

December 23, 2014

Jeremy T. Toman, Esquire

**RE: Multiple Licenses for Production and Sale of Alcoholic Cider**

Dear Mr. Toman:

ISSUE: This office is in receipt of your e-mail dated November 3, 2014, in which you advise that you represent an unidentified company that currently holds a brewery license (“G”) and a brewery pub license (“GP”), and which is considering also acquiring a limited winery license (“LK”) for operation out of the same location as the G and GP. You state that the purpose of acquiring a limited winery license would be to produce alcoholic ciders both above and below the 5.5% alcohol by volume (“ABV”) threshold, and to sell such ciders at the GP location and at satellite locations. It is presumed that you are referring to future approved satellite locations of the licensed limited winery.

You ask a series of questions relating to the sale and distribution of the alcoholic cider by the various entities, with differentiation between alcoholic ciders having an ABV of below 5.5%, as well as alcoholic ciders having an ABV above 5.5%. You also ask about entering into a conditional licensing agreement (“CLA”) with the Pennsylvania Liquor Control Board (“Board”) regarding the hours of operation of each licensed entity, as well as the required locations for production for each entity. Finally, you ask if there are any restrictions regarding the supply of apples and/or apple juice to be used for the ciders, and you specifically reference making an exclusive supply arrangement with a supplier that is not a Board licensee.

OPINION: As a threshold matter, “alcoholic cider” is a defined term in the Liquor Code as follows:

“Alcoholic cider” shall mean a beverage which may contain carbonation in an amount not to exceed three hundred ninety-two one thousandths of a gram per one hundred milliliters and flavors, produced through alcoholic fermentation of any fruit or fruit juice, consisting of at least one-half of one per centum, but not greater than

five and one-half per centum, alcohol by volume and sold or offered for sale as alcoholic cider and not as a wine, a wine product or as a substitute for wine, in bottles, cases, kegs, cans or other suitable containers of the type used for the sale of malt or brewed beverages in this Commonwealth.

[47 P.S. § 1-102].

“Wine” is also a defined term in the Liquor Code as follows:

“Wine” shall mean liquor which is fermented from grapes and other fruits, having alcoholic content of twenty-four per centum or less. The term “wine” shall not include any products containing alcohol derived from malt, grain, cereal, molasses or cactus.

[Id.]. Therefore, alcoholic cider containing more than 5.5% ABV is a wine and cannot lawfully be produced or sold by a brewery.

On the issue of where and to whom each entity may lawfully sell alcoholic cider, limited winery licensees are permitted to produce and sell both wines and alcoholic ciders [47 P.S. § 5-505.2(a)(1)] and to sell alcoholic cider produced by the limited winery, or purchased in bulk in bond from another licensed limited winery, on the limited winery’s licensed premises and at no more than five (5) Board-approved satellite locations, to the Board, to individuals, and to hotel, restaurant, club and public service liquor licensees, and to winery and brewery pub licensees. [47 P.S. § 5-505.2(a)(3)].

Generally, a brewery may sell malt or brewed beverages produced and owned by the brewery to individuals for off-premises consumption in containers or packages of unlimited quantity and of any volume, and to licensees in quantities of not less than a case or original containers containing one hundred twenty-eight (128) ounces or more. [47 P.S. §§ 4-431, 4-440]. A brewery may sell its product for on-premises consumption only in compliance with section 446(a)(1) of the Liquor Code. [47 P.S. § 4-446(a)(1)]. This section requires that these sales be conducted under such conditions and regulations as the Board may enforce. [Id.]. Please note that a brewery may not sell products not produced and owned by the brewery, so if your client produces alcoholic cider under a limited winery license, that alcoholic cider cannot lawfully be sold by the brewery licensee.

The limited winery's alcoholic cider may, however, be sold by the brewery pub licensee, as your correspondence suggests as the Board's Regulations provide that sales of alcoholic beverages at a brewery pub premises are limited to sales of malt or brewed beverages produced at and owned by the brewery adjacent to it or a brewery which is under common control with the brewery pub. [40 Pa. Code § 3.92]. A brewery pub licensee may also sell, for on-premises consumption, wine (including alcoholic cider) manufactured by the holder of a Pennsylvania limited winery license. [Id.].

Next, the Board's Bureau of Licensing ("Licensing") will not typically dual-license a location, absent specific statutory authority. Thus, only one (1) license may be in effect at one (1) time at any particular portion or location. However, as you alluded, the Board has, in the past, entered into a CLA with a licensee that wishes to place two (2) manufacturing licenses at the same location. Such an arrangement would require the consent of both Licensing and the Board, and a decision on whether such an arrangement is acceptable is not a decision made by this office. Therefore, this office cannot provide any further guidance on this point other than suggesting that if you wish to pursue this matter, you should submit an application to Licensing.

Finally, on the issue of the source of apples and/or juice to be used in the production of alcoholic cider, section 505.2 of the Liquor Code provides as follows:

(a) In the interest of promoting tourism and recreational development in Pennsylvania, holders of a limited winery license may:

(1) Produce alcoholic ciders, wines and wine coolers, subject to the exceptions provided under this section, only from an agricultural commodity grown in Pennsylvania.

[47 P.S. § 5-505.2(a)(1)].

However, the Pennsylvania agricultural commodity limitation has been deemed unenforceable as a result of the U.S. Supreme Court decision in the case of Granholm v. Heald, 544 U.S. 460 (2005), and the Pennsylvania federal court decision in Cutner v. Newman, 398 F. Supp.2d 389 (E.D. Pa. 2005), both involving legislative distinctions between in-state and out-of-state wineries.

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Accordingly, a limited winery licensee is not required to produce its wine using fruit from sources in Pennsylvania; rather, it may utilize fruit from other sources, whether from Pennsylvania or outside of Pennsylvania, although actual wine purchases from other limited wineries for subsequent resale are limited to no more than fifty percent (50%) of the purchasing winery's previous year's production.

Therefore, as the law presently stands, a licensed limited winery may produce wine from agricultural commodities without regard to the source of such commodities. Otherwise, the Board does not involve itself in supply arrangements such as these.

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. 14-635