



DEPARTMENT OF THE TREASURY
ALCOHOL AND TOBACCO TAX AND TRADE BUREAU

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Paul Pisano, Esquire
Senior Vice President of Industry Affairs and General Counsel
National Beer Wholesalers Association
1101 King Street, Ste. 600
Alexandria, VA 22314

Dear Mr. Pisano:

This letter is in response to your e-mail dated October 26, 2017 to Lisa Gesser of my office concerning your request for clarification regarding the applicability of the Federal Alcohol Administration ("FAA") Act's Commercial Bribery provisions with respect to specific supplier incentive programs and sales contests as outlined in your e-mail. A discussion of the general applicability of the Commercial Bribery provisions to such promotional activities is below and a response to each of your scenarios follows.

Commercial Bribery Law and Regulations

The Federal Alcohol Administration Act's Commercial Bribery provisions, 27 U.S.C. 205(c), and the implementing TTB regulations (27 CFR part 10) make it unlawful for any industry member¹, directly or indirectly or through an affiliate, to induce a trade buyer² to purchase distilled spirits, wine, or malt beverages from the industry member to the exclusion, in whole or in part, of similar products sold or offered for sale by other persons in interstate or foreign commerce, (1) by commercial bribery; or (2) by offering or giving any bonus, premium, or compensation to any officer, employee, or representative of the trade buyer. The bonus, premium, compensation, or other thing of value need not be offered or given for the purpose of directly inducing a trade buyer to purchase from the seller, but rather is applicable if an industry member induces officers, employees or representatives of the trade buyer to promote sales of the industry member's products and thereby indirectly induces the trade buyer to purchase from the industry member. (See 27 CFR 10.21)

With respect to sales promotion contests, the TTB regulations at 27 CFR 10.24 provide that sales contests sponsored by an industry member which offer prizes directly or indirectly to trade buyer officers, employees, or representatives are inducements within

¹ An industry member includes 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.

² A trade buyer is a retailer or a wholesaler of alcohol beverages.

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the meaning of the FAA Act. When such practice by an industry member, whether direct, indirect, or through an affiliate, places (or has the potential to place) trade buyer independence at risk by a means of a tie or link between the industry member and trade buyer or by any other means of industry member control over the trade buyer, and such practice results in the trade buyer purchasing less than it would have of a competitor's product, a violation of the FAA Act would occur assuming the jurisdictional clauses are met. (See 27 CFR 10.4 and 10.51.) We discuss the jurisdictional clauses in detail later in the letter.

The TTB regulations at 27 CFR 10.52 provide a specific example of an activity deemed *per se* to place a retailer's independence at risk.

§ 10.52 Practice which puts trade buyer independence at risk.

The practice specified in this section is deemed to place trade buyer independence at risk within the description of exclusion in § 10.51: Industry member payments of money to the employee(s) of a trade buyer without the knowledge or consent of the trade buyer-employer in return for the employee agreeing to order distilled spirits, wine, or malt beverages from the industry member. The practice enumerated here is an example and does not constitute a complete list of those situations which result in such control.

Accordingly, if a supplier incentive program or sales contest includes industry member payments of money to employee(s) of a trade buyer without the knowledge or consent of the trade buyer-employer, in return for the employee agreeing to order product from that industry member, a violation of the FAA Act would occur assuming the other elements of a violation are present. As stated in 27 CFR 10.52, this example does not constitute a complete list of those situations that would place the trade buyer's independence at risk.

Other than the example provided in 27 CFR 10.52, TTB uses the following criteria to determine if a particular practice between an industry member and an officer, employee, or representative of a trade buyer places trade buyer independence at risk. A practice need not meet all of the criteria specified in order to place trade buyer independence at risk.

- The practice restricts or hampers the free economic choice of a trade buyer to decide which products to purchase or the quantity in which to purchase them for sale to retailers and consumers.
- The industry member obligates the trade buyer to participate in the promotion to obtain the industry member's product.
- The trade buyer has a continuing obligation to purchase or otherwise promote the industry member's product.

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- The trade buyer has a commitment not to terminate its relationship with the industry member with respect to purchase of the industry member's products.
- The practice involves the industry member in the day-to-day operations of the trade buyer. For example, the industry member controls the trade buyer'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 trade buyer's premises.
- The practice is discriminatory in that it is not offered to all trade buyers in the local market on the same terms without business reasons present to justify the difference in treatment.

(See 27 CFR 10.54.)

Gifts or Payments to Wholesale Entity

The commercial bribery provisions of the FAA Act and TTB regulations do not preclude offering or giving money or other things of value directly to a wholesale entity itself (i.e., the corporation, partnership, or individual who owns the business). However, TTB will consider the wholesaler as acting as a mere conduit between its officers, employees, or representatives and the industry member, if:

- There is an agreement or understanding, implied or explicit, that the money or thing of value will be passed on to the officers, employees, or representatives, or
- It is obvious by the very nature of the item given (such as a free trip) that a pass through to the officers, employees, or representatives is clearly contemplated, or
- The records of the recipient wholesaler do not accurately reflect such money or item as an asset of the wholesale entity, thus being subject to all ensuing tax consequences as distinguished from the receipt of the money or item as a personal asset of an officer, employee, or representative.

(See 27 CFR 10.23)

Jurisdictional Limitations

With respect to jurisdictional limitations, the commercial bribery provisions of the FAA Act and TTB regulations apply to³:

Primary Jurisdictional Clause: An industry member that induces a trade buyer to purchase distilled spirits, wine, or malt beverages from such industry member to the exclusion, in whole or in part, of products sold or offered for sale by other persons in interstate or foreign commerce.

In addition to the primary clause, one of the following jurisdictional clauses must be satisfied in order for a violation of the FAA Act to occur:

³ In the case of malt beverages only, there must also be a similar State law.

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First Jurisdictional Clause: The inducement is made in the course of interstate or foreign commerce;

OR

Second Jurisdictional Clause: The industry member engages in the practice of using an inducement to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products;

OR

Third Jurisdictional Clause: The direct effect of the inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce.

(See 27 CFR 10.4.)

Sales Incentive Scenarios

In this section, we will respond to each of the scenarios you provided in your October 26th e-mail as outlined below:

Your Scenario 1: “Large Supplier offers sales incentive to distributor to sell more Brand X. Payment from Supplier to Distribution company. Or incentive to sell more of all supplier beer brands.”

TTB Response:

As provided above, if the industry member is providing sales incentives to the wholesale entity itself and not its employees, the commercial bribery provisions would not apply unless the wholesaler was acting as a mere conduit between its officers, employees, or representatives. TTB will consider the wholesaler as acting as a mere conduit between its officers, employees, or representatives and the industry member, if:

- There is an agreement or understanding, implied or explicit, that the money or thing of value will be passed on to the officers, employees, or representatives, or
- It is obvious by the very nature of the item given (such as a free trip) that a pass through to the officers, employees, or representatives is clearly contemplated, or
- The records of the recipient wholesaler do not accurately reflect such money or item as an asset of the wholesale entity, thus being subject to all ensuing tax consequences as distinguished from the receipt of the money or item as a personal asset of an officer, employee, or representative.

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Your Scenario 2: “Large supplier offers sales incentive to distributor employee who sells most of brand X. Supplier pays for something like bike, car, t-shirt, trip for the employee.”

TTB Response:

As provided above, the TTB regulations at 27 CFR 10.24 state that sales contests sponsored by an industry member which offer prizes directly or indirectly to trade buyer officers, employees, or representatives are inducements within the meaning of the FAA Act. When such practice by an industry member, whether direct, indirect, or through an affiliate, places (or has the potential to place) trade buyer independence at risk by a means of a tie or link between the industry member and trade buyer or by any other means of industry member control over the trade buyer, and such practice results in the trade buyer purchasing less than it would have of a competitor’s product, a violation of the FAA Act would occur assuming the activity involves interstate or foreign commerce and, in the case of malt beverages only, there exists a similar State law. (See 27 CFR 10.4 and 10.51.)

Your Scenario 3: “In-State craft brewer offers in-State wholesaler incentive for increased sales. No out of state commerce. Permissible?”

TTB Response:

See answer to Scenario 2. Regardless of whether both the industry member and trade buyer are in the same State, a violation of the FAA Act may occur if the activity meets the primary jurisdictional clause and one or more of the first through third jurisdictional clauses specified above. For example, if the product being excluded travels in interstate or foreign commerce, the primary jurisdictional clause would be met. If the industry member engages in the practice of using an inducement to such an extent as substantially to restrain or prevent transactions in interstate or foreign commerce in any such products (second jurisdictional clause); or, if the direct effect of the inducement is to prevent, deter, hinder, or restrict other persons from selling or offering for sale any such products to such retailer in interstate or foreign commerce (third jurisdictional clause), a violation of the FAA Act may occur.

Your Scenario 4: “What if sales of Brand X goes up. But other brands from other suppliers all go down? What if some brands of other suppliers are up and some are down? What if substantially all brands sales are up?”

TTB Response

It is unclear what exactly you are asking in this scenario; however, if you are referring to the second clause of exclusion under 27 CFR 10.51(a)(2) (that is, “such practice results in the trade buyer purchasing less than it would have of a competitor’s product”) TTB

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would have to conduct an investigation and review the records of the entities involved to determine if this clause is met.

Your Scenario 5: “(Does it matter if supplier pays 100%? 50%? 75% of the incentive?)”

TTB Response

See TTB Response to Scenario 2 above. Any sales incentive payments by an industry member directly or indirectly to trade buyer officers, employees, or representatives are inducements within the meaning of the FAA Act’s Commercial Bribery provision. A violation of such provision would occur if the other elements of a violation were present.

Your Scenario 6: “Supplier pays incentive to wholesaler to pass through to employee to secure certain supplier targets: retail shelf space achieved, glassware placement, brand shelf space achieved, beer displays achieved.”

TTB Response:

As stated in TTB Response to Scenario 1, if the industry member is providing sales incentives to the wholesale entity itself and not its employees, the commercial bribery provisions would not apply unless the wholesaler was acting as a mere conduit between its officers, employees, or representatives. TTB will consider the wholesaler as acting as a mere conduit between its officers, employees, or representatives and the industry member, if:

- There is an agreement or understanding, implied or explicit, that the money or thing of value will be passed on to the officers, employees, or representatives, or
- It is obvious by the very nature of the item given (such as a free trip) that a pass through to the officers, employees, or representatives is clearly contemplated, or
- The records of the recipient wholesaler do not accurately reflect such money or item as an asset of the wholesale entity, thus being subject to all ensuing tax consequences as distinguished from the receipt of the money or item as a personal asset of an officer, employee, or representative.

Your Scenario 7: “What is permissible incentive from supplier to distributor? From Distributor to his employees? From distributor to retailers? Why is 27 FR 10.53 reserved?”

TTB Response:

With respect to what is a permissible sales incentive from a supplier (industry member) to a distributor (trade buyer), please see TTB Response to Scenario 1 above. With respect to permissible sales incentives from the trade buyer to his employees, TTB does not regulate sales incentives that a trade buyer may give to his or her employees;

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however, if the money is flowing from an industry member through the trade buyer and then to his or her employees, see TTB Response to Scenario 1 above. With respect to permissible sales incentives from a distributor (industry member) to a retailer (trade buyer), see TTB Response to Scenario 2 above. As far as why 27 CFR 10.53 is reserved, TTB has not promulgated regulations outlining practices that would not result in exclusion.

I hope that this sufficiently answers the questions you have about TTB's enforcement of the commercial bribery provisions of the FAA Act and the TTB regulations. If you have any questions regarding this matter, please contact Program Manager Lisa M. Gesser at (202) 453-2292 or Lisa.Gesser@ttb.gov.

Sincerely yours,

Sandra L. Sisler
Assistant Director
Trade Investigations Division