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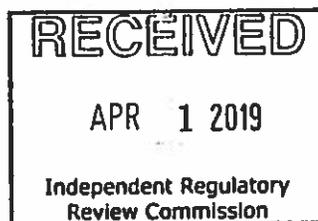


**HOUSE OF REPRESENTATIVES**  
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Independent Regulatory Review Commission  
George D. Bedwick, Chairman  
333 Market St, 14th Floor  
Harrisburg, PA 17101



March 22, 2019

Re: Proposed Regulation IRRC #3224, Establishing what constitutes "proof in writing" relating to participation in a recycling program.

Dear Chairman Bedwick –

I trust all is well.

The Pennsylvania Liquor Control Board (LCB) recently proposed new rulemaking concerning written proof of participation in a recycling program as required under Act 77 of 1994. I have concerns about the proposed rulemaking. This comment outlines those concerns and proposes an easy-to-enforce alternative proposal that meets the legislative intent of Act 77, without placing an undue burden on liquor licensees.

#### **AUTHORIZING STATUTE FOR THE PROPOSED RULEMAKING**

Prior to delving into the proposed rulemaking, it is useful to review the authorizing statute. Section 491 of the Liquor Code deals with "Unlawful Acts Relative to Liquor, Alcohol, and Liquor Licenses." Fifteen subsections address a variety of specific situations contemplated by the legislature. Of interest, section 491(5) deals with the Failure to Properly Dispose of Empty Liquor Containers.

Prior to Act 77 of 1994, the liquor code required licensees to break empty liquor bottles unless the bottles were decorative in nature. Section 491(5) does not give any reason for the requirement to break empty liquor bottles, which would seem to leave the legislative intent for this requirement a mystery and perhaps open for broad interpretation. However, the reason (and legislative intent) for this requirement becomes clear upon reading section 491(10), which details the reason the legislature was so concerned about empty liquor bottles. Section 491(10) specifically prohibits:

*"any licensee or any employe [sic] or agent of a licensee or of the board, to fortify, adulterate or contaminate any liquor, except as permitted by the regulations of the board, or to refill wholly or in part, with any liquid or substance whatsoever, any liquor bottle or other liquor container.*  
(emphasis added)

Clearly lawmakers were concerned that unscrupulous bartenders would refill empty liquor bottles. In addition to the obvious sanitary issues with refilling non-sterilized glass or plastic bottles, it is likely the aforementioned unscrupulous bartender would refill the empty container with an inferior product. Of course, this would allow the licensee to pass-off the cheap booze as a higher-grade, and higher-priced, drink to the unsuspecting and perhaps slightly intoxicated consumer.

Act 77 of 1994 implemented several changes to the Liquor Code, one of many omnibus bills to revise the code over the years. Of interest, the bill that became Act 77 was amended in the Senate Law and Justice Committee and reported to the full Senate, then referred back to committee, back to the Senate floor, back to committee, and back to the Senate floor, with amendments made during each visit to the Law and Justice Committee. The language amending section 491(5), and of interest to IRRC #3224, was inserted on the second of the three re-referrals. As enacted, Act 77 amended the law as follows:

*(5) Failure to Properly Dispose of Empty Liquor Containers.*

*For any restaurant, hotel or club licensee, his servants, agents or employes, [sic] to fail to break any package in which liquors were contained, except those decanter packages that the board determines to be decorative, within twenty-four hours after the original contents were removed therefrom, unless the licensee participates in either a municipal recycling program, in accordance with the act of July 28, 1988 (P.L.556, No.101), known as the "Municipal Waste Planning, Recycling and Waste Reduction Act," or a voluntary recycling program. The licensee shall provide proof in writing of the participation in a recycling program upon the demand of the Bureau of Liquor Control Enforcement of the Pennsylvania State Police. The proof of participation shall be provided in a manner as prescribed by the Pennsylvania Liquor Control Board [emphasis on language added by Act 77.]*

This amendment provides a wealth of interesting information and clear legislative intent. First, the General Assembly is still concerned about the potential misuse of empty liquor bottles. If this concern had subsided, Act 77 of 1994 presented a golden opportunity for the General Assembly to do away with the provision to break empty liquor bottles, but it did not. In fact, the bottle-breaking requirement remains "unless" the licensee is recycling the bottles. For good measure, the General Assembly proscribed that the "licensee shall provide proof in writing" "upon...demand" concerning

participation in a recycling program. Finally, the General Assembly gave the LCB broad latitude to determine what exactly would constitute a licensee's "proof of participation" in a recycling program.

The proposed regulation before the IRRC seeks to put some parameters around what exactly should be required to provide "proof of participation." While the proposed regulation is well-intentioned, I believe it should be rejected by the IRRC. I have proposed an alternate rulemaking for consideration.

### **PROPOSED RULEMAKING BY THE LCB**

The LCB rulemaking proposes the addition of section 5.43 to the newly renamed "Maintenance of the Licensed Premises" subchapter. Subsection (a) is merely a reference to the underlying section of the liquor code, and does not contain any new guidance. Subsection (b) requires a licensee to deface the label of a liquor package (bottle) prior to recycling with a permanent marker to (hopefully) prevent someone from refilling the bottle.

Subsection (c) has the most substance in the proposed rulemaking. This section requires a licensee intending to recycle liquor bottles to complete several new administrative tasks. A licensee must possess written proof that their county recycles the type of material the licensee proposes to recycle. A licensee who participates in curbside recycling must retain copies of a receipt or invoice from the trash hauler that picks up their recycling. A licensee that voluntarily transports used liquor bottles to a drop-off location must track "what was delivered to the drop off location and when" on a "simple form" developed by the LCB, in addition to keeping a written copy of two out of seven different proposed recycling documents. All documents must be retained for two years.

There are several flaws with the proposed rulemaking, both for licensees voluntarily participating in a recycling program, and licensees residing in an area with curb-side recycling.

### **IMPACT OF THE LCB PROPOSAL ON LICENSEES PARTICIPATING IN A VOLUNTARY RECYCLING PROGRAM**

Suppose a licensee currently recycles glass liquor bottles on a voluntary basis. The proposed rulemaking may actually result in licensees halting their existing recycling program, and instead disposing of empty liquor bottles in the trash. If the proposed rulemaking is finalized, the licensee may determine that keeping track of two years worth of "simple forms" denoting "what was delivered to the drop off location and when" is simply not worth the hassle, or the potential fine if the LCB determines the recordkeeping is inadequate. For this licensee, the simpler and less risky solution is to simply break the bottles and throw them in the trash.

Common sense and legislative intent both commend the societal good that comes from recycling. Indeed, since the underlying statute was enacted, recycling has only increased in popularity. While

certainly challenges have developed in recent years, particularly with the ebbing demand for recyclable waste from emerging markets like China, recycling remains both the law of the state and popular with its citizens.

It could not be the legislative intent of the General Assembly to discourage licensees from recycling – an outcome that is clearly unreasonable on its face. Section 1922 of the Statutory Construction Act states:

*In ascertaining the intention of the General Assembly in the enactment of a statute, the following presumption... may be used: (1) That the General Assembly does not intend a result that is absurd, impossible of execution, or unreasonable. (emphasis added)*

A counterargument might be made that the General Assembly viewed the threat posed by the potential misuse of empty liquor bottles to be significant, and that the legislative intent of section 491(5) is, in fact, that it would be preferable to see licensees destroy glass or plastic liquor bottles and send them to the landfill if they can not or will not comply with the “proof of participation” written recycling standard established by the LCB. Such an argument might encourage a robust threshold for any proposed “proof of participation,” perhaps with the recordkeeping envisioned by the proposed LCB rulemaking.

However, the fact that the General Assembly saw fit to establish, in statute, a full 24 hours for the destruction of an empty liquor bottle shows that the risk posed is not immediate, significant, or substantial. Legislative intent, common sense, and hundreds of years of practical experience dictate that the substance contained in the liquor bottle is more dangerous, and carries more risk, than the bottle itself. The legislature clearly viewed the societal good of recycling to outweigh the risks posed by empty liquor bottles. If this were not the case, then it is hard to see how the legislature would have granted the exception to the bottle-breaking rule for any reason. Certainly there are many other objects made of materials that are easily recycled, but carry a risk too great to allow for recycling (for example, medical waste.)

As a result, it stands to reason that the “proof in writing” as determined by the board should be accomplished in a manner that will not, in any way, *discourage* recycling. There are certainly methods the board could employ that would satisfy the legislature’s demand for written proof that impose less of a burden on licensees and encourage maximum participation in recycling initiatives.

## **IMPACT OF THE LCB PROPOSAL ON LICENSEES PARTICIPATING IN A MUNICIPAL RECYCLING PROGRAM**

Another flaw to the proposed rulemaking concerns licensees who reside in an area with mandatory curbside recycling. To take a step back, let us assume that there are two types of licensees in areas

required to participate in a municipal recycling program: Those licensees who obey the law and regularly recycle, and those who do not.

The licensee who obeys the law and regularly recycles is going to do so whether the LCB adopts the proposed rulemaking or not. However, the proposed rulemaking with the requirement to track trash invoices and keep various data concerning recycling on hand will create additional paperwork and regulatory headaches for the licensee. A licensee may even be fined for not conforming to the letter of the proposed rulemaking. It would be certainly be preferable if the "proof in writing" required by the clear legislative intent of Act 77 of 1994 could be accomplished in a manner that would be easier for the licensee to implement, while achieving a similar result.

Let us now consider the licensee who chooses not to follow the law to participate in mandatory recycling where required. The proposed written proofs will change...nothing. A licensee could be in compliance with the new requirements under section 5.43, and still fail to recycle anything at all. Such a licensee could deface their bottles, keep a brochure on recycling somewhere on the premises, and keep their trash invoices. Upon inspection, licensees could produce the brochure and invoices to meet the "proof of participation" standard, but again, this has nothing to do with actually recycling anything.

It is reasonable that the board would promulgate the "proof in writing" and "proof of participation" requirement in a way that would assume all licensees in affected jurisdictions are following Act 101 and responsibly participating in a municipal recycling program. However, it could be argued that the board's proposed regulations will do absolutely nothing to change the reality on the ground concerning recycling for licensees located in a municipality subject to mandatory recycling. Licensees flouting Act 101 will continue to do so, and will be able to comply with the new regulations by keeping trash invoices on hand and a brochure on recycling. Law-abiding licensees will continue to follow the requirements of Act 101, but now will be required to keep track of two years worth of trash invoices and keep recycling brochures on hand.

## **CONCLUSION REGARDING LCB PROPOSED RULEMAKING**

It is entirely reasonable to think that, under the board's proposed regulation, a licensee voluntarily recycling may cease to recycle simply to avoid the potential fines and regulatory actions associated with the proposed rulemaking. It is also entirely reasonable to think that a licensee subject to a mandatory recycling program that is faithfully recycling could nevertheless be cited and fined for a newly established Act 77 violation, and that a licensee who is not recycling might comply with the newly established Act 77 regulation upon inspection.

I suggest a better outcome could be achieved that still meets the clear legislative intent established in Act 77. The proposed alternative is much simpler and less burdensome for licensees than the

multiple requirements outlined in the proposed rulemaking, while removing several of the negative outcomes previously contemplated.

**PROPOSED ALTERNATIVE**

The General Assembly’s legislative intent for some sort of written statement concerning a licensee’s participation in a recycling program is obvious. The LCB clearly has the authority to develop this proposed rulemaking in any way the board determines. Again, as stated in section 491:

*The proof of participation shall be provided in a manner as prescribed by the Pennsylvania Liquor Control Board.*

The General Assembly has given complete discretion to the LCB on determining compliance with the proof-of-participation-in-writing requirement. However, the LCB proposed rulemaking, while certainly creating new rules and written requirements, does not meaningfully accomplish anything other than a great deal of new paperwork for licensees.

As an alternative, I propose the “proof in writing” and “proof of participation” requirement could be satisfied by simply requiring a licensee who participates in a recycling program to display a clearly posted placard (sign) in the licensed premises, perhaps next to the establishment’s liquor license, that states:

*“This establishment participates in a municipal recycling program”*

Or

*“This establishment participates in a voluntary recycling program”*

| IRRC #3224   | LCB Proposed Section 491(5) | Proposed Alternative |
|--|-----------------------------|----------------------|
| Satisfies legislative requirement for written proof?           | Yes                         | Yes                  |
| Ensures licensee is actually recycling?                        | No                          | No                   |
| May result in licensees suspending existing recycling efforts? | Yes                         | No                   |
| Adds burdensome recordkeeping requirement for licensees?       | Yes                         | No                   |

The proposed alternative meets the requirements established by the clear legislative intent of the General Assembly, and will result in a better outcome than the proposed rulemaking put forth by the LCB. The proposed alternative has at least two distinct benefits – its simplicity will ensure licensees participating in a voluntary recycling program will continue to do so, and it requires significantly less recordkeeping for all licensees.

The proposed alternative also benefits from simplicity in enforcement for both the board and the licensee. The board's proposed rulemaking is subject to endless confusion and interpretation – Does that printout from the County's website clearly state the County recycles the type of plastic used for this liquor bottle? Does the licensee have every trash invoice for the past two years, or is one missing? One can imagine other such situations. However, compliance with the proposed alternative is simple for both the licensee and the board – the prescribed placard is either displayed next to the licensee's liquor license, or it isn't. There is no room for debate, confusion, or interpretation. And certainly, a clearly outlined and enforced standard is of great benefit to licensees, the board, and the citizens of the Commonwealth.

## CONCLUSION

While the board's authority to order this new rulemaking cannot be questioned, it is undeniable that the board's proposed "proof in writing" and "proof of participation" requirements are more burdensome and more difficult to enforce than the proposed alternative. The easier-to-enforce and easier-to-comply-with proposed alternative will have the same (or better) end-result as the more complex proposal put forward by the board.

With this in mind, the IRRC should refer the proposed rulemaking back to the LCB with a recommendation to review and implement the proposed alternative.

Thank you for the opportunity to comment on this matter, and please do not hesitate to contact me with any questions or concerns.

Kind Regards,



John Lawrence  
State Representative  
Commonwealth of Pennsylvania