

## NOTICE OF PROPOSED ADOPTION OF REGULATION

The Department of Alcoholic Beverage Control (“Department”) proposes to adopt the emergency regulation described below after considering all comments, objections, and recommendations regarding the proposed action. Pursuant to Government Code Section 11346.1, the Department has added Section 144 “Penalty Guidelines” to Title 4, Division 1, of the California Code of Regulations. The proposed addition of Section 144 is pursuant to the California Constitution, Article XX Section 22, Business and Professions Code Sections 23001 and 25750, and Government Code Section 11340, et. seq., and specifically, but not limited to, Sections 11340.5, 11342.600 and 11425.50; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557; and *Vicary v. ABC, AB-7606a* (Nov. 12, 2003).

### PUBLIC HEARINGS

The Department has not scheduled a public hearing on this proposed action since public hearings were previously held on July 12 and 13<sup>th</sup>, 2004. However, the Department will hold a hearing if it receives a written request for a public hearing from any interested person, or his or her authorized representative, no later than 15 days before the close of the written comment period.

### WRITTEN COMMENT PERIOD

Pursuant to Government Code § 11346.5, any interested person may present statements, arguments, or contentions relating to the proposal, in writing, by 5:00 p.m., on **November 8, 2004**. The Department will consider only those comments received at the Department office by that time. Submit comments to any of the following persons:

Nicholas R. Loehr, Staff Counsel  
Department of Alcoholic Beverage Control  
3927 Lennane Dr., Ste. 100  
Sacramento, CA 95834

Dennis Clear, Legislative Officer  
Department of Alcoholic Beverage Control  
3927 Lennane Drive, Suite 100  
Sacramento, CA 95834

### AUTHORITY AND REFERENCE CITATIONS

The Department adds Section 144 under the authority granted to it in California Constitution, Article XX, Section 22, Business and Professions Code Sections 23001 and 25750, and Government Code Sections 11340.5, 11342.600 and 11425.50; the California Supreme Court's holding in *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557; and the ABC Appeals Board's ruling in *Vicary v. ABC*, AB-7606a (Nov. 12, 2003).

INFORMATIVE DIGEST/  
POLICY STATEMENT OVERVIEW

California Code of Regulations, Title 4, Division 1, Section 144, “Penalty Guidelines.”

It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.

The California Constitution authorizes the Department, in its discretion, to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department’s discretion.

Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

1. Add Section 144.

Section 144 incorporates by reference the Department’s “Penalty Guidelines” dated December 17, 2003. The Department’s prior “Penalty Policy Guidelines” were found to be an underground regulation in violation of the Administrative Procedures Act by the ABC Appeals Board. This proposes to codify the Department’s penalty policy, procedures and guidelines to insure that disciplinary proceedings are conducted in a fair, reasoned and consistent manner, and in a manner authorized by law.

Authority and Reference Citations

Section 144:

The Department of Alcoholic Beverage Control proposes to add Section 144 pursuant to California Constitution, Article XX, Section 22, Business and Professions Code Sections 23001 and 25750, and Government Code Sections 11340.5, 11342.600 and 11425.50; *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4<sup>th</sup> 557; and *Vicary v. ABC*, AB-7606a (Nov. 12, 2003).

DISCLOSURES REGARDING THE PROPOSED ACTION

Fiscal Impact Estimates

Fiscal Impact on Public Agencies Including Costs or Savings to State Agencies or Costs/Savings in Federal Funding to the State: None.

Nondiscretionary Costs/Savings to Local Agencies: None.

Cost to Any Local Agency or School District for Which Government Code §17561 Requires Reimbursement: None.

### Local Mandate Statement

Addition of the above-mentioned section does not impose a mandate on local agencies.

### Business Impact Statement

The Department of Alcoholic Beverage Control has determined that the proposed regulatory action would have no significant statewide adverse economic impact directly affecting California business enterprises and individuals, including the ability of California businesses to compete with businesses in other states.

### Impact on Jobs/New Businesses

The Department of Alcoholic Beverage Control finds that the proposed regulatory action will not have any impact on the creation or elimination of jobs or businesses or the expansion of businesses in the State of California.

### Statement of Potential Cost Impact on Private Persons or Entities

The Department of Alcoholic Beverage Control is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

### Statement of Effect on Small Businesses

The Department of Alcoholic Beverage Control finds that the proposed regulatory action will have no effect on small businesses since it merely codifies existing disciplinary procedures.

## CONSIDERATION OF ALTERNATIVES

In accordance with Government Code section 11346.5(a) (13), the Department must determine that no reasonable alternative it may have considered or that has otherwise been identified and brought to the attention of the Department would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons than the proposed action.

The Department invites interested persons to present statements, comments, or arguments with respect to alternatives to the proposed regulation at the scheduled hearings or during the written comment period.

### CONTACT PERSONS

Inquiries concerning the proposed administrative action may be directed to any of the following persons:

Nicholas R. Loehr, Staff Counsel  
Department of Alcoholic Beverage Control  
3927 Lennane Dr., Ste. 100  
Sacramento, CA 95834

Dennis Clear, Legislative Officer  
Department of Alcoholic Beverage Control  
3927 Lennane Drive, Ste. 100  
Sacramento, CA 95834

Questions on the substance of the proposed regulation may be directed to any of the persons listed above.

Please direct requests for copies of the proposed text (the “express terms”) of the regulation, statement of reasons, or any other information concerning the rulemaking file to Ms. Theresa Laster at the above address.

### AVAILABILITY OF CHANGED OR MODIFIED TEXT

After holding the hearings and considering all timely and relevant comments received, the Department upon its own motion or at the instance of any interested person may adopt the proposal substantially as presented. If the Department makes modifications which are sufficiently related to the originally proposed text, it will make the modified text (with the changes clearly indicated) available to the public for at least 15 days before the Department adopts the regulation as revised. Please send requests for copies of any modified regulation to the attention of Nicholas Loehr at the address indicated above. The Department will accept written comments on the modified regulation for 15 days after the date on which it is made available.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF  
PROPOSED REGULATIONS

The Department will have the entire rulemaking file available for inspection and copying throughout the rulemaking process at its office at the above address. As of the date this notice is published in the Notice Register, the rulemaking file consists of this notice, the proposed text of the regulation, and the Initial Statement of Reasons. The aforementioned items are also available for review on the Department website at <http://abc.ca.gov>. (Located under ‘points of interest.’)

Notice is also given that each proposal should be reviewed in terms of the statutory requirements for necessity, clarity, consistency, authority, reference, and non-duplication.

AVAILABILITY OF THE FINAL STATEMENT OF REASONS

Upon completion, copies of the Final Statement of Reasons may be obtained by contacting Nick Loehr at the above address.

ITEMS UNDER CONSIDERATION in Title 4. Business Regulations, Division 1, Department of Alcoholic Beverage Control ARE:

Item 1: Add Section 144: Penalty Guidelines (Incorporated by reference herein)

**INITIAL STATEMENT OF REASONS**

## SECTION 144. “PENALTY GUIDELINES”

### SPECIFIC PURPOSE OF REGULATION (Section 144).

The proposed regulation will delineate the Department of Alcoholic Beverage Control’s penalty policy, procedures, and guidelines to ensure that licensee discipline is administered in a fair, reasoned and consistent fashion, and in a manner authorized by law.

### NECESSITY.

The Department of Alcoholic Beverage Control (“Department”) was created in 1955 by Constitutional Amendment – Article XX, Section 22.

The Department of Alcoholic Beverage Control “shall have the exclusive power ... to license the manufacture, importation and sale of alcoholic beverages in this State. . . . The Department shall have the power, in its discretion, to deny, suspend or revoke any specific alcoholic beverages license if it shall determine for good cause that the granting or continuance of such license would be contrary to the public welfare or morals, or that the person seeking or holding a license has violated any law prohibiting conduct involving moral turpitude.” (California Constitution, Article XX, Section 22.)

The Alcoholic Beverage Control Act is “an exercise of the police powers of the State for the protection of the safety, welfare, health, peace, and morals of the people of the State . . . [which] involves in the highest degree the economic, social, and moral well-being and the safety of the State and of its entire people.” (Business and Professions Code Section 23001.)

In accordance with its authority to discipline alcoholic beverage licensees, the Department has maintained “Penalty Policy Guidelines” in its Instructions, Interpretations, and Procedures Manual. These “Penalty Policy Guidelines” were never adopted as a regulation pursuant to Government Code Section 11340.5, et. seq.

In November 2003, the Alcoholic Beverage Control Appeals Board ruled that the Department’s “Penalty Policy Guidelines” constituted an underground regulation in contravention of Government Code Section 11340.5, et. seq. (*Vicary v. ABC*, AB-7606a)

The Department is proposing Section 144 to address issues raised in the Alcoholic Beverage Control Appeals Board's ruling in *Vicary v. ABC*, AB-7606a (Nov., 2003)

Pursuant to Business and Professions Code Section 25750, the Department shall make and prescribe reasonable rules as may be necessary or proper to carry out the purposes and intent of Section 22 of Article XX of the California Constitution and the ABC Act (Business and Professions Code Section 23000, et. seq.)

Section 144 adopts the Department's "Penalty Policy Guidelines" as they currently exist in its Instructions, Interpretations and Procedures Manual, and the Department proposes to establish as Section 144, Title 4, Division 1, California Code of Regulations, the aforementioned "Penalty Guidelines" to ensure that licensee discipline is administered in a fair, reasoned and consistent fashion, and in a manner authorized by law.

#### **TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDY, REPORTS, OR DOCUMENTS**

The Department did not rely upon any technical, theoretical, or empirical studies, reports or documents in proposing the adoption of this regulation.

#### **REASONABLE ALTERNATIVES TO THE REGULATION AND THE DEPARTMENT'S REASONS FOR REJECTING THOSE ALTERNATIVES**

No other reasonable alternatives were presented to or considered by the Department.

## REASONABLE ALTERNATIVES TO THE PROPOSED REGULATORY ACTION THAT WOULD LESSEN ANY ADVERSE IMPACT ON SMALL BUSINESSES

The Department has not identified any alternatives that would lessen any adverse impact on small businesses.

## EVIDENCE SUPPORTING FINDING OF NO SIGNIFICANT ADVERSE ECONOMIC IMPACT ON ANY BUSINESS

The Department finds that the proposed regulatory action will have no significant adverse economic impact on any business because it merely adopts longstanding disciplinary guidelines and Department licensees would only incur adverse economic consequences if they violated pertinent laws and/or rules.

## PENALTY GUIDELINES

### POLICY STATEMENT

It is the policy of this Department to impose administrative, non-punitive penalties in a consistent and uniform manner with the goal of encouraging and reinforcing voluntary compliance with the law.

### PENALTY POLICY GUIDELINES

The California Constitution authorizes the Department, in its discretion, to suspend or revoke any license to sell alcoholic beverages if it shall determine for good cause that the continuance of such license would be contrary to the public welfare or morals. The Department may use a range of progressive and proportional penalties. This range will typically extend from Letters of Warning to Revocation. These guidelines contain a schedule of penalties that the Department usually imposes for the first offense of the law listed (except as otherwise indicated). These guidelines are not intended to be an exhaustive, comprehensive or complete list of all bases upon which disciplinary action may be taken against a license or licensee; nor are these guidelines intended to preclude, prevent, or impede the seeking, recommendation, or imposition of discipline greater than or less than those listed herein, in the proper exercise of the Department's discretion.

Higher or lower penalties from this schedule may be recommended based on the facts of individual cases where generally supported by aggravating or mitigating circumstances.

Aggravating factors may include, but are not limited to:

1. Prior disciplinary history
2. Prior warning letters
3. Licensee involvement
4. Premises located in high crime area
5. Lack of cooperation by licensee in investigation
6. Appearance and actual age of minor
7. Continuing course or pattern of conduct

Mitigating factors may include, but are not limited to:

1. Length of licensure at subject premises without prior discipline or problems
2. Positive action by licensee to correct problem
3. Documented training of licensee and employees
4. Cooperation by licensee in investigation

## **PENALTY SCHEDULE**

*Note: For purposes of this schedule of penalties, “revocation” includes any period of stayed revocation as well as outright revocation of the license.*

Sales to minors - § 25658 B&P:	
Sales of alcoholic beverages to person(s) under 21	15 day suspension
Permitting person(s) under 21 to consume	15 day suspension
Furnishing or causing to be furnished alcoholic beverages to person(s) under 21	15 day suspension
2 <sup>nd</sup> violation of Section 25658 within 36 months	25 day suspension
3 <sup>rd</sup> violation of Section 25658 within 36 months	Revocation
(Note: priors must be final – B & P § 25658.1)	
Minor(s) on public premises – 25665 B&P	10 day suspension
Employment of minor(s) – 25663 B&P	10 day suspension
Unsupervised sales by person(s) under 18 – 25663(b) B&P	10 day suspension
Sales to obviously intoxicated person(s) – 25602 B&P	15 day suspension
2 <sup>nd</sup> violation of 25602 within 3 years	25 day suspension
3 <sup>rd</sup> violation of 25602 within 3 years	45 day suspension to revocation
Sale and/or Consumption After Hours – 25631 & 25632 B&P:	
By public	15 day suspension
By employees and friends only	10 day suspension
By employees only	5 day suspension
Illegal Solicitation of Alcoholic Beverages:	
Violation of Section 24200.5(b)	Revocation
Violation of Section 25657(a)	Revocation
Violation of Section 25657(b) and Section 303a PC	30 day suspension To revocation
Employees accepting alcoholic drinks – Rule 143 CCR	15 day suspension
Refilling – 25176 & 25177 B&P Code:	
With different brand	15 day suspension
With same brand	5 day suspension
Contaminated Bottles (insects, etc.) – 347b PC	5 day suspension
Substitution of Brands – 25609 B&P	15 day suspension

Club Licenses, Sale to Public – 23431 B&P	10 day suspension
Sale to Purchase Between Retailers – 23402 B&P	15 day suspension
Not Operating Bona Fide Eating Place – 23038 & 23396 B&P	10 day suspension indefinite until compliance
Licensee or Bartender Working In Premises While Intoxicated -24200(a) B&P	30 day suspension
Licensee or Employee Resisting Arrest or Interfering With Investigation on The Premises – 24200(a) B&P & 148 PC	35 day suspension to revocation
Licensee or Employee Not Permitting Inspection Of: Premises – 25755 B&P Records – 25616 B&P	30 day suspension 30 days and indefinite until records produced
Alcoholic Beverage Not Permitted By License – 25607 & 23355 B&P: Sale Possession	15 day suspension 10 day suspension
Gambling – 24200(a) B&P and 330 PC: Organized (bookmaking, football cards, etc.) Local (cards, dice, football & baseball pools, etc.) Electronic/video games (slot machines, Poker, 21, etc.) – possession Electronic/video with payoffs	30 day suspension 10 day suspension 15 day suspension 30 day suspension, with 15 days stayed for 2 years
Disorderly House, Prostitution, Lewd Conduct – 25601 B&P: Occasional or isolated offenses Recurring/aggravated offenses Nude Entertainers, etc. – Rule 143.2 & .3	30 day suspension Revocation 30 day suspension to revocation
Narcotics – B&P 24200.5 and H&S Violations: Transactions on licensed premises Paraphernalia, possession for sale	Revocation Revocation, stayed for 3 years and a 20 day suspension

Failure to correct objectionable conditions -24200(e) and (f) B&P	30 day suspension to revocation
Undisclosed Ownership – 23300 & 23355 B&P: Hidden owner qualified	15 day suspension Indefinite until ownership corrected
Hidden owner not qualified	Revocation
Hidden owner-priority license	Revocation
Commission of Crime Involving Moral Turpitude – 24200(a) B&P: Committed on premises	Revocation
Committed away from premises (petty theft/shoplifting)	Revocation stayed 3yrs
Committed away from premises (other than petty theft)	Revocation
Conviction of a crime involving moral turpitude – 24200(d) B&P	Revocation
Violation Of Conditions – B&P 23804	15 day suspension with 5 days stayed for one year
Rule 65 – Chapter 1, Title 4 of the CCR	Revocation stayed for 180 days to permit transfer or reactivation of license
Rule 107 – Chapter 1, Title 4 of the CCR	5 day suspension
Rule 108 – Chapter 1, Title 4 of the CCR	5 day suspension to a suspension equal to double the original suspension
Exceeding license privileges – 24200(a), 23300, 23355 B&P	5 day suspension to revocation
PC 313.1 – Harmful matter	5 day suspension
Sale of alcoholic beverages while under suspension	Double the original suspension to revocation
Receiving Stolen Property – 24200(a) and 664 & 496 PC: By the licensee on premises	Revocation
By employee on premises	Revocation stayed for 3 years, and a 20 day suspension

Food Stamp Violations – 24200(a) B&P:	
Allowing purchases of alcoholic beverages	10 day suspension
Food stamp trafficking (i.e. purchasing stamps at discount):	
By licensee	Revocation
By employee, with premises involvement	Revocation, stayed for one year and a 20 day suspension.
Keg Registration violations	10 day suspension
Operating Condition Violations – Section 25612.5 B&P:	
Subsections (c) (3), (4), (5), (6), (7), (10)	5 day suspension
Subsections (c) (1), (2), (8), (9)	10 day suspension indefinite until compliance
Misrepresenting Material Fact on Application – 24200(c) B&P	Revocation

**PETITION FOR OFFER IN COMPROMISE (“POIC”):**

Business and Professions Code Section 23095 authorizes the Department to accept a Petition for Offer in Compromise (“POIC”) in lieu of the service of a suspension of 15 days or less. For purposes of determining whether the Department may accept a POIC in lieu of suspension, the total penalty imposed must be for 15 days or less, and shall not include any period of stayed suspension that would result in the potential suspension being for a period of greater than 15 days, nor can it include any period of stayed revocation. In the event that the suspension is for a period of 15 days or less with some portion thereof stayed, the POIC shall be calculated based upon the period of actual suspension (not including the stayed portion). In such cases, if the stayed period of suspension is later reimposed, the Department will generally not accept a POIC in lieu of serving the reimposed period of suspension.

**Abbreviation legend:**

B&P	California Business and Professions Code
PC	California Penal Code
H&S	California Health & Safety Code
CCR	California Code of Regulations
POIC	Payment of Offer in Compromise (B&P Sections 23095 & 23096)