

Comments of the Independent Regulatory Review Commission



Pennsylvania Liquor Control Board Regulation #54-92 (IRRC #3395)

Distilleries

April 17, 2024

We submit for your consideration the following comments on the proposed rulemaking published in the February 17, 2024 *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. Statutory Authority; Whether the regulation is consistent with the intent of the General Assembly; Need for the regulation; and Clarity.

Distillery

The proposed definition of “Distillery,” when capitalized, means all manufacturers licensed under section 5-504.4 of the Liquor Code, including distilleries of historical significance, limited distilleries and distilleries. It also states that “Distilleries shall manufacture a minimum of 100 gallons of distilled liquor or distillery products per calendar year.”

Our concern with this proposed definition is several-fold. First, it may convey the impression that the manufacturing of spirits for personal use is permissible, so long as it does not exceed 100 gallons per calendar year. The Liquor Code allows individuals, in the case of wine and beer production, to manufacture up to 200 gallons of product per calendar year provided the products are for personal use and not for sale. 47 P.S. §§ 4-491(2) and 4-492(1). However, it does not permit any such exception for the production of spirits. If an individual produces alcohol that is potable, and is not wine or a malt or brewed beverage, he or she would need to obtain a distillery or limited distillery license from the Board to manufacture the alcohol. 47 P.S. § 5-501. The Board should submit a revised Preamble and Regulatory Analysis Form (RAF) that cites its statutory authority to impose the production threshold. It should also explain how it conforms to the intent of the legislature.

Second, neither the Preamble nor the RAF to the proposed regulation discusses the production limit contained in the definition. As such, it is difficult to discern the need and rationale for the limit since all three types of distilleries are presumably licensed and authorized to sell product to the Board, Board licensees and the public. What is the impact of this proposal on distilleries producing less than 100-gallons per calendar year? When the Board submits the final-form

regulation, the revised Preamble should describe the need for the production limit, including how it determined the appropriate limit. Additionally, the Board should address how the provision will be implemented and enforced.

Third, the inclusion of the production limit in the definition of “Distillery” is a substantive provision. Section 2.11(e) of the *Pennsylvania Code & Bulletin Style Manual* states that substantive provisions may not be contained in a definition section. If the Board retains the production limit in the final rulemaking, it should be removed from the definitions section and placed in a separate section.

Finally, we understand the Board’s desire to not have to continuously repeat “distilleries of historical significance, limited distilleries and distilleries” every time all three types of licensees are affected. We do not object to a catchall term that includes all three types of licensees. However, we disagree that such a term should have two different meanings depending on whether it is capitalized. The Board should utilize a different, distinct term to serve as a catchall in the final version of this rulemaking or explain how use of a capitonym conforms to the RRA clarity criterion.

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, the Commission 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 #19 and #23 – These sections of the RAF relate to the fiscal impact the rulemaking will have on the regulated community. The information provided by the Board indicates that the rulemaking will not have a fiscal impact. We ask the Board to revise this answer to include the costs associated with beer line cleaning and wine dispensing system sanitation for distilleries or limited distilleries that choose to sell these types of beverages; and
- RAF #29 – The Preamble to the proposed regulation states the rulemaking will become effective 6 months after publication of the final-form rulemaking in the *Pennsylvania Bulletin*. The dates for the schedule of review of this regulation in the RAF should be updated when this rulemaking is submitted in final-form.

The Board should also revise the final Preamble summary by providing a complete description of the new subchapter’s Definitions section. It should include a concise, non-technical description of the amendments, including the need for and rationale for the new language.