

February 1, 2016

Matthew Quigley
Federal Distilling
161 Cecil B. Moore Avenue
Philadelphia, PA 19122
VIA E-MAIL

RE: Various Limited Distillery Operational Questions

Dear Mr. Quigley:

ISSUE: This is in response to your e-mail of December 3, 2015, forwarded to this office for handling, wherein you ask eight questions regarding various operational issues of a licensed limited distillery. Your questions will be set forth in detail below.

Records of the Pennsylvania Liquor Control Board (“Board”) indicate that Sweet Grace Distilling Company LLC, trading as Federal Distilling, holds Limited Distillery License No. AL-39 (LID 70421) for the premises located at 161 Cecil B. Moore Avenue, Unit 103, Philadelphia, Pennsylvania. You are the Board-approved manager.

OPINION: As a threshold matter, since you are beginning a private commercial enterprise in a highly regulated field, it is strongly recommended that you seek counsel from a private attorney experienced in Pennsylvania liquor law. You may also find voluminous information on the Board’s website at www.lcb.state.pa.us. This information includes but is not limited to the Liquor Code, the Board’s Regulations, Advisory Notices and a searchable Advisory Opinion database. Your questions and the responses follow.

Question #1: When selling bottles of spirits directly to a licensee, what information does the licensed limited distillery (“AL”) need to collect and document? How and when does that information need to be reported to the Board?

Response #1: Section 512 of the Liquor Code states in pertinent part:

Every [limited distillery licensee] shall keep on the licensed premises daily permanent records which shall show, (a) the quantities of any alcohol or liquor manufactured, produced, distilled, developed, denatured, redistilled, recovered, reused, stored in bond, stored as bailee for hire, received or used in the process of manufacture by [the licensee], and of all other material used in manufacturing or developing any alcohol or liquor; (b) the sales or other disposition of any alcohol, liquor or malt or brewed beverages if covered by said license; (c) the quantities thereof, if any, stored in bond, stored for hire, or transported for hire by or for the licensee; and (d) the names and addresses of the purchasers or other recipients thereof

[47 P.S. § 5-512]. A licensee is only required to maintain, on its licensed premises, business records for the most recent six months, and may only remove those records from the licensed premises for “a lawful business purpose,” and must return those records after such business has been concluded. [Id.]. A licensee may maintain records off the licensed premises that are between six months and two years old, provided that such records are returned to the licensed premises within twenty-four hours of a request by the Board or the Pennsylvania State Police, Bureau of Liquor Control Enforcement (“Bureau”). [47 P.S. § 4-493(12)]. Such records are to be kept on the licensed premises, subject to inspection by the Board “for the purpose of ascertaining the correctness of the records required . . . to be kept by licensees.” [47 P.S. § 5-513].

Thus, you do not need to submit the records to the Board unless specifically asked to do so by the Board. As noted, the records are also subject to review by the Bureau at any time. [Id.].

Question #2: When selling to a licensee, our understanding is that we are to charge the exact same price that is charged in the Board’s stores. However, licensees get a discount off the shelf price at the Board’s stores. Please clarify what price we should be charging licensees. For reference, our product retails at \$27.99 in Pennsylvania stores.

Response #2: Section 505.4 of the Liquor Code provides that a limited distillery may sell its product as follows:

The holder of the [limited distillery] license may manufacture and sell bottled liquors produced on the licensed premises to the board, to entities licensed by the board and to the public between the hours of nine o'clock antemeridian and eleven o'clock postmeridian so long as a specific code of distilled liquor which is listed for sale as a stock item by the board in State liquor stores may not be offered for sale at a licensed limited distillery location at a price which is lower than that charged by the board and under such conditions and regulations as the board may enforce.

[47 P.S. § 5-505.4(b)(1)].

The discount for which licensees are eligible at Board stores is a function of the Liquor Code, specific to purchases made from the Board, and is not transferable to a manufacturing licensee for purposes of its pricing. That is, you may not extend the Board's licensee discount to your licensee customers.

Product listed for retail sale by the Board may not be sold at a limited distillery location for a lower price. This provision contemplates that there may be product that the limited distillery would sell only at its own locations and not through the Board. Listing such product with the Board would not be necessary. Furthermore, you may choose to sell at a higher price than the Board's price if you wish.

Question #3: When selling to a consumer, our understanding is that we need to charge the same price as the Board stores, with no discount.

Response #3: As noted in Response #2 above, you may not discount the price of your listed products below the retail price charged by the Board, whether the buyer is a licensee or a consumer. [Id.]. You may sell at a higher price if you wish.

Question #4: How do we handle Pennsylvania and Philadelphia sales tax on our spirits sold to consumers and licensees?

Response #4: Sales taxes on liquor sales are not within the jurisdiction of the Board. On the issue of Pennsylvania's six percent sales tax, please contact the Pennsylvania Department of Revenue at 717-783-9360, as that agency is responsible for the oversight of state sales taxes. On the issue of municipal sales taxes, please contact the Tax Departments of the relevant locations (i.e., Philadelphia and Allegheny Counties).

Question #5: We are not supposed to discount relative to the Board's retail stores; however, when selling to a consumer, can we throw in something extra with the purchase of a bottle? For example, distillery tours are normally \$10.00, but we say that they are free with purchase of a bottle. Or buy two bottles and we'll give you free T-Shirt. Are things like this permissible?

Response #5: Section 493(24)(i) of the Liquor Code prohibits a licensee, including a manufacturer, from offering things of value as an inducement to the purchase of alcohol, with the exception of advertising novelties of nominal value and coupons. [47 P.S. § 4-493(24)(i)]. The Board has defined "advertising novelties of nominal value" as "matches, disposable lighters, bottle or can openers, caps, tee shirts, recipe pamphlets, pens, corkscrews and ashtrays, which bear advertising matter." [40 Pa. Code § 13.52(a)]. In addition, you may sell promotional items advertising your business only, such as tee shirts, mugs, caps and other similar items, to the general public. [40 Pa. Code § 13.52(f)].

Licensed limited distilleries may offer coupons, but only for the purchase of spirits through the Board's wine and spirits stores. [47 P.S. § 4-493(24)(i)].

To summarize, you may offer an advertising novelty to a person who purchases your product, or a coupon towards the purchase of your products at one of the Board's wine and spirits stores. You may not offer to waive the normal tour fee for those consumers purchasing your product. [Id.].

Question #6: Can we post bars/restaurants that carry our product online or on social media? This would be sort of a "store locator" function, but for bars and restaurants as well as the Board's stores.

Response #6: Nothing in the Liquor Code or the Board's Regulations would preclude a licensee from utilizing internet tools or social media to advertise a product or the locations where such product may be available for purchase, subject to the following restrictions. Please be advised generally that section 498(a) of the Liquor Code permits establishments, manufacturers and shippers to advertise their products and prices in the Commonwealth. [47 P.S. § 4-498(a)]. No advertisement of products or prices, however, may contain the following: (1) any statement that is false, deceptive or misleading; (2) any statement that is disparaging of the products of a competitor; and (3) any statement referring to monetary comparisons between brands. [47 P.S. § 4-498(b)(1)-(3)].

The entity responsible for the advertisement shall be clearly identified in the advertisement. [47 P.S. § 4-498(e)(1)]. No advertisement may use any subject matter, language or slogan directed to minors to promote the consumption of alcoholic beverages by minors. [47 P.S. § 4-498(e)(4)]. No advertisement that is obscene is allowed. [47 P.S. § 4-498(e)(6)]. Advertisements shall not be inconsistent with the spirit of safety or safe driving programs. [47 P.S. § 4-498(f)].

This office has historically stated that the listing of many retail locations on an internet-based website carries *de minimus* value and thus is permissible, all other requirements being met.

Question # 7: Can we announce/promote events online that take place at other off-premise licensees? For example: "Our Master Distiller, Matthew Quigley will be at Mac's Tavern from 5-8PM tonight discussing Stateside Vodka's unique distillation process." What about drink specials that take place at other bars?

Response #7: General regulations pertaining to advertising of distilled spirits are found at 40 Pa. Code §§ 13.11 – 13.16.

Next, section 13.51 of the Board's Regulations prohibits a licensee of one class, such as a manufacturer, from providing anything of value to licensees of another class, such as a restaurant liquor licensee. [40 Pa. Code § 13.51]. Similarly, the Liquor Code's provisions on interlocking business practices prohibit manufacturers from providing money or other things of value to equip or otherwise help the operation of the licensed business of a retail licensee. [47 P.S. § 4-443].

Historically, however, this office has approved cooperative advertising between manufacturers, distributors and retail licensees, so long as each party pays its proportionate share for the cost of advertisement. The proposed listing of a retailer's name and address on a website provides something of value to the retailer, as does a print advertisement of a retail establishment's special events or drink specials.

Accordingly, section 13.51(a) of the Board's Regulations would prohibit this type of arrangement unless the retailer pays its proportionate share of the value of the advertising event. [40 Pa. Code § 13.51(a)]. As a practical matter, for internet or social media applications, the type of ads and listings that you describe would likely be of nominal cost and, thus would be permissible. For print ads, there is a defined cost that would have to be shared and documented.

Since there are also federal issues involved, it is recommended that you seek counsel from the Alcohol, Tobacco, Tax and Trade Bureau, specifically regarding potential issues arising from section 6.98 of the Federal Register relating to advertising services and tied house prohibitions. [27 C.F.R. § 6.98].

Question #8: What is the law with regards to shipping samples in state and out of state, whether to licensees or consumers? What needs to be done to attain the proper permits, etc?

Response #8: Your AL license includes the privilege of transporting your products within Pennsylvania in your own vehicles. Please be advised that licensees are required to have painted or affixed on each side of each vehicle used in the operation of the business their name, address, including the street name and number as shown on the license, and the license number as shown on the license in letters no smaller than two inches in height. [47 P.S. § 4-492(9)]. The license identification number shall be preceded by the letters “P.L.C.B.” [40 Pa. Code § 9.22]. This office has previously approved of the use of magnetic signs placed upon the sides of delivery vehicles containing the required information.

Alternatively, you may ship your products within Pennsylvania via a licensed transporter-for-hire. If you decide to use the services of a transporter-for-hire, you may find such licensees on the Board’s above-referenced website. From the “Licensees” link, scroll down to “Licensing Search.” You will need to click on the “Start” button at the bottom of the disclaimer page. On the next screen, search for licenses with an “Active” status, and then search for Transporter-for-Hire Class A or Class C. These are the only types of licensees that can transport distilled spirits.

Please note that in either scenario you must ensure that the product is sold and delivered only to persons aged twenty-one or older, and to persons who are not visibly intoxicated. [47 P.S. § 4-493(1)].

Out of state shipments of liquor are outside the jurisdiction of the Board; you will need to inquire of the receiving states’ authorities.

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
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
Joseph Puhalla, Director of Product Selection

LCB Advisory Opinion No. 15- 528