

September 5, 2014

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Robert B. Back
Bacmar International LLC

RE: Requirements for Malt Beverage Distribution

Dear Mr. Back:

ISSUE: This is in response to your e-mail of August 27, 2014 and a follow-up telephone conversation, in which you stated that you represent American Beverage Corporation (“ABC”). ABC plans to have a flavored malt beverage containing between five (5) and twelve (12) percent alcohol by volume manufactured on its behalf by a non-Pennsylvania entity or entities. The flavored malt beverage would then be shipped back to ABC’s warehouse location near Pittsburgh, Pennsylvania.

From this Pennsylvania location, ABC would process orders from licensed wholesalers in other states, but possibly also from Pennsylvania-licensed wholesalers. You clarified that ABC would not be taking internet orders from individual consumers, but rather this would be a wholesale-only operation from the Pittsburgh area.

You ask whether ABC’s warehouse would have to be licensed. You also ask what reporting requirements and/or alcohol tax liabilities would attach to this operation.

Pennsylvania Liquor Control Board (“Board”) records indicate that American Beverage Corporation holds Distillery License No. A-161 (LID 52671) and Importer License No. I-742 (LID 53406), both for the premises located at 1 Daily Way, Verona, Pennsylvania.

OPINION: Initially, please be advised that sections 491 and 492 of the Liquor Code make it unlawful for any person to possess any malt or brewed beverage, wine or liquor within Pennsylvania that has not been purchased through a Pennsylvania Liquor Store, a licensed limited winery, a sacramental wine dealer, a limited distillery, or from an entity licensed to sell malt or brewed beverages. [47 P.S. §§ 4-491(2), 4-492(3)].

Furthermore, it is unlawful for any person to import alcohol into the Commonwealth except as permitted within the Liquor Code and the Board's Regulations. [47 P.S. § 4-491(8), (11)]. Section 9.91(a) of the Board's Regulations provides that a person cannot import malt or brewed beverages into the Commonwealth for delivery or use therein, unless the person holds a valid importing distributor (ID) license issued by the Board, or unless a person is exempted by other provisions of that section. [40 Pa. Code § 9.91(a)].

The Liquor Code and the Board's Regulations prohibit licensed distributors and importing distributors from conducting sales of malt or brewed beverages anywhere other than on their licensed premises. [47 P.S. § 4-441(c); 40 Pa. Code § 9.95(a)]. A "sale" is defined as "any transfer of liquor, alcohol or malt or brewed beverages for a consideration." [47 P.S. § 1-102].

The business plan as described would constitute the sale of malt or brewed beverages in Pennsylvania, even if the product will be shipped out of Pennsylvania. Therefore, ABC would need an importing distributor license for the premises where the flavored malt beverages would be shipped, stored, and sold, *i.e.*, the warehouse. However, please note that it is not permissible to hold both an importer license and an importing distributor license, as such is specifically precluded by section 492(14) of the Liquor Code. [47 P.S. § 492(14)].

In response to your question and notwithstanding the prohibition on the holding of both importer and importing distributor licenses, more information concerning reporting and other requirements of importing distributors can be found on the Board's website at www.lcb.state.pa.us, then select "Licensees," then "Licensing Information," then "Pamphlets," and then "LCB-118 Information Booklet for Wholesale Licensees."

An alternative that ABC may wish to consider is obtaining a brewery license for the Pittsburgh location. In that manner, although some manufacturing of beer or other malt beverages would have to occur on the Pennsylvania licensed premises, ABC could lawfully import its own beer from non-Pennsylvania locations into its Pennsylvania licensed manufacturing premises. [47 P.S. § 4-446]. Information about brewery licenses, along with application forms, is available on the Board's website under the aforementioned "Licensees" tab.

On the issue of tax liabilities, the Tax Reform Code of 1971 prohibits the importation of untaxed beer. [72 P.S. § 9011]. Therefore, it is unlawful to possess any malt beverage upon which state taxes have not been paid. Please be advised

that the Commonwealth of Pennsylvania, Department of Revenue, is the agency responsible for tax collection in the Commonwealth and may be accessed at the website www.revenue.state.pa.us. You are also advised to contact the federal authorities at www.ttb.gov.

Finally, it is strongly suggested that ABC consult private counsel experienced in Pennsylvania liquor law to provide advice and guidance for this new business venture, particularly in light of the two (2) licenses of differing classes currently held by ABC.

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,
Bureau of Liquor Control Enforcement
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 14-502