



November 14, 2018

Ms. Jennifer Jones
Acting Director
Sunset Advisory Commission
P.O. Box 13066
Austin, TX 78711

Dear Ms. Jones:

Thank you for the opportunity to submit comments on behalf of the Distilled Spirits Council of the United States to the Sunset Advisory Commission staff report regarding the Texas Alcoholic Beverage Commission. The Distilled Spirits Council is a national trade association representing the leading producers and marketers of distilled spirits sold in the United States.

We agree with the report's statement that the "TABC and the Alcoholic Beverage Code are in serious need of modernization" and several of our modifications we submit for consideration will help shift the agency forward in that direction and will allow the TABC to reallocate resources currently utilized to over-regulate certain business practices and re-focus those resources on the agency's core mission.

Issue 1 – Texas Has a Continuing Need for TABC, but a Weak Commission Limits Its Ability to Effectively Oversee and Regulate the Alcoholic Beverage Industry

The Council supports the recommendations to give the TABC added flexibility to adequately regulate the beverage alcohol marketplace. We support the continuation of the agency for another twelve years and expansion of the Commission from three to five members. We also support additional industry stakeholder input through advisory committees and more transparent processes for establishing agency policies.

Council Recommendations:

- Modify Issue 1 – Failure to adopt needed rules to clarify whether private labels for wine and distilled spirits violate the tied-house provisions

We urge that the TABC provide a definition in the Code of what constitutes a private label product for wine and distilled spirits. If the revised statute allows for private labels, further clarification would be needed to establish whether or not those products could be sold exclusively.

Assuming all ambiguity regarding private labels is addressed in the Code or rules, licensees and permittees would have a clear understanding of how to market their products legally. The agency would receive fewer complaints for investigations

regarding private labels, allowing the agency to refocus resources on other violations. Depending on the definitions, some entities may have to stop selling private labels in Texas.

Suppliers of national brands have no in-store voice to promote and market their brands in the same way retailers can promote and market their private labels in their respective establishments. To achieve TABC's goals referenced above, we offered in our June 2018 submission proposed rulemaking language embodying the following three regulatory goals that also defined a private label and controlled label: (1) requiring the disclosure by the retailer of brands owned or controlled by the retailer, (2) disallowing preferential in-store sales practices and (3) prohibiting "look alike" bottle designs and brand names.

- Modify Issue 1 – Failure to adopt needed rules to define what qualifies as an "excessive discount" from a manufacturer or distributor to a retailer

Regarding "excessive discounting," the pricing of product on the shelf is a retailer issue. The term "excessive discount" is both vague and counter-intuitive. Presumably, a discount is based upon concrete criteria so that "excessive" discounting would have a substantiated basis. Any proposed regulation needs to take these points into account and also exclude from its ambit volume discounts, promotional offers and the like so that any regulation of retail price has a foundation in commercial and marketplace realities.

Issue 2 – TABC Cannot Effectively Regulate the Alcoholic Beverage Industry Without Modernizing the State's Byzantine Licensing System

The Council supports streamlining the licensing system by reducing the number of licenses and permits to provide regulatory clarity and administrative efficiency. Specifically, the recommendation to remove the unnecessary regulation of agents will improve efficiencies within the marketplace. While the report addresses the disparity in the hours of distribution and sale of beer and ale, it does not address the disparity between the hours of distribution and sale of distilled spirits and beer, which also should be modernized to provide a level playing field among all alcohol retailers.

Council Recommendations:

- Modify Issue 2 – To allow package stores to operate the same number of hours and days as beer and wine retailers

Package store operators are at a competitive disadvantage vis-à-vis other beverage alcohol retailers both in terms of limitations and requirements. For example:

- Package stores must close Sunday, New Year's, Thanksgiving, and Christmas Day. If New Year's or Christmas fall on a Sunday, they must close the following Monday.

- Package stores must close at 9 p.m.
 - A person cannot own more than 5 package stores without circumventing the statutory limit using family members to collaborate.
 - A package store owner cannot also hold a number of other retail permits/licenses. No other retail permittee is subject to an intra-tier ownership restriction.
 - A package store cannot be owned by a publicly traded company, which excludes not only companies that are traded on a public exchange, but also any company that has more than 35 shareholders.
 - A package store (other than a package store inside a hotel or qualifying for a grandfather clause exclusion) is subject to a number of physical requirements that do not apply to any other establishments and severely limit where a package store can operate. A package store must be a separate unit that does not share a foyer or restroom with any other businesses. A package store must have separate front and either side or back entrances that open into public spaces.
- Modify Issue 2 - To address the unwieldy fee structure for distilled spirits permits and licenses

Permittees/licensees who sell distilled spirits should not be required to pay higher application fees and taxes than permittees and licensees who sell wine and malt beverages. The Commission follows the same procedures to process original and renewal applications for all of these permits and licenses. There is no reason for the permit fees and surcharges to be so much higher for distilled spirits permits than for all other permits and licenses.

Similarly, the Commission's procedures are the same for auditing distilleries, manufacturers, breweries, and wineries. There is no reason for the excise taxes to be so much higher on distilled spirits than on other commodities.

Issue 3 – Over-Regulation of Certain Business Practices Creates Burdens on TABC and the Alcoholic Beverage Industry With Little Public Benefit

While the Council supports the recommendations to address the over-regulation of certain business practices that create a burden on TABC and the Texas beverage alcohol industry with little public benefit, we do not feel these recommendations go far enough to address several other irregularities that exist in the law. In regard to outdoor advertising signs/displays, the report accurately points out that “state law does not extend these restrictions to all retailers, calling into question the public safety benefit of such regulations.” There are several other instances where restrictions are applied to one segment of the alcohol retail industry but not extended to all retailers. Many of these arbitrary laws deal with ownership requirements and limitations on the hours and days of operation for package stores, and also raise constitutional issues.

Also, in regard to marketing practices, similar to federal label approvals, there are numerous provisions in federal law, that if applied to the Texas marketplace, would remove additional over-regulation of certain business practices and provide administrative clarity and certainty to the industry.

Council Recommendations:

- Current law provides the protection in Sec. 101.671 (b) for the agency to pursue otherwise unlawful products with COLAs. The word “only” was added to this Section in the 84th Regular Session to recognize that label approval from TABC is not certification that the product complies with all other requirements – it is just a registration of the label, so the producer can enter the market. The TABC has the ability today to pursue unlawful products that have been issued a COLA. It would be burdensome to require additional label approval steps for spirits with approved labels.
- Modify Issue 3 regarding hours and days of sale for package stores; and remove restrictive package store ownership provisions that limit competition and over regulate one segment of the industry
- Modify Issue 3 to align the federal trade practices regulations with TABC Code by removing duplicative and over-regulation of certain marketing and trade practices

The Council supports the same “rules of the road” for each tier regarding permissible and impermissible trade practice activities, thereby ensuring parity between what suppliers/wholesalers can/cannot do and what retailers can/cannot receive. This principle should be applicable to the entire TABC statutory and regulatory framework.

To that end, we strongly urge that the TABC adopt a rule prohibiting retailers from soliciting, accepting and/or receiving from industry members items or services that industry members cannot offer or furnish to retailers.

Today, there is more of a “pull” versus “push” marketplace and the same rules for the upper tier should apply to retailers for a level compliance field. Consequently, the TABC’s tied-house obligations should be applicable to retailers soliciting, accepting or receiving items and services that suppliers and wholesalers cannot offer or furnish to a retailer.

The Council supports a level playing field for all beverage alcohol retailers and suggests that Texas adopt the rules set forth by the Tax and Trade Bureau in Subpart D of 27 C.F.R. Part 6 regarding, for example, matters pertaining to coupons (27 CFR § 6.96); providing an illustrative list of retailer advertising specialty items and allowing the use of a retailer’s name on these items (27 CFR § 6.84); the provision of equipment and supplies (27 CFR § 6.88); and the ability to furnish product samples to retailers (27 CFR § 6.91).

Issue 4 – TABC’s Protest Process Needs A Complete Overhaul to Meet Basic Transparency, Accountability, and Fairness Standards.

The Council supports the standardization of practices to promote consistent, fair decisions regarding TABC applicants.

Issue 5 – Several TABC Enforcement Practices Do Not Follow Common Standards, Limiting Regulatory Efficiency and Effectiveness.

The Council has no comment on this recommendation.

Issue 6 – The High Cost of Collecting Alcohol Import Taxes at the Border Outweighs the Negligible Public Safety Benefit.

The Council has no comment on this recommendation.

Issue 7 – TABC’s Statute Does Not Reflect Standard Elements of Sunset Reviews.

The Council has no comment on this recommendation.

We appreciate the Sunset Advisory Commission staff’s time and attention to the matters reflected in their recommendations. While we agree with the summary statement that the agency still regulates the beverage alcohol industry as if it were operating in 1935, we respectfully proffer substantive recommendations now lacking in this report to address some of the more pressing matters facing the TABC and the beverage alcohol industry.

We look forward to working with the Sunset Advisory Commission staff and members during the 86th Regular Session and appreciate your thoughtful consideration of the modifications to the recommendations contained in this letter.

Sincerely,



Dale C. Szyndrowski