

Comments of the Independent Regulatory Review Commission



Pennsylvania Liquor Control Board Regulation #54-86 (IRRC #3123)

Management Contracts

January 20, 2016

We submit for your consideration the following comments on the proposed rulemaking published in the November 21, 2015 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Liquor Control Board (Board) to respond to all comments received from us or any other source.

1. Consistency with statute.

The Board's Preamble states, in part:

In response to comments from the regulated community, the Board believes amendments are needed to recognize the reality of the modern business environment in which licensees enter into negotiated management agreements that, while not structured as a formal partnership or joint venture, may involve the sharing of profits and control. The Board further believes that proposed amendments will be more consistent with the statutory definition of "management company" than the regulations.

The Board proposes to delete provisions that reserve to the licensee the capability to direct its own business, prohibit a management company from having a pecuniary interest in the license, and allow the Board to refuse the involvement of a person providing services as a management company if the contract creates a pecuniary interest.

In regard to a license application, the Liquor Code at 47 P.S. § 4-404 states, in part

Upon receipt of the application and the proper fees, and upon being satisfied of the truth of the statements in the application that **the applicant is the only person in any manner pecuniarily interested in the business so asked to be licensed and that no other person will be in any manner pecuniarily interested therein during the continuance of the license**, except as hereinafter permitted
[Emphasis added.]

Similar language relating to pecuniary interest in the business is in 47 P.S. §§ 4-436(e) and (f).

The Liquor Code also includes this definition at 47 P.S. § 1-102, which the Board cites in the Preamble:

“Management company” shall 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.

While we do not disagree with the Board’s stated intent in the Preamble that it needs “to recognize the reality of the modern business environment in which licensees enter into negotiated management agreements,” we question whether the amendments to the regulation are consistent with the Liquor Code and in particular with the statutory phrase “that no other person will be in any manner pecuniarily interested therein during the continuance of the license.” Should the Board seek amendments to the Liquor Code to accomplish its stated intent? We ask the Board to provide further explanation in support of the proposed regulatory amendments.

2. Section 3.141. Management contracts. – Consistency with statute.

“Reserve to the licensee the capability to direct its own business”

The Board is proposing to delete Subsection (b) which states:

A management contract must reserve to the licensee the capability to direct its own business.

Subsection (b) protects the licensee’s authority over its own license, and particularly compliance with the Liquor Code and the Board’s regulation, when it contracts out management services. We ask the Board to further explain how deleting this provision is consistent with the Liquor Code and in the public interest.

“A management contract may not give a pecuniary interest to a management company”

Subsection (d), which prohibits a management contract from creating a pecuniary interest, is proposed to be deleted. How would it be consistent with the statute to permit a management contract to create a pecuniary interest “during the continuance of the license” without amending the license itself?

3. Section 3.143. Board approval and license responsibility. – Consistency with statute.

The Board is proposing to delete Paragraph (b)(2), which allows the Board to refuse the involvement of a person providing services as a management company if the contract creates a pecuniary interest. How is it consistent with the statute to delete this basis for refusal of a management contract when the contract creates a pecuniary interest in the license?

4. Pecuniary interest. – Consistency with statute.

The Board’s existing definition of “pecuniary interest” in Section 1.1 states:

Pecuniary interest - An interest that sounds in the attributes of proprietorship. There is a rebuttable presumption of a pecuniary interest when a person receives 10% or more of the proceeds of the licensed business or when control is exercised by one or more of the following:

- (i) Employing a majority of the employees of the licensee.
- (ii) Independently making day-to-day decisions about the operation of the business.
- (iii) Having final authority to decide how the licensed business is conducted.

As outlined above, the Liquor Code includes the phrase “pecuniarily interested” and similar language. Based on our review, with the deletions proposed by this regulation, the phrase “pecuniary interest” would no longer appear in the Board’s regulation, other than the definition in Section 1.1. Since the Liquor Code addresses pecuniary interest but does not define what it is, a definition is needed in regulation.

At the same time, we question how the Board’s intent expressed in the Preamble to “recognize the reality of the modern business environment in which licensees enter into negotiated management agreements . . . that involve the sharing of profits and control” can be accomplished within the parameters of the current statute and the definition of “pecuniary interest” in Section 1.1, or whether the Board should seek amendments to the Liquor Code to better address the modern business environment.