DEPARTMENT OF THE TREASURY
Alcohol and Tobacco Tax and Trade Bureau

Industry Circular
Number: 2012-01
Date: January 11, 2012

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Guidance Regarding Industry Members' Participation in Retail Programs

To: Proprietors of Distilleries, Bonded Wineries, Bonded Wine Cellars and Breweries, Importers and Wholesalers of Distilled Spirits, Wines and Malt Beverages, and Other Interested Parties.

1. What is the Purpose of this Circular?

The Alcohol and Tobacco Tax and Trade Bureau (TTB) issues this industry circular to inform all industry members and other interested parties of the Bureau's position regarding participation in retail promotional programs. In this circular, TTB provides guidance on its views of several permissible and impermissible activities for industry members who provide promotional support to alcohol beverage retailers. The circular also reminds industry members that furnishing things of value to alcohol beverage retailers for the purpose of obtaining the retailer's express or implied agreement to place the industry member's products on any particular shelf or in any particular display space may result in Tied-House violations of the Federal Alcohol Administration Act (FAA Act), 27 U.S.C. 205(b).

2. What is TTB's Authority to Issue this Guidance?

TTB administers the Tied-House provisions of the FAA Act as promulgated under Title 27, Code of Federal Regulations (CFR), part 6 (27 CFR part 6). The part 6 regulations, among other things, restate the statutorily prohibited means to induce, including but not limited to furnishing, giving, or selling any equipment, fixtures, signs, supplies, money, services, or other things of value to a retailer, subject to the exceptions listed under Subpart D (27 CFR 6.81 - 6.102), or the "Subpart D" exceptions or items. TTB regulation 27 CFR 6.21(c) deems certain things of value, such as product displays, point of sale advertising materials, equipment and supplies, and outside signs, as limited exceptions to the general rule that furnishing things of value to retailers constitutes an unlawful inducement.

TTB's regulations deem a promotion wherein an industry member rents display space at a retail establishment (i.e., where the industry member pays "slotting allowances") as both an interest in the retailer's property, as proscribed by 27 CFR 6.21(b) and a payment to the retailer for rendering a display service, as proscribed by 27 CFR 6.21 (d). (See also 27 CFR 6.35 and 27 CFR 6.56.) Further, an industry member that purchases or rents display, shelf, storage, or warehouse space from a retailer places the retailer's independence at risk, as outlined under 27 CFR 6.152(b).

3. What Action Has TTB Taken?

TTB recently settled a series of trade practice investigations wherein the Bureau alleged violations under § 6.21(b), (c) and (d) that involved several industry members' participation in a retailer-initiated alcohol beverage promotional program. TTB alleged that through this promotional program, industry members directly or indirectly furnished retailers with things of value that were subject to the Subpart D exceptions, as well as things of value that were not subject to such exceptions. TTB further alleged that the specific purpose for furnishing these things of value was to assure preferential shelf and display space for the participating industry members' alcohol beverage products. Specifically, the retailer and the industry members mutually agreed that the retailer would place the participating industry members' products in specific locations within the retailer's premises.

The participating industry members asserted, in part, that furnishing retailers with items subject to the Subpart D exceptions could not constitute an unlawful inducement under any circumstances, regardless of the purpose for which they furnished such items. However, TTB and its predecessor agencies' longstanding position is that an industry member may not use allowable exceptions as a subterfuge to violate some other provision of the tied-house law or regulations.

A portion of the items furnished to the retailer were covered by the Subpart D exceptions and did not constitute means to induce under § 6.21(c). However, TTB contended that the items constituted means to induce under § 6.21(b) and (d) because they resulted in the industry member renting shelf or display space at the retailer's premises.

4. What are the Legal Requirements with Respect to Furnishing Retailers with Things of Value?

TTB regulations at 27 CFR 6.21(a) through (g) list seven prohibited means to induce that can lead to a violation under the Tied-House provisions. Paragraph (c) of this regulation provides that an industry member may not furnish, give, rent, lend, or sell to a retailer any equipment, fixtures, signs, supplies, money, services, or other things of value, subject to the exceptions listed under Subpart D of part 6. Exceptions found under Subpart D identify promotional support items such as product displays, point of sale advertising materials, equipment and supplies, and other items and services that are considered not to be an unlawful inducement under § 6.21(c) **only**.

5. Where Can I Find More Information Regarding TTB's Position on Industry Members' Participation in Retail Programs?

Below are a number of questions and answers that may give industry members, retailers, and other interested parties a better understanding of TTB policy views on this subject. If we have not addressed in this circular a particular question you have, you may contact the Trade Investigations Division.

a. **May an industry member participate in a retailer-initiated marketing or promotional program that results in the industry member furnishing the retailer with the things of value listed in the Subpart D exceptions?**

   Yes, although the general rule is that furnishing things of value to a retailer constitutes a tied-house "inducement," an industry member may furnish retailers with the items and services specified in the Subpart D exceptions without violating 27 CFR 6.21(c) if the industry member follows the pertinent quantity or monetary

restrictions in the specific regulation and complies with the recordkeeping requirements under 27 CFR 6.81(b). However, it is the industry member's responsibility to provide oversight and guidance to ensure that only those items, services, and things of value listed under Subpart D exceptions are furnished to the retailer within the quantity or monetary allowances and that records required for those items are maintained in accordance with 27 CFR 6.81.

b. **May an industry member provide monetary promotional support directly to a retailer?**

Neither Subpart D nor any other regulations in part 6 authorize industry members to provide monetary promotional support (i.e., funds) directly to a retailer, even if the retailer uses such funds entirely to purchase items subject to the Subpart D exceptions. TTB would consider such payments as an unlawful means to induce.

c. **May an industry member participate in a retailer-initiated marketing or promotional program in which the retailer explicitly or impliedly agrees to place the industry member's alcohol beverages on any particular shelf or in any particular display space in exchange for Subpart D items and services furnished by the industry member?**

An industry member's willful participation in promotional programs in which a retailer links the furnishing of Subpart D items with preferential shelf and display space for the industry member's products may result in a violation of the tied-house provisions when the elements of interstate commerce and exclusion are present. In the case of malt beverages, similar state law must also be present for FAA Act provisions to apply. TTB may consider the furnishing of such items to be a "slotting fee allowance" paid to the retailer even if such items consisted entirely of Subpart D items. Further information on this subject appears in TTB G 2011-03, Tied House Exceptions, dated May 6, 2011.

d. **May an industry member that participates in a retail marketing or promotional program suggest to the retailer that the retailer would benefit from their products being placed in specific space or display locations in the retailer's premises?**

An industry member may, as part of its participation in a retail marketing or promotional program, discuss with or suggest to the retailer the benefits of placing or displaying the industry member's products in specific locations within the retail premises. However, TTB considers an industry member (1) making their participation in a marketing or promotional program contingent on preferential product display or placement in the retailer premises, or (2) accepting an offer by a retailer for preferential shelf or display space in exchange for the industry member's participation in the retail promotional program, to be an unlawful means to induce, and more specifically, a "slotting allowance." To be in accordance with the tied-house law and regulations, the ultimate decision to place the industry member's products in specific locations within the retail premises must rest solely with the retailer.

e. **If an industry member obtains a written statement from a retailer attesting that the industry member's participation in the retailer promotional**

program does not obligate the retailer to place the industry member's products in preferential shelf or display space, will such a written statement demonstrate full compliance with part 6 regulations?

An industry member may obtain, in good faith, a written statement from the retailer attesting that the retailer has retained final authority over product placement and display decisions, and that the retailer is not obligated to purchase or place the industry member's products on any particular shelf or in any particular display space. While such a statement standing alone would not conclusively demonstrate compliance with the law, TTB may consider it an indication of intended compliance. We reiterate that, to be in accordance with the tied-house law and regulations, the ultimate decision to place the industry member's products in specific locations within the retail premises must rest solely with the retailer.

f. **May an industry member base the monetary amount of Subpart D items furnished to a retailer on the retailer's historical or expected product purchase levels?**

In determining the quantity of Subpart D items furnished to a retailer, TTB recognizes that the industry member may take into consideration such factors as:

- the amount of product previously purchased by the retailer;
- a reasonable expectation of new product purchases;
- the seasonal nature of a product;
- expected changes in market conditions; or
- the anticipated amount of product to be purchased by a new retail account.

Under the tied-house law and regulations, however, the industry member may not require a retailer to purchase, or purchase any particular quantity of, the industry member's products unless specifically authorized by the regulations.

g. **May an industry member advance, or "front end," Subpart D items to a retailer before the retailer purchases a particular product?**

Yes, TTB recognizes that an industry member may advance, or "front end," Subpart D items to a retailer related to a new product or seasonal product prior to the retailer purchasing such given product.

h. **May an industry member use a third-party promotional company to provide Subpart D items to a retailer?**

An industry member may select a third-party promotional company and provide that company with funds to purchase Subpart D items for a retailer. It is the industry member's responsibility to review, evaluate, and provide guidance to the third-party promotional company to ensure that the funds provided to the third-party promotional company are used in compliance with all Subpart D requirements. The industry member should be especially mindful if the selected third-party promotional company is owned, created, operated, or controlled by the retailer or is in any way acting on behalf of the retailer. In such cases, TTB may consider the industry member's furnishing of funds to the third-party promotional

company as an indirect means to induce to the retailer.

i. **May industry members who participate in a retail promotional program "pool" the cost of Subpart D items furnished to a retailer?**

TTB's predecessor agency recognized in Industry Circular 82-12 (Nov. 11, 1982) that pooling of promotional funds by a single industry member for multiple brands is permissible under the tied-house regulations, subject to the conditions and limitations provided therein. Further, TTB would recognize that multiple industry members may "pool" or combine their promotional program funds for specific Subpart D items to be furnished to a retailer provided the industry members are in compliance with any and all conditions or limitations, including monetary limits, placed upon such items by the Subpart D regulations. For example, if it costs $10,000 to print "point of sale advertising material" such as wine menus furnished to a retailer, Winery A, B and C may each contribute $3,000, respectively, while the retailer pays the remainder of the cost. On the other hand, industry members may not pool promotional funds for product displays furnished to a retailer valued in excess of $300 per brand, in accordance with 27 CFR 6.83(c).

j. **May industry members who furnish third-party promotional companies with money to purchase Subpart D items require such companies to return or repay the value of such promotional support?**

When a third party does not use all of the funds provided by the industry member for retailer promotional support, TTB recognizes that the industry member may require the third-party promotional company to repay the unused funds.

k. **May industry members who furnish Subpart D items to retailers require retailers to return or repay the value of such promotional support?**

TTB would view an industry member's request that a retailer return or repay the value of Subpart D items to such industry member as potential evidence of a "quota" sale means to induce under 27 CFR 6.21(g), if the industry member's request for return or repayment was motivated in part by the retailer's failure to purchase, or purchase any particular quantity of, the industry member's alcohol beverage products. In other words, at issue would be whether the industry member furnished Subpart D items to the retailer as a subterfuge to violate 27 CFR 6.21(g).

6. Questions?

If you have any questions concerning this circular or other questions regarding participation in retail programs, please contact the Trade Investigations Division.

Signed by John Manfreda

John J. Manfreda
Administrator
Alcohol and Tobacco Tax and Trade Bureau