



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-6

Harry "Trey" Kouri, III, Chairman
ABLE Commission
3812 N Santa Fe Ave., Suite 200
Oklahoma City, Oklahoma 73118

June 29, 2018

Dear Chairman Kouri:

This office has received your request for an Official Attorney General Opinion in which you ask, in effect, the following questions:

1. Does 37A O.S. § 3-111(K) prohibit a small brewer that does not self-distribute from receiving money or another thing of value from a beer distributor in exchange for entering into a distribution agreement with that distributor?
2. If the answer to Question # 1 is yes, does the Alcoholic Beverage Laws Enforcement Commission have authority prior to October 1, 2018 to administratively discipline a small brewer that attempts to charge a beer distributor for entering into a distribution agreement?
3. Does 37A O.S. § 3-116(A) allow a manufacturer to select one wine and spirits wholesaler to exclusively distribute its brands?
4. May a wholesaler who lawfully obtained a manufacturer's products before October 1, 2018 lawfully sell those products after October 1, 2018 if that manufacturer has given another wholesaler the exclusive right to distribute its products?

I.
BACKGROUND

During the 2016 legislative session the Legislature passed Senate Joint Resolution 68 ("SJR 68"), which was presented as State Question 792 for a vote of the people of Oklahoma. *See* S.J. Res. 68, 55th Leg., 2nd Reg. Sess., § 1 (2016). The measure appeared on the November 2016 ballot and was approved, effecting a broad-scale reform of the State's regulation of beer, wine, and liquor. Effective October 1, 2018, SJR 68 will repeal Article 28 of the Oklahoma Constitution and in its

place enact new Article 28A, which, among other things, directs the Legislature to “enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages, consistent with the provisions of this Article.” OKLA. CONST. art. 28A, § 2(A).¹

During the same session, the Legislature passed Senate Bill 383 (“SB 383”), largely repealing Title 37 of the Oklahoma Statutes—the existing regulatory structure for alcoholic beverages—and enacting a new framework under Title 37A titled the “Oklahoma Alcoholic Beverage Control Act” (the “New Act”).² *See* 2016 Okla. Sess. Laws c. 366. Enactment of the New Act was made contingent upon the people of Oklahoma approving of SJR 68. *See id.* § 197. As with the constitutional changes in SJR 68, much of SB 383’s repeal of Title 37 and implementation of Title 37A becomes effective on October 1, 2018. *See id.* § 198. Until then, many provisions of Article 28 and Title 37 remain in effect.

While the regulatory changes brought about by SJR 68 and SB 383 are far-reaching, your questions focus on discrete issues involving distribution arrangements for beer, wine, and spirits under the New Act, and seek guidance as to how the Alcoholic Beverage Laws Enforcement Commission (“ABLE Commission”) should enforce these laws before and after October 1, 2018.

II. DISCUSSION

The broad regulatory structure for distribution of beer, wine, and liquor under the new scheme is articulated in Section 2 of Article 28A of the Oklahoma Constitution, which states in relevant part:

A. The Legislature shall enact laws providing for the strict regulation, control, licensing and taxation of the manufacture, sale, distribution, possession, transportation and consumption of alcoholic beverages, consistent with the provisions of this Article. Provided:

1. a. there shall be prohibited any common ownership between the manufacturing, wholesaling and retailing tiers, unless otherwise permitted by this subsection. . . .

2. A manufacturer, except a brewer, shall not be permitted to sell alcoholic beverages in this state unless such sales occur through an Oklahoma wholesaler. A manufacturer, except a brewer . . . may sell such brands or kinds of alcoholic beverages to any licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler;

¹ While Article 28A is not yet effective, for ease of reference we cite to its provisions as we normally would for provisions currently in effect.

² The regulatory structure largely set forth in Title 37 is also known as the “Oklahoma Alcoholic Beverage Control Act.” *See* 37 O.S.2011, § 502. Accordingly, we refer to the provisions comprising that Act as the “Old Act.”

3. A brewer, with the exception of a small brewer as defined by law, shall not be permitted to sell beer in this state unless such sales occur through an Oklahoma licensed wholesaler pursuant to a wholesaler agreement. . . The wholesaler agreement shall designate the territory within which the beer will be sold exclusively by the wholesaler;

4. Winemakers either within or without this state may sell wine produced at their wineries to any licensed wholesaler who desires to purchase the wine; provided, that if a winemaker elects to sell the wine it produces to multiple wholesalers, then such sales shall be made on the same price basis and without discrimination to each wholesaler. . . .

5. Every wholesaler, except a beer wholesaler, must sell its products on the same price basis and without discrimination to all on-premise and off-premise licensees, unless otherwise provided by law. . . .

OKLA. CONST. art. 28A, § 2. Based on this broad directive, the Legislature passed SB 383 to implement new regulations on the beer, wine, and liquor industries.

A. Section 3-111(K) of Title 37A prohibits a small brewer that does not self-distribute from receiving money or any other thing of value from a beer distributor in exchange for entering into a distribution agreement.

Effective October 1, 2018, “no person shall manufacture, rectify, sell, possess, store, import into or export from this state, transport or deliver any alcoholic beverage except as specifically provided the [New Act].” 37A O.S. § 3-101(A).³ At that time, every licensed brewer authorized to sell beer in Oklahoma will be required to enter into a distribution agreement with a licensed distributor⁴ to sell its beer, with certain statutorily-required terms. *Id.* § 3-108(B). Under Section 3-111(K) of the New Act, “[n]o brewer shall charge or accept, and no beer distributor shall pay or provide, any money, property, gratuity, rebate, free goods, shipping charges different than those charged for all beer distributors, allowances, thing of value or inducement from a beer distributor in exchange for the brewer entering into a distributor agreement with the beer distributor.” *Id.* § 3-111(K). This language is unambiguous; it prohibits brewers of all sizes from charging or accepting any inducement to enter into an agreement with a distributor.

³ Like Article 28A of the Oklahoma Constitution, much of Title 37A is not yet effective. Nevertheless, for ease of reference we cite to the as-codified provisions rather than referring to the Session Law citations.

⁴ As used in the New Act, the terms “distributor” and “wholesaler” each refer to the persons or entities that serve as the link between the beverage manufacturer and the retailer. However, the term “distributor” is used only with regard to beer and is defined to mean “any person licensed to distribute beer for retail sale in the state[.]” 37A O.S. § 1-103(7). The term “wholesaler” refers to a wine and spirits wholesaler, which is defined as “any sole proprietorship or partnership licensed to distribute wine and spirits in the state.” *Id.* § 1-103(63). For purposes of this opinion, those definitions have been adopted.

This broad prohibition notwithstanding, Section 3-111(K) also includes an explicit provision for small brewers who self-distribute their products. The term “small brewer” means a “brewer who manufactures less than twenty-five thousand (25,000) barrels of beer annually pursuant to a validly issued Small Brewer License.” 37A O.S. § 1-103(53). A small brewer is permitted to hold a self-distribution license and, pursuant thereto, may distribute its own beer to various approved outlets. *Id.* § 2-102(E). While Section 3-111(K) broadly prohibits the providing or accepting of benefits to induce a brewer to enter into a distribution agreement, it also explicitly provides that “a holder of small brewer license who desires to change its election from self-distribution to the use of a distributor agreement may accept a payment for the fair market value of its existing and established distribution business.” *Id.* § 3-111(K).⁵ Thus, the New Act explicitly permits a small brewer that (i) distributes its own products under a self-distribution license, and (ii) wishes to switch to an independent distributor, to recover the fair market value⁶ of its distribution rights in exchange for the distribution agreement. This recovery of fair market value is not an inducement to enter the agreement, but instead allows a distributor to compensate the small brewer for obtaining the small brewer’s “existing and established distribution business.” *Id.* Outside of this scenario, small brewers are prohibited from receiving money or any other “thing of value” from a beer distributor in exchange for entering into a distribution agreement.

B. The ABLE Commission does not have the authority before October 1, 2018 to administratively discipline a brewer who attempts to charge a beer distributor in exchange for entering into a distribution agreement.

In general, the ABLE Commission has broad powers to regulate and, if necessary, discipline its various licensees. *See* 37 O.S.Supp.2017, § 514; 37A O.S. § 1-107. Under the New Act, the Commission has “such power and authority to enforce such laws, rules and regulations as shall be prescribed by the [New Act].” 37A O.S.Supp.2017, § 1-104. This section became effective on October 1, 2017. *See* 2016 Okla. Sess. Laws c. 366, § 198. Therefore, the ABLE Commission currently may enforce provisions of the New Act, but only those that are presently effective.

As noted above, beginning on October 1, 2018 the New Act will require brewers to enter into distribution agreements with licensed distributors to sell their products. 37A O.S. § 3-108(B)(1). In addition, Section 3-111(K)—a provision that also becomes effective on October 1, 2018—prohibits brewers from receiving any inducement to enter into these distributor agreements. Therefore, the act of receiving an inducement to enter into a distributor agreement is not prohibited until that time. *See City of Tulsa v. Pub. Emp. Relations Bd.*, 1990 OK 114, ¶ 14, 845 P.2d 872, 876 (“The operative statutes are those which were in effect at the time the contract was executed, and it is those statutes which determine the force and effect of the contract.”). The ABLE Commission has authority only to enforce presently effective portions of the New Act, and because Section 3-111 is not yet effective, the Commission may not enforce its prohibitions until October 1, 2018. *See* Norman Singer, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 33.7

⁵ While not relevant to this opinion, this provision also applies to “a brewer who also holds a beer distributor license and desires to sell all or a portion of its beer distribution rights and business[.]” 37A O.S. § 3-111(K).

⁶ The New Act defines “fair market value” as “the value in the subject territory covered by the written agreement with the distributor or wholesaler that would be determined in an arm’s length transaction entered into without duress or threat of termination of the distributor’s or wholesaler’s rights and shall include all elements of value, including goodwill and going-concern value[.]” 37A O.S. § 1-103(13).

(7th ed.) (“The purpose of the future effective date is to inform people of the provisions of a statute before it becomes effective so they may protect their rights and discharge their obligations.”).

This conclusion notwithstanding, it is important to note that the prohibition found in Section 3-111(K), once effective, will apply to distribution agreements “*existing on* or after the effective date of [the New Act].” 37A O.S. § 3-111(L) (emphasis added). Accordingly, an agreement entered into before October 1, 2018, but which continues beyond that date, must comply with the requirements of Section 3-111.⁷ This means that if, prior to October 1, 2018, a brewer charges or accepts or a beer distributor pays or provides a “thing of value or inducement” in exchange for entering into a distribution agreement, and that agreement continues to be in effect on and after October 1, 2018, the agreement would violate the New Act even though the prohibited conduct occurred before October 1, 2018. Because the agreement would be “[c]ontrary to an express provision of law,” or at the very least, “[c]ontrary to the policy of express law, though not expressly prohibited,” such an agreement would be unlawful. 15 O.S.2011, § 211.

C. Section 3-116(A) of Title 37A allows a manufacturer or subsidiary of a manufacturer to select one wine and spirits wholesaler to exclusively distribute its brands.

Your next questions shift to the New Act’s regulation of wine and spirits wholesalers, which differs substantially from that of beer distributors. Article 28A of the Oklahoma Constitution states in part:

A manufacturer, except a brewer . . . *may* sell such brands or kinds of alcoholic beverages to *any* licensed wholesaler who desires to purchase the same. Provided, if a manufacturer, except a brewer, elects to sell its products to multiple wholesalers, such sales shall be made on the same price basis and without discrimination to each wholesaler.

OKLA. CONST. art. 28A, § 2(A)(2) (emphasis added).⁸ By contrast, the predecessor to this provision that appeared in Article 28 read, in relevant part, as follows: “any manufacturer . . . *shall* be required to sell such brands or kinds of alcoholic beverages to *every* licensed wholesale distributor who desires to purchase the same, on the same price basis and without discrimination.” OKLA. CONST. art. 28, § 3 (emphasis added). The Old Act and New Act reflect a similar change in language. *Compare* 37A O.S. § 3-116(A) (“Any manufacturer...may sell...to every licensed wine and spirits wholesaler who desires to purchase the same[.]”), *with* 37 O.S.2011, § 533 (“Any manufacturer...shall be required to sell...to every licensed wholesaler or Class B wholesaler who desires to purchase the same[.]”).

When a “statute is permissive in character . . . the definitive word chosen by the legislature is ‘may’ instead of ‘shall.’ ‘May’ denotes a permissive statute. ‘Shall’ signifies a mandatory directive or command.” *Grimes v. City of Oklahoma City*, 2002 OK 47, ¶ 11, 49 P.3d 719, 724. Thus, whereas

⁷ In general, a contract is effective immediately upon its execution, *see Winn v. Nilsen*, 1983 OK 91, ¶ 6, 670 P.2d 588, 590, and continues in effect indefinitely until terminated per the terms of the contract or rescinded by the parties. *See Texas Cty. Mem’l Found., Inc. v. Ramsey*, 1984 OK CIV APP 4, ¶8, 677 P.2d 665, 667.

⁸ The term “manufacturer” is broadly defined to include “a brewer, distiller, winemaker, rectifier or bottler of any alcoholic beverage and its subsidiaries, affiliates and parent companies[.]” 37A O.S. § 1-103(29).

both Article 28 of the Oklahoma Constitution and Section 533 of the Old Act *required* a manufacturer to sell its products to *every* wholesaler wishing to purchase them, Article 28A and Section 3-116 of the New Act permit a manufacturer to choose to sell its products to any *or* every wholesaler who wishes to distribute its products. Indeed, Article 28A explicitly leaves to the manufacturer’s discretion whether to sell to more than one wholesaler. OKLA. CONST. art 28A, § 2(A)(2) (“*If* a manufacturer, except a brewer, *elects* to sell its products to multiple wholesalers...” (emphasis added)).

Regarding exclusivity of designated wholesalers, Title 37A contains several references to a “designated wholesaler” or a “single” wholesaler, and it could be argued that this language means that the Legislature intended to require the manufacturers to designate only a single wholesaler. For example, Section 3-123 makes it unlawful for a manufacturer to discriminate in price between wholesalers “when that manufacturer has not *designated a single wine and spirits wholesaler.*” 37A O.S. § 3-123 (emphasis added). Also, Section 3-116.1 defines price posting requirements where a manufacturer “has not *designated a wine and spirits wholesaler.*” *Id.* § 3-116.1 (emphasis added); *see also id.* § 3-116.2 (entitled “Posting Requirements for *Designated Wholesalers*” (emphasis added)).

The words “designate” and “designated wholesaler” are not defined in the New Act. “In the absence of a contrary definition, we must assume that the legislature intended the words used to have the meaning attributed to them in ordinary and usual parlance.” *Hurst v. Empie*, 1993 OK 47, ¶ 18, 852 P.2d 701, 706. The word “designated” is commonly defined as “to choose and set apart (as by public will or in the process of government administration).” WEBSTER’S THIRD NEW INT’L DICTIONARY 612 (3d ed. 2002). This definition does not require a designated item to be the only of its kind, and is consistent with the notion a manufacturer may designate whichever and as many wholesalers as it desires under the New Act. Thus, despite the use of the term throughout the New Act, “designated wholesaler” appears to denote a manufacturer having chosen to select one or multiple wholesalers to distribute its products, rather than signaling that the manufacturer is required to select a single wholesaler to distribute its products.

In sum, given the permissive language of Article 28A, Section 2 of the Oklahoma Constitution and Section 3-116 of the New Act, a manufacturer may select a single wine and spirits wholesaler to exclusively distribute its products.

D. A wholesaler that lawfully obtains a manufacturer’s products before October 1, 2018 may sell those products after October 1, 2018, even if the manufacturer has given another wholesaler the exclusive right to distribute its products.

As noted in the preceding section, the current regulatory structure in Oklahoma requires manufacturers of alcoholic beverages to sell their products to every wholesaler that wishes to purchase them. *See* OKLA. CONST. art. 28, § 3; 37 O.S.2011, § 533. When this structure is replaced in full on October 1, 2018, manufacturers will be permitted to select a designated exclusive wholesaler. *See* OKLA. CONST. art 28A, § 2; 37A O.S. § 3-116(A). This has the potential to create a scenario in which a non-designated wholesaler will be in possession of products that were legally obtained prior to October 1, but whose products will be subject to an exclusive distribution agreement with a different wholesaler after October 1. You have asked whether, in this scenario, the non-designated wholesaler may sell the remaining inventory.

We are not aware of any provision of the New Act that would prohibit non-designated wholesalers from distributing a particular manufacturer’s products. The only provision that addresses the relationship between manufacturers and wholesalers is Section 2-107, which defines whom a wholesaler may sell to and buy from, and sets forth several other miscellaneous provisions regarding wholesaler operations. *See* 37A O.S. § 2-107. Section 2-107 allows a wholesaler to sell spirits and wines to retailers, mixed beverage licensees, catering licensees, special event licensees, and hotel beverage licensees, among others. *Id.* § 2-107(4). It also allows a wholesaler to purchase spirits and wines from manufacturers, nonresident sellers, distillers, rectifiers, winemakers and other wholesalers. *Id.* § 2-107(A)(1-3). None of these provisions limit the wholesalers’ ability to sell products in their inventory to qualified purchasers.

When the legislature is silent on an issue, we turn to the maxim *nulla poena sine lege*, which is translated to mean “no penalty without a law.” *Rogers v. Tennessee*, 532 U.S. 451, 468 (2001). It is “one of the most widely held value-judgments in the entire history of human thought.” *Id.* (internal citations omitted). This maxim has been interpreted to mean that everything which is not forbidden is allowed. The Legislature has remained silent on whether a non-designated wholesaler may sell the products of a manufacturer that designates an exclusive wholesaler effective October 1, 2018. This silence cannot act as a prohibition. Because it is not prohibited by statute for a non-designated wholesaler to distribute such products, it is lawful and therefore must be allowed.

It is, therefore, the official Opinion of the Attorney General that:

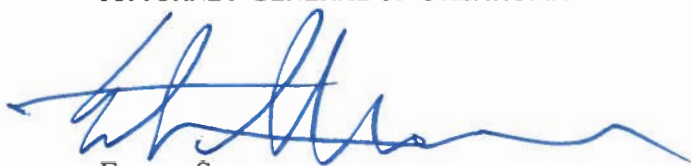
- 1. Under 37A O.S. § 3-111(K) all brewers, including small brewers, are prohibited from receiving money, inducements, or any other thing of value from a beer distributor in exchange for entering into a distribution agreement with that distributor. However, a small brewer that distributes its own products under a self-distribution license may receive “the fair market value of its existing and established distribution business” if it opts to convert from self-distribution to the use of a distributor agreement. *Id.***
- 2. Because 37A O.S. § 3-111(K) does not become operative until October 1, 2018, the Alcoholic Beverage Laws Enforcement Commission does not have the authority before that date to administratively discipline a brewer that attempts to obtain money or another thing of value from a beer distributor in exchange for entering into a distribution agreement with that distributor. *See City of Tulsa v. Pub. Emp. Relations Bd.*, 1990 OK 114, ¶ 14, 845 P.2d 872, 876. However, a distribution agreement “existing on” October 1, 2018, but which is the result of conduct prohibited by 37A O.S. § 3-111(K), would be unlawful even if the prohibited conduct occurred before October 1, 2018. *See* 15 O.S.2011, § 211.**

3. Under OKLA. CONST. art. 28A, § 2 and 37A O.S. § 3 -116(A) a manufacturer may select a single wine and spirits wholesaler to exclusively distribute its brands.

4. A wholesaler that lawfully obtains a manufacturer's products before October 1, 2018 may sell those products after October 1, 2018, even if the manufacturer has designated another wholesaler to exclusively distribute its products pursuant to OKLA. CONST. art. 28A, § 2 and 37A O.S. § 3 -116(A).



MIKE HUNTER
ATTORNEY GENERAL OF OKLAHOMA



ETHAN SHANER
DEPUTY GENERAL COUNSEL

