

February 7, 2017

Aaron K. Zeamer, Esq.
Russell, Krafft & Gruber, LLP
Hempfield Center, Suite 300
930 Red Rose Court
Lancaster, PA 17601
VIA E-MAIL

RE: Implementation and Interpretation of Act 166

Dear Mr. Zeamer:

ISSUE: This correspondence is in response to your e-mail and letter dated December 27, 2016, wherein you indicate that you are writing on behalf of your clients, consisting of both distillers and breweries, in order to obtain further clarification with respect to the implementation of Act 166 of 2016 (“Act 166”) and the language therein which places a limit on the ability of licensed Pennsylvania breweries, wineries and distilleries to sell one another’s products. Specifically, you have questions regarding what the Pennsylvania Liquor Control Board (“PLCB”) considers to be included in a manufacturer’s own on-premises sales, which will be used to calculate the amount of other licensed manufacturer’s products that may be sold after Act 166 takes effect on January 17, 2017. You raise two scenarios that will be restated and addressed below.

OPINION: By way of background, Act 39 of 2016 (“Act 39”) amended the Liquor Code to allow Pennsylvania-licensed manufacturers, i.e. breweries, limited wineries, distilleries, and limited distilleries, to sell, for on-premises consumption, products made by other Pennsylvania-licensed manufacturers. 47 P.S. §§ 4-446(a)(2), 5-505.2(a)(6.1), 505.4(b)(1), 505.4(c)(1). Act 166 clarified that licensed manufacturers may also sell products made by other Pennsylvania-licensed manufacturers of the same type, i.e. breweries may sell beer made by other Pennsylvania-licensed breweries.

However, Act 166 placed a limit on the quantity of alcohol produced by other manufacturers that a licensed manufacturer may sell. Effective January 17, 2017, the combined sales of wine, liquor, and malt or brewed beverages produced by another manufacturer may not, on a yearly basis, exceed 50% of the on-premises sales of the manufacturer’s own product for the preceding calendar year, or for the current year if the manufacturer was not operating for a full calendar year. 47 P.S. §§ 4-446(a)(2), 5-505.2(a)(6.1), 5-505.4(c)(1), 5-505.4(b)(1).

First Scenario

You state that your client, a limited distillery licensee, plans to operate in conjunction with other limited distilleries at an additional Board-approved (“satellite”) location. Each of the limited distillery licensees would seek permission to use the combined location, and there would be one Board-approved manager. You indicate that food for on-premises consumption would be offered, and liquor produced by each of the licensed limited distilleries would be available for purchase by the glass or by bottle for on-site consumption. You ask the following question: “since there are multiple licensees approved at this location, will the PLCB aggregate the on-premises sales of each of the licensees’ products for all of the licensed limited distilleries’ products sold at this location?” You further inquire about the reporting requirements for this combined location.

Assuming your first question refers to the aforementioned 50% limit placed by Act 166 on a limited distillery’s annual sales of other manufacturers’ products for on-premises consumption, the answer is no; the PLCB would not “aggregate” the combined sales of all of the limited distilleries approved to operate a shared satellite location. The amended text of section 505.4(b)(1) clearly states that the 50% limit is calculated using the amount of “on-premises sales of the limited distillery’s own sales of liquor.” Therefore, each of the limited distilleries approved to operate at your proposed shared satellite location would have a separate 50% threshold, based on each distillery’s respective sales of its own products for on-premises consumption. As to your second question, each limited distillery operating at a shared satellite location is responsible for keeping its own complete records. 47 P.S. § 5-505.4(b)(2)(ii).

Second Scenario

You indicate that your client holds a manufacturing (“G”) license which is coupled with a restaurant (“R”) license. Your client is considering adding a limited distillery (“AL”) license to this location, and possibly selling the R license to simply operate as a brewery/limited distillery. You pose the following question: “Assuming for the purpose of this inquiry that this entity was granted permission by the Board to operate both a G license and an AL license at the same location, how would the Board determine and calculate the amount of on-premises sales for the licensee under 47 P.S. § 4-446(a)?”

Again, under Act 166 each of the two manufacturing licenses you referenced will have a separate 50% limit that will be calculated using the sales for on-premises consumption of products manufactured under that particular license. Therefore, in your scenario there

would be a permissible amount of sales of other manufacturers' products based on the brewery's prior-year sales of its own malt or brewed beverages; there would also be a permissible amount of sales of other manufacturers' products based on the distillery's current-year sales, since it would not have been operating in the prior calendar year. The permissible amounts would be calculated separately using the respective sales numbers.

In addition, since your proposed scenario involves multiple licenses at a premises, please note that the PLCB's Bureau of Licensing ("Licensing") will not typically dual-license a location, absent specific statutory authority. See 47 P.S. §§ 5-505.2(a)(3); 5-505.4(b)(2). Thus, only one license may be in effect at one time at any particular portion of a premises. Since you have not yet filed an application for a limited distillery license, this office cannot provide any further guidance other than suggesting that if you wish to pursue this matter, you should submit an application to Licensing.

Should you have any other questions and/or issues related to the Liquor Code or the PLCB's Regulations, please feel free to once again 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.

Sincerely,



RODRIGO J. DIAZ
CHIEF COUNSEL

cc: Pennsylvania State Police, Bureau of Liquor Control Enforcement
Tisha Albert, Director of Regulatory Affairs
B.L. Peifer, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing