

<h1 style="margin: 0;">Regulatory Analysis Form</h1> <p style="margin: 0;">(Completed by Promulgating Agency)</p> <p style="margin: 0;">(All Comments submitted on this regulation will appear on IRRC's website)</p>		<p>INDEPENDENT REGULATORY REVIEW COMMISSION</p> <p style="font-size: 24pt; font-weight: bold; margin: 10px 0;">RECEIVED</p> <p style="font-size: 10pt;">Independent Regulatory Review Commission</p> <p style="font-size: 14pt;">June 11, 2024</p>
<p>(1) Agency Pennsylvania Liquor Control Board</p>		<p>IRRC Number: 3372</p>
<p>(2) Agency Number: 54 Identification Number: 104</p>		
<p>(3) PA Code Cite: 40 Pa. Code §§ 5.30, 5.32</p>		
<p>(4) Short Title: Duties and Rights of Licensees</p>		
<p>(5) Agency Contacts (List Telephone Number and Email Address):</p> <p>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</p> <p>Secondary Contact: Jason M. Worley, Chief Counsel (Same Contact Information)</p>		
<p>(6) Type of Rulemaking (check applicable box):</p> <p><input type="checkbox"/> Proposed Regulation</p> <p><input checked="" type="checkbox"/> Final Regulation</p> <p><input type="checkbox"/> Final Omitted Regulation</p>		<p><input type="checkbox"/> Emergency Certification Regulation;</p> <p><input type="checkbox"/> Certification by the Governor</p> <p><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>This final-form rulemaking updates sections 5.30 and 5.32 of the Board's Regulations and is undertaken as part of an ongoing effort to review and update the Board's Regulations. The final-form rulemaking adds definitions, updates citations, and provides clarity for the regulated community. It also increases the prize limits for activity on licensed premises to be consistent with the Local Option Small Games of Chance Act.</p>		
<p>(8) State the statutory authority for the regulation. Include <u>specific</u> statutory citation.</p> <p>Pennsylvania Liquor Code, section 207(i) (47 P.S. § 2-207(i)).</p>		
<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.</p>		

The relevant case law is Conchatta Inc. v. Miller, 458 F.3d 258 (3rd Cir. 2006), *cert. denied*, Miller v. Conchatta, 549 U.S. 1246 (2007). This case found that the word “lewd,” found in Section 493(10) of the Liquor Code and section 5.32(b) of the Board’s Regulations, is unconstitutionally overbroad. The district court found the words “immoral and improper” to be void for vagueness and that issue was not raised before the Third Circuit. While this court decision did not *mandate* the regulatory change, in that it did not direct the Board to change section 5.32(e)(1), the regulated community is better served with language that has not been found to be unconstitutional.

(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 final-form rulemaking amends section 5.30 (relating to definitions) to expand some existing definitions and add new definitions to provide clarity to the regulated community. These amendments stem from questions posed by the regulated community to the Board’s Office of Chief Counsel, which provided answers through advisory opinions issued pursuant to section 211.1 of the Liquor Code, 47 P.S. § 2-211.1.

The final-form rulemaking amends section 5.32 (relating to restrictions/exceptions) for the purpose of clarity and improved readability. The first two subsections are reserved; therefore, the amendments begin at subsection (c), which states that a licensee may not directly or indirectly hire or permit a minor under 18 to act as an “entertainer” and does not identify any exceptions. The regulation needs to be updated because the legislature did not grant the Board the authority to determine when a minor under 18 may be employed or engaged as an entertainer. Therefore, the final-form rulemaking deletes subsection (c) and creates subsection (c.1). The final-form subsection (c.1) provides that any employment or engagement of a minor under 18 years of age as an entertainer must be in accordance with the Pennsylvania Child Labor Act (43 P.S. § 40.1 et seq.).

The final-form rulemaking amends subsection (d) in paragraphs (1) and (4) for the purpose of legal accuracy. In paragraph (1), instead of referencing “Parts and Subparts” of statutes, the final-form rulemaking now references the corresponding acts (the Boxing Act and the Wrestling Act) with their corresponding statutory citations. The statutory citations were inadvertently omitted from the proposed rulemaking but have been incorporated into the final-form rulemaking. In subparagraph (4)(i), the definition of “charitable organizations” is no longer available in 49 Pa. Code Part I, Subpart B, because that regulation was deleted in 1997. See 27 Pa.B. 2934. Therefore, final-form rulemaking now cites, in subparagraph (4)(ii), to the Solicitation of Funds for Charitable Purposes Act, 10 P.S. § § 162.1—162.23. In addition, the legal citation in subparagraph (4)(ii) to the Local Option Small Games of Chance Act has been updated.

In the proposed rulemaking, the Board deleted the language at section 5.32(e)(1), including the phrase “lewd, immoral or improper,” based on the decision by the Third Circuit Court of Appeals, in Conchatta, Inc. v. Miller, 458 F.3d 258 (3^d Cir. 2006), *cert. denied*, Miller v. Conchatta, 127 S.Ct. 1330 (2007). The Third Circuit held that the word “lewd,” found in section 493(10) of the Liquor Code, 47 P.S. § 4-493(10), and section 5.32(b) of the Board’s Regulations, is unconstitutionally overbroad. The district court found the words “immoral and improper” to be void for vagueness and that issue was not raised before the Third Circuit.

The Board received comments from the Honorable Representative John Lawrence, the Independence Law Center, and the Independent Regulatory Review Commission regarding the proposed deletion of section 5.32(e)(1). The Board's response to those comments is set forth in a separate document. In the interest of compromise, the Board amended paragraph 5.32(e)(1), instead of deleting it, so that in the final-form rulemaking, the paragraph now reads, "The licensee, its servants, agents, employees, patrons or event, contest or tournament participants may not engage in conduct otherwise prohibited by law." By removing the phrase "lewd, immoral or improper," this amendment eliminates the question of unconstitutionality addressed in Conchatta. The Board anticipates that this language will provide clearer guidance to licensees while avoiding constitutional issues. Assuming that the law prohibits conduct for the purpose of promoting public health, safety, and welfare, the language in revised paragraph 5.32(e)(1) now accomplishes this goal.

This final-form rulemaking adds a sentence to subsection (e)(3), providing that no amount of liquor, alcohol, or malt or brewed beverages may be offered as a prize for participating in an event, contest or tournament, whether for on-premises or off-premises consumption. Similar language exists in subsection (h), for sweepstakes prizes.

In subsection (e)(5), this final-form rulemaking replaces the word "charity" with "charitable organization," to be consistent with the language used in subsection (d)(4).

This final-form rulemaking amends subsection (e)(7) to increase the total value of prizes for any event, tournament or contest from \$1,000 to \$2,000, and to increase the total value of prizes awarded in a 7-day period from \$25,000 to \$35,000. These amendments are consistent with the limits provided in the Local Option Small Games of Chance Act. The final-form rulemaking also corrects the citation to the Local Option Small Games of Chance Act.

Lastly, the final-form rulemaking reserves subsection (g), which provides that "municipalities may petition the Board for exemption from the Board's regulations regarding *the enforcement of subsection (a)* for all licensees within an identifiable area in accordance with section 493.1(b) of the Liquor Code (47 P.S. § 4-493.1(b))." (Emphasis added). Subsection (a) prohibited a licensee from using or permitting to be used, inside or outside of the licensed premises, a loudspeaker or similar device whereby the sound of music or other entertainment, or the advertisement thereof, could be heard on the outside of the licensed premises. The act of December 22, 2011 (P.L. 530, No. 113) and the act of July 5, 2012 (P.L. 1007, No. 116) amended the Liquor Code (47 P.S. §§ 1-101—10-1001) to render subsection (a) obsolete, and thereafter, the Board submitted a final-omitted rulemaking to rescind subsection (a). See 43 Pa.B. 7082. That final-omitted rulemaking overlooked subsection (g), but the Board rescinds it with this final-form rulemaking.

As of May 1, 2024, there were approximately 15,500 licensees who may benefit from this final-form rulemaking. Licensees benefit when the regulations that pertain to them contain correct information, without language that has been held to be unconstitutional, and with accurate citations to other laws that may be pertinent to their situation.

(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 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 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 final-form 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. That being said, the Board has received at least one request to increase the prize amounts.

(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?

Section 3 of the Regulatory Review Act (71 P.S. § 745.3) defines "Small business" as "size standards described by the United States Small Business Administration's Small Business Size Regulations under 13 CFR Ch. 1 Part 121 (relating to Small Business Size Regulations) or its successor regulation." 71 P.S. § 745.3. 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:

- 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;
- breweries with less than 1,250 employees;
- wineries with less than 1,000 employees;
- distilleries with less than 1,000 employees; and
- all other amusement and recreation industries with annual receipts of less than \$7.5 million.

(13 C.F.R. § 121.201).

As of May 1, 2024, there were approximately 15,500 licensees who may be affected by this rulemaking. Although some of the PLCB's licensees may not fall within the definition of small business, the majority of businesses licensed by the PLCB would likely be considered small businesses.

(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.

It is anticipated that approximately 15,500 licensees will be required to comply with the regulation. This includes restaurants, hotels, eating place retail dispensers, clubs, and brew pubs.

(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.

It is anticipated that the regulation will have a positive financial, economic and social impact on the regulated community and the public. Licensees benefit when the regulations that pertain to them contain correct information, without language that has been held to be unconstitutional, and with accurate citations to other laws that may be pertinent to their situation. These changes will reduce frustration with outdated regulatory language and enhance the accessibility of regulations. In addition, the regulation increases the prize limits for activity on licensed premises to be consistent with the Local Option Small Games of Chance Act. This change will provide a positive financial, economic, and social benefit for members of the regulated community who offer such games.

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

Licensees benefit when the regulations that pertain to them contain correct information, without language that has been held to be unconstitutional, and with accurate citations to other laws that may be pertinent to their situation. These changes will reduce frustration with outdated regulatory language and enhance the accessibility of regulations.

Comments to the proposed rulemaking objected to the deletion of paragraph 5.32(e)(1), presumably believing that the deletion of this paragraph will result in costs or adverse effects on the regulated community. In the interest of compromise, the Board has revised paragraph 5.32(e)(1) so that it now states, "The licensee, its servants, agents, employees, patrons or event, contest or tournament participants may not engage in conduct otherwise prohibited by law." The revised paragraph provides the benefit of clear guidance to the regulated community, no longer includes language that could have a chilling effect on a licensee's First Amendment rights, and ensures the public that licensees are not permitted to engage in unlawful conduct.

The Board believes these benefits outweigh any costs or adverse effects anticipated from these changes.

(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.

The rulemaking does not result in costs or savings for the regulated community. 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 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 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 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.

It is anticipated that neither 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	\$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.

Program	FY -3 2020-2021	FY -2 2021-2022	FY -1 2022-2023	Current FY 2023-2024
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:

- 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;
- breweries with less than 1,250 employees;
- wineries with less than 1,000 employees;
- distilleries with less than 1,000 employees; and
- all other amusement and recreation industries with annual receipts of less than \$7.5 million.

(13 C.F.R. § 121.201).

As of May 1, 2024, there were approximately 15,500 licensees who may be affected by this rulemaking. Although some of the PLCB’s licensees may not fall within the definition of small business, the majority of businesses licensed by the PLCB would likely be considered small businesses.

(b) The regulation does not require any additional reporting, recordkeeping or other administrative

activities.

(c) The regulation is anticipated to have a minimal but positive impact on small businesses. The regulation provides updated and clear guidance with regard to permissible amusement and entertainment activities. Finally, since the final-form rulemaking also increases the prize limits for activity on licensed premises to be more consistent with the Local Option Small Games of Chance Act, this may benefit licensees who offer such games.

(d) Only an update of the existing regulations would achieve the purpose of providing accurate regulations for 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.

The PLCB has not identified, within the regulated community, a subgroup that may need any special provisions or accommodations. As stated in response to question 24, it is estimated that almost all of the regulated community falls within the category of small business. There is no subgroup that has an identifiable need that is different from the entire group.

(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. 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;
- (b) The establishment of less stringent schedules or deadlines for compliance or reporting requirements for small businesses;
- (c) The consolidation or simplification of compliance or reporting requirements for small businesses;
- (d) The establishment of performing standards for small businesses to replace design or operational standards required in the regulation; and
- (e) The exemption of small businesses from all or any part of the requirements contained in the regulation.

The final-form rulemaking is not expected to have any adverse impact on small businesses. Nonetheless, in the interest of submitting a completed form, the PLCB submits the following answers:

- (a) The final-form rulemaking does not establish less stringent compliance or reporting requirements.
- (b) The final-form rulemaking does not establish any schedules or deadlines for compliance or reporting requirements.

(c) The final-form rulemaking does not contain any compliance or reporting requirements that would need to be consolidated or simplified for small businesses.

(d) The final-form rulemaking does not establish any performing standards for small businesses to replace design or operations standards.

(e) The final-form rulemaking does not establish any new requirements; therefore, there is nothing from which small businesses could be given an exemption.

(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: | <u>30 days</u> |
| B. The date or dates on which any public meetings or hearings will be held: | <u>July 18, 2024</u> |
| C. The expected date of delivery of the final-form regulation: | <u>September 2024</u> |
| D. The expected effective date of the final-form regulation: | <u>September 2024</u> |
| E. The expected date by which compliance with the final-form regulation will be required: | <u>September 2024</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 regulations is ongoing, and any changes will be through the rulemaking process.

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Independent Regulatory
Review Commission

June 11, 2024

FACE SHEET
FOR FILING DOCUMENTS
WITH THE LEGISLATIVE REFERENCE BUREAU

(Pursuant to Commonwealth Documents Law)

DO NOT WRITE IN THIS SPACE

Copy below is hereby approved as to form and legality.

Attorney General:

BY: _____
(DEPUTY ATTORNEY GENERAL)

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)

DOCUMENT/FISCAL NOTE NO. 54-104

DATE OF ADOPTION: 6/5/2024

BY: Tim Holden

TITLE: Chairman
(Executive Officer, Chairman or Secretary)

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

BY: James M. Conroy
Chief Counsel

6/5/2024
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 5. DUTIES AND RIGHTS OF LICENSEES

SUBCHAPTER C. AMUSEMENT AND ENTERTAINMENT

LIQUOR CONTROL BOARD
[40 PA. CODE CH. 5]

Duties and Rights of Licensees

The Liquor Control Board (Board), under the authority of section 207(i) of the Liquor Code (47 P.S. § 2-207(i)), amends §§ 5.30 and 5.32 to read as set forth in Annex A.

Summary

This final-form rulemaking updates sections 5.30 and 5.32 of the Board’s Regulations and is undertaken as part of an ongoing effort to review and update the Board’s Regulations. The final-form rulemaking adds definitions, updates citations, and provides clarity for the regulated community. It also increases the prize limits for activity on licensed premises to be consistent with the Local Option Small Games of Chance Act.

The final-form rulemaking amends section 5.30 (relating to definitions) to expand some existing definitions and add new definitions to provide clarity to the regulated community. These amendments stem from questions posed by the regulated community to the Board’s Office of Chief Counsel, which provided answers through advisory opinions issued pursuant to section 211.1 of the Liquor Code, 47 P.S. § 2-211.1.

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The final-form rulemaking amends subsection (d) in paragraphs (1) and (4) for the purpose of legal accuracy. In paragraph (1), instead of referencing “Parts and Subparts” of statutes, the final-form rulemaking now references the corresponding acts (the Boxing Act and the Wrestling Act) with their corresponding statutory citations. The statutory citations were inadvertently omitted from the proposed rulemaking but have been incorporated into the final-form rulemaking. In subparagraph (4)(i), the definition of “charitable organizations” is no longer available in 49 Pa. Code Part I, Subpart B, because that regulation was deleted in 1997. See 27 Pa.B. 2934. Therefore, final-form rulemaking now cites, in subparagraph (4)(ii), to the Solicitation of Funds for Charitable Purposes Act, 10 P.S. § § 162.1—162.23. In addition, the legal citation in subparagraph (4)(ii) to the Local Option Small Games of Chance Act has been updated.

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Affected Parties

As of May 1, 2024, there were approximately 15,500 licensees who may be affected by this final-form rulemaking.

Paperwork Requirements

This final-form rulemaking will not require any additional paperwork to be filed.

Fiscal Impact

This final-form rulemaking is not anticipated to have any fiscal impact.

Effective Date

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

Contact Person

Questions regarding this final-form regulation should be addressed to Jason Worley, Chief Counsel, or Norina Foster, Assistant Counsel, Office of Chief Counsel, Pennsylvania Liquor Control Board, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001.

Regulatory Review

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on April 25, 2023, the Board submitted a copy of the notice of proposed rulemaking, published at 53 Pa.B. 2735 (May 20, 2023) to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Liquor Control Committee and Senate Committee on Law and Justice for review and comment.

Under section 5(c) of the Regulatory Review Act, the Board is required submit to IRRC and the House and Senate Committees copies of comments received during the public comment period, as well as other documents when requested. In preparing this final-form rulemaking, the Board has considered all comments received from IRRC and the public. The Board responded to these comments in a separate document.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on _____, 2024, the final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act (71 P.S. § 745.5a(e)), IRRC met on _____, and approved the final-form rulemaking.

TIM HOLDEN,
Chairperson

RESPONSES OF THE PENNSYLVANIA LIQUOR CONTROL BOARD

TO

Comments about Board Regulation #54-104 (IRRC #3372)

Duties and Rights of Licensees

1. RRA Section 5.2(a) - Legislative comments.

In determining whether a proposed, final-form, final-omitted or existing regulation is in the public interest, the commission shall, first and foremost, determine whether the agency has the statutory authority to promulgate the regulation and whether the regulation conforms to the intent of the General Assembly in the enactment of the statute upon which the regulation is based. 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. 71.P.S. § 745.5b.

Representative John Lawrence submitted comments expressing support for the majority of the proposed changes contained in this rulemaking. The legislative comments note, most of the amendments are either technical in nature or in direct response to actions of the General Assembly. They agree that these proposed changes are appropriate and necessary. However, they observe that the Board's proposal to delete Section 5.32(e)(1), regarding lewd, immoral or improper conduct at a licensed premises, does not fit into either previously mentioned category. The proposed repeal of this section, they argue, goes beyond a "housekeeping" measure and instead represents a substantive regulatory change for which the Board fails to provide justification.

In the Preamble and its response to Regulatory Analysis Form (RAF) question #10, the Board, regarding the deletion of Section 5.32(e)(1), states that:

This proposed rulemaking deletes subsection (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, 458 F.3d 258 (3rd Cir. 2006), held that the prohibition on "lewd, immoral or improper conduct" was unconstitutional on the basis that it is substantially

Response of the PLCB to IRRRC Comments

Board Regulation #54-104 (IRRC #3372)

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overbroad. Conchatta was not based on subsection (e)(1) of the Board's regulation, but a different subsection—subsection (b)—that has since been reserved. See 43 Pa.B. 7082 (December 7, 2013). Since the phrase “lewd, immoral or improper conduct” is legally unenforceable, this proposed rulemaking deletes it from subsection (e)(1).

The legislative comments disagree strongly with the Board's statement that the phrase “lewd, immoral or improper conduct” is legally unenforceable. The Board, as asserted in the legislative comments, fails to provide any basis for Conchatta's applicability to the proposed repeal of Section 5.32(e)(1). They contend that the Board's opinion is unsupported and has no basis in fact or law. They further assert that recent court rulings that suggest courts have taken a more agreeable view toward the types of restrictions envisioned in Section 5.32(b) have been ignored by the Board.

Response:

Responding to these points requires an in-depth review of the Conchatta decisions. The Plaintiffs in Conchatta were the operator of a club that featured semi-nude dancing and two of its dancers (“Club/Dancers”). The Defendant was the Commissioner of the Pennsylvania State Police, which is responsible for enforcing the Liquor Code and the Board's Regulations through the Bureau of Liquor Control Enforcement (“PSP”).¹

The Club/Dancers sought injunctive and declaratory relief as to the enforcement of section 493(10) of the Liquor Code, 47 P.S. § 4-493(10), and section 5.32(b) of the Board's Regulations, 40 Pa. Code § 5.32(b) (“the Challenged Provisions”).

Section 493 of the Liquor Code specifies unlawful acts relative to liquor, malt and brewed beverages and licensees. 47 P.S. § 4-493. Subsection 493(10) provides that it shall be unlawful “for any licensee, under any circumstances, to permit in any licensed premises or in any place operated in connection therewith any **lewd, immoral or improper** entertainment....” Id. (Emphasis added). Section 493(10) is the only source in the Liquor Code for this phrase, and it serves as the statutory basis for the now-reserved regulatory section

¹ At the time of the District Court decision, the Commissioner was Col. Paul J. Evanko. At the time of the Third Circuit decision, Col. Evanko had been replaced by Col. Jeffrey B. Miller.

5.32(b) as well as regulatory section 5.32(e)(1), which is the focus of these comments. At the time of the Conchatta decision, section 5.32(b) stated:

A licensee may not permit an employee, servant, agent, event/tournament/contest participant or a person engaged directly or indirectly as an entertainer in the licensed establishment or a room or place connected therewith, to be in contact or associate with the patrons in the establishment room or place for a lewd, immoral, improper or unlawful purpose.²

Section 5.32(e)(1) currently states:

There may not be lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants.

40 Pa. Code § 5.32(e)(1).

In the case before the District Court, the Club/Dancers asserted that, because the language in the Challenged Provisions was vague and overbroad, they were unable to determine what conduct was permitted and what conduct was forbidden. As a result, they argued that their freedom of expression was being curtailed in violation of the First Amendment. See Conchatta, Inc. v. Evanko, 2005 U.S. Dist. LEXIS 2638 (E.D. Pa. 2005), *reversed in part and remanded*, Conchatta Inc. v. Miller, 458 F.3d 258 (3rd Cir. 2006).

The PSP concurred with the Club/Dancers' position regarding the words "immoral or improper," and suggested in its brief that those words be stricken from the statute. The District Court also agreed that the terms "immoral or improper" were vague, as their meanings could vary with the views of the beholder. Conchatta, 2005 U.S. Dist. LEXIS 2638, *4.

However, the District Court held that the prohibition against "lewd" conduct was not unconstitutionally vague. Id. at *6. Note that the District Court did *not* rule on whether the statute and regulation were unconstitutionally overbroad.

² The text of this now-reserved regulation is available at 34 Pa.B. 6142.

On appeal to the Third Circuit, the Club/Dancers argued that the Challenged Provisions prohibiting “lewd” entertainment were unconstitutional on their face and as applied to them.³ The Third Circuit considered the issue of whether the Challenged Provisions were unconstitutionally overbroad and noted:

The parties agree that **approximately 15,000 to 18,000 establishments** have liquor licenses in Pennsylvania and **are subject to the Challenged Provisions**. Many of these are ordinary restaurants, but dinner theaters, comedy clubs, and other venues that present some form of entertainment and serve alcohol are also subject to the Challenged Provisions. Moreover, the reach of the Statute extends to all places “operated in connection” with licensed premises. This language presumably applies to performance spaces that serve alcohol in the lobby during intermission. Thus, **the Challenged Provisions do not solely apply to nude dancing**, which “falls only within the outer ambit of the First Amendment’s protection,” *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S. Ct. 1382, 146 L. Ed. 2d 265 (2000) (plurality opinion), **but also apply to a variety of performances that are entitled to the full protection of the First Amendment, as long as the venues serve alcohol.**

Conchatta, 458 F.3d at 265-266 (emphasis added).

The PSP asserted that the Challenged Provisions were not intended to restrict freedom of expression, but were enacted to limit the negative secondary effects resulting from the combination of “lewd” entertainment and the consumption of alcohol. *Id.* at 267. The United States Supreme Court observed that legislation intended to curb the negative secondary effects of entertainment establishments is often aimed at “crime rates, property values, and the quality of the city’s neighborhoods.” *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 434 (2002).

The Supreme Court established a four-part test to apply in cases where, as in Conchatta, the government’s interest is not connected to actual expression but

³ The PSP did not appeal the District Court’s order that the terms “immoral” and “improper” be excised from the statute and regulation in question. Conchatta, 458 F.3d at 262 (3d. Cir. 2006).

is focused on these negative secondary effects. United States v. O'Brien, 391 U.S. 367 (1968). Under the O'Brien test, a regulation is constitutional only if:

1. It is within the constitutional power of the Government;
2. It furthers an important or substantial governmental interest;
3. The governmental interest is unrelated to the suppression of free expression; and
4. The incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Conchatta, 458 F.3d at 267 (*citing O'Brien*, 391 US at 377).

The Third Circuit in Conchatta applied the four-part O'Brien test and found that the Challenged Provisions satisfied the first three parts. However, regarding the fourth part of the O'Brien test, the Third Circuit held:

We conclude that the Challenged Provisions are substantially overbroad under the fourth *O'Brien* requirement because **the asserted government interest is not applicable to a large number of affected establishments**. With respect to nude or topless dancing at clubs or bars, an interest in limiting harmful secondary effects may justify the Challenged Provisions...With respect to ordinary theater and ballet performances, concerts, and other similar forms of entertainment, however, the [PSP] provides no evidence that the Challenged Provisions prevent harmful secondary effects, and we are exceedingly doubtful that they do. Without evidence of such a connection, there is no state interest to justify a substantial fraction of the Challenged Provisions' scope.

Id. at 267-268 (emphasis added). The Third Circuit concluded that the Challenged Provisions “punish[] a ‘substantial’ amount of protected free speech, ‘judged in relation to [their] plainly legitimate sweep,’” and that they are therefore unconstitutionally overbroad. Id. at 268 (*quoting Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003)). .

Representative Lawrence asserts that the Third Circuit’s decision in Conchatta does not apply to section 5.32(e)(1) of the Board’s Regulations.

However, the Third Circuit decision in Conchatta struck the phrase “lewd, immoral or improper” from section 493(10) of the Liquor Code. Therefore, any regulation flowing from the language of this section no longer has any statutory basis.

Further, Representative Lawrence argues that the Board has ignored “more recent court cases that suggest courts have taken a more agreeable view toward the types of restrictions envisioned in 5.32(b).”⁴ Actually, courts have upheld the statutes in Tennessee and Georgia because the laws were drawn narrowly and therefore were able to withstand judicial scrutiny.

The Tennessee cases were brought by a group of businesses that own a substantial number of adult nightclubs in Memphis; they sought to enjoin and invalidate the Tennessee Adult-Oriented Establishment Registration Act of 1998, as locally enforced by Ordinance 344. Entm’t Prods., Inc. v. Shelby County, 588 F.3d 372 (6th Cir. 2009), *cert. denied*, 562 U.S. 835 (2010) (“Entm’t Prods. I”), and Entm’t Prods., Inc. v. Shelby Cty., 721 F.3d 729 (6th Cir. 2013) (“Entm’t Prods. II”). The Sixth Circuit summarized the pertinent statute:

The Act at issue is a county-option state law, enacted to address the deleterious secondary effects associated with adult-oriented businesses, including crime, the spread of venereal disease, decreased property values, and other public-welfare and safety issues. The Act applies to all businesses falling within the statutory definition of “adult-oriented establishment.” These establishments are regulated in two principal ways. First, all businesses subject to the Act, as well as their employees, must obtain a license. Second, the Act regulates the manner in which entertainment may be provided by these establishments in four major ways: (1) it prohibits nudity; (2) it prohibits certain sexual activities, touching of certain anatomical areas, and all physical contact during performances; (3) it prohibits the sale or consumption of alcohol on the premises; and (4) it requires that all performances take place on a stage at least 18 inches above

⁴ The cases they cited are from Tennessee and Georgia, and therefore are not precedential or binding authority in Pennsylvania.

floor level and that all performers stay at least six feet away from customers and other performers.

Entm't Prods. II, 721 F.3d at 732-733. Tennessee's law focuses on particular kinds of businesses and prohibits specific conduct. Because this law was tailored to address the undesirable conduct, the court challenges failed.

One of the Tennessee cases actually *supports* the Third Circuit Court's decision in Conchatta. In Entm't Prods. I, the Sixth Circuit had no trouble distinguishing the law before it from laws at issue in other cases, including the statute and regulation that were struck down in Conchatta:

The facial attacks in Odle, Triplett Grille, **Conchatta**, Carandola, and Ways succeeded because **the challenged statutes purported to regulate public venues that stage mainstream performances of artistic value, as well as venues that stage adult-oriented performances.** In these cases, the “strong medicine” of facial invalidation was warranted because **casting so wide a regulatory net would certainly chill protected artistic expression that was not shown to produce the same adverse secondary effects associated with adult entertainment.**

Entm't Prods. I, 588 F.3d at 380 (emphasis added). Because the Tennessee law is significantly different from the “lewd, immoral or improper” language struck down in Conchatta, the Entm't Prods. cases are irrelevant.

Likewise, the law at issue in the Georgia case, Discotheque, Inc. v. Augusta-Richmond Cnty., No. 21-13218, 2022 U.S. App. LEXIS 27757 (11th Cir. 2022), is far more specific than the “lewd, immoral or improper” law rejected in Conchatta. The Eleventh Circuit described the law at issue in Discotheque as follows:

In 2003, the City [of Augusta, Georgia,] enacted an adult-entertainment ordinance with the stated purpose of combating negative secondary effects associated with adult-oriented businesses. See Augusta-Richmond County Code (“A.R.C.C.”) § 6-1-1. The ordinance did several things. It imposed licensing and permitting requirements for “adult entertainment

establishments,” including “erotic dance establishments” and “adult dancing establishments.” *Id.* §§ 6-1-2, 6-1-5, 6-1-6, 6-1-11. It prohibited the sale or transfer of permits to operate adult-entertainment establishments (the “non-transferability provision”). *Id.* § 6-1-15. The ordinance also regulated certain conduct within such establishments. *Id.* §§ 6-1-3, 6-1-4. And it limited the locations where adult-entertainment establishments could operate, though it allowed businesses existing as of January 2003 to continue operating as nonconforming uses. *Id.* § 6-1-9(e).

Discotheque, Inc. v. Augusta-Richmond Cnty., 2022 U.S. App. LEXIS 27757, *2, 2022 WL 5077263. Moreover, the ordinance defined the types of businesses that are subject to it, including “adult dancing establishment[s]” and “erotic dance establishment[s],” as follows:

(b) *Adult dancing establishment.* A business that features dancers displaying or exposing specific anatomical areas.

.....

(g) *Erotic dance establishment.* A nightclub, theater or other establishment which features live performances by topless and/or bottomless dancers, go-go dancers, strippers or similar entertainers, where such performances are distinguished or characterized by an emphasis on specific sexual activities or specific anatomical areas.

Id. at *6-7.

The Eleventh Circuit Court rejected the argument that these ordinances were overbroad, citing a Georgia Supreme Court decision that applied a narrowing construction: “[W]e interpret the challenged provision as limited to adult entertainment businesses that studies have shown produce undesirable secondary effects.” *Id.* at *8 (citing Gravelly v. Bacon, 429 S.E.2d 663, 666 (Ga. 1993)). The Eleventh Circuit concluded that, “any potential overbreadth is not ‘substantial’ in relation to the provision’s legitimate sweep and ‘can be handled on a case-by-case basis.’” *Id.* at *9.

Therefore, Representative Lawrence’s comment that “courts have taken a more agreeable view toward the types of restrictions envisioned in Section

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5.32(b)” is not borne out by the very cases he cites. The courts have not taken a more agreeable view towards unconstitutional language; instead, it appears that some legislatures have gotten better at drafting statutes that will withstand judicial scrutiny.

In light of the above, the Board stands by its position that the phrase “lewd, immoral or improper” should be eliminated from its regulations. However, in the interest of compromise, the Board has rewritten paragraph 5.32(e)(1) in the final form regulations to state:

The licensee, its servants, agents, employees, patrons or event, contest or tournament participants may not engage in conduct otherwise prohibited by law.

The Board anticipates that this language will provide better guidance to licensees while avoiding constitutional issues. Assuming that the law prohibits conduct for the purpose of promoting public health, safety, and welfare, the language in revised paragraph (e)(1) now accomplishes this goal.

The legislative comments also identify the following Board’s responses in the proposed rulemaking’s RAF as deficient:

- RAF question #9 asks if the regulation is mandated by any court order or federal regulation. The Board replies that it is not mandated by a federal or state law, court order or federal regulation. These legislative comments assert that the Board’s response to RAF question #9 is inconsistent with its attempt to justify the deletion of Section 5.32(e)(1) with the court’s holding in Conchatta (RAF question #10).
- RAF question #10 asks the promulgating agency to state why the regulation is needed and to explain the compelling public interest that justifies the regulation, to describe who will benefit from the regulation and to quantify the benefits. The Board, according to the legislative comments, fails to address these key elements.
- RAF question #17 requires the promulgating 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. The Board states that it anticipates that the regulated community will not sustain a financial, economic or social impact because of the regulation. A discussion of the social impact of the proposed regulatory change on individuals or other public and private organizations is not included in the Board's response.

- RAF question #18 directs the promulgating agency to explain how the benefits of the regulation outweigh any cost and adverse effects. The Board reports that there are no costs or adverse effects anticipated with this proposed rulemaking. The legislative comments disagree with the Board's assertion. They object to what is perceived as the Board's dismissal of this important question and claim that even a cursory review of the subject matter would suggest otherwise. They suggest that there has been significant community interest and debate over potential adverse effects associated with this subject matter for years, including legislation and litigation across the country.

Response: The Board's Final-form RAF addresses these issues in the responses to the aforementioned questions.

2. Section 5.32. Restrictions/ exceptions. – Whether the regulation is in the public interest; and Protection of the public health, safety and welfare.

The Board proposes to delete paragraph (e)(1), which prohibits lewd, immoral or improper conduct by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants for activities conducted under the subchapter, on the basis that is legally unenforceable.

The Independence Law Center (ILC) submitted comments contrary to the Board's position. It declares that "such conduct is most assuredly able to be prohibited" and that paragraph (e)(1) is constitutional and useful. The ILC writes that:

"To be clear, it was not the words "lewd," "immoral," or "improper" that were unenforceable, but the section 5.32(b) as a whole that did not have limiting text. By contrast to the phrase "lewd, immoral, improper or unlawful *purpose*" in section 5.32(b)(emphasis added), section 5.32(e) states, "There may not be lewd, immoral or improper *conduct*

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by the licensee, its servants, agents, employees, patrons or event, contest or tournament participants.” (Emphasis added.)

The ILC further states that “open lewdness” is prohibited by Pennsylvania law. The offense is defined as follows: “A person commits a misdemeanor of the third degree if he does any lewd act which he knows is likely to be observed by others who would be affronted or alarmed.” 18 Pa.C.S.A. § 5901. The ILC argues that liquor licensed establishments should continue to prohibit this kind of conduct on its premises. Removing this provision, it contends, is a change that is not in the interest of either visitors to liquor licensed establishments or communities as a whole.

Based on the concerns expressed in the legislative comments and the ILC, we ask the Board to submit a revised Preamble and RAF to final-form regulation that includes a detailed explanation of how the proposed regulatory change protects the public health, safety and welfare. Furthermore, we will review the Board’s responses to all of the issues raised by Representative Lawrence and the ILC in our determination of whether the final version of this rulemaking is in the public interest.

Response:

As stated above, the Board has rewritten paragraph (e)(1) in lieu of deleting it. Nonetheless, the Board responds to the points raised by the ILC herein.

The ILC seems to be reiterating a portion of the District Court’s decision in Conchatta, Inc. v. Evanko,⁵ arguing that “lewd” should not be considered

⁵ The relevant portion of the District Court’s decision is as follows:

There can be no doubt that the terms “immoral or improper” are vague; their meaning may vary with the views of the beholder. But, as noted by the defendants, the term “lewd” has, over time, acquired a well-understood meaning. At common law, a lewd act was “an act of open indecency which tends to corrupt the morals of the community.” Commonwealth v. Heinbaugh, 467 Pa. 1, 8, 354 A.2d 244, 247 (1976). The Model Penal Code has included “open lewdness” as a crime, defined as “any lewd act” which is likely to be observed by others who would be affronted or alarmed. Model Penal Code § 251.1. The same definition of “open lewdness” is set forth in Pennsylvania’s Criminal Code, 18 Pa. C.S. § 5901. In Osborne v. Ohio, 495 U.S. 103, 113, 114, 109 L. Ed. 2d 98, 110 S. Ct. 1691 (1990), the Court upheld a state statute outlawing possession of images of nude children where the nudity constituted “lewd exhibitions.” The majority specifically held that the term “lewd” by itself sufficiently defined what was prohibited. In Winters v. New York, 333 U.S. 507, 518, 92 L. Ed. 840, 68 S. Ct. 665 (1948), the Court held that the words “lewd” and “lascivious” were well understood through long use and were sufficiently clear so as not to constitute unconstitutional vagueness. See also Chaplinsky v. New Hampshire, 315 U.S. 568, 571, 572, 86 L. Ed. 1031, 62 S. Ct. 766 (1942) (prohibition on “lewd” speech).

unconstitutionally vague. The ILC cites the same section of the Crimes Code, 18 Pa. C.S. § 5901, for a definition of lewd.

But the Third Circuit did not reject the word “lewd” as unconstitutionally vague; it found that the word “lewd” was overbroad in its application.⁶ The court noted that the regulation applied to all licensees, the quantity of which was between 15,000 and 18,000 licensees. Conchatta, 458 F.3d at 266. However, in Conchatta, the PSP admitted that the focus of the regulation pertained to a small fraction of those licensees, only places that operated as strip clubs or “adult entertainment.”

Moreover, the PSP admitted that it wasn’t the expression of the dancers that it was concerned with, because such expression is protected by the First Amendment. The PSP explained that the regulation was intended to reduce the negative secondary effects of adult entertainment establishments, such as the devaluing of property. Id. at 267. The Conchatta court concluded that because the statute and the regulation were only targeted at a small fraction of licensees, but applied to thousands of other licensees whose conduct did not invite the negative secondary effects that the PSP was targeting, the state did not have an interest high enough to justify the chilling effect on licensees’ First Amendment rights.

The Board’s believes the final version of paragraph 5.32(e)(1), which states that licensees may not engage in conduct prohibited by law, addresses the concerns of the ILC.

Conchatta, Inc. v. Evanko, 2005 U.S. Dist. LEXIS 2638, *4-5.

⁶ Recall that the PSP admitted that the words “improper” and “immoral” were void for vagueness. *Supra* at 3.



June 11, 2024

Randall L. Wenger, Esquire
Independence Law Center
23 North Front Street
Harrisburg, PA 17101

VIA E-MAIL: info@indlawcenter.org

Re: PLCB Final Form Regulation No. 54-104

Dear Mr. Wenger:

This is in response to your letter of June 19, 2023, wherein you registered your objections to the deletion of section 5.32(e)(1) from the regulations of the Pennsylvania Liquor Control Board (“PLCB”).

Please note that in lieu of deleting section 5.32(e)(1), the PLCB has opted to revise the regulatory language so that it now reads: “The licensee, its servants, agents, employees, patrons or event, contest or tournament participants may not engage in conduct otherwise prohibited by law.”

Today the final-form regulatory package was delivered to the legislative oversight committees and the Independent Regulatory Review Commission (“IRRC”). A copy of the final-form regulatory package is attached for your convenience and includes the Regulatory Analysis Form, signed CDL-1 face sheet, Preamble and Annex A (regulatory text), and the PLCB’s responses to comments from IRRC, which will also serve as the PLCB’s response to your comments.

This regulation will become effective upon its publication in final form in the Pennsylvania Bulletin.

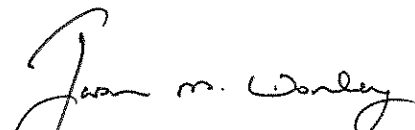
Randall L. Wenger, Esquire

June 11, 2024

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

Sincerely,


JASON M. WORLEY
CHIEF COUNSEL

Attachments



June 11, 2024

The Honorable John Lawrence
Pennsylvania House of Representatives
105 Ryan Office Building
Harrisburg, PA 17120

VIA E-MAIL: jlawrenc@pahousegop.com

Re: PLCB Final Form Regulation No. 54-104

Dear Representative Lawrence:

This is in response to your letter of June 19, 2023, wherein you registered your objections to the deletion of section 5.32(e)(1) from the regulations of the Pennsylvania Liquor Control Board (“PLCB”).

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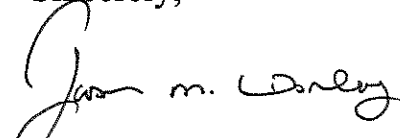
The Honorable John Lawrence

June 11, 2024

Page 2

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

Sincerely,



JASON M. WORLEY
CHIEF COUNSEL

Attachments

Annex A
TITLE 40. LIQUOR
PART I. LIQUOR CONTROL BOARD
CHAPTER 5. DUTIES AND RIGHTS OF LICENSEES
Subchapter C. AMUSEMENT AND ENTERTAINMENT

§ 5.30. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise:

Audio/video playback device—A device which emits a musical recording, or in the case of a video jukebox, emits a musical recording accompanied by recorded video images on a screen that does not exceed 24 inches by 30 inches.

Dancing—**Moving one’s body in rhythm, usually accompanied by tonal music or percussion. Dancing may be performed by a scheduled entertainer or by customers on the licensed premises.**

Event/tournament/contest—A competitive endeavor involving skill, **chance**, speed, strength **[or]**, endurance **or knowledge**. The term includes a competitive endeavor involving physical attributes of contestants. **The term also includes trivia contests.**

Floor shows—**Live entertainment involving musical, dance or comedy acts. To constitute a musical act, there must be a vocalist or singer, more than two instrumentalists or a disc jockey.**

Game—A device, such as a pinball, shuffleboard, bowling **[or]**, video machine **or electronic tablet** which provides the player with amusement and no other form of award excepting free plays.

Instrumental music—Music generated by instruments played by **[musicians]** **no more than two instrumentalists** without vocal accompaniment.

Sweepstakes—A chance promotion in which tickets or game pieces are distributed and the winner or winners are selected in a random drawing.

Theatricals—**The performance of a play, musical or drama. The term includes poetry readings.**

§ 5.32. Restrictions/exceptions.

- (a) [Reserved].

(b) [Reserved].

(c) [A licensee may not directly or indirectly employ a minor person under 18 years of age as an entertainer in the licensed establishment, or in a room or place connected therewith, nor may a licensee permit in the establishment, room or place, a minor person under 18 years of age to act as an entertainer.] [Reserved].

(c.1) A licensee may only employ or engage a minor under 18 years of age as an entertainer if it does so in accordance with the Child Labor Act (43 P.S. §§ 40.1—40.14).

(d) A hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub or malt beverage eating place licensee may not hold or permit to be held, on the licensed premises an event, tournament or contest; nor advertise, offer, award or permit the award on the licensed premises of trophies, prizes or premiums, for any purpose except as follows:

(1) A hotel, restaurant, club or malt beverage eating place licensee may permit to be held within the licensed premises an event sanctioned by the State Athletic Commission under 5 Pa.C.S.**A**, Part I, **[Subparts A and B] Subpart B** (relating to **[general provisions; and boxing] the Boxing Act, 5 PA.C.S.A. §§ 301—1701**) or under 5 Pa.C.S.**A**, Part I, Subpart C (relating to the Wrestling Act, **5 PA.C.S.A. §§ 1901—2110**). Only malt or brewed beverages, as generally permitted by the class of license involved, may be sold, served or delivered on that portion of the licensed premises where the event is held, and not sooner than 1 hour before, and not later than 1 hour after the event. Service of malt or brewed beverages at these events will be conducted only with the prior written approval of the State Athletic Commission filed with the Board. Drinks shall be dispensed in that portion of the licensed premises where the event is conducted only in paper or plastic cups.

(2) A hotel, restaurant, club or malt beverage eating place licensee may hold or permit to be held within the licensed premises or in a bowling alley immediately adjacent thereto as provided in sections 406(a)(1) and 442(b) of the Liquor Code (47 P.S. §§ 4-406(a)(1) and 4-442(b)), a bowling tournament or bowling contest. Liquor and malt or brewed beverages, as generally permitted by the class of license involved, may be served, sold or delivered at the bowling tournament or bowling contest by the licensee.

(3) A hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub or malt beverage eating place licensee may permit the conduct of events on the licensed premises by groups constituting a league. Liquor and malt or brewed beverages, as generally permitted by the class of license involved, may be sold, served or delivered at the events on the licensed premises.

(4) Hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub or malt beverage eating place licensees may permit the conduct of tournaments and contests on the licensed premises for the benefit of, and officially sponsored by, bona fide charitable organizations. **The following apply:**

(i) A charitable organization for the purposes of this section is defined **[as one qualified, approved by and registered with the Department of State and operated under 49 Pa. Code Part I, Subpart B (relating to charitable organizations)] as in the Solicitation of Funds for Charitable Purposes Act (10 P.S. §§ 162.1—162.23).**

(ii) Charitable organization functions shall be operated in accordance with the Solicitation of Funds **[For] for** Charitable Purposes Act ~~{(10 P.S. §§ 162.1—162.24)162.23}~~ and, if applicable, the Local Option Small Games of Chance Act **[(10 P.S. §§ 311—327)] (10 P.S. §§ 328.301—328.308328.3101)**, and the Bingo Law (10 P.S. §§ 301—308.1).

(5) Hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub and malt beverage eating place licensees may conduct self-sponsored tournaments, events or contests on their own licensed premises so long as the activities are in conformance with the applicable provisions of this subchapter.

(e) For an activity conducted under this subchapter, the following apply:

(1) ~~{There may not be lewd, immoral or improper conduct by the~~ **THE licensee, its servants, agents, employees, patrons or event, contest or tournament participants.} ~~[Reserved].~~ **MAY NOT ENGAGE IN CONDUCT OTHERWISE PROHIBITED BY LAW.****

(2) There may not be unlawful gambling directly or indirectly associated with an activity on the licensed premises. A licensee will be held strictly liable for unlawful gambling on the licensed premises.

(3) There may not be an event, contest or tournament which involves the consumption of alcoholic beverages by an event, tournament or contest participant. **In addition, no amount of liquor, alcohol, or malt or brewed beverages may be offered as a prize for participating in an event, contest or tournament, whether for on-premises or off-premises consumption.**

(4) The price of a ticket or evidence of admission to an event, tournament or contest may not include a charge or assessment for alcoholic beverages or entitle the holder thereof to receive an alcoholic beverage anywhere on the licensed premises except for alcoholic beverages included in a meal package offering as provided for in Chapter 13 (relating to promotion).

(5) A licensee or sponsoring **[charity] charitable organization** may advertise an event, tournament or contest.

(6) Hotel, restaurant, club, privately-owned public golf course, privately-owned private golf course, municipal golf course, brew pub and malt beverage eating place licensees, as well as governing bodies of professional golf, skiing, tennis, bowling, pocket billiards and nonlicensee sponsors as provided in subsection (e) may award prizes to contestants or participants of events, tournaments or contests.

(7) The total value of all prizes for any given event, tournament or contest may not exceed **[\$1,000] \$2,000**. The total value of all prizes awarded in any 7-day period may not exceed

~~[\$25,000]~~ **\$35,000**. An event, tournament or contest conducted under the authority of the Local Option Small Games of Chance Act ~~{(10 P.S. § § 328.101—328.707328.3101)}~~ or the Bingo Law ~~{(10 P.S. § § 301—308.1)}~~ is subject to the prize limits in these acts.

(8) Golf, skiing, tennis, pocket billiards or bowling events, tournaments, contests and events sanctioned by the State Athletic Commission are exempted from the prize value restrictions in this section.

(9) Licensees shall maintain on the licensed premises for 2 years, from the date of the event, an itemized list of all prizes for each event, tournament, contest indicating each prize, its value and the name and address of the recipient.

(f) The restrictions in this section apply not only to the licensee, but to partners, officers, directors, servants, agents and employees of a licensee.

(g) [Municipalities may petition the Board for exemption from the Board’s regulations regarding the enforcement of subsection (a) for all licensees within an identifiable area in accordance with section 493.1(b) of the Liquor Code (47 P.S. § 4-493.1(b)).] [Reserved].

(h) A manufacturer, manufacturer’s representative or licensee may sponsor sweepstakes promotions. Permissible sweepstakes shall provide that the following conditions apply:

(i) No purchase is necessary to enter.

(ii) Entrants shall be 21 years of age or older.

(iii) Retail licensed premises may only be involved as pick-up or drop-off points for entry forms and not for the conducting of drawings or the awarding of prizes.

(iv) Alcoholic beverages may not be part of the prize.

Commonwealth of Pennsylvania
Pennsylvania Liquor Control Board
June 11, 2024

**SUBJECT: Final Form Regulation Package 54-104
Duties and Rights of Licensees**

**TO: DAVID SUMNER, EXECUTIVE DIRECTOR
INDEPENDENT REGULATORY REVIEW COMMISSION**

FROM: JASON M. WORLEY 
CHIEF COUNSEL
PENNSYLVANIA LIQUOR CONTROL BOARD

By E-Mail

The Pennsylvania Liquor Control Board (“PLCB”) is submitting final form amendments to sections 5.30 and 5.32 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 PLCB received comments from the Independent Regulatory Review Commission (“IRRC”), the Independence Law Center, and the Honorable John A. Lawrence. The responses to these comments are set forth in a separate document, which is also attached.

The proposed version of these regulations was provided to the legislative oversight committees, IRRC and to the Legislative Reference Bureau on April 25, 2023.

If you have any questions and comments about this regulatory submission, feel free to contact the Office of Chief Counsel, Pennsylvania Liquor Control Board, at RA-LBLegal@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**

RECEIVED

I.D. NUMBER: 54-104
SUBJECT: Duties and Rights of Licensees
AGENCY: Pennsylvania Liquor Control Board

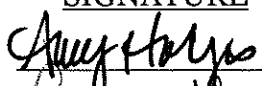
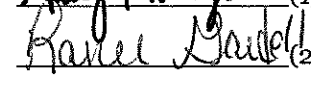

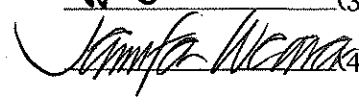
Independent Regulatory
Review Commission

June 11, 2024

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>
6.11.24	 (1)	SENATE LAW & JUSTICE COMMITTEE (Majority)
6.11.24	 (2)	SENATE LAW & JUSTICE COMMITTEE (Minority)
6.11.24	 (3)	HOUSE LIQUOR CONTROL COMMITTEE (Majority)
6/11/24	 (4)	HOUSE LIQUOR CONTROL COMMITTEE (Minority)
_____	_____ (5)	INDEPENDENT REGULATORY REVIEW COMMISSION