



TEXAS ALCOHOLIC BEVERAGE COMMISSION

Texans Helping Businesses & Protecting Communities

P.O. Box 13127
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February 14, 2020

MARKETING PRACTICES ADVISORY – MPA063

Limits on Merchandising Services Provided to Off-Premise Retailers

To: TABC-Licensed/Permitted Distributors, Wholesalers, and Off-Premise Retailers

This advisory provides guidance pertaining to the common merchandising services distributors and wholesalers are authorized to perform at a retailer's premises. For the purposes of this advisory, the term "distributors" also includes wholesaler permittees.

Texas State Law

Texas Alcoholic Beverage Code (Code) § 102.20 authorizes distributors to provide a limited number of merchandising services at a retailer's premises, such as restocking, rotating, resetting, and rearranging beverages, including tasks incidental to performing those activities. Section 102.20 also directs TABC to provide guidance on the section's limitations. This includes harmonizing the agency's guidance with the related prohibitions in the Code, including tied-house provisions. Specifically, Sections 102.07 and 102.15 prohibit distributors from furnishing, lending, renting, or selling anything of value to a retailer, including but not limited to items used in product displays.

TABC Administrative Rule

Rule 45.109 further details the types of services authorized under Section 102.20, but it does not set specific limits on the services that may be provided. This has led to instances in which a distributor provides inappropriate or otherwise impermissible product merchandising and/or stocking activities that amount to a prohibited thing of value.

Legal Compliance

Generally, merchandising services should be limited to activities that enhance product accessibility and the shopping experience for the ultimate consumer. Examples are provided below. TABC will be closely monitoring the activities outlined in this advisory over the next six months. At that time, we will re-evaluate the effectiveness of this guidance and issue any necessary updates.



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Examples of prohibited distributor conduct (i.e., unlawful things of value provided to retailers):

- Adhering to a retailer's demands or requirements to provide services beyond those incidental to serving a store's selling space.
- Maintaining and updating a retailer's inventory systems, *except for* singular instances needed to correct minor errors:
 - Operating a retailer's computer, inventory, or systems, including updating computer UPC codes; and
 - Printing inventory tags and advertising materials using retailer equipment.
- Breaking down product packaging, stocking, and repricing single containers on end caps for consumer access and sale (e.g., repricing single unit containers for Pick 6 programs).
- Providing cleaning services conducted by retailers in the normal course of business (e.g., mopping, disposing of garbage, cleaning retailer shelves and/or product cold boxes), *except for* circumstances in which the distributor caused the breakage and when the distributor performs minor services during an agreed-upon reset. However, cleaning activities such as power washing, cleaning tops of cold boxes, etc. are prohibited even as part of the exceptions listed above.
- Serving as an employee of the retailer (e.g., being subject to a retailer's management or disciplinary processes).
- Engaging in merchandising activities outside of the retailer's consumer space and access points (e.g., spending time in the back storeroom to stack product carts/pallets and conducting retailer activities in the parking lots).
- Utilizing a retailer's heavy equipment (i.e., forklifts, pallet stackers, lift trucks, and/or ladders) to store products on shelving and overhead storage spaces in consumer-accessible areas. TABC considers this practice a public safety issue. Utilization of this equipment in consumer-accessible areas should only be performed by the retailer's employees.
- Engaging in quid pro quo practices with a retailer that offer unauthorized services in exchange for preferential treatment (e.g., premium shelf space for products).



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Examples of appropriate distributor conduct (services that can be provided to retailers):

- *Choosing* to provide stocking and merchandising services to a retailer beyond standard presale and product-ordering activities.
 - A retailer cannot *force* a distributor to perform merchandising activities.
- Providing merchandising services proportional to what is required by business volume and demand.
 - With the exception of the standard delivery process, restocking/put-up and other merchandising services performed by a distributor that exceed 40 hours per week (per location) may be viewed as providing an impermissible service or thing of value.
 - TABC recognizes that there may be rare instances such as major holidays, new product rollouts, and large local /national events that require additional service time.
 - A distributor shall solely determine additional service time as reasonably applicable to major holidays, rollouts, and large/national events.
 - Delivery, pre-sale, and product-ordering activities are not considered merchandising for purposes of the 40-hour maximum.
- Performing necessary merchandising services on the dates, times, and schedule that the distributor chooses for itself.
 - A distributor's employees are not employees of the retailer and should not act as one.
 - The distributor sets its employees' schedule and cannot allow the retailer to require that particular employees of a distributor perform merchandising services on specific days, for specific lengths of time, or at specific times of day.
- Providing services that are directly tied to the consumer shopping experience (e.g., stocking product directly onto consumer-facing shelf space).
- Having responsibility for its own employees' safety on the retail location.
 - TABC strongly discourages the use of the retailer's heavy equipment by a distributor's employees (i.e., forklifts, pallet stackers, lift trucks, and/or ladders). However, a distributor may use such equipment as reasonably necessary to put-up and retrieve products in the backroom storage areas. Distributor employees must first receive the proper training and certification by the retailer before utilizing heavy equipment. For public safety purposes, heavy equipment should not be utilized by distributor employees within the consumer-accessible areas.



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TABC provides this advisory pursuant to Texas Alcoholic Beverage Code § 5.57 in an effort to assist you in your endeavors. It represents the opinion of the staff of the Commission. If you have questions about this advisory or need additional information, you may contact us by mail at P.O. Box 13127, Austin, TX 78711; by email at advisories@tabc.texas.gov; or by phone at 512-206-3411.

Sincerely,

A handwritten signature in blue ink, appearing to read "Tom Graham", with a long horizontal flourish extending to the right.

Thomas Graham
Director of Excise Tax & Marketing Practices