

RULES AND REGULATIONS

Title 40—LIQUOR

LIQUOR CONTROL BOARD

[40 PA. CODE CHS. 9 AND 11]

Return of Liquor

The Liquor Control Board (Board), under the authority of section 207(i) of the Liquor Code (47 P.S. § 2-207(i)), amends Chapter 9, Subchapter F (relating to disposition of liquor and malt or brewed beverages under certain conditions) and adds Chapter 11, Subchapter O (relating to return of liquor to the Board by licensees or permit holders) to read as set forth in Annex A.

Summary

This final-form rulemaking provides guidance to licensees and permit holders for returning liquor to the Board in the ordinary course of business. In addition, it clarifies existing regulations governing the disposition of liquor and malt or brewed beverages under certain circumstances.

The Liquor Code (47 P.S. §§ 1-101—10-1001) makes the Board the primary wholesaler of liquor in this Commonwealth and, as a result, the Board is responsible for supplying liquor to licensees and permit holders for resale. However, the Liquor Code does not address the circumstances under which the Board may accept returns of liquor from licensees or permit holders. Moreover, the Board's regulations were insufficient, since they only addressed repurchases of liquor returned to the Board by licensees going out of business, bankruptcy estates or officers of the law.

To date, returns of liquor by licensees and permit holders in the ordinary course of business have been governed by policies and procedures applicable to the operation of the Board's Fine Wine & Good Spirits stores. With the passage of the act of June 8, 2016 (P.L. 273, No. 39), which authorizes certain licensees who obtain wine expanded permits to sell wine for off-premises consumption, there is a greater need to provide clear and consistent guidance for all licensees and permit holders wishing to return liquor to the Board.

Federal laws and regulations govern the return of alcoholic beverages sold in interstate or foreign commerce. Federal laws and regulations generally make it unlawful to sell products with the privilege of returning those products for any reason other than ordinary and usual commercial reasons arising after the product has been sold. See section 105(d) of the Federal Alcohol Administration Act (27 U.S.C.A. § 205(d)) and 27 CFR 11.31 (relating to general).

Federal regulations define what constitutes "ordinary and usual commercial reasons" for the return of products and outline the conditions and limitations for returns. See 27 CFR 11.32—11.46. These Federal regulations are not generally applicable to sales transactions between the Board and licensees or permit holders in this Commonwealth since they do not occur in interstate or foreign commerce. However, the Federal regulations do offer significant guidance for the return of liquor, which the Board has followed in this final-form rulemaking. They also limit the circumstances under which the Board may seek to return product to its suppliers.

Chapter 11, Subchapter O is based on the previously referenced Federal regulations, albeit tailored to meet the Board's needs and to provide necessary guidance to the regulated community.

Section 11.231 (relating to general provisions) is added to explain the guiding principle for the return of liquor to the Board, which is that liquor may be returned for ordinary and usual commercial reasons arising after the product has been sold. This section is based on 27 CFR 11.31, 11.35, 11.36, 11.45 and 11.46.

Proposed § 11.231 provided that a refund would be given either at the price paid or the then-available price, whichever was lower. In response to a comment from the Independent Regulatory Review Commission (IRRC), final-form § 11.231 is revised to state that the refund will equal the price paid, as evidenced by documentation of the transaction. Final-form § 11.231 is further revised to define "documentation of the transaction" as including a signed bill of lading, a licensee sales invoice or a point of sale receipt. This explains to the licensee what type of paperwork or proof is required to establish the price paid for the product that is being returned.

Section 11.231 also sets forth examples of what is not considered by the Board to be ordinary and usual commercial reasons for the return of liquor, such as when product is sought to be returned because the licensee is overstocked. These examples, which generally follow Federal law, are provided so that the regulated community will know, in advance, whether a return of liquor will be accepted.

Section 11.231(b)(4) is added in this final-form rulemaking to state that the Board will not accept product sought to be returned because it was damaged after the product has left the custody or control of the Board. In this situation, the licensee's recourse would be against the person or entity that damaged the product after it left the custody or control of the Board.

Section 11.231 provides a "signpost" to §§ 9.113 and 9.114 (relating to requests for repurchase by licensees who have discontinued business or sold their licensed business; information to be furnished; and repurchase of liquor presented to the Board) to reduce confusion over which section is applicable when a licensee wants to dispose of its remaining inventory of liquor because it will no longer be operating.

Section 11.231(e) is added in this final-form rulemaking to explain the amount of the refund (the price paid by the licensee) and the amount of the handling charge. The handling charge is calculated to be 12.5% of the price paid or \$50, whichever is greater. In situations when the handling charge may be applied, it will only be assessed when 12 bottles or more are accepted for refund.

Section 11.231(f) is added in this final-form rulemaking to advise that the return of any liquor purchased as a special order listing is subject to § 11.239 (relating to special order listings).

Section 11.232 (relating to defective products) is based on 27 CFR 11.32 (relating to defective products) and sets forth the first of the ordinary and usual commercial reasons for the return of liquor. Defective products are those that are unmarketable at the time of purchase because of product deterioration, leaking containers, damaged labels, or missing or mutilated tamper evident closures.

Proposed § 11.232 required product to be returned within 15 days of product delivery. IRRRC suggested that “or pickup” be added after “product delivery.” IRRRC also asked for the Board’s rationale for the proposed time limits.

The Board proposed a 15-day time frame for the return of defective or erroneous product to be able to reconcile, within a short period of time, the accounts of the licensees that returned product. However, the Board’s return policy for sales to private individuals (nonlicensees) requires individuals to return product within 30 days with a receipt. Therefore, the standard time frame for licensee returns is also 30 days. In the interest of consistency, final-form § 11.232 is revised to require returns of defective product to be made within 30 days of purchase (except for special order listings), to be consistent with the Chapter 9 (relating to transportation, importation, disposition and storage) and to provide for easier enforcement.

Proposed § 11.232 required a licensee to apply the refund toward the purchase of an equal quantity of the same product. Proposed § 11.232 was intended to serve as a reflection of what typically occurs and was not meant to limit a licensee’s options. In response to a comment from IRRRC, this requirement was deleted and this final-form rulemaking provides that the licensee may return product for a refund. Therefore, this final-form rulemaking is revised so that the licensee is free to utilize the refund as it sees fit.

Section 11.233 (relating to error in products delivered) is based on 27 CFR 11.33 (relating to error in products delivered) and is the second of the ordinary and usual commercial reasons for the return of liquor. This scenario occurs when the licensee has ordered one type of product and received a different type of product.

Proposed § 11.233 established that product returned under this section should be returned within 15 days of product delivery. The time frame is revised in this final-form rulemaking to “within 30 days of purchase” in the interest of consistency throughout Chapter 11, Subchapter O and to provide for easier enforcement.

Under proposed § 11.233, the licensee was required to provide “proof of the order and the discrepancy in question.” This phrase was deleted and replaced with “documentation of the transaction, as defined in § 11.231(d) (relating to general provisions), and the erroneous product.” “Documentation of the transaction” may include a signed bill of lading, a licensee sales invoice or a point of sale receipt.

Proposed § 11.233 required a licensee to apply the refund toward the purchase of an equal quantity of the same product. This was intended to serve as a reflection of what typically occurs and was not meant to limit a licensee’s options. In response to a comment from IRRRC, this proposed requirement was deleted and this final-form rulemaking provides that the licensee may return product for a refund. The licensee is free to utilize the refund as it sees fit. Proposed subsections (b) and (c) were deleted in this final-form rulemaking.

Section 11.234 (relating to products that may no longer be lawfully sold) is based on 27 CFR 11.34 (relating to products which may no longer be lawfully sold) and is the third of the ordinary and usual commercial reasons for the return of liquor. This scenario may occur when a product may no longer be sold because a Federal or State law, regulation or administrative procedure was changed. For example, a law may be enacted that prohibits the

sale of any beverages that contain alcohol and caffeine. Another example is when a court rules that a product infringes upon another manufacturer’s trademark and can no longer be sold.

The manufacturer may advise licensees directly about the change in the legal status of its product, and will notify the Board since the Board serves as the principal wholesaler for this Commonwealth. Once the Board is advised of the change in legal status, the Board will notify the licensed community by e-mail.

Proposed § 11.234 did not provide a time limit for the return of liquor. This section is revised to provide licensees 30 days from the date of notification that a product may no longer be sold lawfully to return the product to the Board. Because this product will no longer be a factor in ongoing business transactions between the Board and a licensee, but is being returned to the Board for the final time, the Board believes that 30 days from the date of notification is a reasonable time frame for a licensee to return the unlawful product. This also allows the Board to seek proper recourse with the product supplier in a timely manner.

Section 11.235 (relating to product subject to recall or withdrawal) is the fourth of the ordinary and usual commercial reasons for the return of liquor. This section is based on the United States Department of Treasury, Alcohol and Tobacco Tax and Trade Bureau Industry’s Circular No. 2010-6, which addressed product recalls in the alcohol industry.

Proposed § 11.235 only addressed product subject to recall. Generally, a product is subject to recall when it has been determined that the use of or exposure to a product is likely to cause serious adverse health consequences or death to humans or animals.

Final-form § 11.235 is revised to include product that is subject to withdrawal. “Recall” and “withdrawal” are similar but do not mean the same thing. A product recall is invoked by a government agency when a product is unsafe for the public. A product withdrawal is invoked by a manufacturer when a product is suffering from quality issues, not safety issues. The Board has experienced product recalls and product withdrawals, and wanted to assure the regulated community that recalls and withdrawals are acceptable reasons for a product’s return.

Proposed § 11.235 did not provide a time limit for the return of liquor. Final-form § 11.235 is revised to give licensees 30 days to return product after receiving notification that a product is subject to recall or withdrawal. This period of time is believed to be sufficient given the significant reasons for the return. It also encourages licensees to exercise due diligence upon receiving notification of a product issue so that the Board can pursue recourse with the product supplier in a timely manner.

Section 11.236 (relating to change in product) is based on 27 CFR 11.37 (relating to change in product) and is the fifth of the ordinary and usual commercial reasons for the return of liquor. This section provides for the return of liquor when a product has subsequently been changed in formula, proof, label or container. Usually these changes relate to a change in proof or in the blend of ingredients in the product.

Proposed § 11.236 required a licensee to return product within 30 days of delivery or pickup. Final-form § 11.236 is revised to allow returns—the return of the existing product is voluntary—within 30 days of when the licensee receives notification of the change in formula, proof, label or container. This revision was recommended by IRRRC

and will allow licensees to return product that has been in their inventory for more than 30 days before the announced change in product. It also encourages licensees to exercise due diligence upon receiving notification of a product issue so that the Board can pursue recourse with the product supplier in a timely manner.

Proposed § 11.236 required a licensee to apply the refund toward the purchase of an equal quantity of the same product. Proposed § 11.236 was intended to serve as a reflection of what typically occurs and was not meant to limit a licensee's options. In response to a comment from IRRC, this requirement was deleted and this final-form rulemaking provides that the licensee may return product for a refund. Therefore, the licensee is free to utilize the refund as it sees fit.

This final-form rulemaking clarifies that returns under this section are subject to a handling charge in accordance with § 11.231(e). The imposition of a handling charge in this instance is justified since there is nothing wrong with the existing product. It is future product that is affected by the change in formula, proof, label or container. In other words, the return of the existing product is discretionary on the part of the licensee.

Section 11.237 (relating to discontinued products) is based on 27 CFR 11.38 (relating to discontinued products) and is the sixth of the ordinary and usual commercial reasons for the return of liquor. This section allows a licensee to elect to return product when a manufacturer or importer discontinues the production or importation of the product.

Proposed § 11.237 required the return of product within 30 days of product delivery or pickup. This section is revised to allow returns within 30 days of when the licensee has received notification that the product is being discontinued. This revision was recommended by IRRC and will allow licensees to return product that has been in inventory for more than 30 days before the announced discontinuation.

In addition, the proposed reference to allowing the return "in the Board's discretion" has been deleted. Product will be accepted for return in these circumstances. This final-form rulemaking clarifies that returns under this section are subject to a handling charge in accordance with § 11.231(e). The imposition of a handling charge in this instance is justified since there is nothing wrong with the existing product. In other words, the return of the existing product is discretionary on the part of the licensee.

Section 11.238 (relating to permit holders) is loosely based on 27 CFR 11.39 (relating to seasonal dealers) and is the seventh of the ordinary and usual commercial reasons for the return of liquor. As of April 19, 2018, there have been approximately 9,000 special occasion permit holders, wine auction permit holders and spirit auction permit holders (collectively, permit holders). This figure includes expired permits, since these permits expire at the end of the calendar year, and are typically only renewed as needed throughout the calendar year. Therefore, citing the figure for only active permits would be artificially low.

Permit holders buy liquor for fundraising events and not as part of an ongoing business. As a result, they often want to return liquor that has not been used at the event—sometimes less than a case and, in some situations, truckloads of liquor. Frequently, though, these permits are used at outdoor events, which can have a detrimental impact on the quality of liquor, particularly

wine. A regulation is needed to provide guidance to permit holders as to what the Board needs and expects in order to process a return.

By way of illustration, in 2013, the Board sold alcohol to a permit holder for a Nationally-recognized golf event. The order totaled three truckloads of wine and spirits, which were kept outdoors. At the end of the event, the permit holder tried to return the product that had not been consumed, including partially consumed bottles and bottles of wine that had not been properly stored. This experience underscored the need for regulatory guidance regarding the return of liquor by permit holders.

One of the concerns the Board has regarding liquor returned by permit holders is that, because permit holders are not usually in the business of selling liquor, the Board does not know under what conditions the liquor, particularly wine, has been kept. In the wrong conditions, such as excessive heat or sunlight, product can be ruined. Neither the Board nor the product supplier have control over these conditions once the product is sold and the permit holder takes possession.

Final-form § 11.238 is revised to set forth the conditions that shall be met for the Board to accept the return of liquor from permit holders. In addition, when a permit holder order is picked up or delivered, the permit holder will be asked to initial and sign a pre-authorization form that sets forth the requirements for returning unused product. A copy of the form was included in the final-form rulemaking package submitted to IRRC.

In response to a comment from IRRC, final-form § 11.238 is revised to clarify the situations when the Board will waive the handling charge when product is returned by a permit holder. The handling charge will automatically be waived if a permit holder returns less than 12 bottles that meet the required conditions. If the permit holder is returning 12 bottles or more, the Board will apply the handling charge to all bottles that meet the required conditions. The product must be unopened, unadulterated and in saleable condition. A definition of "saleable" is added in this final-form rulemaking.

Proposed § 11.239 was intended to address situations when the licensee rejected the product delivery and refused to accept the product. Proposed § 11.239 did not fit within the context of this final-form rulemaking at large, which is the return of liquor to the Board after it has been accepted by the licensee. There is no equivalent to proposed § 11.239 in Federal regulations.

Final-form § 11.239 addresses the unique circumstance of special order listings, which the Board is authorized to offer to the public under section 305(a) of the Liquor Code (47 P.S. § 3-305(a)). A special order listing is a product that the Board does not stock that is advertised as being available upon request from the product supplier. The customer is charged for the purchase when the product is shipped from the supplier. There could be as much as a 45-day delay between when a special order is placed and when the licensee can physically receive the product. Therefore, final-form § 11.239 provides that a product may be returned for a refund within 30 days from the date of receipt, rather than 30 days from the date of purchase.

Special order product is not delivered to the Board's warehouses to be handled through standard distribution procedures. It is shipped directly from the supplier to 1 of the Board's approximately 600 stores. As a result, a return of a special order product cannot be processed in the same manner as the Board's inventory. Because the

Board may have previously rejected that product for listing in its stores, or the supplier may have elected to limit distribution of the product by using the special order sales channel, it would not make sense for the Board to accept returns of the product. Therefore, the product supplier shall decide how the special order product return will be handled, within the parameters in §§ 11.231—11.237, and communicate that decision to the Board.

Final-form § 11.239 sets forth the options for the product supplier: 1) pick up the returned product at the Board's store; 2) arrange for the shipment of the returned product back to the supplier; or 3) ask the Board to destroy the returned product. If the Board is asked or required to destroy the special order product, the supplier will be charged a fee.

In October 2017, the Board established return procedures for special order listing products after providing notice of the same to licensees and suppliers. The regulated community has already had an opportunity to comment on these return procedures. Although § 11.239 is added in this final-form rulemaking, it is not new to those affected by it. The Board believes that it is beneficial to codify these procedures by including them in this final-form rulemaking, since it provides consistency to the regulated community and clarifies how special order returns are to be handled compared to returns of other products.

Section 9.111 (relating to alcoholic beverages held by estates; legal process; licensees who have discontinued business) is amended to update the language and delete references to the estate of a decedent, since decedent's estates have the authority under the Liquor Code to sell alcohol through channels other than the Board.

Section 9.111 is further revised to reflect that licensees are not limited to purchasing liquor from the Board. They may purchase from Pennsylvania-licensed manufacturers, such as limited wineries, limited distilleries or distilleries. Therefore, final-form § 9.111 is revised to clarify that, when a licensee discontinues doing business, liquor may be repurchased by the Board or the Pennsylvania-licensed manufacturer from whom it was originally purchased. This was also done to be consistent with the amendment for malt or brewed beverages.

Section 9.112 (relating to requests for repurchase by bankruptcy estates or officers of the law; information to be furnished) is amended by deleting the subsection that addressed the estates of decedents, since decedent's estates are not required to present liquor to the Board for repurchase. Subsections regarding licensees that have discontinued business, with or without the transfer of the license, were deleted as these topics are addressed in § 9.113.

The heading of § 9.112 is revised in this final-form rulemaking to more accurately reflect the section and provide more clarity to the regulated community. Additional verbiage is added to clarify the scenarios addressed in the section.

Final-form § 9.112 is further revised by adding, in each remaining subsection, the type of information that the Board requires to repurchase liquor. Specifically, licensees shall provide information regarding the date of purchase of the product, as evidenced by documentation of the transaction. That phrase is defined in this section, for the convenience of the regulated community, as a signed bill of lading, a licensee sales invoice or a point of sale receipt.

Final-form § 9.112 is revised to clarify that this section does not apply to alcohol seized under Article VI of the Liquor Code (47 P.S. §§ 6-601—6-611), regarding property illegally possessed or used, forfeitures and nuisances. Section 603 of the Liquor Code (47 P.S. § 6-603) addresses the disposition of forfeited property.

The heading of § 9.113 is revised in this final-form rulemaking to more accurately reflect the section.

Final-form § 9.113(a) is revised by adding “who wants to have its remaining liquor inventory repurchased by the Board” for clarity. Subsection (a) is further revised regarding the information a licensee shall provide to the Board, specifically the date of purchase of the product as evidenced by documentation of the transaction. That phrase is defined in subsection (d) as a signed bill of lading, a licensee sales invoice or a point of sale receipt. This was done to be consistent with revisions to Chapter 11 (relating to purchases, sales and returns).

Final-form § 9.113(b) is revised to include a listing of all the information that the licensee shall provide to the Board. This is the same list in § 9.113(a), which pertains to the discontinuance of business without the transfer of the license. Because subsection (b) pertains to the sale of the licensed business, the Board believes that reiterating the list in § 9.113(b) is appropriate, since the information required is the same, and the former regulation did not clearly express this to the regulated community.

Because of the restructuring of § 9.113(b), it was necessary to renumber proposed paragraph (2) as final-form subsection (c). Therefore, subsection (c) does not provide new information to the regulated community. Subsection (c) addresses the scenario when a licensee selling its licensed business wants to transfer its liquor and malt or brewed beverages inventory to the person buying the license.

A minor grammatical change was made to § 9.114(a)—“and” was changed to “or”—to reflect that the licensee is only required to provide the information in one of the sections, not both. Cross-references to §§ 9.112 and 9.113 are revised to reflect the new headings.

Final-form § 9.114 is revised by deleting language that the licensee would be given the price paid or the current price, whichever is lower, and replacing it with language that the licensee will be given the price paid. This was done to be consistent with revisions to Chapter 11.

Final-form § 9.114 is revised to explain that a handling charge would be assessed only when 12 bottles or more are accepted for repurchase by the Board. The handling charge is defined as 12.5% of the purchase price or \$50, whichever is greater. This was done to be consistent with revisions to Chapter 11.

Final-form § 9.114 is revised to provide that the Board will generally only accept liquor for repurchase within 30 days of the original purchase. This was also done to be consistent with the time limits established in revised Chapter 11. However, an exception is added in this final-form rulemaking that allows the Board to repurchase liquor outside this 30-day period when it is in the best interests of the Commonwealth and is operationally prudent for the Board to do so.

Final-form § 9.114 is revised to clarify that repurchases will be confined to saleable liquor in the original containers, unopened and unadulterated, as when originally sold by the Board. A definition of “saleable” is added in this final-form rulemaking.

The former text of § 9.115 (relating to repurchase of liquor or malt or brewed beverages presented to a distributor, importing distributor or manufacturer) is deleted in this final-form rulemaking and the heading is revised. The deletion of the former is negligible, since sales of liquor contrary to the Liquor Code and the Board’s regulations are prohibited.

Section 9.115 is now used to clarify that these regulations do not require a Pennsylvania-licensed distributor, importing distributor or manufacturer to repurchase liquor or malt or brewed beverages; they have the discretion to do so. Final-form § 9.115 reminds these entities to keep records pertaining to repurchases in accordance with sections 493(12) and 512 of the Liquor Code (47 P.S. §§ 4-493(12) and 5-512).

Affected Parties

The affected parties include licensees and permit holders that want to return product to the Board. As of April 19, 2018, there were approximately 13,919 active licensees and permit holders that could be affected by this final-form rulemaking. The members of the regulated community will benefit from the guidance and clarity provided by this final-form rulemaking, as they will be able to better understand what is required, and by when, to successfully return product to the Board. They will also be able to better understand what options exist for disposing of products under certain circumstances, such as the discontinuance of business or bankruptcy, or both.

Paperwork Requirements

The regulated community will be required to provide proof or evidence to support the reasons for return in some instances and may be required to do so in other instances. However, this proof or evidence would consist mostly of documentation of the sales transaction that is already required to be retained by the regulated community for 2 years, under section 493(12) of the Liquor Code. The Board will also have some recordkeeping obligations as a result of this final-form rulemaking, but the Board already has substantial measures in place relative to purchases and tracking returns. Sections 9.112 and 9.113 require some basic information to process a request for the Board to repurchase liquor from a licensee that is no longer in business. Aside from a simple form to be completed by special occasion permit holders, wine auction and spirit auction permit holders, there will be no other new paperwork requirements.

Fiscal Impact

The Board will issue a refund for product that it accepts for return. The refund will be the price paid for the product. In certain situations, the refund will be reduced by the assessment of a handling charge of 12.5% of the refund or \$50, whichever is greater. The handling charge will be waived in situations where the product is defective, is not what the licensee ordered, may no longer lawfully be sold or is subject to a recall or withdrawal. Handling charges will not be assessed if less than 12 bottles are accepted for return.

Effective Date

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

Contact Person

Questions regarding this final-form rulemaking should be addressed to Rodrigo Diaz, Chief Counsel, Jason Worley, Deputy Chief Counsel, or Norina Foster, Assistant Counsel, Office of Chief Counsel, 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 May 4, 2017, the Board submitted a copy of the notice of proposed rulemaking, published at 47 Pa.B. 2978 (May 27, 2017), to IRRC and 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, IRRC and the House and Senate Committees were provided with copies of the 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 from IRRC.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 27, 2018, this final-form rulemaking was deemed approved by the House and Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 28, 2018, and approved this final-form rulemaking.

Findings

The Board finds that:

(1) Public notice of intention to adopt the administrative amendments adopted by this order has been given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and the regulations thereunder, 1 Pa. Code §§ 7.1 and 7.2.

(2) The amendments to the Board’s regulations in the manner provided in this order are necessary and appropriate for the administration of the Liquor Code.

Order

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

(a) The regulations of the Board, 40 Pa. Code Chapters 9 and 11, are amended by adding §§ 11.231—11.239 and amending §§ 9.111—9.115 to read as set forth in Annex A.

(*Editor’s Note:* The amendments to § 9.115 were not included in the proposed rulemaking published at 47 Pa.B. 2978.)

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

(c) This order shall become effective upon publication in the *Pennsylvania Bulletin*.

TIM HOLDEN,
Chairperson

(*Editor’s Note:* See 48 Pa.B. 4189 (July 14, 2018) for IRRC’s approval order.)

Fiscal Note: Fiscal Note 54-91 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 40. LIQUOR

PART I. LIQUOR CONTROL BOARD

CHAPTER 9. TRANSPORTATION, IMPORTATION, DISPOSITION AND STORAGE

Subchapter F. DISPOSITION OF LIQUOR AND MALT OR BREWED BEVERAGES UNDER CERTAIN CONDITIONS

§ 9.111. Alcoholic beverages held by estates; legal process; licensees who have discontinued business.

(a) *Liquor.*

(1) Liquor purchased from a State Liquor Store or from a Pennsylvania-licensed limited winery, limited distillery or distillery, forming part of a bankruptcy estate or in the custody of the law under legal process, may only be repurchased by the Board or the Pennsylvania-licensed manufacturer from whom originally purchased as provided in this subchapter.

(2) Liquor in the possession of a licensee at the time the licensed business is discontinued by transfer of the license or otherwise may be sold by the licensee to the transferee or may be repurchased by the Board or the Pennsylvania-licensed manufacturer from whom originally purchased as provided in this subchapter.

(b) *Malt or brewed beverages.*

(1) Malt or brewed beverages purchased from a Pennsylvania-licensed distributor or importing distributor or manufacturer, forming part of a bankruptcy estate or in the custody of the law under legal process, may only be repurchased by the Pennsylvania-licensed distributor, importing distributor or manufacturer from whom originally purchased. Except and only in the event the Commonwealth or an agency thereof obtains the custody, possession, right of possession or the title to the malt or brewed beverages under legal process or under judicial sale, the Commonwealth or the agency may sell the malt or brewed beverages to any distributor of any class or to the Pennsylvania-licensed manufacturer who or which is licensed and authorized to buy and sell malt or brewed beverages, and the brand or brands of malt or brewed beverages.

(2) Malt or brewed beverages in the possession of a licensee at the time the licensed business is discontinued by transfer of the license or otherwise may be sold only to the transferee of the license or may be repurchased by the Pennsylvania-licensed distributor, importing distributor or manufacturer from whom originally purchased.

§ 9.112. Requests for repurchase by bankruptcy estates or officers of the law; information to be furnished.

(a) Receivers and trustees in bankruptcy or officers of the law who possess and wish to sell liquor purchased by a licensee from State Liquor Stores may ask for the liquor to be repurchased by the Board by filing a sworn statement containing the following, as applicable:

(1) Receivers and trustees in bankruptcy.

(i) Name and address of bankrupt and date of bankruptcy.

(ii) Name and address of receiver or trustee who shall file with the statement a certified copy of his appointment or election, and a certified copy of the order of court authorizing or directing the sale of liquor.

(iii) Description of the liquor, including brand name, size and number of containers of each brand, and date of purchase, as evidenced by documentation of the transaction.

(2) Officers of the law.

(i) Name and address of debtor, and nature of debt.

(ii) Name and address of sheriff, constable or other officer of the law who shall file with the statement written evidence of his authority to act, together with the name of court, and number and term or name of magistrate.

(iii) Description of the liquor, including brand name, size, number of containers of each brand and date of purchase, as evidenced by documentation of the transaction.

(b) For purposes of this section, “documentation of the transaction” may include a signed bill of lading, a licensee sales invoice or a point of sale receipt.

(c) This section does not apply to alcohol seized under Article VI of the Liquor Code (47 P.S. §§ 6-601—6-611).

§ 9.113. Requests for repurchase by licensees who have discontinued business or sold their licensed business; information to be furnished.

(a) *Discontinuance without transfer of license.* A licensee who has discontinued business without transfer of the license who wants to have its remaining liquor inventory repurchased by the Board shall provide the Board with all of the following information:

(1) Name and address of licensee.

(2) Written statement under oath that the licensee has discontinued the licensed business and the date thereof. If the business has been discontinued due to the death of the licensee, all of the following additional information shall be provided:

(i) Name and address of the decedent, and date of death.

(ii) Name and address of the executor or administrator who shall file with the statement documentary evidence of the death of the licensee.

(3) Description of the liquor, including brand name, size and number of containers of each brand, and date of purchase, as evidenced by documentation of the transaction.

(b) *Sale of licensed business and repurchase of liquor inventory by the Board.* A licensee who is selling its licensed business and who wants to have its remaining liquor inventory repurchased by the Board shall provide the Board with all of the following information:

(1) Name and address of licensee.

(2) Written statement under oath that the licensee has sold its licensed business and the date thereof.

(3) Description of the liquor, including brand name, size and number of containers of each brand, and date of purchase, as evidenced by documentation of the transaction.

(c) *Sale of licensed business and transfer of liquor and malt or brewed beverages inventory to the transferee.* A licensee who is selling its licensed business may sell the remaining liquor and malt or brewed beverages inventory to the transferee of the license, in which case the licensee shall provide the Board with all of the following information:

(1) At the time the application for the transfer of the license is filed, a statement that it is the licensee's intention to include the liquor and malt or brewed beverages inventory, or a designated quantity thereof, in the sale of the license.

(2) When the transfer of the license is approved, a sworn statement containing a description of the liquor and malt or brewed beverages, including brand name, size and number of containers of each brand sold to the transferee.

(d) *Documentation of the transaction.* For purposes of this section, "documentation of the transaction" may include a signed bill of lading, a licensee sales invoice or a point of sale receipt.

§ 9.114. Repurchase of liquor presented to the Board.

(a) Upon receipt of the information required under § 9.112 or § 9.113 (relating to requests for repurchase by bankruptcy estates or officers of the law; information to be furnished; and requests for repurchase by licensees who have discontinued business or sold their licensed business; information to be furnished) and verification thereof, the Board may arrange to repurchase some or all of the liquor purchased from State Liquor Stores at the price paid by the licensee. A handling charge of 12.5% or \$50, whichever is greater, will be assessed when 12 bottles or more are accepted for purchase. The Board will only repurchase liquor within 30 days of the original purchase by the licensee, except when the Executive Director of the Board or a designee determines that it is in the best interests of the Commonwealth and operationally prudent for the Board to the repurchase the liquor more than 30 days after the licensee purchased it.

(b) Repurchases will be confined to saleable liquor in the original containers, unopened and unadulterated, as when originally sold by the State Liquor Stores. "Saleable" means that the products and containers must look as they did when originally purchased.

§ 9.115. Repurchase of liquor or malt or brewed beverages presented to a distributor, importing distributor or manufacturer.

A Pennsylvania-licensed distributor, importing distributor or manufacturer is not required under this chapter to repurchase liquor or malt or brewed beverages. A Pennsylvania-licensed distributor, importing distributor or manufacturer has the discretion to repurchase liquor or malt or brewed beverages. The Pennsylvania-licensed distributor, importing distributor or manufacturer shall keep records pertaining to repurchases in accordance with sections 493(12) and 512 of the Liquor Code (47 P.S. §§ 4-493(12) and 5-512).

CHAPTER 11. PURCHASES, SALES AND RETURNS

Subchapter O. RETURN OF LIQUOR TO THE BOARD BY LICENSEES OR PERMIT HOLDERS

Sec.	
11.231.	General provisions.
11.232.	Defective products.
11.233.	Error in products delivered.
11.234.	Products that may no longer be lawfully sold.
11.235.	Product subject to recall or withdrawal.
11.236.	Change in product.
11.237.	Discontinued products.
11.238.	Permit holders.
11.239.	Special order listings.

§ 11.231. General provisions.

(a) The Board may accept the return of liquor purchased from the Board for ordinary and usual commercial

reasons arising after the product has been sold. Sections 11.232—11.237 specify ordinary and usual commercial reasons for the return of products and outline the conditions and limitations for returns. If the Board accepts the returned product, the licensee will receive the price paid as evidenced by documentation of the transaction, as defined in subsection (d), less handling charges in accordance with subsection (e). The Board will not accept the return of product purchased from a third party, even if the third party purchased the product from the Board.

(b) The Board will not accept the return of product for reasons that do not constitute ordinary and usual commercial reasons, including all of the following:

(1) Product sought to be returned because it is overstocked or slow-moving.

(2) Product sought to be returned because there is only a limited or seasonal demand, such as holiday decanters and certain distinctive bottles.

(3) Product sought to be returned because the licensee changed its menu or for other similar business reasons.

(4) Product sought to be returned because it was damaged after the product has left the custody or control of the Board.

(5) Product sought to be returned for any other reason that is not included in §§ 11.232—11.237.

(c) The repurchase of product related to the discontinuance or sale of a licensee's business is addressed in §§ 9.113 and 9.114 (relating to requests for repurchase by licensees who have discontinued business or sold their licensed business; information to be furnished; and repurchase of liquor presented to the Board).

(d) For purposes of this subchapter, "documentation of the transaction" may include a signed bill of lading, a licensee sales invoice or a point of sale receipt.

(e) The Board may refund the licensee for some or all of the liquor purchased from State Liquor Stores at the price paid by the licensee in accordance with this subchapter. A handling charge equal to the greater of 12.5% of the purchase price or \$50, whichever is greater, will only be assessed when 12 bottles or more are accepted for return.

(f) The return of liquor purchased as a special order listing, as defined in § 13.71 (relating to definitions), is subject to § 11.239 (relating to special order listings).

§ 11.232. Defective products.

Products that are unmarketable at the time of delivery or pickup because of product deterioration, leaking containers, damaged labels, or missing or mutilated tamper evident closures may be returned for a refund within 30 days of purchase. Returns may be contingent upon verification of the alleged defect, including photographs of the damaged product or any other evidence required by the Board or the manufacturer of the product. The payment of a handling charge will be waived for returns under this section.

§ 11.233. Error in products delivered.

A discrepancy between products ordered and products delivered may be corrected, within 30 days of purchase, by returning the incorrect product for a refund. The licensee will be required to provide documentation of the transaction, as defined in § 11.231(d) (relating to general provisions), and the erroneous product. The payment of a handling charge will be waived for returns under this section.

§ 11.234. Products that may no longer be lawfully sold.

Products that may no longer be lawfully sold may be returned for a refund within 30 days of notification that the product may no longer lawfully be sold. This includes situations when, due to a change in statute, regulation or administrative procedure over which the licensee has no control, a particular size, brand or product is no longer permitted to be sold. The payment of a handling charge will be waived for returns under this section.

§ 11.235. Product subject to recall or withdrawal.

Products that have been recalled or withdrawn by the manufacturer may be returned for a refund within 30 days of notification that the product has been recalled or withdrawn. The payment of a handling charge will be waived for returns under this section.

§ 11.236. Change in product.

When a manufacturer changes a product in formula, proof, label or container, a licensee may return its existing inventory for a refund of that product within 30 days of notification that the product has been changed. A change in vintage does not constitute a change in product for purposes of this section. The licensee will be assessed a handling charge in accordance with § 11.231(e) (relating to general provisions) for returns under this section.

§ 11.237. Discontinued products.

When a manufacturer or importer discontinues the production or importation of a product, a licensee's inventory of that product may be returned for a refund within 30 days of notification that the product is being discontinued. The licensee will be assessed a handling charge in accordance with § 11.231(e) (relating to general provisions) for returns under this section.

§ 11.238. Permit holders.

(a) The Board may accept the return of product from permit holders who sell alcohol less than 15 days in the course of a year, such as special occasion, wine auction or spirit auction permit holders.

(b) At the time product is picked up or delivered, permit holders will be made aware, through the provision of a pre-authorization form, of all of the following conditions for the return of liquor:

(1) If the product was picked up at a Pennsylvania liquor store, the permit holder shall return the product to that store and no other Board location.

(2) If the product was delivered by the Board to the event location, only 100% full, unopened cases will be accepted by the Board's delivery truck for return. All other product shall be returned to a Pennsylvania liquor store or licensee service center as directed by the Board.

(3) The product must be saleable liquor in the original containers, unopened and unadulterated, as when originally sold by the State Liquor Stores. "Saleable" means that the products and containers must look as they did when originally purchased.

(4) At the time of the return, the permit holder shall provide the Board with documentation of the transaction, as defined in § 11.231(d) (relating to general provisions).

(5) The product shall be returned within 30 days of the date of purchase.

(6) The product must be kept out of direct sunlight and in a temperature-controlled environment, such as a refrigerator, temperature-controlled delivery truck or any other location where the temperature does not reach below 55° or above 75°.

(7) The return of liquor purchased as a special order listing, as that term is defined in § 13.71 (relating to definitions), is subject to § 11.239 (relating to special order listings).

(c) The permit holder will be required to acknowledge the pre-authorization form, which will be maintained on file with the Board.

(d) Permit holders who return product in accordance with the conditions in this section will receive a refund.

(1) Refunds will be in the amount of the price paid for the product, as evidenced by the documentation of the transaction, as defined in § 11.231(d).

(2) Refunds for a return of less than 12 bottles, regardless of type or brand, will not be assessed a handling charge.

(3) Refunds for a return of 12 bottles or more, regardless of type or brand, will be assessed a handling charge of 12.5% of the total amount refunded or \$50, whichever is greater.

(4) Fees for the services of a delivery truck are non-refundable.

§ 11.239. Special order listings.

(a) The Board may accept the return of liquor purchased as a special order listing, as defined in § 13.71 (relating to definitions), for ordinary and usual commercial reasons, as set forth in §§ 11.231—11.237.

(b) If a licensee wants to return liquor purchased as a special order listing, the licensee shall return it to a State Liquor Store within 30 days from the date of receipt of the product by the licensee or its agent.

(c) The supplier of the special order listing product may not pick up the product from the licensee.

(d) Returns of special order listing product will be handled by the Board's Special Order Division. The supplier, not the Board, shall decide whether to authorize any returns or refunds for special order listing product.

(e) The supplier shall advise the Special Order Division which of the following will be done with the returned product:

(1) The product may be picked up at the State Liquor Store by the supplier within 30 days of notifying the Special Order Division.

(2) The product may be shipped back to the supplier by the Board if the supplier provides, within 30 days of notifying the Special Order Division, a return shipment label which must include payment for shipping.

(3) The product may be destroyed by the Board for a fee, to be charged against the supplier.

(f) If the supplier fails to pick up the product or fails to provide a return shipment label to the Board, the Board may destroy the product for a fee, to be charged against the supplier.

[Pa.B. Doc. No. 18-1197. Filed for public inspection August 3, 2018, 9:00 a.m.]

Title 67—TRANSPORTATION

DEPARTMENT OF TRANSPORTATION

[67 PA. CODE CH. 441]

Access to and Occupancy of Highways by Driveways and Local Roads

The Department of Transportation (Department), under section 420 of the State Highway Law (36 P.S. § 670-420), amends Chapter 441 (relating to access to and occupancy of highways by driveways and local roads) to read as set forth in Annex A.

Purpose of Chapter 441

The purpose of Chapter 441 is to exercise the Department's statutory authority to promulgate a regulation controlling the safe location, design, construction and maintenance of: driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the State highway right-of-way.

Purpose of this Final-Form Rulemaking

The purpose of this final-form rulemaking is to clarify the provisions relating to who may apply for a permit to construct or alter driveways; local roads; drainage facilities; structures; means of ingress, egress and access; and other property within the State highway right-of-way, and to set forth application requirements that strike a careful balance between the interested parties' property rights.

Significant Provisions of this Final-Form Rulemaking

Significant amendments to Chapter 441 include the following:

The amendments to § 441.1 (relating to definitions) delete the definition of "own," amend the definition of "person" and add the term "owner." Most significant is the term "owner," which clarifies that ownership of legal interests are not limited to owners of property holding fee absolute title or certain leasehold interests.

The amendments to § 441.3(b) (relating to permit application procedure) use the term "owner" and to require an applicant that is not the holder of fee title to the property to notify the fee title holder that an application has been submitted. Section 441.3(e)(6) is amended to require applicants to prove that they are an "owner," where the proof must be in the form of a copy of the valid legal document or court order verifying the applicant's legal estate or interest in the property. Section 441.3(e)(7)(i) is added to require applicants other than fee title holders to submit additional information, including proof that either: 1) the fee title holder consents to the application; or 2) the applicant provided notice of the submission of the application to the fee title holder apprising the fee title holder of the administrative rights available to the fee title holder. The Department will not grant or deny the permit application until 30 days from the fee title holder's receipt of notice.

Section 441.3(e)(7)(ii) also requires applicants other than fee title holders to submit a written statement whereby the applicants indemnify and defend the Department from suits, damages, claims and demands of any type brought by the fee title holder because of the Department granting a permit to the applicant. Lastly, under § 441.3(e)(7)(iii), applicants other than fee title holders shall provide proof that a covenant running with the land has been recorded to ensure that subsequent property owners are bound to the indemnification provisions in § 441.3(e)(7)(ii).

Summary of Comments and Changes

Notice of proposed rulemaking was published at 48 Pa.B. 1563 (March 17, 2018), with a 30-day public comment period. Accordingly, the public comment period opened on March 17, 2018, and closed on April 16, 2018. The Department received four comments during the public comment period, three from two public commentators (one commentator submitted two comments), and one from Representative Brett R. Miller, 41st Legislative District. Thereafter, the Independent Regulatory Review Commission's (IRRC) 30-day review period began. IRRC submitted comments to the Department on May 16, 2018.

The Department carefully reviewed and considered each comment submitted by the public and IRRC. The Department prepared a comment and response document, which reflects each comment and the Department's response. The comment and response document was submitted to IRRC and is available on its web site at www.irrc.state.pa.us (search "18-479") or upon request through the information provided in the Contact Person section of this final-form rulemaking. A summary of the most significant comments and changes between the proposed and final rulemakings follows.

Concerns raised throughout the public and IRRC comments stem from the contention that the Department is "choosing sides" in a conflict between competing property interest holders. In sum, these comments, which conflate the issuance of a highway occupancy permit with making legal determinations impacting property rights, are misguided. Either through negotiations or following a final determination of a court or other judicial entity, third parties obtain property rights that are less than and may not be consonant with the rights of a fee title holder. Chapter 441 does not address that conflict.

Instead, the purpose of Chapter 441 is "to regulate the location, design, construction, maintenance and drainage of access driveways, local roads, and other property within State highway right-of-way for the purpose of security, economy of maintenance, preservation of proper drainage and safe and reasonable access." See § 441.2(a) (relating to purpose and application). The Department does not adjudicate property interests through the highway occupancy permit process, but rather assesses whether an applicant has established an already-existing property interest with a right to access for the purposes of granting a highway occupancy permit.

If a third party has an easement over the land of another and the only way to use, and give effect to, that easement is to access the easement from the State highway right-of-way, the Department must grant a highway occupancy permit or face legal action from the holder of the easement, who would have a valid legal claim that the Department's refusal to grant a highway occupancy permit is a de facto taking of property because a refusal would be tantamount to interfering with the rights of the easement holder. See, for example, *Duquesne Light Company v. Longue Vue Club*, 63 A.3d 270, 279 (Pa. Super. Ct. 2013), regarding the rights of easement holders, and *Turner v. Reynolds*, 23 Pa. 199, 206 (Pa. 1854), regarding rights of possession.

Comments focusing on impacts to fee title holders are not entirely accurate in their characterization of the net effect of this chapter. This chapter does not restrict fee title holder rights but instead gives fee title holders notice of third-party highway occupancy permit applications and encourages fee title holders' participation in the permitting process (both at the issuance and appellate levels).

The determination of the fee title holders' rights vis-à-vis a third-party interest in real property is not negotiated or adjudicated as part of the highway occupancy permit process and this fact should not be lost in the numerous public comments. Stated otherwise, to the extent that the fee title holder's rights have been "restricted" by the granting of a property interest to a third party—such as a through the eminent domain process—that property interest has been already established (and shall be proven) at the time the third party applies for the highway occupancy permit, or the Department would not grant the permit.

As previously noted, each public, legislative and IRRC comment is fully addressed in the Department's comment and response document. Changes based on those comments have been made to the Regulatory Analysis Form as requested by IRRC.

Persons and Entities Affected

This final-form rulemaking affects all applicants for highway occupancy permits to access State highways who intend to create an access point to a State highway or to change the design, operation or location of existing access. These applicants include owners of legal interests in property who require access to the property to exercise their property rights, such as easement holders and mineral estate holders, as well as fee title holders.

This final-form rulemaking carefully balances the interest of all interested parties. When the applicant does not hold fee title, the fee title holder shall be notified that an application has been submitted, which provides the fee title owner an opportunity to object to the application process under 1 Pa. Code Part II (relating to General Rules of Administrative Practice and Procedure), specifically 1 Pa. Code §§ 35.23 and 35.24 (relating to protests) and 1 Pa. Code §§ 35.27—35.32 (relating to intervention). Objections in the form of a protest or intervention can be filed with the Department through its administrative docket.

Fiscal Impact

This final-form rulemaking should not increase costs for the Commonwealth or local governments. New fiscal impacts to the regulated community are not anticipated because the amendments are consistent with current practices that have been in place since 2002.

Regulatory Review

(Editor's Note: The Regulatory Review section of the proposed rulemaking contained an error regarding the year of filing of the proposed rulemaking. The following date is correct.)

Under section 5(a) of the Regulatory Review Act (71 P.S. § 745.5(a)), on March 8, 2018, the Department submitted a copy of the notice of proposed rulemaking, published at 48 Pa.B. 1563, to IRRC and the Chairpersons of the House and Senate Transportation Committees for review and comment.

Under section 5(c) of the Regulatory Review Act, the Department 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 the final-form rulemaking, the Department has considered all comments from IRRC, Representative Miller and the public.

Under section 5.1(j.2) of the Regulatory Review Act (71 P.S. § 745.5a(j.2)), on June 27, 2018, the final-form rulemaking was deemed approved by the House and

Senate Committees. Under section 5.1(e) of the Regulatory Review Act, IRRC met on June 28, 2018, and approved the final-form rulemaking.

Sunset Provisions

The Department is not establishing a sunset date for these regulations since these regulations are needed to administer provisions required under section 420 of the State Highway Law. The Department will continue to closely monitor these regulations for their effectiveness.

Contact Person

The contact person for this regulation is Jeffrey M. Spotts, Regulatory Counsel, Department of Transportation, Commonwealth Keystone Building, 400 North Street, Harrisburg, PA 17120-8212, (717) 787-5299, jespotts@pa.gov.

Findings

The Department finds that:

- (1) Public notice of the proposed rulemaking was given under sections 201 and 202 of the act of July 31, 1968 (P.L. 769, No. 240) (45 P.S. §§ 1201 and 1202) and regulations promulgated thereunder, 1 Pa. Code §§ 7.1 and 7.2.
- (2) A public comment period was provided as required by law, and all comments were considered.
- (3) These regulations do not enlarge the purpose of the proposed rulemaking published at 48 Pa.B. 1563.

Order

The Department orders that:

- (a) The regulations of the Department, 67 Pa. Code Chapter 441, are amended by amending §§ 441.1 and 441.3 to read as set forth in Annex A, with ellipses referring to the existing text of the regulations.
- (b) The Secretary of the Department shall submit this order and Annex A to IRRC and the Senate and House Committees as required under the Regulatory Review Act (71 P.S. §§ 745.1—745.14).
- (c) The Secretary of the Department shall submit this order and Annex A to the Office of Attorney General for approval as to legality and form as required by law.
- (d) This order shall take effect upon publication in the *Pennsylvania Bulletin*.

LESLIE S. RICHARDS,
Secretary

(Editor's Note: See 48 Pa.B. 4189 (July 14, 2018) for IRRC's approval order.)

Fiscal Note: Fiscal Note 18-479 remains valid for the final adoption of the subject regulations.

Annex A

TITLE 67. TRANSPORTATION

PART I. DEPARTMENT OF TRANSPORTATION

Subpart B. NONVEHICLE CODE PROVISIONS

ARTICLE III. HIGHWAYS

CHAPTER 441. ACCESS TO AND OCCUPANCY OF HIGHWAYS BY DRIVEWAYS AND LOCAL ROADS

§ 441.1. Definitions.

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

* * * * *

Minimum use driveway—A residential or other driveway which is used or expected to be used by not more than 25 vehicles per day.

Owner—A person holding:

- (i) fee title to property,
- (ii) an estate or other legal interest in property, such as an easement, a lease, a license or subsurface rights, or
- (iii) an equitable interest in property under a sales agreement or an option to purchase;

provided that the estate or other legal or equitable interest in property includes the use requested in the permit.

Pavement edge—The edge of the main traveled portion of any highway, exclusive of shoulder.

Permanent curbing—Plain or reinforced cement concrete curb which meets Department standards.

Permit—A highway occupancy permit (Form M-945P) issued by a district office pursuant to this chapter.

Person—An individual, business entity, association, political subdivision, authority, Federal or Commonwealth agency, or other entity recognized by law.

* * * * *

§ 441.3. Permit application procedure.

(a) *General rule.* No driveway, local road or drainage facility or structure shall be constructed or altered within State highway right-of-way and no drainage facility of the Department may be altered or connected onto without first obtaining a permit from the Department. A permit may not be required for maintenance.

(b) *Who may apply for a permit.* Permit applications shall be submitted in the name of the owner of the property. If the applicant does not hold fee title to the property, the applicant shall notify the fee title holder that an application has been submitted.

(c) *Where to submit application.* Permit applications shall be submitted to either the district or county office having jurisdiction over the county in which the proposed work will be performed.

(d) *When to submit applications.* Permit applications shall be submitted prior to the construction of any building which the proposed driveway will serve to assure that the driveway can be constructed in accordance with this chapter.

(e) *Application procedure and required information.* Permit applications:

(1) Shall be submitted in person or by mail on a properly completed Department Form M-945A.

(2) Shall be signed by the applicant.

(3) Shall include five sets of plans, of a quality sufficient for microfilming, detailing the location and pertinent dimensions of both the proposed installation and related highway features.

(4) Shall be accompanied by a check or money order, payable to the Department, in the appropriate amount, as set forth in § 441.4 (relating to permit fees).

(5) Shall be submitted to the Department at least 30 days prior to the anticipated start of work.

(6) Shall contain proof that the applicant is an owner. The proof shall be in the form of a copy of the valid legal document or court order verifying the applicant's legal estate or interest in the property.

(7) Shall, when submitted by an applicant other than a fee title holder, contain:

(i) Proof of one of the following:

(A) The fee title holder consents to the application.

(B) The applicant provided written notice of the submission of the application to the fee title holder apprising the fee title holder of the administrative rights relative to the permit application under 1 Pa. Code §§ 35.23, 35.24 and 35.27—35.32. The Department will not grant or deny the permit application until 30 days after receipt of the written notice by the fee title holder.

(ii) A signed written statement, whereby the applicant agrees to indemnify and defend the Commonwealth (if requested) from all suits, damages, claims and demands of any type whatsoever by the fee title holder of the property because of granting the permit to the applicant, such as a failure of the permittee or other person to comply with the permit or any other statutes, ordinances or regulations in connection with the permit.

(iii) Proof that the applicant executed and recorded in the Office of the Recorder of Deeds in the appropriate county or counties, a covenant running with the land providing that all subsequent purchasers, heirs, assigns or transferees of the property take the property subject to the indemnification in subparagraph (ii), unless released by the Department.

(f) *Traffic control plan.* Submission of the traffic control plan shall be as follows:

* * * * *

[Pa.B. Doc. No. 18-1198. Filed for public inspection August 3, 2018, 9:00 a.m.]