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MEMORANDUM

TO:

FROM: Chris Young

DATE: October 20, 2010

RE: Laws and Regulations related to the use of "Enhancers" at licensed retail outlets

As requested at the Beer League Board of Directors meeting held on Wednesday, October 13, 2010, please allow this *Memorandum* to serve as a review and analysis of the current laws and regulations applicable to the use of "enhancers" (a/k/a "dealer loaders") at licensed retail outlets. The following review applies to the use of "enhancers" provided by licensed wholesalers and/or suppliers in connection with a contest, offer, promotion, sweepstakes, or advertising or marketing campaign at a licensed retail outlet. This review does not include "product displays" (e.g., racks, bins, shelving, etc.). "Product displays" are governed by a different state alcohol regulation/rule.

LAW AND ANALYSIS

There is no provision in Title 26 (state alcoholic beverage control law statutes) that relates specifically to the use of "enhancers" at licensed retail outlets other than the general prohibition against giving a licensed retailer "anything of value." As you are aware, a licensed wholesaler and/or supplier can only give a retailer something of value if the "thing of value" is specifically enumerated as an exception to the general prohibition in "regulations" promulgated by the commissioner of the state Office of Alcohol and Tobacco Control (OATC).

The OATC has promulgated a couple of exceptions related to the use of "enhancers" provided by wholesalers and/or suppliers at licensed retail outlets.

"Enhancer" is defined in current regulations as "an item used on a display that will be awarded to a customer who shops in a retail outlet voluntarily participating in a contest, offer,

promotion, sweepstakes, or advertising or marketing campaign, the object of which is to award the enhancer to a winner thereof." (See page 304 (Green Color) of the 2010 OATC Law Book)

Pursuant to the above definition of "enhancer," all enhancers must eventually be awarded to a customer.

Another provision of the OATC regulations provides the following:

"m. Enhancers, as defined in this Chapter, may be used as part of a contest, offer, promotion, sweepstakes, or advertising or marketing campaign.

i. Items may include ice chests, grills, rafts, and other items not to exceed \$155 in value.

ii. Industry members utilizing enhancers must provide either entry forms and a drop box in which all entries must be placed, a mailing address to which entries may be sent, or an Internet or other electronic address where entries may be accepted, and post the date of the official prize drawing." (See page 315 (Green Color) of the 2010 OATC law book)

Pursuant to this provision and the definition of "enhancer" referenced above, the value of "enhancers" used in connection with a contest, offer, promotion, sweepstakes, or advertising or marketing campaign must not exceed \$155 and must be awarded to a customer according to the rules set forth above (e.g., post date of official drawing, entry form drop box or entry form mailing address, etc.).

There is one exception to the \$155 cap on the value of "enhancers." That exception is found in the OATC regulations related "sweepstakes."

"Sweepstakes" is defined by OATC regulations as "any program that employs any enhancement(s) that exceed \$155 in value as part of a retail display for any contest, offer, promotion, or advertising or marketing campaign." (See page 306 (Green Color) of the 2010 OATC law book)

The only apparent difference between a "sweepstakes" and a "contest, offer, promotion, or advertising or marketing campaign" is that an enhancer with a value exceeding \$155 can be used in connection with a "sweepstakes." Otherwise (contest, offer, promotion, or advertising or marketing campaign), the "enhancer" cannot exceed \$155 in value.

The OATC regulations further provide the following with regard to "sweepstakes":

"n. Sweepstakes. Sweepstakes, as defined in this Chapter, may be used as part of a contest, promotion, or advertising or marketing campaign with the following restrictions:

i. Enhancers that exceed \$155 in value, such as four-wheel all-terrain vehicles, trips, etc., may be utilized as part of a sweepstakes.

ii. Industry members and wholesalers must offer the opportunity to participate in any

sweepstakes conducted to the entire retail base which the participating wholesalers serve.

iii. Participation by retailers must be voluntary.

iv. Enhancers cannot be displayed within any retail outlet.

v. Photographs or models of enhancers may only be displayed, provided the photographs or models do not exceed \$155 in value.

vi. Industry members conducting sweepstakes must provide entry forms and a drop box in which all entries must be placed, a mailing address to which entries may be sent, or an Internet or other electronic address where electronic entries may be accepted, and post a date on which the official prize drawing will occur.

vii. Industry members are prohibited from purchasing enhancers from any retail outlet participating in the display or sweepstakes.

viii. Retail owners, industry members, and their employees and family members are not eligible to participate in any display or sweepstakes drawing allowed under provisions of this Section."

(See pages 315 & 316 (Green Color) of the 2010 OATC law book)

Since the definition of "enhancer" mandates that all "enhancers" be awarded to a customer, I do not see any compelling reason to treat "sweepstakes" any different from "contest, offer, promotion, or advertising or marketing campaign" for purposes of our discussion herein. There is no significant difference except that when the enhancer exceeds \$155 in value the law classifies it as a "sweepstakes." Other than that, there is no real difference except that (i.) the enhancer with a value over \$155 cannot be displayed in the retail outlet (only photos or models of the enhancer); (ii.) participation must be offered to all retailers in the "entire retail base" (this presents an issue when the supplier is involved); and (iii.) you cannot purchase the "enhancer" from the "retail outlet participating in thesweepstakes."

Other than the general requirement that all "enhancers" be eventually awarded to a "customer," there are no regulations (e.g., procedures that document who wins the "enhancer", what retailers receive enhancers, etc.) that address the disposition of "enhancers" once they are placed on the premises of a retail outlet.

Without citing the specific provisions of the laws and regulations, it is unlawful for a retailer, wholesaler and/or supplier to violate any of the regulations set forth above. Penalties could include fines, and/or suspension or revocation of alcohol permits.

OPTIONS

1. Strict enforcement of current laws and regulations with an eye toward ensuring that "enhancers" are properly "awarded" to customers pursuant to a "contest, offer, promotion, etc."

2. Amend current regulations to "tighten" the restrictions regarding "enhancers" and how they are disposed of once they are placed at a retail outlet. This may include some sort of procedure (maintaining records, etc.) to track which retail outlets receive enhancers and who (name, address, etc. of customer) receives the enhancer as an award.

3. Do nothing

Once you have a chance to review this Memo, please contact me to discuss this matter further.

Thanks.

Chris