

## **Laws and Regulations Affecting Wine & Alcohol Beverage Industry Members**

Members of the law firm of Dickenson, Peatman & Fogarty (located in Napa & Santa Rosa) summarize what they see as some important laws and regulations affecting members of the California wine and alcohol beverage industry in 2012. For more information on any of the topics below, please contact the authors or check out the firm's wine law blog at [www.lexvini.com](http://www.lexvini.com).\*

### **1. ABC Clarifies Role of Third Party Providers of Marketing and Promotional Services - *Bahaneh Hobel* ([bhobel@dpf-law.com](mailto:bhobel@dpf-law.com)) & *Michael Mann* ([mmann@dpf-law.com](mailto:mmann@dpf-law.com))**

On November 1, 2011, the California Department of Alcoholic Beverage Control issued a new Industry Advisory regarding Third Party Providers ("TPPs") to address industry confusion with respect to TPPs. The Advisory provides that "unlicensed entities that are involved with the promotion, marketing and facilitation of sales of alcoholic beverages by licensees over the Internet" can facilitate the sale of wine over the Internet, provided that the benefited alcoholic beverage licensee at all times retains control over all sales transactions, including all decisions regarding pricing, selection, shipping and fulfillment. A TPP would therefore be permitted to place advertising for an alcoholic beverage at the direction of a licensee, make buying recommendations to a consumer, direct consumers to specific licensees, receive orders and pass them on to the licensee for acceptance and fulfillment, process payments (the licensee ultimately must control the funds and the flow of funds) and assist with shipping arrangements. TPPs may be compensated for their services, so long as the compensation is reasonable and does not result in any "actual or de facto control" over the licensee by the TPP.

TPPs and the licensees with whom they work continue to be subject ABC's prohibition on the giving of "free goods", which includes no free shipping. While the ABC still retains a great deal of discretion in reviewing relationships between TPPs and industry members, the TPP Advisory has clarified the scope of permissible activities for TPPs and has provided industry members some much needed guidance with respect to their relationships with TPPs.

### **2. ABC Issues New Type 85 Off-Sale Retail License Allowing Consumer-Only Internet, Phone and Mail Sales - *Bahaneh Hobel* ([bhobel@dpf-law.com](mailto:bhobel@dpf-law.com)) & *Michael Mann* ([mmann@dpf-law.com](mailto:mmann@dpf-law.com))**

Effective January 1, 2012, a new ABC Type 85, Limited Off-Sale Retail Wine License will be available in California. Previously, any licensees that were interested in selling wine to consumers by Internet, phone or mail order (without a retail storefront), were required to obtain two licenses – a Type 17 Wine and Beer Wholesalers license and a Type 20 Off-Sale Beer and Wine license. Such operations were permitted via direct mail, telephone, or the Internet only and so long as the licensee also made sales to a licensed retailer (as opposed to a consumer) at least every 45 days. Now, the holder of a new Type 85 license may make direct sales to consumers without also being required to make sales to licensed retailers at the wholesale level. Current Type 17/20 licensees could therefore transition to the new license and conduct consumer-only sales. However, a Type 85 licensee is still only permitted to solicit and accept sales via direct mail, telephone, or the Internet – no sales from a retail premises open to the public (i.e., from a "storefront") are permitted.

### **3. On-Sale Licensees, Including Restaurants, Now Permitted to Infuse Spirits & Wine On Premises - *Bahaneh Hobel* ([bhobel@dpf-law.com](mailto:bhobel@dpf-law.com)) & *Michael Mann* ([mmann@dpf-law.com](mailto:mmann@dpf-law.com))**

Section 23016 of the California Business and Professions Code was recently amended to allow on-sale licensees, including restaurants, to infuse spirits and wine with flavors or blending processes. Previously, the practice of infusing spirits and wines with fruits or flavoring, often done by restaurants throughout California, was prohibited. The new amendment, which is already in effect, permits on-sale licensees to color, flavor, or blend distilled spirits or wine products on the on-sale licensed premises so long as those products are consumed on the licensed premises.

**4. New BOE Regulation Classifies Wines That Derive More than .5% Alcohol From Sources Other Than Those From Which The Wine Was Made as Distilled Spirits For Taxation Purposes - Bahaneh Hobel ([bhobel@dpf-law.com](mailto:bhobel@dpf-law.com)) & Michael Mann ([mmann@dpf-law.com](mailto:mmann@dpf-law.com))**

The California State Board of Equalization recently adopted Regulation 2558.1, effective January 1, 2012, to clarify the definition of wine in the context of determining the applicable tax rate for alcoholic beverages. The Regulation has now clarified that for purposes of taxation, “wine” as defined in Section 23007 of the Business and Professions Code does not include products that contain 0.5% or more alcohol by volume from a source other than the particular agricultural product from which the wine is made. For example, if an alcohol distilled from a grain (as opposed to an alcohol distilled from grapes such as brandy) was added to a grape based wine product and that product contains more than 0.5% percent alcohol from that non-grape source, it would be considered a distilled spirit and taxed as a distilled spirit. Wine producers and importers should therefore remain informed as to the alcohol source and percentage of any flavorings and blending material that may be added to natural wine that could result in the reclassification of their wine product to a distilled spirit for taxation purposes. Note that this Regulation does not impact or in any way change the way the California Department of Alcoholic Beverage Control defines wine under Section 23007 above. As such, licensees selling wine products that may be reclassified as a distilled spirits for taxation purposes would not be required to obtain a different license from ABC.

**5. New Russian River Frost Protection Rules To Be Applied to Growers, Absent Court Action – Tom Carey ([tcarey@dpf-law.com](mailto:tcarey@dpf-law.com))**

Effective March 15, 2012, growers diverting water from the Russian River watershed for frost protection will be subject to new regulations promulgated by the State Water Resources Control Board (SWRCB). These new regulations were developed over the last two years in response to concern about the effect of frost protection activities on threatened and endangered salmon species. The regulations require that all growers using water from the Russian River watershed for frost protection participate in a state approved water demand management program (WDMP). The WDMP would be administered by a third party and require reporting of water use by growers, monitoring of stream levels in their region. Growers would be required to take actions to reduce their impact on stream levels if their diversions potentially affect river wildlife. The regulations will be phased in over a number of years because it will take time to set up the required stream monitoring equipment. Compliance with the regulations will be a condition of all existing water rights permits for the diversion of water from the Russian River watershed. Failure to comply could result in enforcement action and forfeiture of existing permits. A group called Russian River Water Users for the Environment has filed suit in Sacramento Superior Court to prevent the regulations from taking effect and the impact of that suit remains to be seen.

**6. Revisions to the Agricultural Labor Relations Act Regarding Union Elections– by Jennifer Phillips ([jphillips@dpf-law.com](mailto:jphillips@dpf-law.com))**

As of January 1, 2012 there will be new provisions to the Agricultural Labor Relations Act (“ALRA”) regarding union elections. The ALRA applies to agricultural employers, agricultural employees and labor organizations which represent agricultural employees. After vetoing an earlier bill, which would have revised the ALRA to allow a simple card check voting procedure for union certification, Governor Brown approved scaled back revisions which preserve the secret ballot for unionization. Instead of altering the election procedure, the revisions will, among other things, shorten the time periods in which the ALRB can take certain actions when it believes the employer has acted inappropriately in an election. Employers with agricultural employees should consult legal counsel about how these new provisions may affect their interactions with existing or potential labor organizations representing their employees.

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