

October 23, 2015

Katie Molchan
VIA E-MAIL

RE: Private Happy Hour

Dear Ms. Molchan:

ISSUE: This is in response to your e-mail dated September 28, 2015, wherein you state that your licensed establishment would like to allow guests to book private “VIP” happy hour packages that would be arranged and reserved at least twenty-four (24) hours in advance. The package would include the following:

For up to twelve (12) people—value \$250.00

- Early entrance for a duration of 1.5 hours
- One (1) complimentary round of one (1) of your signature cocktails, for which the “VIP” group would have naming rights for that evening (value ranging from \$9 - \$12)
- Happy hour pricing on all subsequent drinks
- “VIP” wristbands with “in and out” privileges and reserved lounge space until 10:30 p.m.
- Two (2) charcuterie boards (approximate value \$14)

You ask three (3) specific questions about this proposed package, which will be set forth below with the corresponding answers.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Mixtape LLC (“Mixtape”) holds Restaurant Liquor License No. R-12467 (LID 71894) for use at the premises located at 4907 Penn Avenue, Pittsburgh, Pennsylvania. You are the Board-approved manager of this establishment.

OPINION: As a threshold matter, it is not clear from your e-mail whether you intend to charge a fee for this “VIP” package. That is, you note a package value of two hundred fifty dollars (\$250.00), but do not indicate that there will be any

actual payment made by patron groups availing themselves of this package, other than discounted drinks for all drinks after the complimentary round.

Generally, please note that a promotion in which individuals would be entitled to food, alcoholic beverages and intangibles such as drink naming rights, reserved lounge space and early entrance, with no discounting of either the food or drink components when tabulating the final cost, is permissible. This also presumes that the early entrance would be during hours that Mixtape is lawfully open for service. On that point, please note that restaurant liquor licensees are permitted to sell alcoholic beverages between the hours of 7:00 a.m. of any weekday and 2:00 a.m. of the following day. [47 P.S. § 4-406(a)(2)]. If a Sunday sales permit is held by a licensee, alcoholic beverages may be sold on Sundays between 9:00 a.m. and 11:00 a.m., provided that the licensee offers a ‘meal’ beginning at 9:00 a.m. [47 P.S. §§ 4-406(a)(3); 4-432(f)]. A “meal” is defined as “food prepared on the premises, sufficient to constitute breakfast, lunch or dinner; it shall not mean a snack, such as pretzels, popcorn, chips or similar food.” [47 P.S. § 4-406(e)].

Further, a restaurant liquor licensee may remain open during those hours it would normally be closed, i.e., 2:00 a.m. until 7:00 a.m. or 9:00 a.m. on Sundays, for the purpose of serving food, if the licensee obtains an extended hours food permit. [47 P.S. § 4-499(b)]. This privilege does not extend the hours of sale for alcoholic beverages; nor does it preclude or replace the Sunday sales permit.

While it would be permissible to discount alcoholic beverages that are part of a package, if the non-alcoholic components are not discounted, such discounting must be done in accordance with the Board’s discount pricing practice regulations as set forth in detail below. [40 Pa. Code § 13.103; Board Advisory Notice No. 16].

Question #1: Provided that all happy hour discounts for the day do not exceed four (4) hours and are consistent throughout, does the proposed package in any way violate the Liquor Code or Board’s Regulations?

Response #1: In addition to the caveats above, note that while Mixtape is permitted to offer whatever discounts it wants on food and non-alcoholic beverages, the discounting of alcoholic beverages must adhere to the following rules. In each business day, retail licensees may engage in the following discount

pricing practices as permitted by section 13.102 of the Board's Regulations: a daily drink special and a happy hour. [40 Pa. Code § 13.102].

Regarding daily drink specials, a retail licensee is permitted to offer one (1) specific type of alcoholic beverage at a discounted price all day, or for a portion of the day, if it chooses. [40 Pa. Code § 13.102(b)(2)]. A specific type of alcoholic beverage means either a specific registered brand of malt or brewed beverages, a type of wine, a type of distilled spirits or a mixed drink. [Id.].

With regard to happy hour pricing, a retail licensee is permitted to discount any and all alcoholic beverages for a period of time not to exceed four (4) consecutive hours, and not to exceed fourteen (14) hours per week. [47 P.S. §§ 1-102, 4-406(g) and 40 Pa. Code § 13.102(a)]. During such happy hours, the price of alcoholic beverages may not change. The hours need not be consecutive and may be divided, subject to the above noted limitation, in any manner a licensee desires. However, please note that no discount pricing practice (daily drink special or happy hour) may occur between 12 a.m. midnight and the legal closing hour. [40 Pa. Code § 13.102]. Lastly, please be advised that a notice of all happy hours must be posted on the licensed premises seven (7) days prior to each happy hour. [Id.].

Furthermore, section 13.53 of the Board's Regulations [40 Pa. Code § 13.53] provides that retail licensees may give to or purchase an alcoholic beverage for consumers at retail licensed premises, provided that the giving of alcoholic beverages is not contingent upon the purchase of any other alcoholic beverage. Bar spending or free drinks are limited to one (1) standard size alcoholic beverage per patron in such offering. A standard sized alcoholic beverage is defined as twelve (12) fluid ounces of a malt or brewed beverage, four (4) fluid ounces of wine (including fortified wine), and one and one-half (1½) fluid ounces of liquor. [Id.].

In the context of your question, while Mixtape may have a happy hour whereby all or certain alcoholic beverages would be discounted, it may also treat the "VIP" package as a catered event, which is also permissible. [40 Pa. Code § 13.102(b)(1)]. Specifically, section 13.102(b)(1) of the Board's Regulations provides an exception to the above discount pricing practices such that a retail licensee may sell or serve an unlimited or indefinite amount of liquor, wine or malt or brewed beverages for a fixed price for catered events which have been arranged at least twenty-four (24) hours in advance. [Id.]. In order to comply, Mixtape

would have to charge a fixed price for the participants of the catered event. Your e-mail did not specify whether this is your intent.

If there is no payment for participation in the “VIP” package, then Mixtape could, in accordance with section 13.53 of the Board’s Regulations, offer one (1) free standard size drink for those patrons identified as being part of a “VIP” package group. [40 Pa. Code § 13.51]. This free drink can be in addition to any discount on alcoholic beverages offered to everyone as part of any happy hour.

Question #2: Though it is Mixtape’s understanding that, pursuant to 40 Pa. Code § 13.53, licensees may give customers one (1) standard size free drink, would the complimentary drink included in the aforementioned package be considered a free drink in this instance? [You] wonder whether the guests could still consume all twelve (12) free drinks in the event that the booking party contains less than twelve (12) people and/or if one (1) of the VIP party gave his or her free drink to another member of the VIP party.

Response #2: As noted above, it is not clear whether you intend to collect payment for the “VIP” package itself. In any case, a licensee may only give one (1) free drink per customer, as set forth above. The licensee is responsible for ensuring that no customer receives more than one (1) such free drink. [40 Pa. Code § 13.53].

Question #3: Provided that the proposed package is permissible, if you want to run a promotional sweepstakes, are you correct in believing that you would have to adjust the package to exclude the complimentary drink pursuant to section 5.32(h) of the Board’s Regulations prohibiting licensees from including alcoholic beverages as part of a prize?

Response #3: It is unclear how you would intend to implement the proposed package into a sweepstakes configuration; however, as you note, section 5.32(h) of the Board’s Regulations states that a manufacturer or licensee may sponsor sweepstakes promotions subject to the following conditions:

- i. No purchase is necessary to enter.
- ii. Entrants shall be twenty-one (21) years of age or older.

- iii. Retail licensed premises may only be involved as pick-up or drop-off points for entry forms and not for the conducting of drawings or the awarding of prizes.
- iv. Alcoholic beverages may not be part of the prize.

[40 Pa. Code § 5.32(h) (emphasis added)].

In addition to all of the above parameters, you must comply with all terms of any relevant Conditional Licensing Agreements that may be in effect.

Finally, as you are interested in developing complex commercial promotions that are potentially problematic, it is recommended that you consult private counsel experienced in Pennsylvania liquor law.

Should you have any additional questions, do not hesitate to contact this office.

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,

RODRIGO J. DIAZ
EXECUTIVE DEPUTY CHIEF COUNSEL

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LCB Advisory Opinion No. 15- 447