



**F.X. O'BRIEN**  
ASSOCIATES, LLC

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April 28, 2016

Scott R. Schalles  
Regulatory Analyst  
Independent Regulatory Review Commission  
333 Market Street, 13<sup>th</sup> Floor  
Harrisburg, PA 17101

**RE: Proposed Regulation Package 54-89  
Pennsylvania Liquor Control Board  
Credit Card**

Dear Mr. Schalles:

I am writing on behalf of my client, the Pennsylvania Beer Alliance ("PBA"), the trade group of the family-owned wholesale beer distributors in Pennsylvania.

Thank you for your time in meeting with us on this proposed regulation. We appreciate the opportunity to express our concerns and renew the offer to provide any other information or explanation if that would help the process.

As we explained at the meeting, PBA opposes the proposed regulation for several reasons. We oppose this because the Liquor Code does not give the legal authority to implement this regulation and the regulation is bad policy because it is anti-consumer. However, if the regulation does go forward, we request several modifications to it to accommodate implementation.

On its face, the Liquor Code section the LCB relies upon, 493(2) presents a conflict between the 'cash only' phrase at the beginning of the paragraph and the 'no cash' further down in the paragraph. Of course we must look at this in light of the presumption that the General Assembly did not intend a result that is absurd, impossible of execution or unreasonable, and that it "intends the entire statute to be effective and certain." 1 Pa.C.S. §1922(1), (2). Reading the apparently contradictory phrases as making sense is simple to do.

Liquor Code Section 493(2) states it shall be unlawful “for any licensee, his agent, servant or employee, to sell or offer to sell or purchase or receive any liquor or malt or brewed beverages except for cash.” 47 P.S. §4-493(2). There are several exceptions to the prohibition, but the exceptions for credit do not apply “to customers possessing a license under this article.” Id. There is a further prohibition that states an importing distributor or distributor may not accept “cash for payment of any malt or brewed beverages from anyone possessing a license issued under this article.” Id. The law allows the ID or D to accept money orders or cashiers’ checks for payment of malt or brewed beverages “in addition to any other type of payment authorized by the Board.”

The section of the Liquor Code uses the term “cash” in two different contexts, with meanings of the word that should be read differently. The Pennsylvania Statutory Construction Act dictates that words and phrases “shall be construed ... according to their common and approved usage.” 1 Pa.C.S. §1903(a). The only reading of the first use of the term “cash”, as stated in numerous LCB opinions, is that credit may not be extended to licensed purchasers. In context, the second use of the term suggests the more limited meaning of the term “cash,” that is, folding paper currency. This is supported by the alternative use of money orders or cashiers’ check for payment of malt or brewed beverages. LCB legal advisory opinions subsequent to the statutory change support the interpretation that while IDs or Ds cannot accept paper currency, they still are not permitted to extend credit to the purchaser. LCB Advisory Opinion No. 15-177 (April 17, 2015), A.O. No. 08-130 (April 10, 2008), A.O. No. 04-628 (January 3, 2005).

As the LCB should acknowledge, the impetus behind the amendment, in Act 239 of 2004 to say ‘can’t accept cash’ were the attacks against and robberies of delivery drivers because they were known to carry large amounts of cash. The next year, Act 39 of 2005 authorized other non-credit forms of payment because many smaller businesses had no other payment options.

The LCB does not have the legal authority, by regulation, to authorize the use of credit by the purchaser because the statute specifically prohibits the use of credit to purchase malt or brewed beverages. The phrase the Board is relying on as its authority to promulgate the credit card regulation is the following: “It shall be permissible for the importing distributor or distributor to accept money orders or cashiers’ checks for payment of any malt or brewed beverages in addition to any other type of payment authorized by the board from anyone possessing a license under this article.” Liquor Code Section 493(2). The phrase “any other type of payment authorized by the board” must be interpreted in light of the string of types of payment listed before it. In saying that cash can no longer be accepted, the legislature specified secure forms of payment under which the purchaser had already given up its funds for the payment document – money order or cashier’s check. The phrase ‘other authorized type of payment’ must be interpreted in light of the preceding legislative language.

Since the Board has consistently interpreted 493(2) to prohibit the extension of credit to licensed purchasers, the statute cannot be read to give the Board legal authority in 493(2) to extend credit by administrative regulations. Despite this, in its Legislative Reference Bureau filing initiating this regulatory change, the LCB conceded that the use of a credit card by a purchaser creates “a debt obligation to the third-party card issuer.” Proposed Rulemaking p.1; Regulatory Analysis Form p.2 (Feb. 10, 2016)

We continue to assert that the regulation as proposed is without basis in the Liquor Code. In our opinion the interpretation of the law being relied upon by the Board ignores the guidance of the Statutory Interpretation Act and is not the most reasonable, logical interpretation. Nonetheless, recognizing the possibility that our argument may not prevail, we would like to follow up on the topic we raised at our meeting – additions to the regulatory change.

As we explained, a change such as this would require lead time and a predictable start date. Several months ago the industry went through a sudden change when the LCB issued a legal opinion (immediately effective) that radically changed the packaging scheme that the industry has been operating on for decades. This change caused chaos and numerous meetings between and among the various industry trade groups, Pennsylvania State Police Bureau of Liquor Control Enforcement (which does the Liquor Code enforcement), and the LCB. The chaotic transition reminds us that careful planning and a clear effective date will give all concerned reasonable time to comport their business arrangements with the change. Licensees who will be accepting credit cards must establish relationships with credit card processors, purchase and install equipment, and conduct training for staff.

Also there will be legal issues to resolve. Once a delivery is made, at the end of the day the driver must reconcile the payment because of container deposits and returns, breakage, and errors in assembling the order. By law, the payment must be processed at the wholesaler’s licensed business (driver cannot accept payment), so there are questions such as whether a new credit card charge at the end of the day for beer already delivered violates the law requiring prepayment. For these reasons, we renew our request that any regulatory change have an effective date 9 to 12 months after approval.

In addition to the lead time, any such regulation should specifically provide that anyone accepting credit cards in these circumstances must pass on to the user of the credit card any

service fees incurred as a result of the use of the card. By industry estimates, such charges range between 2% and 4%, and represent a substantial impact on any licensee that would be starting to accept these. (The anti-consumer effect of a 2%-4% increase in the price of beer is also significant.) Additionally, if our customers are permitted to purchase malt or brewed beverages on credit cards, the regulation should also allow us to purchase from the brewers on credit cards.

Thank you for your consideration.

Very truly yours,



Francis X. O'Brien  
F.X. O'BRIEN ASSOCIATES LLC

FXO/msr

[Carbon copy recipients listed on next page.]

cc: Honorable Tim Holden, Chairman, LCB  
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