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Steven M. Weinberg, MD, JD
Member-Colleyville

Melinda S. Fredricks
Member-Conroe

Sherry Cook
Administrator

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MARKETING PRACTICES ADVISORY – MPA056

Wine Shipping and Third Party Advertisers/Payment Processing Services

To: Alcoholic Beverage Industry

This Advisory addresses the provision by unlicensed third parties of advertising and payment processing services for holders of winery and direct shipper permits selling wine directly to consumers. It does not address the situation where the provider of such services is legally affiliated or otherwise associated with the holder of a Texas permit or license, which could raise other issues including, for example, possible tier violations.

Although the use of these services has been addressed by other states, it is a developing practice and a matter of first impression for this Commission. The staff of the Commission has held stakeholder meetings and had numerous discussions with interested parties concerning if and how unlicensed third parties can provide advertising and payment processing services to permit holders without either party running afoul of the Texas Alcoholic Beverage Code. Our inquiry has focused on these two types of services in the context of internet sales of wine. This has been characterized as a “budding corner of the commercial garden”. The challenge is to understand how these unlicensed third parties can provide these services to permit holders without either themselves engaging in activities that require a permit or exercising control of the business of the actual permit holder.

Texas Alcoholic Beverage Code §11.01 provides:

(a) No person who has not first obtained a permit of the type required for the privilege exercised may, in a wet area, do any of the following:

(1) manufacture, distill, brew, sell, possess for the purpose of sale, import into this state, export from this state, transport, distribute, warehouse, or store liquor;

(2) solicit or take orders for liquor; or

(3) for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process liquor.

(b) A person may manufacture, distill, brew, sell, import, export, transport, distribute, warehouse, store, possess, possess for the purpose of sale, bottle, rectify, blend, treat, fortify, mix, or process liquor, or possess equipment or material designed for or capable of use for manufacturing liquor, if the right or privilege of doing so is granted by this code.

(c) A right or privilege granted by this section as an exception to prohibitions contained elsewhere in this code may be exercised only in the manner provided. An act done by a person which is not permitted by this code is unlawful.

Texas Alcoholic Beverage Code §109.53 provides:

Every permittee shall have and maintain exclusive occupancy and control of the entire licensed premises in every phase of the storage, distribution, possession, transportation and sale of all alcoholic beverages purchased, stored or sold on the licensed premises. Any device, scheme, or plan which surrenders control of the employees, premises or business of the permittee to persons other than the permittee shall be unlawful.

This Advisory describes one method of providing advertising and payment processing services that should allow the permit holder to be in control of the product and of the transaction. Other methods might be acceptable as long as they too assure that the permit holder remains in control of the product and of every stage of the transaction. The permit holder is always responsible for compliance with the Texas Alcoholic Beverage Code and the Commission's rules (including, for example, payment of appropriate taxes).

Subject to the permit holder's control, an unlicensed third party provider may generally advertise a selection of wines of various types and prices and provide customers information related to the wines that are being offered for sale by the permit holder. Depending on the specific agreement with the permit holder, the third party may also process the wine order from a Texas consumer for a listed wine by redirecting the order to the permit holder. The permit holder will then either accept and fill the order from the permit holder's inventory or reject the order.

The third party can collect the payment from the customer once an order is accepted by the permit holder. In this regard, we believe that the following statement from the California Department of Alcoholic Beverage Control in its October 2011 Industry Advisory on Third Party Providers represents the best practice:

The control of funds from a transaction involving the sale of alcoholic beverages constitutes a significant degree of control over a licensed business. As such, while a Third Party Provider may act as an agent for the licensee in the collection of funds (such as receiving credit card information and securing payment authorization), the full amount collected must be handled in a manner that gives the licensee control over the ultimate distribution of funds. This means that the Third Party Provider cannot independently collect the funds, retain its fee, and pass the balance on to the licensee. The Third Party Provider should pass all funds collected from the consumer to the licensee conducting the sale, and that licensee should thereafter pay the Third Party Provider for services rendered. Alternatively, the parties may utilize an escrow account, or similar instrument, that dispurses [sic] the funds upon the instructions of the licensee.

[Those who attended the stakeholder meeting where "An Acceptable Model" for these activities was discussed will notice that this differs from the staff's tentative view shown in that model,

which showed that the third party could send the payment to the winery minus the third party's fee. After further discussion and consideration, we believe the California model is the better practice in that it clearly allows the permit holder to control the funds.]

The third party provider should not store wine in its distribution centers or ship wine directly to the customer since the Texas Alcoholic Beverage Code authorizes these activities only for the holders of winery or direct shipping permits. The permit holder must fill and package the orders, and ship the orders to the Texas consumer, subject to any limitations and restrictions outlined in the Texas Alcoholic Beverage Code. Although the consumer may place orders from different permittees through the same third party provider, the consumer will not be able to aggregate wines from more than one winery in a single shipment because each winery will be shipping its own wine.

In order to demonstrate that the permit holder remains in control of all activities, there should be a written agreement between the permit holder and the third party provider that authorizes and governs these arrangements. In the absence of a written agreement setting forth the services to be provided and the expectations/requirements concerning those services, it is difficult to see how the permit holder can effectively assure that it retains control over the activities of the third party provider. For this reason, if the Commission ever has reason to investigate an arrangement or transaction related to dealings with a third party provider, a logical starting point would be for us to ask the permit holder for a copy of any agreements with the provider.

This Advisory is issued pursuant to Texas Alcoholic Beverage Code §5.57. It represents the opinion of the staff of the Commission. It has not been approved by the Commissioners and is not a rule. The staff of the Commission will not bring an enforcement action because a practice is inconsistent with this Advisory, but may bring an enforcement action if the practice violates the Texas Alcoholic Beverage Code or the Commission's rules at Chapters 31 – 50 of Title 16, Part 3 of the Texas Administrative Code. This determination will be made on an individual case basis and is dependent on the facts of the particular case. This Advisory does not represent preapproval of any specific activity.

We hope this opinion will assist you in your endeavors. If you would like additional information or have questions regarding this Advisory, you may contact me in writing at P.O. Box 13127, Austin, TX 78711, by email at marketing.practices@tabc.state.tx.us, by phone at 512-206-3411 or by facsimile at 512-206-3349.

Sincerely,



Thomas Graham
Marketing Practices Supervisor

cc: Sherry Cook, Administrator
Emily Helm, General Counsel
Ed Swedberg, Assistant Administrator
Steve Greinert, Director of Tax and Marketing Practices
Executive Management
Regional Personnel