

December 24, 2018

Scott Schleifstein
Cohen Silverman Rowan LLP
79 Madison Avenue
New York, NY 10016
VIA E-MAIL

RE: Smirnoff Seltzer “Middle Seat” Contest

Dear Mr. Schleifstein:

ISSUE: This office is in receipt of your e-mail dated November 30, 2018, wherein you request legal review of a proposed contest promotion to be conducted in Pennsylvania.

According to the official rules you provided, the “Smirnoff Seltzer “Middle Seat” Contest” promotion was scheduled to begin on November 30 and ended on December 14, 2018. To participate in the contest, interested individuals had to go to <https://smirnoffseltzerupgrade.com> to complete and submit the online entry form with a comment explaining why an upgrade from a middle seat would have started the holidays “off right.” Entrants were limited to one entry per person.

The winner was to be selected via judging by an independent agency as well as representatives of the sponsor based upon the following criteria: creativity and originality (20%); persuasiveness of the individual’s communication of need for a seat upgrade (50%); alignment with the spirit animating the Smirnoff Seltzer brand (25%); and proper spelling, syntax, and grammar (5%).

Sixteen winners were chosen to receive a seat upgrade for him/herself on a departing and returning flight as designated on the entry form. If the seat upgrade was not available on either flight, the sponsor reserved the right to award an alternate prize of a \$500.00 gift card. The approximate total retail value of all prizes was \$50,000.00. A purchase of a coach class ticket with a middle seat assignment on a U.S. domestic, non-stop airline flight between December 17, 2018 and January 31, 2019, was necessary to enter the contest, and the contest was only open to adults

who were at least twenty-one years of age at the time of entry. The official rules do not indicate whether alcohol was part of any prize.

OPINION: Section 493(24)(i) of the Liquor Code provides, in pertinent part, that it shall be unlawful for:

any licensee under the provisions of this article, or the board or any manufacturer, or any employee or agent of a manufacturer, licensee or of the board . . . to offer or give or solicit or receive anything of value as a premium or present to induce directly the purchase of liquor or malt or brewed beverage, or for any licensee, manufacturer or other person to offer or 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.

47 P.S. § 493(24)(i).

However, section 5.32(h) of the Pennsylvania Liquor Control Board's ("PLCB") Regulations states that a manufacturer, manufacturer's representative, or licensee may sponsor sweepstakes promotions subject to the following conditions:

- i. No purchase is necessary to enter.
- ii. Entrants shall be twenty-one 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).

The PLCB's Regulations define the term "sweepstakes" as "[a] chance promotion in which tickets or game pieces are distributed and the winner or winners are selected in a random drawing." 40 Pa. Code § 5.30. Promotions which meet the definition of "sweepstakes" set forth in section 5.30 and which are conducted in accordance with the requirements of section 5.32(h) of the PLCB's Regulations are not considered unlawful inducements to purchase liquor or malt or brewed beverages.

Although there are no similar provisions in the PLCB's Regulations addressing manufacturer-sponsored contests where winners are selected by a panel of judges, such as the promotion proposed in this instance, this office has traditionally opined that such promotions are permissible as long as they comply with the same conditions applicable to sweepstakes as set forth above.

This office has reviewed the proposed sweepstakes promotion and determined that it comported with applicable liquor laws and regulations, specifically section 5.32(h) of the PLCB's Regulations, 40 Pa. Code § 5.32(h), as long as alcohol was not part of any prize.

Please be advised that prior approval of malt or brewed beverages point-of-sale ("POS") material and retail licensed premises POS material is no longer required. However, the requirement for prior approval of POS material intended for use in the PLCB's Fine Wine & Good Spirits stores from the Bureau of Product Selection remains. The total cost of all POS advertising material relating to any one brand of any one manufacturer at any one time may not exceed \$300.00 on retail licensed premises. 47 P.S. § 4-493(20)(i).

Therefore, as long as alcohol was not included in the prizes, it would have been permissible to conduct this promotion in the Commonwealth in reference to the areas checked below:

- retail licensed premises.
- distributor licensed premises.
- both retail and distributor licensed premises.
- the PLCB's Fine Wine & Good Spirits stores, subject to approval of the Bureau of Product Selection (POS only).
- other – Internet, text messaging.

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

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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.

Sincerely,

A handwritten signature in black ink that reads "Rodrigo J. Diaz". The signature is written in a cursive style with a large initial 'R' and a stylized 'D'.

RODRIGO J. DIAZ
CHIEF COUNSEL

cc: Pennsylvania State Police, Bureau of Liquor Control Enforcement

LCB Advisory Opinion No. 18-451