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RE: Trade Practice Questions

Dear Mr. Smith:

ISSUE: This office is in receipt of your e-mail containing thirteen (13) multiple-part questions pertaining to trade practices.

OPINION: Responses to your questions follow:

1. *Can brewery staff give samples to retail on-premise account decision-makers? Are there any restrictions (i.e., size or quantity of sample)?*

Section 13.211 of the Board's Regulations provides that tastings may be conducted by licensed brokers, distributors, importing distributors and manufacturers or their agents upon licensed or unlicensed premises. [40 Pa. Code § 13.211]. Such tastings must be conducted as follows: 1) Products used shall be legally procured and properly registered and taxes on the products shall be paid; 2) Purchase requirements may not be associated with the tasting; and 3) No more than one (1) standard-size alcoholic beverage of each product shall be provided to each tasting participant. A "standard-size alcoholic beverage" is defined by section 13.201 of the Board's Regulations as "twelve (12) fluid ounces of malt or brewed beverage, four (4) fluid ounces of wine (including fortified wine) or one and one half (1½) fluid ounces of liquor." [40 Pa. Code § 13.201].

There are no forms that must be completed in order to conduct a tasting, and prior permission from the Board is not necessary.

Please be aware that a tasting is different from a sampling promotion. A sampling promotion is intended to introduce consumers to the manufacturer's product. Samplings must adhere to the following criteria: (1) samples may be provided by the manufacturer's representatives and distributor or importing distributor licensees to licensed and unlicensed customers; (2) samples must be in unopened containers of the smallest commercially available size; (3) the providing of such samples cannot be conditioned upon any purchase requirement; (4) samples may not be opened or consumed on Pennsylvania wine and spirits store premises or distributor or importing distributor licensed premises; and (5) samples are limited to one (1) container per patron in any offering. [40 Pa. Code § 13.231 and Board Advisory Notice No. 10 (6th Revision)].

The Liquor Code and the Board's Regulations are silent on the time length of a tasting or a sampling. On a licensed premises, such an event could only occur during the hours and on the days the premises is licensed to operate. [47 P.S. 4-493(16)]. There is nothing in the Board's Regulations that would prohibit a supplier from offering such a tasting or sampling promotion to its retail licensees and their employees, provided they adhere to the aforementioned rules.

2. *Can brewery staff give samples to on-premise retail account patrons?*
 - a) *Who can conduct samplings? (i.e., Brewery? Retailer?)*
 - b) *Who may provide beer?*
 - c) *Other restrictions?*

See response to Question 1. Please also be advised that if access to the tasting requires payment of any kind of fee, it would be considered a sale, and the above prohibition of any purchase requirement being associated with the tasting would be violated and could, depending on the particulars of the promotion, result in the issuance of a citation against a license if the tasting is being held on licensed premises.

3. *Can brewery give samples to off-premise retail account decision makers? Are there any restrictions (i.e., size or quantity of sample)?*

See response to Question 1.

4. *Can brewery staff give samples to off-premise retail account patrons?*

- a) *Who may conduct samplings?*
- b) *Who may provide beer?*
- c) *Other restrictions?*

See response to Question 2.

5. *Can brewery donate beer to retail, non-licensees for purpose of complimentary sampling to their patrons? Are there any restrictions (i.e., size or quantity of sample)?*

There is nothing in the Liquor Code that would prohibit a brewery from donating beer to retail unlicensed businesses for the purpose of complimentary sampling.

6. *Can brewery donate beer to 501(c)(3) to be consumed at retail account as part of non-profit fundraiser?*

Section 13.51 of the Board's Regulations provides that no licensee or group of licensees, their servants, agents or employees, may directly or indirectly, in person, individually or through a trade organization, contribute to or accept from another licensee or group of licensees of a different class, their servants, agents or employees, or a trade organization of licensees of a different class, anything of value by means of advertisements, contributions, purchase, sale of tickets, donations or by any device for any purpose. [40 Pa. Code § 13.51]. Accordingly, a retail licensee would be prohibited from accepting donations from manufacturer or distributor licensees even if the licensee is a 501(c)(3) non-profit entity. However, nothing in the Liquor Code or the Board's Regulations would prohibit the distributors and other contributors from donating liquor, wine or beer to non-licensee patrons or organizations, who may then bring it onto licensed (or unlicensed) premises and consume it. Note that licensees are strictly liable for violations of the Liquor Code and the Board's Regulations which occur on their premises.

7. *Are there any other legal ways to donate beer?*

See response to question 6.

8. *Can brewery participate in charity organization sponsored pub crawl that involves on-premise retail accounts?*

While a charity organization may sponsor an event in Pennsylvania off licensed premises, the same sponsorship on retail licensed premises is unlawful under section 5.32(e) of the Board's Regulations [40 Pa. Code § 5.32]. Section 5.32 permits a retail licensee to hold, or permit to be held, on its licensed premises an event, tournament, or contest, but only under certain conditions. One (1) of these conditions is that, except under certain circumstances not relevant herein, it must be self-sponsored, i.e., paid for and carried out by the licensee itself. [40 Pa. Code § 5.32(e)(5)]. Another of the conditions under which such contests are allowed is if it is conducted by, sponsored by and for the benefit of a bona fide charitable organization. [40 Pa. Code § 5.32(d)(4)].

Additionally, section 13.51 of the Board's Regulations prohibits licensees or manufacturers from contributing to or accepting from another licensee of a different class anything of value by means of advertisement for any purpose. [40 Pa. Code § 13.51]. Thus, it would not be acceptable for the brewer to provide anything of value to the retail accounts in reference to the event.

9. *May brewery provide the following promotional items and what is the cost to the retailer? a) Glassware; b) Permanent POS (neon, bar mirrors, bar signs, back bar pieces); c) Temporary POS (banners, table tents); d) Coasters; e) Promotional giveaways (key chains, bottle openers); f) Apparel; g) Display enhancers.*

Interior point-of-sale displays (other than window and door displays) may be furnished by manufacturers or malt/brewed beverage distributors or importing distributors to wholesale and retail licensees at no charge. The cost may not exceed three hundred (\$300.00) dollars per brand at one (1) time. [Board Advisory Notice No. 10 (6th Revision); 47 P.S. § 4-493(20); 40 Pa. Code §§ 13.42, 13.43]. Relative to malt or brewed beverage suppliers, section 13.51 of the Board's Regulations prohibits a licensee of one class, such as a manufacturer, from providing anything of value to licensees of another class, such as a restaurant liquor licensee. [40 Pa. Code § 13.51]. Similarly, the Liquor Code's provisions on interlocking business practices prohibit manufacturers from providing money or other things of value to equip or otherwise help the operation of the licensed business of a retail licensee. [47 P.S. § 4-443]. Historically, however, this office has approved cooperative advertising between manufacturers of malt or brewed beverages, distributors and retail licensees, so long as each party pays its

proportionate share of the cost of advertisement. These cooperative advertising rules do not apply to point-of-sale advertising displays.

Section 493(24) of the Liquor Code allows manufacturers and licensees to provide advertising novelties with a value of fifteen dollars (\$15.00) or less to other licensees and consumers with or without a purchase. Such advertising novelty giveaways may or may not be conditioned on the purchase of an alcoholic beverage. While you did not provide information regarding the value of the merchandise in question, so long as the merchandise has a value of less than fifteen dollars (\$15.00) and contains advertising material, it would be permissible for you to provide said merchandise to consumers regardless of whether the give away is conditioned on purchasing alcohol. [40 Pa. Code § 13.52; 47 P.S. § 4-493(24)].

However, section 493(17) of the Liquor Code prohibits any licensee from providing equipment or fixtures to other classes of licensees and permits licensees to sell glasses at not less than cost. [47 P.S. § 4-493(17)]. The Board has traditionally considered glassware to be equipment for retail licensees. Therefore, a distributor **may not** sell at less than cost or otherwise give retail licensees such beer-branded or non-beer-branded glassware for use in their establishments, or for promotions. Likewise, an importing distributor **may not** sell at less than cost or otherwise give distributors such beer-branded or non-beer-branded glassware for use in their establishment, or for promotions.

10. Are mail-in rebates allowed? a) Generic; b) With Logos; c) With branded partner; d) Other restrictions.

In response to your inquiries, section 493(24) of the Liquor Code [47 P.S. § 4-493(24)] prohibits the Board or any manufacturer, or any employe or agent of a manufacturer, licensee or of the Board, to offer to give anything of value to induce directly the purchase of liquor or malt or brewed beverage, or for any licensee, manufacturer or other person to offer to give to trade or consumer buyers any prize, premium, gift or other inducement to purchase liquor or malt or brewed beverages, except advertising novelties of nominal value which the board shall define. However, manufacturers may offer coupons which offer monetary rebates on purchase of wines and spirits through Pennsylvania wine and spirits stores and purchases of malt or brewed beverages. Further, no manufacturer or any agent of a manufacturer shall honor any coupons without proof of purchase in the form of a sales receipt attached to the coupons. [47 P.S. § 4-493(24)].

Mail-in rebates are permitted for purchases at wine and spirit stores, retail license premises, distributors, and import distributors only. For example, a coupon could offer one dollar (\$1.00) back by sending in a rebate form along with the proof of purchase. A rebate may be offered up to the full purchase price of the wine, spirit, or malt beverage.

11. Are instant redeemable coupons allowed? a) Generic; b) With Logos; c) With branded partner; d) Other restrictions.

Instant redeemable coupons are permitted for purchases at wine and spirits stores only. For example, a coupon could offer one dollar (\$1.00) off at the register of a purchase of an alcoholic beverage.

12. Are cross-merchandising promotions allowed? (non-branded); Are there any restrictions?

Cross-merchandising promotions are permitted with a few restrictions. A coupon may require the purchase of a non-alcoholic item in conjunction with alcoholic items. For example, a coupon may require a customer to buy a bottle of wine and pizza and get one dollar (\$1.00) off the wine. Alternatively, a coupon could require a customer to buy a pizza and get a coupon for one dollar (\$1.00) off a bottle of wine. However, a coupon for the discount of another product is not permitted. For example, a promotion that required buying a bottle of wine to get one dollar (\$1.00) off the purchase of pizza is not permissible.

In regard to sweepstakes, 40 Pa. Code § 5.32(h) states that a manufacturer or licensee may sponsor sweepstakes promotions subject to the following conditions:

- i. No purchase is necessary to enter.
- ii. Entrants shall be twenty-one (21) years of age or older
- iii. Retail licensed premises may only be involved as pick-up or drop-off points for entry forms and not for the conducting of drawings or the awarding of prizes.
- iv. Alcoholic beverages may not be part of the prize.

[40 Pa. Code § 5.32(h)].

Further, sweepstakes winners may be chosen by random drawing or non-random drawing. Distributors can hold sweepstakes on the licensed premises, but as already indicated, retail licensee may only be involved as pick-up or drop-off points. Manufacturers who wish to hold sweepstakes at Pennsylvania Wine and Spirit stores must seek approval from the Bureau of Product Management.

13. *Are non-coupon sweepstakes allowed? Are there any restrictions?*

Because this has already been addressed, please refer to the answers above.

THIS OPINION APPLIES ONLY TO THE FACTUAL SITUATION DESCRIBED HEREIN AND DOES NOT INSULATE THE LICENSEE OR OTHERS FROM CONSEQUENCES OF CONDUCT OCCURRING PRIOR TO ITS ISSUANCE. THE PROPRIETY OF THE PROPOSED CONDUCT HAS BEEN ADDRESSED ONLY UNDER THE LIQUOR CODE AND REGULATIONS. THE LAWS AND POLICIES ON WHICH THIS OPINION IS BASED ARE SUBJECT TO CHANGE BY THE LEGISLATURE OR THE PENNSYLVANIA LIQUOR CONTROL BOARD.

Very truly yours,

FAITH S. DIEHL
CHIEF COUNSEL

cc: Pennsylvania State Police,
Bureau of Liquor Control Enforcement

LCB Advisory Opinion No. 07-293

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