

# Comments of the Independent Regulatory Review Commission



## Pennsylvania Liquor Control Board Regulation #54-90 (IRRC #3236)

### Responsible Alcohol Management Program

September 18, 2019

We submit for your consideration the following comments on the proposed rulemaking published in the July 20, 2019 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (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.

#### GENERAL

##### 1. Section 5.202. Definitions. – Consistency with statute; Clarity; Reasonableness.

###### *Material change*

The definition of “material change” includes changes to “the order of the curriculum” of Responsible Alcohol Management Program (RAMP) server/seller training for alcohol service personnel. Why does reordering the curriculum, without a change to substance, constitute a material change? Since a sizeable fee is required, we ask the Board to explain the reasonableness of considering reordered curriculum a material change.

Additionally, the definition states that a material change “**may include** the addition of unapproved information or the deletion of approved information.” [Emphasis added.] We have two concerns. First, “may” indicates a discretionary action. We ask the Board to revise this definition to omit the discretionary language. Second, classroom instructors and online training providers are required to submit changes to the standard and approved alternative curriculums to the Board for approval. Are there additional modifications the Board considers to be material changes? To improve the clarity of the definition, we ask the Board to add additional examples to the definition.

###### *Responsible server practices*

The definition of “responsible server practices” is proposed to be deleted. However, Section 471.1(a) of the Liquor Code (47 P.S. § 4-471.1(a)) requires that “newly hired alcohol service personnel [shall be oriented] to responsible server practices, **as the term is defined by the [B]oard, through regulation.**” [Emphasis added.] The Preamble to the proposed regulation

does not address this proposed deletion. We ask the Board to explain in the Preamble to the final regulation the reasonableness of deleting this term which the Liquor Code directs the Board to define by regulation.

**2. Section 5.203. Mandatory training for managers. – Clarity.**

Subsection (b) states that “licensees must ensure that the manager has successfully completed owner/manager training within the past [two] years.” We ask the Board to clarify in the Preamble to the final regulation that owner/manager training expires after two years and that a manager must renew owner/manager training every two years.

This comment also applies to Section 5.204(b) (relating to mandatory training for alcohol service personnel).

**3. Section 5.204. Mandatory training for alcohol service personnel. – Clarity; Reasonableness.**

Subsection (c) states, “If a licensee obtains an off-premises catering permit for use at a catered function, every **employee whose primary responsibility at the catered function is to sell and/or serve alcoholic beverages or check identifications of those seeking to enter** the catered function must have successfully completed server/seller training within [two] years prior to the date of the catered function.” [Emphasis added.] The Board defines the term “alcohol service personnel” as “[a]ny employe . . . whose primary responsibility includes the resale, furnishing or serving of liquor or malt or brewed beverages. It shall also mean any employe . . . whose primary responsibility is to ascertain the age of individuals who are attempting to enter the licensed premises.” We ask the Board to use the defined term “alcohol service personnel” or to explain in the Preamble to the final regulation why it is reasonable not to use the defined term.

Similarly, we ask the Board to clarify the final regulation by replacing “employee” with the defined term “alcohol service personnel” in Section 5.205(b)(1)(iii) (relating to RAMP certification prerequisites) where the regulation states, “Instruction will be provided on techniques to ensure that employees are complying with house rules . . . .”

**4. Section 5.205. RAMP certification prerequisites. – Protection of public health, safety and welfare; Clarity; Reasonableness; Implementation procedures.**

Subsection (b)(3) addresses new employee orientation. We have two concerns.

First, Subparagraph (i) requires a licensee to “review an orientation checklist with all alcohol service personnel” when the licensee is preparing to apply for RAMP certification or renewal. Is a licensee required to review the orientation checklist with new employees or all employees? Section 471.1(a) of the Liquor Code only requires orientation for new employees. Further, under Subparagraph (ii), a licensee shall conduct new employee orientation within 30 days of hire, which is separate from the licensee applying for RAMP certification or renewal. We ask the Board to clarify in the final regulation the type of employee who receives orientation and the timeframe for completion of orientation.

Second, Subparagraph (ii) provides that a licensee shall ensure that new employee orientation – covering service to minors, service to visibly intoxicated patrons, acceptable forms of identification, carding practices and house policies – occurs “within 30 days of the employee’s hire.” Given that compliance with these standards is fundamental to an employee’s job duties and a licensee’s RAMP certification, is the Board ensuring public health, safety and welfare by providing this length of time for new employee orientation? We ask the Board to explain in the Preamble to the final regulation the reasonableness of this timeframe.

**5. Section 5.206. RAMP certification. – Statutory authority.**

Subsection (c) appears to bind the Office of Administrative Law Judge to take official notice of the Board’s records with regard to licensee certification. We ask the Board to explain its statutory authority for this provision in the Preamble to the final regulation.

**ONLINE TRAINING PROVIDERS AND PROGRAMS FOR SERVER/SELLER TRAINING**

**6. Section 5.221. Online training provider application. – Economic or fiscal impacts; Reasonableness; Implementation procedures.**

This section addresses how an individual applies for authorization as an online training provider, including minimum qualifications related to age, education and experience. We have two questions. First, will the Board authorize a business as an online training provider? Second, if so, what are the minimum qualifications? We ask the Board to explain in the Preamble to the final regulation the implementation procedure for authorizing a business as an online training provider.

Subsection (a)(1) provides for an open enrollment period, as posted on the Board’s website, for applications from online training providers. The Board may “limit the number and frequency of open enrollment periods.” We have three concerns. First, is it reasonable for the Board to limit when applications may be submitted? Second, did the Board consider establishing a schedule for open enrollment and posting it on the Board’s website? Third, has the Board considered the economic impact upon prospective online training providers who will incur expenses developing an online training module without knowing when it may submit an application for authorization? We ask the Board to address these concerns in the Preamble to the final regulation. This comment also applies to Sections 5.213(c)(2)(ii), 5.222(e)(2), 5.225(c)(5), 5.227(d), 5.231(a)(1), 5.235(c)(4) and 5.236(d).

Subsection (b), regarding minimum qualifications, does not require an online training provider to attend owner/manager training, which is mandatory for classroom instructors under Section 5.234(7) (relating to classroom instructor responsibilities). Further, Section 5.234(6) requires classroom instructors to attend instructor meetings scheduled by the Board. Why is this Board-provided instruction not relevant for an online training provider? We ask the Board to explain in the Preamble to the final regulation the reasonableness of excluding online training providers from these requirements.

**7. Section 5.223. Minimum standards of the online training program. – Clarity.**

Subsection (e)(1) states, “The online training program must comply with the most current version of the [Board’s] Web Trainee Transfer Service requirements, as referenced in [Section] 5.222(a) (relating to online training program approval process).” Should this reference be to Section 5.213(a) (relating to alternative curriculum)?

**8. Section 5.224. Online training provider responsibilities. – Clarity; Need; Reasonableness; Implementation procedures.**

Paragraph (3) requires an online training provider to provide training to at least 225 students per year. We have three questions. First, how did the Board determine the number of students who must be trained? Second, what are the repercussions of not meeting this minimum? Third, why is there a need to set a minimum number of students per online training provider? We ask the Board to explain in the Preamble to the final regulation the need for and the reasonableness of this requirement.

Paragraph (4) requires an online training provider to send records regarding online training to the Board immediately following completion of online training. Subparagraph (i) provides that “records must be sent in real-time or in frequent batch submissions within 15 minutes after completion of the final examination.” Does the Board consider these requirements to be equal? Further, a commentator suggested that this requirement should be revised to allow online training providers to send records once per day to accommodate scheduled maintenance and downtime. We ask the Board to clarify in the final regulation the timeframe in which the online training provider is required to send final examination records.

Paragraph (7) requires an online training provider to resolve a technical support inquiry within one business day. A commentator expressed concern with implementing this requirement when correcting technical issues and communicating with students. The commentator suggested that two business days is a more reasonable timeframe. We note that Paragraph (8) does allow 48 hours for an online training provider to respond to e-mails, telephone calls or other contacts. We ask the Board to revise this paragraph as suggested by the commentator or to explain in the Preamble to the final regulation the reasonableness of the proposed timeframe.

Paragraph (10)(i) requires an online training provider to make changes to online training program content within 24 hours of being notified by the Board. Subparagraph (ii) requires the online training provider to limit public access to the online training program until the changes have been made and approved by the Board. A commentator stated that “[m]aking changes to a properly built and tested online course is nearly impossible to do in one day.” The commentator suggested that Subparagraphs (i) and (ii) be revised to allow the online training provider to submit a plan to the Board to implement changes, while allowing access to the previously-approved online training program. We ask the Board to explain in the Preamble to the final regulation the reasonableness of how this provision will be implemented.

Paragraph (10)(iii) directs an online training provider to “[r]efrain from making material changes to online training program content” without approval from the Board or unless directed to by the Board. The online training provider is required to submit the material changes to the program for Board review and approval under Clause (A). Will the Board require the online training provider to follow the procedures for review and approval of an alternative curriculum in Section 5.213, including the \$250 fee in Subsection (b)? We ask the Board to explain in the Preamble to the final regulation how it will implement the provisions in this paragraph and Section 5.213.

Paragraph (11)(i) requires an online training provider to notify the Board not less than 30 days before an online training program is modified, enhanced or upgraded. We have three concerns. First, is a minimum 30-day notification period reasonable? Second, will the Board review and test the online training program following the completion of the system changes? Third, is the online training provider required to limit public access during this time? In the Preamble to the final regulation, we ask the Board to clarify how this provision will be implemented and to explain the reasonableness of this timeframe.

**9. Section 5.225. Renewal of authorization. – Economic or fiscal impacts; Clarity; Reasonableness; Implementation procedures.**

Subsection (b) states, “The online training provider shall submit, with the application for renewal of authorization, hard copy screen shots of the most recent [Board]-approved online training program with renewal. The online training provider shall submit no more than [two] screen shots per one side of an 8 ½ by 11 inch piece of paper. The screen shots may be in color or black and white.” Since the online training program has already been approved by the Board, did the Board consider requiring the online training provider to certify that the same program will be used rather than submitting screen shots on paper?

We have several concerns related to Subsection (c) which addresses untimely applications for authorization renewal. Subsection (c) is proposed as follows:

- (1) The [Board] may accept an application for renewal of authorization that is filed less than 30 days before the expiration of the current authorization, but not after expiration, if the applicant includes an additional filing fee of \$100.
- (2) The [Board] may accept an application for renewal of authorization that is filed up to 30 days after the expiration of the current authorization if the applicant includes an additional filing fee of \$250.
- (3) The [Board] will not accept applications for renewal of authorization that are filed more than 30 days after the expiration of the current authorization.
- (4) As of the date of the expiration of an online training provider’s authorization, the following will no longer be valid:
  - (i) Training that is completed by a student after the date of expiration.
  - (ii) Any training vouchers issued by an online training provider that have not been redeemed and training completed.
- (5) The [Board] will not accept, for a minimum of [one] year from the date of expiration, an application from an online training provider whose authorization has expired. Under such circumstances, a new application must be filed, not an application for

renewal. Applications will only be accepted during a period of open enrollment, which shall be posted on the [Board's Bureau of Alcohol Education's] page on the [Board's] web site. See [Section] 5.221(a) (relating to online training provider application).

Paragraph (2) raises several concerns related to implementation. By allowing an online training provider to submit an application for renewal up to 30 days after expiration of the current authorization, the Board creates a gap of uncertainty related to Paragraph (4). Under Paragraph (4)(i), why would a student be able to take training from an online training provider whose authorization has expired? We ask the Board to prohibit the applicant from providing public access to the online training when the online training provider's authorization has expired. Also, under Paragraph (4)(ii), how will unredeemed training vouchers and incomplete training be handled if the online training provider submits an application after the expiration date but within 30 days? We ask the Board to explain in the Preamble to the final regulation the reasonableness and fiscal impact of how unredeemed training vouchers and incomplete training will be handled.

Also, Paragraph (5) states that an application will not be accepted for at least one year from the date of expiration of the current authorization. This contradicts Paragraph (2) which states that an application may be accepted for up to 30 days following the expiration of the current authorization. We ask the Board to carefully review Subsection (c) and clarify how it will be implemented in the final regulation.

**10. Section 5.226. Training vouchers. – Economic or fiscal impacts; Clarity; Need; Reasonableness; Implementation procedures.**

This section allows an online training provider to sell training vouchers to licensees for use by their alcohol service personnel within 60 days of purchase. Training vouchers may be purchased in bulk. Two commentators oppose the requirement to use training vouchers within 60 days, stating that this may deter bulk purchases, thereby limiting volume discounts and increasing the cost per employee. We have three questions. First, why is there a need to require a licensee to use training vouchers within a given time period? Second, is the 60-day timeframe reasonable? Third, did the Board consider limiting the sale of training vouchers within 30 days of the expiration of an online training provider's authorization? We ask the Board to answer these questions in the Preamble to the final regulation and to consider revising this regulation as suggested by the commentators.

Further, this section does not require an online training provider to refund the purchase price of training vouchers to licensees when the online training provider is deauthorized or authorization is not renewed. A commentator suggested that an online training provider should be required to obtain surety bonds so that licensees are able to obtain refunds. Has the Board considered a system to ensure refunds to licensees? We ask the Board to address in the Preamble to the final regulation the economic impact of training vouchers and to clarify the implementation procedures in the final regulation.

**11. Section 5.227. Deauthorization of online training providers. – Economic or fiscal impacts; Clarity; Reasonableness; Implementation procedures.**

Subsection (b) states that a notice of violation may advise the online training provider that its authorization is temporarily suspended, pending resolution of a violation. What is the impact on students and training vouchers if authorization is suspended? Will the online training provider be required to prohibit public access to the online training program if authorization is suspended? We ask the Board to clarify how this provision will be implemented when a notice of violation includes the temporary suspension of an online training provider’s authorization.

Similar to our comment on Section 5.225(c)(4)(i) and (ii) (relating to renewal of authorization), we have concerns related to Paragraph (1) which addresses deauthorization of an online training provider. The proposed language is as follows:

- (1) As of the date of the [Board’s] notice of deauthorization to an online training provider, the following will no longer be valid:
  - (i) Training that is completed by a student after the date of the [Board’s] notice of deauthorization.
  - (ii) Any training vouchers issued by an online training provider that have not been redeemed and training completed.

Under Paragraph (1)(i), why would a student be able to take training from an online training provider who has been deauthorized? We ask the Board to clarify implementation procedures for deauthorization and to prohibit the online training provider from providing public access to the online training program when the online training provider has been deauthorized.

Under Paragraph (1)(ii), how will unredeemed training vouchers and incomplete training be handled if the online training provider has been deauthorized? We ask the Board to explain in the Preamble to the final regulation the reasonableness and fiscal impact of how unredeemed training vouchers and incomplete training will be handled.

**CLASSROOM INSTRUCTORS OF SERVER/SELLER TRAINING**

**12. Section 5.231. Classroom instructor application. – Clarity.**

Subsection (b)(2) sets one qualification for a classroom instructor as “having a minimum of [two] years of experience, full-time, as a trainer or in giving presentations in the field of education, law, law enforcement, substance abuse prevention, hospitality related to hotel/restaurant management or alcohol service training or other equivalent combination of experience and training.” We ask the Board to clarify in the Preamble to the final-form regulation how it will evaluate experience “giving presentations” compared to experience as a trainer.

Subsection (b)(5) requires a classroom instructor to attend owner/manager training. We ask the Board to consider changing the “attending” and “attend” terminology to “completing” and “complete” to clarify the training requirements.

**13. Section 5.233. Minimum standards of classroom training. – Clarity; Need; Reasonableness; Implementation procedures.**

Subsection (a)(1) requires a classroom session to be at least 2 ½ hours long. Under Section 5.223(a)(5) (relating to minimum standards of the online training program), an online training program must include at least 1 ½ hours of instructional time. How did the Board determine the need for a longer classroom session? We ask the Board to explain in the Preamble to the final regulation the reasonableness of this time requirement.

Subsection (d) requires a student to complete the final examination individually and without assistance from others. Has the Board considered allowing a student with a learning disability to request an accommodation to complete the final examination?

Subsection (e) requires a classroom instructor to notify a student of the grade on the final examination. However, the method of notification and a timeframe for doing so are not stated. We ask the Board to clarify implementation of this subsection in the final regulation.

**14. Section 5.234. Classroom instructor responsibilities. – Clarity; Need; Reasonableness; Implementation procedures.**

Paragraph (2)(i) states, “A classroom instructor shall refrain from making any **modifications or changes** to the standard curriculum without being required to do so by the [Board].” [Emphasis added.] Subparagraph (ii) states, “A classroom instructor shall refrain from making any **modifications or changes** to an alternative curriculum without first receiving approval from the [Board] . . . .” [Emphasis added.] Subparagraph (iii) requires a classroom instructor who opts to use an alternative curriculum to submit a \$250 fee for review and approval. We have two issues with these subparagraphs. First, we ask the Board to revise “modifications or changes” to the defined term “material changes.” Second, when a material change is made to the standard curriculum or an approved alternative curriculum, the classroom instructor is required to follow the procedure under Subparagraph (iii). Will the Board require the classroom instructor to follow the procedures for review and approval of an alternative curriculum in Section 5.213, including the \$250 fee in Subsection (b)? We ask the Board to clarify in the Preamble to the final regulation how it will implement the provisions in this paragraph and Section 5.213.

Paragraph (3) requires a classroom instructor to hold training sessions throughout this Commonwealth. We have three questions. First, how will the Board determine that a classroom instructor has met this standard? Second, how will the Board enforce this regulation? Third, what are the repercussions of not meeting this requirement? We ask the Board to explain in the Preamble to the final regulation the need for and the reasonableness of this requirement.

Paragraph (4) requires a classroom instructor to hold at least two training sessions per year for at least 225 students. We have three questions. First, how did the Board determine the number of

sessions and the number of students who must be trained? Second, what are the repercussions of not meeting these minimums? Third, why is there a need to set a minimum number of sessions and students? We ask the Board to explain in the Preamble to the final regulation the need for and the reasonableness of these requirements.

**15. Regulatory Analysis Form (RAF). – Economic or fiscal impacts; Need; Reasonableness; Timetables for compliance.**

Related to Questions #17, #19, #23 and #24, we ask the Board to provide additional information related to fees. The Board currently charges the same fee for classroom instructors and online training providers for applications, renewals and changes to standard curriculum. The proposed regulation separates classroom instructors and online training providers and establishes different fees for each. For example, where both classroom instructors and online training providers each currently submit \$250 with an application, under the proposed regulation, applicants for authorization as a classroom instructor would pay \$500 while an applicant to provide online training would pay \$850. In the Preamble, the Board states that the fees are less than half of the costs incurred by the Board “to train and authorize classroom instructors or to review the content of an online training provider as well as test every link and every digital functionality.” We ask the Board to explain why and how it determined that this cost sharing percentage is appropriate. Further, since many of these fees are newly established or significantly increased, we ask the Board to provide additional information related to the need, fiscal impact and reasonableness of the fees in the final regulation.

We note that the Board states in several responses in the RAF that no costs for the regulated community are included because it is expected that the online training providers and classroom instructors will pass the cost along to individuals taking server/seller training. However, licensees and alcohol service personnel are a part of the regulated community as they are required to comply with the training and certification regulations. We ask the Board to provide specific cost estimates for licensees and alcohol service personnel.

Additionally, in response to Question #24, the Board states that online training providers and classroom instructors “will [recoup increased fees] by passing along the cost to the attendees of the training, of which there are tens of thousands across the Commonwealth.” The Board acknowledges increased class fees and provides measurements for small businesses, but fails to adequately address licensees classified as small businesses. We ask the Board to provide an economic impact statement relative to licensees who meet the standards for small businesses.

Related to Question #29, we ask the Board to update the timetable for the review of the regulation.

**16. Miscellaneous clarity.**

- In the RAF and Preamble, the statement regarding the calculation of fees relating to Section 5.225 is incorrect. These statements should be corrected in the final-form regulation.

- Section 5.233(a) (relating to minimum standards of classroom training) consists of two sentences which are essentially the same. We ask the Board to delete one sentence in the final regulation.
- The Board did not include Section 471.1 of the Liquor Code in the statutory authority statement in the Preamble to the proposed regulation. We ask the Board to include this provision in the Preamble to the final regulation.