

RULES AND REGULATIONS

Title 40—LIQUOR

LIQUOR CONTROL BOARD

[40 PA. CODE CHS. 9 AND 11]

Transportation, Importation, Disposition and Storage; Purchases and Sales

The Liquor Control Board (Board) amends §§ 9.96, 9.108(a) and (b), 11.1, 11.201(a)—(d) and deletes §§ 11.201(e)—(h) and 11.202 to read as set forth in Annex A.

Section 11.201(e)—(h) is being deleted because it contains essentially the same provisions as those found in the previous version of section 447 of the Liquor Code amended by Act 196 of 1996 (act) (47 P. S. § 4-447).

Amendments to §§ 9.96 and 9.108(a)(b) are necessary to establish Malt Beverage Compliance for dealing with franchise or territorial agreements and brand registration as specified in the act. Amendments to §§ 11.1, 11.201(a)—(d) and the adoption of § 11.203, are being made to establish guidelines for reporting wholesale prices by manufacturers, importing distributors and distributors; monitoring and investigating wholesale price changes; and, to establish procedures for hearings on price changes as prescribed by the act.

Notice of proposed rulemaking is omitted under section 204(1) of the act of July 31, 1968 (CDL) (P. L. 769, No. 240) (45 P. S. § 1204(1)) since these regulatory amendments arise from the interpretation of a self-executing Act of Assembly, and further, are related to agency practice and procedure.

Fiscal Impact

These regulatory changes will impose no new costs upon out-of-State manufacturers, distributors and importing distributors of malt or brewed beverages, the Board or the public.

Paperwork Requirements

These amendments will impose additional paperwork requirements upon malt or brewed beverage manufacturers, distributors and importing distributors to the extent that they will be required to post their wholesale prices with Malt Beverage Compliance on an annual basis,

Statutory Authority

The authority for these amendments is section 207 (i) of the Liquor Code (47 P. S. § 2-207 (i)).

Contact Person

Anyone requiring an explanation of these amendments or information related thereto, should contact Jerry Danyluk, Room 401, Northwest Office Building, Harrisburg, PA 17124-0001.

Regulatory Review

Under section 5(f) of the Regulatory Review Act (71 P. S. § 745.5(f)), on November 18, 1997, the Board submitted copies of these amendments with proposed rulemaking omitted to the Independent Regulatory Review Commission (IRRC) and to the Chairpersons of the House Committee on Liquor Control and Senate Committee on Law and Justice. On the same date, the amendments were submitted to the Office of Attorney General for review and approval under the Commonwealth Attorneys

Act (71 P. S. §§ 732-101—732-506). In accordance with section 5(c) of the Regulatory Review Act, these amendments were deemed approved by the House Liquor Control Committee and by the Senate Law and Justice Committee on December 9, 1997 and were approved by IRRC on December 11, 1997.

Findings

The Board finds that:

(1) The notice of proposed rulemaking is omitted under the authority of section 204(1) of the CDL since these regulatory amendments arise from the interpretation of a self-executing Act of Assembly, and further relate to Board practice and procedure.

(2) The amendment of the Board's regulations in this order is necessary and appropriate for the administration and enforcement of the authorizing statutes.

Order

The Board, acting under the enabling statute, orders that:

(a) The regulations of the Board, 40 Pa. Code Chapters 9 and 11, are amended by amending §§ 9.96, 9.108, 11.1 and 11.201; by adding §§ 11.203—11.205; and by deleting § 11.202 to read as set forth in Annex A.

(b) The Board shall submit this order and Annex A to the Office of Attorney General for approval as to form and legality as required by law.

(c) The Board shall certify this order and Annex A and deposit them with the Legislative Reference Bureau as required by law.

(d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

JOHN E. JONES, III,
Chairperson

(Editor's Note: For the text of the order of the Independent Regulatory Review Commission relating to this document, see 27 Pa.B. 6878 (December 27, 1997).)

Fiscal Note: 54-52. No fiscal impact; (8) recommends adoption.

Annex A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 9. TRANSPORTATION, IMPORTATION, DISPOSITION AND STORAGE

Subchapter E. IMPORTATION AND DISTRIBUTION OF MALT OR BREWED BEVERAGES

GENERAL PROVISIONS

§ 9.96. Distribution rights.

(a) *Agreements, franchises or statements of distribution rights.* Agreements, franchises or statements of distribution rights given by a manufacturer or by an importing distributor under section 441 of the Liquor Code (47 P. S. § 4-441) shall be in writing, and a correct copy thereof shall be permanently maintained on the licensed premises of each party to the agreement, franchise or statement. The agreement, franchise or statement of distribution rights shall be open to inspection by authorized representatives of the Board at all times.

(b) *Filing and posting.*

(1) An importing distributor and secondary importing distributor deriving rights of distribution by agreement with a manufacturer or importing distributor shall comply with the following:

(i) Post and keep posted at all times on the licensed premises of the importing distributor, in a conspicuous place near to the license issued to the importing distributor by the Board, a schedule designating the territorial areas of, limits of or rights vested in the importing distributor by a manufacturer or importing distributor. The importing distributor shall furnish to distributors and importing distributors in his territory to whom he intends to sell, a schedule in which the territorial areas of the selling distributor or importing distributor are set forth, and he shall obtain the signatures on a copy of the schedule of distributors or importing distributors to whom he intends to sell. These signed copies of schedules shall be kept on file in the selling distributor's office or importing distributor's office.

(ii) File with the Board's Office of Malt Beverage Compliance, a certified copy of each franchise or territorial agreement entered into with a manufacturer or importing distributor.

(iii) File with the Board's Office of Malt Beverage Compliance, a certified copy of each revised, altered or modified franchise or territorial agreement revising, altering or modifying previously existing agreements, within 10 days of execution thereof.

(iv) Repost on the licensed premises within 5 days of execution of the revised, altered or modified agreement the schedule required under paragraph (1) indicating changes in territorial areas, limits or rights as a result of revision, alteration or modification of a previously existing agreement; furnish to distributors or importing distributors in his territory to whom he intends to sell, a revised, altered or modified schedule indicating changes in territorial areas, limits or rights as a result of the revision, alteration or modification of a previously existing agreement; and obtain the signatures of the distributors or importing distributors on copies thereof.

(2) Distributors, when making purchases from importing distributors or secondary distributors, have the right to rely upon territorial areas, limits or rights posted on the premises of the importing and secondary distributors.

RECORDS AND REPORTS

§ 9.108. Brand registration.

(a) *Definitions.* For the purpose of malt or brewed beverage brand registration as required by section 445 of the Liquor Code (47 P. S. § 4-445), the following words and terms, when used in this section, have the following meanings, unless the context clearly indicates otherwise:

Brand—Malt or brewed beverages, distinguished by a unique prescribed formula and sold under a distinct label. Differences in packaging such as different style, type or size of container are not considered different brands.

Franchisee—A person, corporation, partnership or association in which rights have been conferred by a domestic or nondomestic manufacturer of malt or brewed beverages to offer, sell or deliver products within this Commonwealth to licensed importing distributors.

Malt Beverage Compliance—The section of Special Investigations responsible for handling the various duties of brand registration for the Board.

(b) *Registration.* Each brand of malt or brewed beverages that a manufacturer or franchisee offers, sells or delivers within this Commonwealth shall be first registered with the Board by filing the proper forms with Malt Beverage Compliance. The registration shall be on forms as provided by the Board and shall be renewed annually. An initial application shall be accompanied by:

(1) A label or copy of a label for each brand registered and a Federal label approval containing a copy of the label.

(2) A copy of a territorial franchise agreement between the manufacturer and each Pennsylvania importing distributor.

(3) If the brand registrant is an out-of-State importer/wholesaler the following:

(i) A copy of the agreement designating the United States importer/wholesaler as the authority to market in this Commonwealth.

(ii) A copy of the territorial/franchise agreements between the importer/wholesaler and each Pennsylvania importing distributor. The agreement shall contain the written consent and approval of the out-of-State domestic or nondomestic manufacturer to the appointment of the Pennsylvania importing distributor and the rights conferred thereunder.

(4) If the brand registrant is a licensed Pennsylvania importing distributor holding an agreement as franchisee with a nondomestic manufacturer, a copy of the agreement with the nondomestic manufacturer.

(c) *Notification of changes.* Changes in brand ownership, franchise agreements, territorial agreements or the desire to offer, sell or deliver additional brands of malt or brewed beverages, shall be reported to the Board within 30 days.

CHAPTER 11. PURCHASES AND SALES

Subchapter A. GENERAL PROVISIONS

RETAIL AND WHOLESALE PURCHASE—GENERAL

§ 11.1. Definitions.

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

Market conditions or other good cause—Factors that affect the wholesale price of malt or brewed beverages, including, but not limited to, the following: the availability and cost of raw materials, labor, transportation, weather, natural disaster, or other extraordinary events affecting supply and demand.

Manufacturer—A person engaged in the manufacture, rectification or compounding of liquors, other than wines, or an agent or representative of the manufacturer. The term, as it relates to Subchapter L (relating to manner of changing prices of malt or brewed beverages), is any entity licensed for and engaged in the manufacture of malt or brewed beverages within this Commonwealth or elsewhere.

State, territory or county of origin—The place where liquors other than wines offered for sale to the Board are manufactured, rectified or compounded for the market.

Subchapter L. MANNER OF CHANGING PRICES OF MALT OR BREWED BEVERAGES

§ 11.201. Malt beverage compliance and reporting requirements generally.

(a) This subchapter implements the manner in which wholesale prices of malt or brewed beverages shall be changed by manufacturers, importing distributors and distributors, in accordance with Act 196 of 1996 (Act 196), and for active supervision by the investigative unit specified in Act 196, to be known as Special Investigations, within which is Malt Beverage Compliance. Malt Beverage Compliance is responsible for all aspects of the implementation of Act 196 as specified in this subchapter as well as other duties specified in this title and as the Board may from time to time prescribe.

(b) Manufacturers, importing distributors and distributors shall file their wholesale prices (commonly referred to in the malt beverage industry as "case one" prices) for all configurations sold, including volume discount price structures, with Malt Beverage Compliance between February 1 and April 1 of every calendar year. These wholesale prices shall be those in effect on April 1 of the calendar year in which the prices are reported to Malt Beverage Compliance.

(c) Manufacturers, importing distributors and distributors that do not sell for resale shall so indicate, in writing, to Malt Beverage Compliance by April 1 of each year.

(d) The reporting requirements specified in this subchapter are in addition to those contained in section 447 of the Liquor Code (47 P. S. § 4-447). Price information reported to Malt Beverage Compliance is public information and will be available for inspection upon written request to: Malt Beverage Compliance, Northwest Office Building, Harrisburg, PA 17124-0001.

§ 11.202. (Reserved).

§ 11.203. Hearing procedures.

(a) When a wholesale price is increased within 120 days of a price reduction due to market conditions or any good cause, sales may be made at the new price and Malt Beverage Compliance shall be notified in writing within 48 hours after the change in price. A hearing will be scheduled as soon as possible before a Board Hearing Examiner to determine if the wholesaler can show by admissible evidence that market conditions or other good cause justifies the price increase.

(b) Malt Beverage Compliance will:

(1) Upon receipt of a notice of price increase, conduct a prehearing investigation by visiting the premises of the applicant, completing a price increase report and obtaining any other relevant documentation:

(2) Notify the applicant for price increase of its right to waive the hearing and provide a copy of the waiver of hearing form to the applicant:

(3) Complete its report promptly and submit the report to the Board, upon receipt of a signed waiver of hearing.

(4) Notify the applicant of the time and place of the scheduled hearing if the hearing is not waived.

(5) Immediately send written notice to the applicant by certified mail (return receipt requested) following the Board meeting announcing the decision.

(c) Hearings held before an examiner of the Board shall be conducted under 1 Pa. Code Part II (relating to Rules of Administrative Practice and Procedure). After accepting

evidence, the examiner will submit a report and recommendation within 7 working days to the Board for its determination. The decisions by the Board relating to price changes are final. Appeals shall be filed with the Commonwealth Court under 42 Pa.C.S. § 763 (relating to direct appeals from government agencies) within 30 days of the Board's decision.

(d) A person who can demonstrate a direct interest in an application to raise a wholesale price under this section may file a request to intervene in these proceedings. The request shall include the name, address, telephone number and a statement of the direct interest and reasons for intervention of the person filing. The request shall be received by Malt Beverage Compliance at least 48 hours before the hearing to be considered. Notice of hearing will be provided in writing to persons meeting the filing requirements.

(e) The hearing examiner has the discretion to receive evidence from anyone filing a timely request to intervene. A recommendation on the party status of those requesting intervention will be included in the examiner's report for the Board's consideration.

(f) Upon waiver of hearing, the applicant and anyone requesting intervention shall submit an affidavit of testimony regarding the price change to Malt Beverage Compliance. The affidavits and investigative report will be submitted by Malt Beverage Compliance to the Board for a decision at its next public meeting.

§ 11.204. Refusal to grant price increase.

If the Board refuses to grant the price increase requested, the manufacturer, importing distributor or distributor shall without regard to its right of appeal:

(1) Immediately revert to the price charged before the increase denied by the Board.

(2) Refund, to all wholesale customers, the total difference between the increased price charged for the product purchased and the price which was in effect prior to the increase.

(3) Provide a written statement to Malt Beverage Compliance within 30 days of the Board's decision with an accounting of the refunds made to its customers.

§ 11.205. Noncompliance.

A manufacturer, importing distributor or distributor who is not in compliance with the reporting requirements of section 447 of the Liquor Code (47 P. S. § 4-447) or this subchapter may be granted up to 48 hours by Malt Beverage Compliance to take the necessary steps to come into compliance including, but not limited to, rescinding price changes on its wholesale prices or submitting the proper information, or both. Subsequent noncompliance by the same wholesaler may result in referral to the Pennsylvania State Police, Bureau of Liquor Control Enforcement for citation proceedings to show cause why the license or privilege to transact business within this Commonwealth should not be suspended or revoked or a fine imposed.

[Pa.B. Doc. No. 98-82. Filed for public inspection January 16, 1998, 9:00 a.m.]