

2613



IN THE PUBLIC INTEREST

## PENNSYLVANIA LIQUOR CONTROL BOARD

Harrisburg, Pennsylvania 17124-0001

September 29, 2009

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Kim Kaufman  
 Executive Director  
 Independent Regulatory Review Commission  
 333 Market Street, 14<sup>th</sup> Floor  
 Harrisburg, PA 17101

**RE: Regulation #54-63 (IRRC #2613)  
 License Application and Management Contracts**

Dear Director Kaufman:

By its letter to the Pennsylvania Liquor Control Board's ("Board") Chairman, Patrick J. Stapleton, III, dated September 22, 2009, you noted that the Independent Regulatory Review Commission ("IRRC") has suggested revisions to the final-form Regulation No. 54-63, referenced above, which was submitted for review on August 20, 2009. These suggestions were discussed between representatives of IRRC and this office on September 17, 2009. Based upon the suggested changes to the final-form regulations, the Board hereby requests that the time for review of the regulations be tolled in accordance with section 5.1(g) of the Regulatory Review Act [71 P.S. § 745.5a(g)].

Tolling will permit consideration by IRRC and the Standing Committees of the changes being considered by the Board in response to IRRC's suggested changes to the final-form regulations. These suggested changes, and a brief description of the revisions being considered by the Board and how those revisions will satisfy IRRC's concerns, are provided below, in accordance with section 307.5 of IRRC's regulations [1 Pa. Code § 307.5]:

- IRRC asked for more detailed information pertaining to fiscal impact and cost-benefit analysis in the Regulatory Analysis Form and the Preamble, so that it is clear whether the regulations are in the public interest. The Board intends to revise both the Regulatory Analysis Form and the Preamble to

reflect any expected costs or anticipated savings to be realized by the regulated community (e.g., licensees of the Board), as well as local and state governments, for each of the various regulatory changes being implemented. It is hoped that this additional information will allow IRRC to determine whether the regulations are in the public interest.

- IRRC asked for a more complete explanation, in the Preamble, of the reasons certain portions of the Board's proposed regulations have been withdrawn in the final-form of the regulations. The Board intends to revise the Preamble to explain why portions of sections 1.1, 3.8(a), 3.142(a)(2) and 11.144, were deleted from the proposed regulations. For example, with respect to section 11.144, the Board will explain that a change in the Commonwealth's administrative procedures regarding the payment of Commonwealth vendors resolved the issues to be addressed by the proposed regulations, hence the proposed regulation was withdrawn in its entirety.
- IRRC indicated that the numbering of certain sections in the final-form regulations conflicts with the numbering in the *Pennsylvania Bulletin*. After consulting with the Legislative Reference Bureau, the Board acknowledges that, for example, section 3.140 as cited in the proposed regulations, should have been changed to section 3.141 in the final-form regulations. Accordingly, the Board intends to correct the numbering of the sections at issue to correspond with the numbering provided in the *Pennsylvania Bulletin*.
- IRRC expressed concerns regarding the Board's revised definition of the term "pecuniary interest" as contained in section 1.1 of the final-form regulations. First, the definition describes the interest as one that "sounds in" the attributes of proprietorship, and while IRRC acknowledged that this phrase comes from recent case law, it expressed concern that this alone does not adequately explain what a "pecuniary interest" is. Also, the definition includes a ten percent (10%) threshold for a rebuttable presumption of this interest, but IRRC expressed concern that the Board never explains the rationale for the percentage. The Board intends to amend the Preamble to fully explain the rationale for the definition of "pecuniary interest" contained

in the final-form regulations. Specifically, the Board intends to explain that the proposed definition incorporates the factors specified in the E-J Westside decision: participation in the profits of the licensed business and exercising *substantially* all right to control the business. Further, the Board intends to explain that the ten percent (10%) threshold for the participation in the proceeds of the business has been the administrative standard utilized by the Board for at least the last two (2) decades.

- IRRC noted that the title of section 3.1 is erroneously capitalized in the final-form regulations and that a period was omitted after the “1” in 3.1. The Board intends to correct these formatting errors in the text of section 3.1 in the final-form regulations.
- IRRC asked for clarification regarding whether, under subsection 3.142(c), the Board would require the payment of the three hundred fifty dollar (\$350.00) fee for any modification to a management contract (even a change of address). IRRC recommended that the Board amend the Preamble and the regulation to explain the circumstances under which the Board would not require payment of the fee. The Board intends to amend the Preamble and section 3.142 to clarify that licensees submitting minor modifications to management contracts (e.g., a change in corporate address or a change in corporate name), which do not include any substantive changes to the terms of the contract, will not be required to pay the three hundred fifty dollar (\$350.00) fee. It is hoped that this will clarify, for the benefit of the regulated community, the circumstances under which the fee must be paid.
- IRRC commented that section 3.144 of the final-form regulations does not set forth a specific time frame for the Board to notify an applicant or licensee of the Board’s decision regarding approval of a management contract. In addition, IRRC expressed concerns that neither the Preamble nor the regulations discuss the “facts” upon which the Board could refuse a person’s involvement in a management contract. Further, the IRRC noted some formatting errors in language added in the final-form regulations. The Board intends to amend the Preamble to include an explanation for not providing in the regulations a specific time frame for Board approval. More

specifically, the Board will explain that the approval or rejection of a management contract represents an after-the-fact event (i.e., the licensee has already engaged the services of the management company) and therefore does not adversely affect the operation of the licensed business, as the licensee can continue to utilize the management company pending Board approval. Moreover, the Board intends to amend the Preamble to make clear that the intent of the regulation is to put the regulated community on notice that the Board will examine the qualifications of a management company in the same manner that it examines the qualifications of a licensee, utilizing the criteria specifically provided in the Liquor Code. Further, the Board will correct the formatting errors contained in section 3.144. It is hoped that these changes will address IRRC's specific concerns that the Preamble does not fully explain the rationale behind this specific proposed regulation to the regulated community.

- The final-form regulation includes the term "definition" in the title of section 5.51, which, IRRC noted, is not standard procedure unless the section deals specifically with definitions. Also, IRRC commented that the text of subsection (a) needs to be reformatted, as well as that of (c)(1). Finally, IRRC noted that the Board's responses to its comments referenced a copy of a memo from the Department of Health, however it was not included in the final-form regulatory package received by IRRC. The Board intends to correct the formatting in both the title and the language of the section 5.51, and resubmit the final-form regulations with a copy of the memo from the Pennsylvania Department of Health dated March 18, 2005.
- Finally, IRRC noted that there is an extraneous period in the last line of section 5.53, between the words "contaminant" and "SUCH." The Board intends to delete the extraneous period in the final-form of the regulations.

It is hoped that the above-referenced proposed changes to the final-form regulations will resolve the issues identified by IRRC in its letter dated September 22, 2009. Please advise whether you need any further information in evaluating this request to toll the time for review of the regulations in accordance with section

5.1(g) of the Regulatory Review Act [71 P.S. § 745.5a(g)]. Should you have any questions, please contact Executive Deputy Chief Counsel Rodrigo Diaz or Deputy Chief Counsel Christopher Herrington at (717) 783-9454.

Very truly yours,



FAITH S. DIEHL  
CHIEF COUNSEL

cc: Honorable John Rafferty, Chairman, Senate Committee on Law and Justice  
Honorable Sean Logan, Democratic Chairman, Senate Committee on Law  
and Justice  
Honorable Robert Donatucci, Chairman, House Committee on Liquor  
Control  
Honorable John Taylor, Republican Chairman, House Committee on Liquor  
Control  
Robert A. Mulle, Chief Deputy Attorney General  
Mr. Mark Meyer, Senate Committee on Law and Justice  
Mr. Ken Varhola, Senate Committee on Law and Justice  
Ms. Marcia Lampman, Executive Director (R), House Committee on Liquor  
Control  
Ms. Lynn Benka-Davies, Executive Director (D), House Committee on  
Liquor Control  
Ms. M. Lois Hein, Governor's Office of the Budget  
Barbara Adams, Governor's Office of General Counsel  
Ms. Donna Cooper, Governor's Office  
Major John P. Lutz, Pennsylvania State Police, Bureau of Liquor Control  
Enforcement

**TRANSMITTAL SHEET FOR REGULATIONS SUBJECT  
TO THE  
REGULATORY REVIEW ACT**

**I.D. NUMBER:** 54-63 (IRRC #2613)  
**SUBJECT:** License Application and Management Contracts  
**AGENCY:** Liquor Control Board

**TYPE OF REGULATION**

- Proposed Regulation
- Final Regulation
- Final Regulation with Notice of Proposed Rulemaking Omitted
- 120-day Emergency Certification of the Attorney General
- 120-day Emergency Certification of the Governor
- Delivery of Letter Requesting Tolling

**FILING OF REGULATION**

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
9-29-09	(1)	HOUSE COMMITTEE ON LIQUOR CONTROL ( <i>Democrat</i> )
9/29/09	(2)	( <i>Republican</i> )
9-29-09	(3)	SENATE COMMITTEE ON LAW & JUSTICE ( <i>Republican</i> )
9-29-09	(4)	( <i>Democrat</i> )
9/29/09	(5)	INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____ (6)	ATTORNEY GENERAL
_____	_____ (7)	LEGISLATIVE REFERENCE BUREAU