located has been given great weight; and
 - (5) The applicant does not hold a manufacturer's or wholesaler's license; or
- (c) The applicant applies for an off-premises retailer's license, class B:
 - (1) Qualifies as a corner store and has been approved by the Board of Zoning Adjustment for a special exception under Chapter 2 of Title 11-U DCMR (11-U DCMR § 254);
 - (2) The applicant's establishment is located in ANC 1B;
 - (3) The sales area of the applicant's establishment that is devoted to the sale of alcohol for off-site consumption constitutes no more than fifteen percent (15%) of the gross floor area of the ground floor of the corner store;
 - (4) The applicant's sale of alcoholic beverages constitutes no more than fifteen percent (15%) of the total volume of gross receipts on an annual basis;
 - (5) The applicant's establishment is located in a Great Streets Corridor; and
 - (6) The opinion of the ANC, if any, has been given great weight.

Chapter 5, LICENSE APPLICATIONS, is amended as follows:

Section 500, APPLICATION FORMAT AND CONTENTS, is amended by adding a new § 500.5 to read as follows:

500.5 Any changes to an applicant's listed contact information, including mailing address, e-mail address, and telephone number, provided on its license application that has been submitted to or approved by the Board shall be reported to ABRA within thirty (30) calendar days of the change. The failure to comply after a written warning has been issued concerning the licensee's timely compliance with this subsection, shall be deemed a secondary tier violation and may result in the Board issuing a fine, suspension or revocation of the license.

Chapter 7, GENERAL OPERATING REQUIREMENTS, is amended as follows:

Section 705, HOURS OF SALE AND DELIVERY FOR OFF-PREMISES RETAIL LICENSEES, is amended by repealing § 705.12 so that it reads as follows:

705.12 Repealed.

Section 709, NOTICE OF EMPLOYEE'S CRIMINAL CONVICTION, is amended in its entirety to read as follows:

709 NOTICE OF CRIMINAL CONVICTION

709.1 A licensee shall immediately notify the Board in writing if the licensee discovers that a Board-approved manager, owner, or solicitor has been convicted of an offense other than a minor traffic offense; except, that there shall be no notification required for any such conviction that is more than five (5) years old.

709.2 For purposes of this section, "immediately" shall mean notifying the Board within seven (7) calendar days upon discovery of the criminal conviction.

Section 712, PUB CRAWLS, is amended by amending § 712.4 in its entirety to read as follows:

712.4 The annual fee for a pub crawl license shall be five hundred dollars (\$500). A pub crawl license shall remain in effect for three (3) years unless the license is suspended or revoked prior to its expiration.

Chapter 8, ENFORCEMENT, INFRACTIONS, AND PENALTIES, is amended as follows:

Section 809, CEASE AND DESIST ORDERS, is amended by amending § 809.1 by: (1) striking the phrase “deadline; or” and inserting the phrase “deadline;” in its place in paragraph (f); (2) striking the phrase “unpaid.” and inserting the phrase “unpaid; or” in its place in paragraph (g); and (3) adding a new paragraph (h), so that the entire subsection reads as follows:

- 809.1 The Board, in its discretion, may issue a cease and desist order immediately suspending a licensee’s liquor license when one (1) of the following has occurred:
- (a) The licensee has been issued a notice of summary suspension by the Department of Health;
 - (b) The licensee’s basic business license has expired;
 - (c) The licensee’s certificate of occupancy has been revoked or expired;
 - (d) The licensee’s sales tax certificate has been suspended or revoked by the Office of Tax and Revenue;
 - (e) The corporation, limited liability company, or partnership owning the liquor license is no longer in good standing to operate in the District;
 - (f) The licensee has failed to pay a Board-ordered fine or a citation by the payment deadline;
 - (g) Where payment has been made to ABRA with a check returned unpaid; or
 - (h) Where the licensee fails to comply with a Mayor’s Order to cease operations in order to protect the public health, welfare, and safety of District residents.

Chapter 10, ENDORSEMENTS, is amended as follows:

Sections 1006, TEMPORARY RESTAURANT ENDORSEMENT, and 1007, ADDITIONAL OUTDOOR SEATING ON PUBLIC AND PRIVATE SPACE, are renumbered as Sections 1008 and 1009, respectively.

A new Section 1006 is added to read as follows:

1006 SPORTS WAGERING ENDORSEMENT

- 1006.1 No licensee under an on-premises retailer’s license, class C/R, D/R, C/H, D/H, C/T, D/T, C/N, D/N, C/X, D/X, class Arena C/X, or a manufacturer’s license class A or B holding an on-site sales and consumption permit, shall be permitted

to offer sports wagering without obtaining a sports wagering endorsement from the Board in accordance with D.C. Official Code § 25-113a(d).

A new Section 1007 is added to read as follows:

1007 SPORTS WAGERING ENDORSEMENT APPLICATION

1007.1 An applicant for a sports wagering endorsement shall apply on a form provided by ABRA. The form shall require, at a minimum, the following:

- (a) The name of the licensee;
- (b) The establishment's address;
- (c) The requested number of sports wagering mechanical or electronic devices, along with where the devices will be placed on the licensed premises; and
- (d) A detailed diagram of the licensed premises.

Chapter 12, RECORDS AND REPORTS, is amended as follows:

Section 1207, QUARTERLY STATEMENTS AND ANNUAL REPORTS OF RESTAURANTS AND HOTELS, is amended by (1) amending the section title to read as QUARTERLY STATEMENT OF RESTAURANTS AND HOTELS, (2) amending § 1207.1, (3) repealing §§ 1207.5 through 1207.8, and (4) amending § 1207.9 to read as follows:

1207.1 Within thirty (30) days after the end of each quarter, the holder of a Retailer's license, class CR, DR, CH, or DH, shall file with the Board a self-certified statement of expenditures and receipts by the licensed establishment during that quarter. The statement, which may be submitted electronically or digitally to the Board, shall include the following:

- (a) The total amount of receipts for the sale of alcoholic beverages and food;
- (b) Of that total, the amount received for the sale of alcoholic beverages and the amount received for the sale of food, and the percentages of the total receipts represented by the respective amounts;
- (c) Total expenditures for alcoholic beverages and food;
- (d) Of that total, the amount expended for alcoholic beverages and the amount expended for food, and the percentages of the total expenditures represented by the respective amounts;

- (e) A statement indicating the method used to compute the amounts and percentages.
- (f) For purposes of this section, each licensee shall report under “alcoholic beverages” any non-alcoholic liquid or solid served as part of the contents of an alcoholic beverage, and
- (g) In computing the amounts received and expended for alcoholic beverages and for food, a licensee shall exclude:
 - (1) All amounts received for taxes and gratuities in conjunction with these transactions; and
 - (2) All amounts, including surcharges, related to obtaining and providing entertainment or any other goods and services unrelated to the provision of food and alcoholic beverages at the licensed establishment.

1207.5 Repealed.

1207.6 Repealed.

1207.7 Repealed.

1207.8 Repealed.

1207.9 The making of a false statement on a quarterly statement with the knowledge of the license holder, shall constitute grounds on which the Board may deny the renewal of the license, or subsequently revoke the license, when the renewal of the license is based wholly or in part on the contents of the false statement.

Chapter 16, CONTESTED HEARINGS, NON-CONTESTED HEARINGS, PROTEST HEARINGS, AND PROCEDURES, is amended as follows:

Section 1603, ROLL CALL HEARING, §§ 1603.2 AND 1603.3, are amended to read as follows:

- 1603.2 Each applicant and each protestant shall attend the roll call hearing in person or appear through a designated representative.
- 1603.3 The ANC may designate any member or every member of its Commission, or a non-member of the Commission to participate in the protest process, hearings, and negotiating settlement agreements.

Section 1603, ROLL CALL HEARING, is amended by adding a new § 1603.4 and 1603.5 to read as follows:

- 1603.4 A protestant consisting of a group of five (5) or more members, or three (3) or more members if protesting in a moratorium zone, shall have no fewer than five (5) members, or three (3) members if protesting in a moratorium zone established under D.C. Official Code § 25-351, appear at the roll call hearing in order to be granted standing to protest.
- 1603.5 When a protestant fails to produce five (5) members, or three (3) members if protesting in a moratorium zone as established under D.C. Official Code § 25-351, at the roll call hearing, the Board's Agent may only grant conditional standing to the protestant at that time. The protestant must produce the requisite remaining number of members of its group at the status hearing in order to be granted full standing.

Section 1603, ROLL CALL HEARING, is amended by renumbering current § 1603.4 through § 1603.9 as § 1603.6 through § 1603.11.

Section 1604, PROTEST STATUS HEARING, is amended by amending § 1604.1 to read as follows:

- 1604.1 The protest status hearing is a proceeding held by the Board at which the parties may address any unresolved legal issues from the roll call hearing, including whether a protestant granted conditional standing has subsequently met the standard for full standing, or address motions or pleadings previously filed with the Board.

Section 1610, SETTLEMENT AGREEMENTS, is amended by (1) repealing § 1610.4 and (2) amending § 1610.9 so that they read as follows:

- 1610.4 Repealed.
- 1610.9 Settlement agreements shall be submitted to the Board for the Board's consideration no later than ninety (90) calendar days after execution by the parties. Any settlement agreement submitted after ninety (90) calendar days from date of execution will not be considered by the Board.

Section 1618, DISMISSAL FOR FAILURE TO PURSUE AN APPLICATION OR PROTEST, is amended in its entirety to read as follows:

- 1618 DISMISSAL FOR FAILURE TO PURSUE AN APPLICATION OR PROTEST**

1618.1 Absent good cause, where an applicant or a protestant fails to appear for hearings, fails to file requested pleadings, or fails to comply with a Board order, the Board shall, on its own motion, dismiss the application or protest.

1618.2 Examples of good cause include, but are not limited to:

- (a) The Applicant or Protestant did not receive notice of a scheduled hearing;
- (b) The Applicant or Protestant had an emergency that prevented him or her from appearing at the hearing; or
- (c) The Applicant or Protestant did not receive the Board order or the Board's request for pleadings.

Chapter 17, PROCEDURAL REQUIREMENTS FOR BOARD HEARINGS, is amended as follows:

Section 1710, SCHEDULING AND CONDUCT OF HEARINGS: GENERAL PROVISIONS, is amended by amending § 1710.6 and § 1710.7 in their entirety to read as follows:

1710.6 The Chairperson of the Board shall have the authority to:

- (a) Open and close a meeting or hearing;
- (b) Administer oaths and affirmations;
- (c) Regulate the course of the hearing and the conduct of the parties and their representative;
- (d) Take any other action in accordance with the above provisions in furtherance of a fair and orderly hearing; and
- (e) Issue subpoenas requested by parties to require the attendance and testimony of witnesses and the production of all documentary evidence related to the merits of the hearing.

1710.7 In the event the Chairperson is unable or unavailable to preside over a hearing or meeting, the Chairperson may designate a member of the Board to act as the presiding officer in the Chairperson's absence.

Section 1720, EX PARTE COMMUNICATIONS, is amended by amending § 1720.2 and § 1720.3 to read as follows:

1720 EX PARTE COMMUNICATIONS

- 1720.2 The prohibitions set forth in § 1720.1 shall apply upon the filing of a protest against an application for an original, transfer, substantial change or renewal license, or upon the issuance of notice to appear for a show cause hearing.
- 1720.3 For purpose of this section, “*ex parte* communication” does not include an inquiry regarding the Board’s procedure or practice, or a request for a status report on a matter, proceeding, or notice of a meeting or hearing.