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Eddie J. Jenkins
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NOTICE
TO ALL LOCAL LICENSING AUTHORITIES
AND ALL LICENSEES UNDER M.G.L. c. 138, § 12

COMPLIANCE ISSUES DURING THIS HOLIDAY SEASON

The Alcoholic Beverages Control Commission (“the Commission”) has recently observed, while monitoring the manner in which certain holders of § 12 licenses conduct business under their license, that many § 12 licensees persist in engaging in activities that violate the Liquor Control Act and Commission Regulations. For example, some licensees continue to offer an “open bar” to customers for a fixed price or offering discounted prices for drinks during a limited time period during the calendar week. Both of these activities violate Commission regulations and will result in a license being modified, suspended, revoked or cancelled.

To advance the Commission’s consistent out-reach to assist you in your efforts to control the licensed premises and the operation of the business, to prevent violation of any of the provisions of the Liquor Control Act and Commission regulations, to help conduct the licensed business in a proper and orderly manner, and to avoid compliance issues, the Commission would remind you that the Commission has prohibited certain practices by licensees under G.L. c. 138, §§ 12 and 14. These prohibited practices are specified in 204 C.M.R. 4.00, *et seq.*, (commonly referred to as the “Happy Hour regulation”) and are available on the Commission’s website, www.mass.gov/abcc.

As a reminder, this “Happy Hour” regulation prohibits any licensee or employee or agent of a licensee from engaging in or permitting any of 8 activities. No licensee or employee or agent of a licensee may:

1. offer or deliver any free drinks to any person or group of persons;
2. deliver more than two drinks to one person at one time;
3. sell, offer to sell or deliver to any person or group of persons any drinks at a price less than the price regularly charged for such drinks during the same calendar week, except at private functions not open to the public;
4. sell, offer to sell or deliver to any person an unlimited number of drinks during any set period of time for a fixed price, except at private functions not open to the public;
5. sell, offer to sell or deliver drinks to any person or group of persons on any one day at prices less than those charged the general public on that day, except at private functions not open to the public;
6. sell, offer to sell or deliver malt beverages or mixed drinks by the pitcher except to two or more persons at any one time;

7. increase the volume of alcoholic beverages contained in a drink without increasing proportionately the price regularly charged for such drink during the same calendar week;
8. encourage or permit, on the licensed premises, any game or contest which involves drinking or the awarding of drinks as prizes.

Because of this regulation, licensees may not be legally offering an “open bar” to customers for a fixed price or offering discounted prices for drinks during a limited time period. Any licensee who engages in this practice will be investigated and prosecuted before the Commission by its investigators. Further, no licensee shall advertise or promote in any way, whether within or without the licensed premises, any of the practices prohibited under 204 CMR 4.03. Any licensee who advertises these illegal practices will be also investigated and prosecuted.

In May 2004, the Commission issued a series of 4 decisions that specified what a § 12 license holder must do to persuade the Commission that an event was a “private function” within the meaning of 204 C.M.R. §§ 4.00, *et seq.* In these 4 decisions the Commission stated that “evidence must be presented to persuade and prove that the licensee:

- (1) identified an individual or group as the host of any Private Function held in the licensed premises;
- (2) restricted admission to the Private Function to particular persons or a group based on specific, *bona fide* invitations issued by the individual or group identified as the host of the Private Function;
- (3) did not charge, directly or indirectly, any individual invited to attend the Private Function by the identified host a fixed price for an unlimited number of drinks during any set period of time at anytime and did not receive directly or indirectly any payment from any individual invited by the identified host to attend the Private Function;
- (4) did charge for and accept payment from only the individual or group identified as the host of the Private Function;
- (5) did not advertise the availability of the Private Function to the general public (but may have at the request of the host of the Private Function, invited to attend the Private Function only the particular persons or groups selected by the host of the Private Function to be invited to attend and to whom admission is restricted;) and,
- (6) did create written records of the particular persons or groups to whom admission to the Private Function was granted that included within the records the name, address and contact number(s) for the individual or group identified as the host of the Private Function and were available for inspection by the licensing authorities and their agents.

The Commission reads its regulation to include these elements of proof for an activity to be considered a Private Function.” *In re: Bedford Dining, Inc. dba White Horse Tavern*, (ABCC Decision dated May 24, 2004); *In re: The Boston Leco Corporation dba Matrix*, (ABCC Decision dated May 24, 2004); *In re: Boylston Entertainment, Inc. dba The Big Easy*, (ABCC Decision dated May 24, 2004); *In re: K.M.F. Hospitality, Inc. dba Jose McIntyre’s*, (ABCC Decision dated May 24, 2004).

CAUTION: License holders should take caution that permitting a third party to sell tickets or other methods of admission to the licensed premises, where the price of admission includes any alcoholic beverages (even when the number of alcoholic beverages is limited to

comply with the “Happy Hour regulation”), results in the license holder transferring the privilege of its license, or transferring a direct or indirect beneficial interest in the license, to the third party. Any such transfer requires the prior approval from both the local licensing authority and the Alcoholic Beverages Control Commission. Any licensee who transfers the privilege of its license, or transfers a direct or indirect beneficial interest in the license, to a third party without the prior approval of the local board and the ABCC will be investigated and prosecuted.

Licensees should be vigilant during the holiday season to avoid violations of G.L. c.138, § 69 and ensure that no alcoholic beverage is sold or delivered on any licensed premises to an intoxicated person. Care should also be taken to avoid violations of G.L. c.138, § 34 by ensuring not only that no one makes “a sale or delivery of any alcoholic beverage or alcohol to any person under 21 years of age, either for his own use or for the use of his parent or any other person” but also that no one furnishes, and knowingly or intentionally supplies, gives, or provides to or allows a person under 21 years of age to possess alcoholic beverages on premises or property owned or controlled by a license holder.

As the festive holiday season is upon us, the Commission extends to you all the sincere wishes of all the members and employees the Commission. We are sure that each of you work daily to ensure that all operations, particularly those holiday celebrations hosted within licensed premises, are structured, advertised and actually operated in compliance with all laws of the Commonwealth. Through our efforts together, we can be sure that each license serves the public need and is operated only in such a manner so as to protect the common good. With this mutual success, our entire holiday season will sure to be bright and safe.

With grateful appreciation and many thanks for your attention, assistance and co-operation in these efforts, together we extend our wish for a Happy New Year.

Dated at Boston, Massachusetts this 3rd day of December 2008.

ALCOHOLIC BEVERAGES CONTROL COMMISSION

A handwritten signature in black ink, appearing to read "Eddie J. Jenkins". The signature is stylized with a large initial "E" and a cursive "J".

Eddie J. Jenkins
Chairman