pennsylvania
LIQUOR CONTROL BOARD

February 24, 2016

Lana Ganetsky
Via E-mail

RE: Distributor Advertising by Mail

Dear Ms. Ganetsky:

ISSUE: This office is in receipt of your e-mail of January 10, 2016, wherein you advise that you are writing on behalf of a beer distributor. You state that you are aware that you are not permitted to advertise prices in printed materials distributed by mail. You inquire if you use "Valpack," which is distributed by both mail and the internet, how you should address the issue if one form of advertising (i.e. internet based) is permitted and another (i.e. mail) is forbidden. Additionally, you inquire as to what information you are permitted to advertise via mail. Pennsylvania Liquor Control Board ("Board") records indicate that Jacksonville Beverages, Inc., holds Distributor License No. D-1695 (LID 71085) for use by it at premises located at 201 Jacksonville Road, Hatboro, Pennsylvania.

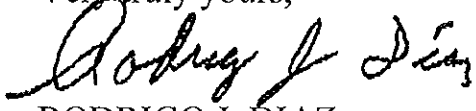
OPINION: You are correct that you are permitted to advertise prices via the internet. However, regarding direct mail solicitation, please be advised that section 498(e)(2) of the Liquor Code prohibits the distribution by mail of price lists, circulars or handbills to the general public as a means of advertising liquor, wine or malt or brewed beverages [47 P.S. § 4-498(e)(2)]. The Liquor Code does not define the terms "circular" or "mailing." However, Webster's II New College Dictionary (1999) defines "circular" as a "printed advertisement, directive or notice for mass distribution," and "mailing" is defined as "a batch of mail sent at one time by a mailer." For purposes of clarity and uniformity, the Board has interpreted the terms "circular," "price list," and "handbill" to mean any form of "unsolicited" advertising. Sending pricing information to those who have requested it, is permissible. In addition, please note that the Pennsylvania Attorney General's Office has determined that this prohibition does not prevent a licensee from advertising in a newspaper or community newspaper.

Thus, to the extent "Valpack" constitutes a newspaper or community newspaper you would be permitted to utilize its services; if it does not, then advertising via this medium through the mail would be impermissible.

Regarding your inquiry as to what you can do via mail, please be advised that circulars or mailings that do not advertise the availability of alcoholic beverages and/or their prices may be provided to the general public off licensed premises. [Board Advisory Notice No. 15]. A copy of the aforementioned Advisory Notice is attached.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,



RODRIGO J. DIAZ
CHIEF COUNSEL

Attachment

cc: Pennsylvania State Police, Bureau of Liquor Control Enforcement
Jerry W. Waters, Director of Office of Regulatory Affairs
Tisha Albert, Director, Bureau of Licensing
Jeffrey Lawrence, Assistant Director, Bureau of Licensing

LCB Advisory Opinion No. 16-035

pennsylvania
LIQUOR CONTROL BOARD

ADVISORY NOTICE NO. 15 (Fourth Revision)

ADVERTISING OF ALCOHOLIC BEVERAGES IN PENNSYLVANIA
MARCH 15, 2007

TO: All Manufacturers and Licensees

Act 199 of 1996, which became effective February 18, 1997, lifted the ban on alcoholic beverage price advertising in Pennsylvania. However, it imposed certain additional rules on both price advertising and the advertising of alcoholic beverages in general. These rules and their subsequent amendments are embodied in section 498 of the Liquor Code [47 P.S. § 4-498], which is attached. The Pennsylvania Office of Attorney General then issued an opinion on section 498(e)(2) specifically. In that opinion, the Attorney General advised that section 498(e)(2) of the Liquor Code does not prohibit licensees from advertising alcohol products and prices in community papers. Therefore, in light of the opinion issued Advisory Notice No. 15 has been revised.

1. Is it legal to advertise the price of alcoholic beverages in Pennsylvania ?
Yes. Section 498 of the Liquor Code states that all in-state and out-of-state manufacturers, wholesalers, retailers, shippers, and Pennsylvania Liquor Control Board licensees, are permitted to advertise their products and prices in Pennsylvania , subject to certain conditions.

2. ***What is an "advertisement" for purposes of section 498?***
Section 498(g) defines the term "advertisement" as any advertising of alcoholic beverages by radio or television broadcast, newspapers, periodicals or other publications, outdoor advertisement, any form of electronic transmission (including the Internet and text messaging), or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.

3. ***What type of advertisement is <u>not</u> covered by section 498?***
Only advertisements that reference alcoholic beverages, their availability, or their prices, are regulated by the Liquor Code. Any advertisement or message of any manufacturer, wholesaler, retailer, shipper or licensee that does not make reference to alcoholic beverages, the availability of alcoholic beverages, or the price of alcoholic beverages, is not considered an advertisement for purposes of section 498 and, therefore, is not subject to the conditions found in that section. For example, advertisements that list the name, address, phone number, hours of operation, and/or availability and type of food or nonalcoholic beverages of a licensee, are permitted anywhere in Pennsylvania without restriction.

4. ***Is information given to customers over the telephone in response to a customer's telephone call to the licensee subject to the restrictions in section 498?***
No. Telephone conversations initiated by a customer are not considered advertisements and, therefore, are not subject to section 498 of the Liquor Code. However, false information given over the telephone could subject the licensee to prosecution under other statutes pertaining to fair business practices.

Originally Issued 3/2007
Reformatted 4/2015

5. ***What about information provided over the Internet?***
Internet information about alcoholic beverages is considered to be advertising under section 498 as it is a form of "electronic transmission" covered by the definition in section 498(g). However, it is not "print" advertisement and would be permitted within three hundred (300) feet of a church or school.

6. ***What are the conditions that apply to all alcohol advertising?***
All alcohol advertisements are subject to the following conditions: (1) the entity responsible for the advertisement must be clearly identified in the advertisement; (2) the advertisement cannot be obscene; (3) the advertisement cannot be inconsistent with the spirit of safety or safe driving programs; and (4) the advertisement cannot be directed to minors. The use of any subject matter, language, or slogan directed to minors to promote the consumption of alcoholic beverages is not allowed. However, this does not prohibit or restrict advertisements to those persons of legal drinking age, even though some minors may be exposed to it.

7. ***Do these conditions apply to alcohol advertising by means of radio or television or the Internet?***
Yes. These conditions apply to all alcohol advertising, no matter what form it takes.

8. ***Are there any special conditions for advertisements of alcoholic beverages which appear in "print" or written form?***
Yes. Additional restrictions apply to printed advertisements of alcoholic beverages, their availability, and/or their price. These restrictions impact advertisements via circulars/flyers, in educational publications, and within a certain distance of churches, schools, or public playgrounds.

9. ***May a licensee advertise alcoholic beverages by the use of flyers, circulars, price lists, handbills, or similar mailings?***
Yes, under some circumstances. Section 498(e)(2) of the Liquor Code prohibits a licensee from distributing by mail, personally or by servants, agents, or employees, price lists, circulars, or handbills off the licensed premises to the general public as a means of advertising liquor, wine, or malt or brewed beverages. The Pennsylvania Office of Attorney General was asked by the Board to issue an opinion on section 498(e)(2) specifically. In that opinion, the Attorney General advised that section 498(e)(2) of the Liquor Code does not prohibit licensees from advertising alcohol products and prices in community papers. Therefore, it is now permissible to advertise in local community papers. However, the opinion issued by the Attorney General focuses specifically on the relationship between the licensee and the advertising agent. A licensee who advertises in a community paper that the licensee does not own, operate, or control does not violate section 498(e)(2). It remains impermissible for licensees to conduct their own flyer/magazine/circular mailing because the licensee would technically own and operate the publication which is a clear violation of section 498(e)(2). In addition, it is also impermissible to enter into a principal-agent relationship with a community paper where the community paper would produce a flyer/magazine containing the licensee's advertisements alone because the licensee would completely control the publication which is a clear violation of section 498(e)(2). An advertisement that only mentions a licensee's name, address and/or the availability of food and nonalcoholic beverages could be distributed by the licensee to the general public off the licensed premises. In addition, it is permissible to send such mailings advertising the availability of alcoholic beverages and/or their prices to a distinct group of individuals of legal drinking age who have specifically requested to receive such mailings from a particular licensee. Further, licensees may distribute such price lists, circulars, and handbills on their licensed premises, regardless of their content.

10. ***Is a newspaper advertisement considered to be a circular or handbill?***
No. Although the Liquor Code does not define these terms, a "circular" generally means "a printed advertisement, directive, or notice for mass distribution," and a "handbill" is "a written or printed notice displayed, handed out, or posted, to inform those concerned of something to be done or some event," whereas a newspaper is generally defined as "a typically daily or weekly publication containing recent news, feature articles, editorials, and (usually) advertising,"

11. ***May advertisements of alcoholic beverages appear in school-related printed material, such as yearbooks?***
Not generally. Section 498(e)(5) of the Liquor Code prohibits such advertisements from appearing, either directly or indirectly, in any booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular, or other similar publication, published by, for, or on behalf of any educational institution.
However, an advertisement merely indicating the name and address of a licensee or a licensed premises, or an advertisement which indicates what nonalcoholic products may be acquired at the licensed premises which makes no reference to the availability of alcoholic beverages, would be permissible. Further, advertisements in magazines, newspapers or other periodicals which have no connection to an educational institution other than the fact the school may subscribe to that particular newspaper are permissible. For example, an advertisement announcing the availability of alcoholic beverages is permitted in the *Philadelphia Inquirer*, even if a local high school receives a subscription to that newspaper. However, this same advertisement would not be permissible in the high school's school newspaper.

12. ***Are colleges and universities considered to be educational institutions for the purposes of this prohibition?***
Until recently, colleges and universities were considered to be subject to the print advertisement ban affecting educational institutions. However, the Third Circuit Court of Appeals has held that particular subsection of the law unconstitutional with regard to alcohol advertising in college-related newspapers. In *Pilt News v. Pappert* , 379 F.3d 96 (3rd Cir. 2004), the court (which covers federal appellate cases from Pennsylvania) enjoined the Pennsylvania State Police, Bureau of Liquor Control Enforcement ("Bureau") from citing Pittsburgh-area licensees who advertised in the *Pilt News* , a publication affiliated with the University of Pittsburgh.

13. ***Are print advertisements of alcoholic beverages permitted near churches or schools?***
Such advertisements are permissible only if they are over three hundred (300) feet from a church, school or public playground. Any written advertisements of alcoholic beverages within three hundred (300) feet of a church, school, or public playground are prohibited by section 498(e)(3) of the Liquor Code. For example, a billboard or banner advertising alcoholic beverages located two hundred (200) feet away from a church would be prohibited.

14. ***Are advertisements of alcoholic beverages placed on the side of a bus legal if the bus passes within three hundred (300) feet of a church, school, or public playground?***
Yes. Advertisements on mobile (transient) vehicles, such as buses, trucks, and cars, are not subject to the three hundred (300)-foot rule. Similarly, advertisements in newspapers or magazines (that are otherwise legal) are not subject to the three hundred (300)-foot rule even though an individual newspaper or magazine could temporarily be carried by someone to within three hundred (300) feet of a church, school, or public playground.

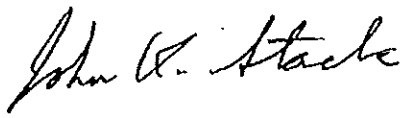
15. ***If a licensed premises is located within three hundred (300) feet of a church, school, or public playground, is it precluded from having any print advertisement on or in its premises?***
No. Although outside print advertisements of alcoholic beverages, such as banners and sign boards, would be precluded by the three hundred (300)-foot rule, any such advertising that is located inside the licensed premises, such as menus and point-of-sale items, is permitted. This is true even if the advertising can be seen from the outside of the premises.

16. ***Can a licensee be cited for violation of the rules on advertising?***
Yes. Violations of any of the rules found in section 498 will subject the licensed entity or out-of-state manufacturer, wholesaler, retailer, or shipper placing the advertisement to possible citation by the Bureau. Individual members of the media, however, are not subject to citation under the Liquor Code.

As always, licensees who desire legal opinions on specific advertisements should send those requests, in writing, to:
Faith S. Diehl
Chief Counsel
Office of Chief Counsel
PENNSYLVANIA LIQUOR CONTROL BOARD
401 Northwest Office Building
Harrisburg , PA 17124-0001

The provisions of this Advisory Notice are effective immediately. Please govern your operations accordingly.

BY ORDER OF:
THE PENNSYLVANIA LIQUOR CONTROL BOARD



JOHN K. STARK
Secretary to the Board

TITLE 47 PURDON'S STATUTES – PENNSYLVANIA LIQUOR CODE

§4-498. Unlawful advertising

a. Manufacturers, wholesalers, retailers and shippers, whether from outside or inside this Commonwealth, and any licensee under this act are permitted to advertise their products and prices in this Commonwealth. All advertisements shall be subject to all Federal and State laws and regulations.

b. No advertisement of price may contain the following:
   1. Any statement that is false, deceptive or misleading.
   2. Any statement that is disparaging of the products of a competitor.
   3. Any statement referring to monetary comparison between brands.

c. Prices that are advertised or displayed on the licensed premises shall be those that are in effect at the time of the advertisement or display.

d. Repealed. [No prices, other than the posting of a printed menu or wine list as expressly provided for in section 493(20)(i), may be displayed in a window at any licensed establishment.]

e. The following shall apply to all alcoholic beverage and malt beverage advertising:
   1. The entity responsible for the advertisement shall be clearly identified in the advertisement.
   2. No licensee may distribute, by mail, personally or through servants, agents or employees, price lists, circulars or handbills off the licensed premises to the general public as a means of advertising liquor, wine or malt or brewed beverages.
   3. No print advertisement of alcoholic beverages of any type shall be permitted within three hundred feet of any church, school or public playground. **This prohibition shall not preclude any point-of-sale advertisements, menus, or other print advertisement regarding any alcoholic beverages inside the licensed premises**.
   4. The use in any advertisement of alcoholic beverages of any subject matter, language or slogan directed to minors to promote consumption of alcoholic beverages is prohibited. Nothing in this section shall be deemed to restrict or prohibit any advertisement of alcoholic beverages to those persons of legal drinking age.
   5. No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular or other similar publication published by, for or in behalf of any educational institution.
   6. No advertisement that is obscene shall be permitted.

f. Advertisement of alcoholic beverages and malt and brewed beverages shall not be inconsistent with the spirit of safety or safe driving programs.

g. For purposes of this subsection, the term **"advertisement"** shall mean any advertising of alcoholic beverages through the medium of radio broadcast, television broadcast, newspapers, periodicals or other publication, outdoor advertisement or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.

1951, April 12, P.L. 90, No. 21, § 498, added 1987, June 29, P.L. 32, No. 14, § 86, effective July 1, 1987. Amended 1996, Dec. 20, P.L. 1523, No. 199, § 5, effective in 60 days. **Amended 2002, February 21, P.L. 73, No. 10, § 24, effective in 60 days.**