

# Comments of the Independent Regulatory Review Commission



## Pennsylvania Liquor Control Board Regulation #54-103 (IRRC #3375)

### Hearings by Teleconference

**August 9, 2023**

We submit for your consideration the following comments on the proposed rulemaking published in the June 10, 2023 *Pennsylvania Bulletin*. Our comments are based on criteria in Section 5.2 of the Regulatory Review Act (RRA) (71 P.S. § 745.5b). Section 5.1(a) of the RRA (71 P.S. § 745.5a(a)) directs the Pennsylvania Liquor Control Board (Board) to respond to all comments received from us or any other source.

- 1. Whether the agency has the statutory authority to promulgate the regulation; Whether the regulation is consistent with the intent of the General Assembly; Whether the regulation represents a policy decision of such a substantial nature that it requires legislative review.**

In the Regulatory Analysis Form (RAF) submitted with this proposal, the Board explains that this rulemaking will codify its existing practices, including the use of video teleconference hearings, which were started during the Covid-19 pandemic. The proposal will also codify the Office of Administrative Law Judge's (OALJ), an autonomous office within the Board, current practice of holding all hearings via video teleconference.

Representative John Lawrence submitted a letter in opposition to this rulemaking. The written comments explain in detail why he believes the Board “does not have the statutory authority to unilaterally promulgate this regulation.” The letter states the “purported benefits of the virtual hearing framework merit consideration” and suggests the Board “outline these benefits to the General Assembly and seek a sponsor for a bill to accomplish this goal.”

Section 5.2 of the RRA directs the Independent Regulatory Review Commission (IRRC) to determine whether a regulation is in the public interest. 71 P.S. § 745.5b. In making this determination, IRRC must first consider whether an agency has the statutory authority to promulgate a regulation and whether it conforms to the intent of the General Assembly. 71 P.S. § 745.5b(a). In making its determination, IRRC shall consider written comments submitted by the committees and current members of the General Assembly, pertinent opinions of Pennsylvania's courts and formal opinions of the Attorney General.

We will review the Board's response to all of the issues raised in the legislative comments submitted by the Representative in our determination of whether the Board has the statutory

authority to promulgate the rulemaking, whether the rulemaking is consistent with the intent of the General Assembly and whether the rulemaking is a policy decision of such a substantial nature that it requires legislative review.

## **2. Compliance with the provisions of the RRA or the regulations of the Commission in promulgating the regulation.**

When determining if a regulation is in the public interest, IRRC reviews the information a promulgating agency is required to provide in the RAF pursuant to Section 5(a) of the RRA. 71 P.S. § 745.5(a). The RAF and Preamble submitted with this proposal do not provide sufficient information to determine if the rulemaking is in the public interest.

When the final-form regulatory package is submitted for consideration, we ask the Board to provide additional information for the following sections of the RAF:

- RAF #15, #16 and #24 – These sections of the RAF require a promulgating agency to identify the types and numbers of persons, businesses, small businesses (as defined by Section 3 of the RRA) and organizations which will be affected by the regulation. The Board states that there are approximately 14,000 active licenses in the Commonwealth and those businesses would only be affected if they are required to participate in hearings before the Board or the OALJ. We ask the Board to quantify the number of hearings that were held last year, how many of those hearings were video teleconferences, and how many of the participants would be considered small businesses.
- RAF #21 – This section of the RAF relates to the estimated costs and savings the rulemaking will have on the state government. In response to RAF #10, the Board has provided examples of savings that have been realized through the use of virtual hearings. However, the Board has not quantified the total savings that have been realized through the use of virtual hearings. We ask the Board provide a more detailed response to this question when the final rulemaking is submitted for consideration.
- RAF #29 – The dates for the schedule of review of this regulation should be updated when this rulemaking is submitted in final-form.

## **3. Video teleconferences. – Reasonableness; Clarity.**

The Board is adding video teleconferencing language to the following sections of its regulations as follows:

- § 15.46 (c) – Hearings before the OALJ shall be conducted by video teleconference. Hearings may be conducted in-person at the discretion of the Administrative Law Judge (ALJ).
- § 17.16 (c)(1) – Hearings shall be conducted by video teleconference, unless the Office of Chief Counsel of the Board determines otherwise.

- § 17.32 (a) – Hearings will be conducted by video teleconference, unless the Office of Chief Counsel of the Board determines otherwise.

The new language allows for the possibility of in-person hearings, but only at the discretion of ALJ or the Office of Chief Counsel (OCC) of the Board. We believe it would be more reasonable if the option for in-person hearings was guaranteed, and not at the discretion of an ALJ or the OCC. We suggest that the final-form rulemaking be amended to ensure participants can participate in hearings either in-person or via video teleconference.

In addition, two of the subsections noted above state that hearings “shall” be conducted via video teleconference and one subsection states that hearings “will” be conducted in that manner. Section 6.7 of the *Pennsylvania Code and Bulletin Style Manual (Manual)* provides guidance on the proper usage of the words “shall” and “must” when used in a regulation. Section 6.7(a) of the *Manual* states that the word “shall” expresses a duty for a person, committee or other nongovernmental entity to take action. Section 6.7(c) of the *Manual* states that the word “will” indicates that the Commonwealth pledges to act. Based on the guidance provided in the *Manual*, and for consistency, the Board should replace the word “shall” with the word “will” in the final-form regulation.