Legal Aspects of Alcohol Beverage Marketing

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I. SCOPE OF ARTICLE

When people think about alcohol beverage marketing, they might think about Budweiser ads on television during halftime, or a billboard advertising their favorite wing and drink place. However, alcohol beverage advertising includes not only commercials and billboards, but print ads in newspapers and magazines, retailer specialty items and consumer novelties (the so called "trinkets and trash"), coupons, product samplings/tastings, contests and sweepstakes, direct mail, contests and sweepstakes, and the list goes on and on. All of these advertising promotions will involve some level of regulatory compliance, usually focusing on who pays for the promotion, the cost or value of the promotion, some restrictions as to content, and the manner and location of distribution. On the federal level, alcohol beverage marketing is governed by the Federal Alcohol Administration Act, 27 U.S.C. §201 *et seq*., and corresponding rules in the Code of Federal Regulations. Because the 21st Amendment to the United States Constitution allows the states to regulate the sale and distribution of alcohol within their individual borders, each state may legislate its own statutory scheme and have a governing alcohol agency which can promulgate corresponding regulations. The great majority of laws governing alcohol marketing focus on payment and "of value" issues derived from tied house concerns, in order to protect retailers from undue influence and to prevent manufacturers from giving retailers "things of value." In addition, some states have temperance statutes or regulations which are directed at preventing over-consumption by consumers.

II. LEGAL FRAMEWORK GOVERNING ALCOHOL BEVERAGE MARKETING

All of the following are different forms of alcohol beverage marketing: (1) coasters on restaurant tables containing manufacturer logos; (2) branded baseball caps; (3) tap markers; (4) restaurant wine tastings; (5) newspaper advertisements; (6) grocery store coupons; (7) contests sponsored by alcohol beverage suppliers; (8) direct mail pieces; and (9) two-for-one drinks. All of these marketing activities are governed by federal laws and regulations, as well as state statutes and regulations. Clients phone with a variety of questions. Are there regulations about who pays? Are there legal limitations as to the cost? Are there restrictions as to the content? Are there restrictions as to the manner and location of distribution? The answer to all of these questions is a resounding "yes!" To begin any analysis of whether a given promotion is permissible, we begin with the legal framework outlined below.

A. Background

Analysis of any advertisement involving alcohol beverages must include review of both federal and state laws. On the federal level, most issues discussed in this section are governed by the Federal Alcohol Administration Act ("the Act"), codified at 27 U.S.C. § 201 *et seq.* The Twenty-first Amendment to the United States Constitution gives the states the power to regulate the sale, distribution, and marketing of alcohol beverages within their borders.[1] Most every state exercises this power via a legislated statutory scheme and corresponding administrative

[1] Section 2 of the Twenty-first Amendment provides: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."

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regulations related to alcohol beverages. Depending upon the issue and the jurisdiction, local ordinances may also apply.

An analysis of a proposed alcohol advertisement (or one existing in the marketplace that has come under regulatory scrutiny) generally involves tied house concerns (whom does the advertisement benefit and who paid for it), and content concerns. A background summary of the law in each area follows below.

B. The "Three Tier System" and "Tied House Evil

The "three tier system" is industry parlance for the manner in which alcohol beverages are sold, marketed, and distributed in America. The three tier system is in play for all segments within the industry (beer, wine, and distilled spirits). The top tier is the manufacturing tier, and consists of brewers, vintners, and distillers. The middle tier is the wholesale or distribution tier, and the third tier is the retail tier. Manufacturers enter exclusive distribution agreements with distributors, who are assigned to specific geographic territories, where they may sell to retailers. In most states, all of these industry members are private entities, however, in "control states" the state government owns and operates retail outlets.[2] Rarely, the control state performs the wholesale, rather than the retail function. Nonetheless, regardless of whether a state is a control state or an "open" state, retailers may only purchase alcohol beverage products from duly licensed distributors, and cannot buy directly from the manufacturer. The reason for this is a perfect segue into the concept of "tied house evil."

Almost every state has a "tied house" statute that regulates the manner in which the three tiers may interact. The term originated in the days of Prohibition, when a "tied house" referred to a retailer that was bound to a manufacturing house via a kickback scheme and was precluded by the manufacturer from making independent purchasing decisions. Today, state tied house statutes prohibit this activity, and serve as the enabling authority for administrative regulations promulgated by state agencies regarding restrictions on industry activities, including advertising.

The majority of the state tied house statutes are patterned after the federal tied house statute, codified at 27 USC § 205. Section 205 prohibits exclusive outlets (e.g., a manufacturer requiring a retailer to purchase its products to the exclusion of others), tied house violations, commercial bribery, and consignment sales. It also establishes requirements and restrictions for labeling and advertising.

The tied house and commercial bribery provisions are those most frequently cited by regulators reviewing an advertisement or marketing campaign.

> It shall be unlawful for any person engaged in business as a distiller, brewer, rectifier, blender, or other producer, or as an importer or wholesaler, of distilled spirits, wine, or malt beverages, or as a bottler, or warehouseman and bottler, of distilled spirits, directly or indirectly or through an affiliate...

[2] The control states are Alabama, Idaho, Iowa, Maine, Montgomery County, Maryland (the rest of Maryland is open), Michigan, Mississippi, Montana, New Hampshire, North Carolina, Ohio, Oregon, Pennsylvania, Utah, Vermont, Virginia, Washington, West Virginia, and Wyoming. Though it is not true in every case, advertising restrictions tend to be more stringent in control states than in open states.

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(b) "Tied house"

To induce through any of the following means, any retailer, engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from sel1ing or offering for sale any such products to such retailer in interstate or foreign commerce: (1) By acquiring or holding (after the expiration of any existing license) any interest in any license with respect to the premises of the retailer; or (2) by acquiring any interest in real or personal property owned, occupied, or used by the retailer in the conduct of his business; or (3) by furnishing, giving, renting, lending, or selling to the retailer, any equipment, fixtures, signs, supplies, money, services, or other thing of value, subject to such exceptions as the Secretary of the Treasury shall by regulation prescribe, having due regard for public health, the quantity and value of articles involved, established trade customs not contrary to the public interest and the purposes of this subsection; or (4) by paying or crediting the retailer for any advertising, display, or distribution service; or (5) by guaranteeing any loan or the repayment of any financial obligation of the retailer; or (6) by extending to the retailer credit for a period in excess of the credit period usual and customary to the industry for the particular class of transactions, as ascertained by the Secretary of the Treasury and prescribed by regulations by him; or (7) by requiring the retailer to take and dispose of a certain quota of any of such products; or

(c) Commercial bribery

To induce through any of the following means, any trade buyer engaged in the sale of distilled spirits, wine, or malt beverages, to purchase any such products from such person to the exclusion in whole or in part of distilled spirits, wine, or malt beverages sold or offered for sale by other persons in interstate or foreign commerce, if such inducement is made in the course of interstate or foreign commerce, or if such person engages in the practice of using such means, or any of them, to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products, or if the direct effect of such inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any products to such trade buyer in interstate or foreign commerce: (1) By commercial bribery; or (2) by offering or giving any bonus, premium, or compensation to any officer, or employee, or representative of the trade buyer; …

Tied house laws, both federal and state, arise in a variety of contexts. Normally, the issue is whether manufacturer advertising used by a retailer is a thing of value or impermissible premium not governed by a legislated exception. For example, in State X, may manufacturer Y issue instantly redeemable coupons on its products on the premises of retailer Z? Or, may manufacturer Y give away printed T-shirts on the premises of retailer Z? These issues are addressed in more detail in the sections that follow.

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The Act also restricts the content of alcohol beverage advertisements. Such advertisements may not contain any matter which is (1) false, deceptive, or misleading; (2) disparaging of the products of a competitor; (3) obscene or indecent; (4) related to the product's age or manufacturing process; (5) related to any guaranty; (6) inconsistent with product labeling; (7) directed to minors; (8) inconsistent with the spirit of safety or safe driving programs; or (9) a representation of athletic prowess or of curative or therapeutic effects, *See* 27 U.S.C. § 205(f). These restrictions apply to all alcohol beverage advertisements, regardless of format or means of transmission.

III. FEDERAL TIED HOUSE EXCEPTIONS: SPECIFIC KINDS OF ALCOHOL ADVERTISEMENTS

A. Point of Sale Materials and Consumer Advertising Specialties

Both federal and state laws govern the use of so-called "Point of Sale Materials" and "Consumer Advertising Specialties". Point of Sale materials, or "POS", are referred to in some states as "Retailer Advertising Specialties". POS consist of any items given or sold by the manufacturer to the retailer for the purpose of attracting consumers to the manufacturer's products. These items are designed to remain on the retail premises and include, among other things, posters, inside signs, coasters; menu cards, napkins, and wine lists. *See* 27 C.F.R. § 6.84 (b)(l).

Menus are becoming an increasingly popular item in the retailer advertising specialty category. With consumer traffic down and costs on the rise, retailers are seeking to defray all possible operating costs with supplier funds. The original concept of the menu card or the wine list contemplated by 27 C.F.R. § 6.84 began with an acceptable expenditure whereby suppliers are allowed to pay for listings or even photos of their products where sold. Today, however, retailers are trying to use supplier funds for menu covers and food portions of menus and other pieces that do not contain supplier advertising at all. Most states will consider these kinds of payments gifts of value and therefore illegal under state and federal tied house law. For example, the State of New York has adopted a very strict position on menus paid for with supplier funds.

Last year, the State of New York gained wide attention as a result of a lawsuit filed by the New York State Liquor Authority (“NYSLA”) against several alcohol beverage wholesalers for various violations, including some related to retailer specialty items. In summary, the NYSLA contended that the wholesalers were extending benefits to certain retailers which exceeded those allowed by tied house laws. Per a consent judgment and order, the wholesalers may not pay for retailer wine and drink menus unless (a) the payment is not for any portion of a menu which consists of food items; (b) the payment is not for menu jackets, covers, binders or similar items, except where such an item is made of paper, cardboard or similar material, and is of *de minimis* value; (c) all payments are made to a bona fide printing company that is independent of the licensee, pursuant to an invoice from the printing company for the reasonable cost of printing the menus, or the licensee’s prorated portion.

As with other trade practices, state alcohol beverage agencies have adopted a patchwork of regulations and policies regarding menus, thereby making it difficult for chain retailers with

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outlets in multiple states to adopt a menu printing policy, or to set up an account for legally permissible supplier funding for menus in one location. For example, the State of Florida allows wine and spirits lists to be paid for by suppliers, as long as they contain only information about alcoholic beverages and their prices. However, such lists or menus featuring only beer may not be paid for. Fl. Admin. Code r. 61A-1.010. Texas allows menu "folders" to be paid for by suppliers, but at the time they are delivered to the retailer they must be blank as to the listing of food or beverage items. Tex. Admin. Code tit. 16, § 45.112(c).

Consumer advertising specialties are similar in that they too are given or sold to the retailer by the manufacturer; however, they are designed as take-away gifts for the consumer. They include ashtrays, corkscrews, matches, recipe cards, T-shirts, and hats. *See* 27 C.F.R. § 6.84(b)(2).

Both POS and consumer advertising specialties are subject to restrictions as a result of the tied house laws. Both must contain "conspicuous and substantial advertising matter" about the product or its manufacturer. Furthermore, the manufacturer may not pay or credit the retailer for using these items. *See* 27 C.F.R. § 6.84(c). Individual states impose their own additional restrictions. The most common restriction is the cost of the POS and consumer specialty items; most states limit the cost with a specified dollar amount.

B. Equipment

The federal tied house exception for "equipment and supplies"; *see* 27 C.F.R. § 6.88; includes glassware, dispensing accessories,[3] carbon dioxide and other gases used in dispensing equipment, and ice. This section allows suppliers to sell (not give) glassware to retailers at cost. The retailer must pay for the glassware within thirty days.

Frequently suppliers wish to give glassware to retailers containing supplier branding in order to promote products sold at the licensed premises. The donation of glassware can be a tied house violation because glassware is a thing of value, is an ordinary business expense of the retailer, and is something used in daily operation of the retail business. Many states such as Pennsylvania and Maryland track the federal regulation and require retailers to buy glassware. Some states do not have a regulation addressing glassware, and therefore following the federal regulation in those jurisdictions is often the best practice. Still others, such as Ohio, allow the provision of glassware, but with cost restrictions and under limited conditions.

Donations of tapping equipment and accessories are also very popular, especially in establishments with a large beer business. As with the glassware examples above, many states follow the federal rule and require retailers to purchase this type of equipment at cost. *See, e.g.*, Virginia's regulation at 3 VAC 5-30-60(B) Some states, however, have promulgated far more strict regulations. The State of Washington, for example, requires retailers to pay cash for these items and requires them to pay within five days. Wash. Admin. Code § 314-12-140.

[3] Dispensing accessories are defined by § 6.88 as standards, faucets, cold plates , rods, vents, taps, tap standards, hoses, washers, couplings, gas gauges, vent tongues, shanks, and check valves. *See id*.

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A related issue is whether retailers may accept cleaning or other servicing from supplier or wholesaler representatives for the dispensing systems in place inside the retail premises. Some states, such as New York, allow installation only and not follow up services. *See* NY Alc. Bev. Con. § 101(1)(c); 9 NY Comp. R. & Regs. § 86.13. Others, such as Illinois, specify the particular activities that the upper tier industry member can engage in with regard to dispensing systems. Illinois wholesalers may service, balance, or inspect systems regularly as long as they do it themselves and do not pay an outside company to do the service. Il. Admin. Code, tit. 11, § 100.210(a).

C. Samplings and Tastings

The terminology regarding sampling and tasting is often confused, as they are similar but separate concepts. Both are designed to create interest in a manufacturer's product and generate a sale. Samplings are for retailers, and occur between manufacturer or wholesaler representatives and retailer employees. Tastings are for consumers, and may involve representatives of manufacturers, wholesalers, and/or retailers (depending upon the location) serving to consumers.

The federal regulation on sampling, 27 C.F.R. § 6.91, allows a manufacturer or wholesaler to give a sample of a distilled spirit, wine, or malt beverage product to a retailer who has not purchased the brand to be sampled within the last twelve months. Brand refers to a particular label; therefore, if a retailer bought a supplier's brand of chardonnay in the past year, but not the shiraz, the retailer would be allowed to receive a sample of the shiraz. Quantities are limited. Manufacturers/wholesalers may not give more than three gallons per brand of beer, three liters per brand of wine, or three liters per brand of spirits to any given retail licensee.

The sampling rules vary widely state to state. Many regulators see any donation of free product as an opportunity for abuse of the tied house laws, so there are several states which allow sampling under more restrictive circumstances than the federal regulation. For example, the State of Connecticut only allows samples to be given to employees with purchasing power. *See* Conn. Gen. Stat. § 30-6-A33. Other restrictions include smaller sample sizes, special permits needed to give samples, record keeping, and prior approval and/or notice to the state agency regulating alcoholic beverages.

The federal regulation on tastings is codified at 27 C.F.R. § 6.95. It allows suppliers and wholesalers to conduct tasting activities on the retail premises. The supplier may buy the products to be used at the tasting from the retailer for no more than the ordinary retail price. As with the samplings, state restrictions on tastings are several and are far more specific and confining than the federal regulation. Although wine tastings are the most popular promotion in this category, states regulate beer and spirits tasting also. Areas of regulation include the sizes of the tastes, how many tastes each consumer may have, where the tasting may be held (*e.g.*, in the main area of the retail premises or in a partitioned area), who pays for the product, and what category or categories of licensees may be present at the tasting and which of them may pour the alcohol beverages. For example, the State of Oregon allows wine and beer tastings to be conducted by manufacturers at licensed premises with a full or limited on premises sales license or at off-premises locations. Or. Rev. Stat. § 471.402; Or. Admin. Code r. 845-005-0427. Manufacturers must provide the product and remove any leftovers, and tasting samples are limited to 1.5 oz. each for wine and 3 oz. each for beer. Manufacturers must pay for their

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employees to be the servers, who need service permits. Manufacturers may not pay retail employees to participate. Tastings may not exceed 2 consecutive days, may not occur more than 8 times per calendar year per retail premises, and must be at least 4 weeks apart. Manufacturers may not advertise the tasting; retailers may only advertise inside their establishment. Retailers may conduct their own tastings with the help of a service permittee provided by a manufacturer; in such a case the retailer must buy the wine to be used. The eight tasting limit for manufacturers includes retailer tastings where manufacturers assist. Or. Admin. r. 845-006-0450. For spirits, tastings may be held at Full On-Premises retailers. The manufacturer or its representative must pay a third party with a Service Permit to do pouring/service. Manufacturer may provide the product but must remove it after the tasting. No more than ½ oz. total per person per day (may be either one ½ oz. sample or two ¼ oz. samples). Or. Admin. r. 845-005-0428. Retailers must identify a designated tasting area and keep on file a marked floor plan sketch of the area. Tastings may not last more than 3 consecutive hours and only one entity may offer/sponsor a tasting at one time. Or. Admin. r. 845-015-0155.

D. Print Media: Magazines, Newspapers, and Other Publications

Print advertising for alcohol beverages is governed by 27 C.F.R. §§ 6.52, 6.92, and 6.98. Manufacturer-funded ads which make no reference to a retail outlet do not raise tied house concerns. Retailer ads which are entirely paid for by the retailer and which advertise the availability of alcohol beverages on the retail premises do not raise tied house concerns. Tied house laws do apply, however, when a manufacturer and a retailer are both participating in some way in the same advertisement. "Cooperative advertising'" wherein the manufacturer pays the retailer to place an advertisement, is absolutely prohibited. *See* 27 C.F.R. § 6.52.

Federal law, and some state laws, allow limited exceptions to these prohibitions. Suppliers may donate graphics to retailers for their use in their own retailer advertisements. Section 6.92 allows suppliers to give newspaper cuts, mats, or engraved blocks to retailers for their use in retailer advertisements. An appropriate example would be an ad for a retailer featuring a steak dinner in the foreground and a bottle of wine behind it on the table. Many states will allow the suppliers to pay for the piece of the ad featuring their graphic. Some states, including North Carolina, Ohio, and Tennessee, do not adopt § 6.92, and prohibit suppliers and retailers from jointly participating in any advertisement.

Advertisements for the supplier are regulated under a different provision at the federal level. As a general rule, suppliers may not make any reference to retailers in their own advertising as a result of the exclusion provisions of the tied house laws. However, 27 C.FR. § 6.98 allows suppliers to list the names of two or more unaffiliated retailers that sell the featured product, unless the retailer is a state entity, in which case the listing of two retailers is not required.

See 27 C.FR. § 6.98, which provides:

> **Advertising service**. The listing of the names and addresses of two or more unaffiliated retailers selling the products of an industry member in an advertisement of the industry member does not constitute a means to induce within the meaning of section 105(b)(3) of the Act, provided:

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> (a) The advertisement does not also contain the retail price of the product (except where the exclusive retailer in the jurisdiction is a State or a political subdivision of a State), and
>
> (b) The listing is the only reference to the retailers in the advertisement and is relatively inconspicuous in relation to the advertisement as a whole, and
>
> (c) The advertisement does not refer only to one retailer or only to retail establishments controlled directly or indirectly by the same retailer, except where the retailer is an agency of a State or a political subdivision of a State.

By containing the names of two or more unaffiliated retailers, the advertisement does not work any exclusion among retailers.

E. Educational Seminars

Educational seminars are used by suppliers as a form of marketing to teach retail customers about their products, and of course, to encourage them to buy. In many instances retailers enjoy the benefits of an educational seminar, which may include supplier paid food and beverages, as well as information that retail employees can use to encourage consumers to buy the supplier's product.

Educational seminars are governed by 27 C.F.R. § 6.94. Section 6.94 allows manufacturers or wholesalers to give or sponsor educational seminars for retailer employees, either at their place of business or at the retail establishment. Acceptable subject matter includes but is not limited to use of equipment, trainings, or tours of the upper tier member's facility. Manufacturers and wholesalers may not pay for the retailer's expenses in connection with the seminar (travel or lodging), but may pay for "nominal hospitality". The term "nominal hospitality" is not defined. Some states dispel the mystery by specifying in their own regulations exactly what may be provided. For example, Indiana allows the supplier to provide food and non-alcoholic beverages. *See* Ind. Admin. Code tit. 905, § 1-5.2-12. In the absence of a state regulation defining "nominal hospitality" or a similar term, the best practice is for the upper tier member to provide light food or snacks and a reasonable quantity of non-alcoholic beverages.

F. Consumer Promotions

The federal regulation on consumer promotions, 27 C.F.R. § 6.96, addresses two very popular marketing concepts directed at consumers: coupons and rebates, and sweepstakes and contests.

1. Coupons and Discounts

Coupons are a very popular form of alcohol beverage advertising used by both manufacturers and retailers to sell alcohol beverage products. They are found as cut outs in newspapers, on product packages, at the point of sale, and are even sent via email and direct mail. They are most popular in the off-premises environment, but in these trying economic times are gaining popularity in the restaurant arena as well.

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In the off-premises sector, there are two types of coupons in common use: the "instantly redeemable" or "cents off" coupon, and the rebate coupon. In each case, the discount off the product is paid for by the manufacturer. As the names imply, the first variety allows the consumer to receive the discount at the cash register on the retail premises upon presentment of the coupon. Because tied house laws prevent the retailer from giving money directly to the retailer, normally the retailer is reimbursed by the manufacturer via an independent clearing house. Rebate coupons require mail in of a proof of purchase and rebate form to the manufacturer for redemption, and therefore they allow the manufacturer to deal directly with the consumer to refund the discount offered.

Federal law permits manufacturer coupons under certain conditions. First, all retailers in the market where the coupon offer is made must be able to redeem the coupon. Second, manufacturers may not reimburse the retailer for more than the face value of the redeemed coupons, plus a standard handling fee. The majority of states in the U.S. have a statute or regulation governing the use of alcohol beverage coupons. Many states which prohibit the use of alcohol beverage coupons link the prohibition directly to the state tied house law. Regulators raise several tied house-related issues in connection with coupons, including those related to redemption (*e.g.*, potential for funds to be improperly transmitted from a manufacturer to a retailer), exclusion (*e.g.*, if the coupon is not offered to all retailers) and cooperative advertising (*e.g.*, if the manufacturer pays the retailer for the production of the coupon. Coupon rules vary from state to state, and the rules for beer, wine, and liquor coupons may differ within the same state. In some jurisdictions, only rebate coupons are allowed under the theory that because the coupons are redeemed as between the manufacturer and the consumer, the opportunity for a tied house violation is not present.

In the on-premises environment, there are additional concerns regarding the use of coupons. Coupons offering direct discounts on alcohol beverages may not be permitted in certain jurisdictions that regulate happy hours or which have laws on uniform pricing of alcohol beverages. Coupons related to meal packages, where a food item and alcohol beverage item are sold together for a special price, are more likely to be consistent with the regulatory framework in most states.

2. Contests, Sweepstakes, and other gaming

Section 6.96 classifies contests and sweepstakes as “direct offerings” to consumers. The section allows contest prizes, premium offers, refunds to be offered by industry members (manufacturers and wholesalers) directly to consumers. Officers, employees, and representatives of wholesalers and retailers may not participate.

Sweepstakes and contest rules are rarely so simple at the state level. Most states have a regulation addressing this issue and in most cases the state regulation is more restrictive than the federal one. The most common restriction is the relationship between supplier and retailer in connection with the contest or sweepstakes, and in almost every state, no act of consumption or purchase of alcoholic beverages may be required. New Jersey’s sweepstakes regulation is a typical provision where sweepstakes are allowed with reasonable limitations. There, suppliers may sponsor sweepstakes as long as there is no purchase requirement. Any prizes may not include alcohol beverages, and the sweepstakes cannot involve coupons that are redeemable for

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alcoholic beverages. No instant win coupons, tickets, caps, or game cards are allowed. Finally, no employees or family members of industry members may participate. *See* N.J. Admin. Code tit. 13, § 2-23.16.

In contrast, in some other states, the circumstances under which suppliers may sponsor contests and sweepstakes are very limited. For example, California does not allow suppliers to sponsor a sweepstakes unless it is in conjunction with an amateur, professional, nonprofit, or charitable organization, and retailers may not be involved. Cal. Comp. Code Regs. tit. 4, § 106(i). In Texas, suppliers may sponsor contests and sweepstakes only under the following conditions. There may be no entry fees, and retailers may give out entry forms but cannot give away prizes, and cannot host skill games. Contests may not be retailer specific. At off-premises retailers, if entry forms are attached to a product package, there must be a conspicuously displayed alternative means of entry that does not require a purchase. *See* Tex. Alco. Bev. Code Ann. §§ 102.07(e) and 108.061; *see also*, Tex. Admin. Code tit. 16, § 45.106.

IV. ADDITIONAL TIED HOUSE CONCERNS RAISED BY SUPPLIER TO RETAILER MARKETING

In addition to the promotions discussed in Section III above, suppliers frequently market their products to retailers through "retailer incentive contests" and "retailer entertainment." Federal tied house laws do not address either concept directly. Nevertheless, more generic federal provisions are often cited by regulators to prohibit both types of retailer marketing. *See, e.g.*, 27 C.F.R. § 6.41 (general prohibition of gifts of value),[4] § 6.42 (indirect inducement through third party arrangements)[5] and 27 C.F.R. § 6.153 (criteria for determining retailer independence).[6] Many states do have tied house or trade practice regulations which address

[4] Section 6.41 provides:

> Subject to the exceptions listed in subpart D, the act by an industry member of furnishing, giving, renting, lending, or selling any equipment, fixtures, signs, supplies, money, services, or other things of value to a retailer constitutes a means to induce within the meaning of the Act.

[5] Section 6.42 provides:

> (a) *General*. The furnishing, giving, renting, lending, or selling of equipment, fixtures, signs, supplies, money, services, or other thing of value by an industry member to a third party, where the benefits resulting from such things of value flow to individual retailers, is the indirect furnishing of a thing of value within the meaning of the Act. Indirect furnishing of a thing of value includes, but is not limited to, making payments for advertising to a retailer association or a display company where the resulting benefits flow to individual retailers.
>
> (b) *Exceptions*. An indirect inducement will not arise where the thing of value was furnished to a retailer by the third party without the knowledge or intent of the industry member, or the industry member did not reasonably foresee that the thing of value would have been furnished to a retailer. Things which may lawfully be furnished, given, rented, lent, or sold by industry members to retailers under subpart D may also be furnished directly by a third party to a retailer.

[6] Section 6.153 provides:

> The criteria specified in this section are indications that a particular practice, other than those in §6.152, places retailer independence at risk. A practice need not meet all of the criteria specified in this section in order to place retailer independence at risk.

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these two concepts, as discussed below. These activities are usually restricted because they are opportunities for "of value" gifts to be made to retailers and their employees, and create an opportunity for favoritism among retailer customers.

A. Retailer Incentive Contests

Retailer Incentive Contests are supplier –sponsored programs wherein the supplier encourages (usually through advertisement) retail employees to sell certain amounts of the supplier's product in exchange for gifts, prizes, or other compensation. Some states, such as Iowa, prohibit these contests altogether through a specific regulation. *See* Iowa Admin. Code r. 185-16.18(123). Many others, such as California, New York, and Wyoming prohibit them as a matter of agency policy, in reliance on the state's tied house statute. A small minority allow retailer incentive contests under restricted conditions. For example, the State of New Jersey, refers to retailer incentive programs as "RIP"s. RIP's may only award monetary rebates paid on business checks of participating wholesalers. There are quantity ceilings and minimums for beer, wine, and spirits. In the case of spirits, for example, no RIP rebate may be awarded for any quantity in excess of fifty cases, and for every RIP rebate offered, there must be a small quantity rebate offered on the same product for five cases or less. No one rebate may exceed $1,000.00, and wholesalers must publish the details of all rebates provided in the price list that they file with the state. *See* N.J. Admin. Code tit. 13, § 2-24.1.

B. Retailer Entertainment

Retailer entertainment is a broad category which involves just that – entertainment by a retailer and/or its employees at the supplier's expense. This is a highly regulated area at the state level because it is frequently an area of abuse. Depending on the jurisdiction, acceptable forms of retailer entertainment may include dinners and/or tickets to cultural or sporting events. However, entertainment of spouses, travel and hotel stays also become part of this category from time to time. The extent of entertainment permitted, if at all, is a state by state issue, and can be

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(a) The practice restricts or hampers the free economic choice of a retailer to decide which products to purchase or the quantity in which to purchase them for sale to consumers.

(b) The industry member obligates the retailer to participate in the promotion to obtain the industry member's product.

(c) The retailer has a continuing obligation to purchase or otherwise promote the industry member's product.

(d) The retailer has a commitment not to terminate its relationship with the industry member with respect to purchase of the industry member's products.

(e) The practice involves the industry member in the day-to-day operations of the retailer. For example, the industry member controls the retailer's decisions on which brand of products to purchase, the pricing of products, or the manner in which the products will be displayed on the retailer's premises.

(f) The practice is discriminatory in that it is not offered to all retailers in the local market on the same terms without business reasons present to justify the difference in treatment.

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very detailed. Some examples of state regulations showing the degree of variation from state to state, follow below.

In California, wholesalers may pay for retailers' food and beverages to be consumed at business meetings, as well as local transportation (in other words, no plane trips) to and from those meetings. They may also pay for tickets to athletic events, concerts, and food and beverage at these activities. *See* Cal. Bus. & Prof. Code § 25503.27. In Virginia, the types of entertainment allowed are similar, but the dollars spent and the frequency of the entertainment are limited. Meals, beverages, concert and theater tickets, sports tickets, charitable event tickets, and private parties may be given as long as the supplier accompanies the retailer to the event or entertainment. No more than $400 may be spent on any retail employee in a 24 hour period, not including spouses. No retail employee may be entertained more than six times per year by a wholesaler and six times a year by a manufacturer. *See* 3 VAC 5-30-70. In New York, retailer entertainment is limited to providing lunch or dinner. N.Y. Alc. Bev. Con. § 101(1)(c).

V. MARKETING GOVERNED BY TEMPERANCE LAWS: THE HAPPY HOUR

All of the promotions discussed above are restricted by federal and or state tied house laws which govern the interactions between upper and lower tier members of the three tier system. There are also temperance laws which govern relations between any licensee and consumers. Usually these laws impact promotions between retailers and their customer consumers. These laws are designed to prevent over-consumption, and promote safety.

The most common enemy of the temperance law is the "Happy Hour" and other related promotions which involve drink discounts in an on-premises setting. Happy hour-type promotions may be regulated on a state and local (county and/or city) level depending on the jurisdiction, making it very difficult for chain operators to design happy hour promotions that will work at all of their locations. For example, happy hours in Missouri are regulated by both the state and the city; happy hours in Georgia are regulated by each city only.

Some common prohibitions on happy hour promotions are: free drinks (*e.g.*, the two-for-one special), discounts in one area of the restaurant (*i.e.*, just the bar) and not the entire premises, and specials directed at one group (*e.g.*, women only). In addition, many jurisdictions require that the same price be charged all day, thus eliminating the 5-9 happy hour. As the examples below illustrate, the types of restrictions vary widely from state to state.

The State of Arkansas does not allow payment of a cover charge in order for consumers to receive unlimited alcohol beverages. In addition, half price appetizers may not be linked to an alcohol beverage purchase. *See* Code Ark. Reg. 006 02 001 §§ 1.79(28) and 3.17.1. Illinois, among other restrictions, prohibits any use of the word "free" in a happy hour promotion, and prohibits the sale of drinks in pitchers that are usually served individually. *See, e.g.*, 235 ILCS 5/6-28; Il. Reg. 100.280. Louisiana prohibits any sales of alcohol beverages below cost, plus applicable tax. La. Rev. Stat. § 51:422(A). Ohio allows happy hour style lower prices prior to 9:00 p.m. *See* Ohio Admin. Code § 4301:1-1-50. Among other restrictions, Virginia does not allow happy hours to be advertised in the media or on the exterior of the licensed premises. *See* 3 VAC 5-5-160.

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VI. CONCLUSION

Marketing promotions are subject to a wide variety of federal, state, and even local laws. Most of these laws address permissible ways for members of the three tier system (suppliers, wholesalers, and retailers) to cooperate in these promotions. Industry members need to be mindful, however, of the great number of restrictions these laws place on their behavior. A promotion that is legal in a chain outlet in one state will not necessarily be legal in another state. Retailers must be particularly attentive to the financial support they accept from suppliers for menus, advertisements, and other promotions, to ensure they are following the laws and regulations of their state.

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