ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

TITLE 4. BUSINESS REGULATIONS

DIVISION 1.1 ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

INITIAL STATEMENT OF REASONS

PURPOSE OF THE PROPOSED REGULATIONS

The Alcoholic Beverage Control Appeals Board ("Board") consists of three members appointed by the Governor. The Board provides quasi-judicial administrative review of final decisions of the Department of Alcoholic Beverage Control ("Department"). The Board issues written decisions with orders affirming, reversing, and/or remanding Department decisions regarding: issuance of licenses, conditions placed upon a license, protests against a license being issued, and violations of law by a licensee.

The Board was created by the California Constitution effective January 1, 1955. The questions that may be considered by the Board are limited by the California Constitution and by statute (California Constitution, article XX, section 22; Business and Professions Code sections 23084 and 23085). Judicial review of the Board's order may be obtained by filing a petition for writ of review with the California Supreme Court or the Court of Appeal (Business and Professions Code sections 23090 – 23090.7).

The purpose of these regulations is to clarify and make specific the various procedures to be followed by license applicants, licensees, members of the public / protestors, and the Department when participating in an appeal. These proposed revisions also seek to clarify definitions and update existing language, which were drafted decades ago.

Proposed rules 176-178, 181.1, 183-184, 187-190, 193-197.1, 198-199 will clarify or make specific what the principal office of the Board and the Department refers to; that references to one gender shall apply to all genders and references to singular numbers shall apply to plural numbers; definitions of commonly used terms; how to attach a proof of service; the ways in which a party may serve documents; how to file and serve the notice of appeal; how to file and serve the administrative record; how to file briefs that argue a party's position; how to file and serve motions; the method by which dates for oral argument may be scheduled; limits on oral arguments; the procedure by which a two-member quorum of the Board decides on appeals;

how to move to remand a case due to new evidence; and the reasons for which the Board may dismiss an appeal.

PROBLEM STATEMENT

Business and Professions Code section 23077 empowers the Board to adopt regulations that establish the procedures for appeals. In accordance with section 23077, the Board adopted its original rules and procedures not long after its creation in 1955. However, it has been several decades since many of the rules and regulations have been updated.

As a result, parties such as licensees, license applicants, and the Department are still relying on rules and regulations that were drafted long ago. The problem is that the language of the rules is often vague, archaic, and/or confusing.

As a government entity, it is important to operate with transparency, and to minimize barriers for parties wishing to exercise their due process rights through the appeals process. Without clear and consistent procedures, appeals may vary substantially from case to case, which will cause delays, confusion, and inconsistencies for parties to the appeal and the Board itself.

BENEFITS ANTICIPATED FROM THE REGULATORY ACTION

The proposed addition and amendment of Rules 176-199 will benefit alcohol license applicants, licensees, and the Department by clearly defining the process parties must follow when filing or responding to an appeal of a licensing decision by the Department. The rules and regulations will clarify what the Board's deadlines and criteria are for hearing and deciding cases – thus fostering greater transparency in the appeals process. The adoption of a uniform appeals process will help prevent discrimination and promote fairness for parties appealing an adverse licensing decision. It also provides for openness in how the Board conducts its business.

The rules and regulations will benefit the Board by defining a clear structure under which it will accept, hear, and decide appeals. This will enable the Board to handle incoming cases in a fair and consistent manner.

BACKGROUND

At the Board's April 9, 2021 meeting, the regulatory proposal was presented to the Board for its review and was unanimously approved. (See Underlying Data, April 9, 2021 Meeting Minutes.)

NECESSITY

Article 1. General

§ 176. Location of Offices.

The proposed revision would add a new rule, rule 176, regarding the office locations for the Board and the Department.

Proposed rule 176, subsection (a), provides that the Board's principal office is its physical mailing address listed on its website. Subsection (b) provides that the Department's principal office is its physical mailing address listed on its website. This proposed rule is necessary so that parties to an appeal before the Board know where to deliver certain documents required within these regulations. It also gives the Board flexibility in the event its physical address changes. The Board has relocated several times since its creation in 1955.

§ 177. Tenses, Gender, and Number.

The proposed revision would add a new rule, rule 177, which provides that, for purposes of these rules and regulations, any reference to one gender includes all other genders and any reference to a singular number includes plural numbers. This proposed rule is necessary to ensure uniformity and consistency in the reading and application of these rules and regulations as to avoid any confusion. For example, if a specific provision requires action from a party, it will apply equally to all genders whether the provision refers to "she" or "he".

§ 178. Definitions.

The proposed revision would amend the existing language of rule 178 to provide additional definitions for terms used throughout these rules and regulations.

Subsection (c) defines "Appellant" as any person or entity who files an appeal with the Board. This is necessary to clarify which party to the appeal is considered the "appellant" during the proceedings.

Subsection (d) defines "Respondent" as any person or entity who responds to an appeal filed with the Board. This is necessary to clarify which party to the appeal is considered the "respondent" during the proceedings.

Subsection (e) defines “Party” to include the Department, appellant(s), and respondent(s). This is necessary to not only clarify that any individual or entity participating in an appeal may be referred to as a “party”.

Subsection (f) defines “Person or entity” to include the attorney or an authorized agent of a party. This is necessary because when certain provisions of these regulations require action by the “appellant” or a “party,” this subsection clarifies that their attorney or authorized representative may lawfully complete the action on their behalf.

Subsection (g) defines “Day” as a calendar day unless otherwise stated. This is necessary because California laws and regulations occasionally interpret the word “days” as meaning “business days,” which do not include weekends or holidays. Therefore, this definition clarifies that the term “days” means “calendar days” when used in these regulations.

Subsection (h) defines “File” or “filed” as when a document is received by the Board, *except* when it is mailed to the Board through registered or certified mail. If a document is mailed through registered or certified mail, the document is deemed “filed” on the date of registry or certification with the United States Post Office. It is necessary to deem a document “filed” on the date it is registered or certified with the Post Office because, at that point, the party that is sending the document has completed their delivery obligations. Moreover, certain procedures (e.g., filing briefs) require the deadline to be based off the filing date. Therefore, this regulation provides needed guidance to parties in how to properly identify the filing date.

Subsection (i) defines “Section” or “subsection” to refer to these rules and regulations unless otherwise specified. This is necessary to prevent confusion over whether the Board is referring to its own rules and regulations or, for example, a section within the Business and Professions Code.

§ 181. Proof of Service.

The proposed revision would add a new rule, rule 181, regarding proof of service requirements.

Subsection (a) provides that proof of service must be attached to any documents filed or served within these rules and regulations. This is necessary to ensure all parties in the appeal receive a copy of documents at the same time as the Board so that they have adequate time to review and respond.

Subsection (b) requires that a proof of service shall include the address where the document was served; the date of service; the manner of service; a statement that the individual who

served the document is over 18 years of age, and; a signature, under penalty of perjury, by the individual who served the document. This is necessary in order to best effectuate the requirement outlined in subsection (a) above. It is necessary for the address to be included so that documents are served at the correct address of the receiving party. It is necessary to include the date of the service in order to corroborate that documents are filed and served on a timely basis. It is necessary to specify the manner of service because the Board's controlling statutes only allow for in-person or mail service (see Business and Professions Code sections 23081, 23088). It is necessary to require a statement that the individual making service is 18 years or older to confirm the individual is an adult who understands their legal duties and obligations in serving a document to a party. Finally, by requiring a signature under penalty of perjury, subsection (b) ensures that a document is filed timely, at the right place, by an adult. This is necessary in order to prevent individuals from lying about whether or not they complied with all the proof of service requirements.

§ 181.1 Manner of Service.

The proposed revision would add a new rule, rule 181.1, regarding the methods of service.

Proposed rule 181.1, subsection (a), specifies the ways in which a party may serve a document to the Board. It is necessary to clarify to parties that they may serve documents in one of two ways: by person or by mail. This is because the Board must comply with its controlling statutes, which only allow for those two methods (see Business and Professions Code sections 23081, 23088).

Subsection (b) specifies the manner of service when a party serves another party to the appeal (such as the Department). It is necessary to clarify and confirm to parties that they may serve documents either in person or by mail. This is because the Board must comply with its controlling statutes, which only allow for those two methods (see Business and Professions Code sections 23081, 23088).

Article 2. Filing of Appeal

§ 183. Notice of Appeal.

The proposed revision would add a new rule, rule 183, which provides guidance on how an appellant shall file their appeal with the Board. The proposed rule explains who qualifies to appeal an adverse decision of the Department to the Board by cross-referencing to the

authorizing statute. This is necessary so that a potential appellant can determine whether their matter is something the Board is empowered to consider on appeal.

Subsection (a) requires an appellant to file the notice in accordance with Business and Professions Code section 23081.5, which outlines when an appeal is deemed filed with the Board. Specifically, the notice is deemed filed when received by the Board, *except* when mailed through registered or certified mail. If a document is mailed through registered or certified mail, the document is deemed filed on the date of registry or certification with the Post Office. Therefore, subsection (a) is necessary to inform an appellant that the filing date may be different depending on the method of service. As subsection (b) sets a 10-day deadline, this regulation provides clarity to an appellant as they manage the regulatory deadlines.

Subsection (b) limits the time an appellant may appeal an adverse decision to 10 days after the last day on which reconsideration of the underlying decision can be requested to the Department. This language is necessary because it mirrors the time prescribed in Business and Professions Code section 23081. In setting filing deadlines, the Board is bound to follow statutory authority.

Subsection (c) requires the appellant to serve a copy of the Notice of Appeal to all parties, including the Department. This is necessary because without this requirement, a party to the appeal may never learn that an appeal has even been filed with the Board. This also provides the respondent in an appeal sufficient time to prepare their case prior to the Board hearing and deciding the matter.

Subsection (d) explains that failure to submit the Notice of Appeal to the Board in compliance with rule 183 may result in dismissal of the appeal pursuant to rule 199. This is necessary as a warning to potential appellants of the potential consequences of attempting to appeal an underlying decision after the 10-day window has passed.

§ 184. Contents of Notice of Appeal.

The proposed revision would amend the existing language of rule 184 regarding the content of a notice of appeal.

The proposed amendments to rule 184 primarily involve non-substantive deletions. This is necessary to cut down and streamline the language of the rule by deleting redundancies or topics that are covered in a different rule. The reference to Business and Professions Code section 23084 was removed because the note section at the bottom of the rule already refers to

section 23084. The reference to “in Sacramento” was deleted because it is redundant in light of proposed rule 176, subsection (b). The deleted portion that begins with “[s]uch service shall be made…” was deleted because it is already addressed in proposed rule 183, subsection (c). With the proposed deletions shortening the language of rule 184, the Board has determined there is no need to divide the rule into subsections.

Article 3. Record on Appeal

§ 187. Preparation, Payment, and Filing of the Record of Appeal.

The proposed revision would amend the existing language of rule 187, which provides instructions on the preparation, payment, and filing of the record of appeal.

The proposed change of the rule’s title from “Filing Record” to “Preparation, Payment, and Filing of the Record of Appeal” is non-substantive in nature. This change is necessary to reduce any confusion for readers. By itself, “Filing Record” is vague. However, by clarifying and expanding on the title, readers will be better informed as to the content and topic of rule 187. Under the proposed revision, subsection (a) would provide that—once a notice of appeal has been filed—the Department will calculate the estimated cost of the record, notify the appellant of the cost, and demand payment directly.

Currently, under existing language, the Board—not the Department—first requests a calculation of the cost from the Department. Depending on their workload, the Department may take several weeks to provide this information. Once the Board receives the calculated fee, it informs the appellant and requests payment. After payment is received, the Department will request a copy of the transcript from the court reporter. Depending on the Department's workload and the workload of the court reporter, this can also take several weeks. The risk to the Board’s appeals process is that the Department’s workload and the workload of the court reporter controls the time it takes to process the appeals fee and prepare the case for an appeal hearing.

This proposal is necessary to reduce any unnecessary delays in the appeals process for lack of an underlying record. This is because the Board will base much of its decision on the administrative record in the underlying adverse action. Requiring prompt action by the Department ensures that the Board will receive the bulk of the evidence early in the appeal. Finally, since the Department is the primary entity in the underlying license denial and disciplinary hearings, they have the comparative advantage in calculating fees and notifying the appellant of such.

Under subsection (b), once the Department requests payment, appellants will have 15 days to make the payment. This is necessary because the Board will base much of its decision on the administrative record in the underlying adverse action. Requiring prompt payment ensures that the Board will receive the bulk of the evidence early in the appeal, and also ensures that the appeal will not be unnecessarily delayed for lack of an underlying record. The Board has determined 15 days strikes an appropriate balance between giving appellants enough time to determine how to make payment while minimizing unnecessary delays in the appeals process.

The proposed changes to subsection (c) are non-substantive in nature. Specifically, subsection (c) would simply refer to the record of appeal rather than refer to every piece of content. This is necessary since the immediately following rule (rule 188), defines the contents of the record on appeal. Thus, the proposed changes would reduce and eliminate redundancy in the language of these rules and regulations.

The proposed changes to subsection (d) are similar in nature to those of subsection (c). Subsection (d) would simply refer to the record of appeal rather than refer to every piece of content. This is necessary since the immediately following rule (rule 188), defines the various contents of the record. Thus, the proposed changes would reduce and eliminate redundancy in the language of these rules and regulations. Next, subsection (d) would revise “delivering” to “serving”. This is necessary to maintain consistency in the language of these rules and regulations as “serve” is the preferred, formal term.

There is no change to subsection (e) other than existing language being organized under subsection (e).

The proposed changes in subsection (f) are non-substantive in nature. Specifically, it would update and modernize the existing language, drafted decades ago. This is necessary so that the language of these rules and regulations are more accessible for readers.

The final proposed change to rule 187 is to re-organize its various provisions into subsections. As it currently exists, the provisions of rule 187 are presented in a single, large paragraph. Therefore, the proposed change is necessary in order to better organize the rule and improve accessibility for readers.

§ 188. Contents of Record.

The proposed revision would amend the existing language of rule 188, which specifies what documents shall be included in the record on appeal.

Subsection (a) outlines what shall be included within the Department's file transcript. The first proposed change adds in "the Department's" to specify whose file transcript shall be filed with the Board. This is necessary to clarify and emphasize that it is the Department's duty under proposed rule 187, subsection (f), to file the record with the Board.

Subsections (a)(1)-(3) takes existing language and divides them into specific provisions. Currently, this portion is presented in a single, large paragraph. Therefore, the proposed change is necessary to better organize the rule, as well as improve accessibility for readers.

Subsection (a)(2) deletes "correspondence" and adds "filed by any" to modify "party". The deletion is necessary in order to clarify that correspondences (e.g., emails between attorneys) are typically not a part of the record that is reviewed by the Board. The addition is necessary to clarify that any pleadings which become part of the record must have been properly filed and served. Moreover, it also clarifies that pleadings filed by *any* party (not just the Department) must be included in the record.

Subsection (a)(3) adds "any filed" to modify the list of documents and also deletes "correspondence" from the same list. The addition is necessary to clarify that any notices, orders, or pleadings pertaining to reconsideration must have been properly filed and served. The deletion is necessary in order to clarify that correspondences (e.g., emails between attorneys) are typically not a part of the record that is reviewed by the Board. Lastly, it is proposed that the "and" be revised to "or". This is necessary to clarify that not every underlying decision shall involve or include matters concerning reconsideration.

Subsections (b) and (c) remain unchanged aside from existing language being organized under those subsections.

The final proposed change is to change the subsections from numbers to letters. As it currently exists, the provisions of the rule are organized into subsections (1)-(3). However, this would be inconsistent with the rest of the rules and regulations which have letter subheadings. Therefore, the proposed change is necessary to maintain consistency throughout these rules and regulations.

§ 189. Documents Filed with Board.

The proposed revision to rule 189 is to repeal it entirely. This is necessary because other subsequent rules (e.g., rule 193) specify the other documents that may be filed and served in

the appeals process. Therefore, the proposed revision shall minimize redundancies amongst the proposed rules and regulations.

§ 190. Cost of Record and Payment Therefor.

The proposed revision to rule 190 is to repeal it entirely. This is necessary because rule 190 is redundant as the cost and payment for the record shall be governed by proposed rule 187. Therefore, the proposed revision shall minimize redundancies amongst the proposed rules and regulations.

Article 4. Filing of Briefs and Motions

§ 193. Filing of Briefs.

The proposed revision would amend the existing language of rule 193, which outlines the procedure for filing briefs in the appeals process before the Board. This rule explains the process and time restrictions when it comes to filing a brief.

The first revision to rule 193 is to delete the existing language of subsection (a) in its entirety. This is necessary because the formatting requirements for briefs have been moved to and expanded on in proposed rule 194. Subsection (b) would change the deadlines for filing each of the briefs. Currently, the opening brief must be filed with the Board and served on all parties within 15 days of the record being filed with the Board. Under the proposed revisions, the deadline would be changed from 15 days to 30 days. Currently, the reply brief must be filed and served within 15 days after the opening brief has been served. Under the proposed revisions, the deadline would be changed from 15 days to 20 days. A respondent would thus have 10 fewer days to file their reply brief than the appellant has to file their opening brief. This is because the opening brief sets the stage by focusing on specific arguments. Since this narrows the scope of issues for the respondent to reply to, the Board has determined it is reasonable to require a quicker deadline for the reply brief. Currently, the closing brief must be filed and served within five days after the reply brief has been served. Under the proposed revisions, the deadline would be changed from five days to seven days. Altogether, these changes are necessary to ensure the appeal continues to proceed in a timely manner while giving the appellant adequate time with the record to craft the substance of their appeal. The extended timelines reflect what the Board believes are reasonable deadlines for parties to prepare each brief, especially considering the established page-length restrictions (see proposed rule 194). Moreover, these timelines are consistent with the practices of other administrative appellate

bodies as well as general industry standards. The Board also hopes that the increased deadlines will reduce the need to grant extensions, which are frequently requested.

Subsection (b) also eliminates the requirement that the Board must be served with three copies *in addition* to the original of each brief filed. This is necessary in order to save time and resources. Instead of each party providing three extra copies every time they file a brief with the Board, the Board can scan and make copies of the original as necessary. By continuing the shift from paper to digital records, the Board will keep pace with legal offices and courts that have modernized at a faster pace in recent years.

The proposed rulemaking also removes the word “served” from the phrase “served and filed with the Board” in subsection (b). This is necessary in order to clarify the rule’s language and reduce any confusion for readers. Rule 178, subsection (h), defines “file” or “filed” as when a document is received by the Board. It is sufficient to simply state that a brief has been filed with the Board; the phrase “served and filed with the Board” is redundant.

The final revision to subsection (b) is to add a proof of service requirement. This is necessary in order to clarify that parties must abide by the proof of service requirements outlined in rules 181 and 181.1. If a party fails to submit a brief on time, they should not be able to request a deadline extension simply because rule 193, subsection (b), does not specifically mention a proof of service requirement. Rule 181, subsection (a), makes clear that a “proof of service shall be attached to any documents filed or served under sections 175 through 200.1.” To remove any ambiguity, the Board wishes to confirm to all parties that briefs, like all other documents filed or served under these rules and regulations, must also follow proof of service requirements.

Subsection (c) elaborates on the existing language regarding how a party may request an extension of time to file a brief. Currently, rule 193 only provides that “[a]n extension of time within which to file a brief will be granted only upon a showing of good cause.” Therefore, the proposed revision is necessary to expand on and clarify this process. The subsection permits any party to the appeal to file a motion to request an extension for submitting their brief, but only allows the Board, or its Executive Director if authorized, to grant motions upon a showing of good cause. This is necessary because there may be special circumstances where a party has a genuine need for an extension. This subsection therefore gives the Board the authority to grant extensions in such instances where good cause is established. The proposed change is also necessary because such matters are more procedural than substantive within an appeal, and therefore the Board may wish to empower its Executive Director to deal with these issues

on a day-to-day basis while it focuses strictly on the legal issues present. This subsection also would provide that a party may file an objection to the request within three days of the request being made. The three-day requirement is necessary because the Board needs adequate time to review the request and opposition prior to rendering a decision. Furthermore, by setting forth a prompt timeline, it would minimize parties from using this process to delay the appeal. Finally, the subsection states that the Board will reach a decision without a hearing. This is necessary because the question of whether a party should be granted extra time to file their briefs is purely procedural and does not require a hearing to decide. Additionally, the time it takes to schedule a hearing could create unnecessary and lengthy delays in the appeal.

The final revision to rule 193 is to delete “by Parties” from its current title, “Filing of Briefs by Parties.” This change is non-substantive in nature and makes the rule’s language more concise by deleting redundancies from its title. This is necessary to improve accessibility for readers.

§ 194. Requirements for Briefs.

The proposed revision would add a new rule, rule 194, which outlines the formatting requirements for briefs filed in the appeal.

Subsection (a) shall require all briefs to be double-spaced on 8 1/2 x 11-inch paper, use only one side of the paper, and have margins of at least one inch on all sides. It also specifies that headings will be capitalized, in bold, or underlined. This is necessary because it will ensure the Board receives uniform, legible briefs in each appeal.

Subsection (b) outlines the page requirements for briefs. Opening briefs would be limited to no more than 20 pages, reply briefs to 15 pages, and closing briefs to 10 pages. However, subsection (c) clarifies that the page length restrictions do not include exhibits, appendices, tables of contents, or cover or title pages. These requirements are necessary because they require parties to make concise and direct arguments in their briefs and limits the amount of material the Board needs to review in each appeal. The exception for exhibits, appendices, etc. is also necessary because these documents can vary in length and should not further constrict a party’s ability to express the substance of their appeal.

Subsection (d) allows parties to file a motion to request a waiver of the page length restrictions in subsection (b). This is necessary because there may be special circumstances where a party requires more than the permitted number of pages to adequately describe the basis and arguments for their appeal or response. Finally, the subsection states that the Board, or its

Executive Director if authorized, will decide about waivers without a hearing. This is necessary because the question of whether a party should be granted additional pages in their brief is purely procedural and does not require a hearing to decide. Additionally, the time it takes to schedule a hearing could create unnecessary and lengthy delays in the appeal. The proposed change is also necessary because such matters are more procedural than substantive within an appeal, and therefore the Board may wish to empower its Executive Director to deal with these issues on a day-to-day basis while it focuses strictly on the legal issues present.

§ 195. Motions.

The proposed revision would amend the existing language of rule 195, which describes the process by which parties may submit motions to the Board in connection with an appeal.

Specifically, subsection (a) requires all motions to: follow the formatting rules set forth in rule 194(a); be no more than 10 pages, unless accompanied by a declaration showing good cause for additional pages, but in which case shall be no more than 15 pages; and include proof of service on all parties to the appeal when filed with the Board. The formatting requirements are necessary to ensure the Board receives uniform, legible motions that are easy to review. The page limit is necessary because it compels parties to make concise and direct arguments in their motions and limits the amount of material the Board needs to review in each appeal. The adjusted 15-page limit upon a showing of good cause is necessary because there may be special circumstances where an issue being argued is so complex that it requires additional pages. By merely requiring a declaration at the time of filing, the Board is streamlining the process for reviewing cause for extended motions by not further requiring an additional motion for a motion. Finally, the proof of service requirement is necessary to ensure all parties receive a copy of the motion at the same time as the Board so that they have adequate time to review and potentially submit an objection.

Subsection (b) allows any party opposing a motion to file their written opposition with the Board within seven days of being served with the initial motion, and in compliance with the requirements described in subsection (a). This is necessary to preserve all parties' rights to respond to a motion. The seven-day time limit is necessary to ensure the process of responding to a motion does not unduly delay the appeal, and otherwise allows the Board to make a swift determination on the issue raised. Before this revision, a party had 10 days to file their opposition motion. They now have three fewer days. This is because the original motion sets the stage by focusing on one specific request. Since this considerably narrows the scope of

issues for the opposing party to reply to, the Board has determined it is reasonable to require a shorter deadline for a written opposition. Moreover, this timeline is consistent with the practices of other administrative appellate bodies. For example, Cannabis Control Appeals Panel, which is modeled after the Board (see Business and Professions Code section 26042), requires written oppositions to be submitted within five days (see California Code of Regulations, title 16, section 6010(b)).

Finally, requiring the party opposing the motion to follow the same formatting and service requirements is necessary for the same reasons described in the paragraph above.

Subsection (c) explains that the Board may place any motion on the calendar for a hearing. This is necessary to clarify the process for when and how hearings will be scheduled for oral arguments concerning motions filed. The subsection also states that notwithstanding the foregoing, the Board may elect to rule on the motion without holding a hearing. This is necessary because there will likely be instances where the Board does not need to conduct a hearing to decide on a motion. Giving the Board the authority to forego a hearing will therefore better streamline the appeals process and prevent needless delays.

Article 5. Oral Argument

§ 196. Hearing.

The proposed revision would add a new rule, rule 196, which provides the process and options for holding a hearing on the merits of an appeal.

Subsection (a) provides that, after the record has been filed with the Board, the Board will set a hearing date and time and notify all parties. This is necessary as the Board is in the best position to determine the availability of all parties, including Board members and staff, as well as which date and time is the most practical and timely for the hearing.

Under subsection (b), any party that wishes to present oral argument before the Board must submit a written request at least 21 days before the scheduled hearing date. Failure to request oral argument on time may result in the submission of the appeal on the pleadings. This is necessary because all relevant information and arguments in the appeal should be part of the administrative record and written briefs, allowing the Board to render a decision based only on the submitted documents. For the sake of expediency, some parties may wish to waive a hearing, and therefore the case may be decided purely on the written record.

In the event a party wishes to have a hearing, however, they are still given that opportunity once they are notified of a date and time for a potential hearing. The requirement that a party provide notice of its desire for oral argument at least 21 days before the scheduled hearing date is necessary to give the Board adequate time to account for any logistical issues in scheduling oral argument. Furthermore, the Board believes the timeline still provides parties with adequate time to decide if they wish to request a hearing, given that appeals are assigned to a hearing date several months in advance.

Subsection (c) states that notwithstanding subsection (b), the Board may direct for oral argument to be held even if no party requests one. This is necessary because there may be instances in which the Board would like to hear further arguments or clarification in a given appeal.

Subsection (d) further explains that a party seeking a continuance shall first attempt to stipulate to an alternative hearing date with all other parties, and then coordinate with the Board to reschedule. In the event the parties will not stipulate to a continuance, the requesting party can submit a request to the Board to continue the hearing. A party may object to the continuance request within five days of such request. This is necessary because it provides the parties an opportunity to stipulate to an alternative hearing date without having to file any motions or unnecessarily involve the whole Board. Nevertheless, it is also necessary to also establish a clear procedure when the parties cannot stipulate that gives the Board a proper means and opportunity to decide whether there is good cause to alter the hearing date. The five-day timeline within which to submit an opposition is necessary to ensure the appeal is not needlessly delayed due to purely procedural matters.

Subsection (e) states that continuance requests by any party may be granted by the Board, or its Executive Director if authorized, without a hearing and upon a showing of good cause. This is necessary because there may be legitimate special circumstances that prevent a party from appearing at a hearing on a specific date. This subsection gives the Board a mechanism to adjust the hearing date in such instances. The subsection also allows the Board to delegate its authority to decide requests for continuances to its Executive Director. The proposed change is necessary because such matters are more procedural than substantive within an appeal, and therefore the Board may wish to empower its Executive Director to deal with these issues on a day-to-day basis while it focuses strictly on the legal issues present.

§ 197. Oral Argument.

The proposed revision would amend the existing language of rule 197, which sets forth the procedural guidelines and restrictions on oral arguments should a hearing be held.

Subsection (a) provides that each party shall be allowed a maximum of 15 minutes for oral argument, only one person may speak on behalf of each party, and the appellant (or moving party) may divide their allotted 15 minutes into both an opening and closing statement. This is necessary because the Board will often hear numerous appeals at each hearing, and therefore must limit the amount of time parties may speak. Not only that, but Board members often take time at the conclusion of oral argument to ask parties follow-up questions. Therefore, the Board has determined that 15 minutes is a reasonable amount of time because all arguments should already have been made in the hearing briefs, and therefore, the time for oral argument is only necessary to clarify issues or questions. Dividing the 30 minutes currently allotted into 15 minutes for each party is also consistent with fairness and due process. Limiting one speaker per party is also necessary to keep hearings streamlined, and to otherwise prevent confusion about which speakers represent which parties. Finally, the right for an appellant or moving party to make both an opening and closing statement is necessary to preserve the traditional oral argument structure in appeals, and to clarify the order in which the parties may speak.

Under the proposed revisions, the existing language of subsection (b), regarding continuances, will be repealed. This is because continuances of oral argument are governed by proposed rule 196. Therefore, this proposal is necessary to avoid duplication and redundancy within these rules and regulations. Subsection (b) would also provide that additional time for oral argument may be granted if good cause is established. This is necessary because there may be special circumstances where a party requires more than the permitted time to adequately explain the basis and arguments for their appeal or response. Alternatively, there may be instances in which the Board would like to hear further arguments or clarification in a given appeal.

§ 197.1 Quorum.

The proposed revision would add a new rule, rule 197.1, which provides guidance for when the Board is deciding an appeal with only two members present.

Subsection (a) would provide that the Board may decide an appeal if there is a quorum of at least two members present. This is necessary because the Board is primarily responsible for carrying out its statutory duties and is required by law to hear any case properly appealed.

Therefore, the absence of the third member, by itself, should not restrict the Board's appeals process to the point of becoming inoperable.

Subsection (b) would provide that where the two-member quorum cannot reach a unanimous decision, oral argument and closed session deliberation will be continued for a time when the third member of the Board can be present. This is necessary to reduce unnecessary delays to the appeals process. Under current law, a two-member quorum may decide on appeals only if their decision is unanimous. In a situation where the two members clearly cannot reach a unanimous decision, prolonging the hearing would result in wasted time and resources. This would be prejudicial to the Board and its staff, as well as all parties in attendance for the Board hearing that day. The proposal would establish a clear, uniform process so that when a unanimous decision cannot be reached, the Board can move to continue adjudication on the pending matter to a date and time when the third member can be present. This is necessary to ensure that the Board can conclude the pending appeal in a timely manner and promptly proceed to the remaining appeals on the agenda as to not infringe on any party's due process rights.

Subsection (c) would provide that where there are only two members appointed to the Board and the two-member quorum cannot reach a unanimous decision, the Department's decision shall stand. This is necessary to reduce unnecessary delays to the appeals process. Under current law, a two-member quorum may decide on appeals only if their decision is unanimous. Unlike the situation envisioned in subsection (b), there is no option to continue the hearing so that a third member can be present to be a potential tiebreaker. Therefore, prolonging the hearing would only result in wasted time and resources. This would be prejudicial to the Board and its staff, as well as all parties in attendance for the Board hearing that day. The proposal would establish a clear, uniform process so that when a unanimous decision cannot be reached in these instances, the Department's underlying decision shall stand. This is necessary to ensure that the Board can conclude the pending appeal in a timely manner and promptly proceed to the remaining appeals on the agenda as to not infringe on any party's due process rights.

Article 6. Newly Discovered Evidence

§ 198. New Evidence.

The proposed revision would amend the existing language of rule 198. Business and Professions Code section 23085 provides that the Board may remand a case when it finds there

exists “relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department.” Rule 198 describes the process by which a party may move to remand a case on appeal based on this statute.

The proposed change of the rule’s title from “Nature of Evidence and Showing” to “New Evidence” is non-substantive in nature. It would update the existing title, drafted decades ago, so that the phrasing and wording are more modern. This is necessary to reduce any confusion for readers.

Under the proposed revisions, subsection (a) remains unchanged.

As for subsection (b), existing language only specifies that “merely cumulative evidence” will not be a proper ground for remand. The proposed revision would specify that “exclusion of evidence” would also not be a proper ground for remand. This is necessary to clarify the provision and prevent any abuse of the remand request. If, at the underlying hearing with the Department, the party seeking remand failed to produce the evidence without justification or the evidence was properly excluded, the party should not be able to argue for remand simply because subsection (b) does not specifically mention excluded evidence. To remove any ambiguity, the Board wishes to clarify for all parties that exclusion of evidence, by itself, is also not a proper ground for remand.

Article 8. Dismissal of Appeal

§ 199. Dismissal of Appeal.

The proposed revision would amend the existing language of rule 199, which describes the circumstances in which the Board will dismiss an appeal and affirm the decision of the Department. The proposed change to subsection (a) is non-substantive in nature as it simply rearranges existing language. This is necessary to improve the clarity of the rule for readers.

Under subsection (b), the Board shall dismiss an appeal upon motion of a party, or upon its own determination and notice, that the appellant failed to timely file their Notice of Appeal or pay for the record in compliance with rules 183 and 187. The changes to the subsection are non-substantive in nature. It simply rephrases the existing language. This is necessary to make the language of the rule clearer for modern readers. Finally, the last change to the subsection is to correctly identify rules 183 and 187, and not 187 and 190, as the controlling provisions. This is necessary because, in light of all the proposed changes to the Board’s rules and regulations,

numerous existing rules will be moved in and out of order. Therefore, the proposed change will account for the changes and prevent any unnecessary confusion to the reader.

Subsection (c) directs the Board, after the Notice of Appeal has been filed, to dismiss an appeal without prejudice upon certification from the Department that it will reconsider a case after the Notice of Appeal is filed. This is necessary because there may be instances where the appellant files their Notice of Appeal prior to the deadline for the Department to reconsider the underlying case. In such a situation, if the Department subsequently grants reconsideration, the appellant must exhaust their initial administrative remedies before filing their appeal. Such dismissals shall be without prejudice though because the applicant or licensee may still be aggrieved after the reconsideration is complete and must have the ability to have their appeal still heard on the merits in the same case.

Subsection (d) directs the Board to dismiss an appeal upon a party's motion, or through the Board's notice to parties, where sufficient cause exists for dismissal. In such instances, the Board is required to specify the sufficient cause for the dismissal in its order. It is necessary for the Board to describe the specific reason for the dismissal in its order because the Board's reasoning and conclusions may be the basis for further appeals to California's appellate courts or Supreme Court.

Finally, subsection (e) directs the Board to dismiss an appeal upon stipulation of the parties. This is necessary because in such instances neither party will wish to continue with the appeal, having come to a mutually agreed resolution. Furthermore, since such an agreement effectively concludes the pending appeal before the Board, it is appropriate for the Board to dismiss the appeal.

UNDERLYING DATA

April 9, 2021 Board Meeting Minutes

ECONOMIC IMPACT ASSESSMENT

The Board concludes:

(1) Creation/Elimination of jobs within the state: It is unlikely that the proposal would create or eliminate jobs within the state because the proposed amendments make specific or clarify the procedures to be followed by those parties that elect to participate in an appeal before the Board. The regulations in no way alter or enhance the legal or factual basis for a party's

appeal, and do not affect the Board's decision to affirm or reverse an adverse action taken by the Department.

(2) Creation/Elimination of businesses within the state: It is unlikely that the proposal would create new businesses or eliminate existing businesses within the state because the proposed amendments make specific or clarify the procedures to be followed by those parties that elect to participate in an appeal before the Board. The regulations in no way alter or enhance the legal or factual basis for a party's appeal, and do not affect the Board's decision to affirm or reverse an adverse action taken by the Department.

(3) Expansion of existing businesses within the state: It is unlikely that the proposal would result in the expansion of businesses currently doing business within the state because the proposed amendments make specific or clarify the procedures to be followed by those parties that elect to participate in an appeal before the Board. The regulations in no way alter or enhance the legal or factual basis for a party's appeal, and do not affect the Board's decision to affirm or reverse an adverse action taken by the Department.

(4) Benefits of proposed action to the health and welfare of California residents, worker safety and the state's environment: The proposed regulations will ensure an orderly and consistent method for alcoholic license applicants and licensees to appeal adverse administrative decisions by the Department. These regulations enhance due process for those Californians participating in the alcohol industry by creating and clarifying the procedures to be followed when participating in an appeal before the Board. Otherwise, these regulations do not benefit worker safety or the state's environment.

TECHNICAL, THEORETICAL, AND/OR EMPIRICAL STUDIES, REPORTS, OR SIMILAR DOCUMENTS RELIED UPON

The Board did not rely on any technical, theoretical, and/or empirical studies, reports, or similar documents in proposing these regulations.

EVIDENCE SUPPORTING DETERMINATION OF NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

Historically, appellants have paid a fee between $50 to $500 to have the underlying administrative record prepared and copied for the Board. This fee remains unchanged by these proposed regulations. Accordingly, the Board concludes the proposed regulations do not have any significant, statewide, and adverse economic impact on businesses.

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

The Board determined that the proposed regulations do not have an adverse impact on small businesses.

REASONABLE ALTERNATIVES TO THE PROPOSED ACTION AND THE AGENCY'S REASONS FOR REJECTING THOSE ALTERNATIVES

The Board has determined that no alternatives were presented to, or considered by, the Board that would be more effective in carrying out the purpose of the proposed regulation or would be as effective and less burdensome to affected private persons that the proposed regulation. No subsequent alternative recommendations were made prior to the notice. The Board invites any interested party to submit comments which offer any alternative proposal.

PERFORMANCE STANDARD AS ALTERNATIVE

The Board made every effort to consider performance standards where possible by removing overly restrictive requirements. To the extent a regulation prescribes a specific action or procedure, the requirement is necessary to modernize the language of these rules and regulations, clarify the procedures to follow in any appeal before the Board, and streamline the overall appeals process.

MANDATED USE OF TECHNOLOGY

The proposed regulations do not mandate the use of any technology.