

February 29, 2016

Greg Skirboll
Mexitaly-Brick Oven Brew House
VIA E-MAIL

RE: Scope of Brewery License

Dear Mr. Skirboll:

ISSUE: This is in response to your January 20, 2016 e-mail to this office in which you ask several questions about what you may and may not do with your liquor licenses. Specifically, you ask if you are permitted to sell kegs directly to consumers and/or restaurants and bars and, if so, whether you must enter into a distributor agreement with them. It will be presumed for purposes of this response that, by “kegs,” you are referring to barrel-sized containers most typically containing between five and fifteen and a half gallons. It will also be presumed for purposes of this response that, by “distributor agreement,” you mean territorial agreements as between a licensed malt beverage manufacturer and a licensed distributor. You also ask if you are permitted to sell six-packs of cider/wine or growlers of cider/wine.

Next, you ask if there would be any licensing obstacles to adding a distillery to your operation, whereby both functions would be performed under the same roof. Finally, if you can be licensed as a distillery, you ask if you would be permitted to sell bottles directly to consumers on site and offer product directly to restaurants or bars, or whether the sale of your products would have to go through a state store.

Records of the Pennsylvania Liquor Control Board (“PLCB”) indicate that Lucid Foods LLC, trading as Mexitaly, is the holder of Malt Beverage Manufacturing License No. G-516 (LID 68738) and Brew Pub License No. GP-516 (LID 68739) for use at the premises located at 2440 East Market Street, York, Pennsylvania. You are the PLCB-approved manager/steward.

OPINION: As a threshold matter, since you are embarking on a significant commercial enterprise in a highly regulated area, you are strongly encouraged to seek private counsel experienced in Pennsylvania liquor law. Next, for your general information, there is voluminous information available on the PLCB’s website at www.lcb.state.pa.us. For example, click on “Licensees” and/or “Legal” for Frequently Asked Questions,

pamphlets, forms, the Liquor Code and PLCB's Regulations, advisory opinions and the like.

In response to your first question, a brewery ("G") license entitles its holder to produce malt or brewed beverages and to transport, sell and deliver those malt or brewed beverages. [47 P.S. § 4-431(a)]. 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 128 ounces or more. [47 P.S. §§ 4-431, 4-440].

There is no maximum quantity or limitation on the amount that a G licensee may sell for off-premises consumption. Thus, your G entity could sell kegs directly to consumers and/or restaurants, as long as the kegs constitute original containers as described above. You may choose to self-distribute your products and you are not required to enter into a territorial agreement with a distributor.

However, please note that your GP entity is limited to sales of its own products for off-premises consumption only in quantities equal to or less than 192 fluid ounces in a single sale. [40 Pa. Code § 3.92]. Thus, the GP cannot sell kegs as described above.

In response to your second question, it will be presumed for purposes of this response that your reference to "cider/wine" means "alcoholic cider" as that term is defined in section 102 of the Liquor Code:

. . . 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]. The answer to your question depends on whether you are referring to "alcoholic cider" that is a malt or brewed beverage or "alcoholic cider" that is classified as wine. The answer also depends on which of your two licensed entities is making the subject sale, since there are different rules for G and GP licenses in this respect.

Notably, your G license allows you to manufacture and sell "alcoholic cider" containing at least 0.5%, but not greater than 5.5%, alcohol by volume. To be clear, you may not

manufacture alcoholic cider having greater than 5.5% alcohol by volume. As noted above, a G licensee may choose to package its alcoholic cider in six-pack configurations (or as growler fills) for sale to individuals for off-premises consumption; however, for sales to licensees, the G licensee must configure its six-pack or growler packaging to meet the requirements of section 440, i.e., quantities of not less than a case or original containers containing 128 ounces or more. [47 P.S. § 4-440].

Your GP license permits the sale of malt or brewed beverages produced at and owned by your G license, as well as wines manufactured by the holder of a Pennsylvania limited winery license. [40 Pa. Code § 3.92(d)]. Thus, for sales to individuals for off-premises consumption, your GP licensed entity could lawfully sell six-packs or growlers of alcoholic cider (i.e., malt beverage) only if it has been produced and is owned by your G licensee.

In response to your third question, absent specific statutory authority, the PLCB will not typically dual-license a single premises. More specifically, although the general rule in section 438(c) of the Liquor Code is that no person shall possess more than one class of license, there is nothing in the Liquor Code or PLCB's Regulations prohibiting an entity from holding multiple licenses, provided such licenses are of the same class. [47 P.S. § 4-438(c)]. Therefore, notwithstanding the general rule, you may hold multiple manufacturing licenses, such as a brewery license and a limited distillery license.

As noted, generally only one license may be in effect at one time at any particular portion or location. The PLCB Bureau of Licensing will investigate each application and make recommendations to the three-member Board. You may choose to separate the licensed premises such that they are two physically distinct locations within the same building, just as if you held one license and someone else held the other license. In this manner, each license would have its own physical space. However, it would be necessary to obtain PLCB approval if you wished to have an interior connection between these licensed premises. [40 Pa. Code § 3.52(b)].

In response to your fourth question, a licensed limited distillery may sell its products directly to consumers for off-site consumption, directly to other licensees, and also to the PLCB, as desired. [47 P.S. § 505.4(b)(1)]. Again, you are encouraged to seek private counsel to assist you with your endeavors.

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

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