

Regulatory Analysis Form

(Completed by Promulgating Agency)

INDEPENDENT REGULATORY
REVIEW COMMISSION

(All Comments submitted on this regulation will appear on IRRC's website)

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(1) Agency: Pennsylvania Liquor Control Board

(2) Agency Number: 54
Identification Number: 77

IRRC Number: 3023

(3) PA Code Cite: 40 Pa. Code, Chapter 5

(4) Short Title: 5.32 Repeals

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

Primary Contact: Alan Kennedy-Shaffer (717) 783-9454
Pennsylvania Liquor Control Board
401 Northwest Office Building
Harrisburg, Pennsylvania 17124
FAX: (717) 787-8820
Email: ra-lblegal@pa.gov

Secondary Contact: Rodrigo Diaz, Executive Deputy Chief Counsel (717) 783-9454
(Same Contact Information)

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

- Proposed Regulation
 Final Regulation
 Final Omitted Regulation

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

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

With regard to section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], Act 113 of 2011 and Act 116 of 2012 created a new subsection within section 493 of the Liquor Code, which expressly supersedes section 5.32(a). Therefore, section 5.32(a) should be rescinded.

With regard to section 5.32(b) of the Board's Regulations [40 Pa. Code § 5.32(b)], decisions by the Third Circuit Court of Appeals and federal district court have struck down section 493(10) of the Liquor Code [47 P.S. § 4-493(10)] and section 5.32(b) of the Board's Regulations as unconstitutional. Therefore, section 5.32(b) should be rescinded.

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

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

(9) 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 regulation is not mandated by any federal or state law, court order or federal regulation.

(10) 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 proposed rulemaking will amend section 5.32 of the Board's Regulations by rescinding section 5.32(a) of the Board's Regulations, which has been superseded by statute, consistent with Act 113 of 2011 and Act 116 of 2012, and section 5.32(b) of the Board's Regulations, which judicial rulings have struck down as unconstitutional.

With regard to section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], Act 113 of 2011, which became effective December 22, 2011, created a new subsection within section 493 of the Liquor Code titled "Noise." [47 P.S. § 4-493(34)]. Under the new subsection, a licensee may not use, or permit to be used, inside or outside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard beyond the licensee's property line. As is also made clear in section 493(34) of the Liquor Code, this new section superseded section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], creating a need to rescind section 5.32(a).

With regard to section 5.32(b) of the Board's Regulations [40 Pa. Code § 5.32(b)], on August 15, 2006, the Third Circuit Court of Appeals struck down section 493(10) of the Liquor Code [47 P.S. § 4-493(10)] and section 5.32(b) of the Board's Regulations as facially unconstitutional insofar as they prohibited "lewd" entertainment in any establishment holding a liquor license. Conchatta Inc. v. Miller, 458 F.3d 258 (3rd Cir. 2006). In conjunction with a 2005 District Court decision that struck down section 493(10) of the Liquor Code [47 P.S. § 4-493(10)] and section 5.32(b) of the Board's Regulations [40 Pa. Code § 5.32(b)] as facially unconstitutional insofar as they prohibited "immoral or improper" entertainment in any establishment holding a liquor license, section 5.32(b) of the Board's Regulations is unconstitutional and unenforceable, and therefore should be rescinded.

Consistent with section 493(34) of the Liquor Code and section 1204 of the Commonwealth Documents Law [45 P.S. § 1204], this regulatory amendment may be submitted in final-omitted form because the amendment is necessary as a result of a self-executed statute and judicial rulings on the regulation's constitutionality.

(11) 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.

The amended regulation is not known to be more stringent than federal regulations.

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

This amendment is necessary because of statutory change and judicial rulings, and makes no substantive changes to the regulation. Therefore, the regulatory change should not put Pennsylvania at a competitive disadvantage.

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

The proposed rulemaking will amend section 5.32 of the Board's Regulations [40 Pa. Code § 5.32] by rescinding section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], which has been superseded by Act 113 of 2011 and Act 116 of 2012, and by rescinding section 5.32(b) of the Board's Regulations [40 Pa. Code § 5.32(b)], which the federal courts have struck down as unconstitutional.

(14) Describe the communications with and solicitation of input from the public, any advisory council/group, small businesses and groups representing small businesses in the development and drafting of the regulation. List the specific persons and/or groups who were involved. ("Small business" is defined in Section 3 of the Regulatory Review Act, Act 76 of 2012.)

The Board will consider any comments, recommendations or objections, and will respond as required.

(15) Identify the types and number of persons, businesses, small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012) and organizations which will be affected by the regulation. How are they affected?

Those affected by this proposed amendment include retail and other licensees which must comply with the provisions of the Liquor Code and the Board's Regulations. Enforcement is the province of the Pennsylvania State Police Bureau of Liquor Control Enforcement. As the statutory amendment to section 493(34) of the Liquor Code [47 P.S. § 4-493(34)] supersedes section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], and judicial rulings have rendered section 5.32(b) of the Board's Regulations [40 Pa. Code § 5.32(b)] unenforceable, the regulatory changes simply acknowledges the statutory change and judicial rulings, respectively.

(16) List the persons, groups or entities, including small businesses, that will be required to comply with the regulation. Approximate the number that will be required to comply.

Those affected by this proposed amendment include retail and other licensees which must comply with the provisions of the Liquor Code and the Board's Regulations. Enforcement is the province of the Pennsylvania State Police Bureau of Liquor Control Enforcement. As the statutory amendment to section 493(34) of the Liquor Code [47 P.S. § 4-493(34)] supersedes section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], and judicial rulings have rendered section 5.32(b) of the Board's Regulations [40 Pa. Code § 5.32(b)] unenforceable, the regulatory changes simply acknowledges the statutory change and judicial rulings, respectively.

(17) Identify the financial, economic and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations. Evaluate the benefits expected as a result of the regulation.

This regulatory change is not expected to have any fiscal impact, since the regulatory change simply acknowledges that section 493(34) of the Liquor Code explicitly supersedes section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], and judicial rulings have held that section 5.32(b) of the Board's Regulations [40 Pa. Code § 5.32(b)] is unconstitutional, and therefore unenforceable.

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

Those affected by this proposed amendment include retail and other licensees which must comply with the provisions of the Liquor Code and the Board's Regulations. Enforcement is the province of the Pennsylvania State Police Bureau of Liquor Control Enforcement. As the statutory amendment to section 493(34) of the Liquor Code [47 P.S. § 4-493(34)] supersedes section 5.32(a) of the Board's Regulations [40 Pa. Code § 5.32(a)], and judicial rulings have rendered section 5.32(b) of the Board's Regulations [40 Pa. Code § 5.32(b)] unenforceable, the regulatory changes simply acknowledges the statutory change and judicial rulings, respectively.

(19) 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.

This regulatory change is not expected to have any impact on the regulated community since the regulatory change simply affirms a statutory change and judicial rulings as to constitutionality.

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

This regulatory change is not expected to have any impact on local governments since the regulatory change simply affirms a statutory change and judicial rulings as to constitutionality.

(21) Provide a specific estimate of the costs and/or savings to the **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.

This regulatory change is not expected to have any impact on state government since the regulatory change simply affirms a statutory change and judicial rulings as to constitutionality.

(22) For each of the groups and entities identified in items (19)-(21) above, 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 does not anticipate that this regulatory change will affect the amount of legal, paperwork or administrative costs of the regulated community, as the regulation simply affirms a statutory change and judicial rulings as to the regulation's constitutionality.

(23) 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 Year	FY +1 Year	FY +2 Year	FY +3 Year	FY +4 Year	FY +5 Year
SAVINGS:	\$	\$	\$	\$	\$	\$
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Savings	0	0	0	0	0	0
COSTS:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Costs	0	0	0	0	0	0
REVENUE LOSSES:						
Regulated Community	0	0	0	0	0	0
Local Government	0	0	0	0	0	0
State Government	0	0	0	0	0	0
Total Revenue Losses	0	0	0	0	0	0

(23a) 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	N/A

(24) For any regulation that may have an adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), provide an economic impact statement that includes the following:

- (a) An identification and estimate of the number of small businesses subject to the regulation.
- (b) The projected reporting, recordkeeping and other administrative costs required for compliance with the proposed regulation, including the type of professional skills necessary for preparation of the report or record.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

No special regulatory methods to minimize any adverse impact on small businesses were considered because the regulatory change is not expected to have any impact on small businesses. As previously noted, the regulatory change simply affirms a statutory change and judicial rulings as to constitutionality.

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

No special provisions have been developed to meet the particular needs of affected groups or persons including, but not limited to, minorities, the elderly, small businesses, and farmers.

(26) 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.

Non-regulatory alternatives were not considered because the regulatory change simply affirms a statutory change and judicial rulings as to constitutionality.

(27) In conducting a regulatory flexibility analysis, explain whether regulatory methods were considered that will minimize any adverse impact on small businesses (as defined in Section 3 of the Regulatory Review Act, Act 76 of 2012), including:

- a) The establishment of less stringent compliance or reporting requirements for small businesses;
- b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- c) The consolidation or simplification of compliance or reporting requirements for small businesses;

- d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation; and
- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

No special regulatory methods to minimize any adverse impact on small businesses were considered because the regulatory change is not expected to have any impact on small businesses. As previously noted, the regulatory change simply affirms a statutory change and judicial rulings as to constitutionality.

(28) If data is the basis for this regulation, please provide a description of the data, explain in detail how the data was obtained, and how it meets the acceptability standard for empirical, replicable and testable data that is supported by documentation, statistics, reports, studies or research. Please submit data or supporting materials with the regulatory package. If the material exceeds 50 pages, please provide it in a searchable electronic format or provide a list of citations and internet links that, where possible, can be accessed in a searchable format in lieu of the actual material. If other data was considered but not used, please explain why that data was determined not to be acceptable.

The Board has not relied on data to justify this regulation.

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

- A. The date by which the agency must receive public comments: N/A
- B. The date or dates on which public meetings or hearings will be held: None
- C. The expected date of promulgation of the proposed regulation as a final-form regulation: November 2013
- D. The expected effective date of the final-form regulation: November 2013
- E. The date by which compliance with the final-form regulation will be required: N/A
- F. The date by which required permits, licenses or other approvals must be obtained: N/A

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

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

CDL-1

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

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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. 054-77

DATE OF ADOPTION: September 12, 2013

BY: _____

TITLE: Chairman
(Executive Officer, Chairman or
Secretary)

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

BY: YSDiehl

September 11, 2013
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 5. DUTIES AND RIGHTS OF LICENSEES
SUBCHAPTER C. AMUSEMENT AND ENTERTAINMENT

The following Section is proposed to be amended:

5.32. Restrictions/exceptions.

FINAL-OMITTED RULEMAKING

LIQUOR CONTROL BOARD

40 PA. CODE CHAPTER 5

5.32 Repeals

The Liquor Control Board (“Board”), under the authority of section 207(i) of the Liquor Code (47 P.S. § 2-207(i)), amends Chapter 5.

Summary

The proposed rulemaking will amend section 5.32 of the Board’s Regulations by rescinding section 5.32(a) of the Board’s Regulations, which has been superseded by Act 113 of 2011 and Act 116 of 2012, and section 5.32(b) of the Board’s Regulations, which judicial rulings have struck down as unconstitutional.

With regard to section 5.32(a) of the Board’s Regulations [40 Pa. Code § 5.32(a)], Act 113 of 2011, which became effective December 22, 2011, created a new subsection within section 493 of the Liquor Code titled “Noise.” [47 P.S. § 4-493(34)]. Under the new subsection, a licensee may not use, or permit to be used, inside or outside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard beyond the licensee’s property line. As is also made clear in section 493(34) of the Liquor Code, this new section superseded section 5.32(a) of the Board’s Regulations [40 Pa. Code § 5.32(a)], creating a need to rescind section 5.32(a).

With regard to section 5.32(b) of the Board’s Regulations [40 Pa. Code § 5.32(b)], on August 15, 2006, the Third Circuit Court of Appeals struck down section 493(10) of the Liquor Code [47 P.S. § 4-493(10)] and section 5.32(b) of the Board’s Regulations as facially unconstitutional insofar as they prohibited “lewd” entertainment in any establishment holding a liquor license. Conchatta Inc. v. Miller, 458 F.3d 258 (3rd Cir. 2006). In conjunction with a 2005 District Court decision that struck down section 493(10) of the Liquor Code [47 P.S. § 4-493(10)] and section 5.32(b) of the Board’s Regulations [40 Pa. Code § 5.32(b)] as facially unconstitutional insofar as they prohibited “immoral or improper” entertainment in any establishment holding a liquor license, section 5.32(b) of the Board’s Regulations is unconstitutional and unenforceable, and therefore should be rescinded.

Consistent with section 493(34) of the Liquor Code and section 1204 of the Commonwealth Documents Law [45 P.S. § 1204], this regulatory amendment may be

submitted in final-omitted form because the amendment is necessary as a result of a self-executed statute and judicial rulings on the regulation's constitutionality.

Affected Parties

Those affected by this proposed amendment include retail and other licensees which must comply with the provisions of the Liquor Code and the Board's Regulations. Enforcement is the province of the Pennsylvania State Police Bureau of Liquor Control Enforcement. As the statutory amendment to section 493(34) of the Liquor Code supersedes section 5.32(a) of the Board's Regulations, and judicial rulings have struck down section 5.32(b) of the Board's Regulations as unconstitutional, the regulatory changes simply affirm the statutory change and judicial rulings, respectively.

Paperwork Requirements

The Board does not anticipate that this regulatory change will affect the amount of paperwork or administrative costs of the regulated community.

Fiscal Impact

This regulatory change is not expected to have any fiscal impact, since the regulatory change simply affirms section 493(34) of the Liquor Code, which explicitly supersedes the Board's noise regulation, and judicial rulings as to the regulation's constitutionality.

Effective Date

These regulations will become effective upon publication in final form in the *Pennsylvania Bulletin*.

Contact Person

Further information is available by contacting Alan Kennedy-Shaffer, Assistant Counsel, or Rodrigo Diaz, Executive Deputy Chief Counsel, Office of Chief Counsel, Pennsylvania Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001.

Regulatory Review

Under section 5a(c) of the Regulatory Review Act, (71 P.S. § 745.5a(c)), the Board submitted a copy of these final-omitted regulations and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC), the Chairpersons of

the House and Senate Committees, and the Office of Attorney General on _____. A copy of this material is available to the public upon request.

Under section 5a(j.2) of the Regulatory Review Act, on _____, these final-form regulations were (deemed) approved by the House and Senate Committees. Under section 5a(e) of the Regulatory Review Act, IRRC met on _____ and approved the final-omitted regulations.

Joseph E. Brion
Chairman

ANNEX A

TITLE 40. LIQUOR

Part I. LIQUOR CONTROL BOARD

CHAPTER 5. DUTIES AND RIGHTS OF LICENSEES

SUBCHAPTER C. AMUSEMENT AND ENTERTAINMENT

§ 5.32. Restrictions/exceptions.

(a) [A licensee may not use or permit to be used inside or outside of the licensed premises a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, can be heard on the outside of the licensed premises.] [Reserved]

(b) [A licensee may not permit an employee, servant, agent, event/tournament/contest participant or a person engaged directly or indirectly as an entertainer in the licensed establishment or a room or place connected therewith, to be in contact or associate with the patrons in the establishment, room or place for a lewd, immoral, improper or unlawful purpose. A copy of this restriction shall be constantly and conspicuously displayed on the wall of the dressing room used by the entertainers, as well as in a conspicuous location visible to employees, servants, agents and event/tournament/contest participants.] [Reserved]

...

**Commonwealth of Pennsylvania
Pennsylvania Liquor Control Board**

September 11, 2013

**SUBJECT: Final-Omitted Regulation Package 54-77
(Title 40, Pennsylvania Code, Section 5.32)**

TO: DAVID SUMNER
EXECUTIVE DIRECTOR
INDEPENDENT REGULATORY REVIEW COMMISSION

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

Telephone: 717-783-9454

Submitted herewith is a copy of final-omitted amendments to section 5.32 of the regulations of the Pennsylvania Liquor Control Board. Also enclosed are copies of the regulatory analysis form, signed CDL-1 face sheet, preamble and Annex A (regulatory text).

These amendments are being delivered today to the legislative oversight committees, the Independent Regulatory Review Commission and to the Office of Attorney General for approval as to form and legality.

Any questions and comments about this regulatory submission should be directed to Alan Kennedy-Shaffer, Assistant Counsel, or Rodrigo J. Diaz, Executive Deputy Chief Counsel, at (717) 783-9454.

Enclosures

cc:

Honorable Charles McIlhinney, Chairman, Senate Law and Justice Committee
Honorable Jim Ferlo, Democratic Chairman, Senate Law and Justice Committee
Honorable John Taylor, Chairman, House Liquor Control Committee
Honorable Paul Costa, Democratic Chairman, House Liquor Control Committee
Ms. Gail Reinard, Legislative Director (R), Senate Law and Justice Committee
Mr. Stephen Bruder, Executive Director (D), Senate Law and Justice Committee
Ms. Marcia Lampman, Executive Director (R), House Liquor Control Committee
Ms. Lynn Benka-Davies, Executive Director (D), House Liquor Control Committee

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

I.D. NUMBER: 54-77
SUBJECT: 5.32 Repeals
AGENCY: Pennsylvania Liquor Control Board



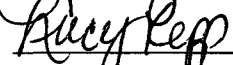
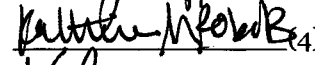
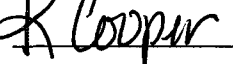
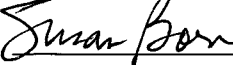
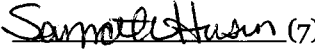
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TYPE OF REGULATION

- 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>
9/10/13	 (1)	HOUSE LIQUOR CONTROL COMMITTEE (Majority) (Minority)
9/11/13	 (2)	
9/11/13	 (3)	SENATE LAW & JUSTICE COMMITTEE (Majority) (Minority)
9/11/13	 (4)	
9/11/13	 (5)	INDEPENDENT REGULATORY REVIEW COMMISSION
9/11/13	 (6)	ATTORNEY GENERAL
9-11-13	 (7)	LEGISLATIVE REFERENCE BUREAU