

TEXAS ALCOHOLIC BEVERAGE COMMISSION

COMMENTS RELATED TO SUNSET ADVISORY COMMISSION STAFF REPORT

First Crush Tastings, Inc. by and through its Chief Executive Officer, Daniel Hernandez submits the following comments related to the Texas Sunset Advisory Commission's Staff Report with respect to the Texas Alcoholic Beverage Commission.

INTRODUCTION

1. Product demonstrations of alcoholic beverages are an important marketing tool for the beverage suppliers and retailers. The wine industry in Texas is booming and gaining greater respectability among connoisseurs of fine wine. The beer and liquor industries are also gaining market shares. The ability to conduct product samplings of these alcoholic beverages has significantly contributed to the acceptance of Texas wines, beers and liquors. However, the conflict between the Texas Alcoholic Beverage Code and its mandates and the Texas Labor Code are putting this marketing tool at risk to the detriment of Texas businesses.

2. Issue 3 of the Staff Report focuses on over-regulation of certain business practices that create an unnecessary burden on the TABC, as well as the alcoholic beverage industry with little or no public benefit. In conjunction with the issues spotted by the Staff, I want to ask the Commission to also address the negative impact to the TABC resulting from the Texas Workforce Commission ("TWC") pattern of denying alcoholic beverage demonstrators the protections of section 201.070 of the Texas Labor Code due to the requirements of the TABC. The ultimate impact of the TWC's approach will be to destroy this aspect of the alcoholic beverage industry in Texas.

3. Section 201.070 of the Texas Labor Code was specifically enacted to exclude product demonstrators from coverage by the Texas Unemployment Compensation Act. However, because of the reporting, advertising, and purchasing requirements of the TABC, the TWC has systematically removed alcoholic beverage product demonstrators from the protections of Section 201.070 although these reporting, advertising or purchasing requirements are not within the control of product demonstration companies.

4. Pursuant to the TABC, “[u]nless otherwise specifically provided by the terms of this code [TABC], the manufacture, sale, distribution, transportation, and possession of alcoholic beverages shall be governed exclusively by the provisions of this code.”¹ If any criteria set forth in section 201.070 of the Texas Labor Code conflicts with provisions of the TABC, the TABC should, **by its own terms** controls. Despite this conflict and the supremacy of the TABC over this provision of the Texas Labor Code, the TWC has denied product demonstration companies the protection of these statutes. Thus, it appears that a change to the Texas Alcoholic Beverage Code or the operation of the Commission is necessary to resolve this conflict.

5. The TWC takes the position that alcoholic product demonstrators are “employees” as defined by the Texas Unemployment Act because, (1) the worker is subject to direction and control by the product demonstration company as to the location of the work performed; (2) the product demonstrator does not control the opportunity to experience a significant profit or loss and (3) the expenses incurred by the product demonstrators are not significant. As will be shown below, the TWC’s conclusions have nothing to do with the relationship between the product demonstration companies and its product demonstrators; but rather these aspects of the relationship are solely controlled by the TABC.

¹ TABC § 1.06 (emphasis added).

ARGUMENT

6. The statutory justification for the TABC is based upon the United States Constitution. The Texas legislature found that “the state was authorized under the Twenty-first Amendment of the United States Constitution to promote the public’s interest in the fair, efficient, and competitive marketing of malt liquor, ale, and beer in this state” and further, “it is the public policy of the state to exercise the police power of the state to protect the welfare, health, peace, temperance, and safety of the people of Texas.”² As noted above, the Texas legislature gave the TABC exclusive authority over all aspects of the manufacture, distribution, sale and consumption of alcoholic beverages.³ Thus, to the extent the TABC conflicts with the Texas Labor Code, the legislature has already determined that the provisions in the TABC must prevail by granting it the powers enumerated in the TABC as well as “all powers incidental, necessary or convenient to the administration” of the TABC.⁴ However, in practice, this does not occur and modifications to the statute or the TABC procedures are necessary to correct this disconnect. Another section of the TABC reiterates the legislature’s intent that the TABC control when it states, “[t]he commission shall supervise and regulate licensees and permittees and their places of business in matters affecting the public. **This authority is not limited to matters specifically mentioned in this code.**” (emphasis added).⁵ A failure of the TWC to acknowledge the preemptive authority of the TABC when evaluating the application of section 201.070 it tantamount to denying equal protection under the law to businesses who are regulated by the TABC.

² Notes 1 and 6, A NOTE REGARDING LEGISLATIVE INTENT OF SB 515, SB 516, SB 517, AND SB 518 (83rd Legislature, Regular Session, 2013).

³ Texas Alcoholic Beverage Code §§ 5.31 and 5.33.

⁴ Texas Alcoholic Beverage Code §5.31.

⁵ Texas Alcoholic Beverage Code §5.33.

7. As will be discussed in greater detail below, the interplay between the impact of the TABC and the Texas Labor Code require the legislature to make it clear that the product demonstrators controlled by the TABC have the ability to be exempted from the Texas Labor Code's definition of "employee" as set forth in section 201.070 of the Texas Labor Code despite the requirements imposed by the TABC and not the product demonstration company itself.

A. The worker is not subject to direction and control by the product demonstration company as to where they work.

8. Product demonstrators have sole control in the choice of location and time of any alcoholic beverage demonstration on which they wish to bid. Pursuant to the TABC, for each product demonstration the beverage supplier chooses the location, which is always the retailer's retail location. The retailer chooses the time in accordance with TABC regulations. The product demonstrator then typically opts into bidding for the product demonstration that best suits his or her choice of location and time. A product demonstrator may rule out a particular time/location for any reason or no reason at all, and may bid on all available listings for a given time period, or none. The listings bid on by a product demonstrator remain in the sole discretion of that product demonstrator. Although the product demonstration company retains absolutely no control or direction over what, if any, tastings the product demonstrator chooses to bid or what bids the product demonstrator chooses to accept, due to the operation of the TABC, the TWC determines that alcoholic beverage demonstrators do not meet the criteria of section 201.070 of the Texas Labor Code.

9. The TABC requires that "[n]o person may use a permit or exercise any privileges granted by the permit except at the place, address, premises, or location for which the permit is issued, except as otherwise provided by this code."⁶ Clearly, the location of the alcoholic

⁶ Texas Alcoholic Beverage Code § 11.06.

beverage tasting is dictated by the TABC and chosen by the product demonstrator during the bid process. Section 16.07 of the TABC places additional restrictions on certain types of samplings, again demonstrating that these are not requirements dictated by the product demonstration company, by stating:

(a) The holder of a winery permit may conduct wine samplings, including wine tastings, on the permitted premises. The holder of the permit may collect a fee for the wine sampling.

(b) A sampling event authorized by this section may not be advertised except by on-site communication or by direct mail.

(c) A person other than the holder of a permit or the holder's agent or employee may not dispense or participate in the dispensing of wine under this section.

(d) A person authorized to dispense wine under this section:

(1) may serve a person more than one sample;
and

(2) may not serve a sample to a minor or to an obviously intoxicated person.

(e) A person who receives a sample may not remove the sample from the permitted premises.⁷

10. Details of any product tastings conducted in retail stores across Texas are also regulated by the TABC. As noted in section 52.01 of the TABC:

(a) Except as provided by this subsection, the holder of a package store tasting permit may conduct product tastings of distilled spirits, wine, beer, and malt-based or spirit-based coolers on the permitted premises of the holder's package store or wine only package store during regular business hours as provided by this section. The holder of a wine only package store permit and a package store tasting permit may conduct product tastings only of alcoholic beverages the permit holder is authorized to sell under Section 24.01.

(b) Written notification of a product tasting must be posted on the licensed premises of the permit holder's package store not later than 48 hours before the tasting event. The notification shall clearly state:

- (1) the type and brand of alcoholic beverage to be tasted;
- (2) the date and hours the tasting is to take place; and
- (3) the address of the premises where the tasting is to occur.

⁷ Texas Alcoholic Beverage Code § 16.07.

(c) A copy of the notification shall be kept on file and available for inspection on the premises during all tasting hours.

(d) Sample portions at a product tasting shall be limited to no more than:

- (1) one-half ounce for distilled spirits;
- (2) one ounce for wine; and
- (3) one ounce for beer and coolers.

(e) Not more than 20 different products may be made available for tasting at any one time.

(f) *Repealed by Acts 2003, 78th Leg., ch. 1063, Sec. 2.*

(g) No charge of any sort may be made for a sample serving.

(h) A person may be served more than one sample. Samples may not be served to a minor or to an obviously intoxicated person. No samples may be removed from the licensed premises.

(i) During the tasting, not more than two containers of each brand or type of product being tasted may be open on the premises at one time.

(j) At the conclusion of the tasting, all empty or open containers of alcoholic beverages used in the tasting shall be removed from the premises or stored in a locked, secure area on the licensed premises.

(k) A tasting event authorized by this section may not be advertised except by on-site communications, by direct mail, by electronic mail, or on the permit holder's Internet website.

(l) Except as provided by Subsection (m) or elsewhere in this code, a person other than the permittee or the permittee's agent or employee may not dispense or participate in the dispensing of alcoholic beverages under this chapter.

(m) The holder of a distiller's or rectifier's permit, distiller's agent's permit, nonresident seller's permit, or manufacturer's agent's permit or that permit holder's agent or employee may participate in and conduct product tastings of alcoholic beverages at a retailer's premises and may open, touch, or pour alcoholic beverages, make a presentation, or answer questions at the tasting. Any alcoholic beverage tasted under this subsection must be purchased from the package store permit holder on whose premises the tasting is held. The permit holder may not require the purchase of more alcoholic beverages than are necessary for the tasting. This section does not authorize the holder of a distiller's or rectifier's permit, distiller's agent's permit, nonresident seller's permit, or manufacturer's agent's permit to withdraw or purchase an alcoholic beverage from the holder of a wholesaler's permit or provide an alcoholic beverage for tasting on a retailer's premises that is not purchased from the retailer.

11. Hours of operation for any facility selling alcoholic beverages is also specifically controlled by Chapter 105 of the TABC. The sale of beer and wine for off-premises consumption is the same, "[a] person may sell, offer for sale, or deliver beer between 7 a.m. and

midnight on any day except Sunday. On Sunday he may sell beer between midnight and 1:00 a.m. and between noon and midnight, except that permittees or licensees authorized to sell for on-premise consumption may sell beer between 10:00 a.m. and noon if the beer is served to a customer during the service of food to the customer.”⁸ Failure to comply with this or any other section of the TABC subjects the persons involved to criminal penalties.⁹

12. Thus, it appears that one cannot comply with both the Texas Labor Code 201.070 and the TABC for purposes of alcoholic beverage demonstrations.

B. The product demonstrator does not experience a significant profit or loss.

13. The TABC requires that the suppliers provide the alcoholic beverages used in the product demonstrations and thus, a product demonstrator’s investment is usually limited to a table, gas, cups, tablecloth, etc. However, the main expense of the product demonstrator is the commodity of time. A commitment of time to an independent contractor “takes them off the market” foregoing their ability to make money elsewhere. Additionally, the costs incurred by the product demonstrators must be compared to the income received from a product demonstration to determine materiality. Typically a product demonstrator receives \$60.00-\$75.00 per product demonstration. Because the duration of the tastings is tightly controlled by section 52.01 of the TABC;¹⁰ the duration of the tastings has a direct correlation to the money paid and supplies used.

14. As noted in section 52.01 of the TABC, only the retailer permit holder can advertise the product demonstration.¹¹ At least 48 hours prior to the event, the retailer must submit the type and brand of alcoholic beverage, the date and hours of the tasting and the address of the tasting location to the TABC in order for the product demonstration to comply with TABC

⁸ TABC § 105.05(b).

⁹ TABC §105.10.

¹⁰ See paragraph 6, *supra*.

¹¹ TABC §52.01(k).

regulations.¹² This requirement eliminates any flexibility to change times or dates of the tasting after they have been established.

C. The product demonstrators do not pay all expenses and operating costs.

15. Under section 201.070(i)(B)(ix) the Labor Code, the product demonstrator is required to pay all expenses and operating costs. TABC's mandate that the beverages tasted during the product demonstration be purchased from the retailer the day of the tasting impose additional restrictions not within the ability of the demonstrator to control.¹³ Since these tastings are sponsored and paid for, by the beverage suppliers, they, not the product demonstration company, provide the funds for reimbursing the product demonstrator the cost of the beverages featured in the tasting.¹⁴ Thus, the TABC regulations operate to prevent product demonstrators from meeting the criteria of section 201.070 of the Texas Labor Code but other product demonstrators, not constrained by the TABC are excluded from the Texas Unemployment Act. This inequitable approach violates the equal protection principles of the Fourteenth Amendment of United States Constitution. Effectively, the conflict between the statutes has resulted in prohibiting product demonstrations of alcohol from being performed by an independent contractor without violating TABC regulations.

16. Although section 201.070 of the Texas Labor Code does not require that a product demonstrator pay for the product demonstrated, the fact that the TABC permits the structure whereby the product demonstrator can be reimbursed by the beverage supplier, the TWC has used that provision to further argue alcoholic beverage product demonstrators fall outside of the exemption in section 201.070. The fact that the legislature failed to include the cost of the

¹² TABC §52.01(b).

¹³ TABC §51.01(b).

¹⁴ TABC §51.01(m).

product being demonstrated as a requirement of section 201.070 is significant to the analysis and is rooted in the principles of statutory interpretation.

17. Thus, the interpretation of the statute must be framed by an appreciation that the purpose of section 201.070 of the Texas Labor Code was to exclude product demonstrators from coverage by the Texas Unemployment Compensation Act. However, the TWC's strained interpretation of the statute is contrary to its plain meaning and its intention. For example, when giving examples of the types of expenses for which the product demonstrator must be responsible, the legislature did not have to limit the list to "including fuel, repairs, supplies and motor vehicle insurance." Had the legislature intended for product demonstrators to be responsible for cost of the product demonstrated in order to qualify under this exclusion, it could have easily listed the "product" as the first item for which the product demonstrator must be responsible. The fact that the "product" is not listed at all must be considered when construing the statute.

18. The TWC improperly added requirements to the statute in order to impose an additional requirement on the alcoholic beverage product demonstrators not found elsewhere, thereby eliminating the exclusion for this class of product demonstrator. This is another example of the inequality created by the interface of these two statutes.

CONCLUSION

19. The ability to market Texas wines, beers and liquor is central to the growth of this industry in Texas. Shoppers having the opportunity to taste a beer or wine will often purchase that wine for their own consumption or for a gift. The product demonstrations are an efficient way to market effectively to the target audience. However, due to the inequitable application of the statutes as noted above, the result will be product demonstration companies will not be able

to operate and the alcoholic beverage market will lose a valuable marketing tool. Perhaps if the TABC rules were changed to eliminate some of the controls discussed here, product demonstrators could have the characteristics required by the TWC in order to maintain their independent contractor status and exclusion from the Texas Unemployment Act.

20. It should be significant to this Sunset Advisory Commission that the Texas legislature passed a specific section in the Texas Labor Code to exempt product demonstrators from the definition of "employees" and the Texas Unemployment Act. It appears that the over-regulation of certain business marketing practices has resulted in an avoidance the legislature's intent in enacting section 201.070 of the Texas Labor Code only as it is applied to alcoholic beverage product demonstrators. The conflict between the Texas Alcoholic Beverage Code and the Texas Labor Code is important and should be addressed by this Commission. It seems that simple changes to the regulation of these business practices could benefit the industry.

Respectfully,

FIRST CRUSH TASTINGS, INC.

By: 
Daniel Hernandez, CEO