When Does a Good Become a Gift?

Extra Caution is in Order When Cooperating with Suppliers on Store Promotions and Placements

BY KEVEN DANOW

The Alcohol and Tobacco Tax and Trade Bureau ("TTB") recently concluded a series of investigations which resulted in charges against members of the supplier tier. In each of these investigations the supplier participated in a retailer-initiated program in which the retailer agreed to give the industry member the most sought-after shelf or display space in exchange for items of value.

Although, as most industry members know, it is a violation of federal law and New York State law for a supplier to provide a retailer with gifts or services, the Code of Federal Regulations (and New York State regulations) contain a list of exceptions. These exceptions include signs, displays costing less than $300 per brand, as well as certain point of sale advertising material.

A national retailer developed a promotional program and offered to give the suppliers preferential shelf and display space in all of its retail locations in exchange for their participation in the program. The suppliers agreed to participate by furnishing the retail licensee with display and advertising material qualifying for the gift and service exceptions.

When the TTB brought charges against the suppliers for participating in the retailer's program, the suppliers argued that furnishing retailers with items of value that come within gift or service exceptions could not constitute an unlawful inducement under any circumstance. They believed that if the items of value supplied to retailers came within the exceptions enumerated in the regulations and did not exceed the authorized values, they were sailing within the "safe harbor." The Alcohol and Tobacco Tax and Trade Bureau disagreed. In essence, the TTB told them: "You cannot use the exceptions to circumvent the intent of the statute."

Without admitting any wrongdoing, the suppliers paid substantial fines to settle the charges. In order to avoid further misunderstandings, the TTB issued industry circular 2012-01 on January 11, 2012, to provide guidance on tied-house issues.

New Circular Deserves Attention

Because retail licensees generally do not come under the jurisdiction of the TTB, the new circular is directed at wholesalers and suppliers. However, the TTB warnings are also applicable under New York law; and in New York a violation of the tied-house rules results in charges against retailers as well as suppliers and wholesalers. Any retailer who participates in an illegal gift or service program puts his/her license at risk.

The new industry circular warns industry members: "Industry members may not use allowable exceptions as a subterfuge to violate some other provision of the tied-house law or regulations."

In other words, the TTB believes that it violates federal law for an industry member to give an otherwise allowable gift or service in exchange for the retailer's promise to purchase the industry member's product instead of the product of a competitor or to grant the industry member's products preferential shelf or display space.

A supplier or wholesaler may suggest that a retailer will benefit by placing its displays and products in a specific location, but may not trade the advertising material or condition it upon a promise, expressed or implied, that the retailer will provide the brand with preferential placement.

While the industry member is not permitted to condition its advertisements on promises of future business, in determining the quantity of Subpart D items furnished to a retailer, the Industry Member may take into consideration:

- *The amount of product previously purchased by the retailer*
- *A reasonable expectation of new product purchases*
- *The seasonal nature of the product*
- *Expected changes in market conditions, or*
- *The anticipated amount of product to be purchased by a new retail account.*

In the new circular, the TTB warns industry members not to give retailers promotional support funds either directly or indirectly. Thus, while a wholesaler or supplier is permitted to use a third-party promotional company it would be a violation to use a company related to a retailer. Similarly it would violate law and regulations to require the retailer to return or repay the value of items given to it, because the retailer did not purchase a sufficient quantity of a product.

Although the circular reiterates and explains the rules, the real takeaway is that the exceptions listed in the federal regulations will not protect an industry member if they are used as part of an overall plan to evade the tied-house rules. ■

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