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THIS BULLETIN IS HEREBY REVISED PURSUANT TO HB 1541 of the 80th Legislative Session amending §102.07(g) of the Alcoholic Beverage Code relating to preannouncement of certain promotional activity and purchases of distilled spirits and wine by certain alcoholic beverage permit holders, effective 09/01/07.

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MARKETING PRACTICES BULLETIN – MPB012
COMMON MEDIA ISSUES

To: Alcoholic Beverage Industry
ALL CAPTAINS and COMPLIANCE SUPERVISORS

This bulletin is intended to clarify statutory and common practices related to media issues involving trade practices of members of the manufacturing, wholesaler and retailer tiers of the alcoholic beverage industry.

We have been presented with numerous inquiries from the industry relating to acceptable methods of advertising involving the use of media outlets including but not limited to TV, radio, and periodical advertising.

The prevailing law which governs intra-industry relationships and provisions relating to advertising can be found in Chapter 102 and 108 of the Alcoholic Beverage Code.

Further, exceptions to prohibitions promulgated in Chapters 102 and 108 can be found in Chapter 45 Subchapter D of the Texas Alcoholic Beverage Commission Administrative Rules. The following guidelines are not inclusive and are provided only as a reference tool:

- A. On-Premise “Happy Hour” Promotions {16 TAC 45.103}
Retail licensees may advertise the sale and service of alcoholic beverages.

Retailers may advertise drink prices, brand names (provided they are paying the entire cost for the ad), promotions, and “happy hour” information (prices, times, brands, etc.). While drinks may be advertised at reduced prices, retailers may not reduce or offer reduced price drinks after 11:00 p.m.

Retailers may not sell serve or offer an undetermined quantity of alcoholic beverages for a fixed price or “all you can drink” basis.

Retailers may not sell, serve or offer to sell or serve more than two drinks to a single consumer at one time.

Retailers may not sell, serve or deliver alcoholic beverages in pitchers, carafes, buckets or similar containers to one consumer - [Retailers may sell or serve these items to two or more consumers].

Retailers may not sell, serve or offer alcoholic beverages at a reduced price to consumers paying a fixed buy in price.

Retailers may not sell, serve, or offer alcoholic beverages at a price contingent on the amount of alcoholic beverages consumed by an individual.

Retailers may not conduct, sponsor, participate or allow anyone on their licensed premises to conduct, sponsor or participate in any game or contest to be determined by the quantity of alcoholic beverages consumed by consumers or where alcoholic beverages or reduced price alcoholic beverages are awarded as prizes. Section 45.103 (Texas Administrative Rules)

B. Free/Complimentary Alcoholic Beverages {16 TAC 45.103}

A retailer may **without prior advertising** give one free or complimentary alcoholic beverage to an individual consumer in celebration of birthdays, anniversaries or similar events.

A retailer may offer one free alcoholic beverage to any identifiable segment of the population during the course of one business day.

C. "2 for 1," "Buy 1, Get 1 Free," {16 TAC 45.103}

Retailers cannot offer alcoholic beverages for on-premises consumption at "two for the price of one" or "buy one, get one free," or under any other scheme where the express or implied meaning is that a customer, in order to receive a reduced price, would be required to purchase more than one drink at one time.

D. Beer Bucket Pricing {16 TAC 45.103(c) (11)} [Added October 2007]

Retailers may set prices at their discretion. We recommend that the bucket price is not unusually low and is not a scheme to provide multiple drinks at the price of one. Further, pricing should not be in a manner that encourages the consumer to consume to excess or whereby the price affects the retailer's ability to control consumption.

E. Alcoholic Beverages as part of a Meal or Hotel Package {16 TAC 45.103}

A retailer may include an alcoholic beverage as part of a meal or hotel package price but such price must include the beverage cost.

F. Private Club Advertising {16 TAC 45.107}

A private club retailer must in any advertisement, either directly or indirectly advertising the service of alcoholic beverages, whether or not by any specific brand name, state that the service of alcoholic beverages is only for persons who are members of the club.

G. Retailer Use of Advertising Credits or Free Spots {Alcoholic Beverage Code §102.07, §102.15, §108.06}

A retailer may not use free spots or advertising credits that have been accumulated by a member of the manufacturing or wholesale tier stemming from other contractual or non-contractual agreements with Media Outlets.

H. Retailer Responsibility

The retailer is responsible for all activities at their licensed premises, whether or not a media outlet indicates that they are "hosting" an event at the licensed premises.

I. Upper Tier Advertising Permitted {Alcoholic Beverage Code 108.51}

Manufacturers, and/or members of the wholesale tier of the alcoholic beverage industry may use broadcast media to advertise their products provided such advertising does not violate any statutory provision in the Alcoholic Beverage Code or Administrative Rules of the Texas Alcoholic Beverage Commission. Further, such advertisement may not benefit a specific retailer or group of retailers and may not be cooperative with a retailer.

J. Cooperative Advertising is Not Permitted {Alcoholic Beverage Code §102.07, §108.05}

Members of the manufacturing and wholesaler tiers are prohibited from advertising in conjunction with retail licensees and from cooperatively paying (directly or indirectly) for any advertising or distribution of advertising with or for a retailer.

[Added October 2007] The exception to the above is advertising as permitted by HB 1541 of the 80th Legislative Session effective September 1, 2007. Suppliers and wholesalers of distilled spirits and wine may pre-arrange with retailers and pre-announce to consumers promotional activity and/or purchases of distilled spirits or wine occurring at a licensed retailer premises. Malt liquor/ale suppliers may pre-arrange with a retailer and pre-announce with a consumer promotional activity of malt liquor/ale products occurring at a licensed retailer premises to the consumer. [Note: of importance here is that this exception does not apply to beer suppliers or distributors].

K. "Tied-House" Statutes {Alcoholic Beverage Code §102.01}

Members of the manufacturing and wholesaler tiers are prohibited from furnishing, giving or lending money or any other thing of value, directly or indirectly, to a retail licensee or his/her employee(s).

L. Use of Retailer Name in Upper Tier Advertising Prohibited {Alcoholic Beverage Code §102.07 and §108.05}

The Texas Alcoholic Beverage Code prohibits cooperative advertising between a member of the manufacturing and/or wholesale tier and a retailer.

A media outlet, affiliated directly or indirectly with a member of the manufacturing or wholesale tier of the alcoholic beverage industry, acting in conjunction with or on behalf of a member of the alcoholic beverage industry or acting in conjunction with or on behalf of a third party associated with a member of the alcoholic beverage industry, and/or are being compensated in any way by a member of the alcoholic beverage industry or goods and services have been exchanged with a member of the alcoholic beverage industry, shall be considered to be an agent or servant of the upper tier member.

As the agent or servant of an upper tier member, any unlawful activity committed by the media outlet will be imputed to the alcoholic beverage member as if the alcoholic beverage member had directly committed the violation.

M. Brand Name May Be Included in Retailer Advertising {Alcoholic Beverage Code §102.07, §102.15 §108.05}

A retailer may include the brand name of a beer, wine, or distilled spirits in its advertising provided that the retailer has not been compensated in any way, directly or indirectly, by the manufacturer, or member of the wholesale tier or affiliated third party of that particular alcoholic beverage. Extreme caution should be taken to ensure the retailer has not been influenced in any manner to engage in brand specific advertising.

N. Event Promotion by a Non-Retail Licensee {Alcoholic Beverage Code §102.07 §102.15}
Alcoholic beverage manufacturers and wholesalers cannot pay for or advertise concerts or other special events to take place at a retailer's premises, or arrange to have their brand in the title of a retailer's event, as a result of a purchase, trade, sponsorship or other arrangement.

Other arrangements would include "promo" mentions promised to the manufacturer or wholesaler member of the alcoholic beverage industry as part of an ad buy.

If a manufacturer or wholesaler member directs a media outlet to tie its brand, trade name, logo, or trademark to a retailer or retailer sponsored event, the media outlet is acting as an agent of the supplier, even if no money exchange or trade has occurred. This would be considered "cooperative advertising" and is prohibited.

The sponsoring member of the alcoholic beverage industry will bear responsibility for all such acts.

O. Event Sponsorship at Retail Premises {Alcoholic Beverage Code §108.73}

Members of the manufacturing and wholesale tiers are prohibited from sponsoring bands, musicians, or paying for other entertainment benefiting a retailer.

Conversely, members of the manufacturing and wholesale tier may engage in advertising sponsorship of public entertainment facilities.

A public entertainment facility is defined by Texas Statute as a facility not owned or operated by a retailer but rather the retailer is an independent concessionaire only and the facility is either an arena, stadium, automobile race track, amphitheater, auditorium, theater, civic center, convention center, or similar facility that is primarily designed and used for live artistic, theatrical, cultural, educational, charitable, musical, sporting, nationally sanctioned automobile racing or entertainment events.

A public entertainment facility does not include a facility whereby the primary purpose of operation is derived from the sale of food or alcoholic beverages including a bar, nightclub, restaurant, hotel, bowling alley, pool hall, or dance hall.

P. Sponsorship of Station Concert Hotlines by Members of the Alcoholic Beverage Industry {Alcoholic Beverage Code §102.07 §108.05}

Members of the alcoholic beverage industry cannot buy title sponsorship of "Hot Lines" or "Event Lines" from radio stations, which listeners call to hear a listing of events at retail locations, nor may they be referenced as a sponsor of such "Lines."

Q. Members of the Manufacturing and Wholesaler Tier Sweepstakes Contests {16 TAC 45.106}

Members of the manufacturing and wholesaler tier may advertise contests or sweepstakes promotions, noting that entry forms "are available at your nearest retailer" or in other generic terms, but are prohibited from identifying specific retail-licensed locations.

R. Consumer Giveaways and Sweepstakes Prizes {16 TAC 45.106, 45.113, 45.117}

Novelty Items:

Rule 45.113 and 45.117 provide provisions for consumer giveaways and limits the monetary value of novelty items by members of the manufacturing and wholesale tiers of the alcoholic beverage industry. Beer manufacturers and wholesalers may give consumers novelty items designed to advertise or promote a specific brand or product. Such items may not exceed a value of \$1.00 per unit wholesale cost. Consumer giveaways awarded during radio call-in contests must not exceed the monetary limitations described herein.

Liquor manufacturers and wholesalers (distilled spirits, wine, malt liquor and/or ale) may give consumers novelty items designed to advertise or promote a specific product or brand. Such items must be of limited value and must be legally offered ~~and conducted in 30 or more states during the same time period~~ [deleted following 79th Legislative Session].

Consumer giveaways sponsored by liquor manufacturers and/or wholesalers that are awarded during radio call-in contest must adhere to provisions described herein.

Sweepstakes Items:

Rule 45.106 governs sweepstakes. Manufacturers and wholesalers may sponsor sweepstakes contests provided that such contests are lawfully conducted. Prizes may not include alcoholic beverages and may not benefit or include a retailer.

Media outlets who advertise consumer giveaways or call-in contests or sweepstakes on behalf of a member of the alcoholic beverage industry cannot give away prizes that do not meet the criteria or whose values exceeds the limits described herein, regardless of whether the station has paid for the prizes.

Of importance here is that the media outlets, marketing/advertising firms, promoters and any other entity conducting business for or on behalf of any member of the alcoholic beverage industry does so as an agent of the alcoholic beverage industry member and thus, the alcoholic beverage industry member will be imputed for any violation committed by the third party.

It is our opinion that the aforementioned guidelines will provide considerable guidance for media outlets conducting business with members and non-members of the alcoholic beverage industry. Further, it is our hope that this bulletin will clarify any misconception regarding advertising and intra-industry relationships related to media issues.

Anyone having questions about alcoholic beverage advertising, specifically if the advertisement potentially ties-in a retailer and a member of the manufacturing and/or wholesale tier of the alcoholic beverage industry, are encouraged to contact Dexter Jones, Director of Marketing Practices at P.O. BOX 13127, Austin, TX 78711, or by email at marketing.practices@tabc.state.tx.us or by phone at 512-206-3411 and by facsimile 512-206-3449.

Kind Regards,



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