



## **INDUSTRY ADVISORY**

### **Third Party Providers**

In June 2009, the Department issued an Industry Advisory entitled “Unlicensed Third Party Service Providers.” In that Advisory, the Department expressed concern about activities engaged in by unlicensed providers of certain services to licensees in connection with the sale of alcoholic beverages, particularly in the context of Internet sales. A number of regulatory issues and concerns were identified. Since the issuance of that Advisory, the Department has received numerous inquiries seeking clarification or further guidance in the context of various unlicensed activities and licensee relationships with unlicensed service providers. In response, in February 2011, the Director of the Department asked stakeholders to present an evaluation of the different types of services offered and to address issues posed by existing laws and regulations. The Department was consulted throughout this process and worked with stakeholders to address the issues presented.

Although the Department remains concerned that certain activities by Third Party Providers may violate California law, particularly in the areas of sales by a person without a license and the exercise of impermissible control of a licensee by a person without the privilege of that license (Business and Professions Code section 23300), the Department believes that licensees and Third Party Providers can form business relationships that facilitate lawful transactions for sales of alcoholic beverages over the Internet. Accordingly, the Department now issues the following advisory guidelines to assist licensees and unlicensed Third Party Providers in complying with California law:

- For the purposes of this advisory, the term “Third Party Provider” refers to unlicensed entities that are involved with the promotion, marketing, and facilitation of sales of alcoholic beverages by licensees over the Internet. Third

Party Providers are involved in one or more of the steps in the transfer of title of an alcoholic beverage from a licensee to a consumer, such as placement of advertising, making recommendations to consumers, directing consumers to licensees, receiving orders and passing them on to licensees, processing payments, and assisting with shipping arrangements.

- Given that only licensees may engage in activities for which a license is required, all sales transactions involving Third Party Providers must ultimately be conducted by and under the control of a licensee. This includes decisions concerning the selection of alcoholic beverages to advertise or offer for sale, the pricing of those beverages, and the ultimate acceptance and fulfillment of the sales transaction.
- A licensee working with a Third Party Provider is ultimately responsible for any activities undertaken by the Third Party Provider on the licensee's behalf.
- Advertisements to sell alcoholic beverages on Internet sites are akin to print, radio and television advertisements, and they only become an integral part of a sale when the sale is completed by the transfer of title of an alcoholic beverage for consideration. The mere placement of an advertisement for an alcoholic beverage on the Internet by a Third Party Provider at the direction of a licensee, without a transfer of title for consideration, is not a completed sale within the meaning of Business and Professions Code section 23025.
- Orders for alcoholic beverages solicited by licensees utilizing Third Party Providers must be transmitted by the Third Party Provider to the licensee involved. The licensee responsible for the sale must be clearly identified and must ultimately control the transaction, including any decisions concerning acceptance or rejection of such orders. Licensees must also be responsible for, and must control, the fulfillment of orders and the shipment of alcoholic beverages from the licensees' licensed premises or other authorized shipping point (such as a licensed public warehouse).
- The control of funds from a transaction involving the sale of alcoholic beverages constitutes a significant degree of control over a licensed business. As such, while a Third Party Provider may act as an agent for the licensee in the collection of funds (such as receiving credit card information and securing payment authorization), the full amount collected must be handled in a manner that gives the licensee control over the ultimate distribution of funds. This means that the Third Party Provider cannot independently collect the funds, retain its fee, and pass the balance on to the licensee. The Third Party Provider should pass all funds collected from the consumer to the licensee conducting the sale, and that licensee should thereafter pay the Third Party Provider for

services rendered. Alternatively, the parties may utilize an escrow account, or similar instrument, that disburses the funds upon the instructions of the licensee. So, for example, a Third Party Provider may accept consumer credit card information, debit the card, deposit the funds in an account under the licensee's ultimate control, and, upon the licensee's acceptance of the order and direction to the account holder, receive a fee from the account. Given the nature of Internet transactions, the Department recognizes that such collection, acceptance, and disbursement of funds will often times be accomplished solely through computer-generated means.

- Licensees may not give any premium, gift, or free goods, directly or indirectly, in connection with the sale or distribution (including marketing) of alcoholic beverages, unless expressly authorized by law. (Business and Professions Code section 25600; Title 4, Cal. Code of Regulations, section 106.) This means that a Third Party Provider acting for or on behalf of a licensee cannot engage in such activities in connection with the sale, distribution, or marketing of that licensee's products. Disclaimers such as "void where prohibited by law" or "included with purchase" may not relieve a licensee of liability where the consumer is not actually charged for the item offered "free" or the consumer has no choice but to "purchase" the item offered "free" to non-California consumers. Accordingly, invoices should accurately reflect the cost, or reduction in cost, to the consumer.
- Third Party Providers may receive compensation for services provided. Such compensation must be reasonable, and any compensation structure utilized may not result in any actual or de facto control over the licensed business operations, in whole or in part, by the Third Party Provider. In evaluating the intent and impact of any particular compensation structure, the Department will look at the total operations and relationships between the parties to determine whether a non-licensee is in fact exercising license privileges, or engaging in any activities for which a license is required.
- The Department has received specific inquiries concerning the licensing of trademarks and compensation for such licensing arrangements. The Department recognizes that trademarks have value and that a trademark holder may generally license the use of its trademark and receive compensation for such a license. Moreover, the Department also recognizes that a trademark holder has an interest in insuring that products sold under the authority of the licensed trademark meet standards of quality established by the trademark holder. As with compensation structures, the Department will look to the totality of the trademark license arrangement to determine whether or not there is any excessive license fee such that the trademark holder is engaging in activities for which an ABC license is required, or if there exist indicia of

control over the licensed business under the guise of monitoring or controlling the use of the trademark. For example, it would be appropriate for a trademark holder to require a winery to use grapes or wine of a certain agreed-upon quality and that the license for use of the trademark may be withdrawn if such quality is not maintained; however, it would be improper for a trademark holder to require that a winery may only purchase grapes from certain vineyards or may only sell the wine produced under the trademark to certain persons or at a certain price point. Furthermore, it is noted that this guidance does not mean that the Department approves of the use of trademark licensing arrangements that may circumvent tied-house restrictions.

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