



New Mexico Regulation and Licensing Department

ALCOHOL AND GAMING DIVISION

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2017 RENEWAL MEMORANDUM

To: All License Holders
From: Mary Kay Root, Director, Alcohol and Gaming Division (AGD)
Date: June 2017
Re: **Message from the Director – Mary Kay Root, Esq.**

Greetings to all our liquor industry members!

Here at the Alcohol & Gaming Division, we wish to see you succeed through the responsible sale and service of alcohol, leading to positive business growth and development. Whether you are starting a new business or expanding an existing one, we will help you determine the best path forward to abide by New Mexico laws. Responsible alcohol sales and service protect our citizens and visitors to the state, as well as your business. We can assist in determining weak links that put the public and your business at risk and recommend best practices to guide you on your way. Your success is our success.

In the last year, we've seen 72 new Restaurant beer & wine Licenses, 24 new Small Brewers (including off-sites), 5 new Winegrowers (including off-sites), and 1 new Craft Distiller. These are the license types that often work in our rural communities, bringing growth with hospitality. During the Martinez administration, several initiatives have helped responsibly grow the industry; creation of a Craft Distiller license, creation of a Bed and Breakfast license, designation of a "brewery district" in the City of Albuquerque, allowing NM Wineries to sell their products via internet websites, allowing for reciprocity between Small Brewers and Winegrowers so that both license types can sell any NM beer or wine and allowing all retailer businesses (such as grocery stores, convenience stores and others) to fill and sell growlers.

AGD's staggered license renewal dates have smoothed out processing time for renewals as well as for new applications received during the renewal cycle. We completed our comprehensive overhaul of the rules and regulations, adopting them in late May, 2017.

2017 LEGISLATION

Below is a summary of the 2017 Liquor Legislation signed into law by Governor Martinez:

HB 162 Local Option for Liquor Sales Hours

Because hours and days of operation are regulated solely by state law, this bill was brought to allow the City of Gallup and the County of McKinley to restrict hours for package liquor sales of alcoholic beverages on non-Sundays between the hours of 7 a.m. and 10 a.m. by authorizing them to adopt local ordinances changing hours of operation for package liquor establishments.

HB 262 Sunday Liquor Sales on December 31

This restores New Year's Eve hours to 2 am for 2017. The bill was brought this year because, without this statutory change, New Year's Eve hours of operation for 2017 would halt at midnight. This occurred when the provision regarding extending Sunday sales hours on New Year's Eve that had been previously contained in the Liquor Control Act was inadvertently removed in 2013.

POWDERED, FROZEN, VAPOR AND ALTERNATIVE FORMS OF ALCOHOL

Powdered alcohol poses significant health and safety risks to consumers, creating a much greater likelihood of underage use and abuse as well as potentially tragic consequences for both consumers and the public. We therefore encourage all of our distributors not to carry powdered alcohol and likewise encourage all retailers not to request that their wholesalers carry this product. While some states have passed laws to ban powdered alcohol, others have chosen to regulate it and other new and emerging products. New Mexico has chosen the regulatory path, discouraging the creation of black markets for powdered alcohol. As we continue forward committed to responsible alcohol sales and service, we encourage increased education and awareness surrounding powdered alcohol and any other alternative alcohol products.

WHAT CONSTITUTES A DRINK- RECAP

AGD has consistently communicated what constitutes a drink since at least 2005, when it was defined in our alcohol server education training. This is also the same information taught to anyone getting a New Mexico driver's license. Directors have usually included this reminder in the annual renewal memorandum. Although not codified in statute or listed in rule, this is AGD's strong recommendation. As taught in all of our alcohol server education training programs, a drink is:

- 12 oz. of Beer
- 5 oz. of Table Wine
- 1-½ oz. of distilled spirits (80 proof)

Pursuant to 15.10.51.11C NMAC, it is impermissible to allow more than two unconsumed alcoholic beverage drinks at any one time in front of a patron. Under the above guidelines, an individual may have 24 oz. of Beer, 10 oz. of Table Wine or 3 oz. of distilled spirits on the table in front of him/her at one time. The same amounts can be broken down into different containers, i.e. a flight of beer that contains 6 ea. 4 oz. servings; or a flight of wine that includes 5 ea. 2 oz. servings; or a flight of Tequila that includes 5 ea. ½ oz. servings.

Establishments are also encouraged to avoid the "supersize" trend (such as serving a 26 oz. glass of beer) as well as avoiding combining very high proof spirits into cocktails that result in large amounts of alcohol being combined into a single drink, making it difficult for patrons to know their intake.

TRADE PRACTICES ADVISORY - RECAP

This information was included in the 2014, 2015 and 2016 Messages from the Director and is included this year for consistency. This is a reminder to all licensees concerning activities that may constitute unfair competition or "tied house" practices in violation of NMSA (1981) §60 - 8A-1. This reminder is primarily for our Supplier and Wholesaler tiers, for whom a violation can result in fines and penalties. Although the Retail tier does not strictly violate the law when engaging in the practices described below, *please be aware that we are keeping an eye on this type of activity and will not look favorably upon such practices.* Lastly, remember that the New Mexico Liquor Control Act grants to the Director broad latitude and discretion to regulate alcohol consistent with public health, safety and morals.

Background:

AGD has received allegations of furnishing, giving or otherwise offering items of value, such as exclusive product displays, draught systems, refrigeration units, equipment such as refrigeration doors, and other items of value to licensees. We have also received reports of widespread trade practice violations from other states and the Department of Treasury, Alcohol and Tobacco Tax and Trade Practice Bureau (“TTB”). To the extent that such activities are occurring in New Mexico, please be aware that such facts may give rise to a violation of NMSA (1981) §60-8A-1, which prohibits commercial inducement, unfair competition, and tied house relationships. In addition to being against state law, such practices violate federal law as well and should not be present in the marketplace.

Regarding scan-backs, IRCs or other forms of product offers, these are currently allowed in the state of New Mexico as long as the offer is made to *all* Retailers. That means that all Retailers must be kept informed about every special offer and sufficient coupons or IRCs must be printed and available to allow every Retailer to participate, if they desire to do so. If a scan-back is offered, an IRC must likewise be available so that Retailers who do not have the ability to take advantage of the offer through scan-backs will be able to take advantage of the offer through IRCs. Suppliers are prohibited from forcing or coercing Wholesalers to fund the offers, in whole or in part. We have seen numerous regulatory concerns in the arena of “invisible pricing.” If issues continue to arise, it is possible that these practices will become fully prohibited in the future.

AGD has a duty to administer and enforce the Liquor Control Act (“LCA”) to ensure commercial fairness for all license holders. Pursuant to NMSA (1981) §60-8A-1, it is not fair or lawful to offer economic inducements that have a coercive effect or create a preferential advantage to the exclusion, in whole or in part, of other industry license holders. Unfair trade practice laws exist primarily to assure Retailer independence in choosing product. Since New Mexico is a franchise state, such practices also limit the competitiveness and health of the marketplace. It is our goal to have a clean market that is diverse and competitive with a level playing field. Upon request by any Retailer, any Wholesaler shall offer, on an equal basis, in a timely manner, any product that is offered to any other Retailer.

It is not appropriate for Retailers or Dispensers to demand items of value, services or preferential treatment that would place Wholesalers or Suppliers in the position of being pressured to break state or federal law. Licensees should also be aware that the TTB is actively investigating trade practice violations under similar federal laws and regulations. Therefore, whether or not an establishment receives a citation under the Liquor Control Act, federal investigations continue.

New Mexico “Tied House” Law:

Pursuant to NMSA (1981) §60-8A-1, entitled “Unfair competition; exclusive outlet; tied house; consignment sales” [i]t is unlawful for any importer, manufacturer, nonresident licensee, or any kind or class of wholesaler, directly or indirectly, or through an affiliate, [to]

- require by agreement *or otherwise* that a licensee purchase alcoholic beverages *to the exclusion in whole or in part of alcoholic beverages sold or offered for sale by other persons*; or
- *induce, directly or indirectly*, a licensee to purchase alcoholic beverages *to the exclusion, in whole or in part of alcoholic beverage products sold or offered for sale by other persons*.

NMSA (1981) §60-8A-1 is similar, although more restrictive in some respects, to federal law addressing prohibited trade practices as set forth in 27 U.S.C. §205. While the AGD is bound by the New Mexico statutes and not by 27 U.S.C. §205, we will take federal law under advisement for guidance and recommend that New Mexico licensees review 27 C.F.R. pt. 6 and all TTB Circulars issued in connection with trade practice activities.

Prohibited “Inducement” and “Exclusion”:

New Mexico industry members may not induce, directly or indirectly, a Licensee to purchase alcoholic beverage products to the exclusion in whole or in part of alcoholic beverage products offered for sale by other industry members.

The meaning of the term “induce” is well established at law. Please be aware that furnishing, lending, and giving of things of value, whether directly or through a third party, constitutes a *means to induce* under the LCA. Giving of things of value can create a presumption of inducement even if there is no intent to induce.

While the AGD has not defined “exclusion in whole or in part” by rule, this term has been addressed by other states and in the Code of Federal Regulations. Many states find that “exclusion” has occurred where a Licensee purchases less of a competitor’s product than it otherwise would have done so. 27 C.F.R. §6.151 states that exclusion, in whole or part, occurs:

- (1) When a practice by an industry member, whether direct, indirect, or through an affiliate, places (or has the potential to place) Retailer independence at risk by means of a tie or link between the industry member and Retailer or by any other means of industry member control over the Retailer; and
- (2) Such practice results in the Retailer purchasing less than it would have of a competitor's product.

Examples:

- Supplying items of value such as product displays, point of sale advertising, and equipment in *exchange for favorable shelf space, product placement, or “well” placement*;
- Payment of menu printing costs in exchange for product guarantee, such as 40% of brands on menu;
- Giving of value *in any form* for *preferential product display or shelf space* (known as “slotting fees” or “allowances”);
- Giving or furnishing value in any form, including “*promotional support*” (including per case LMF expenditures), “*partnership programs*” or “*partnership discounts*”, contingent on an understanding that the Licensee must purchase product for a period of time to the exclusion in whole or in part of other products, promote the product, take and dispose of a product “quotas”, or otherwise have the effect of restricting economic choice by the Licensee;
- Furnishing or providing value in exchange for exclusive or semi-exclusive product arrangements, such as “exclusive well representation”, “vodka representation”, or “50% of wine list”;
- Money or value for Licensee build out and design, “free” up front orders, cash, tap systems, equipment installation and servicing, financial sponsorships, or similar items of value in exchange for carrying product with the effect of excluding other products (whether in whole or in part);
- Providing items, payments or services through third parties, such as marketing or promotional companies or to third parties owned by a Licensee, in exchange for product placement or other preferential treatment;

- Requirement, whether in writing or implied, that the Licensee must purchase one product in order to purchase another product;
- Unless authorized by the LCA, involvement or exercise of control in the day-to-day operations of the Wholesaler, Retailer or Dispenser: examples include “embedded” supplier personnel exercising control of Wholesaler or Retailer operations (e.g., supplier reps, “category captains”, or Brand Development Specialists), Supplier “hire and fire” authority with respect to Wholesaler employees, and control of the Retailer’s decisions on which brand of products to purchase, the pricing of products, or the manner in which the products will be displayed on the licensed premises; and/or
- “Service policies” whereby a Wholesaler provides free labor to stock and reset Retailer’s entire liquor department, or resets stock other than stock offered for sale by the Wholesaler (note that a Wholesaler may provide stocking assistance with respect to its products, but may not alter, disturb, reset or re-arrange products sold by other industry members).

This list is by no means inclusive, and is intended to list some examples that have emerged through state and federal investigations. For a list of TTB prohibited practices, please see 27 C.F.R. pt. 6 and TTB circulars at http://www.ttb.gov/trade_practices. Licensees should be aware, however, that AGD is charged with enforcement of trade practices in accordance with New Mexico law, which is more restrictive in certain respects than the Code of Federal Regulation.

While we primarily focus on the responsibilities and duties of the Suppliers and Wholesalers, Retail and on-premise establishments need to enhance awareness of unacceptable trade practices. Here are some potential questions and answers in that regard:

Q. If I purchase a cooler for beer or wine, can I ask my Wholesaler for free product that would equal the full price of the equipment?

A. No.

Q. When is it acceptable for me to receive a buy one get one free deal from a Wholesaler?

A. It might be acceptable on rare occasions such as the introduction of new product, where the deal in a one-time offer only.

Q. I need beer tap equipment installation. Can I have the Wholesaler install the equipment if I purchased the equipment?

A. Yes, that is allowed.

Q. Can Wholesalers pick up close to code beer from one account and resell to an account that sells the product at a faster velocity?

A. Yes, this is considered a reasonable return.

Q. To what extent can Suppliers be held accountable for their violations in dealing with retail or on-premise accounts?

A. Suppliers and Wholesalers are subject to the same strict requirements regarding trade practices and either or both may be fined and/or have alcohol sales suspended for violations.