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## MARKETING PRACTICES ADVISORY – MPA061

# Alcohol Delivery and Sales by Certain Retail Permit Holders

**To:** Alcoholic Beverage Industry

In 2019, the 86th Texas Legislature authorized certain retailers to deliver alcohol directly to consumers and established a new alcohol delivery permit. In 2021, the 87th Legislature expanded those privileges by codifying the Governor's temporary COVID-19 authorizations relating to selling alcoholic beverages for to-go purposes, setting standards for sealing containers used in alcohol delivery or sold to-go, and creating an additional avenue to obtain a Food and Beverage Certificate. This advisory provides guidance for retailers authorized to sell alcohol for on-premises consumption who conduct deliveries or engage in to-go sales.

## Eligibility to Conduct Deliveries and/or To-Go Sales

### **MB/FB Permit** (Chapter 28) & **N/NB/NE/FB** (Chapter 32)

Mixed Beverage and Private Club Permit holders who also hold a Food and Beverage Certificate may, with food, deliver or sell alcoholic beverages for consumption off the premises (i.e., to-go).

### **CD Permit** (Chapter 57 Delivery Only)

A Consumer Delivery (CD) Permit may be issued to:

- a business or person who contracts with or employs individuals for the delivery of retail goods to consumers, unless they are the holder of a license/permit in the manufacturing or wholesale tier; or
- the holder of a:
  - Package Store Permit;
  - Wine Only Package Store Permit;
  - Wine and Malt Beverage Retailer's Permit;
  - Wine and Malt Beverage Retailer's Off-Premise Permit;
  - Retail Dealer's On-Premise License;
  - Retail Dealer's Off-Premise License;
  - Mixed Beverage Permit (if authorized under Code § 28.1001); or

- Private Club Registration Permit (if authorized under Code § 32.155)

## **Authority to Conduct Deliveries and/or To-Go Sales**

### **MB/FB Permit (Chapter 28) & N/NB/NE/FB (Chapter 32)**

These businesses may sell alcoholic beverages to-go or deliver alcohol to consumers themselves (through employees or agents) or use a third party (including an independent contractor of a CD permittee) to make deliveries on their behalf. Any person delivering alcohol under this authority must be at least 21 years old.

### **CD Permit (Chapter 57 Delivery Only)**

The CD permittee may make deliveries of alcoholic beverages only in response to bona fide orders placed by the consumer. The holder may employ or contract with a driver to deliver alcoholic beverages from an authorized retailer's premises to an ultimate consumer located in an area that is legal/wet for the type of beverage being delivered. The beverage being delivered must be sold to the consumer by specifically authorized retailers that hold one of the above listed licenses or permits.

Any person delivering alcohol under this authority must be at least 21 years old and hold a valid driver's license.

## **Qualifying for a Food and Beverage Certificate**

To qualify for a Food and Beverage Certificate, the business must either: (a) maintain alcohol sales that are 60% or less of the business's total sales; or (b) meet the definition of a restaurant under section 1.04(29) of the Alcoholic Beverage Code.

Under both options, the location must also have permanent food service facilities for the preparation and service of multiple *entrées* for consumption at the location. If qualifying for the certificate as a restaurant, the applicant business must also operate its *own* permanent *food service facility* with commercial cooking equipment on its premises.

- A "food service facility" is a designated permanent portion of the licensed location where food is stored and prepared for consumption at the location.
- An "entrée" is a course of a meal that may include an appetizer, small plate, main dish, dessert, or other similar food item.

In addition to these general requirements, license and permit holders must also comply with the provisions in Rule § 33.5, which outlines the operational requirements for the certificate.

## **Requirements for Completing a Delivery**

The same standards for selling/serving alcohol to consumers on a retailer's premises apply to delivering alcohol to consumers located off the retailer's premises. It is illegal to deliver an alcoholic beverage to a minor or an intoxicated person. Additionally, both of these delivery authorities require the recipient of the alcohol to actually present the driver with valid proof of their identity and age before the alcohol is handed over to the recipient.

### **MB/FB Permit (Chapter 28) & N/NB/NE/FB (Chapter 32)**

Deliveries may be made to any person of legal age. The recipient must present valid proof of their identity that confirms they are at least 21 years old. The delivery person must either acknowledge completion of the delivery on a software application or have the recipient sign a receipt (can be electronic) acknowledging delivery.<sup>1</sup>

#### **CD Permit (Chapter 57 Deliveries)**

Alcohol may only be delivered to a person that is at least 21 years old who purchased the beverage from the retailer, was designated in advance by the purchaser as the recipient of the beverage or is located at the delivery address. The recipient must present valid proof of identity and age.

### **Limits on the Time of a Delivery**

#### **MB/FB Permit (Chapter 28) & N/NB/NE/FB (Chapter 32)**

There is no authority under Code § 28.1001 to deliver the beverage to the consumer outside of the permittee's hours of legal sale.

#### **CD Permit (Chapter 57 Deliveries)**

The beverage may be delivered to the recipient outside the retailer's hours of operation *only if* the delivery driver receives the beverage from the retailer during the legal hours of sale and completes delivery to the consumer within a reasonable amount of time after leaving the retailer's premises.

### **Limits on Where Alcohol May Be Delivered**

Deliveries may only be made to an address that is legal/wet for the type of alcohol being delivered and that is located within the same county, city, or town as the retailer's premises. If the retailer's premises is located within a city or town, the lawful delivery area extends to addresses that are not further than two miles beyond the city's or town's municipal boundary.

### **Limits on Beverage Type, Size, Packaging, etc.**

#### **MB/FB Permit (Chapter 28) & N/NB/NE/FB (Chapter 32)**

Qualifying businesses may deliver or sell to-go any number of malt beverages, wines and/or distilled spirits to their customers only when:

- accompanied by an order of food that was prepared on the permittee's premises;  
**Note:** *There is no required food-to-alcohol ratio.*
- the delivery is not made to another premises licensed by TABC;
- the alcohol is delivered or sold to-go either:
  - in the original container that was sealed by the manufacturer of the beverage;
  - or

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<sup>1</sup> Code § 28.1001 does not require the software application used to acknowledge the delivery to comply with the application requirements established under § 57.09(a)(2). However, industry members are reminded that a person is prevented from utilizing the rebuttable presumption that a sale was not made to an intoxicated person or a minor if the software application does not adhere to § 57.09(a)(2).

**Note:** Distilled spirits are limited to single-serving containers not larger than 375 mL.

- in a *tamper-proof container* that is sealed by the permit holder and is clearly labeled with the permit holder's business name and the words "Alcoholic Beverage."

**Note:** Distilled spirits must be mixed with other beverages or garnishes and placed in the tamper-proof container.

**Note:** The case containing the 375 mL bottles may be stamped with one ID stamp by the package store selling them to the permittee. (The bottles do not have to be individually stamped.) permittees should keep invoices with the ID stamp for the case listed on the invoice. There are no delivery restrictions pertaining to the size of a container for malt beverages or wine.

*Tamper-proof container*<sup>2</sup> means a container that, once sealed, clearly shows whether it has been opened and includes a closed cup or similar container that is either:

1. placed into a bag that has been sealed with a zip tie or staple;
2. sealed with shrink wrap or a similar seal;
3. sealed with a tamper-evident adhesive tape or seal having one or more indicators or barriers to entry which, if breached or missing, can reasonably be expected to provide visible evidence that tampering has occurred; or
4. sealed mechanically on-premises with a can seamer.

Unless used in combination with a method described in Nos. 1 – 4 above, the following are examples of sealing methods that are not sufficient to meet the standard for a tamper-proof container:

1. freezing the beverage, putting a lid on it, and leaving the straw out of the lid's straw hole; and
2. sealing with a sticker or adhesive tape that is not tamper-evident.

Beverages in a tamper-proof container may not be transported in the passenger area of a motor vehicle. The "passenger area of a motor vehicle" means the area of a motor vehicle designed for the seating of the operator and passengers of the vehicle. The term does not include:

- a glove compartment or similar storage container that is locked;
- the trunk of a vehicle; or
- the area behind the last upright seat of the vehicle if the vehicle does not have a trunk.

**Note:** There is no limit on the number of containers that may be delivered to an individual. However, as providers of alcoholic beverages, industry members should always be mindful of reasonable and responsible consumption.

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<sup>2</sup> See Rule § 41.16

### **CD Permit (Chapter 57 Delivery Only)**

CD permittees may not deliver an alcoholic beverage unless it is in response to a bona fide order placed with an authorized retailer by an ultimate consumer located in an area where the sale of the beverage is legal. The types of beverages that may be delivered are determined by the authority of the underlying retailer that makes the sale to the consumer.

*Note: Distilled spirits purchased from a Mixed Beverage or Private Club permittee must adhere to the above requirements pertaining to the types of beverages and containers.*

### **Undeliverable Alcoholic Beverages**

If the person delivering alcoholic beverages is unable to complete the delivery because no one is available at the designated delivery address, or because the delivery recipient is either a minor or intoxicated, the delivery driver must return the alcoholic beverages to the retailer as soon as reasonably possible. Because the alcohol has already been sold to a consumer at that point in time, it may not be resold until returned to the retailer and placed back into inventory. All returns of undeliverable alcohol must be documented by the retailer in its business records. Under no circumstances may a delivery driver or a CD permittee sell an alcoholic beverage to another person.

### **Limitations on Liability When Delivering Alcohol**

#### **MB/FB Permit (Chapter 28) & N/NB/NE/FB (Chapter 32)**

For alcohol deliveries to consumers under Code § 28.1001, the standard liabilities associated with an MB permittee's brick and mortar location apply, and the permittee is liable if alcohol is delivered to a minor or intoxicated person.

#### **CD Permit (Chapter 57 Deliveries)**

For alcohol deliveries to consumers under Chapter 57, there are different protections from liability for the retailer, the CD permittee, and the delivery driver. These protections are separate and distinct from the safe harbor provisions under Code § 106.14, which do not apply to consumer deliveries in this context. Thus, seller/server certification will not fulfill the training requirements for an alcohol delivery driver operating under a CD Permit.

#### **Liability of Retailers**

A retailer who sells an alcoholic beverage to a consumer satisfies its responsibility when it transfers possession of the alcoholic beverage to a CD permittee or a delivery driver acting as an agent of or on behalf of the CD permittee. At this point, the conduct of a CD permittee or a driver acting as its agent or on its behalf is not attributable to the retailer with respect to:

- providing, selling, or serving alcohol to a minor or an intoxicated person;
- delivering alcohol to a dry or otherwise illegal area; or
- any other provision of the Alcoholic Beverage Code.

A retailer is not required to confirm that a CD permittee or its delivery driver has received TABC's delivery driver training certification and may not be held responsible for their conduct. However, if a retailer contractually agrees to be responsible for ensuring that deliveries are made to areas that are legal/wet for the type of alcohol sale being conducted, the retailer will be held liable for the CD permittee's or their driver's improper delivery.

### **Liability of CD Permittees**

A CD permittee is not liable for the conduct of the driver acting on the permittee's behalf if:

- the CD permittee has not directly or indirectly encouraged the delivery driver to violate the law; and
- the delivery driver either (1) holds a valid Texas Responsible Alcohol Delivery (TRAD) certification or (2) completes the delivery using a software application that meets the standards set forth in the Commission's rule governing delivery compliance software applications.

However, TABC may suspend a CD Permit if, after notice and hearing, the Commission finds that the CD permittee, an agent or employee of the CD permittee, or a person acting on behalf of the CD permittee delivered with criminal negligence an alcoholic beverage to a minor or an intoxicated individual.

### **Liability of Delivery Drivers**

It is illegal to sell or deliver (for commercial purposes) an alcoholic beverage to a minor or an intoxicated individual. Ultimately, it is the delivery driver that bears criminal liability for both violations. The law does provide some protections to drivers. Specifically, it is a presumption that an alcoholic beverage was not sold or delivered with criminal negligence if:

- the driver held a valid TABC Texas Responsible Alcohol Delivery (TRAD) certification at the time of delivery; and
- the driver completed the delivery due to a technical malfunction of a valid delivery compliance software application that otherwise meets the requirements established in the Commission's rules.

It is also illegal to deliver an alcoholic beverage to a location that is not wet for the type of beverage being delivered. It is a defense to a prosecution for a violation of delivering an alcoholic beverage to a dry location if:

- the individual or the CD permittee relied on publicly available information produced by TABC relating to an address' wet/dry classification; and
- the information indicated that the respective address was wet for the type of beverage delivered on the date of delivery. The defense is not available to a person using information other than what is produced publicly by TABC.

While not specifically regulated by TABC, license and permit holders that meet the definition of restaurant should be aware of provisions in the Business and Commerce Code – Ch. 144 and the Local Government Code – Ch. 250 (Sec. 250.011)

TABC's publicly available wet/dry classification information can be found on the TABC website at [tabc.texas.gov/texas-alcohol-laws-regulations/local-option-elections/](http://tabc.texas.gov/texas-alcohol-laws-regulations/local-option-elections/).

### **Statement From TABC**

This advisory is issued pursuant to Alcoholic Beverage Code § 5.57. It represents the opinion 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 advisory, you may contact me in writing at P.O. Box 13127, Austin, TX 78711; by email to [advisories@tabc.texas.gov](mailto:advisories@tabc.texas.gov); or by phone at 512-206-3411.

Sincerely,

A handwritten signature in black ink, appearing to read 'AMaceyra', written in a cursive style.

Andrea Maceyra  
Chief of Regulatory Affairs