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

September 19, 2007

Patrick J. Stapleton, III, Chairman
Pennsylvania Liquor Control Board
502 Northwest Office Building
Harrisburg, PA 17124

Re: Regulation #54-63 (IRRC #2613)
Pennsylvania Liquor Control Board
License Application and Management Contracts

Dear Chairman Stapleton:

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.

Sincerely,

Kim Kaufman
Executive Director

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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 Robert C. Donatucci, Majority Chairman, House Liquor Control Committee
Honorable Ron Raymond, Minority Chairman, House Liquor Control Committee

Comments of the Independent Regulatory Review Commission

on

Pennsylvania Liquor Control Board Regulation #54-63 (IRRC #2613)

License Application and Management Contracts

September 19, 2007

We submit for your consideration the following comments on the proposed rulemaking published in the July 21, 2007 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Liquor Control Board (Board) to respond to all comments received from us or any other source.

1. Determining whether the regulation is in the public interest.

Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b) directs this Commission to determine whether a regulation is in the public interest. When making this determination, the Commission considers criteria such as economic or fiscal impact and reasonableness. To make that determination, the Commission must analyze the text of the proposed rulemaking and the reasons for the new or amended language. The Commission also considers the information a promulgating agency is required to provide in the regulatory analysis form (RAF) pursuant to § 745.5(a) of the RRA.

The explanation of the regulation in the Preamble and the information contained in the RAF is not sufficient to allow this Commission to determine if the regulation is in the public interest. More specifically, there is no detailed fiscal impact and cost benefit analysis in the RAF. Without this information, we cannot determine what fiscal impact this proposal will have on the regulated community and whether the regulation is in the public interest. In the Preamble and RAF submitted with the final-form rulemaking, the Board should provide more detailed information as required under §745.5(a) of the RRA.

2. Section 1.1. Definitions. - Clarity:

Merchant

The definition of "merchant" includes terms that are not defined in statute or regulation. The terms include: importer; brewery; vendor and spirits. We recommend that these terms be defined. Also, a comma should be added between the terms "limited winery" and "brewery."

Pecuniary Interest

The definition of "pecuniary interest" includes the phrase "the capability of a person." This term is vague, and clarification is necessary in the final-form regulation. The definition also states that there is a rebuttable presumption of a pecuniary interest "when a person controls a **substantial portion** of the proceeds of the licensed business." (Emphasis added.) The Board needs to specify what constitutes a "substantial portion."

Applicant

The term "applicant" is used in Sections 3.8 (a) and (b), 3.142 (a) and (b), and 11.143 (c) and (d); however, it is not defined. The Board should add a definition for this term to this section.

3. Section 1.5. Reputation: Use of criminal and citation history. - Implementation procedures; Clarity.

Subsection (b) states that the Board "may" consider the reputation of stockholders, directors, officers, managers or members when considering the reputation of a corporation, partnership, limited liability company or other business entity. The term "may" connotes that the Board can consider these factors "at its discretion." However, the regulation does not include the circumstances under which the Board would not consider the reputation of the stockholders, directors, officers, managers or members. The Board should either specify when it would consider the reputations of the parties listed or change "may" to "will."

4. Section 3.8. Certificate of completion; letter of authority. - Clarity.

Subsection (a) describes the documentation issued and resulting operating authority when the Board approves an application for new license, transfer of a license or extension of premises. We raise two concerns.

First, with respect to the type of documentation, the phrase "certificate of approval" has been changed to "letter of operating authority." Why was the terminology changed and what is the difference between a certificate of approval and a letter of operating authority? How will this change impact the regulated community?

Second, the subsection also states that the letter of operating authority "may list conditions the applicant shall complete before a license is issued." The final-form rulemaking should specify what these "conditions" are.

5. Section 3.141. Management contracts. - Clarity.

The phrases "management contract" and "management services" are used throughout Subchapter M of Chapter 3. The final-form rulemaking should include definitions for these terms.

6. Section 3.142. Reporting. - Consistency with the Statute; Implementation procedures; Reasonableness; Need; Clarity.

Subsection (a)

This subsection describes the information that "licensees or applicants for licenses that have management contracts shall file...." We have two concerns.

First, in addition to licensees or applicants for licenses that have management contracts, it is unclear from the existing language whether licensees that *currently* have management contracts must file the necessary information as well. The regulation should provide further clarification of the appropriate persons required to file.

Second, the regulation does not specify *with whom* these persons are required to file. Would this information be included on the forms to be filed? The final-form regulation should direct to whom filing is necessary.

Subsection (a)(2)

Subsection (a)(2) requires the filing of tax certification and clearance statements for the person providing management services. We have two questions. First, the subsection of the Liquor Code (Code) to which this subsection refers (47 P.S. § 4-477(g)) states that: “[t]his section (§ 4-477) shall also be applicable to any management company utilized by the **applicant.**” (Emphasis added.) Furthermore, this entire section of the Code refers only to the filing of various information by an “**applicant** for the grant, renewal, or transfer of any license.” (Emphasis added.) As mentioned above, we question whether the proposed Subsection (a) applies to existing licensees that *currently* have management contracts. If the section does apply, what is the Board’s statutory authority for requiring a licensee to file tax certification and clearance statements on behalf of the management company, since the Code only permits *applicants, and management companies utilized by the applicant* to file such statements? See 47 P.S. § 4-477 (a).

Subsection (a)(2) also mentions forms “supplied by the **Departments of Revenue and Labor and Industry.**” (Emphasis added.) However, § 4-477(a) of the Code only mentions “forms approved by the Department of Revenue.” Furthermore, this section of the Code requires various types of information to be supplied not only from the Departments of Revenue and Labor and Industry (Departments), but also from the Office of the Attorney General. Why is the regulation inconsistent with the Code, both in the type of forms to be used and the agencies from which information is needed?

Subsection (c)

Subsection (c) requires “licensees filing notice of the establishment or modification of a management contract to pay a fee of \$350.” We have four questions. First, what is the Board’s statutory authority for prescribing such a fee? Second, what is the basis for the fee of \$350? Third, to whom must the fee be paid? Fourth, what is meant by “modification of a management contract?” Since there are varying degrees of “modification” (for example, something as simple as changing an address versus a more substantive modification, such as changing the work required), the regulation should specify the type of contract modification necessary before a licensee must pay a fee.

7. Section 3.143. Board approval and licensee responsibility. - Statutory authority; Implementation procedures; Clarity.

Subsection (a)

This subsection discusses when the Board can refuse involvement of a person providing management services. However, it does not explain the review and approval process for management service providers. We have five questions. First, what is the Board’s statutory authority for requiring licensees or applicants for licenses to obtain Board approval for management contracts? Second, can a licensee enter into a management contract before Board approval is granted? Third, how and when will a licensee be notified of the decision of the Board? Fourth, can the Board deny or disapprove a management contract? Finally, if a management contract is not approved, will a licensee have appeal rights?

Subsection (a)(2)

Subsection (a)(2) refers to "facts upon which the Board could refuse a person's involvement in the license." The final-form regulation should include the specific criteria that the Board will consider when reviewing a management contract.

Subsection (b)

This subsection provides that "the licensee's use of a management company will not affect the licensee's responsibility for violations of the Liquor Code or this title." The intent of this subsection is unclear. Do licensees act in a supervisory role and are therefore liable for violations of the Code or this title by the management company?

8. Section 5.51. Cleaning of malt or brewed beverage dispensing systems. - Clarity.

Malt or brewed beverage dispensing system

The term "malt or brewed beverage dispensing system" is used in Sections 5.51(a), (b), and (c), but it is not defined. This term is also used in Sections 5.52, 5.53 and 5.54. The Board should define this term in Subchapter D of Chapter 5.

Subsection (b)

Subsection (b) requires that the method of cleaning must leave the entire malt or brewed beverage dispensing system in a "clean and sanitary condition." However, the regulation does not indicate when a system is determined to be in a "clean and sanitary condition." The Board should define this term. Furthermore, is the Board the appropriate agency to develop this standard, or should it be created in conjunction with another agency, such as the Department of Health?

9. Section 5.53. Pressure maintenance. - Clarity.

This Section refers to the introduction of "contaminants" to the malt or brewed beverage dispensing system. What would be considered a "contaminant"?

10. Section 5.54. Responsibility for condition of equipment. - Clarity.

As with the phrase "clean and sanitary condition" in Section 5.51 (b), the proposed regulation does not indicate what constitutes "unsanitary conditions" for a malt or brewed beverage dispensing system, as mentioned in Section 5.54. The Board should also define this term.

11. Section 11.143. Merchant tax responsibility. - Statutory authority; Clarity.

According to the RAF (Number (11)), the intent of this Section is to extend the Commonwealth's Contractor Responsibility Program to "merchants that sell liquor and liquor accessories to the Board." However, this entire section contains language similar to that in § 4-477 of the Code, which relates to "applicants for the grant, renewal or transfer of any license," not tax liability (Emphasis added.) What is the Board's statutory authority for applying these provisions to merchants? Do these provisions apply to currently licensed merchants or just "applicants?" How do these provisions relate to the concept of "merchant tax responsibility?" The term "merchant tax responsibility" should also be defined in the regulation.

Subsection (a)

Subsection (a) refers to information that must be filed by a "merchant not already licensed by the Board." Does this mean that licensed merchants do not have to file such information? Does the

Board have this information on file for all currently licensed merchants? This should be clarified in the final-form regulation.

Subsection (b)

Under this subsection, a merchant will be required to “waive any confidentiality with respect to tax information ... in the possession of the Department of Revenue, Office of the Attorney General, or the Department of Labor and Industry....” Can the Board require a merchant to waive confidentiality requirements of information that is controlled by and in the possession of other agencies? Does the Board have the authority to request tax information regarding merchants from other agencies?

Subsection (c)

Under this subsection, the Board will request tax information regarding the applicant from the Departments, as well as the Office of the Attorney General. What statutory authority does the Board have to require these agencies to comply with its request for information?

Subsection (e)

While subsection (c) states that the Board will “review” the tax status of the applicant, subsection (e) states that the Departments will notify the Board if an applicant is not in compliance “with the provisions in this section.” Who ultimately makes the decision regarding compliance? Also, it is unclear which “provisions” must specifically be complied with. These issues should both be clarified in the final-form regulation.

Consistency of Terms

The entire section uses the term “merchant” and “applicant” interchangeably. For consistency, the Board should use the same word throughout.

12. Section 13.201. Definitions. - Clarity.

Sponsor

The definition of “sponsor” includes terms that are not defined in statute or regulation. The terms include: importer and vendor. We recommend that these terms be defined.

13. Section 13.228. Disposal and storage of partially-used liquor and empty containers. - Reasonableness.

Subsection (a) states that partially-consumed liquor containers may not be placed in storage at a store for more than 15 days. What is the basis for the 15-day storage limit?

14. Section 17.5. Subpoenas. - Implementation procedures; Clarity.

Subsection (a)

The proposed regulation addresses the process for issuance of subpoenas “except for subpoenas issued upon the Board’s own motion.” When would a subpoena be issued on the Board’s own motion, and what is the process for such issuance?

Facsimile Cover Sheet



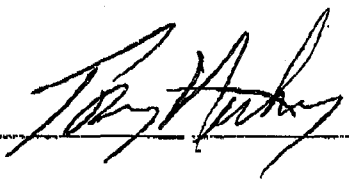
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Pages: 7

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OFFICE OF CHIEF COUNSEL

Comments: We are submitting the Independent Regulatory Review Commission's comments on the Liquor Control Board's regulation #54-63 (IRRC #2613). 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: 

Date: 9/19/07

Fax5

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