AMERICAN BEVERAGE LICENSEES
AMERICA'S BEER, WINE AND SPIRITS RETAILERS

June 22, 2023

The Honorable Dan Deasy
Chairman
Liquor Control Committee
House of Representatives
Commonwealth of Pennsylvania
304 Irvis Office Building
Harrisburg, PA 17120-2027

Re: Public Hearing on HB 41 (Mustello)

Dear Chairman Deasy:

American Beverage Licensees ("ABL") is the preeminent national trade association for beverage alcohol retailers. ABL represents nearly 12,000 independent on-premise (bar, tavern, restaurant) and off-premise (package store) beer, wine and spirits retailers in twenty-eight states. Direct retail beverage alcohol sales in the United States generate more than a 2.03 million well-paying jobs and contribute billions in federal, state, and local taxes.

ABL has long supported states' rights to determine alcohol policy as enshrined by the 21st Amendment to the U.S. Constitution. As a result of local control, state alcohol laws reflect the culture and established business practices of each state. Operating on this Constitutional foundation has allowed for the creation of 50 unique and vibrant alcohol marketplaces that meet local consumers' needs with products and service; function to collect taxes that are used for government services; and incorporate accountability to make sure that public safety remains paramount.

This letter is to serve as a comment for the record on House Bill 41, which would amend the Pennsylvania Liquor Code to allow the delivery of alcohol to consumers by third-party companies.

In light of ABL's support of states' rights when setting alcohol policy, our comments should be interpreted as educational guidance, not a policy position. We lend our voice to this conversation to make sure that the perspective and experiences of independent beverage alcohol retailers are heard and can be considered appropriately by the policymakers of the Commonwealth of Pennsylvania.

It is also our understanding that a mechanism already exists for Pennsylvania beverage licensees to deliver alcohol. The Pennsylvania Liquor Control Board ("PLCB") offers a "Transporter-for Hire" license, which "allows the licensee to transport various types of alcohol to points within Pennsylvania." Considering this, we can't help but point out that it would make sense for legislators to give due weight to the fact that a solution for packaged alcohol delivery already exists in the Commonwealth and addresses the needs of consumers seeking alcohol delivery.

We would also urge Pennsylvania legislators to properly weigh locally owned retail business' view on this legislation as they are closest to Pennsylvania consumers and have a vested interest in public safety in their communities as it relates to alcohol access and following the law.

Proliferation & Implications of Unlicensed Third-Parties in the Alcohol Ecosystem

It is appropriate to first consider events that are taking place nationally, in multiple states and within the beverage alcohol industry, to put the proposed policy in context. The last 10 years have witnessed a proliferation of third-party companies seeking to enrich their investors by inserting themselves into traditional three-tier beverage alcohol systems. These systems, which differ by degrees in each state, generally include a supplier→wholesaler→retailer chain of accountability wherein legal alcohol is reliably produced, taxed, distributed and sold to consumers. Increased competition in the third-party delivery space and shareholder demands have led these companies to pursue growth by pushing into new channels, as evidenced by the introduction of HB 41.

Whether their entry into state beverage alcohol systems is a net positive or negative for retail alcohol businesses and consumers can be debated, but it is true that these new marketplace entrants, operating as unlicensed entities in an otherwise federal and state licensed beverage alcohol ecosystem, have benefitted from not being subject to the same regulatory scrutiny as licensed beverage retailers.

Some retailers who have contracted with these e-commerce or delivery tech platforms have expressed frustration that licensees remain responsible for the actions of third-party delivery agents. In some states, third-party companies have avoided assuming liability or accountability that would routinely follow a licensed alcohol business and its employees, while reaping the benefits of access to retail business information and consumer data. We also understand that some technology platforms that facilitate e-commerce for alcohol retailers (but are not necessarily part of "last mile" delivery) may now be pressuring retail licensees to support or engage with third-party delivery.

As third-party delivery companies exhaust channel growth opportunities in their role as fulfillment and logistics providers, it is conceivable that they will subsequently use the troves of consumer data they have collected to become retailers themselves – and thereby competitors – with the very business partners that they've pledged to benefit. Given alcohol market disrupters' disregard or contempt for bedrock alcohol regulatory and licensing structures, this is not a far-fetched assumption. In fact, savvy grocers may already be wrestling with this very question given their deep relationships with third-party delivery companies and the erosion of relationships with their customers.

Competition Concerns Remain with Big Tech Firms

Competition issues in the tech world – which is where many of these third-party delivery companies originate[1] – remain a concern for small beverage businesses that are considering adopting technology to compete not just with similarly situated beverage businesses, but also with large, national "big box" chains that have been pushing into state alcohol marketplaces. This

[1] https://unstop.com/blog/instacarts-apoorva-mehta-steps-down-ex-facebook-executive-to-succeed-as-the-ceo

environment can leave local businesses susceptible to the allure of short-term solutions that have long-term negative consequences such as being pressured into entering exclusive agreements with delivery providers that would hold a retailer captive to specific platforms. Any public policy considered should address these types of arrangements.[2]

Competition in the alcohol industry is also being scrutinized at the federal level. The Federal Trade Commission ("FTC") is looking at the alcohol industry[3], and the U.S. Department of the Treasury, through the Alcohol and Tobacco Tax and Trade Bureau ("TTB") and at the behest of the Biden Administration, is engaging in "Consideration of Updates to Trade Practice Regulations".[4] This review of federal trade practices includes "digital marketplaces"[5] and "third party companies"[6] that engage in the beverage alcohol market, including through advertising.

Advertising is a new area of interest for third-party delivery companies, as is pointed out in this article from *Modern Retail* titled "As competition heats up, Instacart is on the move to diversify beyond delivery"[7]:

> *The company recently introduced Instacart Platform, a suite of services and technology for retailers, which includes data tools, e-commerce development and in-store technology like smart carts. It follows a series of updates; Instacart moved deeper into advertising in January when it introduced new marketing capabilities for other brands, such as CPG brand pages that act as digital storefronts.*

A thorough review of the Commonwealth's trade practice laws for alcohol and how new, unlicensed actors fit into the regulatory regime, would be in order as this proposal is considered.

As a matter of due diligence, legislators should also understand the experiences of restaurants that have contracted with third-party delivery companies, including the calculation of fees and the opacity of the fee process. As recently noted in *The Hill* article "Food delivery fees add up. Who keeps the money from all those surcharges?"[8]:

> *In some places, the apps levy a "regulatory response fee" to offset the effects of local regulations. For example, after an outcry from struggling restaurants during the pandemic, dozens of cities passed limits on the amount apps could charge restaurants to deliver the food. Now, in some cases, the apps are tacking on an extra fee for users in response. On DoorDash, these fees are between $0.10 to $3.40, depending on the region.*

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[2] https://www.thestatehousefile.com/politics/bill-protecting-businesses-from-food-delivery-services-passes-senate-committee/article_f7516574-c42e-11ed-83e2-3f94b8129cd0.html
[3] https://www.ftc.gov/industry/alcohol
[4] https://www.federalregister.gov/documents/2022/11/09/2022-24435/consideration-of-updates-to-trade-practice-regulations
[5] https://www.federalregister.gov/d/2022-24435/p-21
[6] https://www.federalregister.gov/d/2022-24435/p-26
[7] https://www.modernretail.co/retailers/as-competition-heats-up-instacart-is-on-the-move-to-diversify-beyond-delivery/
[8] https://thehill.com/homenews/nexstar_media_wire/4020677-food-delivery-fees-add-up-who-keeps-the-money-from-all-those-surcharges/

The price of the food you order may also have hidden fees baked in. Grubhub's terms of service, for example, say the company "reserves the right to consolidate or otherwise incorporate fees and/or surcharges into the prices listed for Merchant food and beverage items."

Restaurants may set menu prices higher on delivery apps to help cover the cost of doing business on the platforms. In addition to fees that users pay, the delivery apps take a cut from the restaurants' sales.

Beverage retailers, who have dealt with the questionable and expensive swipe fees imposed on them by big banks and credit card companies, are by nature wary of additional or hidden fees from service providers. Policymakers should consider the importance of balancing parties' interests before allowing third-party delivery companies to implement service fees or take a cut from a beverage retailer's sales.

Access, Enforcement and Liability

Consumer access is an important market component for those who sell or collect tax on beverage alcohol. However, so too is the even enforcement of laws and regulations for alcohol commerce that encourage public safety. Many states have experienced internal and external forces pushing for more alcohol access via increased hours of sales; sales at non-retail outlets or expansion of retail channels in which alcohol may be sold. What has failed to accompany these campaigns is a commensurate increase in alcohol regulation enforcement. Agencies already stretched thin and with limited resources are being asked to maintain an effectively regulated alcohol marketplace with the addition of hundreds or thousands of new points of sale or transaction but no additional enforcement resources.

As beverage licensees know, local control and accountability are hallmarks of successful alcohol marketplaces and are paramount to maintaining them. A level playing field for all licensed businesses incentivizes good behavior, and the application of equal enforcement of laws and regulations deters bad actors from trying to get an edge on their competitors by cutting corners.

When considering adding new layers and actors to the chain of custody for alcohol, it is essential that the Commonwealth balance consumer access with public safety, and other interests the state may have in alcohol commerce including tax collection and the integrity of the licensing system.

Enforcement of state alcohol laws naturally leads to a conversation about liability, and what entity is liable for a delivery made by a third-party company's employee or contractor. Some states that allow third-party delivery of alcohol have worked closely with retailers and legislators to make sure liability concerns are addressed in a way that includes liability shifting from the licensee to the third-party delivery company once the product has changed hands on a licensed premises. The third-party delivery company is then responsible for the products and making sure they are not provided to an intoxicated person, minor, etc.

Responsible alcohol vendor training is also an important component in states' alcohol commerce systems and for alcohol retailers' businesses. Beverage licensees take training seriously because they don't want to make a sale to a minor or someone who is intoxicated; and because they risk losing their license – and by default their business – should they fail to uphold the responsibility that comes with their license. It would be fair to expect that EVERY delivery agent from third party companies should undergo the same training and be held to the same account as beverage licensees' and their employees who deliver alcohol and fail to comply with state laws.

We have heard from retailers in some states where third party delivery agents do not always check IDs because there is no expectation of enforcement and/or they bear no liability for delivering alcohol to minors. In at least one state that does not have delivery agent reporting requirements, the state alcohol regulatory authority is pursuing licensees for delivery violations because they can't track down the third-party company drivers. This scenario is harmful to otherwise law-abiding businesses, and steps should be taken to mitigate this from occurring in other states.

Is Pennsylvania Out-of-Step with Other States?

Alcohol policy change is by nature deliberative and thoughtful under normal circumstances. It is worth taking time to thoroughly assess the true need for changing a law that has seemingly met the needs of consumers while also providing for accountability from licensed alcohol businesses in the name of public safety.

It is true that some states have exercised their rights under the 21st Amendment and adopted third-party delivery provisions for packaged alcohol products. Those who are uniformly in favor of third-party alcohol delivery in every state may suggest that Pennsylvania would be out-of-step with other states should it not allow third-party delivery of alcohol. But it is important to recognize that other states have rejected recent attempts to adopt third-party delivery provisions. Some examples of failed efforts to adopt third-party delivery of alcohol include:

- **Arkansas –** Earlier this year, the state legislature rejected HB 487 which would have allowed third-party delivery of alcohol. The legislature also rejected SB 284, which would have repealed the state's law allowing retail liquor permit holders to deliver alcohol directly to consumers.

- **Colorado –** At the ballot box in November 2022, voters in Colorado blocked third-party alcohol delivery sales by voting down Proposition 126. Had it passed, the proposal would have allowed licensed stores and businesses that sell alcohol to deliver it through third-party companies. Current Colorado laws do allow deliveries, but mandate stores use their own employees for the service.

- **Indiana –** This spring, Indiana rejected Amendment #1 to HB 1217 which would have allowed third-party delivery of alcohol. Currently, only package liquor stores can deliver wine.

- **Kansas –** The legislature did not pass SB 253, which would have allowed third-party delivery of alcohol. Concerns were raised about public safety being undermined by unlicensed entities selling or delivering alcohol.

- **Maryland –** The Maryland legislature refused to pass HB 787/SB 815 this spring, which would have allowed retailers to use third-party delivery services. Concerns were expressed about the lack of underage sales enforcement on third party deliverers; and deliveries going beyond county lines, which would run counter to Maryland's county-by-county regulatory structure.

- **Oklahoma –** A bill, SB 2090, to allow third-party alcohol delivery was unsuccessful for the third year in a row in part because the legislation calls for liquor liability to remain with retail licensee after custody of the product has been taken by the third-party delivery agent.

Consensus & Systemic Integrity

Changes to state alcohol policies should be well-considered and legislators should seek to find consensus support amongst those who operate in the beverage alcohol system in each state. Taking a critical eye when evaluating proposed changes is proper and a responsible course of action, especially when changes could severely disrupt or unintentionally change state alcohol markets.

Proposals to adopt third-party delivery of alcohol deserve strong scrutiny. As any good legislator (or parent) knows, you can't put toothpaste back into the tube. Getting policy decisions right the first time – which can include making no policy changes at all – is critically important and perhaps no more so than with beverage alcohol regulation.

Alcohol regulation is a closed loop system in which every licensed party has something to lose, and a regulatory apparatus exists to provide oversight. Under this system, innovation and creation have found a home to the benefit of consumers, businesses, and the state. When the loop is opened to actors with nothing to lose, the risk of upsetting the balance of access and public safety increases. For other commodities and consumer package goods that are not age-restricted or dangerous if misused, that may be an acceptable level of risk. But for alcohol, the risk is much greater.

We appreciate the opportunity to share a national perspective on this issue and wish you the best as you work in the best interest of the people of the Commonwealth of Pennsylvania.

Sincerely,

John D. Bodnovich

John D. Bodnovich
Executive Director
American Beverage Licensees