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MARKETING PRACTICES BULLETIN – MPB 020
On- Premise Consumer Taste Comparison

To: Alcoholic Beverage Industry

This bulletin is intended to clarify an industry concern regarding the legality of a beer manufacturer or anyone engaged in the alcoholic beverage industry to conduct an on-premise promotion at a licensed retail account designed to derive product comparisons of competitive products. Although this inquiry is specific to a beer manufacturer, the contents of this bulletin where applicable shall apply to a liquor manufacturer.

Of particular concern is whether a beer manufacturer may purchase its products and a competitor's product, whereby the manufacturer conducts a comparison test designed to determine consumer taste preferences of the two competitive products. Statutory provisions found in Section 108.06 of the Alcoholic Beverage Code state that no manufacturer or distributor, directly or indirectly or through a subsidiary, affiliate, agent, employee, officer, director, or firm member, may offer a prize, premium, gift, or other inducement to a dealer in, or *consumer* of, brewery products. Conversely, Section 108.04 grants the commission discretionary authority to relax this restriction, meaning a beer manufacturer may not give anything to a retailer or consumer, except that which has been authorized by virtue of Section 108.04 and promulgated in 16 TAC 45.113. The commission has exercised its discretion in 16 TAC 45.113 (b) (3) which allows an upper tier member to purchase alcoholic beverages for consumers provided that such purchases are not excessive, not prearranged or pre-announced. Further, 16 TAC 45.113(b)(4) grants the administrator discretionary authority to govern manufacturing tests designed to determine consumer taste preferences. The administrator has exercised this discretion through the commission staff by developing formal guidelines for tests designed to determine consumer taste preferences (see **exhibit 1**).

Commission guidelines for consumer taste preference tests require that such tests be administered in an unlicensed facility by a recognized, independent, marketing research firm on behalf of the requesting manufacturer. Hence, it shall be unlawful for a manufacturer or anyone else to conduct a test or engage in any activity which purports to determine consumer **taste** preferences at a licensed retail account. Further, the commission emphasizes that Sections 102.07, 102.15, 108.01, 108.04, 108.05, 108.06 of the Alcoholic Beverage Code and provisional guidelines promulgated in accordance with 16 TAC 45.113 (b)(4) provide that a manufacturer, its representatives, agents, servants, employees, contractors, etc., at a licensed retail account may not:

- engage a consumer to determine taste preferences;
- pre-arrange a promotion with a retailer if representing the beer industry;
- pre-announce a promotion to consumers;
- provide a service to a retailer;
- induce a consumer to participate in a promotion;
- collect data regarding consumer preference of product color, aroma, perceived taste, etc.;
- use data resulting from commercial speech (i.e. discussions) regarding consumer preference of product color, aroma, perceived taste, etc., for advertisement in any manner; or
- disparage a competitor's product.

Invariably a manufacturer may engage in limited spontaneous bar spending promotions. Be mindful a manufacturer may not pre-announce bar spending promotions to consumers, prearrange promotions with retailers, or advertise promotions in any manner (Note: prearrangement is defined as any prior communication with a retailer regarding any aspect of a promotion). During such promotions:

A manufacturer may:

- purchase its product and/or a competitor's product for a consumer;
- engage in commercial speech with the consumer(s) about the purchase, including discussions of the products characteristics such as color, aroma and/or perceived taste;
- collect personal data from a consumer, e.g., consumer's name, mailing address, email address, age, etc.; and
- provide novelty items limited in value to \$1.00 or less.

A manufacturer may not:

- encourage or allow the consumer to taste the competitor's product and provide feedback on the taste;
- collect any data resulting from commercial speech with a consumer regarding the consumer's preference for color, aroma and/or perceived taste;
- use any data or dialogue resulting from the commercial speech about the products in any print, television, radio, or other form of advertisement;
- induce a consumer to participate in the promotion; and
- provide novelty items to the consumer contingent upon the consumer's participation.

It is our concern to ensure that the industry is aware of what the commission's position is on this matter to alleviate any misconception of what is permissible. We will monitor events relating to this practice and make necessary regulatory decisions as applicable.

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. 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 512-206-3203.

Kind Regards,



Dexter K. Jones
Director of Marketing Practices

CC: Alan Steen, Administrator
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Executive Management
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The following are guidelines used by the Texas Alcoholic Beverage Commission under the authority of the Texas Administrative Code (16 TAC) §45.113 (b)(4) for members of the industry to follow when conducting sampling test designed to determine consumer taste preferences in the State of Texas. {applicable to manufacturers of liquor and malt beverages}

1. The test must be conducted in a wet area.
2. The test must be conducted at an unlicensed location.
3. Participants must be 21 years of age or older.
4. The test must be run by a recognized, independent, marketing research firm.
5. Compensation may be paid to a participant by the marketing research firm.
6. Results are not to be advertised or published.
7. Advance notice must be given to the TABC, Marketing Practices Department, in Austin, TX at-least 10 days in advance.
8. Participants must not know what manufacturer requested the test.
9. The beverages used in the test must be legally purchased in Texas from a licensed retailer or directly from the manufacturer if not currently available in the Texas market. An accounting by the marketing research firm must be made of all beverages purchased, used in the test, and disposed of after the test.
10. The marketing research firm must adhere to all other city and state laws.
11. The marketing research firm may supply food for the limited purpose of clearing the taste buds of the participants during the test.
12. The test is to be conducted for manufacturers only and specifically excludes all distributors.
13. The participants are not allowed to remove the product from the test area, and all products not consumed must be destroyed.

Kind Regards,

Dexter K. Jones
Director of Marketing Practices

For Purposes of MPB020, this page is referred to as Exhibit 1