COMMISSION MEETING

October 26, 2010

Texas Alcoholic Beverage Commission
5806 Mesa Drive
Austin, Texas 78731

José Cuevas, Jr., Presiding Officer
Midland

Steven M. Weinberg, MD, JD, Member
Colleyville

Melinda Fredricks, Member
Conroe
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AGENDA

REGULAR COMMISSION MEETING

9:30 a.m. – October 26, 2010

5806 Mesa Drive
Austin, Texas 78731
### Agenda

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<th>1. Call to Order</th>
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<td>Approval of Commission Meeting Minutes of August 24, 2010</td>
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<td>Administrator’s Report: Administrator and Agency Activities, Budget Issues, Staff Achievements</td>
<td>Sherry Cook</td>
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<td>Public Safety Grant</td>
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<td>15.</td>
<td>Executive Session to Consult with Legal Counsel Regarding Pending and Anticipated Litigation Against the Agency and to Discuss the Duties, Responsibilities, and Evaluation of the Administrator (Govt. Code §551.071, §551.074)</td>
<td>José Cuevas, Jr.</td>
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<td>17.</td>
<td>Adjourn</td>
<td>José Cuevas, Jr.</td>
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Note: *Items may not necessarily be considered in the order they appear on the agenda. Executive session for advice of Counsel (pursuant to §551.071 of the Government Code) may be called regarding any agenda item. Action may be taken on any agenda item.*

**NOTICE OF ASSISTANCE AT PUBLIC MEETINGS**

Persons with disabilities who plan to attend this meeting and who may need auxiliary aids or services (such as interpreters for persons who are deaf, hearing impaired readers, large print, or Braille) are requested to contact Luann Dickerson at (512) 206-3217 (voice) (512) 206-3203 (fax), or (512) 206-3270 (TDD), at least three (3) days prior to the meeting so that appropriate arrangements can be made.
The Commissioners of the Texas Alcoholic Beverage Commission (TABC) met in Regular Session on Tuesday, October 26, 2010, at the Texas Alcoholic Beverage Commission, 5806 Mesa Drive, Suite 185, Austin, Texas.

**PRESIDING OFFICER:** José Cuevas, Jr.

**COMMISSIONERS PRESENT:**
- Steven M. Weinberg, MD, JD

**STAFF PRESENT:**
- Sherry Cook, Assistant Administrator
- Carolyn Beck, Director of Communications and Governmental Relations
- Darryl Darnell, Inspector of Public Safety
- Luann Dickerson, Executive Assistant, Executive Division
- Loretta Doty, Director, Human Resources Division
- Shelby Eskew, Director, Business Services Division
- Joey Estrada, Grant Coordinator
- Kathy Gersbach, Executive Assistant, Executive Division
- Bobby Gideon, Captain, Training Division
- Thomas Graham, Supervisor, Marketing Practices
- Amy Harrison, Director, Licensing Division
- Emily Helm, General Counsel, Legal Division
- Tanya Jimenez, Administrative Assistant, Executive Division
- Ashleigh Jons, Coordinator, Seller Training
- Dexter K. Jones, Assistant Chief of Field Operations
- JoAnn Joseph, Assistant Director, Licensing Division
- Charlie Kerr, Director, Tax Division/Education and Prevention
- Richard Maness, System Support Specialist, Information Resources Division
- Luke Nutt, Education Specialist, Education and Prevention
Earl Pearson, Chief of Staff, Executive Division
Andy Pena, Director, Office of Professional Responsibility
Gloria Darden Reed, Executive Assistant, Executive Division
Santos Saldana, Supervisor, Ports of Entry
Loretta Smith, Assistant Director, Business Services Division
Rod Venner, Assistant Chief of Enforcement, Enforcement Division
Jay Webster, Director, Information Resources Division
Martin Wilson, Assistant General Counsel, Legal Division

GUESTS PRESENT:

Vickie Adams, Coalition Coordinator, Circles of San Antonio, San Antonio, Texas
Janiece Attal, Director of Accreditation, 360training.com, Inc., -- Learn 2 Serve
Dewey Brackin, Attorney, Gardere Wynne Sewell
Lou Bright, General Counsel, Texas Wine and Grape Growers Association (TWGGA)
M L Calcote, Republic National Distributing
Rick Donley, President, The Beer Alliance of Texas
Brian Flickinger, Account Manager, Training for Intervention Procedures (TIPS)
Glen Garey, General Counsel, Texas Restaurant Association
Alan Gray, Executive Director, Licensed Beverage Distributors
Brittany Hibbs, Public Policy Liaison, Texans Standing Tall
Grace Kelly, Texas State Liaison, Training for Intervention Procedures (TIPS)
Lance Lively, Executive Director, Texas Package Stores Association
Fred Marosko, Executive Director, Texas Package Stores Association
Grace Stafford, Coalition Specialist, San Antonio Council on Alcohol and Drug Abuse, San Antonio, Texas
Ralph Townes, Senior Vice President, Glazers/LBD
Randy Yarbrough, Wholesale Beer Distributors of Texas
CALL TO ORDER

The meeting of the Texas Alcoholic Beverage Commission was called to order at 9:32 a.m. by Presiding Officer José Cuevas.

Before proceeding with the meeting, Presiding Officer José Cuevas stated for the record the absence of Commissioner Melinda Fredricks due to a prior commitment and also the absence of Administrator Alan Steen due to his recovery from surgery.

APPROVAL OF COMMISSION MEETING MINUTES OF AUGUST 24, 2010

Presiding Officer José Cuevas called for approval of the Commission meeting minutes of August 24, 2010. Commissioner Steven Weinberg so moved to approve the minutes as written, and Commissioner José Cuevas seconded. The motion carried.

ADMINISTRATOR'S REPORT: ADMINISTRATOR AND AGENCY ACTIVITIES, BUDGET ISSUES, STAFF ACHIEVEMENTS

Presiding Officer José Cuevas called upon Assistant Administrator Sherry Cook for the Administrator's report.

After welcoming the Commissioners back to Austin for another commission meeting, Assistant Administrator Cook's report began with comments directed to Commissioner Weinberg from his past predictions of the Texas Rangers representing the American League West baseball team in the World Series.

In preparation for the upcoming event, Assistant Administrator Cook stated that Assistant Chief Rod Venner has met with the hosting city of Arlington’s Police Department, City Attorney’s Office, Texas Rangers’ Concessionaire, event sponsors, and organizers. She stated that these preliminary discussions and preparations has demonstrated TABC’s willingness to serve and efficiently provide public safety during this event. Assistant Administrator Cook commented on Chief Joel Moreno’s involvement with the Super Bowl preparations and how his involvement in that event will make it easier in dealing with the details of the World Series.

Chief Joel Moreno commented that the officials in Dallas, Fort Worth, Arlington, and other areas in North Texas have expressed their appreciation to TABC for their business friendly attitude for the upcoming events.

Chief Moreno has met with Dallas’ Mayor Tom Leppert and other city officials. He has experienced an overwhelming support and appreciation for the creation of the Super Bowl Resource Guide. Mayor Leppert is entertaining the idea in having the cities of
Dallas, Fort Worth, and Arlington link to the TABC’s Resource Guide website that is located on the public inquiry website page.

Chief Moreno further commented that linking to the website would provide immediate answers to inquiries such as:

- Who to contact at TABC regional offices or at headquarters;
- Information on the approval process pertaining to licensing issues relating to temporary events;
- Information on the approval process pertaining to compliance promotional events;
- Standard operating procedures – what TABC will relax/what TABC will not relax.

Chief Moreno discussed TABC’s intent to educate the public, local authorities, and industry stakeholders of the Agency’s plan of action as it relates to our regulatory authority in the host city.

Assistant Administrator Cook’s report continued with the two propositions on the Dallas election ballot on November 2\textsuperscript{nd} dealing with alcohol. She commented that if both propositions passed, the workload for that region would significantly be impacted. Licensing Director Amy Harrison and the Agency has a plan ready to implement in preparation of the election’s outcome. Director Harrison has met with the city and county officials and has informed them that they are responsible in the certification of the applications before any actions can be taken on the part of the Agency. Assistant Administrator Cook stated that imaging will play an important role in providing licensing the ability to process a large number of applications in a timely manner from anywhere in the state in the event, it becomes necessary.

Presiding Officer Cuevas commented that if the Agency uses the past Lubbock’s election outcome as a model to work through the Dallas election, the process should run smoothly and the Agency should not cause any interruptions in services. Assistant Administrator Cook stated that the Agency will be available for all the stakeholders in answering any questions that may arise.

Commissioner Weinberg inquired if the on-line application process was available. Assistant Administrator Cook answered negatively and stated that the on-line application process is scheduled for a trial run January 2011.

Commissioner Weinberg asked how long does it take for the votes to be canvassed after the election. Director Harrison stated that for the Dallas election, the votes will be discussed at the city council meeting on November 10\textsuperscript{th} or November 17\textsuperscript{th}.

Director Harrison will report the outcome and effect to the Agency of the Dallas propositions to the Commissioners as it becomes available.
Assistant Administrator Cook briefed the Commissioners on the “Commission’s Legislative Agenda.” She stated that members of the Executive Management Staff have been meeting with members of the legislature in preparation of the upcoming legislative session. Though the legislative session will not start until January 2011, Administrator Steen asked his team to take a proactive approach in scheduling meetings with members of the legislature that serve on committees of appropriations, public safety, economic development, and technology to name a few. The meetings are scheduled at the legislative member’s district office or at the State Capitol. The Executive Management Staff’s delivery consisted of an assembled packet highlighting the efforts of our dedicated employees which has attributed to the Agency’s success in managing a significant revenue stream for the state. A prioritized emphasis was placed in maintaining a balance in public safety by getting the right people into business. A detailed analysis contained in the packet outlined the challenges the Agency will face in managing our current environment in the event there is a reduction in the workforce.

Assistant Administrator Cook outlined other packet items discussed with the legislative members:

- A detailed analysis of the challenges the Agency will face in managing the current environment in the event there is a reduction in the workforce;
- Explanation describing the growth in the alcohol industry in comparison to the economic growth and population growth in the State of Texas;
- Discussion on how the Agency has modernized its operation post Sunset;
- Chart illustrations depicting the revenue estimates;
- Historical data charts that provides a visual view on effects of additional budget reductions outside of the 5% cuts;
- Effects of the impact on additional 10% budget cuts on the Agency.

Concluding her report, Assistant Administrator Cook spoke on the Agency’s 75th anniversary celebration which will take place around the state. She gave kudos to Carolyn Beck for taking the lead in organizing the framework for the celebrations. She noted that invitations have gone out and an invitation has been posted on the TABC website. The regional district offices are listed on the website invitation as having receptions in those respective area offices.

Presiding Officer Cuevas asked how receptive has the legislative members been after the presentation. Assistant Administrator Cook stated that the packet information has been received well by the legislative members. Some of the questions asked during the presentation or information requested on follow-up are:

- Demographics of the Agency;
- Personnel – Headquarters/Field Operations;
Presiding Officer Cuevas asked if there had been some legislative misunderstandings about the Agency before the presentation. Assistant Administrator Cook answered affirmatively. She cited an inquiry about the Cash/Credit Law, how and why was it established and what drives the law. Written responses have been returned to the inquiring legislative members concerning the Cash/Credit Law.

Presiding Officer Cuevas inquired if the team is re-enforcing the emphasis on the employees as being the Agency’s most valuable asset. Assistant Administrator Cook answered affirmatively. She commented that one of the documents in the packet mentions how valuable the employee is to the Agency, but also during the last legislative session supported that idea in its approval and the funding of a career succession plan.

Presiding Officer Cuevas commented that the liquor industry in Texas is not getting smaller, it is increasing. Assistant Administrator Cook agreed and further commented that this fact is reflected in the discussion with the legislative members and also documented in the information packet. She stated that the Agency has progressed in changing its philosophy to being “business friendly” and making sure we are putting the “right people in business”.

Presiding Officer Cuevas quizzed Chief Moreno if he is getting the same responses from the legislative members he meets. Chief Moreno answered affirmatively.

Presiding Officer Cuevas congratulated Carolyn Beck for doing a good job in the handling of the 75th anniversary celebration. He inquired if press releases would be sent out before each regional district office celebration. Ms. Beck stated that invitations has been sent out to the media in the regional areas and will follow up with press releases.

Assistant Administrator Cook’s report was supported with a PowerPoint presentation. (Attachment 1)

PUBLIC SAFETY GRANT

Presiding Officer José Cuevas called for Chief Joel Moreno for agenda item #4, the Public Safety Grant.

Chief Joel Moreno briefed the Commissioners on the Public Safety Equipment Grant, a federal grant, that was awarded to TABC by the Office of the Governor in the amount of $597,685. He stated that the grant will be used to purchase Panasonic Toughbooks, full size keyboards, portable color printers and carrying cases for TABC
agents. This updated technology for the agents will provide them to have more time in the field and instant accessibility to information and equipment that is necessary to prepare their paperwork. In having the computer with greater connectivity, agents will decrease the travel time between their respective offices and license premises.

Additional training equipment purchased with the grant included:

- Glock 22
- Bushmaster M4 – Firearms Simulator Machine
- Firearms Simulator Computer and Projector
- Glock 17-T Training Pistols

Chief Moreno stated that the additional equipment will be used to better prepare agents to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving concerning the amount of force that is necessary in a particular situation.

Chief Moreno cited that the grant has allowed an initiation of a program to train 22 agents and auditors. The Certified Fraud Examiners (CFE) will provide training opportunities to the Agency’s Compliance and Enforcement Divisions and enhance public safety. Certified Fraud Examiners are experts in fraud prevention and deterrence.

Commissioner Weinberg asked what additional cost is associated with equipment purchase. Chief Moreno stated that the additional cost would be the wireless aircards.

Commissioner Weinberg asked if the aircards were part of the grant. Assistant Administrator Cook stated that the aircards request was included in the Legislative Appropriations Request (LAR). She stated the estimated monthly charge for the aircard is $40.00.

Presiding Officer Cuevas inquired on the training support for the agents on the equipment. Chief Moreno stated that the training will be provided by TABC’s Information Resources Department (IRD).

Chief Moreno’s PowerPoint presentation supports his report. (Attachment 2)

**SHATTERED DREAMS**

Presiding Officer Cuevas called for the Charlie Kerr, Director of Tax/Education and Prevention for the agenda item entitled “Shattered Dreams”.

Director Kerr’s report began as he gave a brief history of the Shattered Dreams program. He stated that the Shattered Dreams program was developed by the Bexar County DWI Task Force Advisory Board on Underage Drinking in 1998, is an
expanded and renamed version of the Every 15 Minutes program first conducted by the Police Department of Chico, California in 1996. The original program name emphasizes the frequency with which people die in alcohol related crashes. The name “Shattered Dreams”, emphasizes the result of such crashes: the shattered dreams of those who drink and drive, their innocent victims, and their families.

Director Kerr stated that substantial community support with volunteers and pre-planning of the event is required for the Shattered Dreams program to be successful. He reported that the target audience for the program are junior and senior high school students. TABC has offered Texas high schools mini-grants to help pay some of the cost associated with hosting a Shattered Dreams program. TABC agents have also been actively involved in the program to offer their expertise in alcoholic beverage laws and assist with on-site crash scene, retreat, and parent education workshops.

After this year, Director Kerr expects TABC to phase out its support to the Shattered Dreams program because of the difficulty in measuring its effectiveness. He suggests to use the federal funds in other programs that would be more beneficial to educate against underage drinking.

Presiding Officer Cuevas' inquiry was answered with Director Kerr's report in that he needed a better understanding of the effectiveness of the program. He stated that awarding federal funds needs to be used where it will benefit the most and one in which the Agency can stand behind.

**POE SECURITY**

Director Charlie Kerr's next agenda item, POE Security, was supported by a PowerPoint presentation. (Attachment 3)

Director Kerr briefed the Commission of the Ports of Entry (POE) issues that have occurred in recent months. He spoke about the Risk Assessment Analysis report as requested by Administrator Steen of all the Ports of Entry in the State of Texas and recommendations from that report has been put in place.

Director Kerr stated that during the Commissioners' visit to Ports of Entry sites, each one of them had opportunities to have a first hand observation of POE's daily operations. He spoke about the uniqueness of the typical day at the site and how each site had a different working routine.

Director Kerr mentioned that one of the POE sites, Donna, is scheduled to open on November 20th. He stated that President Obama and President Felipe Calderón of Mexico have been invited to the grand opening. Director Kerr discussed the different ports locations and how some ports are busier when the winter Texans are present and travel across to the border of Mexico. He stated that the Ports of Entry Tax
Collection System (POETCS) has been beneficial in recording the high/low peak sales.

Director Kerr stated that the recommendation from Presiding Officer Cuevas on a safety issue at one of ports locations involving a vehicle lane – making it more identifiable has been implemented.

In summing up his presentation, Director Kerr’s key points were:

- TABC management team is committed to keeping the Ports of Entry program viable, professional and a safe operation by ensuring efficient use of state resources;
- Continued offering of education in customer service, personal safety and personnel management;
- Providing staff the necessary equipment to mitigate the risks that are created as environment changes take place.

As an additional note, Director Kerr stated that he anticipates the receipt of a grant from the Governor’s Office in which additional equipment such as handheld radios and more safety equipment can be purchased. He commented that the grant will also be used for travel that will allow TABC’s Training Division to send trainers to the port locations to offer verbal judo training.

Commissioner Weinberg stated that his visit was an eye opening experience. He was impressed and spoke highly of the Ports of Entry employees. After his visit to the port locations, Commissioner Weinberg stated he feels more comfortable with the employee safety precautions that have been implemented and of the training that is planned.

Presiding Officer Cuevas concurred with Commissioner Weinberg’s comments. He further stated that Director Kerr’s analysis presentation at the last meeting was very good. He also noted that the POE employees are very enthusiastic about the job they do and take real pride of what they do for TABC. Presiding Officer Cuevas stated that that management needs to continue to offer training and continue to monitor the potential security issues regarding border violence.

Presiding Officer Cuevas suggested to get name tags for the employees. Director Kerr stated that name tags and vests have been ordered for each POE employee. He also commented that with the additional grant funds, a pilot study will be conducted that will include cameras installed at three POE locations to test their effectiveness.

Director Kerr thanked the Commissioners for visiting the Ports of Entry. He stated that this was the first time in the history of TABC’s existence Commissioners visited ports.
Presiding Officer Cuevas called upon Assistant General Counsel Martin Wilson for his report to Adopt Repeal of Rule §33.8, On-Premises Application Notification; and Rule §33.13, Application for Beer License.

The Texas Alcoholic Beverage Commission adopts the repeal of §33.8, On-Premises Application Notification without change to the proposed published in the September 10, 2010 issue of the Texas Register (33 TexReg 8225).

Section 33.8 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The Commission determined that the reasons for initially adopting the rule continue to exist and believes the policy expressed in the rule should be updated, and chooses to address the issues in proposed the new §33.13, Process to Apply for License or Permit. Therefore, the Commission determined that §33.8 should be repealed.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The Agency certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency’s legal authority.

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to approve the adoption of the repeal of Rule §33.8, On-Premises Application Notification; and Rule §33.13, Application for Beer License. Presiding Officer Cuevas seconded and the motion passes.

Presiding Officer Cuevas called upon Assistant General Counsel Martin Wilson for the Approval to Adopt New Rule §33.13, Process to Apply for License or Permit.

The Texas Alcoholic Beverage Commission adopts new §33.13, relating to Process to Apply for License or Permit. The section is adopted without changes to the
proposed text as published in the September 10, 2010 issue of the Texas Register (35 TexReg 8226) and will not be republished.

New §33.13 is adopted to clarify application procedures and to conform those procedures to the Texas Alcoholic Beverage Code. New §33.13 establishes the procedures an applicant must follow to apply for a license or permit from the commission. The section requires completion of a pre-qualification packet before an application for an on-premises location may be filed and sets forth the requirements for a complete pre-qualification packet. The section also clarifies requirements for the posting of notice signs relating to applications for on-premises locations.

The Commission received no comments about the proposed rule.

The new section is adopted under the authority of Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

This Agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency's legal authority. (Attachment 5)

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to approve the adoption of New Rule §33.13, Process to Apply for License or Permit. Presiding Officer Cuevas seconded the motion and the motion passes.

APPROVAL TO ADOPT REPEAL OF RULE §45.105, (OUTDOOR ADVERTISING BY MIXED BEVERAGE ESTABLISHMENTS); RULE §45.107 (ADVERTISING OF ALCOHOLIC BEVERAGES BY PRIVATE CLUBS) AND RULE §45.111 ADVERTISING SIGNS AT CHARITABLE OR CIVIC EVENTS

Before his briefing on the next agenda item, Assistant General Counsel Martin Wilson requested the removal of Rule §45.111, Advertising Signs at Charitable or Civic Events. He stated that further discussion is required before action can be taken on this rule.

Presiding Officer Cuevas acknowledged the request and approved the request for the removal of Rule §45.111, Advertising Signs at Charitable or Civic Events.

The Texas Alcoholic Beverage Commission adopts the repeal of current §45.105, Outdoor Advertising by Mixed Beverage Establishments without change to the proposal published in the September 10, 2010 issue of the Texas Register (33 TexReg 8227).
Current §45.105 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The Commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission has determined that the current rule should be amended for clarification and to consolidate the Commission’s policies regarding other forms of advertising, that it should therefore be repealed, and that a new rule should be adopted to replace the repealed rule.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

This Agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency’s legal authority.

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to approve the adoption of the repeal of Rule §45.105, Outdoor Advertising by Mixed Beverage Establishments, and Rule §45.107, Advertising of Alcoholic Beverage by Private Clubs. Presiding Officer Cuevas seconded and the motion passes.

APPROVAL TO ADOPT NEW RULE §45.105 (ADVERTISING)

The Texas Alcoholic Beverage Commission adopts new §45.105, Advertising. The section is adopted without changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (33TexReg 8228) and will not be republished.

New §45.105 clarifies and consolidates the Commission’s policies regarding price display at mixed beverage establishments, advertising by private clubs, obligations of retailers using internet advertising, mobile advertising on vehicles, and advertising in and on public vehicle conveyances for hire.

The Commission received no comments about the proposed rule.

The new section is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Alcoholic Beverage Code §108.07, which requires the Commission to promulgate reasonable rules relating to advertising of mixed beverage establishments, and Government Code §2001.39, which requires an agency to periodically review its rules to determine if the need for them continues to exist.
The Agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency’s legal authority. (Attachment 7)

APPROVAL TO ADOPT NEW RULE §45.107 (ALCOHOLIC BEVERAGES UTILIZED FOR COOKING PURPOSES AT ON-PREMISE LOCATIONS)

The Texas Alcoholic Beverage Commission adopts new §45.107, Alcoholic Beverage utilized for Cooking Purposes at On-Premises Locations. The section is adopted without changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (33 TexReg 8229) and will not be republished.

Alcoholic Beverage Code §25.109 and §28.06 authorize the Commission to allow certain on-premises permittees to possess and use certain alcoholic beverages for cooking purposes that they are not allowed to sell. New §45.107 implements these provisions of the Alcoholic Beverage Code by setting forth safeguards to assure that products for sale and products for cooking only are separately maintained.

The Commission received no comments about the proposed rule.

The new section is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Alcoholic Beverage Code §25.09 and §28.06, which authorizes the Commission to adopt rules on the use of certain alcoholic beverages for cooking purposes only.

The Agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency’s legal authority. (Attachment 8 )

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to approve the adoption of New Rule §45.107, Alcoholic Beverage Utilized for Cooking Purposes at On-Premise Locations. Presiding Officer Cuevas seconded and the motion passes.

APPROVAL TO ADOPT REPEAL OF RULE §45.108 (RESTRICTIONS TO THE USE OF BRAND NAMES AND INSIGNIA BY INDUSTRY); AND ADOPT AMENDMENTS TO RULE §45.112 (USE OF BRAND NAMES AND INSIGNIA RESTRICTED)

The Texas Alcoholic Beverage Commission adopts the repeal of §45.108, Restrictions to the Use of Brand Names and insignia by Industry, without change to the proposal published in the September 10, 2010 issue of the Texas Register (33TexReg 8230).

Section 45.108 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The Commission determined that the reasons for initially adopting the rule
continue to exist. The Commission believes that issues regarding the use brand names and insignia currently addressed in §45.108 should be consolidated with similar issues in §45.112, which is being amended in a separate but simultaneous proceeding. Therefore, the Commission has determined that §45.108 should be repealed.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the code, Alcoholic Beverage Code §108.03, which authorizes the Commission to adopt rules relating to alcoholic beverage advertising, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The Agency certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency's legal authority.

(Attachment 9)

The Texas Alcoholic Beverage Commission adopts an amendment to §45.112, Use of Brand Names and Insignia Restricted. The amendment is adopted with changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (33TexReg 8231).

Section 45.112 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The Commission has determined that the reasons for initially adopting the rule continue to exist. In a separate but simultaneous proceeding, §45.108, Restrictions to the Use of Brand Names and Insignia by Industry, was similarly reviewed under Government Code §2001.039. The Commission in that proceeding has determined that the reasons for adopting §45.108 continue to exist, but that it should be repealed and the matters formerly addressed in §45.108 should now be addressed in §45.112. The rule is necessary because the provisions of the Alcoholic Beverage Code restricting the use of brand names are still applicable and the rule implements those provisions.

The amendment to §45.112 is adopted to centralize and clarify policies restricting the use of alcoholic beverage brands on caps or uniforms worn by employees of manufacturers, distributors or wineries; and participants in sporting events who are sponsored by manufacturers, distributors, distillers or wineries. The amendment also addresses the use of alcoholic beverage brands in connection with business cards and stationery; manufacturer, local distributer and wholesaler vehicles; and menus provided to a retailer by a member of the manufacturing or wholesale tiers.

The staff of the Commission conducted a public hearing on September 26, 2010 at which two comments were received regarding the proposed amendment.
The Beer Alliance of Texas, represented by Mr. Rick Donley, appeared and testified at the hearing recommending the removal of proposed subsection (f) (which restricted retail employees from buying branded caps or uniforms from an upper tier member). Mr. Donley stated that the commission was overreaching its authority in the proposed subsection, that it did not help in maintaining an orderly market (which is the purpose of regulation in this area), and that it was unenforceable.

The Texas Package Store Association, represented by Mr. Fred Marosko, also appeared and suggested that proposed subsection (f) was unenforceable and that the Commission had higher priority concerns.

The Commission agrees with the commenters. Therefore in the section as adopted deletes proposed subsection (f) and renumbers proposed subsection (g) appropriately. The Commission notes that Alcoholic Beverage Code §102.07 and §102.15 restrict upper tier members from providing anything of value to a retailer.

No comments were received regarding the other proposed subsections, and the remaining subsections are adopted as proposed and renumbered appropriately.

The amendment is adopted under the authority of: Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code; Alcoholic Beverage Code §108.03, which authorizes the Commission to adopt rules relating to alcoholic beverage advertising; and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

This Agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency's legal authority. (Attachment 10)

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to approve the adoption of the repeal of Rule §45.108, Restrictions to the Use of Brand Names and Insignia by Industry; and the adoption of amendments to Rule §45.112, Use of Brand names and Insignia Restricted. Presiding Officer Cuevas seconded and the motion carries.

APPROVAL TO ADOPT AMENDMENTS TO RULE §45.120 (CO-PACKAGING OF LIQUOR); RULE §45.121 (CREDIT RESTRICTIONS AND DELINQUENT LIST FOR LIQUOR); AND RULE §45.131 (PAYMENT REGULATION FOR MALT BEVERAGES)

The Texas Alcoholic Beverage Commission adopts an amendment to §45.120, Co-Packaging of Liquor. The amendment is adopted without changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (33 TexReg 8232).
Section 45.120 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The Commission has determined that the reasons for initially adopting the rule continue to exist, but that the rule should be amended. The rule is necessary to implement Alcoholic Beverage Code § 102.07(a)(5).

The amendment to § 45.120 defines co-packs, requires pricing to demonstrate that the retailer receives no unlawful value or benefit from the co-pack, and provides that co-packs may not be used as bargaining chips to induce retailers to buy other products.

The staff of the Commission conducted a public hearing on September 26, 2010 at which two comments were received regarding the proposed amendment.

Mr. Fred Marosko, representing the Texas Package Store Association, appeared and testified at the hearing that after the holiday season package stores may break a co-pack and give away for free the item that was co-packaged with the alcoholic beverage. He asked that this practice be acknowledged in the rule.

The Commission did not intend to change the current practice described by Mr. Marosko, but understands that the language in proposed subsection (c) could be read that way. In proposed subsection (c), the Commission proposed to renumber old subsection (b) and modify the text thereof. In response to Mr. Marosko’s comment, the Commission declines to modify the text of old subsection (b), but instead simply renumbers it as new subsection (c). The effect of this is to retain the status quo in this area. The proposed textual changes to proposed subsection (c) are withdrawn.

Mr. Alan Gray, representing Licensed Beverage Distributors, appeared and testified at the hearing to support the amendment as proposed. He noted that co-packs are offered throughout the year and not just at the holidays.

The Commission acknowledges Mr. Gray’s information, but makes the previously discussed change to proposed subsection (c) to effectuate the Commission’s intent, which was to maintain the status quo in this area.

The amendment is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The Agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency’s legal authority.

(Attachment 11)
The Texas Alcoholic Beverage Commission adopts an amendment to §45.121, relating to Credit Restrictions and Delinquent List for Liquor. The amendment is adopted with changes to the proposed text as published in the September 10, 2010 issue of the *Texas Register* (35 TexReg 8233).

The amendment to §45.121 is adopted to fulfill part of the Commission’s commitment to gradually reduce the number of days between a retailer becoming delinquent on a bill to a wholesaler and the retailer’s name appearing on the delinquent list. This commitment was made in recognition both of the efficiencies of the Commission’s new procedures for the delinquent list and of the need to allow retailers an opportunity to adjust to those efficiencies.

The amendment to §45.121 shortens the time allowed from the end of the reporting period for credit delinquencies to the date of publication of the delinquent list. The effect of the amendment is to give delinquent retailers two fewer days to pay a delinquent bill before their names appear on the delinquent list. When a retailer’s name appears on the delinquent list, all wholesalers are on notice that they may not sell any liquor to that retailer until the delinquent account is paid in full, pursuant to Alcoholic Beverage Code §102.32(d).

The Commission received two comments about the proposed section and makes a change in response to one of the comments.

First, the Licensed Beverage Distributors, represented by Mr. Alan Gray, testified at the hearing that the proposed section states the appropriate policy and supports it as published.

Second, the Texas Wine and Grape Growers Association ("TWGGA") submitted a written comment objecting to the inclusion of proposed §45.121(b)(6), which defined wineries as retailers as to any alcoholic beverages purchased from a seller for purposes of resale to an ultimate consumer. The effect of the language was to subject wineries in those limited circumstances to the requirements of Alcoholic Beverage Code (Code) §102.32 and the other provisions of §45.121 applicable to retailers. They already are subject to the requirements applicable to wholesalers.

TWGGA asserts that the proposed amendment is contrary to the express language of Code §102.32(a)(1), which lists “winery” under the definition of “wholesale dealer”. The proposed amendment presumed that a winery, when functioning as a retailer, belongs in the category of “any other retailer” and is thus appropriately categorized as a “retailer” under the express language of Code §102.32(a)(2).

Contrary to the principles of the three-tier system, which underlies the system of alcoholic beverage regulation in Texas and is the public policy of this state as declared by the Texas Legislature in Code §6.03(i), Chapter 16 of the Code allows the holder of a winery permit to engage in activities in all three tiers (see:
§16.01(a)(1), allowing manufacturing; §16.01(a)(4), allowing wholesaling; and §16.01(a)(5), allowing retailing).

TWGGA suggests that the Code consistently classifies wineries as members of the upper tiers and cites §§ 102.03, 102.04 and 102.07 in support of that proposition. However, the Legislature is at pains to prevent a winery functioning as a manufacturer or wholesaler from controlling, as a manufacturer or wholesaler, other non-affiliated retailers. A winery is allowed to control its own retail operations. The fact that the legislature classified wineries as members of the upper tiers for the purpose of restraining their behavior as members of the upper tiers is not instructive as to how the legislature meant to treat their retail behavior in connection with credit arrangements between buyers and sellers of alcohol.

TWGGA acknowledges that the Code does not elsewhere define “retailer”, but seeks to divide retailers from wholesalers by focusing on their ability to resell a product. It notes that every entity defined as a “wholesaler” in Code §102.32(a)(1) is authorized to sell its products to others who may resell it, and cites in support thereof Code §§ 16.01(a)(4), 19.01(3), 20.01(3) and 23.01(a)(2). There is no argument that a wholesaler sells for resale and that wineries are allowed by Code §16.01(a)(4) to sell for resale.

TWGGA states that “the defining characteristic of a retailer within the structure of the code” is that it is only authorized to sell its product “not for resale”, and cites Code §§ 22.01(2), 24.01(a)(2), 25.01(1), 26.01(a), 27.01, 27.11, 28.01(a), 32.01(a), 69.01 and 71.01. While these code provisions effectively, if not always explicitly, prohibit resale, the Commission disagrees that this is the “defining characteristic” for classifying one as a retailer. The Commission relies on Code §102.01 for guidance. Code §102.01 imposes tied house restrictions to implement the State’s three-tier policy. Since that policy is foundational as to alcoholic beverage regulation in Texas, the Commission believes Code §102.01 is a more reliable guidepost for understanding the structure of the code. Code §102.01(a) provides that the terms “wholesaler”, “retailer” and “manufacturer” are to be considered as they are “ordinarily used and understood, regardless of the specific names given permits” elsewhere in the code. And “retailer” is ordinarily used and understood according to its dictionary definition: “the sale of goods or commodities in small quantities directly to consumers”.

The inability to resell is not the defining characteristic of “retailers” in the Code (although they may have that characteristic in common). The ability to sell “directly to consumers” is the defining characteristic. And that is a characteristic that wineries share with other retailers. Code §16.01(a)(5). Classifying wineries as “other retailers” for purposes of §45.121(b)(6) is not, therefore, per se beyond the Commission’s authority.

The Commission is persuaded by TWGGA’s arguments that the practical difficulties associated with the legal operation of a winery business under Code § 16.01(a) do deprive it of the ability to apply the credit requirements of the code and rules to
wineries operating as retailers. Under Code §16.01(a)(4), wineries can purchase alcohol from other wholesalers, which is what retailers do. Under Code §16.01(a)(5), a winery can sell to ultimate consumers, which is what retailers do. But TWGGA points out that a winery can do other things with the product they buy from wholesalers other than sell it to consumers. The winery could resell the product to other wholesalers, inside or outside of the state (Code §16.01(a)(4)). The winery could also use it to blend with other wines (Code §16.01(a)(7)). As TWGGA discusses, the winery may not know to what use it will put the purchased product at the time it purchases it. Since the Commission cannot impose an obligation on the winery at the time of purchase to specify how it will use the product, the Commission cannot impose the credit obligations on the winery as retailer without imposing them on the winery as wholesaler or manufacturer and the Commission is without power to do that. For the reasons discussed, the Commission agrees with TWGGA that the proposed amendment to §45.121(b)(6) should be withdrawn, and that change is made in the section as adopted.

No other comment was received regarding the other amendments proposed in §§45.121(d) - (h) and (j), and the amendments to those subsections are adopted as proposed.

Based on the proposed amendment, TWGGA challenged the Commission's conclusion that there would be no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the Commission as a result of adopting the proposed amendment. The Commission notes its decision to withdraw the portion of the proposed amendment defining wineries as "other retailers", which would have imposed additional obligations on them. The Commission concludes that there will be no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the Commission as a result of adopting the section as amended.

The amendment is adopted under the authority of: Alcoholic Beverage Code §5.31, which grants the Commission the authority to prescribe rules necessary to carry out the provisions of the Code; Alcoholic Beverage Code §102.32(f), which authorizes the Commission to adopt rules to give effect to that section of the Code; and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

This Agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency's legal authority.

(Attachment 12)

The Texas Alcoholic Beverage Commission adopts an amendment to §45.131, Payment Regulation for Malt Beverages. The amendment is adopted without change to the proposal published in the September 10, 2010 issue of the Texas Register (33 TexReg 8235).
The effect of the proposed amendment is to remove language in the current section that appears to restrict the Commission's enforcement authority.

No comments were received regarding the proposed amendment.

The amendment is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Texas Alcoholic Beverage Code §102.31(e), which authorizes the Commission to adopt rules to give effect to that section of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The Agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the Agency's legal authority.

(Attachment 13)

Presiding Officer Cuevas called for a motion. Commissioner Weinberg moved to approve the adoption of amendments to Rule §45.120, Co-Packaging of Liquor; Rule §45.121, Credit Restrictions and Delinquent List for Liquor; and Rule §45.131, Payment Regulation for Malt Beverages. Presiding Officer Cuevas seconded and the motion passes.

EXECUTIVE SESSION

The regular open session of the Texas Alcoholic Beverage Commission was recessed at 10:36 a.m., October 26, 2010 and an executive session was held to consult with Legal Counsel regarding pending and anticipated litigation against the agency and to discuss the duties, responsibilities, and evaluation of the Administrator, pursuant to Texas Government Code, §551.071, §551.074.

The Texas Alcoholic Beverage Commission concluded its executive session at 11:07 a.m., October 26, 2010, and resumed the open regular session. No final action, decision or vote was made in executive session.

PUBLIC COMMENT

Presiding Officer Cuevas opened the floor for public comment. No one came forward to address the Commission.

NEXT MEETING

Presiding Officer Cuevas announced the next meeting dates are scheduled for Thursday, November 18, 2010 and Tuesday, January 25, 2011. There will not be a meeting in December.
ADJOURNMENT

Presiding Officer Cuevas called for a motion to adjourn. Commissioner Weinberg so moved and Presiding Officer Cuevas seconded. The motion was made and seconded. The motion carried, and Presiding Officer Cuevas announced that the meeting was adjourned at 11:10 a.m.
Attachment 1

Administrator's Report: Administrator and Agency Activities, Budget Issues, Staff Achievements
Administrator’s Report
Commission Meeting
October 26, 2010
Meetings were held with Industry representatives concerning the upcoming Super Bowl. Positive feedback was received surrounding the agency’s Super Bowl Guide which can be found on the agency’s website.

Asst. Chief Rod Venner has taken the lead and has already meet with local officials and sponsors of the event.
Proposition No. 1
The legal sale of beer and wine for off-premise consumption only.

Proposition No. 2
The legal sale of mixed beverages in restaurants by food and beverage certificate holders only.

DALLAS COUNTY
ELECTIONS

NEXT ELECTION
(ELECCIÓN SIGUIENTE)

General Election
November 2, 2010
Elección General
2 de Noviembre 2010

ELECTION RESULTS

Check back here on election night for up-to-the-minute results

- Sample Election Night Report
- Reporting System Help Guide

NOTE: Early voting results will be posted at 7:00 pm on election day. Election day results will be posted as they are received on election night; results will be cumulative. You must refresh your browser to see the latest updates.

Texas Alcoholic Beverage Commission
service ★ courtesy ★ integrity ★ accountability
Legislative Road Show

• Fast Facts
  – Growth
  – Modernization
  – LAR
• Revenue Estimates
• 10% Budget Reduction
• Historical Data
Legislative Road Show

To Date: Administrator Steen, Asst. Administrator Cook, Chief Moreno, and Chief of Staff Earl Pearson have visited 39 Members.

Remaining: Staff has 16 Members left to visit which will complete the Commission’s pre-session legislative agenda.
Texas Alcoholic Beverage Commission

invites you to our 75th Anniversary Celebration

Please join us for a reception in your area!

Amarillo District Office
3131 Bell, Suite 106
11/4/2010, 9:30am - 11:30am
RSVP Tiffany Blanford@tabc.state.tx.us

Austin Headquarters
5806 Mesa Drive
11/18/2010, 9:30am Commission Meeting
No RSVP required

El Paso District Office
401 E. Franklin #12
11/12/2010, 12:00pm - 2:00pm
RSVP Maria Guadalupe@tabc.state.tx.us

Fort Worth, Stockyards Historic District
River Ranch, 500 NE 23rd
11/19/2010, 10:30am - 1:30pm
RSVP Tara Travis@tabc.state.tx.us
Deadline 11/1. Seating Limited

Houston District Office
427 West 20th Street, Suite 600
11/3/2010, 1:00pm - 3:00pm
No RSVP required

McAllen District Office
6521 North 10th Street, Suite D
11/17/2010, 11:00am - 2:00pm
RSVP Maria Villareal@tabc.state.tx.us

Odessa District Office
6010 East Highway 191, Suite 234
11/10/2010, 1:30pm - 4:00pm
RSVP Diana Yanez@tabc.state.tx.us

San Antonio Regional Office
4203 Woodcock Dr, Suite 110
11/12/2010, 2:00pm - 5:00pm
RSVP Yolanda Moreno@tabc.state.tx.us

For more information, please email Carolyn Beck at questions@tabc.state.tx.us

http://tinyurl.com/tabcinvitation
Attachment 2

Public Safety Grant
PUBLIC SAFETY EQUIPMENT GRANT

CHIEF JOEL MORENO
FIELD OPERATIONS
- TABC was awarded a federal grant by the Office of the Governor in the amount of $597,685.

- The grant, branded the TABC Public Safety Equipment Grant, was used to purchase 130 sets of Panasonic Toughbooks with port-replicators, full-size keyboards, mice, portable color printers and carrying cases for our agents. The computers will incorporate DVD multi-drivers and Sierra Wireless Aircards for greater connectivity. Providing agents more time in the field, and instant access to the information and equipment necessary to prepare paperwork. Thus, decreasing travel between their respective offices and license premises.
The Public Safety Equipment Grant was used to purchase five computer firearm simulators, 10 Texas Bushmaster M4’s and Glock 22’s each equipped with air-recoil kits, and 20 Glock 17-T training pistols with 24,000 Force-on-Force marker rounds. Plus personal protective equipment for both students and instructors.

These reality-based training tools will be utilized to better prepare agents to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving concerning the amount of force that is necessary in a particular situation.
Glock 22

Bushmaster M4
Firearms Simulator Machine

Firearms Simulator Computer and Projector

Glock 17-T Training Pistols
# Public Safety Equipment Grant Budget Summary

<table>
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<tr>
<th>DESCRIPTION</th>
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<tr>
<td>In Car Computers</td>
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<td>Mobile Printers w/Case</td>
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<tr>
<td>Firearms Training Simulators</td>
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<tr>
<td>Force on Force Equipment</td>
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**TOTAL AMOUNT** $597,685.00
With an additional grant from the Governor’s office, we are able to train 22 agents and auditors to become Certified Fraud Examiners (CFE). CFEs are experts in fraud prevention and deterrence. This program is another example of TABC providing training opportunities to our Compliance and Enforcement Divisions in order to promote public safety.
QUESTIONS?
Attachment 3

POE Security
Texas Alcoholic Beverage Commission
Anzalduas POE
Donna POE
Progreso POE
Progreso POE
POETCS
Ports of Entry Tax Collection System

Fully automated on: December 1, 2008
Comments:

**Power Outages:** Every port has a back-up plan in cases where loss of power were to occur. Desktops have back-up power supplies but if needed, a TCOs would switch to handheld computer devices with 8-hour battery life. Last option would be go to manual stamp process. A one month supply of stamps are allocated at key ports.
Comments:

**Door Locks:** Port supervisors have been instructed to secure office doors and make sure only authorized personnel can have access to our facilities.

Hidalgo POE
Comments:

**Yellow Striping:** Pharr POE has been painted with yellow stripes to outline the queuing lane and signage has been anchored.

![Pharr POE](image1.jpg)

![Pharr POE](image2.jpg)
Average Tenure:
9.2 yrs. for all TCOs

TCO I (0-2 yrs)
Avg. Tenure: < 1 yr

TCO II (2-5 yrs)
Avg. Tenure: 4.4 yrs

TCO III (over 5 yrs)
Avg. Tenure: 12.3 yrs

TCO IV / Asst Supervisor
Avg. Tenure: 15.5 yrs

TCO V / Port Supervisor
Avg. Tenure: 10.5 yrs

Not On Career Ladder

<— Career Ladder —>
Turnover Rate for POE:

2008 = 9%

2009 = 4%

2010 = 5%

employees who left employment for any reason.
In Summary,

The TABC management team is committed to keeping the Ports Of Entry program a viable, professional and safe operation by ensuring efficient use of state resources; offering continuous education in customer service, personal safety and personnel management and by providing staff the necessary equipment to mitigate the risks that are created as environmental changes take place.
Attachment 4

Approval to Adopt Repeal of Rule §33.8 (On-Premises Application Notification); and Rule §33.13 (Application for Beer License)
PROPOSED ADOPTED REPEAL §33.8 ON-PREMISES APPLICATION NOTIFICATION

The Texas Alcoholic Beverage Commission (commission), adopts the repeal of §33.8, On-Premises Application Notification without change to the proposal published in the September 10, 2010 issue of the Texas Register (33 TexReg 8225).

Section 33.8 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission believes the policy expressed in the rule should be updated, and chooses to address these issues in proposed new §33.13, Process to Apply for License or Permit. Therefore, the commission has determined that §33.8 should be repealed. The matters formerly addressed separately in §33.8 will now be addressed as part of a more general rule addressing several matters relating to the application process.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

§33.8. On-Premises Application Notification.

(a) For purposes of §§11.08, 11.391(a), 61.09 and 61.381(a) of the Alcoholic Beverage Code, an application is filed with the commission on the date it is received in the commission’s headquarters office.

(b) For purposes of the above referenced sections, locations not previously licensed or permitted for on-premises consumption of alcoholic beverages shall refer to locations for which a license or permit authorizing the on-premises consumption has not been active for any part of the 24 months immediately preceding the initial review of any part of an application by a commission field office.
PROPOSED ADOPTED REPEAL §33.13 APPLICATION FOR BEER LICENSE

The Texas Alcoholic Beverage Commission (commission) adopts the repeal of current §33.13, Application for Beer License, without change to the proposal published in the September 10, 2010 issue of the Texas Register (33 TexReg 8225).

Current §33.13 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission has determined that the current rule needs significant changes, that it should therefore be repealed, and that a new rule should be adopted to replace the repealed rule. The procedures applicants must follow for beer licenses will now be addressed as part of a broader rule applying to all applications for permits and licenses.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

§33.13. Application for Beer License.

(a) This rule relates to §61.31 of the Alcoholic Beverage Code.
(b) Prior to filing an application for license or permit to manufacture, distribute, store, or sell beer with a county judge as required by §61.31 of the Alcoholic Beverage Code, a completed application shall be presented to the commission.
(c) An application presented under subsection (b) of this section shall be processed by the commission in accordance with the practices, policies, and standards relating to the processing of applications for permits made under §11.31 of the Alcoholic Beverage Code. The administrator or his/her designee shall conduct such processing to determine initial compliance with all provisions of the Alcoholic Beverage Code and rules of the commission by the applicant or whether there is legal reason to deny the application as required by §61.33(b) of the Alcoholic Beverage Code.
(d) On completion of its processing, the administrator or his/her designee shall return the application and all related documents to the applicant. The applicant may then file the application with the county judge as mandated by §61.31(a) of the Alcoholic Beverage Code. The administrator or his/her designee shall present any grounds for denial of the application at the hearing conducted pursuant to §61.31(b) and §61.32 of the Alcoholic Beverage Code.
Attachment 5

Approval to Adopt New Rule §33.13 (Process to Apply for License or Permit)
The Texas Alcoholic Beverage Commission (Commission) adopts new §33.13, relating to Process to Apply for License or Permit. The section is adopted without changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (35 TexReg 8226) and will not be republished.

New §33.13 is adopted to clarify application procedures and to conform those procedures to the Texas Alcoholic Beverage Code.

New §33.13 establishes the procedures an applicant must follow to apply for a license or permit from the commission. The section requires completion of a pre-qualification packet before an application for an on-premises location may be filed and sets forth the requirements for a complete pre-qualification packet. The section also clarifies requirements for the posting of notice signs relating to applications for on-premises locations.

The Commission received no comments about the proposed rule.

The new section is adopted under the authority of Texas Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

This agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority.

§33.13. Process to Apply for License or Permit.

(a) This section relates to any license or permit. The purpose of this section is to clarify the pre-qualification process in subsection (b) of this section and distinguish it from the application process described in subsections (c) and (d) of this section.

(b) Before an application for a license or permit that is required to be certified under §11.37 or §61.37 of the Alcoholic Beverage Code may be filed with the commission, a pre-qualification packet must be completed. A pre-qualification packet is deemed incomplete if it does not contain all required certifications applicable to the type of license or permit sought and for the location requested, and a response to each item requested by the commission in the packet. For purposes of this section, a completed pre-qualification packet is one that contains:

(1) all required certifications signed by the city secretary, where appropriate, and the county clerk that the location for which the license or permit is sought is in a “wet” area for such license or permit and is not prohibited by charter, by ordinance, or by valid order in reference to the sale of any alcoholic beverage allowed by the license or permit;

(2) all other applicable certifications signed by the city secretary, where appropriate, and the county clerk that are in the pre-qualification packet prescribed by the commission;

(3) the required certification by the Comptroller of Public Accounts that the person submitting the packet holds, or has applied for and satisfies all legal requirements for, the issuance of a sales tax permit;

(4) proof of publication of notice of the application, if required by §11.39 of the Alcoholic Beverage Code; and

(5) a response to each item requested by the commission in the packet.

(c) A person or entity may file an application with the commission by submitting all forms, documents and information prescribed by the commission in accordance with the practices, policies, and standards relating to the processing of applications for licenses and permits. If a prequalification packet is required by subsection (b) of this section, the packet must be completed...
before an application is filed. The commission shall process the application to determine whether the application is in compliance with all provisions of the Alcoholic Beverage Code and rules of the commission or whether there is legal reason to deny the application.

(d) On completion of its processing pursuant to subsection (c) of this section, the commission shall inform the applicant that the application:

1. may be filed with the county judge as mandated by §61.31 of the Alcoholic Beverage Code;
2. has been referred to the State Office of Administrative Hearings;
3. is granted; or
4. is refused.

(e) For purposes of §11.391 and §61.381 of the Alcoholic Beverage Code, a notice sign must be posted for 60 days prior to filing an application pursuant to subsection (c) of this section. For purposes of this subsection, an application is filed on the date a completed application packet is received by the commission.

(f) A notice sign is required for purposes of §11.391 and §61.381 of the Alcoholic Beverage Code unless a license or permit authorizing the on-premises consumption of alcoholic beverages has been active at the requested location any time during the 24 months immediately preceding the filing of the application.
Attachment 6

Approval to Adopt Repeal of Rule §45.105 (Outdoor Advertising by Mixed Beverage Establishments); Rule §45.107 (Advertising of Alcoholic Beverage by Private Clubs)
PROPOSED ADOPTED REPEAL §45.105 OUTDOOR ADVERTISING BY MIXED BEVERAGE ESTABLISHMENTS

The Texas Alcoholic Beverage Commission (commission) adopts the repeal of current §45.105, Outdoor Advertising by Mixed Beverage Establishments without change to the proposal published in the September 10, 2010 issue of the Texas Register (33 TexReg 8227).

Current §45.105 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission has determined that the current rule should be amended for clarification and to consolidate the commission’s policies regarding other forms of advertising, that it should therefore be repealed, and that a new rule should be adopted to replace the repealed rule.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

§45.105. Outdoor Advertising by Mixed Beverage Establishments.

The holder of any permit allowing the sale or service of mixed beverages may not advertise any prices which may be seen from the street on any sign, billboard, marquee, or any other display on or outside of the building or which may be seen from outside of the building.
The Texas Alcoholic Beverage Commission (commission) adopts the repeal of current §45.107, Advertising of Alcoholic Beverages by Private Clubs, without change to the proposal published in the September 10, 2010 issue of the Texas Register (933 Tex Reg 8228).

Section 45.107 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission believes that another issue related to advertising of alcoholic beverages by private clubs should be addressed, and believes it is appropriate to consolidate these issues in new §45.105, relating to Advertising. Therefore, the commission has determined that current §45.107 should be repealed.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

§45.107. Advertising of Alcoholic Beverages by Private Clubs.

The holder of a private club registration permit or a private club exemption certificate must in any advertisement either directly or indirectly advertising the service of alcoholic beverages, whether or not by any specific brand name, must state that the service of alcoholic beverages is only for persons who are members of the club.
Attachment 7

Approval to Adopt New Rule §45.105 (Advertising)
The Texas Alcoholic Beverage Commission (commission) adopts new §45.105, Advertising. The section is adopted without changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (33 TexReg 8228) and will not be republished.

New §45.105 clarifies and consolidates the commission’s policies regarding price display at mixed beverage establishments, advertising by private clubs, obligations of retailers using internet advertising, mobile advertising on vehicles, and advertising in and on public vehicle conveyances for hire.

The commission received no comments about the proposed rule.

The new section is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Alcoholic Beverage Code §108.07, which requires the commission to promulgate reasonable rules relating to advertising of mixed beverage establishments, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

§45.105 Advertising.

(a) Mixed Beverage Establishments.
   (1) This subsection relates to Alcoholic Beverage Code §108.07.
   (2) Except as provided in this paragraph, the holder of any permit allowing the sale or service of mixed beverages may not advertise any price for an alcoholic beverage on any sign, billboard, marquee, or other display located on the licensed premises in such a manner that the price may be read by persons outside of the premises. It is an exception to the restriction in this paragraph if the holder of a food and beverage certificate places a menu on the exterior wall of the premises so that it can be read outside of the premises only by a pedestrian in close proximity to the menu. In order to qualify for the exception granted in this paragraph, the menu visible outside of the premises must be of the same size and in the same sized font as the menu presented to the establishment’s customers, and must show both food and beverage prices.

(b) Private Clubs.
   (1) This subsection relates to Alcoholic Beverage Code §§32.01(b), 108.51, 108.52 and 108.56.
   (2) The holder of a private club registration permit or a private club exemption certificate must, in any advertising either directly or indirectly advertising the service of alcoholic beverages, whether or not by any specific brand name, state that the service of alcoholic beverages is only for persons who are members of the club.
   (3) The holder of a private club registration permit or a private club exemption certificate may advertise any class of alcoholic beverages in an area where the sale of that class of alcoholic beverages is legal for on-premises consumption, provided no other provisions of the Alcoholic Beverage Code are violated.

(c) Mobile Advertising.
   (1) This subsection relates to Alcoholic Beverage Code §§108.51, 108.52 and 108.54.
   (2) Mobile advertising on vehicles is not permitted unless it meets the definition of an “electric sign” in Alcoholic Beverage Code §108.51(3).
   (3) Mobile advertising that meets the definition of an “electric sign” in Alcoholic Beverage Code §105.51(3) and that is funded directly or indirectly by upper-tier members may
not be parked within 200 feet of a retail location for more than one hour, in order to prevent
benefit to the retailer by drawing consumer traffic to the location.

(4) Mobile advertising that meets the definition of an “electric sign” in Alcoholic
Beverage Code §108.51(3) may not be parked, maintained in, or driven through an area or zone
where the sale of alcoholic beverages is prohibited.

(d) Internet Advertising.

(1) This subsection relates to Alcoholic Beverage Code §§102.07, 102.15 and
108.07.

(2) Retailers may advertise on the internet via their website or through third party
advertising, unless the advertising is funded directly or indirectly by an upper-tier member.

(3) All retailer advertising on the internet must conform with the on-premises
promotion restrictions of §45.103 of this Subchapter, coupon and inducement restrictions of
§45.101 of this Subchapter, and sweepstakes and giveaway restrictions of §45.106 of this
Subchapter.

(e) Public Vehicle Conveyance for Hire.

(1) This subsection relates to Alcoholic Beverage Code §108.51.

(2) For purposes of this subsection, “public vehicle conveyance for hire” includes
taxi cabs, public transportation, pedicabs, rickshaws, and any other means of transportation
available to the public for which a charge is made.

(3) No member of the alcoholic beverage industry may advertise alcoholic
beverages or the sale thereof on the outside of a public vehicle conveyance for hire.

(4) Advertising of alcoholic beverages on the inside of a public vehicle conveyance
for hire must not be displayed in such a manner that it may be read by persons outside of the
vehicle.
Attachment 8

Approval to Adopt New Rule §45.107 (Alcoholic Beverages Utilized for Cooking Purposes at On-Premise Locations)
The Texas Alcoholic Beverage Commission (commission) adopts new §45.107, Alcoholic Beverages Utilized for Cooking Purposes at On-Premises Locations. The section is adopted without changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (33 TexReg 8229) and will not be republished.

Alcoholic Beverage Code §25.09 and §28.06 authorize the commission to allow certain on-premises permittees to possess and use certain alcoholic beverages for cooking purposes that they are not allowed to sell. New §45.107 implements these provisions of the Alcoholic Beverage Code by setting forth safeguards to assure that products for sale and products for cooking only are separately maintained.

The commission received no comments about the proposed rule.

The new section is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Alcoholic Beverage Code §25.09 and §28.06, which authorize the commission to adopt rules on the use of certain alcoholic beverages for cooking purposes only.

The agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

§45.107. Alcoholic Beverages Utilized for Cooking Purposes at On-Premise Locations.

(a) Wine and Beer On-Premises Retailers.

  (1) This subsection is promulgated pursuant to Alcoholic Beverage Code §25.09.
  (2) Any alcoholic beverage that is in excess of 17 percent alcohol by volume and is used by wine and beer on-premises retailers for cooking purposes must be individually labeled as "For Cooking Use Only".
  (3) All alcoholic beverages in excess of 17 percent alcohol by volume used by wine and beer on-premises retailers for cooking purposes must be stored separately from alcoholic beverages that are legal for sale on the premises by such retailers.
  (4) No alcoholic beverage in excess of 17 percent alcohol by volume that is designated by wine and beer on-premises retailers for cooking purposes may be sold, served or consumed in liquid form by staff or customers of the retailer.
  (5) All receipts for the purchase by wine and beer on-premises retailers of alcoholic beverages in excess of 17 percent alcohol by volume must be retained on the premises until the bottle is empty and disposed of.

(b) Mixed Beverage Permittees.

  (1) This subsection is promulgated pursuant to Alcoholic Beverage Code §28.06.
  (2) Alcoholic beverages used for cooking purposes may be purchased from, tax stamped by and invoiced by a Local Distributor’s Permittee or may be purchased at retail from a licensed retailer. Alcoholic beverages purchased at retail without a tax stamp may not be served or sold in liquid form.
  (3) An alcoholic beverage purchased for cooking purposes at retail without a tax stamp must be individually labeled as “For Cooking Use Only”.
  (4) All alcoholic beverages purchased for cooking purposes at retail without a tax stamp must be stored separately from alcoholic beverages purchased from, tax stamped by and invoiced by a Local Distributor’s Permittee.
  (5) Alcoholic beverages purchased for cooking purposes at retail without a tax stamp may not be sold, served or consumed in liquid form by staff or customers.
(6) All receipts for the purchase of alcoholic beverages purchased for cooking purposes at retail without a tax stamp must be retained on the premises until the bottle is empty and disposed of.
Attachment 9

Approval to Adopt Repeal of Rule §45.108
(Restrictions to the Use of Brand Names and Insignia by Industry)
The Texas Alcoholic Beverage Commission (commission) adopts the repeal of §45.108, Restrictions to the Use of Brand Names and Insignia by Industry, without change to the proposal published in the September 10, 2010 issue of the Texas Register (33 TexReg 8230).

Section 45.108 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. However, the commission believes that issues regarding the use of brand names and insignia currently addressed in §45.108 should be consolidated with similar issues in §45.112, which is being amended in a separate but simultaneous proceeding. Therefore, the commission has determined that §45.108 should be repealed.

No comments were received regarding the proposed repeal.

The repeal is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Alcoholic Beverage Code §108.03, which authorizes the commission to adopt rules relating to alcoholic beverage advertising, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the repeal, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

§45.108. Restrictions to the Use of Brand Names and Insignia by Industry.

(a) This section is promulgated pursuant to the Alcoholic Beverage Code, §108.03.
(b) Advertising of alcoholic beverages on caps, regalia or uniforms worn by employees of manufacturers, distributors, distilleries, or wineries or by a participant in any game, sport, athletic contest or revue, when said participant is sponsored by a manufacturer, distributor, distiller, or winery shall be limited to the firm name and address of said manufacturer, distributor, distiller, or winery and the brand names and slogans which appear on the container labels for such alcoholic beverages which have been approved by the administrator.
Attachment 10

Approval to Adopt an Amendment to Rule §45.112
(Use of Brand Names and Insignia Restricted)
PROPOSED ADOPTED AMENDMENT §45.112 USE OF BRAND NAMES AND INSIGNIA RESTRICTED

The Texas Alcoholic Beverage Commission (commission), adopts an amendment to §45.112, Use of Brand Names and Insignia Restricted. The amendment is adopted with changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (33 TexReg 8231).

Section 45.112 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist. In a separate but simultaneous proceeding, §45.108, Restrictions to the Use of Brand Names and Insignia by Industry, was similarly reviewed under Government Code §2001.039. The commission in that proceeding has determined that the reasons for adopting §45.108 continue to exist, but that it should be repealed and the matters formerly addressed in §45.108 should now be addressed in §45.112. The rule is necessary because the provisions of the Alcoholic Beverage Code restricting the use of brand names are still applicable and the rule implements those provisions.

The amendment to §45.112 is adopted to centralize and clarify policies restricting the use of alcoholic beverage brands on caps or uniforms worn by: employees of manufacturers, distributors or wineries; and participants in sporting events who are sponsored by manufacturers, distributors, distillers or wineries. The amendment also addresses the use of alcoholic beverage brands in connection with: business cards and stationery; manufacturer, local distributor and wholesaler vehicles; and menus provided to a retailer by a member of the manufacturing or wholesale tiers.

The staff of the commission conducted a public hearing on September 26, 2010 at which two comments were received regarding the proposed amendment.

The Beer Alliance of Texas, represented by Rick Donley, recommended removing proposed subsection (f) (which restricted retail employees from buying branded caps or uniforms from an upper tier member). Mr. Donley stated that the commission was overreaching its authority in the proposed subsection, that it did not help in maintaining an orderly market (which is the purpose of regulation in this area), and that it was unenforceable.

The Texas Package Store Association, represented by Fred Marosko, also suggested that proposed subsection (f) was unenforceable and that the commission had higher priority concerns.

The commission agrees with the commenters and therefore in the section as adopted deletes proposed subsection (f) and renumbers proposed subsection (g) appropriately. However, the commission notes that Alcoholic Beverage Code §102.07 and §102.15 restrict upper tier members from providing anything of value to a retailer.

No comments were received regarding the other proposed subsections, and the remaining subsections are adopted as proposed and renumbered appropriately.

The amendment is adopted under the authority of: Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code; Alcoholic Beverage Code §108.03, which authorizes the commission to adopt rules relating to alcoholic beverage advertising; and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

This agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.
§45.112. Use of Brand Names and Insignia by Industry [Restricted].

(a) This section is promulgated pursuant to [the] Alcoholic Beverage Code, §102.07 and §108.03.

(b) Advertising of an alcoholic beverage on caps, regalia or uniforms worn by an employee of a manufacturer, distributor, distiller or winery, shall be limited to:

(1) the name and address of the manufacturer, distributor, distiller or winery; and

(2) the brand names, logos and slogans that appear on the container labels approved by the administrator for such alcoholic beverage.

(c) Advertising of an alcoholic beverage on caps, regalia or uniforms worn by a participant in any game, sport, athletic contest or revue, when the participant is sponsored by a manufacturer, distributor, distiller or winery, shall be limited to:

(1) the name and address of the manufacturer, distributor, distiller or winery; and

(2) the brand names, logos and slogans that appear on the container labels approved by the administrator for such alcoholic beverage.

(d)(eb) Business cards and stationery bearing brand insignia may be used by licensees and permittees who are not [holders of licenses and permits, except holders of] retail licensees [licenses] and permittees [permits]. Such business cards and stationery may contain:

(1) the name and address of the user,

(2) the name and address of the firm represented,

(3) the brand insignia of any alcoholic beverage which the firm represented or the user is licensed to sell, and

(4) any other logo, slogan or trademark that appears on the approved label for such alcoholic beverage, or which slogan or trademark has otherwise been approved by the administrator.

(e)(eb) Menu cards, folders, or sheets advertising beer, ale, or malt liquor may be furnished to holders of retail licenses and permits by other license and permit holders, but such menu cards, folders, or sheets, at the time of their delivery to the retailer, shall be entirely blank as to any listing of food or drink items sold or offered for sale by the retailer. The cost of listings on the menu cards, folders, or sheets, food and drink items offered for sale by the retailer shall not be borne by any license or permit holder who is authorized by the code to sell beer, ale, or malt liquor to holders of retail licenses and permits.

(e)(eb) Advertising of alcoholic beverages on the equipment, service or delivery vehicles of a member of the manufacturing or wholesale tiers shall be limited to the brand names or logos [insignia] of the alcoholic beverages sold or represented by the manufacturer, local distributor or wholesaler, firm names and addresses of the manufacturer, local distributor or wholesaler, [owners of the vehicles or equipment] and such slogans as have been approved by the administrator.

(f) Menu cards, folders or sheets advertising beer, ale or malt liquor may be furnished to a holder of a retail license or permit by an upper-tier member, if such menu cards, folders or sheets, at the time of their delivery to the retailer, do not list any food or drink item offered for sale by the retailer. The holder of the retail license or permit shall bear all costs of listing any such food or drink item on the menu cards, folders or sheets.
§45.112. Use of Brand Names and Insignia by Industry.

(a) This section is promulgated pursuant to Alcoholic Beverage Code, §102.07 and §108.03.

(b) Advertising of an alcoholic beverage on caps, regalia or uniforms worn by an employee of a manufacturer, distributor, distiller or winery, shall be limited to:
   (1) the name and address of the manufacturer, distributor, distiller or winery; and
   (2) the brand names, logos and slogans that appear on the container labels approved by the administrator for such alcoholic beverage.

(c) Advertising of an alcoholic beverage on caps, regalia or uniforms worn by a participant in any game, sport, athletic contest or revue, when the participant is sponsored by a manufacturer, distributor, distiller or winery, shall be limited to:
   (1) the name and address of the manufacturer, distributor, distiller or winery; and
   (2) the brand names, logos and slogans that appear on the container labels approved by the administrator for such alcoholic beverage.

(d) Business cards and stationery bearing brand insignia may be used by licensees and permittees who are not retail licensees and permittees. Such business cards and stationery may contain:
   (1) the name and address of the user;
   (2) the name and address of the firm represented;
   (3) the brand insignia of any alcoholic beverage which the firm represents or the user is licensed to sell; and
   (4) any other logo, slogan or trademark that appears on the approved label for such alcoholic beverage, or which slogan or trademark has otherwise been approved by the administrator.

(e) Advertising of alcoholic beverages on the equipment, service or delivery vehicles of a member of the manufacturing or wholesale tiers shall be limited to the brand names or logos of the alcoholic beverages sold or represented by the manufacturer, local distributor or wholesaler, firm names and addresses of the manufacturer, local distributor or wholesaler, and such slogans as have been approved by the administrator.

(f) Menu cards, folders or sheets advertising beer, ale or malt liquor may be furnished to a holder of a retail license or permit by an upper-tier member, if such menu cards, folders or sheets, at the time of their delivery to the retailer, do not list any food or drink item offered for sale by the retailer. The holder of the retail license or permit shall bear all costs of listing any such food or drink item on the menu cards, folders or sheets.
Attachment 11

Approval to Adopt an Amendment to Rule §45.120 (Co-Packaging of Liquor)
The Texas Alcoholic Beverage Commission (commission), adopts an amendment to §45.120, Co-Packaging of Liquor. The amendment is adopted without changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (33 Tex Reg 8232).

Section 45.120 was reviewed under Government Code §2001.039, which requires that each state agency review and consider for readoption each rule adopted by that agency. The commission has determined that the reasons for initially adopting the rule continue to exist, but that the rule should be amended. The rule is necessary to implement Alcoholic Beverage Code §102.07(a)(5).

The amendment to §45.120 defines co-packs, requires pricing to demonstrate that the retailer receives no unlawful value or benefit from the co-pack, and provides that co-packs may not be used as bargaining chips to induce retailers to buy other products.

The staff of the commission conducted a public hearing on September 26, 2010 at which two comments were received regarding the proposed amendment.

Fred Marosko, representing the Texas Package Store Association, noted that after the holiday season package stores may break a co-pack and give away for free the item that was co-packaged with the alcoholic beverage. He asked that this practice be acknowledged in the rule.

The commission did not intend to change the current practice described by Mr. Marosko, but understands that the language in proposed subsection (c) could be read that way. In proposed subsection (c), the commission proposed to renumber old subsection (b) and modify the text thereof. In response to Mr. Marosko’s comment, the commission declines to modify the text of old subsection (b), but instead simply renumbers it as new subsection (c). The effect of this is to retain the status quo in this area. The proposed textual changes to proposed subsection (c) are withdrawn.

Alan Gray, representing Licensed Beverage Distributors, supported the amendment as proposed. He noted that co-packs are offered throughout the year and not just at the holidays.

The commission acknowledges Mr. Gray’s information, but makes the previously discussed change to proposed subsection (c) to effectuate the commission’s intent, which was to maintain the status quo in this area.

The amendment is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

**MARK-UP VERSION (SEE CLEAN VERSION BELOW)**

§45.120. Co-Packaging of Liquor.

(a) This section relates to ["Co-packs" are defined by Texas] Alcoholic Beverage Code[;][102.07(a)(5)].[as those]

(b) As used in this section:
PROPOSED ADOPTED AMENDMENT §45.120 CO-PACKAGING OF LIQUOR

(1) "Co-pack" means a package:
(A) originally bundled and supplied by a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery or wine bottler (or an agent, employee or servant of such);
(B) containing an alcoholic beverage and another item; [beverages packaged in combination with other items if]
(C) where the package is designed to be delivered intact to the ultimate consumer; and
(D) where the additional items have no value or benefit to the retailer other than that of having the potential of attracting purchases and promoting sales.

(2) "Naked bottle" means an alcoholic beverage sold by a wholesaler that is similar in all regards to the alcoholic beverage contained in a co-pack sold by that wholesaler, except that it is not packaged with any other item.

If any alcoholic beverage is sold by a wholesaler as a "co-pack", no retailer may separate the other packaged item and sell it by any other means other than the way it was originally packaged when received.

In order to demonstrate that a non-alcoholic beverage item in a co-pack has no unlawful value or benefit to the retailer, a retailer must price and sell a co-pack at a cost/price differential not to exceed the cost/price differential at which the retailer prices and sells a naked bottle received from the same wholesaler.

Nothing in this section shall preclude a supplier from differentiating in the price of a naked bottle and co-pack during the packaging phase of a co-pack by adding cost to the co-pack and increasing the baseline price of the co-pack offered to wholesalers.

A retailer may not be forced, induced or persuaded to purchase a prescribed number of co-packs in order to purchase naked bottles, nor may a retailer be forced, induced or persuaded to purchase a prescribed number of naked bottles in order to purchase co-packs.

CLEAN-VERSION

§45.120. Co-Packaging of Liquor.

(a) This section relates to Alcoholic Beverage Code §102.07(a)(5).

(b) As used in this section:

(1) "Co-pack" means a package:
(A) originally bundled and supplied by a distiller, brewer, rectifier, wholesaler, class B wholesaler, winery or wine bottler (or an agent, employee or servant of such);
(B) containing an alcoholic beverage and another item;
(C) where the package is designed to be delivered intact to the ultimate consumer; and
(D) where the additional items have no value or benefit to the retailer other than that of having the potential of attracting purchases and promoting sales.

(2) "Naked bottle" means an alcoholic beverage sold by a wholesaler that is similar in all regards to the alcoholic beverage contained in a co-pack sold by that wholesaler, except that it is not packaged with any other item.

If any alcoholic beverage is sold by a wholesaler as a "co-pack", no retailer may separate the other packaged item and sell it by any other means other than the way it was originally packaged when received.

In order to demonstrate that a non-alcoholic beverage item in a co-pack has no unlawful value or benefit to the retailer, a retailer must price and sell a co-pack at a cost/price differential not to exceed the cost/price differential at which the retailer prices and sells a naked bottle received from the same wholesaler.
(e) Nothing in this section shall preclude a supplier from differentiating in the price of a naked bottle and co-pack during the packaging phase of a co-pack by adding cost to the co-pack and increasing the baseline price of the co-pack offered to wholesalers.

(f) A retailer may not be forced, induced or persuaded to purchase a prescribed number of co-packs in order to purchase naked bottles, nor may a retailer be forced, induced or persuaded to purchase a prescribed number of naked bottles in order to purchase co-packs.
Attachment 12

Approval to Adopt an Amendment to Rule §45.121
(Credit Restrictions and Delinquent List for Liquor)
PROPOSED ADOPTED AMENDMENT §45.121 CREDIT RESTRICTIONS AND DELINQUENT LIST FOR LIQUOR

The Texas Alcoholic Beverage Commission (commission), adopts an amendment to §45.121, relating to Credit Restrictions and Delinquent List for Liquor. The amendment is adopted with changes to the proposed text as published in the September 10, 2010 issue of the Texas Register (35 TexReg 8233).

The amendment to §45.121 is adopted to fulfill part of the commission’s commitment to gradually reduce the number of days between a retailer becoming delinquent on a bill to a wholesaler and the retailer’s name appearing on the delinquent list. This commitment was made in recognition both of the efficiencies of the commission’s new procedures for the delinquent list and of the need to allow retailers an opportunity to adjust to those efficiencies.

The amendment to §45.121 shortens the time allowed from the end of the reporting period for credit delinquencies to the date of publication of the delinquent list. The effect of the amendment is to give delinquent retailers two fewer days to pay a delinquent bill before their names appear on the delinquent list. When a retailer’s name appears on the delinquent list, all wholesalers are on notice that they may not sell any liquor to that retailer until the delinquent account is paid in full, pursuant to Alcoholic Beverage Code §102.32(d).

The commission received two comments about the proposed section and makes a change in response to one of the comments.

Licensed Beverage Distributors, represented by Alan Gray, believes the proposed section states the appropriate policy and supports it as published.

The Texas Wine and Grape Growers Association (“TWGGA”) objected to the inclusion of proposed §45.121(b)(6), which defined wineries as retailers as to any alcoholic beverages purchased from a seller for purposes of resale to an ultimate consumer. The effect of the language was to subject wineries in those limited circumstances to the requirements of Alcoholic Beverage Code (Code) §102.32 and the other provisions of §45.121 applicable to retailers. They already are subject to the requirements applicable to wholesalers.

TWGGA asserts that the proposed amendment is contrary to the express language of Code §102.32(a)(1), which lists “winery” under the definition of “wholesale dealer”. The proposed amendment presumed that a winery, when functioning as a retailer, belongs in the category of “any other retailer” and is thus appropriately categorized as a “retailer” under the express language of Code §102.32(a)(2).

Contrary to the principles of the three-tier system, which underlies the system of alcoholic beverage regulation in Texas and is the public policy of this state as declared by the Texas Legislature in Code §6.03(i), Chapter 16 of the Code allows the holder of a winery permit to engage in activities in all three tiers (see: §16.01(a)(1), allowing manufacturing; §16.01(a)(4), allowing wholesaling; and §16.01(a)(5), allowing retailing).

TWGGA suggests that the Code consistently classifies wineries as members of the upper tiers and cites §§ 102.03, 102.04 and 102.07 in support of that proposition. However, in those instances, the Legislature is at pains to prevent a winery functioning as a manufacturer or wholesaler from controlling, as a manufacturer or wholesaler, other non-affiliated retailers. A winery is, of course, allowed to control its own retail operations. The fact that the legislature classified wineries as members of the upper tiers for the purpose of restraining their behavior as members of the upper tiers is not instructive as to how the legislature meant to treat their retail behavior in connection with credit arrangements between buyers and sellers of alcohol.
PROPOSED ADOPTED AMENDMENT §45.121 CREDIT RESTRICTIONS AND DELINQUENT LIST FOR LIQUOR

TWGGA acknowledges that the Code does not elsewhere define “retailer”, but seeks to divide retailers from wholesalers by focusing on their ability to resell a product. It notes that every entity defined as a “wholesaler” in Code §102.32(a)(1) is authorized to sell its products to others who may resell it, and cites in support thereof Code §§ 16.01(a)(4), 19.01(3), 20.01(3) and 23.01(a)(2). There is no argument that a wholesaler sells for resale and that wineries are allowed by Code §16.01(a)(4) to sell for resale.

However, TWGGA states that “the defining characteristic of a retailer within the structure of the code” is that it is only authorized to sell its product “not for resale”, and cites Code §§ 22.01(2), 24.01(a)(2), 25.01(1), 26.01(a), 27.01, 27.11, 28.01(a), 32.01(a), 69.01 and 71.01. While these code provisions effectively, if not always explicitly, prohibit resale, the commission disagrees that this is the “defining characteristic” for classifying one as a retailer. Instead, the commission relies on Code §102.01 for guidance. Code §102.01 imposes tied house restrictions to implement the State’s three-tier policy. Since that policy is foundational as to alcoholic beverage regulation in Texas, the commission believes Code §102.01 is a more reliable guidepost for understanding the structure of the code. Code §102.01(a) provides that the terms “wholesaler”, “retailer” and “manufacturer” are to be considered as they are “ordinarily used and understood, regardless of the specific names given permits” elsewhere in the code. And “retailer” is ordinarily used and understood according to its dictionary definition: “the sale of goods or commodities in small quantities directly to consumers”.

Thus, the inability to resell is not the defining characteristic of “retailers” in the Code (although they may have that characteristic in common). Instead, the ability to sell “directly to consumers” is the defining characteristic. And that is a characteristic that wineries share with other retailers. Code §16.01(a)(5). Classifying wineries as “other retailers” for purposes of §45.121(b)(6) is not, therefore, per se beyond the commission’s authority.

Nonetheless, the commission is persuaded by TWGGA’s arguments that the practical difficulties associated with the legal operation of a winery business under Code § 16.01(a) do deprive it of the ability to apply the credit requirements of the code and rules to wineries operating as retailers. Under Code §16.01(a)(4), wineries can purchase alcohol from other wholesalers, which is what retailers do. Under Code §16.01(a)(5), a winery can sell to ultimate consumers, which is what retailers do. But TWGGA points out that a winery can do other things with the product they buy from wholesalers other than sell it to consumers. The winery could resell the product to other wholesalers, inside or outside of the state (Code §16.01(a)(4)). The winery could also use it to blend with other wines (Code §16.01(a)(7)). As TWGGA discusses, the winery may not know to what use it will put the purchased product at the time it purchases it. Since the commission cannot impose an obligation on the winery at the time of purchase to specify how it will use the product, the commission cannot impose the credit obligations on the winery as retailer without imposing them on the winery as wholesaler or manufacturer and the commission is without power to do that.

For the reasons discussed, the commission agrees with TWGGA that the proposed amendment to §45.121(b)(6) should be withdrawn, and that change is made in the section as adopted.

No other comment was received regarding the other amendments proposed in §§45.121(d) - (h) and (j), and the amendments to those subsections are adopted as proposed.

Based on the proposed amendment, TWGGA challenged the commission’s conclusion that there would be no fiscal or regulatory impact on micro-businesses and small businesses or persons
regulated by the commission as a result of adopting the proposed amendment. The commission notes its decision to withdraw the portion of the proposed amendment defining wineries as “other retailers”, which would have imposed additional obligations on them. The commission concludes that there will be no fiscal or regulatory impact on micro-businesses and small businesses or persons regulated by the commission as a result of adopting the section as amended.

The amendment is adopted under the authority of: Alcoholic Beverage Code §5.31, which grants the commission the authority to prescribe rules necessary to carry out the provisions of the Code; Alcoholic Beverage Code §102.32(f), which authorizes the commission to adopt rules to give effect to that section of the Code; and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

This agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

MARK-UP VERSION (SEE CLEAN VERSION BELOW)

§45.121. Credit Restrictions and Delinquent List for Liquor.

(a) Purpose. This rule implements §§102.32, 11.61(b)(2), and 11.66 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Alcoholic beverage--As used in this section includes only liquor, as that term is defined in §1.04 of the Code.

(2) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including, money order, cashier's check, certified check or completed electronic funds transfer.

(3) Delinquent payment--A financial transaction or instrument that fails to provide payment in full or is returned to the Seller as unpaid for any reason, on or before the day it is required to be paid by §102.32(c) of the Code.

(4) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in a Retailer making one or more delinquent payments to one or more Sellers.

(5) Incident--A single delinquent payment.

(6) Retailer--A package store permittee, wine only package store permittee, private club permittee, private club exemption certificate permittee, mixed beverage permittee, or other retailer, and their agents, servants and employees.

(7) Seller--A wholesaler, class B wholesaler, winery, wine bottler, or local distributor and their agents, servants and employees.

(c) Invoices. A delivery of alcoholic beverages by a Seller, to a Retailer, must be accompanied by an invoice of sale showing the name and permit number of the Seller and the Retailer, a full description of the alcoholic beverages, the price and terms of sale, and the place and date of delivery.

(1) The Seller’s copy of the invoice must be signed by the Retailer to verify receipt of alcoholic beverages and accuracy of invoice.

(2) The Seller and Retailer must retain invoices in compliance with the requirements of §206.01 of the Code.

(3) Invoices may be created, signed and retained in an electronic or internet based inventory system, and may be retained on or off the licensed premise.

(d) Delinquent Payment Violation. A Retailer who makes a delinquent payment to a Seller for the delivery of alcoholic beverages violates this section unless an exception applies.
PROPOSED ADOPTED AMENDMENT §45.121 CREDIT RESTRICTIONS AND DELINQUENT LIST FOR LIQUOR

(1) A Retailer who violates this section must pay a delinquent amount, and a Seller may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) A Retailer whose permit or license expires or is cancelled for cause, voluntarily cancelled, suspended or placed in suspension while on the delinquent list will be disqualified from applying for or being issued an original or renewal permit or license until all delinquent payments are satisfied. For purposes of this section, the Retailer includes all persons who were owners, officers, directors and shareholders of the Retailer at the time the delinquency occurred.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation or payment must be submitted electronically to the commission on the commission’s web based reporting system at www.tabc.state.tx.us.

(2) A Seller who cannot access the commission’s web based reporting system must either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports on behalf of the Seller.

(3) All reports of violations or payment under this subsection must be made to the commission on or before the date the delinquent list is published.

(4) A Seller who fails to report a violation or a payment as required by this subsection is in violation of this section.

(f) Prohibited Sales and Delivery.

(1) Sellers are prohibited from selling or delivering alcoholic beverages to any licensed location of a Retailer who appears on the commission’s Delinquent List from the date the violation appears on the Delinquent List until the Release Date on the Delinquent List, or until the Retailer no longer appears on the Delinquent List.

(2) A sale or delivery of alcoholic beverages prohibited by this section is a violation of this section.

(g) Prohibited Purchase or Acceptance.

(1) A Retailer who violates subsection (d) of this section is prohibited from purchasing or accepting delivery of alcoholic beverages from any source at any of Retailer’s licensed locations from the date any violation occurs until all delinquent payment are paid in full.

(2) A prohibited purchase or acceptance of a delivery of alcoholic beverages is a violation of this section.

(h) Exception. A Retailer who wishes to dispute a violation of this section or inclusion on the commission’s Delinquent List, based on a good faith dispute between the Retailer and the Seller may submit a detailed electronic or paper written statement with the commission with an electronic or paper copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records tending to support the Retailer’s dispute, which may include:

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;

(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and

(C) bank statement or records showing:

(i) bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid, or

(ii) the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.
PROPOSED ADOPTED AMENDMENT §45.121 CREDIT RESTRICTIONS AND
DELINQUENT LIST FOR LIQUOR

(2) A disputed delinquent payment will not be removed from the delinquent list until documents and/or other records tending to support the Retailer's dispute are submitted to the commission.

(3) The Retailer must immediately submit an electronic notice of resolution of a dispute to the commission under this subsection.

(i) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §11.61(b)(2) of the Code for one or more violations of this section. The commission may consider whether the violation(s) is/are the result of an event or incident when initiating an action under this subsection.

(j) Delinquent List.

(1) The Delinquent List is published bi-monthly on the commission’s public web site at http://www.tabc.state.tx.us. An interested person may receive the Delinquent List by electronic mail each date the Delinquent List is published by registering for this service online.

(2) The Delinquent List will be published the 3rd day of the month for purchases made from the 1st to the 15th day of the preceding month, for which payment was not made on or before the 25th day of the preceding month. The Delinquent List will be published the 18th day of the month for purchases made between the 16th and the last day of the preceding month for which payment was not made on or before the 10th day of the month.

(3) The Delinquent List is effective at 12:01 A.M. on the date of publication.

(4) The Delinquent List is updated hourly to reflect reports of payments submitted.

(k) Calculation of Time. A due date under this section or §102.32(c) of the Code or the publication date of the Delinquent List that would otherwise fall on a Saturday, Sunday or a state or federal holiday, will be the next regular business day. A payment sent by U.S. postal service or other mail delivery service is deemed made on the date postmarked or proof of date delivered to the mail delivery service. A payment hand delivered to an individual authorized to accept payment on behalf of the Seller is deemed made when the authorized individual takes possession of the payment.

CLEAN VERSION

§45.121. Credit Restrictions and Delinquent List for Liquor.

(a) Purpose. This rule implements §§102.32, 11.61(b)(2), and 11.66 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Alcoholic beverage--As used in this section includes only liquor, as that term is defined in §1.04 of the Code.

(2) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including, money order, cashier's check, certified check or completed electronic funds transfer.

(3) Delinquent payment--A financial transaction or instrument that fails to provide payment in full or is returned to the Seller as unpaid for any reason, on or before the day it is required to be paid by §102.32(c) of the Code.

(4) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in a Retailer making one or more delinquent payments to one or more Sellers.

(5) Incident--A single delinquent payment.

(6) Retailer--A package store permittee, wine only package store permittee, private club permittee, private club exemption certificate permittee, mixed beverage permittee, or other retailer, and their agents, servants and employees.

(7) Seller--A wholesaler, class B wholesaler, winery, wine bottler, or local distributor and their agents, servants and employees.
PROPOSED ADOPTED AMENDMENT §45.121 CREDIT RESTRICTIONS AND
DELINQUENT LIST FOR LIQUOR

(c) Invoices. A delivery of alcoholic beverages by a Seller, to a Retailer, must be
accompanied by an invoice of sale showing the name and permit number of the Seller and the
Retailer, a full description of the alcoholic beverages, the price and terms of sale, and the place
and date of delivery.

(1) The Seller’s copy of the invoice must be signed by the Retailer to verify receipt
of alcoholic beverages and accuracy of invoice.

(2) The Seller and Retailer must retain invoices in compliance with the requirements
of §206.01 of the Code.

(3) Invoices may be created, signed and retained in an electronic or internet based
inventory system, and may be retained on or off the licensed premise.

(d) Delinquent Payment Violation. A Retailer who makes a delinquent payment to a Seller
for the delivery of alcoholic beverages violates this section unless an exception applies.

(1) A Retailer who violates this section must pay a delinquent amount, and a Seller
may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) A Retailer whose permit or license expires or is cancelled for cause, voluntarily
cancelled, suspended or placed in suspension while on the delinquent list will be disqualified
from applying for or being issued an original or renewal permit or license until all delinquent
payments are satisfied. For purposes of this section, the Retailer includes all persons who were
owners, officers, directors and shareholders of the Retailer at the time the delinquency occurred.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation or payment must be submitted electronically to the
commission on the commission’s web based reporting system at www.tabc.state.tx.us.

(2) A Seller who cannot access the commission’s web based reporting system must
either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports
on behalf of the Seller.

(3) All reports of violations or payment under this subsection must be made to the
commission on or before the date the delinquent list is published.

(4) A Seller who fails to report a violation or a payment as required by this
subsection is in violation of this section.

(f) Prohibited Sales and Delivery.

(1) Sellers are prohibited from selling or delivering alcoholic beverages to any
licensed location of a Retailer who appears on the commission’s Delinquent List from the date
the violation appears on the Delinquent List until the Release Date on the Delinquent List, or until
the Retailer no longer appears on the Delinquent List.

(2) A sale or delivery of alcoholic beverages prohibited by this section is a violation
of this section.

(g) Prohibited Purchase or Acceptance.

(1) A Retailer who violates subsection (d) of this section is prohibited from
purchasing or accepting delivery of alcoholic beverages from any source at any of Retailer’s
licensed locations from the date any violation occurs until all delinquent payment are paid in full.

(2) A prohibited purchase or acceptance of a delivery of alcoholic beverages is a
violation of this section.

(h) Exception. A Retailer who wishes to dispute a violation of this section or inclusion on the
commission’s Delinquent List based on a good faith dispute between the Retailer and the Seller
may submit a detailed electronic or paper written statement with the commission with an
electronic or paper copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records
tending to support the Retailer’s dispute, which may include:
PROPOSED ADOPTED AMENDMENT §45.121 CREDIT RESTRICTIONS AND DELINQUENT LIST FOR LIQUOR

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;
(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and
(C) bank statement or records showing:
   (i) bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid, or
   (ii) the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

(2) A disputed delinquent payment will not be removed from the delinquent list until documents and/or other records tending to support the Retailer's dispute are submitted to the commission.

(3) The Retailer must immediately submit an electronic notice of resolution of a dispute to the commission under this subsection.

(i) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §11.61(b)(2) of the Code for one or more violations of this section. The commission may consider whether a violation is the result of an event or incident when initiating an action under this subsection.

(j) Delinquent List.
   (1) The Delinquent List is published bi-monthly on the commission's public web site at http://www.tabc.state.tx.us. An interested person may receive the Delinquent List by electronic mail each date the Delinquent List is published by registering for this service online.
   (2) The Delinquent List will be published the 3rd day of the month for purchases made from the 1st to the 15th day of the preceding month, for which payment was not made on or before the 25th day of the preceding month. The Delinquent List will be published the 18th day of the month for purchases made between the 16th and the last day of the preceding month for which payment was not made on or before the 10th day of the month.
   (3) The Delinquent List is effective at 12:01 A.M. on the date of publication.
   (4) The Delinquent List is updated hourly to reflect reports of payments submitted.

(k) Calculation of Time. A due date under this section or §102.32(c) of the Code or the publication date of the Delinquent List that would otherwise fall on a Saturday, Sunday or a state or federal holiday, will be the next regular business day. A payment sent by U.S. postal service or other mail delivery service is deemed made on the date postmarked or proof of date delivered to the mail delivery service. A payment hand delivered to an individual authorized to accept payment on behalf of the Seller is deemed made when the authorized individual takes possession of the payment.
Attachment 13

Approval to Adopt an Amendment to Rule §45.131 (Payment Regulations for Malt Beverages)
The Texas Alcoholic Beverage Commission (commission) adopts an amendment to §45.131, Payment Regulation for Malt Beverages. The amendment is adopted without change to the proposal published in the September 10, 2010 issue of the Texas Register (33 TexReg 8235).

The effect of the proposed amendment is to remove language in the current section that appears to restrict the commission’s enforcement authority.

No comments were received regarding the proposed amendment.

The amendment is adopted under the authority of Alcoholic Beverage Code §5.31, which grants authority to prescribe rules necessary to carry out the provisions of the Code, Texas Alcoholic Beverage Code §102.31(e), which authorizes the commission to adopt rules to give effect to that section of the Code, and Government Code §2001.039, which requires an agency to periodically review its rules to determine if the need for them continues to exist.

The agency certifies that the rule, as adopted, has been reviewed by legal counsel and found to be a valid exercise of the agency’s legal authority.

MARK-UP VERSION (SEE CLEAN VERSION BELOW)

§45.131. Payment Regulations for Malt Beverages.

(a) Purpose. This rule implements §§102.31, 11.61(b)(2), 11.66[.–28.42], 61.72 and 61.73 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including, money order, cashier's check, certified check or completed electronic funds transfer.

(2) Cash payment--United States Currency and coins, or a cash equivalent financial transaction or instrument.

(3) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in one or more incidents to one or more Sellers.

(4) Incident--One financial transaction or instrument made by a Retailer that fails to provide payment in full for malt beverages delivered by a Seller to the Retailer.

(5) Malt beverages--Ale or malt liquor containing more than four percent of alcohol by weight and beer containing one-half of one percent or more of alcohol by volume and not more than four percent alcohol by weight.

(6) Retailer--A license or permit holder and their agents, servants and employees, authorized to sell malt beverages for on or off premise consumption to an ultimate consumer.

(7) Seller--A general, local or branch distributor’s license holder, or a local distributor’s permit holder and their agents, servants, employees, or a subsidiary or affiliate, authorized to sell malt beverages to a retailer.

(c) Invoices. A delivery of malt beverages by a Seller, to a Retailer, must be accompanied by an invoice of sale showing the name and permit number of the Seller and the Retailer, a full description of the malt beverages, the price, the place and date of delivery.

(1) The Seller’s copy of the invoice must be signed by the Retailer to verify receipt of malt beverages and accuracy of invoice and by the Seller to acknowledge payment was received on or before the delivery.
PROPOSED ADOPTED AMENDMENT §45.131 PAYMENT AND REGULATION FOR MALT BEVERAGES

(2) The Seller and Retailer must retain invoices for four years from the date of delivery.

(3) Invoices may be created, signed and retained in an electronic or internet based inventory system, and may be retained on or off the licensed premise, as long as the records can be accessed from the licensed premise and made available to the commission during normal business hours.

(d) Cash Payment Violation. A Retailer who fails to make a cash payment to a Seller for the delivery of malt beverages violates this section unless an exception applies.

(1) A Retailer who violates this section must pay the amount due, and a Seller may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) For purposes of this section, the Retailer includes all persons who are or were owners, officers, directors, managers or shareholders of the Retailer at the time a cash payment violation occurs.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation must be submitted electronically on the forms provided on the commission’s web based reporting system at www.tabc.state.tx.us.

(2) A Seller who cannot access the commission’s web based reporting system must either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports on behalf of the Seller.

(3) All reports of violations under this subsection must be made to the commission within two business days from the date the violation is discovered by the Seller.

(4) A Seller who fails to report a violation as required by this subsection is in violation of this section.

(f) Exception. A Retailer who wishes to dispute a violation of this section, based on a good faith dispute between the Retailer and the Seller may submit supporting documents and a detailed written statement to the commission with a copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records tending to support the Retailer's dispute, which may include:

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;

(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and

(C) bank statement or records showing:

(i) bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid; or

(ii) the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

(D) bank statement or records showing the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

(2) The Retailer must immediately submit a notice of resolution of a dispute to the commission under this subsection.

(g) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §§11.61, 28.12, 61.71, 61.73 or 61.74 of the Code for one or more violations of this section. The commission may consider whether a violation is the result of an event or incident when initiating an action under this subsection.

(h) Calculation of Time. Sundays and legal holidays are not counted in determining time periods under this section.
§45.131. Payment Regulations for Malt Beverages.

(a) Purpose. This rule implements §§102.31, 11.61(b)(2), 11.66, 61.72 and 61.73 of the Texas Alcoholic Beverage Code (Code).

(b) Definitions.

(1) Cash equivalent--A financial transaction or instrument that is not conditioned on the availability of funds upon presentment, including, money order, cashier's check, certified check or completed electronic funds transfer.

(2) Cash payment--United States Currency and coins, or a cash equivalent financial transaction or instrument.

(3) Event--A financial transaction or instrument that fails to provide payment to a Retailer and results in one or more incidents to one or more Sellers.

(4) Incident--One financial transaction or instrument made by a Retailer that fails to provide payment in full for malt beverages delivered by a Seller to the Retailer.

(5) Malt beverages--Ale or malt liquor containing more than four percent of alcohol by weight and beer containing one-half of one percent or more of alcohol by volume and not more than four percent alcohol by weight.

(6) Retailer--A license or permit holder and their agents, servants and employees, authorized to sell malt beverages for on or off premise consumption to an ultimate consumer.

(7) Seller--A general, local or branch distributor's license holder, or a local distributor's permit holder and their agents, servants, employees, or a subsidiary or affiliate, authorized to sell malt beverages to a retailer.

(c) Invoices. A delivery of malt beverages by a Seller, to a Retailer, must be accompanied by an invoice of sale showing the name and permit number of the Seller and the Retailer, a full description of the malt beverages, the price, the place and date of delivery.

(1) The Seller's copy of the invoice must be signed by the Retailer to verify receipt of malt beverages and accuracy of invoice and by the Seller to acknowledge payment was received on or before the delivery.

(2) The Seller and Retailer must retain invoices for four years from the date of delivery.

(3) Invoices may be created, signed and retained in an electronic or internet based inventory system, and may be retained on or off the licensed premise, as long as the records can be accessed from the licensed premise and made available to the commission during normal business hours.

(d) Cash Payment Violation. A Retailer who fails to make a cash payment to a Seller for the delivery of malt beverages violates this section unless an exception applies.

(1) A Retailer who violates this section must pay the amount due, and a Seller may accept payment, only in cash or cash equivalent financial transaction or instrument.

(2) For purposes of this section, the Retailer includes all persons who are or were owners, officers, directors, managers or shareholders of the Retailer at the time a cash payment violation occurs.

(e) Reporting Violation and Payment; Failure to Report.

(1) A report of a violation must be submitted electronically on the forms provided on the commission's web based reporting system at www.tabc.state.tx.us.

(2) A Seller who cannot access the commission's web based reporting system must either:

(A) submit a request for exception to submit reports by paper; or

(B) contract with another seller or service provider to make electronic reports on behalf of the Seller.
(3) All reports of violations under this subsection must be made to the commission within two business days from the date the violation is discovered by the Seller.

(4) A Seller who fails to report a violation as required by this subsection is in violation of this section.

(f) Exception. A Retailer who wishes to dispute a violation of this section based on a good faith dispute between the Retailer and the Seller may submit supporting documents and a detailed written statement to the commission with a copy to the Seller explaining the basis of the dispute.

(1) The written statement must be submitted with documents and/or other records tending to support the Retailer's dispute, which may include:

(A) a copy of the front and back of the cancelled check of Retailer showing endorsement and deposit by Seller;
(B) bank statement or records of bank showing funds were available in the account of Retailer on the date the check was delivered to Seller; and
(C) bank statement or records showing:
   (i) bank error or circumstances beyond the control of Retailer caused the check to be returned to Seller unpaid; or
   (ii) the check cleared Retailer's account and funds were withdrawn from Retailer's account in the amount of the check.

(2) The Retailer must immediately submit a notice of resolution of a dispute to the commission under this subsection.

(g) Penalty for Violation. An action to cancel or suspend a permit or license may be initiated under §§11.61, 28.12, 61.71, 61.73 or 61.74 of the Code for one or more violations of this section. The commission may consider whether a violation is the result of an event or incident when initiating an action under this subsection.

(h) Calculation of Time. Sundays and legal holidays are not counted in determining time periods under this section.
CERTIFICATION

REGULAR COMMISSION MEETING

9:30 a.m. – October 26, 2010

5806 Mesa Drive
Austin, Texas 78731
STATE OF TEXAS

COUNTY OF TRAVIS

This certifies that the attached is a true copy of the proceedings of the Texas Alcoholic Beverage Commission meeting held on October 26, 2010.

Sherry Cook
Assistant Administrator

Sworn and subscribed before me this the 12th day of November 2010.

Gloria Darden Reed
Notary in and for Travis County, Texas