

Uniform Alcohol Direct-Shipping Compliance Act

drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
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By

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

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Uniform Alcohol Direct-Shipping Compliance Act

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Uniform Alcohol Direct-Shipping Compliance Act

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Uniform Alcohol Direct-Shipping Compliance Act

Prefatory Note

Alcoholic beverages enjoy a unique constitutional status, and states have broad power to regulate the alcohol trade. Section 2 of the 21st Amendment empowers states to regulate the “transportation or importation” into the state of intoxicating liquor “for delivery or use therein.” The 21st Amendment grants the states “virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.” *Granholm v. Heald*, 544 U.S. 460, 488-89 (2005) (quoting *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980)).

In preparing this act, the National Conference of Commissioners on Uniform State Laws (Conference) recognizes that the policy-makers in each state are best suited to determine whether alcoholic beverages should be sold in the state and, if so, under what circumstances or with what restrictions the distribution and sale of alcoholic beverages should occur. The Conference is a state-supported organization comprised of representatives from each state who are appointed by state governments. The Conference was founded on principles of federalism and state autonomy.

At the time this act was prepared, approximately 48 states plus the District of Columbia had chosen to allow some form of direct-to-consumer (DTC) wine shipping by wineries. Some of these states also allow DTC shipping by retailers and by producers of beer and distilled spirits. Most of these states require licensing of DTC shippers. The purpose of this act is not to require states to allow DTC shipping of alcoholic beverages or to establish requirements or standards for DTC shipments, but rather to assist states with better mechanisms to stop the unlawful DTC shipments that state policy-makers have chosen not to allow. Unauthorized DTC shipments are often interstate shipments, and the act promotes uniformity and cooperation among states seeking more effective cross-border enforcement of their existing DTC shipping laws.

This act enhances each state’s capability to detect and stop unlawful DTC shipments of alcoholic beverages to the state’s residents. The act incorporates the state’s existing law as to the industry participants and types of alcoholic beverages for which DTC shipping is allowed and does *not* create any new or additional authorization to ship alcoholic beverages directly to a consumer. The act provides state regulators with new tools to distinguish between DTC shipments that originate from shippers licensed under the state’s existing law and DTC shipments that do not, and aids state regulators in enforcing their existing laws governing DTC shipments of any type of alcoholic beverage.

Uniform Alcohol Direct-Shipping Compliance Act

Section 1. Title

This [act] may be cited as the Uniform Alcohol Direct-Shipping Compliance Act.

Section 2. Definitions

In this [act]:

(1) “Alcoholic beverages” has the meaning in [cite to state law defining alcoholic beverages].

(2) “Carrier” means a person that:

(A) holds itself out to the general public as engaged in the business of transporting goods for a fee; and

(B) is engaged in the business of transporting and delivering alcoholic beverages directly to consumers.

(3) [“Commission”] means the [state alcoholic beverage commission].

(4) “Consignor” means a person that provides alcoholic beverages to a carrier for shipment.

(5) “Consumer” means an individual who orders, or for whom is ordered, covered alcoholic beverages to be shipped to the individual in this state. The term does not include an individual who [:

(A)] holds, or acts on behalf of a person that holds, an alcoholic-beverage [license] [permit] authorizing the receipt of shipments of alcoholic beverages for resale or production [; or

(B) orders, or for whom is ordered, alcoholic beverages sold by a retailer [licensed] [permitted] in this state for delivery not later than [24] hours after the order and not

more than [50] miles from the retailer's [licensed] [permitted] premises].

(6) "Covered alcoholic beverages" means [list types of alcoholic beverages for which the state authorizes direct-to-consumer shipments].

(7) "Direct-shipper license" means a [license] [permit] issued by the [commission] authorizing the sale and shipment of covered alcoholic beverages directly to a consumer.

(8) "Electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(9) "Fulfillment provider" means a person that acts on behalf of a licensed direct shipper to ship covered alcoholic beverages to a consumer and arranges for transport of covered alcoholic beverages by a carrier to the consumer.

(10) "Licensed direct shipper" means a person that holds a direct-shipper license.

(11) "Person" means an individual, estate, business or nonprofit entity, government or governmental subdivision, agency, or instrumentality, or other legal entity. The term includes a protected series, however denominated, of an entity if the protected series is established under law that limits, or limits if conditions specified under the law are satisfied, the ability of a creditor of the entity or of any other protected series of the entity to satisfy a claim from assets of the protected series.

(12) "Record" means information:

(A) inscribed on a tangible medium; or

(B) stored in an electronic or other medium and retrievable in perceivable form.

(13) "Registered fulfillment provider" means a fulfillment provider registered

under Section 3.

(14) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any other territory or possession subject to the jurisdiction of the United States.

Legislative Note: *In paragraph (3), a state should replace the term “commission” and bracketed agency description with the agency reference in the state.*

In paragraph (5), a state should substitute “person” or “person that” for “individual” or “individual who” and substitute “for which” for “for whom” in each instance in which the term is used if the state allows shipment of covered alcoholic beverages to an entity without naming a specific individual as the intended recipient of the shipment.

The bracketed text in paragraphs (5)(A) and (7) allows a state to adjust these paragraphs to reflect whether the authorization is in the form of a license or permit. If appropriate, the state also may insert another form of authorization, such as registration. The state may prefer to substitute cross references to state law authorizing direct shipping to a consumer.

The bracketed text in paragraph (5)(B) should be included in a state that allows local delivery by or through a licensed retailer of alcoholic beverages supplied by an in-state wholesaler following an order received by means other than an in-person communication on the licensed premises. The bracketed text allows the state to tailor the exclusion from the definition of “consumer” to fit the specific authorization granted to the licensed retailer under state law.

In paragraph (6), depending on the types of alcoholic beverages that may be shipped, the state also may need to add the state’s definitions of those alcoholic beverages.

Comment

States take a variety of approaches to direct-to-consumer shipping. Approximately 48 states plus the District of Columbia allow wineries to ship wine directly to consumers, although there are significant limitations in some states. About 14 states allow retailers to ship directly to consumers. Some states allow producers and retailers to ship any type of alcoholic beverage (wine, beer, or distilled spirits) directly to consumers. Almost all of these states require licensing to ship directly to the state’s consumers. The enacting state’s approach to enforcement will depend in part on what types of shipments are considered lawful, so the act is drafted to recognize this variation in both the types of direct shipping licenses states issue and the types of alcoholic beverages that may be lawfully shipped to consumers. The act’s definition of “covered alcoholic beverages” identifies the types of alcoholic beverages for which the state authorizes direct-to-consumer shipments. The act’s definitions of “licensed direct shipper” and “direct-shipper license” are also intended to fit within the enacting state’s existing framework. The term “person” in the definition of “licensed direct shipper” might be limited to a winery in some states, or also include a retailer or other producers in other states, depending on whether the state

authorizes only direct-to-consumer shipping of wine by wineries or authorizes other direct-to-consumer shipping as well.

The term “consumer” is used repeatedly throughout the act. It is worth emphasizing that a consumer is an individual located in the state of enactment. The consumer is the consignee of the shipment, the addressee or intended recipient of the package containing alcoholic beverages. The consumer will usually be the individual who purchases the product and to whom it is shipped. However, if the product is ordered by someone as a gift for another, the consumer will be the intended recipient of the gift rather than the purchaser. The act recognizes that, as with other packages delivered by a carrier, many states allow the package containing alcoholic beverages to be received and signed for by another of-age person, such as a spouse at the consumer’s residence or a receptionist at the consumer’s place of business. Under the act, the consumer is the addressee or *intended* recipient of the package even if the *actual* recipient of the package is a third-party who signs the carrier’s delivery slip on behalf of the consumer. The act identifies a “consumer” as an “individual” (i.e., human being) rather than a “person” (i.e., human being or entity) because of state age-verification requirements. An individual may order alcoholic beverages on behalf of an entity, but the requirement in most if not all states that an alcoholic beverage may only be sold to or received by someone (typically referred to as either an individual, a person, or a resident) who is at least 21 years of age necessarily means that the legally responsible party must be an individual. The act does not preclude an individual from ordering alcoholic beverages for an entity’s use at a reception or other event if doing so complies with the enacting state’s existing law. If an enacting state allows or might allow direct-to-consumer shipments addressed to persons who are not individuals, the state may change the term “individual” in the definition of “consumer” (paragraph (5)(intro.)) to “person” (defined in paragraph (11)) to more comprehensively identify the intended recipient deemed the “consumer” under the act.

Most states restrict direct-to-consumer shipping to shipments for the recipient’s personal use, and the act clarifies that a consumer does not include, for example, a person who receives the shipment as an employee of a retailer or rectifier or otherwise as part of the three-tier distribution system. In theory, a state’s “three-tier system” requires alcoholic beverages to be distributed through a vertical chain in which the producer sells to an independent, in-state wholesaler, this wholesaler sells to an independent, in-state retailer, and only the retailer may then sell to the consumer. Almost every state has adopted a form of the three-tier system, but with various exceptions to it. The term “consumer” is also defined to exclude a person who orders alcoholic beverages for local delivery, as opposed to shipment. Many states have now authorized retailers to make online sales followed by local delivery, both directly and through third-party applications and services, and the act is not intended to apply to these transactions that are made locally through the three-tier system and typically involve contemporaneous purchase and delivery.

The term “fulfillment provider” means, in effect, the consignor or sender of a shipment if the shipment is arranged with the carrier by a third-party and not by the seller (the licensed direct shipper). Usually fulfillment providers warehouse, pack, and ship the product for the licensed direct shipper, but providing storage and packaging services is not a requirement for being considered a fulfillment provider subject to the provisions of the act.

Regarding the term “carrier,” the definition is in part similar to the definition of “common carrier” under 15 U.S.C. Section 375 relating to cigarette taxes and the definition under South Dakota statute section 35-12B-1. The definition of “carrier” is intended to be much narrower than “common carrier,” focusing only on common carriers that deliver direct-to-consumer shipments of alcoholic beverages. The definition does not apply to motor carriers, water carriers, and railroads that transport alcoholic beverages into and within the state as part of the three-tier system (that is, to other businesses in the alcoholic beverage industry). The act allows, but does not require, the carrier to have the consignor identify whether the package containing alcohol is being sent to a licensee (that is, distributed through the three-tier system) or to a consumer. Only consumer shipments must be reported under Section 5 of the act. A carrier engaged in the business of transporting and delivering to consumers only wine and no other alcoholic beverages meets the standard under paragraph (2) (B) because wine is an alcoholic beverage.

Regarding the term “Commission,” the name of the department or agency responsible for administering the state’s alcoholic beverage laws varies from state to state. Common agency names include the Alcoholic Beverage Commission, Department of Revenue, Liquor Control Commission, and others. The act uses the term “Commission” as the default because it is the most common agency name.

The definition of “state” in paragraph (14) does not include a federally recognized Indian tribe as a separate jurisdiction. In *Rice v. Rehner*, 463 U.S. 713 (1983), the Supreme Court held that tribes and states have concurrent authority to regulate liquor transactions, including imposing licensing requirements, on tribal lands, and such transactions must be in conformity with both state law and tribal ordinances. Because a tribe is not exempt from a state’s alcoholic beverage law, there is not a compelling reason to treat tribal lands as an independent jurisdiction.

Section 3. Registration of Fulfillment Provider

(a) A fulfillment provider must register with the [commission] before shipping covered alcoholic beverages into or within this state.

(b) Subject to subsection (c), an application for registration as a fulfillment provider must include:

(1) each address from which the fulfillment provider will ship covered alcoholic beverages to a consumer;

(2) the name, business address, and license number of each licensed direct shipper, with the name stated as it appears on the direct-shipper license, on whose behalf the fulfillment provider will ship covered alcoholic beverages to a consumer; and

(3) other information the [commission] requires.

(c) To register under this section, a fulfillment provider must agree to:

(1) allow the [commission] to inspect and audit its records under Section 6(b);

(2) allow the [commission] to inspect a location under Section 6(c);

(3) appoint and maintain an agent for service of process under Section 6(d);

and

(4) submit to the jurisdiction of the [commission], the courts, and other enforcement authority of this state in a matter relating to enforcement of law of this state regulating shipment of alcoholic beverages directly to a person in this state.

(d) A registered fulfillment provider shall provide [monthly] to the [commission] a current list of all licensed direct shippers on whose behalf the fulfillment provider ships covered alcoholic beverages to consumers. The list must include the name, business address, and license number of each licensed direct shipper, with the name stated as it appears on the direct-shipper license. A fulfillment provider is not required to provide a list under this subsection in a [month] in which the list is unchanged from the previous [month].

(e) A fulfillment provider may ship covered alcoholic beverages to a consumer only if:

(1) the fulfillment provider maintains a registration under this section that is not suspended, revoked, canceled, or, subject to section 4(d), expired;

(2) a licensed direct shipper provided the covered alcoholic beverages to the fulfillment provider;

(3) the package containing the covered alcoholic beverages clearly indicates:

(A) on the shipping label, the name of the fulfillment provider and the address from which the fulfillment provider originated the shipment, as the name and address

appear in the registration, as consignor and the name and address of the consumer as intended recipient; and

(B) on the package or shipping label, the name and license number of the licensed direct shipper that provided the fulfillment provider the covered alcoholic beverages; and

(4) the shipment is authorized under other law of this state.

(f) A registration under this section is valid for [two] years and may be renewed for [two]-year periods. [The fee for the initial registration and each renewal is \$[50].] If there is a material change in the information provided in the application under subsection (b) to the [commission], the registered fulfillment provider shall provide updated information to the [commission] not later than [14] days after the change.

(g) Use by a licensed direct shipper of the services of a registered fulfillment provider does not relieve the direct shipper of a requirement imposed on the direct shipper under [cite to applicable law of the state].

[(h) The [commission], after notice and an opportunity for an evidentiary hearing, may suspend, revoke, impose conditions on, or deny renewal of the registration of a fulfillment provider [for good cause, including a violation listed in Section 10(a)(1)].]

[(i) A registered fulfillment provider may cancel its registration. Cancellation does not affect the [commission's] jurisdiction relating to activity before the cancellation. If an enforcement proceeding is pending against a registered fulfillment provider, the fulfillment provider may cancel its registration only with consent of the [commission].]

Legislative Note: *This section requires a registered fulfillment provider to notify the commission of each licensed direct shipper on whose behalf it makes shipments. A state may choose to amend its law to require a licensed direct shipper to notify the commission of each fulfillment provider it has engaged to make shipments on its behalf. The state may need to clarify in its law that a*

licensed direct shipper may engage the services of a registered fulfillment provider to make a shipment to a consumer.

In subsection (g), a state should cite to law that imposes restrictions on direct-to-consumer shipments, such as the quantity of covered alcoholic beverages that may be shipped to a consumer.

In subsection (h), the bracketed text after “provider” allows a state to adopt a different standard, including listing specific conduct or a violation for which the commission may suspend, revoke, impose conditions on, or deny renewal of the registration.

Subsections (h) and (i) are bracketed because the subjects may be covered under a state’s administrative procedure act or may fit better under other state law addressing similar matters.

The information a state requires under subsection (b)(3) could include, for example, criminal history information. In subsection (h), a state may include the bases for disqualification of an applicant from initial registration consistent with the state’s standards for disqualification of an applicant from initial issuance of other alcoholic beverage licenses.

This section does not include an interest-restriction provision. If a state chooses, for example, to prohibit common ownership and operation by a licensed direct shipper and registered fulfillment provider, the state may amend its law establishing eligibility requirements for a direct-shipper license to preclude a registered fulfillment provider from holding a direct-shipper license or include an interest restriction in subsection (h) as a disqualifying criterion for initial registration.

Comment

A significant amount of direct-to-consumer shipping of alcoholic beverages is accomplished by means of an intermediary, usually referred to as a fulfillment provider. Few states require licensing or registration of these intermediaries, but the use of an intermediary makes it difficult for state regulators to identify the originator of the alcoholic beverage shipment. This act provides a mechanism under which state regulators can better identify what alcoholic beverages are being shipped into the state and by whom. The act does not establish standards or requirements for these shipments. The enacting state’s existing law will govern such matters as licensing requirements for direct shippers authorized to ship to consumers in the state, which might be wineries only or might include retailers and other producers. The enacting state’s existing law also governs what types of alcoholic beverages may be shipped, i.e., whether the state authorizes direct-to-consumer shipments of wine only or also allows direct-to-consumer shipments of other alcoholic beverages, and what restrictions apply to these shipments, such as quantity limits, package marking, and age verification. The enacting state’s law will require compliance by the licensed direct shipper, whether that shipment is accomplished directly or with help from a fulfillment provider. This act assists state regulators in establishing the identity of both the seller of alcoholic beverages and the fulfillment provider acting on its behalf.

A central aspect of this act is ensuring that the enacting state can establish jurisdiction

over out-of-state actors. Subsection (c) is included in the act, in addition to Section 6, to create stronger support for the enacting state's authority to assert jurisdiction. Subsection (c) requires the actor to agree to the state's jurisdiction, rather than relying only on a statutory assertion of jurisdiction. It is contemplated that the agreement will take the form of a check-box on the registration application.

Subsection (h) allows the enacting state to suspend or revoke a fulfillment provider's registration for good cause, including violations of the act. This standard is bracketed as optional because the state may wish to more specifically identify the conduct that may result in suspension or revocation of the registration. The act also allows the state, in Section 11, to adopt rules to define, or establish guidelines for determining, "good cause." Subsection (h) also allows the state to opt for a punishment less severe than suspension or revocation by imposing a condition on the registration, such as requiring additional employee training. Subsections (h) and (i) are also bracketed in their entirety because the enacting state may have existing standards or procedures that are well-suited to the administrative considerations underlying these provisions.

Subsection (d) requires a registered fulfillment provider to provide the state with a current list of licensed direct shippers on whose behalf shipments are made. Under Section 2, "licensed direct shipper" is a defined term that includes only a person holding a direct-shipper license issued by the enacting state. In other words, this list of direct shippers is limited to the direct shippers licensed by the enacting state.

The act does not specifically require a contract between a fulfillment provider and the licensed direct shipper on whose behalf it arranges shipments, but it is likely there will be such a contract defining the parties' respective responsibilities and liabilities. The act also does not expressly refer to the fulfillment provider as the "agent" of the licensed direct shipper, although the parties' contract might.

Section 4. Delivery by Carrier from Licensed Direct Shipper or Registered

Fulfillment Provider

(a) A carrier may not deliver to a consumer a package the carrier knows contains alcoholic beverages unless the consignor is:

(1) a licensed direct shipper and the carrier has verified the direct-shipper license for the current license period; or

(2) a registered fulfillment provider and the carrier has verified the registration under Section 3 for the current registration period.

(b) A carrier that verifies that a direct shipper has a direct-shipper license for the current

license period may consider the license to be valid for the remainder of the license period unless the carrier receives notice from the [commission] that the license has been [suspended, revoked, or canceled].

(c) A carrier that verifies that a fulfillment provider is registered under Section 3 for the current registration period may consider the registration to be valid for the remainder of the registration period unless the carrier receives notice from the [commission] that the registration has been suspended, revoked, or canceled.

(d) A carrier may consider an expired direct-shipper license or expired fulfillment provider's registration as valid if:

(1) an application for renewal of the direct-shipper license or fulfillment provider's registration was submitted to the [commission] in the time required;

(2) the carrier reasonably believes the [commission] is experiencing delays in processing renewal applications and has not acted on the application for renewal because of the delays; and

(3) the [commission] has not informed the carrier that it may no longer consider the direct-shipper license or fulfillment provider's registration as valid under this subsection.

Legislative Note: In subsection (b), a state should insert the proper terminology for suspension, revocation, or cancellation of a direct-shipper license.

Comment

This section creates requirements related to the carrier's activities in the enacting state, where the delivery occurs. Under subsection (a), a carrier may deliver a package known to contain any alcoholic beverage only if the package is received by the carrier from a licensed direct shipper or registered fulfillment provider. By definition, licensed direct shippers and registered fulfillment providers are the persons authorized to ship alcoholic beverages directly to the state's consumers. Subsection (a) applies in conjunction with the state's other direct shipping law and does not override any restriction in other law on, for example, the type or quantity of alcoholic beverages that a direct shipper or fulfillment provider may ship.

After a carrier has verified that a consignor either holds a direct-shipper license valid for the applicable license period or has a fulfillment-provider registration valid for the applicable registration period, the carrier is not required to continually confirm that the license or registration has not been suspended or revoked. However, if the carrier receives notice that the license or registration has been suspended or revoked, the carrier cannot thereafter consider the license or registration as valid.

Subsection (d) creates an exception allowing the carrier to continue delivering alcoholic beverages if there is an administrative delay in renewing a direct-shipper license or fulfillment-provider registration, but the commission may override this exception through a directive to the carrier.

Section 5. Shipment Report

(a) Except as provided in subsection (e), a registered fulfillment provider shall file with the [commission] a [monthly] report that includes:

(1) the name, business address, and registration number of the fulfillment provider;

(2) the total [gallons] [liters] of each type of covered alcoholic beverages shipped to consumers by the fulfillment provider during the reporting period, categorized in accordance with the state's tax classification for alcoholic beverages; and

(3) for each shipment of covered alcoholic beverages to a consumer during the reporting period:

(A) the name, business address, and license number of the licensed direct shipper, with the name stated as it appears on the direct-shipper license, on whose behalf the fulfillment provider shipped the covered alcoholic beverages;

(B) the name and address of the consumer to whom the covered alcoholic beverages were shipped;

(C) the address from which the fulfillment provider originated the shipment, stated identically as an address provided by the fulfillment provider under Section

3(b)(1);

(D) the date the shipment was delivered;

(E) the type and quantity by volume of covered alcoholic beverages shipped, with the type categorized in accordance with the state's tax classification for alcoholic beverages; and

(F) the name and business address of the carrier that delivered the covered alcoholic beverages and the carrier's tracking number for the shipment.

[(b) Except as provided in subsection (e), a licensed direct shipper shall file with the [commission] a [monthly] report that includes:

(1) the name, business address, and license number of the licensed direct shipper;

(2) the total [gallons] [liters] of each type of covered alcoholic beverages shipped to consumers by the licensed direct shipper, or by a registered fulfillment provider on behalf of the licensed direct shipper, during the reporting period, categorized in accordance with the state's tax classification for alcoholic beverages; and

(3) for each shipment of covered alcoholic beverages to a consumer during the reporting period:

(A) the name and address of the consumer to whom the covered alcoholic beverages were shipped;

(B) the date the shipment was delivered;

(C) the type and quantity by volume of covered alcoholic beverages shipped, with the type categorized in accordance with the state's tax classification for alcoholic beverages;

(D) the purchase price of the covered alcoholic beverages shipped and the

amount and type of each tax charged relating to the covered alcoholic beverages;

(E) if the covered alcoholic beverages were shipped for the licensed direct shipper by a fulfillment provider, the name, business address, and registration number of the fulfillment provider, with the name stated as it appears on the fulfillment provider's registration; and

(F) if the covered alcoholic beverages were delivered by a carrier, the name and business address of the carrier and the carrier's tracking number for the shipment.]

[(c) Except as provided in subsection (e), a carrier shall file with the [commission] a [monthly] report that includes:

(1) the name and business address of the carrier;

(2) a list containing the name, business address, and license or registration number of each licensed direct shipper and registered fulfillment provider with which the carrier has an agreement to ship alcoholic beverages, with the name stated as it appears on the direct-shipper license or fulfillment provider's registration; and

(3) for each shipment known by the carrier to contain alcoholic beverages that was delivered to a consumer during the reporting period:

(A) the name and business address of the consignor of the shipment;

(B) the name and address of the consumer;

(C) the date the shipment was delivered by the carrier;

(D) the weight, in pounds, of the package shipped; and

(E) the carrier's tracking number for the shipment.]

(d) The [commission] may require a person filing a report under this section to submit additional information, including business records, to substantiate information in the report.

(e) If covered alcoholic beverages were not shipped to a consumer during the reporting period, a report under this section must include the information under subsection [(a)(1)] [(a)(1) or (b)(1)] [(a)(1) or (c)(1)] [(a)(1), (b)(1), or (c)(1)] and report that covered alcoholic beverages were not shipped to a consumer during the reporting period.

Legislative Note: *If a state authorizes direct-to-consumer shipping of distilled spirits, the state should determine whether the quantity in subsections (a)(2) and (b)(2) must be stated in proof gallons.*

In subsections (a)(3)(B) and (b)(3)(A), a state may substitute “to which” for “to whom” if the state allows shipment of covered alcoholic beverages without naming a specific individual as the intended recipient of the shipment.

If other law of this state requires a licensed direct shipper or carrier to file a report with the state regulator, the state may choose to amend the other law to add the information under subsection (b) or (c) and omit the subsection.

In subsection (e), the bracketed text requires a choice based on whether optional subsections (b) or (c) is included.

Comment

The act requires reporting of certain critical pieces of information that assist state regulators in determining whether shipments into the enacting state are originating from a licensed or unlicensed direct shipper. If the carrier reports the package tracking number, the direct shipper reports the package tracking number and its direct-shipper-license number, and (if applicable) the fulfillment provider reports the package tracking number and the name and license number of the direct shipper on whose behalf it is shipping, the state regulator can “triangulate” information to determine whether the shipment originated from a licensed direct shipper. That is, the absence of a tracking number match with an associated direct-shipper-license number indicates a possible unlicensed shipment. This information is particularly helpful if reports are filed electronically and included in a searchable database.

The act requires a registered fulfillment provider, licensed direct shipper, and carrier to report some of the same information. As discussed, cross-reporting of information is intended to assist the state regulator in analyzing shipping into the enacting state. Although the act requires a carrier to report only the weight of the package and the licensed direct shipper and fulfillment provider to report the contents of the package, this information can be cross-referenced to ascertain whether the package weight is consistent with the reported contents or whether the direct shipper appears to be underreporting shipments (and tax obligations). Reporting requirements in the act assist the state in verifying that required taxes are being reported and collected.

State regulators also have difficulty matching information among reports if the same

information is reported in an inconsistent manner. For example, if a direct shipper is licensed as “Three Lakes Winery, Inc.” but the registered fulfillment provider reports the direct shipper as “3 Lakes,” the regulator may be uncertain whether it is the same company. The act requires names to be reported as they appear on a license or registration maintained with the enacting state. The reporting entity may obtain this information by requesting a copy of the applicable license or registration certificate or, in a state that makes this information publicly available, by checking the state’s database. This requirement for precision in reporting a name is not intended to preclude the reporting entity from using a trade name (DBA) identified in a license or registration, but the DBA must be stated with accuracy on each report.

The act requires reporting by a common carrier that delivers alcoholic beverages in the enacting state to a consumer. The act does not require carriers to report alcoholic beverage shipments to licensed industry participants receiving the package through the three-tier system. Although the act does not require it, a carrier may choose to compel consignors to declare (perhaps through a check-box) whether the consignee is a consumer or a licensee.

Many states already require licensed direct shippers and carriers to report information similar to the information required under this section. If this is the case in the enacting state, the enacting state may wish to add elements of this section to its existing requirements to ensure that state regulators are able to make full use of the reported information.

Most states require direct shippers’ reports to include the name and address of the consumer for each shipment of alcoholic beverages. Likewise, subsection (a) requires fulfillment provider reports to include this information, but Section 7 generally requires the state regulator to maintain this information as confidential.

The act includes a minimal reporting requirement if there was no reportable activity during the reporting period. State regulators will therefore be able to distinguish between lack of activity and non-compliance (failure to report). The act includes a presumption of monthly reporting, but the enacting state may prefer a different reporting period.

As mentioned above, reports under this section assist the state not only in identifying shipment origin but also in ensuring tax collection. Therefore, subsections (a)(2), (a)(3)(E), (b)(2), and (b)(3)(C) require reporting in accordance with tax classifications. To use federal tax classifications as an example, aggregate volumes would be grouped in the reports as follows: still wine with an alcohol content not exceeding 16 percent; still wine with an alcohol content greater than 16 percent; sparkling wine; and cider (although there are actually more tax classifications than these).

This section establishes a system for cross-reporting information about shipments of “covered alcoholic beverages,” which are the types of alcoholic beverages that licensed direct shippers and registered fulfillment providers are allowed to ship to the state’s consumers. This section does not require a report to include unlawful shipments of alcoholic beverages of a type not authorized for direct-to-consumer shipment. A requirement to report unlawful shipments would have little practical benefit and is not consistent with existing

reporting requirements for direct shippers. Because a violation occurs with the unlawful shipment, creating a second violation for failure to report the unlawful shipment does not improve a state's ability to enforce its direct shipping law.

Section 6. Jurisdiction; Enforcement

(a) A registered fulfillment provider[, licensed direct shipper, and carrier] [is] [are] subject to the jurisdiction of the [commission], the courts, and other enforcement authority of this state in a matter relating to enforcement of law of this state regulating shipment of alcoholic beverages directly to a person in this state.

(b) The [commission] may inspect and audit the records of a registered fulfillment provider[, licensed direct shipper, and carrier] for compliance with law of this state regulating shipment of alcoholic beverages directly to a person in this state. A registered fulfillment provider[, licensed direct shipper, and carrier] shall allow the [commission] to inspect and audit its records and, at the [commission's] request in a record, provide complete and accurate copies of its records to the [commission] at a location specified by the [commission], not later than [15] days after the date of the request.

(c) The [commission] may inspect, during ordinary hours of operation, a location where a registered fulfillment provider[, licensed direct shipper, or carrier] conducts business, to assess compliance with law of this state regulating shipment of alcoholic beverages directly to a person in this state.

(d) A registered fulfillment provider[, licensed direct shipper, and carrier] shall appoint and continuously maintain with the [commission] an agent for service of process. The agent may be located in this or another state. By appointing an agent under this subsection, the registered fulfillment provider[, licensed direct shipper, and carrier] affirms that the agent consents to accept service. Service of process on the agent constitutes valid service of process on the

registered fulfillment provider[, licensed direct shipper, or carrier] in an action or proceeding arising out of enforcement of law of this state regulating shipment of alcoholic beverages directly to a person in this state. If a registered fulfillment provider[, licensed direct shipper, or carrier] fails to maintain in the records of the [commission] a current agent for service of process or if the current agent cannot be served with reasonable diligence, the [commission] is the agent for service of process.

Legislative Note: The bracketed terms “licensed direct shipper” and “carrier” allow the state to impose requirements of this section on a licensed direct shipper or carrier, or both, if the state’s law does not impose similar requirements.

In subsection (d), a state may replace the bracketed term “commission” with, or add as a filing alternative, the name of the state agency responsible for appointments of agents for service of process.

Comment

Many states require licensed direct shippers to consent to jurisdiction, appoint an agent for service of process, provide records upon request, and allow audits and inspections. Similar requirements may also apply to carriers, although carriers by definition conduct physical operations (package delivery) within the territorial limits of the state so jurisdiction is evident.

Subsection (a) asserts the enacting state’s jurisdiction over registered fulfillment providers, whether located in the enacting state or another state, and further asserts jurisdiction over licensed direct shippers and carriers if the optional language is included. (This jurisdictional provision is not necessary for an entity with significant in-state operations, like a carrier or in-state direct shipper.) Subsection (a) operates in conjunction with Section 3(c)(3) and (4) to ensure that out-of-state fulfillment providers registered to ship alcoholic beverages to the enacting state’s consumers are subject to jurisdiction in the enacting state. Subsection (a) does not assert jurisdiction over a person that is not licensed or registered in the enacting state and is not regularly operating within the enacting state. Whether the enacting state has jurisdiction over an unlicensed or unregistered “bad actor” unlawfully shipping into the state will be determined on a fact-specific basis under the state’s long-arm statute in light of constitutional due process considerations, such as whether the bad actor has “minimum contacts” with the state. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985); *Int’l Shoe Co. v. Washington*, 362 U.S. 310 (1945).

The enforcement provisions of Section 6 apply with respect to all alcoholic beverages. Even if the enacting state limits authorized shipping to wine only, the state has a strong interest in detecting and stopping unlawful shipments of any type of alcoholic beverage. The state also has a strong interest in enforcing tax obligations, and the right to records inspection in Section 6

helps the state ensure appropriate tax collections.

Section 2 defines a record to include electronic materials. Accordingly, subsection (b) authorizes the state to inspect and audit electronic records as well as records in paper format.

Section 7. Confidential Information

(a) Except as provided in subsection (b), (c), or (e)[and [cite to applicable exceptions to state open records law]], the [commission] shall maintain as confidential[and treat as exempt from public inspection and disclosure under [cite to state open records law]]:

(1) information specified in Section 3(b)(2) and (d);

(2) a report filed under Section 5 and information contained in the report;

(3) a record inspected or obtained by the [commission] under Section 6(b) and information contained in the record; and

(4) other information obtained by the [commission] relating to enforcement or investigation of a violation of this [act].

(b) Subject to subsection (d), the [commission] may disclose a report, a record, or information specified in subsection (a) to:

(1) a court, law enforcement agency, or other state or local agency of this state or another state with enforcement authority over a matter relating to alcoholic beverages or taxation, to enforce or investigate a violation of law of this state or the other state relating to the shipment or taxation of alcoholic beverages; and

(2) a court, federal law enforcement agency, or other federal agency with enforcement authority over a matter relating to alcoholic beverages or taxation, to enforce or investigate a violation of federal law or to assist the [commission] in enforcing or investigating a violation of law of this state relating to the shipment or taxation of alcoholic beverages.

(c) The [commission] may disclose information specified in Section 3(b)(2) and (d) to a

carrier.

(d) A person to which a report, record, or information is disclosed under subsection (b) may not disclose to any other person the report, record, or information unless the subsequent disclosure meets the requirements under subsection (b) that apply to the original disclosure. A carrier to which information is disclosed under subsection (c) may not disclose the information to any other person.

(e) This section does not prohibit the [commission] from disclosing:

(1) aggregate data that does not reveal:

(A) personally identifiable information relating to a consumer; or

(B) information identifiable to a specific registered fulfillment provider, licensed direct shipper, or carrier;

(2) an order of the [commission] resulting from a completed investigation[,][or] other enforcement action[, or other order or advisory opinion of the [commission]], if the [commission] redacts personally identifiable information relating to a consumer; or

(3) information identifying a fulfillment provider and its registration status and registration number or a direct shipper and its license status and license number.

Legislative Note: *Because open records laws vary considerably from state to state, the bracketed text in subsection (a) allows a state to harmonize subsection (a) with the state law. Alternatively, a state may amend its open records law to accomplish the confidentiality required under this section. If harmonization is required, changes may be necessary in subsection (a).*

In subsection (e)(2), the bracketed term “or other order or advisory opinion of the commission” allows the commission to make industry guidance publicly available.

Comment

Section 5 incorporates the approach taken for direct shipper reporting in most states by requiring registered fulfillment provider reports to include detailed information about direct-to-consumer shipments, including the name and address of the consumer and the quantity of alcoholic beverages shipped. This section creates a default generally requiring the state to maintain confidentiality of these reports and exempting them from disclosure under the

state's open records law, subject to limited exceptions. If the state incorporates optional language for reporting by carriers and licensed direct shippers, these default confidentiality provisions apply to these reports as well. However, state open records laws vary widely. If similar records are not confidential under the enacting state's existing law, optional language in the act allows the state to maintain its existing open records policy.

Subsection (b) allows the state regulator in the enacting state to share information with regulators in other states, and with other officials in the same state and federal officials, for purposes of enforcement or investigation, including prosecuting violations. This provision allows states to easily cooperate to stop unlawful interstate shipping. For example, the regulator in the destination state where unlawful shipments are received might provide evidence of the unlawful shipments to the regulator in the origination state, which could then initiate a proceeding under Section 9. The regulator in the receiving state might also provide evidence of the unlawful shipments to the Alcohol and Tobacco Tax and Trade Bureau (TTB) that serves as the basis for TTB action against the violator's federal basic permit.

This section clarifies that it is public information whether a direct shipper is licensed or a fulfillment provider is registered, but a registered fulfillment provider's customer list is not public information. A carrier, however, can access information from the state regulator submitted by the registered fulfillment provider identifying the direct shippers it claims to be authorized to ship on behalf of, because this information could be relevant to the carrier under Section 4 if the carrier questions the fulfillment provider's candor with the carrier.

Section 8. Notice of Consignor's Unlawful Shipment; Order

(a) If the [commission] has good cause to believe that a consignor has shipped alcoholic beverages unlawfully into or within this state, the [commission] may give notice in a record to the consignor requiring the consignor to show cause why the consignor should not be prohibited from shipping alcoholic beverages into or within this state. If the [commission], after an opportunity for an evidentiary hearing, determines that the consignor shipped alcoholic beverages into or within this state unlawfully, the [commission] may issue an order prohibiting the consignor from additional shipment of alcoholic beverages into or within this state.

(b) The [commission] may give notice in a record to a carrier of an order under subsection (a). The carrier may not deliver into or within this state a package received by the carrier from the consignor identified in the notice and known by the carrier to contain alcoholic beverages. The prohibition on delivery begins 15 days after the date of the notice and ends when

the carrier receives notice from the [commission] that the order is [rescinded or modified].

(c) [[For [good cause], the] [The] [commission] may [rescind or modify] an order issued under subsection (a).] If an order issued under subsection (a) is [rescinded or modified], the [commission] shall give notice in a record of the [rescission or modification] to each carrier that received notice under subsection (b).

Alternative A

(d) A proceeding under this section is governed by [cite to state administrative procedure act].

Alternative B

(d) The [commission] may not hold a hearing under subsection (a) sooner than [30] days after the date of the notice under subsection (a) unless:

(1) the consignor agrees to an earlier hearing date; or

(2) the notice describes with particularity how the consignor's alleged unlawful shipment poses a serious risk to public health or safety.

(e) If the notice under subsection (a) includes a description under subsection (d)(2) and the [commission] issues an order under subsection (a):

(1) the order must identify the risk;

(2) the time period specified in subsection (b) does not apply; and

(3) the [commission's] notice under subsection (b) must require the carrier to comply with the order as soon as possible.

(f) An order issued or denied under this section, including an order [rescinding or modifying] or denying [recission or modification of] an order, is subject to judicial review under [cite to state administrative procedure act].

End of Alternatives

Legislative Note: In subsections (b), (c), and (f), a state may replace the bracketed text relating to rescission and modification of an order with the terms commonly used in state law.

If a state's administrative procedure act is sufficient to govern a proceeding under this section, the state should adopt Alternative A and omit the bracketed first sentence of subsection (c). A state may need to authorize the commission to issue an order under this section if the state's administrative procedure act does not include the authority. Alternatively, if the state's administrative procedure act is not sufficient to govern a proceeding under this section, the state should adopt Alternative B and use the bracketed first sentence of subsection (c). The bracketed term "good cause" in subsection (c) may be replaced with more specific criteria for rescinding or modifying an order.

Comment

This section provides an enforcement mechanism to aid the enacting state in stopping unlawful alcoholic beverage shipping into or within the state, particularly by unlicensed shippers. The advantage of this mechanism is that it involves an administrative proceeding rather than a court action. If the state regulator detects an unlawful shipment of alcoholic beverages into or within the state, the state regulator may give notice to the consignor to show cause why shipments from the consignor should not be enjoined. After affording the consignor an opportunity for an evidentiary hearing, the state regulator may determine that the consignor has unlawfully shipped alcoholic beverages into or within the enacting state and issue an administrative order prohibiting additional shipments of alcoholic beverages into or within the state by the consignor. The state regulator may give notice of the administrative order to any carrier, whether it be the carrier that delivered the unlawful shipment or other carriers in the state. Beginning 15 days after this notice, the carrier may not accept from the consignor identified in the notice any package known to contain alcoholic beverages, except that, under Alternative B, this 15-day period is shortened if the consignor's shipment poses a serious risk to public health or safety. The act neither limits carriers to accepting packages from only an authorized list of shippers, nor prohibits carriers from accepting packages from an ever-changing list of banned consignors. The notice to a carrier under the act is specific to a single consignor and permanent unless the carrier receives a subsequent notice that the administrative order has been rescinded or modified to allow shipping to resume.

Under Section 3, if a registered fulfillment provider unlawfully ships alcoholic beverages into or within the enacting state, the regulator may suspend or revoke the fulfillment-provider registration and the fulfillment provider may not thereafter ship alcoholic beverages into or within the state. The act presumes that the enacting state's existing law provides similar authority to suspend or revoke a direct-shipper license if the licensed direct shipper unlawfully ships alcoholic beverages into or within the state. The most significant aspect of this section is to provide state regulators with an enforcement tool when there is no registration or license to take action against. Nonetheless, a state regulator could pursue an administrative order under this section against a consignor that is a registered fulfillment provider or licensed direct shipper, including pursuing an administrative order in tandem with a proceeding to suspend or revoke the

fulfillment-provider registration or direct-shipper license.

Most states have enacted a general prohibition making it unlawful to ship alcoholic beverages into the state unless the shipper is authorized to do so. In some states, the statute prohibits any person from shipping alcoholic beverages into the state except to a licensed wholesaler, with an exception recognized for certain licensed direct-to-consumer shippers. Other states specifically prohibit direct-to-consumer shipments unless the shipper holds a specified direct-shipper license. (A few states allow direct-to-consumer shipments with no required license.) This act presumes, and relies on, the enacting state's existing general prohibition and does not include a blanket ban on unlicensed direct-to-consumer shipments.

Certain provisions in this section are not needed if the enacting state has a comprehensive administrative procedure act that governs proceedings under this section. In that case, the state should adopt Alternative A. If the state adopts Alternative B and the bracketed language at the beginning of subsection (c), the state may wish to replace the "good cause" standard with specific requirements or criteria for rescinding an administrative order. The act also allows the state, in Section 11, to adopt rules to define, or establish guidelines for determining, "good cause" under subsection (c).

Section 9. Suspension, Revocation, or Nonrenewal of [License] [Permit] for Unlawful Shipping into Another State

[(a)] [Except as provided in subsections (b) and (d) and subject to subsection (g), the] [The] [commission] [or other applicable authority] may suspend, revoke, or deny renewal of a [license] [permit] issued by the [commission] [or other applicable authority] to produce, distribute, or sell alcoholic beverages if the [commission] [or other applicable authority] finds, after notice and an opportunity for an evidentiary hearing, that the person holding the [license] [permit] shipped alcoholic beverages into another state in violation of the other state's law.

[(b) The [commission] [or other applicable authority] may not suspend, revoke, or deny renewal of a [license] [permit] under subsection (a) if the person holding the [license] [permit] shows that the violation of the other state's law:

(1) is the subject of a pending enforcement action in the other state;

(2) was the subject of an enforcement action in the other state that has concluded and resulted in a determination that no violation of the other state's law occurred; or

(3) occurred more than [two] years before the date of the notice under subsection (a).]

[(c) Suspension or revocation of, or refusal to renew, a [license] [permit] under subsection (a) is not effective until all administrative proceedings under subsection (a) are concluded and administrative remedies exhausted.]

[(d) The [commission] [or other applicable authority] may not suspend, revoke, or deny renewal of a [license] [permit] under subsection (a) unless the [licensee] [permittee] ships alcoholic beverages into another state in violation of the other state's law after the [commission] [or other applicable authority] issues a cease and desist [order] [letter].]

[(e) The [commission] [or other applicable authority] shall determine the duration of a suspension under subsection (a). The suspension may not exceed [60] days for a first violation or [120] days for a violation that occurs not later than [three] years after an earlier violation. A violation that occurs more than [three] years after an earlier violation is treated as a first violation. If the [commission] [or other applicable authority] revokes or refuses to renew a [license] [permit] under subsection (a), the [licensee] [permittee] may not reapply for issuance of the same [license] [permit] for [one year] after the date of the revocation or refusal to renew.]

[(f) Suspension or revocation of, or refusal to renew, a [license] [permit] under this section is subject to judicial review under [cite to state administrative procedure act].]

[(g) Instead of suspending, revoking, or refusing to renew a [license] [permit] under subsection (a), the [commission] [or other applicable authority] and the [licensee] [permittee] may agree to [an offer in compromise under which the [licensee] [permittee] pays to the [commission] [or other applicable authority]] an administrative penalty.]

[(h) After the [commission] [or other applicable authority] gives notice under subsection

(a) of a proceeding to suspend, revoke, or deny renewal of a [license] [permit], the [licensee] [permittee] may not surrender the [license] [permit] without the consent of the [commission] [or other applicable authority].]

Legislative Note: *A state may include in this section each alcoholic-beverage licensing authority in the state. A state should substitute the appropriate terminology in this section if state administrative action against a licensee or permittee is characterized by terms other than suspension or revocation, such as cancellation or termination.*

A state may limit the administrative authority granted under subsection (a) by adopting subsection (b).

Subsections (c) through (h) are bracketed because, if a state's law governs suspension, revocation, or nonrenewal of an alcoholic beverage license or permit, the state may choose to amend that law instead of adopting subsections (c) through (h). A state may choose not to adopt subsections (c) through (h) if they are inconsistent with the state's administrative process or a policy objective.

A state that issues both licenses and permits should retain both terms in this section.

The bracketed text in subsection (g) allows a state to refer to the settlement process by the term "offer in compromise" used by many states and the federal Alcohol and Tobacco Tax and Trade Bureau.

Comment

This section allows the enacting state to, for example, take action against a retailer licensed in the enacting state if the retailer is unlawfully shipping alcoholic beverages into another state in violation of that state's law. A retailer that does so risks losing its retail license in its home state. The provision facilitates cooperation among state regulators, as the retailer's unlawful shipping is likely to come to light as a result of information provided by regulators in other states. The retailer's home state must afford the retailer due process in any action taken against the retailer.

Optional subsection (b) limits the authority granted in subsection (a) for a licensee's home state to take action against a license based on the licensee's unlawful shipping of alcoholic beverages into another state. For example, the home state may not proceed against the license if the licensee has been exonerated in the state where the shipments were received or if there is a pending enforcement action in that state, including an action pending before an administrative body or a trial or appellate court.

Each state issues various forms of alcoholic beverage licenses or permits. There may also be more than one issuing authority in the enacting state. For example, the state may issue licenses to producers, but local governments may issue permits to retailers or wholesalers. Each

state has some form of existing process and standards for the suspension, revocation, or nonrenewal of alcoholic beverage licenses or permits. Accordingly, at least some portion of this section is likely to already be covered by the enacting state's law, and that is why most of the section is bracketed as optional. The state may prefer to address the topics contained in this section by amendment of its existing law governing the administrative process applicable to its alcoholic beverage licensing system.

While subsection (e) includes a three-year "look back" period in counting prior violations, many states place no limit on the "look back" period. In subsection (e), the date the violation occurs is the date of the conduct giving rise to the offense. Regarding subsections (d) and (g), some states provide for a cease-and-desist "warning" process and allow settlement of violations through an offer-in-compromise process and some do not. Regarding subsection (h), the enacting state may already preclude a licensee from surrendering a license while an administrative enforcement proceeding is pending unless the license-issuing authority consents to the surrender.

[Section 10. Penalties

(a) A court may impose a civil penalty on:

(1) a fulfillment provider that violates:

(A) Section 3(e)(1), (2), or (4);

(B) Section 3(e)(3) or 6(d); or

(C) Section 3(d), 5(a), or 6(b); [and]

(2) a carrier that violates[:

(A)] Section 4 or 8(b)[;] [or]

[(B) Section 6(d)][; or

(C) Section 5(c) or 6(b)][; and

(3) a licensed direct shipper that violates:

(A) Section 6(d); or

(B) Section 5(b) or 6(b)].

(b) Except as provided in subsection (c), the penalty for a violation under:

(1) subsection (a)(1)(A) is [not more than \$1,000];

- (2) subsection (a)(1)(B) is [not more than \$100];
- (3) subsection (a)(1)(C) is [not more than \$100][,]; and]
- (4) subsection [(a)(2)(A)] [(a)(2)] is [not more than \$1,000][,]; and]
- [(5) subsection (a)(2)(B) is [not more than \$100][,]; and]
- [(6) subsection (a)(2)(C) is [not more than \$100][,]; and]
- [(7) subsection (a)(3)(A) is [not more than \$100]; and
- (8) subsection (a)(3)(B) is [not more than \$100]].

(c) For a violation listed in subsection (b) that occurs not later than [three] years after an earlier violation under subsection (b), the penalty for the subsequent violation under:

- (1) subsection (a)(1)(A) is [not more than \$5,000];
- (2) subsection (a)(1)(B) is [not more than \$500];
- (3) subsection (a)(1)(C) is [not more than \$500]; [and]
- (4) subsection [(a)(2)(A)] [(a)(2)] is [not more than \$5,000][,]; and]
- [(5) subsection (a)(2)(B) is [not more than \$500][,]; and]
- [(6) subsection (a)(2)(C) is [not more than \$500][,]; and]
- [(7) subsection (a)(3)(A) is [not more than \$500]; and
- (8) subsection (a)(3)(B) is [not more than \$500]].

(d) The court may impose a separate penalty under subsection (b)(1), (2), [or] (4)[,] [or] [(5)][, or] [(7)] or (c)(1), (2), [or] (4)[,] [or] [(5)][, or] [(7)] for each day a violation occurs.

(e) The court may impose a separate penalty under subsection (b)(3)[,] [or] [(6)][, or] [(8)] or (c)(3)[,] [or] [(6)][, or] [(8)] for each violation.

(f) A violation of a rule adopted by the [commission] under this [act] is a violation of the provision of this [act] to which the rule relates.]

Legislative Note: *A state should omit this section if it chooses to add the penalties to its alcoholic beverage law.*

A state that makes a violation of alcoholic beverage law a criminal offense may need to amend its law to conform to the civil penalties in this section or may substitute criminal penalties in this section.

A state should enact subsections (a)(2)(B) and (C) and (3), (b)(5) through (8), and (c)(5) through (8) only if the state enacts the corresponding optional text in Sections 5 and 6. The state should ensure that the text in these provisions is consistent.

If a state requires licensed direct shippers to submit reports, it should conform the penalties under this section for fulfillment providers to the penalties under the law for licensed direct shippers.

In subsections (b)(4) and (c)(4), if a state enacts subsection (a)(2)(B) or (C), the state should refer to subsection (a)(2)(A).

Comment

Some states prescribe general penalties that apply to almost any violation of the state's alcoholic beverage laws. Accordingly, at least some portion of this section may already be covered by the enacting state's law. It is also common for violations of a state's alcoholic beverage laws to be criminal offenses. The creation in the act of only civil penalties might not be consistent with the state's approach to penalizing alcoholic beverage violations.

The monetary penalties imposed under this section are in addition to any administrative remedies available under other sections of the act, such as suspension or revocation of a license, permit, or registration under section 3 or 9 or an order prohibiting shipments under section 8.

Subsections (b) and (c) establish a higher monetary penalty for a subsequent violation occurring within three years of a first violation. If the subsequent violation occurs more than three years after the earlier violation, subsection (c) does not apply and the violation is treated under subsection (b) as a first violation. Subsections (d) and (e) limit the total penalty that may apply for multiple violations. Subsection (d) generally applies to violations related to shipping and is intended to limit the aggregate penalty for a violator that makes dozens or hundreds of shipments per day. The provision also specifies that the penalty for failure to maintain an agent for service of process is assessed per day. Subsection (e) applies to violations that are occasional and discrete, like failure to file a monthly report or provide required records upon request. The state may wish to assess the impact of subsection (d) when determining the appropriate amount of the penalty under subsections (b) and (c) for a violation identified in subsection (a)(1)(A) and (a)(2)(A).

The penalties imposed under this section are imposed by a court. The act does not include any provision specifying who may bring a court enforcement proceeding. Depending on the state, the action might be brought by the attorney general, a district attorney or city attorney, or

the regulatory agency. This act presumes that each state will continue to rely on existing law that specifies which agencies or governmental units may bring an enforcement action.

[Section 11. Rulemaking Authority]

The [commission] may adopt rules under [cite to state administrative procedure act] to administer, enforce, implement, or interpret this [act], including rules concerning:

- (1) a form under this [act];
- (2) the method for submitting an application for registration, or cancelling registration, as a fulfillment provider; [and]
- (3) the method and deadline for filing a report, including the format of an electronic report[;] [and]
- [(4) appointing and maintaining an agent for service of process[;] [and]]
- [(5) due process in administrative proceeding[; and]
- (6) a definition of, or guidelines for determining, [good cause] under [cite to provisions of this [act] that refer to [good cause]].]

Legislative Note: *A state should include this section only if the state’s administrative procedure act does not provide adequate rulemaking authority to the commission.*

A state should include paragraph (6) only if it enacts the bracketed language referring to “good cause” in Section 3(h) or 8(c).

Section 12. Uniformity of Application and Construction

In applying and construing this uniform act, a court shall consider the promotion of uniformity of the law among jurisdictions that enact it.

Section 13. Relation to Electronic Signatures in Global and National Commerce Act

This [act] modifies, limits, or supersedes the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 et seq.[, as amended], but does not modify, limit, or supersede 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices

described in 15 U.S.C. Section 7003(b).

Legislative Note: *It is the intent of this act to incorporate future amendments to the cited federal law. In a state in which the constitution or other law does not permit incorporation of future amendments when a federal statute is incorporated into state law, the phrase “as amended” should be omitted. The phrase also should be omitted in a state in which, in the absence of a legislative declaration, future amendments are incorporated into state law.*

[Section 14. Transitional Provision]

(a) A [license] [permit] issued by the [commission] [to a person to ship covered alcoholic beverages on behalf of another to a consumer] in effect on [the effective date of this [act]] continues until the earlier of its date of expiration or [six] months after [the effective date of this [act]]. During that period, the person holding the [license] [permit] may continue activity authorized under the [license] [permit] and is subject to the law of this state applicable to the [license] [permit] as it existed immediately before [the effective date of this [act]]. On expiration of that period, the person holding the [license] [permit] is subject to this [act].

(b) A person that does not hold a [license] [permit] [to ship covered alcoholic beverages on behalf of another to a consumer] on [the effective date of this [act]] is subject to this [act] on and after [the effective date of this [act]].]

Legislative Note: *A state should include this section only if it already issues fulfillment-provider licenses or permits.*

Comment

Several states authorize by license, registration, or otherwise the operations of fulfillment providers. If the enacting state is such a state, this section provides a “phase-in” during which the state’s existing system is replaced with the fulfillment provider registration system under the act.

[Section 15. Severability]

If a provision of this [act] or its application to a person or circumstance is held invalid, the invalidity does not affect another provision or application that can be given effect without the invalid provision.]

Legislative Note: Include this section only if the state lacks a general severability statute or a decision by the highest court of the state adopting a general rule of severability.

[Section 16. Repeals; Conforming Amendments

[(a)] [Cite to direct-to-consumer alcoholic-beverage shipping law relating to a fulfillment provider] is repealed.]

[(b) ...]

Legislative Note: A state should examine its statutes to determine whether conforming revisions are required by:

- (1) Section 3 {Registration of Fulfillment Provider};
- (2) Section 7 {Confidential Information};
- (3) Section 9 {Suspension, Revocation, or Nonrenewal of License or Permit for Unlawful Shipping into Another State}; or
- (4) Section 10 {Penalties}.

Section 17. Effective Date

This [act] takes effect . . .

Legislative Note: A state may wish to consider a delayed effective date, for example 60 days, to allow time for agencies and industry to prepare for implementation.