



COMMENTS ON PROPOSED REGULATION 54-104 DUTIES & RIGHTS OF LICENSEES - IRRC 3372

SUBMITTED BY:

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INTRODUCTION

LCB proposes an omnibus regulation changing several provisions of the liquor code. Most of these changes are technical in nature or in direct response to actions of the General Assembly. IRRC should approve these changes.

However, the proposal to delete paragraph 5.32(e)(1) should be rejected for at least the following reasons.

OVERVIEW OF THE PROPOSED CHANGES

LCB proposes seven changes in this omnibus proposal:

- 1) Amend section 5.30 to update definitions to provide clarity to the regulated community.
- 2) Amend section 5.32 regarding employment of minors as an entertainer in a licensed premises.
- 3) Amend section 5.32 in two places regarding the definition of a charitable organization.
- 4) Delete paragraph 5.32(e)(1) regarding lewd, immoral, or improper conduct at a licensed premises.
- 5) Amend section 5.32 regarding the nature of prizes awarded at a contest held at a licensed premises.
- 6) Amend section 5.32 regarding the dollar value of prizes awarded at a licensed premises.
- 7) Rescind part of section 5.32 concerning the use of loudspeakers to project music beyond the licensed premises.

With regard to the aforementioned proposed changes:

The changes proposed in relation to 1 are in response to questions posed by the regulated community. It is appropriate to provide clarity within the scope of precedent and the law to such questions.

The changes proposed in relation to 2, 3, 6, and 7 are all in response to direction provided by the General Assembly through duly enacted legislation.

The changes proposed in relation to 5 bring clarity to an existing prohibition, namely to provision of alcohol as a prize for participating in an event, contest, tournament, or sweepstakes at a licensed premises.

However, the changes proposed in 4 do not fit into any of these categories. The changes proposed in 4 purport to result from a desire to update regulations to reflect a 17-year-old court case. IRRC should reject LCB's proposal to delete paragraph 5.32(e)(1) for at least the following reasons.

LCB FAILS TO IDENTIFY A BASIS FOR REMOVING 5.32(E)(1) IN RAF SECTION 9

An agency submitting proposed regulatory changes to IRRC must submit a Regulatory Analysis Form. Section 9 of the RAF requires the agency to advise if the proposed regulation is mandated by any court order or federal regulation. LCB responds:

"The regulation is not mandated by a federal or state law, court order or federal regulation."

LCB admits that the proposed regulation is not in response to a court ruling, but then later attempts to justify the deletion of 5.32(e)(1) on that very basis – citing the *Conchatta* case. LCB fails to show applicability of the cited court case to the proposed deletion of 5.32(e)(1), and in fact explicitly denies any basis for such an argument in section 9 of the RAF. This alone is a fatal flaw that should lead IRRC to reject deletion of section 5.32(e)(1).

IN RESPONSE TO RAF SECTION 10, LCB'S EXPLANATION REGARDING THE PROPOSED DELETION OF 5.32(E)(1) IS WHOLLY INSUFFICIENT

LCB FAILS TO DESCRIBE THE COMPELLING PUBLIC INTEREST THAT JUSTIFIES THE REGULATION CHANGE

An agency submitting proposed regulatory changes to IRRC must submit a Regulatory Analysis Form. Section 10 of the RAF requires the agency to describe the compelling public interest that justifies the regulations change. LCB responds:

The proposed rulemaking deletes paragraph 5.32(e)(1), which prohibits 'lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event,

contest or tournament participants.” The case of Conchatta. Inc. v. Miller, 458F.3d258(3dCir.2006), held that the prohibition on ‘lewd, immoral or improper conduct’ was unconstitutional on the basis that it is substantially overbroad. Conchatta was not based on this paragraph of the Board’s regulation, but a different paragraph— 5.32(b)—that has since been reserved. See.43Pa.B.7082. Since the phrase “lewd, immoral or improper conduct” is legally unenforceable, the proposed rulemaking deletes it from the regulation.

LCB fails to identify any compelling public interest that justifies a regulatory change.

LCB FAILS TO DESCRIBE WHO WILL BENEFIT FROM THE REGULATORY CHANGE

An agency submitting proposed regulatory changes to IRRRC must submit a Regulatory Analysis Form. Section 10 of the RAF requires the agency to advise who will benefit from the regulatory change. LCB responds:

The proposed rulemaking deletes paragraph 5.32(e)(1), which prohibits ‘lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants.” The case of Conchatta. Inc. v. Miller, 458F.3d258(3dCir.2006), held that the prohibition on ‘lewd, immoral or improper conduct’ was unconstitutional on the basis that it is substantially overbroad. Conchatta was not based on this paragraph of the Board’s regulation, but a different paragraph— 5.32(b)—that has since been reserved. See.43Pa.B.7082. Since the phrase “lewd, immoral or improper conduct” is legally unenforceable, the proposed rulemaking deletes it from the regulation.

LCB fails to identify who will benefit from the regulatory change.

LCB FAILS TO QUANTIFY THE BENEFITS OF THE REGULATORY CHANGE

An agency submitting proposed regulatory changes to IRRRC must submit a Regulatory Analysis Form. Section 10 of the RAF requires the agency to quantify the benefits “as completely as possible.” LCB responds:

The proposed rulemaking deletes paragraph 5.32(e)(1), which prohibits ‘lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants.” The case of Conchatta. Inc. v. Miller, 458F.3d258(3dCir.2006), held that the prohibition on ‘lewd, immoral or improper conduct’ was unconstitutional on the basis that it is substantially overbroad. Conchatta

was not based on this paragraph of the Board's regulation, but a different paragraph— 5.32(b)—that has since been reserved. See 43 Pa.B.7082. Since the phrase “lewd, immoral or improper conduct” is legally unenforceable, the proposed rulemaking deletes it from the regulation.

LCB fails to quantify even a single benefit from the proposed regulatory change.

LCB IGNORES POTENTIAL FINANCIAL AND SOCIAL IMPACT OF THE PROPOSED DELETION OF 5.32(E)(1)

An agency submitting proposed regulatory changes to IRRC must submit a Regulatory Analysis Form. Section 17 of the RAF requires the agency to identify the financial, economic, and social impact of the regulation on individuals, small businesses, businesses and labor communities and other public and private organizations.

In response to Section 17, LCB's sole apparent justifications for the removal of 5.32(e)(1) are:

- 1) The regulated community has additional guidance on permissible activities in the area of amusement and entertainment, and
- 2) The regulated community benefits from the elimination of provisions that are obsolete or unenforceable.

Both of these alleged benefits are unsupported by any facts and seem to be based solely on the opinions of LCB staff. In response to question 14, LCB notes that the proposed regulation was developed and drafted internally *without input from outside groups*. LCB specifically notes only one recent request to increase prize amounts, something dealt with elsewhere in the proposed regulation. Contrary to LCB's assertion in Section 17, the regulated community has not requested additional guidance, nor has it requested a deletion of 5.32(e)(1). If the regulated community had requested such actions, LCB would have stated as such in section 14.

Furthermore, LCB admits in Section 28 that it *“has not relied on data to justify this regulation.”* The purported benefits listed in Section 17 are wholly speculative.

Furthermore, LCB fails to give even passing mention to the social impact of the proposed regulatory change on individuals or “other public and private organizations.”

LCB FAILS TO RECOGNIZE POTENTIAL ADVERSE EFFECTS OF THE PROPOSED DELETION OF PARAGRAPH 5.32(E)(1)

Section 18 of the RAF requires LCB to explain how the benefits of the regulation outweighs any “adverse effects.” LCB dismisses this important question with a 12-word sentence denying any adverse effects associated with the deletion of 5.32(e)(1). Even a cursory review

of the history of the subject matter included in 5.32(e)(1) would suggest that there has been significant community interest and debate over potential “adverse effects” associated with this subject matter. Indeed, such matters have been the subject of legislation and litigation across the county for decades. LCB’s failure to recognize and address this in Section 18 is at best an oversight, and at worse a shocking and a startling omission.

LCB FAILS TO JUSTIFY APPLICABILITY OF *CONCHATTA* TO THE PROPOSED REPEAL OF 5.32(E)(1)

In Section 10, LCB cites *Conchatta v Miller* as an apparent justification for the repeal of 5.32(e)(1). LCB admits that *Conchatta* did not speak to 5.32(e)(1), but to the since reserved-paragraph 5.32(b). LCB fails to provide any basis for *Conchatta*’s applicability to section 5.32(e)(1) except for the wholly unsupported claim that:

“the phrase “lewd, immoral or improper conduct” is legally unenforceable.”

As it relates directly to 5.32(e)(1), this claim is nothing more than an unsupported opinion offered by the LCB with absolutely no basis in fact or law. The LCB attempts to apply the court’s holding in 5.32(b) to a separate regulatory provision in 5.32(e)(1) without justification.

Consider:

- Throughout the extensive litigation of *Conchatta*, the neither plaintiff nor the courts saw fit to raise an issue with 5.32(e)(1).
- The courts had every opportunity to strike down 5.32(e)(1), but chose not to.
- The LCB fails to recognize the differences between the since-reserved paragraph 5.32(b) and the remaining paragraph 5.32(e)(1).
- LCB is a regulatory executive-branch agency, it is not part of the judiciary. Attempting to apply court opinions in the absence of a definitive court decision on the matter at hand is beyond the scope or privilege of the LCB’s authority.
- By the LCB’s admission, no licensed establishment has raised an issue with 5.32(e)(1).
- LCB itself undercuts any supposed basis for applying the *Conchatta* court decision to IRRC #3372 by specifically stating in Section 9 of the RAF *“The regulation is not mandated by a federal or state law, court order or federal regulation.”*

LCB RELIES ON A 17-YEAR-OLD COURT CASE WITHOUT ACKNOWLEDGING INTERVENING COURT ACTION SINCE 2006

LCB plainly states in Section 9:

“The [proposed] regulation is not mandated by a federal or state law, court order or federal regulation.”

Contradicting the plain statement in Section 9, LCB then attempts to justify deletion of 5.32(e)(1) on the basis of the 2006 *Conchatta* decision with regard to 5.32(b). LCB ignores more recent court cases that suggest courts have taken a more agreeable view toward the types of restrictions envisioned in 5.32(b).

Consider:

- In 2009 and again in 2013, the U.S. Court of Appeals for the Sixth Circuit ruled in favor of government restrictions on adult-oriented businesses in *Entm't Prods., Inc. v. Shelby County*, 588 F.3d 372, (6th Cir. Tenn., 2009), *cert denied*, 562 U.S. 835 (2010), and *Entm't Prods., Inc. v. Shelby Cty.*, 721 F.3d 729 (6th Cir. 2013) specifically upholding the ability of Shelby County, Tennessee to prohibit certain activities on the premises of adult-oriented businesses and regulating the manner in which entertainment may be presented within such establishments.
- Late last year, the U.S. Court of Appeals for the Eleventh Circuit upheld restrictions placed on adult-oriented bars in *Discotheque, Inc. v. Augusta-Richmond Cty.*, No. 21-13218, 2022 U.S. App. LEXIS 27757 (11th Cir. Oct. 5, 2022).

CONCLUSION

For at least the reasons outlined, IRRC should reject the proposed deletion of 5.32(e)(1) from subchapter C of Title 40 as stated on page 6 of Annex A attached to the Regulatory Analysis Form IRRC #3372.

I appreciate the opportunity to comment on this matter before the Commission.