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**ADVISORY OPINION REQUEST 2017-002**

November 16, 2017

*via electronic mail*

Hon. Stephen G. Amato  
201 East Main St., Suite 900  
Lexington, Kentucky 40507

**RE: Souvenir Package Sales and Delivery by Licensed Distillers**

Dear Mr. Amato:

The Department of Alcoholic Beverage Control (“ABC” or “Department”) received your November 3, 2017 correspondence on behalf of the of the Kentucky Distillers' Association (“KDA”) requesting “clarification from the ABC Board regarding recent ABC opinions about the delivery and direct shipment of products by retailers to consumers.” Specifically, KDA requested “clarification as to whether or not the ABC Opinion dated October 26 [2017] and issued to the Kentucky Guild of Brewers is applicable to distillers and distilled products.”

As you acknowledge, on October 26, 2017, the Department issued Advisory Opinion Request (“AOR”) 2017-001 concerning the delivery of products to consumers by retailers and microbreweries. For reference purposes, a copy of that opinion is attached.

Strictly speaking, AOR 2017-001 is not applicable to distillers and souvenir packages because the opinion dealt instead with microbreweries and malt beverages, which are governed in part by different statutory provisions. The Department will, however, interpret your request as asking the same questions on behalf of distillers for souvenir packages as were asked in AOR 2017-001. Restated, those questions are:

1. For a distiller that holds a proper license, is that distiller permitted to deliver souvenir packages directly to consumers like others holding a quota retail package license?
2. If the answer to question number 1 is yes, does delivery include delivery by shipping methods? Specifically, is shipping souvenir packages directly to consumers through use

of a properly licensed commercial carrier that holds the appropriate transporter license also permissible?

The Department interprets both questions as understanding that the sale must be handled directly by the distiller (which holds the appropriate retail license) and that the point of sale must occur at the distiller's licensed premises.

In its 2017 Regular Session, the General Assembly passed House Bill 183 ("HB 183") relating to alcoholic beverage control. In HB 183, the legislature amended or repealed several statutes to treat all types of alcoholic beverages equally. For example, in HB 183, Sections 106 and 109 were harmonized so that Sunday sales of alcoholic beverages were consistent among malt beverages and distilled spirits and wine. *See, e.g.*, KRS 244.290; KRS 244.480. In addition, Section 66 revised KRS 243.355 to allow retailers to hold a storage license for distilled spirits and wine. Previously, only malt beverage storage licenses were available to retailers. *See, e.g.*, KRS 243.212; 243.215. Of importance here, Section 119 repealed KRS 244.350 to accomplish the equalization objective. In informational materials prepared by the ABC, both before and after HB 183 became law, the Department explained that the repeal of KRS 244.350 would allow the delivery of distilled spirits and wine by retailers to consumers so as to be consistent with permitted beer delivery recognized by the Kentucky Supreme Court in *Roppel v. Shearer*, 321 S.W.2d 36 (Ky. 1959).

Accordingly, and in recognition of the legislative intent of KRS 244.350, the Department provided guidance to retailers about delivery of all types of alcoholic beverages packages after HB 183 became law on June 29, 2017. A copy is attached for your ease of reference and is available under the Frequently Asked Questions tab at [www.abc.ky.gov](http://www.abc.ky.gov).

In your November 3, 2017 correspondence, you note that KRS 243.0305 grants certain retail privileges to distillers licensed in a wet territory. Specifically, KRS 243.0305(3) provides that "a distiller may sell **souvenir packages** at retail to distillery visitors of legal drinking age, in quantities not to exceed an aggregate of four and one-half (4-1/2) liters per visitor per day."<sup>1</sup> (Emphasis added). "[S]ouvenir package sales shall be governed by all the statutes and administrative regulations **governing the retail sale of distilled spirits by the package.**" KRS 243.0305(5) (emphasis added).

Prior to its repeal, KRS 244.350 prohibited the sale and delivery of distilled spirits packages by retailers. By operation of KRS 243.0305(5), licensed distillers were also governed by KRS 244.350 and thus prohibited from delivering souvenir packages of distilled spirits that they sold. With the repeal of KRS 244.350, retailers holding quota retail package licenses are now able to deliver packages of distilled spirits that they sell, including a "souvenir package." Because the law now permits retailers to deliver souvenir packages of distilled spirits, the Department opines that a distiller that holds a proper license also is authorized to deliver souvenir packages of distilled spirits that it sells, as would any other retailer authorized by law. *See* KRS 243.0305(5).

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<sup>1</sup> KRS 241.010(59) defines a "souvenir package" to mean "a special **package** of distilled spirits **available from a licensed retailer** that is: (a) Available for retail sale at a licensed Kentucky distillery where the distilled spirits were produced or bottled; or (b) Available for retail sale at a licensed Kentucky distillery but produced or bottled at another of that distiller's licensed distilleries in Kentucky." (emphasis added).

Further, in AOR 2017-001, the Department addressed permissible methods of delivery. As explained in detail therein, the Department interprets Kentucky law to permit a licensee to use a common carrier with a transporter's license to ship and deliver packages of alcoholic beverages to a Kentucky consumer of legal age (in a wet territory) who purchases the alcoholic beverages from the licensed premises over the phone or internet with a credit card or debit card. This same analysis applies whether that retailer is a package store, microbrewer, or distiller.

Kentucky has no jurisdiction outside its geographic borders. Any privilege a licensee seeks regarding its ability to ship or deliver alcoholic beverages packages to out-of-state consumers should be directed to the governing regulatory body in the respective state it seeks to operate.

Please feel free to contact us with any additional questions.

Sincerely,

Department of Alcoholic Beverage Control



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**ADVISORY OPINION REQUEST 2017-001**

October 26, 2017

*via electronic mail*

Ms. Stephanie Stumbo  
Goss Samford  
2365 Harrodsburg Road  
Suite B-325  
Lexington, Kentucky 40504

**RE: Shipping and/or Delivery - Microbrewers**

Dear Ms. Stumbo:

Thank you for your August 22, 2017 correspondence on behalf of the Kentucky Guild of Brewers requesting guidance on the scope of a microbrewer's ability to directly deliver and/or ship its product to retail consumers:

“Commissioner Trout and Members of the Board, I am emailing on behalf of our client, the Kentucky Guild of Brewers. The Guild’s membership is specifically requesting clarification and opinion by the Board/Department in regards to the delivery of malt beverages. Below please find the Guild’s questions: First, as you are aware microbreweries hold regular retail licenses. Our question is for microbrewers holding the proper non quota malt beverage package retail licenses- are we permitted to deliver malt beverages (beer) directly to consumers like all other retailers holding the same retail license? Second question is, if yes, does delivery include delivery by shipping methods? Specifically, is shipping beer directly to our end consumer through use of a proper license commercial carrier holding the appropriate transporter license like FedEx, UPS other common carrier also permissible? We ask the previous questions understanding that the sale must be handled directly by us (the licensed microbrewery holding the appropriate retail license) and that the point of sale must occur at our licensed brewery premises whether a computer sale to consumer or the consumer is in person on our premises. Your consideration of this opinion request is greatly appreciated. We look forward to receiving the Board’s response. Thank you.”

In response, the Kentucky Department of Alcoholic Beverage Control (“ABC”) offers the following opinion. To sell malt beverages by the package, a microbrewery must hold a nonquota retail malt beverage package license under KRS 243.280. See KRS 243.157(3)(c)1; KRS 243.020(1). In *Roppel v. Shearer*, 321 S.W.2d 36 (Ky. 1959), the Kentucky Supreme Court recognized that licensees holding retail malt beverage licenses under KRS 243.280 had the right to deliver malt beverages to consumers, if purchased by telephone or mail order “from the licensed premises.” Notably, *Roppel* was decided in 1959 – a time when telephone and mail were the only available methods to consumers for placing orders. Technology now provides a more convenient way for consumers to place sales orders directly to businesses: the internet. Internet orders are also permissible under the *Roppel* analysis as long as orders are taken at the retail premises. The Department’s recent interpretation requiring credit card or debit card payment at time of order further ensures that the sale occurs at the licensed premises as *Roppel* requires.

Accordingly, if a microbrewer holds a nonquota retail malt beverage package license, it may deliver malt beverages purchased from its licensed premises to consumers.

The next question raised is how the microbrewer may deliver the malt beverage package to the consumer. In recent guidance, the Department interpreted KRS 243.200(1) to allow an independent contractor company to obtain a transporter’s license and offer delivery services to multiple local retailers for a fee under service contracts. See Attachment 2. In reaching this conclusion, the Department relied on the language of KRS 243.200(1) which provides that the license holder may “transport alcoholic beverages to or from the licensed premises of **any licensee** under this chapter if both the consignor and consignee in each case are authorized by the law of the states of **their residence** to sell, purchase, ship, or **receive** the alcoholic beverages.” Since consumers are allowed to receive alcoholic beverages at their residence, a local entity holding a transporter’s license can deliver alcoholic beverages on behalf of a retailer.

Some businesses often fulfill orders by use of common carriers like United Parcel Service, Federal Express, or the United States Postal Service. Although common carriers generally are thought to be in the “shipping” business, KRS Chapters 241-244 do not define the terms “shipping” and “delivery,” so the Department must use their common, ordinary or popular meaning.

The common and ordinary meanings of “delivery” and “shipping” are essentially synonymous when a third party independent contractor (including common carriers) performs those services for a licensed retailer. A licensed common carrier performs the exact same service as a local delivery company: delivery of alcoholic beverages to a consumer on behalf of a retailer. Furthermore, a common carrier is the primary business type authorized to hold a transporter’s license that evidences a legislative intent that shipping companies would deliver alcoholic beverages on behalf of other licensees. See KRS 243.200(1).

For these reasons, the Department interprets Kentucky law to permit a licensee holding a nonquota retail malt beverage license to use a common carrier with a transporter’s license to ship and deliver malt beverages to a Kentucky consumer (in wet territory) who purchases malt beverages over the phone or internet with a credit card or debit card. Kentucky has no jurisdiction outside its

geographic borders. Any privilege a licensee seeks regarding its ability to ship or deliver malt beverages packages to out-of-state consumers should be directed to the governing regulatory body in the respective state it seeks to operate.

The Department appreciates the contribution microbrewers make to the economic success and growth of a new vibrant industry in Kentucky. Please feel free to contact us with any additional questions.

Sincerely,

Department of Alcoholic Beverage Control

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Christine Trout  
Commissioner

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Trina Summers  
Distilled Spirits Administrator

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Carol Beth Martin  
Malt Beverage Administrator