

# Regulatory Analysis Form

(Completed by Promulgating Agency)

**INDEPENDENT REGULATORY  
REVIEW COMMISSION**

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

(1) Agency Pennsylvania Liquor Control Board

(2) Agency Number: 54

Identification Number: 91

IRRC Number: 3170

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**IRRC**  
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(3) PA Code Cite: 40 Pa. Code, Chapters 9 and 11

(4) Short Title: Return of Liquor

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

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 (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)

This final-form rulemaking provides guidance to licensees and permit holders for returning liquor to the Pennsylvania Liquor Control Board ("Board") in the ordinary course of business. In addition, it clarifies existing regulations governing the disposition of liquor and malt or brewed beverages under certain circumstances, including but not limited to when a licensee has discontinued its licensed business.

(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 final-form rulemaking 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 Liquor Code makes the Board the primary wholesaler of liquor in Pennsylvania, and as a result, the Board is responsible for supplying liquor to licensees and permit holders for resale. However, at present, the Liquor Code does not address the circumstances under which the Board may accept returns of liquor from licensees or permit holders. Moreover, the Board's current regulations are insufficient, since they only address repurchases of liquor returned to the Board by licensees going out of business, bankruptcy estates or officers of the law.

To date, returns of liquor by licensees and permit holders in the ordinary course of business have been governed by policies and procedures applicable to the operation of the Board's Fine Wine & Good Spirits stores. With the passage of Act 39 of 2016, which authorizes certain licensees who obtain wine expanded permits to sell wine for off-premises consumption, there is a greater need to provide clear and consistent guidance for all licensees and permit holders wishing to return liquor to the Board.

Federal laws govern the return of alcoholic beverages sold in interstate or foreign commerce. 27 U.S.C. § 205(d); 27 C.F.R. § 11.31. Such laws generally make it unlawful to sell products with the privilege of returning those products for any reason other than "ordinary and usual commercial reasons" arising after the product has been sold. Id.

Federal regulations define what constitutes "ordinary and usual commercial reasons" for the return of products and outline the conditions and limitations for such returns. 27 C.F.R. §§ 11.32 – 11.46. These federal regulations are not generally applicable to sales transactions between the Board and licensees or permit holders in Pennsylvania since they do not occur in interstate or foreign commerce. However, the federal regulations do offer significant guidance for the return of liquor, which the Board has followed in this final-form rulemaking. They also limit the circumstances under which the Board may seek to return product to its suppliers.

The Board is adding Subchapter O, Return of Liquor to the Board by Licensees and Permit Holders, to Chapter 11. Most of this Subchapter is based on the above-referenced federal regulations, albeit tailored to meet the Board's needs and to provide necessary guidance to the regulated community. Each section in Subchapter O, and the necessity for it, is described in the Preamble.

Chapter 9, Subchapter F pertains to the disposition of liquor and malt or brewed beverages under certain conditions. One purpose for amending this subchapter was to remove the requirement that liquor held by decedents' estates and executors and administrators of decedents' estates could only be repurchased by the Board. Section 491(1) of the Liquor Code (47 P.S. § 4-491(1)) makes it lawful for an executor or an administrator of a decedent's estate to sell privately or at public auction liquor that was an asset of the decedent. Therefore, amending the language of the regulation was necessary to eliminate inconsistencies or possible confusion.

Chapter 9, Subchapter F also pertains to the repurchase of liquor by the Board when a licensee has discontinued operating its licensed business. The final-form rulemaking amends the subchapter's language to address the repurchase of liquor and malt or brewed beverages bought from manufacturers, since the Board is no longer the exclusive source of liquor in the Commonwealth. The remainder of the changes to Chapter 9, Subchapter F involve organizing and formatting the text to improve understanding of the regulation, as well as including amendments to make it consistent with Chapter 11, Subchapter O.

The members of the regulated community will benefit from the guidance and clarity provided by the final-form rulemaking, as they will be able to better understand what is required, and by when, to successfully return product to the Board, as well as understanding when a handling charge will be imposed and the amount of such charge. As of April 19, 2018, there were approximately 13,919 active licensees and permit holders that could be affected by the final-form rulemaking.

In addition, this final-form rulemaking has the potential to provide some cost savings for the Board, in that the Board may assess handling charges in certain situations. It also lessens the chances that the Board will have to take back product for which it would have no recourse with the product supplier. However, such cost savings are very speculative and not easily quantifiable.

(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 Board is guided by federal regulations for industry participants on alcohol product returns (27 C.F.R. §§ 11.31 – 11.46). The final-form rulemaking is not known to be more stringent than federal regulations, although it provides more specific information to be useful to the regulated community.

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

The retail sale of liquor is regulated by neighboring states in accordance with their unique and individual systems of alcoholic beverage control. Because of this, the regulatory change does not play a role in Pennsylvania's ability to compete with other states.

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

The final-form rulemaking will not affect any other existing or proposed regulations of the Board or any other state agency.

(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 sale of alcohol is regulated by the Alcohol and Tobacco Tax and Trade Bureau through the Federal Alcohol Administration Act (27 U.S.C. §§ 201, et seq.) and Title 27 of the Code of Federal Regulations (27 C.F.R. §§ 1.1, et seq.). The Board was guided by the limitations placed on the return of liquor by federal law.

With regard to the return of product obtained through the special order listing process, this information was communicated to the regulated community via a webinar in October 2017. This information is also available on the Board's website at <http://www.lcb.pa.gov>, by clicking on the tab labeled "Suppliers" and selecting the last item on the drop down list that appears ("2017 Special Order Changes Guide for Suppliers"; <http://www.lcb.pa.gov/Wine-and-Spirits-Suppliers/Documents/2017%20SLO%20Program%20Changes%20Guide%20for%20SLO%20Suppliers.pdf>). Information is also available on the Board's website for licensees, by clicking on the tab labeled "Licensing" and selecting the last item on the drop

down list that appears (“2017 Special Order Changes Guide for Licensees”; <http://www.lcb.pa.gov/Licensing/ResourcesForLicensees/Documents/2017%20Special%20Order%20Program%20Changes%20Guide%20for%20Licensees.pdf>).

(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?

Federal regulation (relating to small business size standards) provides the following measurements for determining whether a business may be considered to be a “small” business: a full-service restaurant with annual receipts of less than \$7.5 million; a drinking place (alcoholic beverages) with annual receipts of less than \$7.5 million; hotels with annual receipts of less than \$32.5 million; supermarkets or other grocery stores (except convenience) with annual receipts of less than \$32.5 million; and convenience stores with annual receipts of less than \$29.5 million. (13 C.F.R. § 121.201).

As of April 19, 2018, there were approximately 13,919 active licensees and permit holders that could be affected by the final-form rulemaking. Licensees and permit holders would only be affected by the final-form rulemaking if they have or purchase liquor that they would like to return to the Board for the reasons addressed in the rulemaking. Although some of the Board’s licensees probably do not fall within the definition of small business, the majority of businesses licensed by the Board would likely be considered small businesses.

(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.

The affected parties include all licensees and permit holders that want to return product to the Board or have the Board repurchase product. As of April 19, 2018, there were approximately 13,919 active licensees and permit holders that could be affected by the final-form rulemaking. The final-form rulemaking will benefit licensees and permit holders by providing clear and consistent guidance regarding the return of liquor to the Board.

The regulation also sets forth the procedure for the Board to repurchase product when a licensee discontinues its business.

(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.

The expected financial, economic and social impact of the final-form rulemaking is that it will be beneficial to those licensees who wish to return product to the Board for “ordinary and usual commercial reasons.” The Board will issue a refund for product that it accepts for return. The refund will be the price paid for the product. Under certain circumstances specified in the final-form regulations, the refund will be reduced by the assessment of a handling charge of 12.5% of the refund or \$50.00, whichever is greater. The handling charge is designed to cover the costs associated with processing the return. The handling charge will be waived in situations where the product is defective, is not what the licensee ordered, may no longer lawfully be sold, or is subject to a recall or withdrawal. In addition, no handling charges will be assessed if less than twelve bottles are accepted for return.

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

It is expected that the final-form rulemaking will not have any adverse effects and only minimal costs. The rulemaking more clearly defines the reasons for which the Board will accept the return of product and, thus, provides clarity to the regulated community. Moreover, the handling charge will be waived in situations where the product is defective, is not what the licensee ordered, may no longer be sold, or is subject to a recall. No handling charges will be assessed if less than twelve bottles are accepted for return.

(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.

The regulated community would only incur a minimal handling charge of 12.5% or \$50.00, whichever is greater, of the cost of any product accepted for return. The current regulations have referenced a 12.5% handling charge since the 1950s, so this is not a new concept. Moreover, the handling charge will be waived in situations where the product is defective, is not what the licensee ordered, may no longer be sold, or is subject to a recall or withdrawal. No handling charges will be assessed if less than twelve bottles are accepted for return. No legal, accounting or consulting procedures are required.

(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 final-form rulemaking is not expected to result in costs or savings to local governments.

(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 final-form rulemaking is not expected to result in any significant overall costs or savings to state government. Any potential costs or savings would be very speculative and not easily quantifiable.

(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.

This final-form rulemaking is not expected to require any additional measures for implementation by local governments or state governments other than the Board. The regulated community will be required to provide documentation of the transaction when making a return, which documentation consists of, but is not limited to, a signed bill of lading, a licensee sales invoice, and/or a point of sale receipt. However, this proof or evidence would consist mostly of documentation of purchases that is already required to be retained by the regulated community for two years, pursuant to section 493(12) of the Liquor Code. 47 P.S. § 4-493(12).

In sections 9.112 and 9.113, the final-form regulations require some basic information in order to process a request for the Board to repurchase liquor from a licensee that is no longer in business. Aside from a simple form to be completed by special occasion permit holders, wine auction and spirit auction permit holders, there will be no other new paperwork requirements. The Board will also have some

recordkeeping obligations as a result of the final-form rulemaking, but the Board already has substantial measures in place relative to purchases and tracking returns.

(22a) Are forms required for implementation of the regulation?

A form is required for a permit holder to be allowed to return product. It is a simple, one-page form that requires no expertise to complete.

(22b) If forms are required for implementation of the regulation, **attach copies of the forms here**. If your agency uses electronic forms, provide links to each form or a detailed description of the information required to be reported. **Failure to attach forms, provide links, or provide a detailed description of the information to be reported will constitute a faulty delivery of the regulation.**

The form is attached to the end of this RAF and also at the end of the Preamble and Annex A.

(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
<b>SAVINGS:</b>	\$0	\$0	\$0	\$0	\$0	\$0
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
<b>COSTS:</b>	\$0	\$0	\$0	\$0	\$0	\$0
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
<b>REVENUE LOSSES:</b>	\$0	\$0	\$0	\$0	\$0	\$0
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 2014-2015	FY -2 2015-2016	FY-1 2016-2017	Current FY
	\$0	\$0	\$0	\$0

(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.

Federal regulation (relating to small business size standards) provides the following measurements for determining whether a business may be considered to be a "small" business: a full-service restaurant with annual receipts of less than \$7.5 million; a drinking place (alcoholic beverages) with annual receipts of less than \$7.5 million; hotels with annual receipts of less than \$32.5 million; supermarkets or other grocery stores (except convenience) with annual receipts of less than \$32.5 million; and convenience stores with annual receipts of less than \$29.5 million. (13 C.F.R. § 121.201).

As of April 19, 2018, there were approximately 13,919 active licensees and permit holders that could be affected by the final-form rulemaking. Licensees and permit holders would only be affected by the final-form rulemaking if they would like to return liquor to the Board for the reasons addressed in the rulemaking. Although some of the Board's licensees probably do not fall within the definition of small business, the majority of businesses licensed by the Board would likely be considered small businesses. However, it is not anticipated that the final-form rulemaking would have an adverse impact.

- (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.

The regulated community will be required to provide documentation of the sales transaction that is already required to be retained by the regulated community for two years, pursuant to section 493(12) of the Liquor Code. 47 P.S. § 4-493(12). This information is necessary to establish the date of purchase and the purchase price. In sections 9.112 and 9.113, the final-form regulations require some basic information in order to process a request for the Board to repurchase liquor from a licensee that is no longer in business. The Board will also have some recordkeeping obligations as a result of the final-form rulemaking, but the Board already has substantial measures in place relative to purchases and tracking returns. Aside from a simple, one-page form to be completed by permit holders, there will be no other new paperwork requirements. No professional skills are necessary as the final-form rulemaking does not require the preparation of any reports or records.

- (c) A statement of probable effect on impacted small businesses.

Any effect on impacted small businesses is likely to be positive, as the final-form rulemaking clarifies, and in some instances even expands, the reasons for the return of product to the Board.

- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

The final-form rulemaking is not intrusive or costly; therefore, a less intrusive or less costly alternative method is not available.

- (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 such special provisions have been developed to meet the particular needs of affected groups because it is believed that these groups do not have particular needs when it comes to the return of liquor.

- (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.

No other alternative regulatory provisions were considered. Because Chapter 9 already included some regulatory provisions for the return or repurchase of alcohol, under very limited circumstances, the Board believes that nothing less than a regulatory promulgation, addressing additional rules allowing for the return or repurchase of alcohol, would be appropriate.

- (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;

With regard to this final-form rulemaking, there are no compliance or reporting requirements for small businesses.

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

The only schedule or deadline in the final-form rulemaking pertains to the time by which a licensee must return product to the Board if it seeks a refund. Depending upon the circumstances, this time period is within 30 days of purchase or receipt, or within 30 days of notification of the situation that triggers the reason for the return. The Board believes these are reasonable deadlines.

- c) The consolidation or simplification of compliance or reporting requirements for small businesses;

With regard to this final-form rulemaking, there are no 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

The final-form rulemaking does not establish any performing, design, or operational standards.

- e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

There are no requirements contained in the final-form rulemaking unless a licensee or permittee wants to return liquor to the Board. There is no exemption for small businesses from this requirement if the small businesses want to return liquor to the Board.

(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 final-form rulemaking.

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

- |   |                  |
|---|------------------|
| A. The length of the public comment period:   | <u>N/A</u>       |
| B. The date or dates on which any public meetings or hearings will be held:                   | <u>N/A</u>       |
| C. The expected date of delivery of the final-form regulation:                                | <u>May 2018</u>  |
| D. The expected effective date of the final-form regulation:                                  | <u>July 2018</u> |
| E. The expected date by which compliance with the final-form regulation will be required:     | <u>July 2018</u> |
| F. The expected date by which required permits, licenses or other approvals must be obtained: | <u>N/A</u>       |

(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.

**SPECIAL OCCASION, WINE OR SPIRIT AUCTION PERMIT HOLDERS**

**PRE-AUTHORIZATION FORM FOR THE RETURN OF LIQUOR**

To return, for a refund, any liquor that you do not use at your event, the PLCB has established the following requirements (to acknowledge, please write your initials in the right-hand column):

*Initials*

1. I understand that, unless my order is delivered by truck to the event location, the product must be returned to *this* store and no other PLCB location.
2. I understand that, if my order is delivered by truck to the event location, only 100% full, unopened cases will be accepted by the delivery truck for returns, and that all other product must be returned to the store or licensee service center as directed by my PLCB representative.
3. I understand that the product must be saleable liquor in the original containers, unopened and unadulterated, as when originally sold by the state liquor stores. "Saleable" means that the products and containers must look as they did when originally purchased.
4. I understand that, when the product is returned, I must provide copies of the documentation of the transaction (including, but not limited to, a signed bill of lading, a licensee sales invoice, and/or a point of sale receipt).
5. I understand that the product must be returned within 30 days of the date of purchase. If the product was a special order listing, it may be returned for refund within 30 days from the date of receipt by the permittee or its agent.
6. I understand that the product must be kept out of direct sunlight and in a temperature-controlled environment, such as a refrigerator, a temperature-controlled delivery vehicle, or any location where the temperature does not reach below 55 degrees or above 75 degrees.
7. I understand that the return of products obtained through the special order listing process must be handled through the PLCB's Special Order Division.


**Regarding the amount of your refund:**

- Refunds for a return of less than 12 bottles (regardless of type or brand) will not be assessed a handling charge.
- Refunds for a return of 12 or more bottles (regardless of type or brand) will be assessed a handling charge of 12.5% of the total amount refunded or \$50.00, whichever is greater.
- Fees for the services of a delivery truck are non-refundable.

Permit Holder Organization Name	Permit Number
Product Accepted By (Please PRINT)	Date of Pickup or Delivery

**By signing this form, you swear and affirm under penalty of law that the statements made in this form are true, correct and complete, pursuant to 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.**

Product Accepted By (Signature):	Permit Holder Telephone:
Order Picked Up at Store No.	Order Delivered to Event Location by

*Signed and initialed original retained by the PLCB.*

FACE SHEET  
FOR FILING DOCUMENTS  
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

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<p>Copy below is hereby approved as to form and legality.</p> <p>Attorney General:</p> <p>BY: _____ (DEPUTY ATTORNEY GENERAL)</p> <p>_____ DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable Copy not approved. Objections attached.</p>	<p>Copy below is hereby certified to be a true and correct copy of a document issued, prescribed or promulgated by:</p> <p><u>Pennsylvania Liquor Control Board</u> (AGENCY)</p> <p>DOCUMENT/FISCAL NOTE NO. 54-91</p> <p>DATE OF ADOPTION: <u>April 25, 2018</u></p> <p>BY: <u>T. Ides</u></p> <p>TITLE: <u>Chairman</u> (Executive Officer, Chairman or Secretary)</p>	<p>Copy below is hereby approved as to form and legality. Executive or Independent Agencies:</p> <p>BY: <u>[Signature]</u> Chief Counsel</p> <p><u>April 25, 2018</u> DATE OF APPROVAL</p> <p><input type="checkbox"/> Check if applicable. No Attorney General approval or objection within 30 days after submission.</p>
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TITLE 40—LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 9. TRANSPORTATION, IMPORTATION,  
DISPOSITION AND STORAGE

Subchapter F. DISPOSITION OF LIQUOR AND MALT  
OR BREWED BEVERAGES UNDER CERTAIN CONDITIONS

CHAPTER 11. PURCHASES, SALES, AND RETURNS

Subchapter O. RETURN OF LIQUOR TO THE BOARD  
BY LICENSEES AND PERMIT HOLDERS

## FINAL-FORM RULEMAKING

### LIQUOR CONTROL BOARD

#### 40 PA. CODE CHAPTERS 9 AND 11

#### RETURN OF LIQUOR

The Liquor Control Board (Board), under the authority of section 207(i) of the Liquor Code (47 P.S. § 2-207(i)), amends §§ 9.111—9.115 (relating to disposition of liquor and malt or brewed beverages under certain conditions) and adds §§ 11.231—11.239 (relating to return of liquor to the Board by licensees and permit holders) to read as set forth in Annex A.

#### *Summary*

This final-form rulemaking provides guidance to licensees and permit holders for returning liquor to the Board in the ordinary course of business. In addition, it clarifies existing regulations governing the disposition of liquor and malt or brewed beverages under certain circumstances.

The Liquor Code makes the Board the primary wholesaler of liquor in Pennsylvania, and as a result, the Board is responsible for supplying liquor to licensees and permit holders for resale. However, at present, the Liquor Code does not address the circumstances under which the Board may accept returns of liquor from licensees or permit holders. Moreover, the Board's current regulations are insufficient, since they only address repurchases of liquor returned to the Board by licensees going out of business, bankruptcy estates or officers of the law.

To date, returns of liquor by licensees and permit holders in the ordinary course of business have been governed by policies and procedures applicable to the operation of the Board's Fine Wine & Good Spirits stores. With the passage of Act 39 of 2016, which authorizes certain licensees who obtain wine expanded permits to sell wine for off-premises consumption, there is a greater need to provide clear and consistent guidance for all licensees and permit holders wishing to return liquor to the Board.

Federal laws govern the return of alcoholic beverages sold in interstate or foreign commerce. 27 U.S.C. § 205(d); 27 C.F.R § 11.31. Such laws generally make it unlawful to sell products with the privilege of returning those products for

any reason other than “ordinary and usual commercial reasons” arising after the product has been sold. Id.

Federal regulations define what constitutes “ordinary and usual commercial reasons” for the return of products and outline the conditions and limitations for such returns. 27 C.F.R. §§ 11.32 – 11.46. These federal regulations are not generally applicable to sales transactions between the Board and licensees or permit holders in Pennsylvania since they do not occur in interstate or foreign commerce. However, the federal regulations do offer significant guidance for the return of liquor, which the Board has followed in this final-form rulemaking. They also limit the circumstances under which the Board may seek to return product to its suppliers.

The Board is adding Subchapter O, Return of Liquor to the Board by Licensees and Permit Holders, to Chapter 11. Most of this Subchapter is based on the above-referenced federal regulations, albeit tailored to meet the Board’s needs and to provide necessary guidance to the regulated community. Each section in Subchapter O, and the necessity for it, will be described herein.

**Section 11.231** (relating to General provisions) is added to explain the guiding principle for the return of liquor to the Board, which is that liquor may be returned for ordinary and usual commercial reasons arising after the product has been sold. This section is based on 27 C.F.R. §§ 11.31, 11.35, 11.36, 11.45, and 11.46.

The proposed section 11.231 provided that a refund would be given either at the price paid or the then-available price, whichever was lower. In response to a comment issued by the Independent Regulatory Review Commission (“IRRC”), the final-form rulemaking amends this section to state that the refund will equal the price paid, as evidenced by documentation of the transaction. Section 11.231 was further amended to define “documentation of the transaction” as including a signed bill of lading, a licensee sales invoice, and/or a point of sale receipt. This explains to the licensee what type of paperwork or proof is required to establish the price paid for the product that is being returned.

Section 11.231 also sets forth examples of what is not considered by the Board to be ordinary and usual commercial reasons for the return of liquor, such as when product is sought to be returned because the licensee is overstocked. These examples, which generally follow federal law, are provided so that the regulated community can know, in advance, whether a return of liquor will be accepted.

In the final-form rulemaking, the Board added subsection 11.231(b)(4): that it will not accept product sought to be returned because it was damaged after the

product has left the custody or control of the Board. In such a situation, the licensee's recourse would be against the person or entity that damaged the product after it left the custody or control of the Board.

Section 11.231 provides a "signpost" to section 9.113 (relating to Requests for repurchase by licensees who have discontinued business or sold their licensed business; information to be furnished) and 9.114 (relating to Repurchase of liquor presented to the Board) to reduce confusion over which section is applicable when a licensee wants to dispose of its remaining inventory of liquor because it will no longer be operating.

In the final-form rulemaking, section 11.231 was further amended by adding subsection (e) to explain the amount of the refund (being the price paid by the licensee) and the amount of the handling charge. The handling charge is calculated to be 12.5% of the price paid or \$50.00, whichever is greater. In situations where the handling charge may be applied, it will only be assessed when twelve or more bottles are accepted for refund.

Finally, subsection (f) was added to section 11.231 to advise that the return of any liquor purchased as a special order listing is subject to the provisions of section 11.239. A more detailed explanation for section 11.239 will be provided subsequently.

**Section 11.232** (relating to Defective products) is based on 27 C.F.R. § 11.32 and sets forth the first of the ordinary and usual commercial reasons for the return of liquor. Defective products are those that are unmarketable at the time of purchase because of product deterioration, leaking containers, damaged labels, or missing or mutilated tamper evident closures.

The proposed regulation required product under this section to be returned within 15 days of product delivery. IRRC suggested that the final-form rulemaking add the phrase "or pickup" after "product delivery." IRRC also asked for the Board's rationale for the proposed time limits.

In the proposed rulemaking, the Board wanted a 15-day time frame for the return of defective or erroneous product to be able to reconcile, within a short period of time, the accounts of the licensees that returned product. However, the Board's return policy for sales to private individuals (non-licensees) requires individuals to return product within 30 days, with a receipt. Therefore, the standard timeframe for licensee returns is also 30 days. In the interest of consistency, the Board has amended the proposed rulemaking and expanded the time to 30 days and now

requires returns of defective product to be made within 30 days of purchase (except for special order listings, which will be explained below), to be consistent with the language in Chapter 9 and to provide for easier enforcement.

The proposed section 11.232 required a licensee to apply the refund towards the purchase of an equal quantity of the same product. The proposed language was intended to serve as a reflection of what typically occurs and was not meant to limit a licensee's options. In response to a comment by IRRC, the final-form rulemaking deletes this requirement and simply provides that the licensee may return product for a refund. Therefore, the final-form rulemaking amends the language so that the licensee is free to utilize the refund as it sees fit.

**Section 11.233** (relating to Errors in products delivered) is based on 27 C.F.R. § 11.33 and is the second of the ordinary and usual commercial reasons for the return of liquor. This scenario occurs when the licensee has ordered one type of product (for example, Chardonnay) and received a different type of product (Chablis).

In the proposed regulation, the Board established that product returned under this section should be returned within 15 days of product delivery. However, in the final-form rulemaking, the time frame was amended to "within 30 days of purchase," in the interest of consistency throughout the Subchapter and to provide for easier enforcement.

In the proposed section 11.233, the licensee was required to provide "proof of the order and the discrepancy in question." This phrase was deleted and, in the final-form rulemaking, replaced with "documentation of the transaction, as that term is defined in subsection 11.231(d), and the erroneous product." "Documentation of the transaction" may include, but is not limited to, a signed bill of lading, a licensee sales invoice, and/or a point of sale receipt.

The proposed section 11.233 required a licensee to apply the refund towards the purchase of an equal quantity of the same product. The proposed language was intended to serve as a reflection of what typically occurs and was not meant to limit a licensee's options. In response to a comment by IRRC, the final-form rulemaking deleted this requirement and now provides that the licensee may return product for a refund. The licensee is free to utilize the refund as it sees fit.

Since the Board was able to provide all of the necessary details in one subsection, it was no longer necessary to have subsections (b) and (c), and therefore they were deleted in the final-form rulemaking.

**Section 11.234** (relating to Products that may no longer be lawfully sold) is based on 27 C.F.R. § 11.34 and is the third of the ordinary and usual commercial reasons for the return of liquor. This scenario may occur when a product may no longer be sold because federal or state law, regulation, or administrative procedure was changed. For example, a law may be enacted that prohibits the sale of any beverages that contain both alcohol and caffeine. Another example is when a court rules that a product infringes upon another manufacturer's trademark and can no longer be sold.

The manufacturer may advise licensees directly about the change in the legal status of its product, but will always notify the Board since the Board serves as the principal wholesaler for Pennsylvania. Once the Board is advised of the change in legal status, the Board will notify the licensed community via e-mail.

The proposed regulation for section 11.234 did not provide a time limit for the return of such liquor. For the final-form regulation, the language of this section was amended to provide licensees 30 days from the date of notification that a product may no longer be sold lawfully to return the product to the Board. Because this product will no longer be a factor in ongoing business transactions between the Board and a licensee, but is being returned to the Board for the final time, the Board believes that 30 days from the date of notification is a reasonable timeframe for a licensee to return the unlawful product. This also allows the Board to seek proper recourse with the product supplier in a timely manner.

**Section 11.235** (relating to Product subject to recall or withdrawal) is the fourth of the ordinary and usual commercial reasons for the return of liquor. This regulation is not based on a federal counterpart, but on the Alcohol and Tobacco Tax and Trade Bureau Industry Circular No. 2010-6, which addresses product recalls in the alcohol industry.

When the proposed regulation was submitted, this section addressed only product subject to recall. Generally, a product is subject to recall when it has been determined that the use of or exposure to a product is likely to cause serious adverse health consequences or death to humans or animals.

The final-form regulation amends section 11.235 to include product that is subject to withdrawal. The terms "recall" and "withdrawal" are similar but do not mean the same thing. A product recall is invoked by a government agency when a product is unsafe for the public. A product withdrawal is invoked by a manufacturer when a product is suffering from quality issues, not safety issues. The Board has experienced both product recalls and product withdrawals, and wanted to assure the

regulated community that both recalls and withdrawals are acceptable reasons for a product's return.

The proposed regulation for section 11.235 did not provide a time limit for the return of such liquor. The final-form rulemaking amends this section, giving licensees 30 days to return product after receiving notification that a product is subject to recall or withdrawal. This period of time is believed to be sufficient given the significant reasons for the return. It also encourages licensees to exercise due diligence upon receiving notification of a product issue, so that the Board can pursue recourse with the product supplier in a timely manner.

**Section 11.236** (relating to Change in product) is based on 27 C.F.R. § 11.37 and is the fifth of the ordinary and usual commercial reasons for the return of liquor. This section provides for the return of liquor when a product has subsequently been changed in formula, proof, label or container. Usually such changes relate to a change in proof or in the blend of ingredients in the product.

The proposed regulation required a licensee to return product within 30 days of delivery or pickup. The final-form regulation amends the language to allow returns—the return of the existing product is voluntary—within 30 days of when the licensee receives notification of the change in formula, proof, label or container. This change was recommended by IRRC and will allow licensees to return product that has been in their inventory for more than 30 days before the announced change in product. It also encourages licensees to exercise due diligence upon receiving notification of a product issue, so that the Board can pursue recourse with the product supplier in a timely manner.

The proposed section 11.236 required a licensee to apply the refund towards the purchase of an equal quantity of the same product. The proposed language was intended to serve as a reflection of what typically occurs and was not meant to limit a licensee's options. In response to a comment by IRRC, the final-form rulemaking deletes this requirement and simply provides that the licensee may return product for a refund. Therefore, the final-form rulemaking amends the language so that the licensee is free to utilize the refund as it sees fit.

Finally, the final-form regulation clarifies that returns under this section are subject to a handling charge in accordance with subsection 11.231(e). The imposition of a handling charge in this instance is justified since there is nothing wrong with the existing product; it is future product that is affected by the change in formula, proof, label or container. In other words, the return of the existing product is discretionary on the part of the licensee.

**Section 11.237** (relating to Discontinued products) is based on 27 C.F.R. § 11.38 and is the sixth of the ordinary and usual commercial reasons for the return of liquor. This section allows a licensee to elect to return product when a manufacturer or importer discontinues the production or importation of the product.

The proposed section 11.237 required the return of product within 30 days of product delivery or pickup. The final-form regulation amends the language to allow returns within 30 days of when the licensee has received notification that the product is being discontinued. This change was recommended by IRRC and will allow licensees to return product that has been in their inventory for more than 30 days before the announced discontinuation.

In addition, the final-form regulation deletes a reference to allowing the return “in the Board’s discretion.” Product will be accepted for return in these circumstances, but the final-form regulation clarifies that returns under this section are subject to a handling charge in accordance with subsection 11.231(e). The imposition of a handling charge in this instance is justified since there is nothing wrong with the existing product. In other words, the return of the existing product is discretionary on the part of the licensee.

**Section 11.238** (relating to Permit holders) (in the proposed rulemaking, this section was referred to as Occasional sellers) is loosely based on 27 C.F.R. § 11.39 (relating to Seasonal dealers) and is the seventh of the ordinary and usual commercial reasons for the return of liquor. As of April 19, 2018, there have been 9,000 total special occasion permit holders, wine auction permit holders and spirit auction permit holders (collectively, “permit holders”). This figure includes expired permits, since these permits expire at the end of the calendar year, and are typically only renewed as needed throughout the calendar year. Therefore, citing the figure for only active permits would be artificially low.

Permit holders buy liquor for fundraising events and not as part of an ongoing business. As a result, they often want to return liquor that has not been used at the event—sometimes less than a case, but in some situations, truckloads of liquor. Frequently, though, these permits are used at outdoor events, which can have a detrimental impact on the quality of liquor, particularly wine. A regulation is needed to provide guidance to permit holders as to what the Board needs and expects in order to process a return.

By way of illustration, in 2013, the Board sold alcohol to a permit holder for a nationally recognized golf event. The order totaled three truckloads of wine and

spirits, which were kept outdoors. At the end of the event, the permit holder tried to return all of the product that had not been consumed, including partially consumed bottles and bottles of wine that had not been properly stored. This experience underscored the need for regulatory guidance regarding the return of liquor by permit holders.

One of the concerns the Board has regarding liquor returned by permit holders is that, because permit holders are not usually in the business of selling liquor, the Board does not know under what conditions the liquor, particularly the wine, has been kept. In the wrong conditions, such as excessive heat or sunlight, product can be ruined. Neither the Board nor the product supplier have control over these conditions once the product is sold and the permit holder takes possession.

The final-form regulations amend this section to set forth the conditions that must be met for the Board to accept the return of liquor from permit holders. In addition, when a permit holder order is picked up or delivered, the permit holder will be asked to initial and sign a pre-authorization form that sets forth the requirements for returning unused product. A copy of the form is appended to Annex A.

In response to a comment from IRRC, the final-form regulations amend section 11.238 to clarify the situations where the Board will waive the handling charge when product is returned by a permit holder. The handling charge will automatically be waived if a permit holder returns less than 12 bottles that meet the required conditions. If the permit holder is returning 12 bottles or more, the Board will apply the handling charge to all bottles that meet the required conditions. The product must be unopened, unadulterated and in saleable condition. A definition of "saleable" was added in the final-form rulemaking.

The final-form rulemaking revised, *in toto*, **section 11.239** (relating to Special order listings) (in the proposed rulemaking, this section was referred to as Products not accepted). In the proposed rulemaking, this section was intended to address situations where the licensee rejected the product delivery and refused to accept the product. The Board deleted this language from the final-form rulemaking because it did not fit within the context at large, which is the return of liquor to the Board after it has been accepted by the licensee. There is no equivalent to the language of the proposed section 11.239 in federal regulations.

In the final-form rulemaking, section 11.239 has been amended to address the unique circumstance of special order listings, which the Board is authorized to offer to the public under section 305(a) of the Liquor Code. 47 P.S. § 3-305(a). A special order listing is a product that the Board does not stock, but which is advertised as

being available upon request from the product supplier. The customer is charged for the purchase when the product is shipped from the supplier, but there could be as much as a 45-day delay between when a special order is placed and when the licensee can physically receive the product. Therefore, final-form section 11.239 provides that such product may be returned for a refund within 30 days from the date of receipt, rather than 30 days from the date of purchase.

Special order product is not delivered to the Board's warehouses to be handled through standard distribution procedures, but is shipped directly from the supplier to one of the Board's approximately 600 stores. As a result, a return of a special order product cannot be processed in the same manner as the Board's inventory. Because the Board may have previously rejected that product for listing in its stores, or the supplier may have elected to limit distribution of the product by using the special order sales channel, it would not make sense for the Board to accept returns of such product. Therefore, the product supplier must decide how the special order product return shall be handled, within the parameters of sections 11.231-11.237, and communicate that decision to the Board.

The amended section 11.239 sets forth the options for the product supplier: either pick up the returned product at the Board's store, arrange for the shipment of the returned product back to the supplier, or ask the Board to destroy the returned product. If the Board is asked or required to destroy the special order product, the supplier will be charged a fee.

It bears noting that, in October of 2017, the Board established these return procedures for special order listing products after providing notice of the same to both licensees and suppliers. As such, the regulated community has already had an opportunity to comment on these return procedures. Although the content of section 11.239 is new to the regulatory process, it is not new to those affected by it. The Board believes that it is beneficial to codify these procedures by including them in the final-form rulemaking, since it provides consistency to the regulated community and clarifies how special order returns are to be handled as compared to returns of other products.

The final-form rulemaking also includes changes in Chapter 9. **Section 9.111** (relating to Alcoholic beverages held by estates; legal process; licensees who have discontinued business) was amended in the proposed regulations to update the language and to delete references to the estate of a decedent, since decedent's estates have the authority under the Liquor Code to sell alcohol through channels other than the Board.

The final-form rulemaking further amended section 9.111 to reflect the fact that licensees are not limited to purchasing liquor from the Board; they may purchase from Pennsylvania-licensed manufacturers, such as limited wineries, limited distilleries, or distilleries. Therefore, this section was amended in final-form to clarify that, when a licensee discontinues doing business, liquor may be repurchased by the Board or the Pennsylvania-licensed manufacturer from whom it was originally purchased. This was also done to be consistent with the change in the proposed regulation for malt or brewed beverages.

**Section 9.112** (relating to Requests for repurchase by bankruptcy estates or officers of the law; information to be furnished) was amended in the proposed rulemaking stage by deleting the subsection that addressed the estates of decedents, since decedent's estates are not required to present liquor to the Board for repurchase. Also deleted were subsections regarding licensees that have discontinued business, with or without the transfer of the license, as these topics will be addressed in section 9.113.

In the final-form rulemaking, section 9.112 was amended first by revising the section name to more accurately reflect the information provided within the section. Instead of the previous generic title of "Information to be furnished," the section name was amended to "Requests for repurchase by bankruptcy estates or officers of the law; information to be furnished," to provide more clarity to the regulated community. Additional verbiage was added to the section to clarify the scenarios addressed in the section.

Section 9.112 was further amended in the final-form rulemaking by adding, in each remaining subsection, the type of information that the Board requires to repurchase liquor. Specifically, licensees must provide information regarding the date of purchase of the product, as evidenced by documentation of the transaction. That phrase is defined in the section, for the convenience of the regulated community, as a signed bill of lading, a licensee sales invoice, and/or a point of sale receipt.

Finally, section 9.112 was amended to clarify that this section does not apply to alcohol seized pursuant to article VI of the Liquor Code. Article VI pertains to "Property Illegally Possessed or Used; Forfeitures; [and] Nuisances." Section 603 of the Liquor Code addresses the disposition of forfeited property. 47 P.S. § 6-603.

**Section 9.113** (relating to Requests for repurchase by licensees who have discontinued business or sold their licensed business; information to be furnished) was amended in the final-form rulemaking first by revising the section name to more

accurately reflect the information provided within the section. Instead of the previous generic title of “Repurchase of liquor by the Board,” the section name was amended to “Requests for repurchase by licensees who have discontinued business or sold their licensed business; information to be furnished,” to provide more clarity to the regulated community.

The section was further amended in the final-form rulemaking by adding to subsection (a), after “A licensee who has discontinued business without transfer of the license,” the phrase “who wants to have liquor repurchased by the Board.” This phrase was added for the sake of clarity. Subsection (a) was further amended in the final-form rulemaking regarding the information a licensee must provide to the Board, specifically, the date of purchase of the product, as evidenced by documentation of the transaction. That phrase is defined in subsection (d), which was added in the final-form rulemaking, as a signed bill of lading, a licensee sales invoice, and/or a point of sale receipt. This was also done to be consistent with the Chapter 11 changes.

Section 9.113(b) was also amended in the final-form rulemaking to include a listing of all the information that the licensee must provide to the Board. This is the same list set forth in section 9.113(a), but that section pertains to the discontinuance of business without the transfer of the license. Because this subsection pertains to the sale of the licensed business, which is clearly different from the discontinuance of business without the transfer of the license, the Board believes that reiterating the list in section 9.113(b) is appropriate, since the information required is the same, but the existing regulation does not clearly express this to the regulated community.

Because of the restructuring of subsection (b), it was necessary to take the verbiage contained in paragraph (2) and move it to its own subsection, which, in the final-form rulemaking, is subsection (c). Therefore, subsection (c) does not provide new information to the regulated community, but is set forth in its own subsection for the sake of clarity. Subsection (c) addresses the scenario where a licensee selling its licensed business wants to transfer its liquor and malt or brewed beverages inventory to the person buying the license.

**Section 9.114** (relating to Repurchase of liquor presented to the Board), a minor grammatical change was made to subsection (a)—“and” was changed to “or”—to reflect that the licensee is only required to provide the information in one of the sections, not both. The references to sections 9.112 and 9.113 were updated to reflect the new section names.

This section was further amended in the final-form rulemaking by deleting language that the licensee would be given the price paid or the current price, whichever is lower, and replacing it with language that the licensee will be given the price paid. This was also done to be consistent with the Chapter 11 changes.

Section 9.114 was further amended in the final-form rulemaking to explain that a handling charge would be assessed only when 12 or more bottles are accepted for repurchase by the Board. The handling charge is defined as 12.5% of the purchase price or \$50.00, whichever is greater. This was also done to be consistent with the Chapter 11 changes.

Section 9.114 was also amended to provide that the Board will generally only accept liquor for repurchase within 30 days of the original purchase. This was also done to be consistent with the time limits established in the Chapter 11 changes. However, an exception was added in the final-form rulemaking that allows the Board to repurchase liquor outside this 30-day period when it is in the best interests of the Commonwealth and is operationally prudent for the Board to do so.

Finally, in the final-form rulemaking, section 9.114 was amended to clarify that repurchases will be confined to saleable liquor in the original containers, unopened and unadulterated, as when originally sold by the Board. A definition of "saleable" was added in the final-form rulemaking.

**Section 9.115** (relating to Repurchase of liquor or malt or brewed beverages presented to a distributor, importing distributor, or manufacturer) was not amended in the proposed rulemaking but was amended in the final-form rulemaking. Previously, this section was named "Sales prohibited," and the text of the section provided: "Sales of other than State Store liquor, or of State Store liquor contrary to the provisions of this subchapter, are prohibited, except where made by licensees in accordance with the provisions of the Liquor Code." The elimination of this verbiage is negligible, since even without this language, sales of liquor contrary to the Liquor Code and the Board's Regulations are prohibited.

Instead, the Board chose, in the final-form rulemaking, to use this section to clarify that these regulations do not require a Pennsylvania-licensed distributor, importing distributor, or manufacturer to repurchase liquor or malt or brewed beverages; they have the discretion to do so. The final-form section 9.115 also reminds these entities to keep records pertaining to repurchases in accordance with sections 493(12) and 512 of the Liquor Code (47 P.S. §§ 4-493(12), 5-512).

### *Affected Parties*

The affected parties include all licensees and permit holders that want to return product to the Board. As of April 19, 2018, there were approximately 13,919 active licensees and permit holders that could be affected by the final-form rulemaking. The members of the regulated community will benefit from the guidance and clarity provided by the final-form rulemaking, as they will be able to better understand what is required, and by when, to successfully return product to the Board. They will also be able to better understand what options exist for disposing of products under certain circumstances, such as the discontinuance of business and/or bankruptcy.

### *Paperwork Requirements*

The regulated community will be required to provide proof or evidence to support the reasons for return in some instances and may be required to do so in other instances. However, this proof or evidence would consist mostly of documentation of the sales transaction that is already required to be retained by the regulated community for two years, pursuant to section 493(12) of the Liquor Code. 47 P.S. § 4-493(12). The Board will also have some recordkeeping obligations as a result of the final-form rulemaking, but the Board already has substantial measures in place relative to purchases and tracking returns. In sections 9.112 and 9.113, the final-form regulations require some basic information in order to process a request for the Board to repurchase liquor from a licensee that is no longer in business. Aside from a simple form to be completed by special occasion permit holders, wine auction and spirit auction permit holders, there will be no other new paperwork requirements.

### *Fiscal Impact*

The Board will issue a refund for product that it accepts for return. The refund shall be the price paid for the product. In certain situations, the refund will be reduced by the assessment of a handling charge of 12.5% of the refund or \$50.00, whichever is greater. The handling charge will be waived in situations where the product is defective, is not what the licensee ordered, may no longer lawfully be sold, or is subject to a recall or withdrawal. No handling charges will be assessed if less than twelve bottles are accepted for return.

### *Effective Date*

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

*Contact Person*

Questions regarding this final-form should be addressed to Rodrigo Diaz, Chief Counsel, Jason Worley, Deputy Chief Counsel, or Norina Foster, Assistant Counsel, Office of Chief Counsel, Pennsylvania Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001.

*Regulatory Review*

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on May 4, 2017, the Board submitted a copy of the notice of proposed rulemaking, published at 47 Pa.B. 2978 (May 27, 2017) and a copy of a Regulatory Analysis Form to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Liquor Control Committee and Senate Committee on Law and Justice for review and comment.

Under section 5a(c) of the Regulatory Review Act, the Board is required to provide IRRC and the Committees with copies of the comments received during the public comment period, as well as other documents when requested. The Board received comments from IRRC, the response to which is set forth in a separate document.

Under section 5.1(j.2) of the Regulatory Review Act (71 P. S. § 745.5a(j.2)), on \_\_\_\_\_, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5(g) of the Regulatory Review Act, the final-form rulemaking was deemed approved by IRRC effective \_\_\_\_\_.

Tim Holden  
Chairman

ANNEX A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 9. TRANSPORTATION, IMPORTATION,  
DISPOSITION AND STORAGE

Subchapter F. DISPOSITION OF LIQUOR AND MALT OR  
BREWED BEVERAGES UNDER CERTAIN CONDITIONS

Sec.

9.111. Alcoholic beverages held by estates; legal process; licensees who have discontinued business.

9.112. ~~Information to be furnished~~ REQUESTS FOR REPURCHASE BY BANKRUPTCY ESTATES OR OFFICERS OF THE LAW; INFORMATION TO BE FURNISHED.

9.113. ~~Repurchase of liquor by the Board~~ REQUESTS FOR REPURCHASE BY LICENSEES WHO HAVE DISCONTINUED BUSINESS OR SOLD THEIR LICENSED BUSINESS; INFORMATION TO BE FURNISHED.

9.114. ~~Licensees who have sold their licensed business~~ REPURCHASE OF LIQUOR PRESENTED TO THE BOARD.

9.115. ~~Sales prohibited~~ REPURCHASE OF LIQUOR OR MALT OR BREWED BEVERAGES PRESENTED TO A DISTRIBUTOR, IMPORTING DISTRIBUTOR, OR MANUFACTURER.

**§ 9.111. Alcoholic beverages held by estates; legal process; licensees who have discontinued business.**

(a) *Liquor.*

(1) Liquor purchased from a State Liquor Store ~~and~~ OR FROM A PENNSYLVANIA-LICENSED LIMITED WINERY, LIMITED DISTILLERY, OR DISTILLERY, forming part of [the estate of a decedent or bankrupt or liquor so purchased and] a bankruptcy estate or in the custody of the law under legal process[,] may ~~not be sold except to the Board~~ ONLY BE REPURCHASED BY

THE BOARD OR THE PENNSYLVANIA-LICENSED MANUFACTURER FROM WHOM ORIGINALLY PURCHASED as provided in this subchapter.

(2) ~~Liquor purchased from a State Liquor Store by a licensee of the Board and in the possession of the A licensee at the time [he discontinues business,] the licensed business is discontinued by transfer of [his] the license or otherwise[,] may be sold by the licensee TO THE TRANSFEREE or may be repurchased from [him] the licensee by the Board OR THE PENNSYLVANIA-LICENSED MANUFACTURER FROM WHOM ORIGINALLY PURCHASED, but only [under this subchapter] in accordance with this subchapter and Chapter 11, Subchapter O (relating to return of liquor to the Board by licensees AS PROVIDED IN THIS SUBCHAPTER.~~

(b) *Malt or brewed beverages.* ~~Malt or brewed beverages shall be disposed of in accordance with the following:~~

(1) Malt or brewed beverages purchased from a PENNSYLVANIA-licensed distributor or importing distributor or [brewery] manufacturer, forming part of [the estate of a decedent or bankrupt,] a bankruptcy estate or in the custody of the law under legal process, ~~may be sold only to~~ ONLY BE REPURCHASED BY the licensed PENNSYLVANIA-LICENSED distributor, importing distributor or [brewery] manufacturer from whom originally purchased. Except and only in the event the Commonwealth or an agency thereof [,] obtains the custody, possession, right of possession, or the title to the malt or brewed beverages under legal process or under judicial sale, the Commonwealth or the agency may sell [such] the malt or brewed beverages to any distributor of any class or to the [manufacturing brewery] PENNSYLVANIA-LICENSED manufacturer who or which is licensed and authorized to buy and sell malt or brewed beverages, and [such] the brand or brands of malt or brewed beverages.

(2) Malt or brewed beverages in the possession of a licensee at the time [he discontinues business by transfer of his] the licensed business is discontinued by transfer of the license or otherwise[,] may be sold only to the transferee of the license or ~~to the~~ MAY BE REPURCHASED BY THE PENNSYLVANIA-LICENSED distributor, importing distributor or [brewery] manufacturer from whom originally purchased.

**§ 9.112. ~~Information to be furnished~~ REQUESTS FOR REPURCHASE BY BANKRUPTCY ESTATES OR OFFICERS OF THE LAW; INFORMATION TO BE FURNISHED.**

(A) ~~Persons other than the purchasers [and] or licensees who have discontinued business[,] RECEIVERS AND TRUSTEES IN BANKRUPTCY OR OFFICERS OF THE LAW who possess and desire to sell liquor purchased BY A LICENSEE from State Liquor Stores[,] MAY ASK FOR THE LIQUOR TO BE REPURCHASED BY THE BOARD BY FILING shall file with the Board~~ a sworn statement containing the following as applicable:

**[(1) *Executors and administrators.***

**(i) Name and address of the decedent, and date of death.**

**(ii) Name and address of the executor or administrator, who shall file with the statement a short form certificate from the Registrar of Wills.**

**(iii) Description of the liquor, including brand name, size and number of containers of each brand.]**

**[(2)](1) *Receivers and trustees in bankruptcy.***

**(i) Name and address of bankrupt, and date of bankruptcy.**

**(ii) Name and address of receiver or trustee, who shall file with the statement a certified copy of his appointment or election, and a certified copy of the order of court authorizing or directing the sale of liquor.**

**(iii) Description of the liquor, including brand name, size ~~and~~, number of containers of each brand-, AND DATE OF PURCHASE, AS EVIDENCED BY DOCUMENTATION OF THE TRANSACTION.**

**[(3)](2) *Officers of the law.***

**(i) Name and address of debtor, and nature of debt.**

**(ii) Name and address of sheriff, constable or other officer of the law[,] who shall file with the statement written evidence of his authority to act, together with the name of court, and number and term or name of magistrate.**

**(iii) Description of the liquor, including brand name, size ~~and~~, number of containers of each brand-, AND DATE OF PURCHASE, AS EVIDENCED BY DOCUMENTATION OF THE TRANSACTION.**

**[(4) Licensees who have discontinued business without transfer of license.**

**(i) Name and address of licensee.**

**(ii) Written statement under oath that the licensee has discontinued his licensed business and the date thereof.**

**(iii) Description of the Liquor, including brand name, size and number of containers of each brand.**

**(5) Licensees who have sold their licensed business together with the liquor license. Reference should be made to § 9.114 (relating to licensees who have sold their licensed business).]**

**(B) FOR PURPOSES OF THIS SECTION, THE PHRASE "DOCUMENTATION OF THE TRANSACTION" MAY INCLUDE, BUT IS NOT LIMITED TO, A SIGNED BILL OF LADING, A LICENSEE SALES INVOICE, AND/OR A POINT OF SALE RECEIPT.**

**(C) THIS SECTION DOES NOT APPLY TO ALCOHOL SEIZED PURSUANT TO ARTICLE VI OF THE LIQUOR CODE.**

**§ 9.113. [Repurchase of liquor by the Board.] REQUESTS FOR REPURCHASE BY LICENSEES WHO HAVE DISCONTINUED BUSINESS OR SOLD THEIR LICENSED BUSINESS; INFORMATION TO BE FURNISHED.**

**[(a) Upon receipt of the information required and verification thereof, the Board may, in its discretion, arrange to repurchase at the price paid by the licensee or the then available price to licensees, whichever is lower, less 12.5% handling charges, all such liquor purchased from State Liquor Stores.**

**(b) The repurchases will be confined to saleable liquor in the original containers, unopened and with revenue stamps attached, as when originally sold by the State Liquor Stores.]**

**(a) *Discontinuance without transfer of license.* A licensee who has discontinued business without transfer of the license, WHO WANTS TO HAVE ITS**

REMAINING LIQUOR INVENTORY REPURCHASED BY THE BOARD shall provide the Board with all of the following information:

(1) Name and address of licensee.

(2) Written statement under oath that the licensee has discontinued the licensed business and the date thereof. If the business has been discontinued due to the death of the licensee, the following additional information shall be provided:

(i) Name and address of the decedent, and date of death.

(ii) Name and address of the executor or administrator, who shall file with the statement documentary evidence of the death of the licensee.

(3) Description of the liquor, including brand name, size and number of containers of each brand, AND DATE OF PURCHASE, AS EVIDENCED BY DOCUMENTATION OF THE TRANSACTION.

*(b) Sale of licensed business AND REPURCHASE OF LIQUOR INVENTORY BY THE BOARD. A LICENSEE WHO IS SELLING ITS LICENSED BUSINESS AND WHO WANTS TO HAVE ITS REMAINING LIQUOR INVENTORY REPURCHASED BY THE BOARD SHALL PROVIDE THE BOARD WITH THE FOLLOWING INFORMATION:*

(1) ~~The Board may, in its discretion, repurchase the liquor in the licensee's possession at the time of the transfer of the license, in accordance with § 9.114 (relating to repurchase of liquor returned to the Board).~~ NAME AND ADDRESS OF LICENSEE.

(2) WRITTEN STATEMENT UNDER OATH THAT THE LICENSEE HAS SOLD ITS LICENSED BUSINESS AND THE DATE THEREOF.

(3) DESCRIPTION OF THE LIQUOR, INCLUDING BRAND NAME, SIZE AND NUMBER OF CONTAINERS OF EACH BRAND, AND DATE OF PURCHASE, AS EVIDENCED BY DOCUMENTATION OF THE TRANSACTION.

~~(2)~~ (C) *SALE OF LICENSED BUSINESS AND TRANSFER OF LIQUOR AND MALT OR BREWED BEVERAGES INVENTORY TO THE TRANSFEREE. The licensee may sell the liquor* A LICENSEE WHO IS SELLING ITS LICENSED

**BUSINESS MAY SELL THE REMAINING LIQUOR AND MALT OR BREWED BEVERAGES INVENTORY to the transferee of the license, in which case the licensee shall provide the Board with the following information:**

**[(i)] (1) At the time the application for the transfer of the license is filed, a statement that it is the licensee's intention to include the liquor AND MALT OR BREWED BEVERAGES INVENTORY, or a designated quantity thereof, in the sale of the license.**

**[(ii)] (2) When the transfer of the license is approved, a sworn statement containing a description of the liquor AND MALT OR BREWED BEVERAGES, including brand name, size and number of containers of each brand sold to the transferee.**

**(D) FOR PURPOSES OF THIS SECTION, THE PHRASE "DOCUMENTATION OF THE TRANSACTION" MAY INCLUDE, BUT IS NOT LIMITED TO, A SIGNED BILL OF LADING, A LICENSEE SALES INVOICE, AND/OR A POINT OF SALE RECEIPT.**

**§ 9.114. [Licensees who have sold their licensed business] Repurchase of liquor presented to the Board.**

**[When a licensee sells his licensed business, and transfer of the license is approved, the Board may, in its discretion, repurchase the liquor in his possession at the time of the transfer of the license; or the licensee may, if he so desires, sell the liquor to the transferee of his license, provided the licensee, at the time the application for transfer of his license is filed, notifies the Board in writing of his intention to include the liquor, or a designated quantity thereof, in the sale of his licensed business, and provided further the licensee furnishes a sworn statement containing a description of the liquor, including brand name, size, and number of containers of each brand so sold to the transferee, when the transfer of the license is approved.]**

**(a) Upon receipt of the information required under §§ 9.112 and OR 9.113 ~~(relating to information to be furnished by bankruptcy estates or officers of the law; and licensees who have discontinued business or sold their licensed business~~ REQUESTS FOR REPURCHASE BY BANKRUPTCY ESTATES OR OFFICERS OF THE LAW; INFORMATION TO BE FURNISHED; OR REQUESTS FOR REPURCHASE BY LICENSEES WHO HAVE DISCONTINUED BUSINESS OR SOLD THEIR LICENSED BUSINESS;**

INFORMATION TO BE FURNISHED) and verification thereof, the Board may, in its discretion, arrange to repurchase some or all of the liquor purchased from State Liquor Stores at the price paid by the licensee. ~~or the then available price to licensees, whichever is lower, minus a handling charge equal to the greater of 12.5% or \$50.~~ A HANDLING CHARGE OF 12.5% OR \$50.00, WHICHEVER IS GREATER, WILL BE ASSESSED WHEN TWELVE OR MORE BOTTLES ARE ACCEPTED FOR PURCHASE. THE BOARD SHALL ONLY REPURCHASE LIQUOR WITHIN 30 DAYS OF THE ORIGINAL PURCHASE BY THE LICENSEE, EXCEPT WHEN THE EXECUTIVE DIRECTOR OF THE BOARD OR HIS DESIGNEE DETERMINE THAT IT IS IN THE BEST INTERESTS OF THE COMMONWEALTH AND OPERATIONALLY PRUDENT FOR THE BOARD TO THE REPURCHASE THE LIQUOR MORE THAN 30 DAYS AFTER THE LICENSEE PURCHASED IT.

(b) The repurchases will be confined to saleable liquor in the original containers, unopened AND UNADULTERATED, as when originally sold by the State Liquor Stores. "SALEABLE" MEANS THAT THE PRODUCTS AND CONTAINERS MUST LOOK AS THEY DID WHEN ORIGINALLY PURCHASED.

§ 9.115. [Sales prohibited.] Repurchase of liquor or malt or brewed beverages presented to a distributor, importing distributor, or manufacturer.

[ Sales of other than State Store liquor, or of State Store liquor contrary to the provisions of this subchapter, are prohibited, except where made by licensees in accordance with the provisions of the Liquor Code.] A Pennsylvania-licensed distributor, importing distributor or manufacturer shall not be required by these regulations to repurchase liquor or malt or brewed beverages but shall have the discretion to do so. The Pennsylvania-licensed distributor, importing distributor or manufacturer shall keep records pertaining to repurchases in accordance with sections 493(12) and 512 of the Liquor Code (47 P.S. §§ 4-493(12), 5-512).

## CHAPTER 11. PURCHASES [AND], SALES AND RETURNS

### Subchapter O. RETURN OF LIQUOR TO THE BOARD BY LICENSEES OR PERMIT HOLDERS

Sec.

- 11.231. General provisions.
- 11.232. Defective products.
- 11.233. Error in products delivered.
- 11.234. Products that may no longer be lawfully sold.
- 11.235. Product subject to recall OR WITHDRAWAL.
- 11.236. Change in product.
- 11.237. Discontinued products.
- 11.238. [Occasional sellers] PERMIT HOLDERS.
- 11.239. [Products not accepted] SPECIAL ORDER LISTINGS.

#### § 11.231. General provisions.

(a) The Board may[, in its discretion,] accept the return of liquor purchased from the Board for ordinary and usual commercial reasons arising after the product has been sold. Sections [11.232—11.239] 11.232—11.237 specify ordinary and usual commercial reasons for the return of products, and outline the conditions and limitations for returns. If the Board accepts the returned product, the licensee will receive [either] the price paid [or the then-available price, whichever is lower] AS EVIDENCED BY DOCUMENTATION OF THE TRANSACTION, AS DEFINED IN SUBSECTION 11.231(D), less handling charges in accordance with [§ 9.114 (relating to repurchase of liquor returned to the Board)] SUBSECTION 11.231(E). The Board will not accept the return of product purchased from a third party, even if the third party purchased the product from the Board.

(b) The Board will not accept the return of product for reasons that do not constitute ordinary and usual commercial reasons, including:

- (1) Product sought to be returned because it is overstocked or slow-moving.
- (2) Product sought to be returned because there is only a limited or seasonal demand, such as holiday decanters and certain distinctive bottles.

**(3) Product sought to be returned because the licensee has changed its menu or for other similar business reasons.**

**(4) PRODUCT SOUGHT TO BE RETURNED BECAUSE IT WAS DAMAGED AFTER THE PRODUCT HAS LEFT THE CUSTODY OR CONTROL OF THE BOARD.**

**[(4)] (5) Product sought to be returned for any other reason that is not included in §§ [11.232—11.239] 11.232—11.237.**

**(c) [Return] THE REPURCHASE of product related to the discontinuance or sale of a licensee's business is addressed in § 9.113 (relating to [licensees who have discontinued business or sold their licensed business] REQUESTS FOR REPURCHASE BY LICENSEES WHO HAVE DISCONTINUED BUSINESS OR SOLD THEIR LICENSED BUSINESS; INFORMATION TO BE FURNISHED) AND § 9.114 (RELATING TO REPURCHASE OF LIQUOR PRESENTED TO THE BOARD).**

**(D) FOR PURPOSES OF THIS SUBCHAPTER, THE PHRASE "DOCUMENTATION OF THE TRANSACTION" MAY INCLUDE, BUT IS NOT LIMITED TO, A SIGNED BILL OF LADING, A LICENSEE SALES INVOICE, AND/OR A POINT OF SALE RECEIPT.**

**(E) THE BOARD MAY REFUND THE LICENSEE FOR SOME OR ALL OF THE LIQUOR PURCHASED FROM STATE LIQUOR STORES AT THE PRICE PAID BY THE LICENSEE, IN ACCORDANCE WITH THIS SUBCHAPTER. A HANDLING CHARGE EQUAL TO THE GREATER OF 12.5% OF THE PURCHASE PRICE OR \$50.00, WHICHEVER IS GREATER, WILL ONLY BE ASSESSED WHEN TWELVE OR MORE BOTTLES ARE ACCEPTED FOR RETURN.**

**(F) THE RETURN OF LIQUOR PURCHASED AS A SPECIAL ORDER LISTING, AS THAT TERM IS DEFINED IN SECTION 13.71 (RELATING TO DEFINITIONS), IS SUBJECT TO SECTION 11.239 (RELATING TO SPECIAL ORDER LISTINGS).**

**§ 11.232. Defective products.**

**Products that are unmarketable at the time of delivery or pickup because of product deterioration, leaking containers, damaged labels, or missing or**

mutilated tamper evident closures may be returned FOR A REFUND within [15] 30 days of [product delivery for a refund which may then be applied toward the purchase of an equal quantity of the same product] PURCHASE. Returns may be contingent upon verification of the alleged defect, including photographs of the damaged product or any other evidence required by the Board or the manufacturer of the product. The payment of a handling charge will be waived for returns under this section.

**§ 11.233. Error in products delivered.**

[(a)] A discrepancy between products ordered and products delivered may be corrected, within [15] 30 days of [product delivery or pickup] PURCHASE, by returning the incorrect product for a refund[, which may then be applied toward the purchase of the correct product]. The licensee will be required to provide [proof of the order and the discrepancy in question] DOCUMENTATION OF THE TRANSACTION, AS DEFINED IN SUBSECTION 11.231(D) (RELATING TO GENERAL PROVISIONS), AND THE ERRONEOUS PRODUCT. The payment of a handling charge will be waived for returns under this section.

[ (b) The Board will consider, as acceptable proof of the order, a printed copy of an order that includes the details as to what product was ordered, and in what quantities, and that also indicates when the order was submitted to or received by the Board, or both.]

[(c) The discrepancy must be proven by presenting the incorrect product along with acceptable proof of the order.]

**§ 11.234. Products that may no longer be lawfully sold.**

Products that may no longer be lawfully sold may be returned for a refund WITHIN 30 DAYS OF NOTIFICATION THAT THE PRODUCT MAY NO LONGER LAWFULLY BE SOLD. This includes, BUT IS NOT LIMITED TO, situations when, due to a change in statute, regulation or administrative procedure over which the licensee has no control, a particular size, brand or product is no longer permitted to be sold. The payment of a handling charge will be waived for returns under this section.

**§ 11.235. Product subject to recall OR WITHDRAWAL.**

**Products that have been recalled OR WITHDRAWN by the manufacturer may be returned for a refund WITHIN 30 DAYS OF NOTIFICATION THAT THE PRODUCT HAS BEEN RECALLED OR WITHDRAWN. The payment of a handling charge will be waived for returns under this section.**

**§ 11.236. Change in product.**

**[A licensee's inventory of a product which has been changed in formula, proof, label or container may be exchanged, in the Board's discretion, within 30 days of product delivery or pickup and that refund may then be applied toward the purchase of equal quantities of the new version of that product] WHEN A MANUFACTURER CHANGES A PRODUCT IN FORMULA, PROOF, LABEL OR CONTAINER, A LICENSEE MAY RETURN ITS EXISTING INVENTORY FOR A REFUND OF THAT PRODUCT WITHIN 30 DAYS OF NOTIFICATION THAT THE PRODUCT HAS BEEN CHANGED. A change in vintage does not constitute a change in product for purposes of this section. THE LICENSEE WILL BE ASSESSED A HANDLING CHARGE IN ACCORDANCE WITH SUBSECTION 11.231(E) (RELATING TO GENERAL PROVISIONS) FOR RETURNS UNDER THIS SECTION.**

**§ 11.237. Discontinued products.**

**When a [producer] MANUFACTURER or importer discontinues the production or importation of a product, a licensee's inventory of that product may be returned[, in the Board's discretion,] for a refund within 30 days of [product delivery or pickup.] NOTIFICATION THAT THE PRODUCT IS BEING DISCONTINUED. THE LICENSEE WILL BE ASSESSED A HANDLING CHARGE IN ACCORDANCE WITH SUBSECTION 11.231(E) (RELATING TO GENERAL PROVISIONS) FOR RETURNS UNDER THIS SECTION.**

**§ 11.238. [Occasional sellers] PERMIT HOLDERS.**

**[The Board may accept the return of products from licensees or permittees who sell alcohol less than 15 days in the course of a year, such as special occasion permit holders and wine auction permit holders. These returns will be for a**

**refund. The payment of a handling charge may be waived, in the Board's discretion, for returns under this section.] (A) THE BOARD MAY ACCEPT THE RETURN OF PRODUCT FROM PERMIT HOLDERS WHO SELL ALCOHOL LESS THAN 15 DAYS IN THE COURSE OF A YEAR, SUCH AS SPECIAL OCCASION, WINE AUCTION OR SPIRIT AUCTION PERMIT HOLDERS.**

**(B) AT THE TIME PRODUCT IS PICKED UP OR DELIVERED, PERMIT HOLDERS WILL BE MADE AWARE, THROUGH THE PROVISION OF A PRE-AUTHORIZATION FORM, OF THE FOLLOWING CONDITIONS FOR THE RETURN OF LIQUOR:**

**(1) IF THE PRODUCT WAS PICKED UP AT A PENNSYLVANIA LIQUOR STORE, THE PERMIT HOLDER MUST RETURN THE PRODUCT TO THAT STORE AND NO OTHER BOARD LOCATION.**

**(2) IF THE PRODUCT WAS DELIVERED BY THE BOARD TO THE EVENT LOCATION, ONLY 100% FULL, UNOPENED CASES WILL BE ACCEPTED BY THE BOARD'S DELIVERY TRUCK FOR RETURN. ALL OTHER PRODUCT MUST BE RETURNED TO A PENNSYLVANIA LIQUOR STORE OR LICENSEE SERVICE CENTER AS DIRECTED BY THE BOARD.**

**(3) THE PRODUCT MUST BE SALEABLE LIQUOR IN THE ORIGINAL CONTAINERS, UNOPENED AND UNADULTERATED, AS WHEN ORIGINALLY SOLD BY THE STATE LIQUOR STORES. "SALEABLE" MEANS THAT THE PRODUCTS AND CONTAINERS MUST LOOK AS THEY DID WHEN ORIGINALLY PURCHASED.**

**(4) AT THE TIME OF THE RETURN, THE PERMIT HOLDER SHALL PROVIDE THE BOARD WITH DOCUMENTATION OF THE TRANSACTION, AS DEFINED IN SUBSECTION 11.231(D) (RELATING TO GENERAL PROVISIONS).**

**(5) THE PRODUCT MUST BE RETURNED WITHIN 30 DAYS OF THE DATE OF PURCHASE.**

**(6) THE PRODUCT MUST BE KEPT OUT OF DIRECT SUNLIGHT AND IN A TEMPERATURE-CONTROLLED ENVIRONMENT, SUCH AS A REFRIGERATOR, TEMPERATURE-CONTROLLED DELIVERY TRUCK OR ANY OTHER LOCATION WHERE THE TEMPERATURE DOES NOT REACH BELOW 55 DEGREES OR ABOVE 75 DEGREES.**

(7) THE RETURN OF LIQUOR PURCHASED AS A SPECIAL ORDER LISTING, AS THAT TERM IS DEFINED IN SECTION 13.71 (RELATING TO DEFINITIONS), IS SUBJECT TO SECTION 11.239 (RELATING TO SPECIAL ORDER LISTINGS).

(C) THE PERMIT HOLDER WILL BE REQUIRED TO ACKNOWLEDGE THE PRE-AUTHORIZATION FORM, WHICH WILL BE MAINTAINED ON FILE WITH THE BOARD.

(D) PERMIT HOLDERS WHO RETURN PRODUCT IN ACCORDANCE WITH THE CONDITIONS SET FORTH IN THIS SECTION WILL RECEIVE A REFUND.

(1) REFUNDS SHALL BE IN THE AMOUNT OF THE PRICE PAID FOR THE PRODUCT, AS EVIDENCED BY THE DOCUMENTATION OF THE TRANSACTION, AS THAT TERM IS DEFINED IN SUBSECTION 11.231(D).

(2) REFUNDS FOR A RETURN OF LESS THAN 12 BOTTLES (REGARDLESS OF TYPE OR BRAND) WILL NOT BE ASSESSED A HANDLING CHARGE.

(3) REFUNDS FOR A RETURN OF 12 OR MORE BOTTLES (REGARDLESS OF TYPE OR BRAND) WILL BE ASSESSED A HANDLING CHARGE OF 12.5% OF THE TOTAL AMOUNT REFUNDED OR \$50.00, WHICHEVER IS GREATER.

(4) FEES FOR THE SERVICES OF A DELIVERY TRUCK ARE NON-REFUNDABLE.

**§ 11.239. [Products not accepted.] SPECIAL ORDER LISTINGS.**

**[Products that are ordered but not accepted by a licensee shall be subject to a handling charge as set forth in § 9.114 (relating to repurchase of liquor returned to the Board).](A) THE BOARD MAY ACCEPT THE RETURN OF LIQUOR PURCHASED AS A SPECIAL ORDER LISTING, AS THAT TERM IS DEFINED IN SECTION 13.71 (RELATING TO DEFINITIONS), FOR ORDINARY AND USUAL COMMERCIAL REASONS, AS SET FORTH IN SECTIONS 11.231—11.237.**

(B) IF A LICENSEE WANTS TO RETURN LIQUOR PURCHASED AS A SPECIAL ORDER LISTING, THE LICENSEE MUST RETURN IT TO A STATE LIQUOR STORE WITHIN 30 DAYS FROM THE DATE OF RECEIPT OF THE PRODUCT BY THE LICENSEE OR ITS AGENT.

(C) THE SUPPLIER OF THE SPECIAL ORDER LISTING PRODUCT MAY NOT PICK UP THE PRODUCT FROM THE LICENSEE.

(D) RETURNS OF SPECIAL ORDER LISTING PRODUCT SHALL BE HANDLED BY THE BOARD'S SPECIAL ORDER DIVISION, BUT THE SUPPLIER, NOT THE BOARD, SHALL DECIDE WHETHER TO AUTHORIZE ANY RETURNS OR REFUNDS FOR SPECIAL ORDER LISTING PRODUCT.

(E) THE SUPPLIER SHALL ADVISE THE SPECIAL ORDER DIVISION WHAT SHALL BE DONE WITH THE RETURNED PRODUCT:

(1) THE PRODUCT MAY BE PICKED UP AT THE STATE LIQUOR STORE BY THE SUPPLIER WITHIN 30 DAYS OF SO NOTIFYING THE SPECIAL ORDER DIVISION;

(2) THE PRODUCT MAY BE SHIPPED BACK TO THE SUPPLIER BY THE BOARD IF THE SUPPLIER PROVIDES, WITHIN 30 DAYS OF NOTIFYING THE SPECIAL ORDER DIVISION, A RETURN SHIPMENT LABEL WHICH SHALL INCLUDE PAYMENT FOR SHIPPING; OR

(3) THE PRODUCT MAY BE DESTROYED BY THE BOARD FOR A FEE, TO BE CHARGED AGAINST THE SUPPLIER.

(F) IF THE SUPPLIER FAILS TO PICK UP THE PRODUCT OR FAILS TO PROVIDE A RETURN SHIPMENT LABEL TO THE BOARD, THE BOARD MAY DESTROY THE PRODUCT FOR A FEE, TO BE CHARGED AGAINST THE SUPPLIER.

**SPECIAL OCCASION, WINE OR SPIRIT AUCTION PERMIT HOLDERS**

**PRE-AUTHORIZATION FORM FOR THE RETURN OF LIQUOR**

**To return, for a refund, any liquor that you do not use at your event, the PLCB has established the following requirements (to acknowledge, please write your initials in the right-hand column):**

*Initials*

1. I understand that, unless my order is delivered by truck to the event location, the product must be returned to *this* store and no other PLCB location.
2. I understand that, if my order is delivered by truck to the event location, only 100% full, unopened cases will be accepted by the delivery truck for returns, and that all other product must be returned to the store or licensee service center as directed by my PLCB representative.
3. I understand that the product must be saleable liquor in the original containers, unopened and unadulterated, as when originally sold by the state liquor stores. "Saleable" means that the products and containers must look as they did when originally purchased.
4. I understand that, when the product is returned, I must provide copies of the documentation of the transaction (including, but not limited to, a signed bill of lading, a licensee sales invoice, and/or a point of sale receipt).
5. I understand that the product must be returned within 30 days of the date of purchase. If the product was a special order listing, it may be returned for refund within 30 days from the date of receipt by the permittee or its agent.
6. I understand that the product must be kept out of direct sunlight and in a temperature-controlled environment, such as a refrigerator, a temperature-controlled delivery vehicle, or any location where the temperature does not reach below 55 degrees or above 75 degrees.
7. I understand that the return of products obtained through the special order listing process must be handled through the PLCB's Special Order Division.


**Regarding the amount of your refund:**

- Refunds for a return of less than 12 bottles (regardless of type or brand) will not be assessed a handling charge.
- Refunds for a return of 12 or more bottles (regardless of type or brand) will be assessed a handling charge of 12.5% of the total amount refunded or \$50.00, whichever is greater.
- Fees for the services of a delivery truck are non-refundable.

Permit Holder Organization Name	Permit Number
Product Accepted By (Please PRINT)	Date of Pickup or Delivery

**By signing this form, you swear and affirm under penalty of law that the statements made in this form are true, correct and complete, pursuant to 18 Pa.C.S. § 4904, relating to unsworn falsification to authorities.**

Product Accepted By (Signature):	Permit Holder Telephone:
Order Picked Up at Store No.	Order Delivered to Event Location by

*Signed and initialed original retained by the PLCB.*

# RESPONSES OF THE PENNSYLVANIA LIQUOR CONTROL Board

TO

## Comments about Board Regulation #54-91 (IRRC #3170)

### Return of Liquor

1. **Determining whether the regulation is in the public interest; Reasonableness of requirements, implementation procedures and timetables for compliance by the public and private sectors; and Economic or fiscal impact.**

The Preamble submitted with the proposed regulation provides a general overview of the amendments to Chapter 11 and Chapter 9. However, it does not include a description or rationale for each section under the new Subchapter O (Return of Liquor to the Board by Licensees). This Commission is unable to determine if the regulation is in the public interest without this information. In the Preamble to the final-form regulation, we ask the Board to provide a description for each section of the rulemaking and an explanation of why the language is needed.

**Response:** The requested descriptions and explanations have been incorporated into the Preamble.

#### *Time limits*

The Board states that time limits within which products may be returned are based on its operational needs and believes they are reasonable relative to each stated reason for return. In Section 11.232 (relating to Defective products) and Section 11.233 (relating to Error in products delivered) licensees may return products that are defective or incorrect within 15 days of delivery or pick up. Similarly, in Sections 11.236 and 11.237 products that have been changed or discontinued by the manufacturer or importer may be returned within 30 days of delivery or pick up. How did the Board determine that the time limits were reasonable for the regulated community to comply? The Board should explain in the Preamble to the final regulation its rationale for the proposed time limits.

**Response:** The Board was guided by its return policy for sales to private individuals (non-licensees). That policy requires individuals to return product within 30 days, with a receipt. Therefore, the standard timeframe for licensee returns is also 30 days. In the proposed rulemaking, the Board wanted a 15-day time frame for the return of defective or erroneous product to be able to reconcile, within a short period of time, the accounts of the licensees that returned product. However, in the interest of consistency, the Board now requires returns to be made within 30 days of purchase (for sections 11.232, 11.233, and 11.238) or notification (for sections 11.234, 11.235, 11.236, and 11.237), to provide for easier enforcement. Section 9.114 was also amended to generally require product to be presented

for repurchase within 30 days of the original purchase when a licensee discontinues its business.

We note that Sections 11.234-11.237 are conditions beyond the control of the licensee. It is unclear from the Preamble why the Board treats certain product returns differently. We ask the Board to explain its distinction of Sections 11.236 and 11.237 from Sections 11.234 and 11.235 which neither allow for the Board's discretion nor impose a time limit.

**Response:** Sections 11.234 (relating to Products that may no longer lawfully be sold) and 11.235 (relating to Products subject to recall or withdrawal) address situations in which the product is being returned by the licensee because the product may no longer be lawfully sold, or the product is subject to a recall or a withdrawal and should therefore be removed from the marketplace as quickly as possible. In both sections, the Board is waiving the payment of a handling charge. By contrast, the products subject to sections 11.236 (relating to Change in product) and 11.237 (relating to Discontinued products), may lawfully be sold. In section 11.236, a product is being returned because a manufacturer is changing a product's formula, proof, label or container. In section 11.237, a manufacturer or importer has decided to discontinue the production or importation of a product. In both scenarios, the licensee can continue using the product it has in its inventory; there is nothing wrong with that product. It was for this reason that the Board provided, in the proposed rulemaking, that such product would be accepted for return in the Board's discretion.

In the interest of clarity, references to the Board's discretion in sections 11.236 and 11.237 have been deleted. Instead, the Board will accept product returned under these sections, but will impose a handling charge for returns under these sections because the return is discretionary on the part of the licensee. The licensee may decide to return this product, even though there is nothing wrong with it, but the refund will be subject to a handling charge if twelve or more bottles are being returned.

The lack of a time frame in proposed sections 11.234 and 11.235 was an oversight stemming from the fact that the regulated community is usually efficient when returning products that may no longer be lawfully sold or products that are subject to recall or withdrawal. For the final-form regulation, these sections were amended to provide licensees with 30 days from the date of notification (that the product may no longer be sold or that the product is subject to recall or withdrawal) to return the product to the Board. Sections 11.236 and 11.237 have also been amended in final-form to allow for a return within 30 days of the date of the notification of the change or discontinuation.

It is our understanding that product manufacturers will inform the Board about product recalls, changes or discontinuations. They may, at times, directly notify licensees of the same. Since licensees rely on the Board, as the primary wholesaler of liquor, to inform them about issues with products, we ask the Board to explain the significance of using the product delivery or pick up date as it relates to product returns. Why does the Board use these dates rather than when the licensee is notified by the Board that there is a problem with a product?

Our concern is that all licensees who have the product (that is the subject of a change or is discontinued) will not be treated equally. Licensees that took delivery or picked up the product within 30 days of the Board's notice would be eligible to return that product for an exchange or refund while others who have had the same product in their inventory for a longer time period would not. The Board should explain how the return policy for changed or discontinued products is fair and is in the economic interest of the regulated community.

**Response:** The Board recognizes IRRC's concern and has amended the final-form regulations to provide that returns pursuant to sections 11.234-11.237 must be returned within 30 days of notification.

## **2. Section 11.231. General provisions. – Clarity and Economic or fiscal impact.**

Under this section, if the Board accepts the returned product, the licensee will receive either the price of the product at the time of purchase or the current price, whichever is lower. Given that most of the circumstances under which a return is permitted are beyond the licensee's control, why wouldn't the refund be for the price paid? The Board should explain in the Preamble to the final-form rulemaking its rationale for this provision and how it will determine whether a licensee will be refunded the price paid at the time of purchase or the current price.

**Response:** The Board agrees with IRRC's comment and has amended the final-form regulations to provide that the refund for the returned product shall be the price paid by the licensee, as evidenced by documentation of the transaction. Section 11.231 was further amended to define "documentation of the transaction" as including a signed bill of lading, a licensee sales invoice, and/or a point of sale receipt. For the sake of consistency and clarity, sections 9.112, 9.113, and 9.114 were also amended to reflect that product would be repurchased at the price paid, as evidenced by the documentation of the transaction.

## **3. Section 11.232. Defective products. – Clarity or Economic or fiscal impact.**

Under this section, a product that is unmarketable at the time of delivery or pick up because it is leaking, damaged or has a missing or mutilated tamper evident closure may be returned to the Board "within 15 days of product delivery for a refund **which may then be applied to the purchase of an equal quantity of the same product.**" [Emphasis added.] What is the Board's intent with this language? It is unclear whether the Board intends for the refund to be applied to an equal quantity of the same product or is just stating an option for the licensee to decide. The Board should clarify its intent and explain in the Preamble to the final regulation why it is necessary to include this language.

The same comment applies to similar language that appears in Section 11.233 (relating to Error in products delivered) Subsection (a) and Section 11.236 (relating to Change in product).

**Response:** The intent behind this language was to reflect what nearly always happens – the product is refunded and then the licensee is sold an equal quantity of the same product

without the defect. However, the Board realizes that the language of the proposed regulation deprives the licensee of the opportunity to decide for itself what it would like to do. Therefore, the final-form regulation has been amended in sections 11.232, 11.233, and 11.236 to state that the licensee will be given a refund for the returned product. The licensee may then choose to buy replacement product or not, as it deems most appropriate for its business.

#### **4. Section 11.238. Occasional sellers. – Clarity.**

This section gives the Board discretion to waive the handling charge for product returns from occasional sellers. Under what circumstances or conditions would the Board waive such charges? Without criteria or standards for the Board's determination, it could appear that the Board is making decisions in an arbitrary and capricious manner. In the Preamble to the final-form rulemaking, the Board should explain why this language is necessary and how it will ensure fair treatment of licensees, special occasion permit and wine auction permit holders in determining whether to waive handling charges.

**Response:** The Board has amended section 11.238 to specify the conditions that must be met in order for the Board to accept the product for return. A form was developed as well (and is appended to Annex A) to ensure that permit holders are aware of those conditions.

The final-form regulations further amended section 11.238 to clarify the situations where the Board will waive the handling charge when product is returned by a permit holder. The handling charge will automatically be waived if the Board accepts less than 12 bottles that meet the required conditions. If the Board accepts 12 or more bottles that meet the required conditions, the Board will apply the handling charge. Since there are typically 12 bottles in a case, this amount is a logical threshold for assessing a charge.

#### **5. Miscellaneous**

In Sections 11.233, 11.236, and 11.237, products may be returned or exchanged within 15 or 30 days of product delivery or pick up. For purposes of clarity and consistency, we recommend the Board add "or pick up" following the phrase "within 15 days of product delivery" in Section 11.232 (relating to Defective products).

**Response:** The Board recognizes the reason for this comment and is not opposed to this suggestion. In lieu of the phrase "delivery or pickup," however, the Board has amended sections 11.232 and 11.233 of the final-form regulations to require products to be returned or exchanged within 30 days of purchase; the word "purchase" is more inclusive and therefore is applicable to all scenarios, including the repurchase of product in Chapter 9 and the return of product by permit holders. Please note that sections 11.234 - 11.237 have been amended to provide for a return within 30 days of notification of the change in circumstances that may trigger the return of the product.

**Commonwealth of Pennsylvania**  
**Pennsylvania Liquor Control Board**  
April 26, 2018

**SUBJECT: Final-form Regulation Package 54-91**  
**Return of Liquor to the Board**

**TO: DAVID SUMNER, EXECUTIVE DIRECTOR**  
**INDEPENDENT REGULATORY REVIEW COMMISSION**

**FROM: RODRIGO J. DIAZ**   
**CHIEF COUNSEL**  
**PENNSYLVANIA LIQUOR CONTROL BOARD**

**By Hand Delivery**

The Pennsylvania Liquor Control Board ("PLCB") is submitting final-form amendments to chapters 9 and 11 of its regulations. Enclosed please find a copy of the regulatory analysis form, signed CDL-1 face sheet, preamble and Annex A (regulatory text). The PLCB received comments from the Independent Regulatory Review Commission ("IRRC"), the response to which is set forth in a separate document, also enclosed.

The proposed version of these regulations was provided to the legislative oversight committees, IRRC and to the Legislative Reference Bureau on May 4, 2017.

If you have any questions and comments about this regulatory submission, feel free to contact the Office of Chief Counsel, Pennsylvania Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124, or by telephone at (717) 783-9454. If I am not available, you can discuss this matter with Jason Worley, Deputy Chief Counsel, or Norina Foster, Assistant Counsel.

Enclosures

cc with enclosures:

Honorable Charles McIlhinney, Majority Chairman, Senate Law and Justice Committee  
Honorable James Brewster, Minority Chairman, Senate Law and Justice Committee  
Honorable C. Adam Harris, Majority Chairman, House Liquor Control Committee  
Honorable Paul Costa, Minority Chairman, House Liquor Control Committee  
Gail Reinard, Executive Director, Senate Law and Justice Committee  
Stephen Bruder, Executive Director, Senate Law and Justice Committee  
Michael Biacchi, Executive Director, House Liquor Control Committee  
Lynn Benka-Davies, Executive Director, House Liquor Control Committee

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

**I.D. NUMBER:** 54-91  
**SUBJECT:** Return of Liquor to the Board  
**AGENCY:** Pennsylvania Liquor Control Board

RECEIVED  
IRRC  
2018 APR 26 P 2: 1

**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>
4/26	<u>Ret Davis</u> (1)	SENATE LAW & JUSTICE COMMITTEE (Majority)
4/26	<u>Rance Dardell</u> (2)	SENATE LAW & JUSTICE COMMITTEE (Minority)
4/26	<u>Shelly K. Haines</u> (3)	HOUSE LIQUOR CONTROL COMMITTEE (Majority)
4/26	<u>[Signature]</u> (4)	HOUSE LIQUOR CONTROL COMMITTEE (Minority)
4/26/18	<u>K. Cooper</u> (5)	INDEPENDENT REGULATORY REVIEW COMMISSION