

January 2, 2019

Rodney J. Kundrod  
**VIA EMAIL**

**RE: Importing Distributor Questions**

Dear Mr. Kundrod:

ISSUE: This office is in receipt of your e-mail correspondence of October 17, 2018, wherein you ask what steps are necessary in order to acquire a new territory and a second warehouse for an importing distributor. You reference a current deal in which your company is attempting to acquire all or part of another licensee's territory and distribution rights including an existing warehouse in the new territory.

Records of the Pennsylvania Liquor Control Board ("PLCB") indicate that Inco Beverage, Inc. holds Importing Distributor License No. ID-343 (LID 8527) for the premises located at 147 Allison Drive, Johnstown, Pennsylvania.

OPINION: As you seem to be aware, under the beer distribution system in Pennsylvania, out-of-state manufacturers whose products are sold and delivered in Pennsylvania are required to give distribution rights for their products to importing distributors for a specific geographical area within Pennsylvania. 47 P.S. § 4-431(b). Written territorial franchise agreements between the out-of-state manufacturer and its importing distributor regulate, among other things, the geographical area in which the importing distributor may sell the manufacturer's products. Id. Importing distributors may then sell the products to importing distributors, distributors and other licensees within their appointed territories. Id. If an importing distributor sells the products of another importing distributor, then the two importing distributors must enter into their own territorial agreement. The territorial agreement between the two importing distributors may only include areas that are part of the selling importing distributor's territory. Id.

Similarly, when a Pennsylvania manufacturer of malt or brewed beverages (an "in-state manufacturer") names or constitutes a distributor or importing distributor as the primary or original supplier of his product, he/she shall also designate the specific geographical area for which the said distributor or importing distributor is given distributing rights,

and such distributor or importing distributor shall not sell or deliver the products of such manufacturer to any person holding a PLCB license whose licensed premises are not located within the geographical area for which distributing rights have been given to the distributor and importing distributor by the said manufacturer. 47 P.S. § 4-431(b). Again, if an importing distributor is selling the products of another importing distributor, then the two importing distributors must enter into their own territorial agreement which may only include areas that are part of the selling importing distributor's territory.

Modification, cancellation, termination, or rescission of distribution and territory agreements is governed by sections 492(19) and 431(d) of the Liquor Code. Section 492(19) of the Liquor Code provides that:

It shall be unlawful . . . [f]or any manufacturer or any officer, agent or representative of any manufacturer to modify, cancel, terminate, rescind or not renew, without good cause, any distributing rights agreement, and in no event shall any modification, cancellation, termination, rescission or nonrenewal of any distributing rights agreement become effective for at least ninety (90) days after written notice of such modification, cancellation, termination, rescission, or intention not to renew has been served on the affected party and board by certified mail, return receipt requested, except by written consent of the parties to the agreement. The notice shall state all the reasons for the intended modification, termination, cancellation, rescission or nonrenewal. The distributor or importing distributor holding such agreement shall have ninety (90) days in which to rectify any claimed deficiency or challenge the alleged cause.

If the deficiency shall be rectified within ninety (90) days of notice, then the proposed modification, termination, cancellation, rescission or nonrenewal shall be null and void and without legal effect.

If the notice states as one of the reasons for the intended modification, cancellation, termination, rescission or [non]renewal that the importing distributor or distributor's equipment or warehouse requires major changes or additions, then if the distributor or importing distributor shall have taken some positive action to comply with the required changes or additions, the distributor or importing distributor shall have [been] deemed to have

complied with the deficiency as set forth in the notice. The notice provisions of this section shall not apply if the reason for termination, cancellation or nonrenewal is insolvency, assignment for the benefit of creditors, bankruptcy, liquidation, fraudulent conduct in its dealings with the manufacturer, revocation or suspension for more than a thirty (30) day period of the importing distributor or distributor license.

47 P.S. § 4-492(19).

Further, section 431(d)(4) provides that:

The court of common pleas of the county wherein the licensed premises of the importing distributor or distributor are located is hereby vested with jurisdiction and power to enjoin the modification, rescission, cancellation or termination of a franchise or agreement between a manufacturer and importing distributor or distributor at the instance of such importing distributor or distributor who is or might be adversely affected by such modification, rescission, cancellation, or termination, and in granting an injunction the court shall provide that no manufacturer shall supply the customers or territory of the importing distributor or distributor by servicing the territory or customers through other importing distributors or distributors or any other means while the injunction is in effect: Provided, however, that any injunction issued under this subsection shall require the posting of sufficient bond against damages arising from an injunction improvidently granted and a showing that the danger of irrevocable loss or damage is immediate and that during the pendency of such injunction the importing distributor or distributor shall continue to service the accounts of the manufacturer in good faith.

47 P.S. § 4-431(d)(4). Thus, whether or not a territorial agreement can be reassigned is not a determination made by the PLCB, nor can this office provide you with directions on how to accomplish the “deal” described in your e-mail. You are advised to consult private counsel for further advice regarding territorial agreements.

Additionally, please note that the PLCB’s Regulations require any change in territorial agreements be reported to the PLCB within thirty days. 40 Pa. Code § 9.108(c). Such changes should be reported to the PLCB’s Bureau of Licensing (“Licensing”).

The PLCB may issue up to four storage facilities licenses to an importing distributor. Storage locations must be designated solely as a storage facility, from which only sales to other licensees are permitted. 47 P.S. § 4-431(b). Section 441(d) states that an importing distributor cannot maintain any place for the storage of malt or brewed beverages except in the franchise territory in which the licensed premises is located unless otherwise approved by the PLCB. 47 P.S. § 4-441(d)(2). Therefore, in the case of storage at a PLCB-approved storage facility, a specific manufacturer's beverages can only be stored at a location within the assigned geographic territory for the manufacturer. An importing distributor can store any products at the originally licensed premises, regardless of whether that premises is located within the franchise territory.

An application for a secondary storage facility can be filed through the PLCB's online regulatory system PLCB+ found at <https://plcbplus.pa.gov/pub/Login.aspx>. Please note that the application process will take a minimum of thirty days. You may also contact Licensing at 717-783-8250 for more information on the application process.

Please do not hesitate to contact this office should you have any additional questions.

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, Office of Regulatory Affairs  
B.L. Peifer, Director, Bureau of Licensing

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