



MEMORANDUM

TO: All Manufacturers, Suppliers, Brokers, Wholesale Distributors, and Retail Permit Holders
FROM: James V. Canepa, Superintendent, Division of Liquor Control
DATE: April 11, 2019
RE: Trade Practice Reminders

Handwritten signature of James V. Canepa

As Superintendent of the Division of Liquor Control (Division), I would like to take this opportunity to answer some recent stakeholder questions.

Glassware

The Division has recently seen an increase in the number of questions received regarding the provision of glassware to retail permit holders. The Division is providing the following information to educate all members of Ohio's Three-Tier System.

Ohio's Tied House Law, R.C. 4301.24, prohibits a manufacturer or wholesale distributor from aiding or assisting a retail permit holder by "gift or loan of any money or property of any description or other valuable thing, or by giving premiums or rebates." It also prohibits the retail permit holder from receiving any such items. The Ohio Liquor Control Commission (Commission) has codified exceptions to the general Tied House prohibition, many of which are found at O.A.C. 4301:1-1-43. With regard to glassware, this rule states:

(B) No manufacturer or wholesale distributor of alcoholic beverages shall furnish advertising specialties or utilitarian specialties to any retail permit holder at less than their full cost, including glassware or other containers intended for the serving of alcohol beverages, except that:

- (2) Trays, bar caddys, bar mats, matches, crumbers, stir sticks, menu cards, paper coasters, foam scrapers, olive picks, back bar display pieces, lighters, cigar cutters, T-shirts, hats, wine bottle seals, buckets, glassware or other containers intended for the serving of alcohol beverages, and other similar items, which bear a brand name or logo for any type of alcoholic beverage, may be furnished by the manufacturer or supplier free of charge to any retail permit holder. The cost of each item shall not exceed twenty-five dollars per item and at no cost to the wholesale permit holder. However, no manufacturer or supplier shall furnish to an individual

retail permit holder more than twenty-five dollars worth of glassware or other containers intended for the serving of alcohol beverages at one time, and shall not furnish glassware to an individual retail permit holder more than twice per year. (Emphasis added.)

As such, a manufacturer or supplier may furnish up to \$25.00 worth of glassware to a retail permit holder, up to twice a year. The cost of the glassware cannot exceed \$25.00 per item. A manufacturer, wholesale distributor, or retail permit holder who furnishes or receives more than that, or who furnishes or receives items other than those specifically identified in the Commission's exceptions, would be in violation of the Tied House prohibition.

Spirituos Liquor Size Requirements

R.C. 4301.19 prohibits the Division from selling spirituous liquor containers holding one-half pint or less except at retail through its Contract Liquor Agents. The exception to this prohibition is that the Division may sell 50 ml. sealed containers to permit holders authorized to sell spirituous liquor for on-premises consumption. What does this mean to manufacturers, brokers, and retail permit holders?

Manufacturers and brokers should not be soliciting retail permit holders to purchase products in containers of one-half pint (200 ml.) or less, with the exception of 50 ml. containers. Retail permit holders selling spirituous liquor for on-premises consumption are limited to purchasing containers holding 50 ml. or holding more than a half pint of spirituous liquor.

Advertising

The Division frequently receives inquiries regarding permitted and prohibited forms of advertising. The Advertising Rule, Ohio Administrative Code 4301:1-1-44, is enacted by the Ohio Liquor Control Commission (Commission). This rule specifies what a permit holder may or may not do in advertising.

While a manufacturer, supplier, or wholesale distributor is prohibited from stating or giving the name or address of any permit holder where that manufacturer's, supplier's or wholesale distributor's products may be obtained or purchased, there is one exception. That information may be given in response to a direct inquiry from a consumer when the names of two or more unaffiliated retail permit holders are given. With regard to electronic advertising, posting that information directly on a website homepage is not sufficient to meet the requirement of an inquiry from a customer. The Division has repeatedly indicated, however, that a "Click Here for Where to Buy Our Products" type of button on a website, which takes the consumer to another page where the proper information is listed, is sufficient to equate to a direct inquiry from a consumer.

The Division has received additional inquiries regarding the applicability of the advertising rules and regulations to social media. While the Commission has been solicited to exempt social media types of advertising e.g. Facebook, Instagram, Twitter, from the prohibitions listed in the rule, the Commission has opted not to do so. Additionally, the Division notes that its federal counterpart, the Department of the Treasury, Tax and Trade Bureau (TTB) has likewise indicated that advertising of any sort, whether paid or free, social or otherwise, is subject to the same rules and regulations. (See TTB Industry Circular 2013-01, which may be found at https://www.ttb.gov/industry_circulars/archives/2013/13-01.html.) As such, permit holders are

reminded that, regardless of the form of advertising, it must comply with the requirements of the rules.

Stocking vs. Rotation of Product by Manufacturers, Wholesale Distributors, or Suppliers

It has come to the Division's attention that there may be some confusion as to what is permissible in Ohio with regard to the stocking or rotating of product. Simply stated, stocking a retail permit holder's shelves is prohibited. Rotating product for freshness is permissible under the limitations set out in O.A.C. 4301:1-1-43.

Stocking is defined at O.A.C. 4301:1-1-43(B)(5)(f) as "the refilling or replenishment of empty or partially empty shelves or displays." Rotation or rotating is defined in O.A.C. 4301:1-1-43(B)(5)(g) as "the rearrangement of alcoholic beverages within a pre-assigned space, moving the older containers to the front and the newer containers to the back, to ensure that the older containers sell first." The activities that qualify as rotating product are generally described in the rule, however, these activities **do not** include moving product from the storage area of a retail permit premises and placing it on the retail permit holder's shelves or in a cooler space. Also excluded would be the placement of product at a permit premises that doesn't have a stock room, such as a carry out or "beer cave." Once the product is delivered, it is the responsibility of the retail permit holder to place it where they want it for storage or sale, with the exception of rotating existing stock for freshness.

The facts and circumstances in a particular case will be the determining factors as to whether a violation exists. Every conceivable scenario related to the issue of permissible rotating activities, as opposed to prohibited stocking activities, cannot be addressed in a reminder such as this. The purpose of this reminder is merely to put all industry members on notice that the Division has the duty and obligation to enforce the liquor laws and rules as enacted, and fully intends to do so.

This duty includes issuing warnings or citations to manufacturers, wholesale distributors, and suppliers who engage in the stocking of retail permit holder's shelves and coolers. As an additional reminder, a manufacturer, supplier, or wholesale distributor cannot pay a third party to engage in prohibited activities on their behalf. Further, depending on the facts and circumstances, the retail permit holder at whose premises stocking activity is observed is also subject to warnings or citation. Finally, I would also like to note that if a manufacturer's, wholesale distributor's, or supplier's personnel wore a retail permit holder's employee uniforms or other work apparel to avoid detection while stocking shelves, they would be in violation of the rule. Citations will be issued if such activities come to light in an investigation.

Registered Solicitors

Persons representing manufacturers, suppliers, brokers, brands, and wholesale distributors who are out in the marketplace, promoting products to retail permit holders and educating consumers about those products, are typically identified as a "Trade Marketing Professional," or "Brand Ambassador." These persons are employees or under contract with a trade marketing company, which solicits the purchase of beer and intoxicating liquor, and educates the public about those products. The Division is finding that many of these individuals are not registered as Solicitors with the Division. The Division registers the individuals, not the company that they work for. These individuals are required to pay a biennial \$50 fee and file an Application for Solicitor Registration (DLC Form 1504), found on the Division's website at https://www.com.ohio.gov/documents/LIQR_1504.pdf. Manufacturers, Suppliers, Brokers, and

Wholesale Distributors are reminded that they are responsible for the people who are marketing their products and need to make sure they've complied with the registration requirement as well as the rest of Ohio law.

In Conclusion

The purpose of this reminder is to educate and put all industry members on notice that the Division has the duty and obligation to enforce the liquor laws and rules as enacted. Violations of the above-mentioned requirements, or any other requirements under Ohio law, will result in citations. If you have questions about the above information, feel free to call Sharon Mull, Assistant Division Counsel, in the Division's Legal Section at 614-644-2489.

All of the Ohio liquor laws and rules referenced above may be accessed via the Division's website at <https://www.com.ohio.gov/liqr> under "Resources."

Thank you for your efforts to ensure that your companies are in compliance with Ohio's liquor laws and rules.