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ATTORNEY GENERAL OPINION NO. 2018- 3

Debbi Beavers, Director
Alcoholic Beverage Control Division
Kansas Department of Revenue
915 S.W. Harrison St.
Topeka, KS 66625-3512

Re: Intoxicating Liquors and Beverages—Division of Alcoholic Beverage Control—Market Impact Study of Sale of Beer By Persons Licensed as Cereal Malt Beverage Retailers; Oversight By Director and Promulgation of Rules and Regulations

Synopsis: The Division of Alcoholic Beverage Control may promulgate administrative rules and regulations to implement amendments to the Cereal Malt Beverage Act, K.S.A. 2017 Supp. 41-2701 *et seq.* This authority extends to regulating trade practices and below-cost sales of beer containing not more than 6.0 percent alcohol by volume as well as such necessary and appropriate matters as recordkeeping and inspections. The Legislature did not provide for a separate licensing scheme for cereal malt beverage retailers that sell beer containing not more than 6.0 percent alcohol by volume, nor did the Legislature provide new enforcement mechanisms. Cited herein: K.S.A. 2017 Supp. 41-212; 41-1101a; 41-2702; 41-2726; K.S.A. 41-2726; 41-2727.

* * *

Dear Director Beavers:

As Director of the Division of Alcoholic Beverage Control (ABC), you request our opinion on two questions arising from the passage of 2017 Senate Bill 13 (SB 13),¹ which grants “oversight over the sale of beer containing not more than 6% alcohol by volume

¹ L. 2017, Ch. 56.

by persons licensed as cereal malt beverage retailers” to ABC.² You inquire how ABC may lawfully enforce rules and regulations against persons to whom it does not issue licenses, and whether the legislative direction to adopt administrative rules and regulations is legally sustainable.

Broadly speaking, SB 13 will allow persons licensed to sell cereal malt beverage (CMB) to sell beer containing not more than 6.0 percent alcohol by volume;³ in addition, any person with a retailer’s license to sell alcoholic liquor will also be allowed to sell CMB, and the prohibition against selling CMB next to alcoholic liquor is repealed. The provisions of SB 13 will go into effect on April 1, 2019 and the Legislature has directed ABC to promulgate rules and regulations on or before July 1, 2018 to administer the bill. Although the Legislature has granted “oversight” to ABC over the “the sale of beer containing not more than 6% alcohol by volume by persons licensed as cereal malt beverage retailers,” SB 13 does not contain provisions granting ABC explicit licensing authority over CMB retailers,⁴ raising several related questions about the extent of ABC’s authority. Specifically, you ask:

1. Notwithstanding the language contained in [K.S.A. 2017 Supp. 41-212(b)], can ABC actually promulgate administrative rules and regulations governing entities that it does not possess legal regulatory authority over?
2. If ABC can in fact promulgate such regulations, what authority does it have over CMB retailers if a violation is subsequently discovered?
 - a. Regarding ABC’s authority specifically, since the suspension and revocation of CMB licenses is explicitly delegated to cities and counties under K.S.A. 41-2708, does the language contained in [K.S.A. 2017 Supp. 41-212(b)] also provide ABC with the authority to suspend or revoke a license?
 - b. The most common method of discipline against a *liquor* licensee is the imposition of a fine, pursuant to K.S.A. 41-2633a and K.S.A. 41-328. Despite not being the licensing authority for CMB retailers, does the language contained in New Section 3 of SB 13 allow ABC to issue civil or administrative fines to CMB licensees?⁵

Your first question requires us to characterize the nature of the grant of authority to ABC to exercise oversight over the sale of certain beers by CMB retailers. K.S.A. 2017 Supp. 41-212(b) states:

The director shall have oversight over the sale of beer containing not more than 6% alcohol by volume by persons licensed as cereal malt beverage retailers pursuant to K.S.A. 41-2702, and amendments thereto, to ensure

² K.S.A. 2017 Supp. 41-212(b).

³ K.S.A. 2017 Supp. 41-1101a(b).

⁴ As you note in your letter, a non-railway car CMB retailer is licensed by the city or county in which its place of business is located.

⁵ Debbi Beavers, Correspondence, August 4, 2017 (emphasis in original).

that such sales promote an orderly market. For such purpose, the director may adopt such rules and regulations as the director deems necessary and appropriate, including rules and regulations making applicable to cereal malt beverage retailers selling beer containing not more than 6% alcohol by volume such provisions of the existing rules and regulations concerning industry trade practices as are necessary and appropriate. The rules and regulations authorized by this section shall be promulgated by the director on or before July 1, 2018.⁶

We first note ABC's existing regulatory authority over CMB retailers is statutorily limited to: (1) issuing licenses to CMB retailers located within railway cars;⁷ (2) collecting a \$25 fee and affixing a state stamp to licenses issues by a county or city;⁸ (3) authorizing below-cost sales of CMB;⁹ and (4) approving CMB retailers' self-compliance programs involving the use of persons under the legal age for consumption of CMB.¹⁰ The only changes made by the Legislature within these four grants of authority were to include beer containing not more than 6.0 percent alcohol by volume within ABC's direct licensing authority for railway cars and to ABC's below-cost permitting authority for CMB retailers.¹¹

The "oversight" authority over CMB retailers granted by K.S.A. 2017 Supp. 41-212(b) is limited at the outset by the direction to "promote an orderly market." To that end, the Legislature provided the example regulatory category of "trade practices," which we assume without deciding includes such matters as inducement to purchase, storage, advertising, and promotions.¹² Although the Legislature granted ABC the authority to adopt such rules and regulations as may be "necessary and appropriate," the Legislature did not repeal KSA 41-2702(a)—which grants exclusive licensing authority over non-railway car CMB retailers to cities and counties.

We therefore conclude the grant of authority to exercise "oversight over the sale of beer containing not more than 6% alcohol by volume by persons licensed as cereal malt beverage retailers" is a grant of regulatory authority to ABC that may be implemented outside of a typical licensing paradigm. While we cannot develop an exhaustive list of the matters that might fall within the umbra of this authority, it is clear that regulating trade practices and below-cost sales of beer containing not more than 6.0 percent alcohol by volume are covered by the Legislature's grant of authority. Additionally, the grant of authority to promulgate administrative rules and regulations that are "necessary and appropriate" for carrying out the purpose of ensuring an orderly market would allow

⁶ *Id.*

⁷ K.S.A. 2017 Supp. 41-2702(a).

⁸ K.S.A. 2016 Supp. 41-2702(e).

⁹ K.S.A. 41-2726(b).

¹⁰ K.S.A. 41-2727(b)(3).

¹¹ K.S.A. 2017 Supp. 41-2726(b).

¹² See 27 C.F.R. Part 6, adopted by reference in K.A.R. 14-10-17.

ABC to promulgate administrative rules and regulations governing, *inter alia*, recordkeeping and inspection requirements to ensure compliance.¹³

We cannot conclude, however, that the Legislature intended to disturb the existing licensing arrangement whereby a non-railway car CMB retailer is licensed by the city or county in which its place of business is located. Although SB 13 amended K.S.A. 2017 Supp. 41-2702 (applying for a CMB retailer license), 41-2703 (issuing a CMB retailer license) and 41-2708 (disciplinary action against CMB retailers), the Legislature did not grant ABC authority within those statutes to issue additional licenses or to take disciplinary action against CMB retailers licensed by cities or counties. Nor did the Legislature add CMB retailers selling beer containing not more than 6.0 percent alcohol by volume to the provisions of K.S.A. 2017 Supp. 41-2633a (civil fines for violations of the Club and Drinking Establishment Act) or K.S.A. 41-328 (civil fines for violations of the Liquor Control Act). ABC may, however, refer violations of K.S.A. 41-2701 *et seq.* for criminal prosecution¹⁴ to the relevant city or county attorney, or to the governing body of the city or county that issued the license for disciplinary action.

In summary, the Legislature has granted ABC sufficient legal authority to promulgate administrative rules and regulations governing CMB retailers who sell beer containing not more than 6.0 percent alcohol by volume. The ambit of that authority, however, does not extend to establishing a licensing program for CMB retailers licensed by cities and counties, nor does it allow ABC to fine or revoke or suspend the licenses of CMB retailers who violate the Cereal Malt Beverage Act. Instead, ABC must rely on local prosecutors to pursue criminal violations and on the governing bodies of the city and county that issued the license for disciplinary action.

Sincerely,

/s/Derek Schmidt

Derek Schmidt
Kansas Attorney General

/s/Craig Paschag

Craig Paschang
Assistant Attorney General

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¹³ Although we can find no other statute directing a state agency to adopt rules and regulations necessary and appropriate to promote an orderly market, the Kansas Supreme Court has observed that the Legislature may “grant state agencies discretion to fill in details if the legislature establishes reasonable and definite standards to govern the exercise of this authority.” *Vakas v. Kansas Bd. of Healing Arts*, 248 Kan. 589, 594 (1991).

¹⁴ K.S.A. 41-2711 makes it a misdemeanor to violate any portion of the Cereal Malt Beverage Act.