

JOHN R. MCGINLEY JR. ESQ., CHAIRMAN
ALVIN C. BUSH, VICE CHAIRMAN
ARTHUR COCCODRILL
MURRAY UFBERG, ESQ.
KIM KAUFMAN, EXECUTIVE DIRECTOR
MARY S. WYATTE, CHIEF COUNSEL



PHONE: (717) 783-5417
FAX: (717) 783-2664
irrc@irrc.state.pa.us
<http://www.irrc.state.pa.us>

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

June 8, 2005

Honorable Jonathan H. Newman, Chairman
Pennsylvania Liquor Control Board
502 Northwest Office Building
Harrisburg, PA 17124

Re: Regulation #54-61 (IRRC #2468)
Pennsylvania Liquor Control Board
Revisions to Codify Practices and Procedures Resulting from Legislative Amendments

Dear Chairman Newman:

Enclosed are the Commission's comments for consideration when you prepare the final version of this regulation. These comments are not a formal approval or disapproval of the regulation. However, they specify the regulatory review criteria that have not been met.

The comments will be available on our website at www.irrc.state.pa.us. If you would like to discuss them, please contact me at 783-5506.

Sincerely,

A handwritten signature in black ink, appearing to read "Kim", written over a horizontal line.

Kim Kaufman
Executive Director

wbg

Enclosure

cc: Honorable John C. Rafferty, Jr., Chairman, Senate Law and Justice Committee
Honorable Sean F. Logan, Minority Chairman, Senate Law and Justice Committee
Honorable Ron Raymond, Majority Chairman, House Liquor Control Committee
Honorable Robert C. Donatucci, Democratic Chairman, House Liquor Control Committee

Comments of the Independent Regulatory Review Commission
on
Pennsylvania Liquor Control Board Regulation #54-61 (IRRC #2468)
Revisions to Codify Practices and Procedures Resulting from Legislative
Amendments

June 8, 2005

We submit for your consideration the following comments that include references to the criteria in the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Pennsylvania Liquor Control Board (Board) must respond to these comments when it submits the final-form regulation. The public comment period for this regulation closed on May 9, 2005. If the final-form regulation is not delivered within two years of the close of the public comment period, the regulation will be deemed withdrawn.

CHAPTER 11. PURCHASES AND SALES

1. Section 11.176. Renewal. – Economic impact; Reasonableness; Need

Subsection (b)

Under 47 P.S. § 4-406(a)(3), a Sunday sales permit is permissible if “. . . sales of food and nonalcoholic beverages are equal to thirty per centum or more of the combined gross sales of both food and alcoholic beverages” In existing regulation (40 Pa. Code § 11.172(a)(4)), the Board established that this 30% limit must be met for “. . . at least 90 consecutive days during the 12 months immediately preceding the date of application” Proposed Subsection (b) establishes the procedure for a licensee to apply for a new Sunday sales permit if the licensee cannot meet the 30% limit and therefore does not qualify for renewal of the existing permit.

We agree that the regulation should address how a licensee can reapply for a Sunday sales permit. However, this proposed subsection adds a 120-day waiting period for licensees to reapply after the expiration of the previous permit. As demonstrated by the example, a licensee whose application does not meet the 30% ratio would lose its Sunday sales permit from March 1 until the reapplication is approved, presumably sometime in July.

We have the following concerns with the 120-day waiting period:

- A licensee could meet the statutory 30% ratio for 90 consecutive days during the several months between the date of application (November 30, 2003 in the example) and prior to expiration of the permit (February 28, 2004 in the example). Yet, the regulation would prohibit use of this data until the 120-day period expires (July 1, 2004 in the example).
- The 120-day waiting period would extend well into the summer tourist season.

- Since no Sunday sales of alcoholic beverages occur during the 120-day period, a licensee who remains open on Sundays would accumulate a higher overall ratio of nonalcoholic beverage and food sales.
- Renewal under this circumstance is considered differently than a new application.

We recommend that the regulation allow a licensee to reapply as soon as it can demonstrate 90 consecutive days of compliance with the 30% ratio in the most recent 12 months. Alternatively, the Board should explain why the 120-day waiting period is reasonable.

Subsection (c)

This subsection states:

When the licensee delays its renewal application, sales during the prior Sunday sales permit may not be used to qualify the applicant for a new Sunday sales permit.

Once again, it is not clear why a renewal in this circumstance is considered differently from a new application. We recommend that the regulation allow a licensee to reapply as soon as it can demonstrate 90 consecutive days of compliance with the 30% ratio in the most recent 12 months. Alternatively, the Board should explain why sales during the prior Sunday sales permit need to be excluded and why this is reasonable.

If the Board believes this provision is needed and reasonable, the language should be revised. The point where a licensee is considered to have delayed its renewal application is pivotal, but is not clear in the regulation. In the example immediately following this subsection, the licensee would apply on November 30, 2003 to renew a permit that expires February 28, 2004. Would a renewal application be considered delayed if it was filed after November 30, 2003 or after February 28, 2004? This will determine whether the “prior sales permit” would be the permit that expired in 2003 or 2004. This provision should clearly explain when a renewal application is “delayed” and thus what sales may not be included.

CHAPTER 13. PROMOTIONS

2. Section 13.27. Board participation in wine events. – Statutory Authority; Reasonableness.

We have two concerns with this section. First, we question the statutory authority for the reference to Board approval in Subsections (c) and (d). Section 2-215(e) of the Liquor Code (47 P.S. § 2-215(e) provides that the Board is authorized to participate in or sponsor wine events, not “approve” them. What does the Board contemplate by approval?

Second, concerning Subsection (d), we question the Board’s statutory authority to prohibit appeal of its decision to disapprove. Section 702 of the Administrative Agency Law (2 Pa.C.S. § 702) provides that “any person aggrieved by an adjudication of a Commonwealth agency who has a direct interest in such adjudication shall have the right to appeal” The

Board should remove this prohibition or explain why this provision is exempt from the appeal process.

3. Miscellaneous Clarity.

- Section 5.121(a) cross references “Section 494(14) of the Liquor Code (47 P.S. § 4-494(14)).” This reference should be corrected to Section 4-493(14).
- Section 11.13 references all of Section 305 of the Liquor Code (47 P.S. § 3-305). It appears that only Subsection (h) of the Code applies to gift cards. If so, the reference in the regulation should be more specific by referencing 47 P.S. § 3-305(h).
- Section 11.172(a)(4) is being amended to state “. . . at least 30%” To be consistent with 47 P.S. § 4-406(a)(3) and Section 11.171(b) of existing regulation, this provision should be amended to state “equal to 30% or more.”
- The example in Section 11.176 does not specify which subsection it demonstrates. It is placed after Subsection (c), but it appears to demonstrate Subsection (b). The regulation should clearly state which provision is being demonstrated.
- The terms “wine event” and “event” are used interchangeably in Section 13.27. The term “wine event” should be defined and used consistently.
- The amendments to Section 13.51(a) replace specific references to exceptions with general language. The Board should retain the specific reference to exceptions.
- Section 17.15(a) states when petitions to intervene may be filed. It should also include where they must be filed.

Facsimile Cover Sheet

Kristine M. Shomper
Administrative Officer



Phone: (717) 783-5419
Fax #: (717) 783-2664
E-mail: kriss@irrc.state.pa.us
Website: www.irrc.state.pa.us

INDEPENDENT REGULATORY REVIEW COMMISSION
333 MARKET STREET, 14TH FLOOR, HARRISBURG, PA 17101

2005 JUN -8 PM 3:38
INDEPENDENT REGULATORY REVIEW COMMISSION

To: Jim Maher
Agency: Liquor Control Board
Phone: 3-9454
Fax: 7-8820
Date: June 8, 2005
Pages: 5

RECEIVED
P.L.C.B.
05 JUN -8 PM 2:05
OFFICE OF CHIEF COUNSEL

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Liquor Control Board's regulation #54-61 (IRRC #2468). Upon receipt, please sign below and return to me immediately at our fax number 783-2664. You have made arrangements to pick up the original instead of mailing through interdepartmental mail. Thank you.

Accepted by: FSDuhl Date: 06/08/05