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Amended February 5, 2014 – Beer Co-Packs – New Legislation
Originally Released December 11, 2007

MARKETING PRACTICES ADVISORY – MPA025

Retail Sale of Liquor and Beer Co-Packs

To: Alcohol Beverage Industry

This Advisory replaces the original Bulletin released December 11, 2007. It has been updated to include the co-packaging of beer as authorized by SB 1090, 83rd Legislature. Section 108.035 of the Texas Alcoholic Beverage Code, effective September 1, 2013, allows the holder of a brewer's permit, nonresident brewer's permit, manufacturer's license, or nonresident manufacturer's license, or the person's agent or employee, to package alcoholic beverages in combination with other items if the package is designed to be delivered intact to the wholesaler or distributor and the additional items are branded and have no value or benefit to the retailer other than that of having the potential of attracting purchases and promoting sales.

Pursuant to §102.07 (a)(5) and §108.035 of the Alcoholic Beverage Code [Code], a co-pack is defined as a combination package comprised of an alcoholic beverage and additional items e.g., glassware, decanter, etc., designed to be delivered intact to the ultimate consumer whereby the additional items have no value or benefit to the retailer other than that of having the potential of attracting purchases and promoting sales.

Section 102.07(a)(5) allows all upper-tier members that manufacturer, import and wholesale liquor products (ale, malt liquor, wine and distilled spirits) to co-package products on their licensed premises. In contrast, §108.035 only allows manufacturers of beer, not distributors, to co-package beer products. Therefore, beer products can only be co-packaged at the manufacturing tier level; a distributor is prohibited from co-packaging beer at their facilities.

In accordance with Rule 45.120 and §102.07 (a)(5) and §108.035 of the Code, it shall be unlawful for a retailer to increase the price of a co-pack disproportionately or break apart the co-pack and sell the additional items separately. Co-packs must remain intact and be priced at the retailer's standard markup percentage price of a naked bottle and offered for sale accordingly. In contrast, nothing shall preclude a retailer from offering at its sole discretion a discounted price of either a naked bottle or co-pack provided that such discount does not violate inducement or other provisions of the Alcohol Beverage Code.

In addition, we have been asked to address the legality of a supplier 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, whereby the

cost is proportionately passed on to the retailer and consumer. Historically, it has been the Commission's position to allow all tiers to set the price of their products with discretionary business justification, provided that the pricing method does not violate statutory provisions. Hence, it is our belief that nothing shall preclude the supplier from differentiating in the price of a naked bottle and co-pack by increasing the cost of a co-pack offered to wholesalers, whereby the cost is proportionately passed on to the retailer and consumer.

We will be compelled to take regulatory action against all involved parties in cases where the upper-tier member's action relating to co-packs conflict with §102.07 (a)(5) or §108.035 and causes the retailer to receive economic benefit thereof. Finally, be mindful a retailer may not be forced, induced or persuaded to purchase a set number of co-packs in order to purchase naked bottles and vice versa.

This opinion is of the staff of the Commission. We hope this opinion will assist you in your endeavors. If you would like additional information or have questions regarding this bulletin, 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