



## **Industry Advisory**

### **Unlicensed Third Party Service Providers**

The Department has received numerous inquiries regarding the participation by licensees in programs operated by unlicensed Third Party Service Providers. These programs often involve the operation of Internet websites through which consumers may purchase alcoholic beverages.

While there are many different components to the various programs, the regulatory concerns remain consistent. The Department has neither approved nor disapproved any of these programs and this Industry Advisory is intended to provide guidance under existing law as to some of the most common issues that typically present themselves to aid licensees in evaluating whether to participate in such programs.

For purposes of this Industry Advisory, “Third Party Service Providers” includes persons or businesses operating Internet websites for the purpose of promoting, marketing, or selling alcoholic beverages. Such persons or businesses are often referred to as “marketing agents”, “compliance agents”, “agents of the consumer”, “agents of the winery”, “agents of the retailer”, “fulfillment operators”, “logistics providers”, “affiliate marketers”, or similar descriptors. While many Third Party Service Providers engage in activities that do not require licenses issued by the Department (such as, for example, simply producing and maintaining a website operated by or for a licensee, or providing back-office compliance services), many are engaging in activities for which a license is required.

Following are the statutory provisions typically implicated and the regulatory concerns of the Department:

- Business and Professions Code section 23300 prohibits the exercising of license privileges without holding a license authorizing such privileges.
- Business and Professions Code section 23355 authorizes the exercising of license privileges only by the person to whom the license is issued at the premises licensed by the Department.
- Business and Professions Code section 23025 defines the “sale” of alcoholic beverages to include any of the following:
  - Any transaction whereby title to alcoholic beverages is transferred from one person to another for consideration; or
  - The solicitation or receiving of orders for alcoholic beverages; or
  - The delivery of alcoholic beverages pursuant to an order therefore.

The Department’s position is that any Third Party Service Provider soliciting orders of alcoholic beverages for or on behalf of licensees is engaged in the “sale” of alcoholic beverages and must hold a license issued by the Department. “Solicitation” includes transactions often described as an “offer to purchase” by the consumer.

The Department does not consider independent delivery services, acting pursuant to the express direction of licensees, to be engaged in the “sale” of alcoholic beverages pursuant to this provision.

- Business and Professions Code sections 25500 and 25502 prohibit suppliers of alcoholic beverages (manufacturers, distributors and importers) from giving anything of value to on-sale and off-sale retail licensees (respectively). In addition, Rule 106(f) prohibits cooperative advertising by suppliers and retailers. Business and Professions Code section 25503(h) prohibits suppliers from paying for the privilege of placing advertising on or in a retail premises—such payment need not be to the retail licensee directly. It can be extremely problematic for suppliers and retailers to be involved in the same program through which alcoholic beverages are sold to consumers, as the platform (website or otherwise) will often be financed, in whole or in part, by suppliers with a benefit to retailers, or retailers will necessarily receive benefits from advertising or purchase order submission via the platform.
- Business and Professions Code section 25600 and Rule 106 prohibit the giving of any premium, gift, or free goods in connection with the sale or distribution (including marketing) of alcoholic beverages, except as expressly permitted. The Department has observed that many programs operated by Third Party Service Providers will include enticements or inducements to order alcoholic beverages, such as free shipping or free items with orders.

- Licensees may only sell alcoholic beverages to consumers that they actually own at the time orders are received. As to retail licensees, to do otherwise could result in a consignment sale between the retailer and supplier(s); as to other licensees, it may result in the licensee exceeding their license privileges. See, generally, Business and Professions Code sections 23355, 23393, 23394, 25502, and 25503(a).
- Management decisions, pricing decisions, controlling the distribution of funds, and profiting from the sale of alcoholic beverages are considered fundamental privileges of a licensee. As such, if any such decisions are made by non-licensees, or if non-licensees share in the profits from the sale of alcoholic beverages, violations of Business and Professions Code sections 23300 and 23355 may occur.
  - Service fees are not, in and of themselves, improper. However, the Department does have significant concerns when fees are based upon a percentage of the sale of alcoholic beverages. The Department does draw a distinction between sharing in the profits from the sale of alcoholic beverages and nominal transaction fees charged by independent financial service providers (such as credit card companies and banks). While financial service providers may typically charge a transaction fee based upon a percentage of the sale, such a fee is generally de minimus and is otherwise unrelated to the sale or promotion of the product. Moreover, unlike many Third Party Service Providers, such financial service providers are otherwise uninvolved in the program and have no vested interest in the promotion or sale of alcoholic beverages.

In evaluating any proposal involving Third Party Service Providers, licensees should consider the entirety of the program and the respective roles of the various participants.

Violation of the above statutory provisions may subject a licensee to discipline, even if all prohibited activities are conducted by a Third Party Service Provider.

If you have any questions regarding this advisory, please contact the Department's Trade Enforcement Unit at (916) 419-2500.