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Re: Brewery and Couplet Questions

Dear Mr. Goldstein:

ISSUE: This is in response to your letter sent via e-mail on October 9, 2013, wherein you ask several questions related to your client, who is a shareholder and member of two (2) restaurant (“R”) liquor licenses: R-1175 (LID 53147) and R-7604 (LID 54015). Your client will also be an owner of a new entity that will be applying for both a brewery (“G”) license and an R license at a currently unlicensed location in Pennsylvania. You would like confirmation that a G license and an R license at the new, proposed location would constitute a “couplet” and, therefore, would not be an impermissible interlocking interest with respect to your client’s other two (2) R licenses.

In addition, you advise that your client intends to engage in a contract brewing relationship with a licensed brewery located in another state. You advise that your client would retain title to the products brewed by the out-of-state contract brewer, and would be the ultimate seller thereof. You ask if your client would be permitted to sell sealed bottles/cans of beer to retail patrons for take-out of a) its own beer manufactured at the on-site brewery; b) its own beer manufactured out-of-state by the contract brewer; and c) beer manufactured by other breweries and purchased for resale at the brewery/restaurant location.

You also ask if the couplet arrangement, where the same location holds both a G license and an R license, prohibits self-distribution by the brewery and requires the use of importing distributors and distribution through the three (3)-tier system.

Finally, you ask if the beer brewed by the out-of-state contract brewer may be packaged and labeled to reflect that it was manufactured at the Pennsylvania

location. You ask if there is a source of rules or regulations governing advertising, packaging and labeling in a contract brewing situation.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Adam K. Ritter is an officer and stockholder of Beacon on East Girard, Inc., which holds Restaurant Liquor License No. R-1175 (LID 53147) for the location at 541-543 East Girard Avenue, Philadelphia, Pennsylvania. Mr. Ritter is also identified as a member of Yetti, LLC, which holds Restaurant Liquor License No. R-7604 (LID 54015) for the premises located at 2201 Christian Street, Philadelphia, Pennsylvania.

OPINION: Sections 411 and 443 of the Liquor Code generally prohibit someone from simultaneously holding an interest in both a retail license and a manufacturing license. [47 P.S. §§ 4-411; 4-443]. Section 438(c) of the Liquor Code prohibits a person from possessing more than one (1) class of license. [47 P.S. § 4-438(c)]. However, sections 411 and 438 provide an exception which states:

...an entity may acquire both a manufacturer's license or a limited winery license and a hotel, restaurant or retail dispenser license for use at the same location and more than one location may be so licensed. The licenses and a person's interest in the licenses or in the entity holding the licenses shall not be subject to this section.

[47 P.S. §§ 4-411; 4-438(c) (emphasis added)]. It should be noted that a G license is considered a manufacturing license for purposes of the Liquor Code, and an R license is considered a retail license for purposes of the Liquor Code. Therefore, it would be permissible for your client to operate R licenses at his two (2) locations and a G and an R at the same location, since the new location holding the G and the R license would not be considered by the Board when determining whether an entity has an impermissible interlocking interest in multiple licenses issued by the Board.

A G licensee may sell to individuals for off-premises consumption, in containers or packages of unlimited quantity and of any volume, beer manufactured on its licensed premises. [47 P.S. § 4-440]. An R licensee may sell up to one hundred ninety-two (192) ounces of beer in a single sale to an individual for off-premises consumption. When the two (2) licenses are located on the same property as in a couplet situation, unlimited sales of the G licensee’s beer for off-premises

consumption may occur on the G-licensed portion of the property, but sales for off-premises consumption are restricted to one hundred ninety-two (192) ounces in a single sale on the R-licensed portion of the property.

With regard to the beer that is manufactured by the out-of-state contract brewer, it must be treated like any other beer that is manufactured out-of-state; the fact that your client will hold title to the beer at its out-of-state location is irrelevant. Such beer must be imported into the Commonwealth through the three (3)-tier system. [See 47 P.S. § 4-446(a)(3)]. It could only be sold, for off-premises consumption, on the R-licensed portion of the property, since it was not manufactured on the G-licensed portion of the property and therefore may not be sold from that location.

When a manufacturer obtains a retail license for the same location, thereby having a “couplet” at that location, the manufacturer may no longer self-distribute. Section 446(a)(4) provides that the “holder of a brewery license who receives a hotel liquor license, a restaurant liquor license or a malt or brewed beverages retail license to operate a brewery pub shall not sell directly to any person licensed by this act, except if any malt or brewed beverage is to be distributed in this Commonwealth it shall be only through specific importing distributors who shall have first been given distributing rights for such products in designated geographical areas through the distribution system required for out-of-State manufacturers under section 431(b)....” [47 P.S. § 4-446(a)(4)]. If the brewery operates a brewery pub pursuant to a GP license, rather than a restaurant, hotel or retail dispenser license, the brewery is limited to selling the malt or brewed beverages it manufactures, but may continue to self-distribute.

You ask if the beer brewed by the out-of-state contract brewer may be packaged and labeled in such a manner as to inaccurately indicate that it was actually manufactured at the Pennsylvania location. All beer must be registered with the Board prior to it being offered, sold or delivered to any buyer within the Commonwealth. [47 P.S. § 4-445; 40 Pa. Code § 9.108]. The registration process in Pennsylvania consists of filling out the application, paying the appropriate fee, providing a copy of the federal label approval and providing a copy of all territorial agreements affecting the beer.

Please note that the Board’s label approval process relies on the Alcohol and Tobacco Tax and Trade Bureau’s (“TTB”) issuance of a certificate of label approval (“COLA”). The Board normally does not review a label if TTB has

issued a COLA for it. You may wish to contact the TTB at www.ttb.gov for more information.

Please note that certain beers do not meet the definition of a “malt beverage” under the Federal Alcohol Administration Act (FAA Act) (See TTB Ruling 2008-3, dated July 7, 2008). Such beers are not subject to the labeling provisions of the FAA Act, but are subject to the food labeling provisions of the Federal Food, Drug, and Cosmetic Act (FFDCA), 21 U.S.C. 341-415; the Fair Packaging and Labeling Act (FPLA), 15 U.S.C. 1451-1461; and Food and Drug Administration’s (“FDA”) implementing regulations. Thus, you may also need to research the FDA’s labeling requirements.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

cc: Pennsylvania State Police,
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