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SUBCHAPTER B. FEES AND PAYMENTS

16 TAC §§33.25 - 33.28, 33.30 - 33.32, 33.37 - 33.39

The repeals are proposed pursuant Section 410 H.B. 1545, 86th Tex. Leg. R.S. (2019), which eliminated certain authorizations, and §5.31 of the Code, which authorizes the commission to prescribe and publish rules necessary to carry out the provisions of the Code.

The proposed repeals do not impact any other current rules or statutes.

§33.25. *Temporary and Secondary Permits and Licenses.*

§33.26. *Manufacturer's Agent's Warehousing Permit Fee.*

§33.27. *Regional Forwarding Centers Fee.*

§33.28. *Consumer Delivery Permit Fee.*

§33.30. *Fee for a Manufacturer's Agent's Warehousing Permit.*

§33.31. *Secondary Permits.*

§33.32. *Nonresident Brewer's and Nonresident Manufacturer's Agent's Registration and Fee.*

§33.37. *Refunds of License and Permit Fees.*

§33.38. *Fees related to Renewals of Licenses and Permits after Expiration.*

§33.39. *Food and Beverage Certificate Fee.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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TRD-202102343

Shana Horton

Rules Attorney

Texas Alcoholic Beverage Commission

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For further information, please call: (512) 487-9905

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CHAPTER 45. MARKETING PRACTICES

The Texas Alcoholic Beverage Commission (TABC, agency, or commission) proposes amendments to rules §§45.1, 45.2, 45.4, 45.5, 45.25 - 45.27, 45.30, 45.40 - 45.43, 45.50, 45.106, 45.113, 45.117, and 45.131; and new rules §§45.51, 45.121 - 45.127, and 45.130. The repeal of rules §45.22 and §45.121 is proposed in a separate, simultaneous proposal.

Background and Summary

The agency proposes these changes to Chapter 45 of the agency's rules as the result of a comprehensive review of the chapter pursuant to the regular four-year review cycle prescribed by Government Code §2001.039, as well as to conform its rules to statutory changes made by House Bill 1545 (H.B. 1545, 86th Tex. Leg. R.S. (2019)), including the consolidation of beer and ale and changes to license and permit types. Because those statutory changes become effective on September 1, 2021, the commission proposes to make these rule changes effective on the same date to reduce confusion. Additionally, provisions related to advertising that were repealed effective December 31, 2020 are proposed to be consolidated and readopted to ensure the agency's continuing ability to enforce them independently. Members of the regulated industry must

comply with these requirements and restrictions under federal regulations; therefore, their readoption should not have any impact on regulated industry.

The amendments are proposed pursuant to the commission's general powers and duties under §5.31 of the Alcoholic Beverage Code (the "Code").

Section by Section Discussion

§45.1. *Statutory Authority and Applicability.*

The commission proposes to amend §45.1 to add a reference to advertising statutes in Code Chapter 108, which are implemented within this rule chapter (primarily in Subch. F).

§45.2. *Definitions.*

The commission proposes to amend §45.2(1) to add back in the definition of "Advertisement" and update methods of publication to include modern methods of advertising (prior §45.12, repealed effective Dec. 31, 2020).

The commission proposes to amend §45.2(2) to conform to statutory changes made by H.B. 1545 (2019).

The commission proposes to amend §45.2(12) and (13) to conform to statutory changes made by H.B. 1545 (2019).

The commission proposes new §45.2(16) to add a definition for sake, a beverage type becoming increasingly common.

§45.4. *Product Registration Required.*

The commission proposes to amend §45.4 to conform to statutory changes made by H.B. 1545 (2019).

§45.5. *Denial of Product Registration.*

The commission proposes to amend §45.5(b) to add back in provisions related to guarantees on labels and expand application of the rule from wine labels to all beverage types (prior §45.46(a)(5), repealed effective Dec. 31, 2020).

§45.25. *Damaged Stock.*

The commission proposes to amend §45.25 to extend the provision prohibiting selling distilled spirits that have had fire, smoke, or water damage to the label, container, or contents, unless authorized by the executive director, to apply to all alcoholic beverages.

§45.26. *Intrastate Bottling.*

The commission proposes to amend §45.26 to swap a reference to "certificate of label approval" for "registration with the commission" for consistency with earlier rule changes in conformance with H.B. 1545 (2019) and to make other non-substantive changes.

§45.27. *Illicit Beverage.*

The commission proposes non-substantive amendments to §45.27 for clarity and to correct grammar.

§45.30. *Certificate of Registration for a Distilled Spirit Product.*

The commission proposes to amend §45.30 to correct a capitalization error.

§45.40. *Certificate of Registration for a Malt Beverage Product.*

The commission proposes to amend §45.40 to conform to statutory changes made by H.B. 1545 (2019).

§45.41. Additional Reasons for Denial of Registration of a Malt Beverage Product.

The commission proposes to amend §45.41(a)(1)(C) and (c) to implement Alcoholic Beverage Code §101.41(c) requiring that malt beverage product labels include the product's alcohol content by volume (ABV), and to conform to other statutory changes made by H.B. 1545 (2019).

§45.42. Misbranding.

The commission proposes to amend §45.42 to conform to statutory changes made by H.B. 1545 (2019).

§45.43. Verification Regarding Use of Facilities.

The commission proposes to amend §45.43 to conform to statutory changes made by H.B. 1545 (2019).

§45.50. Certificate of Registration for Wine.

The commission proposes to amend §45.50 to add a cross-reference to make clear that the rule does not apply to holders of out-of-state winery direct shipper's permits under Chapter 54 of the Code and to correct a capitalization error.

§45.51. Additional Provisions for the Examination of Wine.

The commission proposes new §45.51, the content of which is simultaneously proposed for repeal from §45.22 and has been edited for clarity, punctuation, and grammar.

§45.106. Sweepstakes and Games of Chance.

The commission proposes to amend §45.106 to conform to statutory changes made by H.B. 1545 (2019).

§45.113. Gifts, Services and Sales.

The commission proposes to amend §45.113 to conform to statutory changes made by H.B. 1545 (2019).

§45.117. Gifts and Advertising Specialties.

The commission proposes to amend §45.117(c)(2) to open for *discussion only* raising the cap on the total cost of advertising specialties provided to a retailer in a year, which has not increased since 2004. The cap cannot be raised significantly without amendment of the underlying statute. The purpose of the proposal is to gauge stakeholder interest in raising this cap and by how much.

All other proposed amendments to §45.117 are either necessary to conform to statutory changes made by H.B. 1545 (2019) or are non-substantive.

§45.121. Advertising Standards Required.

The commission proposes new §45.121 to add back into rule the general prohibition on advertising that does not comply with rule standards (prior §45.11, repealed effective Dec. 31, 2020).

§45.122. Prohibited Statements.

The commission proposes new §45.122 to add back into rule provisions prohibiting certain statements in advertisements (prior §45.15, repealed effective Dec. 31, 2020).

§45.123. Required Statements.

The commission proposes new §45.123 to add back into rule provisions requiring certain statements in advertisements (prior §45.13, §45.88, repealed effective Dec. 31, 2020).

§45.124. Lettering.

The commission proposes new §45.124 to add back into rule a provision requiring required statements to be in conspicuous and legible font (prior §45.14, repealed effective Dec. 31, 2020).

§45.125. Cooperative Advertising by Package Stores.

The commission proposes new §45.125 to add back into rule the prohibition on cooperative advertising by package stores (prior §45.49(c), repealed effective Dec. 31, 2020).

§45.126. Additional Mandatory Statements for Distilled Spirits.

The commission proposes new §45.126 to add back into rule additional mandatory statements for distilled spirits (prior §45.13(c), (d), §45.15(i), repealed effective Dec. 31, 2020).

§45.127. Additional Prohibited Statements for Distilled Spirits.

The commission proposes new §45.127 to add back into rule additional prohibited statements for distilled spirits (prior §45.15(c), repealed effective Dec. 31, 2020).

§45.130. Credit Law and Delinquent List.

The commission proposes new §45.130 to contain the Credit Law and Delinquent List rule that is simultaneously proposed for repeal from §45.121 as part of reorganization of the chapter. In addition, amendments proposed to subsection (d) clarify when a credit payment is considered late and the purpose of four-day period between payment due date and placement on Delinquent List.

All other proposed amendments to §45.130 are either necessary to conform to statutory changes made by H.B. 1545 (2019) or are non-substantive.

§45.131. Cash Law.

The commission proposes amendments to §45.131 to conform to statutory changes made by H.B. 1545 (2019) and to make non-substantive changes.

Fiscal Note: Costs to State and Local Government

Shana Horton, Rules Attorney, has determined that for each year of the first five years that the proposed amended rules will be in effect, they are not expected to have a significant fiscal impact upon the agency. There are no foreseeable economic implications anticipated for other units of state or local government due to the proposed amendments. The amendments are required by the legislature under H.B. 1545; non-substantive edits for clarity, grammar, and internal consistency; consolidation and rearrangement of rules for efficiency; and reincorporation of agency advertising rules that mirror federal regulations and were in commission rules until December 31, 2020. The commission will be able to administer the amended rules using existing agency resources. The amended rules do not impact other units of state and local government.

Rural Communities Impact Assessment

The proposed amendments will not have any material adverse fiscal or regulatory impacts on rural communities. The amendments are required by the legislature under H.B. 1545; non-substantive edits for clarity, grammar, and internal consistency; or consolidation and rearrangement of rules for efficiency. The rules apply statewide and have the same effect in rural communities as in urban communities. Likewise, the proposed rules will not adversely affect a local economy in a material way.

Small Business and Micro-Business Assessment/Flexibility Analysis

No material fiscal implications are anticipated for small or micro-businesses due to the proposed amended rules. Therefore, no Small Business and Micro-Business Assessment/Flexibility Analysis is required.

Most of the amendments are required by the legislature under H.B. 1545, limiting the commission's flexibility with respect to their adoption. Where possible, the proposed rules mitigate impacts on small and micro-businesses. For example, proposed amended §45.41 implements the statutory requirement that malt beverage labels show the product's alcohol content by volume. The commission's proposed rule includes a schedule that allows brewers time to use up cans and other labels printed prior to the new requirement to reduce waste of those containers and labels for which the brewer has already paid.

Other amendments are non-substantive edits for clarity, grammar, and internal consistency or consolidation and rearrangement of rules for efficiency and have no material fiscal impacts.

Takings Impact Assessment

The proposed amendments do not affect a taking of private real property, as described by Attorney General Paxton's Private Real Property Rights Preservation Act Guidelines. The rulemaking would impose no burdens on private real property because it neither relates to, nor has any impact on, the use or enjoyment of private real property and there is no reduction in value of property as a result of this rulemaking.

Public Benefits and Costs

Ms. Horton has determined that for each year of the first five years that the proposed amendments would be in effect, the public would benefit from the updated rules conforming to statutory changes because their adoption will decrease confusion and lead to greater compliance with the agency's rule standards designed to protect public health and safety and the Texas economy. There is no increase in costs to the public.

Government Growth Impact Statement

This paragraph constitutes the commission's government growth impact statement for the proposed amendments. The analysis addresses the first five years the proposed amendments would be in effect. The proposed amendments neither create nor eliminate a government program. The proposed amendments do not require the creation of new employee positions or the elimination of existing employee positions. Implementation of the proposed amendments requires neither an increase nor a decrease in future legislative appropriations to the commission. The proposed amendments are not expected to result in a significant change in fees paid to the agency. The proposed amendments are not anticipated to have any material impact on the state's overall economy.

The proposed amendments do not create any new regulations except in proposed amended §45.41, regarding addition of alcohol content by volume to labels, which is required by the Texas Legislature.

Proposed amendments to §45.25 extend the provision prohibiting selling distilled spirits that have had fire, smoke, or water damage to the label, container, or contents, unless authorized by the executive director, to apply to all alcoholic beverages. However, this amendment should have little impact on the regulated industry as the change reflects current agency and industry practices. Other proposed amendments do not expand the applica-

bility of any rules or increase the number of individuals subject to existing rules' applicability beyond current rule requirements.

Comments on the proposed rules and rule amendments may be submitted in writing to Shana Horton, Rules Attorney, Texas Alcoholic Beverage Commission, at P.O. Box 13127, Austin, Texas 78711-3127, by facsimile transmission to (512) 206-3498, attention: Shana Horton, or by email to rules@tabc.texas.gov. Written comments will be accepted for 30 days following publication in the *Texas Register*.

The staff of the commission will hold a public hearing to receive oral comments on the proposed rules and rule amendments on July 13, 2021, at 10:00 a.m. The commission has designated this hearing as the appropriate forum to make oral comments under Government Code §2001.029. DUE TO PUBLIC HEALTH CONCERNS RELATED TO COVID-19, THIS HEARING WILL BE HELD BY VIDEOCONFERENCE ONLY. Interested persons should visit the TABC's public website prior to the meeting date to receive further instructions or call Shana Horton, Rules Attorney, at (512) 206-3451.

SUBCHAPTER A. GENERAL PROVISIONS

16 TAC §§45.1, 45.2, 45.4, 45.5

The rules and rule amendments are proposed pursuant to the commission's authority under §5.31 of the Code to prescribe and publish rules necessary to carry out the provisions of the Code.

The proposed amendments do not impact any other current rules or statutes.

§45.1. Statutory Authority and Applicability.

(a) This chapter implements Alcoholic Beverage Code §§101.67 and 101.671, which provide for the registration of alcoholic beverage products with the state, and Chapter 108, Advertising.

(b) This chapter does not apply to:

- (1) distilled spirits for export or for industrial use;
- (2) wine produced pursuant to §109.21, Alcoholic Beverage Code;
- (3) wine that is to be exported in bond;
- (4) malt beverages in bond; or
- (5) malt beverages manufactured for sale exclusively outside this state.

§45.2. Definitions.

When used in this chapter, the terms listed below shall have the following meanings:

(1) Advertisement--Any statement provided by or at the behest of a permittee promoting the purchase of a brand of alcoholic beverage through the medium of: radio broadcast; television broadcast; the internet; newspapers, periodicals, or other publications; any sign or outdoor advertisement; or of any other printed or graphic matter, including trade booklets, menus, and cards, if such advertisement is in, or is calculated to induce sales in, this state, or is disseminated by mail or electronic mail. The term "advertisement" does not include: any label affixed to any alcoholic beverage bottle; or any individual covering, carton, or other container of the bottle, or any written, printed, graphic, or other matter accompanying the bottle, which constitutes a part of the labeling under this chapter; or any editorial or other reading matter in any periodical newspaper, or other publication for which no money or other valuable consideration is paid or promised, directly or indirectly, by any permittee.

(2) ~~[(4)]~~ Alcoholic beverage--~~Alcohol~~ [alcohol], or any beverage containing more than one-half of one percent of alcohol by volume, which is capable of use for beverage purposes, either alone or when diluted, including distilled spirits, malt beverages, and wine, as defined herein.

~~[(2)]~~ Ale--~~Any malt beverage containing more than 4.0% of alcohol by weight. In this chapter, "malt liquor" and "ale" have the same meaning.~~

(3) Applicant--A person who submits an application with the commission to register an alcoholic beverage product.

(4) Bottler--Any person who places alcoholic beverages in containers.

(5) Brand label--The label carrying, in the usual distinctive design, the brand name of the alcoholic beverage.

(6) Brewpub--A holder of a brewpub license under Chapter 74 of the Alcoholic Beverage Code.

(7) Code--The Texas Alcoholic Beverage Code.

(8) COLA--A certificate of label approval issued by the United States Alcohol and Tobacco Tax and Trade Bureau pursuant to 27 CFR Ch. I, Subch. A, Part 13.

(9) Commission--The state agency, the Texas Alcoholic Beverage Commission; this term is not intended to refer to the agency's commissioners sitting as a deliberative body.

(10) Container--Any can, bottle, barrel, keg, cask, tank car, or other closed receptacle, irrespective of size or of the material from which made, for use for the sale of malt alcoholic beverages. This provision does not in any way relax or modify §1.04(18) of the Alcoholic Beverage Code.

(11) Distilled spirits--Alcohol, ethyl alcohol, hydrated oxide of ethyl, spirits of wine, whiskey, rum, brandy, gin, other distilled spirits, and any liquor produced in whole or in part by the process of distillation, including all mixtures and dilutions thereof.

(12) Malt beverage--A fermented beverage of any name or description containing one-half of one percent or more of alcohol by volume, brewed or produced from malt, in whole or in part, or from any malt substitute. [A beverage made by the alcoholic fermentation of an infusion or decoction, or combination of both, in potable brewing water, of malted barley with hops, or their parts, or their products, and with or without other malted cereals, and with or without the addition of unmalted or prepared cereals, other carbohydrates or products prepared therefrom, and with or without the addition of carbon dioxide, and with or without other wholesome products suitable for human consumption.]

~~[(13)]~~ Malt liquor--~~Any malt beverage containing more than 4.0% of alcohol by weight. In this chapter, "malt liquor" and "ale" have the same meaning.~~

(13) ~~[(14)]~~ Person--~~A~~ [a] natural person or association of natural persons, trustee, receiver, partnership, corporation, organization, or the manager, agent, servant, or employee of any of them.

(14) ~~[(15)]~~ Producer--~~A~~ [a] manufacturer of all classes of alcoholic beverages and nonresident sellers that are the primary American source of supply for purposes of §37.10 of the Code.

(15) ~~[(16)]~~ TTB--~~The~~ [the] United States Alcohol and Tobacco Tax and Trade Bureau or its successor agency.

(16) Sake--An alcoholic beverage made by fermenting rice.

(17) Wine--A product obtained from the alcoholic fermentation of juice of sound ripe grapes, fruits, berries, or honey, and includes wine coolers and other alcoholic beverages made in the manner of wine, including sparkling and carbonated wine, vermouth, cider, sake, and perry.

§45.4. *Product Registration Required.*

(a) Except as provided by subsection (b) of this section, no alcoholic beverage product may be shipped or imported into the state, manufactured and offered for sale, or distributed or sold in the state until the product is registered with the commission.

(b) Product registration is not required for products sold:

(1) in compliance with Code §101.6701 by holders of brewer's ~~[permits and manufacturer's]~~ licenses authorized to sell directly to consumers under Code §62.122 [~~§§12.052 or 62.122~~];

(2) by holders of brewpub licenses except for malt beverages sold under the authority of Code §§74.08 or a distributor under 74.09; and

(3) pursuant to out-of-state winery direct shipper's permits under Chapter 54 of the Code.

§45.5. *Denial of Product Registration.*

(a) The commission may deny an application for product registration for one or more of the following reasons:

(1) the product label does not meet applicable federal requirements;

(2) registration of the product would create a cross-tier violation;

(3) the label includes a statement, design, device, or representation that is obscene or indecent;

(4) the commission determines the product would create a public safety concern; or

(5) the commission determines the product violates any other section of the Code.

(b) No alcoholic beverage label may contain any statement, design, device, or representation of or relating to any guarantee, irrespective of falsity, other than a bona fide guarantee to refund the purchase price if the consumer is dissatisfied.

~~(c) [(b)]~~ If the commission denies an application to register a product, the applicant is prohibited from shipping or importing into or within the state, manufacturing or offering for sale, or distributing or selling the product in the state using the denied label.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (512) 487-9905



SUBCHAPTER B. ENFORCEMENT

16 TAC §§45.25 - 45.27