



**John T. Steen, Jr.**  
*Chairman – San Antonio*

**Gail Madden**  
*Member - Dallas*

**Jose Cuevas, Jr.**  
*Member – Midland*

**Alan Steen**  
*Administrator*

4<sup>th</sup> Amendment September 17, 2010 - Allow Tastings of Beer at Package Stores and Wine Only Package Stores with Package Store Tasting Permit

3<sup>rd</sup> Amendment May 13, 2010 – Disallow Tastings at Package Stores and Wine Only Package Stores without a Package Store Tasting Permit (See Page 5)

2<sup>nd</sup> Amendment November 12, 2007 [HB2723 of 80<sup>th</sup> Legislature]

1<sup>st</sup> Amendment November 16, 2005 [HB 937, HB 2526 and HB 2590 of 79<sup>th</sup> Legislature]

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### **MARKETING PRACTICES BULLETIN – MPB 002**

“Wine, Beer and Other Alcoholic Beverage Tastings at Retail Accounts”

#### **To: Alcoholic Beverage Industry**

As you are aware legislation passed by the 78<sup>th</sup>, 79<sup>th</sup> and 80<sup>th</sup> Legislature has authorized wine, beer and/or other alcoholic beverage product tastings to be conducted by varied permit / license holders. We have received numerous inquiries from the industry relating to statutory changes impacting wine and/or product tasting/samplings. Please note that the terms tastings and samplings are used interchangeably in the Texas Alcoholic Beverage Code. There appears to be no legal distinction in the use of the two terms. The following material should clarify how and by whom a wine, beer and/or other alcoholic beverages tastings may be conducted.

#### **Texas Winery**

In accordance with §16.01(c) and §54.001 of the Texas Alcoholic Beverage Code, a Texas Winery (holder of a winery permit) or a Promotional Permit Holder acting on behalf of a Texas Winery may conduct a wine tasting on the premises of any on or off premise retailer (includes a Private Club Permit Holder and/or Private Club Exempt Certificate Holder whereby the winery employees or agents has procured membership) who is authorized to sell or serve wine to the ultimate consumer. The following guidelines should be followed:

- Winery employees participating in the wine tasting must hold Agent’s Permits. Employees of the promotional permit holder representing the winery should have an identification card issued by the Promotional Permit Holder.
- Employees of either the Texas Winery or Promotional Permit Holder may open, touch, or pour wine. They may also make product presentations and answer questions at the wine tasting.
- The Texas Winery may provide wine from its inventory provided the wine is legally transported to the retailer and is wine ordinarily offered for sale by the Winery (except that wine may not be taken onto the premise of a holder of a Private Club Permit, Private Club Exempt Certificate or Mixed Beverage Permit.)
- The Retailer may provide wine for the tasting provided the retailer has obtained the product through the legal course of distribution, has an invoice authenticating the purchase and is serving wine ordinarily offered for sale by the Texas Winery.

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- The Texas Winery or Promotional Permit Holder may not pay the retailer a fee to host a wine tasting.
- The Texas Winery or Promotional Permit Holder may advertise a wine tasting but may not provide any money or other thing of value to a retailer for consideration to advertise the wine tasting.
- Wholesaler representatives who hold an Agent's Permit may be present during the tasting, but may not participate in the opening or pouring of product. They may however answer questions during the event.
- The retailer or its employees may assist in pouring or opening the wine, but may not represent themselves as an agent or employee of the Winery.
- Any unused portions of wine purchased by the bottle must be discarded or removed from the premises immediately following the wine tasting. (Note: Unused and unsold portions of wine remaining from wine purchased by the drink at an on-premise retailer for consumer tastings may be retained by the on-premise retailer.)

**Nonresident Seller Who Owns a Winery or Brewery Outside This State**

In accordance with §37.01(b)and (c); and §54.001 of the Texas Alcoholic Beverage Code, a Nonresident Seller who owns a winery or brewery outside this state, or a Promotional Permit Holder acting on behalf of a Nonresident Seller who owns a winery or brewery outside this state, may conduct a wine tasting on the premises of any on or off premise retailer (includes a Private Club Permit Holder and/or Private Club Exempt Certificate Holder whereby the non-resident seller's employees or agents has procured membership with the private club) who is authorized to sell or serve wine to the ultimate consumer. The following guidelines should be followed.

- The Nonresident Seller who owns a winery or brewery outside this state or Promotional Permit Holder may conduct tasting of the kinds of alcoholic beverages the permit holder is authorized to produce, on the premises of a Mixed Beverage Permit Holder(MB); Private Club Permit Holder (N); Private Club Exempt Certificate Holder (NE); Wine and Beer Retailers Permit Holder (BG), Wine and Beer Retailer's Off-Premise Permit Holder (BQ), Wine Only Package Store Permit Holder (Q) with or without a Package Store Tasting Permit; and a Package Store Permit Holder (P) with or without a Package Store Tasting Permit.
- Each employee of the Nonresident Seller participating in the tasting must hold a Manufacturer's Agent's Permit. Employees of the promotional permit holder representing the Nonresident Seller should have an identification card issued by the Promotional Permit Holder.
- Agents of the Nonresident Seller or employees of the Promotional Permit Holder may open, touch or pour the alcoholic beverages. They may also make product presentations and answer questions at the tasting.
- The Nonresident Seller or Promotional Permit Holder must purchase the alcoholic beverages used for the tasting at fair market value from the Retailer on whose premises the tasting is held and may not provide alcoholic beverages for the tasting that are not purchased from the retailer. Alcoholic Beverages provided at the tasting event may not be purchased or otherwise obtained from the Holder of a Wholesaler's Permit.
- The Nonresident Seller or Promotional Permit Holder may not pay the Retailer a fee to host a tasting.

- The Nonresident Seller who owns a winery or its representative Promotional Permit Holder may announce a wine tasting to the consumer. In contrast a Non Resident Seller who owns a brewery or its representative Promotional Permit Holder may not announce a tasting of a product it produces to a consumer. The Non Resident Seller or Promotional Permit Holder may not provide any money or other thing of value to a Retailer for consideration to advertise the tasting.
- The Nonresident Seller or Promotional Permit Holder may not charge the consumer a fee to participate in the tasting if the tasting is held at an off-premise retailer.
- Any unused portions of alcoholic beverages purchased by the bottle must be discarded or removed from the premises immediately following the tasting. (Note: Unused and unsold portions of wine remaining from wine purchased by the drink at an on-premise retailer for consumer tastings may be retained by the on-premise retailer).
- Wholesaler representatives who hold an Agent's Permit may be present during the tasting; however, they may not participate in the opening or pouring of product. They may however answer questions during the event.
- The Retailer or its employees at the Retailer's discretion may assist in pouring or opening the alcoholic beverages, but may not represent themselves as an agent or employee of the Nonresident Seller or Promotional Permit Holder.

**Brewer's Permittee {Ale / Malt Liquor}, Manufacturer's Licensee {Beer} , and Non – Resident Manufacturer's Licensee {Beer}:**

In accordance with §12.01(a)(5) and (b); §62.01 (a)(4) and (b); §63.04 and §54.001 of the Texas Alcoholic Beverage Code, a Brewer's Permittee, Manufacturer's Licensee, Non-Resident Manufacturer's Licensee, or a Promotional Permit Holder acting on behalf of a Brewer's Permittee, Manufacturer's Licensee, Non-Resident Manufacturer's Licensee, may conduct a tasting of ale, malt liquor, or beer {whichever is applicable}, on the premises of any on or off premise retailer (includes a Private Club Permit Holder and/or Private Club Exempt Certificate Holder whereby the supplier employees or agents have procured membership with the private club) who is authorized to sell or serve ale, malt liquor or beer to the ultimate consumer. The following guidelines should be followed.

- The Brewer's Permittee {Ale / Malt Liquor}, Manufacturer's Licensee {Beer} , and Non – Resident Manufacturer's Licensee {Beer} or Promotional Permit Holder may conduct a tasting of the kinds of alcoholic beverages the permit holder is authorized to produce, on the premises of a Mixed Beverage Permit Holder(MB); Private Club Permit Holder (N); Private Club Exempt Certificate Holder (NE); Wine and Beer Retailers Permit Holder (BG), Wine and Beer Retailer's Off-Premise Permit Holder (BQ), Wine Only Package Store Permit Holder (Q) with or without a Package Store Tasting Permit; and a Package Store Permit Holder (P) with or without a Package Store Tasting Permit.
- Each employee of the holder of a Brewer's Permit {Ale / Malt Liquor}, Manufacturer's License {Beer} , and Non – Resident Manufacturer's License {Beer} participating in the tasting must hold a Manufacturer's Agent's Permit. Employees of the promotional permit holder representing the Nonresident Seller should have an identification card issued by the Promotional Permit Holder.

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- Agents of the Brewer's Permit {Ale / Malt Liquor}, Manufacturer's License {Beer} , and Non – Resident Manufacturer's License {Beer} or employees of the Promotional Permit Holder may open, touch or pour the alcoholic beverages. They may also make product presentations and answer questions at the tasting.
- The Brewer's Permittee {Ale / Malt Liquor}, Manufacturer's Licensee {Beer} , and Non – Resident Manufacturer's Licensee {Beer} or Promotional Permit Holder must purchase the alcoholic beverages used for the tasting at fair market value from the Retailer on whose premises the tasting is held and may not provide alcoholic beverages for the tasting that are not purchased from the retailer. Alcoholic Beverages provided at the tasting event may not be purchased or otherwise obtained from the Holder of a Wholesaler's Permit or Distributor's License.
- The Brewer's Permittee {Ale / Malt Liquor}, Manufacturer's Licensee {Beer} , and Non – Resident Manufacturer's Licensee {Beer} or Promotional Permit Holder may not pay the Retailer a fee to host a tasting.
- The Brewer's Permittee {Ale / Malt Liquor}, Manufacturer's Licensee {Beer} , and Non – Resident Manufacturer's Licensee {Beer} or its representative Promotional Permit Holder may not pre-announce a tasting of beer/ale/malt liquor to the consumer. A holder of a Brewer's Permit or its representative Promotional Permit Holder may pre-arrange a tasting of ale/malt liquor with a retailer on whose premise the tasting will be held [however this exception does not apply to a holder of a Manufacturer's License or Non Resident Manufacturer's License]. The Brewer's Permittee {Ale / Malt Liquor}, Manufacturer's Licensee {Beer} , and Non – Resident Manufacturer's Licensee {Beer} or Promotional Permit Holder may not provide any money or other thing of value to a Retailer for consideration to advertise the tasting.
- The Brewer's Permittee {Ale / Malt Liquor}, Manufacturer's Licensee {Beer} , and Non – Resident Manufacturer's Licensee {Beer} or Promotional Permit Holder may not charge the consumer a fee to participate in the tasting if the tasting is held at an off-premise retailer.
- Any unused portions of alcoholic beverages purchased by the bottle must be discarded or removed from the premises immediately following the tasting. They should not be given to the retailer. (Note: Unused and unsold portions of wine remaining from wine purchased by the drink at an on-premise retailer for consumer tastings may be retained by the on-premise retailer).
- A Wholesaler or Distributor representative who hold an Agent's Permit or Agent's Beer License may be present during the tasting; however, they may not participate in the opening or pouring of product. They may however answer questions during the event.
- The Retailer or its employees at the Retailer's discretion may assist in pouring or opening the alcoholic beverages, but may not represent themselves as an agent or employee of the Brewer's Permittee {Ale / Malt Liquor}, Manufacturer's Licensee {Beer} , and Non – Resident Manufacturer's Licensee {Beer} or Promotional Permit Holder.

**Retailer: MB, N, NE, BG, BQ**

Considering the intent of §24.12; and §26.08 of the Texas Alcoholic Beverage Code, it is this Agency's opinion that any on- or off-premise retailer authorized to sell or serve alcoholic beverages to the ultimate consumer may conduct a product tasting of the products it is authorized to sell or server on its premises. (Note: The holder of a private club permit or private

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club exempt certificate must ensure that each consumer participating in the wine tasting holds a private club membership card or temporary membership card issued by the private club.) The following guidelines should be followed.

- The Retailer or its employees may open, touch or pour wine, beer or malt liquor on its premise. The employees may make product presentations and answer questions at the tasting.
- If the Retailer is not authorized to sell wine, beer or malt liquor for on-premise consumption, the retailer may not collect a fee of any sort from a consumer participating in the tasting.
- The Retailer may only conduct tastings of wine, beer or malt liquor that it is authorized to sell to the ultimate consumer. (For example, if a retailer only holds a BQ which only allows the sale of 14% wine, the retailer may not conduct tastings of wine in excess of 14%.)
- Product used for the tasting must be product purchased through the legal channels of distribution by the Retailer on whose premises the tasting will occur and must be invoiced to that Retailer.
- The Retailer may not receive any money or other thing of value from a member of the alcoholic beverage industry or its affiliates as consideration for hosting a tasting.
- The Retailer may advertise the tasting at its discretion. However, the Retailer must directly bear all cost associated with advertising the tasting.
- If the tasting is held on the premises of an off-premise retailer, any unused portions of authorized alcoholic beverages for the tasting must be discarded or removed from the premises immediately following the tasting.

**Retailer: Q and/or P with a Package Store Tasting Permit**

Upon request by members of the industry to review HB290, the agency interprets Chapter 52 of the Texas Alcoholic Beverage Code to require Wine Only Package Store and Package Store permit holders to hold a Package Store Tasting Permit in order to conduct tasting of products it is authorized to sell to the ultimate consumer. The following guidelines should be followed:

- The permit holder must specifically adhere to all regulations as outlined in Chapter 52 of the Alcoholic Beverage Code (Refer to the Texas Alcoholic Beverage Code, September 1, 2005 Edition.)
- The permit holder may not receive money or other thing of value from upper tier members or their affiliates as consideration for hosting a wine tasting.
- The permit holder may only conduct tastings of product that it is authorized to sell to the ultimate consumer under its primary permit. (For example a Wine Only Package Store may sell ale, malt liquor and vinous liquor to the ultimate consumer; therefore, it may only conduct tastings of these products. Notice its permit does not allow the sale of beer and therefore, the permit holder may not conduct in-store tastings of beer under its Package Store Tasting Permit.)
- The holder of a Package Store Permit or Wine Only Package Store Tasting Permit who holds a Package Store Tasting Permit as well as a Beer Retailer's Off-Premise License may conduct products tastings of beer.

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- In accordance with Section 52.01 (m), any holder of a Nonresident Seller's Permit, whether the owner of a winery located outside of this state or not, may engage in a product tasting of liquor at a Wine Only Package Store who also holds a Package Store Tasting Permit or a Package Store who also holds a Package Store Tasting Permit. (Of importance here is to note that there is a statutory conflict between 52.01 (m) and 37.01 (a) of the Alcoholic Beverage Code as it relates to the kinds of alcoholic products which may be sampled at a Wine Only Package Store or Package Store both who hold a Package Store Tasting Permit. Although statutory language in 52.01 (m) authorizes a Nonresident Seller to conduct product tastings of alcoholic beverages, statutory language in 37.01 limits the type of products handled by a Nonresident Seller solely to distilled spirits, vinous and malt liquors. Therefore Section 37.01 would prevail and limit a Nonresident Seller to only conduct product tastings of distilled spirits, vinous and malt liquor at a Wine Only Package Store with Package Store Tasting Permit or a Package Store with Package Store Tasting Permit.
- Wholesaler representatives who hold an Agent's Permit may be present during the tasting; however, they may not participate in the opening or pouring of product. They may however answer questions during the event.

This opinion is of the staff of the Commission and it should be noted that any permittee/licensee may pursue a different opinion through administrative proceedings with the State Office of Administrative Hearings. We hope this opinion will assist you in your promotional endeavors. Please feel free to contact us at any time should other questions arise. We will monitor these events and make necessary regulatory changes as applicable. 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](mailto:marketing.practices@tabc.state.tx.us), by phone at 512-206-3411 or by facsimile at 512-206-3449.

Kind Regards,



Dexter Jones  
Director of Marketing Practices

CC: Alan Steen, Administrator  
Jeannene Fox, Assistant Administrator  
Executive Management  
Regional Personnel