

February 29, 2016

Francis X. O'Brien, Esquire
411 Walnut Street
Harrisburg, PA 17101

RE: Interlocking Business Prohibitions

Dear Mr. O'Brien:

ISSUE: This office is in receipt of your letter of January 8, 2016¹, wherein you pose, on behalf of your unnamed client a number of questions regarding the interlocking business prohibitions ("IBP") found in section 411 of the Liquor Code 47 P.S. § 4-411.

OPINION: Your questions are as follows:

- 1) Is the beneficiary of a trust holding a liquor license subject to the IBPs?

Yes. This office has previously opined on this scenario under a similar IBP found in section 443 of the Liquor Code. 47 P.S. § 4-443. In Advisory Opinion 2008-0485, this office opined that the beneficiaries of a trust have a direct financial interest in it. Thus, the IBPs found in the Liquor Code apply. Moreover, this office has further opined that the trustee of a trust also is subject to the IBPs because the trustee exercises control over the trust.

- 2) Does the exception in section 411(e) apply to trust beneficiaries?

Because you do not identify what type of license your client holds, this question cannot be answered with certainty.

You inquire if the exception found in section 411(e), which you have labeled "the safe harbor exception" applies to trust beneficiaries. Please be advised that generally a person who holds a 5% or less interest in a publicly or privately-held

¹ This letter was received by the Office of Chief Counsel on January 29, 2016.

entity owning a restaurant or eating place retail dispenser license is not deemed to have a "financial interest" and is not subject to the interlocking business prohibitions if the person is not an officer or employee of, nor has an interest in, nor exercises any control over any other licensed entity that engages in any sales to or from the restaurant ("R") or eating place retail dispenser licensee ("E"). 47 P.S. §§ 4-411(e); 4-438(c)(emphasis supplied). To the extent your client is the beneficiary of a trust that holds an R or an E, then the "safe harbor" exception would apply. If the trust holds any other type of license, the exception would not apply.

3) Can an individual have interests of below 5% in multiple licenses?

Yes. Again, provided your client holds an R or an E, the 5% threshold is not cumulative.

4) How does the Pennsylvania Liquor Control Board ("PLCB") calculate the interests held in joint ventures?

A licensee may enter into management agreements which provide for sharing the control of the licensed business in certain areas, or joint venture agreements in which the license is transferred to and held by the joint venture, and which would allow the allocation of the profits of the licensed business between the members of the joint venture in whatever manner it wished.

A joint venture is defined as "A business undertaking by two or more persons engaged in a single defined project. The necessary elements are: (1) an express or implied agreement; (2) a common purpose that the group intends to carry out; (3) shared profits and losses; and (4) each member's equal voice in controlling the project." (Black's Law Dictionary, Seventh Edition, 1999). Prior approval is required of such a joint venture agreement by the PLCB's Bureau of Licensing.

You provide a scenario where your client owns 10% of one of the two entities in a joint partnership. The two entities in the joint partnership each hold a 50% interest in the license. You inquire if Licensing would treat your client as having a 10% ownership, or a 5% ownership, since he/she only holds an interest in one of the joint partners.

This office has consulted Licensing, which indicated that in your hypothetical, Licensing would recognize your client as having a 5% interest in the license.

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

Sincerely,

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

LCB Advisory Opinion No. 16-058