

**Texas Alcoholic Beverage Commission
Quarterly Update to the Senate Business and Commerce Committee
January 4, 2012**

IMPLEMENTATION OF SIGNIFICANT LEGISLATION

TABC has implemented, without problems or concerns, all legislation that went into effect following the 82nd Legislative Session. The most significant bills are as follows:

HB1936 by Gutierrez relating to importation and shipment of alcoholic beverages for personal consumption. HB1936 went into effect on September 1, 2011, serving three functions:

- increased the administrative fee on alcoholic beverages from 50 cents to \$3 per container;
- equalized the importation limits between Texas residents and non-residents, increasing the importation limit for Texans from one quart to a gallon of distilled spirits every 30 days;
- allowed for the importation of a personal collection of beer and/or distilled spirits by persons moving to Texas. State law already allowed the importation of a personal wine collection.

TABC implemented the new importation limits and fees on September 1st. There were a few complaints about the increased fee, but not many as the agency had begun posting notices and handing out fliers about the changes earlier in the summer. We have noted an increase in half gallon containers being imported and a decrease in miniature bottles being imported. Following is a comparison of alcoholic beverage importations from September-November of 2010 compared to 2011.

	1st Quarter FY 2011	1st Quarter FY 2012	% Change
Revenue	\$432,562.75	\$1,023,217.25	136.5%
Containers Stamped	392,269	280,731	(28.4%)
Containers Confiscated	748	2,808	275.4%

HB1959 by Thompson Relating to appeal of the certification of an area's wet or dry status. HB1959 went into effect on September 1, 2011. Although the bill does not directly impact TABC, communications with county judges about the new legislation indicate some concerns. The new law allows applicants for TABC permits to appeal to the county judge if their application is not certified by the city clerk, city secretary or county clerk to say that the location is “wet” based on previous local option elections. This makes sense because the county maintains local option election historical information. Applicants within a city’s limits may also appeal to the county judge if their application is not certified by the city clerk or city secretary as being a lawful location for alcohol sales because of a city ordinance or charter.

SB1331 by Watson (and HB3474 by Gallego) relating to criminal offenses regarding the possession or consumption of alcoholic beverages by a minor and providing alcoholic beverages to a minor. The 911 Lifeline Legislation went into effect on September 1, 2011. TABC has been working with the non-profit association Aware Awake Alive to educate the public about the danger of alcohol poisoning and about the 911 Lifeline Legislation. Correspondence was sent to 75 public and private universities in Texas notifying university board chairs, presidents and police chiefs of the new law and offering assistance to educate faculty, staff, police departments and students. Several universities contacted TABC for such assistance. TABC has used the social media outlets Facebook and Twitter to educate the public. In February and March 2012, TABC's Spring Break education/prevention initiative will be focused on alcohol poisoning.

HB2582 by Murphy relating to the repeal of the partial tax exemption for certain beer. Effective September 1, 2011, HB2582 repealed the 25% excise tax exemption previously given to Texas beer manufacturers and brewpubs whose annual production of beer in this state does not exceed 75,000 barrels.

HB2582 may have reduced the chance of potential litigation. Additionally, excise taxes gathered from small manufacturers and brewpubs in the first quarter of fiscal year 2012 increased 68.5% compared to the first quarter of fiscal year 2011. However, most of that increase was due to growth in the amount of beer produced. Two additional manufacturers opened in fiscal year 2012, and there was a net increase of two brewpubs that make beer.

	1st Quarter FY 2011	1st Quarter FY 2012	% Change
Small Manufacturers	\$5,669.57	\$11,509.12	103.0%
Brewpubs	\$5,130.08	\$6,692.42	30.5%
TOTAL	\$10,799.65	\$18,201.54	68.5%

OTHER SIGNIFICANT EVENTS

Authentic Beverage Company Inc. v. Texas Alcoholic Beverage Commission

In 2010, beer distributor Authentic Beverage Co. (with co-plaintiffs Jester King Craft Brewery and Zax Restaurant and Bar) filed a federal lawsuit against TABC alleging violations of rights under the 1st and 14th Amendments and the Commerce Clause

In October 2011, attorneys for the plaintiffs and the Office of the Attorney General on behalf of TABC filed cross-motions for summary judgment. Judge Sam Sparks issued a ruling on December 19, 2011, in favor of the plaintiffs on the first amendment free speech issues and in favor of the state on the 14th amendment equal protection and commerce clause issues.

The judge's ruling means that

- Brewers will be able to tell customers (and advertise) where the public can buy the brewery's products.
- Brewers will be able to post / advertise the alcohol content of their products in places such as websites and on social media.
- Brewers will be able to use terms that describe the strength of products like "strong," "low alcohol," "full strength," etc
- TABC will no longer require brewers to designate high or low alcohol content based on specific words like "beer" and "ale." Specifically, Judge Sparks said that "nothing prevents Texas or TABC from passing appropriate regulations requiring producers to include accurate statements about the alcohol content of their products in labeling or advertising; absent a constitutionally sound justification, however, Texas may not dictate the exact words producers must use to do so."

Under the Equal Protection Clause of the 14th Amendment, the plaintiffs maintain that breweries, like wineries, should be able to sell their products directly to the public and brewpubs should be able to sell beer through a retailer or distributor. Finally, the lawsuit challenged the requirement that every foreign brewery wishing to sell beer in Texas obtain its own separate license. Foreign wineries and distilleries may sell their products in Texas through an importer that has one license for all the wine and spirits it brings into the state. The wineries and distilleries themselves are not required to obtain a permit.

In the short-term, TABC will engage the public in the rulemaking process in order to craft new rules to replace the ones that were overturned by the court. In the meantime, TABC will be issuing a marketing practice bulletin designed to inform the industry of interim guidelines.

In the long-term, Judge Sparks' opinion indicates that Texas alcoholic beverage regulations that treat various products, or in-state and out-of-state entities, differently may warrant a closer look to ensure that the state has a rational basis for the distinctions. The opinion also suggests that where commercial speech is involved, there needs to be a closer look at whether substantial government interest is advanced by these regulations, and whether these interests could be advanced through more narrow regulations.

Wine.com Opens Warehouse in Houston, Obtains Winery Permit

For several years, Wine.com has been selling and shipping wine to Texas consumers from outside of Texas without holding a permit that authorized such activities. Due to TABC's work with FedEx and UPS to stop illegal shipments, Wine.com stopped shipping to Texas. TABC heard from a few consumers who were frustrated because they felt like they no longer had access to the products they wanted. However, by early December, Wine.com had opened a warehouse in Houston and obtained a winery permit. This permit authorizes Wine.com to purchase wine from Texas wineries, out-of-

state wineries who hold nonresident sellers permits and from Texas wholesalers. They are then authorized to sell and ship this wine to consumers anywhere in Texas.

This series of events brought to light some concerns about disparities in Texas law with regard to in-state and out-of-state wineries.

Realigning Agency Resources and Relying on Early Intervention

Due to the tough economic times of the day, state agencies have been asked to determine ways they can reduce costs while still providing the level of service that citizens have come to expect and need. TABC's budget was cut during the 82nd Legislative Session; however, due to advanced planning, the agency did not have to lay off any personnel. TABC was able to make those cuts using vacant positions in headquarters and in the field.

The expectation is that the next legislative session will come with similar questions about whether the agency can reduce the workforce to cut costs further. As a result, TABC is in the process of re-aligning resources within our organization to improve regulation of the alcohol industry. Effective September 1, 2011, TABC reconfigured the state to three regions with five districts instead of five regions with 17 districts.

The changes allow for a more balanced distribution of licensed locations per district. Additionally, assigning agents and auditors to specific zip codes increases accountability: each licensed location will "belong" to a specific agent and auditor. Under the new plan, TABC has three regional directors – one in Arlington, one in Houston and one in San Antonio; two captains – one in Lubbock and one in Austin; five compliance supervisors and five licensing supervisors. In addition to better aligning the agency's resources with the agency's workload, several lieutenant positions were eliminated.

Along with the realignment, TABC continues to find more efficient ways of regulating through the use of technology and data collection. The ability to tie in to local law enforcement databases in certain cities allows TABC to focus on licensed locations that are having small problems before they become big. Reviewing calls for service for specific addresses prevents problem locations from falling through the cracks and provides the opportunity for early intervention. TABC is focusing on bringing businesses that are "on the edge" back into compliance before they are facing serious penalties. Through early intervention and education, the agency can achieve voluntary compliance from those business owners who are motivated to be a part of the community. Relying on administrative sanctions only after a licensed location becomes a public safety threat is a drain on the agency and on local law enforcement resources. Keeping these businesses operating safely and within the law prevents crime, prevents drawn out litigation, provides consistent employment and keeps tax revenue flowing into the community.