

**THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD**

In the Matter of:)	
)	
Online Third Party Advertisers)	License No.: N/A
)	Order No.: 2014-314
)	
<i>Advisory Opinion</i>)	
)	

BEFORE: Ruthanne Miller, Chairperson
Nick Alberti, Member
Donald Brooks, Member
Herman Jones, Member
Mike Silverstein, Member
Hector Rodriguez, Member
James Short, Member

ALSO PRESENT: Martha Jenkins, General Counsel
Alcoholic Beverage Regulation Administration

**ADVISORY OPINION ON ONLINE THIRD PARTY ADVERTISERS AND
PAYMENT PROCESSING SERVICES**

Recently, a number of online third party advertisers and payment processing services (online third party providers) have attempted to participate in the alcohol industry by developing online websites and smartphone applications that allow consumers to order and purchase alcoholic beverages from licensed retailers over the Internet. In many cases, the transaction involves the entering of credit card information on the website and forwarding a customer's order to a licensed retailer to process the sale for delivery.

The Alcoholic Beverage Control Board issues the following advisory opinion to provide guidance regarding the conditions that must be met for an online third party provider to comply with the alcoholic beverage control laws of the District of Columbia. See generally 23 DCMR § 1902 (West Supp. 2014).

DISTRICT LAW

Alcohol licenses in the District of Columbia are issued to license holders on the condition that “. . . the applicant is the true and actual owner of the establishment for which the license is sought, and he or she intends to carry on the business for himself or herself and not as the agent of any other” D.C. Official Code § 25-301(a)(5). This

means that only the license holder may engage in activities authorized by an alcohol license.

The sale of alcohol without a license is prohibited under § 25-102(a). D.C. Official Code §25-102(a). The term “sell” or “sale” includes “soliciting orders for sale,” among other definitions. D.C. Official Code § 25-101(45). The term “solicit” is defined as “[t]o try to obtain by entreaty, persuasion, or formal application.” Webster’s II New College Dictionary (1995) (solicit).

The Board also notes that retailers are generally prohibited from selling alcohol on credit to consumers; however, retailers may accept payment by credit card. D.C. Official Code § 25-734(a), (d).

The Board previously addressed the issue of online third party advertisers and payment processing services in a prior advisory opinion issued at the request of BeerRightNow.com. See generally In re BeerRightNow.com LLC, t/a BeerRightNow.com, Board Order No. 2013-062 (D.C.A.B.C.B. Mar. 20, 2013) (Advisory Opinion). There, the Board concluded that “when a third party participates or has a substantial interest in the exchange of money between the consumer and the retailer this constitutes solicitation” Id. at ¶ 5. The Board further concluded that a third party advertiser or payment processor would not violate § 25-102(a), if they did not “. . . accept or receive money, debit or credit card information, or other financial instruments on behalf of a retailer.” Id. at ¶ 6.

OTHER JURISDICTIONS

The Board has found the advisory opinions and guidance provided by California, Texas, and New York on this issue persuasive in crafting this Advisory Opinion.

I. California

The California Department of Alcoholic Beverage Control (California) issued an advisory related to third party providers in October 2011. *California Department of Alcoholic Beverage Control*, Industry Advisory: Third Party Providers, 1 (Oct. 2011) [*Industry Advisory*]. California defined third party providers as “. . . unlicensed entities that are involved with the promotion, marketing, and facilitation of sales of alcoholic beverages by licensees over the Internet.” Id. at 1. California advised third party providers that only licensees could engage in activities permitted by their license; only licensees could conduct sales transactions; and licensees retained ultimate responsibility for all activity taken on the licensee’s behalf by the third party provider. Id. at 2.

California also emphasized that

[t]he 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 the 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.

Id. at 2-3.

II. Texas

On June 20, 2013, the Texas Alcoholic Beverage Commission (Texas) issued a marketing practices advisory to the alcohol industry. *Texas Alcoholic Beverage Commission, Marketing Practices Advisory – MPA056: Wine Shipping and Third Party Advertisers/Payment Processing Services*, 1 (Jun. 20, 2013). Texas law requires a person to obtain a permit in order to “solicit or take orders for liquor.” Id. The Commission decided to agree with California’s interpretation. Id. at 2.

As guidance, Texas advised unlicensed third party providers to refrain from storing alcohol in its distribution centers and directly shipping alcohol to consumers. Id. at 3. Texas also stated that permit holders must fill, package, and ship the orders. Id.

III. New York

The New York State Liquor Authority (New York) issued a declaratory order requested by Drizly on September 25, 2013 regarding a “smartphone/web application” that permits consumers to order alcohol from local stores and have their purchase delivered. *New York State Liquor Authority, Declaratory Ruling 2013-02526* (Sept. 25, 2013) [*Declaratory Ruling*]. The question in that case was whether Drizly was obtaining the privileges of licensure without having been issued a license and whether Drizly had an “. . . ownership or financial interest in the licensed premises.” Id. at 2.

New York found Drizly’s operations complied with New York law, because the retailer “. . . selects the products to be sold, the price it is sold at and whether or not to accept an order.” Id. at 3. The “. . . retailer delivers the product, ensures that the customers are of a legal age and processes and collects all the funds for each sale.” Id. New York further found Drizly in compliance with the law because

All funds go directly from the customer to the retailer. The retailer is the only one with access to these funds. Drizly and the licensee do not maintain escrow accounts. Rather, Drizly is paid a flat fee for their services Drizly does not receive a portion of the licensed retailer’s profits.

Id. at 3.

ANALYSIS OF DISTRICT LAW

After the end of Prohibition, our society came to the conclusion that both the complete prohibition of alcoholic beverages and the unregulated sale of alcoholic beverages have highly detrimental impacts on society. RAYMOND B. FOSDICK AND ALBERT L. SCOTT, TOWARDS LIQUOR CONTROL, 9-12 (1933). Recognizing the failure of these two policy approaches, the District of Columbia, similar to other jurisdictions, chose to create a licensing system to regulate the sale of alcoholic beverages. See generally, D.C. Official Code § 25-101, *et seq.*

One of the key principles of the District's licensing system is that a purveyor of alcoholic beverages must remain accountable to its local community. FOSDICK AND SCOTT, at 29. Thus, in order to maintain a system of local accountability, the District, like other jurisdictions, only permits license holders to engage in activity authorized by an alcohol license. §§ 25-102, 25-301(a)(5); *Declaratory Ruling*, at 2; *Industry Advisory*, at 1-2.

The Board reviews the issue of online third party advisors with this policy in mind. Previously, in order to prevent unlicensed entities from unlawfully obtaining the privileges of licensure, the Board cautioned the business community that online third party providers could not obtain “. . . a substantial interest in the exchange of money between the consumer and the retailer.” In re BeerRightNow.com LLC, t/a BeerRightNow.com, Board Order No. 2013-062, at ¶ 5. The Board further cautioned that an online third party provider should not “. . . accept or receive money, debit or credit card information, or other financial instruments on behalf of a retailer.” Id. at ¶ 6. The Board recognizes that the terms “substantial interest” and “on behalf of” can be interpreted either strictly or liberally.

In light of the opinions issued by California, Texas, and New York, the Board is persuaded that Title 25 of the D.C. Official Code permits online third party providers to connect customers through the internet to a licensed off-premise retailer, as long as the transaction to purchase alcoholic beverages occurs between the consumer and the licensed retailer. Specifically, the Board finds that it is permissible for online third party providers to promote, market, and facilitate the sale of alcoholic beverages over the internet provided that the licensee retains ultimate control and responsibility over the sales transaction with the customer, with all funds for each sale going directly from the customer to the licensed off-premise retailer. Under this Advisory Opinion, the Board finds that it is not permissible for an unlicensed online third party provider to (1) sell alcoholic beverages to customers; (2) charge or process the customer's credit cards or directly collect or receive funds from the customer; (3) store or keep alcoholic beverages for sale; or (4) package, fill, or ship the order to the consumer. Additionally, the Board finds that the delivery of alcoholic beverages must be executed by the license holder, employee of the licensee, or contractor to the licensee, so that the license holder is responsible and liable for the legal delivery of the product.

In issuing this Advisory Opinion, the Board finds that online third party providers can charge licensed retailers a flat monthly fee or other type of transaction fee for their services provided that the third party does not: (1) receive a portion of the licensed retailer's profits or (2) collect, receive or retain any funds or fees that stem from the online alcoholic beverage transaction that occurs between the consumer and licensee. Specifically, the Board finds that the online third party provider cannot independently collect the funds, retain its fee, and pass the balance of the funds over the licensee. Rather, the sales transaction should occur directly between the customer and the retailer with the licensee thereafter, through a separate written agreement, paying the third party provider for the services rendered.

The Board notes that it disagrees with the California decision to the extent that it permits third party providers to directly process and charge customer credit cards for the reasons expressed in Board Order No. 2013-062. The Board finds that this opinion is consistent with the guidance provided in Board Order No. 2013-062; however, to the extent there is any conflict between these two opinions, this Advisory Opinion shall govern.

GUIDANCE TO INDUSTRY

In light of the above, the Board issues the following guidance to online third party providers and licensees so that they may structure their relationship in a manner that conforms to District law and policy. Online third party providers and licensees are advised to abide by the following principles:

1. The transaction to purchase alcoholic beverages must take place between the customer and licensee. Credit or debit card information provided to the online third party provider must be transferred or redirected to the licensee. Only the licensee may process and complete the transaction.
2. The licensee must retain the ability to determine whether to complete an order and retain the authority to deny the order, if necessary.
3. The licensee is responsible for delivery of the alcoholic beverages and determining whether the customer is of legal age.
4. Online third party providers may promote, market, and facilitate the sale of alcoholic beverages over the internet provided that the licensee retains ultimate control and responsibility over the sales transaction with the customer. All funds for each sale shall be transferred to the licensed off-premise retailer.
5. The online third party provider shall not sell alcoholic beverages.


6. The online third party provider shall not charge or process the customer's credit or debit card directly or collect any funds from the customer.
7. The online third party provider shall not store or keep alcoholic beverages for sale.
8. The online third party provider shall not package, fill, or ship the order to the consumer.
9. The alcoholic beverages sold to the consumer must be in the possession of the licensee.
10. The online third party provider can charge licensed retailers a flat monthly fee or other type of transaction fee for their services.
11. The online third party provider shall not collect, receive, or retain any funds or fees that stem from the transaction between the consumer and the licensee.

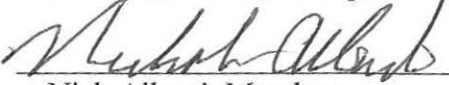
A licensee that fails to comply with this guidance may be found in violation of D.C. Official Code §§ 25-301(a)(5). A third party provider that fails to comply with this guidance may be charged with violating § 25-102(a). Therefore, it is incumbent upon licensees and third party providers to ensure that the structure of their business relationship comports with District law.


ORDER


Accordingly, the Board, on this 13th day of August 2014, hereby **ORDERS** that the above represents the **ADVISORY OPINION** of the Board pursuant to 23 DCMR § 1902.

District of Columbia
Alcoholic Beverage Control Board

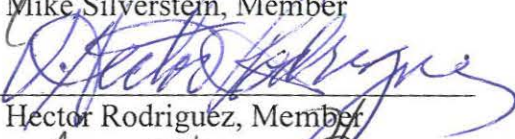


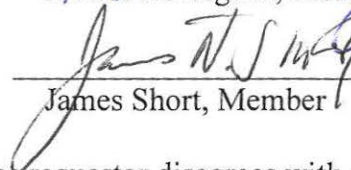
Ruthanne Miller, Chairperson

Nick Alberti, Member

Donald Brooks, Member

Herman Jones, Member

Mike Silverstein, Member

Hector Rodriguez, Member

James Short, Member

Pursuant to D.C. Code § 1902.6 (2008), if the requestor disagrees with the Board's advisory opinion in any respect, he or she may, within twenty (20) calendar days after issuance of the opinion, petition the Board in writing to reconsider its opinion, setting forth in detail the reasons and legal argument which support the requestor's points of disagreement, or may request the Board to issue a declaratory order, pursuant to § 1903. Advisory opinions of the Board may not form the basis of an appeal to any court in the District of Columbia.