

Comments of the Independent Regulatory Review Commission



Pennsylvania Liquor Control Board Regulation #54-91 (IRRC #3170)

Return of Liquor

July 26, 2017

We submit for your consideration the following comments on the proposed rulemaking published in the May 27, 2017 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b). Section 5.1(a) of the Regulatory Review Act (71 P.S. § 745.5a(a)) directs the Pennsylvania Liquor Control Board (Board) to respond to all comments received from us or any other source.

1. 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 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.

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.

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.

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 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.

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.

3. Section 11.232. Defective products. – Clarity and 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).

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.

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.”