ALCOHOLIC BEVERAGE REGULATION ADMINISTRATION
ALCOHOLIC BEVERAGE CONTROL BOARD

NOTICE OF FIFTH EMERGENCY 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) - (c) (2012 Repl. & 2019 Supp.)), D.C. Official Code § 25-502 (2012 Repl. & 2019 Supp.), and Mayor's Order 2001-96, dated June 28, 2001, as amended by Mayor's Order 2001-102, dated July 23, 2001, gives notice of the amendment, on an emergency basis, of Chapter 10 (Endorsements) of Title 23 (Alcoholic Beverages) of the District of Columbia Municipal Regulations (DCMR).

This emergency rulemaking, titled the *Addition of Outdoor Public and Private Space Notice of Fifth Emergency Rulemakin*g, will (1) allow on-premises retailer's licensees and manufacturer licensees, class A or B, holding an on-site sales and consumption permit, or a Convention Center food and alcohol business to register with the Board to sell, serve, and allow the consumption of alcoholic beverages on new or expanded outdoor public and private space not listed on its license; and (2) modify the conditions imposed on registered licensees and businesses.

On May 27, 2020, Mayor Bowser issued Mayor's Order 2020-067, implementing Phase One of Washington, D.C.'s reopening. Among other things, Mayor's Order 2020-067 partially lifted the restriction prohibiting on-site dining by allowing restaurants, taverns, nightclubs, mixed-use facilities and other licensed food establishments to offer table service to seated patrons on outdoor public or private space. In response to Mayor's Order 2020-067, the Board adopted the *Addition of Outdoor Public and Private Space Notice of Emergency Rulemaking* ("first emergency rulemaking"), on May 28, 2020, by a vote of six (6) to zero (0). *See* 67 DCR 8507 (July 10, 2020). The emergency rulemaking allowed restaurants, taverns, nightclubs, multipurpose facilities, and manufacturer licenses, class A or B, with on-site sales and consumption permits to register with the Board to sell, serve, and allow the consumption of alcoholic beverages on new or expanded ground floor or street level outdoor public or private space in accordance with the Mayor's Order.

After the Board adopted the first emergency rulemaking, Mayor Bowser issued another Mayor's Order implementing Phase Two of Washington, D.C.'s reopening. *See* Mayor's Order 2020-075 (June 19, 2020). Mayor's Order 2020-075, among other things, allows seating at an outdoor bar provided that the bar is not being staffed or utilized by a bartender. In response to Mayor's Order 2020-075, the Board adopted the *Addition of Outdoor Public and Private Space Notice of Second Emergency Rulemaking* ("second emergency rulemaking"), which modified the previous rulemaking by incorporating the additional requirements that ABC-licensed establishments needed to comply with in order to expand or add outdoor public or private space. *See* 67 DCR 9096 (July 24, 2020).

After adopting the second emergency rulemaking, the Council of the District of Columbia passed the Streatery Program and Pop Up Locations Emergency Amendment Act of 2020, enacted July 27, 2020 (D.C. Act 23-346; 67 DCR 9387 (August 7, 2020)), which took effect on July 27, 2020. The legislation established additional guidelines and requirements, some of which modified the Board's second emergency rulemaking, for ABC-licensed establishments seeking on-site sales and consumption, carryout services, or who sought to expand or add outdoor public or private space to

the existing licensed premises. In response, the Board adopted the *Addition of Outdoor Public and Private Space Notice of Third Emergency Rulemaking* ("third emergency rulemaking") on August 18, 2020, which superseded the previous emergency rulemaking adopted by the Board. *See* 67 DCR 11259 (September 25, 2020).

After the Board adopted the third emergency rulemaking, the Council passed the Fiscal Year 2021 Budget Support Emergency Act of 2020 (D.C. Act 23-404, 67 DCR 10098 (August 28, 2020)), which established additional requirements for ABC-licensed establishments to follow in response to the COVID-19 Pandemic. In order to ensure that the regulations comport with the act, the Board adopted the *Addition of Outdoor Public and Private Space Notice of Fourth Emergency Rulemaking*, on September 30, 2020, by a vote of seven (7) to zero (0). *See* 67 DCR 12730 (October 30, 2020).

Since adopting the fourth emergency rulemaking, Mayor Bowser issued Mayor's Order 2020-119, dated November 23, 2020. Amongst other things, Mayor's Order 2020-119 sets new restrictions on restaurants and other licensed food establishments where alcoholic beverages can be purchased and sold for on-premises consumption. Specifically, the Mayor's Order (1) reduces the indoor occupancy for restaurants from fifty percent (50%) to twenty-five percent (25%) effective at 12:01 a.m. on Monday, December 14, 2020; and (2) requires restaurants and other licensed food establishments to cease indoor and outdoor on-premises alcohol sales, service, and consumption at 10:00 p.m. (excluding carryout and delivery), daily, and to cease operations for patrons at midnight, effective 12:01 a.m. on Wednesday, November 25, 2020.

In response to Mayor's Order 2020-119, the Board finds immediate emergency action is necessary in order to ensure that the Board's regulations are consistent with the new COVID-19 restrictions. Consistent with the Mayor's Order, the Board finds emergency action is necessary for the preservation of public health, welfare, and safety. Specifically, amending the Board's regulations on an emergency basis to be consistent with Mayor's Order 2020-119 will serve to further the Mayor's and Board's objective to curb the spread of the Coronavirus.

Thus, on Tuesday, November 24, 2020, the Board adopted the *Addition of Outdoor Public and Private Space Notice of Fifth Emergency Rulemaking*, by a vote of four (4) to one (1). These emergency rules, which shall take effect on Wednesday, November 25, 2020, supersede the Board's previously adopted emergency rulemaking and shall remain in effect for the duration of the Extensions of Public Emergency and Public Health Emergency, but in no event longer than one hundred twenty (120) days from the Board's adoption; expiring on or before March 24, 2021, unless superseded.

Chapter 10, ENDORSEMENTS, of Title 23 DCMR, ALCOHOLIC BEVERAGES, DCMR is amended by adding a new Section 1007, ADDITIONAL OUTDOOR SEATING ON PUBLIC AND PRIVATE SPACE, on an emergency basis, to read as follows:

1007 ADDITIONAL OUTDOOR SEATING ON PUBLIC AND PRIVATE SPACE

1007.1 A licensee under an on-premises retailer's license, class C/R, D/R, C/T, D/T, C/N, D/N, C/H, D/H, C/X, or D/X, including multipurpose facilities and private clubs, a manufacturer's license, class A or B, holding an on-site sales and consumption

permit, or a Convention Center food and alcohol business shall be permitted to sell, serve, and allow the consumption of alcoholic beverages to seated patrons on new or expanded temporary ground floor or street level outdoor public or private space not listed on its existing license, provided, that the licensee:

(a) Registers with the Board, at no cost, and receives written authorization from ABRA prior to selling, serving, or permitting the consumption of alcoholic beverages on the proposed outdoor public or private space;

(b) Registers with DDOT prior to operating on any proposed outdoor public space or receives written approval from the property owner prior to utilizing any proposed outdoor private space; and

(c) Agrees to follow all applicable District laws, regulations, guidance documents, administrative orders including Mayor's Orders, and permit requirements or conditions, which may contain requirements that supersede provisions contained in this section.

1007.2 An on-premises retailer's license, class C/R, D/R, C/T, D/T, C/N, D/N, C/H, D/H, C/X, or D/X, including multipurpose facilities and private clubs, a manufacturer's license holding an on-site sales and consumption permit, class A or B, or a Convention Center food and alcohol business that registers with the Board in accordance with § 1007.1 to sell, serve, and allow the consumption of alcoholic beverages to seated patrons on new or expanded ground floor or street level outdoor public or private space not listed on its existing license shall:

(a) Place tables on the sidewalk café or summer garden so that separate parties are at least six feet (6 ft.) apart from one another;

(b) Ensure that all outdoor dining customers are seated and place orders and are served food or alcoholic beverages at tables;

(c) Prohibit events and activities that would require patrons to be standing or in cluster or be in close contact with one another, including dancing, playing darts, video games including games of skill, bowling, ping pong, pool, throwing axes, or indoor playgrounds;

(d) Prohibit patrons from bringing their own alcoholic beverages;

(e) Prohibit self-service buffets;

(f) Have a menu in use containing a minimum of three (3) prepared food items available for purchase by patrons;

(g) Require the purchase of one (1) or more prepared food items per table;

(h) Ensure that prepared food items offered for sale or served to patrons are prepared on the licensed premises or off-premises at another licensed entity

that has been approved to sell and serve food by the District of Columbia Department of Health (DC Health);

(i) Ensure that the proposed outdoor public or private space is located in a commercial or mixed-use zone as defined in the District's zoning regulations;

(j) Restrict the outdoor sale, service, and consumption of alcoholic beverages, excluding carry-out and delivery, to 10:00 p.m., seven (7) days a week, and cease outdoor operations at midnight, seven (7) days a week, effective 12:01 a.m. on Wednesday, November 25, 2020, unless further restricted by settlement agreement or Board Order;

(k) Not have more than six (6) individuals seated at a table or a joined table;

(l) Require patrons to wait outside at least six feet (6 ft.) apart until they are ready to be seated or make an on-site reservation;

(m) Not provide live music or entertainment, except for background or recorded music played at a conversational level that is not heard in the homes of District residents;

(n) Be allowed to play background or recorded music at a conversational level that is not heard in the homes of District residents;

(o) Not serve alcoholic beverages or food to standing patrons;

(p) Prohibit standing at outdoor bars and only permit seating at outdoor bars that are not being staffed or utilized by a bartender.

(q) Require a minimum of six feet (6 ft.) between parties seated at outdoor bars or communal tables;

(r) Abide by the terms of their public space permit with regard to the allowable placement of alcohol advertising, if any, in outdoor public space;

(s) Provide and require that wait staff wear masks;

(t) Require that patrons wear masks or face coverings while waiting in line outside of the restaurant or while traveling to use the restroom or until they are seated and eating or drinking;

(u) Implement a reservation system by phone, on-line, or on-site and consider keeping customer logs to facilitate contact tracing by DC Health;

(v) Implement sanitization and disinfection protocols including the provision of single use condiment packages; and

(w) Have its own clearly delineated outdoor space and not share tables and chairs with another business.

1007.3 Registration under § 1007.1 shall be valid from May 29, 2020, to December 31, 2021, unless extended by the Mayor or the Council of the District of Columbia.

1007.4 The Board may fine, suspend, or revoke an on-premises retailer's license, class C or D, or a manufacturer's license, class A or B, with an on-site sales and consumption permit, and shall revoke the registration issued in accordance with § 1007.1 if the licensee fails to comply with requirements set forth in § 1007.1 or 1007.2. The provisions of D.C. Official Code §§ 25-826 and 25-828 pertaining to notice and an opportunity to be heard in connection with the suspension or revocation of licenses shall also apply to the revocation of registrations issued in accordance with § 1007.1.

1007.5 Notwithstanding § 1007.2, if an on-premises retailer's license, class C or D, or a manufacturer's license, class A or B, with an on-site sales and consumption permit, has a settlement agreement governing its operations, the Board:

(a) Shall interpret settlement agreement language that restricts sidewalk cafes or summer gardens as applying only to those outdoor spaces that are currently licensed by the Board as sidewalk cafes or summer gardens;

(b) Shall not interpret settlement agreement language that restricts or prohibits sidewalk cafes or summer gardens to apply to new or extended outdoor space, the use of which is now permitted under this subsection;

(c) Shall not interpret settlement agreement language that restricts or prohibits the operation of permanent outdoor space to prohibit the temporary operation of sidewalk cafes or summer gardens; and

(d) Shall require all on-premises retailer licenses, class C or D, or manufacturer licenses, class A or B, with an on-site sales and consumption permit, to delineate or mark currently licensed outdoor space from new or extended outdoor space authorized by DDOT or the property owner.

1007.6 With regard to existing outdoor public or private space, parties to a settlement agreement shall be permitted to waive provisions of settlement agreements that address currently licensed outdoor space for a period not to exceed one hundred eighty (180) days.

1007.7 A manufacturer's license, class A or B, with an on-site sales and consumption permit, or an on-premises retailer's license, class C/T, D/T, C/N, D/N, C/X, or D/X, including multipurpose facilities or private clubs, may partner with a food vendor during its operating hours to satisfy the use of a menu containing a minimum of three (3) prepared food items available to patrons requirement set forth in § 1007.2(f), provided that patrons are seated when ordering and ordered food is delivered by the licensee or the food vendor to the seated patron.

1007.8 For purposes of this section:

(a) Ground floor or street level sidewalk cafes or summer gardens enclosed by awnings or tents having no more than one (1) side shall be considered outdoor space;

(b) Areas enclosed by retractable glass walls and other forms of operable walls shall be considered indoor dining; and

(c) Temporary unlicensed rooftops and summer gardens not located on the ground floor or street level are not eligible for registration under § 1007.1.