

Regulatory Analysis Form

(Completed by Promulgating Agency)

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

**INDEPENDENT REGULATORY
REVIEW COMMISSION
RECEIVED**

MAY 24 2022

**Independent Regulatory
Review Commission**

IRRC Number: **3345**

(1) Agency
Pennsylvania Liquor Control Board

(2) Agency Number: 54
Identification Number: 96

(3) PA Code Cite: 40 Pa. Code Sections 13.81 and 13.231

(4) Short Title: Promotion with licensees

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

Primary Contact: Norina Foster, Assistant Counsel (717) 783-9454
Pennsylvania Liquor Control Board
401 Northwest Office Building
Harrisburg, Pennsylvania 17124
FAX: (717) 787-8820
Email: ra-lblegal@pa.gov

Secondary Contact: Rodrigo Diaz, Chief Counsel
Jason M. Worley, Deputy Chief Counsel
(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 proposed rulemaking is part of the Board's ongoing process to update its regulations, updating the process by which licensed vendors may promote products with licensees. The proposed rulemaking adds language to clarify what is required of the regulated community, expands the monthly amount of liquor that can be used for promotion, and adjusts the cost of promotional product to be consistent with the Liquor Code. The proposed rulemaking also eliminates certain procedures and records that the Board no longer considers necessary. Language was added to sections 13.81 and 13.231 to clarify that only unlicensed consumers may receive samples.

(8) State the statutory authority for the regulation. Include specific statutory citation.

Pennsylvania Liquor Code, sections 207(i) and 208(j).

(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 regulation 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 proposed rulemaking clarifies to whom samples may be given. Licensees and the public often use the words “tastings” and “samples” interchangeably, but in the Board’s Regulations, they mean different things:

- A tasting is no larger than a standard-size alcohol beverage, 40 Pa. Code § 13.201, although manufacturing licensees can be restricted to even smaller amounts by the Liquor Code. Tastings are consumed at the location where they are given.
- Samples, on the other hand, must be provided in “*unopened* containers of the smallest commercially available size,” as the regulation currently states. 40 Pa. Code § 13.231 (emphasis added). Also, “samples may not be opened or consumed on State Liquor Store premises or distributor or importing distributor licensed premises.” *Id.*

To reduce confusion over these words, the proposed rulemaking eliminates the word “samples” from section 13.81. When promoting a product with licensees, licensed vendors shall only be able to provide tastings, not opened or unopened bottles of product.

In subsection 13.81(a), the first sentence is amended from the negative—“Each agent...may not use more than one case”—to the positive: “Each agent...may use up to one case....” Next, the quantity is changed from one case of each brand to one case of each product. The word “brand,” in this context, is synonymous with a line or style of products created by a manufacturer or company. The word “product” is a specific item within that brand. By changing the word from “brand” to “product,” the Board is expanding the quantity of items that may be used by licensed vendors for promotion to licensees.

Throughout section 13.81, the word “licensed” has been inserted in front of the word “vendor” for the sake of clarity. The phrase “licensed vendor” is a defined term for this subchapter of the Board’s Regulations, and it includes “A licensee holding a Manufacturer or Importer License, or a vendor’s permit, and selling liquors to the Board.” 40 Pa. Code § 13.71.

The phrase “to promote that product to licensees, as that term is defined in section 13.71 (relating to definitions),” is added to subsection 13.81(a) to distinguish the application of this section from section 13.231, which applies to unlicensed consumers.

The second sentence of subsection 13.81(a) clarifies that the product must be purchased at a State Liquor Store, if it is available there, or through the Board’s special liquor order process, if the product or desired bottle size is not available at a State Liquor Store. The previous calculation of cost is also changed, from the cost price plus 25% to the retail price. It is unclear how “cost plus 25%” was developed as it is not found in the Liquor Code. Section 305(b) of the Liquor Code provides as follows:

Every Pennsylvania Liquor Store shall sell liquors at wholesale to hotels, restaurants,

clubs, and railroad, pullman and steamship companies licensed under this act; and, under the regulations of the board, to pharmacists duly licensed and registered under the laws of the Commonwealth, and to manufacturing pharmacists, and to reputable hospitals approved by the board, or chemists. **Sales to licensees shall be made at a price that includes a discount of ten per centum from the retail price;** except that special order sales to licensees authorized in subsection (a) shall not be subject to the ten per centum discount. The board may sell to registered pharmacists only such liquors as conform to the Pharmacopoeia of the United States, the National Formulary, or the American Homeopathic Pharmacopoeia. The board may sell at special prices under the regulations of the board, to United States Armed Forces facilities which are located on United States Armed Forces installations and are conducted pursuant to the authority and regulations of the United States Armed Forces. **All other sales by such stores shall be at retail,** except that incentives, such as coupons or discounts on certain products, may be offered to unlicensed customers of the board as provided under sections 207(m) and 493(24)(ii)(B).

47 P.S. § 3-305(b) (emphasis added). The statute does not include licensed vendors in the group of licensees that may purchase at wholesale, meaning a ten percent discount from the retail price. Therefore, licensed vendors should pay the retail price.

The third sentence of subsection 13.81(a) is deleted since the proposed rulemaking now requires the licensed vendor to purchase the promotional product at retail. The fourth sentence of subsection (a) is also deleted, since the Board no longer requires a separate order to be placed for each agent. In the fifth sentence of subsection (a), the word “shall” replaces the word “may” because the Board does not wish to exercise discretion in allowing a licensed vendor to purchase and distribute promotional product to its agents; this activity shall be permitted. The final sentence of subsection (a) is deleted, since the Board no longer requires a licensed vendor to file a statement giving the name of the licensed vendor’s authorized supervisor, together with the territories and names of all agents under his supervision.

Subsection 13.81(b) is rewritten to clarify that, for promotion with licensees, agents shall only use product to give tastings, as provided in section 13.211 (relating to tasting events). Agents shall not leave any bottle of product with a licensee, whether opened or unopened. This language is added because the current section 13.81 does not clearly state that an agent may not leave a bottle of product with a licensee.

Subsection 13.81(c) clarifies that the agent is required to label each bottle. It is no longer necessary for the bottles to be labeled before leaving the State Store, the bottles must simply be labeled before the agent promotes the product with a licensee. The language of the label has been updated, replacing the word “Sample” with “For tastings only.”

The first section of subsection 13.81(d) is amended to bring the recordkeeping requirement of the licensed vendor into alignment with recordkeeping required of other licensees. The phrase “in hard copy or electronic media consistent with generally accepted accounting procedures, for a period of at least 2 years” is also used in sections 5.101 (pertaining to breweries) and 9.13 (pertaining to records and reports). The type of information that must be kept is amended to be consistent with the changes made to subsection (a) in that the word “brand” is changed to “products.” The remainder of subsection (d) is deleted as the Board no longer requires this information.

Section 13.231 is renamed “Samples for unlicensed consumers,” to clarify that samples may be given to

unlicensed consumers. The first sentence of subsection (a) is amended by adding the word “only”, to further strengthen the understanding that samples may only be given to unlicensed consumers. The second sentence of subsection (a) is deleted since the proposed rulemaking eliminates the permissibility of allowing a licensed vendor to give samples of product to licensees.

The affected parties include all manufacturing and importing licensees of liquor, including wine, as well as any vendor permittees. As of May 3, 2022, there are approximately 250 licensed vendors that could be affected by this proposed rulemaking. Please note, however, that there are a significant number of manufacturers that get their product into Pennsylvania through the Board or an importer but are not licensed by the Board, such as out-of-state manufacturers. Since these entities are not licensed by the Board, it is difficult to quantify how many there are, let alone how large or small they are, and therefore the Board does not have enough information to evaluate the small business status of all entities that will be affected by the regulation.

(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 proposed rulemaking is not known to be more stringent than federal regulations.

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

Regulations pertaining to alcoholic beverage control are governed by neighboring states in accordance with their unique and individual systems of alcoholic beverage control. Because of this, the proposed rulemaking 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 regulation will not affect any other existing or proposed regulations of the Liquor Control 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 Board developed and drafted this regulation internally, without input from outside groups.

(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: Wineries and distilleries shall have less than 1,000 employees; wine and distilled alcoholic beverage merchant wholesalers—which is the closest category to an importer or vendor permittee—shall have less than 250 employees.

13 C.F.R. § 121.201.

The regulation affects “licensed vendors,” as that term is defined in 40 Pa. Code § 13.71: “A licensee holding a Manufacturer or Importer License, or a vendor’s permit, and selling liquors to the Board.” As of May 3, 2022, there are approximately 250 licensed vendors in the Commonwealth that could be affected by the proposed rulemaking. The majority of businesses licensed by the Board would likely be considered small businesses.

Please note, however, that there are a significant number of manufacturers that get their product into Pennsylvania through the Board or an importer but are not licensed by the Board, such as out-of-state manufacturers. Since these entities are not licensed by the Board, it is difficult to quantify how many there are, let alone how large or small they are, and therefore the Board does not have enough information to evaluate the small business status of all entities that will be affected by the regulation.

The proposed rulemaking changes the cost of promotional product for licensed vendors, from the cost price to the Board plus 25% to the retail price. The Board analyzed a list of new products, introduced in September and October 2021, that were all 750 milliliters in size. The list excluded products that were identified as Luxury or Holiday products. Of the products the Board analyzed, the change in price from cost plus 25% to retail price resulted in an average increase of \$5.81 per unit, with a mean of \$5.60 per unit. Given the fact that licensed vendors have complete control over what and how much product to offer retail licensees for tastings, and that this regulation has not been changed in over twenty years, the Board considers this amendment to be reasonable.

(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 regulation affects “licensed vendors,” as that term is defined in 40 Pa. Code § 13.71: “A licensee holding a Manufacturer or Importer License, or a vendor’s permit, and selling liquors to the Board.” As of May 3, 2022, there are approximately 250 licensed vendors in the Commonwealth that could be affected by the proposed rulemaking. The majority of businesses licensed by the Board would likely be considered small businesses.

Please note, however, that there are a significant number of manufacturers that get their product into Pennsylvania through the Board or an importer but are not licensed by the Board, such as out-of-state manufacturers. Since these entities are not licensed by the Board, it is difficult to quantify how many there are, let alone how large or small they are, and therefore the Board does not have enough information to evaluate the small business status of all entities that will be affected by the regulation.

(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 proposed rulemaking changes the cost of product used for promotion by licensed vendors, from the cost price to the Board plus 25% to the retail price, since there is no basis in the Liquor Code for charging a licensed vendor “cost plus 25%.” The Board analyzed a list of new products, introduced in September and October 2021, that were all 750 milliliters in size. The list excluded products that were identified as Luxury or Holiday products. Of the products the Board analyzed, the change in price from

cost plus 25% to retail price resulted in an average increase of \$5.81 per unit, with a mean of \$5.60 per unit. However, licensed vendors have complete control over what and how much product to offer retail licensees for tastings, and therefore can mitigate whatever fiscal impact might occur because of the change in pricing. Any change in cost to suppliers for lawfully procuring product used for promotion with licensees can also likely be offset by profits derived from future sales of the products for which the product is being used.

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

There are several benefits to this regulation. Licensed vendors are now permitted to use up to one case of each product sold by the licensed vendor, rather than up to one case of each brand. In addition, licensed vendors are no longer limited in the size of bottles to be used for promotion to retail licensees. The regulation also eliminates the requirement that a licensed vendor place a separate order for each agent and file, upon request of the Board, a statement giving the name of the vendor's authorized supervisor, together with the territories and names of all agents under their supervision. The regulation also eliminates the requirement for the licensed vendor to keep a permanent stock ledger of all bottles purchased and distributed to the licensed vendor's agent. Records must still be kept, but they may be kept in hard copy or electronic media consistent with generally accepted accounting procedures.

Licensed vendors must purchase product for promotion with licensees through the Board, which is not a new requirement. However, licensed vendors must now pay the retail price for this product instead of "the cost price to the Board plus 25%," a formula that is not authorized by the Liquor Code. For the products the Board analyzed, the change in price from cost plus 25% to retail price resulted in an average increase of \$5.81 per unit, with a mean of \$5.60 per unit. Licensed vendors have complete control over what and how much product to offer retail licensees in tastings, and therefore can mitigate whatever fiscal impact might occur because of the change in pricing.

(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.

There are too many variables at play, of which the Board has no control, for the Board to provide a specific estimate of the costs or savings for the regulated community. A licensed vendor is not required to use tastings to promote its product with retail licensees. The licensed vendor determines what products will be used for tastings, how much product will be used per retail licensee, and which retail licensees, as well as how many, will be offered tastings. 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.

The proposed rulemaking does not result in costs or savings for local governments. No legal, accounting or consulting procedures are required.

(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.

The proposed rulemaking is not expected to result in costs or savings for state government. No legal, accounting or consulting procedures are required.

(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.

The proposed rulemaking is not expected to affect legal, accounting or consulting procedures and should not require any additional reporting, recordkeeping or other paperwork. Similarly, the regulation is not expected to require any additional governmental measures in order to implement the regulation.

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

No.

(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.**

N/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.

There is no data available regarding how the regulated community, local government and state government will recoup any savings or incur any costs.

| | Current FY Year | FY +1 Year | FY +2 Year | FY +3 Year | FY +4 Year | FY +5 Year |
|----------------------------|--------------------|---------------|---------------|---------------|---------------|---------------|
| SAVINGS: | \$ | \$ | \$ | \$ | \$ | \$ |
| 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 |
| COSTS: | \$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 |
| REVENUE LOSSES: | | | | | | |
| 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.

There are no programs affected by the regulation.

| Program | FY -3 2018-2019 | FY -2 2019-2020 | FY -1 2020-2021 | Current FY 2021-2022 |
|----------------|----------------------------|----------------------------|----------------------------|---------------------------------|
| N/A | N/A | N/A | N/A | N/A |

(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.
- (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.
- (c) A statement of probable effect on impacted small businesses.
- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

(a) 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: Wineries and distilleries shall have less than 1,000 employees; wine and distilled alcoholic beverage merchant wholesalers—which is the closest category to an importer or vendor permittee—shall have less than 250 employees. 13 C.F.R. § 121.201.

The regulation affects “licensed vendors,” as that term is defined in 40 Pa. Code § 13.71: “A licensee holding a Manufacturer or Importer License, or a vendor’s permit, and selling liquors to the Board.” As of May 3, 2022, there are approximately 250 licensed vendors in the Commonwealth that could be affected by the proposed rulemaking. The majority of businesses licensed by the Board would likely be considered small businesses.

Please note, however, that there are a significant number of manufacturers that get their product into Pennsylvania through the Board or an importer but are not licensed by the Board, such as out-of-state manufacturers. Since these entities are not licensed by the Board, it is difficult to quantify how many there are, let alone how large or small they are, and therefore the Board does not have enough information to evaluate the small business status of all entities that will be affected by the regulation.

(b) The proposed regulation reduces the reporting, recordkeeping or other administrative activities, which do not require any professional skills for preparation.

(c) The proposed regulation is expected to have a positive effect on impacted small businesses. Licensed vendors are now permitted to use up to one case of each product sold by the licensed vendor, rather than up to one case of each brand. In addition, licensed vendors are no longer limited in the size of bottles to be used for promotion to retail licensees. The regulation also eliminates the requirement that a licensed vendor place a separate order for each agent and file, upon request of the Board, a statement giving the name of the vendor's authorized supervisor, together with the territories and names of all agents under their supervision. The regulation also eliminates the requirement for the licensed vendor to keep a permanent stock ledger of all bottles purchased and distributed to the licensed vendor's agent. Records must still be kept, but they may be kept in hard copy or electronic media consistent with generally accepted accounting procedures.

(d) The proposed regulation updates the process by which licensed vendors may use liquor to promote products with retail licensees. In addition, the proposed rulemaking adds language to clarify what is required of the regulated community, expands the monthly amount of liquor that can be used for promotion and adjusts the cost of product used for promotion to be consistent with the Liquor Code. The proposed rulemaking also eliminates certain procedures and records that the Board no longer considers necessary. These changes are only possible through a regulatory amendment.

(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 special provisions were developed with regard to the particular needs of affected groups or persons.

(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 alternative regulatory provisions were considered and rejected, since this proposed regulation involves the clarification of existing regulations. The least burdensome acceptable alternative has been selected.

(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 proposed rulemaking, the compliance or reporting requirements have been reduced for all businesses.

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

The proposed rulemaking does not include schedules or deadlines for compliance or reporting

requirements.

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

With regard to this proposed rulemaking, the compliance or reporting requirements have been reduced for all businesses.

- d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation; and

The proposed 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.

Exempting small businesses from all or any part of the requirements contained in the proposed rulemaking would be untenable to maintain.

(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 PLCB has not relied on data to justify this regulation.

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

- A. The length of the public comment period: 30 days
- B. The date or dates on which any public meetings or hearings will be held: September 2022
- C. The expected date of delivery of the final-form regulation: August 2022
- D. The expected effective date of the final-form regulation: November 2022
- E. The expected date by which compliance with the final-form regulation will be required: November 2022
- F. The expected date by which required permits, licenses or other approvals must be obtained: N/A

CDL-1

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU
(Pursuant to Commonwealth Documents Law)

RECEIVED

MAY 24 2022

Independent Regulatory
Review Commission

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved
as to form and legality.

Attorney General:

BY: Amy M. Elliott
Digitally signed by Amy M. Elliott
DN: cn=Amy M. Elliott, o=Pennsylvania Office of
Attorney General, ou=Chief Deputy Attorney
General, email=amy@attorneygeneral.gov, c=US
Date: 2022.05.18 09:12:41 -0400
(DEPUTY ATTORNEY GENERAL)
5/18/22
DATE OF APPROVAL

Check if applicable
Copy not approved. Objections
attached.

Copy below is hereby certified to be a
true and correct copy of a document
issued, prescribed or promulgated by:

Pennsylvania Liquor Control Board
(AGENCY) ⁹⁶
DOCUMENT/FISCAL NOTE NO. 54-96
DATE OF ADOPTION: 1/12/2022

BY: T. J. [Signature]

TITLE: Chairman
(Executive Officer, Chairman or
Secretary)

Copy below is hereby approved as to form
and legality. Executive or Independent
Agencies:

BY: [Signature]
Chief Counsel
1/12/2022
DATE OF APPROVAL

Check if applicable. No Attorney
General approval or objection within
30 days after submission.

TITLE 40—LIQUOR
PART I. LIQUOR CONTROL BOARD
CHAPTER 13. PROMOTION

PROPOSED RULEMAKING

LIQUOR CONTROL BOARD

40 PA. CODE CH. 13

Promotion with licensees.

The Liquor Control Board (Board), under the authority of sections 207(i) and 208(j) of the Liquor Code (47 P.S. §§ 2-207(i), 2-208(j)), proposes to amend section 13.81 (relating to promotion with licensees) and section 13.231 (relating to samples for unlicensed customers) to read as set forth in Annex A.

Summary

This proposed rulemaking is part of the Board's ongoing process to update its regulations, updating the process by which licensed vendors may promote products with licensees. The proposed rulemaking adds language to clarify what is required of the regulated community, expands the monthly amount of liquor that can be used for promotion, and adjusts the cost of promotional product to be consistent with the Liquor Code. The proposed rulemaking also eliminates certain procedures and records that the Board no longer considers necessary. Language was added to sections 13.81 and 13.231 to clarify that only unlicensed consumers may receive samples.

The proposed rulemaking clarifies to whom samples may be given. Licensees and the public often use the words "tastings" and samples" interchangeably, but in the Board's Regulations, they mean different things:

- A tasting is no larger than a standard-size alcohol beverage, 40 Pa. Code § 13.201, although manufacturing licensees can be restricted to even smaller amounts by the Liquor Code. Tastings are consumed at the location where they are given.
- Samples, on the other hand, must be provided in "*unopened* containers of the smallest commercially available size," as the regulation currently states. 40 Pa. Code § 13.231 (emphasis added). Also, "samples may not be opened or consumed on State Liquor Store premises or distributor or importing distributor licensed premises." *Id.*

To reduce confusion over these words, the proposed rulemaking eliminates the word "samples" from section 13.81. When promoting a product with licensees, licensed vendors shall only be able to provide tastings, not opened or unopened bottles of product.

In subsection 13.81(a), the first sentence is amended from the negative—"Each agent...may not use more than one case"—to the positive: "Each agent...may use up to one case..." Next, the quantity is changed from one case of each brand to one case of each product. The word "brand," in this context, is synonymous with a line or style of products created by a manufacturer or company. The word "product" is a specific item within that brand. By changing the word from "brand" to "product," the Board is expanding the quantity of items that may be used by licensed vendors for promotion to licensees.

Throughout section 13.81, the word “licensed” has been inserted in front of the word “vendor” for the sake of clarity. The phrase “licensed vendor” is a defined term for this subchapter of the Board’s Regulations, and it includes “A licensee holding a Manufacturer or Importer License, or a vendor’s permit, and selling liquors to the Board.” 40 Pa. Code § 13.71.

The phrase “to promote that product to licensees, as that term is defined in section 13.71 (relating to definitions),” is added to subsection 13.81(a) to distinguish the application of this section from section 13.231, which applies to unlicensed consumers.

The second sentence of subsection 13.81(a) clarifies that the product must be purchased at a State Liquor Store, if it is available there, or through the Board’s special liquor order process, if the product or desired bottle size is not available at a State Liquor Store. The previous calculation of cost is also changed, from the cost price plus 25% to the retail price. It is unclear how “cost plus 25%” was developed as it is not found in the Liquor Code. Section 305(b) of the Liquor Code provides as follows:

Every Pennsylvania Liquor Store shall sell liquors at wholesale to hotels, restaurants, clubs, and railroad, pullman and steamship companies licensed under this act; and, under the regulations of the board, to pharmacists duly licensed and registered under the laws of the Commonwealth, and to manufacturing pharmacists, and to reputable hospitals approved by the board, or chemists. **Sales to licensees shall be made at a price that includes a discount of ten per centum from the retail price;** except that special order sales to licensees authorized in subsection (a) shall not be subject to the ten per centum discount. The board may sell to registered pharmacists only such liquors as conform to the Pharmacopoeia of the United States, the National Formulary, or the American Homeopathic Pharmacopoeia. The board may sell at special prices under the regulations of the board, to United States Armed Forces facilities which are located on United States Armed Forces installations and are conducted pursuant to the authority and regulations of the United States Armed Forces. **All other sales by such stores shall be at retail,** except that incentives, such as coupons or discounts on certain products, may be offered to unlicensed customers of the board as provided under sections 207(m) and 493(24)(ii)(B).

47 P.S. § 3-305(b) (emphasis added). The statute does not include licensed vendors in the group of licensees that may purchase at wholesale, meaning a ten percent discount from the retail price. Therefore, licensed vendors should pay the retail price.

The third sentence of subsection 13.81(a) is deleted since the proposed rulemaking now requires the licensed vendor to purchase the promotional product at retail. The fourth sentence of subsection (a) is also deleted, since the Board no longer requires a separate order to be placed for each agent. In the fifth sentence of subsection (a), the word “shall” replaces the word “may” because the Board does not wish to exercise discretion in allowing a licensed vendor to purchase and distribute promotional product to its agents; this activity shall be permitted. The final sentence of subsection (a) is deleted, since the Board no longer requires a licensed vendor to file a statement giving the name of the licensed vendor’s authorized supervisor, together with the territories and names of all agents under his supervision.

Subsection 13.81(b) is rewritten to clarify that, for promotion with licensees, agents shall only use product to give tastings, as provided in section 13.211 (relating to tasting events). Agents shall not leave any bottle

of product with a licensee, whether opened or unopened. This language is added because the current section 13.81 does not clearly state that an agent may not leave a bottle of product with a licensee.

Subsection 13.81(c) clarifies that the agent is required to label each bottle. It is no longer necessary for the bottles to be labeled before leaving the State Store, the bottles must simply be labeled before the agent promotes the product with a licensee. The language of the label has been updated, replacing the word “Sample” with “For tastings only.”

The first section of subsection 13.81(d) is amended to bring the recordkeeping requirement of the licensed vendor into alignment with recordkeeping required of other licensees. The phrase “in hard copy or electronic media consistent with generally accepted accounting procedures, for a period of at least 2 years” is also used in sections 5.101 (pertaining to breweries) and 9.13 (pertaining to records and reports). The type of information that must be kept is amended to be consistent with the changes made to subsection (a) in that the word “brand” is changed to “products.” The remainder of subsection (d) is deleted as the Board no longer requires this information.

Section 13.231 is renamed “Samples for unlicensed consumers,” to clarify that samples may be given to unlicensed consumers. The first sentence of subsection (a) is amended by adding the word “only”, to further strengthen the understanding that samples may only be given to unlicensed consumers. The second sentence of subsection (a) is deleted since the proposed rulemaking eliminates the permissibility of allowing a licensed vendor to give samples of product to licensees.

Affected Parties

The affected parties include all manufacturing and importing licensees of liquor, including wine, as well as any vendor permittees. As of May 3, 2022, there are approximately 250 licensed vendors that could be affected by this proposed rulemaking. Please note, however, that there are a significant number of manufacturers that get their product into Pennsylvania through the Board or an importer but are not licensed by the Board, such as out-of-state manufacturers. Since these entities are not licensed by the Board, it is difficult to quantify how many there are, let alone how large or small they are, and therefore the Board does not have enough information to evaluate the small business status of all entities that will be affected by the regulation.

Paperwork Requirements

The proposed regulation would not require any additional paperwork to be filed. On the contrary, the proposed regulation eliminates existing paperwork requirements that the Board no longer deems necessary.

Fiscal Impact

The proposed rulemaking changes the cost of promotional product for licensed vendors, from the cost price to the Board plus 25% to the retail price, since there is no basis in the Liquor Code for charging a licensed vendor “cost plus 25%.” The Board analyzed a list of new products, introduced in September and October 2021, that were all 750 milliliters in size. The list excluded products that were identified as Luxury or Holiday products. Of the products the Board analyzed, the change in price from cost plus 25%

to retail price resulted in an average increase of \$5.81 per unit, with a mean of \$5.60 per unit. However, licensed vendors have complete control over what and how much product to offer retail licensees in promotion—within the size restrictions set forth in section 13.211—and therefore can mitigate whatever fiscal impact might occur because of the change in pricing. Any change in cost to suppliers for lawfully procuring promotional product can also likely be offset by profits derived from future sales of the products for which the product is being used.

Effective Date

This proposed rulemaking will become effective upon final-form publication in the *Pennsylvania Bulletin*.

Public Comments

Interested persons are invited to submit written comments about this proposed rulemaking to Rodrigo Diaz, Chief Counsel, Jason M. Worley, Deputy Chief Counsel, or Norina Foster, Assistant Counsel, Office of Chief Counsel, Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001, or RA-lblegal@pa.gov, within 30 days after publication of this proposed rulemaking in the *Pennsylvania Bulletin*. ***E-mail is preferred.*** When commenting, individuals should indicate if they wish to be apprised of future developments regarding this proposed rulemaking, and include a name, address and e-mail address. Comments submitted by facsimile will not be accepted.

Public comments will be posted on the Independent Regulatory Review Commission's (IRRC) website. Personal information will not be redacted from the public comments received.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on _____, 2022, the Board submitted a copy of this proposed rulemaking and a copy of a Regulatory Analysis Form to IRRC and to the Chairpersons of the House Liquor Control Committee and Senate Committee on Law and Justice. A copy of this material is available to the public upon request.

Under section 5(g) of the Regulatory Review Act, IRRC may convey comments, recommendations or objections to the proposed rulemaking within 30 days of the close of the public comment period. The comments, recommendations or objections must specify the regulatory review criteria in section 5.2 of the Regulatory Review Act (71 P.S. § 745.5b) which have not been met. The Regulatory Review Act specifies detailed procedures for review prior to final publication of the rulemaking by the Board, the General Assembly and the Governor.

TIM HOLDEN,
Chairperson

Annex A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 13. PROMOTION

Subchapter B. MARKETING BY VENDORS AND AGENTS;
SPECIAL ORDERS; LUXURY ITEM ORDERS; [SAMPLES]
PROMOTION WITH LICENSEES AND UNLAWFUL ACTS

§ 13.81. [Samples of liquor] Promotion with licensees.

(a) Each agent of a licensed vendor may [not] use [more than] up to one case of each [brand] product of liquor sold by the licensed vendor to promote that product to licensees, as that term is defined in section 13.71 (relating to definitions), during any calendar month. The [samples] product shall be purchased only through the Board, at a State Liquor Store, if the product is available for purchase at a State Liquor Store, or through the Board's special liquor order purchase process, if the product or desired bottle size is not available for purchase at a State Liquor Store, at [a sum equal to the cost price to the Board plus 25%] the retail price [and] plus any required taxes. [The purchase of samples at retail in any State Store is prohibited. A separate order for samples shall be placed for each agent, and the name of the agent shall appear on the order.] The licensed vendor (or the licensed vendor's authorized supervisor) [may] shall be permitted to purchase and distribute the product to [the vendor's agents the prescribed allotment for all] agents under the licensed vendor's supervision. [The vendor shall, upon request, file with the Board a statement giving the name of the vendor's authorized supervisor, together with the territories and names of all agents under his supervision.]

(b) [The samples described in subsection (a) shall be restricted in size to half pints of distilled spirits, and to half bottles or smaller sizes of wine, except when operating conditions do not permit supplying the sizes, in which cases the Board may, upon proper application setting forth satisfactory reasons, permit the use of other sizes as samples.] For promotion with licensees, agents shall only use product to give tastings, as provided in section 13.211 (relating to tasting events). Agents shall not leave any bottle of product with a licensee, whether opened or unopened.

(c) [Sample bottles, before leaving the State Liquor Store, shall have affixed thereto] The agent shall affix to each bottle, before promoting the product with a licensee, a separate label, or lettering on the commercial label, at least 1/4 inch high, reading: "[Sample.]For tastings only. Not to be sold. Possession of this bottle by licensee unlawful."

(d) Each licensed vendor shall keep, in hard copy or electronic media consistent with generally accepted accounting procedures, for a period of at least 2 years, a [permanent stock ledger] record of all [the] bottles purchased [by him], the names of the agents to whom samples were issued, and the quantity and [brand] products. [Each authorized supervisor of a vendor shall keep in his office in this Commonwealth a permanent stock ledger record of all samples purchased and distributed by him to his

agents as provided in this section. A requisition shall be prepared for each package removed from sample stock, bearing the signature of the agent receiving the merchandise.]

* * *

§ 13.231. [General provisions.] Samples for unlicensed consumers.

- (a) Samples may be provided by manufacturers or their representatives, licensed distributors and importing distributors only to unlicensed [customers] consumers. [Samples of liquor to licensed customers shall conform to § 13.81 (relating to samples of liquor).]
- (b) Samples shall be in unopened containers of the smallest commercially available size.
- (c) Providing samples may not be conditioned upon any purchase requirement.
- (d) Samples may not be opened or consumed on State Liquor Store premises or distributor or importing distributor licensed premises.
- (e) Samples are limited to one container per patron in any offering.

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

RECEIVED

I.D. NUMBER: 54-96

MAY 24 2022

SUBJECT: Promotion with Licensees

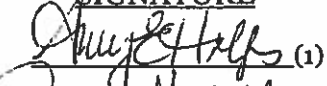
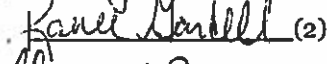

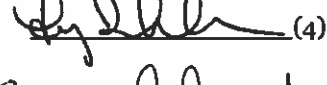


Independent Regulatory
Review Commission

AGENCY: Pennsylvania Liquor Control Board

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> |
|-------------|---|--|
| 5/24/22 |  (1) | SENATE LAW & JUSTICE COMMITTEE (Majority) |
| 5/24/22 |  (2) | SENATE LAW & JUSTICE COMMITTEE (Minority) |
| 5/24/22 |  (3) | HOUSE LIQUOR CONTROL COMMITTEE (Majority) |
| 5/24/22 |  (4) | HOUSE LIQUOR CONTROL COMMITTEE (Minority) |
| 5/24/22 |  (5) | LEGISLATIVE REFERENCE BUREAU |
| 5/24/22 |  (6) | INDEPENDENT REGULATORY REVIEW COMMISSION |