

PENALTY POLICY FOR REGULATORY VIOLATIONS

March 1, 2021

I. GENERAL PROVISIONS

A. Definitions

“Executive director” means the executive director of the Texas Alcoholic Beverage Commission or his or her designee.

“Respondent” means the license or permit holder who is the subject of a commission disciplinary action.

B. Effective Date

This Penalty Policy (“Policy”) is effective beginning on **March 1, 2021**, and remains in effect until it is revoked or the commission issues a revised policy. The recommended penalties for violations that are subject to this Policy and for which a Notice of Violation is issued after March 1, 2021, will be calculated according to this Policy.

C. Purpose, Use, and Accessibility

This Policy is internal agency guidance describing in detail the agency’s method for calculation of recommended penalties for regulatory violations pursuant to commission Rule 34.3.

This Policy does not address when an enforcement action is initiated, but rather, how TABC staff should evaluate violations in order to recommend administrative penalties to the commission.

This Policy is intended for use by commission staff, regulated entities, government officials, and interested members of the general public. The commission will maintain a copy of the current Penalty Policy on its public web site. Questions regarding this Policy should be directed to the TABC Audit Division at 512-206-3300.

D. Adoption, Periodic Review, and Amendment of the Penalty Policy

This Policy was adopted in the manner of a rulemaking proceeding under the Administrative Procedure Act (Tex. Gov’t Code Ch. 2001). As provided by Rule 34.3, the TABC will review this Policy at least once every seven years in the manner of a rulemaking, with opportunities for input from the regulated industry, members of the public, and government officials.

E. Violations Subject to this Penalty Policy

Violations subject to this Policy include violations of statutes and rules listed in commission Rule 34.3, Sanctions for Regulatory Violations. The commission does not intend to assess a penalty for the same alleged conduct under both Rule 34.2 and Rule 34.3, simultaneously.

F. Effect of Penalty Calculation

A penalty calculated pursuant to this Policy is the penalty the executive director will recommend to the commission if a settlement with the respondent is not reached. The calculation of a penalty pursuant to this Policy does not affect the ability of the executive director to agree to a settlement on different terms. Likewise, the commission is not bound by a calculation pursuant to this Policy or the executive director's recommended penalty and may impose any penalty within statutory limits at its discretion.

G. Statutory Authority and Penalty Limitations

Texas Alcoholic Beverage Code §§5.362, 5.363, 11.61, 11.64, and 11.641 provide the basis for the commission's and its executive director's authority to enforce the laws and rules under its jurisdiction by imposing civil penalties and suspending licenses and permits. Section 11.61 authorizes the suspension of a license or permit for a period of up to 60 days for a variety of reasons, including violation of the laws and rules of the commission. Section 11.64 requires that with some specified exceptions, the commission offer a civil penalty (fine) in lieu of license or permit suspension. It further requires that the amount of a civil penalty assessed by the commission be not less than \$150 or more than \$25,000 for each day the license or permit was to have been suspended. Penalties and suspension days calculated under this Policy may not violate these statutory constraints.

II. BASE PENALTIES: CATEGORIZATION OF VIOLATIONS

Rule 34.3 assigns a base penalty amount to regulatory violations according to the statute and/or rule violated. Violations are assigned to a category based upon the severity of the violation type and the amount of penalty necessary to deter that violation. The base penalties and the violations categorized under each base penalty were initially adopted following a rulemaking proceeding under the Administrative Procedure Act (Tex. Gov't Code Ch. 2001).

The commission is charged with assessing administrative sanctions in the form of days of suspension with a corresponding administrative penalty amount between \$150 - \$25,000 per day of assessed suspension. The amount of the penalty must be appropriate for the nature and seriousness of the violation. Taking into account the type of permit/license involved and the type of violation, the commission has assigned base penalties of \$250, \$500, or \$1,000. The base penalty for violations within each category represents a single instance of a violation without considering any additional factors that warrant increasing or decreasing the final penalty from the base penalty.

In general, violations in the \$250 category pertain to activities and conduct that make up a business's daily operations, such as record keeping, displaying the permit/license at the premises, or filing a report. Violations of this nature are expected to occur from time to time and, if not connected to a pattern of repeat conduct or purposeful disregard for the Code, pose a minimal impact on public safety, the marketplace, or the commission's ability to carry out its duties.

In general, violations in the \$500 category pertain to the core conduct of a respective permit's/license's authorized privileges. These are often stated as specific prohibitions within the permit's/license's governing chapter in the Code.

In general, violations in the \$1,000 category pertain to conduct that involves, harms, or affects another person or business in some manner. These violations either have a heightened penalty by statute, pose a threat to a fair and orderly marketplace, or impair the commission's ability to effectively carry out its regulatory duties.

III. NUMBER OF VIOLATION EVENTS

The number of violation events refers to the number of discrete instances of a particular violation or the amount of time the violation was ongoing. For example, if a distributor provides an impermissible benefit to five different retail store locations, the commission may impose five separate violations. Or, if an ongoing problem has persisted for the past three months, the commission may impose three violations, one for each month. Because circumstances will vary, the commission will determine the appropriate number of violation events on a case-by-case basis. The basis for the number of violation events will be noted on the Penalty Calculation Worksheet ("PCW").

The number of violation events is *not* intended to capture violations from past incidents or inspections or repeated violations. These prior violations will be considered as aggravating circumstances in the next step of the calculation.

IV. AGGRAVATING AND MITIGATING CIRCUMSTANCES

Adjustments to the penalty amount due to aggravating and mitigating circumstances are based upon the conduct of the respondent in relation to the violation, including culpability (e.g., was the violation an oversight, due to gross negligence, intentional, or even fraudulent?); level of cooperation with the commission's inspections and investigations; and immediate steps taken by the respondent to correct a violation and/or prevent it from occurring again. The nature of the violation itself is not considered in aggravating circumstances as that is accounted for by a higher base penalty categorization.

As noted in Section III, above, prior instances of the same or similar violations may also be considered aggravating circumstances. A respondent that continues to have the same problems again and again will see their subsequent violations aggravated due to that repetition. If the conduct is widespread in the organization or appears to be an ongoing course of conduct in violation of

commission statutes or rules, the executive director may consider that an extraordinary or flagrant level of aggravation.

Examples of mitigating and aggravating circumstances are listed in the instructions in Section VII of this Policy. This list is non-exclusive; the executive director may consider other relevant facts and circumstances on a case-by-case basis. The respondent may present evidence of mitigating circumstances to the executive director for consideration.

The executive director's identification and use of mitigating and aggravating circumstances to either enhance or discount the penalty is entirely discretionary.

V. ECONOMIC BENEFIT

The 2019 Sunset Bill (HB 1545) amended §11.641(a) of the Code to require the executive director to consider, when determining the appropriate amount of the civil penalty for a permittee or licensee who has previously violated the Code, whether the permittee or licensee profited from the violation, and if so the amount of the permittee's or licensee's profit. According to the Sunset Report, "(a)llowing TABC to consider a business's profits from violating the law would ensure TABC can effectively penalize a licensee for illegal behavior, so that violating the code and paying a fine does not become simply a cost of doing business."

Pursuant to this direction from the Texas Legislature, in determining the appropriate penalty, the executive director may consider the economic benefit realized by a respondent resulting from the violation. In general, the economic benefit is an assessment of the pecuniary gains from a violation, both in costs avoided, costs delayed, and additional profits gained due to the violative conduct. If the economic benefit realized by the respondent exceeds the calculated penalty amount, the amount of the economic benefit will be added to the calculated administrative penalty. Essentially, the economic benefit realized due to the violation is recouped by the agency, resulting in a net zero impact to the violator. Then, the administrative penalty is imposed to both provide consequences for the instant violation as well as deter future violations. This will discourage regulated entities from violating the laws or rules of the agency based upon a calculated business decision.

Economic benefit will not be calculated in every case and will often be left blank. Pursuant to statute, it can only be used when the permittee or licensee has previously violated the Code. Of those cases, the commission will calculate the economic benefit when there is reason to believe it is in excess of the penalty that would otherwise be imposed.

The variables leading to an economic benefit to a respondent will vary in every case and therefore cannot be defined in advance in this Policy. Instead, the economic benefit will be determined on a case-by-case basis, using the information available to the commission. Where accounting ledgers, receipts, inventory records, marketing and promotional invoices, bills of lading, or other documentation is not available or is withheld by the respondent, the commission may rely upon reasonable estimates. The commission will explain the basis for its economic benefit calculation within the PCW, using additional sheets, as necessary.

To assist in deciding whether to pursue an economic benefit calculation, staff members will consider the following list of questions:

1. Did the respondent avoid or delay capital outlay required by its license or permit, the Code, or a rule?
2. Did the respondent earn any interest by avoiding or delaying a capital outlay required by its license or permit, the Code, or a rule?
3. Did the respondent gain an economic advantage over its competitors as a result of the violation?
4. Did the respondent avoid or delay any operating costs as a result of the violation?
5. Did the respondent receive increased profits or revenue due to the violation?
6. Did the respondent avoid the purchase of a required bond?

These questions are intended to assist the staff member in thinking about some common types of economic benefits but is not an exclusive list of the types of economic benefits that may be considered based upon the circumstances of the individual case.

Respondents may provide documentation to assist in the accurate calculation of economic benefit. However, the commission may decline to use the information if the respondent selectively provides documentation tending to show little economic benefit but refuses to provide access to other financial documentation requested by the commission in an effort to see a more complete and accurate picture of the circumstances.

VI. SUSPENSION DAYS IN LIEU OF FINE

Pursuant to statute, the commission is required to offer a respondent a number of days of license or permit suspension in lieu of paying a fine. Dividing the final penalty amount by the base penalty for that violation results in a commensurate number of days of suspension. This will be done separately for each violation and the number of days will be added from each worksheet, like the fine amounts, to determine the total.

Partial days are allowed only for cases involving multiple violations. In those cases, any partial days will be added to one another, and the resulting number of days, if not a whole number, will be rounded up to the next whole number.

VII. INSTRUCTIONS FOR USING THE PENALTY CALCULATION WORKSHEET

To Begin: Enter Identification and Violation Information

After entering identifying information regarding the license or permit holder and complaint number, if any, indicate the violation addressed by this Penalty Calculation Worksheet (“PCW”). A violation is characterized as conduct that falls under a single statutory or rule citation. *Only one violation* should be entered on each PCW; in other words, each statute or rule that is violated will be recorded on a separate PCW. Cases involving multiple different violations will require several PCWs, which will be summed up at the end of the process for the final penalty calculation.

Enter the proper database tracking code corresponding to the violation for this PCW and the name of the offense in the Violation Code box (Example: “673—MB Possess. Un-

invoiced/Unauth AB”). Enter a narrative description of the violation in the Description of Offense box (Example: “Retailer purchased alcoholic beverages from out-of-state liquor store. Product does not have TABC label approval.”). The applicable statutes and rules will automatically populate in the third box. Check to ensure the citations are correct for the violation you have entered.

Step 1: Select the Base Penalty Amount

Go to Commission Rule 34.3, Figure 1 TAC §34.3(a). Find the statute or rule violated listed in the chart and select the base penalty amount corresponding to that violation.

Step 2: Determine the Number of Violation Events

The number of violation events may be based upon the number of discrete instances of conduct or the amount of time a violation continued. First, if the act or omission that violates the Code or rules is a discrete act or omission, count each separate act or omission, resulting in multiple instances of the same unlawful conduct. For example, if a licensee or permittee distributes noncompliant promotional materials, each store or event at which the promotional materials were used may be counted as a separate violation event.

If the violative act or omission is continuing in nature or occurs over an extended period, assess a number of violation events corresponding to the number of days, weeks, or months that the violation continued. For example, if a person fails to file a regularly required report or fails to respond to a request for information or documents, a violation event may be counted for each day the person fails to file the report or comply with the request after the applicable deadline.

Only count the number of violation events of a single statute or rule resulting from the *current* investigation, and do not include prior violations or notices of violations from prior incidents or years or violations of different statutes or rules. A history of prior violations, including prior administrative penalties for violations of the same or similar regulations or demonstrating a pattern of disregard for the law or agency rules, should instead be considered an aggravating factor under Step 3 of this policy.

Provide an explanation of the basis for the number of violations in the area provided (e.g., “Three violations are assessed, one for each location at which the prohibited activity occurred”). Multiply the Base Penalty by the Number of Violations. Enter this amount on the Step 1 Subtotal line (alt: Check to ensure the Step 1 Subtotal automatically calculated and filled in is correct).

Step 3: Consider Mitigating & Aggravating Circumstances

You may increase the penalty due to aggravating circumstances or conduct or discount it in recognition of mitigating circumstances or conduct. Use of mitigating and aggravating circumstances is entirely discretionary. You may consider any information provided to you by the respondent in this step.

Examples of mitigating and aggravating conduct include but are not limited to the factors listed below (considerations specifically authorized in Tex. Alco. Bev. Code §11.64(c) are marked with a *).

Mitigating:

- The violation could not reasonably have been prevented by the respondent by the exercise of due diligence*;
- The respondent was entrapped*;
- An agent, servant, or employee of the respondent violated the Code or a rule without the knowledge of the respondent*;
- The respondent did not knowingly violate the code or rules*;
- The respondent has demonstrated good faith, including taking actions to rectify the consequences of the violation and/or to deter future violations*;
- The violation was a technical one*;
- The respondent is a first-time offender of non-egregious violation;
- The respondent agrees to training of personnel;
- The respondent enters into a Compliance Agreement;
- The respondent has a clean violation history;
- The violation resulted from deception/fraud by an employee without the respondent's knowledge;
- The respondent was cooperative during the investigation;
- The respondent self-reported the violation;
- The respondent voluntarily ceased the violative conduct; and
- The respondent adhered to an agency-imposed cease and desist during the investigation.

Aggravating:

- The respondent is a repeat violator;
- The respondent knowingly and purposefully violated the law or rule;
- The respondent was uncooperative during the investigation;
- The respondent refused to provide records requested by the agency during the investigation;
- The respondent committed additional violations during the investigation through the final resolution;
- The respondent contributes to or encourages non-compliant behavior of an agent, servant, or employee;
- The respondent participated with additional license or permit holders as part of a larger scheme;
- The respondent disregarded an agency-imposed cease and desist order during investigation;
- The respondent exhibits an on-going culture of non-compliance or the behavior is systemic throughout the business entity;

- The respondent does not demonstrate pattern of voluntary compliance (e.g., refuses to accept agency training or Compliance Agreements); and
- The respondent engaged in the conduct despite clear direction from the agency.

Step 4. Economic Benefit

If a license or permit holder has previously violated the Code or rules, an economic benefit factor may be used in the assessment of subsequent violations. Determine whether the respondent has violated the Code or a commission rule in the past. If so, decide whether the economic benefits realized by the respondent *as a direct or indirect result of the violative conduct* may exceed the penalty calculated in the Step 3 subtotal. If so, contact your Regional Supervisor to begin the process of calculating the economic benefit. Only count the economic benefits of the particular violation you are assessing with this PCW, not overall economic benefits of all violations in the case.

In deciding whether the economic benefits realized by the respondent may exceed the penalty calculated in the Step 3 subtotal, consider the following list of questions:

1. Did the respondent avoid or delay capital outlay required by its license or permit, the Code, or a rule?
2. Did the respondent earn any interest by avoiding or delaying a capital outlay required by its license or permit, the Code, or a rule?
3. Did the respondent gain an economic advantage over its competitors as a result of the violation?
4. Did the respondent avoid or delay any operating costs as a result of the violation?
5. Did the respondent receive increased profits or revenue due to the violation?
6. Did the respondent avoid the purchase of a required bond?

These questions are intended to assist you in thinking about some common types of economic benefits but is not an exclusive list of the types of economic benefits that may be considered based upon the circumstances of the individual case.

Enter the costs avoided, costs delayed, and additional profits, if any, in the space provided. The Total EB (economic benefit) will be summed for you. Check to ensure the calculation appears to be correct. If the economic benefit you calculate exceeds the penalty amount under Subtotal 3, check the box next to “Total EB exceeds Step 3 Subtotal?” The economic benefit will automatically be added to the Step 3 subtotal and will appear in the TOTAL PENALTY box. Check to ensure that this calculation appears to be correct.

Days of Suspension in Lieu of Penalty

The number of suspension days in lieu of penalty will be automatically calculated by dividing the TOTAL PENALTY by the Base Penalty. If the days in lieu of penalty for all PCWs for all violations in a case add up to a non-whole number, the total number of days in lieu will be rounded up to the nearest whole number. As with the other automatic fields in the PCW, check to ensure this calculation appears correct.

For example, if the first violation type results in a calculation of 2.5 suspension days and the second violation type results in a calculation of 2 suspension days, the sum is 4.5 days. The final suspension days in lieu of penalty will be rounded up to 5 days. Only round up *after* summing all partial or full days from each worksheet.

Go on to the Next PCW

If you have a case with more than one violation type—in other words, there is a violation of another statute and/or rule—begin another PCW for each violation and repeat all of the steps. Be sure to consider only the violation for that PCW when thinking about the number of violation events, aggravating and mitigating circumstances, and economic benefits. When all PCWs for the case are complete, sum the TOTAL PENALTY and # of days in lieu of penalty boxes at the bottom of each page. Round up the days in lieu of penalty to the nearest whole number, if necessary. The resulting totals are the calculated penalty for this case. Use as many PCWs as necessary and never put more than one type of violation on one PCW. Use additional pages, as necessary, to explain your reasoning for any step.

Remember: A violation or case can be settled at any time and for any penalty amount or number of suspension days to which the executive director and respondent agree, regardless of any calculation under this methodology.