

July 1, 2015

Vincent LaBella
Sidney Frank Importing Co. Inc.
VIA E-MAIL: vlabella@sidneyfrank.com

RE: Fifty-six (56) Days of Summer Campaign

Dear Mr. Labella:

ISSUE: This correspondence is in response to your e-mail sent to the Pennsylvania Liquor Control Board's ("Board") Director of Regulatory Affairs, Jerry W. Waters, on June 11, 2015, which was forwarded to this office for response, wherein you request legal review of an advertising campaign that Sidney Frank Importing Co., Inc. ("SFIC") is considering in partnership with a third party promotional company, Philly2Night, to promote Jägermeister in the Philadelphia market.

According to the information that you supplied, the advertising campaign would be called the "Fifty-six (56) Days of Summer Campaign" and would involve making a list of fifty-six (56) different exciting bars, night clubs, and restaurants in Philadelphia to coincide with the fifty-six (56) different ingredients found in a bottle of Jägermeister. SFIC would find something unique about each of the fifty-six (56) accounts and then each establishment would be featured on its own night during the campaign. In order to participate, the account would simply need to help SFIC identify something that is unique about it and then be willing to feature Jägermeister on its assigned night through a drink special and/or advertising signage.

SFIC would also like to schedule some Jägermeister samplings on about ten (10) of the nights during the campaign at the accounts with the largest millennial consumer demographic. The campaign will run from July 1, 2015 through August 25, 2015, and it will be featured solely on the Philly2Night website, <http://philadelphia.cities2night.com>.

The Board's records indicate that SFIC holds Sales Permit No. SP-420 (LID 22870) and Vendor Permit VP-349 (LID 22956) for the premises at Cedar Plaza, 20 Cedar Street, New Rochelle, New York.

OPINION:

Advertising of Alcohol Generally

In Pennsylvania, the advertisement of alcoholic beverages is generally governed by section 498 of the Liquor Code [47 P.S. § 4-498]. Pursuant to section 498, manufacturers, wholesalers, retailers and shippers, whether from outside or inside the Commonwealth, and any licensees are permitted to advertise their products and prices in Pennsylvania. [47 P.S. § 4-498(a)]. Any advertisement of price may not contain: “[a]ny statement that is false, deceptive, or misleading”; “[a]ny statement that is disparaging of the products of a competitor”; or “[a]ny statement referring to monetary comparison between brands.” [47 P.S. § 4-498(b)]. Prices that are advertised or displayed on licensed premises must be the prices that are in effect at the time of the advertisement or display. [47 P.S. § 4-498(c)].

Moreover, for all alcoholic beverage and malt beverage advertising, the following conditions apply:

1. The entity responsible for the advertisement must be clearly identified in the advertisement.
2. No licensee may distribute, by mail, personally or through servants, agents or employees, price lists, circulars or handbills off the license premises to the general public as a means of advertising liquor, wine or malt or brewed beverages.
3. No print advertisement of alcoholic beverages of any type shall be permitted within three hundred feet of any church, school or public playground. This prohibition shall not preclude any point of sale advertisement, menus or other print advertisement regarding alcoholic beverages inside the licensed premises.
4. The use in any advertisement of alcoholic beverages of any subject matter, language or slogan directed to minors to promote consumption of alcoholic beverages is prohibited. Nothing . . . shall be deemed to restrict or prohibit any advertisement of alcoholic beverages to those persons of legal drinking age.
5. No advertisement shall be permitted, either directly or indirectly, in any booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular or other similar publication published by, for or on behalf of any educational institution.
6. No advertisement that is obscene shall be permitted; and

7. Advertisement of alcoholic beverages and malt and brewed beverages shall not be inconsistent with the spirit of safety or safe driving programs.

[47 P.S. § 4-498(e)-(f)]. The term “advertisement” is defined as “any advertising of alcoholic beverages through the medium of radio broadcast, television broadcast, newspapers, periodicals or other publication, outdoor advertisement, any form of electronic transmission or any other printed or graphic matter, including booklets, flyers or cards, or on the product label or attachment itself.”

[47 P.S. § 4-498(g)].

As indicated above, no advertisement is permitted, either directly or indirectly, in a booklet, program book, yearbook, magazine, newspaper, periodical, brochure, circular or similar publication published by, for or on behalf of any educational institution. However, you may wish to consult the decision in Pitt News v. Pappert, which held section 498 of the Liquor Code unconstitutional as applied to The Pitt News. [Pitt News v. Pappert, 379 F.3d 96, 113 (3d Cir. 2004) (holding 47 P.S. § 4-498 unconstitutional, as applied)].

Also, while section 498(e)(2) of the Liquor Code prohibits the distribution by mail of price lists, circulars or handbills to the general public as a means of advertising liquor, wine or malt or brewed beverages [47 P.S. § 4-498(e)(2)], the Liquor Code does not define the terms “circular” or “mailing.” However, Webster’s II New College Dictionary (1999) defines “circular” as a “printed advertisement, directive or notice for mass distribution,” and “mailing” is defined as “a batch of mail sent at one time by a mailer.” For purposes of clarity and uniformity, the Board has interpreted the terms “circular,” “price list,” and “handbill” to mean any form of “unsolicited” advertising. Nevertheless, please note that the Pennsylvania Attorney General’s Office has determined that this prohibition does not prevent a licensee from advertising in a newspaper or community newspaper.

Additionally, please be advised that section 493(24)(i) of the Liquor Code prohibits licensees from offering or giving anything of value as a means to induce the purchase of alcoholic beverages, or from offering or giving to trade or consumer buyers any prize, premium, gift or other inducement to purchase alcoholic beverages, except advertising novelties of nominal value. [47 P.S. § 4-493(24)(i)]. The Board has defined advertising novelties of nominal value as items that have a wholesale cost of fifteen dollars (\$15.00) or less and contain advertising material. [40 Pa. Code § 13.52; Board Advisory Notice

No. 10 (6th Revision)]. Advertising novelty giveaways may or may not be conditioned on the purchase of an alcoholic beverage.

Cooperative Advertising

Section 13.51 of the Board's Regulations prohibits a licensee of one class, such as a manufacturer or importer, from providing anything of value to a licensee of another class, such as a retail licensee. [40 Pa. Code § 13.51]. Similarly, the Liquor Code's provisions on interlocking business practices generally prohibit manufacturers or importers from providing money or other things of value to equip or otherwise help the operation of a retail licensee. [47 P.S. §§ 4-411, 4-443]. Historically, however, this office has approved cooperative advertising between licensees of a different class, so long as each party pays its proportionate share for the cost of advertisement.

Discount Pricing Practices

Section 406(g) of the Liquor Code and section 13.102(a) of the Board's Regulations authorize retail licensees to offer happy hour discount pricing. That is, retail licensees are permitted to discount ***any and all*** alcoholic beverages for a period of time not to exceed four (4) consecutive or non-consecutive hours per day, and not to exceed fourteen (14) hours per week. [47 P.S. 4-406(g)]. During such happy hours, the price of alcoholic beverages may not change. The hours need not be consecutive and may be divided, subject to the above noted limitation, in any manner a licensee desires. Notice of all happy hours must be visibly posted on the licensed premises seven (7) days prior to each happy hour. [Id.].

In addition, section 13.102(b)(2) of the Board's Regulations authorizes retail licensees to offer daily drink special discount pricing. [40 Pa. Code § 13.102(b)(2)]. With regard to daily drink specials, retail licensees are permitted to offer one (1) specific type of alcoholic beverage at a discounted price all day, or for a portion of the day, if it chooses. [Id.]. A specific type of alcoholic beverage means a specific registered brand of malt or brewed beverage, a type of wine, a type of distilled spirits or a mixed drink. [Id.]. A specific brand of beer such as "Blue Hound Pilsner" or "Brendan's Cream Stout" or "Oil City Light" may be discounted, but not "all draft" or "all bottled" beer or "all Blue Hound products." Daily wine drink specials could be "Chardonnay" or "Merlot," but not "all white wine" or "all red wine" or "all Kendall's wines." Permissible spirits specials would be "Rum and Cola" or "all brandy drinks," but not "all well drinks" or "all Jackson's products." [Board Advisory Notice No. 16].

No discount pricing practice (daily drink special or happy hour) may occur between 12:00 a.m. and the legal closing hour, which is 2:00 a.m. for most retail establishments. [47 P.S. § 4-406(g); 40 Pa. Code § 13.102].

Further, although section 493(24)(i) of the Liquor Code generally prohibits licensees from offering anything of value to induce directly the purchase of alcoholic beverages [47 P.S. § 4-493(24)(i)], section 13.53 of the Board's Regulations authorizes representatives of manufacturers or retail licensees to give to or purchase for consumers one (1) standard-size alcoholic beverage on retail licensed premises, provided the giving of the alcoholic beverage is not contingent upon the purchase of any other alcoholic beverages. [40 Pa. Code § 13.53]. Bar spending or free drinks are limited to one (1) alcoholic beverage per patron in any such offering. A standard-size alcoholic beverage is twelve (12) fluid ounces of a malt or brewed beverage, four (4) fluid ounces of wine (including fortified wine), and one and one-half (1½) fluid ounces of liquor. [*Id.*].

Tastings/Samples

Tasting or tasting events are defined in the Board's Regulations as presentations of alcoholic products to the public for the purpose of market research, disseminating product information and education to the public as to quality and availability. [40 Pa. Code § 13.201]. Tastings may be conducted by sponsors, which are defined as "any licensed vendor, importer, distributor, importing distributor or manufacturer or its agent or employee who is 21 years of age or older." [*Id.*]. Tastings may be conducted on licensed or unlicensed premises, provided the following conditions are met: (1) any products used must be legally procured and registered, and the taxes thereon must be paid; (2) there can be no purchase requirement associated with the tasting or tasting event; and (3) no more than one (1) standard size alcoholic beverage of each product may be provided to each tasting participant. [40 Pa. Code § 13.211(b)].

Board Regulations provide that a standard-sized alcoholic beverage is 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 spirits. [40 Pa. Code § 13.201].

A sampling promotion is intended to introduce consumers to a manufacturer's product and when conducted by a manufacturer, licensee or their representative, must adhere to the following criteria: (1) samples may be provided by manufacturers or their representatives, licensed distributors and importing distributors to unlicensed customers; (2) samples must be in unopened containers of the smallest commercially available size;

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(3) providing samples may not be conditioned upon any purchase requirement; (4) samples may not be opened or consumed on State Liquor Store premises or distributor or importing distributor licensed premises; and (5) samples are limited to one container per patron in any offering. [40 Pa. Code § 13.231 and Board Advisory Notice No. 10 (6th Revision)].

Therefore, as long as the proposed advertising campaign is conducted in a manner that is consistent with the restrictions applicable to advertising generally, cooperative advertising, discount pricing practices, and tastings/samples, as set forth above, it would be permissible.

Should you have any additional questions regarding this matter, the Liquor Code, or the Board's Regulations, please do not hesitate to contact this office directly.

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
Jerry W. Waters, Director of Office of Regulatory Affairs

LCB Advisory Opinion No. 15-271