

<h1>Regulatory Analysis Form</h1> <p>(Completed by Promulgating Agency)</p> <p><i>(All Comments submitted on this regulation will appear on IRRC's website)</i></p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p> <p>RECEIVED</p> <p>MAY 17 2023</p> <p>Independent Regulatory Review Commission</p> <p>IRRC Number: 3375</p>	
<p>(1) Agency Pennsylvania Liquor Control Board</p>			
<p>(2) Agency Number: 54 Identification Number: 103</p>			
<p>(3) PA Code Cite: 40 Pa. Code, sections 15.46, 17.16, and 17.32</p>			
<p>(4) Short Title: Hearings by Video Teleconference</p>			
<p>(5) Agency Contacts (List Telephone Number and Email Address):</p> <p>Primary Contact: Justin Blake, Assistant Counsel Pennsylvania Liquor Control Board 401 Northwest Office Building Harrisburg, Pennsylvania 17124 (717) 783-9454 FAX: (717) 787-8820 Email: ra-lblegal@pa.gov</p> <p>Secondary Contact: Rodrigo Diaz, Chief Counsel Jason M. Worley, Deputy Chief Counsel (Same Contact Information)</p>			
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input checked="" type="checkbox"/> Proposed Regulation <input type="checkbox"/> Final Regulation <input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation; <input type="checkbox"/> Certification by the Governor <input type="checkbox"/> Certification by the Attorney General</p>	
<p>(7) Briefly explain the regulation in clear and nontechnical language. (100 words or less)</p> <p>Section 464 of the Liquor Code authorizes the Board to “fix a time and place for hearing” on license applications, which include nonrenewal matters and transfers, but leaves the specifics on the conduct of such hearings to the Board’s discretion. The proposed rulemaking will codify the Board’s existing practices, including the use of virtual hearings, which were initially necessitated by the COVID-19 emergency but have since proved to be beneficial for hearing participants. Similarly, the Office of Administrative Law Judge (OALJ) is codifying its current practice of holding all hearings virtually.</p>			
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>Pennsylvania Liquor Code, sections 207(i), 212(a), and 464 (47 P.S. §§ 2-207(i), 2-212(a), 4-464)</p>			

(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.

Like other agencies and businesses, the Board and the OALJ, which is an autonomous office within the Board, faced an unprecedented challenge with the arrival of the COVID-19 public health emergency in March 2020. The executive orders and mandates of the Governor necessitated that many agencies transition to a telework environment in order to continue day-to-day operations and ensure continued service to citizens of the Commonwealth.

In September 2020, the Board began operating under temporary procedures for hearings conducted via electronic means, the procedures for which have been available on the Board's website. The OALJ began conducting virtual hearings in November 2020. After extensive testing and revision, virtual hearings have proved extremely successful, offering a variety of benefits as discussed in further detail below. The Board believes making such hearing procedures permanent is in the public interest and therefore proposes to supplement and amend its regulations to provide clear guidance to the regulated community.

Pursuant to section 464 of the Liquor Code, 47 P.S. § 4-464, the Board is authorized to "fix a time and place for hearing" on license applications, which include nonrenewal matters and transfers. Section 464 places few requirements on the conduct of such hearings and leaves many of the specifics to the Board's discretion. Similarly, pursuant to section 15.46(a) of the Board's Regulations, 40 Pa. Code § 15.46(a), hearings before the OALJ are conducted in accordance with 1 Pa. Code §§ 35.121–35.133, i.e. the General Rules of Administrative Practice and Procedure. Of those provisions, the only general requirement pertaining to the time and place of hearings states that the agency will initiate hearings by issuance of an order or notice. 1 Pa. Code § 35.121.

Since September 2020, hundreds of licensing hearings have been conducted by virtual means. No in-person licensing hearings have been held since the COVID-19 emergency began in March 2020, although the Board's Office of Chief Counsel has scheduled an in-person licensing hearing in October 2022, in order to accommodate the needs of participants. The OALJ has conducted dozens of virtual hearings since November 2020 and has yet to require an in-person hearing.

Since the implementation of virtual hearings, the Board, the OALJ, and hearing participants have realized the following benefits:

1) Cost savings. Conducting hearings by virtual means has resulted in the complete elimination of several costs associated with traditional, in-person hearings. As a result of the transition to virtual hearings, Board personnel, hearing examiners, OALJ personnel, and Pennsylvania State Police, Bureau of Liquor Control Enforcement (BLCE) personnel no longer generate transportation, lodging, or meal expenses for the Commonwealth in connection with their participation in hearings at the administrative level, thus eliminating all travel costs.

By way of example, one Board attorney traveled 7,370 miles for administrative hearings in 2018 and 7,453 miles for administrative hearings in 2019, including numerous overnight trips. In contrast, that same attorney traveled zero miles for administrative hearings in 2020 and 2021, generating no travel costs for administrative-level hearings.

Further, hearing examiners are compensated at \$250.00 per hour, including for driving time, in addition to being reimbursed at the Internal Revenue Service's annual rate for mileage on any personal vehicle used when a hearing location is more than fifty miles from their principal place of business. Considering that there are only a few hearing examiners to cover the entire Commonwealth, the expense of that time and mileage is considerable when conducting in-person hearings but is completely eliminated through the use of virtual hearings.

Additionally, in-person hearings in certain locations of the Commonwealth routinely necessitated that the Board or the OALJ reserve the use of conference rooms to be used as a hearing space. However, as with travel expenses, virtual licensing hearings have eliminated this expense entirely.

Virtual hearings have also resulted in substantial cost savings to licensees. Licensees are able to participate in hearings from the location of their choosing, thereby reducing their own travel expenses including any costs associated with an absence from their place of work. In addition, virtual hearings have afforded licensees the opportunity for reduced legal fees. Time spent by counsel travelling to participate in a hearing on the behalf of the licensee, and the associated fees for such time, may be greatly reduced thereby providing licensees with tangible savings in legal costs.

Finally, the exclusive use of electronic documents in virtual hearings has dramatically reduced the consumption of paper and other office supplies. It has also reduced the cost of postage for all parties.

2) Increased Productivity. Travel for Board personnel, hearing examiners, OALJ personnel, BLCE personnel, and any witnesses to and from in-person hearings throughout the Commonwealth primarily occurred during normal business hours. Virtual hearings eliminate travel time altogether, thereby enabling Board and BLCE attorneys to spend more time preparing cases, completing assignments, and participating in hearings. Likewise, judges and hearing examiners can more efficiently use their time to get through their caseloads.

By way of illustration, the same attorney referenced above spent approximately 147 hours traveling in 2018 and 149 hours traveling in 2019. At a standard rate of 37.5 hours per week, that is roughly the equivalent of four full weeks of work per year spent traveling.

3) Convenience for Hearing Participants. Virtual hearings enable law enforcement witnesses, many of whom work overnight shifts or otherwise have demanding work schedules, to testify from a variety of locations including their home or police headquarters. Similarly, other participants such as witnesses and court reporters no longer bear the burden of traveling to in-person hearings.

The inherent flexibility of virtual hearings also simplifies scheduling and results in fewer continuances. Both the Board and the OALJ have received a significant amount of positive feedback from licensees and/or applicants and their counsel on the convenience of virtual hearings for all participants.

4) Health and Safety. COVID-19, including its new variants which continue to emerge, remains a potential threat to licensees, witnesses, attorneys, hearing examiners, judges, court reporters, and Board

employees. Travel only increases the likelihood of spreading disease from one office/household/community to another. Virtual hearings help protect the health and safety of all hearing participants and their families.

Additionally, by eliminating travel, the risk of traffic accidents while traveling for in-person hearings is eliminated. Over the years, Board employees have been involved in traffic accidents while traveling for in-person hearings. Without question, the inherent risks of roadway travel, especially travel during inclement weather, are eliminated by virtual hearings.

5) Training/Monitoring Opportunities. Virtual hearings provide a convenient, non-intrusive opportunity for supervisors and/or new hires to listen in on a proceeding for training or employee oversight purposes. Furthermore, virtual hearings offer a convenient opportunity for collaboration and mentorship, e.g., between Board attorneys and between OALJ judges.

6) Superior Performance. Virtual hearings enable participants to use a variety of computer-based resources in real time during virtual hearings. Instant access to licensing records, legal research platforms, maps, and other databases is either impossible or impractical when conducting in-person hearings. During virtual hearings, documents or information can be retrieved and presented without delay as the situation dictates, allowing for more effective advocacy and decreasing delays.

7) Flexible Scheduling. Previously, both the Board and the OALJ had to coordinate the scheduling of multiple hearings on the same day, at the same location, in order to maximize travel efficiency. Unlike proceedings that are to be held in person, virtual hearings can be scheduled based purely on the availability of the participants.

For example, instead of forcing a license applicant from Montgomery County and an applicant from Erie County to wait until a hearing date can be scheduled in each respective area, both hearings may be heard on the same day. Similarly, the OALJ has previously had to delay the scheduling of hearings until there were a sufficient number of pending cases to warrant the expenses associated with in-person hearings; however, with virtual hearings, this is no longer a problem.

Moreover, the elimination of travel results in counsel, witnesses, judges, hearing examiners, and court reporters having greater availability for hearings. Virtual hearings are also far less likely to be canceled due to inclement weather or be delayed due to traffic issues, thereby increasing efficiency and judicial economy.

8) Environmental Impact. Virtual licensing hearings alleviate the environmental impact of travel and its accompanying fossil fuel consumption and resulting emissions. Moreover, the exclusive use of electronic computer-based files in virtual hearings results in far less consumption of paper and printer ink, along with a reduction in the amount of wastepaper being generated.

9) Employee Morale/Retention. Work-related travel presents a hardship for employees and their families, especially those with dependent children. In addition to eliminating this hardship, virtual hearings reduce other work-related stresses thereby enhancing morale, reducing employee turnover, and helping to make the Board and OALJ more desirable workplaces when filling vacancies.

10) Continuity of Government. Like all Commonwealth agencies, the Board and the OALJ maintain plans for the continuity of government in the event of circumstances which may disrupt the ability to operate.

The recent COVID-19 public health emergency illustrated such a contingency. Given the magnitude of that disruption, it is fair to say that while agency continuity of operations plans are comprehensive, they cannot anticipate every contingency. Virtual hearings will augment the Board and OALJ's continuity of operations plans and further protect against future disruptions including any future public health emergencies that may require social distancing.

Ultimately, this regulation will provide direction and clarity for participants in licensing hearings before the Board as well as enforcement matters before the OALJ, including the BLCE, which serves as the prosecutor in enforcement actions and thus litigates regularly before the OALJ.

(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 likely will not play a role in Pennsylvania's ability to compete with other states. That said, with the proliferation of telework in the private sector, as well as the convenience of conducting meetings and hearings by video teleconference, it may make the Commonwealth more competitive as a place to do business.

(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 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 has received generally positive feedback from hearing participants since virtual hearings began during the COVID-19 emergency, with convenience and time savings being the most frequently cited benefits. A few complaints have been received regarding a participant's lack of access to the requisite technology. Such issues have been resolved on a case-by-case basis to accommodate participation, and adjustments have been made to the temporary virtual hearing procedures over time in response to feedback. Likewise, the OALJ has received immensely positive feedback from hearing participants, including the BLCE, which prosecutes all cases before the OALJ, with the only negative feedback being from a handful of attorneys who indicated that they had no desire to learn or use a new technology. The Board did not otherwise solicit or receive any additional, formal input from the regulated community in the development and drafting of the regulatory change.

(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 regulations (relating to small business size standards) provide the following measurements for determining whether a business may be considered to be a “small” business: a full-service restaurant with annual receipts of less than \$7.5 million; a drinking place (alcoholic beverages) with annual receipts of less than \$7.5 million; hotels with annual receipts of less than \$32.5 million; and all other amusement and recreation industries with annual receipts of less than \$7.5 million. (13 C.F.R. § 121.201).

As of September 2022, there were approximately 14,000 active licenses in the Commonwealth. Businesses would only be affected if they are required to participate in a hearing ordered by the Board’s Bureau of Licensing, which may occur in license transfer or renewal matters, or if they are cited by the BLCE for violating the Liquor Code or the Board’s Regulations and proceed to litigating before the OALJ.

(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.

As noted above, those required to comply include licensees required to participate in hearings ordered by the Board’s Bureau of Licensing, as well as their counsel. Also affected are the BLCE and any licensees that that are cited to appear before the OALJ for violating the Liquor Code or the PLCB’s Regulations. It is not possible to quantify a precise number of affected licensees, since many licensees operate their businesses without ever having occasion to participate in a hearing before the Board or the OALJ.

(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 expected financial, economic, and social impacts of the proposed rulemaking have been articulated above in response to Question 10.

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

Again, the benefits are detailed in the response to Question 10. No costs are anticipated, since virtual hearings provide ample savings in that regard. With regard to adverse effects, in drafting the proposed rulemaking the Board and the OALJ considered the feedback received from a small minority of participants indicating that they do not wish to learn a new technology to participate in administrative hearings. However, this was not found to be a compelling barrier since the required technology, i.e. an internet-connected computer or smartphone with video capabilities, has become widely adopted by the general public at this point. Additionally, the regulation provides the Board and the OALJ the ability to accommodate when a participant demonstrates he/she needs a hearing to be held in person.

(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.

No legal, accounting or consulting procedures are required by the proposed rulemaking that were not already in effect. It is not possible to quantify the cost savings to the regulated community of the

implementation of virtual hearings, since the cost for each individual or business of participating in in-person hearings would vary significantly.

(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 amendments are not expected to result in costs or savings to local governments.

(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 will result in significant savings to state government for all of the reasons cited in response to Question 10.

(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.

There is no additional recordkeeping required for any of the groups identified.

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

Forms are not required for implementation of the regulation.

(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 are no data available regarding how the regulated community, local government, or 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:	\$0	\$0	\$0	\$0	\$0	\$0
Regulated Community	\$0	\$0	\$0	\$0	\$0	\$0
Local Government	\$0	\$0	\$0	\$0	\$0	\$0

State Government	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000	\$30,000
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:	\$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 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 proposed rulemaking.

Program	FY -3 2015-2016	FY -2 2016-2017	FY-1 2017-2018	Current FY
	\$0	\$0	\$0	\$0

(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.

Federal regulations (relating to small business size standards) provide the following measurements for determining whether a business may be considered to be a “small” business: a full-service restaurant with annual receipts of less than \$7.5 million; a drinking place (alcoholic beverages) with annual receipts of less than \$7.5 million; hotels with annual receipts of less than \$32.5 million; and all other amusement and recreation industries with annual receipts of less than \$7.5 million. (13 C.F.R. § 121.201).

As of September 2022, there were approximately 14,000 licensees that could be affected by the regulation. Licensees would only be affected by the amendments if they are participating in a licensing or OALJ hearing. Although some of the PLCB’s licensees probably do not fall within the definition of small business, the majority of businesses licensed by the PLCB would likely be considered small businesses.

- (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.

The costs for compliance with the proposed regulation will be minimal as the technology and devices required are widely used. Free equipment is even available at local libraries. No professional skills are necessary.

- (c) A statement of probable effect on impacted small businesses.

Any effect on impacted small businesses is likely to be positive, as explained in the response to Question 10.

- (d) A description of any less intrusive or less costly alternative methods of achieving the purpose of the proposed regulation.

As mentioned, both the Board and the OALJ have the discretion to dictate the time and place for hearings. As such, temporary procedures for virtual hearings have been used since the COVID-19 emergency. The purpose of the proposed rulemaking is to formalize these procedures and to provide better guidance and clarity to the regulated community.

- (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.

As discussed, the regulation includes provisions that allow the Board and OALJ to accommodate a hearing participant who demonstrates a need.

- (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, although the Board's temporary virtual hearing procedures were amended over time as improvements were found. The Board and the OALJ believe the least burdensome acceptable provisions 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;

There are no reporting requirements for small businesses. The compliance requirements are intended to be easier and less costly for small businesses to meet.

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

The only schedule or deadline for compliance in the proposed rulemaking, i.e., the exchange of exhibits within a set number of days prior to a hearing, is commonplace. It is believed that the regulation contains the least stringent schedule that would give the parties reasonable time to prepare for a hearing.

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

The compliance requirements have been reduced, not just for small businesses, but for all businesses involved in Board and OALJ hearings.

- 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.

(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 Board has not relied on data to justify these amendments.

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

- | | |
|---|-----------------------|
| A. The length of the public comment period: | <u>30 days</u> |
| B. The date or dates on which any public meetings or hearings will be held: | <u>June 2023</u> |
| C. The expected date of delivery of the final-form regulation: | <u>August 2023</u> |
| D. The expected effective date of the final-form regulation: | <u>September 2023</u> |
| E. The expected date by which compliance with the final-form regulation will be required: | <u>September 2023</u> |
| F. The expected date by which required permits, licenses or other approvals must be obtained: | <u>N/A</u> |

(30) Describe the plan developed for evaluating the continuing effectiveness of the regulations after its implementation.

Review of the Board's regulations is ongoing and any changes will be made through the rulemaking process.

RECEIVED

CDL-1

MAY 17 2023

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

Independent Regulatory
Review Commission

(Pursuant to Commonwealth Documents Law)

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Attorney General, email=amelliott@attorneygeneral.gov,
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BY:

(DEPUTY ATTORNEY GENERAL)

1/19/2023

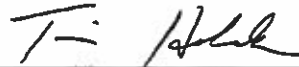
DATE OF APPROVAL

Pennsylvania Liquor Control Board
(AGENCY)

DOCUMENT/FISCAL NOTE NO. 54-103

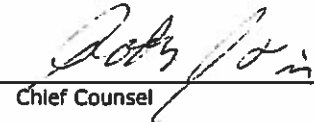
DATE OF ADOPTION: 10/05/2022

BY:



TITLE: Chairman
(Executive Officer, Chairman or
Secretary)

BY:



Chief Counsel

10/05/2022
DATE OF APPROVAL

Check if applicable
Copy not approved. Objections
attached.

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

TITLE 40—LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 15. SPECIAL RULES OF PRACTICE AND PROCEDURE REGARDING
MATTERS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGE

CHAPTER 17. SPECIAL RULES OF PRACTICE AND PROCEDURE
FOR MATTERS BEFORE THE BOARD

PROPOSED RULEMAKING

LIQUOR CONTROL BOARD

40 PA. CODE CHS. 15 and 17

Hearings by Video Teleconference

The Liquor Control Board (Board), under the authority of section 207(i) of the Liquor Code (47 P.S. § 2-207(i)), proposes to add subsection 15.46(c) (relating to hearings before the Office of Administrative Law Judge (OALJ)), add section 17.16 (relating to hearings on license applications), and amend and rename section 17.32 (relating to hearings on supersedeas applications), to read as set forth in Annex A.

Purpose of the Proposed Rulemaking

The proposed rulemaking specifies the manner in which hearings before the OALJ, as well as hearings on license applications before the Board, will be conducted. Like other agencies and businesses, the Board and the OALJ, which is an autonomous office within the Board, faced an unprecedented challenge with the arrival of the COVID-19 public health emergency in March 2020. The executive orders and mandates of the Governor necessitated that many agencies transition to a telework environment in order to continue day-to-day operations and ensure continued service to citizens of the Commonwealth.

In September 2020, the Board began operating under temporary procedures for hearings conducted via electronic means, the procedures for which have been available on the Board's website. The OALJ began conducting virtual hearings in November 2020. After extensive testing and revision, virtual hearings have proved extremely successful, offering a variety of benefits as discussed in further detail below. The Board believes making such hearing procedures permanent is in the public interest and therefore proposes to supplement and amend its regulations to provide clear guidance to the regulated community.

Since September 2020, hundreds of licensing hearings have been conducted by virtual means. Minimal in-person licensing hearings have been held since the COVID-19 emergency began in March 2020, although an in-person licensing hearing may be necessary under special circumstances. For example, the Board's Office of Chief Counsel held an in-person licensing hearing in October 2022, in order to accommodate the needs of participants. The OALJ has conducted dozens of virtual hearings since November 2020 and has yet to require an in-person hearing.

Since the implementation of virtual hearings, the Board, the OALJ, and hearing participants have realized the following benefits:

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By way of example, one Board attorney traveled 7,370 miles for administrative hearings in 2018 and 7,453 miles for administrative hearings in 2019, including numerous overnight trips. In contrast, that same attorney traveled zero miles for administrative hearings in 2020 and 2021, generating no travel costs for administrative-level hearings.

Further, hearing examiners are compensated at \$250.00 per hour, including for driving time, in addition to being reimbursed at the Internal Revenue Service's annual rate for mileage on any personal vehicle used when a hearing location is more than fifty miles from their principal place of business. Considering that there are only a few hearing examiners to cover the entire Commonwealth, the expense of that time and mileage is considerable when conducting in-person hearings but is completely eliminated through the use of virtual hearings.

Additionally, in-person hearings in certain locations of the Commonwealth routinely necessitated that the Board or the OALJ reserve the use of conference rooms to be used as a hearing space. However, as with travel expenses, virtual licensing hearings have eliminated this expense entirely.

Virtual hearings have also resulted in substantial cost savings to licensees. Licensees are able to participate in hearings from the location of their choosing, thereby reducing their own travel expenses including any costs associated with an absence from their place of work. In addition, virtual hearings have afforded licensees the opportunity for reduced legal fees. Time spent by counsel travelling to participate in a hearing on the behalf of the licensee, and the associated fees for such time, may be greatly reduced thereby providing licensees with tangible savings in legal costs.

Finally, the exclusive use of electronic documents in virtual hearings has dramatically reduced the consumption of paper and other office supplies. It has also reduced the cost of postage for all parties.

2) Increased Productivity. Travel for Board personnel, hearing examiners, OALJ personnel, BLCE personnel, and any witnesses to and from in-person hearings throughout the Commonwealth primarily occurred during normal business hours. Virtual hearings eliminate travel time altogether, thereby enabling Board and BLCE attorneys to spend more time preparing cases, completing assignments, and participating in hearings. Likewise, judges and hearing examiners can more efficiently use their time to get through their caseloads.

By way of illustration, the same attorney referenced above spent approximately 147 hours traveling in 2018 and 149 hours traveling in 2019. At a standard rate of 37.5 hours per week, that is roughly the equivalent of four full weeks of work per year spent traveling.

3) Convenience for Hearing Participants. Virtual hearings enable law enforcement witnesses, many of whom work overnight shifts or otherwise have demanding work schedules, to testify from a variety of locations including their home or police headquarters. Similarly, other participants such as witnesses and court reporters no longer bear the burden of traveling to in-person hearings.

The inherent flexibility of virtual hearings also simplifies scheduling and results in fewer continuances. Both the Board and the OALJ have received a significant amount of positive feedback from licensees and/or applicants and their counsel on the convenience of virtual hearings for all participants.

4) Health and Safety. COVID-19, including its new variants which continue to emerge, remains a potential threat to licensees, witnesses, attorneys, hearing examiners, judges, court reporters, and Board employees. Travel only increases the likelihood of spreading disease from one office/household/community to another. Virtual hearings help protect the health and safety of all hearing participants and their families.

Additionally, by eliminating travel, the risk of traffic accidents while traveling for in-person hearings is eliminated. Over the years, Board employees have been involved in traffic accidents while traveling for in-person hearings. Without question, the inherent risks of roadway travel, especially travel during inclement weather, are eliminated by virtual hearings.

5) Training/Monitoring Opportunities. Virtual hearings provide a convenient, non-intrusive opportunity for supervisors and/or new hires to listen in on a proceeding for training or employee oversight purposes. Furthermore, virtual hearings offer a convenient opportunity for collaboration and mentorship, e.g., between Board attorneys and between OALJ judges.

6) Superior Performance. Virtual hearings enable participants to use a variety of computer-based resources in real time during virtual hearings. Instant access to licensing records, legal research platforms, maps, and other databases is either impossible or impractical when conducting in-person hearings. During virtual hearings, documents or information can be retrieved and presented without delay as the situation dictates, allowing for more effective advocacy and decreasing delays.

7) Flexible Scheduling. Previously, both the Board and the OALJ had to coordinate the scheduling of multiple hearings on the same day, at the same location, in order to maximize travel efficiency. Unlike proceedings that are to be held in person, virtual hearings can be scheduled based purely on the availability of the participants.

For example, instead of forcing a license applicant from Montgomery County and an applicant from Erie County to wait until a hearing date can be scheduled in each respective area, both hearings may be heard on the same day. Similarly, the OALJ has previously had to delay the scheduling of hearings until there were a sufficient number of pending cases to warrant the expenses associated with in-person hearings; however, with virtual hearings, this is no longer a problem.

Moreover, the elimination of travel results in counsel, witnesses, judges, hearing examiners, and court reporters having greater availability for hearings. Virtual hearings are also far less likely to be canceled due to inclement weather or be delayed due to traffic issues, thereby increasing efficiency and judicial economy.

8) Environmental Impact. Virtual licensing hearings alleviate the environmental impact of travel and its accompanying fossil fuel consumption and resulting emissions. Moreover, the exclusive use of electronic computer-based files in virtual hearings results in far less consumption of paper and printer ink, along with a reduction in the amount of wastepaper being generated.

9) Employee Morale/Retention. Work-related travel presents a hardship for employees and their families, especially those with dependent children. In addition to eliminating this hardship, virtual hearings reduce other work-related stresses thereby enhancing morale, reducing employee turnover, and helping to make the Board and OALJ more desirable workplaces when filling vacancies.

10) Continuity of Government. Like all Commonwealth agencies, the Board and the OALJ maintain plans for the continuity of government in the event of circumstances which may disrupt the ability to operate. The recent COVID-19 public health emergency illustrated such a contingency. Given the magnitude of that disruption, it is fair to say that while agency continuity of operations plans are comprehensive, they cannot anticipate every contingency. Virtual hearings will augment the Board and OALJ's continuity of operations plans and further protect against future disruptions including any future public health emergencies that may require social distancing.

Although the transition to virtual hearings on an interim basis been largely successful, the Board has occasionally received some pushback from participants. Such issues mostly dealt with participants allegedly not having access to the requisite technology and were promptly addressed by the Board. Likewise, the OALJ has received immensely positive feedback, with the only negative responses being from a handful of attorneys who indicated that they had no desire to learn or use a new technology. That said, prior to the implementation of virtual hearings, the Board and OALJ were accustomed to addressing accommodation requests from participants for hearings held in-person. Should a situation arise that necessitates that a particular hearing be held in-person, the Board and OALJ retain the ability to do so. However, over the course of the past two years, adjustments have been made to improve the efficiency and convenience of virtual hearings while preserving the integrity of the legal process, such that in-person hearings are rarely, if ever, necessary. Further improvements will continue to be made going forward to provide ever-increasing convenience and access to the Board and OALJ's administrative hearings.

Explanation of the Proposed Rulemaking

Pursuant to section 464 of the Liquor Code, 47 P.S. § 4-464, the Board is authorized to “fix a time and place for hearing” on license applications, which include nonrenewal matters and transfers. Section 464 places few requirements on the conduct of such hearings and leaves many of the specifics to the Board’s discretion. Similarly, pursuant to section 15.46(a) of the Board’s Regulations, 40 Pa. Code § 15.46(a), hearings before the OALJ are conducted in accordance with 1 Pa. Code §§ 35.121–35.133, i.e., the General Rules of Administrative Practice and Procedure. Of those provisions, the only general requirement pertaining to the time and place of hearings states that the agency will initiate hearings by issuance of an order or notice. 1 Pa. Code § 35.121.

Accordingly, section 15.46 of the Board’s Regulations (relating to hearings before the OALJ) is being amended to include a new subsection (c). Subsection (c) specifies that hearings before the OALJ will generally be conducted virtually, although the OALJ has the discretion to hold in-person hearings.

Section 17.16 (relating to hearings on license applications) is a new addition to the Board’s Regulations. Subsection 17.16(a) provides for various pre-hearing procedures that have generally been in place since the start of the COVID-19 pandemic, albeit informally. Specifically, subsection 17.16(a) requires the parties to exchange pre-marked exhibits prior to the scheduled date of a hearing and provides that objections relating to an exhibit must be made at the time the proponent moves for admission during the hearing. It further gives the Board’s Office of Chief Counsel and the assigned hearing examiner discretion to require the submission of pre-hearing memoranda. Subsection 17.16(b) allows for pre-hearing conferences, conducted via telephone, upon the request of a party. Subsection 17.16(c) specifies that hearings on licensing matters will generally be conducted virtually, although the Board’s Office of Chief Counsel has the discretion to hold in-person hearings. It further provides the procedure for the scheduling of hearings as well the requirements for participation. It also requires the Board to publish a dial-in number on the Board’s website to allow members of the public to listen in to any licensing hearing.

Finally, subsection 17.32(a) (relating to hearings on supersedeas applications) is being amended to allow for virtual hearings. Further, since the new section 17.16 discussed above governs hearings on license applications, subsection 17.32(a), which was previously simply titled “Hearings,” could have caused confusion. It is therefore being renamed to clarify that it is applicable only to hearings on supersedeas applications.

Affected Parties

All parties to a licensing hearing before the Board, as well as a hearing before the OALJ, will be affected. Additionally, any witnesses or other hearing participants will be affected.

Paperwork Requirements

The proposed rulemaking requires Board attorneys and licensees/applicants or their counsel to exchange pre-marked exhibits electronically prior to the hearing. It also requires the Board to provide advance notice and instructions electronically to hearing participants. While the proposed

rulemaking codifies the Board's pre-hearing procedures, e.g., the exchange of exhibits, such procedures have been in place informally for many years.

Fiscal Impact

The proposed rulemaking is expected to have a positive fiscal impact on the Board, including the OALJ, as well as the BLCE, licensees, and applicants, as explained above.

Effective Date

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

Public Comments

Interested persons are invited to submit written comments about this proposed rulemaking to Rodrigo Diaz, Chief Counsel, or Justin Blake, Assistant Counsel, Office of Chief Counsel, Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001, or ra-legal@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 website. No personal information will 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 _____, 2023, the Board submitted a copy of the proposed regulation to the Independent Regulatory Review Commission (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 any comments, recommendations, or objections to the proposed regulations within 30 days of the close of the public comment period. The comments, recommendations, or objections shall 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 regulation, by the agency, the General Assembly, and the Governor of comments, recommendations or objections raised.

Tim Holden
Chairman

Annex A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 15. SPECIAL RULES OF PRACTICE AND PROCEDURE REGARDING
MATTERS BEFORE THE OFFICE OF ADMINISTRATIVE LAW JUDGE

Subchapter D. FORMAL PROCEEDINGS

§ 15.46. Hearings before the OALJ.

- (a) Hearings shall be in accordance with 1 Pa. Code §§ 35.121 – 35.133.
- (b) No person except the reporter engaged by the OALJ to record its proceedings may record mechanically or electronically a part of the proceedings in a hearing.
- (c) Hearings before the OALJ shall be conducted by video teleconference. Hearings may be conducted in-person at the discretion of the ALJ.

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CHAPTER 17. SPECIAL RULES OF PRACTICE AND PROCEDURE
FOR MATTERS BEFORE THE BOARD

Subchapter B. LICENSE APPLICATIONS

Sec.

- 17.11. License application protests.
- 17.12. Intervention in license application matters.
- 17.13. Protests/intervention procedure.
- 17.15. Intervention in noise exemption petitions.
- 17.16. Hearings on license applications.

* * * * *

§ 17.16. Hearings on license applications.

(a) Pre-hearing procedures.

(1) No later than two weeks prior to the date of the hearing, the assigned attorney for the Board's Bureau of Licensing shall electronically forward all Licensing exhibits to all parties, the hearing examiner, and the court reporter. When submitting exhibits, the Licensing attorney shall

identify the hearing by licensee or applicant name, hearing date, and time. Each exhibit shall be a separate PDF file named and marked according to its Licensing exhibit number (e.g., B1, B2, etc.).

(2) Licensees, applicants, protestants, and/or intervenors (or their counsel) shall electronically submit all exhibits to ra-lbhearings@pa.gov at least three business days prior to the date of the hearing. When submitting exhibits, each participant shall, within the subject field of the e-mail, identify the hearing by licensee or applicant name, hearing date, and time. Each exhibit shall be a separate PDF file and shall be named and marked as follows:

(i) For a license applicant, each exhibit shall be named: A1, A2, etc.

(ii) For an existing licensee, each exhibit shall be named: L1, L2, etc.

(iii) For a protestant or intervenor, each exhibit shall be marked with the protestant or intervenor's name, followed by a sequential number, e.g., Smith1, Smith2, etc.

(3) Failure to provide a copy of an exhibit prior to the hearing may be grounds for its exclusion.

(4) Any objections relating to exhibits shall be made during the hearing, at the time the party moves for admission.

(5) The hearing examiner or the Office of Chief Counsel of the Board may require the submission of pre-hearing memoranda to address issues that may arise at the hearing.

(b) Pre-hearing conferences.

(1) Upon the request of any party or the hearing examiner, and subject to approval by the Office of Chief Counsel of the Board, a telephonic pre-hearing conference may be held with the hearing examiner. A party requesting a pre-hearing conference shall submit such request, including the reason(s) therefore, to the Office of Chief Counsel of the Board and all other parties via e-mail.

(2) Pre-hearing conferences may be held no earlier than fourteen days, and no later than three days, prior to the scheduled date of the hearing.

(3) Notwithstanding the three-business-day requirement of subsection (a)(2), parties shall electronically exchange all exhibits at least one business day prior to a pre-hearing conference.

(c) Scheduling of hearings and requirements for participation.

(1) All hearings shall be conducted by video teleconference, unless the Office of Chief Counsel of the Board determines otherwise.

(2) Hearing attendees who participate in a hearing must use both the audio and video functions of the internet-based videoconferencing software. Each participant testifying as a witness shall use a separate electronic device with its own camera and microphone. Unless approved by the Office of Chief Counsel of the Board or the parties agree otherwise, no witness may testify using

a device that is shared with another person. However, witnesses may share an electronic device with counsel during such times that the individual is not actively testifying.

(3) The Office of Chief Counsel of the Board will electronically send notice to the parties and the hearing examiner of the date and time set for the hearing. Such notice will include the hyperlink needed to access the hearing. Any hearing participant who has not received the required hyperlink shall request access by sending an e-mail to ra-lbhearings@pa.gov no later than three business days prior to the scheduled hearing.

(4) The Board will provide written instructions explaining the virtual hearing requirements on its website. Any hearing participant requiring assistance shall contact ra-lbhearings@pa.gov no later than three business days prior to the hearing to schedule a test of the internet-based videoconferencing software.

(5) The Board will provide the dial-in number and corresponding access code for each hearing on its website, to allow members of the public to listen in by telephone.

(d) This section supplements 1 Pa. Code Chapter 35, Subchapter B (relating to hearings and conferences).

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Subchapter D. SUPERSEDEAS

Sec.

17.31. Supersedeas.

17.32. Hearings on supersedeas applications.

* * * * *

§ 17.32. Hearings on supersedeas applications.

(a) The Board may schedule a hearing for the purpose of receiving relevant evidence on the issue of the grant or the removal of a supersedeas. The hearing may be scheduled and held within 10 days of the mailing date of the notice. Continuances will be granted solely at the discretion of the Board. Hearings will be conducted by video teleconference, unless the Office of Chief Counsel of the Board determines otherwise.

* * * * *

Commonwealth of Pennsylvania
Pennsylvania Liquor Control Board
May 17, 2023

SUBJECT: Proposed Regulation Package 54-103
Hearings by Video Teleconference

TO: DAVID SUMNER, EXECUTIVE DIRECTOR
INDEPENDENT REGULATORY REVIEW COMMISSION

FROM: RODRIGO J. DIAZ 
CHIEF COUNSEL
PENNSYLVANIA LIQUOR CONTROL BOARD

By E-Mail

The Pennsylvania Liquor Control Board is submitting proposed amendments to Chapters 15 and 17 of its regulations. Attached please find a copy of the Regulatory Analysis Form, signed CDL-1 face sheet, Preamble and Annex A (regulatory text). The Office of Attorney General has approved these proposed amendments for form and legality.

These amendments have been delivered today to the legislative oversight committees and to the Legislative Reference Bureau. The Transmittal Sheet is attached.

If you have any questions or comments about this regulatory submission, feel free to contact the Office of Chief Counsel, Pennsylvania Liquor Control Board, at RALegal@pa.gov.

Attachments

cc with attachments:

Honorable Mike Regan, Majority Chairman, Senate Law and Justice Committee
Honorable James Brewster, Minority Chairman, Senate Law and Justice Committee
Honorable Daniel Deasy, Majority Chairman, House Liquor Control Committee
Honorable Mindy Fee, Minority Chairman, House Liquor Control Committee
Taylor Wamsher, Executive Director, Senate Law and Justice Committee
Stephen Bruder, Executive Director, Senate Law and Justice Committee
Lynn Benka-Davies, Executive Director, House Liquor Control Committee
Michael Biacchi, Executive Director, House Liquor Control Committee

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

I.D. NUMBER: 54-103
SUBJECT: Hearings by Video Teleconference
AGENCY: Pennsylvania Liquor Control Board

RECEIVED

MAY 17 2023

Independent Regulatory
Review Commission

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>
5/17/23	(1)	SENATE LAW & JUSTICE COMMITTEE (Majority)
5/17/23	(2)	SENATE LAW & JUSTICE COMMITTEE (Minority)
5/17/23	(3)	HOUSE LIQUOR CONTROL COMMITTEE (Majority)
5/17/23	(4)	HOUSE LIQUOR CONTROL COMMITTEE (Minority)
5.17.23	(5)	LEGISLATIVE REFERENCE BUREAU
—	_____ (6)	INDEPENDENT REGULATORY REVIEW COMMISSION