

Regulatory Analysis Form

(Completed by Promulgating Agency)



IRRC

Independent Regulatory Review Commission

SECTION I: PROFILE

(1) Agency:

Pennsylvania Liquor Control Board

(2) Agency Number: 054

Identification Number: 63

IRRC Number: **2613**

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(3) Short Title: Management Contracts, Cleaning of Draft Beer Systems, Procedures for Wine and Spirits Tastings in Stores, and Administrative Changes.

(4) PA Code Cite:

40 Pa. Code

(5) Agency Contacts (List Telephone Number, Address, Fax Number and Email Address):

Primary Contact: James F. Maher (717) 783-9454
Pennsylvania Liquor Control Board
401 Northwest Office Building
Harrisburg, Pennsylvania 17124
FAX: (717) 787-8820
Email: ra-lblegal@state.pa.us

Secondary Contact: Christopher L. Herrington (717) 783-9454

(6) Primary Contact for Public Comments (List Telephone Number, Address, Fax Number and Email Address) – Complete if different from #5:

(All Comments will appear on IRRC'S website)

(7) Type of Rulemaking (check applicable box):

- Proposed Regulation
- Final Regulation
- Final Omitted Regulation

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- Emergency Certification Regulation;
- Certification by the Governor
- Certification by the Attorney General

(8) Briefly explain the regulation in clear and nontechnical language. (100 words or less)

These regulations clarify that when examining the reputation of a business entity applicant, the Board will consider the reputation of its stockholders, directors, officers, managers and members. The regulations define "pecuniary interest," and they establish standards for the review of management contracts. New rules, reflecting new technology, are set for cleaning draft beer systems. Product tastings in wine and spirits stores are simplified. Hearing procedures related to issuance of subpoenas and the time for filing protests are amended.

(9) Include a schedule for review of the regulation including:

- A. The date by which the agency must receive public comments: 8-20-2007
- B. The date or dates on which public meetings or hearings will be held: None Held
- C. The expected date of promulgation of the proposed regulation as a final-form regulation: 8-20-2009
- D. The expected effective date of the final-form regulation: November, 2009
- E. The date by which compliance with the final-form regulation will be required: Immediately
- F. The date by which required permits, licenses or other approvals must be obtained: _____

(10) Provide the schedule for continual review of the regulation.

Review of the regulations is ongoing and any changes to the regulation will be through the rulemaking process.

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SECTION II: STATEMENT OF NEED

(11) State the statutory authority for the regulation. Include specific statutory citation.

Pennsylvania Liquor Code, section 207(i) [47 P.S. § 2-207(i)].

(12) Is the regulation mandated by any federal or state law or court order, or federal regulation? Are there any relevant state or federal court decisions? If yes, cite the specific law, case or regulation as well as, any deadlines for action.

The regulations are not mandated by any federal or state law or court order or federal regulation.

(13) State why the regulation is needed. Explain the compelling public interest that justifies the regulation. Describe who will benefit from the regulation. Quantify the benefits as completely as possible and approximate the number of people who will benefit.

The Board has found with increasing frequency that holders of hotel licenses, and to a somewhat lesser degree, holders of restaurant and eating place malt beverage licenses are using management companies to carry out day-to-day activities. The Liquor Code requires that the licensee itself be the only party that is “pecuniarily interested” in the license. [47 P.S. §§ 4-404, 436(f)] “Pecuniary interest” is a term that has been used in Pennsylvania’s liquor laws since the late 1880s. It has been interpreted to mean that the licensee, and only the licensee, will control the sale and service of alcoholic beverages in the licensed premises. The Liquor Code was amended in 2002 to permit management companies to operate under agreements so long as the licensee remained the party ultimately responsible for operation of the licensed establishment. These regulations codify the standards that the Board has been applying in its review of such management agreements. The regulations also establish a fee for the Board’s labor-intensive review of such management agreements. These final-form regulations should be helpful to the regulated industry in their drafting of management agreements, so that they understand what criteria the Board examines when reviewing such contracts in deciding whether to approve or reject them.

Another significant change in these regulations involves the procedures for cleaning and maintaining systems for serving draft beer. The advance of technology and consumer demand for a wider selection of draft beer has led to substantial changes in the equipment providing this product to the public. While technology has changed significantly, the Board’s Regulations have not, causing uncertainty and, to a certain extent, inhibiting the use of technology that maintains the cleanliness of

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draft beer systems for a longer period of time. These regulations are intended to reflect the changes in technology and to make enforcement of the Board's cleaning standards more effective.

Another significant change in these regulations reflects the response by the Board and the manufacturers of beverage alcohol to customer demand for new beverage options. The regulations will permit beverage alcohol representatives to transport samples from outside of Pennsylvania to the state for tasting purposes. It will also facilitate the process of conducting "tasting events" in the Board's wine and spirits stores. "Tasting events" are educational programs offered to the public to allow consumers to "try before they buy" new or different wines or spirits products. It is hoped that these regulatory changes will continue the Board's initiative to become more responsive to the needs and interests of its customers.

The remaining regulations in this package address administrative changes that will facilitate and improve the Board's administration of the Liquor Code. Each of these changes as presented responds to the public interest in a regulated alcohol beverage industry in Pennsylvania while keeping pace with changes in the dynamic marketplace for alcohol beverages.

(14) If scientific data, studies, references are used to justify this regulation, please submit material with the regulatory package. Please provide full citation and/or links to internet source.

No scientific data, studies, references were used to justify this regulation.

(15) Describe who and how many will be adversely affected by the regulation. How are they affected?

The Commonwealth may lose revenue on purchases of samples for in-store tastings in an unlikely, but worst-case scenario, if sponsors of in-store tastings universally choose not to purchase their products from the Board, as permitted by these regulations. The estimated loss of gross revenue would be approximately two hundred thousand dollars (\$200,000.00) annually.

(16) List the persons, groups or entities that will be required to comply with the regulation.

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Approximate the number of people who will be required to comply.

Compliance will be required of licensees using management companies, upgrading draft beer systems, and those having hearings before the Board. Other changes will make minor modifications in how licensees are regulated.

SECTION III: COST AND IMPACT ANALYSIS

(17) Provide a specific estimate of the costs and/or savings to the **regulated community** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

The regulated community is not expected to incur new costs. The modification of regulations requiring weekly cleaning of beer dispensing systems may afford licensees some savings.

(18) Provide a specific estimate of the costs and/or savings to **local governments** associated with compliance, including any legal, accounting or consulting procedures which may be required. Explain how the dollar estimates were derived.

Local governments are not expected to incur new costs or realize new savings.

(19) Provide a specific estimate of the costs and/or savings to **state government** associated with the implementation of the regulation, including any legal, accounting, or consulting procedures which may be required. Explain how the dollar estimates were derived.

Cost: If sponsors of in-store tastings all choose not to purchase their products from the Board, as permitted by these regulations, the estimated loss of gross revenue is approximately two hundred thousand dollars (\$200,000.00) annually.

(20) In the table below, provide an estimate of the fiscal savings and costs associated with implementation and compliance for the regulated community, local government, and state government for the current year and five subsequent years.

	Current FY	FY +1	FY +2	FY +3	FY +4	FY +5
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	Year	Year	Year	Year	Year	Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community						
Local Government						
State Government						
Total Savings	N/A	N/A	N/A	N/A	N/A	N/A
COSTS:						
Regulated Community						
Local Government						
State Government						
Total Costs						
REVENUE LOSSES:						
Regulated Community						
Local Government						
State Government	200,000	200,000	200,000	200,000	200,000	200,000
Total Revenue Losses	200,000	200,000	200,000	200,000	200,000	200,000

(20a) Provide the past three year expenditure history for programs affected by the regulation.

Program	FY -3	FY -2	FY -1	Current FY
	N/A	N/A	N/A	N/A

(21) Explain how the benefits of the regulation outweigh any cost and adverse effects

It is believed that the lost revenues for tasting samples not purchased in Pennsylvania will be offset by increased sales of more profitable, high-end products

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(22) Describe the communications with and input from the public and any advisory council/group in the development and drafting of the regulation. List the specific persons and/or groups who were involved.

Input has been received from representatives of services that clean draft beer dispensing systems, and from those who supply and install maintenance systems for such systems. Those providing input include Curtis Mason, Robert Stosic, and Robert Kerrigan.

(23) Include a description of any alternative regulatory provisions which have been considered and rejected and a statement that the least burdensome acceptable alternative has been selected.

No nonregulatory alternatives were considered. The least burdensome alternative has been selected in respect to each regulatory change included herein.

(24) Are there any provisions that are more stringent than federal standards? If yes, identify the specific provisions and the compelling Pennsylvania interest that demands stronger regulations.

None of the provisions contained in these regulations are more stringent than federal standards.

(25) How does this regulation compare with those of other states? How will this affect Pennsylvania's ability to compete with other states?

The Pennsylvania system of liquor regulation is unique. Meaningful comparison to other states is not possible. These regulatory changes will not place Pennsylvania at a competitive disadvantage with other states.

(26) Will the regulation affect any other regulations of the promulgating agency or other state agencies? If yes, explain and provide specific citations.

No effect on the existing or promulgated regulations of the Board is anticipated. These regulations should not affect the regulations of other agencies.

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(27) Submit a statement of legal, accounting or consulting procedures and additional reporting, recordkeeping or other paperwork, including copies of forms or reports, which will be required for implementation of the regulation and an explanation of measures which have been taken to minimize these requirements.

The Board's forms on disclosure of management agreements may be changed. No other paperwork requirements will be significantly affected.

(28) Please list any special provisions which have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, elderly, small businesses, and farmers.

No special provisions have been developed, as it is not believed that such groups will be affected by the regulations.

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved
as to form and legality. Attorney General

BY _____
(DEPUTY ATTORNEY GENERAL)

DATE OF APPROVAL

Check if applicable
Copy not approved. Objections
attached.

Copy below is hereby certified to
be a true and correct copy of a
document issued, prescribed or
promulgated by:

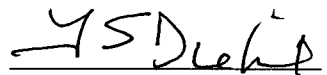
Pennsylvania Liquor Control Board
(AGENCY)

DOCUMENT/FISCAL NOTE
NO. 054- 063

DATE OF ADOPTION: August 20, 2009

BY: 
TITLE: Chairman
(Executive Officer, Chairman or
Secretary)

Copy below is hereby approved
as to form and legality. Executive
or Independent Agencies:

BY: 

August 20, 2009
DATE OF APPROVAL

(Chief Counsel, Independent
Agency)

Check if applicable. No
Attorney General approval or
objection within 30 days after
submission.

TITLE 40—LIQUOR

CHAPTER 1. GENERAL PROVISIONS

The following sections were amended:

§ 1.1 Definitions.

§ 1.5 Reputation: Use of criminal and citation history.

CHAPTER 3. LICENSE APPLICATONS

The following sections were amended:

3.1 Definitions

§ 3.8. Certificate of Completion; [certificate of approval;] letter of authority.

The following Subchapter and sections (underlined) were added:

Subchapter M. MANAGEMENT CONTRACTS

§ 3.140. Management Contracts.

§ 3.142. Reporting.

§ 3.144. Board approval and licensee responsibility.

CHAPTER 5. DUTIES AND RIGHTS OF LICENSEES

The following sections were amended:

§ 5.23. Appointment of managers.

§ 5.91. Required report.

The following sections were amended:

§ 5.51. Definition. Cleaning of [coils, tap rods and connections] malt or brewed beverage dispensing systems.

§ 5.52. Certificate or record required.

§ 5.53. Pressure maintenance.

§ 5. 54. Responsibility for condition of equipment.

CHAPTER 7. TRANSFER, EXTENSION, SURRENDER, EXCHANGE AND SUSPENSION OF LICENSES

The following section was amended:

§ 7.2. Transfers of ownership.

CHAPTER 11. PURCHASES AND SALES

The following section (underlined) was added:

§11.144. Merchant tax responsibility.

CHAPTER 13. PROMOTION

The following sections were amended:

§ 13.43 Interior display.

§ 13.51 General prohibition

§13.201. Definitions

§13.211 Tasting events

§13.223. Procurement of wine or spirits, or both.

§13.228. Disposal and storage of partially-used liquor and empty containers.

CHAPTER 17. SPECIAL RULES OF PRACTICE AND PROCEDURE FOR MATTERS BEFORE
THE BOARD

The following sections were amended:

§17.5. Subpoenas.

§17.7. Exhibits.

§17.13 Protests/intervention procedure

Title 40 -- Liquor

The Pennsylvania Liquor Control Board (Board), under the authority of Section 207(i) of the Pennsylvania Liquor Code [47 P.S. §2-207(i)], proposes to amend 40 Pa. Code, Chapters 1, 3, 5, 7, 11, 13 and 17.

Purpose:

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on May 17, 2007, the Pennsylvania Liquor Control Board submitted a copy of the notice of proposed rulemaking, published at 37 Pa.B. 3418, to the Independent Regulatory Review Commission (IRRC) and the Chairpersons of the House Committee on May 17, 2007 and Senate Committee on May 17, 2007 for review and comment.

Several of the changes to the Board's Regulations that are being pursued pertain to the use of management companies by licensees and to the level of interest in the licensed business that such management companies may have. The Board has found with increasing frequency that holders of hotel licenses, and to a somewhat lesser degree, holders of restaurant and eating place malt beverage licenses, are using management companies to carry out day-to-day activities. While Act 10 of 2002 amended the Liquor Code to acknowledge and regulated this process, the Liquor Code still requires that the licensee itself be the only party that is "pecuniarily interested" in the license. [47 P.S. §§ 4-404, 436(f)]

Unfortunately, the term "pecuniarily interested" is not defined in the Liquor Code and the case law is somewhat scant. This presents a problem to the industry as it tries to draft agreements that would allow them to avail themselves of the opportunity to use a management company in a manner that does not violate the Liquor Code. When analyzing a management agreement, the Board has been guided by the Commonwealth Court decision in Appeal of: E-J Westside Inn Corp., 449 A.2d 93 (Pa. Cmwlth. 1981). In that case, the Commonwealth Court held that a party has a pecuniary interest in a license when it participates in the profits of the business and exercises substantial control over the business.

Thus, the purpose of the Regulation is to let the licensing community know how the Board interprets the Commonwealth Court's decision and the factors that the Board will consider when reviewing an arrangement between the licensee and a third party.

In addition, the Regulations are amended to notify the licensing community of the process that must be followed in order to notify the Board that a management company is being used.

Another area of change to the Board's Regulations involves the procedures for cleaning and maintaining systems for serving draft beer. This change reflects the fact that changes in technology allow for cleaning methods that do not require weekly cleanings and will encourage licensees to adopt these more modern methods.

Another area of change to the Board's Regulations pertains to tastings that are conducted at state stores. Such tastings were first authorized by Act 15 of 2003. In response, the Board drafted Regulations to govern such tastings. Having now conducted several years of tastings, the Board feels that changes to those Regulations will make the tastings more efficient and more consumer-friendly.

Another area of change to the Board's Regulations pertains to the information the Board considers when assessing an applicants reputation. The Regulation is being amended to reflect the fact that the Liquor Code contemplates a review of the persons associated with the licensee in addition to the licensee itself

The remaining regulations in this package address administrative changes that will facilitate and improve the Board's administration of the Liquor Code. Each of these changes as presented responds to the public interest in a regulated alcohol beverage industry in Pennsylvania while keeping pace with changes in the dynamic marketplace for alcohol beverages.

Summary of Amendments:

The regulatory amendments add one (1) new definition, establish regulations for management agreements, revise procedures for wine and spirits tastings in stores and revise rules of hearing procedure. Obsolete regulations about cleaning draft beer systems are updated. The following are summaries of the regulatory changes:

- The rulemaking defines the term "pecuniary interest."
- It clarifies that the reputation of stockholders, directors, officers and members of corporate or other business entity licensees will be considered in assessing the reputation of the licensee.
- It establishes rules and procedures for approval of management agreements and sets a fee for review of such agreements.
- It recognizes that licensees are using new technology to assure that malt or brewed beverage dispensing systems are clean.
- It codifies the Board's established practice that the purchase price for transfers of licenses that involve changes in ownership must be placed into escrow.
- It amends regulations on "tasting events" to clarify the amount of alcoholic beverages that may be given. It also allows sponsors of in-store tastings to import into Pennsylvania, products to be tasted rather than making them buy the products from the Board. It also allows partially-consumed bottles being used for tasting to be stored at wine and spirits stores, rather than requiring that they be discarded.
- The rulemaking amends hearing procedures related to issuance of subpoenas and the time for filing protests.

Affected Parties:

The regulations will affect licensees and applicants for licenses issued by the Board. It will affect anyone participating in a hearing before the Board.

Paperwork Requirements:

The regulatory amendments will not significantly increase paperwork for the agency or most of the regulated community.

Fiscal Impact:

In an unlikely, but worst-case scenario, if sponsors of in-store tastings universally choose not to purchase their products from the Board, as permitted by these regulations, the estimated loss of gross revenue would be approximately two hundred thousand dollars (\$200,000.00) annually.

Effective Date:

This regulation will become effective upon its publication in final form in the *Pennsylvania Bulletin*.

Public Comment/Contact Person:

Comments and questions should be addressed to James F. Maher, Assistant Counsel, Office of Chief Counsel, Pennsylvania Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001.

Regulatory Review:

Under section 5(c) of the Regulatory Review Act, IRRC and the Committees were provided with copies of the comments received during the public comment period, as well as other documents when requested. In preparing these final-form regulations, the Board has considered all comments from IRRC, the Committees and the public.

Under section 5.1(j.2) of the Regulatory Review Act, on _____ (blank) _____, these final-form regulations were (deemed) approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on _____ (blank) _____ and approved the final-form regulations.

P. J. Stapleton III
Chairman

ANNEX A
TITLE 40. LIQUOR
PART I. LIQUOR CONTROL BOARD
CHAPTER 1. GENERAL PROVISIONS

§ 1.1. Definitions.

The following words and terms, when used in this part, have the following meanings, unless the context clearly indicates otherwise:

* * *

~~Merchant an importer, winery, limited winery brewery, distillery or vendor desiring to sell spirits or wine to the Board, or any seller of products the Board is permitted to sell in its stores under section 305 of the Liquor Code. [47 P.S. § 3-305].~~

* * *

~~Pecuniary interest – the capability of a person to the control the business of the licensee AN INTEREST THAT SOUNDS IN THE ATTRIBUTES OF PROPRIETORSHIP. There is a rebuttable presumption of a pecuniary interest where a person controls a substantial portion of the proceeds RECEIVES TEN PERCENT (10%) OR MORE OF THE PROCEEDS of the licensed business or where control is exercised by~~

- ~~(a) Employing a majority of the employees of the licensee;~~
- ~~(b) Independently making day-to-day decisions about the operation of the business, or~~

(c) Having final authority to decide how the licensed business is conducted.

§ 1.5. Reputation: Use of criminal and citation history.

(a) When considering whether a person is reputable or the repute of a person under any section of the Liquor Code or this title, the Board may consider whether that person has been convicted of any crimes including misdemeanors and felonies, the person's history regarding licenses issued by the Board, including the citation history of the licenses, and any other factor the Board deems appropriate.

(b) When considering the reputation of a corporation, partnership, limited liability company or other business entity, the Board may WILL consider the reputation of its stockholders, directors, officers, managers or members.

CHAPTER 3. LICENSE APPLICATIONS

SUBCHAPTER A. GENERAL PROVISIONS

§ 3.1 DEFINITIONS.

* * *

MANAGEMENT CONTRACT - A MANAGEMENT CONTRACT IS AN AGREEMENT BETWEEN A LICENSEE AND A MANAGEMENT COMPANY TO OPERATE, MANAGE OR SUPERVISE ALL OR PART OF THE OPERATION OF THE LICENSED PREMISES.

* * *

§ 3.8. Certificate of completion; [certificate of approval;] letter of authority.

(a) Upon Board approval of an application for new license, transfer of a license or extension of premises, the Board will issue a {certificate of approval} letter of operating authority to the applicant. {The Board will also issue a letter of authority which shall authorize the applicant to operate the licensed premises for no more than 30 days.} ~~The letter of operating authority confers upon the applicant the immediate right to operate the licensed premises and the immediate responsibility as a licensee. The letter of operating authority may list conditions the applicant shall complete before a license is issued.~~ {If the application is for an extension of premises, the letter of authority shall be effective immediately. If the application is for a new license, the letter of authority shall be effective when the applicant acquires the right to occupy the premises. If the application is for the transfer of a license, the letter of authority shall be effective upon completion of the underlying financial transaction. Within 15 days of completion of transactions necessary to complete the process,}

~~(b) Within the time specified by the Board in the letter of operating authority,~~ the applicant shall submit a certificate of completion to the Board, indicating that the financial arrangements were completed as reported or modified. The certification shall be on forms provided by the Board. {If the application is a transfer application, then the certificate of completion must be signed by the transferor and the transferee. Failure to submit a properly executed certificate of completion may void the approval.}

{(b)} ~~(e)~~ If the certificate of completion ~~is not submitted or~~ discloses modified

arrangements, the Board may request **additional** information or documentation, as it deems necessary.

{(c) If the certified modifications are such that the eligibility of the applicant or premises would not be affected, the Board will take no action against the applicant.}

~~**(d) If the certificate of completion is not submitted, or additional information the Board has requested is not provided, or if such additional information indicates that the application does not conform to the Liquor Code or the Board's Regulations, the Board may rescind its approval, order divestiture of individuals, or take other remedial action as it deems necessary.**~~

Subchapter M. MANAGEMENT CONTRACTS

§ 3.140. Management contracts.

(a) A licensee may contract with another person to manage its licensed premises.

(b) Management contracts shall reserve to the licensee the capability to direct its own business.

(c) Management contracts shall be in writing, and a copy shall be maintained on the licensed premises where it shall be available for inspection by the Board.

(d) Management contracts may not give a pecuniary interest to a management company.

§ 3.142. Reporting.

(a) CURRENT Licensees or applicants for licenses that have management contracts shall file WITH THE BOARD'S BUREAU OF LICENSING ('LICENSING'), the following:

~~(i) On forms supplied by the Board LICENSING, the identity of all persons who are parties to the management contract.~~

~~(ii) On forms approved by the Departments of Revenue and Labor and Industry, tax certification and clearance statements for the person providing management services (47 P.S. § 4-477(a)(6)).~~

(b) CURRENT Licensees or applicants for licenses that enter into, modify or terminate management contracts shall, within 30 days, file a written notice with the Board that this has occurred. The changes shall be reported on forms which will be furnished upon request by the Board.

(c) Licensees filing notice of the establishment or modification of a management contract shall pay a fee of \$350.00. No fee is payable when a licensee gives notice to the Board that a management contract has been terminated.

§ 3.144. Board approval and licensee responsibility.

(A) THE BOARD SHALL NOTIFY THE CURRENT LICENSEE OR APPLICANT, IN WRITING, OF THE BOARD'S DECISION TO EITHER APPROVE OR REFUSE THE INVOLVEMENT OF A PERSON PROVIDING SERVICES AS A MANAGEMENT COMPANY.

(aB) The Board may refuse the involvement of a person providing management services AS A MANAGEMENT COMPANY. The Board's refusal may be based upon:

- i. The creation by the management contract of a pecuniary interest in the license;
- ii. Facts upon which the Board could refuse a person's involvement in the license which may include reasons specified in section 470 (a.1) of the Liquor Code such as reputation criminal history, current or prior involvement in other licenses.

(bC) The licensee's use of a management company will not affect the licensee's responsibility for violations of the Liquor Code or the Board's regulations.

CHAPTER 5. DUTIES AND RIGHTS OF LICENSEES

SUBCHAPTER B. EMPLOYES OF LICENSEES EMPLOYMENT OF OTHERS

§ 5.23. Appointment of managers.

* * *

(i) If approved by the Board, management contracts may permit the manager for the licensed premises to be employed by the management company; however, licensee shall have unfettered discretion in all aspects of management of the licensed business, including the employment of the manager and sales of food, alcoholic and nonalcoholic beverages. Licensee's

discretion includes control of the manager's hiring, firing, discipline, salary and duties. The manager is an agent of the licensee.

* * *

SUBCHAPTER D. SANITARY CONDITIONS AND LIGHTING AND CLEANING
OF [COILS] **MALT OR BREWED BEVERAGE DISPENSING SYSTEMS**

* * *

CLEANING OF [COILS] **MALT OR BREWED BEVERAGE DISPENSING
SYSTEMS**

* * *

§ 5.51. DEFINITION;- **Cleaning of [coils, tap rods and connections] malt or brewed beverage dispensing systems.**

(a) [Coils, tap rods and connections, used in drawing malt or brewed beverages in licensed establishments, shall be thoroughly cleaned at least once every 7 days at the sole expense of the licensee dispensing the beverages on draft. The cleaning of coils, tap rods and connections by one licensee for another licensee is prohibited.] **A licensee that uses a malt or brewed beverage dispensing system in its licensed premises must clean the system at its sole expense. One licensee may not clean a malt or brewed beverage dispensing system for another licensee. A MALT OR BREWED BEVERAGE DISPENSING SYSTEM SHALL MEAN A KEG OR OTHER CONTAINER OF MALT OR BREWED BEVERAGES TOGETHER WITH ALL COMPONENTS USED TO SERVE SUCH BEVERAGES ON DRAFT. A licensee that uses a malt or brewed beverage dispensing system in its licensed premises must clean the system at**

its sole expense. One licensee may not clean a malt or brewed beverage dispensing system for another licensee.

(b) [The following methods of cleaning coils, tap rods and connections have been approved by the Board:

- (1) Live steam.
- (2) Hot water and soda solution, followed by thorough rinsing with hot water.
- (3) Another method which thoroughly cleans the coils, tap rods and

connections, and leaves them in a sanity condition.] **The method of cleaning will leave the entire malt or brewed beverage dispensing system in a clean and sanitary condition. The cleaning method used will include cleaning the entire system with a chemical cleaning solution or other cleaning method approved by the Board. The following alternative cleaning methods have Board approval:**

(1) Live steam.

(2) Hot water and soda solution, followed by thorough rinsing with hot water.

(c) The frequency of cleaning for the malt or brewed beverage dispensing system shall be as follows:

(1) Once every seven days for the valves, joints, faucets, couplers, hose fittings, washers, o-rings, empty beer detectors (known as "FOBs") and draft foam control units.

(2) Once every seven days for the dispensing lines, VALVES, JOINTS, COUPLERS, HOSE FITTINGS, WASHERS, O-RINGS, EMPTY BEER DETECTORS (KNOWN AS “FOBS”) AND DRAFT FOAM CONTROL UNITS, except if the licensee has an operating ultrasonic, electromagnetic or other system that retards the growth of yeast and bacteria in the dispensing lines. If such a system is installed and operating, licensee must follow the cleaning frequency and cleaning method guidelines of the system’s manufacturer.

(3) The Board may approve different cleaning frequencies.

§ 5.52. Certificate or record required.

(a) [Coils, tap rods and connections] The malt or brewed beverage dispensing system may be cleaned for the licensee by a person, other than another licensee, thoroughly equipped to do so by a method enumerated in § 5.51 [(relating to cleaning of coils, tap rods and connections)]. The licensee [should] **shall** obtain from the cleaner a certificate showing the date cleaned, the name of the person by whom cleaned and the method utilized. The certificate shall be kept on file at the licensed premises at all times for inspection by the Board.

(b) [Coils, tap rods and connections] The malt or brewed beverage dispensing system may be cleaned by the licensee [himself by a method enumerated in § 5.51]. The licensee

shall maintain and keep a record of the date of each cleaning and the method utilized. This record shall also be kept on file at all times for inspection by the Board.

§ 5.53. Pressure maintenance.

[Where an airline pump is used for pressure, the intake shall be from outside the building and an air filter or satisfactory air cleansing device shall be provided. The use of carbon dioxide is recommended in lieu of air, as this is conducive to the maintenance of normal flavor in that it is much less susceptible than air to the growth of organisms and chemical changes which may impair flavor.] **If a compressed gas or other pressurizing system is used in the malt or brewed beverage dispensing system, it shall be designed to preserve the normal flavor of the malt or brewed beverage and not introduce contaminants. SUCH AS DUST, WATER OR OIL, into the system.**

§ 5.54. Responsibility for condition of equipment.

The licensee has the sole responsibility of maintaining equipment used in dispensing malt or brewed beverages on draft in a clean and sanitary condition. The mere fact that records of licensees [indicating] indicate that [coils, tap rods and connections have] **the malt or brewed beverage dispensing system has** been cleaned [are] **is** no defense to [disciplinary] **enforcement** action under the law and the provisions of this subchapter if the [coils, tap rods or connections are] **malt or brewed beverage dispensing system is** at any time found to be in an [insanitary] **unsanitary** condition.

CHAPTER 7. TRANSFER, EXTENSION, SURRENDER, EXCHANGE AND
SUSPENSION OF LICENSES

Subchapter A. TRANSFER OF LICENSES

§ 7.2. **Transfers of ownership.** Where an application is filed for transfer of a license from one person to another [at the same address], a bill of sale of the business or fixtures shall be executed by the licensee and shall be exhibited to the Board or its representative. The purchase price of the business, either in the form of cash or legal obligation as security for the purchase price, shall be placed in escrow with an attorney or financial institution, to be paid to the original licensee upon the approval of the transfer by the Board. The actual transfer of ownership of the business may not pass until approval of the transfer of license has been given. The transferee shall exhibit a deed or lease for the premises, or bill of sale, or both, as the case may be. The license may not change hands until the license transfer has been approved by the Board and the original licensee may continue the operation of the business and may sell liquor or malt or brewed beverages until formal approval of the transfer is given. If the original licensee does not continue operation of the business under the license, no liquor or malt or brewed beverages may be sold and the license shall be surrendered to the Board until the transfer is approved.

CHAPTER 11. PURCHASES AND SALES

Subchapter F. SALE OF LIQUOR TO THE BOARD

* * *

§ 11.144. Merchant tax responsibility.

(a) A merchant not already licensed by the Board shall provide to the Board, upon forms approved by the Pennsylvania Departments of Revenue and Labor and Industry, the following:

(1) the merchant's personal income tax identification number;

(2) the merchant's sales tax number;

(3) the merchant's corporation tax number;

(4) the merchant's employer withholding tax number; and

(5) the merchant's unemployment compensation account number.

(b) A merchant, at the time of annual renewal and issuance of its license or permit shall, by the filing of an application, waive any confidentiality with respect to tax information regarding said merchant in the possession of the Department of Revenue, the Office of Attorney General or the Department of Labor and Industry, regardless of the source of that information and shall consent to the providing of that information to the Board by the Department of Revenue, the Office of Attorney General or the Department of Labor and Industry.

~~(c) Upon receipt of any application for the grant, renewal or validation of any merchant's license or permit, the Board shall review the tax status of the applicant. The Board shall request tax information regarding the applicant from the Department of Revenue, the Office of Attorney General and the Department of Labor and Industry and said information shall be provided.~~

~~(d) The Board shall not approve any application for the grant, renewal or validation of any merchant's license or permit issued pursuant to this article where the applicant has failed to:~~

~~(1) provide any of the information required by subsection (a);~~

~~(2) file required tax reports; or~~

~~(3) pay any taxes not subject to a timely administrative or judicial appeal or subject to a duly authorized deferred payment plan.~~

~~(e) Upon the required submission of the annual fee or upon renewal, validation or issuance of any merchant's license or permit, if the Department of Revenue or the Department of Labor and Industry notifies the Board of noncompliance with the aforementioned provisions, the Board shall not renew, issue or validate the merchant's license or permit. Any appeal of the Board's action shall not act as a supersedeas.]~~

CHAPTER 13. PROMOTION

SUBCHAPTER A. ADVERTISING

ADVERTISING OF BRAND NAMES

§ 13.43. Interior display.

(a) A licensee may [not] install or permit to be installed electrically operated signs or devices, lithographs, framed pictures, cardboard displays, statuettes, plaques, placards, streamers or similar items advertising brand names and intended for interior display on the licensed premises.

SUBCHAPTER A. ADVERTISING

GIVING AND ACCEPTING THINGS OF VALUE

§ 13.51. General prohibition.

(a) Except as provided **herein** [in subsections (b), (c)] and **in** § 13.52 (relating to advertising novelties), no in-State or out-of-State manufacturer, licensee or group of licensees, their servants, agents or employes, may directly or indirectly, in person, individually or through a trade organization, contribute to or accept from another licensee or group of licensees of a different class, their servants, agents or employes or a trade organization of licensees of a different class, anything of value by means of

advertisements, contributions, purchase, sale of tickets, donations or by any device, for any purpose.

* * *

(e) The sponsorship of a tasting upon a licensed premises shall not be considered giving or accepting a thing of value.

Subchapter D. TASTING EVENTS

§ 13.201. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Sponsor--A sponsor of a tasting event may be any licensed **vendor, importer, distributor, importing distributor or manufacturer** [broker, holder of a limited winery or winery license, or a manufacturer of liquor] or its agent **or employee who is 21** years of age or older.

* * *

Standard size alcoholic beverage--A standard size alcoholic beverage is 12 fluid ounces of a malt or brewed beverage, 4 fluid ounces of wine (including fortified wine) or 1 1/2 fluid ounces of **spirits** [liquor].

* * *

TASTING EVENTS

§ 13.211. Tasting events.

(a) Tastings may be conducted by **sponsors** [licensed brokers vendors, importers, distributors, importing distributors and manufacturers or their agents] upon licensed or unlicensed premises.

(b) **Sponsors** [Licensed brokers, distributors, importing distributors and manufacturers or their agents] conducting a tasting event shall adhere to the following requirements:

(1) Products used shall be legally procured and properly registered and taxes on the products shall be paid.

(2) Purchase requirements may not be associated with the tasting.

(3) **Products offered will not exceed a standard size alcoholic beverage for that product. For example, if wine is offered, each glass of each wine offered to a participant will not exceed four ounces in volume. A tasting event comparing a brand of Chardonnay from California to a brand of Chardonnay from France would allow the participant to receive one four-ounce glass of each Chardonnay.**

[No more than one standard size alcoholic beverage of each product shall be provided to each tasting participant.]

IN-STORE TASTING EVENTS

§ 13.223. Procurement of wine or spirits, or both.

(a) Wine or spirits used during the in-store tasting events must be procured by the sponsor in accordance with the sampling process as specified in § 13.81 (relating to samples of liquor) [or], by [legal] purchase from the Board **or the sponsor may provide and transport the wine and spirits from its own stock.**

§ 13.228. Disposal **and storage** of **partially-used liquor** [unused alcohol] and empty containers.

(a) At the conclusion of the in-store tasting event, sponsors shall **either** discard unused portions of opened liquor containers at the State Liquor Store **or may re-seal the partially-consumed liquor containers. The resealed partially-used containers shall be placed in storage at the store for use at a subsequent store tasting or may be removed from the premises. No partially-consumed liquor containers will be placed in storage at a store for more than 15 days. After 15 days, partially-used containers of liquor may be discarded by the Board.**

(b) Sponsors shall dispose of all empty liquor containers in accordance with section 491(5) of the Liquor Code (47 P. S. § 4-491(5))

(c) **Resealed partially-used** [Unused product, bottles or] containers may not be furnished to employees of the Board **or any other person and may only be used for a subsequent in-store tasting.**

CHAPTER 17. SPECIAL RULES OF PRACTICE AND PROCEDURE FOR
MATTERS BEFORE THE BOARD

Subchapter A. GENERAL

§ 17.5. **Subpoenas.** (a) Issuance. [Issuance] **Except for subpoenas issued upon the Board's own motion, issuance** of subpoenas shall be as follows:

(1) Subpoenas for the attendance of witnesses or for the production of documents will be issued only upon written application to the Board, with a copy of the application to the opposing party.

§ 17.7. **Exhibits.** (a) Exhibits to be presented in connection with a hearing shall be submitted in five copies each at the time of the hearing unless otherwise directed by the Board.

(b) Subsection (a) supersedes 1 Pa. Code § 33.15 (relating to number of copies).

(c) Documents that the Board, a party, petitioner or intervener expects to offer as exhibits may be presented to the Board's Hearing Examiner and all other parties of record in advance of a hearing. Such documents are not evidence unless admitted into the record by the Hearing Examiner at the hearing. Presentation of documents to the other parties before a hearing is encouraged.

* * *

Subchapter B. LICENSE APPLICATIONS

§ 17.13. Protests/intervention procedure.

* * *

(b) Time. A **protest or** petition to intervene shall be filed with the Board within 30 days of the posting of notice of application as required by Chapter 3 Subchapter B (relating to notice posting). The Board may accept an untimely filed protest or petition to intervene, but only upon good cause shown.

Commonwealth of Pennsylvania
Pennsylvania Liquor Control Board
August 20, 2009

SUBJECT: Final Regulations 54-63 (Amendments to Title 40, Pennsylvania Code) – IRRC No. 2613

TO: KIM KAUFMAN, EXECUTIVE DIRECTOR
INDEPENDENT REGULATORY REVIEW COMMISSION

FROM: FAITH S. DIEHL *FSDUM*
CHIEF COUNSEL
PENNSYLVANIA LIQUOR CONTROL BOARD

By Hand Delivery

Refer to: 3-9454

Submitted herewith are final-form amendments to the regulations of the Pennsylvania Liquor Control Board (“Board”). Also enclosed are the signed CDL-1, Preamble, and Regulatory Analysis Form. The signed transmittal sheet also is enclosed.

On May 17, 2007, the proposed version of these regulations was provided to the Legislative Oversight Committees and to the Independent Regulatory Review Commission (“IRRC”). On July 21, 2007, proposed regulations were published in the Pennsylvania Bulletin. [37 Pa.B. 3418]. On August 20, 2007, comments were received from Mr. Curtis Mason, a member of the public, about displaying manufacturer advertising in a licensed premises. Prior to publication in the Pennsylvania Bulletin, public comments were received from Mr. Robert Kerrigan and Mr. Robert Stosic about proposed changes to regulations about the cleaning of draft beer systems. On September 19, 2007, IRRC transmitted, by facsimile, comments relative to the above-proposed rulemaking. The comments and the Board’s responses to these comments are as follows:

I. Comments of the Independent Regulatory Review Commission

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.

Response. The explanation of need for the regulations has been expanded in the Preamble, and the fiscal and cost-benefit analysis has been made more detailed in the Regulatory Analysis Form to address IRRC’s comments and to meet the requirements of the RRA. Additionally, the anticipated cost to the Board of complying with the merchant tax responsibility regulations has been eliminated because the Department of General Services (“DGS”) has implemented its Contractor Compliance program so as to affect all Commonwealth vendors, even those like the vendors of alcoholic beverages, that are not covered by the Pennsylvania Procurement Code. [Management Directive 215.9, April 16, 1999].

The relevant portion of the Preamble is set forth below;

Several of the changes to the Board’s Regulations that are being pursued pertain to the use of management companies by licensees and to the level of interest in the licensed business that such management companies may have. The Board has found with increasing frequency that holders of hotel licenses, and to a somewhat lesser degree, holders of restaurant and eating place malt beverage licenses, are using management companies to carry out day-to-day activities. While Act 10 of 2002 amended the Liquor Code to acknowledge and regulate this process, the Liquor Code still requires that the licensee itself be the only party that is “pecuniarily interested” in the license. [47 P.S. §§ 4-404, 436(f)]

Unfortunately, the term “pecuniarily interested” is not defined in the Liquor Code and the case law is somewhat scant. This presents a problem to the industry as it tries to draft agreements that would allow them to avail themselves of the opportunity to use a management company in a manner that does not violate the Liquor Code. When analyzing a management agreement, the Board has been guided by the Commonwealth Court decision in Appeal of: E-J Westside Inn Corp., 449 A.2d 93 (Pa. Cmwlth. 1981). In that case, the Commonwealth Court held that a party has a pecuniary interest in a license when it participates in the profits of the business and exercises substantial control over the business.

Thus, the purpose of the Regulation is to let the licensing community know how the Board interprets the Commonwealth Court’s decision and the factors that the Board will consider when reviewing an arrangement between the licensee and a third party.

In addition, the Regulations are amended to notify the licensing community of the process that must be followed in order to notify the Board that a management company is being used.

Another area of change to the Board’s Regulations involves the procedures for cleaning and maintaining systems for serving draft beer. This change reflects the fact that changes in technology allow for cleaning methods that do not require weekly cleanings and will encourage licensees to adopt these more modern methods.

Another area of change to the Board’s Regulations pertains to tastings that are conducted at state stores. Such tastings were first authorized by Act 15 of 2003. In response the Board drafted Regulations to govern such tastings. Having now conducted several years of tastings, the Board advocates changes to those Regulations will make the tastings more efficient and more consumer-friendly.

Another area of change to the Board’s Regulations pertains to the information the Board considers when assessing an applicant’s reputation. The Regulation is being amended to reflect the fact that the Liquor Code contemplates a review of the persons associated with the licensee in addition to the licensee itself

The remaining regulations in this package address administrative changes that will facilitate and improve the Board’s administration of the Liquor Code. Each of

these changes as presented responds to the public interest in a regulated alcohol beverage industry in Pennsylvania while keeping pace with changes in the dynamic marketplace for alcohol beverages.

*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.”

Response. The definition for merchant has been eliminated in the final form Regulation.

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.”

Response. The definition of “pecuniary interest” is intended to codify the Commonwealth Court’s holding in the case of Appeal of E-J Westside Inn Corp., 449 A.2d 93 (Pa. Cmwlth. 1982). The Liquor Code states in various sections that all who are pecuniarily interested in a license must be listed in the application. See 47 P.S. §§ 4-404; 4-408.4; 4-436]. The E-J Westside Court then went on to state:

Rather, where, as here, Ms. Ward's interest "*sounds* in the attributes of proprietorship," (citation omitted) that is, where a party other than the licensee has not only participated in the profits but has exercised substantially all right to control the business, such an arrangement gives to that party at least a pecuniary interest in the business in some manner. (Footnotes omitted).

In response to your concern that the phrase “the capability of a person” is vague, the entire first sentence will be replaced with the exact language used in the Westside case: “An interest that *sounds* in the attributes of proprietorship.” In

response to your concern that the phrase “substantial portion” is vague, the phrase has been replaced with a percentage.

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.

Response. With respect to sections 3.8(a) and (b), the amendments to that Regulation are being withdrawn in the final form Regulations. With respect to section 3.142(a), the amendments to that Regulation are being withdrawn in the final form Regulations. With respect to section 3.14(b) the Board intended the term “applicant” to have its ordinary dictionary definition of “one who makes an appeal or request.”¹ Accordingly, the Board does not believe that further clarification is necessary. With respect to section 11.144 (in comments as “11.143”) the amendments to that Regulation are being withdrawn in the final form Regulations.

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.”

Response. The term “may” has been changed to “will” in the final-form regulations.

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

¹ Webster’s Ninth New Collegiate Dictionary 97 (1989).

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.

Response. With respect to section 3.8, the amendments to that Regulation are being withdrawn in the final form Regulations.

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.

Response. Section 102 of the Liquor Code defines a "management company" to mean "any entity employed or otherwise contracted by a licensee to operate, manage or supervise all or part of the operation of the licensed premises." [47 P.S. § 1-102]. A definition of "management contract," tracking the language of the statute, has been added to section 3.1 (Definitions) as a new definition for Chapter 3 (License Applications). Additionally, throughout Subchapter M, the term "management services" has been changed to "services being provided by a management company."

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: “[this 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.

Response. Section 3.142(a) is amended in the final form-regulations to make it clear that the filing shall be with the Board's Bureau of Licensing and that current licensees are required to file such information.

With respect to questions regarding Subsection 3.142(a)(2), that proposed regulation is being withdrawn in the final form Regulation.

Regarding IRRC's comment to subsection 3.142(c), pursuant to section 207(h) of the Liquor Code, the Board has general authority to take action it deems necessary or advisable to effectuate the purposes of the Liquor Code and the Board's Regulations. [47 P.S. § 2-207(h)]. The Board has applied fees in the past for services that are not specified in the Administrative Code of 1929, as amended. Such fees are typically assessed in those situations in which the Board must expend a significant amount of time and labor in evaluating a specific inquiry or request. By way of example, the Board charges a one hundred and fifty dollar (\$150.00) fee when a vendor submits a listing proposal for a product which is currently not sold in the Board's wine and spirits stores. [40 Pa. Code § 11.142]. See Also 40 Pa. Code § 17.21 (imposing a fee on ALJ appeals.) This fee is imposed to cover the costs associated with the labor involved in researching the product at issue and determining whether it should be acquired by the Board, out of the tens of thousand of liquor products available throughout the world, and sold via the Board's six hundred nineteen (619) stores.

When a management contract is currently received by the Board, it is typically reviewed and evaluated initially by the Board's Bureau of Licensing. The contracts are then routed to the Board's Office of Chief Counsel for legal review and analysis. Many of these agreements are more than twenty (20) or thirty (30) pages in length and require a careful examination of all of their provisions to

ensure that, as required of the Board by the Liquor Code, the management company does not have an unlawful pecuniary interest in the license. The proposed fee will compensate the Board for the increased cost of investigating the management company and the individuals involved with the management company, as well as investigating the licensee or applicant. The proposed fee was set at one-half (1/2) the seven hundred dollar (\$700.00) license application fee applied to most types of licenses. [71 P.S. § 240.14A]. The fee is made payable to the Board's Bureau of Licensing, which is clarified in the final-form regulations.

Finally, with respect to whether such fees would apply depending on the extent of a modification of a management contract, the Board's position is that such fees should be assessed in the processing of any modified management contract. While a licensee or applicant may indicate to the Board that a modified management contract merely reflects an address change of the management company or is meant to correct a technical change, the Board's mandate under the Liquor Code requires that the Board, notwithstanding the licensee's representation, review and evaluate the modified management contract to ensure the absence of an unlawful pecuniary interest. Further, the Board believes that attempting to define any "degree of modification" could lead licensees to mischaracterize the nature of the modification in an attempt to avoid paying the fee. Accordingly, the Board has not made such a change in the final form of the regulations.

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?

Response. With respect to the Board's statutory authority for requiring approval of such management contracts, as noted above in answer to the questions related to subsection 3.142, sections 404 and 431 of the Liquor Code mandate that the Board be satisfied upon receipt of the application and proper fees for issuance of a liquor license that the applicant is the only person pecuniarily interested in the license to be issued and that the applicant is a responsible person of good reputation. [47 P.S. §§ 4-404, 4-431]. If the applicant/licensee chooses to engage a management company, the same provisions apply to the management company as the applicant/licensee's agent. These regulations clarify that the same standards apply and that the involvement of the management company may be refused based on the responsibility and reputation of the individuals involved in the management company or upon the determination that an impermissible pecuniary interest exists as a result of the contract with the management company.

Licensees may enter into management contracts without prior Board approval. Pursuant to proposed section 3.142(b), licensees that enter into such agreements file a notice, after-the-fact, with the Board that such has occurred. The final form regulations have been modified to clarify that the Board shall notify the licensee or applicant, in writing, of the Board's decision to either approve or refuse the involvement of a management company based upon the management contract presented for review.

With respect to refusals by the Board, section 464 of the Liquor Code provides for hearings to be held upon the request of any applicant whose application has been refused. [47 P.S. § 4-464]. The licensee's application for use of a management company would be such an application which, if refused, could become subject to

a request for hearing under section 464. Further appeal to the Court of Common Pleas is also provided by section 464 of the Liquor Code. [Id.].

With respect to subsection 3.143(b), the regulation is intended to clarify that the licensee remains the responsible party under the license and its decision to use a management company does not affect that responsibility. Furthermore, licensees are held strictly liable for violations of the Liquor Code and the Board's Regulations that occur on the licensed premises. Pennsylvania Liquor Control Bd. v. TLK Inc., 518 Pa. 500, 544 A.2d 931 (1988). The regulation is intended to make this continued responsibility clear in the context of a licensee's use of a 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?

Response. A definition of the term "malt or brewed beverage dispensing system" is included in the final form regulations.

In March, 2005, the Board received a request for amendment of this regulation from Mr. Donald A. Seelinger. Mr. Seelinger pointed out that the regulations have been in place at least since 1952, and that current beverage dispensing technology had made the old regulations obsolete. As part of the Board's response to Mr. Seelinger's request, the technical literature he supplied was provided for comment to the Pennsylvania Department of Health. On March 18, 2005, the Board

received a memo from M. Jeffrey Shoemaker, Ph.D., Director, Division of Chemistry and Toxicology, Bureau of Laboratories, Department of Health. A copy of this memo is attached. In the memo, Dr. Shoemaker advised that the peer-reviewed paper by A.C. Price titled “An Evaluation of the Efficacy of the BLM 2000 Device for Maintaining Beer Dispense Line Cleanliness” published in the Technical Quarterly for the Master Brewers Association of the Americas (Vol. 39, No. 3, pp. 133 – 137, 2002) supported “... Mr. Seelinger’s claim that significant microbial growth will not occur in beer lines when the BLM 2000 device is used if a longer cleaning cycle is permitted than is currently allowed under existing regulations.”

The regulatory standard of “clean and sanitary” has been in place since 1952. Research of reported court decisions has disclosed nothing to indicate that the existing definition is vague or unenforceable. Accordingly, this standard is maintained in the final-form regulations.

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"?

Response. To clarify this point, in the final form regulations, the term “contaminants” has been clarified by adding “such as dust, water or oil.”

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.

Response. The regulatory standard of “clean and sanitary” has been in place since 1952. Research of reported court decisions has disclosed nothing to indicate that the existing definition is vague or unenforceable. Accordingly, this standard is maintained in the final-form regulations.

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.

Response. With respect to the proposed Regulation, it is being withdrawn in the final form Regulations.

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.

Response. The term "importer" refers to the license issued to those entities licensed under section 410 of the Liquor Code. See 47 P.S. § 4-410(b) ("Every applicant for an importer's license"); 47 P.S. § 4-491(2) (...the holder of...an importer's license). The Board believes those affected by the Regulations are aware of the meaning of the term importer.

The term "vendor" refers to the permit issued under section 208(j) of the Liquor Code [47 P.S. § 2-208(j)]. The Board believes those affected by the Regulations are aware of the meaning of the term vendor.

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?

Response. This regulation is intended to permit manufacturers and their agents to conduct tasting events at wine and spirits stores without having to dispose of

opened containers of products that are intended to be used on subsequent days or at connected events. Historically, it has not been permitted to have any opened containers of alcoholic beverages on the premises of state wine and spirits stores. The fifteen (15) day limit was chosen so that such events could take place on two (2) consecutive weekends. However, at some point thereafter, the Board needs to be able to dispose of such open containers if the manufacturers or their agents have left them behind and have no further use for them. Fifteen (15) days was chosen as a reasonable compromise.

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?

Response. A subpoena would be issued upon the Board's own motion when it wishes to compel the production of either person or of documents. Notice is given to opposing counsel. The Regulation is being amended to eliminate the requirement that the Board write a letter to itself prior to issuing its own subpoena.

II. Reply to Comments of Mr. Curtis Mason (forwarded by Brenda Price).

On August 20, 2007, Mr. Curtis Mason, Sr., sent by e-mail through Ms. Brenda Price, comments on changes proposed to the regulations at section 13.43. Mr. Mason read the proposed change as prohibiting advertisement of brands of alcoholic beverages within licensed premises.

Response. The proposed regulation is intended to correct what appears to have been a long-standing typographical error. As it presently appears in the Board's Regulations, all such advertisements are currently prohibited, including signs for brands of beer and various types of distilled spirits. This prohibition has not been enforced. By deleting the word "not", the existing regulation will be corrected to reflect the permission that licensees currently have to post such advertisements within their licensed premises.

III. Reply to Comments of Robert Kerrigan.

Prior to publication of the proposed regulations, the text of the regulations pertaining to the cleaning of malt or brewed beverage dispensing systems was sent to Mr. Kerrigan, whose business involves the sale, installation and service of a beer line maintaining system known as the BLM 2000. According to the technical literature of the BLM 2000, this system, through induction of ultrasonic signals into the draft beer dispensing system, extends the cleaning cycle for such systems. On April 20, 2007 (prior to publication in the Pennsylvania Bulletin), Mr. Kerrigan advised that using the BLM 2000 extends the cleaning cycle applicable to all parts of the dispensing system that contain liquid beer. He advises that the audio signal uses the liquid to travel the beer line and that it travels “forward to the faucet and backwards all the way to the keg, including all internal parts of the coupler, FOB, faucet, etc.”

Response. Mr. Kerrigan was providing technical information and was not commenting on either the existing or proposed Regulation. Thus no further response is necessary.

IV. Comments of Robert Stosic.

Prior to publication of the proposed regulations in the Pennsylvania Bulletin, copies of the proposed malt and brewed beverage dispensing system cleaning regulations were provided to Mr. Robert Stosic. Mr. Stosic’s business also involves the sale, installation and service of the BLM 2000 system. As was the case with Mr. Kerrigan, Mr. Stosic also advised that “if a licensee has an operating ultrasonic, electromagnetic or other system that retards the growth of yeast and bacteria in the dispensing lines, there is no need to clean the valves, joints, hose fittings, washers, o-rings, empty beer detectors (known as FOBs) and draft foam control units.”

Response. See response to comments of Robert Kerrigan above.

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. Danielle Guyer, Governor's Office of the Budget
Barbara Adams, Chief Counsel, Governor's Office of General Counsel
Ms. Donna Cooper, Governor's Office
Major John P. Lutz, Director, Pennsylvania State Police, Bureau of Liquor Control Enforcement
P. J. Stapleton, III, Chairman, Pennsylvania Liquor Control Board
Thomas F. Goldsmith, Member, Pennsylvania Liquor Control Board
Robert S. Marcus, Member, Pennsylvania Liquor Control Board
John Stark, Secretary, Pennsylvania Liquor Control Board
Joe Conti, Chief Executive Officer, Pennsylvania Liquor Control Board
Jerry W. Waters, Sr., Director, Office of Regulatory Affairs, Pennsylvania Liquor Control Board
Jane Melchior, Director, Bureau of Licensing, Pennsylvania Liquor Control Board

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

I.D. NUMBER: 54-63

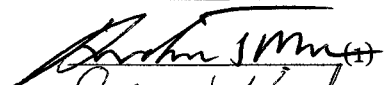
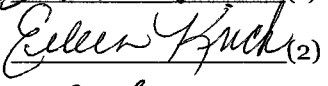
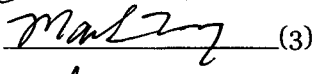
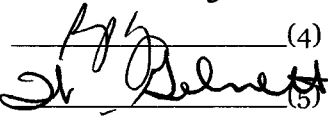
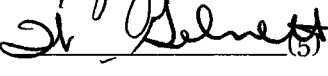
SUBJECT: Management Contracts, Beer System Cleaning

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

FILING OF REGULATION

<u>DATE</u>	<u>SIGNATURE</u>	<u>DESIGNATION</u>
8/20/09		HOUSE COMMITTEE ON LIQUOR CONTROL (<i>Democrat</i>)
8/20/09		(<i>Republican</i>)
8/20/09		SENATE COMMITTEE ON LAW & JUSTICE (<i>Republican</i>)
8/20/09		(<i>Democrat</i>)
8/20/09		INDEPENDENT REGULATORY REVIEW COMMISSION
_____	_____ (6)	ATTORNEY GENERAL
_____	_____ (7)	LEGISLATIVE REFERENCE BUREAU